

#772

## ARBITRATION

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In the Matter of Arbitration  
Between:

THE STATE OF OHIO, DEPARTMENT OF  
EDUCATION, OHIO STATE SCHOOL FOR  
THE BLIND

and

OHIO CIVIL SERVICE EMPLOYEES  
ASSOCIATION, LOCAL 11,  
A.F.S.C.M.E., AFL-CIO

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Grievance of Antony  
Munnerlyn dated  
November 25, 1991

### OPINION AND AWARD

This matter was heard on May 6, 1992 in Columbus, Ohio

### APPEARANCES

#### Arbitrator:

Mitchell B. Goldberg  
2100 Central Trust Center  
Cincinnati, Ohio 45202  
(513) 621-2120

#### For the Employer:

Lou Kitchen, Assistant/Chief of Operations  
Larry Cathell, Director of Personnel  
Sharon Hilliard, Labor Relations  
Dennis L. Holmes, Superintendent  
Phillip E. Yahn, Building Maintenance Supervisor  
Joe Waldron, Building Maintenance Superintendent  
Larry T. Hicks, Custodian  
Brian D. Adams, Custodian  
Don McMillen, OCB-Observer

#### For the Union:

Robert W. Steele, Sr., Staff Representative  
John Fisher, Staff Representative  
Brett A. Friedrich, Union Steward  
Antony G. Munnerlyn, Grievant

## **I. INTRODUCTION AND BACKGROUND**

The State of Ohio ("Employer") and OCSEA, Local 11, A.F.S.C.M.E., AFL-CIO ("Union") are parties to a collective bargaining agreement which continues in full force and effect for two and one-half years, beginning July 1, 1989. Article 25 of the contract sets forth the grievance procedure which consists of five steps culminating in arbitration in the event the grievance is not resolved in one of the first four steps. Section 25.03 of the contract sets forth the arbitration procedures and provides that the expenses and fees of the Arbitrator shall be shared equally by the parties. Said section further provides that only disputes involving the interpretation, application or alleged violation of a provision of the agreement shall be subject to arbitration. The Arbitrator shall have no power to add to, subtract from, or modify any of the terms of the agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of the agreement.

Antony Munnerlyn, hereinafter referred to as "Grievant", filed a grievance on November 25, 1991 in accordance with the provisions of the grievance procedure after he was removed from his employment as a custodian at the Ohio State School for the Blind. The Employer terminated the Grievant's employment on the alleged grounds that the Grievant had committed a theft of school property, namely a track suit. The Employer alleges that the Grievant's removal was for just cause, under the standards for discipline which are contained in Article 24 of the contract. The Grievant

was subject to an investigatory interview, which is referred to as a pre-discipline meeting pursuant to Section 24.04. Section 24.05 provides that the Agency Head or Acting Agency Head shall make the final decision as to the recommended disciplinary action which results from the pre-discipline meeting. The proceeding before the Agency Head relative to disciplinary grievances is referred to as a Step 3 hearing and corresponds to Step 3 of the grievance procedure. A meeting is conducted between the Agency Head or his/her designee, management personnel and the Union in an attempt to resolve the grievance. The Agency Head or designee prepares the Step 3 grievance response and the Union may appeal the response to the next step in the grievance procedure which is a review by the Director of the Office of Collective Bargaining. The Director may reverse, modify or uphold the decision of the Agency Head or designee in Step 3. The Director's review may be appealed to arbitration.

The Grievant was called to an investigatory interview on October 16, 1991. Dennis L. Holmes, the Superintendent of the school conducted the interview with the Grievant and his Union representative. Based upon his investigation, Mr. Holmes reported the incident to the State Police for an investigation as to the alleged theft and Mr. Holmes recommended that a pre-disciplinary hearing be held at the Step 3 or Agency Head level. A copy of Mr. Holmes' report was forwarded to, among others, Dr. Moore, the Agency Head. A Step 3 meeting was conducted on December 30, 1991

by Dr. Moore. The grievance was denied and the recommended discipline of removal was sustained.

The matter proceeded to arbitration on May 6, 1992 in Columbus, Ohio. The parties were given a full opportunity to present evidence and documentation, to examine and cross-examine witnesses, who were sworn and separated, and to argue their respective positions. No post hearing briefs were filed and the record was closed at the conclusion of oral argument. The parties stipulated that the issue is properly before the Arbitrator.

## **II. APPLICABLE CONTRACT LANGUAGE**

### **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 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 timelines of the Employer's decision to begin the disciplinary process.

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#### 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request 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 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 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 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. 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.

