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In the Matter of Arbitration		
Between		Case Number:
District 1199, SEIU		23-08-93215-1050-02-12
and		
		Before: Harry Graham
The State of Ohio, Department of Mental Health, Dayton Mental Health Center		

Appearances: For District 1199, SEIU:

Charles Lester
Staff Representative
District 1199, SEIU
475 East Mound St.
Columbus, OH. 43215

For Dayton Mental Health Center:

Jeff Fogt
Labor Relations Officer
Dayton Mental Health Center
2611 Wayne Ave.
Dayton, OH. 45420

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on January 14, 1995 and the record in this case was closed.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

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

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Background: There is some, but little, dispute over the facts prompting this proceeding. The Grievant, Linda Onuorah, has twelve years of service with the State. At the time of her discharge she was employed as a Forensic Social Worker at the Dayton Mental Health Center in Dayton, OH. On January 12, 1993 Ms. Onuorah was scheduled to work. At about 7:00 a.m. she attempted to start her car in order to make the daily trip to the work site. Her car did not start. Ms. Onuorah attempted to telephone the Employer to inform it that she would be late. She was unable to get through to the Mental Health Center as the phone line was busy. This is a frequent occurrence. In due course, Ms. Onuorah took the bus to work, arriving at about 9:00 a.m. Ms. Onuorah's supervisor told her that in order to account for her lost time she could either use accumulated leave or stay late. The Grievant opted for a third course of action. She worked through her lunch hour and remained at work some 20 minutes after the end of her shift. This was considered by the Employer to constitute insubordination. Ms. Onuorah was discharged.

In order to protest that action a grievance was filed. It was processed through the procedure of the parties without resolution and they agree that it is properly before the Arbitrator for determination on its merits.

Position of the Employer: The State points out that Ms. Onuorah did not ask permission to work through her lunch

hour. Rather, she was told she could stay after work or use leave time to account for her late arrival. She took it upon herself to work through her lunch hour. This violation of a directive from the Employer constitutes insubordination. Insubordination is a serious industrial offense. Consequently, the severe penalty administered in this instance is justified in this instance the Employer asserts.

At the time of her discharge the Grievant had two disciplinary entries on her record. These constituted a written reprimand and a six day suspension. In accord with the principle of progressive discipline the next infraction committed by the Grievant would produce discharge. She was insubordinate on January 12, 1993, hence discharge was appropriate in this instance avers the State. The same result is called for by the disciplinary grid used by the Department.

Ms. Onuorah is not a professional for purposes of consideration under the Fair Labor Standards Act. As that is the case, the law is clear: she must have a lunch break. (Employer Exs. 3a-c). She did not take one on January 12, 1993. This places the Department in a difficult position vis-a-vis the Department of Labor. Potentially there is a liability of some unknown amount if it permits such a violation to occur. In order to prevent that situation it discharged the Grievant. As it followed the concept of

progressive discipline and acted in accord with the Fair Labor Standards Act its action should be upheld the State asserts.

Position of the Union: According to the Union Ms. Onuorah was never specifically directed not to work through her lunch hour. The Employer issued no prohibition against that activity. As insubordination involves willful disregard of an order and none was issued in this instance no insubordination occured. Discipline in such a situation cannot stand the Union insists.

The Employer was well aware that from time to time employees at Dayton Mental Health Center have worked through their lunch hours. Ms. Onourah has done so in the past and not been so much as spoken to about the practice. Other employees have done so as well. (Union Exhibit 1). No discipline has been administered.

As the Union urges the Fair Labor Standards Act be interpreted, a meal period may be considered as work time. On the day in question Ms. Onourah was attempting to make up for her late arrival at work. There is no prohibition in the statute against such activity. Nor was she prohibited from doing so by the Employer. In such circumstances discipline cannot stand the Union insists.

The Grievant has twelve years of service. At the time of her discharge she had on her record two disciplinary entries.

These were a reprimand and a suspension. To move from discipline of that nature to a discharge in the absence of a serious offense is inappropriate according to the Union. Consideration must be given to the Grievant's seniority and work history in evaluating the propriety of discipline. When that is done in this instance the Union insists that the discharge under review in this proceeding was inappropriate. Consequently it urges the grievance be sustained and a make whole remedy directed.

Discussion: Employer Exhibits 3a-c, the Interpretive Bulletins concerning the Fair Labor Standards Act, do not support the position of the State in this case. Nowhere do they mandate that a Employer discharge an employee who is in violation of the Statute. The Employer may have a concern that an employee who acted as Ms. Onourah did in this instance may expose it to liability. That does not prompt the conclusion that discharge is the inevitable result of such action.

In this instance the Grievant has twelve years of service with the State. At the time of her discharge she had two disciplinary entries on her record. To discharge for an offense (if indeed there was an offense) of such minor nature should not be expected. The concept of just cause is a nebulous one. Nonetheless, it incorporates widely accepted notions of fairness, reasonableness and proportionallity. The

penalty must fit the crime. In this instance, the penalty is excessive.

There is a very real question in this proceeding over whether or not any offense whatsoever was committed by the Grievant. On at least one other occasion she had worked through lunch without any notice being taken by the Employer. Other employees had done so as well and experienced no adverse consequences. In this particular situation, it is not accepted as fact that Ms. Onourah was explicitly directed not to work through her lunch hour. She denies receipt of such a directive from her supervisor. In any event, it is unnecessary to determine where truth lies with respect to this point. As noted above, even if the Grievant violated a directive of the Employer, the penalty administered in this instance was excessive.

In the ordinary course of processing this dispute to arbitration it came to be reviewed by the State Office of Collective Bargaining. It is frankly incomprehensible why the dispute proceeded further. The Office of Collective Bargaining is staffed by professional labor relations personnel. They are veterans of review of hundreds of similar instances in State service. They also are the respository for arbitration decisions involving the State as employer. As such, personnel at OCB possesses the sort of expertise that should have prevented this dispute from reaching this point.

This Arbitrator must speculate that OCB furnished the Department with disinterested professional advice indicating the State's case to be weak in this situation. Disregard of such advice in these circumstances amounts to foolhardy behavior and wishfull thinking by administrators in the Department of Mental Health.

This dispute represents a failure of managerial authority at the highest levels of the Department. To continually fail to recognize the trivial nature of the offense (if there was an offense which is specifically not found) indicates a failure to learn the most rudimentary elements of labor relations. After many years of experience with collective bargaining, such a failure is astonishing.

Award: The grievance is SUSTAINED. The Grievant is immediately to be restored to employment at Dayton Mental Health Center. She is to be paid all straight time wages she would have earned but for this incident. All benefit payments she would have received are to be made to her. This is to include any expenditures that might have been incurred that would have been paid by health insurance. All seniority and vacation credit that would have been earned are to be restored to the Grievant. Any income received from the Unemployment Compensation system shall not be used to offset the liability of the State in this situation. The Grievant is to promptly furnish to the Employer such evidence of any

other interim wage and salary earnings. Such earnings, if any, may be used by the Employer to offset its liability to the Grievant.

Signed and dated this 24th day of January, 1995 at South Russell, OH.

Harry Graham
Arbitrator