

**ARBITRATION DECISION NO.:**

109

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Transportation

**DATE OF ARBITRATION:**

February 12, 1988

**DATE OF DECISION:**

March 14, 1988

**GRIEVANT:**

Jeff Sparks

**OCB GRIEVANCE:**

G-87-0811

**ARBITRATOR:**

Rhonda R. Rivera

**FOR THE UNION:**

Patrick A. Mayer  
Dan Smith

**FOR THE EMPLOYER:**

Rodney Sampson  
Tim Wagner

**KEY WORDS:**

Just Cause  
Procedure  
Provision of Statements  
Provision of Pre-  
Disciplinary Report  
Altered Report After Signing

**ARTICLES:**

Article 24 - Discipline  
    §24.01-Standard  
    §24.02-Progressive  
Discipline  
    §24.04-Pre-Discipline

§24.05-Imposition  
of Discipline

Article 25 - Grievance  
Procedure

§25.08-Relevant  
Witnesses and Information

**FACTS:**

Grievant was a Highway Worker for ODOT with nearly five (5) years of service at the time of the incident. He did not have any prior disciplinary record. Grievant was flagging on the highway. Another employee went to pick Grievant up in a dump truck. The driver pulled away before Grievant was fully in the cab, jostling Grievant. It is not clear whether he laughed about it. It is clear that the two men exchanged words and engaged in an altercation that resulted in an injury to grievant's ear. Grievant was treated and released after eight (8) stitches were placed in his ear. Neither employee seemed willing to discuss what had happened and they resumed good working relations. An Employee injury report was filled out, but Grievant claims that portions were added after he signed it. Grievant was not provided with four (4) joint exhibits at the pre-disciplinary hearing. An Employer Representative said that no written pre-disciplinary report existed. Grievant and the other Employee were both suspended for ten (10) days.

**EMPLOYER'S POSITION:**

The investigation revealed a fight. Although there is no explanation of the differing versions of the actual fight, neither party denies involvement in an altercation which resulted in an injury to Grievant. Both Employees were equally disciplined. Although failure to provide certain documents was improper, the failure did not prejudice the Grievants case.

**UNION'S POSITION:**

The discipline was without just cause. Grievant did not strike the other Employee but was assaulted by him. The procedural violations by the Employer removed the procedural safeguards provided by the Contract.

**ARBITRATOR'S OPINION:**

Both men admitted being involved in an altercation or fight. Both were-good workers with no prior discipline. The Employer could not determine fault so equal discipline was imposed. This was reasonable and fair. The Employees clearly violated a work rule punishable by suspension or removal. The substance of the discipline is upheld. The procedural irregularities, although improper and troublesome, did not prejudice the Grievant's case.

**AWARD:**

Grievance denied.

**TEXT OF THE OPINION:**

IN THE MATTER OF THE  
ARBITRATION BETWEEN

**OCSEA, Local 11,  
AFSCME, AFL-CIO**

and

**Ohio Department of  
Transportation**

**Grievance No.:**  
G-87-0811

**(Grievant: Jeff Sparks)**

**Hearing Date:**  
February 12, 1988

**For the Union:**  
Patrick A. Mayer and  
Dan Smith

**For the Employer:**  
Rodney Sampson and  
Tim Wagner

**Present:** Patrick A. Mayer (OCSEA, Staff Rep. and Advocate), Dan Smith, Esq. (OCSEA, General Counsel), Jeff Sparks (Grievant, witness), Rodney Sampson (OCB, Advocate), Tim Wagner (OCB, Advocate), Robert W. Humphrey (ODOT, witness), Philip A. Tirey (ODOT, witness).

**Preliminary Matters**

The Arbitrator received permission from both parties to record the hearing for the sole purpose of refreshing her memory and on the condition that the tapes will be destroyed the day the award is rendered. The Arbitrator also received permission to submit the opinion for publication. The parties stipulated that the issue was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

**Issue**

Was the Grievant suspended for 10 days for just cause? If not, what should the remedy be?  
The Union alleged the following procedural violations:

1. The employer failed to provide statements (Joint Exhibits 7-10) to the Grievant and/or his representative violating Art. 24.04.
2. The employer failed to provide to the Grievant and/or his representative the pre-disciplinary report in violation of §25.08.
3. Unknown agents of management altered the Employee Injury Report (Joint Exhibit #11) after the report was signed by the Grievant in violation of implicit rules of fairness and honesty.

**Stipulations of Facts**

1. The Grievant was hired in May of 1982.
2. Robert Humphrey was hired in July of 1981.
3. The Grievant was suspended on March 2, 1987 for ten (10) days.
4. Neither the Grievant nor Mr. Humphrey has had any previous discipline.
5. Both the Grievant and Mr. Humphrey were both suspended for ten (10) days for their participation in the incident at issue.

