

AWARD OF ARBITRATOR

In the Matter of the Arbitration Between:)

STATE OF OHIO,)
OHIO EXPOSITIONS CENTER)

-AND-)

FRATERNAL ORDER OF POLICE,)
OHIO LABOR COUNCIL, INC., UNIT 2)

HARRY J. DWORKIN,
ARBITRATOR

RE: OCB NO. G86-266
(Disciplinary Suspension For Alleged
Misconduct While on Duty)

A P P E A R A N C E S

On Behalf of Employer

MARLAINA EBLIN
DONNA RALEY
HOWARD BARTLETT
LAURIE NEFF

Labor Relations Specialist
Labor Relations Coordinator
Security Officer
Security Summer Intern

On Behalf of F.O.P.

JAMES BUDZIK, ESQUIRE
PAUL COX

General Counsel
Executive Director

THE ISSUE

WAS THE 30-DAY SUSPENSION (AUGUST 31, 1986
THROUGH OCTOBER 9, 1986) IMPOSED AGAINST THE
GRIEVANT FOR "JUST CAUSE", AND IN COMPLIANCE
WITH SECTION 19.01 OF THE COLLECTIVE BARGAINING
AGREEMENT?

PRELIMINARY STATEMENT AND BACKGROUND:

The grievance appealed to arbitration, and submitted for
resolution by the Arbitrator, is concerned with a 30-day suspension
meted out to the grievant, a Patrolman, for alleged misconduct
while on duty. The grievant is charged with having engaged in a

violent, physical altercation with a fellow employee, a summer intern, on August 16, 1986, while the two employees were within the "break room", located in a building within the State Fair Grounds, in Columbus, Ohio. The facility, and members of the security force are under the supervision of the Ohio Expositions Commission.

Although some conflict exists concerning the extent of the altercation, and the degree of participation engaged in by each, the evidence is undisputed that a physical altercation did take place during working hours, on August 16, 1986.

The grievant holds the position of Expositions Police Officer, with an otherwise favorable work record. The grievant was charged with directing physical violence towards a Student Security employee, Laurie N. Neff, 22 years of age, who held employment as a summer intern for the period of July through August 18, 1986. The grievant's behavior was adjudged improper and resulted in a 30-day disciplinary suspension which has been grieved and appealed to arbitration.

The incident that formed the basis for discipline occurred in the Agriculture Building Office, on August 16, 1986, at approximately 6:00 p.m.

The evidence established that the heated confrontation was initiated by the student security employee, in the form of "horseplay" in the course of which she "flipped" the visor of the grievant's cap. What appeared to be an act of good natured "horseplay" erupted into a violent, heated confrontation, in the course of which both participants engaged in an angry, physical encounter.

The violent exchange between the grievant, and summer intern was preceded by a conversation between the two employees concerning the privacy of paychecks.

In accordance with the testimony of the summer intern, the prevailing atmosphere and relationship between security officers assigned to the Ohio State Fair was characterized by good natured banter, teasing, and joking. Such is the prevalent working environment concerning which no offense is normally taken, or intended. She testified further that, prior to the physical confrontation she had observed the grievant examining employee paychecks which were on the desk. She considered his actions to be improper, and caused her to remark that, "he had no business looking at other peoples' paychecks." The grievant proceeded to distribute the paychecks, as was customary on Fridays. Each paycheck was in an unsealed envelope. It appeared to the student security officer that the grievant was looking at the face of the checks. The student intern registered an oral protest. She accompanied her objection with a verbal characterization of the grievant as "an ass". Simultaneously with making such remark, she "flipped the visor of his cap." It is represented that the grievant retaliated in violent fashion. He commenced striking the student intern, slapping her several times across the face with his open hand, which resulted in her falling to the tile floor. She then got up from the floor and attempted to kick the grievant, "but missed". According to her testimony, as she kicked towards the grievant, he grabbed her left leg, and she again fell to the floor. The two then continued their physical encounter, with both "hitting at each other back and forth." According to the testimony of the student intern she estimated that the grievant struck her as many as ten times. The student intern was also an active participant, and sought to retaliate by striking the grievant. The altercation then subsided. It is represented that the grievant told the student intern that she was "fired". It is conceded that the grievant had no such authority.

The testimony indicated that the past relationship between the two officers is characterized as friendly. The summer intern testified that she had known the grievant in a work relationship at the State Fair Grounds, over a period of three summers. Their past relationship gave rise to no problems. There is no evidence of either having physically threatened the other prior to the August 16, incident. In fact, their behavior on the evening in question appears completely out of character, and inexplicable.

