In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

OCB
Ohio Department of Mental Health

Employer.

Grievance G23-06-
(89-11-13)-01-21-01-03

Grievant (Dennis Jennings)

Hearing Date: July 16, 1990

Brief Date: August 28, 1990

Opinion Date: October 5, 1990

Award #499

For the Union: Robert W. Steele
Ann Hoke, Esq.

For the Employer: Teri Decher
Rachel Livengood - 2nd

In addition to the Advocates named above and the Grievant, the following persons were in attendance at the hearing: Albert Hogan, Labor Relations Specialist (ODMH-COPH), witness, Brenda Cherry, R.N. (COPH), witness, June Price Thompson, R.N. (COPH), witness (hostile witness subpoenaed by Union).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The

Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

1. Contract between OCSEA and State of Ohio 1989-1991
2. Grievant Trail
   Grievance
   Step III
   Step IV
   Request for Arbitration
3. Prior Disciplines
   12/9/86 - 2 Day Suspension
   12/1/87 - 6 Day Suspension
   11/25/88 - 6 Day Suspension
4. Disciplinary Trail
   Request for Corrective Action
   Pre-Disciplinary Hearing Notice
   Removal Order
5. 9/2/89 Witness Statement from Dennis Jennings
6. Employee Training Record
7. Pictures of patient K.R.
8. Discipline of other employees

Joint Stipulations of Fact

1. The employee has been a Psychiatric Attendant at COPH

since 11/29/82.

2. Grievant admits not reporting a patient injury.

Issue

Was there just cause to remove Mr. Jennings for incompetency?

Relevant Contract Section(s)

§ 24.01 - Standard (in part)

> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

§ 24.02 - Progressive Discipline (in part)

> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:
>
> A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
> B. One or more written reprimand(s);
> C. One of more suspension(s);
> D. Termination.

Standard Guide to Disciplinary Action

	First Offense	Second Offense	Third Offense
INCOMPETENCY Performance at sub-standard levels whereby safety, health or rights of patients are endangered; failure to complete assignments in an appropriate manner, thereby endangering rights, safety or health of patients.	2 Day Suspension or 6 Day Suspension or Removal	6 Day Suspension or Removal	Removal

Facts

The incident in question took place at Central Ohio Psychiatric Hospital on September 4, 1989. The Grievant, who was a Psychiatric Attendant, worked third shift at that time: 2:45 p.m. to 11:15 p.m. He had been a Department of Mental Health employee for almost seven (7) years, having been appointed 11/29/82. Prior to that day, the disciplinary record of the Grievant was as follows:

[November 11, 1983	Counseling for absenteeism]
April 16, 1984	Letter of reprimand for repeated incidents of absenteeism and tardiness
September 12, 1984	One day suspension for neglect of duty (repeated tardiness, AWOL, and improperly releasing a patient from restraints)

July 9, 1985	One day suspension for neglect of duty (tardiness - 3 incidents)
January 8, 1986	Two (2) day suspension for neglect of duty (AWOL and repeated incidences of tardiness)
May 19, 1986	Three (3) day suspension for neglect of duty (AWOL and repeated tardiness)

(Contract in force July 1, 1986)

December 1, 1986	Two (2) day suspension for neglect of duty (AWOL and 4 tardiness)
November 13, 1987	Six (6) day suspension for failure of good behavior (using abusive language toward a patient)
November 15, 1988	Six (6) day suspension for neglect of duty (AWOL and tardiness (6))

On September 4, 1989, Grievant was working 1:1 (one-on-one) from 3:00 - 5:40 p.m. with a difficult patient (K.R.) who required constant, personal attention. About 4:30 p.m., the patient K.R., who was strong and aggressive, grabbed the Grievant's arms. In attempting to free himself, the Grievant jerked his hands upward, and the patient stumbled, hitting his lip on the metal door frame. The Grievant pressed a wet washcloth against the cut lip and used ice. The Grievant did not report the incident verbally to anyone, nor did he file an incident report on the injury as required by COPH procedures. Psychiatric Attendant Ramey took over the "1:1" at 5:40 p.m. The investigative report indicated that Psychiatric Attendant Ramey said that he noticed nothing about the patient K.R. except that his lips seemed excessively chapped. At

approximately 8:00 p.m., June Prince Thompson, R.N., passed meds including medication to patient K.R. She said she was close to the patient, noticed the excessively chapped lips, and offered to put vaseline on his lips. The patient K.R. aggressively refused. Psychiatric Assistant Amos Payne took over the "1:1" from 8:20 p.m. to 11:15 p.m. Nurse Brenda Cherry came on duty at 10:45 p.m. At 11:10, the patient K.R. came into the nurse's station to obtain a cigarette. At that time, Nurse Cherry said she noticed that K.R.'s lip was swollen. She lifted his lip and found a cut. She reported the injury both verbally and in writing. The patient was sent to the hospital where he received 6 stitches to close the cut. The patient told R.N. Cherry that "the devil pushed me."

