#1057

IN THE MATTER OF THE
ARBITRATION BETWEEN

Ohio Education
Association, State Council
of Professional Educators,

(OEA/SCOPE)

Union

and

State of Ohio Office of
Collective Bargaining, Ohio
Department of Mental Retardation
and Developmental Disabilities

Employer

Grievance No.: 24-02-94-0324-0098-06-10

Hearing Date: April 18, 1995

Award Date: May 30,1995

Arbitrator: Floyd Weatherspoon

For The Employer: Douglas H. Shupe

For The Union: Henry L. Stevens

The hearing was held on April 18, 1995. The parties mutually agreed to submit Post Hearing Briefs by May 1, 1995. The Arbitrator agreed to render a decision thirty days from receipt of the Briefs. The parties exhibits are attached to the decision.

I. THE ISSUES

The Employer raised the issue of procedural arbitrability. After hearing the parties' arguments on this issue the Arbitrator accepted the issue of arbitrability over the Union's objection. The parties stipulated to issue 2.

1. Whether the grievance and the request for arbitration of the grievance were timely filed in accordance with the Collective Bargaining Agreement (CBA); thus is arbitrable?
2. Was the three day suspension of teacher Raj Ahuja from the Apple Creek Development Center Institution for just cause?

II. APPLICABLE CONTRACT PROVISIONS

5.08 - DISCIPLINARY GRIEVANCE PROCEDURE.

B. Procedure

An employee with a disciplinary grievance or an authorized Association representative shall file a grievance under the procedures listed below unless mutually agreed otherwise.

1. Step 3

An employee or an authorized Association representative may file a grievance directly to the Agency Head/Director or designee of the employing agency at Step 3 either within ten (10) days of the effective date of the action or within ten (10) days after receipt of the notice as to the action, whichever is later. When different work locations are involved, transmittal of grievance appeals and subsequent responses shall be made by U.S. mail. The grievance may be submitted by serving written notice (including a copy of the grievance) presented to the Agency Head/Director or designee. The mailing of the grievance appeal shall constitute a timely appeal, if it is postmarked within the appeal period. Envelopes lacking a legible postmark shall be assumed to have been mailed three (3) days prior to their receipt.

Upon receipt of the grievance, the Agency Head/Director or designee shall schedule a meeting to be held within ten (10) days. An Association representative may attend the hearing and shall represent the employee if requested. The Agency Head/Director or designee shall render a decision in writing and return a copy to the grievant and the Association representative within forty-five (45) days after the meeting.

A representative of the Office of Collective Bargaining may be present at such meeting and the Director of the Office of Collective Bargaining or designee shall review the written decision of the Agency Head/Director or designee, prior to its being mailed to the grievant and/or Association. The Association shall designate an individual within the organization to whom copies of Step 3 responses shall be mailed. The notification shall be sent to the Office of Collective Bargaining by the President of the Association.

By mutual agreement, the Association and agency may waive any preceding step of the grievance procedure.

2. Step 4 - Request for Arbitration

If the Association is not satisfied with the answer at Step 3, it may submit the grievance to arbitration, by serving written notice of its desire to do so (including a copy of the grievance) by U.S. Mail. The notice shall be presented to the Director of the Office of Collective Bargaining, with a copy sent to the Agency Head/Director or designee. This notice shall be mailed within fifteen (15) days after the receipt of the decision at Step 3 or the date such answer was due, whichever is earlier. The mailing of a letter requesting a grievance appeal shall constitute a timely appeal, if it is postmarked within the appeal period. Envelopes lacking a legible postmark shall be assumed to have been mailed three (3) days prior to their receipt.

ARTICLE 13 - PROGRESSIVE DISCIPLINE

13.01 - Standard

Employees shall only be disciplined for just cause.

13.04 - Progressive Discipline

The Employer shall follow the principles of progressive discipline. Disciplinary action shall include:

1. Oral 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.

ARTICLE 14 - WORK RULES

14.01 - Work Rules

Work rules shall be all those written policies, regulations, procedures, and directives which regulate conduct of employees in the performance of the Employer's services and programs.

