**ARBITRATION DECISION NO.:**
263

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

**EMPLOYER:**
Department of Mental Retardation and Developmental Disabilities, Mount Vernon Developmental Center

**DATE OF ARBITRATION:**
February 2, 1990

**DATE OF DECISION:**
May 24, 1990

**GRIEVANT:**
Dorothy Bolton

**OCB GRIEVANCE NO.:**
24-09-(89-03-03)-0181-01-04

**ARBITRATOR:**
David M. Pincus

**FOR THE UNION:**
Brenda Goheen

**FOR THE EMPLOYER:**
Sally Miller, Advocate
Michael P. Duco,
Assistant Advocate

**KEY WORDS:**
Suspension
Fighting
Provocation
Discovery
Article 25.08

**ARTICLES:**
Article 24 - Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.04-Pre-Discipline
§24.05-Imposition of Discipline
Article 25 - Grievance

Procedure
§25.03-Arbitration
Procedures
§25.04-Arbitration Panel
§25.08-Relevant
Witnesses and Information

**FACTS:**

The grievant was a Therapeutic Program Worker employed by the Ohio Department of Mental Retardation and Developmental Disabilities beginning in January 1987. The incident covered by this grievance concerns a confrontation between two bargaining unit members in December 1988.

At approximately 4:00 pm on the day in question the grievant entered the T.V. room and sat in a chair that had been previously occupied by another employee. The other person returned and accused the grievant of sitting in "her" chair. The grievant did not immediately give the chair to the other but she did leave the room to avoid further confrontation.

At 8:00 pm the same day the grievant was in the staff room doing an inventory of clients' clothing. She had moved a chair close to where she was working to stack clothes on. The other employee who had confronted the grievant earlier in the day attempted to pass through the room with a chart cart. The employee moved the chair away claiming that she needed the room to get through with the cart. A fight then began as the other employee passed by the grievant. The grievant was talking on the telephone with her supervisor at the time and told him that the other employee had grabbed her hair and then she dropped the phone. The grievant was suspended for 13 days for fighting on state property.

**EMPLOYER'S POSITION:**

There is just cause for a 13 day suspension of the grievant. The grievant had notice of possible discipline for fighting through orientation materials and in service programs. Also the rule violated is reasonable and necessary for a facility of the type employing the grievant. Employees of a direct care facility are role models for the clients and must act accordingly.

There is substantial evidence that the grievant was fighting with the other employee. A third employee testified that both employees were equally engaged in fighting with each other. This witness is impartial and more credible than the grievant who stated that she was passively resisting the attack. The other employee involved in the fight is also more credible than the grievant. It is not likely that the grievant would allow herself to be beaten without retaliating. Further, the grievant provoked the other employee by interfering with the other's job performance and calling her a bitch.

The investigation conducted by the employer was not improper nor biased. The findings of a parallel internal investigation were not used to support the discipline imposed. In fact, the documents were released when they were completed by the security force. All other relevant documents were provided to the union in a timely manner. Additionally, there was no prejudice to the union's case as all evidence and witnesses were available for examination by the union.

**UNION'S POSITION:**

There was no just cause for imposing a 13 day suspension in this case. The employer's investigation was incomplete. The internal security investigation's findings were not made prior to imposing discipline. The employer's disciplinary investigation did not interview all witnesses who were present. The employer also failed to consider the first incident between the grievant and the other employee which occurred in the T.V. room earlier the same day.

The facts surrounding the fighting do not point directly to a conclusion that the grievant provoked the other employee. The witness to the incident only testified that a fight took place. There is no testimony that the grievant instigated the fight. There was evidence that the grievant's hair was scattered throughout the room and on the telephone. This supports the grievant's story that she was attacked while talking on the telephone to her supervisor. It is also improbable that the grievant would start a fight while talking on the telephone to

her supervisor.

