ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 661

OCB GRIEVANCE NUMBER: 35-06-910304-0002-06-10

GRIEVANT NAME: WHITE, WALTER

UNION: SCOPE/OEA

DEPARTMENT: YOUTH SERVICES

ARBITRATOR: DWORKIN, JONATHAN

MANAGEMENT ADVOCATE: KITCHEN, LOU

2ND CHAIR: KIRSCHNER, PAUL

UNION ADVOCATE: STEVENS, HENRY L.

ARBITRATION DATE: JUNE 19, 1991

DECISION DATE: SEPTEMBER 10, 1991

DECISION: GRANTED

CONTRACT SECTIONS AND/OR ISSUES: ONE DAY SUSPENSION FOR FAILURE TO REPORT USE OF PHYSICAL FORCE

HOLDING: ARBITRATOR DETERMINED THAT A VIOLATION OF ART. 13.03 OCCURRED WHEN THE EMPLOYER FAILED TO SUPPLY THE UNION WITH A COPY OF THE GRIEVANT'S PRIOR DISCIPLINARY RECORD. THEREFORE, THAT RECORD WAS NOT CONSIDERED IN THE ARBITRATOR'S DECISION. "JUST CAUSE DOES NOT EXIST IF A DISCIPLINARY DECISION IS MADE WITHOUT PRIOR CONSIDERATION OF THE EMPLOYEE'S DEFENSES." IT IS RULED THAT GRIEVANT DID NOT USE PHYSICAL FORCE AND THEREFORE NOT OBLIGATED TO REPORT IT.

COST: $1051.07

OCB-SCOPE VOLUNTARY GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between:

THE STATE OF OHIO
Department of Youth Services
Mohican Youth Center
Loudenville, Ohio

-and-

STATE COUNCIL OF PROFESSIONAL EDUCATORS
OEA/NEA, UniServ
State Unit 10

#661

Case No 35-06-(91-03-04)0002-06-10

Decision Issued:
September 10, 1991

APPEARANCES

FOR THE STATE

Lou Kitchen	Labor Relations Specialist
Paul Kirschner	Labor Relations Specialist
Sally Childers	Mohican Superintendent
Jerry Young	Chief of Operations
Joseph A. Torok, Jr.	Principal

FOR THE ASSOCIATION

Henry L. Stevens	SCOPE Staff Representative
Carrie Smolik	SCOPE President
Walter White	Grievant

ISSUE Article 13: Claim that one-day suspension for failing to report use of physical force did not meet contractual requirements.

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

SUMMARY OF DISPUTE

The grievance protests the one-day disciplinary suspension of a Teacher employed by Ohio Department of Youth Services (DYS). The Department provides custodial care for youthful "felons" committed by the juvenile courts of Ohio; and, as a Teacher, Grievant shared the Department's responsibility for the proper and lawful execution of its mission. The State alleges that, on several occasions, Grievant used physical force to control the behavior of a youth and neglected to report the incidents. It is important to note that the use of force was not a cause for the suspension; Management does not argue that Grievant's conduct towards the youth was unreasonable, unjustified, unlawful, or in violation of the rules governing his conduct as an employee. The discipline was premised entirely on the Employee's failure to report the occurrences to his supervisors.

DYS policies are published, distributed to employees, and underscored in training. One of the most emphasized of these, according to the Employer, is Chapter E-7 entitled, "Incidents of Physical Force." The Chapter, consisting of five typewritten pages, defines physical force and restricts its approved use to "wholly justifiable instances which include: self protection; protection of the youth or other persons; prevention of property damage; and prevention of escape." The regulation cautions that the amount of force condoned "is to be the minimum necessary."

Sections III and IV of Chapter E-7 repeatedly accent the reporting responsibility of employees involved in physical force. They state in part:

> III. IMPLEMENTATION
>
> . . .
>
> B. Policy
>
> . . .
>
> 3. Before leaving duty, an employee who has used physical force shall submit to his/her supervisor or designated supervisor, a Physical Force Report (Attached SECTION I). If the report is not submitted prior to leaving duty or without specific authorized waiver by the supervisor, *the employee is subject to disciplinary action*. [Italics added.]
>
> . . .
>
> IV. PROCEDURE
>
> A. Following all physical force situations, the employee(s) directly involved shall immediately notify his/her supervisor.