An investigation ensued. All the psychiatric attendants, including the Grievant, on Second Shift denied any knowledge of the incident. Finally, on September 18, 1989, the Grievant admitted that he had failed to report the injury. He said he did not report the incident because he feared for his job. He testified at the Arbitration hearing that he feared for his job because he had been unfairly treated in past situations which resulted in discipline. He said he believed that he would be "disbelieved" and that he would be severely punished "unlike others who did worse and got off!" The Grievant was terminated on 10/31/89 for Incompetency. He grieved his removal on 11/7/89, claiming that the discipline was not "reasonable and commensurate." In particular, he alleged that other employees

were charged "with more serious incidents" and were "cleared of the charges" and that he "should have been given the same treatment." He asked for "similar treatment."

In addition to the above outlined facts, the following information was adduced at the Arbitration hearing.

Labor Relations Specials Hogan from COPH testified about the discipline administered in the Grievant's case and about other discipline at COPH. He said that if Grievant had had no prior discipline, that in all likelihood, the Grievant would have received a two (2) day suspension for the failure to report. Aside from prior discipline, Hogan said that two other aggravating factors existed: (1) the severity of an injury requiring 6 stitches and (2) the direct participation of the employee in the incident. Hogan said that on September 18th, the Grievant said that he did not report the incident because with all his (the Grievant's) prior discipline he was afraid of loosing his job. Hogan said that if the Grievant had reported the incident which was found to involve no abuse that no discipline would have been administered. With regard to his investigation, Hogan said that he found no evidence that others had knowledge of the injury; nevertheless he personally found it "hard to understand" why no other employee discovered the Grievant's lip problem. In assessing the Grievant's situation, Hogan said all the prior discipline was weighed in deciding the discipline. Most but not all of the prior discipline was due to tardiness and

absenteeism. Hogan said that pre-contract (non-appealable) discipline was considered.

June Price Thompson, R.N., testified that during her 8:00 p.m. medication administration that she had noticed that the patient's mouth was more chapped than usual but that no blood showed. She said during medication time, the patient K.R. opened his mouth and showed her an empty mouth to prove all medications had been swallowed, but she did not see any cut. She said that she had no knowledge of the actual cut until told the next day at her shift "report."

Ms. Thompson was not disciplined in connection with the incident; nor were the 2 PA's who took care of the patient after the Grievant.

During the Union's cross examination of Mr. Hogan, the Labor Relations Specialist, the Union introduced Union Exhibit 8 which consisted of the following material:

1. The verbal reprimand of employee James Coleman for failing to report an incident of verbal abuse. Attached to the verbal reprimand was Mr. Coleman's Record of Discipline which showed no prior discipline. Mr. Coleman's start date was 11/15/82.

2. The two day suspension of employee Diana Butler (Hospital Aide) for neglect of duty, namely, failure to complete an assignment which contributed to the successful suicide of a patient. Her discipline record showed no other discipline; her

start date was 7/20/87.

3. A two (2) day suspension of James Redding (Hospital Aide) for neglect of duty in that he "failed to complete an assignment which contributed to the successful suicide of a patient. He had no prior discipline, and his start date was 7/20/87.

4. A two (2) day suspension of Lucille Crockett (Psychiatric Nurse Supervisor I) for Incompetency in that she issued a wrong medication to a patient who was leaving the facility on an AWL. Employee Crockett had 2 prior disciplines: Verbal reprimand for losing hospital keys and not properly reporting the loss and a written reprimand for "failure to follow proper procedures to place a patient in AWOL status."

The Union Advocate questioned Mr. Hogan about these other disciplines. Hogan pointed out that although suicide was obviously a very serious matter, neither of these aides had any prior discipline. Hogan said that they were not directly responsible for the suicide.

During the Employer's cross examination of the Grievant, the Employer introduced Employer's Exhibit 9 and Employer's Exhibit 10. Employer's Exhibit 9 was an incident report filed by the Grievant which reported that on 9/4/89 at 4:00 p.m. the patient had put a cigarette out on his head. The date of filing of this incident report was 9/5/89 at 6:40 p.m. The report said that the Supervisor had been notified 9/4/89 at 4:00 p.m. Employer's

Exhibit 10 was a second incident report filed by Grievant which stated that at 3:10 p.m. on 9/4/89 no sheets were on patient K.R.'s bed. In the incident report were these words: "Also I noticed that his lips appeared to be chapped but not swollen and bleeding." The time of filing written on the report was 9/5/89 6:40 p.m. The time the supervisor was notified was listed as 6:00 p.m., 9/5/89. The Grievant said he filed these reports because "other people were present at the incidents." He indicated that the date on Exhibit E-10 must be incorrect because he was off 9/5/90 and only filed the report after he came back on duty and learned of the sutures. The Grievant admitted that he believed that if he cleaned up the patient, no one would report the wound.

