

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

Arbitration Between:

STATE OF OHIO
Department of Mental Retardation
and Developmental Disability
Gallipolis, Ohio

-and-

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, OSCEA/AFSCME
Local 11

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* Case No. 24-07-951122-0578-01-01
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* Decision Issued:
* October 14, 1996
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FOR THE EMPLOYER

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Linda Black
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Witness
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FOR THE UNION

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Chief Steward
Grievant
Witness
Witness

Jonathan Dworkin, Arbitrator
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THE ISSUES

This grievance protests the removal of a three-year Employee who worked in the dishwashing area of the Gallipolis (Ohio) Developmental Center. The discipline followed a report to Supervision that Grievant had maliciously sprayed a coworker with a hot-water hose (used for rinsing dishes), causing minor burns to the purported victim's arm. According to the Agency, the water-hose assault was the consummation of Grievant's history of threatening and bullying others. The Removal Order cited both the assault and the prior history as causes:

The basis of this proposed action is the charge:

ALLEGED FAILURE OF GOOD BEHAVIOR

Creating a Disturbance/Fighting on State Property

It is alleged that on or about 09/15/95, you sprayed a fellow co-worker, Brenda Young, with hot water causing her an injury. Also, your co-workers have reported that you have made threatening statements both to and about your co-workers.

While the Union asserted several defenses, the chief one was that Grievant did not commit the misconduct -- that she was innocent of the charge. Two issues, therefore, will decide the outcome:

1. Did Grievant do what Management accused her of doing? It should be observed that the Employer carries the burden of proof and must support the

essential elements of its cause for discipline. To succeed, therefore, it must present evidence of sufficient quality and probity to overcome Grievant's denials.

2. Was the discharge supported by just cause?

Just cause is the governing criterion whenever a Bargaining Unit employee is disciplined or discharged. The OCSEA (Ohio Civil Service Employees Association) Agreement with the State, Section 24.01, commits the Employer to just-cause standards. Section 24.02 defines some of these standards:

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);
- C.
- D. one or more day(s) suspension(s);
- E. termination.

THE DISPUTED FACTS

Did one employee assault another on September 15, 1995?
The answer depends on which version of the facts is believed.

The only witnesses were Grievant and her accuser, Brenda Young, who were working at the dishwasher at the time. The case hinges on Grievant's word against Young's. Both appeared in the arbitration, took oaths to tell the truth, and testified with seeming candor. One lied; it is the Arbitrator's task to decide which one.

An unnerving feature of the conflict is the way the antagonists described each other. Young, who claimed she was the victim of Grievant's malicious attack, told stories about how Grievant domineered the kitchen crew with threats of violence and a menacing aspect. She made people feel afraid. According to Young, Grievant spiced casual conversation by describing her scheme to murder an employee, dismember the corpse, and feed the parts into the Center's garbage grinder. Then, according to the witness, she planned to hose down the area to cover her tracks and punch the murder victim's time card.

Grievant testified that the accusations were nonsense -- fabrications -- inventions of a sick mind. She agreed that kitchen employees were frightened much of the time, but it was Young who frightened them. While Young was not overtly violent, according to Grievant, she had a cunning way of ingratiating herself with supervisors and making herself their confidante. That gave her power, which she plied against coworkers who displeased her.

Allegedly, she carried contrived stories to supervisors and influenced them to discipline her selected victims. She had been heard boasting about her success at getting rid of people, declaring that she had been instrumental in four discharges. Grievant claims she is now the fifth on the list, and says others in the workforce live in constant fear that they will be next.

If either account is true, there was a deranged, possibly dangerous person on the Center's kitchen crew. Did the Agency get rid of that person when it fired Grievant, or is she still there?

* * *

The Employer's Evidence.¹ Brenda Young testified that she and Grievant were friends at first. They worked as a team at the ends of the dishwasher -- Grievant fed the dishes in on the dirty end, Young took them out on the clean end. The women went to lunch together just about every day and had long personal talks. That relationship fell apart around August or September 1995. One factor contributing to its collapse was the conversation where

¹ The allegations in this part of the Decision and the next (The Union's Evidence) are not established facts at this point, nor are all the assertions necessarily relevant. Technically, each sentence ought to begin with a phrase like: "It is alleged," but that would make the writing unduly cumbersome. It should be observed, therefore, that in these sections of the Decision, I have only tried to paraphrase what witnesses said. I have not made a finding of facts.