Another DYS publication, Chapter B-19, outlines general work rules and sets forth a comprehensive schedule of penalties for violations. Rule 24 deals with physical force. Subsection b of the Rule assigns discipline for failure to report use of force -- suspensions of one to three days for a first infraction, five to ten days for a second, and removal for a third. It should be observed that Grievant's one-day suspension was the most lenient discipline for the

misconduct under Chapter B-19. However, the penalties prescribed by Chapter B-19 are not necessarily in line with the Collective Bargaining Agreement. They are unilateral Management assessments of the "worth" of misconduct; they may or may not harmonize with the Employer's disciplinary commitments in its Collective Bargaining Agreement with the State Council of Professional Educators (SCOPE). That Agreement governs this dispute. It is the only source of arbitral authority, and its provisions supersede unilateral pronouncements. If conflict exists, the Agreement controls.[1]

Article 13 of the Agreement, primarily Sections 13.01 and 13.04, circumscribe the State's disciplinary powers. They require that just cause attend penalties, and obligate the Employer to follow principles of progressive, corrective discipline. They state:

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);

---

[1] This finding corresponds with Article 14, Section 14.01 of the Agreement which states: "Work rules shall not conflict with any provision of the Agreement."

2. Written reprimand;
3. Suspension without pay;
4. Demotion or discharge.

Disciplinary action shall be commensurate with the offense.

The question of whether or not Grievant's suspension conformed to the guidelines of Article 13 is the determinant issue.

SCOPE's case rests on the assertion that the Agency violated the contractual standards. First and foremost, the Union maintains that Grievant did not disobey the reporting rule because he did not apply physical force. He did touch the youth, taking the boy's arm and firmly guiding him from a potentially troublesome situation, but he insists his action did not rise to the level of "force." The Union contends logically that without physical force there was no reporting obligation and no misconduct for failing to report. In the absence of a violation, the Union argues, there cannot be just cause for discipline.

The Union's alternative position assumes (purely for the sake of argument) that force was used. Even so, it is urged that the suspension exceeded the just-cause and progressive-discipline principles in Article 13. Additionally, the Union maintains that the Agency forfeited its disciplinary rights in this case by giving Grievant and other employees inadequate and contradictory notification of what was expected of them. The contention centers on a difference between the rules of the Department and those of the Mohican Youth Center

where Grievant works. As stated, DYS Chapters E-7 and B-19 make it clear that employees involved in physical force are required to make written reports to their supervisors. But local Mohican rules, which are also published and distributed to the workforce, seem to transfer the obligation to Supervision. They contain no reference to reports by employees; the only regulation on the subject states:

> IV. PROCEDURE
>
> . . .
>
> B. The Operations Supervisor shall immediately ensure that each person involved in a physical force situation receives medical attention and that a "Report of Injury" is filled out, regardless of whether an injury is apparent or not.

* * *

The grievance remained unresolved in the preliminary levels of the contractual procedure and the Union appealed to arbitration. A hearing was convened in Columbus, Ohio on June 19, 1991. The Representatives stipulated that the appeal met all time limits and procedural requirements, and the Arbitrator was authorized to issue a conclusive award on its merits.

* * *

When the hearing began, SCOPE moved for an order prohibiting the State from introducing Grievant's past disciplinary record into evidence. The record had not been provided to the Union at or before the pre-disciplinary conference. It was argued that the State's action in withholding it defied explicit contractual procedures and denied Grievant contractual due-process rights. The argument referred to Article 13, Section 13.03 of the Agreement which grants every employee facing suspension or termination the right to a conference before discipline is invoked. The provision also places certain disclosure responsibilities on the Employer. It states in pertinent part:

> **13.03 - Pre-Suspension or Pre-Termination Conference**
>
> When the Employer plans to initiate a suspension, termination or demotion, a written notice of pre-disciplinary conference shall be given to the employee who is the subject of the pending discipline and to the designated Association representative. Written notice shall include a statement of the charges against the employee, *contemplated disciplinary action*, and the date, time and place of the conference. The conference will be held at a reasonably convenient location determined by the Employer and shall be scheduled no earlier than three (3) days following the notification to the employee.
>
> . . .
>
> The pre-disciplinary conference will be conducted by a designee of the Appointing Authority who was not directly associated with the incident(s) which led to contemplated disciplinary action against the employee. *At the conference, the employee will be provided with documents used to support the possible disciplinary action which are known of at that time* and an opportunity to present the employee's side of the story. The employee may, but is not required to, respond to the allegations. [Emphasis added.]

