

#1302

**STATE OF OHIO AND STATE
COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA
VOLUNTARY LABOR ARBITRATION PROCEEDING**

In the Matter of the Arbitration Between:

THE STATE OF OHIO, THE OHIO DEPARTMENT
OF REHABILITATION AND CORRECTION,
SOUTHERN OHIO CORRECTIONAL FACILITY,

Employer,

-and-

THE STATE COUNCIL OF PROFESSIONAL
EDUCATORS (SCOPE), OHIO EDUCATION ASSOCIATION (OEA)
AND NATIONAL EDUCATION ASSOCIATION (NEA),

Association.

Grievant: Mary Lou Kennedy (Removal)

Grievance No.: 27-25 (1-28-97) 1206-06-10

Arbitrator's Opinion and Award

Arbitrator: Dr. David M. Pincus

Date: July 10, 1998

Appearances

For the Employer

David Burrus
Wendy Clark

Victor Crum

Dave Colley

Terry J. Collins

Labor Relations Officer

Labor Relations Supervisor, Southern
Ohio Correctional Facility

Labor Relations Officer, Southern Ohio
Correctional Facility

School Administrator/Supervisor II,
Southern Ohio Correctional Facility
Warden/RCI

For the Association

Henry L. Stevens
Mary Lou Kennedy
Ronald Snyder

OEA/NEA/Scope

Grievant

Counsel for Grievant

Issue

Did the Employer remove the Grievant for just cause? If not, what shall the remedy be?

Stipulated Facts

1. The Grievant began employment on July 28, 1980.
2. The Grievant was classified as a teacher.
3. The Grievant acknowledged receipt of the Standards of Employee Conduct.

Introduction

This is a proceeding under Article 5, entitled Grievance Procedure, and Article 6, entitled Arbitration, of the Agreement between the State of Ohio, Southern Ohio Correctional Facility, represented by the Office of Collective Bargaining ("the Employer") and the State Council of Professional Educators, Ohio Education Association and National Education Association ("the Association"). The Arbitration hearing was held at Ross Correctional on May 7, 1998. The parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. No issues of timeliness or other procedural technicalities affecting the merits of the grievance were raised by either party.

At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

Pertinent Contract Provisions

Article 26 - Sick Leave

26.05 - Notification for Use of Sick Leave

An employee who is unable to report for work, and who is not on a previously approved day of vacation, sick leave or personal leave of absence, shall be responsible for notifying the employee's immediate supervisor or other individuals designated by the Employer that he/she will be unable to report for work. The notification must be made no later than one-half (1/2) hour after the time the employee is scheduled to work, unless emergency conditions prevent such notification. If operational needs of a work facility require a different notification time, the Appointing Authority may establish a reasonable notification time requirement not to exceed one (1) hour prior to the time the employee is scheduled to work. The Appointing Authority shall be responsible for informing all employees of the applicable notification policy. Failure to notify the Employer in accordance with the provisions of this paragraph shall result in the employee forfeiting any rights to pay for the time period which elapsed prior to notification unless unusual extenuating circumstances existed to prevent such notification.

Article 13 - Progressive Discipline

13.01 - Standard

Employees shall only be disciplined for just cause.

13.04 - Progressive Discipline

The Employer shall follow the principles of progressive discipline. Disciplinary action shall include:

1. Oral reprimand (with appropriate notation in the employee's official personnel file);
2. Written reprimand;

3. A fine in an amount not to exceed five (5) days' pay, to be implemented only after approval of OCB;
4. Suspension with pay; and
5. Demotion or discharge.

Disciplinary action shall be commensurate with the offense. The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages.

Article 14 - Work Rules

14.01 - Work Rules

Work rules shall be all those written policies, regulations, procedures, and directives which regulate conduct of employees and the performance of the Employer's services and programs.

Work rules shall not conflict with any provision of the Agreement. The Association shall be furnished with a copy of the work rules and a minimum of fifteen (15) working days in advance of the effective date. The Association shall designate an address for receipt of this communication.

