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#587

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio
Department of Youth Services

Employer.

Grievance No. 35-08-901018-0019-01-05
Grievant (Johnna Graham)

Hearing Date: March 21, 1991

Award Date: April 30, 1991

Arbitrator: R. Rivera

For the Union: Ron Stevenson
Robert W. Steele

For the Employer: Brad Rahr
Roger Coe

The following persons were present at the Hearing in addition to the Advocates named above and the Grievant: Ralph Fitzpatrick, Superintendent (witness), James Couser, Food Service Manager (witness), Leon Rolland, father of youth (witness), Sheila Foster (witness).

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 1989- 1991
2. Discipline Trail
3. Grievance Trail
4. DYS General Work Rules July 1985
5. DYS General Work Rules November 30, 1990
6. Grievant's Evaluations for 1987, 1988, 1989, and 1990.

Union Exhibits

1. Opening Statement
2. Three (3) day suspension letter dated 11/14/90 for Violation of Work Rule 17 (S.D.)
3. Thirty (30) day suspension order dated 11/19/87 for Violation of Work Rule 17 (C.W.)
4. Fifteen (15) day suspension letter for Violation of Work Rule 17 (S.F.)
5. Written, undated, unsigned, statement by Sheila Foster

Employer Exhibits

1. Opening Statement
2. Acknowledgement of receipt of Work Rules (1985) by Grievant, dated 5/27/86

3. Acknowledgement of receipt of Work Rule B-19 by Grievant dated 3/31/88

Joint Issue

Was the Grievant removed for just cause, and if not, what shall the remedy be.

Joint Stipulations

1. Grievant has been employed by DYS since May, 1986.
2. Grievant did have contact with youth and did remove youth to Columbus.

Contract Sections

§ 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 or more suspension(s);
> D. Termination.

Facts

The basic facts which underlie this Grievance are not in dispute.

The Grievant, at the time of the incident, was a Cook I at TICO, a juvenile correctional facility of the Department of Youth Services. TICO is a maximum security facility for boys which houses youths who have committed serious felonies.

The Grievant was hired on 5/27/86 with no prior experience in food service. She was promoted to Cook I in December of 1987. Her evaluations show her to be a competent and reliable employee (Joint Exhibit 6). Prior to this incident, the Grievant had two prior disciplines: a Verbal Reprimand on 12/18/89 for failure to notify with regard to leave and a Written Reprimand dated July 25, 1990 for failure to complete a work assignment per a supervisor's order (Joint Exhibit 2).

Youth T.O. had left the institution and resided with his father in Massillon, Ohio. The Grievant called him there and asked if he could accompany she and her husband to an amusement park in Columbus. T.O.'s father gave permission for him to go. The date selected was September 8, 1990. When the Grievant had not arrived by approximately 9:00 p.m., the father told the youth he could not go, and the father went to bed. The Grievant arrived after that time and met the youth at a location away from the residence. The youth was accompanied by his uncle. The Grievant was accompanied by a female friend who was also a TICO employee. The youth spent the night at the Grievant's home. In

the Grievant's home were her husband and son. The youth was returned to his father's home late Sunday evening by the Grievant and the same friend. At that time, the Grievant learned that the father had withdrawn his permission the night before and that the youth had ignored that order.

Superintendent Ralph Fitzpatrick testified that he learned of this conduct first through rumor and second through a phone call from the youth's father. On September 14, 1990, the Superintendent discussed the incident with the Grievant. She said she did not know that when T.O. spent the night at her home that the youth was violating his parole nor did she know that seeing the youth violated DYS work rules.

Records indicate that the Grievant signed a statement on 5/27/86 acknowledging that she received and read the DYS work rules. A second similar acknowledgement which covered Work Rule B-19 was signed by the Grievant on March 31, 1988. On February 8, 1990, the Grievant attended a meeting of Food Service Employees where the Supervisor discussed both contraband problems and B-19. In particular, he mentioned the rule of no contact with youths after they are released (Joint Exhibit 2). At the hearing, the Supervisor testified that the main focus of the meeting was contraband but that he did discuss B-19 as well.

Directive B-19 reads as follows:

> A. Employees participating in the following activities shall be considered to be in violation of Youth Services work rules:
>
> 17. Corresponding with, or accepting correspondence from youth confined in the

> Department's custody without authorization of the appropriate deputy or Director. Contacting or visiting youth, except for official work purposes, who are still in custody of the Department without prior authorization from the Director or appropriate deputy director, even when such youths are not living in a Department institution at the time.

Both the Grievant and her driving companion, who was also a TICO employee were disciplined. The companion received a 15 day suspension; the Grievant was terminated. Mr. Fitzpatrick testified that the companion had been more "cooperative" than the Grievant during the investigation. The Grievant told him she had been advised not to speak by her attorney and her union representative. He said that this "cooperation" was a factor which differentiated the discipline. No evidence was introduced as to the previous discipline of the companion/employee.

