ARBITRATION DECISION NO.:
53

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

EMPLOYER:
Department of Transportation

DATE OF ARBITRATION:
September 15, 1987

DATE OF DECISION:
October 8, 1987

GRIEVANT:
Ralph Bambino

OCB GRIEVANCE NO.:
G87-0205

ARBITRATOR:
Rhonda R. Rivera

FOR THE UNION:
Linda K. Fiely, Esq.

FOR THE EMPLOYER:
Tim Wagner, OCB

KEY WORDS:
Discovery
Pre-Disciplinary Hearing
Relevance

ARTICLES:
Article 25 - Grievance Procedure
§ 25.08 - Relevant Witnesses and Information
Article 24 - Discipline
§ 24.04 - Pre-Discipline
Article 43 - Duration
§ 43.01 - First Agreement

ISSUE:
Whether the Union may discover any pre-disciplinary reports and/or recommendations which resulted from pre-disciplinary meetings or hearings held prior to the imposition of discipline in the

current case.

FACTS:

The Grievant was employed by the Ohio Department of Transportation prior to his removal for fighting on State property. Prior to the presentation of evidence on the merits, the Union raised a procedural issue dealing with discovery. The Ohio Department of Transportation had refused the Union's request that the employer provide pre-disciplinary reports and/or recommendations resulting from pre-disciplinary meetings or hearings held prior to the imposition of discipline in grievant's case.

EMPLOYER'S POSITION:

The employer argued that the requested items were internal work product of the employer and not subject to discovery under Article 25.08 of the contract. In its brief, the employer addressed four (4) specific issues. First, the employer argued that the issue was improperly raised in connection with this grievance because the issue did not surface until approximately two days before the arbitration date. Second, the employer argued that the document was "superfluous" because the Union had representatives at the pre-disciplinary meeting and, therefore, had the desired information. Third, the employer argued that the Union is not really trying to discover the documents but to argue impermissably that the discipline recommended by the impartial administrator must be followed by the appointing authority. In this regard, the employer maintained that the impartial administrator's decision should not effect the ultimate outcome of the arbitration and that, therefore, the document is "irrelevant." Lastly, the employer denied a due process violation of the Grievant's procedural rights under the contract on the basis that the pre-disciplinary report was "immaterial." In support of this claim, the employer relied on the testimony of Deputy Director Eugene Brundige which indicated that its policy was to fire workers for fighting unless mitigating circumstances were shown and Arbitrator Pincus' opinion in Grievance G-86-0224 indicating he "considered, but did not place much weight on" a pre-disciplinary recommendation.

UNION'S POSITION:

The Union's position is that the pre-disciplinary report is discoverable under the language of Article 25.08 because 1) it is "reasonably available" and 2) it is "relevant to the grievance under consideration." The Union maintains that the document is relevant because it provides a written account of the evidence which was provided and a characterization of the testimony of the witnesses relied upon by the Director in imposing discipline. The Union argued that it is entitled to know the facts upon which the Director relied. Second, the Union indicated that Article 25.08 does not specifically except any documents from the scope of discovery. Third, the Union noted that the employer had voluntarily introduced other documents containing disciplinary recommendations which could be characterized as internal work product. Fourth, the Union maintained that the document in question is a public record under R.C. Section 149.43 and that under Article 43.01 the contract supersedes any conflicting state state. Lastly, the Union argued that under Article 24.04 the employer is bound to provide documents "that will be relied upon in imposing discipline" prior to imposition of termination.

ARBITRATOR'S OPINION:

AWARD: The Arbitrator held that the pre-disciplinary report is discoverable under Article 25.08 and transmitted the report to the Union allowing the Union ten (10) days to decide whether to attempt to admit the report and whether to re-open the hearing for testimony. The Arbitrator did not

decide whether the document in question is relevant "evidence" in this grievance.

