ARBITRATION DECISION NO.:
246

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Transportation
Miami County Garage

DATE OF ARBITRATION:
January 4, 1990

DATE OF DECISION:
April 2, 1990

GRIEVANT:
Maurice Winston

OCB GRIEVANCE NO.:
31-07-(89-06-16)-0027-01-06

ARBITRATOR:
David Pincus

FOR THE UNION:
Patrick A. Mayer

FOR THE EMPLOYER:
Carl C. Best

KEY WORDS:
Just Cause
Removal
Fighting
Absenteeism

ARTICLES:
Article 5-Management Rights
Article 24-Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.04-Pre-Discipline
§24.05-Imposition of Discipline
Article 29-Sick Leave
§29.02-Notification
Article 43-Duration
§43.03-Work Rules

FACTS:

The grievant was a Highway Worker 2 employed by the Ohio Department of Transportation. He became involved in a fight with another employee who had been told to request the grievant's help to perform an assignment. The grievant refused to help and was attempting to prevent the other employee from speaking to management about the grievant's refusal. Both received medical treatment after the incident.

The grievant was then on leave for the next week with permission from his doctor. The grievant's leave was extended for four days but he did not return to work after his leave expired and did not notify the employer. The grievant was originally notified on his A-302 hearing letter that management contemplated a 10 day suspension for obscenity and fighting. Prior to the A-302 hearing the grievant was also charged with insubordination for failing to report to work and failing to notify his superiors that he would not be at work.

The grievant was removed for; 1) using obscene language toward another employee; 2) fighting; and 3) failure to follow written report off policies.

EMPLOYER'S POSITION:

There is just cause for removal. There is substantial evidence that the grievant used obscene language and was the aggressor in the fight. For that reason there is no disparate treatment. Evidence consists of witness statements and testimony.

The grievant failed to contact the employer about additional leave. There is no evidence that the phones were inoperative as the employer has tested the phones and found them to be in working order. The leave forms provided by the grievant were considered defective. They were stamped with the District Deputy Director's name but the grievant had not been paid for the day in question. There are no procedural defects based on the grievant's record consisting of three written reprimands for similar offenses over his nineteen month work history with the employer. Notice of the specific penalty imposed is not required prior to a pre-disciplinary hearing.

UNION'S POSITION:

There is no just cause for removal. The grievant was provoked into fighting and the other employee initiated the fight. The grievant struck back in self defense.

The grievant attempted to contact the employer about the additional leave but the employer's phones were not working. He then contacted District Headquarters. The leave forms provided by the grievant were not defective.

Procedural defects are; 1) disparate treatment, as the other employee involved in the fight received no discipline; 2) the penalty imposed is unreasonable. Escalation of the penalty by upper management after the pre-disciplinary hearing violates section 24.04 of the agreement. Management had allegedly offered a 20 day suspension if grievant would waive his pre-discipline hearing. Progressive discipline was violated because department directives provide for suspension or removal for fighting.

ARBITRATOR'S OPINION:

There is just cause for removal. Fighting is a serious form of misconduct warranting a heavy penalty. The grievant was the aggressor and was neither provoked nor acting in self defense. The fact that the grievant was the aggressor eliminates the claim of disparate treatment. Fighting alone is sufficient to justify discharge.

The grievant failed to rebut the charge of unauthorized leave. The grievant never explained why he did not try to contact the employer again. No witnesses were provided to support the grievant's claims concerning non-working phones. The leave forms appear defective and no pay was approved for the period.

The escalation of the penalty is not arbitrary or capricious, therefore, not a violation of section 24.05. An offer of a lesser discipline does not taint the penalty imposed. Section 24.04 only requires notification of possible discipline, not the actual penalty imposed.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

STATE OF OHIO AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF TRANSPORTATION, MIAMI COUNTY GARAGE

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO

GRIEVANCE:
Maurice Winston (Removal)
OCB Case No.:
31-07706-16-89-01-06

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: April 2, 1990

APPEARANCES

For the Employer
Thomas Hawes, Highway Maintenance Superintendent II
Larry L. Rowan, Labor Relations Officer
Bruce Coffey, Mechanic I
Stan Magel, Highway Worker II
Carl C. Best, Advocate

For the Union
Maurice Winston, Grievant
Patrick A. Mayer, Field Representative

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Transportation, Miami County Garage, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on January 4, 1990 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. 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. Both Parties indicated that they would not submit briefs.

