

**ARBITRATION DECISION NO.:**

301

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Youth Services  
Scioto Village/Riverview Complex

**DATE OF ARBITRATION:**

September 21, 1990

**DATE OF DECISION:**

October 24, 1990

**GRIEVANT:**

Paul Livingston

**OCB GRIEVANCE NO.:**

35-07-(90-05-30)-0011-01-03

**ARBITRATOR:**

Rhonda Rivera

**FOR THE UNION:**

Ronald Stevenson  
Robert Steele

**FOR THE EMPLOYER:**

Deneen Donough  
Sally Miller

**KEY WORDS:**

Removal  
Burden of Proof  
Credibility  
Inappropriate Conduct  
with Youth

**ARTICLES:**

Article 24-Discipline  
§24.01-Standard  
§24.02-Progressive Discipline

**FACTS:**

The grievant is a Youth Leader 2 employed by the Ohio Department of Youth Services. He was removed for "failure of good behavior". One youth at the grievant's facility accused him of harassment by improper touching and making suggestive comments. The grievant had been instructed by the employer not to do certain things with the youths such as hugging and giving gifts. No discipline has resulted from the acts the

grievant had been told to stop.

**EMPLOYER'S POSITION:**

There was just cause for removal of the grievant. The youth toward whom the grievant's action was directed is credible. A polygraph test was administered which she passed. Additionally, the grievant has a history of improper contact with youths at the facility. The grievant was ordered by the employer not to hug or give gifts to youths because misunderstandings could arise.

**UNION'S POSITION:**

There was no just cause for discipline. The grievant is a fourteen year employee with no similar prior discipline. The grievant denied that he had behaved improperly at anytime toward the complaining youth. The complaining youth's roommate's story did not support the charges against the grievant.

**ARBITRATOR'S OPINION:**

There was no just cause for discipline. Serious charges like harassment must be supported by clear and convincing evidence. In this case, the complaining youth's story was not consistent and believable. The roommate did not support the complaining youth's claims and, therefore, undercut the complaining youth's charges. The grievant has been ordered not to engage in certain behavior but no prior discipline has resulted from any prior acts. For those reasons the employer's burden of proof has not been met.

**AWARD:**

The grievant was reinstated with full back pay, seniority and restoration of benefits.

**TEXT OF THE OPINION:**

**IN THE MATTER OF ARBITRATION**  
**BETWEEN THE**  
  
**OCSEA/AFSCME, LOCAL 11,**  
  
AND  
  
**THE STATE OF OHIO**  
**DEPARTMENT OF YOUTH SERVICES**

**Grievance No.:**

35-07-(90-05-30)-0011-01-03  
(Livingston)

**Hearing Date:**

9-21-90

**Award Date:**

10-24-90

**For the Union:**

Ronald Stevenson  
Robert Steele

**For the Employer:**

Deneen Donough  
Sally Miller

Present at the hearing in addition to the Grievant (Paul Livingston) and the advocates named above were the following persons: Gwen Shealey - Superintendent DYS (Witness), Consuela Childers (CC) (witness), Linda Corcoran Social Workers DYS (observer) Dan Sanor Youth Counselor, DYS (observer) Leila Elliott (LKE) (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 conditioned on the use of pseudonyms for the two youth involved.

The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

### **STIPULATED DOCUMENTS**

- 1) 1989 Agreement between OCSEA/AFSCME and State of Ohio.
- 2) Grievance Trial
- 3) Discipline Trial
- 4) Directive B-19

### **Stipulations**

- 1) The Grievant was a youth leader 2, hired 4/12/76.
- 2) Grievant was working as a youth leader on April 20, 1990 in Allman Cottage.
- 3) Grievant was charged with violation of 124.34 and DYS Work Rules B-19 #1 and 21.
- 4) Youth Consuela Childers was under the Grievant's supervision and care.
- 5) Grievant's previous discipline includes:

11/4/89-Verbal Reprimand-Late for Work  
2/9/89-1-Day Suspension-Refused to follow orders.  
8/11/88-Written Reprimand-Failed to complete duties.  
12/3/86-1-Day Suspension-Sleeping during duty.

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### **ISSUE**

Was the Grievant disciplined for just cause?  
If not, what shall the remedy be?

### **CONTRACT SECTIONS**

## **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. 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.

#### **§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. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- 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.

#### **Facts**

The Grievant is a Youth Leader 2 who has worked for the Department of Youth Services since April 12, 1976. Effective May 24, 1990, the Grievant was removed for "Failure of Good Behavior" for allegedly violating Work Rules 1 and 21.

Rule 1:

1. Abusing or mistreating youth entrusted to the Department's care; failing to immediately report the use of physical force on a youth as prescribed by local directive or rules.

