In the Matter of Arbitration Between STATE OF OHIO, DEPARTMENT OF MENTAL HEALTH and OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL/CIO	OPINION and AWARD Anna D. Smith, Arbitrator Case 23-12-910805-0270-01-03 Larry E. Fairburn, Grievant Removal

#125

Appearances

For the State of Ohio:

Rick Mawhorr; Labor Relations Officer, Oakwood Forensic Center; Advocate
Rodney Sampson; Assistant Chief of Arbitration Services, Ohio Office of Collective Bargaining; Second Chair
Edward R. McPheron, R.N., C.N.A.; Psych/MR Nurse Manager, Oakwood Forensic Center; Witness
Peggy S. Bockey, R.N.; Psych/MR Nurse Supervisor, Oakwood Forensic Center; Witness
Jane Latane; Ohio Office of Collective Bargaining; Observer

For OSCEA Local 11, AFSCME:

Bob Rowland; Staff Representative, OCSEA Local 11, AFSCME, AFL-CIO; Advocate
John Hall; Staff Representative, OCSEA Local 11, AFSCME, AFL-CIO; Second Chair
Larry E. Fairburn; Grievant

Hearing

Pursuant to the procedures of the parties a hearing was held at 9:15 a.m. on January 9, 1992, at Oakwood Forensic Center, Lima, Ohio before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. The record was closed upon conclusion of oral argument at 1:00 p.m., January 9, 1992. This opinion and award is based solely on the record as described herein.

Issue

By agreement of the parties, the issue to be decided by the Arbitrator is:

> Was the removal for just cause? If not, what shall the remedy be?

Joint Exhibits and Stipulations

Joint Exhibits

1. 1989-91 Collective Bargaining Agreement
2. Grievance Trail
3. Discipline Trail
4. Sign-In/Sign-Out Sheet, May 13, 1991
5. Call-In Log, May 13, 1991
6. Daily Schedule, First Shift, May 13, 1991
7. Overtime Schedule, First Shift, May 13, 1991
8. Daily Schedule, Second Shift, May 13, 1991
9. Overtime Schedule, Second Shift, May 12, 1991-May 16, 1991
10. Key Assignment Sheet, May 13, 1991
11. Statement of Ed McPheron, May 14, 1991
12. Corrective Action Policy, June 25, 1990
13. Policy Acknowledgement Sheet, August 22, 1990
14. Position Description for Psychiatric Attendant
15. Letter from Allen County Children Services, May 29, 1991
18. Memo from George Nash, January 7, 1991

Joint Stipulations of Fact

1. Mr. Fairburn was a psychiatric attendant at Oakwood Forensic Center on first shift (7:00 a.m. - 3:00 p.m.) and has been employed since December 29, 1983.

2. Mr. Fairburn was mandated for overtime on May 13, 1991 at 1:30 p.m. by Mr. McPheron, Psych/MR Nurse Manager. Mr. Fairburn notified Mr. McPheron at 2:25 p.m. that he would not work the overtime. Mr. Fairburn signed off duty at 3:00 p.m., his normal quitting time.

3. Mr. Fairburn was aware of the Corrective Action Policy and possible consequences for any violation.

4. The overtime hiring procedure at that time was:
   a. Contact all persons on the overtime roster within classification;
   b. Contact persons who volunteered for overtime outside classification;
   c. Mandate least senior on work site within classification.

5. All appropriate contact had been made by the supervisor prior to mandating and Mr. Fairburn was the next appropriate person to mandate.

6. The Order of Removal was signed on July 24, 1991.

7. This grievance is properly before the Arbitrator.

Case History

Oakwood Forensic Center is an acute-care maximum-security facility for the mentally ill who have been probated to the Ohio Department of Mental Health from the Ohio Department of Rehabilitation and Correction. The patients under the care of the facility are dangerous to themselves or others. Their behavior is unpredictable and can be volatile. The Grievant has been employed at the facility since 1983. At the time of his removal for neglect of duty and/or failure of good behavior and/or insubordination (refusal to work mandated overtime), he was a psychiatric attendant

on the first shift. As such, he was responsible for supervising patients' daily activities and for their safety and security. Because of the nature of the patient population, psychiatric attendants rarely work alone and must be alert at all times. In May of 1991, Management was hiring a significant amount of overtime. Section 13.07 of the Collective Bargaining Agreement permits the Employer to require the least senior employee who normally does the work to perform overtime if it is not filled by volunteers. On May 13, 1981, such a situation arose when several employees called in sick or to cancel scheduled overtime. Following established procedure, the Employer was unable to fill two second-shift positions with volunteers. It therefore mandated the two least senior employees, including the Grievant, to work. The Grievant, whose wife that morning had decided to go out of town for the day, told Management (Edward McPheron) that he had to be home to meet his children's school bus. McPheron told him he would be permitted to take his paid break at the time he needed to pick up his children and suggested he get someone else to babysit. The Grievant made several phone calls unsuccessfully, so notified McPheron at 2:25 p.m. that he would not stay for the start of the second shift (3:00), but could return at 7 o'clock, when his wife would be at home. McPheron made it clear the mandated overtime was a direct order, but said he would continue to try to find someone else to work the position. The Grievant left at the end of his shift. McPheron mandated the next least senior psychiatric attendant, who was relieved at 7 p.m. by a volunteer found by a

