ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 625

OCB GRIEVANCE NUMBER: 31-10-910108-0002-01-06

GRIEVANT NAME: WING, HARLEY L.

UNION: OCSEA/AFSCME LOCAL 11

DEPARTMENT: TRANSPORTATION

ARBITRATOR: DWORKIN, JONATHAN

MANAGEMENT ADVOCATE: TORNES, JOHN

2ND CHAIR: WAGNER, TIM

UNION ADVOCATE: TEMPLE, MICHAEL

ARBITRATION DATE: MAY 8, 1991

DECISION DATE: JUNE 28, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR HITTING A CO-WORKER WITH A SHOVEL

HOLDING: EVEN THOUGH THE PRE-D HEARING WAS LESS THAN ENTIRELY FAIR, IT DOES NOT NULLIFY THE DISCIPLINE. THE LACK OF INVESTIGATION IN THIS CASE INVITES THE ARBITRATOR TO WEIGH THE EVIDENCE AND DETERMINE IF REMOVAL WAS FOR JUST CAUSE. "THE ARBITRATOR DOES NOT FIND, HOWEVER, THAT GRIEVANT ACTED IN SELF-DEFENSE OR THAT STRIKING THE FOREMAN 3 TIMES WAS MARGINALLY PERMISSIBLE. SOME VIOLATIONS ARE SO VIOLENT ....AS TO WARRANT ENDING EMPLOYMENT REGARDLESS OF INDIVIDUAL'S SENIORITY OR WORK HISTORY."

ARB COST: $885.59

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
SUMMARY ARBITRATION OPINION AND AWARD

#625

In The Matter of Arbitration Between:	*	
THE STATE OF OHIO Department of Transportation Hocking County District	*	
-and-	*	Case No 31-10(91.01.08)0002-01-06
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, OSCEA/AFSCME Local Union 11, State Unit 3	*	Decision Issued: June 28, 1991

APPEARANCES

FOR THE STATE

John Tornes	Chief Advocate
Jim Wagner	State Representative
Henry Hunter	ODOT Representative
Frank Perry	ODOT County Superintendent
William Fisher	Working "Foreman"
Ralph Chilcote	Witness
Michael Ricketts	Witness
George Boggs	Witness

FOR THE UNION

Michael Temple	OCSEA Staff Representative
Richard Sycks	OCSEA Staff Representative
Dan Brooks	Steward
Harley L. Wing	Grievant

ISSUE: Article 24: Whether or not there was just cause for discharging an Employee who repeatedly struck a co-worker with a shovel.

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

This is a discharge controversy. Grievant, a fourteen-year Employee of the Ohio Department of Transportation (ODOT) was discharged for hitting a co-worker with a shovel.

Grievant was a Highway Maintenance Worker 3. On December 12, 1990, he and his crew were assigned to repair berm in a sector of Route 180 in Hocking County, Ohio. Several vehicles were involved in the project; Grievant drove a truck to the site, transporting a load of aggregate stone. The confrontation took place shortly after the vehicles arrived at the job and before work began.

Although the evidence is in significant dispute, the fact that Grievant hit a Working Foreman with a long-handle shovel is uncontroverted. The term, "Foreman," is an anachronism carried over from the time before collective bargaining drew boundaries between Unit members and Supervision. The Foreman was not really a member of Supervision. He was a Highway Maintenance Worker 4 and had only rudimentary authority to direct his fellow employees. He was the highest ranking individual in the crew; his functions included assigning jobs and assuring their proper performance. A more apt title for his job would have been, "Lead Person."[1]

According to testimony, the Foreman and Grievant never worked well together. There was constant squabbling between them, although it never came to blows until December 12. There is also

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[1] For simplicity, the Highway Maintenance Worker 4 will continue to be referred to as, "the Foreman" throughout this decision.

evidence (challenged by the Employer) that it was the Foreman who made the first physical contact and escalated the otherwise routine argument; he started it and Grievant finished it. The Union relies strongly upon this evidence. It contends that the Foreman, as the original aggressor, was the most to blame and should have received the greater discipline. Yet his penalty was only a three-day suspension while Grievant's was removal. The Union also alleges that Grievant acted solely in self-defense or, alternatively, that his conduct was not amenable to harsh discipline because it was severely provoked.