An investigation was conducted, and a pre-suspension hearing was held on August 27, 1986. The grievant, and the summer student employee were present, together with representatives of both management, and the F.O.P. As result of the investigation it was concluded that the incident on August 16, 1986, "apparently began with a conversation concerning the privacy of paychecks." In addition to statements obtained from the grievant, and the summer security employee, a third statement was obtained from a fellow officer who was present, and who observed part of the occurrence. A report of the pre-suspension proceeding included the statement that:

"You will see by reading the attached statements of the three employees that the basic description of the situation is the same with some differences of opinion when questioned of the severity of the encounter between Tim Call and Laurie Neff. When both Laurie Neff and Tim Call gave their versions of their story they both described their version exactly as the statement they had written after the incident. Both Laurie and Tim did, however, admit that everthing was happening so fast that they didn't remember all of the details."

A third statement was obtained from Howard Bartlett, who also witnessed the occurrence. Officer Bartlett confirmed that the physical encounter commenced when the summer intern jokingly "hit the bill of [the grievant's] cap which in turn must have hit his glasses." The grievant responded "by hitting" the summer intern.

Included in the statement of Officer Bartlett, a fellow security officer, was the following:

"I was looking out the front window. I heard Tim yell at her--don't call me any of your family names. I turned to see why and at this time Tim slapped her. Laurie and Tim slapped each other 5 or 6 times rapidly in succession. Tim grabbed her by both arms and slammed her against the wall by the swinging gate. Laurie went down on the floor. I jumped off the stool and yelled for them to stop as I realized it wasn't in fun. Before I could reach either of them Laurie started to get up and Tim either slapped her or struck her again and she went down again. Laurie jumped up. Tim said something to her after which she grabbed her books and personal effects and left the office immediately."

The sumemr intern testified that she engaged in a conversation with the grievant in the course of which she registered strong objection to his looking at other employee checks that were contained in unsealed envelopes. She related the following version of the occurrence:

"I hit the tip of his [the grievant's] hat down. Up to this point we were still joking and laughing. After I tipped his hat is when started hitting me (with open palm) and pushing and shoving me until I went down on the floor. When I got up he hit me in the face and I started hitting him in self-defense. He continued hitting and pushing and shoving me until I fell again. As he was doing this I said 'I can't believe your doing this to me.' And so I went down he said 'you hit me first.' Then he said 'you're fired'. I got up gathered up my things and walked out without saying a word."

The grievant presented a written statement reciting his version of the encounter which followed the discussion concerning the paychecks:

"Then Laurie spoke up and said well I think he's right, and your a goddamn asshole, I looked up at her, and said 'don't call me any of your family names', then she hit me with her hand across the top of my head...me in the forehead and knocking my hat down on my head. I reacted by swatting at her with my open hand. I'm not sure were it hit her, then she tried kicking me in the groin hitting my left leg, and glancing into my left testicle. I had some pain for a while but it did go away. I was not trying to hurt Laurie, but trying to keep her away from

me, in doing so she fell down on her butt. I don't know if it was because I shoved her back, or maybe I grabbed her leg when she tried kicking me. It all happened so fast."

Following the investigation, the pre-suspension hearing, and consideration of the statements provided by both participants, and an eyewitness, the Employer imposed a 30-day disciplinary suspension, without pay, on the basis that the grievant, an Expositions Police Officer, engaged in misconduct while on duty, in the course of which he struck and fought with a fellow employee, resulting in her sustaining minor injuries. His conduct constituted disregard of his obligation to maintain "good behavior".

A grievance was timely filed on September 3, 1986, alleging that:

"The suspension is too harsh of a disciplinary measure in this case because [the summer intern] triggered the incident by hitting the grievant first."

The grievance claims that a lesser measure of discipline would have been warranted, and required.

APPLICABLE CONTRACT PROVISIONS:

ARTICLE 6 - MANAGMENT RIGHTS:

C. Maintain and improve the efficiency and effectiveness of governmental operations;

E. Suspend, discipline, demote, or discharge for just cause, or layoff, transfer, assign, schedule, promote, or retain employees;

H. Effectively manage the work force.

Section 20.07 Arbitration:

5. Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of a provision

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 language of this Agreement.

