ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 618

OCB GRIEVANCE NUMBER: 35-08-901212-0025-06-10

GRIEVANT NAME: MURPHY, FRANK

UNION: SCOPE/OEA

DEPARTMENT: YOUTH SERVICES

ARBITRATOR: DWORKIN, JONATHAN

MANAGEMENT ADVOCATE: BRAVERMAN, BARRY

2ND CHAIR: MILLER, SALLY P.

UNION ADVOCATE: STEVENS, HENRY L.

ARBITRATION DATE: FEBRUARY 21, 1991

DECISION DATE: JUNE 18, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: WAS THE 15 DAY SUSPENSION FOR MISTREATING A YOUTH DISPARATE & INCONSISTENT WITH JUST CAUSE?

HOLDING: UNION'S CHARGE THAT GRIEVANT RECEIVED DISPARATE TREATMENT BECAUSE HE IS A UNION STEWARD IS UNFOUNDED. "IT MADE THE NAKED ALLEGATION WITHOUT A SCINTILLA OF SUPPORTING EVIDENCE. GRIEVANT'S STEWARDSHIP IS SIMPLY NOT A FACTOR IN THIS CONTROVERSY." AS TO JUST CAUSE, "HIS TREATMENT OF THE YOUTH WAS NOT ONLY HUMILIATING, IT WAS DANGEROUS. HIS PAST RECORD DID NOT PROVIDE A RESERVOIR OF LENIENCY SUFFICIENT TO ALLOW GRIEVANT TO ESCAPE THAT DISCIPLINE. HIS ACT WAS DIFFERENT FROM THOSE OF OTHERS WHO PREVIOUSLY MISTREATED STUDENTS."

ARB COST: $929.34

JONATHAN DWORKIN

9461 VERMILION ROAD
P. O. BOX 236
AMHERST, OHIO 44001
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June 24, 1991

Tim D. Wagner
Chief, Arbitration Services
Office of Collective Bargaining
16th Floor, 65 East State Street
Columbus, Ohio 43215

Henry L. Stevens
SCOPE UniServ Consultant
Ohio Education Association
5026 Pine Creek Drive

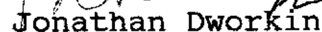
Re: 35-08(90-12-12)0025-06-10
Frank Murphy Suspension

This dispute was heard on February 21, 1991. Please recall that one of the issues concerned the relevancy of testimony provided by SCOPE President, Carrie Smolik. I imagine that the reason had something to do with the manner in which she would be paid for her attendance.

In any event, I ruled verbally during the hearing that her testimony was relevant and necessary on the issue of timeliness. Subsequently, the State withdrew its objection to procedural arbitrability, but that question was very much an issue when Ms. Smolik testified.

If either of you has additional questions or requests in this regard, please contact me and I will be glad to oblige.

Sincerely,



Jonathan Dworkin

OCB-SCOPE VOLUNTARY GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

#618

In The Matter of Arbitration Between:	*	
THE STATE OF OHIO Department of Youth Services Training Institute of Central Ohio	*	
	*	Case No 35-08-(90-12-12)0025-06-10
-and-	*	
STATE COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA, UniServ State Unit 10	*	Decision Issued: June 18, 1991

APPEARANCES

FOR THE STATE

Barry Braverman	Labor Relations Officer
Sally Miller	OCB Representative
Rodney Sampson	Ass't Chief of Arbitration
Bradley Rahr	Labor Relations Officer
Deneen D. Donaugh	Labor Relations Adm'r.

FOR THE ASSOCIATION

Henry L. Stevens	SCOPE Staff Representative
Carrie Smolik	SCOPE President
Frank Murphy	Grievant

ISSUE: Article 13, Progressive Discipline: Claim that fifteen-day suspension for mistreating a youth in State custody was disparate and inconsistent with just cause.

Jonathan Dworkin, Arbitrator
PO Box 236, 9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

This is a discipline case. Grievant, a Teacher of social studies and high-school equivalency courses for the Ohio Department of Youth Services (DYS), was suspended fifteen days for alleged misconduct in disciplining a youth in one of his classes.

Grievant has been an employee of DYS since October, 1987. He is classified Teacher 3, and assigned to the Training Institution of Central Ohio (TICO). His students, as well as all other "inmates" of TICO, are teen-aged boys (up to twenty-one years old) -- adjudged felons who have been committed to the custody of DYS by Ohio juvenile courts. As a Teacher, Grievant is charged with multiple duties; in addition to instructional obligations, he shares the Institution's responsibility for maintaining a safe, secure, healthful environment for its youthful "convicts."

