

ARBITRATION AWARD SUMMARY

#307

CB Award Number: 307

OCB Grievance Number: 32-00-880824-0059-06-10

Union: SCOPE/OEA

Eric Salter

Department: OVCH

Arbitrator: Calvin Sharpe

Management Advocate: Tim Wagner

Union Advocate: Henry Stevens

Arbitration Date: 6-22-89

Decision Date: 8-1-89

Decision: Denied

STATE OF OHIO AND STATE COUNSEL OF PROFESSIONAL EDUCATORS

In the Matter of an Arbitration:

--between--

Ohio Veteran's Children's
Home

--and--

State Council of Professional
Educators

Grievance of Eric Salter

ARBITRATOR'S DECISION AND AWARD

Henry L. Stevens
Uniserve Consultant
For the Union

Timothy Wagner
Director Arbitration Services
For the State

August 1, 1989

Calvin William Sharpe
Arbitrator

On March 9, 1989 the State Council Of Professional Educators, Ohio Education Association/National Education Association (Association) filed a grievance on behalf of Eric Salter, protesting his disciplinary suspension issued on March 8, 1989, by the Ohio Veteran's Children's Home (OVCH or State). At earlier stages of the grievance procedure the State denied the grievance, and the Association has now brought the matter to arbitration. A hearing was held on June 22, 1989 in Xenia, Ohio.

I

STATEMENT OF THE CASE

A. THE ISSUE

1. Was the State's suspension of the Grievant for just cause?
2. If not, what is the remedy?

B. RELEVANT PROVISIONS OF THE 1986-1989 AGREEMENT

1. ARTICLE 9 - CLASSROOM CLIMATE

9.01 - Classroom Climate

The Employer recognizes the responsibility to provide reasonable support and assistance to teachers and teaching coordinators with respect to the maintenance of control and discipline in the educational setting. The Employer, the Association, and employees also recognize the special needs exhibited by the varied populations served at the work facilities.

9.02 - Pupil Personnel Discipline Policies

To provide reasonable support and assistance while appropriately serving the special needs of the varied populations, the employing agencies will develop work

facility policies regarding pupil personnel discipline. Prior to the development or revision of a facility pupil personnel discipline policy, the employing agencies will provide an opportunity for input by the educational staff.

The educational supervisor will meet with the faculty at each facility not less than once per year to review and discuss the pupil personnel discipline policies.

The pupil personnel discipline policy at each work facility will include, but not be limited to, the following:

1. A requirement that an employee testify or offer a written statement regarding alleged disruptive behavior of a pupil; and
2. Availability to the employee of the disposition regarding the alleged disruptive behavior of a pupil.

2. ARTICLE 13 - PROGRESSIVE DISCIPLINE

13.01 - Standard

Employees shall only be disciplined or discharged for just cause.

* * *

13.03 - Pre-Suspension or Pre-Termination Conference

* * *

The Appointing Authority shall render a written decision within ten (10) days of the conclusion of the conference and transmit the written notification to the employee and the designated Association representative.

* * *

13.04 - Progressive Discipline

The following system of progressive discipline will be ordinarily followed:

1. Verbal reprimand (with appropriate notation in the employee's official personnel file);
2. Written reprimand;
3. Suspension without pay;
4. Demotion or discharge.

However, more severe discipline may be imposed at any point if, at the Appointing Authority's discretion, the infraction or violation merits more severe action.

3. ARTICLE 14 - WORK RULES

14.01 - Work Rules

Work rules shall be all those written policies, regulations, procedures, and directives which regulate conduct of employees in the performance of the Employer's services and programs.

Work rules shall not conflict with any provision of the Agreement. The Association will be furnished with a copy of the work rules in advance of their effective date. The Association shall designate an address for receipt of this communication.

Work rules shall be made available to affected employees prior to their effective date.

In emergency situations, as defined by the Employer or the employing agency, the provisions of this Section may not apply. The Association and affected employees will be notified promptly of such declared emergencies and their duration.