Grievant talked about committing the perfect murder (described previously). Young testified in arbitration that: "It scared me to death." Though Grievant threatened her life, her children's lives, and all her pets if she told anyone, she could not keep the secret. She told the person whom Grievant spoke of killing and she told a Supervisor. The Center's security force was notified and took statements. There was no follow-up.

Shortly after the police interview, Grievant asked Young if she was the source. Young admitted that she was and truthfully answered when Grievant demanded to know whom she had told. That ended any cordiality; according to testimony concerning character and reputations, Grievant held savage grudges against those who crossed her.

There was another incident a few days later. Grievant and Young had harsh words, and Young tried to apologize. Grievant responded furiously: "Get the fuck out of my face!" Young answered: "You don't have to talk to me that way," and tried to apologize again. Each time she made the effort to calm the situation (four times in all), Grievant replied with the same vulgarity. The Arbitrator finds it remarkable that, according to Young, two Agency Managers were in an adjoining area at the time, overheard the argument and insults, yet did not intervene.

Next came the occurrence that provoked Grievant's discharge. The women were doing their regular jobs in the dishwashing area. Grievant was feeding dirty dishes and Young was removing them at the other end. Soiled dishes were coming out of the washer, and Young had to carry them back to Grievant. That made unnecessary extra work, and she spoke to Grievant about it. She commented that dishes should be rinsed better before they were put in the washer. Grievant did not answer, but shortly afterwards, she sprayed Young twice with the hot-water rinsing hose. Young concedes that the first time might have been an accident, though she does not think it was. The second spraying, however, clearly was deliberate. Grievant stood just three feet from Young, looked at her malevolently, pointed the hose nozzle at her, and pulled the trigger. A stream of hot water, 145°-160°, drenched Young and drove her back against the dishwasher. Grievant kept pointing the nozzle and spraying. Young raised her left arm to protect herself. The water burned her forearm; the burns later blistered.

Young had more to say about Grievant's aggressions, but the Arbitrator finds it pointless to recite it all. The Supervisor took the witness stand and picked up the narrative. She said that Young came to her office in tears, complaining that her arm "stings a lot." Noticing that the woman's arm was "beet red to

the elbow," the Supervisor suggested that she go to the clinic. Young declined, but did get treatment at the clinic the next day.

* * *

The Union's Evidence. After receiving Young's complaint, Supervision began the process that led to Grievant's removal. It included investigative interviews conducted and transcribed by a Police Officer. Grievant, in her interview, denied all charges. At the end, the Officer asked her if she had anything else to say, and she answered with a statement that aptly summarizes the Union's position in this controversy:

I think this is all a conspiracy. It's harassment, not only on the part of my co-workers, but on the part of management . . . I don't know what it is that these people have against me and don't really care. I'm here to do my job and to serve these clients, the same as these other people are supposed to be. There is a lot of stuff that goes on in the Dietary Department that nobody will put a stop to and I think it's time somebody does something and I am innocent on all counts.

Grievant firmly denied assaulting Young; she said that for her, such violence would have been out of character. In her mind, the charge was trumped up -- consistent with the conspiratorial plotting that had been victimizing her for some time. She did not turn a water hose on Young and could not have done so at the time claimed. According to Grievant, she was away from the kitchen

when Young allegedly suffered a burn injury. She was taking a cigarette break with a coworker. This assertion was consistent with what Grievant said in a predisciplinary interview:

