ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER 761

OCB GRIEVANCE NUMBER: 35-04-911115-0046-01-03

GRIEVANT NAME: PARSONS, JEFFREY

UNION: OCSEA, LOCAL 11

DEPARTMENT DYS

ARBITRATOR: RAY, DOUGLAS

MANAGEMENT ADVOCATE: RAHR, BRADLEY

2ND CHAIR: THORNTON, ROBERT

UNION ADVOCATE: FALCIONE, DENNIS

ARBITRATION DATE: APRIL 29, 1992

DECISION DATE: MAY 14, 1992

DECISION: GRANTED

CONTRACT SECTION
AND/OR ISSUES: GRIEVANT WAS GIVEN A 10-DAY SUSPENSION FOR NEGLECT OF DUTY AND FAILURE OF GOOD BEHAVIOR BECAUSE HE DID NOT RESPOND IMMEDIATELY TO THE MEDICAL NEEDS OF A YOUTH AFTER SLAMMING A DOOR SHUT ON THE YOUTH'S HAND.

HOLDING: THE GRIEVANT CLOSED THE DOOR TO AVOID AN ARTICLE BEING THROWN AT HIM BY THE YOUTH. GRIEVANT RESPONDED TO THE YOUTH'S INJURY AS SOON AS HE DETERMINED THAT THE YOUTH WAS NOT HORSEPLAYING.

COST: TO BE DETERMINED

In the Matter of Arbitration Between:

State of Ohio, Department of Youth Services
Indian River School

and

Ohio Civil Service Employees Association,
Local 11, AFSCME, AFL-CIO

Re: Gr. 35-04-(91-11-15)-0046-01-03

#761

Hearing held April 29, 1992 in Massillon, Ohio

Decision issued May 14, 1992 in Toledo, Ohio

Arbitrator: Douglas E. Ray

APPEARANCES

Employer:

Bradley E. Rahr, Labor Relations Officer
Ohio Department of Youth Services

Robert Thornton, Labor Relations Specialist
Ohio Department of Administrative Services
Office of Collective Bargaining

Crystal Bragg, Superintendent
Indian River School

Union:

Dennis Falcione
Staff Representative
Ohio Civil Service Employees Association

Frank Thomas
Chapter President

Jeffrey Parsons
Grievant

I. BACKGROUND

The Employer, the Ohio Department of Youth Services, operates the Indian River School , a maximum security facility located in Massillon, Ohio. Indian River has approximately 270 felony offender youth in its care. The ages of boys confined range from 16 to 21 and the majority have been committed due to conviction for felony 1's and felony 2's, including homicide.

Employees at the School are represented by the OCSEA. Grievant is a youth leader at the facility who has been employed there and in that capacity since December, 1989. The grievance to be resolved involves an incident that occurred on September 15, 1991 in which one of the incarcerated youths in a department under Grievant's supervision suffered an injury to his hand which required that he obtain medical attention and which resulted in him losing the tip portion of one of his fingers after it became caught in a closing door.

On September 25, 1991, Grievant was given notice of a predisciplinary meeting held on October 3. The meeting was to consider discipline for his actions on September 15. On October 4, the administrator who conducted the meeting issued a two page memorandum recommending that no discipline be issued. On October 18, 1991, Grievant was given a 10 day suspension effective November 5, 1991, for "neglect of duty and failure of good behavior in violation of DYS Directive B-19 Work Rule 1b. and 46" because he "did not respond

immediately to the medical needs of a youth after you kicked the door shut on his hand causing serious injury." On November 15, 1991, a grievance was filed in which Grievant claimed no neglect of duty and requested back pay, that his personnel file be cleared and that all vacation, sick and personal time be added to his totals. A Step 3 hearing was held November 27, 1991 and management denied the grievance on December 31, 1991. On January 14, 1992, the Union requested arbitration and a hearing was held before the undersigned arbitrator on April 29, 1992. At hearing, the parties entered a number of stipulations including that the matter was properly before the arbitrator. The matter was concluded with closing arguments.

II. ISSUE

The parties stipulated the issue to be "Was the employee disciplined for just cause, if not, what shall the remedy be?"