The Union's motion to exclude documentary evidence of Grievant's disciplinary record was denied. On closer examination of the contractual language, the Arbitrator believes the ruling was mistaken. It is appropriate, therefore, to review the requirements of pre-disciplinary disclosure and revise the decision on the exclusionary request.

PRE-DISCIPLINARY DISCLOSURE; PRELIMINARY ARBITRAL FINDINGS

The Agreement provides very little information about the role of the pre-disciplinary hearing officer. Although it is common for him/her to issue written findings of fact and conclusions on whether or not there is just cause for discipline, it is not a contractual requirement to do so. The Agreement assigns a passive function to the officer; it states that s/he is to preside over the pre-disciplinary conference, nothing more. The only mention of hearing officers and what they are supposed to do appears in a single sentence of Section 13.03:

> The pre-disciplinary conference will be conducted by a designee of the Appointing Authority who was not directly associated with the incident(s) which led to contemplated disciplinary action against the employee.

The Employer, through uniform custom and practice in its relationship with this and other Bargaining Units, has enhanced the duties

and capacities of pre-hearing officers. It has empowered them to decide the just-cause question before adverse action is taken by a State agency. In this way, it has added a layer of protection for Bargaining Unit members faced with discipline. It is important to reemphasize that whatever protections the pre-hearing officer's powers might provide, they are not contractual. The Agreement does not make the officer a trier of facts; the State apparently created that role without Union input. The Agreement makes it clear that ultimate disciplinary decisions are solely within the province of the Appointing Authority. This raises an interesting and unanswered question. What happens if a hearing officer finds that there is not just cause for discipline? Does the Appointing Authority have the power to overrule the decision and issue a penalty notwithstanding?

The predisciplinary custom spans five years and two Collective Bargaining Agreements. Its grant of decisional powers to pre-hearing officers is not all-encompassing. An officer decides whether or not there is just cause; s/he ordinarily does not recommend levels of discipline. Once just cause is found to exist, the question of penalty is referred to the Appointing Authority. This fact was pivotal to the Employer's position that SCOPE's exclusionary motion should be denied.

The State concedes: 1) it did not furnish the Union a copy of Grievant's record of past discipline; 2) the record supported and was used to support the Employee's suspension. The State acknowledges

that Article 13, Section 13.03 of the Agreement required it to provide the Union "with documents used to support the possible disciplinary action which [were] known of" when the pre-disciplinary conference convened. Nevertheless, it urges that it was not obligated to supply Grievant or the Union with the record. The primary reason for its position is that the record was not germane to the pre-disciplinary procedure or the hearing officer's function. Past discipline was pertinent only to penalty. Its connection to the suspension did not materialize until *after* the hearing officer issued findings that Grievant committed misconduct and there was just cause to discipline him. The Employer contends that the documents it was required to produce at (or before) the pre-disciplinary hearing were those it intended to use to support its just-cause arguments before the officer. It concludes that it did not have to furnish anything it deemed irrelevant to the hearing and did not intend to introduce to support its position in that forum.

An ancillary State argument for denying the motion is that Grievant's disciplinary record was in his personnel folder and available to SCOPE. It was not withheld or secreted; Union Representatives could have secured it at any time. If they failed to do so, they were negligent, and the Employer contends that its case should not be weakened for a technicality resulting from the fact that Union Officers failed to do their job.

