

**ARBITRATION DECISION NO.:**

173

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Taxation

**DATE OF ARBITRATION:**

**DATE OF DECISION:**

February 21, 1989

**GRIEVANT:**

John R. Murphy III

**OCB GRIEVANCE NO.:**

30-10-(88-08-23)-0075-01-09

**ARBITRATOR:**

Nicholas Duda, Jr.

**FOR THE UNION:**

Linda Fiely

**FOR THE EMPLOYER:**

Timothy D. Stauffer

**KEY WORDS:**

Just Cause For Separation

Progressive Discipline

Supervisory Intimidation

Imposition Of Discipline

Assault Of The Supervisor

**ARTICLES:**

Article 24 - Discipline

§24.01-Standard

§24.02-Progressive

Discipline

§24.04-Pre-Discipline

§24.05-Imposition

of Discipline

**FACTS:**

Grievant was hired as a Clerk II in the Department of Taxation on December 1, 1980. He has been an excellent worker receiving high marks on all of his evaluations. During his more than seven years of employment, has only one prior discipline - a three day suspension on February 25, 1988 for Sexual Harassment based on inappropriate statements and offensive gestures and unwelcomed physical contact.

Grievant is about five feet tall and weighs about 100 pounds and has been physically impaired by epilepsy and a seizure disorder. It was common for the office members to "look after" the Grievant and take measures to help him whenever the signs of a seizure became noticeable.

On August 8, 1988, the Grievant's supervisor was informed by her supervisor that the Grievant had a doctor's appointment the next day. When the supervisor inquired about the appointment, the Grievant said he had no intention of keeping it. Later that afternoon, the supervisor began pressuring the Grievant to keep his appointment. However, the Grievant ignored the supervisor's requests and continued to work at his desk.

Finally, the supervisor walked over to the Grievant's desk and placed both of her hands on the papers which he had been processing, abstracting his ability to pick up any of the papers. When she insisted once more that he keep his doctor's appointment, the Grievant became upset and thrust both his arms upward and hit the supervisor's left arm. Grievant then left work and did not return that day.

The Grievant was removed for insubordination, failure of good behavior, neglect of duty, absence without leave, leaving work area without permission of supervisor, and/or fighting or striking the supervisor.

#### **EMPLOYER'S POSITION:**

The employer maintains that, although the Tax Department does not have any written policy for misconduct, the Grievant's removal was based on an unpublicized policy of the administration which provides for a suspension the first time an employee "assaults" a supervisor and discharge for a second assault. The employer considers the sexual harassment incident as the first "assault" offense, and the August 8, 1988 incident as the second assault made by the Grievant.

While the employer acknowledges that there was not an established and publicized policy concerning misconduct in the department, the employer believes that the Grievant's actions were so "heinous" or serious that the Grievant should have known the conduct was offensive and subject to heavy punishment. The employer maintains that the discipline was progressive and given for just cause.

#### **UNION'S POSITION:**

The union argues that the Grievant was not removed for just cause and that the employer failed to comply with sections 24.02 and 24.05 of the Agreement which establish that discipline shall be progressive, corrective and not punitive. The Union asserts that the Grievant's action on August 8, 1988 is not similar to the Sexual Harassment incident on February 25, 1988 and therefore, cannot be treated as a "second assault."

Additionally, the Union argues that removal is too harsh given the various mitigating circumstances. 1.) Grievant's actions to his supervisor were not premeditated or calculated to harm, 2.) the actions lasted only a moment, 3.) there was minimal harm done to the supervisor and 4.) Grievant gave over seven years of excellent service to the employer. Consequently, the removal should be reduced to a lesser discipline.

#### **ARBITRATOR'S OPINION:**

The Employer has not satisfied the burden of showing either insubordination or fighting or

striking the supervisor. The Grievant did not intentionally assault the supervisor and even if he had, removal under the circumstances would still be excessive. The removal was based on prior discipline for "similar problems." However, the Grievant's physical contact with the supervisor was not sexual in nature and therefore, is not similar to the prior disciplinary problem of sexual harassment.

The mitigating circumstances also warrant a lesser discipline than removal. In addition to the mitigating factors raised by the Union, the Grievant's upset condition at the time of the incident provides some justification for striking the supervisor.