The employer engaged in additional procedural violations by not producing the results of the internal security investigation. The union was prejudiced because extensive discovery had to be done due to the employer's withholding of this information. The fact that this investigation is employer-ordered supports the claim that it is discoverable.

**ARBITRATOR'S OPINION:**

There was not just cause to suspend the grievant for fighting in this case. The criteria used to assess discipline in a fighting incident were not met by the facts presented. The arbitrator must rely on circumstantial evidence, internal inconsistencies and witness credibility when the individuals involved offer differing accounts of the incident. In this case, these factors support the grievant.

The other employee's story is not credible. She was equivocal concerning the incident in the T.V. room which occurred earlier the same day. She was also inconsistent in explaining other incidents she had been involved in with other employees. Likewise, her story concerning this incident contained inconsistencies and changed over time. The assertion that the grievant lunged at her while talking on the telephone is unlikely. The fact that hair was found on the telephone is clear evidence that the grievant did not leave the telephone until after the other employee grabbed her hair. The fact that a fight ensued does not lead to the conclusion that the grievant used excessive force or instigated the fight, only that she defended herself.

The employer, however, did not violate the agreement by not providing the findings of the internal security investigation. The employer had no access to the documents until the security force had determined that no civil or criminal proceedings would result from the incident. The employer therefore could not have used the information contained to support discipline of the grievant. The results of the internal investigation may be admissible as evidence but cannot be used to support discipline. Section 25.08 could have been violated if the employer had access to the findings and then did not disclose the findings to the union upon request. However, that is not the case here.

**AWARD:**

The grievance is sustained. The discipline is to be expunged from the grievant's record and she is to be awarded full back pay and any lost seniority.

**TEXT OF THE OPINION:**

**STATE OF OHIO AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LABOR ARBITRATION PROCEEDING**

IN THE MATTER OF THE
ARBITRATION BETWEEN

**THE STATE OF OHIO, THE OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, MOUNT VERNON DEVELOPMENTAL CENTER**

-and-

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO**

**GRIEVANCE:**

Dorothy Bolton
(13-Day Suspension - Fighting)

**OCB Case No.:**
24-09-890303-0181-01-04

**ARBITRATOR'S OPINION AND AWARD**

**Arbitrator:**
David M. Pincus

**Date:**
May 24, 1990

## APPEARANCES

**For the Employer**
Carl Mackie, Personnel Manager
Wilbur Severns,
Labor Relations Officer
Larry Snow, Supervisor
Mary Morton,
Therapeutic Program Worker
Mary Divan, Nurse
Michael P. Duco,
Assistant Advocate
Sally Miller, Advocate

**For the Union**
Dorothy Bolton, Grievant
Laurie Stelts, Chief Steward
Elizabeth Rhoades,
Hospital Aide
Brenda Goheen,
Staff Representative

## INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Mental Retardation and Developmental Disabilities, Mount Vernon Developmental Center, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on February 2, 1990 at the office of the Ohio Civil Service Employees Association, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

## STIPULATED ISSUE

Was the Grievant's 13-Day Suspension issued for just cause? If not, what shall the remedy be? (Joint Exhibit 2)

## PERTINENT CONTRACT PROVISIONS

**ARTICLE 24 - DISCIPLINE**

**Section 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.

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

(Joint Exhibit 1, Pgs. 34-35)

**. . .**

**Section 24.04 - Pre-Discipline**

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension 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.

**Section 24.05 - Imposition of Discipline**

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five

(45) days after the conclusion of the pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

(Joint Exhibit 11, Pgs. 34-37)

**ARTICLE 25 - GRIEVANCE PROCEDURE**

**. . .**

**Section 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.

**. . .**

(Joint Exhibit 1, Pg. 42)

**JOINT STIPULATIONS**

1. The issue is properly before the Arbitrator.

2. Dorothy Bolton has been employed with the Mount Vernon Developmental Center since 1/5/87 as a Hospital Aide. She was promoted to Therapeutic Program Worker effective 12/8/88 assigned to Snyder Cottage.