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#### 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 modify the contemplated disciplinary action.

#### ARTICLE 25 - GRIEVANCE PROCEDURE

##### 25.02 - Grievance Steps

##### Step 3 - Agency Head or Designee

If the grievance is still unresolved, a legible copy of the grievance form shall be presented by the Union to the Agency Head or designee in writing within ten (10) days after receipt of the Step Two response or after the date such response was due, whichever is earlier. Within fifteen (15) days after the receipt of the written grievance, the parties shall meet in an attempt to resolve the grievance unless the parties mutually agree otherwise. In the Ohio Department of Transportation Step 3 meetings will normally be held at the worksite of the grievant. If the meeting is held at the district headquarters the chief steward will be permitted to represent.

The Agency Head or designee shall process grievances in the following manner:

##### A. Disciplinary grievances (suspension and removal)

The Step 3 grievance response shall be prepared by the Agency Head or designee and reviewed by the Office of Collective Bargaining. The response will be issued by the Agency Head or designee within thirty-five (35) days of the meeting. The response shall be forwarded to the grievant and a copy to one representative designated by the Local Chapter Officer. Additionally, a copy of the answer will be forwarded to the Union's Central Office. This response shall be accompanied by a legible copy of the grievance form.

If the grievance is not resolved at Step 3, the Union may appeal the grievance to arbitration by providing written notice and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given whichever is earlier.

##### B. All other grievances

The Agency Head or designee shall give his/her written response and return a legible copy of the grievance form within fifteen (15) days following the meeting. The Agency shall forward the response to the grievant and a copy to one representative designated by the Local Chapter Officer.

### **III. ISSUE**

The stipulated issue provided by the parties is as follows:  
Was the removal of the Grievant, Antony Munnerlyn, for just cause;  
and, if not, what shall the remedy be?

### **IV. PROCEDURAL ISSUE**

The Union argues that the disciplinary provisions of the contract have been misapplied by the Employer so as to deprive the Grievant with due process of law. Specifically, Mr. Moore was the Agency Head who imposed the discipline issued to the Grievant at the conclusion of the pre-discipline meeting. He recommended the removal of the Grievant from his employment. Mr. Moore also served as the Agency Head under Step 3 of the grievance procedure. In effect, Mr. Moore was charged with reviewing his own opinion formed at the pre-discipline meeting.

The Union made a request at the third step grievance meeting to remove Mr. Moore from the responsibility of conducting the Step 3 hearing. The Employer rejected this request. The Union argues that the purpose of the Step 3 hearing is to conduct a fair and unbiased review of the particular circumstances giving rise to the grievance. In this case, Mr. Moore was biased and he did not serve as a neutral because he had already reviewed the matter and issued his decision at the pre-discipline hearing stage.



The Employer argues that the investigatory interview was conducted by Mr. Holmes, the Superintendent for the school. This report was delivered to Dr. Moore and to Mr. Cathell, the Director of Personnel for the Department of Education. According to Mr. Cathell, he prepared the case for presentation to Dr. Moore and Dr. Moore was not familiar with the facts of the case when he reviewed it at the Step 3 hearing. This is notwithstanding the fact that Dr. Moore is shown to have received a copy of Mr. Holmes' report of the investigatory interview. The Employer argues that Mr. Moore was a disinterested hearing officer regardless of the fact that he is clearly a management employee. The Employer further argues that the contract does not prohibit the Agency Head from acting as the pre-discipline hearing officer and the Step 3 grievance hearing officer.

The issue for consideration is whether or not Articles 24 and 25, when considered in their entirety, is so unfair in terms of its implementation, that the Grievant, under the circumstances of this case, was deprived of a fundamentally fair review and hearing of this grievance. Due process does not require perfect process, but only procedures which meet the standards of fundamental fairness. So long as a Grievant, at some point along the way in the grievance procedure, is apprised of the charges against him, is provided an opportunity to defend against the charges by presenting his case to a neutral party, the fundamentals of due process are complied with. Although it would be preferable to have Mr. Moore's pre-disciplinary hearing decision reviewed by some person other than Mr. Moore

at Step 3 of the grievance procedure, the Grievant is not denied due process because he can appeal the decisions of Dr. Moore to a neutral arbitrator. Since arbitration is a vital part of the grievance procedure and the discipline procedures of Article 24, the due process requirements are met.