At the hearing, the Union introduced the following evidence (Union Exhibit 2, 3, and 4):

1. A food service worker was suspended for three days for violating rule 17 (B-19) (11/14/90)
2. A Youth Leader II was suspended for 30 days for neglect of duty which involved unauthorized contact with youth (11/19/87).

Superintendent Fitzpatrick said that the 30 day suspension was because he could only prove telephone contact not person-to-person contact. The three (3) day suspension involved an employee who admitted she had only minor passing contact with a youth on the street and no other proof was available.

Union's Position (Taken from the Union's Opening Statement.)

Termination for this offense does not follow the contract's progressive discipline criteria and is not commensurate to the act. The Grievant was terminated which is called "The Capital Punishment" of employment.

The Union will show through testimony and documents that other employees of TICO who committed the same offense and who were charged with the same or similar offense received a lesser punishment.

The Department of Youth Services, twenty-eight days after this incident revised its B-19 Directive, General Work Rules, which took effect November 30, 1990. Work Rule 17, in the old directive, because Rule 29, with a "grid" first offense - 15 days or removal.

The Grievant did not deny that she went to Massillon, Ohio to pick youth up, with the understanding that she had the father's permission. The father gave her directions for her to come there and pick the youth up.

After getting lost in Massillon, Ohio, the Grievant called the youth from a gas station for directions. The youth woke his father and asked him for directions, which he gave. After waiting about 45 minutes, youth arrived with a man who said that he was an uncle who told Grievant to drive carefully.

The Union and the Grievant have not said that the Grievant did commit the offense but that the discipline was too "harsh"

and that it is not commensurate with other discipline that has been given at TICO.

Employer's Position (Taken from the Employer's Opening Statement)

The circumstances which gave rise to this discipline are that between September 8 and 9, 1990, the Grievant was in contact with an ex-TICO youth by telephone and by personal contact with him at his home in Massillon, Ohio.

The Department of Youth Services is statutorily mandated through the Ohio Revised Code (Chapters 5139) to confine felony offenders, ages 12 through 21, who have been adjudicated and committed by the 88 county juvenile courts of the State of Ohio. The agency is responsible for promoting and operating effective programs for the successful reintegration of juvenile offenders back into the community as productive and law abiding individuals and for providing appropriate and reasonable safety to the citizens of the State of Ohio.

The Training Institute of Central Ohio (TICO) is a maximum security facility for boys located in Columbus, Ohio. TICO has approximately 270 felony offender youths in its care. The age of the boys confined to TICO range between 16-21, and their average age is 17. The majority of these youths have been committed for committing felony 1's and 2's which also includes youth who have committed homicides. Felony 1 and 2 are the most serious felonies committed.

Management contends that the Grievant went to Massillon, Ohio and picked up a former resident of TICO in violation of DYS directives and also in violation of the youth's parole. Management will show that the Grievant had prior knowledge of this directive and further will show that the Grievant was present during a department meeting prior to this incident where contact with youths outside of the institution was discussed.

The Union, during the Step 3 grievance hearing, admitted that the Grievant had contact with a youth still under DYS care on her off time but contends that the Grievant had permission from the father to take the youth to her home for the weekend. This contention is not true. the youth left his home without his father's knowledge and did not return until the next night.

Management contends that the Grievant's actions were in direct violation of DYS directives and that this violation is severe enough to warrant removal.

Discussion

The Grievant violated Rule 17 of B-19. This rule is a reasonable one, consistent with the mission and purpose of DYS. The Grievant was on notice of this Rule. She had received a copy of this Rule at least twice. She acknowledged twice that she had read the Rule. She was trained on the rule once and was reminded of the rule in a group meeting with her Supervisor in February, 1990. The Grievant was disingenuous when she said she was unaware of the Rule.

In mitigation, the Grievant could have reasonably believed that she had the father's permission. He gave it originally. He withdrew it but only told the youth. The youth was accompanied by his uncle when she picked him up. The prior permission and the presence of the uncle could reasonably lead one to believe that permission remained.

The Grievant was not alone with the youth. The companion/employee was in the car both to and from his home. The investigation report of the employee states that the Grievant's husband and son were at home that weekend. Given that apparent permission was granted, the Grievant could have reasonably believed that she was not violating any parole rules.

