#716

OPINION AND AWARD
The Luwanna Perry Matter
Case No. 19-00-990301-0081-01-14

In The Matter of the Arbitration

-between-

State of Ohio,
Department of Insurance

-and-

Ohio Civil Services Employees
Association/AFSCME, Local 11

@ 4/14/00
REVIEWED BY

APR 14 2000

GRIEVANCE COORDINATOR

ARBITRATOR: John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE UNION: Robert W. Steele, Sr.
Lori Collins
Staff Representatives
OCSEA/AFSCME, Local 11
1680 Watermark Drive
Columbus, OH 43215

Also present: Linda Greene
Prenzetta Layne
Linda Gilliam
Pat Henderson
Members

Mike Davis
Melissa Cote
Stewards

Luwanna Perry
Grievant

FOR THE DEPARTMENT
OF INSURANCE: Jillian Froment
Steve Little
Staff Representatives
Office of Collective Bargaining
State of Ohio
106 North High Street, 7th Floor
Columbus, Ohio 43215

Also present: Teresa Reedus
Cathryn Taylor
Nancy Bucy
Employees, Ohio Department of Insurance

Jon Creal
Human Resource Director, O.D.I.

Tod Linton
Labor Relations Officer, O.D.I.

Kay Thompson
Supervisor, O.D.I.

NATURE OF THE CASE:

This is a challenge by the Union for just cause to the disciplining of the Grievant in the form of a 10-day suspension issued by Memorandum for "Workplace Violence and Insubordination." The Order of Suspension carried the following specification concerning the workplace violence charge.

> Per the investigation of the alleged incident between you and Teresa Reedus on January 13, 1999, it was proven as fact that your pattern of inappropriate behavior included but was not limited to intimidation, threats, and physical confrontation, all of which constitute acts of workplace violence. This is a violation of Work Rule No. 26.

The Order of Suspension also contained a specification of the charge of insubordination. It stated as follows:

> Additionally, you were placed on administrative leave per completion of the investigation of this incident. During this investigation, employees of the Managed Care Division, and employees in this incident were interviewed. In an effort to complete this investigation, two attempts were made to interview you via a telephone conference call, with your union steward present, while you were at home on administrative leave. Both attempts failed as you did not answer the telephone, nor return the calls, even though you were required to be available during the workday while on administrative leave. You were given an order to be available and you were not. This is a violation of Work Rule No. 43.

After two complete days of hearings, the matter, stipulated to be arbitrable, was submitted for decision.

THE SKEIN OF EVENTS

All of the facts in this case occurred in 1999, and involved employees of the Managed Care Division of the Ohio Department of Insurance supervised by Kay Thompson. A summary chronology of

events by key dates with agreed facts is necessary to place the conflict between the parties into context.

January 13: The Grievant complained to the Human Resources Director, Jon Creal, of being bumped and pushed by another employee at the workplace. The Grievant further noted that this event had been witnessed by a third employee. Creal told the Grievant that he would treat the charges seriously and investigate them right away. The Grievant memorialized her complaint by email on the next day with copy to the Union, Creal, and Kay Thompson, her supervisor. Creal did act promptly and interviewed the employee accused of pushing the Grievant as well as the witness on January 15. Creal, however, did not promptly issue a report based upon his investigation, and this led the Grievant to dispatch another email on January 20 to the Union, Creal, and Thompson complaining about the absence of any response to her complaint made to Creal on January 13.

January 21: Creal received two written complaints by two employees who were not involved in the January 13 incident. These complaints were about statements made by the Grievant while in her cubicle. The Grievant was reported to have said that her daughter was very angry and mentioned "waiting for someone outside" and "how would she feel if her mother was pushed" and "my children don't play." The other report was of the Grievant's repeating a statement made by one of her daughters: "I can come over now with a bat that would kill her."

