

**ARBITRATION DECISION NO.:**

262

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Youth Services,  
Training Institution Central Ohio

**DATE OF ARBITRATION:**

April 26, 1990

**DATE OF DECISION:**

May 19, 1990

**GRIEVANT:**

Anthony Kent

**OCB GRIEVANCE NO.:**

35-08-(89-10-05)-0097-01-03

**ARBITRATOR:**

Harry Graham

**FOR THE UNION:**

Ron Stevenson

**FOR THE EMPLOYER:**

Sally Miller

**KEY WORDS:**

Removal  
Just Cause  
Abuse  
Self Defense

**ARTICLES:**

Article 24 - Discipline  
§24.01-Standard

**FACTS:**

A youth leader in the Training Institution Central Ohio was involved in an altercation with a youth under state custody. As a result of this altercation the grievant struck the youth after which a fight between the two ensued. After investigation of the incident the state found that the grievant had abused the youth and it discharged the grievant.

**EMPLOYER'S POSITION:**

The state argues that the grievant overreacted during the incident. By striking the inmate in the mouth the grievant abused the youth. The state's account of the incident is that the grievant had confronted the

youth in the institution's dining hall following his observation that the youth had been messing with the grievant's food while the grievant was away from his table. After confronting the youth about this action the youth directed a stream of profanity at the grievant. Thereupon the grievant struck the youth in the mouth. This was an overreaction because the only aggressive action toward the grievant was the use of profanity. At the time there were also ten other staff members present in the immediate vicinity. The state points out that under Section 24.01 of the contract the arbitrator has no authority to modify a discharge penalty if the grievant is found to have abused a person in the custody of the state.

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

The union adds the following to the above account of the incident. The grievant testified that the youth, after issuing his profanity, made a fist and began to turn on the grievant. The grievant believed that the inmate was about to attack him and he therefore gave the youth a preemptive blow. Further, the union points to the youth's criminal record - which includes "just about every offense known to society with the exception of murder". Given this record the grievant's belief that the youth was about to attack him is understandable. Given these circumstances abuse did not occur. The grievant should be reinstated and made whole.

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

The arbitrator finds that the evidence submitted shows that the youth was abusive toward the grievant - first by messing with the grievant's food and then by verbally abusing him. The arbitrator concluded that the youth probably wanted to provoke a physical reaction in the grievant. Further, based on the grievant's version of the incident, and based on the youth's criminal record, the arbitrator found that the grievant had just cause to feel threatened during the incident. Under these circumstances the grievant's initial blow against the youth cannot be held to constitute abuse within the meaning of the agreement.

#### **AWARD:**

The grievance is sustained. The grievant is to be restored to employment with full back pay and benefits and have his record expunged of the incident.

#### **TEXT OF THE OPINION:**

In the Matter of Arbitration  
Between  
**OCSEA/AFSCME Local 11**  
and  
**The State of Ohio,  
Department of Youth Services**

**Case No.:**  
35-08-89-10-05-0097-01-03

**Before:**  
Harry Graham

**Grievant:**  
Anthony Kent

**Appearances:**

**For OCSEA/AFSCME Local 11:**

Ron Stevenson  
Staff Representative  
OCSEA/AFSCME Local 11  
1680 Watermark Dr.  
Columbus, OH. 43215

**For The State of Ohio:**

Sally Miller  
Office of Collective Bargaining  
65 East State St., 16th Floor  
Columbus, OH. 43215

**Introduction:**

Pursuant to the procedures of the parties a hearing was held in this matter on April 26, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record was closed at the conclusion of oral argument on April 26th.

**Issue:**

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

“Was the Grievant, Anthony J. Kent, removed for just cause? If not, what shall the remedy be?”

**Background:**

At the hearing the parties agreed upon some of the facts that give rise to this dispute. The Grievant, Anthony Kent, has been employed for the past four and one-half (4.5) years as a Youth Leader in the Training Institution Central Ohio (TICO) located in Columbus, OH. That facility is a maximum security institution which houses juvenile offenders who have been convicted of committing a felony. Among the people confined in TICO was Harley Cherry. Without belaboring the point it is accurate to observe that Cherry is a wretched human being who at a young age has compiled an extensive record of serious crimes against society.

On August 4, 1989 the Grievant was on duty in the cafeteria. During the course of his duty he had occasion to use the telephone located in the cafeteria. While he was on the phone he observed Cherry "messing around" with his (Kent's) food. He rushed over to Cherry and asked why Cherry was playing with his food. Cherry responded with profanity. At this point accounts of the incident diverge. What is not at issue is that Kent hit Cherry in the mouth. No doubt exists that Kent hit Cherry.

After investigation of this incident it was the opinion of the State that Mr. Kent had perpetrated abuse upon inmate Cherry. Consequently, it discharged him from employment. A grievance protesting that action was promptly filed. It was processed through the machinery of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

**Position of the State:**

The State asserts it had just cause to discharge the Grievant. As it presents the events involved in the altercation between Kent and Cherry no doubt exists that Cherry directed a stream of profanity at Kent. Thereupon Kent struck him in the mouth. Cherry did not hit Kent first. In the State's opinion, Kent

overreacted to the epithets hurled at him by Cherry. When this incident occurred there were approximately ten (10) staff members in the immediate vicinity. If Kent felt threatened by Cherry they were available to lend assistance immediately. The only aggressive action evidenced by Cherry was the use of profanity. Cherry made no threatening gestures or actions towards Kent. In essence, Kent rushed up to Cherry, was the recipient of profanity and then struck him. Notwithstanding that Cherry has an extensive record of criminal behavior the fact remains that he was in the custody of the State and is entitled to be free from abuse while in that custody. People, no matter how antisocial their conduct may be, must not be abused while in the custody of the State. As no dispute exists that Kent struck Cherry he was the aggressor and termination is warranted as patient abuse occurred in this situation.

