ARBITRATION DECISION NO.:
86

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

EMPLOYER:
Department of Transportation

DATE OF ARBITRATION:
September 25, 1987

DATE OF DECISION:
November 10, 1987

GRIEVANT:
Ralph Bambino

OCB GRIEVANCE NO.:
G-87-0205

ARBITRATOR:
Rhonda R. Rivera

FOR THE UNION:
Linda K. Fiely, Esq.

FOR THE EMPLOYER:
Tim Wagner

KEY WORDS:
Just Cause
Fighting
Removal
Reasonably And
    Commensurate With Offense
Discovery Rights
Hearing Officer's
    Recommendations

ARTICLES:
Article 5 - Management
Rights
Article 24 - Discipline
    §24.01-Standard
    §24.02-Progressive

Discipline
§24.05-Imposition
Of Discipline

FACTS:

Grievant was an Equipment Operator 3 for ODOT for 13 years at the time of removal. At the time of removal, Grievant had no prior disciplinary actions. He had a record of good evaluations. Grievant's assigned task was to service a Vac All vehicle. Grievant's functional supervisor asked if the truck was all greased. Grievant said yes. The supervisor found that the left side was not greased and reported this to Grievant's line supervisor. The line supervisor ordered Grievant to grease both sides of the truck, even though Grievant and others said it was standard procedure to grease the used (right) side every week and the unused side (left) less often. Grievant greased both sides. The line supervisor requested a 3-5 day suspension for insubordination and Grievant was so notified. Grievant and the functional supervisor had an altercation in the parking lot after work. The facts are disputed as to what happened. There was pushing and shoving and wrestling on the ground for a couple minutes before they were separated by other employees. Grievant was then removed. The Union sought discovery of the Hearing Officer's report.

MANAGEMENT'S POSITION:

The Hearing Officer's report is irrelevant and should not be admitted because the Hearing Officer is not the designated or appropriate management official to decide the level of discipline and the arbitrator is to be the trier of fact. The Grievant was insubordinate and engaged in physical violence. Physical violence is just cause for removal under ODOT Directive No. A-301.

UNION'S POSITION:

The hearing officer's report is relevant because he characterized the injury as being received accidentally not intentionally. The report also indicates that ODOT employees were on notice that physical violence was not cause for automatic removal. The Grievant was not insubordinate. He believed the greasing was completed by greasing the right side only. The Grievant did fight with another employee but Grievant's long service, his good work record, and his remorse expressed over the incident mitigate the harsh penalty imposed.

ARBITRATOR'S OPINION:

The Arbitrator did not admit the report of the Hearing Officer because it provided no information which was not testified to at the arbitration hearing. The conversation between Grievant and the two supervisors concerning the greasing was a misunderstanding as to what "greased" meant and did not rise to the level of insubordination. When given a direct order to grease both sides, Grievant obeyed.

Grievant admitted using physical violence. As a general rule, fighting results in removal for the first offense. However, mitigating factors can be considered where present. In this case, the belligerent behavior was of short duration, occurred after work hours and was returned by the other employee. The other employee's description of the fight was incredible. Under Section 24.05 of the contract, the discipline was not "reasonable and commensurate with the offense."

AWARD:

Reinstatement with back-pay as if Grievant had been suspended for six months.

TEXT OF THE OPINION:

IN THE MATTER OF THE
ARBITRATION BETWEEN

OCSEA/AFSCME, Local 11,
AFL-CIO
Union

and

Ohio Department of
Transportation
Employer

OCB Grievance:
No. G-87-0205

Grievant:
Bambino

Hearing Date:
September 25, 1987

Brief Date:
October 21, 1987

For the Union:
Linda K. Fiely, Esq.

For the Employer:
Tim Wagner, OCB

Present at the Hearing: Bambino (Grievant), Fiely (Counsel), Curry (OCSEA), Sherb (Union Witness), Montgomery (Witness), Dickerns (Union Witness), Pollack (Union Witness), Jackson (Union Witness), Wagner (OCB), Chisler (Asst. Atty. General), Deems (OCB), Noble (ODOT Witness), Agnew (ODOT Witness), Rust (ODOT Witness), and Armenti (ODOT Witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing solely for the purpose of refreshing her memory. The tapes are to be destroyed on the date the opinion is rendered. Both the Union and the Employer granted permission to record. The Arbitrator asked permission to publish the opinion. Permission was granted. Witnesses were sequestered. The Arbitrator gave the oath to all witnesses. Both parties stipulated that the Grievance was properly before the Arbitrator.

