#735

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio
Department of Transportation

Employer.

Grievance No. 31-13-(91-07-03)
0029-01-14
Grievant (E. Cecelia Boyer)

Hearing Date: January 28, 1992

Award Date: February 25, 1992

Arbitrator: Rivera

For the Employer: Susan M. Grundey
Richard Daubenmire

For the Union: Robert Goheen
John Gersper

Present at the Hearing in addition to the Grievant and Advocates were Bettie Haynie, OCSEA Steward (witness), Jane Latarie, Contract Compliance, OCB (observer), Byron V. Jackson, Computer Operator (witness), Michael P. McGarvey, Computer Operations Supervisor I (witness), Mark Jensen, Computer Room Supervisor II (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 Stipulations of Fact

1. Grievant was hired by the Department of Transportation on August 18, 1969. At the time of the incident Grievant was classified as a Computer Operator 3, assigned to the Bureau of Computer Operations.

2. Grievant's immediate supervisor at the time of the incident was Michael McGarvey.

3. Directive A-601 was clearly posted in Grievant's work location.

4. Grievant's normal work schedule is 6:30 a.m. - 3:30 p.m. or 7:00 a.m. - 4:00 p.m., rotating weekly, Monday through Friday.

5. On Saturday, April 6, 1991, a mandatory four (4) hour training session was conducted for all Computer Operators in the Bureau of Computer Operations from 8:00 a.m. - 12:00 p.m. (the second of such Saturday training).

6. Grievant failed to appear on Saturday, April 6, 1991, for the mandatory training session.

7. On March 28, 1991, Grievant read and signed an IOC dated March 26, 1991, notifying her of the mandatory training session to be held on April 6, 1991.

8. An investigatory interview was conducted on April 8, 1991, by Mark L. Jensen, Computer Room Supervisor. Ms. Bettie Haynie, Union Steward, was present.

9. Grievant's prior discipline consists of the following actions:

8-27-90	5-day suspension (Arbitrated 7-30-91 modified from a 10 day suspension)	A-301 #2b	Insubordination - willful disobedience of a direct order by a supervisor.
11-28-89	3-day suspension (Arbitrated 3-7-91)	A-302 #2c	Insubordination - Failure to follow written policies of the Director, Districts, or Offices.
		#16a	Unauthorized Absence

10-17-89	3-day suspension	A-301 #16a	Unauthorized Absence.
3-2-89	1-day suspension	A-301 #2c	Insubordination - Failure to follow written policies of the Director, Districts, or Offices.
		#16	Unauthorized Absence.
8-22-88	Written Reprimand	A-301 #1b	Neglect of Duty.
		#2c	Insubordination - Failure to follow written policies of the Director, Districts, or Offices.
		#13	Leaving the work area without the permission of your supervisor.
6-8-88	Written Reprimand	A-301 #2c	Insubordination - Failure to follow written policies of the Director, Districts, or Offices.
		#16a	Unauthorized absence

10. This case is properly placed before the Arbitrator for determination.

Joint Exhibits

J-1 Contract

J-2 Grievance Trail

J-3 Discipline Trail

J-4 Prior Discipline

J-5 ODOT Directive A-601

J-6 Daily Sign-In/Out sheet dated April 6, 1991

J-7 IOC dated 2/12/91 from Mark Jensen to all computer operators

J-8 IOC dated 3/26/91 from Mark Jensen to Computer Room staff

J-9 IOC dated 7/24/90 requiring physician's verification statement for further absences due to illness or injury

Union Exhibits

1. Notes by Steward on April 8, 1991 meeting

2. Physician's letters dated November 2, 1988, August 7, 1989, August 14, 1989, September 11, 1989, May 6, 1991, May 20, 1991, May 28, 1991

3. Grievant's Evaluations

   a) August 20, 1970
   b) September 27, 1972
   c) September 20, 1978
   d) October 22, 1979
   e) August 8, 1982
   f) October 20, 1983
   g) September 12, 1985
   h) August 18, 1989
   i) September 18, 1990

Employer's Exhibits

1. IOC from Jensen dated April 8, 1991

2. IOC from McGarvey dated April 10, 1991

3. Affidavit by B. Jackson dated August 8, 1991

Jointly Stipulated Issue

Was Grievant terminated for "just cause"? If not, what shall the remedy be?