COMMENTS:

After determining that the document requested was "reasonably available" as required by Article 25.08, and that the issue of discovery of the document was properly before the Arbitrator, the Arbitrator addressed each of management's arguments. The Arbitrator distinguished between the content of the pre-disciplinary hearing and the content of the document containing the impartial administrator's findings. While the Union had notice of the former, no notice was provided of the latter. Second, the fact that Arbitrator Pincus did not find the pre-disciplinary document persuasive does not support a conclusion that the document was not relevant as the document was considered in arriving at the decision. Lastly, the employer's policy of terminating workers who engaged in fighting unless mitigating circumstances existed cuts in favor of discovery of the pre-disciplinary document because whether the report to the director included mitigating factors becomes crucial in evaluating the decision to terminate.

However, the Arbitrator addressed the distinction between whether a document is discoverable under Article 25.08 and whether that same document is "relevant" as evidence before the Arbitrator and based her decision primarily on the language of the relevant contract sections. Article 25.08 permits broad discovery requiring only that the document be relevant to the grievance in question. While the Union can request and receive documents under Article 25.08, receipt of a discoverable document is no guarantee that the document will be considered in the evidence, nor that once considered, the document will have sufficient weight to be either credible or probative.

Further, the Arbitrator broadly construed Article 24.05 to guarantee the employee certain information for defensive purposes and to direct the employer to provide "documents that will be relied upon in imposing discipline." In the interest of fairness the Arbitrator determined that the section should be extended beyond the pre-disciplinary hearing. Therefore, since the purpose of the arbitration is to determine whether that decision was made with "just cause," the Arbitrator concluded that any information used to arrive at that decision is relevant to that grievance for the purpose of discovery.

TEXT OF THE OPINION:

IN THE MATTER OF THE

ARBITRATION BETWEEN

OCSEA/AFSCME, Local 11
AFL/CIO

and

Ohio Department of
Transportation

OCB Grievance No.: G-87-0205
Grievant: Ralph Bambino
Hearing Date: September 15, 1987

For the Union: Linda K. Fieley, Esq.

For the Employer: Tim Wagner, OCB.

Hearing was held on September 5, 1987. Both parties agreed that the Arbitrator could record the proceedings for the sole purpose of refreshing her memory. Both parties agreed that the tapes would be destroyed after the opinion on the substantive question was issued. Both parties agreed that the Arbitrator could publish the Opinion. Lastly, the parties agreed that the issues were properly before the Arbitrator.

Prior to the presentation of evidence, the Union raised a procedural issue dealing with discovery. By letter on September 8, 1987, the Union requested that ODOT provide "any pre-disciplinary reports and/or recommendations which resulted from pre-disciplinary meetings or hearings held prior to the imposition of discipline in Grievant's case." At the hearing, theUnion repeated this discovery request which had not been honored. ODOT refused the request, arguing that such items were "internal work product" of the employer and not subject to discovery under Article 25.08 of the contract.

Both parties agreed to brief this procedural issue and proceed to a presentation on the merits. The Arbitrator agreed to decide the procedural issue within 10 days after receiving the briefs. The record was to be held open. If the Arbitrator found the document "discoverable," the document would be forwarded to the Union which could call further witnesses; if the Arbitrator found the document "non-discoverable", the record would be closed, and the Arbitrator would proceed to render a decision on the merits.

Briefs were received by 5:00 p.m., September 28, 1987 from both parties. The sole issue before the Arbitrator at this juncture is whether the Union may discover "any pre-disciplinary reports and/or recommendations which resulted from pre-disciplinary meetings or hearings held prior to the imposition of discipline in the current case"?

The relevant contract sections are as follows:

Art. 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.

Art. 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 ground 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 or termination. 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. No later than at the meeting, 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 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.

Art. 43.01 - First Agreement

The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

ODOT Position

In its brief, ODOT argues that the issue is improperly raised in connection with this grievance because "the issue did not surface in this case until approximately two days before the arbitration date."

Secondly, ODOT argues that the document was "superfluous" because the Union had representatives at the pre-disciplinary meeting before the impartial administrator and thus already had the desired information.

