In the Matter of the
Arbitration Between

OCSEA, Local 11 AFSCME, AFL-CIO	Grievance No. 23-10-(91-11-07)- 0140-01-04
	Grievant: Karen Bonita Hastings
Union	
	Hearing Date: March 31, 1992
and	
	Closings Received: April 20, 1992
State of Ohio Department of Mental Health	Award Date: May 26, 1992
Employer.	Arbitrator: R. Rivera

#768

For the Union: Dennis A. Falcione

For the Employer: Linda Thernes
Tim Wagner (OCB)

Present at the Hearing in addition to the Grievant and Advocates were Phyliss Flowers (witness), Tammie S. Ballard (witness), David Franklin (witness), Betty Robinson (witness), Linda Young (witness), Mick W. Musselman, Labor Relations Officer (witness), John Williams, Police Officer (witness), Mary Jane Bell, Therapeutic Program Worker (witness), Judi Creter, RN (witness), Ray Haggerty, Barber (witness), Louise Maccioli, Employee of Echo Housewares (witness), Sue Tonn, Supervisor (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 (1989-1992)
2. Disciplinary Trail
3. Grievance Trail
4. Job Performance Evaluations - 1989, 1990, & 1991
5. Hospital Wide Policy (Attendance) - 3.99
6. Hospital Wide Policy (Sleeping) - 3.23
7. Hospital Wide Policy (Disciplinary Procedure for Employees) - 3.25

Stipulated Issue

Was the employee disciplined for just cause, if not, what shall the remedy be?

Relevant Contract Sections (1989-91)

ARTICLE 24 - DISCIPLINE
§ 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.

§ 24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by ad processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline employer representatives who violate this section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

§ 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

§ 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon

as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employer and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

§ 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months. Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during

the past twenty-four (24) months. This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

§ 24.07 - Polygraph/Drug Tests

No employee shall be required to take a polygraph, voice stress or psychological stress examination as a condition of retaining employment, nor shall an employee be subject to discipline for the refusal to take such a test.

Unless mandated by federal funds/grants, there will be no random drug testing of employees covered by this Agreement.

§ 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.

Facts

Generally, this Arbitrator completely re-writes the facts. However, for this Grievance, the Arbitrator will adopt, with some editing, the facts as stated by the Employer because in the Arbitrator's judgment, that presentation accurately reflects the facts as found by the Arbitrator.[1]

The case is the removal of the Grievant from her position as a Cosmetologist at the Massillon Psychiatric Hospital effective

[1] [] indicates Arbitrator additions; () indicates evidence exhibits.

on November 4, 1991, for Neglect of Duty, Dishonesty, and Failure of Good Behavior (Joint Exhibit 2).

The entire investigation of the incident leading to the Grievant's removal was clouded by dishonesty and deliberate misinformation with the apparent purpose of deceiving her employer. The Grievant developed a number of stories to explain her whereabouts on September 10, 1991. After each story was investigated and evidence was gathered making the story implausible, then the Grievant would change the story [see Joint Exhibit 2-K, 2-N 1 & 2, Joint 3-b (1-3)].

Certain facts of the case were proven by the State: First, the Barber, Mr. Haggerty testified that he received a phone call about 2:15 p.m. on September 10th in his shop which is located directly across from the beauty shop where the Grievant works. The person on the phone was looking for the Grievant. He advised the caller that the Grievant had been at work but had left her shop approximately 30 minutes prior (Joint Exhibit 2-f).

Second, Officer Williams and TPW Bell testified that while they were returning from a trip to Fallsview Psychiatric Hospital in Akron that they both saw the Grievant in her car with another female passenger at an intersection in downtown Massillon at approximately 3:00 p.m. Both Williams and Bell were sure that the person was the Grievant, and both employees were positive of the time because they had reason to look at their respective watches. Officer Williams further stated that the hourly alarm went off on his watch signifying that it was 3:00 p.m. Both

Williams and Bell testified that they knew the Grievant's car from the parking lot at work, and Officer Williams noted the license plate on the car (Joint Exhibit 2(a)(e)).

Third, upon returning to the hospital, both Williams and Bell noted that the Grievant's car was not in its usual parking area (Joint Exhibit 2(d & e)). Further, when Ms. Bell returned to her work area, she passed the beauty shop which was closed and dark. This statement corroborates the Barber's testimony that when Grievant is out of the shop, she locks the door and turns out the light (Joint Exhibit 2-f).