January 22: While the Grievant was leaving the workplace, Creal gave the Grievant a two-paragraph letter signed by the Director of the Department of Insurance placing her on administrative leave with pay. The letter stated that the leave would be "pending an investigation by the Department of incidents that you have alleged to have occurred on January 13, 1999." The letter dated in bold print that the leave was "not a disciplinary action" and that the letter would not be placed in the Grievant's personnel file. Finally, the letter noted that employees placed on administrative leave must be available during their normal work week. It then stated "you are required to call in to your supervisor or Renee Doll Monday through Friday by 7:30 a.m."

Creal and the Grievant testified about their conversation as Creal gave the letter-notice of administrative leave with pay to the Grievant. Both agreed that Creal told the Grievant: (1) that she need not stay by the telephone; (2) that she should not take a vacation to Disney World; (3) that the matter you brought to our attention would be investigated.

January 25-February 1: During this period, the Labor Relations Officer for the Department of Insurance, Tod Linton, conducted an investigation that included an interview with nine employees in the Managed Care Department as well as the supervisor, Kay Thompson. Linton had been asked to conduct this investigation by Creal on January 22. Creal requested the investigation because of the reports of threats by the Grievant that had been received on

January 21. Creal asked that the investigation include the Grievant's complaint on January 13 "on up."

The investigation report was reduced to writing and included the reports of the nine interviews as well as two efforts to interview the Grievant by way of telephone conference calls on January 29 and February 1. The entire investigation report, including the interviews as well as a summary of facts was submitted by Linton to Creal on February 1.

February 3: A notice of a pre-disciplinary conference was delivered by courier to the Grievant. The notice alleged that the Grievant had violated the Workplace Rules 43 and 26 that prohibit insubordination and workplace violence. The specification with respect to insubordination was as follows:

> While on administrative leave, two attempts were made to contact you by Tod Linton from Human Resources in order to conduct an investigatory interview, however, you failed to answer the phone or return calls although messages were left on your answering machine. This is in violation of the instructions given to you by your supervisor and the letter placing you on administrative leave.

The specification with regard to workplace violence stated:

> Since Thursday, January 14, 1999, numerous coworkers have complained about intimidation and verbal and physical threats in the workplace. The witnesses are as follows: Nancy Bucy, Katy Taylor (the two employees who filed written reports with Creal on January 21), and Teresa Reedus (the employee whom the Grievant alleged had bumped and pushed her on January 13).

February 4: The Grievant received a letter from Creal constituting "an account of the investigation that took place as a result of your complaint to me on January 13, 1999." The letter

reported the details of the Grievant's complaint on January 13 and the details of Creal's interview with Reedus (the employee alleged to have pushed the Grievant on January 13), as well as the supposed witness to this incident. The letter concluded that management finds . . . "there is no foundation to issue discipline."

February 10: The Grievant received a letter hand delivered on this date informing her that she is to return to work on February 11 at her regularly scheduled work hours. The letter noted, "you will no longer be on administrative leave after today, February 10, 1999." Creal testified that the Grievant seemed calm at the pre-disciplinary hearing on February 10, and, therefore, he decided to bring the Grievant back to work.

February 26: The Order of Suspension was issued to the Grievant following the pre-disciplinary hearing on February 10 which was continued to February 16, and the issuance of the report by the hearing officer.

ISSUE:

Did the Grievant, Luwanna Perry, receive a 10-day suspension for just cause? If not, what should the remedy be?

RELEVANT WORK RULES:[1/]

Work Rule 26: "An employee shall not commit any act which constitutes workplace violence." The penalty for the first offense can be a "written reprimand/removal." Elsewhere in the Handbook there is a definition of "violence" and definition of "workplace violence." "Violence" includes "conduct against persons or property that is sufficiently severe, offensive, or intimidating so as to alter the conditions of State employment, to create a hostile, abusive, or intimidating work environment for one or more employees." Workplace violence includes: "all threats or acts of violence occurring on State property, regardless of the relationship."