3. Dorothy Bolton had the following corrective actions in her active file:

12/19/88 Written Reprimand - Neglect of duty/Pattern abuse

8/17/88 Verbal Reprimand - Neglect of duty/Pattern abuse

1/7/88 Verbal Reprimand - Neglect of duty/Pattern abuse

9/25/87 Verbal Reprimand - Neglect of duty/Tardiness

For OCSEA/AFSCME, Local 11
Brenda Goheen, Advocate

For the State of Ohio
Sally Miller, Advocate

(Joint Exhibit 3)

## CASE HISTORY

Dorothy Bolton, the Grievant, was hired by the Mount Vernon Developmental Center, the Employer, during January of 1987. She was initially employed as a Hospital Aide and subsequently promoted to Therapeutic Program Worker status on December 8, 1988. It appears that throughout her tenure she provided direct care services, training in daily living skills, and acted as a role model to mentally retarded residents housed in Snyder Cottage.

The instant matter concerns a series of incidents which took place in Snyder Cottage on December 27, 1988. The Grievant and Elizabeth Rhoades, a co-worker, reviewed an initial confrontation involving the Grievant and Mary Morton in the TV room. At approximately 4:00 p.m. Rhoades and Morton were sitting in the room with Morton sitting next to Rhoades in a chair. Morton left the room and the Grievant subsequently arrived and sat down in the same chair. A few minutes later, Morton returned and a confrontation ensued. Morton told the Grievant that she was sitting in her chair; the Grievant responded by asking whether Morton's name was on the chair. Morton remarked in the affirmative. The Grievant noted that she failed to see Morton's name on the chair and Morton purportedly remarked that the Grievant should "look harder." The Grievant testified that she left the room in an effort to diffuse the situation.

Another encounter took place later on during the shift. Although the facts surrounding the incident are in dispute, the following particulars were testified to by the Grievant. At approximately 8:00 p.m. the Grievant stayed in the staff room during her supper break to inventory some clothes a resident had received for Christmas. The Grievant testified that she was sitting on a desk next to a phone and placed a chair sideways in front of her to deposit the inventoried items. As she conducted the inventory the phone rang. Larry Snow, her supervisor, asked her whether she wanted to work overtime. During the telephone conversation, Morton entered the staff room and took the chair the Grievant was using and placed it at the end of the table. The Grievant allegedly remarked that she was using the chair; while Morton remarked that she had to get the chart cart through a narrow opening. As this dialogue took place, the Grievant was still on the phone with Snow. The Grievant maintained that she asked Snow to come to the staff room because Morton was picking on her all day. As she uttered this request, Morton was approaching with the chart cart; she allegedly stopped, remarked “nobody fucks with me bitch," and proceeded to grab her by the hair. The Grievant purportedly told Snow that Morton had her hair; and as the encounter continued the Grievant eventually dropped the-phone. While Morton allegedly pulled her hair, the Grievant did remark "leave me alone bitch." The Grievant claimed that she never fought back because she knew it would get her into trouble. She merely had her hands up in an attempt to get Morton's hands out of her hair.

Wilbur Severns, the Labor Relations Officer, testified that a Corrective Action Review Committee (CARC) meeting was called as a consequence of the previously mentioned altercation. This Committee serves as an internal management forum which attempts to determine whether a pre-disciplinary conference is necessary or warranted. At the meeting, the Supervisor presented two 246 Fact Finding Forms (Union Exhibits 2 and 3), work schedules, and made the Committee aware of available witnesses. Based upon this information, the Committee determined there was just cause for disciplinary action and recommended a ten-day suspension.

It should be noted that a collateral investigation was initiated by the institution's internal security force on or about the time of the CARC meeting. Severns explained that institutional policy mandates a dual investigation for internal and external consumption. The external investigation, the one initiated by the security force, develops work product in anticipation of a collateral proceeding; either civil or criminal. A prosecutor must determine that an action is not anticipated before the work product is released to either management or union representatives. Severns maintained that in this instance the work product was not officially released until a few days prior to the arbitration hearing. None of the work product, more specifically, was known nor factored into the disciplinary decision.

