# A R B I T R A T I O N

# O P I N I O N  A N D  A W A R D

Arb. Date 10-26-87

STATE OF OHIO
DEPARTMENT OF REHABILITATION AND CORRECTION

and

OHIO HEALTH CARE EMPLOYEES UNION, District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, AFL-CIO

November 12, 1987

87-1592

ARBITRATOR: DONALD B. LEACH, appointed through the Department of Administrative Service, Office of Collective Bargaining

APPEARANCES: FOR THE STATE:
Joseph B. Shaver, Assistant Chief of Labor Relations, Department of Rehabilitation and Corrections, 1050 Freeway Drive, N., Columbus, Ohio 43229

FOR THE UNION:
Robert Callahan, Secretary-Treasurer, Ohio Health Care Employees Union, 1313 East Broad Street, Columbus, Ohio 43205

## I S S U E

Was Grievant, Maurice Breslin, suspended and later discharged properly as a result of his alleged violation of several provisions of the Department's Standards of Employee Conduct.

## I N T R O D U C T I O N

This matter has to do with a five day suspension, effective March 30, 1987 and a later termination, effective June 10, 1987. The events prompting each occurred at different times.

By stipulation of the parties, the two different sets of discipline were combined for hearing.

The proceeding is one characterized in the Agreement of the Parties as "expedited arbitration" (Article 7, Section 7.08).

The hearing was long, covering more than ten hours of elapsed time. Thirty-one exhibits were introduced, many of them quite lengthy. Because of the detail involved in the matter, the parties agreed that the time limits for decision must be and were waived. At the same time, of course, the basic standards of the expedited procedure must be observed. For that reason, and in the interest of disposing of the issues as expeditiously as possible, the Opinion and Award must be much more abbreviated than is the standard in a matter of this complexity.

## B A C K G R O U N D

The principle problem in Grievant's performance appears to have been slowness in completing the reports required by the Employer's procedures.

Grievant was employed as an adult parole officer #1. He was a long service employee, starting with the Employer in Cleveland and later transferring to Columbus, where he has been stationed for a relatively short time. The only shortcoming noted on his performance ratings in Cleveland was his inability to maintain the file reports on individual parolees. That same shortcoming manifested itself in Columbus.

All agreed that Grievant was a very capable counsellor, seeming to enjoy working with parolees in assisting them to adjust to life outside a penal institution.

In order to maintain a running record on each parolee and to support recommendations on treatment, it is obvious that the records must be kept current. Grievant seemed remiss in keeping current on the paper work.

Many discussions, counseling, etc., were undertaken by his supervisors. Other steps were also used to assist in expediting his reports, such as cutting off all telephone calls, all visitors, and confining him to the office during times he would otherwise be making client visits.

More concentrated efforts appear to have begun in 1986 to supervise and guide Grievant in his paper work preparation. Among other things, his immediate supervisor was notified regularly of the details of Grievant's late reports. Many of those reports were also furnished Grievant.

A different type of event arose on December 19, 1986. A parolee, supervised by Grievant, had applied to be continued on parole. It was Grievant's obligation to prepare the necessary documents and proof to prevent it in this instance. Through some combination of events not immediately pertinent, Grievant failed to appear at the parole hearing. It was felt that he had failed to prepare for the hearing. He said he had misunderstood the hour for it. The hearing officer asked Grievant the reason for his lateness when they met in the parking lot as the hearing officer was leaving and the Grievant arriving. Grievant responded to the general effect that he would write a six mile memo for the benefit of the "sons of bitches", apparently referring to the Central Office.

That incident and the lateness of reports, which had not yielded to other methods, became the subject of a pre-disciplinary conference on January 29, 1987. The following is a summary of the action taken:

> "On Thursday, January 29, 1987, a disciplinary conference was convened at Central Office to consider the following charges preferred by your Supervisor, E. I. Bahgat:
> 1. Neglect of duty in that you failed to complete a substantial number of case reports after repeated verbal and written requests given you.
> 2. Failure to appear for testimony at on-site hearing regarding one of your parolees, Clifton Callahan, OCI #171-672, resulting in the dismissal of parole violation charges.
> 3. Use of discourteous or abusive language when questioned by the Hearing Officer as to your failure to appear at the one-site hearing regarding Clifton Callahan, OCI #171-672.

