ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 741

OCB GRIEVANCE NUMBER: 23-18-910430-0670-05-02

GRIEVANT NAME: OSTROWSKYJ, BORYS

UNION: OEA

DEPARTMENT: MENTAL HEALTH

ARBITRATOR: DWORKIN, JONATHAN

MANAGEMENT ADVOCATE: RAUCH, JOHN

2ND CHAIR: DUCO, MICHAEL

UNION ADVOCATE: STEVEN, HENRY

ARBITRATION DATE: JULY 7, 1991

DECISION DATE: MARCH 8, 1992

DECISION: SUSTAINED

CONTRACT SECTIONS
AND/OR ISSUES: 23.14 - GRIEVANT WAS SUSPENDED TWO DAYS FOR INSUBORDINATION--INTENTIONAL REFUSAL TO OBEY INSTRUCTIONS IN A MATTER RELATED TO PATIENT CARE AND FAILURE TO ACCEPT AUTHORITY.

HOLDING: THE ARBITRATOR FINDS HE MUST RESORT TO THE REFUGE OF BURDEN OF PROOF. SINCE THE EVIDENCE IS EVENLY BALANCED, IT REQUIRES THAT GRIEVANCE MUST BE SUSTAINED.

COST: $835.03

OCB-SCOPE VOLUNTARY GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

#741

In The Matter of Arbitration Between: THE STATE OF OHIO Department of Mental Health Western Reserve Psychiatric Hospital, Sagamore Hills, Ohio -and- STATE COUNCIL OF PROFESSIONAL EDUCATORS, OEA/NEA, UniServ	* * * * * * * * * * * * *	Case No 23-18-(91-04-30)0670-05-02 Decision Issued: March 8, 1992

APPEARANCES

FOR THE STATE

John R. Rauch	Labor Relations Manager
Michael P. Duco	OCB Representative
Roger Beyer	Labor Relations Officer
Mark E. Waters	Supervisor

FOR THE ASSOCIATION

Henry L. Stevens	SCOPE Staff Representative
Carrie Smolik	SCOPE President
Borys Ostrowskyj	Grievant

ISSUE: Article 13: Suspension for alleged insubordination; SCOPE defenses examined.

Jonathan Dworkin, Arbitrator
PO Box 187, 9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

The grievance protests a two-day disciplinary suspension for alleged insubordination. Grievant is a Teacher in the Client Education Department of the Western Reserve Psychiatric Hospital. The Hospital, located in Sagamore Hills, Ohio, is a State facility for chronically ill adults requiring medium- to long-term institutionalization. Grievant has been employed there since October, 1982. Until this suspension for insubordination, his work record was free of discipline.

According to the Employer, on February 15, 1991, Grievant willfully disobeyed at least three direct supervisory orders to report for reassignment on a day when the Hospital was dangerously understaffed and cooperation of all employees was urgently needed. An overnight storm of near-blizzard proportion dropped twelve inches of snow on Sagamore Hills. Schools, non-essential government agencies, and commercial enterprises were shut down. Between midnight and 8:00 a.m., more than eighty scheduled employees of the Hospital called to advise that they would be late or would not report for work. Most requested personal, sick, or vacation days; the remaining staff somehow had to provide for the approximately three hundred seventy patients.

Early in the morning, Supervision devised a plan to close buildings and transfer employees to where they could best meet existing needs. Those who were qualified would work in the residences; others would do what they could in buildings remaining open. It was contem-

plated that some, such as Grievant, would perform their regular duties at alternative locations. Building 21, where Grievant taught, was slated to be closed.

To his credit, Grievant not only reported for work, he reported early. Sometime between 8:00 and 9:00 a.m., the Director of Psycho-Social Rehabilitation Services (his immediate Supervisor) asked him to call Central Staffing for a unit assignment. He allegedly refused, claiming that the request violated an employment privilege in his SCOPE Contract. The contractual reference was to Article 23, §23.14 providing:

> **23.14 - Weather Emergencies**
>
> The Employer retains sole jurisdiction for declaring a weather emergency condition.
>
> Employees designated as essential by the Employer are required to work during emergencies.
>
> All other employees not required to report to work or sent home due to a weather emergency shall be granted leave at base rate for their individually scheduled work hours during the emergency.

