

PETER GUIDRY
Arbitrator
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IN ARBITRATION PROCEEDINGS UNDER AUSPICES
OF THE AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between Employee X and O.H. Close School Department of Youth Authority	OPINION AND DECISION Hearing Before: PETER GUIDRY Outside Neutral Arbitrator at Stockton, CA Date: October 15, 1987 File: AAA Case No. 74-45 0014~87
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APPEARANCES

For Employee X: For O.H. Close School:

Employee X, Rod Gooch,

Shawn Cloughesy, CCPOA Counsel Ward Rights Supervisor

The issue involved was submitted for arbitration under terms of the "Ward Grievance Procedure--Section 7115 et seq" and under which Peter Guidry was selected as the outside neutral to review the sufficiency of an investigation that was conducted by O.H. Close School Administration and to determine whether the evidence developed through the investigation supports the finding.

The parties, Employee X and O.H. Close School, hereinafter referred to as "Employee X" and "Superintendent" or "Administration," were accorded ample opportunity for the submission of evidence in the form of oral testimony and written exhibits, and for argument. No witnesses were called. Employee X was accorded full opportunity to challenge the sufficiency of the investigation and the logic of the finding as provided for in Section 7115 of the Ward Grievance Procedure.

ISSUE TO BE RESOLVED

Whether the investigation, as conducted by the administration, was sufficient and whether there is evidence developed during the investigation to support the finding?

PERTINENT POLICY, REGULATIONS, OR PROVISIONS:

Public Safety Officers Procedural Bill of Rights Act

3303. Investigations and interrogations; conduct; conditions; representation; reassignment

When any public safety officer is under investigation and subjected to interrogation by his commanding officer, or any other member of the employing public safety department, which could lead to punitive action, such interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

(b) The public safety officer under investigation shall be informed prior to such interrogation of the rank, name and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present dur-

ing the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

WARD GRIEVANCE PROCEDURE

Section 7115--Outside Neutral

1. Allow appellant and/or his representative full opportunity to challenge the sufficiency of the investigation and/or the logic of the Superintendent's finding.

2. Review the sufficiency of the Superintendent's investigation and determine whether there is evidence developed as part of the investigation that supports the finding.

a. The hearing is a review of the procedures and reasoning employed by the Superintendent in arriving at his conclusion.

b. The review is not to be a reinvestigation of the case or hearing afresh of all the witnesses.

....

d. If the neutral finds the Superintendent's investigation was not sufficient, or that there is no evidence to support his conclusions, the neutral is to remand the matter to the Superintendent for development of

additional evidence to justify the conclusion. A continuance may be set for further review if the neutral determines it is needed.

3. Prepare a written response in accordance with Section 7060. Omit the name of the ward and employee involved; refer to the ward as "grievant" and the employee as "X". The names of witnesses may also be omitted.

BACKGROUND

On April 28, 1987, Ward X filed a grievance alleging that Employee X acted in an unprofessional manner, used profanity and displayed inappropriate behavior to Wards. (Grievance dated 428-87.) In an attached letter, the grieving Ward X explained in greater detail the substance of the allegations. According to Ward X, on April 28, 1987, Employee X entered the gymnasium and immediately went up to another Ward, grabbed the back of the Ward's hair and said, "You are going to cut this shit off." Ward X admitted saying to Employee X, "Why are you sweating him? He hasn't done anything." At that point Ward X stated that Employee X said, "If you want to get into my business, I'll lock your fucking ass up." Ward X claims he then stopped the comments,

fearing lock up. Ward X also claimed that the Ward that Employee X approached was not very good at "speaking or comprehending" English. (Letter dated 4/28/87 attached to grievance.)

In a memo dated May 7, 1987, the Superintendent informed Ward X that the grievance had been taken out of the system for investigation; that an investigator would contact him; and upon completion of the investigation, the grievance would be discussed with Ward X.

The Superintendent informed Employee X by memo dated 5-7-87, that a Ward fast track grievance had been filed against him; that should the allegations be proved true, the result could be disciplinary action. The memo identified the grieving Ward, outlined the allegations: illegal and excessive use of mace, unprofessional conduct, use of profanity, and inappropriate behavior

toward Wards. The investigator was identified and Employee X was notified that the investigator would contact him.

