

ARBITRATION DECISION NO.:

277

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation

DATE OF ARBITRATION:

June 28, 1990

DATE OF DECISION:

July 20, 1990

GRIEVANT:

Edwin D. Bailey

OCB GRIEVANCE NO.:

31-04-(89-06-06)-0030-01-06

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

Gerald Burlingame

FOR THE EMPLOYER:

Joe Jacobs

Meril Price

KEY WORDS:

Ten Day Suspension

Abusive Language

Section 25.08 Discovery

Shop Talk

ARTICLES:

Article 24 - Discipline

§24.01-Standard

§24.02-Progressive

Discipline

§24.05-Imposition

of Discipline

§24.06-Prior

Disciplinary Actions

Article 25 - Grievance

Procedure

§25.08-Relevant

Witnesses and Information

FACTS:

The grievant was a Highway Worker 4, a nine year employee of the Ohio Department of Transportation. His job duties included scheduling, planning and directing a work crew. The grievant's work evaluations showed him to be a good crew leader, however, it was noted that he often did things "in his own way." The grievant's supervisor directed one member of the grievant's crew to remain at the outpost for one day due to an inspection team visit. He was to open the Outpost. The grievant objected because his planned activities for the day required his entire crew. At the end of a tense discussion in the supervisor's office the grievant told his supervisor "You are afraid of your job", and "Fuck You." The grievant was suspended for ten days because of the incident.

EMPLOYER'S POSITION:

There was just cause for a ten day suspension. The grievant had received a written reprimand for abusive language one month earlier. He, therefore, had notice of the employer's rules. Additionally, a ten day suspension is progressive due to the recent related prior discipline. The grievant was told by his supervisor that one of the grievant's crew members was needed elsewhere. It is not the grievant's place to question, or argue with his supervisor. The grievant ended a heated discussion with his supervisor with obscenities directed at the supervisor. Abusive language directed toward another employee, especially a superior, is harmful to the order and discipline necessary in the workplace. It is entirely different from language used but not directed toward another.

The employer refused to produce the grievant's supervisor's discipline records on the grounds of relevancy. The supervisor's past acts are not at issue and do not affect the nature of the grievant's abusive language directed toward the supervisor.

UNION'S POSITION:

There is no just cause for a ten day suspension. It is true that the grievant used obscenities. However, they were not directed toward the supervisor and, therefore, not abusive. The grievant was told that one of his crew was needed to stay and open the outpost to let an inspection team in. The grievant was also responsible for getting his assigned duties done for which he believed he needed his entire crew. He strongly disagreed with his supervisor and at the end of a discussion over the matter the grievant used obscenities. However, no language was directed toward the supervisor. This type of language is commonly used in the workplace and is not a violation of any employer work rule. Further, the supervisor himself uses obscene language in the workplace.

The employer violated section 25.08 of the agreement by not allowing discovery of the grievant's supervisor's disciplinary record. The disciplinary record is relevant to show that the supervisor does use obscene language and has been disciplined for directing abusive language toward other employees. Lastly, a ten day suspension following a written reprimand violates progressive discipline and, therefore, should be reduced.

ARBITRATOR'S OPINION:

The employer did violate section 25.08 of the agreement by not allowing discovery of the supervisor's discipline records. The supervisor denied ever using obscene language or directing obscene, abusive, language toward another. His credibility was crucial and records of discipline for abusive language are relevant to credibility.

Obscenities are commonly used in the workplace. It is a different situation when obscenities are directed toward another person. Directed obscenity may then be classified as abusive. The grievant was ordered by his supervisor to leave a crew member at the Outpost. As a subordinate he was obligated to submit to the order with the proper deference to authority. Use of obscenities at the end of a tense discussion in the supervisor's office is harmful to the work relationship between superior and subordinate. The language used by the grievant was abusive. He said that the supervisor was "afraid of your job" and ended with "Fuck you" as he left the office. Therefore, the grievant did violate the employer's work rules.

The penalty did not follow progressive discipline standards. The grievant did receive a written reprimand one month prior to this incident. The reprimand also involved an order-giving situation. The purpose of discipline, however, is to correct behavior, not to punish employees. The grievant was a nine year employee. He is still obligated to follow orders without disrespect. The circumstances presented by the grievance show this discipline to be punitive and not progressive.

