#1146

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

Arbitration Between:	*	
	*	
STATE OF OHIO Ohio Bureau of Workers Compensation	*	Case No. 34-33-950501-0066-01-09
-and-	*	Decision Issued: July 12, 1996
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, OSCEA/AFSCME Local 11	*	

FOR THE EMPLOYER

Kim A. Brown	OCB Advocate
Patrick W. Mogan	Agency Advocate
Richard DeStefano	Office Manager
Monica White	Witness
Dorothy Meade	Witness
Gary O'Neal	Observer

FOR THE UNION

Brenda Goheen	OCSEA Advocate
Lori R. Collins	Staff Representative
Tanya Clayborn	Chief Steward
Nicole Adams	Grievant
Nancy Booker	Witness
Lori Young	Witness
Mary Dill	Witness
LaTina Forte	Witness

Jonathan Dworkin, Arbitrator
101 Park Avenue
Amherst, Ohio 44001

Grievant either was not offered or did not accept a last-chance settlement like Monica's. Her grievance proceeded to arbitration and was heard May 3, 1996 at Columbus, Ohio. The issues presented were whether the Employer had just cause for the removal and whether the discipline met the following requirements in Article 24 of the Collective Bargaining Agreement:

ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

. . .

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

A. One or more oral reprimand(s) (with appropriate notation in employee's file);

B. one or more written reprimand(s);

. . .

D. one or more day(s) suspension(s);

E. termination.

When the arbitration hearing began, the Union withdrew a potential just-cause question. It stipulated that although Monica received last-chance reinstatement, disparate treatment is not at issue.

allows a woman once a month to act like men do every day." As is common with this genre of faxes, the ones sent to the Agency for Nancy did not identify the sender or intended recipient. Monica happened to be at the fax machine first. As the faxes were not addressed to anyone, she took them and showed them around.

Suspecting that a coworker had taken her faxes without permission, Nancy went to Grievant's cubicle to complain. In loud voices, obviously intended to be overheard, Grievant and Nancy talked about "nosey-ass people who can't mind their own business." The comments hit their mark; Monica overheard and was offended. She went to Nancy, who was at her desk, and admitted taking the faxes. She said she was sorry, but that there was no name or anything showing they belonged to anyone. Nancy rebuffed the explanation and ordered her to leave. Then Monica went to Grievant, intending to give the same explanation. Grievant was less abrupt, but more insulting. She spoke to Monica with palpable nastiness and obvious dislike, lecturing her as one would lecture a bad child. The written statement Grievant voluntarily provided Management tells the story:

> She [Monica] then came to my desk . . . and started bugging me again. She started out saying "first of all this is none of your business." I told her I really didn't want to hear it and again asked her to leave me alone. She kept running her mouth. I said, "Monica the whole problem is you need to mind your own business, the fax had no business being carried around by you. It wasn't yours, bottom line." She then said it had no one's name on it. I asked her what kind of sense this made. I told her my car keys don't have my name on them; this doesn't give just anyone the right

the remark that the Employer found intolerable -- requiring the discharge penalty:

> **Before I'd waste my time fighting you, I'd just as soon blow you away with my .38.**

Monica lost control completely. Pointing her finger in Grievant's face, she screamed repeatedly: "BLOW ME AWAY. COME ON, BLOW ME AWAY!" Her shouts were interspersed with vulgarities. Other women in the room tried to break it up. Before they could, Grievant pointed her finger in Monica's face and uttered another nasty insult. Monica took a hard swing at Grievant's finger, trying to slap it away. The blow missed Grievant but hit an innocent bystander.

* * *

According to the Employer, Grievant's demeanor at her predisciplinary hearing made it unthinkable that a penalty less than discharge might be warranted. Monica had been remorseful at her hearing. She was truly sorry for what she had done and admitted that her behavior had been unacceptable. Also, she explained why she became so unrestrained when Grievant threatened to blow her away. Two months earlier, her grandfather shot her grandmother to death. Monica was traumatized by the tragedy, and was privately seeking therapy when Grievant made the threat. The Union made an impassioned plea for Monica, and Management was swayed. Even so, the Employer was not

lished arbitral decisions supports the view. An employee who participates in but does not start a fight, whose major offense is to be in the way of another's fighting words, belligerence, or assault, may be blameless. At least he or she ordinarily is held less culpable than the aggressor. The point was made in a recent dispute between these parties, which was decided by Arbitrator David Pincus.[3] Pincus cited a published, private sector decision by Arbitrator Raymond Roberts as establishing reliable criteria for evaluating discipline cases stemming from fights. In *Alvey, Inc.*, 74 LA 838, Roberts held:

> . . . not all employees guilty of fighting are necessarily subject to discharge for a first offense. There may be mitigating circumstances and fighting, being in the nature of an assault, is subject to certain recognized defenses as follows:
>
> 1. An employee may be an innocent and injured victim of an unprovoked assault and not, himself, engage in aggression or hostility. In such a case, the victimized employee has engaged in no wrongful conduct and must be regarded as innocent.
>
> 2. Self Defense. When an employee engages in only as much hostile conduct as is reasonably necessary to defend himself from aggression and uses no more force than is reasonably necessary for that purpose, he will generally be found not guilty of fighting or assault. This is a defense of justification which is a complete defense.
>
> 3. Provocation. When an employee is the victim of provocation which is foreseeable to provoke an ordinarily reasonable person to a heat of rage and aggression, the conduct of that employee may be excused (as opposed to justified) either partially so as to mitigate against the full

[3] Case No. 24-09-890303-0181-01-04, decided May 24, 1990.

The Union concedes that Grievant's statement about using a gun could not be overlooked. Perhaps the Employee did earn some corrective discipline. It contends, however, that the statement was provoked by fear of a larger, stronger aggressor -- a bully -- and that the Employer grossly overreacted. The Union maintains that in doing so, Management violated the most fundamental precepts of just cause.