Third, ODOT argues that the Union is not really trying todiscover the document but to argue impermissably that the discipline recommended by the impartial administrator must be followed by the appointing authority.

As a subset of that argument, ODOT maintains that any decision by the impartial administrator "should have no affect on the ultimate outcome of the arbitration" and that therefore the document is "irrelevant".

Lastly, ODOT denies a due process violation of the Grievant's procedural rights under the contract. To support this denial, ODOT pointed to the testimony of Deputy Director Eugene Brundige which indicated that the policy of ODOT was to fire workers for fighting unless mitigating circumstances were shown. ODOT also cited the opinion of Arbitrator Pincus (Grievance G-86-0224) where he indicated that he "considered, but did not place much weight on" a pre-disciplinary recommendation. ODOT claims that for these last two reasons the pre-disciplinary report is " immaterial ".

Union's Position

The Union argues that under the words of Article 25.08, the pre-disciplinary report is discoverable because 1) it is "reasonably available" and 2) it is "relevant to the grievance under consideration".

The Union maintains that the document is relevant because 1) it provides a written account of the evidence which wasprovided the Director for his final decision, and 2) it provides a characterization of the testimony of the witnesses which again was relied upon by the Director in imposing discipline. The Union argues that the Union is entitled to know the facts upon which the Director relied.

Secondly the Union points out that Art. 25.08 does not specifically except any documents from the scope of discovery.

Thirdly, the Union pointed to two other documents which could be characterized as internal work product which the Employer voluntarily introduced. The Union characterized these other

documents as also containing disciplinary recommendations.

Fourth, the Union claims that the document in question is a public record under R.C. _149.43; moreover, the Union also notes that under Art. 43.01 the contract supersedes any conflicting state statutes.

Lastly, the Union notes that under Art. 24.04 the employer is bound to provide prior to imposition of termination documents "that will be relied upon in imposing discipline."

Discussion

Article 25.08 binds the employer to not "unreasonably deny" any Union request for "specific documents" which are (1) "reasonably available" and (2) "relevant to the grievance under consideration."

At the hearing, employer stipulated that the document inquestion was "reasonably available", so the primary question before the Arbitrator is whether the document is "relevant to the grievance under consideration."

In its brief, ODOT argues that this issue is improperly raised at this grievance. However, at the hearing ODOT made no such argument and agreed to brief the issue. The Union raised the issue in the letter of September 8, 1987 and before proceeding to a hearing on the merits. The issue of the discovery of the document is properly before the Arbitrator.

Let us examine management's claims seratim.

First, the employer claims that because the Union was represented at the pre-disciplinary hearing the written statement of the administrator's findings is superfluous. That argument fails to distinguish between the content of the hearing of which the Union had notice and the content of the impartial administrator's findings of which the Union had none. Whether the latter is discoverable is the issue here. However, the content of the event and the content of the document are clearly separable.

Second, ODOT argues that a decision by the impartial administrator should have no effect on the arbitration, and therefore, the document is irrelevant. This argument puts the cart before the horse. The arbitrator has the final decision on the relevancy of evidence; if evidence is relevant, it may affect the outcome. If the evidence is not relevant, it should not affect the outcome. ODOT illustrates this very point by quoting Arbitrator Pincus. The Arbitrator said he "considered" thepre-disciplinary document but "did not give it much weight". Clearly, the decision was that the document in that case was considered "relevant" (albeit not persuasive).

Lastly, ODOT maintained that the policy of Director Smith is to terminate workers who engaged in fighting unless "mitigating circumstances" existed. This policy argument cuts in favor of discovery of the pre-disciplinary document. The question of whether mitigating factors were included in that last report to the Director arguably becomes crucial in evaluating the decision to terminate.

ODOT's arguments aside, the Arbitrator must still decide if the document is discoverable under Article 25.08. A clear distinction must be drawn between whether a document is discoverable under Article 25.08 and whether that same document is "relevant" as evidence before the Arbitrator. Documents produced in discovery can be denied admission as evidence in the arbitration itself. A two step process is mandated and should not be confused. The Union can request documents under Article 25.08 and receive them. However, receipt of a discoverable document is no guarantee that the document will be considered in the evidence. Nor is mere consideration by the Arbitrator a guarantee that a document has sufficient weight to be either credible or probative.

