

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Mental Health

-and-

THE FRATERNAL ORDER OF POLICE
Ohio Labor Council, Inc.
State Unit II

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* Case Number II JD 87-1
* OCB Numbers G-86-0789
* G-86-0790
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* Decision Issued
* August 27, 1987
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APPEARANCES

FOR THE STATE

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FOR THE FOP

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ISSUE: Article 19 -- Whether suspensions for neglect of duty met contractual standards.

Jonathan Dworkin, Arbitrator
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OUTLINE OF GRIEVANCES

This dispute stems from six-day disciplinary suspensions imposed upon two State employees charged with neglect of duty. The Grievants are a Police Officer 1 and a Police Officer 2 at the Pauline Warfield Lewis Center in Cincinnati, Ohio. The Center is part of the Ohio Department of Mental Health. It is primarily an adult residential care and treatment facility for long-term chronic psychiatric patients. Its resident patient population is approximately four hundred fifty.

The charges against Grievants resulted from a series of incidents which began shortly before 9:30 am on August 20, 1986. The Officers, working as a team, were assigned to remove a patient from the Education Building and escort him to his ward. The patient was considered dangerous and suicidal. He was supposed to have been confined to his ward for the day, but was discovered unattended in the exercise room of the educational facility. It was apparent that his confinement had been breached, and Grievants were summoned to correct the situation. According to the Agency, they performed the assignment carelessly, used extraordinarily poor judgment, and exercised little regard for the safety of the patient and others. Several violations of appropriate conduct were cited; the most serious was that Grievants discontinued their escort before the

patient was securely in his ward, leaving him to wander at will. Later, when he was found and approached by Grievants, the patient resisted capture, brandishing a broken bottle.

The incident was fully investigated. It was determined that Grievants had neglected their responsibilities and discipline was warranted. There is some confusion in the record as to why six-day suspensions were issued. Original recommendations of the Superintendent, the Chief of Security, and the Center's Labor Relations Specialist differed. One of the recommendations was that the Police Officer 2, who was the senior lead person, be suspended and demoted. The rationale was:

In addition to [Grievant's] responsibility to the public as a Police Officer, [Grievant] had the additional responsibility on this day as the shift lead officer. This added responsibility places a burden on each lead officer to insure that the assigned duties and requests for assistance are properly carried out by shift personnel. This was not done by [Grievant]. For his neglect of duty I request a 3 day suspension. For the inefficiency in performance, I request a reduction in rank to Police Officer 1 status.

The Department reviewed the recommendations and decided. The discipline was grieved and the grievances were processed to arbitration in accordance with Article 20 of the Collective Bargaining Agreement between the State of Ohio and the Fraternal Order of Police (represented by The Ohio Labor Council, Inc.). They were

heard in Columbus, Ohio on March 2, 1987. At the outset, it was stipulated that the appeals to arbitration met procedural requirements. The parties agreed that the Arbitrator was authorized to issue a conclusive award on their merits. Arbitral jurisdiction is more specifically defined and limited by the following language in Article 20, §20.07-5 of the Agreement:

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.

THE ISSUE

The Representatives of the parties directed the Arbitrator's attention to numerous contractual provisions. The citations were reviewed; most were found to be of limited relevancy. However, two Sections of the Agreement were determined to be decisive. Article 19, §§19.01 and 19.05 place substantive restrictions on the Employer's disciplinary prerogatives. They provide:

§19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

. . .

§19.05 Progressive Discipline

The following system of progressive discipline will be ordinarily followed. However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.

1. Verbal Reprimand (with appropriate notation in employee's file)
2. Written Reprimand
3. Suspension
4. Demotion or Removal

When it adopted these Sections, the State accepted the philosophy of disciplinary restraint. It bound itself to the principle of just cause. It agreed that discipline for "ordinary" offenses would follow a fixed progressive formula. It voluntarily restricted its authority by its agreement not to bypass the formula except for other-than-ordinary offenses.