Q. Were you working with Brenda Young on 9/15/95 when she was injured? I believe it was Friday.

A. Yes. I worked Friday.

Q. Can you tell me if you know anything about the incident where she was injured?

A. No I can not because I was on my legal break and Joyce Chaney was sitting out front on the bench and I was talking with her. A couple minutes later, we seen Brenda Young walking down the sidewalk as if she was coming . . . to the clinic. I noticed that she had her apron on and she was holding, like my shirt tail is her apron, like this, and I thought maybe she had cut her finger. A couple minutes later, Brenda Farrell and Deloris Clagg came out front to smoke a cigarette. Connie Colburn came and I asked Connie 'Where's Brenda going,' and she said to the clinic and I never asked anything else, never said anything else. Later on I asked Deloris, I said 'Did anybody ever hear why Brenda went to the clinic?' and she said she supposedly got burnt. I was never questioned about any of this. It was not even any of my knowledge until Richie Houck brought it to my attention yesterday. That's all I know about that.

The only area of agreement in Grievant's testimony and her accuser's was both acknowledged there was tension between them. Young said it derived from Grievant's tyranny and intimidation. The Employee allegedly threatened to break arms and use other gangster methods against anyone who reported her to Supervision.

Grievant responded that the allegation was absurd; she never made threats. Young's lack of work ethics was the reason they did not get along. According to Grievant, Young habitually shirked responsibilities, spent inordinate amounts of time on cigarette breaks, flirting, and gossiping with coworkers. Meanwhile, trucks of dirty dishes came in and this Employee kept falling behind. The reason was that her work partner, her accuser, refused to carry her share. Grievant characterized herself as a person dedicated to work, committed to getting it done on time. Her partner's indolence sabotaged those goals; admittedly, that made her angry.

Grievant did admit that she had a few clashes with one or two others, but in each case she was the victim and never the aggressor. Mostly, she got along well with people. The Union presented two believable witnesses to verify this contention. One was the Union Steward who also was Grievant's friend. She said that this Employee is "good natured, happy-go-lucky." She testified that Young, on the other hand, is a trouble maker who routinely runs to Supervision with rumors, innuendos, and outright lies.

The other character witness said she never had a problem with Grievant, heard her make threats, or feared her. To her knowledge, the Employee was liked and respected by almost everyone on the kitchen staff.

One point was repeated by all the Union witnesses. There **were** interpersonal problems in the Food Service Department and apathetic supervisors were to blame. They cloistered themselves in their offices, hardly ever coming out onto the workroom floor. They relied on informants like Young to keep them advised of what was going on. The supervisors never tried to resolve squabbles. One witness testified: "When there's a problem between employees, they're never there to head it off. Sometimes they even feed the situation and keep it going."

WAS THE WATER HOT ENOUGH TO BURN YOUNG?
PRELIMINARY ARBITRAL FINDING

The water temperature became a predominant issue during the hearing. It preoccupied the Advocates to an extent that the Arbitrator found perplexing. The issue, in short, stemmed from the Agency's assertion that the water was heated 145° to 160°, and burned Young's arm severely. The Union contended it was much cooler than that and could not have caused the injury. To prove its point, the Union took the Arbitrator to the kitchen, brought the dishwasher to operating temperature, and checked the sprayer with a laser gun. While the dishwasher monitor read around 150°, the spray at three feet from the nozzle (Young testified Grievant stood about three feet away when spraying her) registered only

as high as 120°. The Arbitrator put his hand in the stream for a few seconds and found it uncomfortable but bearable.

My act proved to be enormously disconcerting to Agency Advocates, and I still do not fully understand why. From the Union perspective, of course, temperature was important. If the OCSEA Advocate could establish that the water was not hot enough to burn, it would cast doubt on Young's testimony. But why was the question so crucial to the Employer? What difference did it make if Grievant assaulted Young with hot water, tepid water, or cold water? The deliberate and prolonged spraying, if it happened as Young claimed, was intolerably dangerous. Hose pressure and the wet floor could have caused a fall and far more serious injury than the minor burn. When discipline and especially discharge is at issue, the misconduct is vastly more important than the result. If Grievant deliberately turned a water hose on her coworker, she committed extreme misconduct and earned an extreme penalty. Depending on the surrounding circumstances, discharge was not out of the question.