Work rules shall not conflict with any provision of the Agreement. The Association shall be furnished with a copy of the work rules a minimum of fifteen (15) working days in

advance of their effective date. The Association shall designate an address for receipt of this communication.

Work rules shall be made available to affected employees prior to their effective date.

In emergency situations, as defined by the Employer or the employing agency, the provisions of this Section may not apply. The Association and affected employees will be notified promptly of such declared emergencies and their duration.

14.02 - Uniformity

It is the intent of the Employer that work rules shall be interpreted and applied uniformly to all affected employees.

III. STATEMENT OF FACTS

A. Arbitrability Issue

The Grievant, Raj Ahuja is employed as a teacher at The Apple Creek Development Center. Grievant has been employed by the State since April 12, 1976. Grievant received a ten day suspension for violating the Employer's work rule, (inconsiderate treatment) which occurred on January 31, 1994. Grievant's suspension was later reduced to a three-day suspension which he served on March 28 through March 30, 1994.

The Apple Creek Development Center, is a residential facility of the Ohio Department of Mental Retardation and Disabilities. The facility provides housing and services to retarded patients. The Grievant has been employed with the Employer for 19 years and has no prior disciplinary record.

A pre-disciplinary conference was held on February 25, 1994 which upheld the Employer's decision to suspend the Grievant. Subsequently, the Grievant filed a grievance regarding his suspension.

Aside from the above facts the parties agreed to very little else as to the filing and processing of the grievance, and the January 31, 1994 incident. However,

the parties did agree to submit joint exhibits which provided information on the dates the grievance was filed, the Step 3 hearing, and the request for arbitration.

1. Union's Position

The Union argues that the Grievant first filed a grievance on March 31, 1994 (Exhibit A-1) regarding the three day suspension. The Union again filed the grievance on June 1, 1994 (Exhibit J-2(b)). The Union further argues that the grievance filed on March 31, 1994, was timely and that the Employer never raised the issue that the grievances filed on either March 31, 1994 or June 1, 1994 were untimely. Moreover, the Union claims that the Employer never objected to their September 2, 1994 letter requesting arbitration.

The Union's position is that the Employer never raised the issue of arbitrability at any time during the processing of the grievance. According to the Union, the Employer raised for the first time the timeliness issue at the arbitration hearing. The Union stated during the hearing that the Employer "has not given a single document that can show that they raised this issue".

The Union further states in their Brief that "while substantive arbitrability claims may be legitimately raised as late as the hearing, arbitrators have long held that questions of procedural arbitrability must be raised during the grievance process; that failure to do so constitutes a waiver of such claim. The Union cited, *Sterling Engineering Products*, 92 LA 340 (1989) to support this principle.

2. Employer's Position

The Employer's position is that the grievance is not arbitrable because the grievance was never filed at Step three (3) in a timely manner and the Union never

requested arbitration in a timely manner (Brief of Employer).

Specifically, the Employer states in its Brief: "[T]he employee received notice of a suspension for three days to be served on March 28 through 30, 1994, however, a grievance was not filed until June 3, 1994 by Register U.S. mail, a total of 66 days after knowledge of the event". The Employer also argues that the grievance dated March 31, 1994, was never filed in accordance to the CBA.

"If this is not sufficient to show a procedural flaw, the grievance trail shows that a Step 3 meeting took place on June 27, 1994, however the request for arbitration was not made until September 3, 1994, a total of 68 days after the meeting". (Brief of Employer.)

B. THREE DAY SUSPENSION ISSUE

As stated earlier the Grievant served a three-day suspension on March 28, 29, and 30, 1994 for violating a work rule on "Unapproved Behavior Intervention/ Inconsiderate Treatment of Treatment".

The Employer's Work rule States:

Unapproved Behavior Intervention/Inconsiderate Treatment.