As stated, the Arbitrator first adopted the State's arguments, but now finds his decision was incorrect. It rested on an assumption that the pre-discipline hearing officer was contractually authorized to issue a finding on just cause but not on the penalty to be imposed. It turns out that the Agreement invests no powers at all in the hearing officer except to conduct the meeting. His/her decisional authority derives from custom, not contract. While custom can develop into binding practice, it cannot validly alter, contradict, or subsume written provisions of a governing collective bargaining agreement. Article 13, Section 13.03 of the Agreement controlling this dispute speaks of "pending," "contemplated," and "possible" disciplinary action. In the Arbitrator's judgment, these words designate potential penalties. If the word "penalty" is inserted into Section 13.03, the negotiated intent becomes clearer. The provision charges the Employer with the responsibility to provide an aggrieved employee with documents, known of at the time of the pre-disciplinary conference, and intended to be used to support the possible penalty. This interpretation fits well with the first paragraph of the Section which requires the Employer to supply the employee and his/her Representative with advance notice of charges and "contemplated disciplinary action."

The purposes for the requirement are obvious. They are to place the Union on notice of what it faces, facilitating the decision of whether or not to pursue a grievance and aiding the organization of defenses. Viewed from the perspective of these contractual goals,

it is not enough for the information simply to be available to the Union. Section 13.03 requires a good deal more. It forces the Employer to disclose its basic case against an employee by revealing the documents it is aware of and intends to use to support a potential disciplinary penalty. The other side of the coin is that an agency's failure to furnish known documents at the pre-disciplinary hearing is tantamount to an affirmation that such evidence will not be used to support the contemplated penalty. In the absence of unusual facts, the Union has a right to rely on such affirmation; it does not have to defend against documents which the Employer, by its inaction, indicates it does not intend to use.

Grievant's past record was a component of the decision to suspend him. It was known and recognized as such by the Employer when the pre-disciplinary hearing took place. Yet it was not furnished to the Employee or his SCOPE Representatives. A violation of Article 13, Section 13.03 occurred, and the Arbitrator was in error to disregard it by summarily denying the Union's motion. The motion should have been granted. Grievant's past disciplinary record will not be considered further in this decision-making process.[2]

---

[2] The rejection of the documentary history of Grievant's past discipline is more a matter of form than substance. As will be observed, its admission would have had negligible influence on the award.

THE CONFLICT BETWEEN DYS AND MOHICAN RULES; PRELIMINARY ARBITRAL CONCLUSION

As the Union points out, there is a marked difference between DYS regulations and those of the Mohican Youth Center regarding the obligation to report use of physical force. The Department requires an employee involved in force to fill out a form and submit it to his/her supervisor before the end of the workday. Mohican Rules place that obligation on the Operations Supervisor and make no statement about responsibilities of employees. On first review, it would appear that the local regulation is incomplete; but the appearance is not entirely accurate. According the testimony of the Mohican Superintendent, employees of the facility are not required to report physical force in writing; verbal reports are sufficient.

If verbal use-of-force reports are required, the rules should say so. Although they do not, the Superintendent testified that each employee, including Grievant, has been thoroughly instructed concerning his/her obligation. Use of force and reporting standards are considered so important by Management that they constitute an individual block in the initial training program. Additionally, the requirements are reviewed periodically in job counselings, and every employee has received (and signed for) a copy of the Department Rules on the subject.

SCOPE maintains that Grievant cannot be disciplined for failing to report a use of force because his obligation to do so was not

adequately set forth in Mohican Rules. The Arbitrator disagrees. The evidence confirms that the Employee knew and understood what he was supposed to do after using physical force. He did not require additional written notice or clarification; he was not confused by any conflict between local and Departmental regulations. It is most noteworthy that Grievant did not testify that he misunderstood nor did he claim he had been insufficiently trained.

The goal of rule-making -- communicating expectations -- was fulfilled by the Agency. In view of this established fact, SCOPE's argument that Mohican employees were insufficiently advised of their responsibility to report use of force is form without substance. Grievant knew what he was supposed to do.

THE ISSUES

Just cause does not permit an employer to penalize an employee who is innocent of misconduct. This statement of principle forms the Union's primary defense of Grievant. The charge in dispute contains two elements, use of force and failure to report it. Both must be present before there can be cause for discipline. An allegation of failure to report obviously cannot succeed without proof that the aggrieved employee was involved in a bona fide use-of-force incident. Grievant insists he was not involved in such an incident and that the accusations to the contrary are untrue. The predominant

factual issue, therefore, is whether or not Grievant used physical force to control the behavior of a Mohican youth-inmate.