OPINION

The Arbitrator agrees that when contemplating discipline for fighting, an employer ordinarily has to distinguish between aggressor and victim. If it disregards the difference and fires both employees in knee-jerk fashion, it places its decision at significant risk of reversal by an arbitrator. Even if fighting is viewed as joint misconduct, just cause requires management to carefully estimate degrees of fault. When an employer fails to do that, the duty falls to the arbitrator.

Here, however, estimating fault would not have saved Grievant. The Union's idea that the only aggression was what occurred in the restroom is too narrow to fit the facts. The fight began on the workroom floor where Grievant mercilessly and with marked effect inflamed Monica's anger. She insulted and debased Monica skillfully. The vernacular says it best: Grievant knew what buttons would provoke Monica, and she pushed them all.

To determine salvageability, an employer must temper its view of the offense with judicious and discerning regard for every potentially mitigating factor. Of course, the employer may consider aggravating factors as well, but it cannot overlook mitigating ones. It bears repeating that the employee's salvageability is the key.

The evidence convinces the Arbitrator that the State based the removal entirely on Grievant's misconduct and on negative aspects of her work record. The Employee had seven years' seniority and worked for the Agency as an intern two years before establishing her seniority date. She had longevity, but her work history was anything but admirable. May 1990 through August 1993, she accumulated a startling number of disciplinary impositions for attendance violations. Her file contains two written reprimands, a one-day suspension, a three-day suspension, and two ten-day suspensions, all for absenteeism and tardiness. In April 1990, her written comment on a reprimand was: "I will try to adapt to my new situation (baby). I will try to get up early enough to get us both dressed and get there on time." She did not keep her promise. In December 1992, the Agency placed her on restricted sick leave, requiring physician verifications for absences due to illness. Under the State Sick-Leave Policy, such requirement applies to employees whose sick-leave usages display pattern abuse.

Grievant's attendance did not improve. In January 1993, she received a ten-day suspension and a six-month EAP referral. It appears that the referral might have been in lieu of discharge. That conclu-

out its job of evaluating an employee's salvageability. When it fails to do so, the obligation becomes the arbitrator's. He or she must then reassess just cause and, if necessary, invade and overturn management's considered judgment.

As stated, the Arbitrator finds that the Employer did not do enough. It looked only to Grievant's misconduct and her poor attendance record, and then made its decision. The Arbitrator must go further; he must examine the whole picture -- both the negative and the positive elements. In carrying out that duty, the Arbitrator finds the following factors relevant:

1. Grievant's Attendance: It was deplorable up to December 1993. According to the evidence, however, it improved since then. The Employee's record showed no discipline for attendance or any other misconduct for more than a year following the EAP referral.

2. Evaluations: At first, Grievant's evaluations were uniformly good. Her mid-probation performance assessment in May 1988 was acceptable. Her supervisor noted that she was doing a better-than-adequate job, was open to learning new procedures, was consistently outgoing, friendly and cooperative. The final probationary evaluation in July of that year was even better. The written supervisory comment was: "[Grievant] gets along well with everyone. She is able to handle her work flow effectively and efficiently." In subsequent years, most of Grievant's ratings were at or above standards.

She did not seem to regret or acknowledge the fact that her own aggressiveness provoked the incident, but the Arbitrator believes that a severe penalty less than discharge would have impressed that on her.

4. The Threat: Telling Monica that she would blow her away was horrible, and the Employer rightfully was frightened by it. This was not free speech, and it would be a mistake for the Arbitrator to underestimate it. However, Grievant testified believably that she did not mean it -- that the threat derived from fear that Monica was going to hit her. That testimony stood up well against searching cross examination.

What cannot be overlooked here is that Grievant was not a physical battler. She fought with her mouth, and she was good at it. Despite the threat, however, there is absolutely no evidence that she is inclined toward violence. The probability is that she is not.

* * *

Evidence establishes that Grievant was not a good or valuable employee. She had many problems, which were resistant to corrective discipline. But she was not fired for those problems. Her discharge was based mainly on the fight in the bathroom (which she was instrumental in provoking) and her threat to blow her adversary away. The evidence proves to a high degree of certainty that the statement was made in the heat of the moment, that Grievant is not a violent person,

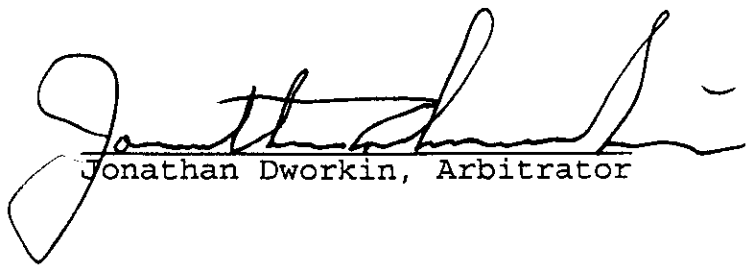
AWARD

The grievance is sustained in part.

The State is directed to reinstate Grievant at the beginning of the pay period following receipt of this Award. Such reinstatement shall be without back pay or restoration of benefits, but shall include full, unbroken seniority.

If, due to the gun threat, the Employer genuinely believes Grievant is unstable and her return to the workforce might be dangerous, it may condition the reinstatement on a psychiatric fitness-for-duty examination. Such examination shall be at the Employer's expense and will not delay Grievant's restoration to pay status. In other words, if the Employer elects to have Grievant examined, and Grievant passes the examination, her reinstatement will be retroactive to the beginning of the first pay period following receipt of this Award.

Decision issued at Lorain County, Ohio July 12, 1996.



Jonathan Dworkin, Arbitrator