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ARBITRATION DECISION NO.:
657

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

EMPLOYER:
Ohio Veteran's Home

DATE OF ARBITRATION:
September 17, 1997

DATE OF DECISION:
January 5, 1998

GRIEVANT:
Anita Kennedy

OCB GRIEVANCE NO.:
33 00 (97 05 06) 0771 01 05

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Robert Robinson, Advocate
Robert L. Bogeri

FOR THE EMPLOYER:
Robert Day, Advocate
Shirley Turrell, Second Chair
John Cook, Labor Relations Officer

KEY WORDS:
Disparate Treatment
Estoppel
Fighting
Investigation: Fairness of
Just Cause
Removal

ARTICLES:
Article 24 – Discipline
§24.01 – Standard
§24.02 – Progressive Discipline

FACTS:

The grievant worked as a Food Service Worker in the Dietary Department of the Ohio Veterans Home. The grievant was involved in a non work related dispute with a co worker. Their supervisor arranged a

meeting in her office for the two women. The meeting consisted mostly of a verbal altercation between the grievant and her co worker. At some point, the altercation became physical. The supervisor as well as another employee eventually separated the grievant and her co worker. The two were taken to separate rooms to calm down. At this time it was discovered that the co worker had several cuts to her forearms. The grievant was asked whether she had a knife in her possession. She stated yes, and revealed a pocket knife, that she said she used for work. She denied using the knife during the altercation. The grievant was removed for fighting or striking another employee while on duty and for possession of a weapon while on duty. The co worker was also disciplined for fighting.

EMPLOYER'S POSITION:

The Employer argued there was just cause to remove the grievant. First, the Employer argued that the Union admitted that the grievant was involved in the altercation and that the victim was cut durlu, the altercation. The Union even argued that the grievant could have inflicted the injuries with her fingernails

Second, evidence demonstrated that the knife found in the grievant's possession was the instrument us, A to cause the cuts on the victim's arms Expert testimony established this as well as the fact that the cuts were not consistent with those made by fingernails

Third, no work related justifications were given by the Union in support of possession of the knife.

Fourth, there was testimony that the victim saw the knife during the altercation. The supervisor heard the victim shout "she's got a knife." Furthermore, x0en the grievant was asked about the knife, it was open with the blade exposed. AJso, the Employer argued that testimony established that the grievant was the aggressor in the altercation.

The Employer also argued that the Union's disparate treatment argument was invalid. First of all, the grelvant and the victim were not similarly Situated because the grievant was the aggressor. Second, the Union was estopped from raising the disparate treatment argument. The victim was also disciplined and filed a grievance. The Union argued on behalf of the victim that she was acting in self defense. This argument was successful and the victim retained her employment status. Since the Union already argued that the grievant was the aggressor, it is estopped from arguing they were similarly situated.

UNION'S POSITION:

The Union argued that the Employer did not have just cause to remove the grievant. First, the investigation was not undertaken in a fair and objective manner prior to discipline. Two of the witnesses stated they never saw the grievant with a knife, however, no weight was placed on these statements. Also, no scrutiny was applied the statements of the Employer's witnesses, the statements of the victim, or the notion that the grievant's knife caused the injuries. Furthermore, the investigation was unfair because the Human Resources Administrator served in multiple roles in the investigation and disciplinary process.

Second, the Union argued that there was insufficient evidence presented to conclude that the grievant's knife caused the victim's injury. There was never any forensic testing of the knife to prove causation.

Third, the grievant's version of events was credible. Her explanation for possessing the knife was reasonable, and consistent with the existence of knives at the facility.

Fourth, the Union argued that it is unknown who was the aggressor in this fight, The co worker was originally disciplined for fighting on duty as well, but the charge was dropped. Since the grievant was similarly

situated, her self defense justification is just as credible as her co worker's. Since the grievant was similarly situated, the Employer engaged in disparate treatment

ARBITRATOR'S OPINION:

The Arbitrator found that the Employer did not have just cause to remove the grievant. First, the Arbitrator found that the Employer's investigation was unfair and incomplete. All sides were not considered by the investigators and all relevant evidence was not obtained. In particular, the Employer did not fully investigate whether grievant's knife caused the co worker's injuries.

