ARBITRATION DECISION NO.:
534

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

EMPLOYER:
Department of Youth Services
Indian River School

DATE OF ARBITRATION:
December 6, 1993

DATE OF DECISION:
January 18, 1994

GRIEVANT:
Sheridan Crum

OCB GRIEVANCE NO.:
34-04-(92-12-08)-0088-01-09

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Dennis A. Falcione

FOR THE EMPLOYER:
Barry Braverman
Coleen Wise

KEY WORDS:
Suspension
Credibility
Failure to Follow Orders
Physical and Verbal
Abuse of Co-Worker

ARTICLES:
Article 24 - Discipline
§ 24.01 - Standard
§ 24.02 - Progressive Discipline
Article 25 - Grievance Procedure
§ 25.03 - Arbitration Procedures

FACTS:

The grievant, a Storekeeper I for DYS, was suspended for 15 days for his combined behavior in two separate incidents. Because the grievant and the state have differing versions of the events, the facts presented in this section will be those which the arbitrator found to be most credible.

In the first incident, the grievant went to the office of the Administrative Secretary to request vehicle #241. The Administrative Secretary received permission from the Security Officer to issue the vehicle, but this permission was quickly revoked when the Security Officer called back and said that he had mistakenly allowed the authorization, but that the grievant could use vehicle #242. The grievant became hostile and directly asked the Security Officer for vehicle #241. He was denied authorization. The head of Security came into the room and the grievant became hostile with him. The head of Security said, "you know I'm only following orders" and shook his finger at the grievant. The grievant continued to argue, the head of Security placed his hand on the grievant's shoulder "in order to calm him down," and the grievant then allegedly shoved the head of Security against the wall, where he slid down and lost his hearing aid. The two of them exchanged more verbal attacks. Apparently, no mention of a safety concern was made about vehicle #242.

In the second incident, the grievant attended a meeting with his supervisor and co-workers and after the supervisor asked for comments, the grievant turned to one of his co-workers and began to read in a "loud and nasty tone" various criticisms about the performance of that co-worker. At one point the grievant said that "a moron could do a better job" than his co-worker and at another point, the grievant referred to his supervisor as a "wimp." The co-worker left in tears.

The grievant was charged with four work rule violations: Rule 6b (willful disobedience of a direct order), Rule 19 (using insulting, malicious, threatening, or intimidating language toward another employee), Rule 23 (fighting with, striking or physically abusing another employee), and Rule 46 (failure of good behavior).

EMPLOYER'S POSITION:

The state argued that the grievant never claimed that vehicle #242 was unsafe. It further argued that the grievant's force against the head of Security was excessive, that the grievant refused to follow an order, and that the grievant verbally harassed both the head of Security and his co-worker.

UNION'S POSITION:

The Union contended that the grievant was only trying to avoid an unsafe vehicle and that this constitutes sufficient and legal grounds for refusing an order. In addition, the Union contended that the grievant used only the force necessary to protect himself when the head of Security placed his hand on the grievant. Finally, the union argued that during the second incident, the grievant's comments were requested by the supervisor and that he never called his co-worker a moron, but merely stated that a moron could do her job better than she could.

ARBITRATOR'S OPINION:

With regard to the first incident, the arbitrator found that the grievant violated work rule 23 by striking another employee. The grievant's reaction was inappropriate and excessive. If the grievant truly was concerned with safety, then he is correct in that he could have lawfully refused to use the unsafe truck. However, the grievant did not go to his supervisor with his concerns nor did he ever mention to anyone present at the time that his concern was safety. In any case, under the disciplinary grid there was just cause to suspend the grievant for 15 days, given the grievant's violent reaction.

The grievant did not violate rule 6b (violation of a direct order) because at no point was there a direct order. However, the grievant did violate rule 19 (insulting language) by calling his co-worker a "moron" and his supervisor a "wimp." Because the disciplinary grid provides for a suspension of one to three days for violation of this rule, there was just cause to impose the discipline.