## **Contract/Rule Sections**

### **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. (emphasis added)

#### **§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. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand;
- C. Suspension;
- D. Termination.

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 employee's 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. (emphasis added)

#### **§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 or termination. 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. No later than at the meeting, 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 possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the

meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut. (emphasis added)

#### **§24.05 - Imposition of Discipline**

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

#### **§25.08 - Relevant Witnesses and Information**

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

Directive A-301

January 10, 1986

Supersedes Directive A-301

January 15, 1985

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## **OHIO DEPARTMENT OF TRANSPORTATION DISCIPLINARY GUIDELINES**

### **VIOLATIONS/OCCURRENCES WITHIN 24 MONTH PERIOD**

4. Striking a fellow employee. First Occurrence Suspension/Removal; Second Occurrence Removal.

### **Facts**

This incident happened on November 14, 1986. The incident happened while the participants, employees of ODOT, were on highway R-54 doing maintenance work. The Grievant was "flagging." Robert Humphrey was driving a dump truck. Mr. Humphrey was requested to go back down the road and pick up the Grievant. Mr. Humphrey pulled up next to the Grievant to pick him up. Mr. Humphrey testified he was pressured by on-coming traffic and started the truck forward before the Grievant was fully in the cab. The Grievant was jostled and almost lost his balance. Mr. Humphrey said this action was an accident for which he apologized at the time. The Grievant claimed that Mr. Humphrey popped the clutch on purpose and laughed about it. Both men admit

angry words were exchanged between them in the cab. Mr. Humphrey claims that the Grievant pushed him into the steering wheel, tore his vest, and called him a "nigger." The Grievant denies all three actions. When Mr. Humphrey stopped the truck, both men alighted and both men admitted that angry words continued. Mr. Humphrey claims that the Grievant pushed him and that he then struck him back. The Grievant claims that he started to walk away and that Mr. Humphrey struck him from the rear. The Grievant's ear was cut and bleeding.

Apparently Gilbert McCombs (HW4), the immediate supervisor of both men called out on the radio about the Grievant's injury. Both Ronald Raines and Phil Tirey (Highway Maintenance Supervisor I) heard this call. Raines ordered the Grievant to be taken to the hospital and that Tirey meet him there. At the hospital, the Grievant received 8 stitches, was released, and returned to work. Tirey testified that the Grievant told him that "Bob (Mr. Humphrey) and I had an altercation." Beyond that statement, the Grievant was reluctant to discuss the incident. Mr. Tirey testified "that both (men) wanted to keep it quiet." Tirey also testified that Gil McCombs wished to hide the incident. Tirey testified that he told both Grievant and Humphrey to write up their version but that neither had done so by Monday, 11-17-86.

According to the testimony of both Grievant and Humphrey, both men went after work for a beer with Gil McCombs, their supervisor. From this meeting, Humphrey agreed to pay the Grievant's hospital bill. Humphrey testified that he feared for his job. Tirey testified that the Grievant had made a similar remark to him at the hospital. Humphrey testified that purpose of the meeting was to cover up the incident. The Grievant also testified that the meeting after work was at the instigation of Supervisor McCombs.

Despite this meeting, on Monday, 11-17-86, the incident became a supervisory/management issue. In a series of IOC's (Joint Exhibits #7-#10), Tirey and Raines reported the various versions of the incident which they had obtained from Grievant and Humphrey. In Joint Exhibit #7, Tirey notes that at 7:30 a.m. on 11-11-86, neither party had made any written statement. In Joint Exhibit #9, Raines reports to Eyink that on Monday neither party wanted to make a statement. Subsequently, Humphrey wrote his version (Joint Exhibit #6), but it is undated. An Employee Injury Report (Joint Exhibit #11) was filled out. It was signed by the Grievant on 11-25-86. However, the report is dated 11-14-86. But that item is in a different handwriting hand than the rest of the report. Most of the report is typed. Some of the report is handwritten by the Grievant. At least two other unidentified handwritten items appear. The Grievant claims that the words "while engaged in fight" were added to this sentence. "Jeff Sparks says he was struck by Bob Humphrey." The Grievant claims the words were added after he signed the report.

On December 31, 1986, the Grievant was notified that he was to be disciplined for the events of 11-14-86. His hearing was set for January 9, 1987. At that hearing, Joint Exhibits 7 through 10 were not provided to Grievant. The exhibits were discovered in the Grievant's personnel file by the Grievant's union advocate during the pre-arbitration investigation.

On February 23, 1987, the Grievant was suspended. He filed his grievance on March 4, 1987. A level III hearing was held on March 19, 1987 and a decision rendered April 7, 1987. Step IV decision was rendered April 21, 1987. A request for Arbitration (Step 5) was dated May 13, 1987. Immediately prior to the arbitration, Mr. Mayer, the Union advocate, requested of Mr. Wagner, the Employer advocate, those documents "which management used to support its discipline against the Grievant."