> Including but not limited to: deprivation of meals; subjecting resident to unpleasant tastes, substances; exposure to extreme hot or cold substances; prank, or any act that is inconsistent with generally accepted program practice standards and which goes beyond failure of good judgment. (Exhibit M-1(d).

The unapproved behavior according to the Employer occurred on January 31, 1994, when the Grievant pushed one of the patients in the facility and yelled "come on get out of here". The Grievant denies he touched or yelled at the patient.

1. Union's Position

The Union presents the following arguments: The Grievant and the Union emphatically denied that the Grievant touched or yelled at the client.

The Employer failed to meet the seven tests for just cause for discipline of an employee as required by sections § 13.01, 13.03 and 13.04 of the Collective Bargaining Agreement (CBA).

The Employer failed to follow the progressive discipline procedures as required by § 13.04 of the CBA.

2. Employer's Position

The Employer presented the following arguments:

That Apple Creek Development Center (ACDC) is a residential care facility for persons with severe mental retardation;

That both state and federal laws requires ACDC to ensure the facility is in no way "abusive, intimidating, harassing or humiliating" to patients;

That the Grievant violated ACDC Operational Directive HR 3 (Exhibit M-1-d) which outlines conduct which would be considered offensive; That testimony from a senior management official witnessed the incident first hand supports the Employer's position; and that the Grievant was disciplined in accordance to just cause requirements of the CBA.

A. ARBITRABILITY ISSUE

The Arbitrator finds that the grievance and the request for arbitration were untimely filed; therefore not in compliance with Section 5.08 of The Collective Bargaining Agreement. However, it is clear that the Employer waived its right to challenge the timeliness of the grievance and the request for arbitration by processing the grievance without giving notice

to the Union their challenge to the timeliness of the grievance.

With regard to the filing of the grievance on March 31, 1994, the Union failed to submit any documentation or testimony which support their contentions that the grievance was actually filed late. The Grievant's testimony only revealed that he gave the grievance form to a union representative name "Hilda Herra" (sp.). There was no evidence that the grievance (Exhibit A-1) was hand delivered, mailed, or any way given to the Employer for processing from the Union or the Grievant. The burden is initially on the Union to establish that a grievance was filed in accordance with the CBA. This typically is a lenient burden to meet.

Mr. Jim Kovack, Labor Relations Officer at the ACDC testified that the Grievant "never personally gave him a grievance--never put it in his hand or his office." Mr. Kovack also denied that he discussed the issue of timeliness of the grievance with Henry Stevens, Union representative. Carolyn Collins, Labor Relations Officer, for the Department of Mental Retardation, located in the Central Office testified that she is designated to hear Step 3 hearings. She testified she never received any other grievance filed by the Grievant other than the grievance dated June 1, 1994.

In reviewing the grievance dated March 31, 1994, Collins testified her office could not have received the form because it did not have a grievance number, a post office mark written on it, or a date stamp.

The Union failed to present what would have been their best witness, Hilda Herra. She could have testified that she gave the grievance form to the Employer. The Union provided no explanation why she was absent from these proceedings or her statement.

Susan D. May, Vice President of SCOPE and the Grievance Chair Person, testimony was insufficient to confirm that the grievance dated March 31, 1994, was filed with the Employer.

Clearly, the grievance filed on June 1, 1994, was received by the Employer for processing. The grievance was mailed certified and stamped in by the Employer as having received the grievance on June 7, 1994. (Exhibit J-2(b)). This is not to imply that such procedural safeguards must be taken in filing a grievance. In most cases, the testimony of a responsible union official that they delivered or mailed the grievance to a representative of the Employer would have allowed the Union to meet the initial burden of proving a grievance was filed.

Of course, the analysis does not end at this point. The next question is whether the grievance dated June 1, 1994 was timely filed? Section 5.08(B1)(1) Step 3 states that:

> An employee or an authorized Association representative may file a grievance directly to the Agency Head/Director or designee of the employing agency at Step 3 within ten (10) days of the effective date of the action or within ten (10) days after receipt of the notice as to the action, whichever is later.