In any event, the Agency's last witness dealt with temperature as an expert. The witness, Dr. Rebecca Strafford, is a physician with experience examining and treating burns. Referring to a Harvard University Medical School burn study, she testified about correlations between temperatures, exposure times (in seconds),

and effects on the human body. Before leaving the witness stand, Dr. Strafford addressed the following hypothetical:²

- Q. Dr. Strafford, assume a woman of Ms. Young's age, physical appearance, and health came to you with a blistered burn on the skin of her forearm. Assume further that she gave you a history in which she said that the previous day, she had been exposed to a water spray for several seconds, perhaps five to ten seconds, at temperatures between 112° and 120°, and claimed the spray caused the burn. Do you have an opinion, **based on reasonable medical certainty in the area of burn diagnosis and treatment**, as to whether the patient's assessment of cause and effect was likely?
- A. I would have no medical reason to doubt her.
- Q. In other words, the spray could have caused the burn as described.
- A. Yes.
- Q. And given the hypothetical, is that opinion based on **reasonable medical certainty**?
- A. It is.

The Advocates continued to argue strenuously about water temperature at the hearing and in their written closing arguments submitted about three weeks later. From the Arbitrator's point of view, however, there was nothing left to argue about. Dr.

² I did not take verbatim notes of what Dr. Strafford said. The dialog is an attempt to paraphrase. It is not precise word-for-word, but is substantively accurate.

Strafford's medically certain expert opinion had put the issue to rest.

DECISION ON WITNESS CREDIBILITY

The Arbitrator does not believe Grievant is all bad -- the unredeemed monster Agency witnesses made her out to be. Nor does he believe Grievant's accuser is all good. Union witnesses said that she claimed bragging rights for being instrumental in the discharges of coworkers. If that is so, it is a repugnant characteristic.

These initial findings equalized the credibility of Young's and Grievant's conflicting accounts -- at first. The Arbitrator began evaluating the evidence without inclination toward either employee's story. He regarded both versions as equally plausible and equally implausible.

That balance remained until Grievant testified about her employment history. The Employee's record, on its face, was not inadequate. It was free of progressive discipline, and almost all evaluation ratings were satisfactory. It did not signify an Employee who was in trouble or a likely candidate for removal. But the record did contain a few negative features. Whenever the Agency Advocate raised any of those at the arbitration hearing, Grievant always gave the same responses: She was falsely accused

or evaluated; someone else was to blame. The following summary is illustrative:

1. Grievant had six performance reviews between November 1991 and September 1995. While the ratings were acceptable, five of the six appraisals criticized her lack of team effort and cooperation. Her first probationary appraisal noted "some question, early on about working positively with peers." Grievant's relationships in the workplace seem to have caused her supervisors ongoing concerns.

In arbitration, Grievant denied that she had a problem. She insisted that she ordinarily got along well with everyone. The only difficulties she had were caused by the unprovoked belligerence of coworkers and the fact that Management treated her differently from others.

2. October 5, 1991, when Grievant was still in her probationary period, a Supervisor called her to the office for a job discussion. The reasons were that Grievant allegedly had made threats against people and had used bad language in the workplace. According to the notes of the meeting, the Supervisor handled the counseling meticulously. She told Grievant about incidents she herself had witnessed and what others had reported and concluded with a warning that if the behavior continued, it could influence the

decision to retain Grievant. The Employee was given an opportunity to respond. The notes show that she denied everything and blamed others:

She maintained that she was totally innocent of any wrong doing & suggested that she was new & that probably people had it in for her. She said that most of the people here gave her the cold shoulder.

She said she guessed that she would have to keep her mouth shut, do her work & smile all the time. She admitted that she slacks up once in a while, but she stated that so did everyone else around here.

