#917

ARBITRATION DECISION

January 31, 1994

In the Matter of :

State of Ohio, Department of Mental Health	)	
	)	
and	)	Case No. 23-12-930827-0741-01-04
	)	Betty Evans, Grievant
Ohio Civil Service Employees Association,	)	
AFSCME Local 11	)	

APPEARANCES

For the State:

Rita Surber, Human Resources Administrator, Pauline Warfield Lewis Center
Rachel Livengood, Second Chair OCB
Alice Gray, Director of Quality Management, PWLC
Jean Harris, Director of Housekeeping, PWLC
Gary McCall, Supervisor, Cincinnati Restoration, Inc.

For the Union:

Michael Temple, Staff Representative
Penny Lewis, Staff Representative
Betty L. Evans, Grievant

Arbitrator:

Nels E. Nelson

BACKGROUND

The hearing in the instant case was conducted on September 8, 1993. At that time the grievant was unable to work due to an on-the-job injury and it was uncertain when the grievant would be able to return to work should she be reinstated by the Arbitrator. Consequently, the state requested the Arbitrator to retain jurisdiction to fashion a proper remedy should he reinstate the grievant. The union did not oppose the state's request. Therefore, when the Arbitrator reinstated the grievant on October 27, 1993, he retained jurisdiction to determine any further remedy at the time the grievant was able to return to work.

A conference call was conducted on January 28, 1994. At that time the parties stated their positions regarding the proper remedy. The Arbitrator agreed to issue a final award in the case setting forth the appropriate discipline in the case.

The Arbitrator does not believe that it is necessary to provide a detailed rationale for this final award. He would note, however, that his decision indicates that the grievant's offense and poor record dictate a severe penalty. In view of this fact, he will impose a 30-working-day disciplinary suspension. In addition, the Arbitrator must warn the grievant that any further problems are likely to result in her termination and that such a termination would likely be upheld in arbitration.

FINAL AWARD

The grievant's termination is to be converted to a 30-working-day suspension.

Nels E. Nelson
Arbitrator

January 31, 1994
Russell Township
Geauga County, Ohio

ARBITRATION DECISION

October 27, 1993

In the Matter of:

Ohio Civil Service Employees Association, AFSCME Local 11	)	
and	)	Case No. 23-13-930504-0704-01-04 ~~23-12-(93-08-27)-0741-01-04~~ Betty Evans, Grievant
State of Ohio, Department of Mental Health	)	

APPEARANCES

For the Association:

Michael Temple, Staff Representative
Betty L. Evans, Grievant

For the State:

Rita Surber, Human Resources Administrator, Pauline Warfield Lewis Center
Rachel Livengood, Second Chair, OCB
Alice Gray, Director of Quality Management, PWLC
Jean Harris, Director of Housekeeping, PWLC
Gary McCall, Supervisor, Cincinnati Restoration, Inc.

Arbitrator:

Nels E. Nelson

BACKGROUND

The Pauline Warfield Lewis Center is a 360-bed hospital for the treatment and care of the mentally ill. It is accredited by the Joint Commission for the Accreditation of Health Care Organizations. The accreditation is very important because third-party payments require accreditation. As part of the process, the center is subject to periodic surveys.

The grievant, Betty Evans, was hired as a custodial worker at the Rollman Psychiatric Institute on April 14, 1982. She worked at the Institute until August, 1990 except for a three-year disability leave from March 5, 1986 to March 13, 1989. In August, 1990 the Institute merged with the center and the grievant transferred to the center. At the time of the grievance she was a custodial worker in unit 2.

The parties stipulated that the grievant participated in the Employee Assistance Program. She enrolled in the program on June 24, 1992 for a period of 60 days. However, on November 3, 1992 her participation was extended for 30 days. The grievant completed the program on January 4, 1993. At that time a removal that had been held in abeyance was reduced to a six-day suspension.

In January, 1993 the center was making final preparations for a survey by JCAHCO. As part of the process the grievant was given extra work assignments. On Saturday, January 23, 1993 the grievant reported to work at 6:30 A.M. and received a list of work from Jean Harris, the director of

housekeeping. The list included dusting the ceiling, removing a mop from 2B71, washing the ceiling in 2B78, vacuuming the living room, cleaning behind the washer and dryer, mopping the kitchen floor, and stripping and waxing the hallway floor. When the grievant reported to work on Sunday, January 24, 1993, she received another list of work from Harris which included stripping and waxing the hallway floor as well as other work that had not been completed the previous day.