If Grievant knowingly used force, neglecting to report it violated his employment responsibilities.[3] The oversight constituted misconduct warranting corrective discipline. But was the suspension commensurate with the contractual guidelines? The Union urges that it was not -- that Grievant earned no more than a verbal warning under the progressive steps in Article 13, Section 13.04. The State urges that the magnitude of the offense should not be underestimated. It points out that Section 13.04 of the Agreement does not require agencies to blindly adhere to disciplinary progressions. Management has discretion which is verified by the contractual statement, "Disciplinary action shall be commensurate with the offense."[4] According to the disciplinary grid in DYS Chapter B-19, a one-day suspension was the most lenient "commensurate" penalty for failing to report physical force. Chapter B-19, according to the Employer, stems from the Department's judicious assessment of offenses and their impact on its mission. The State maintains that it would be improper for the Arbitrator to substitute his judgment for Management's.

---

[3] The word, "knowingly" is critical. The State concedes that there is an indistinct line between verifiable physical force and non-forceful touching. An employee who truly and reasonably believes that his/her contact with a student did not constitute force is not obliged to make a report. Therefore, a question inherent in the use-of-force issue is whether Grievant knew or reasonably should have know that his conduct towards the youth constituted physical force.

[4] Article 13, Section 13.04.

ADDITIONAL FACTS AND CONTENTIONS

Mohican is one of nine Ohio facilities for youth felons. It is a medium-security institution for boys, ages 16 to 18, who have been adjudged guilty of third and fourth degree felonies (offenses against property). The Institution's inmate population averages about 175; the length of each boy's commitment is six months with the possibility for early release after ninety days.

Grievant has been a teacher at Mohican five years. When hired, he was given two weeks' academy training followed by two weeks of institutional orientation. As an employee involved in direct custodial contact with inmates, he was also required to complete forty hours of re-training annually with emphasis on verbal strategies to control behavior. According to the supervisory testimony, verbal strategies was an area of weakness for this Employee. He was offered special training in the discipline, but declined the offer.[5]

Grievant's primary accuser was a youth inmate whose deportment caused particular problems for teachers and other direct-care workers. He was openly resistant to authority, rude, and insubordinate. Grievant was his special victim and frequently had to endure the epithet,

---

[5] The State seemed to consider this fact important, and stressed it repeatedly through testimony and arguments. The Arbitrator frankly does not understand its relevancy. Grievant was not charged with improper use of physical force. The sole cause for his suspension was neglecting to report his alleged use of force.

"balloon butt." The name-calling took place in the classroom in front of other students.

On December 20, 1990, the boy filed an internal Youth Grievance Form charging that Grievant pushed and manhandled him three times. One of the allegations referred to an episode when the student was out of control and Grievant had to call a supervisor to remove him from the classroom. According to the evidence, the call probably fulfilled Mohican's verbal-report requirement and the incident should not be considered among the causes for the Employee's discipline. But the other two incidents are not so easily disposed of; if there was physical force on those occasions, it was not reported.

The Youth Grievance was crudely drafted; parts are undecipherable. The portions the Arbitrator was able to read stated:

> I was in class and [Grievant] grabbed me and pushed me around. This was not the kind of guidance I [want]. It was physical force. This was the third time!!!!!!
>
> I went to class got my folder and book sat down and was joking with the kids when I asked to go to [the] bathroom. He said no. I called him balloon butt. I was mad. So I sat down. A little later I took the book to the desk. He meanly said you know where it goes. I put away [the] book [and] asked him a question. he got up and instead of asking me to sit he physically forced me. He grabbed my shoulder and pushed me hurting me. Red marks [are] gone. I backed up to sit down [and] he pushed me again. I pushed his arm away and told him never to touch me again. He put me in my seat. This is the third incident in the past week. Oh, I called him balloon butt a couple [of] times to[o].