ISSUE

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

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9.

(Joint Exhibit 1, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

Section 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.

(Joint Exhibit 1, Pgs. 34-35)

. . .

Section 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.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

Section 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-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days 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.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public 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 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 11, Pgs. 35-37)

. . .

ARTICLE 29 - SICK LEAVE

. . .

Section 29.02 - Notification

When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification. The Employer may request that a physician's statement be submitted within a reasonable period of time. In institutional agencies or in agencies where staffing requires advance notice, the call must be made at least ninety (90) minutes prior to the start of the shift or in accordance with current practice, whichever period is less.

If sick leave continues past the first day, the employee will notify his/her supervisor or designee every day unless prior notification was given of the number of days off.

(Joint Exhibit 1, Pgs. 47-48)

ARTICLE 43 - DURATION

Section 43.03 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding

authority in any proceeding arising under this Agreement.

. . .

(Joint Exhibit 1, Pg. 62)

CASE HISTORY

Maurice Winston, the Grievant, was initially hired by the Ohio Department of Transportation, the Employer, on August 31, 1987. He was assigned to the Miami County Garage as a Highway Worker II.

The instant matter concerns an altercation which took place at the Miami County Garage on Thursday, March 23, 1989 at approximately 8:30 a.m. It appears that prior to the altercation, Denise Reinoehl, a Highway Worker II, was instructed by Dennis Neff, a Highway Worker IV and Group Leader, to transfer road signs from a truck assigned to Stan Magel, a Highway Worker II, to her vehicle. Neff purportedly told her to solicit the help of the Grievant and another co-worker, Nate Hill. It should be noted that on the morning in question the Grievant was assigned flag trafficking duty; these signs were necessary for the duties that morning.

Reinoehl allegedly attempted to solicit the Grievant's help but he refused. Reinoehl indicated to Magel that she had received her "first turn down from them." As a consequence, Magel began to help her unload his truck.

As the unloading process progressed, the Grievant and Hill exited from the restroom. Magel shouted toward the Grievant and told him to get over and help get the signs off the truck. The Grievant responded by stating, "fuck you, I'm not going to help or do anything because you're not Management, and you have no right telling me what to do." Magel noted that “he would see what he could do. And that he would find out from Management." This verbal confrontation took place at a distance of 75-100 feet separating these two individuals.

Magel proceeded to walk towards the office door. The Grievant, walking rapidly and hollering, “you're not going to do that," intercepted Magel in the vicinity of the office door. Another confrontation ensued with both the Grievant and Magel hollering profanities at each other, "bumping bellies," and deflecting each other's hands out of the way. Although this confrontation did not continue for a significant period of time, Magel eventually faced the Grievant with his back toward the office door. The Grievant punched Magel and hit his left cheek.

Magel left the scene without retaliating and went to the front office. Magel informed Thomas Hawes, the Superintendent, that he had been hit and that something had to be done. As they conversed, the Grievant was approaching the Assistant Superintendent's office. Once again, Magel and the Grievant engaged in a heated confrontation and were ordered to separate by management representatives. Both individuals requested medical attention and were escorted for treatment purposes.

Shortly after the incident, the Grievant contacted Hawes and allegedly informed him that his physician had excused him from work for the period March 23, 1989 to March 31, 1989. He also remarked that he had a doctor's appointment the following Friday to determine when he could return to work. It appears that the Grievant met with his physician and he extended his leave until April 4, 1989.

The Grievant initially submitted a Request For Leave form for the period March 24, 1989 to March 31, 1989 (Union Exhibit 4). He submitted supporting documentation (Union Exhibit 3) and received pay for this leave period.