The grievant had a scheduled day off on Monday, January 25, 1993 and returned to work on Tuesday, January 26, 1993. Since the hallway floor had not been properly stripped and waxed, Paul Blackwell, the director of operations, requested Cincinnati Restoration, Inc., a contractor that employed mentally retarded and handicapped individuals to clean the public areas of the center, to do the hallway in unit 2. Gary McCall, the CRI supervisor, testified that he spent two hours working on the floor. He stated that the grievant was on the unit but did not say anything to him about CRI doing the work.

On February 18, 1993 Harris submitted a request for discipline against the grievant. She charged the grievant with neglect of duty under Hospital Policy HR-101 for failing to complete assigned tasks on January 23, 24, 26, and 27, 1993. On April 9, 1993 Michael Hogan, the Director of the Department of Mental Health, ordered the grievant's removal. The grievant was notified on April 22, 1993 by Saundra

Jenkins, the chief executive officer of the center, that the removal would be effective April 27, 1993.

On April 30, 1993 the grievant filed a grievance. She charged that she was removed without just cause. The grievant stated that she was not guilty of neglect of duty; that management failed to make necessary equipment available; that her work had been assigned to non-bargaining unit CRI employees; and that all of the assigned work had been completed except the hallway floor. The grievance was denied at step three on May 5, 1993 and appealed to arbitration on July 6, 1993.

The arbitration hearing was held on September 8, 1993. The record was closed at the conclusion of the hearing. The Arbitrator subsequently requested an extension of the time for issuing his decision to October 29, 1993.

ISSUE

The issue as agreed to by the parties is as follows:

Did the Pauline Warfield Lewis Center remove Ms. Evans for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

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.

* * *

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 oral reprimand(s)(with appropriate notation in employee's file);

B. One or more written reprimand(s);

C. One or more suspension(s);

D. Termination.

* * *

24.05 - Imposition of Discipline

* * *

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

* * *

STATE POSITION

The state argues that there is just cause for the grievant's removal. It contends that the grievant was guilty of neglect of duty in violation of Hospital Policy HR-101. The state maintains that given the grievant's prior disciplinary record and the use of progressive discipline, the grievant's removal was commensurate with the offense.

The state asserts that the JCAHCO survey was very important. It points out that by meeting the JCAHCO accreditation standards the center minimizes the number of surveys by other agencies such as Medicare. The state notes that maintaining its accreditation insures the receipt of third-party payments.

The state claims that on January 23, 1993 Harris gave the grievant a list of jobs that needed to be done. It

states that Harris checked the work at the end of the shift and found that only a few of the jobs had been done and that the tasks completed would have taken only one hour. The state emphasizes that the most important assignment -- stripping and waxing the hallway -- was not done.

The state indicates that on January 24, 1993 Harris gave the grievant another list of jobs to be done including the hallway floor. It observes that Harris testified that the grievant applied stripper to the floor but allowed it to dry along the walls causing the floor to turn brown six inches from the baseboard. The state notes that the stripper should not have been put down without having a buffer on hand since it is hard to get the stripper off when it dries.

The state acknowledges that on January 24, 1993 the grievant called Harris regarding supplies and equipment. It indicates that a message was left on Harris's voice mail at 10:30 A.M. by the grievant stating that she had no buffer or stripper. The state points out that at 11:35 A.M. the grievant picked up the stripper and that Harris told her where to find a buffer.

The state charges that the grievant again did not complete the assignment. It notes that Harris's request for discipline states:

> On 1/24/93 I gave you another list of the assignments which you failed to complete on 1/23/93. At 11:00 a.m. I returned to my office and found a message on my audix which you left at 10:30 a.m. stating you did not have a buffer or a ladder to do your assignment. You came to the office at 11:35 a.m. to obtain the ladder and a gallon of stripper. I told you that a buffer

> had been available to you on Unit 4 all morning. You stated you had been all over the place and could not find a buffer or me. You returned to your unit and poured stripper all over the one side of the hallway floor. You left the stripper on the floor and the floor itself in a mess.