The incident leading to the discipline took place during the school day on October 25, 1990. Just before the period began, Grievant had to stop two fights in the hallway. He was in no mood for disobedience, which was exactly what he encountered when class started. One of his students, a one hundred sixty-five pound "boy" who had been committed to TICO for burglary, began acting out, obstreperously refusing to comply with directives. After he answered "No" to Grievant's instructions twice, the Employee walked over to the desk-chair combination where the student was seated and flipped it backwards with his left hand. The student fell to the floor; he was not injured because he caught himself with his hands. Then he extricated himself from beneath the desk, cursed Grievant, and stormed out of the class-

room. Later he filed an internal complaint. It was administratively investigated and the fifteen-day suspension was the outcome.

The discipline was premised on the allegation that Grievant violated two explicit DYS regulations. In July, 1985, the Department issued a five-page document entitled, "General Work Rules."[1] It stated in pertinent part:

B. Policy

1. The Department of Youth Services shall establish uniform, written work rules regarding subjects which have general applicability for all employees regardless of their location or affiliation. The unauthorized activities contained herein shall not be considered as all inclusive, but are intended to be representative examples of activities which warrant immediate corrective action. * * * Violation of this Directive and other Department of Youth Services directives as well as those directives developed by each Managing Officer shall constitute cause for corrective action, up to and including removal depending on the gravity of the situation.

2. The work rules set forth in this Directive shall apply equally to all employees of the Department of Youth Services whether or not they are affiliated with an employee or professional organization, and regardless of their position.

3. It is the desire of the Director of the Department of Youth Services to protect the rights of all Departmental employees, while at the same

[1] The Work Rules were issued approximately one year before the parties adopted their first Collective Bargaining Agreement. They remain in effect today, but their enforceability may be tempered by the Agreement. There is no question but that the Agreement takes precedence in areas where it conflicts with departmental regulations. Regardless of their pre-contract status, once the Agreement was in place, the Rules became nothing more than unilateral statements of Management's expectations of its employees.

time not unduly restricting generally accepted rights of any individual employee. Where possible, employees should be placed on notice, in writing and in advance of any alleged violation of conduct expected of them by their employer and by their fellow workers.

IV. PROCEDURE

A. Employees participating in the following activities shall be considered to be in violation of the Department of Youth Services work rules:

1. 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.[2]

In the Employer's judgment, Grievant violated both portions of Rule 1. He physically mistreated a youth entrusted to the Department's (and his) care, and afterwards, cavalierly failed to report his use of force. It is the Employer's conclusion that he richly deserved the fifteen days off -- the suspension was regarded as lenient compared to the severity of his misconduct.

While the Union challenged the discipline on a number of grounds, the overriding questions presented to arbitration are whether or not the Employer's action met contractual provisions which restrict Management's disciplinary authority. As a member of the Bargaining Unit represented by the State Council of Professional Educators (SCOPE), Grievant was entitled to a number of negotiated job protections. Among them were guarantees that discipline would be corrective, progressive, commensurate with an offense, and for just cause. Article 13 of the Agreement provides in relevant part:

[2] Emphasis added.

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.

The grievance protesting the suspension was submitted to the contractual procedures for dispute adjustment and appealed to arbitration. It was heard in Columbus, Ohio on February 21, 1991. The parties agreed that the controversy was arbitrable, and the Arbitrator was authorized to issue a conclusive award on its merits.[3]

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[3] Initially, the Employer challenged arbitrability, contending that Scope's appeal from Level 3 was untimely. Subsequently, on March 5, 1991, the State's Assistant Chief of Arbitration Services withdrew that position. His letter to the Arbitrator stated:

> In the matter of the above cited case heard before you on February 21, 1991 between OEA/SCOPE and the State of Ohio, Department of Youth Services, the parties agree to withdraw the issue of timeliness.

THE EMPLOYER'S POSITION

The State points out that the disciplinary decision was thoroughly reviewed by several levels of Supervision and Management before it was finalized. All procedural safeguards were observed. A pre-disciplinary hearing was conducted in full compliance with the Agreement. Grievant and his SCOPE representatives were accorded ample opportunity to be heard -- "to present the employee's side of the story."[4] Indeed, the Agency's stance in the hearing was balanced. It condemned the misconduct, not the Employee. The Institution's School Principal, a supervisory employee, praised Grievant as a "highly rated teacher and an asset to TICO." The State never tried to dilute that testimony; to the contrary, it continues to agree with SCOPE's characterization of Grievant as a well regarded Employee, but he is also an Employee who committed a drastic and intolerable breach of conduct regulations.

