In the Matter of the Arbitration Between

# 382

**OCSEA, Local 11**
**AFSCME, AFL-CIO**
Union

and

**Ohio Department of Mental Retardation/Developmental Disabilities,**
Employer.

**Grievance:**
24-09-890303-0182-01-04
**Grievant:**
(Margaret Hoar)
**Hearing Date:**
November 30, 1989
**Briefs Due:**
January 19, 1990
**Award Date:**
February 20, 1990

**For the Employer:**
Edward Ostrowski

**For the Union:**
Brenda Persinger

Attendance: In addition to the advocates named above and the Grievant, the following persons were in attendance Wilber Severns, LRO (MVDC), Barry Groseclose, MHA (MVDC), Karen Ewalt, Program Coordinator (MVDC), Joseph Roop, Chief of Police (MVDC), Ann Crouse, LPN (MVDC), Laurie Stelts, Chief Steward (witness), Barbara Anderson, TPW (witness), May Street , TPW (witness), Geri Wallace, Teacher (witness), Deb Cox, Activity Therapist (witness).

## Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted

their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

## Issue

Did the Arbitrator exceed her power and hence violate the contract when she ruled sua sponte that the Employer had failed to meet its burden of proof when it closed its case and hence, the grievance was sustained?

## Relevant Contract Sections

§24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. **The Employer has the burden of proof to establish just cause for any disciplinary action.** In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

if either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

## Facts

On November 30, 1989, an Arbitration hearing was held in the matter of Grievance 24-09-890303 (Margaret Hoar). The Grievant had been suspended for twenty (20) days for allegedly neglecting a Resident on 11/5/88 by "Failure to Act."

After opening statements, the Employer presented its case. The case consisted of three (3) witnesses. The first, Ann Crouse an LPN, was an eye witness to part of the incident; she testified as to her memory of the event. The other two witnesses were administrators who testified as to MVDC procedures and to the importance of following treatment plans for patients at MVDC. At this point in the hearing, the Employer wished to use Dr. Ken Tecklenberg as its fourth witnesses. The Arbitrator determined that Dr. Tecklenberg was not an MVDC employee at the time of the incident, nor was he familiar with the patient in question. The Employer said Dr. Tecklenberg would testify about the importance of following the I.T.P. The Arbitrator said sufficient testimony on the importance of I.T.P. had already been admitted and that she would take arbitral notice of the importance. Dr. Tecklenberg was dismissed. At this point the Employer rested. The Arbitrator asked the Employer's advocate three (3) times if he rested. He said yes each time. No mention of rebuttal witnesses was made.[1][1] The Arbitrator, without a motion from the Union advocate, ruled that the Grievance was sustained because the Employer had not met its burden of showing just cause and therefore, no burden shifted to the Union. The Arbitrator used the phrase “no prima facie case”, yet explained at least three times that by prima facie case she meant the Employer had not carried its burden to show just cause for discipline. In the Employer's testimony, the Arbitrator concluded that insufficient evidence was adduced to show either patient abuse or neglect by the Grievant. The Employer's advocate protested, saying that the Employer intended to make its case during its cross examination of the Grievant during the Union's presentation. The advocate indicated that prior to the Hearing the Union Advocate had said she planned to call the Grievant and that he (the employer advocate) had relied on this factor.

The Employer objected to the Arbitrator's ruling. The Arbitrator requested that both sides file a brief on the procedural issue (as stated). The Arbitrator stated that if, upon review, she found that she had exceeded her authority, she would recuse herself from the case.

The Employer claimed three errors:

1. The Arbitrator erred when she injected her assessment and prematurely rendered an opinion and decision on the case, without a motion from the Union;

2. The Arbitrator erred when she did not allow the Employer to question the Union's witnesses; and

3. The Arbitrator erred when she did not allow the Employer to call witnesses to establish and/or corroborate certain facts contained within the jointly stipulated documents.

Of these alleged errors, only the first is salient. If the Arbitrator did not err as indicated in #1, then no witnesses existed to be questioned, hence #2 is moot.