Rule 21:

21. Displaying immoral or indecent conduct on or off Department premises.  
(Joint Exhibit 4)

The notice of Investigation stated the charge in the following manner:

"When and where did the alleged incident occur? (Date/Time)

4/20/90 approx. Describe alleged incident: On the stated date and time a youth entrusted under our care alleges you did make inappropriate "passes", "touching", and suggestions to her on more than one occasion. Further, that your inappropriateness was without encouragement from her. With respect to these allegations, I find you in violation of ODYS Chapter B-19 #1 . . . Abusing or mistreating youth entrusted to the Department's care, and B-19 #21 Displaying immoral or indecent conduct.

(Joint Exhibit 3)

Gwen Shealey, Superintendent of Scioto Village and Riverview testified. She described Scioto Village where the Grievant was stationed as a state facility for girls convicted of felonies 1 through 4, ages 12-21. Some are run-aways, 85% have been sexually abused, and 85% have abused drugs. She described the job of Youth Leader as critical to the mission of the facility. The mission of the youth leader includes security, control, and treatment. In one sense, the youth leader is both Mom and Dad; youth leaders supervise the youth 24 hours a day. She indicated that the female youths commonly flirt with youth leaders; in fact, some

of the young women have solicited sex professionally prior to their detention. Any sexual interaction is to be immediately reported to one's Supervisor or the Duty officer. The Superintendent testified that she knew the Grievant prior to the alleged incident. She had previously counseled him on "hugging girls." He had said that in 12 step meeting, hugging was intrinsic. The Superintendent indicated that she had subsequently ordered everyone to stop "hugging" as part of 12 step programs. She said she had also previously counseled the grievant to not bring gifts to youth. Allegedly, the grievant said "black girls need these things." She said she told him "no gifts." Further she told him "his intentions were fine; his message wrong" and to be careful that a youth did not "set him up." With regard to the incident in question, her only personal knowledge was that the youth in question (C.C.) was polygraphed by the Highway Patrol and found to be truthful.

The youth C.C. testified she was incarcerated for felonious assault. The youth described three (3) incidents with the grievant.

One evening when she needed ice to place on an injury, the Grievant accompanied her to the kitchen. On the way back to her room, she said she sat down in the day room in front of the TV. The grievant sat behind her and said "what are you gonna give me" (for letting you look at TV). The youth said that these words by the Grievant meant "What was I gonna do with him."

The youth said the second incident occurred when she and her roommate were on the way to the bathroom. The grievant allegedly hit the youth "on her butt."

The third incident she said occurred after she and her roommate were in the bathroom together. The grievant allegedly yelled at the youth to hurry and when her roommate was already back in the room, he put his hand up the youth's blouse and touched her breast. The youth said that she had never reported any of the incidents, rather that her roommate had reported them. She said she did not report them because she was scared.

She admitted that she previously had written a note to the Grievant when she had a different roommate. She described the note as written at the instigation and direction of the roommate. She said the note was a "joke". She said the grievant had never given her any cigarettes.

The youth's roommate at the time of the incident "L.K.E." also testified. She said she had never seen the grievant touch "C.C." or heard him make a pass at "C.C.". She said that she had never gone to the bathroom jointly with "C.C.". She said that she only knew what "C.C." told her. She said that when "C.C." described the Grievant's actions, that she (LKE) reported them because "they weren't right." The Roommate testified that "C.C." had told her that the grievant 1) let "C.C." stay up and watch TV, 2) brought her cigarettes, 3) he had put his hand up her shirt when he "cornered" her.

The Grievant denied that he had made inappropriate remarks to "C.C.", denied that he patted her on the behind, and denied that he had put his hand down her blouse. He admitted that she had previously given him a note. He said that he put it in his pocket and forgot about it. He said the only trouble between he and "C.C." was that she had demanded cigarettes, when and he had refused them, she got mad.

## **Discussion**

Removal from a position is the most serious workplace discipline. Removal under a charge of abusing a young person in custodial care will follow an employee for life. Such a charge must be supported by clear and convincing evidence.

In this case, a 14 year employee is charged. While he has had prior discipline, none of that discipline related to any type of similar incidents. The Superintendent did testify to counseling on related matters, but no incident subsequently occurred which was reported and disciplined.

The testimony of the youth was not believable. Her story was internally inconsistent; moreover, significant details varied between her testimony and her previously written statements. More importantly, glaring inconsistencies appeared between her story and the story of the roommate. The roommate was very credible in her testimony. However, she said that the youth "C.C." told her that the grievant gave her cigarettes; the youth denied that. The roommate said she never was together in the bathroom with "C.C."; "C.C." described at length a scene where she and the roommate were allegedly in the bathroom together. Their descriptions of their movements within the locations involved were inconsistent. No direct evidence of

any abuse was provided. The corroborating witness (the roommate) weakened "C.C's" story rather than strengthened it.

Insufficient evidence exists to discipline the Grievant.

**Award**

The Grievant is to be reinstated with full back pay, restoration of benefits and seniority.

Date: 10/26/90  
RHONDA R. RIVERA  
Arbitrator