The Union's arguments invoke the contractual guidelines for a decision. The Agreement between the State and OCSEA Local 11 places strict limitations on Management's disciplinary authority. It mandates that no Employee shall be disciplined without just cause, any discipline imposed shall be progressive and, if not progressive, at least commensurate with the offense. The Agreement also requires that penalties be administered to correct rather than punish an Employee. It states in pertinent part:

ARTICLE 24 - DISCIPLINE

§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. * * *

§24.02 - Progressive Discipline

> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:
>
> A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
>
> B. One or more written reprimand(s);
>
> C. One or more suspension(s);
>
> D. Termination
>
> **§24.05 - Imposition of Discipline**
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> . . .
>
> Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The dispute proceeded through the Steps of the contractual grievance procedure and the Union appealed to arbitration. A hearing was convened in Columbus, Ohio, on May 8, 1991. At the outset, the Representatives of the parties agreed the matter was arbitrable and the Arbitrator had authority to issue a conclusive award on its merits. It is to be observed that arbitral discretion is more specifically defined and limited by the following language in Article 25, §25.03 of the Agreement:

> 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.

ADDITIONAL FACTS AND CONTENTIONS

Grievant's account of the incident hopelessly clashes with the Foreman's. He states that the shovel wasn't picked up until after the Foreman bumped and punched him repeatedly and was warned to stop or there would be retaliation. The Foreman, on the other hand, states that he was entirely innocent and was hit from behind after giving Grievant a legitimate instruction. Likewise, the testimony of eyewitnesses conflicts. Each member of the crew gave a written statement to Supervision on December 12, 1990, and testified in the arbitration on May 8, 1991. In most instances, the written statements and testimonies did not match in pivotal areas. The one fact all witnesses agreed upon was that both Grievant and the Foreman were mercurial, confrontational, and bad-tempered.

The argument actually began before the combatants came together. The truck Grievant drove was part of a small convoy of work vehicles dispatched to the job site. The route took Grievant past his own property. When he arrived at mile marker 6, in front of his land, he dumped approximately two wheelbarrows of slag onto a low spot in the berm. That spot was scheduled for repair, but not on that day. The Foreman, sitting in a pickup truck already parked at the site, saw what Grievant did and decided to reprimand

him. At this juncture, the stories split into disparate directions. The following excerpt is taken from the Foreman's written statement:

> I am a crew leader 4. We was berming on SR 180 South. We had bermed by his [Grievant's] residence on Monday 12-10-90 and returned to finish berming operation on Wednesday 12-12-90. Me & [a crew member] had put out work signs and went up passed (sic) [Grievant's] residence to turn around and seen [Grievant] dumping stone in his driveway off State right-of-way. [Grievant] pulled 2 or 3 truck lengths behind me as I had gotten out of my pickup and was standing behind it, had words with [Grievant] as to why he dumped the gravel in his driveway and he said you son-of-a-bitch you will fix it. And I said not unless I'm told to do it. And started to my pickup and he [Grievant] hit me 3 times with shovel, round point and [another crew member] took the shovel away from [Grievant].

The variance in Grievant's statement is apparent:

> We were getting ready to berm on SR 180. Some of the crew was at the job site and some of us were still coming in. I was in the next to last truck in line, with a load of gravel on. I was by myself in the truck. I stopped about the 6 mile marker on the northwest berm and put some gravel in a low place. About 2 wheelbarrow loads or so. I next proceeded to the job site. I pulled off the roadway onto the left berm behind [the] dump truck. I got out and walked up to [the Foreman's] truck to see what we were going to do at the site. I stopped about half way up the side of [the Foreman's] truck. [The Foreman] was already out of his truck. When I walked up [the Foreman] said "If I had wanted gravel in that hole I would have put it there." I told him I put about 2 wheelbarrow loads in the hole.

> [The Foreman] again said that if he wanted any gravel in the hole he would have put it in there himself. I was leaning over against the pickup and told [the Foreman] that the berm was low back there and it [had] to be fixed sometime. He then told me at this point that he was running it and he would fix it if he wanted to and wouldn't if he didn't want to. He then started walking towards me and shoved me back with his chest and belly. I told him then to quit shoving me and leave me alone. He then told me he would continue to harass me as long as I was here. He again pushed me back, about 2 or 3 times along side the truck as I was walking backwards. When we got against the rear of the pickup [the Foreman] then took a swing at me with his fist. I think it was the left hand. I ducked and his fist brushed against the right side of my face (cheek) and shoulder. He swung more than once.
>
> I reached in the back of the pickup and grabbed the shovel I saw.
>
> I swatted at [the Foreman] two or three times with the shovel. When I first swung at him he threw up his arm and I don't know whether I struck him in the arm or head.
>
> [A crew member] told me to stop. I quit and threw the shovel back in the truck and went back to my truck.