A pre-disciplinary hearing was indeed held on January 24, 1989. As a consequence, a thirteen-day suspension was recommended and approved. On February 24, 1989, the Grievant received a Notice of Suspension acknowledging the thirteen-day suspension for fighting with a fellow employee on State property

while on duty (Joint Exhibit 4); a violation of the Standard Guidelines for Progressive Corrective Action (Joint Exhibit 6). It should be noted that Morton received a ten-day suspension for engaging in the altercation.

On March 3, 1989, the Grievant filed a grievance which contested the previously mentioned disciplinary action. The grievance contained the following Statement of Facts:

**". . .**
Statement of Facts (for example, who? what? when? where? etc.)

On February 24, 1989 I was given an Order of Suspension for 13 working days. The reason for this action was Failure of Good Behavior - Fighting. I feel this is unfair and unreasonable due to the fact that I was defending myself from another employee. I also feel the pre-disciplinary hearing was unfair due to the fact the security police reports were not made available to me or the Union. I feel the employeer (sic) has failed to establish just cause in this case.
**. . ."**

(Joint Exhibit 4, Pg. 2)

On April 11, 1989, a Third Step grievance hearing was held by the Parties. The Employer denied the grievance based upon the unwillingness of either participant to discontinue the confrontation. The Hearing Officer did, however, admit that the participants offered differing versions of the incident (Joint Exhibit 4, Pgs. 4-5).

The Parties were unable to resolve the grievance during subsequent stages of the grievance procedure. Since neither Party raised any objections regarding procedural nor substantive arbitrability, this grievance is properly before the Arbitrator.

## THE MERITS OF THE CASE

### The Position of the Employer

It is the position of the Employer that it had just cause to suspend the Grievant for thirteen days. The suspension was viewed as properly based upon the Grievant's fighting on State property while on duty; a specific violation of the Standard Guidelines for Progressive Corrective Action (Joint Exhibit 6).

The Employer argued that the Grievant was placed on notice concerning the possible or probable consequences of her disciplinary misconduct. Severns testified that the Guidelines (Joint Exhibit 6) are reviewed during all orientation programs and are readily available in the cottage. Evidence was also introduced indicating that the Grievant had initiated a policy verification form (Employer Exhibit 2).

The Employer contended that the rule prohibiting fighting was reasonable. It was, more specifically, related to the orderly, efficient, and safe operation of the facility. This rule was viewed as especially important in light of the institution's mission and the Grievant's role model requirements.

It was asserted that the Employer's investigation was conducted properly, fairly and objectively before administering the discipline to the Grievant. The Employer maintained that the investigation was not defective because it failed to fully examine the Grievant's prior relationship with Morton. The CARC and pre-disciplinary processes were not viewed as proper forum to determine whether the Grievant was guilty beyond a reasonable doubt. Rather, they were initiated to determine whether sufficient evidence existed to proceed with disciplinary action.

The Employer alleged that it obtained substantial evidence of proof that the Grievant did engage in a fight with Morton. Mary Divan, a Licensed Practical Nurse, provided testimony which supported Morton's version of the events. She testified that she observed both individuals equally engaged and participating in a fight. Divan's testimony was viewed as extremely objective and credible because she was the only neutral person that observed a portion of the altercation. The Grievant's statement (Union Exhibit 6) to the security force further supported her active rather than her passive role in the incident. In the statement, the Grievant noted that she wrestled with Morton. This assertion was also supported by Divan during the hearing.

The above testimony and evidence clearly failed to establish that the Grievant's conduct constituted a

valid self-defense attempt. Such an affirmative defense requires specific proof rather than disapproval by the Employer. Morton's potential personality conflict with the Grievant and other bargaining unit members did not serve as a valid self-defense proposition.