Article 25.08 on its face includes broad discovery. The document need only to be relevant to

the grievance in question. Relevancy in discovery is traditionally significantly more liberal than in evidentiary matters.

Article 34.04 specifically provides for a meeting prior to the imposition of a suspension or termination. Moreover at this hearing, the employee is guaranteed for defensive purposes certain information, and the employer is directed to provide "documents that will be relied upon in imposing discipline". Arguably, this provision of information under Article 24.04 could be narrowly construed to pertain solely to the pre-disciplinary hearing. However, a broad construction is in keeping with concept of fairness. ODOT has maintained, and the contract supports at 24.05, that subsequent to the pre-discipline meeting the Agency Head makes all final disciplinary decisions. Since the purpose of the Arbitration is to determine whether that decision was made with "lust cause", any information used to arrive at that decision is "relevant to that grievance" for the purpose of discovery.

The Arbitrator does not decide whether the document in question is relevant "evidence" (as distinguished from discovery) in this grievance.

Award

The pre-disciplinary report is discoverable under Article 25.08. That report is transmitted to the Union with this decision. The Union has ten (10) days from receipt of this Awardto decide whether to attempt to admit the report and whether to re-open the hearing for testimony.

October 8, 1987
Date

Rhonda R. Rivera
155-28-4858
Arbitrator

INTER-OFFICE COMMUNICATION

TO: Martin A. Gallito, Deputy Director **DATE** October 9, 1986

FROM: Richard J. Barnick, Hearing Officer

SUBJECT: Directive A-302 Hearing - Ralph Bambino

Case No. 12042-86

I conducted a pre-removal hearing for Ralph Bambino on October 8, 1986 beginning at 9:00 AM.

Bob Deems and Clarence Noble were present representing ODOT management. Mr. Bambino was present with his union representatives Joe Carry and Bob Montgomery.

Pertaining to the insubordination charge (Violation 2a, Directive A-301), it appears that Mr. Bambino has been performing adequate maintenance operations, including greasing on a routine schedule, on the sweeper truck for the past ten years. The greasing instructions given by his supervisor differed from the routine previously followed by Mr. Bambino and he initially balked. The

following day he did complete the greasing per instructions.

Mr. Bambino admitted to the charge of striking a fellow employee (Violation 4, Directive A-301). The fight occurred after work but still on State property. Statements offered by witnesses for both management and the employee indicate that the head wound incurred by John Agnew during the fight was accidental and not deliberately inflicted by Mr. Bambino.

Striking a fellow employee is a serious violation which demands disciplinary action; however, considering Mr. Bambino's good work record over his 13 1/2 years with ODOT, I feel that removal is too extreme. I recommend that he be disciplined with a 25 day suspension for Violation 4 and that no disciplinary action be taken on the charge of insubordination (Violation 2a). I suggest that Mr. Bambino be ordered to return to work immediately to perform his duties until disciplinary action is invoked.

RJB:pj

cc: R. Deems
file

FORM GEN 1001
Rhonda R. Rivera **(614) 299-6818**
ATTORNEY AT LAW **(614)292-2422**
131 Price Avenue
Columbus. Ohio 43201

October 6, 1987

Mr. Tim Wagner
OCB
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16th Floor
Columbus, OH 43215

Linda K. Fieley, Esq.
OCSEA/AFSCME Local 11
995 Goodale Blvd.
Columbus, OH 43212

Dear Mr. Wagner and Ms. Fieley:

Enclosed is the procedural decision in G-87-0205. Ms. Fieley, please take appropriate action consonant with this ruling within ten (10) days (no later than October 19, 1987).

Sincerely yours,

Rhonda R. Rivera
Attorney at Law

RRR/mmwn
enclosure