The statements of the other employee-witnesses were variations of these two. No one except Grievant saw the Foreman throw a punch, but none was in a position to see it. The Arbitrator is inclined to believe Grievant's testimony. To put it bluntly, the Foreman was not believable and the Arbitrator is of the opinion that his assertions were not completely truthful.

Supervision initially believed the Foreman, and the only discipline imposed was Grievant's discharge. After the Agency investigated further, it found out that the Foreman was a participant and perhaps the aggressor. It sent him a notice advising that he was a candidate for discipline and was scheduled for a pre-disciplinary hearing. Attached to the notice was a three-day-suspension letter. This is a tact of ODOT designed to avoid the time and expense of grievances and arbitrations. It gave the Foreman an option to accept the three days and end the matter or proceed to a pre-disciplinary hearing and through the grievance levels. It was a gamble. If he did not consent to the suspension, he took a chance of receiving a greater penalty -- perhaps discharge. The Foreman accepted the three days.

Having reviewed the testimony and statements in depth, the Arbitrator finds that the most logical sequence of events is as follows: After observing Grievant dump the aggregate, the Foreman turned to the other employees seated in the pickup truck and said in a conspiratorial manner, "Watch me piss old Harley off." He left the truck and waited for Grievant. When the Employee arrived, the Foreman (a large, stout individual) remonstrated about dumping the aggregate before arriving at the work site. Grievant responded angrily and, as the interchange became heated, the Foreman bellied Grievant to the back of the pickup. "Belly," was used by witnesses as a verb. It means bumping and shoving repeatedly with a stomach. Grievant warned the Foreman to stop, but to no avail. After he was bellied the full length of the truck, he spotted the long-handle

shovel. At the same instant, the Foreman took a swing with his fist. Grievant ducked. The blow missed, slightly grazing his cheek. As he slid under the punch, Employee grabbed the shovel and hit the Foreman. By the third blow, the Foreman had retreated and was lying on his back in a vehicle known as a "two-seater," his arm up to protect his head. He was vulnerable, practically defenseless. He had already been struck twice in the head and once on the back.[2] Grievant raised the shovel to strike again, when a co-worker stepped in, grabbing the shovel and shouting, "You're going to kill him."

The Foreman then radioed the garage for permission to go to a hospital emergency room. Permission was granted. Surprisingly, the injuries were not serious. The reason is unclear; the evidence indicates that Grievant did not hold back. One of the witnesses stated that he could tell by the sounds that the clouts were hard. The Foreman maintains that he sustained serious injuries, including bleeding kidneys, cuts, bruises, and permanent hearing loss. The emergency room record (the emergency room was the only place the Foreman received treatment) identified no internal injuries -- no bleeding kidneys. It did mention a complaint of "a fullness in the right ear," but stated "no detectible decrease in auditory acuity" was observed. In the Arbitrator's judgement, the Foreman's claims of injuries were as stilted and self-serving as his account of the incident. The shovel caused him harm and discomfort, but nothing

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[2] The location of a bump on the Foreman's head indicates at least one of the blows was struck from behind.

more than temporary contusions and abrasions of his head, face, and right forearm.

The Union urges that Grievant's discharge was a travesty, at odds with just cause. In support of this position, it submitted a volume of past arbitral decisions in both public- and private-sector disputes. The submissions affirmed a common trend in arbitral thinking regarding cases of this kind. As in any arbitration involving just cause, mitigating factors must be considered to assess the propriety of a penalty. Three of the most prominent factors when it comes to fights between employees are non-aggression, provocation, and self-defense. The Union's opening statement appropriately summarizes the generally accepted principles. Quoting from a decision by Arbitrator Raymond R. Roberts,[3] it argues for application of the following precepts:

> 1. An employee may be an innocent and injured victim of an unprovoked assault and not, himself, engage in aggression or hostility. In such a case, the victimized employee has engaged in no wrongful conduct and must be regarded as innocent.
>
> 2. Self Defense. When an employee engages in only as much hostile conduct as is reasonably necessary to defend himself from aggression and uses no more force than is reasonably necessary for that purpose, he will generally be found not guilty of fighting or assault. This is a defense of justification which is a complete defense.
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> 3. Provocation. When an employee is the victim of provocation which is foreseeable to provoke an ordinarily rea-

[3] Alvey, Inc., 74 La 835, 838 (1980).

