

ARBITRATION DECISION NO.:

634

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

The Ohio Student Aid Commission

DATE OF ARBITRATION:

June 26, 1996 and
December 3, 1996

DATE OF DECISION:

May 8, 1997

GRIEVANT:

Selina Miller

OCB GRIEVANCE NO.:

60-00-(95-10-27)-0112-01-09

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Robert W. Steele

FOR THE EMPLOYER:

Michael P. Duco

KEY WORDS:

Burden of Proof
Due Process
Evidence: Admissibility
Just Cause
Progressive Discipline
Removal

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline
 §24.04-Pre-Discipline
 §24.05-Imposition
of Discipline
 §24.06-Prior
Disciplinary Action
Article 25 - Grievance

Procedure

§25.03-Arbitration

Procedures

§25.04-Arbitration/

Mediation Panels

FACTS:

The Grievant worked as an Examiner 3 in the State Grants and Scholarship Department at the Ohio Student Aid commission. On July 10, 1995, the Grievant was involved in a physical altercation with a co-worker. Both the Grievant and the co-worker claimed that they were injured by the other. The Grievant and the co-worker both reported their version of the incident to supervisors. The Grievant later complained of chest pains which she said were the result of being struck in the chest by the co-worker. She was taken to the hospital and x-rays revealed she had a bruised sternum.

Management conducted an investigation into the co-worker's claims but not into the claim of the Grievant. The Employer did not investigate the Grievant's injury, nor did they follow up on the Grievant's claim that the co-worker was the aggressor in the altercation. The Grievant was removed because of this incident. The witness accounts which were taken tended to support the version of the co-worker. The evidence presented at arbitration included these witness accounts and evidence of prior inappropriate acts by the grievant.

EMPLOYER'S POSITION:

The Employer argued that there was just cause to remove the Grievant. First, the Grievant's behavior was assaultive and designed to intimidate and harass her co-worker. This conduct is serious and it warrants removal without progressive discipline. Further, the Grievant has expressed no remorse for her actions nor has she taken responsibility for them.

Second, the Employer argued that the Grievant was justly removed because of her prior acts. Those acts, combined with this one, have caused the Grievant's co-workers to fear her and express a desire that she not return to work. The Employer argued that the evidence of prior acts should be admitted because it shed more light on the subject than it prejudiced the Grievant's rights. Further, these acts should be admitted because they were not being used to support the guilt of the Grievant but to support management's decision to remove the Grievant.

Last, the Employer argued that the investigation of this matter was fair and impartial. The Employer argued that the Grievant's prior bad acts legitimized the fact that she was the focus of the investigation. Further, the Union had never established that the Grievant and the co-worker were both aggressors in this incident.

UNION'S POSITION:

The Union argued that there was not just cause to remove the Grievant. First, the Union argued that the Employer's case was based on defective proof that the Grievant was responsible for the incident. The Union pointed out that the Grievant's version of the facts was not explored and her injury was ignored by the Employer.

Second, the Union argued that the evidence of the Grievant's prior acts should not be admitted. The Union argued that it was being used to establish that the Grievant was the aggressor in the altercation and that the evidence was more prejudicial than probative.

Third, the Union argued that the Grievant and the co-worker were not treated equally by the Employer. The Union pointed out that both workers made reports concerning the incident and only the co-worker's claim was investigated. The Union also pointed out that Work Rule 4.4 states that in any incident of physical attack "both parties shall be subject to disciplinary action." This procedure was not followed in this case and only the Grievant was subject to disciplinary action and investigation. The Union also pointed out that the Employer has the burden to prove that the Grievant was the aggressor. The Union does not have the burden to prove that the employees were co-aggressors.

ARBITRATOR'S OPINION:

The Arbitrator found that there was not just cause for the removal of the Grievant. First, the Arbitrator stated that there were several procedural defects engaged in by the Employer. The Arbitrator pointed out that all relevant evidence should be obtained and analyzed by the Employer in order to have a fair investigation. The Employer failed to investigate the Grievant's chest injury even though they had explicit notice of it. The investigation began with the assumption that the Grievant was to blame, which clearly prejudiced the Employer's perception of the charge and what penalty to administer.

The Arbitrator also found that the investigation was not conducted in accordance with the Employer's own work rule 4.4, which required that both parties to a physical altercation be subject to discipline. The fact that no disciplinary proceedings or investigation were conducted against the co-worker constituted unequal treatment of the employees.