It bears repeating that the Youth was one of Mohican's more troublesome inmates. His assertions against Grievant, standing alone, were not believable. Nevertheless, they were sufficient to warrant an investigation. On December 21, 1990, the Institution Superintendent issued a memorandum to the Operations Supervisor, stating: "This youth has a legitimate grievance if in fact force was used & not reported. Start an investigation on this." The directive was referred to a Duty Officer who carried it out by interviewing the complaining youth and other inmates who claimed to have witnessed the events. The Duty Officer took no written statements and did not interview Grievant. His report, issued January 7, 1991, was based on memory (and possibly notes) of what inmates told him. It identified another incident in which Grievant, when contentiously confronted by the youth in the school hallway between classes, allegedly grasped his shirt front and shoved him against a wall. The confrontation must not have been loud or disruptive. An Assistant Principal was standing nearby with his back turned; he saw and heard nothing. The incident apparently was not disorderly enough to draw his attention. At any rate, the Duty Officer mentioned it in his report and concluded with a finding that whatever force Grievant used on any of the occasions was probably justified. The report stated:

> In all three situations, [the youth] was clearly out of line. He hasn't been working on what he should and has gone out of his way to be disruptive and disrespectful to [Grievant]. [Grievant] has shown restraint most of the

> time but used physical force at least twice without notifying his supervisor. The physical force employed in each case was probably appropriate to the situation but should have been seen beforehand and reported. Failing that, it should have been reported after the fact.

The Superintendent activated the disciplinary process solely on the strength of the report. Her decision resembled the Duty Officer's investigation in that it did not involve an interview with Grievant. The Employee was given no chance to tell Management his side of the story until the pre-disciplinary hearing on January 30, 1991. By then, the Superintendent had formed a judgment. Her memorandum to DYS recommending the suspension confirmed that her mind was made up prior to the pre-discipline meeting. It stated in part:

> IN REVIEWING THE HEARING OFFICER'S CONCLUSIONS, THERE WAS JUST CAUSE IN THIS DISCIPLINARY ACTION.
>
> *I CONTINUE TO RECOMMEND THAT [GRIEVANT] RECEIVE A ONE DAY SUSPENSION* FOR FAILING TO REPORT THE USE OF PHYSICL (sic) FORCE ON MORE THAN ONE OCCASION WITHIN A PERIOD OF A FEW DAYS. [Italics added.]

DYS approved the recommendation. The disciplinary notice was issued, and the Employee served the suspension on February 26, 1991.

The Employer's and SCOPE's positions both depend primarily on whether or not Grievant used physical force, and credibility is the core of the issue. The Employer believed the youth who filed the complaint and the others who verified it. Grievant's contrary

testimony was brief and to the point. He maintained that he did not use physical force. He admitted placing his hand on the boy's arm and guiding him away from potential trouble; on one occasion into his seat, on another to his next class. There was no resistance -- the youth did not pull away, he cooperated. Grievant contends that, because there was no resistance, there was no force. According to this testimony, he never pushed the boy against the wall or did anything of the sort.

Before ending his testimony, Grievant gave a demonstration of his physical contact with the student, using the Arbitrator to play the youth's role. He grasped the Arbitrator's arm and physically directed him in a desired direction. He exerted about as much force as one would use to help a feeble person cross a busy street. His grasp was firm. It justified an inference that he would use real force if he encountered resistance. But so long as the Arbitrator moved as Grievant's non-verbal communication instructed him to, the kind of force contemplated by DYS and Mohican regulations was not present.

As can be seen, the controversy turns on the difference between Grievant's testimony and the Duty Officer's report. Which is to be believed? The State admits that the youth's complaint against Grievant would have been implausible if it stood alone. But it was corroborated by the statements of five other inmates, none of whom expressed loyalty or friendship to the youth in question. In fact (according to the

Duty Officer's summary), they uniformly agreed that the boy's belligerence towards Grievant was intolerable.

In view of the youth's temperament -- his antagonism and lack of respect or fear -- the Employer maintains it is unlikely that he responded to Grievant's gentle persuasion. It is more consistent with the known facts that the Employee used force to compel obedience. The Employer finds nothing wrong with such use of force, but contends that Grievant's failure to report it violated a crucial employment rule. It concludes that the discipline was lenient and should not be overturned by the Arbitrator.