Article 19, §§19.01 and 19.05 define the issues. The overriding subject for inquiry is whether or not Grievants' actions or inactions provided just cause for disciplinary responses. Assuming penalties were justified under §19.01, a secondary issue is whether or not the six-day suspensions met the requirements of §19.05. This issue calls for examining two subordinate questions: 1) Were the suspensions within the contractually established progression? 2)

If not, were Grievants' offenses so severe as to permit the Employer to bypass the progressive steps?

ADDITIONAL FACTS

While the basic facts are not in serious dispute, witnesses did disagree on details. The following are the Arbitrator's findings. They may not comport with some of the testimony, but they incorporate implicit conclusions as to which of the witness accounts seemed the most reliable.

The patient whom Grievants were to escort from the Education Building was capable of violence. He had prodigious strength and was skilled in martial arts. According to one of the Grievants, seven men had difficulty subduing him when he acted out in the past. Recent events had given the professional staff additional cause for concern over the patient's emotional predictability. A day or two before the August 20 incident, he wrote a long, tortured letter to one of the Center's teachers in which he mourned his abandonment by a woman he loved and repeatedly stated his intention to kill himself. Moreover, he had been AWOL on August 19. Because of these circumstances, teachers and other employees of the Educational facility were concerned when they discovered the patient in the exercise room at 9:25 am on August 20. They suspected that his presence meant he was AWOL from ward confinement; a telephone call

to the ward confirmed their suspicion. At that point, the Police Department was called for assistance.

Most of this background was unknown to Grievants when they answered the call. Their instructions were simply to go to the Education Building and take a patient back to his unit. They did not know which patient they were to pick up; they had to ask when they arrived at the building. When the question was answered, they went to the exercise room where they confronted the individual. Meanwhile, the staff was closeted in the building office, separated from the exercise room. They were unaware of what was occurring on the other side of the door. They heard no shouting, no struggle. What they observed and later reported was that after several minutes the Police Officers left by the front door without the patient. As they departed, one was overheard commenting, "We're not going to fight with him today!" Moments later, the patient walked out the back door.

The staff was bewildered. The Officers' demeanor in the potentially dangerous situation had seemed cavalier. It appeared that the patient had been left to roam without supervision. In actuality, these perceptions were mistaken, but it is clear that Grievants' failure to communicate with the staff was to blame. What really happened was that the Officers found the patient reasonably calm and controlled. The only threatening aspect of his behavior was that he refused to be taken into custody and he underscored his

refusal by assuming a karate position. He agreed to return to his ward but insisted upon walking there by himself. In Grievants' judgment, it was better to let him have his way and monitor him from their cruiser. They returned to their cruiser through the front door of the building and watched the patient closely as he left through the back door.

While following the patient, Grievants received a "Signal 2" call on their radio. "Signal 2" meant they were to report to the Police Chief immediately. At that point they had several alternatives. They could have radioed back that they were engaged in the urgent project of returning the patient to his ward; they could have left one Grievant to continue monitoring the patient while the other reported to the Chief. Instead, at the lead Officer's direction, they abandoned what they were doing and both returned to the Chief's office. The lead Officer went inside while his subordinate, following instructions, waited in the cruiser.

As it turned out, Grievants' "Signal 2" response was useless. All the Chief asked was whether the patient had returned to the ward. The lead Officer did not know, and the Chief ordered him to return to what he had been doing and finish the assignment. Grievants started to comply. They drove around looking for the patient, but they were interrupted by a "Code Blue" radio call -- someone was choking in the dining hall.

Grievants discontinued their search to respond to the "Code Blue." The emergency in the dining hall was well in hand when they

arrived, so they resumed looking for the patient. They found him sitting alone on a bench in front of a building, "not bothering anybody." But when they approached him, he jumped up waving a broken beer bottle. He screamed at the Officers repeatedly, "If you come any closer I'll kill you!" Observing no one else in the vicinity and no immediate danger, Grievants backed off. One radioed a "Double Code Yellow" (Hazardous Psychiatric Emergency) while the other tried to pacify the patient by calmly talking to him from a distance. Finally the patient threw his weapon away and ran. After that Grievants had little difficulty catching and subduing him, and completing their assignment. The patient was back in the ward by 10:15 am, fifty minutes after Grievants were first summoned to the Education Building.