The Arbitrator did find that the evidence of prior acts by the Grievant could be considered in this case. The Arbitrator pointed out, however, that it could only be used to justify the penalty administered or to refute the charge of unfair treatment. The evidence could not be used to establish that the Grievant was responsible for the altercation.

AWARD:

The grievance was sustained. The Employer was directed to reinstate the Grievant with all back pay, minus any appropriate deductions. The Arbitrator clarified the term "appropriate deductions" to include taxes, retirement contributions, interim earnings and any unemployment compensation. The Grievant was directed to submit documentation of interim earnings and unemployment compensation so that her back pay may be calculated. The Grievant's benefits and seniority were also reinstated.

TEXT OF THE OPINION

THE 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
Student Aid Commission**

-and-

**Ohio Civil Service
Employees Association,**

Grievant:
Selina Miller

Grievance No:
60-00 (95-10-27) 0112-01-09

Arbitrator's Opinion and Award

Arbitrator:

David M. Pincus

Date:

May 8, 1997

Appearances

For the Employer

Rae Ann Estep,
Executive Director
Michelle Widner,
Special Assistant to
the Director
Thomas Lee Rudd,
Director of Operations
Rhonda L. Thompson,
Secretary
Susan Minturn,
Program Administrator
Alice Doughty,
Payment Coordinator
Tom Randle,
Columbus Police Department
Marla A. Gaskill, Trooper
Barbara Smallwood,
Application Examiner
Theodore Adams,
Prior General Counsel
David Bastian, Supervisor
Brian D. Walton,
Labor Relations Specialist
Michael P. Duco, Manager,
Dispute Resolution and Advocate

For the Union

Selina Miller, Grievant
Rhonda Fleming,
Chapter President
Tim Rippeth,
Staff Representative
Ronald Snyder,
Associate General Counsel
Robert W Steele,
Staff Representative and Advocate

Introduction

This is a proceeding under Article 25, entitled Grievance Procedure, Section 25.03 - Arbitration Procedures, Section 25.04 - Arbitration/Mediation Panels of the Agreement between The State of Ohio, The Ohio Student Aid Commission, hereinafter referred to as the "Employer," and Ohio Civil Service Employees Association, AFSCME, Local 11, hereinafter referred to as the "Union," for the period March 1, 1994-February 28, 1997. The arbitration hearing was held on June 26, 1996 and December 3, 1996. The parties

had selected 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. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

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Stipulated Issue

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

Stipulated Facts

- The grievance is properly before the Arbitrator.
- The Grievant was hired by the Ohio Board of Regents on September 11, 1989 in the State Regents and Scholarships Department.
- On January 10, 1993, the State Grant's and Scholarship Department was transferred to the Ohio Student Aid Commission.
- At the time of her removal, the Grievant had no active discipline.

Pertinent Contract Provisions

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 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. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from a separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

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 of more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
- D. one or more days(s) suspension(s);
- E. 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 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.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

* * *
(Joint Exhibit 1, Pgs. 68-69)
* * *

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, a fine or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. An employee who is charged, or his/her representative, may make such a written request for a continuance of up to 48 hours. Such continuance shall not be unreasonably denied. A continuance may be longer than 48 hours if mutually agreed to by the parties. 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. When the pre-disciplinary notice is sent, 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 ask questions, 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.

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-discipline meeting. At the discretion of the Employer, the forty-five (45) day 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. The OCSEA Chapter President shall notify the agency head in writing of the name and address of the Union representative to receive such notice. 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 that 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 1, Pgs. 70-72)

24.06 - Prior Disciplinary Action

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.

The retention period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave.

* * *

(Joint Exhibit 1, Pg. 72)

Case History

Selina Miller, the Grievant, has been employed by the State of Ohio since September of 1989. Initially, she worked for the Board of Regents, and was subsequently transferred with the rest of her section to the Ohio Student Aid Commission. At the time of her removal on October 13, 1995, the Grievant was classified as an Examiner III working in the State Grants and Scholarship (SGS) department.

The removal action is based on an incident which took place on July 10, 1995, involving the Grievant and Rhonda Thompson, a co-worker working in the Grievant's department. The facts for the most part are in dispute. As such, the version provided below reflects the Employer's perspective of the events. A subsequent portion of the Opinion and Award will review the Union's perspective; which will represent the Grievant's recollections regarding the disputed incident.