3. August 29, 1993, Grievant allegedly was unruly and insubordinate to the point that her Supervisor called for police back-up. The following police report describes the incident:

RE: REPORT OF PROBLEMS WITH EMPLOYEE IN THE KITCHEN

DETAILS: This unit was notified by the Operator that Supervisor Linda Black had requested a Police Officer to respond to the kitchen in reference to a problem with an employee in the kitchen. This unit contacted Linda Black by telephone and was advised that staff person [Grievant] was in a severely aggravated state, had been slamming items around in the kitchen, had been repeatedly told to leave the kitchen area to go on her break, had refused and been insubordinate in a manner. After talking with union representative, Dan Frazier, had later left the area still in an aggravated state. This unit responded to the Administration Building, met with Dr. Dey and advised him of the situation, and also met with Linda Black. This unit was requested to remain at or near the Administration Building reference possible problems forthcoming in the evening as [Grievant] was scheduled to work until 8:00 p.m. There were no further outbreaks reported to this unit reference this incident.

Grievant denied it all.

4. A Supervisor's memorandum, dated February 19, 1994, noted that when Grievant's request for a day off was turned down, the Employee showed her displeasure by banging pots. After putting up with the noise about ten minutes, the Supervisor called her out and admonished her. She allegedly warned that she would call security if the disruption continued. According to the memorandum, Grievant looked coldly at the Supervisor and said: "Go ahead!"

In the hearing, Grievant denied everything. She implied that the memorandum was a lie.

* * *

As can be observed, Grievant's denial of the current charges is not discernibly different from her rejoinders each time Supervision targeted other behavior for disapproval. Her employment history shows an unbroken string of denials toward disagreeable appraisals, job counselings, and incident reports. In each case, Grievant insisted she was falsely accused. She was blameless; others were the transgressors. It was all a conspiracy. Consequently, for the Arbitrator logically to accept her testimony here as true, he must buy into the conspiracy theory.

It does not make sense that food-service supervisors and coworkers have been in collusion for three years to make difficulties for this Employee and unjustly cause her to lose her job. It is possible, but improbable. If Supervision planned to remove Grievant, it could have done so more easily during her probation period when the behavioral problems first surfaced -- when it did not have to face a Union grievance or to arbitral overview. Instead of firing Grievant back in 1991, Supervision tried to rescue her through counseling.

As the parties know, arbitrators have no divine insight or special endowment for distinguishing truths from untruths. The best they can do is use their experience to find probabilities. The probability here is that Grievant did commit the assault, and that is the Arbitrator's finding.

PROVEN SUPERVISORY DEFAULTS
CERTAIN CHARGES DISMISSED

Until now, Grievant never was disciplined. That startling fact is confirmed by the record -- a record that shows incidents of threats, vulgar inflammatory language, gross insubordination, disruptive behavior, and intolerable rebelliousness toward legitimate authority. According to the Agency's own evidence, two Food Service Managers heard the Employee shout at Young four times:

"Get the fuck out of my face!" They did nothing about it even though Grievant previously had been counseled for coarse language in the workplace. In the arbitration hearing, Linda Black (the Supervisor who initiated the removal) was asked if she had prior information about Grievant's threat to kill a coworker, cut her up, and run her parts through the disposal. Black's answer was astonishingly indifferent. She said that the information came out in the predisciplinary hearing. "Someone might have told me about it before the hearing, but I can't recall."

The Agency knew about Grievant's ungovernable deportment for years. The support for this finding appears in the Employer's own closing argument:

The State has shown, through testimony and documents, an established history of hostile behavior by the grievant and record of her inability to get along with her co-workers extending beyond her tenure at Gallipolis Developmental Center. She had intimidated her co-workers, even threatening, in graphic detail, to kill them in rather gruesome ways. Her supervisor, Linda Black, testified of past instances of bad behavior and having to speak to the grievant about her poor attitude. Ms. Black also testified to the grievant's performance evaluations, five of six showing the grievant had problems in her relationships with her peers.

It has always been this Arbitrator's belief that Article 24, Section 24.01 of the Agreement has a dual purpose. The provision speaks to progressive discipline and states: "The Employer will follow the principles of progressive discipline."