Procedural Issues

1. By letter on September 8, 1987, the Union had sought to discover the written statement of the A-302 Hearing. The employer refused to produce the document. Argument was had as to the right to discover this document under Article 25.08 of the Contract. Both parties briefed the issue to the Arbitrator. In a decision rendered October 8, 1987, the Arbitrator ruled that the document was discoverable.
2. At the hearing on September 25, 1987, the Union moved that the document (A-302 Hearing) be admitted into evidence if discovered. Management objected. Both parties briefed the issue. The admission issue will be discussed subsequently.

Relevant Contract Sections

Article 5 - Management Rights

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(A) numbers 1-9.

§24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§24.02 - Progressive Discipline (in pertinent part)

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

§24.05 - Imposition of Discipline (in pertinent part)

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.

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

Issue:

Was the Grievant terminated for just cause?

Facts

The Grievant was an Equipment Operator 3 in the Cleveland Yard for District 12, Ohio Department of Transportation. At the time of the incident, the Grievant had worked for ODOT for over thirteen,(13) years. He had no prior discipline (Joint Exhibit No. 3). On November 20, 1986, the Grievant was removed from his position effective at the close of business, November 21, 1986. He allegedly violated §2A and §4 of Directive 301 (Exhibit #6). Directive No. A-301 on p. 4 is as follows (Joint Exhibit #7):

ODOT
Disciplinary Guideline

Violation and Occurrences within 24 months

2. Insubordination
   a. Refusal to carry out assignment/1st Offense - Written reprimand/suspension; 2nd - Suspension; 3rd - Removal
4. Striking a fellow employee/1st Offense - Suspension/removal; 2nd - Removal

The Grievant's evaluations from 1982 through 1986 indicate that the Grievant was a better than average employee as to quality and quantity of work, whose work skills were also good. Until 1986, his personality and initiative were also rated highly; however in 1986, these items were significantly lower. The remarks of his reviewer were favorable.

Mr. Gene Brundige was Deputy Director of OCB at the time of the imposition of discipline. Mr. Brundige was called by the Employer to testify about the imposition of the discipline in this case. Mr. Brundige indicated that his job was to review all discipline. He testified that three types of behavior generally warrant discharge on the first offense: sale of drugs, theft, and physical violence. With regard to the latter behavior, the rationale to support dismissal is as follows: "people who have to work together without supervision cannot be allowed to have the perception that they can get away with violence." Mr. Brundige indicated that the policy of 1st offense dismissal for physical violence preceded the current contract. Mr. Brundige also testified that first offense dismissal for physical violence could be reduced under certain mitigating circumstances. He acknowledged that under A-301, an employee can receive either dismissal or suspension. According to Mr. Brundige, mitigating circumstances could include whether self-defense was involved, how intense the physical contact was, and the length of service of the employee involved.

On September 10, 1986, the Grievant's assigned task was to clean and service his vehicle (Vac all) number 636. In this yard, the Grievant's functional supervisor, was Mr. Agnew, a Mechanic #3, also a union member. His line supervisor was Mr. Noble. According to both the Grievant and Mr. Agnew, Mr. Agnew came over to Grievant's truck and asked if the truck was “all greased". The Grievant said "yes". Mr. Agnew examined the truck and found that the left side was not greased. Mr. Agnew reported his observation to Mr. Noble. Twice that same afternoon, according to Mr. Noble, he (Mr. Noble) discussed the truck and its grease-status with Grievant. According to Mr. Bambino, the first time Mr. Noble asked if the truck greasing was completed, and he (the Grievant) said "yes". The content of the second conversation is unclear from the evidence. However, Mr. Noble specifically testified that he gave the Grievant no direct order on September

10th to grease both sides of the truck. Apparently, Mr. Noble only told the Grievant that the truck had to be serviced by the end of that work day.

