OCB-SCOPE VOLUNTARY GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

Award #567

In The Matter of Arbitration Between:	*	
THE STATE OF OHIO Department of Youth Services Training Center For Youth Columbus, Ohio	*	
-and-	*	Case No 35-16-(90-08-07)0051-06-10
STATE COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA, UniServ State Unit 10	*	Decision Issued: March 7, 1991

APPEARANCES

FOR THE STATE

Bradley E. Rahr	Department Advocate
Tim D. Wagner	Office of Collective Barg.
Granville "Bud" Potter, Jr.	Mental Health Services

FOR THE ASSOCIATION

Henry L. Stevens	SCOPE Staff Representative
Carrie Smolik	SCOPE President
Harold Fox	Grievant

ISSUE: Article 13, Sections 13.01 & 13.04: Discipline of Teacher for Assaulting a Juvenile; Requirements of Just Cause, Progressive Discipline, and Commensurate Discipline.

Jonathan Dworkin, Arbitrator
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BACKGROUND AND CONTRACTUAL EXAMINATION;
THE ISSUE DEFINED

The grievance protests the ten-day disciplinary suspension of a mathematics teacher at the Ohio State Training Center for Youth. The Center, which is operated by the Department of Youth Services (DYS), houses and educates boys committed to it by the juvenile court system. All the youths it serves are incarcerated for what would have been felony convictions had they been adults.

Grievant has been employed by DYS as a teacher since 1966. He was transferred to the Center from the Fairfield School for Boys. Prior to teaching for the State, he graduated from Notre Dame University and served seventeen years as a Brother in the Holy Cross Order. His suspension stemmed from an incident which occurred on July 11, 1990 during the school's seventh period. A teenaged boy in Grievant's class was disorderly in an especially vulgar way. He repeatedly swallowed air and caused himself to belch loudly. Grievant tried six or seven times to put an end to the disturbance. He paid individual attention to the youth, trying to help with his work. But as the two of them were bending over some math work, the boy deliberately belched in Grievant's face. The Employee responded instantly and reflexively, slapping the youth with the back of his hand on the right side of the jaw. At that point, the youth stormed out of the room. Grievant momentarily tried to bar his exit, but gave way. The Employee made no effort to report that one of his students had left the room without permission and without an escort. He also did not report his use of force.

Assaulting the youth, failing to notify school administrators when he left the classroom, and failing to submit a timely Use of Force Report were regarded by the Agency as three separate offenses under the established rules of employee conduct. Two of the violations fell under the published and distributed Department rule which prohibits:

> Abusing or mistreating youth entrusted to the Department's care; failing to immediately report the use of physical force on a youth as prescribed by local directive or rules.

The third allegation -- that Grievant neglected to report the youth truant from his class -- did not form a direct charge, but was viewed by the Employer as an aggravating circumstance justifying the length of the suspension. According to unchallenged facts and evidence, Grievant was well aware of his responsibility in this regard and simply did not perform it.

The Union contends that the discipline imposed on Grievant lacked just cause and violated progressive-discipline principles. The contentions refer to Article 13 of the Collective Bargaining Agreement between the State Council of Professional Educators (SCOPE) and the State of Ohio. Article 13 contains decisive language restricting the Employer's disciplinary prerogatives. Sections 13.01 and 13.04 are pertinent to this case. They provide:

ARTICLE 13 - PROGRESSIVE DISCIPLINE

13.01 - Standard

Employees shall only be disciplined for just cause.

. . .

13.04 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall include:

1. Verbal reprimand (with appropriate notation in the employee's official personnel file);

2. Written reprimand;

3. Suspension without pay;

4. Demotion or discharge.

Disciplinary action shall be commensurate with the offense.

These contractual provisions appear to be straightforward expressions of a negotiated purpose. In reality, they are packed with ambiguities. The principle guiding all discipline under the Agreement is "just cause," a term that designates a broad range of managerial responsibilities to employees. It includes obligations to judiciously consider individual factors attending misconduct and, at the same time, to treat all members of the Bargaining Unit with relative equality. In order to carry out these seemingly conflicting charges, the Employer must first weigh the seriousness of an employee's offense against mitigating and aggravating factors. Second, the Employer must avoid disparate treatment; just cause prohibits singling out an employee and disciplining him/her more severely than others committing the same or similar offense under the same or similar circumstances. The words, "same or similar offense under the same or similar circumstances" grant leeway needed by the Employer to balance its just-cause responsibilities. They permit -- in fact,

demand -- that an individual with a long record of quality service be disciplined less harshly for an offense than an employee without comparable attributes.