The Grievant's only actionable offense was leaving work early without leave which the Grievant had not done previously. Under the circumstances, the Arbitrator concludes that any discipline for this offense beyond a three day suspension would be excessive, unreasonable and so punitive as to violate Sections 24.02 and 24.05 of the Agreement.

**AWARD:**

Grievance is sustained. Removal is reduced to a three day suspension.

**TEXT OF THE OPINION:**

IN THE MATTER OF ARBITRATION  
UNDER THE CONTRACT

Between:

**The State of Ohio**  
**(Department of Taxation)**  
THE EMPLOYER

and the

**Ohio Civil Service Employees**  
**Association, Local 11**  
**A.F.S.C.M.E., AFL-CIO**  
THE UNION

**Grievance No.:**  
30-10-(8-23-88)-75-01-09

ND 705

**Grievant:**  
John R. Murphy III

**Before:**  
NICHOLAS DUDA, JR.,  
ARBITRATOR

**OPINION AND AWARD:**  
February 21, 1989

## **CASE DATA**

### **SUBJECT**

Removal.

### **APPEARANCES**

#### **FOR THE EMPLOYER**

Timothy D. Stauffer, Attorney - Administrative Counsel, Presenting the Case

Michael E. Kinneer, Attorney, Co-Counsel

Carol Crofut, Assistant Administrator, Human Resources, Witness

Clarence Hall, Supervisor, Estate Tax Division, Witness

Tim Wagner, Chief, Arbitration, Office of Collective Bargaining

Donald Wilson, Office of Collective Bargaining

#### **FOR THE UNION**

Linda Fiely, Associate General Counsel, Local 11, Presenting the Case

Gary Raines, Staff Representative, Co-Counsel

John Murphy III, Clerk 2, Grievant

Coyette Brown, Statistical Clerk

Shirley Kramer, Clerk 2

John Murphy II, Grievant's Father, Observer

#### **BACKGROUND**

On August 16, 1988, the Tax Commissioner notified Grievant that he was removed from employment:

The reasons for this action are insubordination, failure of good behavior, neglect of duty, absence without leave/leaving work area without permission of supervisor, and/or fighting or striking your supervisor. Specifically, on August 8, 1988 at approximately 1:55 p.m. your supervisor asked you for specific information, you did not respond and instead began working with documents at your desk. When your supervisor attempted to stop this activity and return your attention to her questions by placing her arm over the documents, you struck her arm with your fist. Immediately thereafter you left your work station, did not seek permission, did not report off and did not return again that day. In the past in an effort to correct similar problems you have been given a three-day suspension (March 1, 1988) for sexual harassment and/or failure of good behavior which included unwelcome physical contact.

On August 23, 1988 the removal was protested by the Union in the subject grievance which stated as follows:

Contract Article(s)/Section(s) Allegedly Violated: Preamble, Article 2:01, 2:02, 24:03, 24:05, and any and all pertinent documents.

Statement of Facts: On Aug. 8, 1988 John R. Murphy III was harassed and coerced into actions

which his supervisor, Clarence Hall took offense. Clarence asked John about a doctor appt. for that day. John chose to not go and felt Clarence had no right to get involved in his personal life. He chose to do his job, but Clarence kept on with her harassment and questions. She placed her body over his work, and got her face right up to his. He was angered and got up pushing her aside. In the room at the time was Coyette Brown, who said Clarence had provoked John into an angry mood. He did not strike Clarence, Coyette testified. Shirley Kramer also testified, she didn't see John strike Clarence, as management alleged. Both Shirley and Coyette say John was badgered and harassed and coerced, by his supervisor. The Union feels with all the facts known, that the punishment is not commensurate to the offense.

Remedy Sought: John is made whole again. John be reinstated to his job as a Clerk 2. That the removal letter be removed from his file, and John's discipline be modified to punishment commensurate to the offense. John receive back pay for any salary missed, because of this incident and all benefits be restored without any penalties or waiting period. Added at Step 3 Meeting 9-7-88 - John would like to be transferred, if reinstated, to a Clerk 2 position in another unit or division.

The Department's Step 3 response on September 22, 1988 denied the grievance. The denial letter included the following:

Upon review of the information presented, I find that I am unable to conclude that a violation of the Contract has occurred. The record discloses that you were suspended for just cause, based on insubordination, failure of good behavior, neglect of duty, absence without leave/leaving work area without permission of supervisor, and fighting or striking your supervisor....