Finally, the grievant was charged with violation of "failure of good behavior." The use of this charge, however, amounts to stacking because fighting and use of insulting language are failures of good behavior, and thus the grievant has been charged with the same actions twice. Where an action violates two rules, the more specific rule violation should be chosen. As such, there is no violation of the failure of good behavior.

This case is essentially one of credibility, but the grievant has not been credible. He claimed no responsibility for his actions. His reactions were hostile and inappropriate and his actions during the arbitration itself lacked the insight that his behavior is something which cannot be tolerated. The Arbitrator concluded that there was just cause to suspend the grievant for 15 days: 12 days for striking another

employee and 3 days for using abusive and insulting language towards another employee.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO
Union

and

Department of Youth Services
c/o Office of Collective Bargaining
Employer.

Grievance No.:
35-04-(12-08-92)-0088-01-09
Grievant:
S. Crum
Hearing Date:
December 6, 1993
Award Date:
January 18, 1994

Arbitrator:
R. Rivera

For the Employer:
Barry Braverman
Coleen Wise

For the Union:
Dennis A. Falcione

Present at the Hearing in addition to the Grievant and Advocates were Frank Thomas, Union President, Donald Feldkamp, Supervisor (witness), Phyllis Reynolds, Administrative Secretary (witness), Jeffrey Parsons, P. 0. (witness), Tom Jones, Sec. Supervisor (witness), Darlene DeHoff, Business Manager (witness), Terry Johnson, Storeroom Supervisor (witness), and Wanda Adams-Gbur, Storekeeper I (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and

the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Stipulations

1. The Grievant is a Storekeeper 1 at Indian River School.

2. The Grievant began with the State July 11, 1982.

3. The Grievant had no active prior discipline at the time of suspension.

4. The Grievant's immediate supervisor is Terry Johnson. Mr. Johnson's supervisor is Darlene DeHoff.

5. The Grievant's co-worker is Wanda Adams-Gbur.

6. The Grievant attended a staff meeting on October 27, 1992.

Issue

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

Joint Exhibits

1. Labor Agreement between AFSCME and the State of Ohio

2. Grievance packet

3. Pre-disciplinary packet

4. DYS directive B-19

5. Oral reprimand dated January 5, 1993 of T. Jones

6. Inter-office memo dated 10/7/92 of Mr. Baylock
7. Vehicle 53-242 Maintenance history 10/14/92 - 9/26/91

Relevant Contract Sections

ARTICLE 24 - DISCIPLINE

§ 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

§ 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be

commensurate with the offense.

Disciplinary action shall include:

A. one or more oral reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
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.

ARTICLE 25 - GRIEVANCE PROCEDURE

§ 25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Union and/or Employer may make requests for specific documents books, papers or witnesses reasonably available from the other party and relevant to the grievance under consideration. Such requests will not be unreasonably denied.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Such requests shall be made no later than three work days prior to the start of the arbitration hearing, except under unusual circumstances where the Union or the Employer has been unaware of the need for subpoena of such witnesses or documents, in which case the request shall be made as soon as practicable. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

Facts

The incidents giving rise to this Grievance occurred at the Indian River School for Boys run by the Ohio Department of Youth Services. The Grievant held the position of Storekeeper I and was an eleven year employee with no prior discipline at the time of the incidents. The Grievant's immediate supervisor was Terry Johnson, Storekeeping Supervisor and an exempt employee. Mr. Johnson's immediate superior was Darlene DeHoff, Fiscal Officer and Business Manager.