At the disciplinary conference wherein you were represented by Ms. Amy Stear of Ohio Health Care Employees Union District 1199, a finding of just cause was made on each of the three charges and a suspension of five (5) working days without pay was ordered. Said Suspension is to be held in abeyance until March 1, 1987, and wil be cancelled on condition that you:
1. Complete all overdue reports by March 1, 1987.
2. Submit a bona fide plan, subject to my approval, for improvement of your organizational skills by March 1, 1987."

Grievant completed all the requirements of the order except as to some of the overdue reports which he continued to fail to complete. Accordingly, the five day suspension was made effective on March 30, 1987. Grievance was filed in the required time.

Reports continued to be delinquent in greater or lesser numbers and for varying periods of time until another separate event occurred.

On May 1, 1987, Grievant apparently became disturbed by the delay caused him because the case files on which he was to report routinely to his supervisor that morning were not immediately available to him.

His supervisor was told that Grievant had made threats about him and his immediate assistant. Involved, apparently, was the Grievant's feelng that they were persecuting him. He was understood to threaten that he would get them before they got him. The supervisor then became concerned about Grievant's gun, a weapon carried by parole officers, and reported it to the Highway Patrol Office in the same building. The Patrolman in charge there called Grievant and asked him to come to see him, which Grievant did. The Patrolman had no problem obtaining Grievant's gun but did it only after considerable conversation and then by adroit indirection.

The conversation between them was quite lengthy, and on Grievant's part loud and nervous, not in terms of threatening the Patrolman but of his resentments against his immediatel supervisors. The threats he had made against them were defined by Grievant to the Patrolman as threats of legal action. Grievant finally calmed down and left.

He was then given another pre-disciplinary conference and his employment terminated as of June 13, 1987. Grievance on it was duly filed.

The suspension was based on the Employer's view that Grievant had violated the "Standards of Employee Conduct" with respect to insubordination, disorderly conduct and failure to cooperate - official investigation, i. e., Rules Nos. 3a, 11 and 14a.

The termination recited violations respecting careless workmanship, insubordination, threatening employees and making false statements concerning others, i. e., Rules 2, 3a, 9b and 13.

## C O N T R A C T  P R O V I S I O N S

ARTICLE 7 - GRIEVANCE PROCEDURE

7.08 Disciplinary Grievances and Arbitration

An employee with a grievance involving a suspension, a discharge, or reduction in pay and/or position shall be subject to an expedited grievance/arbitration procedure and shall be excluded from the regular procedure outlined in Section 7.07. In this expedited procedure the grievance is filed directly at Step 3 except that probationary employees shall not have the right or ability to file disciplinary grievances under this agreement. If the employee is not satisfied with the answer at Step 3 he/she may appeal to Step 4 (Steps 3 and 4 in this expedited process are identical to the same steps in Section 7.07). If the union is not satisfied with the decision issued at Step 4 it may submit the disciplinary grievance to expedited arbitraiton by sending a written notice to the Director of the Office of Collective Bargaining with a copy to the agency or designee within ten (10) days of the receipt of the Step 4 answer.

The hearing under this expedited procedure shall be conducted by the next panel arbitrator in a special disciplinary rotation who is able to schedule a hearing within thirty (30) days. By mutual consent the parties may waive the hearing and submit the issue on written material only.

If both parties mutually agree at the conclusion of the hearing, the arbitrator may issue a bench ruling sustaining or denying the grievance or modifying the discipline imposed or issue a short written decision within five (5) days of the close of the hearing. The written decision shall include only a statement of (1) the granting of the grievance, or (2) denial of the grievance, or (3) a modification of the discipline

imposed, and a short examination of the reasoning leading to the decision.

By mutual agreement, the parties may reduce to writing their version of what happened along with the names of any witnesses to the incident(s) giving rise to the discipline or any facts surrounding same. The parties will exchange these written statements at least fifteen (15) days prior to the arbitration hearing.

On the day of the hearing, the arbitrator shall consider the arguments of the representatives of each party, the testimony of any witnesses and the written statements, if any. Documents may be entered by either side.

Only suspensions, reduction in pay and/or position, or discharge shll be arbitrable under this agreement. Written reprimands may be grieved directly to Step 2. The decision at Step 3 shall be final. Verbal reprimands shall not be grievable, nor shall they be placed in an employee's personnel file.

7.10 Miscellaneous

A. Extensions and Mutual Agreement

The grievant or the union representative and the agency may mutually agree at any point in the procedure to a time extension.***

ARTICLE 8 - DISCIPLINE

8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

A. Verbal Reprimand
B. Written Reprimand
C. Suspension
D. Demotion or Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

8.03 Pre-Discipline

Prior to the imposition of a suspension of more than three (3) days, demotion or termination, the employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story. This opportunity shall be offered in

accordance with the "Loudermill decision" or any subsequent court decisions that shall impact on pre-discipline due process requirEments.