The Employer charged that the Grievant provoked Morton into the fight. The Grievant obstructed Morton's attempt to accomplish her duties and called her "a bitch" during her conversation with Snow. Both Morton and Snow testified that this utterance occurred prior to the disruption.

For a number of additional reasons the Employer alleged that Morton's version was more credible than the one offered by the Grievant. First, the Grievant's passive role seemed unbelievable if in fact Morton engaged in the asserted behavior. It seemed highly unlikely that the Grievant would allow herself to be pummeled in such a fashion without any retaliation. Second, Morton's physical stature belied the notion that she could manhandle the Grievant. Third, Morton had no reason to lie about the events because her disciplinary suspension had already been administered prior to the arbitration hearing. Fourth, the Grievant provided varying versions regarding the scope of her involvement. The security report (Union Exhibit 6) indicated that the Grievant wrestled with Morton, while the fact-finding statement (Union Exhibit 2) suggested that the Grievant played a passive role.

The penalty administered, and its duration, were thought to be commensurate with the offense. Fighting within an institutional environment could have jeopardized the Grievant as a role model to residents housed in Snyder Cottage. Residents roaming through the cottage could have viewed and subsequently mimicked the fighting behavior. The Grid (Joint Exhibit 6) provides a potential range of penalties for this type of offense. The thirteen-day suspension falls at the lower end of the continuum and was viewed as reasonable. It was, moreover, thought to be progressive, and thus, in accordance with Section 24.02. The Grievant had four prior disciplines active in her file at the time of the altercation. As such, her prior record distinguished her situation from Morton's record of service justifying the different penalty. The Employer maintained that the prior reprimands did not have to be similar to the present violation to prevent their consideration. It would be absurd to require the Employer to discipline progressively for each violation of an item in the corrective action policy (Joint Exhibit 4).

The Employer contested the Union's Section 24.04 and Section 25.08 arguments dealing with the need to provide relevant documents. With respect to the Section 24.04 allegation, the Employer alleged that it did provide the Union with the documents and witnesses used to support the possible disciplinary action. Severns' testimony was thought to reliably support this contention. He noted that work product developed by the internal security force was not used to support the action because these documents were unavailable as a result of institutional policy.

Similar arguments were offered as rebuttal to the Section 25.08 violation. Once again it was asserted that the security police documents were not reasonably available because of the institution's policy. The denial, itself, was viewed as reasonable based on the logic behind the independent investigations. Premature disclosure could have jeopardized a civil or criminal matter. The separate investigation procedures insulate administrative disciplinary matters against possible undue reliance on collateral investigations and related findings.

Timeliness issues were also addressed by the Employer. It was maintained that Section 25.08 does not specify any time frame requirements; and that the particulars dealing with Union requests were satisfied. The Employer claimed that investigation reports (Union Exhibits 3-6) authored by the security force were released to the Union, once they became available, prior to the arbitration hearing. A ruling in the Union's favor would result in a violation of Section 25.03 because the Arbitrator would be imposing an obligation not required by language expressly negotiated by the Parties.

By receiving the investigation reports (Union Exhibit 3-6) prior to the arbitration hearing, the Union's case was not prejudiced. These documents were not viewed as the best evidence because the Union had the ability to examine the direct testimony provided by these witnesses. The Union, moreover, had an opportunity to impeach these very witnesses based upon the information contained in these documents.

Arbitration Rivera's Bambino[1] decision was distinguished and viewed as inapplicable when reviewing the Union's Section 25.08 arguments. The Employer maintained that Section 25.08 does not provide the

Union with broad and unlimited discovery rights. Also, in Bambino the Employer prevented the Union from examining a pre-disciplinary hearing officer's report. A report which might be useful in determining the factors considered when determining the propriety of any disciplinary action. The security reports (Union Exhibits 3-6) were not viewed as clothed with the same degree of import. They were not viewed as relevant by the Employer, and thus, should not be discoverable.