Work Rule 43: "An employee shall not be guilty of insubordination (failure to carry out a direct order of a supervisor). Again, the sanction for the first offense includes "written reprimand/removal."

OPINION:

A) The Workplace Violence Charge

The core of the case on this charge centers on the Union's contention that the disciplinary process used by the Employer in

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[1/] The Union challenged whether the Work Rules contained in the Employee's Handbook for the Department of Insurance had been promulgated consistent with the contractual requirements of Section 44.03 of the contract. Because of the disposition of this case on the merits, it is unnecessary to decide this procedural question, and the analysis in this case assumes that the Work Rules were properly promulgated.

this case was procedurally unfair. The Union argued that the Employer's case should rise or fall on the incident that occurred between the Grievant and co-employee, Teresa Reedus, on January 13--the subject of the Grievant's complaint to the Human Resources Director. The only date mentioned in the Order of Suspension to the Grievant was January 13, and the only incident mentioned was "the alleged incident between you and Teresa Reedus" on that date.

The Union objected to the admission of any evidence of incidents occurring after January 13, particularly the complaints by two employees, Bucy and Taylor, on January 21 of threats uttered by the Grievant in her cubicle, and overheard by Bucy and Taylor. Finally, the Union requested a bench decision for the Grievant on the charge of workplace violence based upon the February 4 report by the Human Resources Director, Creal. The report found that there was "no foundation to issue discipline" for the January 13 event between Reedus and the Grievant.

The State countered that the Order of Suspension of February 26 was not limited to the incident of January 13. The "particularity problem" in the Order as advanced by the Union was not present due to the first three words in this sentence found in the Order:

> Per the investigation of the alleged incident between you and Teresa Reedus on January 13, 1999, it was proven as fact that your pattern of inappropriate behavior included but was not limited to intimidation, threats, and physical confrontation, all of which constitute acts of workplace violence.

The first three words of this sentence indicate that the suspension is based upon all that was found in the investigation, and not just merely the incident between the Grievant and Reedus.

Lastly, if there were a particularity problem in the Order of Suspension, it was cured by the Union's being provided with a copy of the investigation report dated February 1, 1999, and the Union's participation in the pre-disciplinary hearing on February 10 and 16, as well as the Step 3 hearing in April.

B) The Procedural Fairness Problem

Procedural fairness in the disciplinary process is an integral part of the just cause standard that is applicable to the discipline in this case. It arises not from the application of norms lifted directly from the legal world, but from the arbitrator's duty to see that the Employer's disciplinary process exhibits fairness to the Grievant. One element of procedural fairness is the employee's right to notice of the charges upon which the discipline is based. (Brand, Discipline and Discharge in Arbitration at pp. 37-45 B.N.A. 1998). Based upon the following analysis, the State failed to conform to this norm in both the disciplinary investigation and in the disciplinary process following the investigation.

1) The disciplinary investigation

The disciplinary investigation was conducted by the Labor Relations Officer, Tod Linton, beginning on January 25 and completed on February 1. The Human Resources Director, Jon Creal, ordered the investigation because of the written reports to Creal of threats by the Grievant uttered at the workplace on January 21. Not only was the Grievant not told that she was a possible target of the investigation until after it was completed, the Grievant was deliberately lulled into believing that the State was taking the time during her administrative leave to investigate the complaint that the Grievant had lodged against Reedus. The problem in this case is not that the disciplinary investigation was inadequate or shallow; nor is the problem the absence of an opportunity to the Grievant to provide her side of the story. The problem in this case is that the Grievant was not informed that she was the target of the investigation; rather, the Grievant was led to believe that the investigation was centering upon her charges against Reedus.