The state reports that the grievant returned to work on January 26, 1993 after her regular day off. It points out that Harris stated that she did not tell the grievant what to do because she got loud and abusive and thought that she would complete her previous assignments. The state emphasizes that Harris testified that the grievant made no attempt to remove the stripper or finish the hallway floor.

The state indicates that on January 26, 1993 Blackwell asked CRI to scrub the floors in B West, unit 2, and unit 3. It contends that the floors in B West and unit 3 each took 45 minutes with the housekeeper on the unit picking up the excess water. The state claims that in unit 2 where the stripper had dried on the floor it took two hours to do the work. It stresses that the grievant did not help and did not say anything about CRI working on the unit.

The state maintains that the grievant has a poor disciplinary record. It states that the grievant received a written reprimand on March 27, 1991 for neglect of duty, unapproved leave of absence, tardiness, and failure to follow the established calling-in procedure; a two-day suspension on August 27, 1991 for neglect of duty related to tardiness and being AWOL; a six-day suspension on December 5, 1991 for neglect of duty and/or dishonesty related to tardiness; and a six-day suspension on January 18, 1993 for neglect of duty.

due to tardiness and absences which was in lieu of a removal after the grievant completed treatment under the employee assistance program.

The state argues that progressive discipline does not require that all of the prior discipline be related to the same offense. In support of this contention it cites the decision of Arbitrator Rhonda Rivera in OCSEA, Local 11, AFSCME, AFL-CIO and Ohio Department of Transportation, case no. 31-11-(03-30-89)-16-01-06 and the decision of Arbitrator Marvin Feldman in State of Ohio, Mental Retardation and Developmental Disabilities Department and Ohio Civil Service Employees Association and Its Local Union No. 11, AFSCME, AFL-CIO, grievance no. G87-0874.

The state requests the Arbitrator to deny the grievance in its entirety. It asks that if he feels that the penalty is too harsh, he retain jurisdiction for purposes of determining the proper remedy because the grievant has been off work since April, 1993 and it is not clear when she will be able to return to work.

UNION POSITION

The union argues that preparing for the JCAHCO survey strained the center's resources and effected the grievant's ability to complete the tasks assigned to her. It points out that the survey requires that the entire center be cleaned. The union notes that a substantial amount of overtime was worked and equipment was fully utilized. The union indicates that the center knew four to six weeks in advance about the

survey.

The union asserts that the list of work given to the grievant by Harris is not the standard procedure for assigning work at the center. It states that the list appeared to be written on scratch paper and was not signed by Harris so it looked informal. The union claims that the grievant got no instructions regarding when the work had to be done or about returning the lists.

The union contends that the lists with the grievant's notations on them about the work she had done were relied upon at all levels of the disciplinary and grievance process. It maintains that it is apparent from reading Hogan's letter of removal that he considered the lists. The union states that the lists were also relied upon by John Quigley at the third step of the grievance procedure and by Michael Duco at the Office of Collective Bargaining at the fourth step of the grievance procedure. It stresses that Harris did not testify at the pre-disciplinary hearing or at any of the steps of the grievance procedure prior to the arbitration hearing.

The union argues that the grievant did not neglect her work on January 23, 1993. It states that she reported to work at 6:30 A.M. and was given a list of work by Harris. The union claims that she did her regular work plus all of the extra work except the hallway floor. It notes that the grievant returned the list to Harris at the end of the day indicating on it the work which she had done.

The union observes that the grievant again reported for

work at 6:30 A.M. on January 24, 1993. It acknowledges that Harris gave her another list of work but emphasizes that she did not say anything about the work to the grievant and did not ask her about the hallway floor. The union points out that the grievant testified that she put stripper on the hallway floor but then had to call Harris because there was no buffer on the unit that worked. It claims that Harris told the grievant that there was a buffer on unit 4 but when the grievant went to unit 4, she was unable to find one. The union states that when the grievant called Harris back, she was told to look on the other units.

The union states that the grievant would have no reason to complain about CRI working on the floor in unit 2. It maintains that she does not appprove the work done by CRI and was in no position to object. The union stresses that there would have been no point to complaining to management because it had told CRI to do the work.

The union concludes that the grievant is not guilty of neglect of duty. It asserts that she did the best she could under the circumstances. The union asks the Arbitrator to reinstate the grievant with full back pay and make her whole in all respects.