Thompson left her cubicle to do some filing at approximately 12 Noon. The filing cabinets line the west walls of the department. Since the hallway where the cabinets reside is only 3'8" wide, the doors on the file cabinets slide back so as not to obstruct the hallway area. Thompson alleged that while she was standing at the filing cabinets she noticed the Grievant approaching her location after leaving her cubicle. As Thompson moved closer toward the cabinets, the Grievant stood inches away from her and remarked, in a bullying tone, "Excuse me." Thompson purportedly responding by stating there was plenty of room to pass. The Grievant responded, again, by stating "excuse me" but this time her tone was most threatening. Thompson testified she did not move, and that Grievant rammed her and knocked her off balance.

This altercation did not end with the ramming incident. Rather, the Grievant continued the incident by taking a boxer-like stance and remarking "Don't make me drop-kick you. The highway patrol would be taking us both out."

After these comments, Thompson went back to her cubicle. She immediately wrote a description of the incident and delivered it to Rhonda Fleming, the Chapter President, and several other management representatives. The Grievant informed her immediate supervisor, David Bastian, that she had been struck in the chest. He said he would "get back" to her. The Grievant went to lunch and came back approximately thirty (30) minutes later.

Upon her return, the Grievant complained of chest pains. She notified Bastian about her condition, and he proceeded to have security call 911. Prior to leaving the facility, the Grievant authored a Request for Leave form abuse. She stated Thompson had intentionally struck her in the chest during the course of an altercation.

The Grievant was, indeed, examined at Grant Medical Center where she was examined by a physician and counseled. X-rays were taken of her chest and purportedly exposed a contused sternum. Once released from the hospital, she followed the counselor's advice and filed a complaint with the Columbus Police Department.

Subsequent to the incidents described above, Patrick Grubbe, Director of ASAC, contacted the Ohio State Highway Patrol (OSHP) in accordance with a policy memorandum issued by the Governor's office. This collateral criminal investigation caused the Employer to hold in abeyance its own administrative investigation. It should be noted that criminal charges were not filed against the Grievant nor Thompson.

Once the OSHP concluded its investigation, Theodore Adams, the General Counsel, initiated an internal administrative investigation. He issued an Inter-Office Memorandum (Joint Exhibit 3) on August 10, 1995

which contained a recommendation that a pre-disciplinary be held pursuant to Article 24, Section 24.04.

A pre-disciplinary meeting was held on Wednesday, August 30, 1995. The Hearing Officer concluded ". . there are significant documentation and witness statements that warrant appropriate discipline by management."

On October 13, 1995, a removal order was issued. It contained the following relevant particulars:

* * *

This letter is to inform you that you are hereby terminated from employment as a Public Inquiries Assistant 1, assigned to the Office of Instructional Grants, Ohio Student Aid Commission, effective at 4:30 p.m., October 13, 1995.

After reviewing the recommendation of the Pre-Disciplinary Meeting Officer, and others, it has been determined that just cause exists for this action. You are found to have violated the Student Aid Commission Handbook, Section 4.4 - Act of Aggression. You are to remain off Ohio Student Aid Commission property.

* * *

(Joint Exhibit 3, pg. 22)

On October 22, 1995, a formal grievance (Joint Exhibit 2) was filed contesting the Employer's removal decision. The specified remedy sought urged that the Grievant be reinstated to her former position and be made whole.

The parties were unable to resolve the disputed matter during subsequent steps of the grievance procedure. Neither party raised substantive nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

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The Merits of the Case

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The Employer's Position

The Employer opined that it had just cause to remove the Grievant for violating the Ohio Student Aid Commission Employee Handbook, Section 4.4 - Fighting or Acts of Aggression (Joint Exhibit 4, Pg. 10). This proposition was supported by referencing credibility concerns; proofs in support of removal; and arguments rebutting the Union's procedural claims.

The Employer is convinced that Thompson's version of the events is highly credible, while the Grievant's version is not. Thompson's testimony should be viewed as highly credible because prior to the incident she refused to sign a letter of concern circulated by fellow employees about the Grievant's behavior. Her testimony, moreover, is consistent with statements she authored during the Highway Patrol investigation (Employer Exhibit 1), and provided to an Employer's representative shortly after the incident. Portions, moreover, of her testimony were corroborated by co-workers who overheard segments of the altercation.

