

IN THE MATTER OF THE  
ARBITRATION BETWEEN

OHIO EDUCATION  
ASSOCIATION, STATE COUNCIL  
OF PROFESSIONAL EDUCATORS,

(OEA/SCOPE)

UNION

AND

Grievance No.: 27-11(5-21-96)  
456-06-10

Hearing Date: November 26, 1996

Award Date: February 7, 1997

Arbitrator: Floyd Weatherspoon

OHIO DEPARTMENT OF REHABILITATION  
AND CORRECTION,  
LEBANON CORRECTIONAL INSTITUTE

EMPLOYER

APPEARANCES:

For The Employer: David Burrus

For The Union: Henry L. Stevens

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EMPLOYEE TRAINING

The hearing was held on November 26, 1996. The parties agreed that the grievance was properly before the arbitrator. The parties also mutually agreed to submit Post Hearing Briefs by December 16, 1996. The Arbitrator agreed to render a decision thirty days from receipt of the Briefs. However, the decision was delayed to resolve a dispute regarding the stipulated issue. A lists of the parties' exhibits is attached to the decision.

AWARD: The grievance is denied. The Employer had just cause to suspend the Grievant for violating work Rule 40.

**I. THE ISSUE**

The parties stipulated to the following issue:

1. Whether the one (1) day suspension of the grievant was for just cause, if not, what is the appropriate remedy ?

**II. APPLICABLE CONTRACT PROVISIONS**

**ARTICLE 5 - GRIEVANCE PROCEDURE**

**Section 5.08 - DISCIPLINARY GRIEVANCE PROCEDURE.**

**C.. 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.

## 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. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB
4. Suspension without pay;
5. 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

The Grievant, William Parizek is employed as a vocational teacher at the Lebanon Correctional Institution (LCI). LCI is a medium security institution. The facility houses more than eighteen hundred inmates.

On April 19, 1996, the Grievant received a notice of disciplinary action for a one (1) day suspension for violating the Employer's Standards of Employee Conduct-Rule 40. Work Rule 40 states: Any act or commission not otherwise set forth herein which constitutes a threat to the security of the institution, its staff, or inmates. During the arbitration hearing, the parties stipulated to the following facts:

1. The Grievant's date of hire is September 29, 1986.
2. At the time of the one (1) day suspension, the Grievant had no disciplinary actions on his record.
3. Joint Exhibit 5 (Standards of Employee Conduct) dated February 18, 1996, were in effect at the time the disciplinary action was issued.
4. Joint Exhibit 4 (Standards of Employee Conduct) dated June 17, 1990, were in effect at the time the incident occurred.
5. The wording in Joint Exhibit 5, Rule 39 is some what different from what the Grievant was charged with.

It is undisputed that on February 12, 1996, two inmates at the Lebanon Correctional Institution were involved in an altercation. The incident occurred in the Grievant's vocational shop. Approximately two weeks after the altercation between the two inmates, the Grievant reported the incident to his supervisor.

On April 5, 1996, the Grievant received an Internal Affairs Incident Report from his supervisor, Beverly Haynes Baker, which stated in part:

On Friday, February 27, 1996, Mr. Parizek notified Ms. Baker that a fight between two inmates took place on February 12, 1996. Mr. Parizek failed to report this fight on the day in which it occurred and he also failed to have the inmates taken to the infirmary. Also, one of the inmates was not assigned to that area, therefore, he was out-of -place. (Joint Exhibit 3, p. 7 ).

A pre-disciplinary conference was held on April 17, 1996. The Hearing Officer, Ron Hart, determined the following facts:

Mr. Parizek's actions constitute a violation of Rule 40, any act or commission not otherwise set forth herein which constitutes a rule violation, a threat to the security of the institution, its staff, or inmates, of the Standard of Employee Conduct. A fight began between two (2) inmates in the Graphic Arts School on February 12, 1996. Mr. Parizek wrote a report regarding the fight with the assistance of a couple of other inmates in his class. He did not report the fight, take the inmates to the Infirmary or place conduct reports against the inmates. On February 27, 1996, he finally mentioned this to his supervisor, Mrs B.Baker. One of the inmates who was engaged in the fight was out-of- place, as he was not assigned to the school. At the Pre-Disciplinary Conference, he admitted to all the facts mentioned. (Joint Exhibit 3, p.2 ).

A Notice of disciplinary Action, dated April 19, 1996, was approved by H. K. Russell, the warden. The notice stated:

An Internal Affairs Incident Report was submitted by Ms. Beverly baker, charging you with violating Rule 40 of the Standards of Employee Conduct. She indicated a fight between two (2) inmates began in your work area and observed by you on February 12, 1996. You failed to escort these inmates to the Infirmary, write conduct reports against them or even report the incident when it occurred. You informed Ms Baker of the incident fifteen days later. One of the inmates you had in your area was out-of-place. Such negligence and irresponsibility will not be tolerated.