The first incident took place on October 23, 1992. The Grievant's duty was to pick up some supplies within the local area. He went to the office of Phyllis Reynolds, Administrative Secretary to place an order for a vehicle. Ms. Reynolds testified that the Grievant came into her office and asked for vehicle #241, a van. Mr. Reynolds then called Mr. Parsons, Security Officer I, on the phone, and she requested vehicle #241 for the Grievant. Mr. Parsons gave permission. Ms. Reynolds said that, as she was writing down #241, Mr. Parsons called back and said that he had made a mistake, that he was not allowed to authorize the use of #241 for local use and that the Grievant would have to use #242, a Jeep. The Grievant heard this while Ms. Reynolds was still on the phone and began protesting that he did not want #242. Ms. Reynolds said that the Grievant gave no reason why he did not want #242. Mr. Parsons said he was under orders. Rather than get in the middle of the discussion, Ms. Reynolds handed the phone to the Grievant to talk to Mr. Parsons himself. Mr. Parsons told the Grievant that he was not authorized to allow #241 to be used for local use and that he, the Grievant, would have to get permission from Tom Jones, head of Security. Ms. Reynolds said that the Grievant seemed quite upset. Ms. Reynolds then paged Mr. Jones who came to her office in about 3 minutes.

Mr. Jones came in the room, and Ms. Reynolds explained the problem. Mr. Jones took the vehicle authorization form and wrote #242 on it. The Grievant then said to Jones that he wanted #241 and that Mr. Frias had always allowed him to use #241. Jones said "you can only have #242; I am only following orders." The Grievant argued and became quite hostile. Jones said "you know I'm only following orders and shook his finger at the Grievant (according to Reynolds, the finger was a foot from the Grievant's nose). The Grievant continued arguing, and Mr. Jones laid his hand on the Grievant's shoulder. Ms. Reynolds at this moment, turned to use the phone and out of the corner of her eye she saw Mr. Jones fly backward and hit against the opposite wall. He then slid down the wall. More words were then exchanged between the two men. The Grievant threatened Mr. Jones and said he would handle it "outside." Jones mentioned that he "would do what he had to do," a write-up, and regardless, the Grievant still had to use #242. The Grievant said "We'll see about that!"; "I'll take care of you." Mr. Jones said "are you threatening me?" The Grievant said "No, but you are threatening me." The Grievant then left the office. Ms. Reynolds said that absolutely no mention was made of a safety problem with #242.

Mr. Jones testified Mr. Jones was Chief of Security and had been with DYS for 21 years. He indicated that he had been ordered by Mr. Frias that #242 was to be used for local travel only. He said that when he put down #242 on the vehicle authorization form, the Grievant said "that's not the vehicle I asked for." Mr. Jones said that he replied "but that's the vehicle you'll have to take." Jones said that then the Grievant started to become "overly boisterous" and that he (Mr. Jones) laid a hand on the Grievant's shoulder in an effort to calm the Grievant down. Mr. Jones said that the Grievant shoved him hard with both hands, and he hit the wall, slid down it, and lost his hearing aid. He said that he was somewhat dazed and went to sit in the chair. He said the Grievant continued talking in a rambling manner and said he was going to file a grievance. Jones said that he told the Grievant to "expect a write up." According to Jones, the Grievant said "come outside and I'll kick your butt." The Security Chief characterized the Grievant as hostile and out of control. He said he remembered no mention of any safety issue. Mr. Jones said he received a verbal reprimand for putting his hand on the Grievant's shoulder.

The Grievant's story is significantly different. He claimed that he did not want to use the vehicle in question (#242) because it was unsafe. He claimed that he told Reynolds that, he told Parsons that, and that he also told Jones about the unsafe situation. He claims that Jones came through the door shaking his finger at him and that the shaken finger brushed his nose. He claimed that Jones had grabbed his shoulder in a "claw like manner." The Grievant said that he merely made a movement to remove Jones's hand from his shoulder and that Jones stumbled and fell and that he (the Grievant) did not shove him.