The Grievant's testimony, on the other hand, seems incredulous in light of a number of factors. Her testimony is contrary to testimony provided by the majority of the Employer's witnesses. Gaskill testified that in her professional opinion the Grievant was not totally forthcoming when she was being interviewed. This conclusion was partially based on the Grievant's unwillingness to show Gaskill the bruise on her chest.

If the Arbitrator believes the Grievant's version of the events, he would then have to conclude that all the other employees were lying. The record fails to disclose any conspiracy on the part of the Grievant's co-workers. The evident fear of these co-workers concerning potential retribution would have precluded a conspiracy strategy.

Clearly, the record establishes that the Grievant was the perpetrator of the incident. She attacked her which caused Thompson to become the victim of an aggressive attack. As the perpetrator, the Grievant initially engaged in verbal harassment and intimidation, and eventually "walked through" Thompson which constituted assaultive behavior.

Clearly, the physical attack warrants removal. Zero tolerance is the standard contained in the handbook. It cannot, however, be viewed in isolation of the Grievant's prior behavior which further supports the propriety of the administered penalty. This incident did, indeed, reflect the first incident of physical assault, yet, it must

be viewed in the context of prior conduct. The Grievant had evidenced a string of prior erratic behavior designed to intimidate and harass her co-workers and supervisors. Estep's decision to terminate was partially based on the fact the Grievant had crossed the line. The fact that Thompson was not hurt in no way lessens the severity of the act.

The Employer determined the Grievant fits the profile of one who has the potential to commit workplace violence. She engaged in abusive behavior which escalated over time, to where she physically attacked Thompson. The profile argument was supported by Tom Randle, a City of Columbus officer, who provides lectures on workplace violence. The Union, itself, has distributed documents (Employer Exhibit 12) dealing with the problems of worker-on-worker violence. Review of the contents, moreover, indicates that it urges the Employer to take corrective action when bargaining unit members are attacked by patients or residents housed by the State of Ohio.

The removal of the Grievant should be viewed in a similar light. The administrative action abated a workplace safety problem. Not one co-worker testified on the Grievant's behalf. Those that did testify, however, feared what actions the Grievant might engage in if she was returned to work. Reinstatement should not result just because similar prior disciplinary actions had elapsed prior to the incident resulting in removal.

The Employer emphasized the Grievant was properly notified of the potential negative consequences of violating OSAC Employee Handbook, Section 4.4 (Joint Exhibit 4). Although no prior disciplines were active at the time of the present dispute, she had received a reprimand and suspension for similar acts of misconduct toward her co-workers. Arguments dealing with negative notice, because the Employer had somehow condoned prior acts of misconduct, are not supported as a consequence of these prior disciplines. The Employer merely acted within the confines of the Agreement (Joint Exhibit 1). Action was taken when it was deemed to be supportable. The Employer's actions or inactions should not have raised expectations that her behavior was acceptable.

The Employer opined that the evidence regarding prior acts should be admitted by the Arbitrator because it is more probative than prejudicial. This evidence should be used to determine whether the removal was appropriate and commensurate with the offense. The incident in dispute cannot be viewed in isolation, but must be viewed within the contexts of prior acts.

The Grievant's due process rights were not violated as a consequence of the removal. Section 24.02 requirements dealing with progressive discipline were not eroded. Certain misconduct, like the one presently in dispute, does not warrant any corrective action. The Grievant's offense dictates that termination is the appropriate penalty. Traditional standards for fighting or assault established in private sector settings, should not control the present situation. Here, the incident arose in a semi-academic office environment providing services to the general public. The totality of the facts must be examined to determine the risk factor associated with retaining an employee perpetrator.

The Grievant's lack of remorse, and failure to take responsibility for her own actions, indicate that any attempt at rehabilitation would be futile or misplaced. A return to the workplace will merely reinforce an established predatory behavioral pattern.

Section 24.06 terms and conditions were properly applied by the Employer. The prior disciplinary reprimands were not used to support just cause principles. They were used to support the propriety of the penalty levied once just cause was established.

The Employer conducted a fair and impartial investigation. Both Grubbe and Adams testified they followed the Governor's policy dealing with workplace violence. They contacted the Highway Patrol because of the potential criminal charges. As such, the administrative investigation was held in abeyance pending the outcome of the criminal investigation.