The issue in this case clearly hinges on the severity of the discipline. The Grievant was a 5 year employee with a good work record. She had two prior disciplines -- both minor. However, both occurred (12/18/89 and 7/25/90) within one year of this incident. The discipline meted out to the Grievant must inevitably be compared to the discipline of her companion who received a 15 day suspension. The reason given by the Superintendent for the difference in discipline was the cooperative attitude of the companion/employee. However, this difference is discounted by the Arbitrator. The Superintendent admitted that the Grievant told him that she was advised by her lawyer and her union to refrain from discussion. Her "lack of cooperation" was, in truth, a legitimate execution of her rights and must not be counted against her. No evidence was adduced as

to the companion/employee's prior discipline. However, another significant difference (even though unstated at the hearing) exists between the Grievant and her companion. The Grievant invited this contact, called the youth, and had the youth at her home. Surely, she is more culpable.

The contract commits the Employer to both progressive and commensurate discipline. The theory is that discipline should be, where possible, corrective. A termination is not "corrective" and, in this case, is not commensurate. In this case, a 6 year employee with a good work record was fired for an offense that was certainly serious but the employee was not without the potential of learning. Compared to her companion's case and in light of the Grievant's record and behavior, termination was punitive.

Award

The Grievant is to be reinstated as of the date of this opinion. She is to be reinstated on a last chance agreement with reference to Rule 17 of B-19. The time from termination to the date of this award is to be characterized as a suspension. The Arbitrator retains jurisdiction solely to review, if necessary, the last chance agreement.

April 30, 1991
Date

Rhonda R Rivera
Arbitrator

Attachment to Award #587

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio
Department of Youth Services

Employer.

Grievance No. 35-08-901018-0019-01-05
Grievant (Johnna Graham)

Hearing Date: March 21, 1991

Award Date: April 30, 1991

Arbitrator: R. Rivera

Letter Date: June 7, 1991

For the Union: John T. Porter, Esq.

For the Employer: Deeneen D. Donaugh, DYS

On April 30, 1991, the Arbitrator made the following award:

> The Grievant is to be reinstated as of the date of this opinion. She is to be reinstated on a last chance agreement with reference to Rule 17 of B-19. The time from termination to the date of this award is to be characterized as a suspension. The Arbitrator retains jurisdiction solely to review, if necessary, the last chance agreement.

The Employer and the Union have asked the Arbitrator to clarify the Award (see attached letters). The question is the length of the effect of the "Last Chance Agreement."

After review of the positions of the parties, the Arbitrator finds that the Last Chance Agreement falls within the contract section 24.06. In effect, the Last Chance Agreement is coupled with the suspension. Therefore, the Agreement shall remain in

the Greivant's personnel file until removed per § 24.06. The Agrement and record of the suspension shall be removed "after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months."

June 7, 1991
Date

Rhonda R. Rivera
Arbitrator

OCSEA
Local 11 • AFSCME • AFL-CIO

May 28, 1991

Rhonda Rivera
131 Price Avenue
Columbus, OH 43201

Dear Arbitrator Rivera:

Enclosed is the union's position on the length of the last chance agreement for Johnna Graham.

Sincerely,

John T. Porter

John T. Porter
Assistant Director of Arbitration

JP/kws

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IN THE MATTER OF

Johnna Graham
and
OCSEA / AFSCME

V.

Ohio Department
of Youth Services
and
STATE OF OHIO

Arbitrator: Rhonda Rivera

Case #: 35-08-(90-10-18)-0019-01-05

/Her

Union Position on Length of Last Chance Agreement

In the above referenced arbitration case the arbitrator ordered that the grievant's removal be overturned and that the grievant be returned subject to a last chance settlement agreement. The grievant had been charged with having unauthorized communication with a youth. The disagreement between the parties concerns the period of time for which the last chance agreement should last.

It is the union's initial position that the length of the agreement should be controlled by the length of the collective bargaining agreement between the parties. In several cases between the parties arbitrator Jonathan Dworkin has mediated last chance agreements. He has stated that since the arbitrator's powers are derived from the contract, the length of the last chance agreement should be no longer than the expiration of the collective bargaining agreement. In the instant case this means that the last chance agreement should run through December 31, 1991, the expiration date of the current agreement between the parties.

An alternate position taken by the union is that the last chance agreement between the parties should last no longer than two years from the date of the infraction. This position is based upon article 24.06 of the contract which states that "records of other disciplinary action will be removed from an employee's file...After twenty four (24) months if there has been no other discipline imposed during the past twenty-four (24) months." It would be draconian to insist that a last chance agreement be held over an employee's head for the rest of the employee's service with the state of Ohio. No last chance agreement between OCSEA and the State has ever lasted longer than two years and most have lasted for a much lesser period of time.

Two additional issues need to be addressed. First, the last chance agreement should be maintained in the employee's personnel file for no more than 24 months pursuant to 24.06. After that point it should be purged from the employee's personnel file.

Secondly, the arbitrator should retain jurisdiction for the length of the last chance agreement to determine if the grievant is guilty of the same or similar offense. It follows that the arbitrator who found the original violation would be most familiar with the discipline and is best suited to determine whether an alleged violation is the same or similar as the original offense.