Section 13.4 expresses a precept commonly identified as a measure of just cause -- progressive discipline. Employees should be disciplined correctively rather than punitively. The purpose of discipline is to reinforce awareness of the line between proper and improper conduct or performance, and restore an employee to a state of productiveness and compliance with the Employer's expectations. By adopting Section 13.4, the parties expressed agreement with these maxims and mutual recognition that prescribed disciplinary progressions are the way to achieve the goal.

Actually, Section 13.4 makes the Employer's chore of determining the boundaries of just cause easier. So long as the progressive formula is followed, there can be reasonable assurance that just-cause criteria have been met. Difficulty occurs when the Employer bypasses progressive levels and moves immediately to suspension or discharge for a first or second offense. The last sentence of Section 13.4 permits such action if the discipline is "commensurate with the offense."

The precise contractual intent behind the word, "commensurate," is anyone's guess. The meaning is obscure both within and outside the Agreement. The Dictionary offers synonyms -- "proportionate," "proper," "equal," "harmonious," "correspondent," "symmetrical." They are of little help. It is probable that "commensurate" was put into the Agreement for a dual purpose: to prohibit disciplinary penalties which stand out as overly harsh responses to misconduct and, at the same time, to authorize deviations from strict adherence

to progressive-discipline requirements when necessary and appropriate. The "commensurate" clause does not eclipse Article 13; it does not license unbridled penalties or careless disregard for the rest of Section 13.4. In all but the most unusual instances of intolerable misconduct, the Employer is obligated to follow the progressive formula. When it penalizes an individual apart from the formula, its action is open to arbitral scrutiny.

The Arbitrator has no desire to needlessly explore all the contractual uncertainties, but the discussion of Sections 13.1 and 13.4 have been essential for defining the issue. Grievant's suspension was not a progressive penalty. Until the incident of July 11, 1990, his record was absolutely clean. He had nearly a quarter century of unblemished service as a State employee. He had never even received a verbal reprimand. It follows that DYS bypassed the first part of Section 13.4 and suspended Grievant under the second -- as "commensurate discipline."

The issues stipulated by the parties are whether or not Grievant's suspension was for just cause and, if not, "what shall be the remedy?" The Arbitrator finds the dispute not quite so simple. A host of important questions are merged into the issue statement. Most pertinent are the following:

1. Did the Employer have adequate justification for bypassing the progressive levels and suspending Grievant?

2. If Grievant's misconduct warranted greater discipline than a first-level verbal reprimand, was the ten-day suspension truly commensurate with the offense?

3. Was Grievant the victim of a disparate penalty? The Union maintains that he was -- that others without this Employee's exemplary record have received much lighter discipline for striking student-inmates.

ADDITIONAL FACTS AND CONTENTIONS

There is no significant factual disagreement. The Union candidly admits that Grievant committed all of the misconduct charged against him. He did slap a student, but under severe exasperation provoked by the youth's disgusting and insulting behavior. According to unrefuted testimony, there was no premeditation or intent to do harm in Grievant's act; it was a spontaneous reaction rather than a deliberate assault.

The Employer furnished some remarkable testimony which, as it turned out, was more favorable than detrimental to the Union's position. The youth whom Grievant struck, no longer a Center inmate, was presented as a witness. His appearance and demeanor were extraordinary. He is an early teen, but as fully developed as an adult. He is physically imposing, already significantly larger than Grievant. His background, or what he told of it, is equally striking. When barely out of childhood, he was sentenced to the Center for theft, breaking and entering, and voluntary homicide.

Grievant's "victim" spoke intelligently and articulately about the incident. Swallowing air and belching had been part of a pre-conceived plan to get himself dismissed from class. He "just didn't feel like being in class that day." Shortly after the period began, he started emitting loud belches. He did it over and over again, ignoring Grievant's directives to stop. Then he quit for a few minutes

and Grievant tried to give him individual help on the math assignment. According to the witness, "[Grievant] came over and tried to teach me to do my work. When he bent over the paper, I did it again [belched] in his face." That is when the hand came up and hit his jaw. It was not a hard blow; the student was not bruised or hurt.

The situation did not end at that point. The student abruptly left the room for a cigarette, and then returned. He was enraged and totally out of control. He trashed the room, overturning Grievant's desk, breaking furniture, scattering books and papers in a wild frenzy. When he finished, he stood squarely in front of the Employee's face, shouting warnings, threats, and obscenities. At the end of his rampage, he left the classroom and Grievant called the office to report the walkout; however, he failed to report his own actions.

A former student-inmate who witnessed the event was also brought into the hearing by the Employer. When asked to describe his reactions, he said: "I had disbelief. [Grievant] was a good teacher." The individual who was struck also thought well of the Employee. He took full responsibility for the occurrence and expressed what appeared to be sincere regret.