Your action constitute a violation of Rule # 40, any act or commission not otherwise set forth herein which constitutes a threat to the security of the institution, its staff, or inmates.

#### **IV. POSITIONS OF THE PARTIES**

##### **A. UNION'S POSITION**

The Union contends that the Employer failed to meet the seven tests for just cause and to follow the principles of progressive discipline as required by the CBA.

The Union also raised a number of procedural objections. Specifically, the Union contends that the notice of disciplinary action was improperly filed, that management failed to follow the negotiated grievance procedure, and that management failed to provide the employee with all documents used to support the disciplinary action. The Union cited the following provisions of the CBA as violated: Article 13, Progressive Discipline, Section 13.01 Standard, 13.02 Investigatory meeting, and 13.03 Pre-suspension or Pre-termination conference.

##### **B. EMPLOYER'S POSITION**

The Employer contends that there was sufficient just cause to issue the Grievant a one day suspension for violating Rule 40 of the Employer's Standards of Employee Conduct. According to the Employer, the Grievant failed to report that a fight between two inmates had occurred in the Grievant's classroom for approximately two weeks after the incident. The Employer contends that the Grievant failed to issue a conduct report on the inmates involved in the fight, failed to have them medically examined for possible injury, failed to separate and isolate the inmates after the fight, and allowed an inmate to be in the Grievant's area without approval. The Employer also contends that the Grievant's failure to follow institutional procedures jeopardized the safety and security of the institution.

## V. DISCUSSION AND FINDING

### Procedural Objections

The Union raised a number of procedural objections prior to a discussion of the substantive issue. A review of each of these objections appears to be without merit, or not substantial to have an impact on the substantive issue. Therefore, I have summarily dismissed the Union's objections for the following reasons: The Grievant was provided a pre-suspension or pre-disciplinary conference, the appropriate work rule was applied, and the Grievant was provided all the documents used to support the disciplinary action at the pre-disciplinary conference. Further, the notice of disciplinary action was complete, and management substantially complied with the provisions of the grievance procedure.

### Substantive Issue

The heart of this dispute is whether the Employer can meet the just cause standard for disciplining the Grievant required by the Collective Bargaining Agreement (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). An analysis of each of the seven tests for just cause was met by the Employer. The following is a review of the evidence to support a just cause finding:

#### 1. NOTICE

The Employer points to Exhibit M-4 to substantiate that the Grievant received and read Revised Standards of Employee Conduct for the Department of Rehabilitation and Correction. The Grievant also acknowledged that he understood the Standards that were effective June 17, 1990. Clearly, the evidence supports that the Grievant received notice of Rule 40 and that he acknowledged that he understood his responsibility under the rule.

The Union contends that Rule 40 "is ambiguous and not very clear when four management individuals interpret it differently." (Union Post-Hearing Brief). I would agree with the Union that Work Rule 40 is very general in nature and could possibly cover an unlimited number of facts. However, the facts in this grievance would have obviously

alerted an employee such as the Grievant to respond to the fighting incident between inmates in accordance with institutional policies. Even a lay person with no knowledge of Corrections would surely have recognized that fighting between inmates could lead to "a threat to the security of the institution." Thus, at a minimum, it would have been routine for one to report the incident to a responsible supervisor in a timely manner, separate the inmates, and complete the necessary paper work.

To further support that the notice requirement was met, the Employer submitted a number of documents regarding training and instructions that the Grievant received on the use of force. The documents support that the physical force used by the Grievant to end the fighting was within the Employer's definition of use of force. ( Management Exhibit 1). The Union vehemently objects to these documents being submitted at arbitration. The Union contends that the Grievant was not charged with a violation of policies regarding the use of force, nor were these documents submitted by the Employer during the processing of the grievance. I agree with the Union that these documents should not be considered for establishing a violation of the use of force policies during arbitration. The Employer never charged the Grievant with violating the use of force policies. However, I disagree with the Union that these documents should be excluded for all purposes. The documents regarding the Use of Force are relevant for purposes of establishing that the Grievant was cogent of the fact that he had an affirmative duty to do more than just separate inmates when they are involved in an altercation, especially where physical force is used to stop the fight. The Grievant had 12 years of service and training on the procedures to follow when force is used to restrain inmates, and had the knowledge and notice that further actions on his part were mandated.

## 2. REASONABLE RULE OR ORDER

It goes without stating that a medium security institution which houses more than eighteen hundred inmates would issue work rules to prevent or correct any acts which would constitute a threat to the security of the institution. Work Rule 40 is reasonably related to the orderly efficient and safe operation of the business. Compliance with Rule 40 should be



expected of the Grievant and other employees. As stated earlier, work Rule 40 is a catchall policy, however, in this grievance, the fact clearly falls within the standard of reasonableness.