The Union's response calls attention to the definition of "physical force" in the Mohican regulations: "The overcoming of resistance by the use of strength, power or constraint upon or against a person." Since there was no resistance, according to the Union, there was no force. It follows that the first element of just-cause, a proven offense, is missing from the Employer's case. The Union maintains, therefore, that the grievance should be sustained.

OPINION

SCOPE asserts procedural as well as substantive reasons for sustaining the grievance. One of its more persuasive arguments relates to the fact that the investigation preceding discipline was one-sided. The Duty Officer interviewed the complainant and five other Mohican

inmates, but never sought an accounting from Grievant. Likewise, the Superintendent recommended the suspension without first allowing the Employee to explain. The Union charges that the investigatory process was unfair and infringed on Grievant's entitlement to due process; that it contaminated the discipline and disregarded requisites of just cause.

There is a great deal of support for the Union's theory that an inadequate investigation by management vitiates discipline. Scores of published arbitral decisions address the question. Many hold that a fragmentary investigation resulting in discipline before the affected employee is given a chance to be heard violates just cause. A 1985 decision by Arbitrator Wallace B. Nelson aptly summarizes and applies this principle. In *McCartney's Inc.*, 84 LA 799, Arbitrator Nelson was called upon to decide whether or not a discharge for unauthorized absences was for just cause. The arbitrator first resolved a maze of conflicting facts and allegations, holding that the company had met its burden of proof. Nevertheless, he found that the discharge was not for just cause because it was imposed without permitting the employee to be heard. He ruled:

> However charitably one views all this rationalizing, there is no way to avoid the question: does the failure to give the grievant an opportunity to explain, to present his side of the case, *before the decision to discharge is made*, so contaminate the decision as to preclude a finding that it was for just cause? At least where, as here, there is no crisis or emergency, no urgency, we think it does.

> A just cause proviso, standing alone, demands that certain minimal essentials of due process be observed. One at least of those minimum essentials is that the accused have an opportunity, before sentence is carried out, to be heard in his own defense.[6]

Arbitrator Nelson's reasoning was absolutely clear. He ruled in the Company's favor on every factual issue and held that discharge was within the ambit of permissible penalties for the misconduct. Yet he reinstated the employee with back pay solely because of the procedural flaw:

> On the substantive question then, of whether [Grievant's] actions on or about July 12-16, 1982 (a) occurred and (b) justified discipline of some sort seems established. The punishment of discharge is harsh, but not clearly so disproportionate to offense as to warrant its being set aside as an abuse of management discretion.
>
> What is at issue is the procedural deficiency; a failure to afford the grievant an essential element of due process guaranteed by the just cause proviso of the parties (sic) collective bargaining agreement. *The grievant was entitled to an opportunity to present his side. He never got that opportunity, and the failure on the part of the Company to provide it establishes the discharge was not for just cause . . .*[7]

It is important to repeat that the Nelson decision is not one of a kind. It echoes a profusion of arbitral pronouncements that just cause does not exist if a disciplinary decision is made without

---

[6] 84 LA 799 at 804.

[7] Id. at 804-805. Italics added.

prior consideration of the employee's defenses. Professors Marvin Hill, Jr. and Anthony V. Sinicropi, in their distinguished work, Remedies in Arbitration, state that the theory has broad approval among courts as well as arbitrators:

> The most commonly cited violation of "due process" standards revolves around the investigation of the incident giving rise to the penalties assessed. Where management has failed to make a complete investigation, arbitrators have invalidated discharges and ordered reinstatement of the aggrieved employee.
>
> . . .
>
> Particularly noteworthy in the investigative area is a decision by the Court of Appeals for the Eighth Circuit. In *Local 878, Teamsters v. Coca-Cola Bottling Co.*, [613 F.2d 716 (1980)] the appellate court upheld an arbitrator's determination that the concept of **just cause included not only the substantive elements of appropriate factual circumstances but also a procedural requirement that the employee be given some minimal, adequate opportunity to present his side of the case *before* the discharge.**[8]

