ARBITRATION DECISION NO.:
260

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

EMPLOYER:
Department of Youth Services,
Training Center For Youth

DATE OF ARBITRATION:
April 18, 1990

DATE OF DECISION:
May 16, 1990

GRIEVANT:
Wendell Hill

OCB GRIEVANCE NO.:
35-16-(89-08-17)-0042-06-03

ARBITRATOR:
Anna D. Smith

FOR THE UNION:
Gary Raines, Advocate
Dane Braddy, Second Chair

FOR THE EMPLOYER:
Deneen D. Donaugh, Advocate
John Tornes, Second Chair

KEY WORDS:
Abuse of Resident
Removal
Just Cause

ARTICLES:
Article 24 - Discipline
§24.01-Standard
§24.04-Pre-Discipline

FACTS:

The grievant was a Youth Leader 2 at the Training Center for Youth. He was removed from his position for abuse of a youth entrusted to his care. The grievant allegedly extinguished a lit cigarette against the chest of the youth, after he caught the youth smoking. Smoking by youth confined to the facility is prohibited.

EMPLOYER'S POSITION:

The Employer argued that the removal was for just cause. First, the Employer claimed it has proof that the abuse took place. There is a photograph of the burn and eyewitness accounts of the incident. The Union questioned the credibility of the witnesses. However, neither the fact that some of them have mental problems nor their felony convictions negates the truthfulness of their testimonies. Second, while the Union alleged that the youths conspired against the Grievant because he was a strict rule enforcer, the Union offered no evidence to support this claim. Third, although the Union argued that a staff member who testified against the Grievant set him up, this staff member did not witness the incident and did not have authority to discipline the Grievant. Fourth, the lack of union representation for the Grievant at the time the notice of investigation was served is no reason to deny the grievance. Service of notice is not disciplinary action, and the Grievant was not required to respond to the charge at that time. Finally, although the Grievant had no prior discipline, he also had been with the Employer for only eight months, and his misconduct was serious. Article 24.01 of the Agreement prohibits an arbitrator from modifying a removal for proven abuse. Arbitration cases C-87-0813 McNeal (#67) and G-87-2260 Rozenblad (#165) support this interpretation.

UNION'S POSITION:

The Union argued that there was no just cause for the removal. First, the Grievant said that the incident never occurred. The youths set out to get the Grievant because of his by-the-book style of rule enforcement. Second, the Union doubted the credibility of the witnesses. The Union noted that they are capable of lying and drew attention to one of the witness' testimony that his written statement was based on what he was told by the youth burned, not on what he actually saw. Third, the removal letter cited a violation of the Ohio Revised Code as the basis of its action. This is a lesser standard than the just cause standard in the Agreement. Fourth, various discrepancies, in the date and time the incident allegedly took place suggest that the wound might have been self-inflicted. Finally, Article 24.04 calls for the presence of a steward upon request at an investigatory interview. The Grievant requested a steward when served with the notice of investigation, but his request was denied. Finally, the Grievant has no prior disciplinary action on his record with this Employer or previous ones.

ARBITRATOR'S OPINION:

There is no question that the youth was injured. The evidence is overwhelming that the injury resulted from a cigarette burn made deliberately. The question is whether the Grievant or some other person inflicted the injury. As a result, the case turns on the credibility of the witnesses. One witness' testimony was based on what the youth told him happened. The other three witness' statements are consistent about what they saw: the Grievant put the cigarette out on the youth's chest. There is no evidence that their statements were coached or that they fabricated their stories. In addition, had the youths set up the Grievant, it would be much more likely that the burned youth would have come forward, rather than risk the wound not being discovered by staff. Also, the boast made by one of the Grievant's co-workers that she had gotten rid of the Grievant did not constitute a confession. Finally, the possibility that the youth inflicted the wound himself is not supported by the record.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

THE STATE OF OHIO,
DEPARTMENT OF YOUTH SERVICES

and

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL-CIO

OPINION and AWARD

Anna D. Smith, Arbitrator

Case No.
35-16-890817-0042-06-03

Removal of Wendell Hill

I. Appearances

For the State of Ohio:
Deneen D. Donaugh, Advocate,
Ohio Department of Youth Services
John Tornes, Second Chair,
Office of Collective Bargaining
Paul T. B. Hemphill, Deputy
Superintendent, Training
Center for Youth
Andrew M. Grause, Witness
Andre Brown, Witness
Lamar Preston, Witness
Mike Niederhelmen, Witness
Edward M. Brown, Physical
Education Teacher, Training
Center for Youth
Theda E. Clemente, Nurse,
Training Center for Youth
Falyce Yuill, Social Worker,
Training Center for Youth
Christopher Simon,
Training Center for Youth