Second, the Employer failed to establish that the grievant was the aggressor. Much of the testimony supported the notion that the co worker was the aggressor. The Employer was well aware of this.

Third, the Arbitrator found that there was evidence suggesting unequal treatment. Just because the Union had argued earlier that the co worker engaged in self defense, does not mean that they are estopped from asserting the same argument in the grievant's case. The Employer reinstated the co worker without determining who was the aggressor.

AWARD:

The grievance was sustained. The grievant was reinstated in her position with all back pay. Her 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, Ohio Veterans Home

and

Ohio Civil Service Employees
Association, Local 11, AFL CIO

Grievant:
Anita Kennedy

Grievance No.:

Arbitrator's Opinion and Award
33-00-970506-0771-01-05

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Arbitrator: David M. Pincus
Date: January 5, 1998

Appearances

For the Employer

John Cook	Labor Relations Officer
Herbert Bliss	Police Officer
Dorothy Fackler	Food Service Manager
Ruth Faris	Food Service Worker
Shirley Turrell	Second Chair
Bob Day	Advocate

For the Union

Anita Kennedy	Grievant
Vanessa Brown	Dietary Clerk III
Robert L. Boger	Steward
Consetta Shroyer	Food Service Worker
Robert Robinson	Advocate

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Introduction

This is a proceeding under Article 25 Grievance Procedure, Section 25.02, Step 5 Arbitration of the Agreement between the State of Ohio. Ohio Veterans Home, hereinafter referred to as the "Employer", and the Ohio Civil Service Employee's Association, AFSCME, Local 11, AFL CIO hereinafter referred to as the *Union", for the period March 1, 1994 to February 28, 1997 (Joint Exhibit 1).

The arbitration hearing was held on September 17, 1997, at the Ohio Veterans Home in Sandusky, Ohio. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective position 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 agreed to submit briefs.

Stipulated Issue

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

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 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. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the 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 or more 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 day(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 employees wages shall not require the employee's authorization for withholding of fines.

* * *

(Joint Exhibit 1, Pgs. 68 69)

CASE HISTORY

Anita Kennedy, the Grievant, served as a Food Service Worker in the Dietary Department at the time of her removal. In terms of seniority accrual, she had attained less than two (2) years of seniority when the disputed incident arose.

The disputed incident originally arose as a consequence of non work related dispute involving the

Grievant and Ruth Farris, a co worker. As a consequence, a meeting was held on April 14, 1997, in Dorothy Fackler's office per Farris' request. An argument ensued which involved a great deal of screaming and use of expletives by Farris and the Grievant. Fackler, the Food Service Manager, attempted to diffuse the situation. She eventually asked Farris to leave her office and go to Paul Black's office. Farris did, indeed, leave but returned shortly thereafter. The confrontation continued but escalated beyond the previous verbal altercation. Both employees approached each other; whether Farris or the Greivant was the aggressor is somewhat in dispute.

Fackler and Consetta Shroyer, a Food Service Worker, attempted to separate the protagonists. While this was taking place, Ferris stated," watch out Dot, she's got a knife." The protagonists were eventually restrained and Farris exited the office and went to John Cook's office.

Subsequent to the altercation, Farris realized she had sustained cuts to her forearms. She initially stated the Grievant inflicted these cuts by using a single blade pocket knife during the course of the altercation.

While Ruth Farris and the Grievant were separated, Shroyer left Fackler's office to see if Farris was "all right". Shortly thereafter, Shroyer returned and notified the Grievant and Fackler that Farris was being treated for cuts. Shroyer asked the Grievant whether she had a knife in her possession. The Grievant pulled an open

pocket knife from her uniform pocket. Shroyer and Fackler testified that the Grievant said she used the knife to clean food from under her finger nails. She, moreover, maintained that she had not pulled the knife out of her uniform pocket during the course of the altercation.

On May 12, 1997, the Grievant was removed as a Food Service Worker. The removal was based on the following violations of the Employer's Disciplinary Grid Grid #29 "Fighting or striking another employee while on duty" and Grid "30 'Possession, unauthorized distribution or use of weapons or contraband while on duty (Joint Exhibit 2).