Work rules shall be made available to affected employees prior to the effective date.

In emergency situations, as defined by the Employer or the employing agency, the provisions of this Section may not apply. The Association and affected employees will be notified properly of such declared emergencies and duration.

14.02 - Uniformity

It is the intent of the Employer that work rules shall be interpreted and applied uniformly to all affected employees.

Article 6 - Arbitration

6.05 - Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of the provisions of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

Standards of Employee Conduct

Rule Violations and Penalties

Effective: February 18, 1996

Steps in Progressive Discipline:

1. OR - Oral reprimand
2. WR - Written reprimand
3. 1-3 - One to three day suspension
4. 3-5 - Three to five day suspension
5. 5-10 - Five to ten day suspension
6. R - Removal

Offenses

2. Tardiness

- b. Shift tardiness
- c. Failure to report for duty at scheduled starting time

<u>First</u>	<u>Second</u>	<u>Third</u>	<u>Fourth</u>	<u>Fifth</u>
OR	WR	1	3	5-10/R

Offenses

3. Absenteeism

b. Failure to notify supervisor of absence or follow call-in procedure:

<u>First</u>	<u>Second</u>	<u>Third</u>	<u>Fourth</u>	<u>Fifth</u>
OR/WR	WR/1	1-3	5-10	R

h. Being absent without proper authorization (AWOL):

<u>First</u>	<u>Second</u>	<u>Third</u>	<u>Fourth</u>	<u>Fifth</u>
1-3	3-5	5-10	R	

k. Excessive absenteeisms/abuse of leave:

<u>First</u>	<u>Second</u>	<u>Third</u>	<u>Fourth</u>	<u>Fifth</u>
1-3	3-5	5-10	R	

Case History

The Grievant, Mary Lou Kennedy, is a single parent who has been a teacher with the State of Ohio, Department of Corrections, since July 28, 1980. During that time, she served as a teacher and librarian, working with inmates who are convicted felons at the Southern Ohio Correctional Facility (SOCF) in Lucasville, Ohio.

The Grievant worked the first shift in the SOCF library from 7:00 a.m. to 3:30 p.m. As a librarian, the Grievant was responsible for the day-to-day operation of the institution's library. This included responding to "kites" (requests) from the inmates, maintaining periodical subscriptions for reading materials, coordinating educational media systems, and cataloging books. She was aided by another teacher, Mr. Roy Aeh.

Inasmuch as the prison is a maximum security facility, the inmates had limited personal time out of their cells and looked forward to going to the library to read available materials and take advantage of the library's services. The inmates participation in the library was one of many significant factors in the SOCF's smooth operation. The Grievant's position thus required her to report for work on time and on a regular basis to ensure that the inmates' needs were being met and that the SOCF's programmatic goals were being met.

Between 1990 and 1996, the Grievant experienced a series of psychological and physical traumas. She injured her back seriously, lost her mother, lost her close friend, Beverly Taylor, a teacher at the SOCF, as a result of a murder by a SOCF inmate, witnessed the attack of another close friend and co-worker by an inmate in the SOCF library facility, and learned that her son would not be returning home to live with her after completing college. All of these experiences contributed to the Grievant's diagnosis in 1994 of having major depression.

Between November 1994 and November 1996, the Grievant missed a substantial amount of work because of health problems related to her major depression. Her tardinesses and absences resulted in a succession of significant discipline:

1. September 16, 1996. Fifteen day suspension for being absent without authorization and for excessive absenteeism.
2. August 29, 1996. Seven day suspension for failure to provide physician's verification for absence when required.
3. August 20, 1996. Five day suspension for failure to notify supervisor of absence or follow procedures; failure to provide physician's verification of absence; absence without authorization.