**The Position of the Union**

It is the position of the Union that the Employer did not have just cause to suspend the Grievant for fighting while on duty. This conclusion was based upon a number of due process concerns and evidence and testimony introduced at the hearing refuting the fighting allegation.

The Union asserted that the Employer's investigation was incomplete which biased the evidence and testimony collected leading to a biased outcome. It was asserted that a complete investigation would have involved assessing the work product developed by the security force. The Union also alleged that the Employer failed to interview other individuals who could have provided valuable testimony. The Employer merely used the two fact finding reports (Union Exhibits 1 and 2) and the eyewitness testimony of Snow and Divan. A complete investigation, moreover, would have evaluated the import of the TV room incident and the general attitudinal problems Morton had with other bargaining unit members.

With respect to the fighting incident, the Union maintained that many of the facts were in dispute which muddied the Employer's just cause claim. The record failed to substantiate that the Grievant engaged in name-calling and threatening behavior which provoked the Grievant. Specific attention was placed on Snow's testimony regarding his observations regarding the Grievant's utterances during the telephone conversation. The Grievant alleged that she only called Morton "a bitch" after she started pulling her hair, not before the major portion of the altercation.

There was also considerable doubt concerning the Grievant's actual physical involvement in the altercation. The Union, more specifically, alleged that the Grievant was not the instigator nor the aggressor; but once attacked, she merely engaged in self-defense. Divan's testimony merely reinforced the Union's claim that a struggle took place. She did not testify to any aggressive action on the part of the Grievant. As such, Divan's observations supported the Grievant's assertion that she engaged in self-defense by attempting to release Morton's grasp of her hair. Testimony provided at the hearing also indicated that the Grievant's hair was scattered throughout the room; some hair was found on the telephone. The Grievant's perspective, moreover, was further bolstered by statements (Union Exhibits 1 and 2) gathered by the Employer and other statements (Union Exhibits 3-6) gathered by the security force. These documents validated the consistent and unequivocal testimony provided by the Grievant.

The Union maintained that Morton was the provocateur and the aggressor. Testimony provided by the Grievant and Rhoades, and statements (Union Exhibits 4 and 5) authored by two co-workers, Marilyn Christopher and Marty Chrastine, confirmed that Morton had a history of interpersonal problems with fellow employees. She often bossed them around, avoided doing her work, and boasted of her fighting ability. This attitudinal problem surfaced during the TV room incident and spilled over in an intense fashion in the staff room.

Other circumstantial evidence supported the Grievant's version of the events. First, the Grievant would have never started a confrontation while she was on the phone with her supervisor. Second, Divan observed the chart cart in a location testified to by the Grievant, rather than the location alluded to by Morton. Third, Laurie Stelts, the Chief Steward, took measurements of the staff room and its furnishings to determine the veracity of Morton's assertions. Her measurements suggested that sufficient clearance existed to allow Morton to transport the chart cart without moving the chair. As a consequence, the movement of the chair was a mere pretext used to substantiate her provocative actions.

The Union opined that the suspension decision was procedurally defective because the Employer violated Sections 24.04 and 25.08. The Employer, more specifically, failed to provide the security reports (Union Exhibits 3-6) when requested by the Union. Stelts testified that the Union requested all relevant information, including the reports, at various stages of the investigation and the grievance procedure. The

Employer eventually released the documents a number of days prior to the arbitration hearing. By denying these reports the Employer violated the intent of the Agreement (Joint Exhibit 1) to settle grievances at the early stages of the grievance procedure. The denial, moreover, forced the Union to engage in a broadly defined and inefficient discovery effort. The Union supported its interpretation of Sections 24.04 and 25.08 by referencing the broad discovery requirements articulated in Bambino.