C. BACKGROUND FACTS

The OVCH is a residential care facility for children whose ages range from 6 to 18. Residents come from juvenile court because of truancy and unruliness, from the children's service agency because of parental abuse, and from parents who contract with the state because of their inability to manage the child. The OVCH seeks to provide a nurturing environment that educates the children, prepares them to become responsible adults, and helps them to view their parents in a better light.

To insure the proper discipline of the children who are in their care, the OVCH maintains the following paddling policy:

Children at the Ohio Veterans' Children's Home ages 12 and under are subject to be paddled.

1. Schools:

- A. Paddlings may be authorized and approved only by the Principal and/or the Director of Education.
- B. Paddlings may only be done by the Principal or Director of Education, with an adult witness present during the paddling.
- C. Within one hour of the paddling, the child is to be examined by a member of the nursing staff to check for bruises or welts.

No child age 12 and under may be paddled who has a history of being physically abused. It is the responsibility of the Director of Social Services to insure both cottage life and the educational department have an updated list of who is not to be paddled due to having a history of being physically abused.

The Grievant is a teacher of health and physical education at the OVCH. He teaches grades K through 3 co-educationally and only boys in the other grades. During the morning of January 27, 1989, two boys, Jeremy Edison and Keith Robinson, became involved in a fight during gym class. The Grievant stopped the fight and took Keith and Jeremy into his office individually. Following the individual meetings with the Grievant, both boys returned to the gymnasium area.

What happened in the Grievant's office is in dispute. Following an investigation the OVCH found that the Grievant had paddled both boys. The Grievant, on the other hand, denied at earlier stages of the grievance procedure and at the arbitration hearing that he paddled either boy. During the time of this incident, Jeremy Edison was on the non-paddling list of abused children.

Following a prediciplinary hearing on February 24, 1989, the State suspended the Grievant for five working days effective March 10, 1989. The Grievant has been disciplined on four separate occasions before this incident. He received a 15 day suspension on August 24, 1988, a verbal reprimand on November 17, 1988, a written reprimand on December 1, 1988, and a verbal reprimand on January 6, 1989.

II.

CONTENTIONS OF THE PARTIES

A. THE STATE'S POSITION

The State contends that the Grievant paddled Jeremy Edison and Keith Robinson in his office on January 27, 1989. The State argues that this conclusion is supported by the credible testimony and documents introduced at the hearing. Furthermore, the State notes that the paddling policy in effect at the time of the alleged paddling prohibits the paddling of students by their teachers. The Grievant's action was exacerbated by the paddling of Keith Robinson who is on the no-paddling list of abused children, the State argues. The State concludes that the Grievant's five-day suspension was warranted, because of the evidence of paddling, the Grievant's violation of the paddling policy, and his prior disciplinary record.

B. THE ASSOCIATION'S POSITION

On the other hand, the Association contends that the State's imposition of discipline against the Grievant in this case was without just cause. Citing the just cause criteria enunciated by Arbitrator Carroll Daugherty in Enterprise Wire Co., 46 LA 362 (1966), the Association argues that the State failed to give proper notice of the paddling policy, to properly investigate the Grievant's conduct before imposing discipline, to conduct a fair and objective investigation, to obtain substantial evidence of the Grievant's guilt before imposing discipline, to apply the paddling policy evenhandedly, and to

mete out discipline against the Grievant in appropriate measure. The Association also claims that the State's five-day suspension against the Grievant violated Articles 9, 13, and 14 of the Agreement.

III.

DISCUSSION AND OPINION

In discipline cases the employer has the burden of showing that the Grievant committed the act giving rise to discipline. In addition, as Arbitrator Daugherty's criteria indicate, the employer must also observe certain employment due process and equal protection standards when imposing discipline. Specifically, in most cases the employer must give notice to employees of conduct that may lead to discipline, conduct an adequate investigation to determine an employee's involvement in misconduct, impose a proportionate degree of discipline, and apply its rules evenhandedly. In this case the Association claims not only that there was insufficient evidence of the Grievant's violation of the paddling policy, but also that these due process and equal protection standards were not met.