#### **V. FACTS**

On October 11, 1991, the Grievant was observed by two fellow workers carrying a brown paper bag under his arm as he was leaving the school building after his work shift. One of the fellow workers, Mr. Larry Hicks, regularly drove the Grievant and another fellow worker, Brian Adams, from the school parking lot to the bus stop, which was approximately one mile away. On this occasion, Adams observed the Grievant carry the brown paper bag into the Hicks vehicle. Thereafter, Hicks dropped the Grievant and Adams at the bus stop. Adams noticed that the Grievant did not have the brown paper bag when they entered the bus. Hicks drove his vehicle home, locked it and entered the vehicle the following morning. Hicks drove the vehicle to work on October 12, 1991, parked the vehicle at the school parking lot and locked it. During the morning, Hicks sought permission to go to his vehicle in order to look for a cigarette lighter. While searching for the lighter after unlocking the vehicle, Hicks discovered a brown paper bag. He looked inside the bag and observed a gray t-shirt and a school track suit. Hicks believed that this same bag was the bag which was carried by the Grievant out of the school building on October 11th. Hicks turned the bag and its contents over to his Supervi-

sor, Mr. Phil Yahn. Yahn showed the contents to the school track coach, Mr. Jim Peterfish. Peterfish identified the track suit as being school property. Yahn, thereafter, turned the bag and the contents over to Joe Waldron, the Building Maintenance Superintendent. The track suit contained uniform number 16. According to Peterfish, the subject track suit had been missing since the previous Wednesday evening.

During the investigatory interview, the Grievant was shown the bag and its contents. The Grievant did not identify the bag or any of the items. He specifically denied that the t-shirt was his property. Subsequently, however, and at this arbitration hearing, the Grievant admitted that the t-shirt belonged to him. Witnesses observed the Grievant wearing the t-shirt before October 11, 1991.

#### **VI. POSITION OF THE EMPLOYER**

The Employer argues that there was just cause for the termination of the Grievant's employment. The circumstantial evidence was overwhelming that the Grievant left the school building after work with a school track suit in a brown paper bag. The Grievant destroyed his credibility when he failed to tell the truth about the ownership of the t-shirt which was found in the bag. There is nothing in the record to suggest that the witnesses who testified against the witness were not credible. They have complained to management about the Grievant's work performance, but the Grievant could not establish any bad blood between the witnesses and the Grievant.

The contract provides for progressive discipline. However, the Employer considers dishonesty and theft to be so egregious as to warrant immediate termination. Arbitration authorities are in accord with this principle. The Union could not present any like cases in which the Employer failed to discharge employees who engaged in theft or acts of dishonesty. The Frankenfield case, which was brought to the Arbitrator's attention by the Union, involved a different issue of student abuse on the part of another employee and this case could not be used for comparison purposes.

#### **VII. POSITION OF THE UNION**

The Union argues that theft was not established by the degree of proof required to sustain a discharge in this case. The Employer's case comes down to a credibility confrontation between Hicks and the Grievant. Hicks and Adams had complained about the Grievant's work performance on numerous occasions. The Grievant's supervisors were unhappy with the Grievant's work performance and they were irritated by the many complaints which were received. According to the Grievant and the Union, however, the complaints were unjustified. None of the complaints were serious enough to cause any discipline to be issued against the Grievant and the Grievant's work record was clean. The Union argued that Hicks, Adams and the Supervisor conspired to cause the Grievant's employment to be jeopardized. The Union further argued that there was racial discord between the white custodians, such as Hicks and Adams, and the Grievant who is black. Evidence was presented that the Grievant's supervisor had been disciplined on a prior occasion

for making racial comments and remarks about another black employee.

The Union argues that the concept of just cause is further defined in the contract and Section 24.04 specifically provides that discipline shall be "reasonable" and "commensurate" with the offense and shall not be used solely for punishment. Even if it is found that the Grievant improperly removed school property from the premises, the discipline of discharge is unfair and not commensurate with the offense. The contract specifically provides in Section 24.01 that patient abuse, or in this case, student abuse, is so objectionable that the Arbitrator is prohibited in every case from modifying an employment termination once there has been a finding of abuse. The Employer, however, notwithstanding this standard, only issued a one day suspension after finding that an employee struck a blind student at the school. This does not compare with a discharge for a finding that the Grievant removed a track suit from the school premises.

