

For the Union

Selina Miller
Rhonda Fleming
Tim Rippeth
Ronald Snyder
Robert W. Steele

Grievant
Chapter President
Staff Representative
Associate General Counsel
Staff Representative and
Advocate

Introduction

This is a proceeding under Article 25, entitled Grievance Procedure, Section 25.03 - Arbitration Procedures, Section 25.04 - Arbitration/Mediation Panels of the Agreement between The State of Ohio, The Ohio Student Aid Commission, hereinafter referred to as the "Employer," and Ohio Civil Service Employees Association, AFSCME, Local 11, hereinafter referred to as the "Union," for the period March 1, 1994-February 28, 1997. The arbitration hearing was held on June 26, 1996 and December 3, 1996. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

Stipulated Issue

Was the Grievant removed for just cause? If not, what shall the remedy be?

Stipulated Facts

- The grievance is properly before the Arbitrator.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

(Joint Exhibit 1, Pgs. 68-69)

24.04-Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension, a fine or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. An employee who is charged, or his/her representative, may make such a written request for a continuance of up to 48 hours. Such continuance shall not be unreasonably denied. A continuance may be longer than 48 hours if mutually agreed to by the parties. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the

except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted except that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment.

(Joint Exhibit 1, Pgs. 70-72)

24.06 - Prior Disciplinary Action

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

The retention period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave.

(Joint Exhibit 1, Pg. 72)

Case History

Selina Miller, the Grievant, has been employed by the State of Ohio since September of 1989. Initially, she worked for the Board of Regents, and was subsequently transferred with the rest of her section to the Ohio Student Aid Commission. At the time of her removal on October 13, 1995, the Grievant was

President, and several other management representatives. The Grievant informed her immediate supervisor, David Bastian, that she had been struck in the chest. He said he would "get back" to her. The Grievant went to lunch and came back approximately thirty (30) minutes later.

Upon her return, the Grievant complained of chest pains. She notified Bastian about her condition, and he proceeded to have security call 911. Prior to leaving the facility, the Grievant authored a Request for Leave form abuse. She stated Thompson had intentionally struck her in the chest during the course of an altercation.

The Grievant was, indeed, examined at Grant Medical Center where she was examined by a physician and counseled. X-rays were taken of her chest and purportedly exposed a contused sternum. Once released from the hospital, she followed the counselor's advice and filed a complaint with the Columbus Police Department.

Subsequent to the incidents described above, Patrick Grubbe, Director of ASAC, contacted the Ohio State Highway Patrol (OSHP) in accordance with a policy memorandum issued by the Governor's office. This collateral criminal investigation caused the Employer to hold in abeyance its own administrative investigation. It should be noted that criminal charges were not filed against the Grievant nor Thompson.

Once the OSHP concluded its investigation, Theodore Adams, the General Counsel, initiated an internal administrative investigation. He issued an Inter-Office Memorandum (Joint Exhibit 3) on August 10, 1995 which contained a recommendation that a pre-disciplinary be held pursuant to Article 24, Section 24.04.

The Employer opined that it had just cause to remove the Grievant for violating the Ohio Student Aid Commission Employee Handbook, Section 4.4 - Fighting or Acts of Aggression (Joint Exhibit 4, Pg. 10). This proposition was supported by referencing credibility concerns; proofs in support of removal; and arguments rebutting the Union's procedural claims.

The Employer is convinced that Thompson's version of the events is highly credible, while the Grievant's version is not. Thompson's testimony should be viewed as highly credible because prior to the incident she refused to sign a letter of concern circulated by fellow employees about the Grievant's behavior. Her testimony, moreover, is consistent with statements she authored during the Highway Patrol investigation (Employer Exhibit 1), and provided to an Employer's representative shortly after the incident. Portions, moreover, of her testimony were corroborated by co-workers who overheard segments of the altercation.

The Grievant's testimony, on the other hand, seems incredulous in light of a number of factors. Her testimony is contrary to testimony provided by the majority of the Employer's witnesses. Gaskill testified that in her professional opinion the Grievant was not totally forthcoming when she was being interviewed. This conclusion was partially based on the Grievant's unwillingness to show Gaskill the bruise on her chest.

If the Arbitrator believes the Grievant's version of the events, he would then have to conclude that all the other employees were lying. The record fails to disclose any conspiracy on the part of the Grievant's co-workers. The evident fear of these co-workers concerning potential retribution would have precluded a conspiracy strategy.