According to the Employer, the directive was repeated twice more -- the last time as an "order" with the warning that continued refusal could result in discipline. Grievant held stubbornly to his refusal. Since the building was to be closed, the Supervisor was left with no alternative. He approved an application for personal leave and sent the Employee home. Later, he submitted a request for disciplinary action. A predisciplinary meeting convened on April 2, 1991, and

the suspension was approved. On April 22, Grievant received a notice stating in part:

> This is to inform you that you will be suspended for a period of two (2) working days from your position of Teacher 2 at Western Reserve Psychiatric Hospital effective April 23, 24, 1991.
>
> The reason for this action is that you have been guilty of Insubordination - Intentional Refusal to Obey Instructions or Orders in a Matter Related to Patient Care; Failure to Accept Authority or Supervision.
>
> On Friday, February 15, 1991 at approximately 9:00 AM you refused a direct order from [the] Social Rehab Director . . . to contact the Central Staffing Office for a unit assignment. There was a shortage of unit staff this day due to the inclement weather. Since the patients were restricted to the units and the centralized programs were shut down, clinical rehab staff were being given a temporary unit assignment for the day. After the refusal of the direct order, you were informed you could not remain in Building 21, as it was being closed for the day. You were told you could either report to the Human Resources Department or use personal leave and leave duty. You requested personal leave and left for the day. Based on this information, corrective action is being taken at this time.

The grievance was initiated on April 26, two days after Grievant served the suspension. During the processing which moved it through the preliminary contractual levels to arbitration, the Union developed an accumulation of reasons why the discipline should be annulled and the Employee compensated for the two days off. Those reasons will be discussed later. At this juncture, it is appropriate to point out that the single, overriding question is whether or not the suspension was for just cause and consistent with the progressive-

discipline standards of the Agreement. Article 13 places the following restrictions on Management's disciplinary authority:

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 dispute was presented to arbitration in Columbus, Ohio on July 10, 1991. At the outset, the parties' Advocates stipulated that the grievance was procedurally arbitrable and the Arbitrator was empowered to issue a conclusive award on its merits. That jurisdictional stipulation was confined by the following language in Article 6 of the Agreement:

6.04 - Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of provisions of this 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 the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

PERIPHERAL SCOPE ARGUMENTS REVIEWED; PRELIMINARY CONCLUSIONS DEFINING THE ISSUES

The Union took a "scattergun" approach to the dispute, asserting diverse, somewhat disconnected reasons for an award overturning the discipline. While these merit recognition and discussion, it is the Arbitrator's opinion that some detract from the core issue. Accordingly, they will be examined apart from the main opinion.

Timeliness of Employer's Step 3 Response: Article 5, §5.08 of the Agreement establishes explicit time lines for processing grievances over discipline. It provides that an aggrieved employee may commence the dispute at the agency-director level (Step 3 in non-disciplinary matters). Upon receipt, the director has ten days to convene a meeting and, when the meeting ends, s/he (or his/her designee) must "render a decision in writing and return a copy to the grievant and the Association representative within ten (10) days . . ." The meeting for this grievance was held on May 22, 1991, and the Director's response was not issued until June 18. Without question it was late; and to the extent the Association requests arbitral acknowledgement of that fact, the request is hereby granted.