Respectfully submitted,

John T. Porter
Assistant Director of Arbitration
OCSEA/AFSCME Local 11

cc: Ron Stevenson
Bruce Wyngaard
Johnna Graham
File

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Staff Training Academy
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(614) 881-5531

INSTITUTIONS

Buckeye Youth Center
2280 West Broad Street
Columbus, Ohio 43266-0530
(614) 466-0972

Cuyahoga Hills Boys School
4321 Green Road
Highland Hills, Ohio 44128-4898
(216) 464-8200

Freedom Center
P. O. Box 18183
584 West Broad Street
Columbus, Ohio 43218-0183
(614) 752-8800

Indian River School
2775 Erie Street S., P. O. Box 564
Massillon, Ohio 44648-0564
(216) 837-4211

Maumee Youth Center
RFD 2, P. O. Box 331
Liberty Center, Ohio 43532-9598
(419) 875-6965

Mohican Youth Center
P.O. Box 150
Loudonville, Ohio 44842-0150
(419) 994-4127

Riverview School for Boys
5993 Home Road
Delaware, Ohio 43015-9476
(614) 881-5531

Scioto Village
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Training Center for Youth
2280 West Broad Street
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TICO
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615 West Superior Ave., #860
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Northeast Regional Office
161 South High Street, #100
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7162 Reading Road
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May 30, 1991

Rhonda Rivera
131 Price Avenue
Columbus, Ohio 43201

RE: Johnna Graham Arbitration Award
#35-08-(90-10-18)-0019-01-05

Arbitrator Rivera:

In the above case, the Grievant was found in violation of Directive B-19, formerly Rule 17 (Work Rules July, 1985), currently Rule 29 (Work Rules November, 1990), concerning unauthorized communication with a youth while serving as an employee for the Department of Youth Services. Based on the determination that termination was neither corrective nor commensurate, the Grievant was reinstated as of the date of the award on a last chance agreement. The parties to the arbitration are now seeking clarification from the Arbitrator concerning the last chance agreement.

It is the position of the State that the purpose of the last chance agreement is to put an employee on notice that a subsequent incident involving the behavior at issue will result in summary removal. The last chance agreement is used when the behavior is so serious or has continued on such a prolonged path that no more such behavior can be tolerated. With a last change agreement, management still has the burden to investigate and determine that the evidence supports the allegation, but the employee gives up the right to dispute the severity of the discipline imposed.

In the case at hand, the infraction committed by the Grievant was a serious one, one which greatly compromised the Grievant's ability to do her job. This is supported by fact that the Department removed her for such behavior, by the Department's new grid, which provides for a 15 day suspension or removal for the first offense, and finally, by the arbitrator's

decision to award a lengthy suspension for such behavior. Because of the seriousness, it then follows that the next infraction would result in removal. To require removal for the next offense is not unreasonable since the grid allows for removal on the first offense and removal would be progressive and commensurate in light of the lengthy suspension received in this case. Furthermore, based on the Grievant's experience, she has received notice that such behavior is serious and that such behavior may result in removal. In light of this, it does not present a hardship to the Grievant to require summary removal for any subsequent infraction violating Rule 29, Directive B-19, November, 1990 (current work rules), especially since management would still have the burden of investigating and if grieved, producing the evidence to support that the infraction occurred.

The union asserts that a time limit of two (2) years should be included in the last chance agreement, since that is the time contained in the contract for discipline to remain in an employee's personnel file. Such an argument is reasonable for infractions such as tardiness, wherein a single incident in and of itself is not of a serious nature and a clean slate of such behavior for two (2) years, or other designated time period, is evidence of corrected behavior. However, this argument should not apply to the behavior at issue in the instant case, or to other serious behavior, such as abuse. With those type of infractions, because of their seriousness, if removal is not given for the first offense, the discipline should be sufficient to put the employee on notice that such behavior cannot be tolerated and thus removal for a subsequent infraction will occur. In this case, the Grievant's suspension, as well as her overall experience at DYS, serve as sufficient notice that no such behavior can be tolerated again. It is neither harsh nor unreasonable to enforce this standard on the Grievant throughout her continued tenure, and not just for two (2) years, with the Department.

Based on the foregoing, management respectfully requests that the arbitrator uphold the condition of the last chance agreement that summary removal will be issued to the Grievant for any subsequent violation of Rule 29, Directive B-19, throughout the duration of her employment with DYS.

Furthermore, if the arbitrator rules that the last chance agreement will only stand for two (2) years, the employer requests that it be clearly stated and understood that subsequent discipline, within the two year period, will yoke with the last chance agreement, so that the agreement would stand until the Grievant had the designated period free of discipline per Section 24.06.

Sincerely,

Deneen D. Donaugh, Administrator
Labor Relations