> sonable person to a heat of rage and aggression, the conduct of that employee may be excused (as opposed to justified) either partially so as to mitigate against the full degree of penalty, or completely, so as to mitigate against any penalty whatsoever.

The Union urges that the removal was a gross miscarriage of justice and of just cause under the circumstances. Grievant was not the aggressor; he responded to aggression. He was assaulted and needed to defend himself. He acted in the face of intolerable provocation. Moreover, the Union points out that the Foreman -- the one who started it all -- received only a three-day suspension. It argues that his misconduct, not Grievant's merited the more severe discipline.

The Union concludes that Grievant was victimized twice: by the Foreman's assault and the Employer's disparate treatment. It demands that this fourteen-year Employee be reinstated with full restoration of wages and benefits.

The Employer urges the Arbitrator not to substitute his judgement for Management's. Whether provoked or not, Grievant's act far exceeded anything that might be excused under Arbitrator Robert's doctrine. The claim that the Employee acted in self-defense is an absurdity according to the State. It is evident that at least one of the shovel blows was struck from behind. How can Grievant say he was defending himself when his adversary was retreating?

The State's position is straight forward and uncomplicated. It maintains that Grievant committed misconduct so heinous and unconscionable as to cancel his own employment. The discharge

merely confirmed what Grievant had already done. The State asks the Arbitrator to uphold the ODOT decision and deny the grievance.

OPINION

The Union challenges the removal on procedural as well as substantive grounds. It maintains that the Agency acted with inordinate haste, forgetting its just-cause obligation to give judicious consideration to all relevant factors before imposing a penalty. Grievant was placed on Administrative Leave the day of the incident, December 12, 1990. The pre-disciplinary hearing required by the Agreement was held barely a week afterwords, on December 20. The findings of the Hearing Officer were transmitted the same day and the discharge notice was issued only one day later. Moreover, the Union maintains that the Agency improperly circumscribed Bargaining Unit representational rights at the pre-disciplinary stage by refusing to call witnesses. The witnesses the Union wished to question were Grievant's fellow crew members. The ODOT Representative told the Union that they were out on a job and could not be called in. According to testimony, that was a lie; they were actually in the garage at the direction of the ODOT County Superintendent, waiting to be called if needed.

The Arbitrator agrees that irregularities infected the procedure leading to Grievant's removal. Whatever the flaws, however, they did not necessarily vitiate the discipline.

ODOT Rules concerning pre-discipline provide for witnesses on behalf of the charged employee. They state in part:

> Witnesses may be called by either party. The impartial administrator shall have authority to limit testimony and evidence to matters which are relevant to the charges being hears. When witnesses are called, the right of direct and cross examination shall be allowed the parties.

In this respect, the rights established by ODOT are more specific than exist in the Agreement. Article 24, §24.04 may imply a right to witnesses, but does not establish the entitlement with definitive language. It states in relevant part:

> When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

Witnesses might have helped the Union in the pre-disciplinary hearing. Grievant testified on his own behalf, stressing that the Foreman was the aggressor. The Hearing Officer duly recited that

testimony in his report. At the same time, he underscored the fact that the Employee's assertions were not corroborated. He commented, "Note is made of all such allegations in [Grievant's] statement but it must be stressed that there was NO substantive and collaborative and hence probative evidence developed at this meeting." The statement indicates that the Hearing Officer discounted Grievant's testimony because it was not supported by witnesses -- the very witnesses that the Agency would not permit the Union to call. It follows that the pre-disciplinary proceeding was less than entirely fair. The Arbitrator does not find, however, that it annulled the discipline. The only objective of the hearing and the only authority of the Hearing Officer was to determine if just cause for discipline existed. It was not the Officer's place to decide the severity of discipline. Grievant's testimony, even if entirely true, would not have made a difference. It was pregnant with admissions of misconduct. Standing alone, it would have called for a determination that reasonable cause existed for some penalty. Accordingly, it is ruled that the pre-disciplinary inadequacies were relevant but not determinate. They were procedural imperfections which, had they not existed, would not have changed the Hearing Officer's decision that there was just cause for disciplining Grievant.