POSITION OF EMPLOYER:

The Employer maintains that the evidence clearly establishes that the grievant engaged in misconduct in the course of which he violently, and forcefully struck a fellow employee. The grievant acted in an aggressive manner, totally inconsistent with the concept of "good behavior". The Employer acknowledged that its investigation indicated that the "victim" initiated the confrontation; however, her behavior did not warrant so violent a reaction on the part of a fellow officer, who was experienced, and trained to exercise self-restraint. The summer intern acknowledged that she "flipped" the visor of the grievant's cap; however, this was in the nature of horseplay. She pointed out that it was customary for fellow officers to engage in good natured banter, and that such was the prevailing atmosphere.

The Employer reasons that, as a professional security officer, the grievant was required to exercise restraint and judgment; instead, he violently attacked a fellow employee whose only offense was that she engaged in the customary type of office horseplay.

The Employer acknowledges that the summer intern was not disciplined, although her participation in the affray may have warranted consideration of discipline consistent with the degree of her misconduct. She was a temporary, summer intern, and scheduled to complete her internship on the following day, August 17. Accordingly, the employment relationship for disciplinary purposes, had ceased on August 16. She did not report for work on her last day, August 17, inasmuch as the

grievant had instructed her that "she was fired", even though he did not have such authority.

POSITION OF F.O.P.:

The F.O.P. contends that the disciplinary suspension did not conform to the concept of just cause. The Employer has been unable to point to any infraction of an existing work rule that prohibits fighting among employees during working hours; nor has any contract violation been advanced, or demonstrated. In fact, the F.O.P. represents that no work rule exists relating to fighting.

The F.O.P. reasons that, the mere fact that a confrontation between two employees occurred is insufficient to establish misconduct, nor should any significance be attached to the fact that one of the participants was a female. Reference by the F.O.P. to the sex of the participants apparently stems from the finding following the pre-suspension hearing that, the grievant demonstrated "willful and continuous intent of**striking a fellow employee, let alone a female."

Additionally, the F.O.P. reasons that the confrontation was of brief duration, "a matter of seconds". The Employer failed to take into consideration the fact that the confrontation was triggered by improper behavior on the part of the summer intern. She initiated the violence, by reason of which she must be characterized as the aggressor. Her actions initiated and provoked the grievant's response.

The F.O.P. points out that neither participant sustained any injuries, there being no corroborative evidence as regards the claim of injury, or bruises. In any event, the alleged injuries, if any, were minor and required no medical, or emergency treatment.

The F.O.P. underscores the fact that the grievant was not the instigator of the incident; the summer intern was the aggressor. The grievant's response is therefor understandable. In light of the circumstances, no disciplinary action was warranted. In any event, the 30-day suspension was unduly harsh, and severe, and at variance with the principles governing the concept of "just cause."

ARBITRATOR'S FINDINGS AND OPINION:

It is true, as the F.O.P. suggests, that there are no "plant rules" in effect, and none that deals with the subject of fighting, or physical altercations between employees during duty hours. A review of the evidence demonstrates consensus that an altercation did occur between the two employees, during working hours, in a building on the State Fair Grounds which security officers are accustomed to use as their "break room".

The altercation commenced in the form of a verbal complaint registered by the summer intern who observed the grievant looking through payroll checks which were on a desk, in unsealed envelopes. A verbal exchange ensued in the course of which, it is quite probable on the basis of the evidence, that the summer intern directed offensive remarks towards the grievant, and she then flipped the visor of his cap. Such conduct on her part in all probability exceeded the bounds of good natured banter, or horseplay. However, the Arbitrator is impelled to the conclusion that a review of her behavior, which was in some respects improper, did not warrant so violent a response on the part of the grievant. The degree of his violent reaction clearly constituted the grievant as the aggressor. He proceeded to administer considerable physical punishment upon a fellow employee, far beyond any need, or right, to defend or protect himself from the playful actions of

The evidence establishes that the grievant proceeded to slap the fellow employee several times, in the course of which she attempted to strike back at the grievant. He then "grabbed her by both arms and slammed her against the wall by the swinging gate", as result of which she fell to the floor, as reported by Howard E. Bartlett, an eyewitness. After she arose from the floor, the grievant slapped her again, and she fell to the floor a second time. In the judgment of the Arbitrator, the grievant's behavior was clearly improper, and inconsistent with the decorum, and restraint which an experienced and professional police officer is expected to maintain during working hours.

The Arbitrator finds from the evidence that the grievant's behavior was of a far more serious degree than was required in order to defend and protect himself from the aggressive behavior of a fellow employee. In the opinion of the Arbitrator the grievant over-reacted when the summer intern flipped the visor of his cap, and called him names, none of which would have warranted a claim of self defense, or justify so violent, and aggressive reaction. As the saying goes, "sticks and stones will break my bones but words will never hurt me."