The Grievant did not, however, return to work as scheduled on April 3, 1989 and April 4, 1989. The circumstances surrounding these absences are in dispute. The Grievant alleged that he contacted the District Office because he was unable to telephone the garage. He did, however, submit a Request For Leave form dated March 31, 1989 (Union Exhibit 5) and a doctor's excuse dated April 26, 1989 (Union Exhibit 1) in support of this request. The Employer denied the request and the Grievant was not compensated for these dates.

Pursuant to ODOT Directive A-302 (Joint Exhibit 4), the Grievant was notified on April 5, 1989 that a predisciplinary hearing was scheduled for Tuesday, April 18, 1989. He was charged with the following violations of Directive A-301:

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

4. Fighting with or striking a fellow employee.
. . ."

(Joint Exhibit 3, Pg. 4)

The notice, moreover, indicated that the charges were based upon an altercation which occurred between the Grievant and Magel on the morning of March 23, 1989. It should be noted that the recommended discipline was a twenty (20) day suspension.

The meeting was rescheduled for April 24, 1989. Prior to the meeting, on April 19, 1989, the Grievant was charged with an additional Directive A-301 violation. C. William Rudy, the Hearing Officer, advised the Grievant that he was in violation of the following item:

". . .
2. Insubordination
. . .
c. Failure to follow written policies of the Director, Districts, or offices.
. . ."

(Joint Exhibit 3, Pg. 4)

This charge was based upon the Grievant's failure to report to work on April 3, 1989 and April 4, 1989, and failing to notify his supervisor per directives. Rudy noted that this charge would be considered during the hearing scheduled on April 24, 1989. The prior recommended discipline, however, remained as previously stated.

On June 2, 1989, the Grievant was informed by Bernard B. Hurst, the Director, that he was terminated as of June 9, 1989. Hurst noted that he reviewed the recommendation of the impartial administrator and others and determined that the items specified above justified the removal (Joint Exhibit 2).

On June 9, 1989, the Grievant contested the removal by filing a grievance. It contained the following Statement of Facts:

". . .
On 6-9-89 I was removed from my position as a Highway Worker 2 with Miami Co. ODOT. My removal was not for just cause, was not commensurate with the offense and was not corrective in nature.
. . ."

(Joint Exhibit 2)

A Level Three Grievance Hearing was held on August 1, 1989. The Parties were unable to reach a mutually agreeable settlement. Since no objection was raised by either Party dealing with substantive or procedural arbitrability, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to terminate the Grievant. The termination was viewed as properly based upon the Grievant's obscene and insulting language toward another employee; his fighting with a fellow employee; and his failure to follow written policies dealing with proper call-in procedures and notification of supervision.

The Employer asserted that it obtained substantial evidence of proof that the Grievant uttered obscenities and was the aggressor in the altercation involving Magel. In support of this contention, the Employer

referred to a series of submitted witness statements (Employer Exhibits 1-10) which indicated that the Grievant was the aggressor; struck Magel without provocation; and engaged in a verbal harangue laced with guttural expletives. The majority of these allegations, moreover, were supported by testimony provided by Bruce Coffey, a fellow worker in close proximity to the altercation.

Although Magel exchanged insults and uttered obscenities during the altercation, he never retaliated by pushing the Grievant. The record, more specifically, never supported this claim. Coffey and the witness statements (Employer Exhibits 1-10) never mentioned that the Grievant was shoved or pushed. Testimony provided by the Grievant seemed to contradict the Union's premise. He maintained that Magel pushed him which caused him to move back two to three feet. If this had taken place, the Grievant should have experienced injuries which exceeded the reported bruised ribs and contusions. A medical detail summary contained in a Workers' Compensation Report of Investigation (Employer Exhibit 12) disputed the severity of the injury. This report indicated that while unloading highway signs, the Grievant was "struck by the rear of a backhoe machine -- which swung into his lower chest wall having been blocked by his hands -- driving his hands into his lower sternum" (Employer Exhibit 12, Pg. 2).