THE EMPLOYER'S POSITION

None of the managerial and supervisory employees who investigated and reviewed the facts had any doubts that Grievants deserved to be disciplined. The conduct of these Employees was astonishing. The Agency contends that their performance from beginning to end was dreadful. The Employer does not understand how the Union can possibly support its claim that the mistakes were excusable errors in judgment. In the Agency's view, the conduct of these Officers was so flawed that it was closer to deliberate malfeasance than ordinary misjudgment.

During the hearing, the Employer particularized each element of the violations committed by the Officers:

1. Grievants should have physically taken the patient into custody in the Education Building. There are specific standards for handling psychiatric emergencies and Grievants were trained to follow them. In fact, the lead Officer successfully completed a course in crisis intervention in which he was required to demonstrate his understanding of procedures by answering four questions in writing. One of the questions addressed violent defensive behavior and the Officer, in his own handwriting, indicated that the accepted intervention technique was to physically take the patient into custody and "do not attempt to problem solve." The Agency charges that this well recognized rule was violated. It points out that Grievants' assertion that the patient was not defensive or violent is patently absurd, since he had assumed a karate stance and was fully capable of turning his martial arts skills against the Officers.

2. Grievants' failure to inform the staff that the patient had been removed from the exercise room and was under control was not only discourteous, it was blatantly irresponsible. It left the staff in the dark as to the patient's (and their own) welfare, and unnecessarily heightened their anxieties.

3. It is contended that Grievants deliberately chose an unacceptable alternative when they responded to the "Signal 2" call. They should have at least informed the Chief of what they were doing in order to receive further instructions before unilaterally breaking off their observation. They thoughtlessly left unattended a dangerously disturbed psychiatric patient who was supposed to have been confined. They imperiled the patient and any others with whom he might have come into contact.

4. Grievants were allegedly negligent in prioritizing the "Code Blue" call over their more critical obligation to find and secure the the patient. "Code Blue" designates a medical emergency that calls primarily for medical crisis teams to respond. While security forces are included in the Center's "Code Blue" response directive, they are at the bottom of the list of essential personnel.

In conclusion, the Agency contends that Grievants' actions demonstrated willful disregard of their primary duty "to maintain a safe and tranquil environment for staff and clients." The Employer believes that it would have abandoned its own obligations had it not responded swiftly and decisively to Grievants' misconduct. It is argued that the six-day suspensions were clearly lenient and constituted corrective rather than punitive action. Accordingly, it is urged that the grievances be denied.

THE FOP'S POSITION

Grievants admit that they might have used better judgment, but they strenuously deny the allegations of neglect and irresponsibility. It is manifestly unjust, according to the FOP for the Agency to assume the role of "Monday Morning Quarterback" and search for someone to blame for an unfortunate incident. While the Agency admittedly was able to identify some performance flaws, it could

not point to a single concrete rule or regulation which Grievants violated. The reason, according to the FOP, is that there were no rules specifically governing the situation. Grievants are professionals. They are expected to act on instantaneous judgment in a myriad of unpredictable circumstances. Errors are bound to occur; even the most professional employees are human. They are no more immune from making mistakes than are managerial employees; but a reasonable error does not constitute a legitimate basis for discipline.

The FOP criticizes Management for second-guessing two experienced Officers and arbitrarily disciplining for a difference of opinion concerning what should have been done. Management was not in the thick of the situation -- the Officers were. They made what they believed were the best judgment calls, and made them within the scope of their authority and responsibility. They violated no published rules or policies. The FOP contends they acted soundly and ultimately controlled an explosive situation, preventing damage and injury.

