

ARBITRATION DECISION NO.:

182

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation

DATE OF ARBITRATION:

May 11, 1989

DATE OF DECISION:

June 6, 1989

GRIEVANT:

P. Grossenbaugh

OCB GRIEVANCE NO.:

31-05-(880314)-0018-01-06

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

Brenda Persinger

FOR THE EMPLOYER:

Sally Miller

KEY WORDS:

Horseplay
Suspension
Stacking Charges
Mitigation
ODOT

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline
 §24.05-Imposition
of Discipline

FACTS:

The Grievant was hired by the Ohio Department of Transportation on January 17, 1979, and was classified as an Equipment Operator 2. The Grievant was suspended from his job for 10 days because he allegedly violated several disciplinary rules when he was involved in an incident on December 7, 1987. He was charged with violating section 3 of Directive A-301 which deals with posting or displaying obscene material or using abusive insulting language towards another employee, a supervisor, or the general public. In addition, the Grievant was charged with violating section 30 of Directive A-301 which deals with involvement in "horseplay" on ODOT time or property. Moreover, the Grievant was charged with violations of A-301 rules 4, 34, and 35 as well.

The incident which gave rise to these charges occurred on December 7, 1987, when a Highway Worker II went to the stockroom to obtain a particular type of chain saw, one which the Grievant also apparently wanted. The two employees verbally confronted each other. Both employees used abusive language toward one another. According to one employee, the Grievant then scratched the back of the other employee's neck with a tool. The other employee pushed the Grievant away and the incident ended. The supervisor of that section heard of the incident and suspended the Grievant for 10 days.

EMPLOYER'S POSITION:

Discipline consisting of a ten day suspension was commensurate with the Grievant's behavior which the Employer characterized as "abusive, threatening, and intimidating toward a fellow employee" and which resulted in "an injury."

UNION'S POSITION:

Discipline was not commensurate with the offense. The incident constituted no more than horseplay. Any "injury" at best was inadvertent and unintentional. The Grievant is an 11 year employee with no previous disciplinary problems.

ARBITRATOR'S OPINION:

The Arbitrator found that the Grievant violated sections 3 (abusive language) and 30 (horseplay) of Directive A-301 and this was established by clear and convincing evidence. Furthermore, the disciplinary grid for a violation of section 3 provides that the violator could receive anything from a written reprimand to a suspension, while an individual who violated section 30 could receive a verbal or written reprimand. In a work place with dangerous tools and rough conditions such as an ODOT garage, even light hearted horseplay can result in serious injuries. Thus, the Grievant's behavior deserved discipline, even if it was not shown to violate the "rule against fighting."

However, the arbitrator ruled that the contract requires that the discipline be commensurate with the offense and that in this case a 3-day suspension would be more proper than the 10 day suspension given by the supervisor. The arbitrator believes that the charging of 5 separate violations does constitute unnecessary "stacking". In addition, traditional application of discipline also requires that mitigating factors be considered. The Grievant was an eleven (11) year employee with no prior discipline. Nevertheless, horseplay is dangerous on the job and abusive language beyond shoptalk can provoke reactions which also cause unsafe conditions and potential injury.

AWARD:

The 10 day suspension is reduced to a 3-day suspension with seven days back pay.

TEXT OF THE OPINION:

In the Matter of the

Arbitration Between

**Ohio Department of
Transportation,
Employer**

and

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

Grievance No.:

31-05-880314-0018-01-06

Grievant:

(Grossenbaugh)

Hearing Date:

May 11, 1989

Opinion Date:

June 6, 1989

For the Employer:

Sally Miller

For the Union:

Brenda Persinger

Present at the hearing in addition to the Grievant and the Advocates named above were Michael P. Duco, OCB, Bob Hall, ODOT - Superintendent Cochocton (witness), and Steven J. Markley, ODOT-HW II (witness).