The student in question was called as an Agency witness. His testimony was candid and plausible. He stated that before this incident, he had a good relationship with Grievant. He was accustomed to joking with his Teacher, but ordinarily complied when told to stop. He admitted that, on the day in question he refused an instruction. But he was not deliberately insolent; he said "no" in the context of the customary banter -- the joking he and Grievant had so often enjoyed in the past. He was unaware of Grievant's mood. He did not

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[4] Article 13, Section 13.03.

know the directive was earnest and was shocked to suddenly find himself on his back beneath his overturned desk.

Whatever affinity existed between Grievant and the student evaporated at that moment. The boy initiated an internal grievance against the Employee and sent it to the TICO Superintendent. It precipitated an investigation which concluded with the suspension.

The State readily concedes that just cause prohibited hasty discipline of Grievant's misconduct without regard to mitigation, and there was mitigation: the Employee's excellent record; the student's repeated defiance which demanded action to preserve classroom control; the understandable frustration from having to break up two fights just minutes earlier. The Employer maintains that all these factors were considered, and the result was more lenient discipline than otherwise might have been imposed. It urges the Arbitrator not to underestimate the seriousness of Grievant's misconduct. His assault on the student was reckless; its ramifications could have been tragic.

Admittedly, Grievant's teaching environment was imperfect. His pupils were not models of good behavior -- they were convicts, and their school was in a prison. But the Employee was fully trained to cope with the situation. He was not some novice who had been thrust unprepared into a classroom of felons; he had received ample instruction in verbal intervention strategies. He understood how to deal appropriately with students who misbehaved or acted out. And he was aware that physical assaults were strictly forbidden unless necessary to protect life. He knew the rule; he had been trained to follow it.

The State views SCOPE's position in this controversy as an attack on its fundamental right to impose reasonable discipline. One of

the Union's arguments is that Grievant was treated disparately because he received more extreme discipline than three other members of the Bargaining Unit charged with similar rule violations. A Teacher slapped a youth yet received no formal discipline. Another backhanded a student across the jaw. He was issued a ten-day suspension, later reduced to three days by an arbitrator. The third received a ten-day suspension for intentionally slapping a student who did no more than ask annoying questions. The State acknowledges these discrepancies, but argues that they do not support a charge of disparate treatment. The individual who slapped a boy escaped penalty because of a supervisory error -- time limits were missed. With regard to the other two, neither their backgrounds nor misconduct were like this Employee's. Unlike the assault committed by Grievant, none of the others had the potential for serious disabling injury.

The Agency believes that just cause does not require discipline to be tied entirely to an offense. It does not sanction mechanical responses without regard to the background of the employee or the individual circumstances of the misconduct. It contends that it has wide discretion to impose a range of penalties for a rule violation, and is not regulated to exact, mathematical predictability. In sum, the Agency contends that Management responded properly to the combination of the misconduct and the Employee who committed it, and it implores the Arbitrator not to second-guess the decision.

THE ASSOCIATION'S POSITION

While SCOPE recognizes that discipline for an offense need not be precisely the same in every case, it contends there must be at

least a semblance of regularity. Employees are entitled to know the penalty or the range of penalties for a class of misconduct. According to the Association, Management's treatment of Grievant compared to the way it treated others demonstrates unreasonable and unreasoned unevenness. To date, there have been four alleged violations of the rule which prohibits Teachers from physically striking students. Two employees were issued ten-day suspensions; one received no discipline at all; and now, without an apparent distinction, a fifteen-workday (three-week) suspension has been imposed on Grievant. The Association, through testimony of the SCOPE President, demands that the Employer answer the question: What is the penalty for this violation?

In asking the question, the Association does not mean to imply that everyone who strikes a youth should receive pre-determined discipline. Of course the Employer must weigh the quality of the offense, the degree of provocation, and the work history of the Teacher. Considering all those factors, however, it appears to SCOPE that there was no logically defensible reason for treating Grievant differently. The Employee had an excellent record, not just an average one. In 1990, the staff <u>and TICO students</u> nominated him as Teacher of the Year, and he represented the Institution in that capacity. It bears repeating, according to the Association, that the Principal stepped forward in a disciplinary meeting and testified on behalf of Grievant; he spoke of him as "highly rated," and "an asset to TICO." Certainly this was not an individual whose record demanded more forceful corrective discipline than that imposed on others for the same or similar misconduct.