The record indicates that the Grievant served his suspension on March 26, 27, and 28, 1994. More than two months elapsed before the Union filed a viable grievance, much too late to be in compliance with Step 3 requirements.

Even if the Arbitrator had accepted the Union's contention that a grievance was filed on March 31, 1994, or that the June 1, 1994 grievance was timely, the Union would have "won the battle but lost the war" because the request for arbitration was untimely filed. Section 5.08(B)(2) states:

> If the Association is not satisfied with the answer at Step 3, it may submit the grievance to arbitration, by serving written notice of its desire to do so (including a copy of the grievance) by U.S. Mail. The notice shall be presented to the Director of the Office of Collective Bargaining, with a copy sent to the Agency Head/Director or designee. This notice shall be mailed within fifteen (15) days after the receipt of the decision at Step 3 or the date such answer was due, whichever is earlier.

As stipulated by the parties, the Step 3 meeting was held on June 27, 1994, and the request for arbitration was made on September 3, 1994. The Union had 15 days after receipt of a decision from the Employer at Step 3 or the date such answer was due. The Employer did not give an answer within forty-five days as permitted by the grievance procedure, thus the Union was required to request arbitration in late August. The request of September 3, 1994 was untimely. The Union attempts to make a major issue of the fact that a Step 3 response was not given. Collins testified she did not write a response at Step 3. She stated her "office receives more than 300-400 grievances a year and probably 4 or 5 percent may not get an answer." She also testified that the contract permits the Union to appeal when a Step 3 step hearing response has not been given.

With regard to the waiver of time limits, the Employer correctly cited a number of arbitration decisions and the leading treatise on arbitration, How Arbitration Works, which set forth the basic principles on "clear and unambiguous language" in contracts, the burden on the Union to persuade an Arbitrator to ignore such language, and the prohibition against arbitrators exceeding their authority.

The Employer also relies on ORC 4117.03(A(5) which according to the Employer prohibits them from refusing to accept a grievance, even a grievance filed late for processing. Lastly, the Employer cites the Steelworker Trilogy for the principle that the "Employer may not unilaterally dismiss a grievance that suffers from either procedural or substantive defects; thus the Employer "had no choice but to accept and process the grievance."

The Employer's arguments, in theory, may be correct. The Employer, however fails to incorporate one basic arbitration principle which would modify their analysis and conclusion. That basic arbitration principle is that the Employer must at some time prior to the arbitration hearing give notice

directly or indirectly by their action, that they challenge the procedural arbitrability of the grievance. In other words, the Employer must give notice that the grievance is untimely filed or other procedural time limits have not been met.

Numerous arbitration decisions in Elkouri and Elkouri, How Arbitration Works, 4th ed. (1985) supports this rule. Arbitrators have held that the time limit objection is waived by the employer if the grievance is processed through the preliminary steps of the grievance procedure without timeliness being asserted as a defense. See, for example, *In re Unit Parts Company*, 86 Lab. Arb. 1241 1986, citing Owen Fairweather, Practice and Procedure in Labor Arbitration, 2nd ed., p.104.

Where an employer clearly and timely objects to an untimely filed grievance or request for arbitration, the employer has not waived the time requirement by processing the grievance on the merits through the grievance process. Elkouri, id., 195; Also see, *In re Phillips, 66 Company, Houston Chemical Complex, 92 LA 1037 (1992)*. Indeed, employers are encouraged to process all grievances through the grievance process to attempt resolution of the dispute. However, the parties are expected to put all issues and defenses on the table which will facilitate efforts to resolve the dispute. *Denver Post*, 41 LA 200 (1963). Susan May's testimony confirms that the Employer never raised the issue of arbitrability during the time she was scheduling the grievance for mediation or arbitration.