The way in which the Agency controlled the hearing and the speed with which it imposed the removal indicate a cavalier approach to just-cause requirements. The question the Employer was obliged to ask and answer before deciding on discipline was this:

In view of the misconduct, its aggravating factors and its mitigating factors, and in view of the Employee's length and quality of service, what amount of discipline is likely to be corrective? It is apparent to the Arbitrator that the Employer did not ask itself the question. It did not perform the kind of examination just cause demands. Regardless, it does not follow that the discharge was contrary to just cause. When an employer acts against an employee precipitously, in knee-jerk fashion, and fails to perform its solemn duty to weigh mitigation along with aggregation, its actions become suspect. Summary discipline opens the door for arbitral intrusion. It licenses an arbitrator to substitute his/her judgement for Management's. The lack of supervisory investigation and reflection which occurred in this case invites (indeed, obligates) the Arbitrator to do what the Agency did not do -- weigh the attending factors and decide whether or not Grievant's removal was for just cause. In other words, it is up to the Arbitrator to perform the Employer's job when the Employer fails to perform it. If, as a result, the Arbitrator second-guesses Management, that is to be expected when Management neglects its disciplinary responsibilities.

The inquiry into just cause begins with the misconduct. The Arbitrator agrees with the Union that the Foreman was the initial aggressor. It appears the Agency also made that finding after discharging Grievant, because it issued a three-day suspension to the Foreman. The Arbitrator does not find, however, that Grievant acted in self-defense or that striking the Foreman three times

with a shovel was an even marginally permissible response to the provocation.

Grievant's own testimony lent significant support to these findings. He used most peculiar phraseology to describe his actions. He testified that the Foreman pushed and took a swing at him. Then he said, "That's when I slid around under his arm, took the shovel, and went to work on him." When asked what he would have done if his hand had reached out and seized a more lethal weapon -- a tire iron, a crowbar, or an axe, for example -- Grievant stated, "I would not have used any of those things on him." The clear implication is that Grievant chose his instrument. He had the presence of mind not to do anything likely to kill or maim the Foreman; he wanted only to teach him a lesson. He argued that the assault with the shovel was mild compared to what he could have done: "I could have used my hands. It'd been worse." The statements lead unerringly to the finding that the assault was not the act of a man driven mad by bullying. It had too much deliberation for that.

The assault also was not self-defense -- at least not after it proceeded beyond the first strike. One of the blows was from behind and another while the victim was supine and helpless. A fourth would have been administered if a co-worker had not intervened.

There is a point at which even the most forgiving concept of self-defense ends -- when the victim becomes the aggressor. Grievant passed that point. The Arbitrator is willing to accept all the

Employee's testimony as true and all the opposing testimony as false. No matter how lenient his interpretation of the facts, however, he must draw the conclusion that Grievant's conduct went beyond anything that could be termed permissible. In other words, the first clout with the shovel might have been "free," but the other two were not.

As the Union suggests, the Employer gave short shrift to the length and quality of Grievant's service. A long and good work record normally provides an employee a reservoir of leniency. A veteran can expect milder discipline for an offense than a neophyte who commits the same or similar misconduct. Some violations, however, are so violent or so inconsistent with the fundamentals of an employment relationship as to warrant ending it summarily regardless of the individual's seniority and work history. Grievant's action fell in this category. Without extraordinary mitigation, such as proven temporary insanity, his years of employment provided little to no insulation against the discharge.

The governing Collective Bargaining Agreement restricts the State's disciplinary powers profoundly by coupling the principles of just cause, progressive penalties, and commensurate discipline. It implicitly requires that most employees be accorded second chances if they are salvageable. Therefore, it was the Agency's responsibility to analyze the Employee and determine whether or not a lesser penalty would have been corrective.

Supervision did not make the analysis. If it had, it would have discovered that Grievant was not a candidate for correction.

This was not the first time his temper led to discipline. In 1989, he was suspended for dumping a truckload of aggregate in the middle of the roadway. He was piqued that the Foreman told him to move his truck up a grade when he thought the grade was too steep. Additionally, Grievant showed no remorse in the arbitration hearing, nearly six months after his discharge and after he had time to reflect on his conduct. He was not at all sorry for what he had done; to the contrary, he viewed his action as justified and himself as heroic. He exhibited pride when he testified, "He made me mad. I'm fifty years old and I been knocked around most of my life. I'm tired of a big bully like that pushing me around."

Grievant's defenses might have been compelling in an ordinary discipline case. But this case is not ordinary. It would be an abuse of this Arbitrator's office and the authority invested in him by the parties to order reinstatement. The mitigating factors are not enough to rescue Grievant. The grievance will be denied.

AWARD

The grievance is denied.

Decision issued at Lorain County, Ohio, June 28, 1991.

Jonathan Dworkin, Arbitrator