ANALYSIS

The grievant was removed for neglect of duty. The request for discipline states that the grievant failed to complete assignments on January 23 and 24, 1993. In particular, it charges that on January 24, 1993 the grievant

put stripper on one side of the hallway floor and failed to remove it and left the floor a mess. The request for discipline further indicates that on January 26 and 27, 1993 the grievant failed to make any attempt to remove the stripper or finish the floor.

The Arbitrator has no doubt that the grievant did not perform the quantity and quality of work on the dates in question required of employees of the center. On January 23, 1993 the list returned by the grievant and the testimony of Harris indicate that she failed to do much of the work assigned. The next day the grievant again did not complete all of the assigned work. Furthermore, the testimony of both Harris and McCall indicates that she made a mess of the hallway floor.

The work assigned to the grievant was very important. In late January the center was scheduled for a JCAHCO survey. If the center failed to maintain its accreditation, reimbursement by Medicare and others would have been jeopardized creating a severe financial crisis. An important part of the survey is insuring that a clean and healthy environment exists.

The issue is not whether discipline is justified but whether removal is reasonable under all of the circumstances. The Arbitrator does not believe that the removal can be upheld. First, while the grievant has a very poor disciplinary record, all of the discipline is related to absenteeism or tardiness. The last instance of such behavior

led to her removal but the removal was held in abeyance while the grievant completed a total of 90 days in the employee assistance program. There is no indication that after the grievant enrolled in the program on June 24, 1992, she had any further discipline until the instant case.

Second, although the grievant's evaluations for the past three years indicate that the grievant had problems with absenteeism and tardiness, they show that the quantity and quality of her work met expectations. In fact, it is only in the areas of absenteeism and tardiness that the grievant failed to meet expectations.

Third, the Arbitrator believes that the problem with the hallway floor was made worse by the lack of communication between Harris and the grievant. The list of work to be performed was given to the grievant with no explanation, indication of the priorities, or deadlines. Even after the floor was not done on January 23, 1993, Harris did not tell the grievant that the floor was a high priority. In fact, Harris testified that on January 26, 1993 she did not tell the grievant what to do because she got loud and abusive and that she thought that the grievant would complete her previous assignment.

Fourth, the fact that CRI stripped the floor on January 26, 1993 does not appear particularly significant. McCall testified that CRI scrubbed the floors in B West and unit 3 as well as in unit 2. Had the center been unable to get the work done which resulted in problems with respect to the

survey, the grievant's failure to properly complete the work would have been much more serious.

Fifth, the arbitration decisions of Arbitrators Feldman and Rivera which were introduced by the state to show that prior discipline does not have to involve the same offense in order to justify a more severe penalty, involved much more serious conduct than the grievant's failure to properly strip and wax a floor. In State of Ohio, Mental Retardation and Developmental Disabilities Department and Ohio Civil Service Employees Association and Its Local Union No. 11, AFSCME, AFL-CIO, grievance no. G87-0874 Arbitrator Feldman upheld the removal of an aide in a cottage housing profoundly retarded residents when the aide slept for a considerable period of time putting the residents of the cottage at risk. Arbitrator Rivera in OCSEA, Local 11, AFSCME, AFL-CIO and Ohio Department of Transportation, case no. 31-11-(03-30-89)-16-01-06 refused to reduce a removal where an equipment operator who was on suspension ignored an order not to come on Department of Transportation property three times including twice after being warned. Such direct defiance of management authority is a very serious offense.

Finally, the grievant has long service. She was hired at the Rollman Psychiatric Institute on April 14, 1982 and transferred to the center in April, 1990. An employee's long service is frequently considered grounds for mitigation of a penalty.

Although the Arbitrator believes that grievant must be

reinstated, the grievant's offense and her poor record dictate a severe penalty. The record, however, indicates that the grievant left work due to an on-the-job injury before her removal and it was unclear when the grievant will be able to return to work. The Arbitrator, therefore, will grant the state's request that he retain jurisdiction for purposes of fashioning a proper remedy once the grievant is able to return to work.

AWARD

The grievant is to be reinstated. The Arbitrator will retain jurisdiction to determine any further remedy when the grievant is able to return to work.

Nels E. Nelson
Arbitrator

October 27, 1993
Russell Township
Geauga County, Ohio