Normally employers suspend an individual "pending an investigation" particularly where an allegation carries the potential of discharge. The State had in its possession on January 21 written allegations of threats at the workplace by the Grievant--allegations which, if proven, could lead to discharge. Instead of a suspension, the State chose to place the Grievant on administrative leave with pay, and the notice makes no reference to allegations of threats by the Grievant. Rather, the notice states

that the leave is "pending an investigation by the Department of incidents that you have alleged to have occurred on January 13, 1999" (emphasis added).

Furthermore, the administrative leave notice was delivered by the Human Resources Director to the Grievant in a manner that gave no notice to the Grievant that she could possibly be the target of the investigation. The Director said that there would be an investigation of the complaint that she had filed to the Director, and the Director lightly suggested that the Grievant not take a vacation in Disney World during her administrative leave. Finally, the Grievant testified without denial that the Director told her that the purpose of the leave was for her protection. She asked the Director why place her on leave since she filed the charges with the Director. The answer was concern for her protection and the need to investigate the matter that the Grievant had brought to the Director.

The record shows that neither the Grievant nor the Union were aware until February 1 that the Grievant was possibly facing discipline from matters other than the January 13 incident. A Union Steward, Davis, and the Labor Relations Officer, Linton, had conversations on January 29 and February 1 about arrangements to conduct a telephone interview with the Grievant. While Linton hinted at incidents other than January 13 during their conversations on January 29, Linton did not tell the steward that there were allegations against the Grievant with possible

discipline until Monday, February 1. It was at that point that the steward refused to participate in any telephone conference call interview to the Grievant. While the Grievant may probably have received notice from the Union of potential discipline on February 1, the record does not show definite communication to the Grievant of potential discipline until she received by courier a notice of a disciplinary hearing on February 3rd.

The State claims that there was a "nexus" between the Grievant's complaint about the incident on January 13 and the January 21 reports of threats by the Grievant. This may be so, but the State took actions to lull the Grievant and the Union into ignorance about the potentiality of discipline of the Grievant for incidents after January 13. The State was prompted to conduct a thorough disciplinary investigation from January 25 to February 1 by reports of threats by the Grievant at the workplace received by the State on January 21. The disciplinary investigation was conducted and completed before the Grievant or the Union knew that the Grievant was a target of the investigation. The State failed to exhibit fairness to the Grievant during the disciplinary investigation.

All of this is compounded by the Order of Suspension dated February 26. As noted above, the Order does specifically include a date and that is January 13, and the Order does refer to an incident--the one between the Grievant and Reedus on January 13. The fairness of this order must be judged as it is coupled with the

preceding reason given to the Grievant for her administrative leave of absence on January 22. On January 22, the State focused the Grievant's attention on her complaint against Reedus for the incident on January 13 as the basis for the administrative leave.

2) Formulating a Remedy

While the State has been found to have failed to observe procedural fairness consistent with the "just cause" standard, the difficulty is in formulating a remedy (Hill & Sinicropi, Remedies in Arbitration at p. 245-246 (B.N.A. 2nd ed. 1991). As is typical in these cases, the difficulty is more pronounced because there is independent evidence showing guilt by the Grievant. The witnesses for the State on the allegation of threats by the Grievant were credible. Standing alone, their testimony shows that the Grievant did cause an intimidating atmosphere at the workplace, but their testimony does not stand alone. The elements in this case support the nullification of the discipline of the Grievant at least on the charge of workplace violence.

Those elements include:

a) the State's inexcusable action in the lulling of the Grievant and the Union into ignorance that the Grievant was the target of a disciplinary investigation. This continued during the period of the investigation, and it was this investigation that caused the Employer to suspend the Grievant.

b) the effect on the Grievant and the Union as a result of the State's administrative stratagem that prejudiced the Grievant and

the Union. The Union and the Grievant had the right to be aware of the fact that the Grievant was a potential target of the disciplinary investigation. They also had the right to prepare their defense after the issuance of the discipline based upon the State's statement of the reasons for the discipline.

c) the formulation of a remedy in these cases usually occurs in the context of the discharge of the Grievant. In this case the Grievant was suspended for ten days, and the Employer found the Grievant to be fit to return to work on February 10 during the very period that the State was processing the charges of workplace violence against the Grievant. The pre-disciplinary hearing on this charge was not completed until February 16 and the order of the 10-day suspension was not issued until February 26. Consequently, nullification of the 10-day suspension on the workplace violence charge does not subject the Employer or the employees to harm or tension. This conclusion is based upon the State's action in returning the Grievant to the workplace on February 10.