Contract Terms

§ 24.01 - Standard

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§ 24.02 - Progressive Discipline

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.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§ 24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action.

Union's Position

Grievant was a 23 year employee with some prior discipline. She held the classification of Computer Operator 3 for the Ohio Department of Transportation in the Computer Room located at 25 South Front Street, Columbus, Ohio.

The state imposed the removal, citing - Insubordination A301, #2-B. The Grievant failed to call in to report that she would not be able to report for a mandatory training class scheduled for Saturday morning, April 6, 1991.

The Union argues that the charge of Insubordination is overkill and cites Arbitrator Hyman Cohen, in the case of Meranda, between the State of Ohio and OCSEA/AFSCME Local 11, "Failure to call in to report off does not constitute an act of willful disobedience of a direct order by a supervisor."

The Union will submit doctor's statements, which have been accepted by the Employer, excusing the absence of the Grievant. These will prove the existing illness. This illness caused the Grievant to be absent for the training session held on April 6, 1991.

The Union will not attempt to downplay the importance of continuing training but will demonstrate the Grievant's failure to attend did not impose any hardship on the state, its employees, or the citizenry.

The removal of a 23 year employee for failure to report off is unwarranted. Arbitrator Abrams in the Pacific Telephone &

Telegraph Co./Communication Workers of America, Local 9404, FMCS Case 79 K/14568, 11/21/79, states, "Long service creates a presumption that the employee is capable of satisfactory performance so that stronger evidence is needed before the contrary is established. Moreover, the senior employee has developed a greater equity in his job, which is thought of as a species of property right. He has more time to lose when he is terminated and finds it more difficult to get readjusted. It is almost universally accepted that an employer must be willing to put up with more from a long service employee."

Should the Arbitrator find the Grievant failed in her responsibility, the Union also, in the Grievance, argues that the penalty was imposed without consideration to progressive disciplinary steps.

The Grievant's prior discipline was a five-day suspension. Escalating from a five-day suspension to a removal is much too severe a step and does not follow the principles of progressive discipline. The Union cites your decision between the same parties in Mustaine G87-0687 to support this contention. This decision states in part, "This arbitrator, regardless of semantics involved in the standards of proof, regards dismissal as the last resort after progressive discipline in most cases, and the first only in cases where the grievant's offense is so severe that the arbitrator cannot, in good conscience, return the employee to work."

In summary, the triggering event was the failure to report off. In itself, this failure does not warrant removal.

Progressive discipline was not applied. The tenure of the Grievant warrants a much less severe penalty.

For all these reasons, the Union and the Grievant request the Arbitrator put the Grievant back to work, with full back pay, restore seniority and all leave accruals, and make the Grievant whole.

Management's Position

The case before you today is the termination of the Grievant from the Ohio Department of Transportation because of her pattern of stubborn resistance and insubordination to directions provided by management personnel.

On March 28, 1991, Grievant was given written notification to attend a mandatory Initial Program Load (IPL) training session for all computer operators on Saturday, April 6, 1991, from 8:00 a.m. to 12:00 p.m. Grievant reviewed and initialed this document. On April 5, the day prior to the training, at approximately 3:00 p.m., the Grievant's immediate supervisor, Michael McGarvey, reminded Grievant that the training session was scheduled for the next day from 8:00 a.m. to 12:00 p.m. Later that same afternoon, at approximately 3:30 p.m. Grievant engaged in a conversation with her co-worker, Byron Jackson, stating she would not be in on Saturday for the mandatory training session as she had other things to do on her Saturdays. Mr. Jackson will testify to this conversation. On April 6, 1991, Grievant did not attend the mandatory training session nor did she call to report her absence.

On April 8, the next scheduled work day, Mr. Mark Jensen, Computer Room Supervisor, conducted an investigatory interview with the Grievant and her Union representative to determine the reason for Grievant's absence from the mandatory training session. Mr. Jensen will testify that Grievant stated she did not plan on attending and that she had things to do that day. She provided no mitigating circumstances for her absence and gave no indication of sickness being a factor for her absence in any way.

The pre-disciplinary meeting was held on May 7, 1991. At the meeting, Grievant admitted she did not attend the training session. Grievant stated she had ten years experience in the computer room and did not need the training as much as her co-workers. She also stated she was unable to attend because she was not feeling well. Grievant submitted a physician verification statement from Anthony Williams M.D., dated May 6, 1991, one month after the incident.