Acknowledging your 7 years of service with the Department, I nevertheless find that your suspension was reasonably related to the seriousness of your offenses. Lastly, be advised that I find no evidence that you were unfairly or discriminatorily singled out for discipline.

## **ISSUE**

Whether the Employer has shown just cause to remove Grievant? If not, what is the appropriate remedy?

## **POSITIONS OF THE PARTIES**

### **THE EMPLOYER'S POSITION**

...Grievant....struck his supervisor and left work without permission. The testimony has failed to elicit any justification for the Grievant's behavior....

...[Grievant's] supervisor, Clarence Hall....was motivated by her concern for [his] well-being and her responsibility to the Department to provide a functional workplace when she asked [him] about his doctor's appointment. The special facts of this case make it impossible to conclude that Clarence was harassing [him] about personal matters, for the testimony has shown that her concern and interest was based upon the effect of [his] past failure to make his doctor's appointments upon both [Grievant] and the workplace. To grant this grievance would be to conclude that Clarence Hall acted unreasonably, a conclusion that...is unwarranted by the facts

presented in this hearing....

...removal is warranted in this case. While no employer wishes to lose the services of an experienced employee, a justified concern over one who has a past history of assault and sexual harassment has to be paramount in the employer's decision. While...the removal action was justified solely on the basis of the assault on Ms. Hall, the fact remains that [Grievant] was disciplined for sexual harassment with a 3 day suspension in March 1988 in an incident involving [Grievant's] unwelcome touching of a female supervisor. After this incident, [Grievant] failed to follow through with counseling which was offered through the Employee Assistance Program....

The Department wishes particularly to address the Union's contention, in its opening statement, that the "lack of significant harm" arising from this incident is grounds for lesser discipline. This contention is utterly without merit, for the mere act of striking, or even attempting to strike, a supervisor is a serious breach of the employment relationship and an act which both disrupts the workplace and intimidates supervisory personnel....the objective physical manifestation of the assault is of less importance than the potential effect of the assault upon the workplace and the intolerable situation or situations that will arise should aggressive employees be retained....

...this discipline is justified and it is therefore requested that the grievance be denied.

## **THE UNION'S POSITION**

Grievant was terminated...for..."insubordination, failure of good behavior, neglect of duty, absence without leave or leaving the work area without permission of a supervisor and/or fighting or striking [a] supervisor."...

Section 24.01 of the contract establishes that disciplinary action shall not be imposed upon an employee except for just cause....the Employer will not meet that burden of establishing removal is the appropriate penalty given the circumstances in this case by the requisite degree of proof....Grievant admits that he improperly left the work area without permission and did not return that date....It is the Grievant's action which resulted in the physical contact with the Supervisor that the Employer relies upon as the justification for the Grievant's removal....the Employer must establish...that...Grievant engaged in a purposeful, intentional act which was inflicted against his supervisor with intent to harm her....Grievant's conduct was not that type of conduct.

...even if the Arbitrator determined that Grievant did "fight and/or strike" his supervisor...the Employer improperly imposed discipline on its incorrect premise that the Grievant had received prior discipline for "similar problems."...that termination is appropriate in this case because "in the past in an effort to correct similar problems, you have been given a three-day suspension (March 1, 1988) for sexual harassment"....Clearly these incidents are not similar....In fact, the evidence indicates, the three (3) day suspension had its intended and corrective effect upon the Grievant....

...in addition to, or alternatively to the above-arguments, the penalty of removal is too harsh given the various mitigating circumstances present in this case.

...the Grievant's actions to his supervisor was not premeditated or calculated to harm...lasted only a moment...there was minimal harm done to Ms. Hall....Grievant gave over seven (7) years of excellent service to the employer....

Another mitigating circumstance...is that...it was Supervisor Hall's methods of handling this situation which substantially contributed to the results which took place....The supervisor's methods in this case agonized the Grievant and contributed to his uncharacteristic eruption....

...the Employer did not conduct a thorough investigation prior to issuing the pre-disciplinary notice after talking to the supervisor only, failing to talk to witnesses Coyette Brown and Shirley Kramer. Further, these witnesses were questioned by Ms. Crofut after the pre-disciplinary hearing. In effect, she served as the investigator and the pre-disciplinary hearing officer. Thereby affecting her impartiality as hearing officer as required by the contract and due process.