C) The Insubordination Charge

The core of the case on this charge centers on the requirement of the Work Rule concerning insubordination that there be "a direct order of a supervisor" and the failure of the Grievant to carry out such direct order. The State's position is that the Grievant blatantly disregarded both the written instruction of the interim director contained in the notice of administrative leave with pay,

and the direct order of her immediate supervisor. The factual basis for the State's position is the Grievant's failure to be present at her home to receive two telephone calls from Tod Linton made during the course of the disciplinary investigation. The Union's position is that there was no direct order by any supervisor to the Grievant to remain at her home and receive a telephone call from Tod Linton.

The letter from the Director of the Department of Insurance to the Grievant dated January 22 and placing the Grievant on administrative leave does not contain an order to the Grievant to be at her phone to receive any particular calls from the department. The letter does state that the Grievant as well as all employees placed on administrative leave "must be available to work during their normal work hours." Any implication that this language required the Grievant to sit by her telephone is negated by the testimony of the Human Resources Director. He gave the letter placing the Grievant on administrative leave to the Grievant, and while doing so, told her that she did not need to sit by the phone.

By contrast, the administrative leave letter does contain this sentence: "You are required to call in to your supervisor or Renee Doll Monday through Friday by 7:30 a.m." The Grievant did treat this sentence as a direct order, and the evidence showed that she did make this telephone call on each weekday during her administrative leave.

The State's other assertion of a direct order to the Grievant to stay by her phone to receive a telephone call is also not supported in the record in this case. The Grievant's supervisor, Kay Thompson, was sitting at Renee Doll's desk at 7:27 a.m. on February 1 and received the Grievant's telephone call required by the administrative leave notice. Thompson told the Grievant that she "some information for her." She told the Grievant that a Union representative would be calling her at 8:45 a.m., and that she should be near her phone to take the call. Thereafter, there would be a telephone conference call with someone from Human Resources at 9:00 a.m., and that the Grievant should be available to take this call.

There are two problems with the State's case that bases insubordination on the Grievant's failure to take the calls referenced by Kay Thompson, the Grievant's supervisor. The first problem is that Kay Thompson testified that she did not consider her statements to the Grievant during this telephone conversation to be a "direct order." Thompson was asked whether her statements to the Grievant were a direct order to be at her telephone at 8:45 and 9:00 a.m. on February 1. Her answer was: "No, this was not punitive in any way."

Even if Thompson's statements to the Grievant were to be considered a direct order, the facts show that no Union representative called the Grievant at 8:45 a.m. and that no conference call with someone from Human Resources was made to the

Grievant at 9:00 a.m. The record does show that Tod Linton did telephone the Grievant at 9:39 a.m. on February 1 and left a message to the Grievant on voice mail since the Grievant did not received the telephone call.

These facts do not show failure to carry out a direct order, even assuming Thompson's statements to the Grievant constituted a direct order to be at her telephone at 8:45 and 9:00 a.m. on February 1. Alternatively, the Grievant was not under any duty based upon any order of a supervisor to remain at her telephone during the working hours while on administrative leave. Indeed, the Human Resources Director told her that she need not stay by the telephone during the working hours.

AWARD:

The suspension of the Grievant for ten days was without just cause. The record of this suspension should be expunged from the Grievant's personnel file, and the Grievant should be restored lost wages and any other contractual benefits during the ten days of her suspension.

Date: April 10, 2000

John J. Murphy
Arbitrator