On May 7, 1987 the investigator was informed of the allegations contained in the grievance, directed to address all of the allegations in the investigation, and to report the findings to the Superintendent by May 22, 1987. (Memorandum dated 5-7-87 signed by Superintendent.)

In a memo dated 5-7-87, labeled "corrected copy, Employee X was again informed of the grievance and the allegations. The allegation referring to illegal and excessive use of Mace included in the earlier memo, was not among the allegations in this memo.

Employee X responded by memo dated 6-25-87, in which he requested that the matter be dropped

because time limits had been exceeded. In response, the Acting Superintendent concluded that although the time limits for conducting an investigation had been exceeded, no substantial prejudice occurred due to the lateness. Employee X was instructed to cooperate with the investigator and advised that he could appeal to outside arbitration upon conclusion of the investigation. (Memorandum dated 6-29-87.)

An investigation was conducted and a report was submitted to the Superintendent on July 17, 1987. The investigator interviewed three witnesses in addition to Employee X, Ward X, and the Ward who was the focus of the alleged confrontation. The investigation report had thereon attached a summary of each taped interview (although the investigator referred to the summaries as

"statements" of those interviewed). The investigator provided an "Evaluation" of the Incident" as follows:

1. Evidence exists that substantiates Employee's use of profanity.
2. Employee X's use of profanity can be construed as unprofessional conduct.
3. It is probable that Employee X did, in fact, cut Ward's hair lock. This is not only unprofessional but a serious abuse of authority.

By memo dated 8-10-87, the grieving Ward was informed that the investigation supported his allegations against Employee X and that the matter would be corrected. (Memorandum, Superintendent, 8-10-87.)

Evidence produced at the hearing does not reflect if, when, and by what means Employee X was informed of the investigator's findings or of the Superintendent's. However, Employee X, in a memo dated 8-13-87 and addressed to the Superintendent, referred to having received a copy of the grievance response. In that regard, Employee X expressed his feeling that the matter was not resolved. Employee X advanced the following reasons for his conclusion: 1) the grievance was filed on 4-28-87 with a finding of 6-69-87. This far exceeds the time limits set. 2) The investigation is incomplete. All available parties to the incident were not questioned and the investigation does not support the allegations. Employee X requested that 1) the grievance be dropped, and 2) reinvestigation of the facts, including statements of all parties present. (Memorandum dated 8-13-87, Employee X to Superintendent.)

The parties agreed to submit the issue to independent review. (Letter to AAA dated 9-2-87.)

DISCUSSION AND OPINION

The authority of the undersigned arbitrator is limited in the instant dispute to a determination as to whether the investigation by the Administration was sufficient, and, whether the evidence which was developed during the investigation supports the finding(s).

Employee X contends that the investigation was incomplete because (1) all available parties to the

incident were not questioned, and (2) because the evidence discovered during the investigation does not support the allegations or the finding. However, Employee X did not produce evidence to identify what other

person(s) the Administration failed to question. The evidence suggests that Employee X's reference to "parties to the incident" may be interpreted to mean persons that witnessed the incident. Employee X advanced one other contention that the grievance should be dropped because time limits were exceeded. The undersigned arbitrator assigned no weight to this contention because the parties in the instant case stipulated that the matter was properly before the arbitrator.

The Administration contends that the investigation was complete and that the evidence produced through the investigation does support the finding. However, the Administration offered no rebuttal to Employee X's contention that all available witnesses to the incident were not questioned. The responsibility to defend the sufficiency of an investigation rests specifically on the Administration. Section 7115 of the Ward Grievance Procedure, in relevant part, states that, "The Superintendent has the responsibility to defend the sufficiency of the investigation.... (Section 7115 at 0031M-23, lines 13, 14.)

In the immediate foregoing it is evident that substantial shortcomings exist in the position of each party to the instant dispute. Thus, the arbitrator must weigh the actions of the parties during the course of the dispute, to arrive at a determination as to the sufficiency of the investigation and the resultant findings.

My interpretation of the regulations pertaining to investigations is that the Administration has the burden of adhering to certain procedural requirements; and the burden of conducting an investigation that is designed to discover the pertinent facts directly related to the allegations that prompted such an investigation. Subsequently, the evidence produced through the investigation must be evaluated to determine if the evidence is corroborative of the allegations, or not.