Employer's Position

Given the Grievant's prior discipline and the nature of his act, his discharge was for just cause. The other disciplinary situations introduced into evidence as proof of disparate treatment do not refer to employees in similar situations as the Grievant.

Union's Position

The discharge of the Grievant was not for just cause because other employees who violated similar rules were not disciplined as

harshly.

The Union claims that both the other Psychiatric Attendants and the R.N. on the 2nd shift **should** have noticed the injury. Their failure to report the injury did not result in discipline. Nurse Prince Thompson was clearly in a position to see the injury and did not report it. The cases of Coleman, Butler, Redding, and Crockett all show employees who received lesser discipline that Grievant and, therefore, prove disparate treatment.

Discussion

The Grievant failed to file an incident report about an injury to a patient which occurred on the Grievant's watch and in the Grievant's presence. This failure resulted in over 6 hours elapsing between the injury and proper medical care for the patient. Thus, the physical health of a patient entrusted to the care of the State was endangered. The Grievant's stated reason for his failure was to protect his own job because he feared discipline and potential job loss. He placed his personal needs over those of an incompetent human being placed in the State's care. On its face, this conduct constituted "Incompetency" under the Standard Guide to Disciplinary Action by placing the health of a patient in danger. The Grievant had received training on incident reports. Based on Exhibit E-9 and E-10, he knew how to fill out incident reports. He had received a copy of the

Disciplinary Guidelines. He had notice that he could be suspended for 2 days or 6 days or removed for a first offense for such Incompetency. At the time of this conduct, the Grievant was almost a 7 year employee. However, in those 7 years he had accumulated a counseling followed by 8 separate disciplines. While 7 of these disciplines related primarily to excessive and repeated absenteeism, tardiness and AWOL, one (1) discipline less that 2 years prior involved using abusive language toward a patient.

The Employer chose to remove the Grievant. On its face, that decision was just, commensurate, and progressive. One mitigating factor was the Grievant's 7 years of service; however, all 7 years contained repeated discipline. While the majority of the discipline involved absenteeism and tardiness, the Grievant had been recently disciplined for a direct patient-related offense. The Grievant had already been suspended 6 times for absenteeism offenses without any indication that discipline was "correcting" his behavior. Moreover, this new incident was a serious one because the Grievant failed to report an injury which occurred not only in his presence but as a result of his actions, albeit innocent ones. Moreover, he denied any responsibility for over 13 days; a fellow employee almost bore the consequences of his act. Lastly, the filing of the incident report (Exhibit E-10) after the fact was an attempt at a self-serving cover-up. The Employer had just cause for the discipline.

However, the Union has pleaded an affirmative defense: disparate treatment. The Union alleges that other employees who were in similar situations to that of the Grievant were not equally disciplined. Such a situation would destroy just cause. "It is beyond dispute that an employer must treat all employees guilty of like offenses in a like manner. . . ." Seaway Food Town and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 20 [Braverman (1990)], 94 LA 389.

Discipline, commensurate and progressive discipline, is designed to have a "corrective" educational effect, not just on the recipient but on all employees. If the discipline meted out to employees differs from that stated in official Employer statements or varies arbitrarily or discriminatorily among employees, the corrective effect is lost. Moreover, the "notice" element of procedural fairness is also destroyed. An employee cannot be on "notice" of consequences, if the consequences vary unreasonably or arbitrarily. (See: Seaway, 94 LA 389.)

Where an employer has shown a prima facie case of just cause for an employee's discipline, the allegation of disparate treatment shifts the burden of proof to the Union. AFSCME Ohio Council 8 and Ohio Council 8 Staff Employees Union [Feldman (1989)], 92 LA (BNA) 1257; E.B. Eddy Paper, Inc. and United Paperworkers International Union AFL-CIO, Local 51 [Borland (1990)], 94 LA (BNA) 325. The Union must, at a minimum, provide

evidence that other employees in a similar situation to Grievant were treated differently. Showing a "similar situation" involves showing a number of important factors:

Step 1. The Union must show that other employees have (a) committed the same or a very closely analogous offense and (b) have received different discipline.

Step 2. Once the proof of employees with similar offenses being disciplined differently has been shown, the question becomes do relevant factors exist (aggravating or mitigating) which rationally and fairly explain the different treatment.

