Award 26

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF MENTAL RETARDATION

AND DEVELOPMENTAL DISABILITIES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION

LOCAL NO. 11, AFSCME AFL-CIO

BARBARA A. JACKSON, GRIEVANT

Thomas P. Michael, Arbitrator
Columbus, Ohio

Grievance No. G-86-0316, Barbara A. Jackson

Pursuant to notice from the Office of Collective Bargaining, Ohio Department of Adminstrative Services, Thomas P. Michael agreed to serve as the Arbitrator herein. The parties are the State of Ohio, Department of Mental Retardation and Developmental Disabilities, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, hereinafter referred to as the Union.

The parties stipulate that the grievance is properly before the Arbitrator. At the direction of the Employer this grievance went directly to Step 4 of the contractual grievance procedure. The parties further stipulated that two prior disciplinary actions against the Grievant dating to 1980 and 1981 should have been expunged from the Grievant's personnel records and should not be considered by the Arbitrator in determining this matter.

A formal hearing was held on January 22, 1987, at the offices of the Union, 995 Goodale Boulevard, Columbus, Ohio 43212. By agreement of the parties the record was left open pending receipt by the Arbitrator of certain written personnel policies regarding discipline for the tardiness. Those documents were received by the Arbitrator on February 9, 1987. With the consent of the Arbitrator, the parties agreed to forego the filing of

post-hearing briefs and submit this matter to the Arbitrator on the basis of the testimony, exhibits and authorities proffered at the hearing.

APPEARANCES:

For the Employer:

Barbara A. Serve'
Assistant Attorney General

Stanley J. Dobrowski
Assistant Attorney General

For the Union:

Daniel S. Smith
Legal Counsel
OCSEA/AFSCME Local 11

ISSUE

The parties stipulate that the issue before the Arbitrator is:

Was the discipline (termination) for just cause?

If not, what shall the remedy be?

FACTUAL BACKGROUND

Barbara A. Jackson, (hereinafter "Grievant"), has been employed at Cleveland Developmental Center since October 1979, when she began working as a Hospital Aide. On March 17, 1986, the Grievant voluntarily took a demotion to custodial worker and was assigned to the "first shift", which commenced at 7:00 a.m. and ended at 3:30 p.m. For some time prior to that change of assignments the Grievant had worked the "second shift", which originally began at 3:30 p.m. and ended at 12 midnight and later was changed to a 3:00 p.m. to 11:30 p.m. schedule.

On September 23, 1986, the Employer terminated the Grievant (Joint Exhibit E), citing "neglect of duty" for repeated tardiness between May 2, 1986, and July 31, 1986. The Order of Removal listed four prior suspensions of the Grievant for "neglect of duty", two of which date to January, 1981 or earlier.

The contract between the parties (Exhibit A) became effective on August 13, 1986, some thirteen (13) days after the period of tardiness upon which the termination is based and some forty-one (41) days before the Order of Removal. Grievant had received two pre-contract suspensions of ten days each in September, 1985 and

January, 1986.

The disciplinary procedure policy in effect on those occasions (Policy Number L-5, effective April 14, 1985) provided for progressive disciplinary action regarding tardiness. That policy guideline interposed a thirty (30) day suspension as the "usual" disciplinary step to be taken between a ten (10) day suspension and removal.

On November 17, 1986, the Employer published a revised policy statement recommending termination as the disciplinary step to follow a ten-day suspension. An intermediate policy statement, dated July 21, 1986, refers to suspensions of more than three days but does not set forth specific recommendations for the length of such suspensions for recurring violations. Thus, the first written policy guideline available to employees which specifically provided for termination immediately following a ten-day suspension was not implemented until November 17, 1986.

CONTRACT PROVISIONS

The following provisions of the Contract are relevant to the determination of this case:

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME

§13.06 - Report-In Locations

All employees covered under the terms of this Agreement shall be at their report-in locations ready to commence work at their starting time. For all employees, extenuating and mitigating circumstances surrounding tardiness shall be taken into consideration by the Employer in dispensing discipline.

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 patient or another in the care or custody of the State of Ohio, the arbitrator does not have the 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. Verbal reprimand (with appropriate notation in employee's file);
B. Written reprimand;
C. Suspension;
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.

§24.04 - 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. Prior to the meeting, the employee and his/her representative shall be so informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that 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 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 employee 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. 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 thepublic except in extraordinary situation 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 onlyif 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 froman 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.

POSITION OF THE EMPLOYER

The Grievant was terminated for just cause as a result of a history of chronic tardiness. She has been suspended for ten days each on two prior occasions in September, 1985 and January, 1986 for the same job-related problem. Her repeated tardiness disrupts the schedule of her supervisor, the Housekeeping Manager. When a custodial worker is late another employee often must be assigned to that worker's assigned work area until the regular worker appears. This engenders confusion and causes additional work for the Grievant's supervisor.