For OCSEA/AFSCME Local 11:
Gary Raines, Staff
Representative and Advocate
Dane Braddy, Staff
Representative and Second Chair
Wendell Hill, Grievant
Pam Turner, Youth Leader II,
Training Center for Youth
Raymond Wilson, Youth Leader II,
Training Center for Youth

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 9:15 a.m. on April 18, 1990 at the offices

of the State of Ohio Office of Collective Bargaining, 65 East State Street, Columbus, Ohio before Anna D. Smith, Arbitrator. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument, 2:00 p.m., April 18, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

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

IV. Stipulations

The Parties stipulated to the following facts:

1) The Grievant was employed as a full-time permanent Youth Leader II at Training Center for Youth Service, November 20, 1988;
2) The Grievant was working the 3-11 shift at TCY on June 29, 1989;
3) The Grievant has no prior discipline;
4) The matter is properly before the Arbitrator;
5) The Grievant was removed on August 10, 1989 for Failure of Good Behavior, specifically for violation of DYS Work Rules B-19, Section IV.A, Number 1, "Abusing or mistreating youth entrusted to the Department's care; failing to immediately report the use of physical force on a youth as prescribed by local directive or rule."

The following documents were received as joint exhibits:

1) State of Ohio/OCSEA Local 11 Contract, 1986-89;
2) Grievance Trail;
3) Discipline Trail;
4) DYS Directive B-19;
5) Grievant's Position Description;
6) Grievant's Performance Evaluation.

V. Relevant Contract Clauses

Article 24 - Discipline

VI. Background

Wendell Hill was hired as a full-time Youth Leader II at the Training Center for Youth on November 20, 1988. Approximately eight and a half months later he was removed from this position for failure of good behavior. The specific charge against him was abuse of a youth entrusted to the care of the Department of Youth Services (DYS Directive B-19, §IV-A-1) (Joint Exhibit 3). Said abuse allegedly occurred on the evening of June 28, 1989 when the Grievant is said to have extinguished a lit cigarette against the chest of Andrew Grause, who was a youth on the dorm to which Wendell Hill was assigned. The evidence against Mr. Hill consists of the testimony and written statement of his accuser, Andrew Grause, the testimony and written statements of three youths who were present at the time the incident occurred, the testimony of four staff members who saw the burn mark and who also knew the Grievant and/or his accuser, a photograph taken of the youth (Employer Exhibit 1) and the medical record relevant to the incident (Joint Exhibit 8).

The story told by the various witnesses is that around 9:00 or 9:30 p.m. on June 28 the Grievant caught the youth "sneak-smoking" (smoking by youth confined at the facility is prohibited). The Grievant said he would write up the rule infraction. When the youth took a final drag of the cigarette Hill became angry, took the cigarette from the youth and put it out on his chest. The youth claims he had no recourse at the time because Hill was on duty. There were no other staff assigned to the dorm that evening, but the incident was reputedly witnessed by seven other youth (who gave their statements the next day after the burn was discovered by staff), three of whom testified at this arbitration hearing, others of whom were released from the Center. The next day, June 29, the burn was seen by Edward M. Brown, physical education teacher, who asked Grause about it. The youth told his story and was taken to the assistant principal and then to Deputy Superintendent Paul Hemphill. Mr. Hemphill heard the story, saw the burn (but no others), and took a photograph (Employer Exhibit 1). Grause was taken to the clinic and treated (Joint Exhibit 8). The nurse who treated Grause, Theda Clemente, testified that the mark was caused by a cigarette, but gave other testimony conflicting with others' about the time she saw Grause (evening, not afternoon), age of the burn (old, not new), and presence of other burns (many rather than no others). The youth's social worker, Falyce Yuill, testified that she, like Hemphill, observed a single, fresh burn and was told of the incident by the youth. She also testified that although Grause had been written up by Hill and others for smoking, no report was filed on this instance. Furthermore, she stated that it would not be like the youth to burn himself, that he had not talked to her about wanting to set up the Grievant, and that he was subsequently released from the facility early for positive behavior. She denied that she had provided the youth with contraband cigarettes or that she had anything against the Grievant, Mr. Hill.