On May 6, 1997, the Grievant and the Union formally contested the Grievant's removal by filing a grievance. It contained the following relevant particulars

* * *

... This action by management is disparity of treatment to the Grievant and her removal was not for just cause. (Joint Exhibit 3)

* * *

. . . Neither party raised substantive nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator

The Merits of the Case

The Employer's Position

The Employer maintained that it had just cause to remove the Grievant. In support of this theory the Employer relied on: various just cause principles; an

estopple argument dealing with disparate treatment; general defects regarding the Union's disparate treatment argument; the Union's failure in proving a procedural error; and general credibility regarding the Union's case in chief.

Admissions and acknowledgments by the Union basically established that the Employer had substantial proof that the Grievant was guilty as charged. The Union failed to deny that the Grievant was part of the disputed altercation, and that Farris received injuries as a consequence of the dispute. In fact, the Union basically admitted that the Grievant could have inflicted the injuries to Farris' forearms; not by the disputed bladed instrument but by her fingernails.

Testimony and evidence provided at the hearing established that the knife found in the Grievant's possession was the instrument used to inflict the "surgical cuts" sustained by Farris. Expert testimony provided by Officer Norbert Bliss supported this notion. The cuts were not jagged or scraped" indicators of cuts engendered by fingernails. No work related justifications were offered by the Union in support of possession of a pocket knife. Unlike other employees who may carry a knife for workrelated duties, the Grievant used the knife as a weapon to inflict physical harm.

The evidence of the knife was further bolstered by Fackler's testimony. Farris alleged that during the course of the altercation she warned Fackler that the Grievant had knife. Fackler acknowledged she heard Farris warning as she attempted to separate the protagonists. The knife, itself, was found on the Grievant's person when she was confronted by Shroyer. It was open with the blade was exposed.

At the hearing the parties stipulated that the Grievant was not removed as a consequence of a possession charge. Farris, moreover, was originally charged for fighting. This charge was eventually dropped and she received no discipline for her involvement in the altercation.

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Testimony provided by Shroyer clearly indicated the Grievant was the aggressor. Shroyer relied on a diagram (Union Exhibit 2) which depicted each individual's location in Fackler's office during the course of the altercation. She maintained the Grievant was the aggressor because she pursued the Grievant across the room

The Employer proposed that the Union was estopped from raising a disparate treatment argument. Vanessa Brown, a Union Steward, admitted she posed a self defense theory in her attempt to modify or expunge the disciplinary action against Farris. Once Brown succeeded in her efforts to regain Farris' employment status, the Union was estopped from raising a disparate treatment argument in terms of the Grievant's treatment.

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The Grievant's involvement clearly failed to support the Union’s unequal treatment theory. Farris and the Grievant were not similarly situated Farris was acting in self defense while the Grievant was the aggressor.

The Employer's case was not defective as a consequence of any procedural error. Robert Day, the Human Resources Administrator did serve multiple roles. This condition was partially a function of budgetary concerns and staffing limitations. Nothing in the collective bargaining agreement (Joint Exhibit 1) precludes multiple roles throughout the disciplinary process, Section 24.04 merely requires that the Director shall appoint a designee to conduct a predisciplinary hearing. Day was properly appointed, in this instance. The same requirement is reflected at the third step of the process which again was properly complied with by the appointing authority.

The Union's Position appeared even more unpersuasive since it never questioned the fairness of the investigation. Without such a challenge, it becomes difficult to challenge Day's conduct.

The Grievant's administrative leave status in no way caused another procedur defect. She was not placed on administrative leave with pay for the purpose of investigating a criminal case. This administrative decision was merely based on the nature of the alleged violations.

The Union's case was further weakened as a consequence of several credibilit concerns. None of the Union's witnesses offereYany substantive support. Quite surprisingly, the Union failed to produce an expert to support its claim that the cuts were not the result of a bladed instrument. The Grievant had a high degree of interes in the outcome of the arbitration, as such, her credibility was highly suspect. Even though Shroyer inadvertently depicted the Grievant as the aggressor, her remaining testimony should be discounted. As the Grievant's close friend she also had an interest in the outcome of the disputed matter. The Union's Position

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The Union opined that the Employer did not have just cause to remove the Grievant. This proposition was based upon the following arguments, the fairness of the investigation; failure to provide sufficient proof of the matters asserted , and an unequal tireatment charge.