Further, Section 24.05 and 24.02 establish that discipline shall be progressive and corrective and not punitive....The employer in this case has failed to comply with these provisions of the contract.

...the Employer's efforts to monitor and coerce the Grievant with respect to his doctor's appointments violated Section 2.01 because it discriminated against him on the basis of his handicap. The Employer treated the Grievant differently than other employees with respect to doctor's appointments because of his handicap. The Employer also violated Section 2.02 of the contract by trying to coerce the employee into keeping his Doctor's appointment although they had no contractual or statutory bases for requiring the Grievant to keep the Doctor's appointment....

For all of the above-reasons, the Union asks the arbitrator to sustain the grievance reinstate the Grievant and make him whole for all lost pay and benefits. Alternatively, the Union asks the Arbitrator to grant the grievance in part by reinstating Grievant, imposing a penalty commensurate with the offense, and ordering back pay in an amount that the arbitrator deem fair and appropriate.

## **RELEVANT LABOR AGREEMENT PROVISIONS**

### **ARTICLE 24 - DISCIPLINE**

#### **24.01 - Standard**

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

#### **24.02 - Progressive Discipline**

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

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

#### **24.04 - Pre-Discipline**

...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....

## **24.05 - Imposition of Discipline**

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

### **ANALYSIS**

#### **FINDINGS OF FACT**

Grievant was hired as a Clerk 2 in the Department of Taxation on December 1, 1980. Throughout his employment he worked in the clerical section of the state tax division but his duties took him to other areas and he was well known to other employees. His immediate supervisor has always been Ms. Clarence Hall.

The clerical unit consisted of Supervisor Hall, Grievant and two other clerical employees, Coyette Brown and Shirley Kramer. The members of this group were friendly and worked well together. The three women were all very responsive to and cared for Grievant, giving him attention that other persons might give to a younger and smaller brother (Grievant is actually quite small, being approximately 5' tall and having a weight of no more than 100 pounds). In part their tenderness was a response to his generally pleasant disposition but also because of his physical handicap.

When Grievant was hired, and ever since, he has been physically impaired by epilepsy and a seizure disorder. Many times he had seizures at work, a situation to which the others adjusted by mental preparation although sometimes problems had to be handled. The women were so sensitive to his condition that they often were alerted by Grievant's demeanor and flushed skin coloring that an attack was imminent. When an attack occurred the co-workers applied appropriate aid. They wanted Grievant to be given appropriate medical attention. Grievant appreciated this concern and attention from his co-workers. He even gave Clarence Hall his doctor's phone number with the request to call the doctor if Grievant had a seizure with unusual problems which could not be handled by personnel, including the nurse, in the tax department.

Throughout his employment Grievant performed excellent work. In his annual evaluations Ms. Hall always placed him in at least the highest two of five ranking categories in respect to all of the valuation factors (e.g. quality and quantity of work, knowledge of work, adaptability, dependability, cooperation, judgment, initiative, personality). On evaluations for the last two years Ms. Hall ranked him in the top of five groups on every one of the nine factors.

Before the incident in this case Ms. Hall never considered him insubordinate, negligent of duty, uncooperative, or undependable and he had never left work early without permission. As a matter of fact in all his employment Grievant had been charged with misconduct only once.

On January 7, 1988 he made gestures and remarks of a sexual nature, and rubbed the shoulder and arm of a supervisor in another section. He told her he was going to sit on her lap. She responded "get the hell out of my office and go home." Instead he sat down in a chair and invited her to sit on his lap. The supervisor, who was taller and twice as heavy as Grievant said "First of all I'll smash you. Secondly I think this has gone far enough." She got up and went to another supervisor to whom she reported "That motherfucker J\_\_\_ just tried to sit on my lap."

Management investigated the incident. Grievant admitted the factual charges, which he considered only good natured fun, but denied committing "sexual harassment." He had believed sex harassment was "rape," misconduct no one attributed to him. After considering his explanation Management told Grievant he would either have to voluntarily participate in the employee assistance program or he would be suspended three days. He investigated the assistance program but when told it involved out-patient counseling over a three month period he decided he'd



rather simply take the three day suspension. A suspension was issued on February 25, 1988 for "Sexual Harassment" based on "inappropriate statements and offensive gestures and...unwelcome physical contact".