The Grievant was warned on several occasions in the past by the Housekeeping Manager about her chronic tardiness and was on notice of the requirement that she be at her assigned report-in location at the appointed starting time. Her history of chronic tardiness on second shift continued upon her transfer to first shift and the Employer had just cause to remove the Grievant.

POSITION OF THE UNION

The Employer has not demonstrated just cause for the removal of the Grievant from employment. Most of the occasions of tardiness relied upon by the Employer as a basis for the Grievant's dismissal were de minimis. The several occasions on which Ms. Jackson was more than a few minutes late are mitigated by her problems as the single mother of a three-year old child attempting to work in a large city.

Further, the Employer was only entitled by the contract to consider the two prior ten-day suspensions in 1985 and 1986, not the earlier suspensions which occurred in 1980 and 1981. In that context dismissal is not in accordance with the progressive discipline steps in effect either prior to or after the effective date of the contract.

The Grievant has been dismissed pursuant to a progressive discipline policy which was not in effect at the time of her prior disciplines in 1985 and 1986. Therefore, she could not have been on notice of the severity of discipline attendant to a third discipline for tardiness at the time of those earlier suspensions.

The evidence as a whole justifies some lesser form of discipline. Termination under the mitigating factors of this case is without just cause.

OPINION

The Arbitrator wishes to make clear at the outset that he would have no hesitancy in denying this grievance had all the operative facts occurred after the execution of the contract. Under those circumstances removal would be justified for a third occasion of serious discipline for tardiness in approximately one year's time.

To the contrary, however, all the operative facts with the exception of the execution of the actual Order of Removal took place prior to August 13, 1986 under a set of disciplinary policies more liberal than those which have been adopted pursuant to the contract. At the time of her September, 1985, and January, 1986, susupensions the Grievant was on actual or constructive notice only of Policy Number L-5, effective April 14, 1985, which provided (Paragraph IV. B.) for a thirty day suspension prior to an Order of Removal in the "usual" case. Policy Number OP/P-5, which specifically contemplates removal of an employee as the next disciplinary step following a ten-day suspension (Appendix IV.), was not placed into effect until November 17, 1986.

Additionally, even though both the pre-discipline hearing and Order of Removal postdate the execution of the contract, both the report of that September 5, 1986 hearing and the Order of Removal itself refer to previous suspensions of the Grievant in 1980 and 1981. As the Employer agreed at the outset of the arbitration hearing, the contract required that those prior disciplinary actions should have been removed from the Grievant's file and

could not serve as the basis for a disciplinary order in September, 1986. (Contract, Section 24.06). Thus, this Arbitrator can only speculate whether the decision of the agency head would have remained the same had he not been on notice, in violation of the contract, of those two earlier suspensions.

The contract also requires the Employer to consider "extenuating and mitigating circumstances" in tardiness cases (Section 13.06). In that regard there is no evidence that the Grievant's tardiness prevented her from completing her work assignments. Additionally, only four of the twenty-six incidents of tardiness were in excess of thirty minutes, the time at which the Housekeeping Manager testified he was forced to make alternate assignments. Finally, the Grievant's difficulties in finding child care for her then three-year old child is of some mitigating concern although it was her obligation to arrange for more reliable care in light of her change of shifts.

Nonetheless, although the Arbitrator finds that just cause for termination has not been demonstrated, it must be concluded that the Grievant's immediate past work record does not provide a basis for complete reversal of the discipline imposed.

In light of the fact that dismissal would be justified in the absence of the procedural defects noted above, the Arbitrator has determined not to make an award of back pay.

AWARD

The grievance is upheld. Grievant is ordered reinstated effective March 16, 1987, with restoration of all benefits, rights and privileges retroactive to September 23, 1986. Back pay between September 23, 1986, and March 16, 1987, is denied.

Thomas P. Michael, Arbitrator

Rendered this Ninth day of
March, 1987, at Columbus,
Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was mailed to Edward H. Seidler, Deputy Director, Ohio Department of Administrative Services, 375 S. High Street, 17th Floor, Columbus, Ohio 43266-0585, with copies of the foregoing Opinion being served by United States Mail, postage prepaid, this 9th day of March, 1986, upon: Barbara A. Serve', Assistant Attorney General and Stanley J. Dobrowski, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215 and Daniel E. Smith, Legal Counsel, OCSEA/AFSCME Local 11, 995 West Goodale Blvd., Columbus, Ohio 43212.

Thomas P. Michael