While this contractual sentence clearly acknowledges a Management Right, it also imposes a Management Responsibility. Progressive discipline is adverse employment action, but it is also a meaningful employment benefit. It is a buffer against removal -- an adjunct to the Union's major goal of creating job security for its members. The idea is that Supervision will be vigilant to detect employee misconduct before it warrants terminal discipline, and impose measures to correct and rehabilitate employees. This Agency says as much in its own Disciplinary Policy:

I. POLICY

It shall be the policy of the Gallipolis Developmental Center (G.D.C.) that:

- A. The principles of progressive corrective action shall be followed **as a means to prevent the employee from committing future violations**, and will be reasonable, consistent with the offense, and commensurate with the individual employee's disciplinary record. [Emphasis added.]

Grievant's supervisors violated the Center's policy and Section 24.02 as well. They ignored the Employee's misconduct for three years, depriving her of progressive discipline and duping her into a sense of confidence that she could keep on getting away with it. Suddenly, the Agency discharged Grievant not only for the assault, but because "your co-workers have reported that

you have made threatening statements both to and about your co-workers."

Because Supervision breached its contractual obligation to discipline progressively, the charge concerning threats cannot remain as a cause for the removal. That charge is dismissed from consideration, and the Employer's case against Grievant will stand or fall solely on the assault.

JUST CAUSE FOR REMOVAL ARBITRAL CONCLUSION

Just cause requires employers to salvage employees who are salvageable. It authorizes terminal discipline only for individuals who are incorrigible or whose misconduct is so outrageous as to truly cancel the employment relationship. In all other cases, an employer whose disciplinary authority is restricted by just cause must exercise that authority conscientiously, mindful of the need to weigh mitigating factors against the more obvious, aggravating ones. Knee-jerk removals, based only on misconduct, are always suspect and always invite arbitral intervention.

One potentially mitigating factor, pertinent here, is the Employer's prior indifference to the Employee's misconduct. If Grievant's discharge had been for antagonism toward coworkers, using vulgar language, or insubordination, the Arbitrator would

not hesitate to modify or overturn the penalty. That, however, is not this case. The misconduct at issue is in a wholly different category. Grievant did something she had not done before. She deliberately assaulted and battered a coworker, an act of violence that genuinely put the victim at risk of life and limb. If the victim had struck back and a fight had resulted, the Union definitely would have argued that the aggressor deserved harsher treatment than the victim. Grievant was the aggressor.

As reprehensible as the Employee's behavior was, she still deserved the benefit of whatever mitigating factors existed. Since it is apparent that the Employer did not search for those factors, it becomes the Arbitrator's task to do so. After carefully reviewing the record, however, he found none of any significance. Grievant's testimony provided no guidance for the search since it contained only denials and justifications, without explanations. There is no evidence or even a contention that her assault was somehow provoked. Nor is the Employee's cause aided by either the length or quality of her service. She was a short-term employee with only an adequate work record.

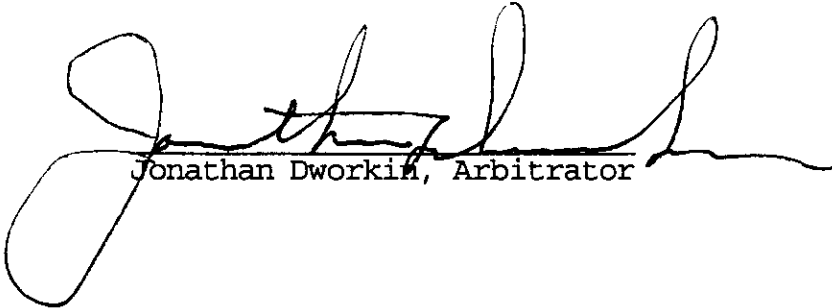
Summarizing, the Arbitrator finds that a short-term Employee with an unremarkable record turned the stream from a hot water hose on a coworker. The act was deliberate and unprovoked. There is no evidence of a mental disturbance. The Employee was not

sorry for her act; to the contrary, she denied doing it. On what basis could the Arbitrator legitimately overturn the discharge and grant the grievance even in part? None is apparent. Accordingly, there is only one direction the Arbitrator can take. He will deny the grievance.

AWARD

The grievance is denied.

Decision issued at Lorain County, Ohio, October 14, 1996.



Jonathan Dworkin, Arbitrator