A number of arguments were proposed by the Employer in support of the leave charges. First, it was alleged that the Grievant never contacted the District Office. The Superintendent testified that he never received a message from the dispatcher acknowledging that the Grievant could not get through to the garage. Also, the Union failed to supply any documentation supporting the call. Hawes maintained that the Grievant's contentions prompted a test of the telephone system. This test failed to disclose any problem with the system. The Grievant, moreover, could not explain why he never attempted to recontact Hawes or directly contact the District Deputy Director.

Second, the documents presented in support of the April 3, 1989 and April 4, 1989 leave requests were considered defective by the Employer. The Request For Leave form (Union Exhibit 5) was stamped with the Deputy District Director's signature which seemed suspicious. Also, the Grievant never received any compen-sation for these days. It, therefore appeared that the Deputy District Director never authorized payment. The medical verification (Union Exhibit 1) presented by the Grievant was thought to be tardy. He provided this information approximately twenty-two days after the incidents in question.

It was asserted that the Employer applied its rules and penalties evenhandedly and without discrimination. The Sparks award was viewed as unpersuasive in support of this claim. Granted, the Grievant in this case did receive a suspension rather than a discharge. But, the circumstances in the submitted case were thought to be different which meant that the Grievant was not similarly situated.

Related bias claims were also refuted by the introduction of several documents and related findings. The Grievant, more specifically, filed charges with the police department (Union Exhibit 7), the Ohio Civil Rights Commission (Employer Exhibit 13), and the Industrial Commission of Ohio (Employer Exhibit 12). None of these agencies were able to find any evidence in support of the Grievant's allegations. As a consequence, these collateral investigations and findings seemed to disprove the Grievant's allegations that the removal decision was prejudiced by some sort of managerial bias.

The Employer maintained that the administered penalty was reasonably related to the seriousness of the Grievant's proven offense, and the record of the Grievant's service with the Employer. Principles of progressive discipline were followed but failed to engender the appropriate results. The Grievant received three prior written reprimands within a nineteen month period. On December 6, 1988 the Grievant received a written reprimand for leaving the work area without the permission of the supervisor, and unauthorized use of a State vehicle (Joint Exhibit 7, Pg. 1). Another written reprimand was issued on December 5, 1988 for carelessness with equipment resulting in the loss, damage, or an unsafe act. He was also charged with the reckless operation of a State vehicle (Joint Exhibit 7, Pg. 4). The last written reprimand considered in the formulation of the administered discipline was issued on November 30, 1988. Here, the Grievant was reprimanded for failure to wear and use appropriate safety equipment including hard hats and vests (Joint Exhibit 7, Pg. 5). Hawes, moreover, testified that he received several complaints concerning the Grievant's temper and his reluctance or unwillingness to follow the orders of certain individuals. On one of these occasions, he counseled the Grievant about leaving the work area without notifying a Group Leader. He did not, however, discuss the other complaints with the Grievant.

The Grievant's length of service was also considered to be an important facet of the administered penalty. At the time of the removal, the Grievant only accrued nineteen months of service.

Even though the particulars contained in Directive A-301 (.Joint Exhibit 3) indicate lesser penalties for the violations in dispute, the Employer claimed that the factors previously discussed, and the severity of the offense, adequately justified an upgrading of the penalty. These same factors, moreover, were considered by the Director and supported the escalation from a twenty-day suspension to a removal. Section 24.05 was referenced by the Employer in support of the Director's discretionary authority dealing with the imposition of any final decision. The Employer emphasized that prior decisions, made by others at the lower levels of the discipline process, were merely recommendations. As such, terms and conditions negotiated by the Parties, and the specific circumstances surrounding the present matter, support the legitimacy of the escalated penalty.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant. This conclusion was based upon evidence and testimony introduced at the hearing and a number of due process concerns raised by the Union.