4. March 27, 1995. One day suspension for being absent without authorization and for excessive absenteeism.
5. March 1, 1995. Written reprimand for failure to provide physician's verification when required.
6. January 30, 1995. Written reprimand for being absent without authorization and for excessive absenteeism.

During the period of time the Grievant had been disciplined, she was referred by the SOCF's Employee Assistance Program (EAP) for weekly therapy sessions and was prescribed anti-depressant medication by her doctor. She was also counseled by her supervisor, David Colley, who attempted several times to discuss the Grievant's absenteeism problems with her and the reasons for it. The Grievant apparently recognized her absenteeism problems but was in denial about any psychological or physical reasons for it.

The Grievant's termination resulted from her absence from and her failure to report to work on November 19, 1996. According to the Grievant, she recalls sitting down in her reclining chair at home on the evening of November 18, 1996 and then remembers being awakened by her neighbor pounding on her door on the evening of November 19, 1996. She has no recollection of what happened between the evenings of November 18 and 19. She admittedly did not call off work on November 19 and did not attend work. The Grievant testified that prior to November 19, she was suffering from numerous psychological symptoms including suicidal ideations, inability to sleep, poor concentration, and withdrawal from friends and family.

During the succeeding days of November 20, 21 and 22, 1996, the Grievant reported for work late three times, at 7:35 a.m., 7:38 a.m., and 7:48 a.m. respectively, in violation of the SOCF's Standards of Employee Conduct. Although she had received and had knowledge of the SOCF standards, had reported off ill on previous occasions, and knew the time frame during which she needed to call in, the Grievant's only explanation for her tardiness between November 20 and 22 was that she had slept in her son's bedroom during that time and she believed his clock may not have been properly set.

Having felt that it had provided her with adequate warnings, counselings and progressive discipline, the Employer decided to remove the Grievant by written notice dated January 15, 1997.

The Merits of the Case

The Employer's Position

The Employer believes just cause existed to terminate the Grievant. With a significant prior disciplinary record, and having just served a fifteen day suspension for absenteeism, the Grievant indisputably failed to report to work on November 19, 1996. The Employer also believes the record establishes that the Grievant failed to timely report to work on November 20, 21, and 22, 1996. The Grievant's absence and tardinesses are direct violations of the SOCF's standards.

In addition, the Employer believes it went over and above what was reasonable in trying to counsel the Grievant. Her supervisors tried to talk to her about her problem and she denied it. Counseling was offered. The Employer even broke up one of the Grievant's

major suspensions over a period of time so that she would have a source of compensation to live on while serving the suspension.

In the final analysis, despite the Grievant's qualifications as a teacher, the reality is that the Grievant cannot come to work or cannot report to work on time on a regular basis. Just cause therefore exists for the Grievant's termination without any grounds for mitigation of the penalty.

The Association's Position

While acknowledging that the Grievant had a history of attendance problems and a prior disciplinary record, the Association believes that the incidents beginning on November 19, 1996 which were the basis of the Grievant's removal were different and were caused by circumstances beyond the Grievant's control.

The Association believes that because of her medical and psychological condition, the Grievant was not functioning properly and that this condition manifested itself on November 19 with an extreme situation causing the Grievant to lose an entire work day. The Grievant's medical records from Dr. Graham, the State's doctor, and Dr. Sokolov, the Department of Administrative Services' doctor, found the Grievant to be disabled and unable to work at least during the period of December 2, 1996 through January 15, 1997.

These reports also clearly indicate that the Grievant was suffering from the condition of major depression before, during and after the incidents of November 19 through November 22, 1996. The reports corroborate that the Grievant's failure to report to work was caused by conditions beyond her control.

In addition, the Grievant's absences did not prejudice the Employer. Other than the failure to process inmates "kites" and delays in renewing periodical subscriptions, all of the Grievant's job duties were picked up by full-time civilian aides working in the library. The Grievant seldom responded to kites and testified that she had timely completed all of the work necessary to renew the subscriptions in the Fall of 1996 prior to her November 19 episode. The Grievant also was undoubtedly a good employee. Due to supplemental programs initiated by the Grievant, the SOCF library budget expanded from \$18,000.00 to \$45,000.00 during the Grievant's short time in the library.