Based upon the above evidence and the arguments, the Arbitrator finds the Employer waived their rights to raise the issue of timeliness at the arbitration hearing and therefore, this grievance is arbitrable. The case now will be decided on its merits.

B. SUSPENSION ISSUE

The heart of this dispute is whether the Employer can meet the just cause standard for disciplining the Grievant required by the CBA. The Employer has the burden of proof in disciplinary cases. Both parties analyzed the following seven tests for just cause in their Briefs: notice, reasonable rule or order, investigation, fair investigation, proof, equal treatment, and penalty. These tests are outlined in *Enterprise Wire Co.*, 46 LA 359 (1966). The Union acknowledged in their Brief, that the investigation of the incident "appear to have been timely and thorough". The Union also acknowledged that the investigation was "considered fairly and objectively".

The Union does not cite any evidence that the Grievant did not received equal treatment in the application of the Employer's rules and orders. The mere fact that the Grievant was the first employee to be disciplined by the Employer for violating a rule or order does not automatically prove that the employee was treated unfairly or in a discriminatory manner.

The remaining tests of just cause have been established by the Employer:

NOTICE

The Employer points to exhibit A-5 which substantiates that the Grievant was aware of the Employer's policy on inconsiderate treatment as spelled out in Directive HR-3. (Exhibit M-1-d). The Grievant testified he did not know what the Employer's policy on "inappropriate behavior" meant. Aside from the fact that the Grievant signed the Inservice Training Form (Exhibit A-5), an employee employed by this type of institution should understand that it would be considered inappropriate behavior, if they "yell" and "shove" a mentally retarded patient.

REASONABLE RULE OR ORDER

The Employer provided credible testimony for the need and purpose of having such a rule. The Employer's Brief also outlined in detail the need for such a rule. More

importantly, the Union during the hearing also testified that based upon the type of institution, they too believed "it was in fact a proper rule."

PROOF

To meet this test of just cause, arbitrators have held that "...the employer must show that there is credible and substantive proof that the employee committed the act for which he is being [disciplined]" *See Universal Frozen Food, 92 La. 4705 (1994)*, citing *Ideal Cement Company 55 LA, 437 (1970)*. "The burden of proof of guilt of the offense in a discipline case is on the employer." *In re Renton [Wash.] School District, 102 LA 854 (1994)* also cites a number of cases.

The Employer provided testimony of a senior manager, J. Dan O'Brien, who witnessed the incident and immediately prepared a written document summarizing the incident. (Exhibit A-M(f)).

One of the difficult task of an arbitrator is to determine the credibility of a grievant and a supervisor, when they have given conflicting testimony. It is particularly difficult in this case where the demeanor, reputation and detailed testimony of the Grievant and Mr. O'Brien appeared reliable. However, when assessing these type of facts, arbitrators also look to other factors, such as whether the supervisor has any known bias against the grievant or has a personal stake in the outcome of the decision. Where it is the supervisor's word against the grievant's, arbitrators have followed this rule:

> "...an accused employee is presumed to have an incentive for not telling the truth and that when his testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed. United Parcel Service, Inc., [CCH] 66-2 ARB #8703, P. 5428, 5432."

See, M. Hillard A. Sinicropi, Evidence in Arbitration, (1987); Tim Bornstein and Gosline, eds. Labor and Employment Arbitration, 1990, p. 5.04. The Union presented no evidence

to support an argument that Mr. O'Brien was bias or has an interest in the outcome of this decision. The witness statements do not clearly corroborate that the Grievant was engaged in the conduct described by Mr. O'Brien. However, there statements do verify that based on Mr. O'Brien's tone of voice he was concerned about something involving the Grievant. I am only left with the Grievant's testimony which is considered self-serving, since no other reliable evidence was presented to the contrary.

PENALTY

This last test of just cause in this grievance is more problematic and the most difficult hurdle for the Employer to set forth.