With respect to the fighting incident, the Union maintained that certain facts were not in dispute, and never contested by the Grievant. He admitted that he was actively engaged in a fight and struck Magel during the course of the altercation. Both the-Grievant and Magel agreed that they "fronted" each other, yelled and shouted, and uttered profanities.

Several key aspects of the altercation were, however, in dispute. The Grievant maintained that he was provoked as a consequence of specific actions engaged in by Magel. Magel, more specifically, ordered the Grievant to help and transfer the signs, even though he was not the Grievant's supervisor nor assigned to the crew. The Grievant, moreover, alleged that part of the provocation involved a push initiated by Magel prior to his own physical response. The contusion and bruised ribs acknowledged in his Physician's statements (Union Exhibits 2 and 3) supported the argument that Magel was an active rather than a passive participant in the altercation. The Grievant emphasized that he struck Magel in self-defense after being pushed by Magel. Coffey and the Grievant testified that at the tail end of the altercation Magel could have broken away because his back was to the office door. As such, he had an unobstructed opportunity to break away and end the altercation.

In a like fashion the leave violations were also contested. The Union maintained that the Grievant followed proper call-in procedures. He initially attempted to contact the Miami County Garage to inform his supervisor about his additional leave request. When he was unable to get through, he contacted the District Headquarters in accordance with an established practice. It was alleged that the Union attempted to obtain call-in logs from the District Headquarters to support this contention. Employees at the District Headquarters, however, informed the Union that incoming calls were not logged in. Hawes' testimony, moreover, suggested that the Garage was experiencing phone difficulties on or about the time of these incidents. Hawes tes-tified that there were problems with the phones a few months prior to the incident as well as after the incident. Hawes acknowledged as well that the Grievant indicated that there was a problem when he returned to work. The Union also asserted that AT&T was on strike during this time period which circumstantially supported the Grievant's claim. A glaring defect dealing with this charge dealt with the Employer's lack of investigation concerning this matter. Hawes admitted that he never contacted District Headquarters to determine the veracity of the Grievant's assertions.

The Employer's arguments dealing with faulty leave documentation were also rebutted by the Union. The Grievant testified that he notified Hawes that his initial leave request might need to be extended based upon a forthcoming doctor's appointment. In addition, the Union alleged that proper leave forms (Union Exhibits 4 and 5) and supporting medical verifications (Union Exhibits 1 and 3) were submitted in accordance with Section 29.02. Tampering and authenticity charges raised at the hearing were never properly supported. Rather, these allegations were supported by relying on innuendo and conjecture. As a consequence, the validity of the call-ins should not have been questioned; and the Grievant should have been compensated for

April 3, 1989 and April 4, 1989.

The present matter was allegedly biased by an unequal treatment violation. Emphasis was placed on a similar fighting incident which took place in the same District, and involved many of the same Employer witnesses. In Sparks[1], the arbitrator upheld a ten-day suspension, even though the physical damage experienced by one of the protagonists was much more severe than Magel's injury. Another unequal treatment claim dealt with the very incident presently in question. With the admitted involvement of Magel, the Union alleged that he also violated Directive A-301 (Joint Exhibit 3), and should have been disciplined as well.

The penalty assessed was thought to be unreasonable, excessive and not commensurate with the offenses in question. The Union placed a great deal of emphasis on the improper imposition of the discipline; this was thought to be a direct violation of Section 24.05. An alleged compromise was offered the Grievant. He was purportedly advised that he would be charged with a twenty-day suspension if he waived his right to a predisciplinary hearing. The Grievant steadfastly refused this settlement offer believing that he was not guilty of the charges. This episode concerned the Union because it raised certain doubts about the removal decision implemented after the Grievant was formally notified of the suspension.

When the Employer decided to escalate the penalty, it allegedly violated Section 24.04. The removal penalty, more specifically, was implemented after the predisciplinary hearing at the Director's level. As such, the Grievant was not informed of the possible form of discipline; an obvious procedural and due process defect.