AWARD:

The grievant was guilty of using abusive language. The discipline was punitive and is therefore reduced to five days.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

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

and

**Ohio Department of
Transportation (OCB)**
Employer.

Grievance:

31-04(89-06-06)0030-01-06

Grievant:

(Edwin D. Bailey)

Hearing Date:

June 28, 1990

Award Date:

July 20, 1990

For the Union:

Gerald Burlingame

For the Employer:

Joe Jacobs
Meril Price

Present in addition to the Grievant named above and the Advocates were the following persons: Archie Shaffer, ODOT Super. II (witness), Lee Primm, Highway Super. (witness), Ronald Stenglein, District Main Superintendent (witness), George Goldner, HWII (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and

the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

J-1 Labor Agreement -- 1986-1989

J-2 Discipline Trail and Grievance Trail

J-3 Department Directives -- A-301, A-302

J-4 Two letters from the Union to the Employer requesting documents regarding Mr. Lee Primm. One dated March 12, 1990 and the second dated June 20, 1990.

J-5 Answer of OCB to J-4

Joint Stipulations

1. The Grievant's employment date is December 15, 1980.
2. The Grievant's classification at the time of the suspension was a Highway Worker IV.
3. The Grievant has had two previous written reprimands.

Relevant Contract Sections

§24.01 - Standard (in part)

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.

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.

§24.05 - Imposition of Discipline (in part)

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

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the

past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

§25.08 - Relevant Witnesses and Information

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

Procedural Issue

Did the Employer violate the contract §25.08 by failing to provide in advance of the Arbitration the discipline records of a Supervisor who was the main witness against the Grievant?

Facts re Procedural Issue

On March 13, 1990, the Union Advocate wrote to the Employer's Advocate and requested, inter alia, the disciplinary records of the Supervisor who was the complainant against the Grievant (Exhibit J-4). On June 20, 1990, the Union Advocate again wrote, pointing out that he had not received the Supervisor's records (Exhibit J-4). On June 22, 1990, the Employer's Advocate by letter refused the items on the grounds of "irrelevancy" (Exhibit J-5).

Before proceeding to the Arbitration of the substantive issue, the Union asked that the records be produced. The Employer again refused.

Ruling

The Arbitrator held that the Employer violated §25.08 by refusing the demand. Discovery under §25.08 is to be broad. In this case, where the main witness was a supervisor whose credibility was crucial, his disciplinary record was a reasonable request. Whether anything in that record would be "relevant" for purposes of admission at the hearing would be ultimately the decision of the Arbitrator. (The Employer produced the record which was given to the Union.)

Substantive Issue

Was the Grievant suspended for ten (10) days for just cause under Article 24 of the Agreement? If not, what shall the remedy be?

Facts

The incident in question occurred on April 20, 1989. On that day, the Grievant had been an ODOT employee since December 15, 1980, and his classification was a Highway Worker IV. In essence, a Highway Worker IV is a lead worker, a crew leader, who directs a crew and is responsible for planning and scheduling their work. (See E-2 Position Description.) Prior to the incident in question, the Grievant had two (2) prior disciplines: On February 21, 1980, he used obscene language to a supervisory employee and received a Written Reprimand. On March 20, 1989, he was given a Written Reprimand for an unauthorized absence.

The past evaluations showed the Grievant to be a good worker, a hard worker, and a crew leader who worked well with his crew. In particular, the Grievant managed very well crew members who were themselves "difficult." The main criticism of the Grievant in both the evaluations (E-3 and E-4) and in the testimony of his supervisors was that while he "got the job done", he often "did it in his own way."

On the day in question, Highway Supervisor Primm (the Grievant's immediate supervisor) had received

notice that the outpost would be inspected that day by senior supervisors including someone from the "Columbus" office. Archie Shaffer, Primm's immediate supervisor, had directed that one crew member be left at the Outpost to receive the visitors. (Normally, if all workers are out on the road working, the outpost is locked.) The exact arrival time of the "visitors" was unknown. Supervisor Primm told the Grievant to leave a crew member at the Outpost. According to the Grievant's testimony, he had planned for that day certain work to be done that needed all his crew members. The loss of this crew member for the day would necessitate a significant change in the work plan. The Grievant "begged" (his words) Supervisor Primm to give him a full crew. Supervisor Primm said he was "under orders" to leave a crew member. A tense discussion ensued; the Grievant arose and shut the door. According to the Supervisor, the Grievant said "You are afraid of your job" and ended with "Fuck You." The Grievant admits telling the Supervisor that he (the Supervisor) was afraid of his job but denied swearing at the Supervisor. Both the Employer and the Union in the testimony introduced at the hearing maintained that the context in which this conversation (with the alleged obscenity) took place was crucial. Clearly, all levels of management were tense about the impending inspection of the Outpost. Moreover, the testimony of all three management personnel (Stinglein, Shaffer, and Primm) revealed that they had held the Grievant responsible in the past for the failure of an Outpost to be properly maintained. Equally clear to the Arbitrator was that the Grievant was an independent person who did good work and planned it carefully.