Evidence of Paddling Policy Violation

This case turns on the Arbitrator's determination of which account of what happened in the Grievant's office on January 27, 1989, is more credible, the State's or the Association's. The State contends that the Grievant paddled both Jeremy Edison and Keith Robinson. On the other hand, relying primarily on the Grievant's denial, the Association asserts that the State has failed to prove the paddling incident. Aside from the due

process and equal protection claims of the Association, there is no dispute about the reasonableness of the policy or the propriety of imposing discipline for violating it.

There are several key evidentiary items that support the State's version. Ms. Wendy Bellar, the House Parent over the residential facility housing Jeremy and Keith, testified that she examined the buttocks of both boys at approximately 5:45 p.m. on January 27, 1989, after they told her they had been paddled. She found redness on Keith's buttocks and what she described as welts, two lines about two inches apart and about 4-5 inches long, on Jeremy's buttocks. Ms. Bellar's testimony was supported by hospital records, entered by Duty Nurse Linthicum after Ms. Bellar sent Keith and Jeremy to the Hospital. They show that large welts were found on the right buttocks of a child who had been paddled by Mr. Salter on January 27, 1989. Though the reference to the Grievant is not very helpful in determining what happened inside the Grievant's office, it does help to establish the identity and condition of the child who was examined. The presence of welts and redness on the buttocks of the two boys certainly increases the likelihood that the paddling occurred.

The Association attacks the foregoing evidence with the argument that Jeremy testified that he was examined only by the nurse and not by Ms. Bellar. The Association also points out that the State failed to call Nurse Linthicum and that the nurse's report of welts was inconsistent with Ms. Bellar's testimony and Security Supervisor Carl E. Benson's report of one

welt.

The Arbitrator attaches no significance to the State's failure to call Nurse Linthicum. Mr. Benson's testimony authenticated the hospital record, since he was able to identify it. Also, the record is relevant and would be admissible as an exception to the hearsay rule to prove the results of Jeremy's examination, even in a formal court proceeding. See Ohio Rule of Evidence 803(6). Furthermore, Mr. Benson misreported the contents of the hospital record, when he stated in his investigative report that a "welt" rather than "welts" were found on Jeremy's buttocks. And contrary to the Association's assertion, Ms. Bellar testified consistently with the hospital records that there were two welts rather than one.

What is potentially troubling to the Arbitrator is the inconsistency, noted by the Association, between Ms. Bellar's testimony that she examined Jeremy's buttocks before sending him to the hospital and Jeremy's testimony that she did not. Jeremy confirmed that the nurse checked his buttocks. Thus, the significance of this inconsistency is reduced, since the nurse stated that welts were found on Jeremy's buttocks. Given his upset emotional state after the paddling, it is possible that Jeremy simply forgot that Ms. Bellar had looked at his buttocks before sending him and Keith to the hospital. It is likely that Ms. Bellar did examine Jeremy's buttocks, since her testimony about the presence of welts is corroborated by hospital records. Yet, because of the existence of the hospital record, the Arbitrator need not rely upon Ms. Bellar's testimony on this point. On the other hand, Ms. Bellar's testimony that Jeremy

told her shortly after the school day ended that he had been paddled is important evidence of the paddling. Jeremy corroborated Ms. Bellar's testimony that he told her about the paddling.

The State's version is also buttressed by the testimony of Jeremy, Kim Short and Donald Haley. Jeremy testified consistently with the Grievant's testimony that the Grievant first took Keith into his office after the fight. Jeremy testified that as he was waiting to go into the Grievant's office he heard the Grievant hit Keith once with the paddle. According to Jeremy he then went into the office and the Grievant hit him once with the paddle. Jeremy described the paddle as having tape on the handle and being two feet long and three inches thick. He also demonstrated his position against the refrigerator as he received the blow from the Grievant. Jeremy remembered that the paddling occurred on Friday and the Grievant said afterwards "Come back next week with a better attitude".