The administered penalty, itself, was thought to be excessive because of a progressive discipline defect; a violation of Section 24.02. The Employer's Disciplinary Guidelines, as specified in Directive A-301 (Joint Exhibit 3), provide for a suspension removal when one is charged with fighting with or striking a fellow employee. By removing the Grievant, the Employer failed to abide by its own guidelines.

THE ARBITRATOR'S OPINION AND AWARD

It is axiomatic that in the absence of mitigating circumstances, fighting is generally regarded as a serious form of misconduct; typically warranting the penalty of heavy suspension up to discharge. Such determinations, however, require an analysis of certain recognized defenses to determine the reasonableness of any implemented penalty. Arbitrator Raymond Roberts discussed the following broad considerations involved in conducting an assessment of a "fighting" disciplinary case:

". . .

1. An employee may be an innocent and injured victim of an unprovoked assault and not, himself, engage in aggression or hostility. In such a case, the victimized employee has engaged in no wrongful conduct and must be regarded as innocent.

2. Self Defense. When an employee engages in only as much hostile conduct as is reasonably necessary to defend himself from aggression and uses no more force than is reasonably necessary for that pur-pose, he will generally be found not guilty of fighting or assault. This is a defense of justification which is a complete defense.

3. Provocation. When an employee is the victim of provocation which is foreseeable to provoke an ordinarily reasonable person to a heat of rage and aggression, the conduct of that employee may be excused (as opposed to justified) either partially so as to mitigate against the full degree of penalty, or completely, so as to mitigate against any penalty whatsoever.

. . ."[2]

The Employer's action will be evaluated in light of the above stated criteria and principles.

Upon thorough review and consideration of the entire record including exhibits, arguments, and arbitral

research, it is this Arbitrator's finding and conclusion that Employer's action terminating Grievant was for proper and just cause. The reasoning follows.

The Arbitrator basically credits the Employer's version of what happened in the garage. Magel did shout toward the Grievant in an attempt to solicit his help; but at the time of the utterance both individuals were separated by a considerable distance. Grievant responded to the query by uttering a profanity, and then intercepted Magel as he approached the office door. While in front of the entrance, a verbal altercation initially ensued as both participants uttered profanities at each other. The altercation was brief and ended with the Grievant assaulting Magel by striking his left cheek. These factual conclusions were supported by a series of witness statements (Employer Exhibits 1-10), Magel and Coffey's testimony, and partially supported by the Grievant's own testimony. Thus, by intercepting Magel and striking the blow the Grievant acted as the aggressor. As such, the Employer's decision to identify the aggressor and to punish the combatant responsible for initiating the altercation cannot be found to have been an abuse of managerial authority or for improper cause.

The evidence hardly supports the Grievant's contention that he acted in self-defense. He alleged that he was pushed by Magel and only then responded with his blow to Magel's cheek. Coffey's eyewitness testimony seemed credible and failed to substantiate the Grievant's version of the events. Coffey, more specifically, noted that some gesturing and profanities were exchanged, but that Magel never assaulted the Grievant. Even if Magel did in fact push the Grievant, he exercised much more force and aggression than was necessary to "defend" himself. Also, the push characterized by the Grievant could not have inflicted the types of injuries suggested by the Grievant.

Other evidence seems to contradict the Grievant's assertions. On March 23, 1989 the Grievant authored a police statement (Union Exhibit 7) and a witness statement (Employer Exhibit 10) dealing with the circumstances surrounding the altercation. Both of these statements contain specific assertions that Magel pushed and punched the Grievant. At the hearing, however, the Grievant never alleged that he was punched in the chest. Col-lateral evidence further lends support to the notion that Magel never struck the Grievant, and raises certain doubt concerning the timing of the Grievant's purported injuries. The Industrial Commission of Ohio conducted an investigation dealing with the Grievant's application (Employer Exhibit 12). By examining certain office notes, it was determined that the injuries could have been engendered when the Grievant was struck by the rear of a backhoe machine while unloading highway signs.