The Grievant denies that the incident ever took place. He says that the youths conspired against him because he is strict, by-the-book and military in his style of handling them and had written them up on various occasions. He had confiscated contraband smoking material from Grause. This upset the youths who were supplied by Grause. The paperwork on this incident, he said, was destroyed and not followed up on by supervisors. Hill also testified that he had been removed from Grause's group because he was too militant, but was put back to control the youths. Mr. Hill enjoyed his work, had never been disciplined, and received satisfactory performance ratings (Joint Exhibit 6).

Two of Mr. Hill's co-workers testified in his behalf. Both Raymond Wilson and Pam Turner indicated that Falyce Yuill, the social worker, disliked the Grievant. Wilson said Yuill told him she had gotten "rid of the mother-fucker." Both witnesses also said youth commonly got cigarettes through staff, and Turner testified that she knew Yuill had been a source of supply, although she had never reported it.

VII. Positions of the Parties

Position of the Employer

The Employer contends that it had just cause to remove Wendell Hill on August 10, 1989. As the legal custodian of the youth felony offenders sentenced to its facilities by the courts, the Department cannot tolerate abuse of the youth for whose safety and well-being it is responsible.

The Employer claims it has proof that the Grievant abused a youth committed to the care of the Department of Youth Services by putting a cigarette out on his chest. It has a photograph of the burn and eyewitness accounts. With respect to the credibility of these witnesses, neither their mental health nor felony convictions negate the truthfulness of their statements. Indeed, one witness is at the Training Center for Youth for arson rather than because of a mental health problem and none of the youths were committed for felonies involving dishonesty.

Regarding the Union claim that the youths conspired against the Grievant, the State points out that no evidence has been offered, nor any motive other than that the Grievant was a rule enforcer. The Employer admits that youth could well resent a strict rule-enforcer, but notes that the Grievant was not the only youth leader to write them up. Additionally, it says that Grause was not known to be a self-abuser and argues that if he had intended to set up the Grievant he would have come forward sooner.

With respect to the Union claim that other staff set up the Grievant, the State points out that neither

Barnes nor Yuill witnessed the incident, nor did either have the authority to discipline him. The Employer admits that youth may obtain cigarettes from staff members, but it is nevertheless inappropriate to handle the infraction by burning the youth involved. The source of the contraband is irrelevant to the method of discipline.

The State argues that the lack of union representation at the serving of the Notice of Investigation is no bar to denying the grievance. Service of notice is not disciplinary action. Hill was not required to respond to the charge at the time and his response did not prevent a proper defense. Moreover, because no union representative was on site at the time the notice was served, Mr. Hill was permitted to have an employee representative.

Finally, in support of the form of discipline, the Employer allows that the Grievant is otherwise discipline-free, but points out that he is also an employee of short tenure and his conduct was most serious. It draws the Arbitrator's attention to §24.01 of the Collective Bargaining Agreement which prohibits arbitral modification of removal for proven abuse and cites cases G87-0813 (Michael re McNeal) and G87-2260 (Graham re Rozenblad). The Employer asks that the grievance be denied in its entirety.

Position of the Union

The Union contends that the Employer has breached the just cause and progressive discipline provisions of the Contract. First, it claims that the events testified to by the youths never occurred. Rather, it says that the youths set out to "get" the Grievant, who was known as a militant, by the-book rule-enforcer and who had written up Grause and other youth in the past. In raising the issue of credibility, it asserts that these witnesses are capable of lying, points to similarities between their written statements and testimony, and draws attention to Andre Brown's testimony that his written statement was based on what he had been told by Grause rather than what he actually saw. The Union also notes various discrepancies in the date and time at which the incident allegedly occurred and wonders why Grause did not report his injury until just before Hill was to come on duty the next day.

In addition to the substantive question, the Union raises two procedural issues. First, the removal letter cites violation of the Ohio Revised Code as the basis of action. The Ohio Revised Code, the Union points out, is a lesser standard than the just-cause standard agreed to by the Parties and codified in their Collective Bargaining Agreement. Second, §24.04 of the Contract calls for the presence of a union steward at an investigatory interview upon request. The Grievant did request a steward when served with the Notice of Investigation and this request was denied.

Finally, the Union points to the Grievant's unblemished record with the Employer and elsewhere: nine years of military service, two honorable discharges, two full-time jobs, currently a senior at Franklin University, good performance evaluations and clean discipline record. It asserts that the Employer has not met its burden of proof and asks that Wendell Hill be returned to his former position with full back pay and benefits.