Management will show the Grievant had prior warning of the consequence of her actions. Directive A-601, the ODOT disciplinary rules and grid, was clearly posted in the Grievant's work area, and indicates removal as the only recommended level of discipline for a second occurrence of Insubordination-Willful disobedience of a direct order by a superior. The Grievant had just recently served a ten (10) day suspension for the exact same offense, and this major suspension did nothing to correct the Grievant's behavior and attitude of insubordination toward management. (This ten day suspension was reduced to a five day suspension by Arbitrator Craig Allen on July 30, 1991 which was after Grievant was removed).

Management will show the Grievant's tenure has been cluttered with numerous disciplinary actions for various types of insubordination. The Grievant lacks a willingness to cooperate with Management, resents higher levels of authority, and is continuously defying Management's policies and procedures.

Article 24, Section 24.01, states in part "Disciplinary action shall not be imposed upon an employee except for just cause." Through testimony and documentation the State will prove this standard was followed in imposing discipline. Further, the State will prove the principles of progressive discipline were followed, and the action taken was commensurate with the offense.

Facts

The majority of "facts" in this case are not in dispute. The Grievant is a 23 year employee who was a Computer Operator 3 assigned to the Bureau of Computer Operations of ODOT. Her evaluations indicate an above average employee in terms of conduct and skills through 1985 (Union Exhibit 3). However, her last two evaluations, both rated by Supervisor Mark Jensen, indicate a somewhat different perspective. In the 1989 evaluation, the Grievant fell below expectations in 3 of 7 areas and in 1990, she fell below in 1 area of 7. Moreover, between June 8, 1988 and August 27, 1990, the Grievant received 2 written reprimands, a 1-day suspension, 2 3-day suspensions, and one 5-day suspension. All of these disciplines involved some form of insubordination and were often coupled with discipline for unauthorized absence. These

disciplines occurred while the Grievant was supervised by three persons: Douglas Ream, Mark Jensen (her "rater"), and Michael McGarvey, her current supervisor. Mr. Jensen, who testified for the Employer, was the 1st shift supervisor for 2 years prior to his promotion to his current position, Computer Operator Supervisor II. While 1st shift supervisor, he supervised the Grievant. During that period, Mr. McGarvey was a co-worker of the Grievant. Mr. McGarvey was promoted to supervise the Grievant and was her immediate supervisor at the time of the incident at hand. Mr. McGarvey also testified. Both Mr. McGarvey and Mr. Jensen were articulate witnesses who conveyed dedication to their professions and their jobs, decided competency, and a zealous approach to their responsibilities. Both men are white; Mr. McGarvey appeared to be under 30 years of age, and Mr. Jensen appeared to be not much older.

The Grievant was at the time of the incident under the general requirement to provide a physician's statement for illnesses (Joint Exhibit J-9) The Grievant testified to have IBS (irritable bowel syndrome) and provided documentary evidence to that effect (Union Exhibit 3). The Arbitrator did not require the Grievant to describe this condition but took arbitral notice of it. Chronic IBS subjects its victims to sudden and painful and unpredictable bouts of diarrhea. While management is possible with medication and diet, the condition is susceptible to exacerbation by stress which often prevents a victim from being able to predict or control an attack. The Grievant is a black woman who appeared to the

Arbitrator to be over 50. Her personal appearance was immaculate, and her testimony showed her to be a person who valued privacy.

The incident in question occurred on April 6, 1991. On that day, Mr. McGarvey had scheduled the second mandatory training session for operators in his department. Operators would be paid overtime for attendance. The Grievant had attended the first session and was clearly on notice of the April 6, 1991 session. The evidence was absolute that this training was necessary and was scheduled on a Saturday for important technical reasons. The Grievant neither called off nor attended. On the Friday before the session in the late afternoon, the Grievant told a co-worker (Bryon Jackson) that she "would not be in on Saturday ... as she had other things to do with her Saturdays." The Grievant admitted these remarks but claimed they were meant jokingly.

On April 8, 1991, the Grievant and her steward (Bettie Haynie) met with Mark Jensen. While some dispute exists as to the exact content of this meeting, at a minimum, the Grievant was less than clear in her explanation. She apparently explained her absence in at least three ways: "no one consulted me," "I didn't intend to" "I had a doctor's appointment" "I had some things to do." (Union Exhibit 1) Mr. Jensen said he had no memory of any claim of illness during this investigatory interview. The Grievant provided no physician's statement for that day within the regular time period.