The Arbitrator agrees with SCOPE that the investigation leading to Grievant's discipline was inadequate. The State may argue that the contractual pre-disciplinary hearing corrected the flaw by giving the employee a chance to be heard before the suspension was issued. The argument might have been persuasive were it not for the fact that the Superintendent decided to recommend the one-day suspension *before*

---

[8] Hill & Sinicropi, Remedies in Arbitration, p. 92 (BNA 1981). Italics are in original text; underscoring has been added for emphasis.

the pre-disciplinary meeting took place.[9] Nevertheless, the Arbitrator does not find that the imperfections in an employer's investigation necessarily annul discipline. Just cause is an amalgam of many principles. It is a fluid abstraction, designed to permit arbitrators to weigh and balance its facets on a case-by-case basis. Hard and fast rules which "codify" just cause tend to draw away from this fundamental purpose. It would be an incongruity if arbitrators uniformly ruled that substandard managerial investigations mechanically invalidated discipline no matter how richly the discipline might have been deserved.

The Arbitrator finds that the procedural irregularity was not automatically fatal to the discipline; but he does not hold that the Agency's incomplete investigation is to be ignored or excused. It has signal bearing on this dispute. When an employer fails to do a thorough job of assuring that disciplinary action is supported by just cause, it is an arbitrator's duty to scrutinize the action, to look for arbitrariness and, if warranted, encroach on the employer's decision-making authority. It is often said that an arbitrator should not substitute his/her judgment for management's, and the saying is influential when the employer's decisions are soundly based. It is less persuasive when, as in this case, a disciplinary decision is premised on an admittedly untrustworthy accusation, second-hand

---

[9] See this decision, p. 18.

information, and absolutely no pre-disciplinary attempt to learn the affected employee's defenses.

The Agency relied on second-hand information. The State's evidence in arbitration was almost entirely hearsay; not the kind of hearsay arbitrators ordinarily admit into evidence, but hearsay two- and three-times removed. The Youth Grievance Form was introduced along with the investigatory report. The report stated that other youth-inmates corroborated the allegations of physical force. But there were no written statements or affidavits from those witnesses. The State did not even present the Duty Officer who conducted the interviews as a witness. He did not appear in the hearing to verify his conclusions or submit to cross examination.

The State asks that its evidence be accorded more weight than Grievant's direct testimony that he did not use physical force on the youth. The obvious question is why should the indirect factual evidence be preferred over the direct. Grievant's testimony was cogent and credible. It withstood searching cross-examination. It was at least as believable as the Agency's investigatory report. Since the Employer had the burden of proof in this case, the finding must be that Grievant used no more force than he admitted to using.

Did Grievant's physical contact with the youth constitute "physical force" under Mohican and DYS rules? If it did, the Employee committed disciplinary misconduct by failing to report it. The difficulty in deciding this issue is that Agency and Department definitions of

"force" are necessarily general and inexact. There is a line between permissible touching, which does not have to be reported, and physical force, which does. In most instances, the distinction is easily observed. For example, in an earlier dispute between these parties, the Union used the same argument -- that the aggrieved teacher did not perceive what he did to a youth as "physical force." The circumstance was that the employee flipped a desk-chair over, throwing it and the one-hundred-sixty-five pound youth who was sitting in it to the ground. The act was held to be a clear application of physical force; it was obvious.[10] As the touching of a youth becomes more moderate, however, the distinction becomes less and less obvious. At some point, the line between force and non-force blurs. This is such a case, and it calls for application of the "reasonable mind" principle. Commonly used as a guideline for criminal juries, the principle holds that an accused is innocent if reasonable, prudent minds could differ on the existence of exculpatory facts. Grievant testified that he did not understand his touching of the youth as physical force. His testimony was reasonable -- reasonable minds could at least differ on whether or not there was physical force. It is ruled, therefore, that Grievant did not use physical force; and it follows that he was not obliged to report it. Accordingly, the grievance will be sustained.

---

[10] Case No. 35-08-(90-12-12)0025-06-10; Decision issued June 18, 1991.

AWARD

The grievance is sustained. The State is directed to expunge the discipline from Grievant's personnel files and reimburse the Employee for wages and other losses occasioned by the suspension.

Decision issued at Lorain County, Ohio September 10, 1991.

Jonathan Dworkin, Arbitrator