An arbitrator has no authority to second-guess management when they issue discipline, moreover, an "arbitrator should not substitute his judgment, in terms of leniency, for that of the Company, unless there is clear evidence that the Company has abused its discretion." *In City of Kansas City, Mo. 94 LA 1294 (1990); Chattanooga Box & Lumber Co., 10 LA 260 (1948).* The Union has presented no evidence that the Company abused its discretion. Indeed, the penalty was reduced from a 10-day suspension to a 3-day suspension.

As the Arbitrator, I was tempted to find that a "shove" and a "yell" by an employee employed for 19 years with a good work history did not warrant a three-day suspension. Had this incident occurred between two employees, or at a different type of facility where the client/patient could provide testimony about the incident, I would not have hesitated to find that the penalty was too severe and that the Employer did not meet the just cause test. In this case, however, I am unwilling to make such a ruling. The health and care of a client is a major consideration. The offense in this case is directly related to the Employer's product, i.e., providing services to mentally retarded patients.

I support Arbitrator Robert G. Howlext's position:

> "...that an arbitrator should be more hesitant to overrule penalties where the offense is directly related to the [Employer's] product than where it involves primarily the personal behavior of employee and is only indirectly related to production." Elkouri and Elkouri, How Arbitration Works, 4th ed.; citing *Valley Steel Casting Co., 22 LA 520, 524-525 (1994).*

Lastly, the Union argues that the Employer did not follow the principle of progressive discipline, as required by Article 13. Article 14--Work Rules permits the Employer to issue "written policies, regulations, procedures, and directives which regulate conduct of employees in the performance of the Employer's services and program" that are not in conflict with the CBA. HR-3 Directive appears to be in compliance with Article 14; therefore, the Employer has the authority to issue discipline for violating the Employer's policy. The disciplinary grid within the HR-3 Directive does not conflict with Article 13 progressive discipline provisions, it only supplements the type of disciplinary actions employees can receive.

AWARD BY THE ARBITRATOR

1. The grievance and the Union's request for arbitration were not timely filed, however, the Employer did not timely raise the timeliness issue; therefore, the grievance is arbitrable.
2. The Grievant was disciplined for just cause; therefore, the grievance is denied.

Floyd Weatherspoon, Arbitrator

5/30/95

EXHIBITS

Joint Exhibits (J)

1. SCOPE/OEA/NEA Agreement of July 1, 1992 to June 30, 1994
2. Grievance Trail
   a. Letter of Arbitration Request dated September 2, 1994 from Henry L. Stevens
   b. Grievance form dated June 1, 1994 grieving the three (3) day suspension
   c. Step three (3) sign in sheet dated June 27, 1994
   d. Letter from Henry L. Stevens to Ms. Carolyn Collins, LRO dated June 2, 1994

Association Exhibits (A)

1. Employee Grievance Form, dated 3/31/94
2. Letter from Brian Walton to Susan May regarding mediation, dated November 7, 1994
3. Letter from Brian Walton to Susan May, dated March 9, 1995
4. Apple Creek Developmental Center, Operational Directive HR-3, Revised 7/90
5. Inservice sign in sheet
6. Statement of Jim Helms, dated 1/31/94 and statement of Estelle Henderson, dated January 31, 1994
7. Raj Ahuja's Suspension Notice, dated March 22, 1994
8. Incident Report of Raj Ahuja

Management Exhibits (M)

1-a Suspension Notice of Raj Ahuja (undated)
1-b Superintendent's Action, dated 3/31/94
1-c Results of Pre-Disciplinary Conference of Raj Ahuja, dated 2/25/94
1-d Disciplinary Grid
1-e Incident Report, dated 1/31/94
1-f Incident Report prepared by Dan O'Brien, dated 1/31/94
1-g Statement of Dan O'Brien, dated 5/20/94
1-h Memo from Joe Clinger to Raj Ahuja, dated 2/25/94
2 Arbitration Decision of Rhonda Rivera, dated 2/19/93