Preliminary Matters

The parties agreed that the Arbitrator could tape the hearing solely for the purpose of refreshing her memory and on condition that the tape(s) be destroyed on the day the opinion is rendered. The parties agreed that the Arbitrator could submit the opinion for potential publication. The parties stipulated the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Exhibits

The parties jointly introduced the following exhibits:

Joint Exhibit No. 1: The Contract
Joint Exhibit No. 2: The Disciplinary Trail
Joint Exhibit No. 3: The Grievance Trail

Stipulations of Fact

1. The grievant was hired in the Ohio Department of Transportation on January 17, 1979 and is classified as an Equipment Operator 2.
2. The grievant was issued a 10-day suspension on February 17, 1988 for the following charges:

Posting or displaying obscene material or using obscene, abusing, or insulting language towards another employee; a supervisor, the general public.

Fighting with or striking a fellow employee.

Involvement in "horseplay" on ODOT time or property.

Violation of Section 124.34 of the Ohio Revised Code. (The severity of the discipline imposed should reflect the severity of the violation.)

Other actions that could harm or potentially harm the employee(s) or a member or members of the general public.

3. The grievant received a proper pre-disciplinary hearing.
4. At the time of the incident in question, the grievant had no discipline in his file.

Statement of the Issue

Was the grievant suspended for 10-days for just cause? If not, what shall the remedy be?

Relevant Contract Sections

§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.

§24.05 - Imposition of Discipline

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

Facts

The Grievant was suspended for 10 days for an incident which occurred December 7, 1987. He was alleged to have violated the following five rules found in Directive A-301 (Disciplinary Actions) (Employer's Exhibit No. 2):

Directive A-301, #3 - Posting or displaying obscene material or using obscene, abusing, or insulting language towards another employee; a supervisor, the general public.

Directive A-301, #4 - Fighting with or striking a fellow employee.

Directive A-301, #30 - Involvement in "horseplay" on ODOT time or property.

Directive A-301, #34 - Violation of Section 124.34 of the Ohio Revised Code. (The severity of the discipline imposed should reflect the severity of the violation).

Directive A-301, #35 - Other actions that could harm or potentially harm the employee(s) or a member or members of the general public.

On December 7, 1987, Steven Markley, a Highway Worker II, went to the stockroom to obtain a particular type of chain saw. As he was placing the saw in the back of a truck, the Grievant asked him if he and his crew could have that particular saw. Markley said no, explaining that he and his fellow workers had significant brush and trees to cut that day. The Grievant then said "Thanks you cocksucker; we'll do you a fucking favor some day." Markley returned to the stockroom for a second saw. Upon returning to the truck, he met the Grievant who said that the Supervisor Steven Lewis had said he (the Grievant) could have the saw. Markley then said "That's fine with me, name of Grievant". "I wish I could whine and complain and get everything I wanted, but as long as you are happy, that's fine with me." As Markley walked away, the Grievant followed him and called Markley names such as "asshole" and "jerk". Markley then walked around to the cab and found the tool (a combined screwdriver/wrench) for the saw given to the Grievant. Markley walked over to the Grievant and said "Here's the tool" for the saw. "You can stick this up your ass." Markley walked away. Grievant stepped in front of Markley and according to Markley said "Wait 'til I see you on the street someday; I'll kick your fucking ass." Markley said in a mocking voice, "Oh, Pat I'm shaking in my shoes." At this point in the incident, the stories of the two men involved diverge. Markley claims that the Grievant came up behind him, grabbed him from behind, and said "Hey Stevie, sweet lips, you little jerk, how do you like this?" According to Markley, the Grievant then scratched the back of Markley's neck with the tool. The Grievant claimed that he put his arm around Markley's shoulder and said "Ain't no sense getting mad now." Both agree that Markley pushed off the Grievant's arm, and they parted and the incident ended. Markley also indicated that while Grievant had him grabbed that Grievant said "Boy, I'd like to get you up in the fucking woods with a chainsaw sometime; I'd show you some cutting."