Despite years of medical treatment for his epilepsy, Grievant continued to have seizures, including many at work. Some people in the tax division believed that his seizures occurred more often if he neglected to take his medication.

On or about August 1, 1988 Grievant had an interview with his doctor at which time the doctor renewed his prescription. The doctor suggested that Grievant return the next week, on August 9th.

On the morning of August 8, 1988 Clarence Hall returned to work after an absence of about a week. She did not know that Grievant had seen his doctor the prior week. Ms. Hall's supervisor told her that Grievant had an appointment the next day with the doctor and asked her to find out the time of the appointment from Grievant. Later that morning, at about 9:00 A.M., Ms. Hall asked Grievant what time his doctor's appointment was the next day. He asked her how she had found out about the appointment which he considered private information. She told him not to worry about how she found out, she wanted the appointment time. He replied that he did not intend to keep the appointment the next day. She told him that he had to see the doctor and he should call the doctor and find out what time the doctor would see him. He did not agree with or even acknowledge what she had said. They had no further discussions about the matter during the balance of the morning.

Sometime around 1:30 P.M. that afternoon Ms. Hall came into the room in which all four clerical unit persons had desk space. Sitting down at her desk, she called across the room to Grievant seated about 12-15 feet away to ask if he had called the doctor for the appointment time. He said he was not going to keep the appointment. She said that he had to go to the doctor and he should call for the time. He did not answer but continued his work, sorting papers for various files. She continued to have a "one-person" conversation with only herself talking about the doctor and the appointment time. He ignored her.

At about 1:40 P.M., another member of the clerical unit, Coyette Brown, entered the clerical office. (She had been away from the office that morning). As soon as Coyette entered the room she noticed that Grievant was very flushed, a warning of an imminent seizure. She immediately asked Ms. Hall, "Why is John upset?" From her desk Ms. Hall answered by words to the following effect: "He's upset because I want him to see his doctor tomorrow but he doesn't want to go. I'm going to keep asking him until he says he will go and calls for an appointment time." Then Ms. Hall resumed asking Grievant again if he would call the doctor's office. Ignoring the question Grievant continued to process the stack of papers on his desk.

Hall got up from her desk and walked to the table where Grievant was working. Standing next to him she repeated the question. He continued to work without answering. She told Grievant that he had to keep his appointment. At about this time Shirley Kramer entered the room and began to work but she, as well as Coyette Brown, heard and observed what transpired between Ms. Hall and Grievant.

Ms. Hall leaned over Grievant's desk, within inches of his face and body, and placed both her hands palm down on the papers which he had been processing, obstructing his ability to pick up any paper. He became motionless. She repeated her question again. Without answering he tried to pull some of the papers from the pile but she prevented it by pressing firmly down with both hands. Hall again said "You must keep your appointment with the doctor." At that point Grievant thrust both hands upward. The back of his right hand, which may have been partially clenched, contacted her left upper arm. Immediately she raised her hands from the papers and moved backward, away from Grievant.

He stood and walked out of the room (and building), not to return that afternoon.

Ms. Brown and Ms. Kramer perceived Grievant's action as an attempt to cause Ms. Hall to back away and "free" him so he could work. His testimony was to the same effect; he did not intend to strike her, just seeking her to back out of his space but then he felt "that something bad was going to happen" (viz. a seizure), so he left to change his mood. Grievant says only the back of his unclenched hand struck her, but he did not intend even that contact.

Ms. Hall reported the matter to a supervisor who suggested she write a memo of the incident. Later she went to the nurse. Her arm was sore for a day or two but not seriously injured.

At arbitration, under instructions from Ms. Hall, a person demonstrated on the Arbitrator's arm the force of the "blow" she had received. Recognizing differences in gender and physical condition, the Arbitrator finds the force of the demonstration blow to be relatively moderate, even when applied by a clenched fist.

On August 9th Grievant was notified that his superiors had requested his suspension or removal from employment. The formal notification letter stated

"The reasons for this action are insubordination, failure of good behavior, neglect of duty, absence without leave/leaving work area without permission of supervisor, and/or fighting or striking your supervisor.... In the past in an effort to correct similar problems you have been given a three-day suspension (March 1, 1988) for sexual harassment and/or failure of good behavior."