Fourth, Officer Williams testified that after he dropped off TPW Bell, he went to the Police Department to check in and then returned to the building that houses Grievant's shop. He then noticed that Grievant's car was now in the parking lot. He checked the exhaust system to see if it were hot, which would signify that the car had recently been used; the exhaust system was indeed hot (Joint Exhibit 2d). Then he proceeded to the Grievant's supervisor's office at approximately 3:35 p.m. (Joint Exhibit 2(c)). The time of this visit was noted because the supervisor, Ms. Tonn, was about to lock up the Social Center, a duty she performs everyday at 3:45 p.m. (Joint Exhibit 2c).

Fifth, R.N. Judi Creter testified that she observed and identified Grievant driving on the grounds of Massillon at 3:26 p.m. Ms. Creter was going off duty that day and noted the time on her digital clock in the car (Joint Exhibit 2(g)).

Consequently, with these witnesses, the State met its burden of proof that the Grievant was off grounds without permission from approximately 1:45 p.m. to 3:26 p.m. on September 10, 1991.

Grievant has proffered a variety stories which have changed over time. At first, her initial statement (Joint Exhibit 2h) claims that she was on grounds during the time in question and that she was talking to her cousin, Linda Young, in C-2 and then talked to Cindy Sheegog in D-2 about an ex-patient. She then stated that her cousin, Phyliss Flowers, came and picked up Grievant's car. The Grievant first drove her car to the Administration Building to pick up some medical forms and then drove all the way around the hospital grounds -- even leaving the grounds briefly -- and came back to the parking lot where she normally parks her car. She then stated she spent some time in the bathroom (Joint Exhibit 2h).

At the pre-disciplinary hearing, the Grievant submitted statements (Joint Exhibit 2) from Social Worker Linda Young, cousin Phyliss Flowers, Grievant's daughter, Tammie Ballard, and friend, Betty Robinson, an Aunt, Naomi Killins and a receipt from Dave's Towing (Joint Exhibits 2 k, l, m). Grievant's defense at this hearing was it was her look-a-like cousin, Phyliss Flowers, who had been driving her car in downtown Massillon. Pictures from the Cousin's drivers license were presented at the pre-disciplinary hearing (Joint Exhibit 2n). Management then advised the Grievant that Cindy Sheegog was not on duty on September 10, 1991 (Joint Exhibit 2n); the Grievant changed her story to state

that she went to see Ms. Sheegog but that Ms. Sheegog was not there (testimony).

At the Step III grievance meeting, the same defense was proffered. The only additional evidence were that pictures were presented of the look-a-like cousin was again presented.

Just prior to the Arbitration hearing, Management issued a subpoena duces tecum to Echo Housewares where Phyliss Flowers is employed on the 3:00 p.m. to 11:00 p.m. shift (testimony). The purpose of this subpoena was to ascertain at what time Ms. Flowers got to work on September 10, 1991. A copy of the time card showed that Ms. Flowers clocked in a 2:51 p.m. on September 10, 1991 (testimony). Miss Flowers herself did not testify.

At the Arbitration Hearing, Mr. Armstead of Dave's Towing testified that Phyliss Flowers brought the Grievant's car to him at 2:30 p.m. to check it for repairs. Mr. Armstead testified that he finished the estimate at approximately 2:45 p.m., and the main seal in the car was gone creating a serious oil leak. Mr. Armstead additionally testified the car could <u>not</u> be driven to Canal Fulton and back without putting in a quart of oil (testimony).

Grievant's daughter, Tammie Ballard, reluctantly testified that Phyliss Flowers brought Grievant's car to her at her place of employment, Sun Plastics in Canal Fulton, sometime prior to 3:00 p.m. The car was in the parking lot with the keys under the mat when Ms. Ballard came out of the building sometime after 3:00 p.m. The daughter then got into the car and drove it to

Massillon Psychiatric Hospital and left the keys under the mat, got a ride with someone else, and went home. Ms. Ballard further testified that the Grievant was not aware that she had been driving the car and that she is not supposed to be driving since she does not have a license (testimony). In essence, Ms. Ballard did not tell the truth on her initial notarized statement concerning September 10, 1991 (Exhibit U-1).

Ms. Betty Robinson testified that she called the Grievant at her place of employment at 2:00 p.m. but could not talk to her because she was doing someone's hair.