The Agency concedes there was provocation, but maintains it did not justify the assault. Grievant is not an ordinary schoolteacher. He works in a highly charged environment. His students are juvenile felons, age twelve to twenty-one. Almost all of them have emotional or physical problems; many suffer both. Acting out, such as Grievant confronted on the day in question, is not unusual; teachers at the Center receive training in verbal strategies and non-violent crisis intervention. All are thoroughly instructed that assaulting students

is strictly prohibited unless physical intervention is needed to control a real and present danger to lives or safety.

There are certain requirements teaching and direct-care employees of the Center must observe. The first time the student left the classroom, Grievant should have notified the Administration. He knew it was his responsibility to do so and his classroom was equipped with an intercom for that purpose. Yet he allowed the student to leave the first time with no report to anyone. Every employee also knows that s/he is required to file a Use of Force Report if involved in or a witness to any force against an inmate. Standing alone, the assault was serious enough. But the Employee compounded it by not notifying the Administration or submitting a Report. His only excuse for that violation was, "I didn't think it was all that serious." Apparently, the Agency disagreed. It believed that Grievant's violations were very serious, and it was only his length of service and commendable record which saved him from much more severe discipline. The Agency's Advocate made this point decisively in his brief:

> THE STATE STIPULATES THAT THESE, AND ALL YOUTH COMMITTED TO THE DEPARTMENT, ARE CONVICTED FELONS. HOWEVER, WHILE THE DEPARTMENT'S PRIMARY MISSION IS THE CONFINEMENT OF SERIOUS JUVENILE OFFENDERS, THE DEPARTMENT IS OBLIGATED TO PROVIDE SAFE, SECURE, HUMANE, AND INDUSTRIOUS ENVIRONMENTS IN EACH OF ITS INSTITUTIONS. STAFF ARE NOT PERMITTED TO ABUSE YOUTH. [GRIEVANT] KNOWS THIS.
>
> . . .
>
> MANAGEMENT WILL SHOW THAT FOR THIS TYPE OF OFFENSE, THE DISCIPLINE IMPOSED WAS CONSIDERED TO BE COMMENSURATE IN THAT MANAGEMENT DID TAKE INTO ACCOUNT THE GRIEVANT'S LENGTH OF SERVICE ALONG WITH NO PRIOR DISCIPLINE IN HIS FILE. AN INCIDENT OF THIS NATURE WITH A SHORT TERM EMPLOYEE COULD WARRANT REMOVAL

> MANAGEMENT WILL NOT CONDONE ABUSE OF THE YOUTH IN ITS CARE, AND WILL TAKE ALL STEPS NECESSARY TO SEE THAT IT DOES NOT HAPPEN.
>
> MANAGEMENT ASKS THAT THE ARBITRATOR DENY THIS GRIEVANCE IN ITS ENTIRETY.

If the Advocate meant to imply that Grievant's penalty was moderate in view of the usual discipline imposed for the offense, the Union unqualifiedly disagrees. It contends that there have been other instances of assault where employees were not penalized at all[1] and some have just been reprimanded. The Union produced a March, 1990 Grievance settlement to prove its point. An employee had been suspended one day for striking a youth at the Center. He attempted to excuse the assault by alleging that he had reacted to what he viewed as a physical threat. Management discounted the excuse stating, ". . . because [the employee] had received training in verbal strategy during crisis, . . . his response should have been different." Nevertheless, the Agency voluntarily reduced the penalty. Its decision stated:

> [The employee] has no former reported incidents, above average employee performance evaluations, no prior disciplinary action and there was no injury to the youth. The discipline was for just cause and will thus stand; however,

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[1] The Union supported its contention that some employees have not been disciplined for assaulting juvenile inmates with only one example. The State argued credibly that the example was inappropriate. The employee escaped discipline solely on a technicality; the Employer had failed to meet requisite time limits.

it will be reduced to a written reprimand, following progressive discipline.[2]

The Union's exhibit posed a pivotal question which the Agency never answered. What was the justification for issuing Grievant a ten-day suspension when another employee, guilty of the same offense, had his one-day suspension reduced just four months earlier. Like the other individual, Grievant had no former reported incidents; he was an above-average employee with outstanding evaluations; his record was discipline free; and there was no injury whatsoever to the victim of his assault. Why should he have been subjected to anything more than a written reprimand? What is the relevant difference between the two cases? The answer, according to the Union, is that there is no answer. The Agency's disciplinary policy lacks rhyme or reason. The Union considers it obvious beyond reasonable debate that Grievant was punished selectively and disparately.