The removal of the Grievant should be viewed in a similar light. The administrative action abated a workplace safety problem. Not one co-worker testified on the Grievant's behalf. Those that did testify, however, feared what actions the Grievant might engage in if she was returned to work. Reinstatement should not result just because similar prior disciplinary actions had elapsed prior to the incident resulting in removal.

The Employer emphasized the Grievant was properly notified of the potential negative consequences of violating OSAC Employee Handbook, Section 4.4 (Joint Exhibit 4). Although no prior disciplines were active at the time of the present dispute, she had received a reprimand and suspension for similar acts of misconduct toward her co-workers. Arguments dealing with negative notice, because the Employer had somehow condoned prior acts of misconduct, are not supported as a consequence of these prior disciplines. The Employer merely acted within the confines of the Agreement (Joint Exhibit 1). Action was taken when it was deemed to be supportable. The Employer's actions or inactions should not have raised expectations that her behavior was acceptable.

The Employer opined that the evidence regarding prior acts should be admitted by the Arbitrator because it is more probative than prejudicial. This evidence should be used to determine whether the removal was appropriate and commensurate with the offense. The incident in dispute cannot be viewed in isolation, but must be viewed within the contexts of prior acts.

The Grievant's due process rights were not violated as a consequence of the removal. Section 24.02 requirements dealing with progressive discipline were not

Grievant's version lacked credibility. He, then, determined that the Grievant's allegation about being struck in the chest was not credible, as well, based on the totality of the circumstances.

The Grievance's unequal treatment claim was viewed as equally defective. The Union never established the Grievant and Thompson were similarly situated in terms of being co-aggressors on July 10, 1995; and whether their work histories were similar. Once the Union raised this claim, the Grievant's prior disciplinary episodes were properly used to distinguish the protagonists.

The Union's Position

It is the position of the Union that the Employer did not have just cause to remove the Grievant, which constituted a violation of Section 24.01. Several theories were proposed by the Union to support this premise: the defective nature of the proofs submitted to support removal; the unequal treatment of similarly situated employees and a number of procedural defects which engendered due process defects.

The Union posited that the Grievant's version of the events was highly credible and should be believed even though it differs dramatically from the version proposed by Thompson. The Grievant maintained Thompson refused to move after she asked to be excused. Thompson, in the Grievant's opinion, was the aggressor since she bumped her as she attempted to continue down the hallway. The bump caused the Grievant to lose her balance; and as she attempted to regain her balance, Thompson swung around and struck her in the chest. This aggressive act caused the Grievant to experience an injured sternum. An outcome corroborated by a subsequent physical examination.

claims. At the hearing they attested to having no fear of the Grievant, which conflicts with the accusations contained in the memo.

Testimony provided by Minturn and Bastian did little to support the Employer's primary contention. The former witness testified she only heard a portion of the confrontation, while the latter alleged he heard none of the exchange.

Work Rule 4.4 - Fighting or Acts of Aggression is clear and unambiguous regarding intent and potential consequences. It specifies "no type of physical attack is acceptable. The parties in any such situation will be subject to disciplinary action." Here, the Employer treated the Grievant differently than Thompson even though the work rule in question precludes disparate application. The Employer also knew about the Grievant's accusations dealing with the physical harm inflicted by Thompson, and yet, did nothing about it.

The Employer was clearly placed on notice that Thompson struck the Grievant causing injury to her sternum. Bastian was told directly by the Grievant about this accusation. She reiterated her accusation when she submitted her Request for Leave form on July 10, 1995. The Grievant, moreover, was asked to re-submit a new Request for Leave form with the comments dealing with Thompson's involvement deleted. During the course of the administrative investigation, the Grievant provided Adams with a written statement which restated her accusation that she had been struck by Thompson.

With all the aforementioned notice and the clear and unambiguous work rule, Adams, still, only recommended that the Grievant be subject to a predisciplinary hearing. As such, Adam's investigation was not impartial because he distinguished the

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, and an impartial and complete review of the record, it is this Arbitrator's opinion that the Grievant was not removed for just cause. This finding is based on several procedural defects engaged in by the Employer, and a failure to deal with both protagonists in an even-handed manner.

The hearing held on Tuesday, December 3, 1996 cured the client-attorney privilege issue raised by the Union at the hearing and in its briefs. My ruling regarding client-attorney privilege was in tune with arbitration principles and the existing case law regarding this matter. The Olander decision changed the geometry of the situation which forced a re-consideration of the matter. The Employer offered the re-examination of Adams by the Union. The Arbitrator tendered the offer to the Union with an additional clarification. If the Union decided to re-examine Adams, the privilege would be pierced, and the matter would be cured. The Union decided to re-examine the witness, which renders this particular procedural defect moot.