second shift supervisor. The Grievant did not return that evening and was subsequently removed for intentionally refusing to obey instructions or orders in a matter related to patient care.

A grievance protesting the removal under the Preamble, Article 24 and "all other pertinent articles and sections" of the Contract was timely filed (Joint Ex. 2). Article 24 of the Collective Bargaining Agreement states in relevant part, "Disciplinary action shall not be imposed upon an employee except for just cause....The Employer will follow the principles of progressive discipline....Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment." The parties being unable to resolve their differences at Step 3 of the grievance procedure, the case was appealed to final and binding arbitration, where it presently resides free of procedural defect.

Records submitted as exhibits and testimony of witnesses show that Management was going outside the Grievant's classification to hire overtime at the time, and that an exempt employee worked voluntary overtime (relieving a mandated employee) that week. However, no supervisors worked overtime the night of May 13, although §1.03 of the Contract permits this.

The record also discloses that the Grievant, himself, had worked mandatory overtime (and, in fact, did so later that week) but had been previously disciplined for insubordination upon refusing to work mandatory overtime (a 2-day suspension in 1988 and a 6-day suspension in 1990, Joint Ex. 3). A supervisor, Peggy

Bockey, testified that in the past she had made efforts to accommodate him when his second job conflicted with the Agency's overtime needs.

The corrective action policy under which the Grievant was disciplined calls for removal on the third offense, but also states that the grid is to be used as a guideline and that serious consideration will be given to circumstances surrounding the violation, seriousness of the offense, past record of the offender, and the corrective action taken in similar situations with other employees (Joint Ex. 12).

Arguments of the Parties

Argument of the Employer

The Employer first points out that the facts of this case are not at issue. The Grievant deliberately left the work area after being given a direct order to perform overtime. He was aware he had been mandated and knew his refusal could result in discipline. Refusal of a direct order is insubordination, which is a cardinal industrial offense since it strikes at the fundamental managerial right to direct the work force. The Arbitrator is asked to apply the following tests for insubordination: (1) Was the grievant given an order? (2) Was the order legitimate? (3) Did he have a legitimate reason to refuse? (4) Was he warned of the consequences of his refusal? In disobeying a Management order, the Grievant violated a principle overwhelmingly supported by arbitrators: work, then grieve. Removal, the Employer claims, would be warranted even if this were a first offense.

The Grievant and Union defend on the basis that Management allegedly claimed it would work with the Grievant if he made Management aware of his circumstances. The Employer asks the Arbitrator to review the record of the case she previously heard (#23-12-900613-0202-01-03) to appreciate the context of the CEO's alleged statement. In the instant case, Management did make an offer to accommodate the Grievant's need to pick up his children, but this offer was not satisfactory to the Grievant. The workplace is not a debating society, Management contends. The Agency has a responsibility to provide service to those entrusted to its care. Although it tries to provide adequate staffing without mandating overtime, sometimes it is necessary and the Contract permits it. Management is not responsible for employees' private affairs, and most employees manage to balance their work and family obligations. This employee, who has had previous opportunities to learn from disciplinary action and to correct his behavior, needs to be held accountable for his actions.

With respect to the Union argument that a supervisor might have covered the position, it is true that the Contract permits this, but the intent of §1.03 is to protect Management's right to insure the functioning of the Agency, not to have supervisors fill in for bargaining unit employees. Moreover, this Arbitrator has said that the Contract does not require the employer to exhaust all alternatives before mandating the least senior employee.

The Employer concludes by stating that it has progressively disciplined this employee, and acted in compliance with the Oakwood

Forensic Center disciplinary policy. It believes it has been fair and accordingly asks that the grievance be denied.

Argument of the Union

The Union contends the Grievant was unjustly discharged. At his last arbitration, Management testified that if the Grievant had informed Management of his circumstances when he was mandated, they might have worked something out. This time he did tell, but was fired anyway. The supervisor McPheron testified about alternatives to mandating the Grievant and he was aware of §1.03 about use of management to avoid mandated overtime, yet he chose not to use these alternatives. Joint Exhibit 9 shows the Agency does use supervisors. It could have done so on May 13 to help out the Grievant, but it did not. McPheron also did not explain to the Grievant that the coverage offered could be for more than the 40-minute break--an inadequate time to accomplish the errand, given where the Grievant lives. If he had, this might have given the Grievant another option.