It is a matter of common knowledge that police officers are trained to prevent, and guard against violence; accordingly, it is even more inexcusable for a trained, professional police officer to participate in such physical encounters, including use of force that is far in excess of that reasonably necessary to repel any aggressive behavior on the part of another employee. The grievant's use of force was clearly excessive, and uncalled for in the context of the situation that existed on August 16. Pursuant to the testimony of Howard Bartlett, an eyewitness, following the discussion concerning the grievant's inspection of paychecks of fellow employees, the grievant "grabbed, the summer intern, and swung her against a swinging door, following which she

fell to the tile floor." Bartlett testified further that an openhanded slapping match ensued between the two, in the course of which the summer intern fell to the floor a second time.

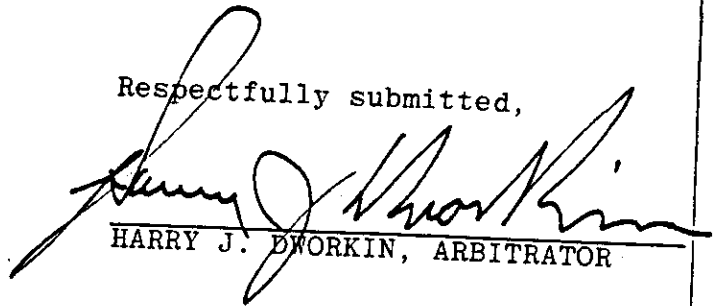
The Arbitrator therefore concludes that disciplinary action was warranted. The conduct attributed to the grievant was inherently, and basically improper, and therefore constituted just cause for discipline. Article 6 - Management Rights, recognizes the Employer's right, and responsibility to maintain the efficiency and effectiveness of its governmental operations, and to suspend, discipline, demote, or discharge for just cause. The evidence establishes to a persuasive, and convincing degree that just cause was present to warrant the exercise of management's contractual right to impose discipline. The Arbitrator recognizes that the 30-day disciplinary suspension, without pay, was somewhat severe; however, the measure of discipline was reasonably within management's judgment. It has not been shown that the discipline was arbitrary, ulteriorly motivated, or administered in a disparate manner.

In all probability the summer intern was also subject to discipline for "imporper behavior"; however, she terminated her employment relationship on the evening of August 16, and therefore the failure to discipline one who was a participant in the physical encounter does not suggest discrimination, partiality, or disparate treatment.

The testimony of the witnesses at the arbitration hearing, together with corroborating evidence, and other undisputed facts, clearly establish that the grievant engaged in improper behavior, and that he rendered himself subject to discipline. The 30-day suspension is viewed as appropriate discipline, and reasonably within the authority of management to discipline for just cause. The employer has the right to assume that its security officers

will conduct themselves reasonably, with proper restraint, and refrain from willfully abusing, or striking fellow employees or others. Failure to impose discipline under the facts here involved, would have a disastrous effect on discipline, and morale of other employees.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Harry J. Dworkin", is written over a horizontal line.

HARRY J. DWORKIN, ARBITRATOR

A W A R D

I.

On August 16, 1986, the grievant engaged in improper behavior, and misconduct, during working hours, in the course of which he directed physical force against a fellow employee, which force was not required either by reason of self-defense, or to ward off the actions of an aggressor; the grievant's actions presented just cause for disciplinary action;

II.

The 30-day suspension was reasonable in light of the grievant's behavior, and designed to be corrective in purpose, rather than punitive;

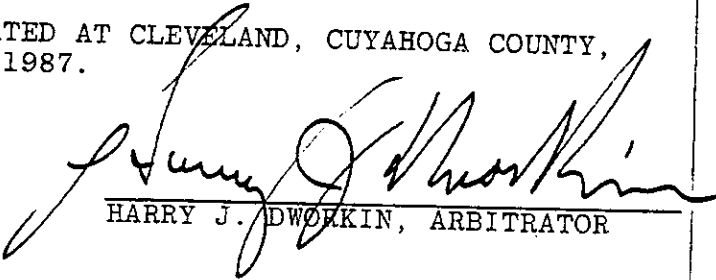
III.

Although behavior of the fellow employee with reference to the encounter appears to have warranted discipline, inasmuch as she terminated her employment relationship on the same day, she no longer was subject to the Employer's disciplinary authority; failure to discipline her under the circumstances would not establish disparate treatment;

IV.

The grievance is therefore denied.

AWARD SIGNED, ISSUED, AND DATED AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 13TH DAY OF MAY, 1987.


HARRY J. DWORKIN, ARBITRATOR