The Employer's denial was thought to be additionally defective because of the reliance placed on these reports. The Union asserted that work product resulting from the security force investigation should be discoverable because the Employer mandates such an investigation. As such, the two investigations are not truly independent. The Employer, moreover, used one of these statements (Union Exhibit 6) to support the notion that the Grievant did participate in the altercation because she wrestled with Morton.

## THE ARBITRATOR'S OPINION AND AWARD

Upon a thorough review and consideration of the entire record including exhibits, arguments, and arbitral research, it is this Arbitrator's judgment that the Employer's action suspending the Grievant was not for proper cause. This Arbitrator has previously relied upon the following criteria discussed by Arbitrator Roberts when assessing the facts surrounding "fighting" disciplinary cases.

"**. . .**

1. An employee may be an innocent and injured victim of an unprovoked assault and not, himself, engage in aggression or hostility. In such a case, the victimized employee has engaged in no wrongful conduct and must be regarded as innocent.

2. Self Defense. When an employee engages in only as much hostile conduct as is reasonably necessary to defend himself from aggression and uses no more force than is reasonably necessary for that purpose, he will generally be found not guilty of fighting or assault. This is a defense of justification which is a complete defense.

3. Provocation. When an employee is the victim of provocation which is foreseeable to provoke an ordinarily reasonable person to a heat of rage and aggression, the conduct of that employee may be excused (as opposed to justified) either partially so as to mitigate against the full degree of penalty, or completely, so as to mitigate against any penalty whatsoever.

**. . .**"[2]

The contested disciplinary action will be evaluated in light of the above-stated criteria.

Fighting cases where protagonists provide the primary testimony are quite difficult from an analysis standpoint. The two presented versions are typically factually inconsistent which often necessitates reliance on circumstantial evidence, internal inconsistencies, and credibility concerns.

In the judgment of the Arbitrator, the suspension was not substantiated by the Employer. This Arbitrator basically credits the Grievant's version of what happened in the staff room. She was attacked by Morton without any provocation and merely engaged in self-defense.

Circumstantial evidence and inconsistent testimony support this conclusion. Morton testified that she did not react to the Grievant's name-calling, but rather responded when the Grievant attempted to grab her as she walked toward the chart cart. The Grievant purportedly lunged or stood up from a sitting position. This proposition seems highly unlikely because all this took place while the Grievant was conversing on the phone with Snow. Morton never maintained that the Grievant dropped the phone during the initial phase of the altercation. A sketch (Joint Exhibit 7) submitted by the Employer and Morton's review of the document indicate that it would have been extremely difficult for the Grievant to grab and lunge toward Morton with any degree of success. Also, testimony provided by Snow and the Grievant strongly suggests that Morton was the aggressor. Snow testified that the Grievant uttered "leave me alone bitch" during the telephone conversation. This utterance was confirmed by the Grievant and a statement (Employer Exhibit 3) authored by Snow shortly after the altercation. Snow and Severns, moreover, testified that the Grievant's hair was

scattered throughout the room; some of which was wrapped or affixed to the phone. The hair samples on the phone provide clear and unrefuted evidence that the Grievant never left the phone at the time of the attack. As such, she did not have the opportunity to provoke Morton.

Any actions engaged in by the Grievant subsequent to the initial attack are viewed as acts of self-defense. In my judgment, the Grievant engaged in conduct reasonably necessary to defend herself from aggression. She did not respond in an excessive manner even though she struggled with Morton. None of the witnesses maintained that samples of Morton's hair were found in the staff room during the course of the investigation. Morton, moreover, did not indicate that she was physically harmed; in fact she continued with her daily routine as if nothing had taken place. Divan's observations do not in any way refute this conclusion. She, more specifically, noted that both participants were struggling and seemed to be applying equal amounts of force. The Grievant's security report statement (Union Exhibit 6) also supports her passive involvement. She maintained that she wrestled with Morton but only in an attempt to break away. Thus, a complete review of this document indicates that the wrestling was a reasonable response to Morton's hair-pulling behavior.