SCOPE maintains that the violation itself, aside from any mitigating factors, did not justify such unusually harsh treatment. The Employee testified that he did not mean to harm the student; he had no malice, disrespect or anger towards him. Admittedly he was "probably a little hot,"[5] but he did not lose his temper. All he did was, "try to get the kid's attention."[6] According to Grievant's testimony and the Association's arguments, it is likely that an accident happened. Grievant maintains that he lightly flipped the chair-desk with his left hand, and did not use anywhere near the amount of force which would have been required to overturn the one-hundred-sixty-five pound youth. The Employee was a surprised as the student when the desk turned over.

To illustrate its point that the discipline was too harsh, the Association introduced a recent decision by Arbitrator Samuel S. Perry involving an assault on a student by a Librarian at Cuyahoga Hills Boys School (an Agency of DYS). The issue was whether or not a ten-day suspension was commensurate with just cause. The Librarian slapped a student for "pestering," he had no other provocation. Moreover, it was his second serious violation of Agency rules. Arbitrator Perry performed an exhaustive examination of just cause, referring to standards promulgated by the American Arbitration Association. He found the suspension conformed with each standard and he declined to second-guess the Employer's judgment. He ruled:

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[5] Grievant's testimony.

[6] Grievant's testimony.

> The Employer has stated that it considers abuse or physical mistreatment of a youth as a serious offense which requires the Department to take strict measures to ensure that the employee understand[s] that such behavior will not and cannot be tolerated. The Employer has established that a ten (10) day suspension is required for mistreatment of a youth by an employee. This Arbitrator cannot, then, substitute his judgment for that of the Employer and change the number of days the Employer has determined is appropriate for such offense. It is the opinion of this Arbitrator, therefore, that the Employer had just cause to suspend the Grievant for ten (10) days when he struck a youth who was "pestering" him in the library at the Cuyahoga Hills Boys School. The grievance must be denied.[7]

The Association calls attention to the Perry decision for a critical reason. It was there established, as an arbitral ruling, that a ten-day suspension was appropriate discipline, established by the Employer, for mistreating a youth in the custody of the State. At least it was confirmed as appropriate for a second offense. If that is so, SCOPE asks how the Agency can possibly justify imposing a fifteen-day suspension for an individual with a superb employment record.

The Association suggests that the answer to its question may lie in the fact that Grievant has been an active participant in SCOPE activities and serves as the TICO Site Representative (Steward). It charges that the unreasonable discipline is designed to harass and punish him for activities unrelated to misconduct.

Regarding the charge that Grievant failed to file a report on his use of force, the Association asserts the following defenses:

1. "Force" is a relative term, and the question of whether or not "use of force" took place in a particular situation

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[7] Case No. 35-03(90 10 16)0078-06-10, page 37. Emphasis added.

is a matter of individual judgment. Grievant honestly believed an accident occurred and that he did not use excessive force. It follows that he was not required to file anything.

2. There is no stated rule requiring use-of-force reports to be in writing.

3. Anything Grievant might have filed would have been redundant. After the occurrence, the student was removed from the classroom by an Administrator. TICO Supervision was fully aware of what had happened.

In conclusion, the Association maintains that there was no just cause for disciplining Grievant outside the progressive levels in Article 13, Section 13.04 of the Agreement. He did not intentionally harm the student. If he did commit misconduct warranting discipline (an assumption the Association rejects), the penalty should not have been more than a verbal reprimand -- the first stage of progressive discipline.

OPINION

An allegation that discipline has been imposed as punishment against an employee for assertively representing his/her union is a grave charge, calling for the most careful arbitral scrutiny. It is not something to be lightly dismissed. It is also not something to be thrown into the evidence and arguments of a case solely for tactical purposes, without substantial proof. It appears that the Association did just that in this dispute -- it made the naked allegation without a scintilla of supporting evidence. It is true

that Grievant's service as a SCOPE officer does not render him amenable to ruthless, punitive discipline. It also does not insulate him against justifiable discipline. If he committed an offense warranting a fifteen-day suspension, the penalty will not be disturbed. If the discipline was unreasonable, arbitrary, discriminatory, or otherwise inconsistent with just cause, it will be modified or overturned. The Arbitrator finds that Grievant's Association stewardship is simply not a factor in this controversy. It will be disregarded.