## APPLICABLE "STANDARDS OF EMPLOYEE CONDUCT"

2. Careless workmanship or negligence resulting in spoilage or waste of materials or delay in work production.
3a. Insubordination: Refusal to carry out a work assignment.
9b. Threatening, intimidating or coercing employees.
11. Disorderly conduct, including the use of obscene language before the public.
13. Making false, vicious, profane or malicious statements concerning others.
14. Interfering with or failing to cooperate in any official inquiry or investigation.

## DISCUSSION

It was generally recognized that Grievant used what was characterized as "salty" language in the office, including profanity and obscenity. His supervisor felt, however, that he was more "salty" than his colleagues but not excessively so. That created a context in which some of Grievant's alleged infractions must be judged.

Perhaps the most critical charge made against Grievant is insubordination, a charge made in both the suspension and discharge cases. The facts establish rather clearly that Grievant was inadequate in his performance respecting timely filing of reports. The issue, however, becomes the characterization of that deficiency as insubordination.

The viewpoint of both his supervisors was that he simply couldn't seem to organize himself to get the reports done. The assistant supervisor said that he would start on a job and then go off to another, etc., without completing any of them except sporadically. The Patrolman observed that he had considerable conversational difficulty in keeping Grievant on a subject, that he wandered off quickly into personal history, side issues, etc. Grievant's supervisor said that Grievant's problem centered around concentration on the relevant matters

in a report. (It must be observed in fairness that the supervisor himself tended to answer questions with the addition of many irrelevancies.)

The arbitrator's own observations of Grievant were that he would agree to answer questions at the hearing directly and would express complete understanding of the practical requirements for doing so, but that he seemed automatically to revert to his prior ways of wandering into various irrelevancies in his answers. The impression was that he was not being obdurate, however, but simply couldn't help himself, that being his normal method of operation. In short, Grievant appears to be extremely nervous with a lack of ability to control the results of that condition.

There is no question but that Grievant didn't do all of the duties of the job promptly as required. In light of the evidence, however, the course of his failure appears to be inability. Insubordination, however, includes an element of willful or intentional disobedience, often evidenced by outright oral refusal or stubborn immobility. Those elements were not present in Grievant's case.

In short, Grievant appears to have wanted to do a satisfactory job but didn't know how or couldn't control himself enough actually to perform as even he desired. In such circumstances, the normal reaction of such individual is the one that Grievant manifested, a plethora of excuses, justifications and a somewhat paranoid attitude toward supervision.

It follows that Grievant is not guilty of insubordination.

What has been said of insubordination applies generally to the charge of careless workmanship, or negligence resulting in spoilage, or waste of materials or delay.

Grievant was hardly careless, which implies a willful disregard for standards. He didn't meet the standards but he didn't wantonly disregard them. He just couldn't seem to accomplish his purpose.

The term negligence doesn't quite seem to apply either. For example, one who doesn't know how to swim or who has a phobia about heights cannot be called negligent because he fails to swim or because he can't go on to a high roof when the circumstances appear to require one or the other. That rule, then, was not violated either.

The suspension was grounded in part on the charge of disorderly conduct before the public. That charge seems to arise from

his use of the phrase "sons of bitches" during the conversation between Grievant and the parole hearing officer.

Grievant's supervisor said that everyone in the office was profane and obscene. Thus, it is doubtful that the comment meant anything more than the routine expression of a strong viewpoint, an attitude that could have been made clear in harmless language, put, however, into bitingly sarcastic phrases. In short, he seems to have been evidencing his frustration at reports in general, knowing that another was now to be required on his failure to appear.

More important, the language was used in speaking to a fellow employee alone. The public was not involved in that the language was not used before any member of the public.

That charge, too, must be rejected.

Grievant's delayed appearance at the parole hearing at the Jackson Road prison was most unfortunate. His delay may have been due to lack of preparation, lack of care in determining the time of the hearing, etc. It must be considered, however, that an employee in his status did not ordinarily attend or assist in such type hearing. (Since then, indeed, a person with his rank is forbidden to do such assignment.) He apparently just didn't have the expeience to know the important factors on which to be prepared. That is a reasonable inference from the hearing officer's statement that he didn't remember Grievant ever having presented such a case before.