The FOP concedes the obvious -- that Grievants could have taken alternative actions. But it must be remembered that they were forced to act without important information. When they answered the call to report to the Education Building, they had not been told that they were to apprehend a patient who was AWOL. They did not know of the patient's recent suicide threats. They were unaware of

the fact that the patient was supposed to be confined to his ward. The FOP concludes that someone may be responsible for the incidents of August 20 but urges that Grievants should not be made to shoulder the blame by serving unjust suspensions. If there was a primary fault, it was lack of communication, and that responsibility rested with others. The FOP requests an award expunging the suspensions from Grievants' records and granting them full restoration of wages and benefits.

OPINION

If there is one factor on which both parties agree, it is that a major component of Grievants' jobs was to exercise professional judgment. As the FOP points out, there were no rules specifying what actions they should have taken on August 20. The lack of rules was not a managerial oversight, it was intentional. Rules tend to confine permissible action and Grievants needed flexibility to make a broad range of unconfined decisions. As the guardians of security in a psychiatric facility, they were expected to face the unpredictable decisively. The Arbitrator agrees that they should not be punished for making errors. The fact that mistakes will occur in a profession fraught with danger and requiring instant responses is a foregone conclusion.

Notwithstanding these undeniable truths, there is a profound difference between errors in judgment and lack of judgment. The

Employer's presentation convinces the Arbitrator that aspects of Grievants' performance demonstrated total, unpardonable lack of judgment. Of particular note is the astounding way in which they abandoned their observation of the patient in order to answer the "Signal 2." Admittedly, the call presented them with a dilemma. They knew they were supposed to see to it that the patient returned to his ward, but they also recognized the "Signal 2" as meaning a message from the Chief, "I want you here now!" It is conceivable that they justifiably believed that ignoring the "Signal 2" would have constituted a disciplinary offense. Nevertheless, they had a superior obligation to protect the patient and others. As stated, they could have taken several courses. They could have split up so that at least one of them remained with the patient, or they could have radioed the Chief to inform him that they would need to delay their response. In the Arbitrator's opinion, the action they took was not a simple error. It was plainly unprofessional and neglectful, even to a lay observer who does not possess Grievants' training and background.

Grievants response to the "Signal 2" was serious enough that, by itself without the other lapses, it would have constituted just cause for discipline. Furthermore, the six-day suspensions, viewed in the abstract, do not appear so harsh or punitive as to exceed what was justified. However, the nexus between the misconduct and the discipline cannot be viewed in the abstract. It must be exam-

ined in light of contractual restrictions. Article 19, §19.05 of the Agreement requires that discipline be progressive in most cases. The contractual mandate requires "ordinarily," a verbal warning will be the penalty for a first offense, a written warning for a second offense, and a suspension only when the number of disciplinary offenses reaches three. The State is not permitted to depart from this formula except when a violation is not ordinary and demonstrably "merits . . . more severe action."

The junior Officer had a prior written warning; the senior lead Officer had an unblemished personnel record spanning twenty-six years. A question of pivotal concern is whether the lead Officer's misconduct was so serious as to authorize the State to ignore its commitment to follow progressive discipline. As in any grievance arising out of discipline, the State bore the evidentiary responsibility. It was required to present evidence sufficient to establish that the discipline imposed met the requirements of both §§19.01 and 19.05. The Employer made a convincing case under §19.01. It amply proved that misconduct did occur and that discipline was justified. However, its evidence fell short of establishing that an exception to §19.05 was warranted. Testimony on the subject was uniformly vague. The Chief of Security repeatedly stated his feeling that Grievants acted inappropriately, neglectfully, and in a manner which created potential for danger. But neither he nor any other of the State's witnesses could give clear reasons for their

failure to follow progressive-discipline requirements. No one was able to confirm the implicit contention that Grievants' misconduct was extraordinary. No witness disclosed facts justifying a finding that the State was somehow exempt from having to comply with §19.05 in this case. Moreover, the record confirms that, from the start, there was broad managerial disagreement over what penalties were appropriate. One supervisory employee recommended two-day suspensions; the Director of the Center recommended a three-day suspension and a demotion for the lead Officer; the Department of Mental Health settled on two six-day suspensions. Ultimately, the issue was left for arbitral speculation.