The Arbitrator is knowledgeable concerning some of the facts behind the Association's claim of disparate treatment. One of the employees disciplined for striking a student challenged his penalty in arbitration, and the case was heard by this Arbitrator.[8] The employee had an even better record than Grievant's -- twenty-three years of spotless service. As he bent over a youth, trying to help him with his work, the boy contemptuously belched in his face. Reflexively, he slapped a student with the back of his hand. The Administrator who handled the matter at the Agency level recommended a three-day suspension, but DYS increased it to ten days for "total agency need and perspective." The Arbitrator found that the penalty was too severe and the reason impermissible under just-cause principles. He ordered the suspension reduced to three days, ruling:

> 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

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[8] Case No 35-16-(90-08-07)0051-06-10; Decision issued March 7, 1991.

> 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.[9]
>
> . . .
>
> 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.[10]

Awards such as the foregoing are legitimate only when the evidence clearly confirms that an adverse action against an employee was significantly greater than allowed by just-cause principles and other contractual restraints on an employer's prerogatives. They must never flow from an arbitrator's individual sense of fairness, mercy, or sympathy. As the Perry decision indicated, Management has the initial right to determine the penalty for an offense, and an arbitrator should not intervene so long as discipline does not stand out as patently unreasonable, arbitrary, capricious, or discriminatory. An apt statement of this precept is contained in a private-sector decision submitted by the Employer. In Trans World Airlines, Inc., 41 LA 142 (1963), Arbitrator Marion Beatty held:

> Under the generally accepted rule, if management's original decision in the matter was not arbitrary, capri-

[9] Id., 12

[10] Id., 12-13.

> cious or unreasonable, or based on mistake of fact, its decision should stand. Furthermore, the boundaries of reasonableness should not be so narrowly drawn that management's judgment must coincide exactly with the arbitrator's judgment. If the penalty imposed is within the bounds of what the arbitrator can accept as a range of reasonableness, it should not be disturbed.[11]

The Arbitrator agrees with the Beatty statement; it expresses the orthodox view of the limitations of arbitral authority under just cause. It should be carefully observed, however, that the model does not provide employers a blank check to impose discipline at will. It carefully circumscribes Management Rights in this area, permitting arbitrators to weigh them against concepts of reasonableness. **The words "reasonable, "arbitrary" and "capricious" have been used so many times by so many decision writers that they have become hackneyed; but they still have critical definition. All three mean approximately the same thing. Each is a shading of the word, "reasonable." An action is reasonable if it is well founded, sensible, and grounded on supporting reason.**

In the Arbitrator's judgment, the doctrine of reasonableness is pivotal in this dispute. It is inextricable from the fundamental issue to be decided. The fact that Grievant was disciplined more severely than others who violated the same work rule is not disputed. Others were issued ten-day suspensions, and one of those was reduced to three days in arbitration. Only Grievant was singled out for a fifteen-day suspension. Standing alone, that fact does not establish a violation of just cause. But it does place an evidentiary burden

[11] 41 LA 142, 144.

on the Employer -- a responsibility to prove that the greater penalty imposed in this case was supported by acceptable rationale. It is not sufficient for the Agency to contend that it had a range of potential discipline at its disposal and had a right to select any penalty within that range. The argument is mistaken. The precepts of just cause required that Grievant be treated no worse than others unless there was a sound, rationally defensible basis for treating him differently. In short, it was up to the Employer to answer why it imposed a fifteen-day suspension on Grievant, and the answer had to comport with just cause. Otherwise, the Agency could not expect to prevail in arbitration.

The Arbitrator does not mean to imply that every violation of a rule requires the same penalty. To the contrary, it would have been almost impossible to justify an award overturning the first ten-day suspension for mistreating youths in custody. The State has maintained in every case that the offense is far too serious for discipline under the progressive policy in Section 13.04 of the Agreement -- that it demands a "commensurate" penalty. Arbitrator Perry, who heard that first case, correctly held:

> [T]he determination of the penalty for misconduct is a function of management and . . . an arbitrator should hesitate to substitute his judgment and discretion for that of Management.[12]

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[12] Perry Decision, op. cit.; citing Elkouri and Elkouri, How Arbitration Works (4th Ed.).