The second incident occurred on October 27, 1992. The Grievant's supervisor, Terry Johnson called a

meeting with the Grievant, Wanda Adams-Gbur, the other storekeeper, and Darlene DeHoff, the Fiscal Officer. After some preliminary matters were discussed, Mr. Johnson asked for comments. The Grievant pulled out a notebook, turned toward Ms. Adams-Gbur, and began to read to her in a very loud voice and nasty tone. He started each statement with the phrase "I need you to ... do" He criticized her in numerous ways. Ms. Adams-Gbur protested that he was not her supervisor. He never the less continued reading criticisms, his voice getting louder and louder. Mr. Johnson told him that he should stop, that this was not the time nor the place for such statements. The Grievant continued and said that "a moron" could do a better job than Ms. Adams-Gbur. He referred to Mr. Johnson as a "wimp." Ms. Adams-Gbur started crying and left, and the Grievant kept on reading the criticisms until both Mr. Johnson and Ms. DeHoff also left.

In her statement written 2 days after the incident, Ms. Adams-Gbur stated that she was "fearful for her life and [the lives of] other staff members as well. At the Arbitration Hearing, the Arbitrator asked her if this statement was a correct characterization of her feeling then, and she said "yes." Both Ms. DeHoff and Mr. Johnson testified. They both admitted that they gave the Grievant no direct order to stop. Mr. Johnson said that he told the Grievant that the meeting was not the time or place to make such statements. Ms. DeHoff said that she told the Grievant that criticism was not his job as it was the supervisors. According to both parties, the Grievant ignored these remarks and continued the criticisms. Mr. Johnson characterized the Grievant as "screaming" at Ms. Adams-Gbur and calling her a moron and him a wimp. Ms. DeHoff said that the Grievant was loud and very angry; she said he called Ms. Adams-Gbur a moron and Mr. Johnson, a wimp.

The Grievant said that he did indeed read criticisms directly to Ms. Adams-Gbur because he had these criticism for some time, and no one had resolved them. He claimed he did not call her a moron, he only said that "a moron could do her job better that she could." He said that the whole meeting was set up as a trap for him. He said his list was merely "requests" for Ms. Adams-Gbur. He said he did characterize the behavior of Mr. Johnson as that of a “wimp.”

Numerous persons testified that the Grievant and Ms. Adams-Gbur did not speak to each other. When Mr. Johnson moved into the position of Storekeeper Supervisor, a Storekeeper I position opened up. Both the Grievant and Ms. Adams-Gbur applied. Mr. Frias awarded the job to the Grievant. Ms. Adams-Gbur grieved and won. She was also made a Storekeeper I. Since that time, the Grievant would not speak to Ms. Adams-Gbur. They only spoke when their work absolutely required it.

The Arbitrator notes that the Grievant submitted numerous pages containing his version of all these events and also containing numerous complaints about various persons. He stated at the hearing that the whole problem was a conspiracy lead by Mr. Frias against him. He said that everything in his writing was 100% true and that he stood behind every word. The essence of his defense was that he was only trying to avoid an unsafe vehicle and that when Mr. Jones attacked him he used only the force necessary for self defense. With regard to the other situation, he had a perfect right to place his "requests" before Ms. Adams-Gbur and that she should not have taken them amiss. He said he did not call her a "moron" only said that a "moron" could do her job better. He said he was never directly ordered to stop saying anything.

The Grievant was charged with violation of three work rules. 6b: "willful disobedience of a direct order of a supervisor;" 19: "using insulting, malicious, threatening, or intimidating language toward another employee;" 23: "fighting with, striking or physically abusing another employee ... while on duty or on State property;" and Rule 46: "Violation of O.R.C. 124.34 -- 'failure of good behavior...'" He was suspended for 15 days.

Discussion

The Arbitrator finds that in the incident with Mr. Jones that the Grievant clearly violated work rule 23 in that he struck another employee while on duty. Ms. Reynolds who is a neutral observer said that Mr. Jones flew back against a wall and slid down the wall. Even though Mr. Jones placed his hand on the Grievant first, the Grievant's reaction was inappropriate and excessive. Moreover, the Arbitrator believes Mr. Jones that his hand, although inappropriate, was meant to calm the Grievant. Testimony of all parties indicate that the Grievant was becoming angry over a situation that could have been handled in a more appropriate way. If he truly was concerned with safety, the Grievant could have lawfully refused the order to use that truck.