Grievant has based her story on the fact that the witnesses saw her look-a-like cousin instead of her. The look-a-like cousin did not testify in this Arbitration. The Arbitrator does make an adverse inference from the fact that the cousin did not come in to testify and be subjected to cross-examination.

If this newest story were to be believed, the Grievant was doing a patient's hair at 2:00 p.m. Grievant testified that she finished the patient's hair at approximately 2:20 p.m. She then went to the bathroom, got into her car and drove to the Administration Building to pick up medical papers, and drove the long way (out of the hospital grounds) back to her parking lot and met Phyliss Flowers and gave her the keys at 2:30 p.m. or 2:33 p.m. The trip to the bathroom, a walk to the car, and a drive to the Administration Building to pick up papers, and then a drive all around the ground back to the parking lot was alleged to take only 12 to 13 minutes.

Next, Ms. Flowers took the Grievant's car to Dave's Towing -- arrived at 2:30 p.m. and stayed until 2:45 p.m. Ms. Flowers then drove 9-1/2 miles to Sun Plastics, dropped off Grievant's car, and had someone drive her to Echo Housewares -- 7.8 miles from Sun Plastics and clocked in at 2:51 p.m. This 17.3 mile trip was alleged to take only six (6) minutes, and most of that trip was in a car with a bad oil leak.

The Grievant still never explained who was driving her car at 3:00 p.m. in downtown Massillon and who was driving the Grievant's car back onto the grounds at 3:26 p.m.? The look-a-like cousin was proven to be at work at 2:51 p.m.

The Grievant was driving her car on September 10, 1991. She left the grounds to take care of her personal business; she did not have permission from anyone to be off work. The Grievant's previous work record is not impressive. Supervisor Tonn testified that numerous problems have occurred with the Grievant with respect to policies and procedures. The Grievant had received a written reprimand and a two (2) day suspension for sleeping while on duty. Her performance evaluations reflected a decline in performance in her three (3) years of service at Massillon Psychiatric Center.

The Grievant was charged with Neglect of Duty, Dishonesty, and Failure of Good Behavior. Even if Neglect of Duty and Failure of Good Behavior are considered as overlapping, the Neglect of Duty charge alone carries a possibility of suspension or removal on the third offense. The Grievant has steadfastly

denied the truth even in the fact of very damaging evidence. The Grievant committed an intentional violation of policy and has never shown any remorse for that act. This employee has apparently not learned from her past mistakes and apparently has learned nothing from this incident. In the attached arbitration awards #314 (Gregory Peters, and #227 (Willard Dill), Arbitrator Rivera stated that when management has a choice of discipline and that discipline is reasonable and commensurate, the Arbitrator cannot substitute her judgment for that of management's.

Discussion

The Union's rebuttal consists of five (5) main contentions.

1. The Grievant was lied to by her daughter and cousin. Once the Grievant realized the actual behavior of her daughter and cousin, she recited the "true" story. The Arbitrator finds the "true" story also incredible; moreover, the Grievant never expressed any meager understanding of the seriousness of honesty and credibility as requisites for employment.

2. The Grievant was not "on notice" as to the possibility of removal. This argument is without basis in fact. The Grievant was clearly notified of the possibility of removal (Joint Exhibits 2, 5 and 7).

3. The Union argument argues that the discipline was not progressive per § 24.02. The Grievant, with her rather short tenure, already had 3 prior disciplines (Joint Exhibits 2-S, 2-R, 2-Q), progressive in nature.

4. The Arbitrator must consider mitigating factors. The Arbitrator finds none:

a) The term of employment was short;

b) The Grievant's performance evaluations were declining (see Joint Exhibit 4(a), (b), & (c)).

c) The Grievant never expressed any clear indication that lesser discipline would be corrective.

5. The Union argues that generally removal is not commensurate for an offense of leaving the grounds without permission even after other discipline. Generally, the Arbitrator would agree. However, the dishonesty,[2] deception,[3] and remorselessness were so egregious that removal is commensurate.

Award

Grievance is denied.

May 26, 1992
Date

Linda R. Rivera
Arbitrator

[2]The Arbitrator must note that almost all the affidavits presented by the Grievant as evidence were not signed in the presence of the notary nor were these alleged affidavits properly sworn (Exhibit U-1).

[3]The Arbitrator must note that almost all the affidavits presented by the Grievant as evidence were not signed in the presence of the notary nor were these alleged affidavits properly sworn (Exhibit U-1).