On December 9, 1987, Superintendent Bob Hall was told of the incident. He requested that Markley write down his recollections of the event, which Markley did and turned into Hall on December 14, 1987. On December 15, 1987, Superintendent Hall decided to recommend discipline for the incident. According to his testimony, he recommended discipline for violations of No. 3 "using obscene, abusing, or insulting language towards another employee", and possibly No. 4: "fighting with or striking a fellow employee". At the hearing, with his memory refreshed by reviewing his notes, Hall indicated that he did not view the incident as "fighting" but perhaps

"striking" because of the scratch on Markley's neck or in the alternative some form of "horseplay". Hall said "I won't tolerate horseplay." At the hearing, Markley indicated that he wrote up the incident only on the grounds that "it would not go further" and to have a record in case of future incidents. Markley said he felt the Grievant scratch, felt a welt arise on his neck, but could not see the welt himself. He agreed that it was possible that the scratch, which he later saw in a mirror, was "possibly" from brush cutting. Markley received a written reprimand for violating Item No. 3. Other than Markley, the Grievant and Hall, no other witnesses testified.

Employer's Position

Discipline of a ten day suspension was commensurate with Grievant's behavior which Employer characterized as "abusive, threatening, and intimidating toward a fellow employee" and resulting in "an injury".

Union's Position

Discipline was not commensurate with the offense. The incident constituted at worst horseplay (No. 30, Employer Exhibit #2). Any "injury" at best was inadvertent and unintentional. Grievant is an 11 year employee with no previous discipline.

Discussion

Clearly, the two employees in this incident used abusive language towards one another. In the context, the language constituted more than shoptalk. Grievant carried the incident a step forward by grabbing the other employee. The crux of the issue is whether that "grabbing" constituted horseplay (#30) or fighting (#4). The scratch on the back of Markley's neck made allegedly with the tool held by the Grievant, if made intentionally, would raise the charge of horseplay to an assault falling within fighting (#4). While the evidence is clear that Grievant initiated the physical contact and clear that Grievant grabbed Markley, his intention to actually assault Markley with the screw driver was not proven. Markley himself expressed some ambivalence in his testimony about this part of the encounter. The Grievant did violate without a doubt the prohibition against "horseplay". As Superintendent Hall said "horseplay cannot be tolerated". While intentions in horseplay may be less malicious than during a fight, the possibility of injury remains unacceptably high. In a workplace with dangerous tools and rough conditions such as an ODOT garage, even light hearted horseplay can result in serious injuries. Thus, Grievant's behavior deserved discipline even if it was not proven to violate the "fighting rule".

Thus, the crux of issue becomes the question of progressivity of the discipline, the question of commensurate discipline, and the questions of comparative discipline. The charging of 5 separate violations does, in the mind of this Arbitrator, constitute unfair and unnecessary "stacking". Charges #34 and #35 in this case have no relevance to the incident. Given the nature of the incident, the employer had clear and specific charges to choose from, i.e., #3, #4, #30.

The Arbitrator finds that by clear and convincing evidence the Grievant violated #3 and #30. The charge of fighting (#4) was unproven. The disciplinary grid provides that for the 1st violation of #3 (abusive language), the violator could receive anything from a written reprimand to a suspension. For the 1st violation of #30 (horseplay), the violator could receive a verbal or written reprimand. The Contract requires that the discipline be commensurate with the offense (§24.02). Traditional application of discipline also requires that mitigating factors be considered. The Grievant was an 11 year employee with no prior discipline.

While the Arbitrator must hesitate to substitute her judgment for management's, the imposition of a 10 day suspension in this incident is not commensurate with the offense nor progressive with regard to this Grievant. On the other hand, horseplay is dangerous on the job and abusive language beyond shoptalk can provoke reactions which also cause unsafe conditions and potential injury.

Decision

Grievance denied in part. Suspension reduced from 10 days to 3 days.

June 6, 1989

Date

Rhonda R. Rivera

Arbitrator