One place where an employee may refuse a direct order is where he legitimately has a safety concern. Once he received the assignment of vehicle #242, the Grievant could have gone to his supervisor with his concerns. Moreover, the Arbitrator does not believe the concern was safety. According to Mr. Parsons and Ms. Reynolds who are both neutral observers, the Grievant never mentioned safety matters during the incident. Under the Disciplinary Grid, violation of Rule 23 can result in a 15 day suspension or removal. Mr. Jones's behavior by laying his hand on the Grievant's shoulder was inappropriate; he received only a verbal reprimand. This disparity in treatment will be dealt with in the mitigation section.

With regard to the meeting situation, the Grievant was charged with a violation of Workrule 6b -- willful disobedience of a direct order of a supervisor. In fact, both supervisory personnel admitted they gave no direct orders, and this lack of order was confirmed by Ms. Adams-Gbur. The lack of appropriate supervisory behavior in this situation is not before the Arbitrator. Therefore, the Arbitrator finds that the Grievant did not violate Rule 6b.

The Grievant was also charged with violating Workrule 19 by "using insulting, malicious, threatening, or intimidating language toward another employee..." The Grievant essentially admitted this behavior. He called Ms. Adams-Gbur a "moron," and Mr. Johnson, his supervisor, a "wimp." Moreover, he did this in public. Both Ms. DeHoff and Mr. Johnson characterized the tone of the Grievant's voice and message to his fellow employee as loud, screaming, nasty, and hostile. Moreover, Ms. Adams-Gbur was intimidated and frightened by his manner; neither reaction was unreasonable. The Arbitrator finds that the Grievant did violate Workrule 19. The Disciplinary Grid provides that for a first violation of Workrule 19 the Grievant could receive either a written reprimand or a suspension of one to three days.

The Grievant was also charged with violation of OR 124.34: "failure of good behavior." The use of this charge in this case amounts to stacking and creates being charged with the same actions twice. Fighting and use of insulting language are failures of good behavior. Where an action violates two rules, the most specific rule violation should be chosen. The Arbitrator finds that the Grievant did not violate OR 124.34.

The Arbitrator has been somewhat cursory in her enunciation of the violations. This case was essentially a matter of the credibility of the Grievant versus the charging parties. The Arbitrator did not find the Grievant credible. He claimed no responsibility for his own actions; everyone was to blame except him. His whole approach to the vehicle problem was designed to create a confrontation. His reactions were hostile and inappropriate. His actions in the meeting situation were totally without insight. He said mean, nasty things about Ms. Adams-Gbur in front of other people and seemed to think she was wrong for being insulted.

The Union has argued that the discipline given Mr. Jones and the Grievant were so disparate that the Grievant's discipline should be removed or dropped. The Arbitrator agrees that a verbal reprimand for Mr. Jones is a light penalty. Therefore, the Arbitrator finds that 15 days for the violation of Rule 23 is reduced to 12 days. However, the Grievant also violated Rule 19 that is subject to a possible 1-3 day suspension. The Arbitrator concludes that the Employer had just cause to suspend the Grievant for 15 days: 12 days for striking another employee and 3 days for using abusive and insulting language towards another employee.

Based on his testimony before the Arbitrator, the Grievant would be well advised to seek counseling so that he can cope with the stresses of workday life without inappropriate behavior. His whole behavior at the Arbitration Hearing indicated that he still lacked insight that his behavior cannot be long tolerated at any worksite. This Arbitrator seldom makes such direct remarks; however, in this case, the Arbitrator believes that to not speak would violate her humane duty towards another human being.

Award

Grievance is denied.

RHONDA R. RIVERA, Arbitrator
Date: January 18, 1994