Another procedural defect was raised by the Union regarding a Section 24.04 violation dealing with a notice defect. The Employer, for the first time, raised the issue of an altercation between the Grievant and another individual prior to the July 10, 1995 incident. The Employer's advocate remarked that this incident appeared in a computer print out dealing with intake information held by the prosecutor's office. He felt it was relevant because it raised the possibility that the Grievant's injury had been inflicted during the course of a prior altercation. The Grievant, at first, was unwilling to provide any detailed information regarding the genesis or the outcome of the altercation. The

Grievant conferred with her advocate and decided to become more forthcoming. Her decision to answer questions regarding the incident in question caused the waiver of the proposed Section 24.04 allegation, and estopped the Union from positing any defect argument in support of its due process claim. In fact, the clarification of the matter helped support the Union's injury claim rather than refute it.

The Union's "prior acts" argument was not supported by the record. The Employer did not introduce this evidence "to show action in conformity with the alleged matters in dispute." Rather, in this Arbitrator's opinion, the prior acts were introduced in an attempt to justify the propriety of the administered penalty. The prior acts were not entered into the record to establish a pattern of behavior. In fact, the removal order (Joint Exhibit 3) does not articulate a pattern-related charge. There is another reason, however, which justifies the introduction of prior acts evidence. Once the Union raised the unequal treatment charge, it presented the Employer with an opportunity to distinguish Thompson from the Grievant based on their work histories and prior disciplinary records.

This Arbitrator has previously articulated the various positions held by others regarding potential remedies for due process violations. For the most part, once procedural defects are documented and supported by the record, discipline will not normally be overturned by an arbitration. Discipline is normally modified to respect the due process rights of the employee, but upheld in part if the charge is supported by the record. If, however, the employee's interests have been - or may have been -

defect clearly prejudiced the Employer's perception regarding the propriety of the charge and related administered penalty.

This predisposed position is further exposed when evaluating the conduct of the administrative investigation initiated by Adams. The Employer properly waited for the collateral investigation to run its course. This investigation, and the related documents and evidence, served as a collateral matter not to be used as the primary basis to support removal. An administrative investigation was conducted by Adams. He interviewed witnesses, but did not have them submit written statements. He felt this exercise was unimportant since he had the Highway Patrol's investigatory reports at his disposal. A faulty decision since the questions asked, and the standards used, in any criminal investigation differ significantly from those involved in any contractually based just cause deliberation.

The record, and related evidence and testimony introduced to establish proof for the matters asserted, were additionally tainted. The Employee Handbook (Joint Exhibit 4) Section 4.4 - Fighting or Acts of Aggression states in pertinent part:

4.4. Fighting or Acts of Aggression

Employees must resolve any differences in a mature and professional manner without resorting to physical violence. Employees should be able to work in an environment free from physical aggression and fighting. No type of physical attack is acceptable. The parties in any such situation will be subject to disciplinary action.

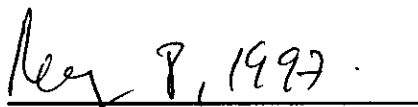
(Joint Exhibit 4, Pg. 10)

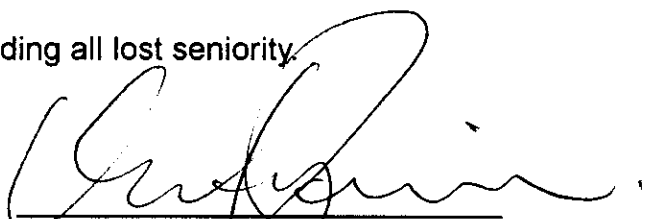
attempt should have been made to elicit some responses to critical aspects of the disputed matter.

It is not his Arbitrator's responsibility to make the record for the parties. The parties, and in this specific instance the Employer, since it moved for removal, had to build a case on the basis of direct or circumstantial evidence. It failed to provide this Arbitrator with substantial evidence or proof that the Grievant was guilty as charged. The Employer, moreover, did not investigate the matter in a fair fashion since it focused its attention entirely on the Grievant. The record indicates an alternative course of action was warranted even if the outcome would have led to the same result. That is, by limiting Thompson's involvement without a fair and complete investigation, however, the Employer's conclusion involving wrongful involvement is incomplete and unsupported.

Award

The grievance is sustained. The Employer is directed to reinstate the Grievant to her former position with all back pay less any appropriate deductions. Her benefits shall be reinstated and made whole including all lost seniority.


May 8, 1997


Dr. David M. Pincus
Arbitrator