Morton's testimony is riddled with several inconsistencies, which raised considerable doubt concerning her credibility, which in turn severely damaged the Employer's case. First, the Union placed a great deal of emphasis on Morton's ongoing interpersonal problems with other members of the bargaining unit. Morton, under direct examination, initially admitted that she and Rhoades had some disagreements over "food carts or a program of a resident or something like that in general." Under cross-examination, however, she asserted that she never had a confrontation with Rhoades dealing with patient care. Snow's testimony indicated that these disagreements did in fact exist. He noted that several employees raised certain issues which were relayed to Morton's supervisor. Snow also stated that these items were discussed with Morton during performance evaluation sessions. This testimony supports two statements (Union Exhibits 4 and 5) authored by bargaining unit members during the security force investigation.

Second, Morton's specific denial of the TV room incident also seemed a bit equivocal. She denied that an altercation ever took place but did admit that she spent some time in the room with the Grievant and Rhoades. As such, she partially supported the testimony provided by the Grievant and Rhoades.

Third, the Grievant initially noted that the Grievant was either leaning against or standing by the desk reading the bulletin board when she arrived in the staff room. While she discussed the confrontation, however, she maintained that the Grievant came out of the chair as she attempted to grab her.

Fourth, Morton's version concerning the altercation varied during various stages of the investigation. Morton initially authored a security force statement (Union Exhibit 3) on December 27, 1988 which contained general information regarding the incident. Her Fact Finding Report (Union Exhibit 1), however, merely referenced the previously mentioned document. Her testimony at the hearing was extremely detailed and disclosed information that was not previously specified.

Fifth, Morton seemed confused about the dialogue she engaged in with the Grievant prior to the struggle. Morton initially stated that she had no discussion with the Grievant prior to the phone conversation. Additional questioning, however, revealed that she told the Grievant that she had to get the chair out of the way so that she could get the chart cart through a very narrow work area.

The Employer did not violate Sections 24.04 and 25.08 when it failed to provide the Union with work product developed by the security force during the various stages of the grievance procedure. It should be noted that the documents were eventually provided, albeit reluctantly, a few days prior to the arbitration hearing. In my judgment, however, the Employer was never provided with these documents, nor were they made available, until the security force made an independent determination that civil and/or criminal proceedings were no longer contemplated. In fact, Severns testified that he attempted to comply with the Union's initial request during the pre-disciplinary hearing. He contacted the security force but was told that the investigation was ongoing. This review clearly indicates that the Employer neither relied on these documents when the matter was reviewed for disciplinary purposes, nor were these documents reasonably available at the time of the various requests.

The bifurcated investigation procedure, on its face, seems reasonable in terms of its dual purpose. Typically, collateral investigations and their findings cannot be used by an employer to establish the proof of

the matter because the results are not dispositive. They may be admissible as evidence, however, when introduced to establish credibility of testimony or consistency of evidence. Section 25.08 would have been violated if the documents in question had been released to the Employer at an earlier date and it failed to comply with the Union's specific request. In this instance, however, the Employer reasonably accommodated the Union's requests. The record, moreover, does not support the Union's reliance contention. The Union introduced these documents (Union Exhibits 1-6) during the course of the hearing. Once introduced, however, the Employer had every right to use the contents to refute the Union's assertions or to bolster its own allegations.

## AWARD

The grievance is sustained.

The evidence warrants the conclusion that just cause did not exist for the suspension of the Grievant. The suspension is to be expunged from the Grievant's work record, and the Grievant is to be awarded back pay for thirteen days as well as any lost seniority.

Dr. David M. Pincus
Arbitrator

May 24, 1990

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[1] OCSEA/AFSCME, Local 11, AFL-CIO and Ohio Department of Transportation, OCB Grievance No: G-87-0205, (Rivera, 1987).

[2] Alvey, Inc., 74 LA 834, 838 (Roberts, 1980).