Much of the testimony dealt with "shop talk." Despite pious proclamations on both sides, the Arbitrator finds that both sides used obscene, foul, street language on a regular basis, i.e., shop talk. Supervisor Primm was asked on cross examination if he had ever used obscene language directed toward another employee and if he had been disciplined. He replied in the negative. The Union then asked permission to introduce Exhibit U-2 as the disciplinary record of the Supervisor (which was the subject of the discovery issue). The Arbitrator found the document relevant. In 1987, Supervisor Primm was suspended for 15 working days for using abusive and insulting language toward another employee. Highway Worker II, George Goldner, testified to another incident where Supervisor Primm allegedly used obscene language toward another employee but for which no discipline ensued.

Superintendent Shaffer testified about the Grievant calling him (Shaffer) an "asshole."

After the April 20, 1989 incident, Supervisor Primm requested discipline for the Grievant. The Grievant was suspended for ten (10) days.

Discussion

Shop talk is a fact of life in highway maintenance work. Language not used in Church flows freely, not just among the "crew" but among supervisors and employees alike. Much of such language is good natured, and most is directed at the work situation itself. Swear words apparently help relieve tension and frustration.

On the other hand, language directed specifically at another human being, if said in anger or contempt rather than as acceptable banter, crosses the line into abuse. Abusive or insulting language directed specifically at a subordinate or at a supervisor crosses the delicate line and undermines the hierarchy and order giving. In many situations, improper statements are ignored, the person to whom they are directed pretending not to hear the personal abuse and the speaker subsequently recanting. (Consider the mother who ignores the muttered, nasty words of a teenager. Consider the teenager when asked "what did you say", who says "oh nothing.") Sometimes angry words cannot be ignored, or one person chooses not to ignore them. A supervisor may choose to make an issue of words if he decides that the maintenance of the proper relationship between himself and his subordinate necessitates a calculated reply. In interpersonal work relationships, the choice is a delicate one.

In this case, both Supervisor Primm and the Grievant were between a rock and a hard place. The Supervisor was under direction to leave a crew member for the threatened inspection, a matter crucial to his superiors. The Grievant had a work plan all set to meet his responsibilities which required the crew member. Something -- someone -- had to "give." The nature of the hierarchy required that the Grievant acquiesce and that he acquiesce with proper deference to authority.

The question before the Arbitrator is the nature of the conversation. The Supervisor claims the Grievant

told him to "fuck himself" and that "he (the Supervisor) was afraid of his job." The Grievant admits the latter statement and denies the first. Both men seemed honest and credible in their testimony. Yet Supervisor Primm's credibility was called into question by his untruthful denial of prior discipline for abusive language. Moreover, the Grievant's previous use of "asshole" directed at a supervisor lends some credence to the Supervisor's version.

Since the door was closed and since no one else was present, no other human being will ever know the exact words used. For the Arbitrator, the key question is did the Grievant step over that delicate line which requires discipline to maintain the hierarchy. The Arbitrator so finds. The statement "you are afraid of your job" combined with some form of swear word in the context of an argument about orders violated No. 3 -- "abusive or insulting language toward a Supervisor."

Is a ten day suspension progressive and commensurate? Grievant had received a Written Reprimand for abusive language on February 21, 1989. This incident followed within a month. The February 21, 1989 incident also occurred within an order giving situation. However, the Grievant is a 9 year employee with a good work record. The purpose of the discipline is not to punish arbitrarily, but to correct. No matter how good a worker, the Grievant is required by his position to follow his supervisor's orders and to do so without disrespect. Given the context of this incident and the working record of the Grievant, a 10-day suspension is punitive rather than corrective and progressive.

Award

The Grievance is denied as to the charge but granted in part as to the quantity of discipline. Suspension is reduced to five (5) days.

July 18, 1990

Date

Rhonda R. Rivera
Arbitrator