III. CONTRACT AND OTHER PROVISIONS

Among the contract provisions most relevant to this arbitration matter are those contained in Article 24, Discipline. Section 24.01 sets just cause as the standard. Section 24.02 obligates the Employer to follow principles of progressive discipline and states that disciplinary actions shall be commensurate with the offense. Section 24.05 states in part that "(d)isciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment."

The Department of Youth Services General Work Rules provide a table of standards of employee conduct and rule violations and penalties. Rule 1b. provides that neglect of duty includes "(f)ailure to perform the duties of the position which the employee holds." Rule 46, Violation of O.R.C. 124.34 includes neglect of duty among its definitions.

IV. POSITIONS OF THE PARTIES

A. The Employer

The Employer argues that it has established just cause for discipline and that the seriousness of the offense established warrants a 10 day suspension rather than some lesser form of corrective discipline. Management contends that Grievant failed to properly perform the duties of his position in that he did not immediately respond to the medical needs of a youth after he kicked a door shut on the youth's hand causing serious injury including amputation of the tip of one of the youth's fingers. It asserts that the discipline was commensurate with the offense and consistent with its commitment to provide a safe, secure and humane environment for the youth confined to the institution. It asserts that a neglect of duty has been established and urges the arbitrator to credit the testimony of the youth witnesses presented rather than that of Grievant. Management asks that the grievance be denied in its entirety.

B. The Union

The Union argues that the discipline was not for just cause and asserts that Grievant was not neglectful in any way. The Union asks that the arbitrator credit Grievant's testimony that the door closed on the youth's hand as a consequence of Grievant's reflex reaction in ducking and pushing away from a sponge thrown by the youth at Grievant, which sponge was covered with feces. It further asserts that Grievant did perform his duty in obtaining prompt medical attention for the youth, pointing out that agency practice was for a youth leader not to enter a room alone in circumstances such as those presented in this case.

The Union also argues that contractual principles of warning and progessive discipline were ignored as were contractual requirements that the penalty be reasonably related to the offense. It notes that Grievant is a two year employee with no prior discipline and asks that the grievance be sustained and Grievant made whole.

V. DECISION AND ANALYSIS

It was apparent to the arbitrator, especially after tours of the facility, that the people of the State of Ohio have given a difficult job to the staff and administration of the Indian River School. Confining, educating and attempting to rehabilitate serious youth offenders is an extreme challenge made yet more difficult by space and budget limitations. That the job gets done is a tribute to them all.

This case presents a situation where the administration of the School, by disciplining Grievant, has sent a strong message to the staff, youth, and the public that it cannot and will not tolerate or ratify harm to the confined youth or failure to attend to their needs immediately. For the reasons which follow, however, the arbitrator determines that such a message is inappropriate because the facts do not provide just cause for discipline. The case turns primarily on credibility determinations. Although it appeared to the arbitrator that the major focus of the suspension notice involved an alleged failure to obtain prompt medical attention, the Step 3 response by management seems to raise an issue as to the cause of the injury and some of the testimony focused on this as well. For this reason, this opinion will attempt to determine how the injury occurred as well as the propriety of Grievant's post-injury response.

A. Cause of the injury

The arbitrator determines that the circumstances under which the injury occurred do not furnish just cause for discipline for the reasons which follow.

1. After reviewing the file and all the testimony, the arbitrator credits Grievant's testimony that the door to the youth's room closed on the youth's fingers as a consequence of Grievant's reflex reaction in seeking to avoid a feces laden sponge thrown at him by the youth. Grievant stated that he was standing behind the partially opened door in the

hall with his head and shoulders around the edge of the door, that the youth held the sponge up and asked him if he wanted some of that, and shortly thereafter whirled around and threw the sponge at him. It is uncontested that the youth had been directed to clean the walls of his room and door because he had smeared his own feces on them earlier in the day and that the sponge was indeed soiled. Given the circumstances, it would be a natural reaction to duck and, from Grievant's position at the time, such reaction would set the door in motion.

2. The arbitrator carefully examined the metal door to the youth's room and confirmed that when set in motion with a very gentle push it will close with sufficient force to cause serious injury.