On September 11, 1987, Mr. Noble and Agnew inspected the truck. They found the left side of the truck had not been greased. They called the Grievant over. Discussion ensued. Mr. Noble called the Grievant into the office. The Grievant was accompanied by Mr. Montgomery, the steward. Both Montgomery and the Grievant claimed that they attempted to justify their greasing procedure but were ignored and rebuffed. Mr. Agnew maintained that both sides needed to be greased every week. According to all three persons, Mr. Noble then gave the Grievant a direct order to grease both sides of the truck. Subsequent to that order, the Grievant greased the left side of the truck.

These incidents revolve around the issue of whether a vac-all should have both sides greased every week. Mr. Agnew and Mr. Noble maintain that a truck greased only on one side is improperly maintained. The Grievant, along with other co-workers (Pollack, Montgomery, Jackson), all maintained in their testimony that only the side being used for work (or going to be used) need be greased. They maintained that the unused side is chained up and needs to be greased less regularly. They maintain that this practice is consistent with their training and that the practice is one of long standing.

As a consequence of this incident, Mr. Noble decided to discipline the Grievant. On September 12th, he sent a IOC to Robert Kovac requesting a 3-5 day suspension for Grievant for insubordination. Apparently, on September 22, 1987, the Grievant received notice of the impending discipline.

On September 22, 1987, Mr. Agnew clocked out and walked toward his car in the company of Mr. Montgomery. While in the parking lot (ODOT property), the Grievant called out to Mr. Agnew. According to all observers including Mr. Agnew, the Grievant said something to this effect: "I understand you told Mr. Noble that I did not service my truck right?!" Mr. Agnew replied, "that's right." What happened next is in dispute. Mr. Agnew testified that the Grievant knocked him down from the rear, jumped on him, kicked him, hit him, and knocked him unconscious for a short time. Mr. Agnew said that he did not bite the Grievant nor strike him in return. Mr. Agnew testified that the "fight" lasted 15 minutes. The Grievant admitted he shoved Mr. Agnew. According to the Grievant, after the shove Mr. Agnew butted him in the stomach. Whereupon, they both rolled on the ground for a while. The Grievant admitted he kicked Mr. Agnew when Mr. Agnew bit him. He estimated that the total time involved was 1-2 minutes until they were separated by Mr. Montgomery and another co-worker.

Mr. Montgomery is a union steward and co-worker. He was walking with Mr. Agnew toward Agnew's car. Mr. Montgomery regularly rode with Mr. Agnew. He characterized himself as friendly with both persons. Mr. Agnew said he knew of no reason why Mr. Montgomery would lie. Mr. Montgomery testified that the Grievant put his hands on Agnew first, that Agnew butted the Grievant, and that subsequently they tussled on the ground for under a minute.

Mr. Pollack testified he saw little of the fight itself. Mr. Scher testified that when Mr. Agnew attempted to walk away from the Grievant, the Grievant kept touching Mr. Agnew on the shoulder. According to Scher, Agnew then turned around and charged the Grievant. The protagonists then, according to Scher, rolled on the ground tussling for under a minute until Scher and Montgomery separated them. The next events are undisputed by all participants. Mr. Agnew went in the office. Shortly afterwards the Grievant went into the office and asked if Agnew "wanted to finish it off". The Grievant left when admonished by Mr. Noble to leave. Subsequently, Mr. Agnew was taken to the emergency room by Mr. Noble. He was treated, and Mr. Noble drove Mr. Agnew back to the parking lot. Mr. Agnew then drove home.

Subsequently on September 24, 1986, Mr. Noble recommended that the Grievant be removed.

On January 22, 1987, the level II Grievance decision supported the removal decision. On October 9, 1986 a hearing officer reviewed the removal decision. The report of this hearing officer was discovered by the Union, and the Union seeks its admission.

At the hearing, much testimony was given as to words, allegedly heard and allegedly spoken about these incidents by Mr. Miller who has since died. Much testimony concerned profane language allegedly used by Mr. Noble, favoritism by Mr. Noble, and other personality issues.

Management's Position

1. The report of the hearing officer of October 9, 1986 should not be admitted because the report is irrelevant.
   a. The impartial administrator is not the designated nor appropriate management official to decide the level of discipline.
   b. The Arbitrator is the trier of fact, and findings by the hearing officer are irrelevant.