The investigation was not undertaken in a fair and objective manner prior to imposing discipline. Even though two witnesses to the dispute acknowledged they never saw a knife, the Employer and the police officer conducting the investigation

never placed any weight in these statements. Additional scrutiny should have been undertaken concerning the instrument used, Farris' recantations, and other observations made by Shroyer and Fackler.

Day's multiple roles during the course of the grievance procedure failed to provide Grievant with due process since the investigation process was biased It became virtually impossible for the Employer to grant the Grievant a fair hearing under these circumstances.

The investigation was also defective because it failed to surface sufficient proofs to bolster the alleged charge used to impose discipline. Whether the knife disclosed by the Grievant after questioning was actually used to inflict the markings on Farris' forearms remains an unanswered question. Forensic testing of this

instrument was never introduced by the Employer to establish any form of reasonable nexus. Conflicting testimony regarding the altercation, including Farris' recantation, further muddied the Employer's proofs. Yet, the Employer never attempted to resolve these conflicts prior to imposing discipline.

The Grievant's actions, while being questioned, support her credibility regarding her version of events. The Grievant never denied possessing the knife and offered it during questioning. Her explanation concerning the underlying reasons for possessing a knife seem highly plausible in light of her own personal justification and the general prevalence of knives on campus.

If a fight did, indeed, take place it was unintended by either protagonist. As such, if discipline was to be imposed, both individuals should have been disciplined. Farris was originally disciplined for fighting on duty but the charge was eventually

dropped. Since the Grievant was similarly situated, her self defense justification sh4uld be viewed as equally credible as Farris' justification for her involvement.

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, and an impartial review of the record including pertinent contract provisions, it is this Arbitrator's opinion that the Employer did not have just cause to remove the Grievant. This conclusion is based on a determination that the investigation undertaken by the Employer was incomplete, testimony which failed to establish that the Grievant was the perpetrator and matters dealing with unequal treatment regtirding the imposition of discipline.

Regardless of the type of misconduct that is involved, an investigation that satisfies the requirements of proof has three primary characteristics all sides of the dispute have been considered, all relevant evidence has been obtained, and the investigation has been timely. The investigation used to impose discipline failed to provide the Grievant with due process because two characteristics were not present.

Proof of misconduct fell short in this instance because a more thorough eftort by the Employer in questioning all relevant witnesses about the events in dispute failed to produce enough evidence by corroboration for the Employer to prevail. Testimony produced at the hearing proved far more enlightening then the witness statements used in support of removal. Key to the Employer's case was the theory that the Grievant used her knife to inflict surgical cuts on Farris' forearms. Yet, Fackler and Shroyer testified that they did not see the knife in the Grievant's possession during the course of the altercation. Farris, herself, recanted her statements regarding the knife the day

after the event and at the arbitration hearing. For some unknown reason the Employer minimized these various perceptions regarding the knife.

Fackler did testify that Farris warned her that the Grievant had a knife during the altercation. Farris, however, never uttered any remark that she had been cut while the altercation took place. A curious outcome when one considers the nature and number of cuts. Also, nothing in the record indicates that anyone

observed the Grievant withdraw of replace the knife from her uniform pocket even though she was continuously observed by Fackler and Shroyer. Fackler, moreover, was attempting. to separate the two individuals when the Grievant was allegedly inflicting these wounds but she never saw a knife. Again, these were some of the inconsistencies that should have been clarified to help affirm or discount the varying versions under analysis during the course of the investigation

These also appears to be considerable uncertainly regarding which participant was the real aggressor. The record clearly indicates that Fackler attempted to diffuse the situation by asking Farris to leave and go to Paul Bock's office. She did leave but returned shortly thereafter which implies she never followed Fackler's instructions. Upon her return she made some form of gesture which escalated the situation as both individuals approached each other. Fackler testified that Farris slapped the Grievant which precipitated the physical portion of the altercation. The Employer was well aware that Farris might have been the initial perpetrator of the attack as evidenced by a memo written to Robert Day by Paul Bock on April 16; 1997. This memo documents admission by Farris that she initiated the attack. This admission was never properly

rebutted nor investigated by the Employer to investigate by the Employer to distinguish Farris' role in the disputed matter.