On June 21, 1991, the Grievant was terminated as a result of this April 6, 1991 incident. She grieved on July 1, 1991, and on

August 8, 1991 the Step III Response denied the grievance. In upholding the Grievance, the Step III officer concluded "all prior discipline has had no positive or corrective affect on the Grievant's insubordinate attitude." (Joint Exhibit 2)

Discussion

From June 8, 1988 until April 6, 1991, the Grievant has clearly and progressively been on notice of her failure to follow orders and of the possible consequence to her employment of her failure to correct her behavior. In the face of these clear warnings, she has continued to break the rules. Moreover, she is openly defiant, uncooperative, unresponsive, hostile, rebellious, and vindicative, etc (a consistent description supplied by both the oral testimony of her supervisors and the written evidence of prior disciplines).

The contract requires that the Employer have just cause. The Employer met the burden of proof that the Grievant had again broken a rule; the Employer also clearly showed that the employee was on notice of the rules and was on notice of the possible consequences of her action. In addition, the former discipline also met the contract standard of progressivity. According to the Union, the key question before this Arbitrator is whether removal is commensurate. However, the Employer's question must be would anything less than removal be corrective? On one hand, removal for failure to attend one session of a mandatory training and failure to call-off is facially too severe and inappropriate. However,

this facially minor offense is the culmination of 2-1/2 years of similar offenses, progressively disciplined. Two objective mitigating factors exist: 1) Both supervisors agree that the Grievant is a competent employee (standing alone, this fact counts for little. A competent, "insubordinate" employee adds little). 2) The Grievant has been an employee for 23 years. Removal has been called the capital punishment of the labor world. The law of the shop has given significant weight to length of service as a counterweight to removal. This use of longevity is needed to achieve some element of long term fairness. Yet, longevity interests recognize, as well, the investment of the Employer in its human resources. Giving recognition to longevity (as long as the Grievant is competent) recognizes the cost and inefficiency of turn-over. Therefore, weighing longevity against removal gives recognition to legitimate needs of both employer and employee.

The Arbitrator in this case is not unmindful of the Step 3 finding -- no evidence of corrective effect was noted. However, the jump from a 5-day suspension to a removal appears to this Arbitrator to have left out a severe discipline which could have induced a corrective behavior -- a long (10-30 day) suspension. That "jump" in discipline mitigated by the longevity of Grievant's service forces the Arbitrator to conclude that the discipline was not commensurate.

In describing the "facts" of this case, the Arbitrator has alluded to a number of factors usually not discussed -- namely the age, gender, and race of the participants. Moreover, the

Arbitrator has taken notice of the illness from which the Grievant suffers. The Arbitrator strongly suspects that the social issues in this Grievance are a significant factor in the lack of resolution. Perhaps, the Grievant, a mature black woman, has difficulty in receiving direction from young white men, some of whom were only recently her equals. Moreover, the Arbitrator can imagine that discussing the state of one's bowels in such a social situation would be agonizing and embarrassing.

Whether this amateur psychoanalyzing has any validity, this Arbitrator will never know. Regardless of the problems, the nature of the employment situation requires that the subordinate must acquiesce to the supervisor. The Grievant must obey her superiors and moderate her conduct and words in a manner appropriate to the workplace. Moreover, she must supply the Employer with appropriate medical evidence to substantiate legitimate absences, and she must explicitly deal with her illness and its problematic effects. (If a worker is otherwise qualified -- which both her supervisors admit -- she can seek reasonable accommodation from the Employer.)

The Steward indicated that she had attempted to get the Grievant into the EAP. The Grievant apparently said "it was not her problem." For this discipline to be corrective, the Grievant need to recognize that indeed this situation is <u>her</u> problem!

<u>Award</u>

The Grievance is denied in part. However, the removal is found to be not commensurate; a thirty day suspension is

substituted. The Grievant is to be reinstated under a last chance agreement. The Grievant is strongly urged to enroll in counseling under the EAP. The Arbitrator retains jurisdiction solely to rule on the content of the last chance agreement, if so needed.

February 25, 1992
Date

Rhonda R. Rivera
Arbitrator