Except for a written attendance policy, the Tax Department does not have any written policy or code of conduct with penalties for misconduct. The Department's Assistant Administrator for Human Resources testified that the action taken against Grievant was based on an unpublicized policy of the administration which provides for a suspension the first time an employee "assaults" a supervisor and discharge for a second assault. The department considers the sex harassment incident as the first "assault" offense, and the incident on August 8, 1988 as the second assault made by Grievant on a supervisor.

## **EVALUATION**

The Employer relies on several actions/non-actions by Grievant to justify his removal:

1. Failing to promise to visit the doctor and to call for an appointment time;
2. Making contact with Ms. Hall's left upper arm when he pushed her away;
3. Leaving the work area and department without permission.

To the Employer those three actions/non-actions constitute "insubordination, failure of good behavior, neglect of duty, absence without leave/leaving work area without permission of supervisor, and/or fighting or striking your supervisor." The failure of good behavior and neglect of duty charges are subsumed by the more serious charges of insubordination, fighting or striking supervisor, and absent without leave/leaving work area without permission of supervisor.

To be subject to discipline for actions or non-actions, the employee must have foreknowledge of possible or probable disciplinary consequences of conduct. Ordinarily the Employer must provide such forewarning, either orally and/or in writing. In the Tax Department there are no established and publicized rules. Nonetheless the Employer believes that Grievant's conduct was so "heinous" or serious that Grievant should have known the conduct was offensive and subject to heavy punishment. It is true that certain conduct may be so clearly incompatible with the employment relationship that commission of the conduct subjects the employee to discipline. The Employer has the burden of clearly showing the employee's conduct was of the "heinous" nature.

To support the insubordination charge the Employer relies on the conduct summarized in items 1 and 2 listed above.

An employee is required to follow a supervisor's direction made within the employment relationship and scope of the employer's actual or at least apparent authority. The Arbitrator does not believe the employer has clearly shown that the demand and question placed by Ms. Hall in this case are within such limits. Certainly the Employer was entitled to know the time of Grievant's medical appointment if he intended to leave work early to make that appointment. But here Grievant said he did not intend to go to the doctor. No business basis was shown for Ms. Hall's insistence that Grievant agree to go to the doctor on August 9th. Furthermore inasmuch as Grievant clearly said he was not going on at least two occasions it was improper for her to repeatedly demand that Grievant call for an appointment time. Accordingly Grievant was not required to obey, and was not insubordinate by failing to perform as demanded by Ms. Hall.

Under ordinary employment relationships, Ms. Hall's persistence despite Grievant's expressed resentment of her intrusion and statement that he was not going to the doctor, might be regarded as an improper, arrogant demand for a supervisor to make. That characterization is inappropriate and does not do justice to Ms. Hall. Although Hall's demands were outside the scope of supervisory authority, it was in the realm of conduct by a person seeking to help her friend. The relationship between Hall and Grievant was unique and Ms. Hall was motivated by concern for Grievant. For that reason her intention, if not all of her conduct, merits understanding and appreciation. It matters not whether Hall was acting as supervisor and/or as friend; Grievant had no duty to acquiesce to her demands in either case, so failure to do so was not actionable insubordination.

Persons in our industrial society are expected to know that they should not fight with or strike their supervisor. That conduct results from intent to physically harm the supervisor by the assault. Here there is no clear showing that Grievant sought or intended to harm Ms. Hall. On the contrary the evidence is more persuasive that he was simply trying to get her to release her hold on his paper and discontinue restricting his movement by keeping her body directly next to and over him by a matter of inches.

Grievant did leave the work area and absented himself for the rest of the day without permission.

In the absence of a formal rule against leaving the work area without supervisory permission, there is no clear basis for finding that to be actionable misconduct. There was not even evidence that permission was required to leave the office or floor. Furthermore, Grievant had become so upset that he was on the brink of a seizure. Under these circumstances even if a rule had been in effect, Grievant might well be excused for leaving abruptly. It would be unreasonable to expect him to continue the confrontation with Hall by asking permission to leave when he was trying to avoid a seizure; such a request by him would be almost ludicrous when she was insisting adamantly that he agree and promise to call the doctor while she used her body to immobilize him. Thus, even if a rule requiring supervisory permission had been shown, Grievant would have been excused to leave briefly to get over his upset.

However, Grievant went beyond the immediate work area; he abandoned his work and left the building two and a half hours early. That absence without leave was subject to discipline, even without a formal rule.