Specific language stating that grievances are automatically granted when an employer neglects to perform its obligations within the required time does exist in some labor-management contracts; but not in this one. Although Article 5 requires Management to conform to time limits, the stated consequence for failure to do so is insignificant. It does not license an arbitrator to summarily sustain grievances or penalize the Employer in any meaningful way. The only language on the question is in §5.07, under the subheading, "Time Extensions and Step Waivers:"

> A. The grievant or the Association representative and representatives of the Employer may mutually agree in writing at any step to a short time extension. Any step in the grievance procedure may be waived by written mutual consent. In emergency situations as defined by the Governor of the State of Ohio, an Appointing Authority, employing agency Director, or the Director of the Office of Collective Bargaining, the time limitations shall be suspended by both parties for the duration of the emergency. *In the absence of such extensions or emergency situations, at any step where a grievance response of the Employer has not been received by the grievant and the Association representative within the specified time limits, the grievant may file the grievance to the next successive step in the grievance procedure within the same number of days from the date the decision was due as specified in Section 5.06 Of this Article.*
>
> Except as provided above, grievances shall be processed within the specified time limits. [Italics added for emphasis.]

The Association argued that the delay forced it to go forward without crucial information. Upon proof that a party was prejudiced

by Management's untimeliness, an arbitrator should take whatever steps are reasonable to undo the inequity. But s/he cannot amend the Agreement and/or devise new rights not implicit in its provisions. In short, the Arbitrator agrees that the Agency Director violated a clear contractual obligation, but finds that the violation is extraneous to the determinant issues.

The Allegation That Grievant Had an "Option" to Take Personal Leave: This contention refers to Article 23, §23.14, previously quoted. It states that when the Employer exercises its sole authority to declare a weather emergency, non-essential employees shall be granted leave. The provision is not self-executing; it does not privilege any employee to declare his/her own leave and disregard conflicting supervisory instructions. It does not permit insubordination. It does not overturn the guiding principle that an employee dissatisfied with a directive must first obey, then seek redress through the grievance procedure. The Agreement permits "self help" only when an employee refuses an order in the good-faith belief that to obey would place him/her in a situation which is "life-threatening or presents the potential for serious injury and which is abnormal to his/her place of employment and/or position description." [Article 7, §7.06.] The fundamental issue is whether or not Grievant was insubordinate, and this Section is not relevant to the answer.

Lack of Definitive Work Rules: Article 14, §14.01 acknowledges that an agency's written policies, regulations, procedures and directives pertaining to conditions of employment constitute work rules. It provides, however, that the rules are to be furnished to the Association and made available to affected employees in advance of their effective date(s). Grievant's Agency issued no rule prohibiting disobedience to Supervision. It is the Arbitrator's guess that it probably did not issue rules proscribing mayhem or murder either. The point is that there are some responsibilities that every rational, adult employee knows without needing formal written reminders. Rules are designed to advise individuals of expectations they might not fully comprehend. They also serve to inform the workforce of how Management intends to exercise its reserved disciplinary authority.

Among the most elemental responsibilities of employment is to follow orders. It is inconceivable that rules are needed for reinforcement; it is absurd to believe that, because there was no rule on the subject, Grievant thought he had a choice of whether or not to comply with directives of his Supervisor. In other words, Article 14, §14.01 has no discernible connection to this case.

Personal Leave Was Granted: At 9:00 a.m. on the day in question, Grievant filled out a personal leave application (as the Supervisor instructed), and it was granted. The Association concludes, therefore, that his failure to perform duties was sanctioned. This is an argument often heard in cases involving insubordination. It is not unusual

for a supervisor to tell an employee to obey or go home. Sometimes, an ignorant person who receives this kind of directive gets a mixed signal and truly believes that s/he is being offered a choice -- that s/he can leave the workplace without incurring discipline. It would insult Grievant's intelligence to place him in that category. The Employer contends he refused three orders to call for a new assignment and finally was told to obey or take personal leave. If the contention is accurate, it is to be presumed that the Employee knew that going home capped his insubordination; it did not relieve him of accountability for it.

The Two-Day Suspension Did Not Follow Contractual Progressions: Article 13, §13.04 of the Agreement requires the Employer to follow principles of progressive discipline and sets forth a series of disciplinary steps. The requirement is meant to apply generally, but not to every conceivable variety of misconduct. The concluding sentence of the provision grants the Employer latitude to step outside the progressions in appropriate situations. It states: "Disciplinary action shall be commensurate with the offense."