3. Grievant's story was more consistent than those of the youth witnesses who claimed the sponge was not thrown and that he kicked the door. Grievant testified that the injured youth threw the sponge in the direction of his face and it landed on a food tray being carried in the hall by another youth. The two youth witnesses testified that the sponge was tossed onto the tray, demonstrating a gentle underhand motion. The injured youth, however, testified that he carefully placed the sponge on the food tray, demonstrating placement with an overhand motion. Thus, one youth said he placed it on the food tray while the one holding the tray said he tossed it. This is inconsistent. Further, it is not natural to place or toss a feces laden

sponge onto a returning food tray. The injured youth had a bucket of water and cleaning solution for the sponge. A youth carrying a food tray is not likely to hold it out to allow placement of a sponge such as this. Further yet, the cleaning job had not been completed. Similar problems arise as to allegations about kicking the door. The alleged youth witnesses did not seem to have a line of sight enabling them to make any such judgment. Their credibility is further impaired by their testimony that the "tip of the finger fell to the floor" because this testimony was rebutted by the medical records which established that the finger tip had not been totally severed.

B. Post-Injury Reaction

The heart of the neglect of duty allegation is that Grievant failed to provide proper care after the youth had been hurt. The youth who testified said that when the youth yelled that he had been hurt, Grievant said he did "not give a ----" and he then walked away down the hall. Grievant testified that he originally thought that he was engaged in horseplay in claiming injury but that he looked in the window and, seeing that the youth was hurt, immediately went for help. After reviewing all the testimony, the arbitrator is convinced that just cause for discipline has not been established for the reasons which follow.

1. The arbitrator credits Grievant's testimony that he reacted as soon as he saw that the injury was real and that there was no delay. The youth witnesses who testified that

he walked away down the hall are not inconsistent with his testimony that he went down the hall a little ways before returning to look in the window as soon as he heard screams. To the extent that one of them claimed he went further, it was established that the youth could not see that far down the hall from his window. Indeed, one of the youth witnesses admitted that Grievant had only gotten to the next door before turning back.

2. Grievant's version that he sprinted up the hall to get help is corroborated by other witnesses. The duty officer testified that he pounded on the duty office window and told him that he needed to see him "right now" and that Grievant was "rattled and shook."

3. Grievant's failure to enter the room immediately did not establish just cause. Testimony established that it is agency practice to have two persons available when doors are opened in situations where a youth might be out of control. In a situation of a youth screaming threats, this is even more appropriate. Because of Grievant's actions in hurrying for help, prompt medical attention was obtained.

4. Grievant admits that he initially said "I don't give a shit" when the injured youth said his finger was cut off and before the youth started screaming. The arbitrator credits his testimony that he initially believed that it was only horseplay. Given that the youth had smeared excrement on his walls and then tossed the sponge he was using to clean up the mess, Grievant's reaction is not unbelievable.

No doubt the agency requires that youth leaders watch their language but, given the circumstances of the situation, his reaction is understandable. He proved that he did care by running for help as soon as he knew the youth was hurt. This led to the prompt arrival of medical help.

C. Other

Because of the above resolution, the arbitrator does not reach the Union's objection to the testimony of all the youth witnesses. Even with their testimony, just cause has not been established. The objection was based on the claim that the Union was denied access to the names of youths providing affidavits as part of the investigation and that their testimony would have helped Grievant. In addition, because no just cause for discipline was found, the arbitrator does not reach the progressive discipline issues raised at hearing.

The arbitrator suggests that the parties seek to resolve the matter of access to investigative statements by negotiating a procedure satisfactory to both sides so that this issue will not be a problem at future hearings. The importance of the matter is demonstrated by the content of the affidavits in question here. Some suggest a conspiracy against Grievant by certain youths who did not like him and who may have been pressuring other youth to tell lies about him. Some corroborate elements of Grievant's story such as his claim that the sponge was thrown at him and that Grievant "ran" down the hall to get the duty officer. While

the Union had the opportunity to cross examine the three youths who did testify against Grievant by using their statements, it did not have the opportunity to interview youths whose investigative statements were favorable to Grievant.

The arbitrator understands that this was not an intentional attempt to undermine the Union's preparation but appeared to be a misunderstanding as to what procedures were required. Given the importance of the matter for future cases, however, the parties can better resolve it now rather than putting it before a future arbitrator who will be less well equipped than they to resolve the matter.

VI. AWARD

The grievance is sustained. The Employer is directed to make Grievant whole and remove the suspension from his record.

Douglas E. Ray

Arbitrator

Toledo, Ohio

May 14, 1992