At the hearing, Mr. Wagner said he had no knowledge as to why Joint Exhibits #7-10 were not given to the Union and the Grievant prior to the pre-disciplinary hearing. Mr. Wagner said that he had searched for a written pre-disciplinary report and that apparently no such report existed. Mr. Wagner stated that he was aware that this Arbitrator had previously held that pre-disciplinary reports were discoverable under \_§25.08.

## **Employer's Position**

Grievant was properly disciplined under A-301(4) for just cause. Employer's investigation revealed a fight and that no witnesses existed to support the differing versions. Both employees were equally disciplined.

With regard to the procedural violations alleged, the Employer's advocate maintained that he had no knowledge of why Joint Exhibits #7-#10, clearly written before the hearing, were not given to the Union representative. He agreed that the omission was improper but argued that such a failure did not prejudice Grievant's case.

With regard to the failure to provide the pre-disciplinary report of the impartial administrator for discovery under §25.08, Mr. Wagner maintained that A-302 (II-F) does not require a "written" pre-disciplinary report.

Lastly, with regard to the alteration of the Injury report, Mr. Wagner testified that he was in possession of no evidence which would shed light on the alleged alteration.

## **Union Position**

The Union alleges that the Grievant did not "strike" the other party but rather was assaulted by the other party. Therefore, the Union maintains that the discipline was without just cause. The Union claims that the procedural violations alleged (See p. 2) prejudiced the Grievant's case and, in addition, removed the procedural safeguards provided by the Contract.

## **Discussion**

Both parties admit angry words, both admit either a "fight" or an "altercation". The incident was viewed by no witnesses. The Arbitrator found the testimony of both parties equally credible and incredible, that is, both men painted self-serving descriptions of an event. Both stories had inconsistencies; both stories had moments of shining truth. Testimony revealed that these men both had no previous discipline, were both good workers, and continued to work together harmoniously after the incident. Rainey and Eyink conducted an investigation and apparently were somewhat hampered by a supervisory and work force decision to handle the incident privately. The management team apparently concluded that a fight occurred and that they could not determine who was at fault and as a consequence equal discipline was imposed. The Arbitrator finds this management conclusion a reasonable and fair result. The Arbitrator finds that the Grievant and Mr. Humphrey engaged in a fight and violated A-301 (#4). The discipline imposed should be equal as no evidence emerged which clearly and convincingly exonerated one of the participants. The substance of the discipline is upheld.

The procedural violations alleged are troublesome.

In essence, the Employer admitted that Joint Exhibits #7-#10 should have been provided to the union and to the Grievant prior to the pre-disciplinary hearing. However, Mr. Wagner's position was that the failure did not prejudice the Grievant's specific case.

With regard to the non-existent pre-disciplinary report, the Arbitrator finds that A-302 (F) does not explicitly require a written pre-disciplinary report. Since this Arbitrator has held previously that written pre-disciplinary reports are discoverable under §25.08, the Arbitrator is troubled by this practice. However, no evidence was adduced in this case that a written report was deliberately omitted. Such a deliberate action to avoid the essence of §25.08 would, in this Arbitrator's opinion, violate the implicit due process requirements of the contract.

Lastly, the injury report does appear to have been improperly altered. However, no evidence was adduced which implicated any one person.

Procedural violations can be handled in a variety of ways by an Arbitrator depending on a variety of factors. These factors include

1. Was the Grievant's case prejudiced?
2. Was the violation one which violated the contract explicitly?
3. Was the violation an implicit violation of due process notions of fairness?
4. Was the violation a failure to follow the employer's own rules?

A violation such as No. 1 requires that the grievance be sustained. A violation such as No. 2 usually requires that the grievance be sustained even if the merits mitigated otherwise. Violations such as No. 3 and 4 require a balancing of interests. A prominent interest inherent in a labor management contractual arrangement which utilizes arbitration is that fair procedures be followed regardless of the substantive outcome. The Arbitrator is often faced with balancing the interest of a substantively correct decision against the interest of ensuring fair procedures in future disputes.

In this Grievance, the Arbitrator finds that none of the procedural irregularities prejudiced the Grievant's case. The failure to provide the IOC's was serious; however, no pattern of such abuse was shown nor was a showing made that the lack of a pre-disciplinary report was deliberate in this case. In a future situation, the balancing of interests might require that a remedy be fashioned to ensure future good faith adherence to these procedures. However, the Arbitrator declines to do so in this instance.

The Arbitrator finds that the Grievant violated A-301 (4) and that a suspension of ten (10) days was proper.

### **Award**

Grievance Denied.

March 14, 1988

Date

Rhonda R. Rivera

Arbitrator