The Employer has not satisfied the burden of showing either insubordination or fighting or striking the supervisor. The only basis to support discipline is his departure without leave two and a half hours early.

The Employer discharged Grievant. Under the circumstances of this case the Arbitrator finds that removal was excessive, unreasonable and improper for the following reasons:

1. Grievant's only actionable offense was leaving work early without leave. This was the first time in eight years that he had ever been guilty of that misconduct. As already noted there is no published scale of discipline for any offenses. Under the circumstances the Arbitrator concludes that any discipline for this offense beyond a three day suspension would be excessive, unreasonable and so punitive as to violate sections 24.02 and 24.05 of the Labor Agreement.
2. Above the Arbitrator found that Grievant had not been guilty of intentionally assaulting Ms. Hall. Assume the evidence clearly showed that he had intentionally struck her; removal, under the circumstances of this case, would still be excessive. The removal was also based on prior discipline "for similar problems." As mentioned above, the Employer has never promulgated and publicized rules of conduct. There is no definition of "assault", "striking/fighting with a supervisor", or of "sex harassment". The sex harassment discipline concerned statements gestures of a sexual nature by Grievant while he stroked the supervisor's arm and shoulder in an intimate fashion. Here Grievant used no words or gestures, and the physical contact with Hall was clearly not sexual in nature. Thus it was not a repetition of a "similar problem."
3. There are various mitigating circumstances.
  - a. Grievant's action was not premeditated and was not intended to harm Ms. Hall. Rather it was spontaneous and momentary.
  - b. The consequences were not serious. Only minimal physical discomfort was experienced by Hall.
  - c. Grievant had seven years of excellent service.
  - d. The most important mitigating circumstance in this Arbitrator's judgment is the way the situation developed. Ordinarily if an employee said he was not going to the doctor, the matter should be dropped. As already noted Ms. Hall's method and the lengths to which she pursued her demand were questionable, beyond her supervisory authority. In most cases a supervisor who acts as Ms. Hall did would be considered as provoking the employee. But this is not a typical case. Ms. Hall was aware of Grievant's epilepsy problem and wanted to help him. She felt that Grievant should go to the doctor even though he said he didn't want to because she incorrectly believed he needed medication. Unfortunately her concern led her to create a confrontational situation because her repeated questioning and close proximity to Grievant literally prevented him from working at his desk and held him immobile, possibly contributing to tension within him. Given his obvious upset condition, some sort of striking out by him was understandable, almost foreseeable. Because of Hall's good intention, it is difficult to criticize her excessive behavior; by the same token, given Grievant's lack of intent to hurt Ms. Hall, he does not deserve punishment for pushing her out of his way so that he could become "free" when he was upset. To this Arbitrator, pushing with minimal force was excusable, and that's all he did.
4. Removal in this case is clearly punitive rather than corrective as required by the Agreement.

## **REMEDY**

Under the circumstances Grievant is entitled to be reinstated.

The Arbitrator recognizes that this incident strained what had been excellent relations between Ms. Hall and Grievant. Both are sorry that the incident ever occurred. Hopefully their good relations are reparable. It would indeed be a tragedy if this one brief incident were allowed to destroy seven years of cooperation, care and good communications between these two persons. The Arbitrator would hope that Clarence Hall will demonstrate the same good motives and intention that influenced her in the past and in this situation; and that Grievant manifest the same dependability, cooperation and personality which characterized his conduct in the past.

Returning Grievant to the same small clerical unit my present problems. Perhaps one or both of them will feel that he or she is inadequate to confine the unfortunate incident to the past and would prefer not working with the other. The Arbitrator is mindful that in the third step Grievant asked "to be transferred, if reinstated, to a Clerk II position in another unit or division." The Arbitrator cannot order the transfer of Grievant or Ms. Hall to a different unit. However, if either Ms. Hall or Grievant cannot handle resuming work together, then the Arbitrator would encourage consideration by the Parties of a transfer of Grievant or by the Employer of a transfer of Ms. Hall.

### **AWARD**

The grievance is sustained.

There was no just cause to remove Grievant, only to suspend Grievant three days for leaving work without leave two and a half hours early on August 8, 1988. The Employer is directed to convert the removal to a written suspension for leaving work without leave and to make Grievant whole for all wages and benefits he lost, less three days pay for suspension until he is offered re-employment without a break in continuous service.

Nicholas Duda, Jr., Arbitrator