VIII. Opinion

The act with which the Grievant is charged--physical abuse--is a serious one requiring a significant quantum of proof to sustain the Employer's decision to discharge. Any real doubt must be resolved in favor of the Employee. For reasons set forth below, the Union here was unable to raise sufficient doubt in the Arbitrator’s mind that the case was other than as represented by the Employer.

At the outset, there is no question that the youth sustained an injury. The evidence is overwhelming that it was the result of a cigarette burn that could only have been made deliberately. The question is whether the Grievant or some other person inflicted the wound. Four youth testified that it was the Grievant. The Grievant denies their accusation. The case, like so many, turns on credibility. To be sure, these youth had reason to be resentful of Mr. Hill, but the Union offered no hard evidence that the youth had reason to single Mr. Hill out from other staff who enforced the rules of the institution. A highly credible management witness, Mr. Hemphill, agreed that the youths had complained about Hill's militancy and that he had been counseled

on it, but testified that in his review of the case he had found no indication that Hill had been set up. Neither is there indication here other than unsupported allegation.

Because of the centrality of credibility in this case, I have carefully scrutinized the testimony and statements of the four youths. One, Andre Brown, testified that he had not seen the incident because he was asleep. He had given his statement based upon what Grause told him the next morning. Essentially he drew a conclusion. The other witnesses, whose statements differ somewhat in what was said by Grause, are consistent both in testimony and written statement about what they saw: Hill put the cigarette on Grause's chest. I find no evidence that these witnesses were unduly coached in the specifics of their testimony or that they fabricated the essence of their story. I also agree with the Employer that had the youths set Hill up, it would be much more likely that Grause would have come forward on his own initiative rather than wait and risk having the wound overlooked by staff.

The nurse, Theda Clemente, raised the possibility that the wound had been self-inflicted because she recalled it being old and seeing many similar wounds on the youth's body. The testimony of Yuill that Grause was not self-abusive, the testimony of other witnesses who saw the injury on June 29, and the photograph offered as Employer Exhibit 1 convince me that the nurse confused Grause with another youth. The possibility of a self-inflicted wound is not supported by the record.

The Union also suggested that staff, specifically Falyce Yuill, participated in the plan to get Hill. By the testimony of Turner and Wilson, Yuill would seem to dislike Hill and/or his methods, although she denied having anything against him. But the boast Wilson claims she made can be variously interpreted (e.g., taking undeserved credit for a popular result) and does not, in this Arbitrator's opinion, constitute a confession.

Finally, the fact that the removal notice cites June 29 as the date of the incident rather than June 28 and is vague on the time of day does not negate events that did occur. All of the other documents and testimony report the incident as happening on June 28. The removal notice error is of no significance.

In sum, while Mr. Hill may have been unpopular with the clients and staff of the facility because of his unconventional methods, there is no real evidence to support the allegation that he was the victim of a conspiracy. In the face of the uncontroverted fact of the youth's injury and the consistency of the youths' stories (internally, with each other and over time in the telling and retelling), the overwhelming weight of the evidence is guilty as charged.

Turning now to the procedural issues raised by the Union, it is true that the removal letter cites the Ohio Revised Code. Nevertheless, there is no claim on the part of the Employer that the lesser standard applies in this case. The record is clear that the Grievant was disciplined for violation of a reasonable work rule published in DYS Directive B-19, §IV-A-1. It is equally clear that the just-cause standard and other discipline provisions of the Contract prevail over the Ohio Revised Code.

With respect to the alleged violation of §24.04, Pre-Discipline, the Employer claims that the serving of Notice of Investigation did not constitute an investigatory interview because the Grievant was not required to answer the charge at the time. This argument is misplaced. Part "II. Employee Statement" of the Notice of Investigation clearly states "Failure to complete a written statement regarding the incident will result in disciplinary action" (Joint Exhibit 3). Nevertheless, there is no indication that the Employer deliberately served the notice when there was no union representative on site, and it did permit an employee representative. Moreover, no prejudice to the Grievant resulted from the Employer's failure to comply with more than the spirit of §24.04. I therefore find the violation insufficient to disturb the finding that the Grievant was discharged for just cause.

Because the Grievant's actions constitute abuse within the meaning of §24.01, the Arbitrator is not free to modify the termination imposed by the Employer.

IX. Award

The grievance is denied. The Grievant was terminated for just cause.

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
May 16, 1990