Grievant had more than eight years of discipline-free employment. Had he committed an "ordinary" violation, the Agency could have issued no more than a first-level progressive penalty -- a verbal reprimand.

There was nothing ordinary about the allegations leading to the suspension. As will be observed in the following portion of this decision, the accusation against Grievant is that he deliberately

refused to comply with orders. The allegations contain no redeeming or mitigating elements; they charge willful insubordination -- universally recognized as one of the gravest forms of misconduct. Insubordination undermines the very essence of the contractual relationship between employers and represented employees -- a relationship which grants benefits and rights and preserves management's authority to direct the workforce. An employee who takes it upon him/herself to individualize his/her working conditions by choosing not to obey orders leaves the employer no alternative. It not only can impose commensurate discipline -- even discharge -- it is obliged to do so.

If Grievant was insubordinate as alleged, the suspension of two days was merciful. He reasonably could have expected a much more severe penalty under the just-cause and commensurate-discipline language of the Agreement.

The Disparate Treatment Claim: The Association calls attention to the fact that many employees declined to come to work on the day in question; others were sent home on personal leave. Only Grievant was disciplined. It argues that just cause was violated by the "disparate treatment."

The problem with the argument is that there is no evidence that anyone else was willfully insubordinate in the face of a direct order. As the Association Advocate well understands, the disparate-treatment defense to discipline does not apply without cogent evidence that a grievant was singled out for markedly harsher discipline than others

who committed *the same or similar offense under the same or similar circumstances.* The Association's presentation on the issue simply did not supply these essential elements.

ADDITIONAL FACTS AND CONTENTIONS

Although other witnesses testified, the Director of Psycho-Social Rehabilitation Services and Grievant were the only ones who presented determinant facts. The Director laid the necessary groundwork for the case. He spoke of the dismal weather conditions and the acute shortage of employees on February 15. He testified that the Chief Officer of the Institution decided early that morning to close buildings and reassign affected individuals to the units. He communicated that decision to Grievant's Supervisor who carried out instructions by telling Grievant and others to call Central Staffing for reassignments.

According to the Supervisor, he first approached Grievant at approximately 8:15 a.m. and asked him to telephone Central Staffing. The Employee did not comply. Instead, he debated the directive, raising objections and asking superfluous questions. Finally he said, "As per my union contract, I do not have to do that."

The Supervisor was uncertain whether or not there may have been an obscure contractual provision granting the "right" Grievant asserted. He responded that he would check on it and return. He

told the Employee that, if necessary, he would give a direct order and initiate a request for discipline if the refusal continued.

The Supervisor had been trained concerning steps to be taken in the face of insubordination. He understood his duty to "ask first, then give a clear, unmistakable, direct order with an equally clear statement that refusal would result in discipline." He followed that prescription upon his return. He communicated the direct order not once, but twice, each time advising Grievant of the potential consequence of continuing to refuse. According to the Supervisor, the Employee was inflexible. He kept citing his supposed contractual right as if it were a talisman shielding him from having to obey. His rejections of the directives were punctuated with statements of privilege: "Per my union contract, I refuse;" "Per my union contract I am not required;" and, "There is no declared emergency. Therefore, per my union contract I do not have to comply."

The Supervisor had neither time nor inclination to pursue the polemic dialogue. The building was to be closed and locked; obviously Grievant could not stay there. At last he told the Employee to either obey or take a personal day. Moments later, Grievant presented him with a personal-day request which he approved.

* * *

Grievant did not try to explain or mitigate the Supervisor's allegations, he denied them completely. He testified that he was

fully conscious of his obligation to obey supervisory orders and knew that he did not have a contractual right to refuse. He served as Site Representative (Steward) since 1986 and received thorough training from SCOPE. He is also a Department Representative and oversees the performance of site representatives at other facilities and departments. He testified: "I understand clearly what insubordination is and the work-now-grieve-later rule. I was trained on it and have trained others on it."