Number 3 is also irrelevant. At no time during the Employer's case did the Arbitrator prevent the advocate from introducing evidence "to establish and/or corroborate certain facts within the jointly stipulated documents". At the end of the hearing, after the Arbitrator's ruling, the advocate for the Employer stated that his case was proven by the documents since the Union had agreed to "their truthfulness". This argument is preposterous on its face. Both parties stipulate that these documents represent an accurate picture of the paper trail of the Grievance. If the Union had agreed to the truthfulness of the charges in the documents, no arbitration would be necessary. Did the Employer stipulate to the truthfulness of the statements in the Union's Grievance? I think not.

The key to this case is whether the Arbitrator exercised proper authority by dismissing the Employer's case when the Employer rested.

One argument was that the Employer is entitled to cross examine the Union's witnesses. True. However, the Union called no witnesses. The Employer maintained that because the Union indicated that it planned to call the Grievant, that the Union was so bound. No. If at the end of the Employer's case, the Union chose to not have the Grievant testify that was it's prerogative.

The Arbitrator is in complete agreement with the Employer's description of the purpose and nature of arbitration hearing. Fairness is the key. Moreover, the Arbitrator is <u>not</u> bound by the rules of evidence. The best way to get at the truth is to hear as much evidence as possible consistent with fairness without formalistic strictures. In fact, in both her opinions and in her spoken word, this Arbitrator has on numerous occasions supported the widest range of information as well as noted the importance of the "venting" function to the settlement of labor disputes.

In this case however, the scope of evidence was not at issue; the question was the burden of proof. The limitations of the scope of evidence is not specifically mentioned in the contract beyond the words of §25.08. However, the burden of proof is specifically stated in the contract where discipline is at issue.

**<u>§24.01 - Standard</u>**

**Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.**

Note the mandatory "shall not" -- discipline **shall not** be imposed **except** for just cause. This obligation is strengthened by the next sentence. "The

Employer **has the burden of proof** to establish just cause for any disciplinary action."

Here the Grievant was accused of patient abuse -- a very serious offense, which if on her record would follow her forever. Moreover, the discipline sought to be imposed was a 20 day suspension -- just short of termination, i.e., industrial capital punishment. At the end of the Employer's case, when the Employer rested, the Arbitrator concluded that insufficient evidence had been introduced to show just cause, i.e., the Employer had not produced enough evidence to shift the burden to the Union.

Aaron says (see Employer's brief at p. 18) that the Employer is not obligated to establish a prima facie case and Justen says (see Employer's brief at p. 18) that neither party has a burden -- they are "equals".

However, while these propositions may have some general truth, the contract to be applied in this case specifically and unequivocally states that in matters of discipline the Employer has the burden of proof (§24.01). Moreover, the Arbitrator's duty is further delineated in §25.03. The Arbitrator "**shall not** impose on either party a limitation or obligation **not specifically** required by the expressed (sic) language of the Agreement." The contract specifically and **unambiguously** places the burden on the Employer.

On page 22 of its brief, the Employer maintains that this Arbitrator had previously found the testimony of grievants critical and that grievants may be cross-examined. Granted. Grievants testimony is often critical in many cases, and the Employer has every right to cross-examine the grievant **if** he or she testifies.

On page 12 of its brief, the Employer alleges that the Arbitrator denied the Employer the right to make a full presentation of its case. The Arbitrator did not deny the Employer its right to fully present its case. After the Employer **fully presented** its case and rested, the Arbitrator found it (the case) clearly insufficient. Lest the Arbitrator be accused of exercising undue power, note that Aaron (cited in the Employer's brief at p. 4) said “Even when it is apparent to an arbitrator . . . that the grievance lacks merit, he/she will **almost never** grant a request by the opposing party for an immediate ruling . . ." This Arbitrator submits that "almost never" should an arbitrator so act. However, even Aaron, cited extensively by the Employer, infers a permissible exception **in the rare case**. Given the explicit standard imposed by the contract (§24.01) and the paucity of credible evidence in the state's case, the Arbitrator submits that she did not abuse her power **in this case**. The better wisdom might have been to have let the case play out; hindsight is always clearer.

## Award

The Arbitrator holds that in the rare case a summary judgment sua sponte by the Arbitrator where the contract specifically imposes the burden of proof on the Arbitrator is not improper.

Grievance sustained.

Date:  February 20, 1990

Rhonda R. Rivera
Arbitrator