Once the criminal investigation report was released, Adams initiated the administrative investigation by interviewing witnesses. Since Adams had the criminal investigation materials, he had no need to take formal written witness statements. After reviewing the criminal report and the various interviews, Adams determined the Grievant's version lacked credibility. He, then, determined that the Grievant's allegation about being struck in the chest was not credible, as well, based on the totality of the circumstances.

The Grievance's unequal treatment claim was viewed as equally defective. The Union never established

the Grievant and Thompson were similarly situated in terms of being co-aggressors on July 10, 1995; and whether their work histories were similar. Once the Union raised this claim, the Grievant's prior disciplinary episodes were properly used to distinguish the protagonists.

The Union's Position

It is the position of the Union that the Employer did not have just cause to remove the Grievant, which constituted a violation of Section 24.01. Several theories were proposed by the Union to support this premise: the defective nature of the proofs submitted to support removal; the unequal treatment of similarly situated employees and a number of procedural defects which engendered due process defects.

The Union posited that the Grievant's version of the events was highly credible and should be believed even though it differs dramatically from the version proposed by Thompson. The Grievant maintained Thompson refused to move after she asked to be excused. Thompson, in the Grievant's opinion, was the aggressor since she bumped her as she attempted to continue down the hallway. The bump caused the Grievant to lose her balance; and as she attempted to regain her balance, Thompson swung around and struck her in the chest. This aggressive act caused the Grievant to experience an injured sternum. An outcome corroborated by a subsequent physical examination.

Based on the circumstances surrounding the disputed incident, the nature of the offense and the penalty imposed, a higher level of proof should be required by the Arbitrator. Here, the Employer should be required to meet the "clear and convincing" standard of proof in support of the removal.

In this instance, the Employer failed to support its removal based upon clear and convincing evidence. Little if any weight should be given to submitted evidence of alleged prior acts of intimidation. The removal order is solely based on acts the Grievant allegedly engaged in on July 10th. It was not based on a supposed pattern of intimidation. Therefore, alleged prior confrontations involving the Grievant and co-workers are irrelevant and should not be considered by the Arbitrator.

The Union argued prior acts evidence was inadmissible for another reason. Character evidence of this sort cannot be used to show action in conformity with the alleged acts in dispute. Since the Union never presented any evidence concerning the Grievant's character, the Employer was precluded from forwarding evidence regarding the Grievant's character as a form of rebuttal. This evidence is tainted with potential prejudice which clearly outweighs any probative value it might enjoy.

Testimony provided by co-workers in the office regarding the disputed incident is not viewed as credible. Both Barbara Smallwood and Alice Daugherty displayed a bias or predisposition toward the Grievant which prejudiced their testimony. They declared their disposition in a memo authored by a number of co-workers. They stated they feared the Grievant and were concerned for their well-being. Not only were these individuals negatively indisposed, but their testimony at the hearing contradicted prior claims. At the hearing they attested to having no fear of the Grievant, which conflicts with the accusations contained in the memo.

Testimony provided by Minturn and Bastian did little to support the Employer's primary contention. The former witness testified she only heard a portion of the confrontation, while the latter alleged he heard none of the exchange.

Work Rule 4.4 - Fighting or Acts of Aggression is clear and unambiguous regarding intent and potential consequences. It specifies "no type of physical attack is acceptable. The parties in any such situation will be subject to disciplinary action." Here, the Employer treated the Grievant differently than Thompson even though the work rule in question precludes disparate application. The Employer also knew about the Grievant's accusations dealing with the physical harm inflicted by Thompson, and yet, did nothing about it.

The Employer was clearly placed on notice that Thompson struck the Grievant causing injury to her sternum. Bastian was told directly by the Grievant about this accusation. She reiterated her accusation when she submitted her Request for Leave form on July 10, 1995. The Grievant, moreover, was asked to re-submit a new Request for Leave form with the comments dealing with Thompson's involvement deleted. During the course of the administrative investigation, the Grievant provided Adams with a written statement which restated her accusation that she had been struck by Thompson.