2. The Grievant was insubordinate and engaged in physical violence. Such behavior is just cause for removal.

Union's Position

1. The hearing officer's report is relevant because the officer characterized the injury as received accidentally not intentionally. The union also states the officer's report is relevant because the report indicates that ODOT employees were on notice that physical violence was not cause for automatic removal.
2. The Grievant was not insubordinate. The Grievant did fight with another employee. He has admitted that he initiated the first physical contact. However, the union maintains that the penalty is too severe because mitigating circumstances existed including Grievant's long service and good work record. Grievant has expressed remorse over the incident.

Discussion

Admission of Evidence

1. The Arbitrator has chosen to disregard all evidence presented as to conversations with the now deceased Mr. Miller. All of the testimony was self-serving for the presenting side, and none of the testimony was corroborated.
2. The Arbitrator declines to admit the report of the hearing officer. The report provides no information which was not testified to at the arbitration hearing. An arbitration is a de novo hearing. The ultimate judge of credibility is the Arbitrator. Moreover conclusions by the hearing officer are just that: conclusions. The Arbitrator is not bound by such conclusions because forming those conclusions is the basic job of the Arbitrator. In this case, the hearing officer's report provides no additional relevant evidence.

Insubordination

Insubordination is an offense that requires very specific elements. To find insubordination, the Arbitrator must find at a minimum a direct order which has been deliberately and knowingly disobeyed. The Arbitrator finds that the events of September 10, 1986 involved no insubordination. When Grievant was asked if the truck greasing was done, his affirmative reply was not an intentional misstatement because he could have reasonably believed that the truck with

one side greased was properly greased. The conversations between Grievant, Agnew, and Noble represented serious misunderstandings among them but did not represent insubordination. Regardless of the legitimacy of either greasing procedure, the line supervisor admitted at the Arbitration hearing that he gave no direct order to Grievant on September 10th.

On September 11, 1986, Mr. Noble gave a direct order coupled with a threat of discipline. Grievant apparently attempted to explain his view of the greasing procedure and complained about the order. However, he also obeyed the order. This scenario simply does not constitute insubordination.

Fighting

The Grievant has admitted using physical violence, admitted being the initiator, and admitted belligerence and inappropriate behavior after the fight. Clearly, the Grievant violated A-301 Item #4. A-301 put the Grievant on notice that such behavior could result in suspension or dismissal. Under Article §24.05, the Appointing Authority decides on final discipline. According to Deputy Director Brundige, fighting is generally penalized by dismissal on the first offense. However, Mr. Brundige testified that mitigating factors could be considered.

As Mr. Wagner for ODOT reminded us, dismissal is "industrial capital punishment". Under the Contract in §24.05, “disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment."

If mitigating factors are available, then every violator must have those factors considered. If a disciplinary grid gives notice of a lesser discipline, then that notice creates a reasonable expectation that where appropriate a lesser discipline will be imposed. Mr. Brundige testified that a number of factors could mitigate the seriousness of the offense. He mentioned self-defense, length of service, and the intensity or severity of the conflict.

On the negative side, the Grievant 1) started the confrontation, 2) made the first physical contact, and 3) was still belligerent after Agnew had retired from the battlefield. The fight was on ODOT property, albeit the parking lot.

On the positive side, the Grievant's violent behavior 1) was of short duration, 2) occurred after work hours, and 3) was returned by Mr. Agnew. The Arbitrator found Mr. Agnew's account of the fight incredible. The Arbitrator finds that the fight was short and that Mr. Agnew returned blows. The Arbitrator notes that Agnew walked unassisted away from the scene and was capable of driving home after a visit to the emergency room.

Lastly, the Grievant's work record and length of service are traditional mitigating factors. The Grievant is a 13 year employee. Prior to this incident, he had no previous discipline. His evaluations indicate a valuable employee.

Under §24.05, the Arbitrator finds the disciplinary measure imposed is "not reasonable and commensurate with the offense". Moreover, the imposition of dismissal is inconsistent with the grid read in conjunction with the stated policy of the Department.

Award

Grievance sustained. The Grievant is to be reinstated with back pay from May 21, 1987. The Arbitrator concludes that a six month suspension will put the Grievant on clear notice of the seriousness of his offense.

Date: November 10, 1987

Rhonda R. Rivera
Arbitrator