It is clear that the Agency had the broadest range of disciplinary discretion the first time it responded to a violation of the rule against mistreating youths. No pattern had been set, and the comparative seriousness of the offense was largely a matter for Management's determination. But the range necessarily contracted after the first incident; and when the Employer issued a ten-day suspension to a second employee with a perfect twenty-three-year record, it set a kind of bench mark. It implicitly acknowledged its accord with the Perry statement, "The Employer has established that a ten (10) day suspension is required for mistreatment of a youth by an employee." Thereafter, a penalty greater than ten days had to be justified by the Agency with an explanation of the aggravating factors which impelled it to treat one employee differently than another.

Sometimes aggravating factors are so apparent that proof is not needed. That is not the case here. While it is true that Grievant had prior discipline on his record, so did the Librarian who violated the rule and received a ten-day suspension.[13] Certainly Grievant's otherwise commendable employment history did not support markedly severe discipline.

The Employer's answer to the question of why Grievant's suspension was fifty percent longer than any others imposed to date for the rule violation is that his misconduct was that much more serious. He did not just slap and thereby demean a student, he overturned the chair

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[13] Grievant violated the rule against smoking in unauthorized areas. The other employee's previous infraction was a Rule IV A 9 violation. The Rule prohibits:

> Being away from assigned work area without prior permission and/or authorization from the supervisor. Being inattentive to duties and/or interfering with work of others.

in which the student was sitting. His treatment of the youth was not only humiliating, it was dangerous. If the victim had not fortuitously caught himself with his hands, he might well have suffered life-long injury. The Employer's Step 3 response to the grievance makes the point:

> The union stated that the discipline received is punitive and not corrective. The Grievant deserved an oral or written reprimand; he would have accepted a one-day suspension.
>
> Management had just cause to discipline the Grievant and, <u>based on the seriousness of the incident</u>, the discipline he received was elevated through the progressive discipline principles to be commensurate with the offense. Teachers are trained on the appropriate procedures for handling youth who are causing problems in the classroom. Flipping a youth over in his desk is clearly an inappropriate method of dealing with a youth who is acting out . . . [Emphasis added.]

SCOPE argues that Grievant's conduct was not willful or unconscionable as the State contends. It regards the occurrence as an accident. The Employee grasped the chair-desk with his left hand (he is right-handed) and flipped it without exerting any extraordinary physical effort. He never imagined that his innocuous, attention-getting action would overturn a desk, chair, and one-hundred-sixty-five pound youth. Although Grievant was agitated when he entered the classroom, he had no animosity towards the student -- not at any time. He was trying to capture his attention, not hurt him. According to SCOPE, the State's implicit charge that he acted with premeditated malice is totally at odds with his reputation as a Teacher who liked and

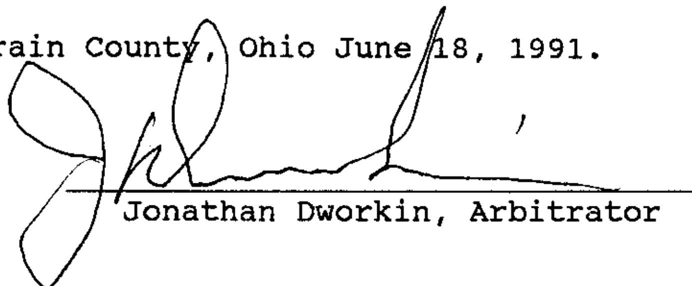
interacted positively with students -- whom students nominated Teacher of the Year.

While the Association's arguments are provocative, they do not correspond with the clearest fact of all -- Grievant did overturn the desk and the student. The Arbitrator is not a physicist; he does not understand laws of gravity and leverage. He does not know how Grievant threw the youth to the floor with his left hand. All the evidence proves is that, somehow, he did it. Whatever strength he exerted was sufficient. As the State contends, the result was more serious and potentially more damaging than the slaps administered by other Teachers disciplined under the rule. The incident also makes a statement about the Employee which is not apparent in his five-year work history; because what happened was either the result of his ungoverned anger or his cavalier irresponsibility. In either event, it called for discipline matching the misconduct. The past record did not provide a reservoir of leniency sufficient to allow Grievant to escape that discipline. His act was different from those of others who previously mistreated students. The Employer had contractual authority to impose a penalty likely to correct the misconduct and one commensurate with the offense. The Arbitrator does not find that the fifteen-day suspension exceeded just cause or the Employer's discretion. The grievance will be denied.

AWARD

The grievance is denied.

Decision issued at Lorain County, Ohio June 18, 1991.



Jonathan Dworkin, Arbitrator