The Arbitrator credits the material portions of Jeremy's testimony. Jeremy testified that he liked the Grievant, and the Arbitrator sees no reason why Jeremy would fabricate the story against the Grievant. Both Ms. Bellar and Teacher Karen Bond, who taught Keith and Jeremy during the periods before and after gym class, testified they did not believe that Jeremy would fabricate the incident. Both held this opinion, even though they candidly stated that Jeremy is not always truthful. The Arbitrator finds these opinions helpful on the issue of Jeremy's credibility. See Ohio Rules of Evidence 608(a) and 701.

Kim Short, a seven year old second grader, who was in the gym class at the time of the incident, remembered the fight between Jeremy and Keith. Her testimony indicates that she was not very attentive to the circumstances of the fight. She said, for example, that it started when Jeremy cursed Keith. In fact, the fight started when Keith tripped Jeremy. Kim was attentive enough to notice that Keith went into the office first. Kim also stated that she went into the Grievant's office to put away some balls shortly after Jeremy and Keith had come out and she saw the paddle on the floor. Even though the Grievant admitted that the paddle was in his office and normally rested on the top of a cabinet, the Association did not refute Kim's statement that it was on the floor after the alleged paddling of Jeremy and Keith. This altered position of the paddle shortly after the Grievant met with the two boys increases the likelihood of its recent use.

Kim also testified that the day before the incident, the Grievant threatened to paddle Jeremy and Keith, if they fought. This testimony is plausible, given the Grievant's testimony that Jeremy and Keith had been fighting all week. Kim's testimony is inconsistent with Jeremy's, however, on the issue of how many licks were passed. Jeremy said that he and Keith each got one lick. Kim said that Keith got three and Jeremy got two. Like Jeremy, Kim liked the Grievant, and the Arbitrator can see no reason why she would fabricate the incident. It is clear that her memory may be faulty, since it does not quite coincide with the other evidence in the case. However, on the critical issue of whether the Grievant paddled the two boys, her testimony cannot be completely discounted. It confirms that she heard at

least one lick given to each boy.

Donald Haley is a fourth grader who was not in the same gym class as Jeremy and Keith. He testified that he returned to the gym on the day of the incident, saw Jeremy throw Keith against the trash can and heard the Grievant say "if you guys don't stop it, I am going to give you a wack". Donald also testified that the Grievant gave him and a classmate a paddling two years earlier, and that the Grievant uses the paddle to tap students on their buttocks to make them run faster when they run laps. Donald's testimony indicates that the Grievant threatens to use the paddle for discipline purposes and uses the paddle in disciplinary and other ways during the course of a gym class.

The Grievant claims that he did not paddle Jeremy or Keith on January 27, 1989. He says that he grabbed their arms and shirts and orally chastised them, threatening to have them placed on In School Suspension where they would not be permitted to participate in gym class. The Grievant claims that he has never paddled a student and has never talked about using the paddle. Further, the Grievant denied that he ever used the paddle for any purpose.

The Grievant's obvious interest in avoiding discipline for violating the paddling policy creates a bias that explains his denial of the action attributed to him. But the statements of Jeremy, Kim, and Donald paint a picture of the Grievant's use of paddling and the threat of paddling as a mode of discipline and motivation. Unlike the Grievant, none of the students has a motive to make up the charges against the Grievant. Judging from

their demeanor and the context of their testimony, the Arbitrator finds the student witnesses to be truthful.

The Association called Maria Denena, an upperclass student who was in the gym at the time of the fight. She testified that she was on the other side of the gym from the Grievant's office, when Jeremy and Keith went into the Grievant's office one at a time. She testified that one came out crying and climbed onto the bleachers and the other came out screaming and upset. She testified that Jeremy was crying before he went into the office. The Association argues that Maria did not hear the sound of paddling, but Maria's testimony indicates that she was so far away from the Grievant's office at the time that she could not be expected to hear any paddling. Furthermore, Maria's testimony about the boys' emotional state after coming out of the Grievant's office supports the State's and not the Association's case.