The Union goes on to claim that the Grievant did not refuse a direct order. What he did was to offer an accommodation or alternative. The Union points out that the institution was not unsecured on that night, for Management just mandated another employee when the Grievant could not work.

The Union renews its argument raised in the Step 3 hearing that a staffing shortage at the institution is creating the need for mandated overtime. A newspaper article of September 1991 (Union Ex. 1) supports this claim. The staffing shortage has been

putting a hardship on the least senior employees who are ordered to work long hours of overtime. The condition still exists at Oakwood Forensic Center and other employees are at risk of discipline when family responsibilities conflict with work demands.

The Union concludes by saying that Management has used its most severe discipline. It is not bound by the grid of the policy. The Collective Bargaining Agreement, specifically §24.02, permits "one or more suspension(s)." The removal was not commensurate and was therefore unjust. The Arbitrator is asked to grant the grievance, return the Grievant to work, and award back pay and benefits.

Opinion of the Arbitrator

There is no question that the Grievant willfully left the work site at the end of his shift after being given a legitimate direct order to work overtime. It is equally clear that he knew he was subject to discipline as a consequence, since he was informed on the Agency's disciplinary policy and had been suspended four times in as many years for insubordination. Of the tests the Employer asks me to apply, three are clearly satisfied. It is the remaining test--reason for refusal--that fails and causes me to overturn the removal.

As the Employer points out, it is a well established principle that when an employee's initial effort fails to persuade management that an order is faulty, the employee should obey anyway and use the grievance procedure to secure justice. This principle, however, has its exceptions, imminent danger to the employee being

the most widely regarded. Here, the Grievant claims an exception and it is thus necessary to strike a balance between the Grievant's reason for refusing the overtime order and Management's need to have him work at that time.

The reason claimed by the Grievant is the childcare obligation that remained despite his last-minute attempts to secure a substitute. I would agree that he was between a rock and a hard place, and dependent on the Employer's reasonableness to get him out of his dilemma. That his Employer was unyielding when he again informed the supervisor he had to meet his children's bus really left him no choice but to disobey. However, the Grievant must bear some responsibility for getting into the dilemma in the first place, for he well knew from past experience that he could be mandated at any time,yet he made no contingency plan for his children's welfare. I shall return to this when I fashion a remedy below.

As to Management's need to have the Grievant work, it is true it has the right to direct its workforce, including the specific contractually-guaranteed right to mandate overtime to the least senior employee, but this right must be exercised with reason and fairness. Employees are not on call every minute of every day. There occassionally will be extenuating circumstances legitimately excusing them from heeding their Employer's demand for overtime. If they are reasonable excuses, made known to the Employer, and not used to avoid unwanted job obligations, the Employer must accept them unless its need for the employee's extra work is over-riding

or it can accommodate the employee's needs as well as its own. In this particular instance, where a legitimate reason for refusing the overtime was raised at the time and the Employer had other ways of covering the position, the Employer abused its discretion when it removed the Grievant for insubordination. In view of Management testimony that it had previously made adjustments to accommodate the Grievant's second job, refusal to accept a childcare excuse seems particularly arbitrary and unreasonable. Moreover, the Employer's own disciplinary policy calls for consideration of circumstances surrounding a violation when a corrective action is contemplated. An employee's inability to secure childcare coverage is such a mitigating circumstance.

If this case stood alone, the Arbitrator would have no difficulty granting the grievance in its entirety. However, the Grievant's substantial history of insubordination and continuing intransigence in solving his childcare problems persuade me that further corrective action is necessary. This is a situation, like others before, that the Grievant had the ability to avoid with advance planning. He must learn that he cannot use his failure to plan to shield him from unwanted overtime. In view of the fact that modest suspensions have not had the desired impact, a lengthy one is in order. The removal is accordingly reduced to a 60-day suspension and the Grievant is warned that this is a last chance for him to put his private affairs in order such that he might satisfactorily fulfill his employment obligations.

Award

The grievance is sustained in part, denied in part. The removal was not for just cause and is reduced to a sixty-day suspension without pay or benefits. The Grievant is to be reinstated as a Psychiatric Attendant, with back pay, seniority and benefits retroactively restored to the 61st day following his removal. Back pay is to be reduced by such interim earnings as the Grievant may have had on account of his removal and he is to supply the Employer with such evidence of earnings as it may require. If reinstatement to the Grievant's former post and shift would have the effect of violating the Contractual seniority rights of more senior employees, he shall be placed in accordance with his seniority.

Anna D. Smith, Ph.D.
Arbitrator

February 5, 1992
Shaker Heights, Ohio