A thorough investigation requires that all documentary, physical, and medical evident must be obtained. When obvious evidence of this sort is overlooked, disregarded or perhaps consciously ignored, most arbitrators would conclude that the investigation was incomplete. Here, a faulty and inadequate investigation produced faulty and inadequate proofs. Forensic and other medical evidence and testimony might have bolstered the circumstantial aspects of the Employer's case in chief.

Bliss' opinions dealing with the nature of the cuts and the instruments used to inflict same are viewed as unpersuasive by this Arbitrator. I do not believe that the Employer sufficiently established his bona fides in the area of knife inflicted wounds and/or cuts. In my view. regardless of his years of service in law enforcement, he is ill equipped to render a medical determination of this sort. A campus physician's opinion would have been given greater deference. An examination by a physician, moreover, shortly after the dispute would have shed considerable light on whether these cuts could have been inflicted by the rings worn by the Grievant. Bliss' testimony that these cuts were "surgical" is viewed as mere pedestrian opinion. He does not have the knowledge or experience to draw inferences or conclusions superior to that of the person having to resolve the issue in dispute.

Forensic testing could have swayed this Arbitrator's opinion, but this avenue was not explored by the Employer. Bliss acknowledged that no blood was found on the knife. He did not, however, confiscate the knife and submit it for more detailed and sophisticated scrutiny. Similarly, the Grievant's uniform was not examined to determine

whether any blood residue matched Farris' blood type. Residue under the Grievant's fingernails could have determined whether the cuts were indeed scratches inflicted by fingernails.

Having admonished the Employer of several investigation defects led to my reinstatement conclusion. I do not agree that the investigation or the grievance process were defective as a consequence of Day's

multiple roles. Nothing in the record supports this conclusion. The mere fact that he did engage In multiple responsibilities does not establish a per se due process violation. In order to support such a violation, the Union would have to introduce evidence and testimony showing that Day acted in a capricious and prejudicial manner which somehow biased the process and related outcome. Also, the Agreement (Joint Exhibit 1) does not specifically prohibit an individual from engaging in multiple roles. It merely requires that a designee be assigned by the appointing authority.

Finally, the previous analysis fails to distinguish the degree of involvement of the two protagonists. The mere fact that the Employer acquiesced to the Union's self defense theory when reviewing Farris' involvement does not estoppe a similar defense on the Grievant's behalf. Once the Employer decided to put Farris back to work it precipitated a potential unequal treatment charge. Especially when it failed to determine who was the aggressor when the circumstances, not withstanding the knife, indicated both individuals were equally involved in a fight. Normally, similar circumstances would cause one to support some form of discipline up to and including removal. But here, such an imposition is not supported by the record based on Farris' status and her degree of involvement. **13**

AWARD

The Employer did not have just cause to remove the Grievant. A faulty and inadequate investigation produced insufficient proof in support of the removal decision. The record, moreover, discloses that the worker involved in the altercation was probably as egregious in her behavior, and yet, no discipline was imposed. As a consequence, the grievant should be reinstated to her former position with all back pay. Her seniority shall also be reconstituted, and she shall have all seniority related benefits restored. o the proper levels. The back pay award shall be discounted by any unemployment benefits or other forms of documented compensation received by the Greivant during the course of the removal.

This Arbitrator is aware that the remedy requested by the Union contained a particular dealing with some promotional opportunity. I do not believe I have the authority to deal with this aspect of the case. The record, moreover, is rather incomplete regarding this matter and I would be hard pressed to fashion a fair remedy even if I had the authority to do so. I do believe, however, that based on my award dealing with the merits of the case, the Union should be able to file a separate grievance dealing with the alleged promotional opportunity.

January 5, 1998

Dr. David M. Pincus
Arbitrator

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