Grievant's performance in the matter of the parole hearing was less than adequate and probably less than could reasonably be expected of him but his performance cannot be characterized as failing to cooperate in an official inquiry. Failure it may have been but not of cooperation.

The making of false, vicious, profane or malicious statements and the separately charged offense of threats, etc., appear to relate to the same incident, i. e., the day when the Patrolman obtained Grievant's gun from him.

Grievant testified that he meant to convey threats of legal action against his supervisors. Threats of that type are not very politic, at best, but from the credible evidence, excluding hearsay, Grievant failed to explain that he was talking about legal action. Thus, the result of his language was undefined threats. That type of threat is alarming and can fairly be understood to include danger of bodily harm. The best evidence of that consequence was the Patrolman's concern and willing involvement in the matter, together with the great circumspection he exercised in getting Grievant's gun away from him,

a result that did not occur until after he had talked to Grievant for some period of time. In other words, after conversing with Grievant for a while, the Patrolman felt it to be imperative to obtain the gun and did so.

If the Patrolman was convinced of possible danger from Grievant, the fear of possible violence by Grievant's immediate colleagues is certainly credible and reasonable.

One may not put another in fear of bodily harm with impunity, whether that fear turns out to be correct or incorrect. If the other person reasonably feels threatened, the one making the threats becomes responsible, whether he meant it that way or not.

It follows that Grievant did threaten employees within the meaning of the rule.

The result is that Grievant's performance has been inadequate, particularly with respect to maintaining reports on a current basis and failing to appear at the parole hearing. It is clear that he did violate the rule on threats.

As to the character of the first group, his problem is lack of workmanship. That is simply a fact and not reprehensible in itself when, as here, the employee tries and, to date, has been unsuccessful. An employer can act by reprimand, suspension, etc., to guide an employee into action designed to remedy his inadequacy and, thereafter, may terminate him because he is not peforming his side of the contract of employment. That is the nature of Grievant's offense here but the Employer has not charged him with anything like that, having found him guilty of several rule violations involving some degree of moral turpitude. Grievant has not offended any reasonable moral standard of conduct. He simply isn't now able to do his job right. Since Grievant hasn't violated the standards he is charged with having violated in this regard, i. e., the first group, he must be absolved of those offenses. It is not the arbitrator's role here to apply a rule the Employer has not thought to be appropriate because he is not informed of the meaning other rules have for the parties.

As to the violation of the rule forbidding threats, appropriate penalty applies. Under the standards, that infraction warrants five points and that equates to a one week suspension.

The first week of suspension, served in March, must be set aside on the basis of the ruling above on the first group of offenses. Since Grievant has already undegone that penalty, however, and is now found to warrant a week's suspension because of the other offense, it serves no purpose to reimburse him for one week and then

impose a one week suspension at a different time. Thus, the suspension served will compensate for the one week found reasonable here.

It must be noted in closing that, while the making of false and vicious remarks were said above to be part of the overall problem of the threats, the two were separately listed offenses. The penalties ought not to be pyramided here where the same words and expressions violated both. They are really one offense here and one penalty is sufficient.

It follows that Grievant must be reinstated and made whole for his loss of earnings for the period from his termination to the date of reinstatement. Under the circumstances, no remission of wages not paid during the earlier suspension is necessary.

A W A R D

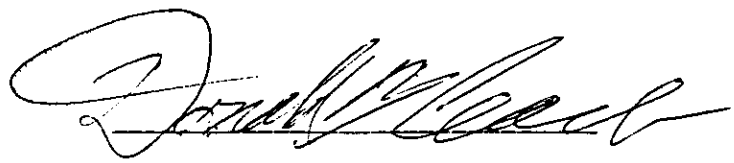
1. Grievances, dated March 31 and June 18, 1987, of Maurice Breslin, are hereby upheld in part.

2. All penalties involved in the two Grievances are set aside.

3. Five day suspension is imposed for Grievant's threats to fellow employees but the pay for the suspension he served previously under the former of the two Grievances shall suffice for the penalty imposed here and no restitution of the pay lost in the suspension is required, although the suspension itself is set aside under paragraph 2 of this Award.

4. The Employer forthwith shall offer reinstatement to Grievant in the position he held just prior to his termination, with no loss of benefits or seniority.

5. The Employer shall pay Grievant for all loss of earnings suffered by him during the period of his termination and to the date of his reinstatement, provided that no such pay shall be made for any period more than one week following the offer of reinstatement.



Donald B. Leach