These factors could include, but are not limited to, the following:

a. The degree of the employee's fault

b. The employee's length of service

c. The employee's prior discipline

Factored into this appraisal must be some recognition that absolute homogeniety of discipline in a work force is impossible. What is required to quote Arbitrator Graham is "a range of reasonableness." Moreover, the employer must have known or have had reason to have known of the particular disparities. One instance of disparate treatment on an employer's part (unless shown to have been an intentional act) will not suffice. On the other hand, a clear pattern of arbitrary or discriminatory discipline infers motivated different treatment which is

manifestly prohibited. The employer is not excused for unfair disparate treatment merely because no evidence of intention is available. On the other hand, discipline does require some flexibility in administration. Most cases where disparate treatment is alleged will, in all likelihood, cover more than one instance of disparate treatment and less than a clear cut pattern of disparate treatment. Once the employer has shown prima facie just cause and once the Union has shown prima facie disparate treatment (similar offense, dissimilar treatment apparently without a proper reason), the waters get murky in terms of burdens of proof and standards. One obvious problem of proof is that the best evidence lies in the hands of the employer who has the greatest access to the background and details of each disciplinary instance.

Good faith use of discovery will be necessary to discover the facts and present the facts in sufficient detail to clearly show unfair treatment. Generalized allegations of different treatment will not suffice. Once an employer has shown just cause in the particular instance, a presumption of regularity in favor of the employer emerges. Domnick's Finer Foods Inc. and Food and Commercial Workers, Local 1550 [Traynor (1987)], 88 LA 847, 854. This presumption must be rebutted with particularity by the Union.

In the case at hand, the Arbitrator finds that the Employer has shown just cause with regard to the removal of the Grievant.

The Union has pointed to certain instances which show disparate treatment which is either arbitrary or invidiously discriminatory.

The Grievant in the grievance itself alleged that the severity of his discipline was racially motivated; however, at the hearing no evidence was presented which focused on race. No other classification of persons was shown to have been the basis of the alleged disparate treatment, hence, the allegation appears not to be based on some instance of invidious discrimination but rather on some form of arbitrary treatment.

One Union claim was that the lack of discipline for the second shift R.N. and the other two attendants proves disparate treatment. The investigation concluded that no evidence existed to charge these three persons. The Union relies on what they **should** have seen; hindsight is always clearer. The other three employees differed significantly from the Grievant. (1) They did not cause the injury and (2) they were not present. Moreover, the Grievant admits he cleaned up the wound and hid the clean-up materials in order to disguise the occurrence. Now he says that others should be disciplined for failing to notice what he worked to cover up. The Arbitrator cannot operate on unsubstantiated inference. The lack of discipline for the 3 other 2nd shift employees does not prove unfair disparate treatment.

The second question, do the four other instances presented by the Union qualify as "similar offenses" with different treatment?

J.C. was given a verbal reprimand for failing to report verbal abuse. His charge was **Neglect of Duty.** Looking at the grid, a first offense for this particular conduct allows a verbal or written reprimand or 2 day suspension for the first offense.

Grievant's offense was Incompetency where the physical health of the patient was endangered.

These offenses are not similar. Grievant directly endangered a patient's health; J.C. did not. A clear difference exists between a physical injury and verbal abuse in terms of the seriousness of the behavior.

[Even if the offenses were similar, J.C. was a 7 year employee as was Grievant, but J.C. had **no** prior discipline.]

D.B. charged with Incompetency which endangered the health of a patient.

This offense is similar. The discipline for D.B. was a 2 day suspension.

D.B. was a 3 year employee with no prior discipline. The Employer testified that her incompetency was not the direct cause of the patient's ability to commit suicide. The Grievant, on the other hand, caused the injury and was present at the injury; he was directly involved.

J.R. was also charged with Incompetency in the same event as D.B. Like D.B. he received a 2 day suspension, listed on the grid as a possible result for a 1st offense. Also like D.B., he had no prior discipline and was a 3+ year employee. Moreover, his improper conduct was not directly involved with the suicide.

The Arbitrator cannot further assess and compare the Grievant and D.B./J.R. because **no** evidence was presented by the Union of the circumstances surrounding D.B. and J.R. and the suicide. Hogan's testimony was unchallenged.

L.C. was charged with incompetency endangering the health of a patient. Hence, the offense was the same. She received a two (2) day suspension. She was a 7+ year employee with 2 prior disciplines of a verbal and written reprimand.

The Arbitrator concludes that in 3 of the 4 cases, the employees committed the same offense and received lesser disciplines. However, in all three cases the employees had significantly different discipline records which could rationally account for the differences in discipline. The L.C. case is closest to the Grievant's in that the offense is the same and the years of service are approximately the same. L.C. had less prior discipline. The context of L.C.'s violation and the end result of her error are unknown for purposes of comparison, no evidence was introduced on these matters. Did L.C.'s actions have any direct result on the patient's health? We do not know. The difference in discipline can be rationally explained; the level of proof simply does not overcome the presumption in favor of the Employer's prima facie showing of just cause. Disparate treatment has not been proven.

Award

Grievance denied.

October 3, 1990
Date

Rhonda R. Rivera
Arbitrator