The Arbitrator declines to speculate. While he agrees that the evidence proves lack of professional judgment, he has no concrete basis for also agreeing that the progressive-discipline mandate did not apply to the misconduct.

DETERMINATION OF GRIEVANCE NO. G-86-0789 [PARCHMAN]

Grievance number G-86-0789 protests the discipline of the senior lead Officer who had an unblemished, twenty-six year employment record. In accordance with the previous analysis, it is held that although discipline was justified, the State was required to comply with the progressive-discipline formula in Article 19, §19.05 of the Agreement. If the requirements of the Section had been followed,

the most discipline that could have been imposed on Grievant was a verbal reprimand with appropriate notation in his file. In order to keep faith with the language of the Agreement, the Arbitrator must issue an award modifying the six-day suspension and limiting the discipline to what is established by \$19.05 as the first level of progressive discipline. It should be observed that this award is limited to the facts of this case and results from the State's failure to establish that more severe discipline was merited.

DETERMINATION OF GRIEVANCE NO. G-86-0790 [FERONE]

The second grievance protests the suspension of the Police Officer 1. He did have what appears to have been a written reprimand in his file. It was imposed on June 5, 1986, two months before the occurrences which fostered this dispute, and stated:

SUBJECT: WRITTEN COUNSELING

On June 4, 1986, Father Waldschmidt reported to you that he saw some kids and an adult going into the old auditorium. He asked you to go over to the auditorium and see what was happening, but you refused.

This type of behavior is not acceptable, and a copy of this counseling will be placed in your personnel file.

While Grievant's record seems to support a finding that a disciplinary suspension was his next contractual progression, he too will receive an award relieving him of the discipline. The award will be premised upon the fact that the Grievants were not equally at fault. The Police Officer 1 was the junior Officer in a team of two. His partner had quasi-supervisory authority. He was responsible for giving direction, this Grievant was obligated to follow his orders.

The Arbitrator recognizes that the defense, "I was just following orders," does not always apply. However, it has greater importance in safety organizations than in any other civilian workforce. The Police Department at the Pauline Warfield Lewis Center is firmly structured. Rank, orders, and obedience to orders are recognized as critical elements of the organization. The junior Officer's principal, overriding duty was to obey the directives of the higher-ranking Police Officer 2. Had he failed to do so, he most certainly would have invited justifiable discipline.

The junior Officer followed the orders of his superior. When he did not physically subdue the patient in the exercise room, he followed orders. When he ended the observation of the patient to answer the "Signal 2" he followed orders. When he waited in the cruiser outside the Chief's office for his partner to return, he followed orders. When he broke off the search for the patient to answer the "Code Blue," he followed orders. In the last analysis,

the Agency's contention that this Grievant was liable for discipline because he followed orders, is untenable.

This grievance will be sustained in its entirety because the State failed to prove that the Police Officer 1 violated his primary responsibility.

AWARD

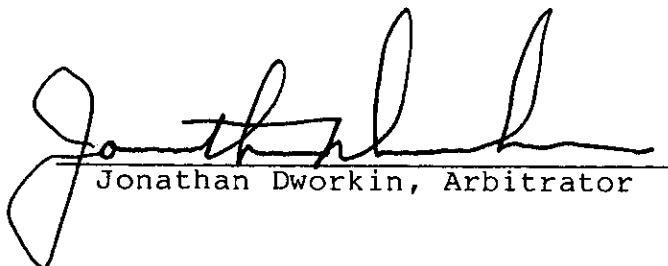
Grievance No. G-86-0789 [Parchman]

The grievance is sustained in part and denied in part. In compliance with Article 19, §19.05 of the Agreement, the six-day suspension issued against the Police Officer 2 is modified to a verbal reprimand with appropriate notation the personnel file. The State is directed to correct the record and compensate Grievant for wages and benefits he lost as a result of the suspension.

Grievance No. G-86-0790 [Ferone]

The grievance is sustained. The State is directed to expunge Grievant's personnel record of the discipline and compensate him for lost wages and benefits.

Decision Issued:
August 27, 1987


Jonathan Dworkin, Arbitrator