At Article 24, Section 24.01 the Agreement provides that if an Arbitrator finds that abuse of a person in the custody of the State has occurred the Arbitrator has no authority to modify the discharge penalty. That provision of the Agreement applies in this instance according to the State. Kent struck Cherry. He was discharged. He abused Cherry and the discharge is appropriate for the offense. No consideration should be given to Cherry's appalling record of crimes against society in the State's view. They are irrelevant.

In support of its decision to remove Mr. Kent the State submitted a number of arbitration awards.

### **Position of the Union:**

The Union asserts that a different version of events occurred in this situation. This difference is crucial to a determination that patient abuse did not transpire when Kent struck Cherry. According to the Union when Kent came up to Cherry and received the profanity directed at him there occurred another event. Cherry made a fist and began to turn on Kent. This action was preliminary to an attack on Kent which was forestalled only by his preemptive blow. Under these circumstances no patient abuse can be found. Consequently the State lacked the requisite just cause to discharge Mr. Kent.

The Union points out that Cherry is a hardened criminal despite his youth. He has committed just about every offense known to society with the exception of murder. While in TICO he raped another inmate. He has not responded to psychological counseling. Given the horrible record of Cherry and the evident threat he made to Kent it must be concluded that patient abuse did not occur in this instance. The Union urges an award reinstating Mr. Kent to employment with a make whole remedy.

### **Discussion:**

It is undisputed that when Mr. Kent approached Harley Cherry that Cherry initiated the conversation with foul language. Accounts of the incident indicate that Cherry called Kent a "black mother fucker." Language of this sort is properly regarded as constituting an epithet or invective. An epithet is defined as "invective or term of abuse." Invective is defined as "an abusive or violent utterance." "Abusive" is defined as "offering harsh words or ill treatment, rudeness of language." The Living Webster Encyclopedic Dictionary of the English Language, The English Language Institute of America, Chicago, Ill. 1975). The element in common in both all is the concept of abuse. Abuse can be more than physical in nature. It can be mental as well. The Grievant is black. Cherry utilized a racial slur of a serious nature. It is properly to be regarded as abusive towards Mr. Kent in the context of its use.

Immediately before Cherry's verbal assault upon Kent he had been "messaging" with Kent's food. This too may be regarded as a form of abuse or harassment. Cherry was intent on disturbing Kent. It is not too strong to believe that Cherry wanted to provoke the sort of reaction that ensued in this instance.

People in the employ of the State are properly to be held to a high standard of conduct with respect to people in their care. The State cannot tolerate gratuitous harassment or abuse of people in its custody. The State is properly cautious about charges of abuse being lodged against it. In this case there is sufficient reason to believe that abuse was committed by Cherry upon Kent prior to Kent striking out. That the abuse did not initially involve Cherry striking Kent does not make it less serious.

There is an element of uncertainty surrounding the physical element of the incident on August 4, 1989. Kent struck the first blow. He admits as much. That fact must be set against the abusive language that had

been directed towards him an instant before and Cherry's actions "messaging" with his food. As he did at the investigatory interview, Kent testified at the hearing that Cherry made a fist and was moving as if to strike him. In those circumstances Kent testified he felt threatened and afraid for his safety. Given Cherry's record, he had ample reason for those emotions. Under the circumstances of this case it is not to be expected that Kent would await the first blow from Cherry. In fact, the ensuing fight between them was vigorous. The Unit Manager, Ed Davis, rated it an 8 on a 10 point scale. Cherry gave as good as he got. The fact that Kent struck first in the face of extreme provocation from Cherry does not serve to constitute evidence of abuse to warrant discharge.

The various arbitration decisions offered by the State in support of its actions in this case do not do so. Case No. G86-0585, decided by Arbitrator Linda Klein, deals with a termination for commission of a felony, drug abuse. Case No. G87-0188 decided by Arbitrator John Drotning is concerned with termination for a felony conviction as well. Anna Smith, Arbitrator of Case No. 35-03-890810-0046-01-03, was confronted with a discharge of an employee for sleeping on duty. Three cases decided by Arbitrator David Pincus were submitted by the State. Case No. G87-2258 involves termination for off duty misconduct. The same is true of Case No. G87-1930 and 23-14-010488-0001-01-04. None of the decisions submitted by the State are concerned with abuse of patients or inmates by State employees. None of them can control the outcome of this dispute.

In this situation Kent experienced abuse by Cherry. That abuse preceded Kent's striking out. As Kent had a bona fide fear for his safety in this situation the fact that he delivered the initial blow cannot be held to constitute abuse within the meaning of the Agreement.

**Award:**

The grievance is SUSTAINED. The grievant is to be restored to employment. He is to receive all pay and benefits he would have earned but for this incident. All record of this event is to be expunged from his personnel file.

Signed and dated this 19th day of May, 1990 at South Russell, OH.

Harry Graham  
Arbitrator