#### **VIII. DISCUSSION**

Arbitration authorities vary as to the required degree of proof necessary to sustain a discharge in a theft or dishonesty case. Some arbitrators require a proof "beyond a reasonable doubt," the same as in a criminal court, on the grounds that the loss of a job is the loss of a substantial property right. Other arbitrators have held that a higher degree of proof is required in theft cases, "clear and convincing" evidence, but not proof beyond a reasonable doubt. Still other arbitrators merely require proof

by a preponderance of the evidence. Regardless of the degree of proof required, however, in order to establish a theft of personal property, certain requirements must be established. Arbitrator Pincus in ODOT/OCSEA, G87-1494 (Hurst) sets forth the elements necessary to prove a theft as follows:

"(1) Personal goods of another must be involved; (2) the goods must be taken without the consent of the other; (3) there must be some asportation; and (4) both the taking and the asportation must be with the intent to steal, or an intent to deprive the owner of his property permanently.

The term "asportation" means the carrying away of property. This may involve merely the changing of the location of the property. Specifically, the act of placing property into a sack, which the Grievant carried out of the school building, would constitute asportation.

The Employer has established the first three elements. The track suit was the property of the school, the consent of the school was not obtained before the property was removed, and the property was removed or carried away from the original location by the Grievant. It is the fourth element, however, which presents the problems relative to the necessary proof in this case. There is minimal evidence, even circumstantially, as to whether the Grievant removed the property from the building with the intent to steal, or that the Grievant intended to deprive the school of its track suit on a permanent basis.

This Arbitrator has weighed and evaluated the testimony of Hicks and Adams against the Grievant's testimony. The Grievant's admission that he lied about the ownership of the t-shirt does not

help his case. The references to the racial discord between the Grievant and his fellow workers and supervisors, and the hostility against the Grievant by his fellow employees, because of the Grievant's work shortcomings, even if true, do not convince this Arbitrator that a detailed conspiracy existed between Hicks, Adams and the Supervisors for the purposes of framing the Grievant so as to cause him to lose his job. The testimony of Hicks and Adams is found to be credible, so far as the evidence goes. The Grievant, on October 1, 1991, walked out of the school building with a school track suit in a paper bag under his arm. The bag was left in Hick's car when Adams and the Grievant exited the car for purposes of catching a bus. This scenario, however, is insufficient to establish the intent to steal (permanently) the track suit on the part of the Grievant. The intent to steal does not wash with the fact that the Grievant left the bag in Hick's vehicle, instead of taking it with him to his destination. The Grievant testified that he played basketball. He could have intended to use the track suit when he played and returned it to the school at a later time. This would not amount to the intent to deprive the school of its property on a permanent basis.

Therefore, accepting the principle that discharges for theft and dishonesty may be made summarily without progressive discipline, the Employer, in this case, has not established, even by a preponderance of the evidence, that a theft occurred. What did occur was the removal of school property from the school by the Grievant without consent. At best, the Grievant borrowed the

property from the school when he was not entitled to do so. This was an improper act for which the Employer is entitled to issue some discipline. The discipline required for this violation should be reasonable and commensurate with the offense.

Many arbitration authorities hold that wide discretion should be granted to management relative to the extent of discipline to be issued in particular cases under the theory that management rights should prevail, and arbitrators should not substitute their judgment for management's judgment; unless, the particular management decision is arbitrary, capricious or entirely unreasonable. The contract language in this case, however, makes it clear that particular management decisions relative to the severity of discipline shall be ultimately resolved by the arbitrator as part of the grievance process. Section 24.02 requires that discipline be "commensurate with the offense." Section 24.05 requires that discipline be "reasonable." The parties have, therefore, by express language, authorized the arbitrator to decide whether the degree of discipline issued in particular cases is reasonable under the circumstances.

The Frankenfield case of student abuse and the issuance of a one day suspension provides some perspective as to the discipline which is reasonable in this case. Student abuse is so intolerable that once the decision of termination is made by the Employer, an Arbitrator is prohibited from modifying the decision, notwithstanding mitigating circumstances. In Frankenfield, the Employer chose to consider various mitigating circumstances, including the poor



health of the Grievant in issuing minimal discipline for this egregious act. A termination of employment for the act of borrowing a school track suit without permission seems excessive and unreasonable for an employee with five years of service and a clean work record with no prior evidence of similar misconduct. Because of the necessity of deterrence for this type of conduct, a suspension of thirty (30) days, under the circumstances of this case, is reasonable.

#### VIII. AWARD

The grievance is sustained. The removal is converted to a thirty day suspension and the Grievant is reinstated to his former position with back pay and benefits, less any interim earnings received by the Grievant, including any unemployment compensation benefits which were received by the Grievant. Jurisdiction is retained by this Arbitrator in order to resolve any issues of back pay and benefits which may be in dispute between the parties as a result of the issuance of this award.

SO ORDERED.

Date: June 3, 1992

Mitchell B. Goldberg  
Mitchell B. Goldberg