The Arbitrator similarly rejects the Association's suggestion that minor discrepancies contained in the Benson investigative report casts doubt on the State's version of the incident. Whether Jeremy extended his buttocks when he demonstrated at the arbitration hearing his position during the paddling is a matter of perception. The Association claims that he did not extend his buttocks as Mr. Benson stated in his investigation report. The Arbitrator would say that Jeremy did extend his buttocks as he leaned against the wall in the hearing room. The Association also claims that Mr. Benson "indicated that the students were taken into the office and paddled together". The only reference in Mr. Benson's report to the

Grievant's taking the boys into his office was the following:

Classmates of Students Robinson and Edison report, during the Gym Class Period, the students were taken by Mr. Salter into the Gymnasium Office and, the other students were placed in line near the south end basketball goal.

First, this sentence merely states that the students were taken into the Grievant's office, which is true. It does not say that they were taken either separately or together. Second, the Benson report contains his conclusions following an investigation. Mr. Benson was not, himself, a witness to the events surrounding the alleged paddling. To the extent that his investigative conclusions failed to accurately reflect the evidence that he gathered, it is the report that is defective and not the underlying evidence. For this reason, Mr. Benson's report, however inaccurate, cannot diminish the probative value of the evidence and the Association's arguments based on the investigative report are unpersuasive.

Mr. Benson did testify at the hearing that the boys told him that they went into the Grievant's office together. However, the testimony of the Grievant, Jeremy, and Kim that the boys went into the office separately suggests that either the boys were mistaken about what happened when they spoke with Mr. Benson or Mr. Benson's recollection about the boys' statements is inaccurate. Neither possibility affects the Arbitrator's finding that Jeremy's testimony should be credited.

Finally, the Association suggests that the State has not met its burden because there is no direct evidence that the Grievant paddled the boys. The Arbitrator disagrees. Jeremy's testimony that he was paddled by the Grievant is certainly direct evidence.

See McCormick On Evidence, Section 185 (3d ed. 1984). If Jeremy is believed, the issue is settled. Much of the other evidence in this case, as the Association correctly points out, is indirect or circumstantial, for example the redness and welts on the two boys, the testimony about other paddlings, and the sounds of paddling. Yet, as is true generally with trials circumstantial evidence is more commonly available than direct evidence, and circumstantial evidence is often more powerful. For example, evidence that a murder defendant stood over the victim with a smoking gun shortly after the shooting is circumstantial but more persuasive than the defendant's wife's testimony that she saw an unknown assailant pull the trigger. The assertion that evidence is not direct, therefore, sheds little light on how persuasive it is. As indicated in the foregoing discussion the Arbitrator is persuaded that the Grievant paddled Jeremy and Keith during gym class on January 27, 1989.

Adequacy of Notice

The Association complains that the OVCH violated Article 14 of the Agreement by not furnishing a copy of the paddling policy to the Association or affected employees before the policy's effective date. In support of this claim the Association produced copies of communications to the Association from the Ohio Department Of Mental Health and the Ohio Department of Youth Services regarding proposed work rule changes submitted in advance. These documents showed that other agencies had complied with Article 14. It also cites an award by Arbitrator

Andrew Love finding a violation where two state agencies failed to comply with the requirement.

The issue before this Arbitrator is whether the State discipline the Grievant without just cause. As pointed out above notice is a due process requirement that is part of the complex of standards that define just cause. Adequate notice eliminates the chance that employees will be unfairly disciplined for conduct whose disciplinary consequences they could not anticipate. In this case the Grievant had the kind of notice required by due process. John Davis, the OVCH's Education Administrator at the time, testified that the current paddling policy was promulgated on December 16, 1988, and the Grievant would have received it before the January 27, 1989, incident. Moreover, the Grievant testified that he received a copy of the policy on or about December 16, 1988. He also testified that he understood the purpose and specifics of the policy. Under these circumstances there is no serious doubt that the Grievant was on notice that paddling outside the guidelines of the paddling policy could lead to discipline. A violation of Section 14.01 of the Agreement does not alter this fact and is properly addressed in a separate grievance.