Grievant protests the discipline because he contends the incident was not as the Supervisor depicted it. He maintains that he arrived early in the morning and voluntarily assisted the overworked switchboard operators by answering the telephone and recording report-offs. At approximately 8:00 a.m., he heard a PA announcement telling all employees present to call Central Staffing. According to Grievant, he complied at once and was told he would not be needed. If he had been transferred to a unit, he would not have declined; unit teaching was his regular assignment five years ago.

More than an hour later, the Supervisor came to him and asked him to call the staffing office. Grievant admits debating the instruction, but urges he had no intent to disobey. He was honestly confused by the conflict between the request and what Central Staffing told him earlier. He urged that he would have called then, but the Supervisor said he would check into the matter and get back to him.

The crux of Grievant's defense is that he was never given the order. He testified: "When Mark (the Supervisor) came back, all he said was that I could report to Human Resources or he would approve a personal day. There was absolutely no order or even a renewed request." Grievant thought he was being given a true option consistent with what the Central Staffing Office told him when he called at 8:00 a.m.

OPINION

In the final analysis, this dispute turns entirely on disputed facts. The Supervisor's testimony was convincing. Standing alone, it confirmed there was ample just cause for the two-day suspension. Grievant's testimony also was believable. If true, it demonstrated that there was no insubordination; at most, there was confused communication engendering honest misunderstanding.

After twenty-two years at this craft, the Arbitrator believes he has become adept at cutting through conflicts such as this and discovering the probabilities. That is not so in this case. The principal witnesses testified credibly. Both seemed to be recalling "truths" as honestly as they could. Grievant was the less direct witness, but that could have been because he had a personal interest in the outcome of the dispute and was impelled to advocate it. This is common for grievants, especially when discipline is at issue.

It is understandably difficult for them to distinguish their roles from those of their bargaining unit representatives and accept the fact that they come to arbitration as witnesses, not parties. But that does not justify a reliable inference that the Employee lied.

The Arbitrator is keenly aware of his burden and what hangs in the balance. His inability to read witnesses better could cause a serious miscarriage. If Grievant's memory was better than the Supervisor's and the grievance is denied, a major contractual protection will be abrogated. An innocent employee with an unblemished record will be forced to bear unjust discipline. If the Supervisor's testimony was true, the Employer will be ill served if it is rejected. It will become all the more difficult for Management to exercise legitimate control over the workforce.

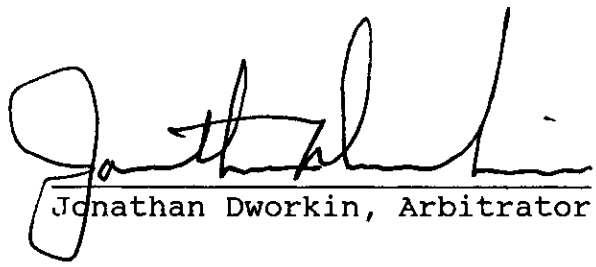
The Arbitrator finds he must resort to the refuge of burden of proof. It is the Employer's in a disciplinary dispute and, since the evidence is evenly balanced, it requires that the grievance be sustained. Although Grievant's claim will be upheld, there is certainly no intent to condone his behavior when he was first confronted by the Supervisor. He argued and protested when all he needed to do was explain that he had already called Central Staffing and had been advised that his services would not be required. His conduct demonstrated a manipulative perversity which might have been the subject of proper discipline -- perhaps a verbal reprimand. But a decision authorizing such discipline would change the Employer's

case and add a new charge not considered previously. The Arbitrator's jurisdiction is restricted to deciding this grievance -- involving a two-day suspension for the Employee's alleged response to two direct orders following a request. No discipline was issued for his initial mulishness.

AWARD

The grievance is sustained based only on the Employer's failure to meet its burden of proof. The State is directed to compensate Grievant for his losses resulting from the two-day suspension and expunge notations of the discipline from all his personnel records.

Decision Issued at Lorain County, Ohio, March 8, 1992.



Jonathan Dworkin, Arbitrator