The Grievant does not have a viable defense of provocation, and thus, his conduct is not excused nor justified. Magel, the alleged provocateur, as a reasonable person, could not have anticipated the kind of aggression in fact evoked. Neither the time nor manner of the request should have provoked the interception and the physical contact. The Grievant's reliance on his previous written reprimands (Joint Exhibit 7) as suggesting that he need solely rely on supervisory directives, does not properly support his provocation argument. If anything, his prior difficulties should have bolstered his initial decision to decline Magel's advances. Any continuing controversy should have been mediated by supervisory personnel rather than self-help in the form of an aggressive response.

Unequal treatment charges are not viewed as persuasive by the Arbitrator. The Union alleges that the Employer has not consistently invoked the penalty of discharge for every instance of fighting. The examples discussed do not seem to comply with the facts of the instant case. The prior discussion clearly indicates that Magel was not the provocateur nor the aggressor. As such, arguments suggesting that Magel should have been penalized as well are totally misplaced. A review of the Sparks award, indicates that the facts do not resemble what happened here. Since the Employer could not determine who was at fault, equal discipline was imposed and upheld by the arbitrator. Also, the incident was not viewed by witnesses, and neither Sparks nor his protagonist had any previous discipline.

Although the fighting charge independently supports the removal decision, the leave charge was not properly rebutted, which further bolsters the implemented discipline. The Grievant could not explain why he never attempted to re-contact the Superintendent. He, moreover, never attempted to contact the Deputy Director, although he directly delivered one of his leave request forms to this individual. The Union attempted to place some of the blame on the Employer's unwillingness to investigate the Grievant's claim. The Employer did, however, conduct a test of the telephone system which partially mitigates this concern. Also,

the Union must accept some responsibility in clarifying the record when it proposes such a critical affirmative defense. The dispatcher could have provided valuable testimony concerning this allegation. In addition, the Union alleged that the District Office had no formal logging procedure. Once again, an allegation does not become a valuable piece of credible evidence without the support of evidence and testimony.

The leave form (Union Exhibit 5), itself, looks suspiciously defective. Larry Rowan, a Labor Relations Officer, indicated that Cappella never authorized any administrative action by using a stamped signature. Also, Grievant's reliance on this method rather than the traditional procedure adds additional doubt to the propriety of this document. Interestingly, one has to wonder why pay was not approved if, in fact, it was properly authorized.

For a number of reasons, the penalty administered was proper, reasonable, and unfettered by procedural defects. First, the Appointing Authority or his designee, in accordance with Section 24.05, makes a final decision on the recommended disciplinary action. As such, unless the Union can document that an escalation of a penalty is arbitrary or capricious, these individuals have every right to escalate or reduce the recommended penalty. The record indicates that an escalated penalty, in light of the supplemented leave charge, was well within the range of reasonableness, and not an abuse of managerial authority.

Second, the compromise settlement and the alleged ultimatum offered the Grievant were not supported but merely presented as argument. Such a settlement offer, if in fact it has been offered but refused, does not automatically taint the reasonableness of a penalty subsequently administered.

Third, Section 24.04 notice requirements were not violated when the Employer escalated the penalty. This section requires the Employer to inform the employee and his/her representative of the "possible" form of discipline. It does not require the Employer to specify "the" discipline. One would hope that the Employer does not develop a practice such as this; but when warranted, as in this instant case, Section 24.04 does not preclude this managerial decision.

Last, Section 24.01, which deals with progressive discipline requirements, was not contradicted. The Grievant's proven violations, disciplinary record, and years of service serve as adequate justification for the administered penalty.

AWARD

For the reasons aforestated, the grievance filed by the Union on behalf of the Grievant shall be denied.

Dr. David M. Pincus
Arbitrator

April 2, 1990

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[1] OCSEA, Local 11, AFSCME, AFL-CIO and Ohio Department of Transportation, Grievance No. 6-87-0811, Jeff Sparks (Rivera, 1988)

[2] Alvey, Inc., 74 LA 834, 838 (Roberts, 1980).