In summary, given the extenuating circumstances of the facts of this case, particularly the Grievant's psychological condition, the Employer's removal is not appropriate or reasonable for the incidents that occurred on November 19 through November 22, 1996. As a long-term employee with an excellent teaching record and someone who has struggled to pursue her professional goals despite continued physical and psychological problems, the Grievant's removal is simply not justified under the circumstances.

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record, including pertinent contract provisions, the parties' briefs, and applicable arbitral precedent, it is this Arbitrator's opinion that the Grievant was removed for just cause. This Arbitrator believes the Employer met its burden to demonstrate it followed progressive discipline and terminated the Grievant for legitimate reasons. The Association, moreover, failed to provide sufficient probative evidence of

mitigating circumstances requiring a reduction of the discipline. The Association's grievance therefore is denied.

This Arbitrator's analysis of whether just cause existed for the termination began with the review of the Grievant's disciplinary record. The Grievant indisputably had been suspended for fifteen days on September 16, 1996, seven days on August 29, 1996, five days on August 20, 1996, and one day on March 27, 1995. In addition, on March 1, 1995 and January 30, 1995, the Grievant had been given written reprimands. All of this discipline was for the same or related reasons: Absenteeism, tardiness or failure to properly justify or document an absence.

This Arbitrator cannot ignore such a lengthy and significant disciplinary record, especially when it involves a pattern of similar or related offenses regarding absenteeism. Indeed, in his opinion and award sustaining the Grievant's most recent fifteen day suspension for absenteeism, Arbitrator Everette J. Freeman concluded that, "given the Grievant's prior absenteeism and discipline record, it is not unreasonable for the Employer to hold Ms. Kennedy to a stringent attendance standard." *Scope v. State of Ohio*, arbitration *slip op.* 27-25-961010, p. 20.

Thus, upon reviewing the record here, given the Grievant's significant disciplinary record of absenteeism, this Arbitrator held the Grievant to a stricter attendance standard, including a closer review of her explanations of the mitigating circumstances for her absences. The record simply did not support a persuasive and credible reason to mitigate the Grievant's termination.

The Grievant indisputably did not call off from or report to work on November 19, 1996. She also was tardy without prior notification on November 20 through 22, 1996. These undisputed facts are a direct violation of Article 26, Section 26.05(A) of the parties' agreement, as well as the SOCF's Standards of Employee Conduct. Article 26, Section 26.05(A) specifically requires notification of absence "must be made no later than one-half (1/2) hour after the time the employee is scheduled to work. . ." The SOCF's standards expressly outline as grounds for significant progressive discipline (suspension/termination) repeated tardiness and absenteeism.

The only question then -- which is the crux of this arbitration -- is whether any mitigating circumstances existed to explain the Grievant's violation of the contract and the SOCF standards to reduce her termination. The Grievant's explanation for her tardiness between November 20 and 22, 1996 can be easily dismissed. As admitted by the Association, "Her only explanation for this phenomena [tardiness] is that she had taken to sleeping in her son's bedroom during this period of time and believed that his clock may not have been properly set" (Association Brief, p. 3). This Arbitrator does not believe the Grievant's failure to properly set her son's alarm three successive times is a proper justification to mitigate her discipline for these offenses.

Although the Grievant's explanation for her absence from work on November 19 is seemingly complicated, the basics, as outlined by the Association, are simple: "She did not attend work on November 19 and did not report off. She has no idea what happened during that time period" (Association Brief, p. 2).

Interestingly, in defense of her fifteen day suspension before Arbitrator Freeman, the Grievant similarly could not substantiate her flat tire incident that was the basis of her absence underlying her fifteen day suspension (*Slip op.* at 21). Arbitrator Freeman noted that the absence of the Grievant's documentation left the Employer bereft of the necessary confirmation about the reason for her absence and thus it acted reasonably upon disciplining her (*Id.*). This Arbitrator draws a similar conclusion but for slightly different reasons.