With all the aforementioned notice and the clear and unambiguous work rule, Adams, still, only

recommended that the Grievant be subject to a pre-disciplinary hearing. As such, Adam's investigation was not impartial because he distinguished the protagonists' actions when the record failed to support such a distinction. Subsequent actions engaged in by managements' representatives perpetuated this disparity when they concluded that the Grievant's removal was proper, and yet, did nothing regarding Thompson's involvement.

The Union stipulated that the procedural claim dealing with Adam's assertion of attorney/client privilege during the hearing had been cured. The matter was rectified when the Arbitrator reconvened the hearing after the issuance of the Olander v. French^[1] decision.

The final procedural defect raised by the Union deals with a violation of Article 24.04. The Union argued that it failed to notify the Union that information from the prosecutor's office would be used during the Arbitration hearing. The matter in dispute deals with a claim filed by the Grievant in May of 1995. The Employer's Advocate became aware of the May, 1995 complaint when he requested and received documents dealing with the July 10th incident. Even though the advocate knew the May, 1995 incident had bearing on the grievance in dispute, he failed to share this information prior to the hearing.

The Employer's reasoning regarding the application of Section 24.04 conflicts with the clear and unambiguous terms and conditions negotiated by the parties. The contract language not only deals with a list of witnesses but other documents.

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, and an impartial and complete review of the record, it is this Arbitrator's opinion that the Grievant was not removed for just cause. This finding is based on several procedural defects engaged in by the Employer, and a failure to deal with both protagonists in an even-handed manner.

The hearing held on Tuesday, December 3, 1996 cured the client-attorney privilege issue raised by the Union at the hearing and in its briefs. My ruling regarding client-attorney privilege was in tune with arbitration principles and the existing case law regarding this matter. The Olander decision changed the geometry of the situation which forced a re-consideration of the matter. The Employer offered the re-examination of Adams by the Union. The Arbitrator tendered the offer to the Union with an additional clarification. If the Union decided to re-examine Adams, the privilege would be pierced, and the matter would be cured. The Union decided to re-examine the witness, which renders this particular procedural defect moot.

Another procedural defect was raised by the Union regarding a Section 24.04 violation dealing with a notice defect. The Employer, for the first time, raised the issue of an altercation between the Grievant and another individual prior to the July 10, 1995 incident. The Employer's advocate remarked that this incident appeared in a computer print out dealing with intake information held by the prosecutor's office. He felt it was relevant because it raised the possibility that the Grievant's injury had been inflicted during the course of a prior altercation. The Grievant, at first, was unwilling to provide any detailed information regarding the genesis or the outcome of the altercation. The Grievant conferred with her advocate and decided to become more forthcoming. Her decision to answer questions regarding the incident in question caused the waiver of the proposed Section 24.04 allegation, and estopped the Union from positing any defect argument in support of its due process claim. In fact, the clarification of the matter helped support the Union's injury claim rather than refute it.

The Union's "prior acts" argument was not supported by the record. The Employer did not introduce this evidence "to show action in conformity with the alleged matters in dispute." Rather, in this Arbitrator's opinion, the prior acts were introduced in an attempt to justify the propriety of the administered penalty. The prior acts were not entered into the record to establish a pattern of behavior. In fact, the removal order (Joint Exhibit 3) does not articulate a pattern-related charge. There is another reason, however, which justifies the introduction of prior acts evidence. Once the Union raised the unequal treatment charge, it presented the Employer with an opportunity to distinguish Thompson from the Grievant based on their work histories and prior disciplinary records.

This Arbitrator has previously articulated the various positions held by others regarding potential remedies

for due process violations. For the most part, once procedural defects are documented and supported by the record, discipline will not normally be overturned by an arbitration. Discipline is normally modified to respect the due process rights of the employee, but upheld in part if the charge is supported by the record. If, however, the employee's interests have been - or may have been - prejudiced in some way leading to an unfair consideration of the case, the matter may be overturned on procedural grounds. ^[2]

Here, the matter is overturned not only because of a series of highly prejudicial procedural defects. These defects made it virtually impossible for the Employer to obtain substantial evidence of proof that the employee was guilty as charged.