Adequacy of Investigation

The Association also claims that the State's pre-discipline investigation was inadequate, because it did not issue a written decision within 10 days of the presuspension conference and the investigation was not conducted by a "higher detached management official with [a] non-partisan perspective". Arbitrator Carroll

Daugherty on whom the Association relies says the following about the prediscipline investigation:

Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions.

Grief Bros. Cooperage Corp., 42 LA 555, 558 (Daugherty 1964)

As the Association points out in this case two OVCH officials were involved in the investigation. Assistant Principal Jack Morton interviewed Jeremy and Keith at approximately 8:30 p.m. on January 27, 1989. The following week Mr. Benson conducted a comprehensive investigation, consisting of reading the paddling policy and talking with Jeremy and Keith, students who were in the gym class, Ms. Bond, Maria Denena, Ms. Bellar, and the Grievant. He also checked hospital records to verify the visit and examination of Jeremy and Keith. On February 6, 1989, Mr. Benson reported his findings of a probable violation to the Principal, Mr. Morth. Thereafter, the predisciplinary hearing was scheduled.

Not only did the Grievant receive his day in court, he also received the benefit of a thorough investigation before Mr. Benson reached his conclusions regarding the violation. The Arbitrator finds that the OVCH made a reasonable effort to discover whether the Grievant committed a violation before administering discipline. Again, even though the Association

may have a separate grievance under Section 13.03 of the Agreement, the timing of the State's written decision following the predisciplinary conference does not impugn the investigative effort under the just cause standard.

Nor is there evidence that the State's investigation was conducted unfairly or without objectivity. Regarding the fairness and objectivity of an investigation Arbitrator Daugherty, whom the Association relies upon, said the following:

Note: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Grief Bros. Cooperage Corp., supra at 558.

This standard attempts to guard against biases that may color the results of an investigation. In this case Mr. Benson and Mr. Morton were management officials who had not been involved in the conduct that led to discipline. Furthermore, the Judge in this case was the principal rather than either one of the investigators.

Disparate Treatment and Proportionality

The Arbitrator also rejects the Association's suggestion that there was disparate treatment in disciplining the Grievant. Such treatment can occur only where similarly situated employees are treated differently. In support of its argument the Association claims that "no teacher has ever been disciplined because of a violation of Rule #30-3". However, it produced no evidence that any other teacher had ever violated the policy. Indeed, Mr. Davis testified that in the four or five years that he was the administrator, not a single teacher to his knowledge

paddled a student.

Finally, the Association argues that a five-day suspension was inappropriate, because the State's proof is unpersuasive and in any event this is the Grievant's first offense under the paddling policy. The preceding discussion demonstrates the Arbitrator's belief that the proof of violation is persuasive. Regarding the progressive discipline policy the Association correctly notes that the parties have agreed upon such a policy under Section 13.04 of the Agreement. There is no requirement under that section that the offense resulting in a higher degree of discipline cannot be a first offense. On this point Arbitrator Daugherty said:

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgment thereon must be used.)

Grief Bros. Cooperage Corp., supra at 558.

In general the purpose of progressive discipline policy is to correct and deter specific misbehavior. See Abrams and Nolan, "Toward A Theory Of 'Just Cause' In Employee Discipline Cases", 1985 Duke L. J. 594, 602-604. The Grievant's previous offenses all involved rule violations including one on December 1, 1988, for violating a work rule on physical abuse to children. The Grievant's repetition of rule infractions within six months before the paddling violation indicates that a greater than minimal degree of corrective discipline was warranted. In light of the Grievant's prior record the Arbitrator finds the five-day suspension to be appropriate.

IV.

AWARD

The grievance is denied.


CALVIN WILLIAM SHARPE
ARBITRATOR

DATE

8/1/87