### 3. INVESTIGATION

The Union contends that the Employer administered discipline before making an effort to discover whether the employee violated any rules or policies. The evidence presented at the arbitration hearing fails to support the Union's contentions. Prior to receiving the Notice of Disciplinary Action, the evidence supports that Baker interviewed the Grievant regarding the incident on February 27, 1996, with a Union Representative present. ( Joint Exhibit 3, p. 8-12). Further, a pre-disciplinary hearing was held on April 17, 1996, regarding the incident. The Union representative, Peggy Kelly, was present at the hearing. During the pre-disciplinary hearing, the Hearing Officer determined that the Grievant's actions were "inexcusable." The Hearing Officer stated in his finding of facts that the Grievant "admitted to all the facts mentioned." (Joint Exhibit 3, p. 1). Once the Grievant agreed with the facts as presented by management, the investigation is complete. The next step is to determine whether the facts support a disciplinary action.

### 4. FAIR INVESTIGATION

Based on a review of the disciplinary documents, the Employer's investigation was fairly conducted. Moreover, the Grievant admitted that the facts regarding the incident as established by the Hearing Officer were correct. The Union failed to provide any evidence that the investigation was not fairly conducted other than making the assertion.

### 5. 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 by the School Administrator, Beverly Hayes Baker who interviewed and documented her conversation with the Grievant regarding the incident. Baker testified that she conducted an interview with the Grievant on February 27, 1996, and prepared an Internal Affairs Incident Report (Joint Exhibit 3, p. 7). The Union representative, Peggy Kelly, was present during the interview. Baker's testimony and the incident report confirm that the fighting incident occurred and that the Grievant failed to follow required procedures to report the incident and to prepare a report documenting the incident in a timely manner. According to Baker, the Grievant also admitted that he allowed an inmate to work in the Grievant's area without permission. Baker testified this was a serious breach of institutional policy. More important, according to Hearing Officer's report, the Grievant admitted to all the facts regarding the incident during the hearing. The Grievant failed to provide any testimony or evidence that the incident did not occur as presented by management.

## 6. EQUAL TREATMENT

The Union asserts that the Grievant was the only employee to be disciplined even though "someone allowed the inmate to be out of place and there was a code 3 Alarm that was not responded to." The mere fact that the Grievant was the only employee to be disciplined by the Employer for violating Rule 40 does not automatically prove that the Employer unfairly treated or discriminated against the Grievant. The Employer may provide a valid reason for only disciplining one of their employees and not others.

In this case, the supervisor, Beverly Haynes Baker, testified regarding the code 3 alarm and to the inmate being out of place. Baker indicated that when she first conducted the investigatory interview, she was concerned that no one came to the assistance of the Grievant when he pushed a code 3 alarm. Baker further testified that it was later determined that there was a response to the signal, but that the employees had gone to the wrong maintenance area. According to Baker, the Grievant should have immediately reported that

he did not receive assistance, however, he never reported the incident. Baker further testified that the Grievant informed her that one of the inmates involved in the fight was away from his area (out of place). The Grievant admitted to her that he had given the inmate to be in his work area even though he did not have the authority to grant such permission. Lieutenant Casey Barr testified that an inmate is considered out of place when he is in a location without proper authorization.

## 7. PENALTY

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 Employer abused its discretion.

Had this incident occurred at a different type of facility where security was not the primary business of the Employer, the severity of the penalty would be a viable question. In this case, however, I am unwilling to ignore the setting and parties involved. The security of the facility, and the safety of employees and inmates are sufficient reasons to discipline the Grievant. The offense in this case is directly related to the Employer's product, i.e., providing a safe and secure environment for employees as well as the inmates.

I support Arbitrator Robert G. Howlert'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. This section of the Standards of Employee Conduct is in compliance with Article 14; therefore, the Employer has the authority to issue discipline for violating the Employer's policy.

The disciplinary grid for work Rule 40 does not conflict with Article 13 progressive discipline provisions, it only supplements the type of disciplinary action an employee can receive. The penalty for the first offense under work Rule 40 ranges from a warning to removal. A one (1) day suspension is clearly within this range.

**AWARD BY THE ARBITRATOR**

The Grievant was disciplined for just cause, therefore, the grievance is denied.

  
Floyd Weatherspoon, Arbitrator

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## EXHIBITS

### Joint Exhibits

1. SCOPE/OEA/NEA Agreement, 1994-1997
2. Disciplinary Documents
3. Grievance Trail
4. Standard of Conduct, Rules Violation and Penalties, dated June 17, 1990.
5. Standard of Conduct, Rules Violation and Penalties, dated February 2, 1996.

### Management Exhibits

1. Ohio Department of Rehabilitation and Correction, Use of Force, 5120-9-01 regulations
2. Memo to All Employees From William H. Dallman, Use of Force, dated May 29, 1991
3. Administrative Rule 5120-9-01, Use of Force Training Records for William Parizek
4. Signed Statement by William Parizek regarding Revised Standards of Employee Conduct, effective June 17, 1990