The evidence suggests that the Administration complied with the procedural requirements of both Section 7115--Ward Grievance Procedure, et seq., and Section 3303--Public Safety Officers Procedural Bill of Rights Act. I find no deficiencies in the procedures that the Administration employed. Thus, the resolution of this matter turns entirely upon the investigation.

The investigation was triggered by the grievance of Ward X. The grievance has both a general characterization of Employee X's alleged behavior, i.e., "bullying" of Wards; obscene gestures and language; "unprofessional and tasteless," and then specific allegations of misconduct: "grabbing the back of his (Ward's) hair"; "You are going to cut this shit off"; "If you want to get in my business, I'll lock your fucking ass up." Based on such allegations, the resulting investigation should seek to discover the extent to which the allegations may be true.

Employee conduct, and the Administration's expectations regarding employee conduct, is outlined in appropriate policies and regulations. General Policy 2160--Department of the Youth Authority

Institutions and Camp Manual, in relevant part, states:

Public employees have a responsibility, 'during or outside duty hours, to conduct themselves in a manner that does not discredit their agency or employment.

Unacceptable conduct during duty hours includes, but is not limited to, horseplay, sexual harassment or physical or verbal intimidation. An employee who engages in such conduct may be subject to disciplinary action, pursuant to Government Code Section 19572.

A review of General Policy 2160 confirms that employee conduct of the nature of Ward X's allegations falls within the policy framework.

The investigating officer interviewed at least six (6) people in the course of the investigation. The principals (Ward X, Employee X, and the allegedly abused Ward) were interviewed and the remaining three included an instructor and two other Wards. Employee X contends that the two other Wards who were

interviewed are actually proven friends of the allegedly abused Ward, and that they gave responses that favor the allegedly abused Ward. The Administration made no response to this contention.

Given the situation that triggered the investigation it is my opinion that the basic objectives of the investigation should have been to discover evidence, if any, that corroborated the allegations made by Ward X. In that regard, efforts to establish the identity of all persons present in the gymnasium at the time of the incident should have been exhausted. Once identified, the witnesses should have been asked what they saw, heard or participated in and from what proximity. Each should have been asked whether Employee X grabbed the Ward's hair, whether Employee X used profane or obscene words when speaking to Ward X and to the allegedly abused Ward, and each should have been asked if they had anything further to offer.

In the instant case the grieving Ward is not the Ward who was allegedly abused. Thus, the investigation should have been designed to discover evidence that would either corroborate Ward X's version of the incident or not. One of the two witnessing Wards stated that Employee X used profanity. This Ward's description of the language used differs from that alleged by Ward X. The remaining Ward and the Instructor gave no statement of having heard Employee X use profanity. No witness, other than Ward X, referred to the allegations of hair grabbing and obscene gestures. The evidence suggests that the witnesses were not

asked the same questions. That fact is not controlling. However, each witness should have been asked specific questions relating to the hair grabbing allegation, and the allegations of obscene language.

In view of the foregoing, I conclude that the investigation had severe deficiencies as conducted. The investigation is marred more by omissions than by the evaluation of the evidence to support the finding.

Had the witnesses been asked whether they observed Employee X grab the Ward's hair, and similar questions on the other allegations, their answers would provide a more appropriate basis for a finding irrespective of whether corroborative or not. Failure to establish whether persons, other than those interviewed, were present within the gymnasium at the time of the incident constitutes a major flaw in the investigation.

The undersigned arbitrator is mindful that the environment of the facility (O.H. Close School) presents unique and peculiar challenges when designing an investigation. Given the transitory nature of the Ward population, the sometime reluctance among Wards to participate fully, and the general tenor of a secured environment, all serve to strain a traditional investigation design. Added to these conditions is the fact that investigation officers are drawn from among the active employee ranks and may be considered as additional duty. However, policy regulations require a thorough investigation.

In terms of the finding by the Administration, the evidence is insufficient to support the finding. Thus for these reasons, and for all of the foregoing reasons, I find that the investigation which was conducted by the Administration was not sufficient.

DECISION

The investigation was not sufficient and the evidence does not support the finding.

November 13, 1987Signed by Peter Guidry

at Berkeley CaliforniaPETER GUIDRY

Neutral Arbitrator

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