In the Union's judgment, the argument that Grievant's record was considered before the suspension was imposed is self-serving and blatantly untrue. No credible evidence was produced to back it up, and it stands out as a contradiction of established facts. The record demonstrates that Grievant was an outstanding employee, and there exists no plausible rationale for treating him so harshly. The Union concludes that the grievance must be sustained, the discipline expunged, and the Employee compensated for lost wages.

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[2] Grievance settlements of the State Office of Collective Bargaining usually contain boiler plate statements that they shall not be considered as precedent and shall not be presented, cited, or referred to in future disputes. No such language was appended to this settlement and, therefore, it was admissible.

OPINION

A curious aspect of this arbitration was that the witnesses most favorable to Grievant's cause were on Management's side of the arbitration table. For example, the Union claimed disparate treatment but presented scant evidence in support. The single example of the employee whose one-day suspension was reduced to a written reprimand was persuasive, but it was only one case. It was insufficient to prove an Agency custom of leniency towards assaults. But a witness for the Employer made up for what was lacking in the Union's presentation. The Administrator of Mental Health Services testified that DYS has issued "a range of discipline" for similar infractions, "including letters of reprimand, suspensions, and dismissals."

The Administrator's testimony served Grievant in other areas as well. In answer to the determinant question -- why was the Employee suspended -- he said: "We cannot allow staff members to strike children . . . and if it can be substantiated, I would recommend a range of discipline appropriate to the circumstances involved. You have to look at each case; case-by-case." The witness went on to describe the factors he examined in Grievant's case:

1. Degree of violence;
2. Degree of provocation and threat against the teacher;
3. Procedure followed;
4. Length and quality of service.

He ended his testimony by stating his philosophy that discipline should be a corrective tool. He emphasized the point with a rhetorical question: "Why use a cannon when a pea shooter will do the job?"

After twenty years of deciding just-cause disputes, this Arbitrator cannot imagine a more cogent definition than that given by the Administrator. Indeed, while scholarly tomes have been written on the subject, the witness' analogy sums it up thoroughly. Yet the ten-day suspension seems to have been more of a cannon than a pea shooter in Grievant's situation, and one might ask why the Administrator recommended it. The answer is that he did not recommend ten days, he advised issuing a three-day suspension. DYS added seven days as a matter of policy; to serve "the total Agency need and perspective."

The Arbitrator believes that the Department lost sight of just cause and individual mitigating circumstances when it reacted against Grievant's misconduct for Agency-wide purposes. Just cause requires examination of the individual and his/her offense. An employer's need to set an example or validate policy cannot legitimately be accomplished by singling out an employee and penalizing him/her too zealously. Just cause and the principles of progressive discipline do not permit it.

The Arbitrator agrees that Grievant's offense was a serious one which, in most cases, probably authorize discipline under commensurate rather than progressive principles. Moreover, the misconduct at issue was intensified by the reporting violations and the Employee's lack of remorse. These were aggravating circumstances. But there were also powerful mitigating circumstances which compelled moderation.

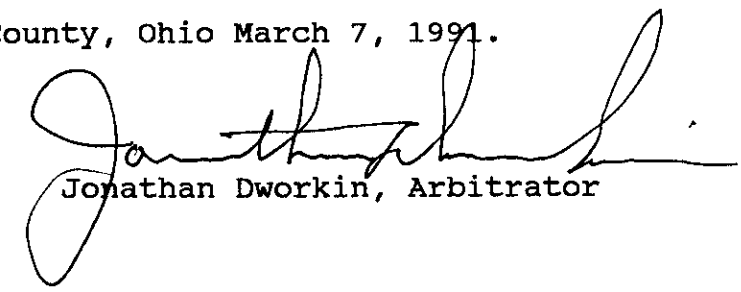
The discipline was overly harsh and, therefore, lacked just cause. The Administrator's recommendation for a three-day suspension was

more on target. Unlike the ultimate DYS determination, it reflected careful and judicious consideration of individual factors, the degree of violence, provocation, lack of actual harm to the person assaulted and, most of all, Grievant's extraordinary service history. If the Arbitrator had been the decision-making manager, he probably would have issued a written reprimand to Grievant, or perhaps a day or two of suspension time to assure a corrective effect. But he has the advantage of hindsight and cannot honestly find that a suspension of three days would have violated just-cause standards. It is clear that any discipline greater than a three-day suspension would have exceeded just-cause limitations. Accordingly, the Arbitrator will accept the original disciplinary recommendation. The suspension will be reduced from ten days to three.

AWARD

The grievance is sustained in part. The ten day suspension imposed on Grievant is reduced to three days. The Employer is directed to amend its records and Grievant's personnel file accordingly, and reimburse the Employee for seven days' lost wages.

Decision Issued at Lorain County, Ohio March 7, 1991.



Jonathan Dworkin, Arbitrator