It is axiomatic that a fair investigation requires that all documentary, physical and medical evidence be obtained and analyzed by the employer. Here, we have a glaring due process defect dealing with the Employer's failure to investigate the Grievant's contusion allegation. Management representatives were fully aware of the allegation on the day of the dispute. This circumstance was brought to Bastian's attention several times on July 10, 1995, when the Grievant advised him that Thompson had hit the Grievant in the chest. The 911 call, visit to the hospital and the presentation of the doctor's diagnosis placed the Employer on explicit notice that the medical ramifications of the dispute should be investigated to determine the veracity of the Grievant's assertions. The lack of follow-through appears even more prejudicial considering statements made by Thompson that she might have "instinctively butted" or struck the Grievant during the course of the altercation.

This Arbitrator can only conclude that this allegation was discounted because of the ongoing problems the Grievant was causing the Employer and other departmental members. Nothing was done to depose the physician, examine the x-ray or gain another neutral physician's diagnosis regarding the Grievant's medical condition. This defect clearly prejudiced the Employer's perception regarding the propriety of the charge and related administered penalty.

This predisposed position is further exposed when evaluating the conduct of the administrative investigation initiated by Adams. The Employer properly waited for the collateral investigation to run its course. This investigation, and the related documents and evidence, served as a collateral matter not to be used as the primary basis to support removal. An administrative investigation was conducted by Adams. He interviewed witnesses, but did not have them submit written statements. He felt this exercise was unimportant since he had the Highway Patrol's investigatory reports at his disposal. A faulty decision since the questions asked, and the standards used, in any criminal investigation differ significantly from those involved in any contractually based just cause deliberation.

The record, and related evidence and testimony introduced to establish proof for the matters asserted, were additionally tainted. The Employee Handbook (Joint Exhibit 4) Section 4.4 - Fighting or Acts of Aggression states in pertinent part:

4.4. Fighting or Acts of Aggression

Employees must resolve any differences in a mature and professional manner without resorting to physical violence. Employees should be able to work in an environment free from physical aggression and fighting. No type of physical attack is acceptable. The parties in any such situation will be subject to disciplinary action.

(Joint Exhibit 4, Pg. 10)

This language anticipates more than one participant in any fighting situation and possible disciplinary action for "the parties in any such situation." This work rule represents a starting point for any investigation; it assumes more than one individual may have equally transgressed this work rule.

Even though the circumstances of the disputed situation, including both protagonist's accounts, readily suggested some preliminary evaluation of their degree of involvement, Adams admitted he did not undertake this warranted neutral approach. He testified since Thompson raised the fighting allegation, he was inclined to pursue that narrow perspective, and virtually discounted the Grievant's version. He not only disregarded

the clear and unambiguous requirements contained in work rule Section 4.4, his actions defy common sense and a fair approach in the conduct of this investigation.

Because of these glaring investigatory flaws, the record contains fissures concerning the involvement of the protagonists. Certain questions remain unanswered which belie any attempt to offer sufficient proofs in support of the renewal. Some of the questions are: Was the altercation avoidable but for the protagonist's intransigents? When was the Grievant "butted" while Thompson was bent over the cabinet or after Thompson was rammed by the Grievant? Did Thompson merely "butt" the Grievant or did she strike her? Were Thompson's actions intentional? The limited listing of questions is not all inclusive. These and other questions should have been answered by the Employer during the course of any proper investigation. At a minimum, an attempt should have been made to elicit some responses to critical aspects of the disputed matter.

It is not this Arbitrator's responsibility to make the record for the parties. The parties, and in this specific instance the Employer, since it moved for removal, had to build a case on the basis of direct or circumstantial evidence. It failed to provide this Arbitrator with substantial evidence or proof that the Grievant was guilty as charged. The Employer, moreover, did not investigate the matter in a fair fashion since it focused its attention entirely on the Grievant. The record indicates an alternative course of action was warranted even if the outcome would have led to the same result. That is, by limiting Thompson's involvement without a fair and complete investigation, however, the Employer's conclusion involving wrongful involvement is incomplete and unsupported.

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Award

The grievance is sustained. The Employer is directed to reinstate the Grievant to her former position with all back pay less any appropriate deductions. Her benefits shall be reinstated and made whole including all lost seniority.

Dr. David M. Pincus
Arbitrator

May 8, 1997

[1] Olander v. French, No. 96APD04-501,2952-2962, Franklin Co. App. - July 16, 1996).

[2] Cameron Iron Works, 73 LA 878 (1979); U.S. Postal Service, 88 LA 825 (Nolan, 1987); Safeway Stores, Inc.; 93 LA 1147 (Wilkinson, 1989).