The Association relies heavily on the Grievant's alleged psychological condition as the basis for her failure to recall her absence on November 19.¹ A catch-22 is thus created because no definite explanation can be provided for the Grievant's actual conduct on November 19 except for the alleged effects of an alleged psychological disability. In other words, since the Grievant cannot recall what happened to her on November 19, the Association asks this Arbitrator to accept, *res ipsa loquitur*, that the alleged psychological disability was the reason for the Grievant's absence.

But the facts do not persuasively support the effects of the alleged psychological disability on November 19. The Association's evidence of the Grievant's alleged psychological problems, based primarily on Dr. Graham's and Dr. Sokolov's evaluations, demonstrate the Grievant "to be disabled and unable to work during at least the period of December 2, 1996 through January 15, 1997" (Association Brief, p. 5). The Association's

¹ This Arbitrator believes the issue of whether the Grievant is disabled is a red herring in this arbitration and better left for another venue if rights on those grounds are alleged to have been violated.

direct medical analysis therefore is outside the period in question about the Grievant's November 19, 1996 absence.

Neither are the Association's generalizations of the Grievant's alleged psychological disability from 1994 persuasive. Even assuming the Association's evidence clearly established the Grievant's psychological problems existed since 1994, she has an inherent obligation to deal with these problems or to be accommodated for them so they did not prevent her from working. As evidenced by her lengthy disciplinary record prior to November 19, and Colley's unrebutted testimony that she repeatedly denied having a psychological problem, the Grievant failed to take any adequate measures that would mitigate her absence on November 19, even if it did result from a psychological problem. The Grievant's failure to take these self-help measures or to make requests for accommodations is on the same analytical plane as her failure to substantiate her flat tire: The Employer was bereft of the necessary information to reconsider the merits of disciplining her for her absence.

Along these same lines, this Arbitrator draws a negative inference from the Association's failure to bring forth the Grievant's neighbor as a witness to the Grievant's "major episode." The Grievant's neighbor certainly could have brought forth some corroborating testimony that he found her in a catatonic state during the evening of November 18.

A negative inference was also drawn from both the Association's and the Grievant's failure to request EAP assistance or other help prior to the November 19 incident. This

Arbitrator therefore infers that the alleged effects of the Grievant's psychological condition on November 19 may have been slightly overstated.

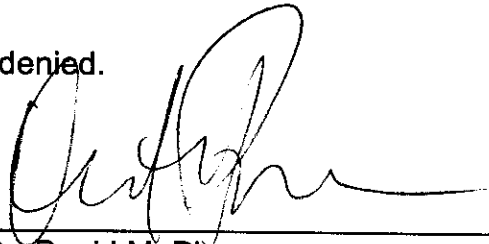
Finally, a negative inference was drawn from the Association's heavy reliance on the Grievant's psychological condition as mitigation for her termination, but yet her tardinesses on November 20-22, 1996 were based on her alleged back problems. The mitigation arguments were therefore somewhat out of balance thereby reducing credibility.

This Arbitrator does not doubt that the Grievant may have and continues to suffer from some degree of psychological disorder that potentially affects her ability to show up for work on time or to report to work. But the Employer under the circumstances here was faced with a number of vagaries about the Grievant's condition on November 19 in the face of her well-established disciplinary record of absenteeism related offenses. The Employer had to draw its own conclusions based on these circumstances. This Arbitrator's only function is to determine whether that conclusion was fair and reasonable under the facts. In this Arbitrator's opinion, based on the facts and circumstances here and the inferences that can be drawn from them, the Employer's decision to terminate the Grievant was not unreasonable.

Award

The Grievance is denied.

DATE: _____



Dr. David M. Pincus
Arbitrator