

ARBITRATION DECISION NO.:

10

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Apple Creek Developmental Center

DATE OF ARBITRATION:

January 30, 1987

DATE OF DECISION:

March 6, 1987

GRIEVANT:

Theresa J. Swan

OCB GRIEVANCE NO.:

G-86-0147

ARBITRATOR:

Thomas P. Michael

FOR THE UNION:

Daniel S. Smith

FOR THE EMPLOYER:

Cheryl J. Nester

KEY WORDS:

Removal
Pre-Disciplinary Rights
45 Day Time Limit

ARTICLES:

Article 5 - Management
Rights
Article 24 - Discipline
 §24.01-Standard
 §24.04-Pre-Discipline
 §24.05-Imposition
of Discipline
Article 25 - Grievance

FACTS:

Grievant had been employed at Apple Creek Developmental Center as a Hospital Aide for nine years at the time of her termination in 1986.

As the basis for her termination, the employer charged her with failure of good behavior, resident abuse and threatening a co-worker.

The employer requested a preliminary ruling from the Arbitrator limiting the scope of the hearing to a consideration of the procedural steps used to effectuate Grievant's removal. Reserving his ruling, the Arbitrator found that since the initial grievance alleged violation of Article 24, the employer was required to demonstrate just cause for the disciplinary action and determined that the facts underlying Grievant's termination were arbitrable.

EMPLOYER'S POSITION:

With regard to the underlying facts, the employer argued that Grievant's discharge was for just cause. Further, the employer argued that its failure to impose discipline within 45 days was excusable because the contractual provisions were not mandatory and there was no irreparable harm to Grievant.

UNION'S POSITION:

The Union argued that the employer failed to sustain its burden of proof to establish patient abuse. The Union also argued that it was inappropriate for the employer to present evidence regarding the grounds relating to threatening a witness since that was not a subject of the pre-disciplinary hearing. The Union also argued that the 45 day limit was a jurisdictional prerequisite to imposing discipline.

ARBITRATOR'S OPINION:

The Arbitrator upheld the grievance, finding that the employer failed to sustain its burden of proof in establishing that patient abuse occurred. The Arbitrator also agreed with the Union that the charge of alleged threats and coercion toward a co-worker witness by Grievant could not be a basis for the termination because the charge was not the subject of a pre-disciplinary hearing.

Having determined that the employer did not meet its burden of proof, the Arbitrator did not rule on the procedural issue relating to the contractual 45 day limitation period, although he did indicate that if he had to decide the issue in the future, he "would feel compelled to consider all circumstances surrounding the particular grievance at issue including the past practices of the parties in similar situations."

The Grievant was reinstated with full back pay.

AWARD:

The grievance is upheld.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION
BETWEEN

**OHIO DEPARTMENT OF MENTAL
RETARDATION AND
DEVELOPMENTAL DISABILITIES**

AND

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION LOCAL NO. 11,
AFSCME AFL-CIO**

THERESA J. SWAN, GRIEVANT

Thomas P. Michael, Arbitrator
Columbus, Ohio

Pursuant to notice from the Office of Collective Bargaining, Ohio Department of Administrative Services, Thomas P. Michael agreed to serve as the Arbitrator herein. The parties are the State of Ohio, Department of Mental Retardation and Developmental Disabilities, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, hereinafter referred to as the Union.

The parties stipulate that the grievances are properly before the Arbitrator and also have agreed to an extension of the thirty (30) day time limit for the Arbitrator to render a written decision. A formal hearing was held on January 30, 1987, at Apple Creek Developmental Center, Apple Creek, Ohio. With the consent of the Arbitrator, the parties agreed to forego the filing of post-hearing briefs and submit this matter to the Arbitrator on the basis of the testimony, exhibits and authorities proffered at the hearing.

APPEARANCES:

For the Employer:

Cheryl J. Nester
Assistant Attorney General

For the Union:

Daniel S. Smith
Legal Counsel
OCSEA/AFSCME Local 11

PRELIMINARY RULING

This is a termination case. At the outset of the formal hearing the Employer requested a ruling from the Arbitrator limiting the scope of the hearing to a consideration of the propriety of the procedural steps used to effectuate Grievant's removal. The Employer posits that the written grievances herein relate only to the procedures used and do not bring into issue the factual events surrounding the termination.

The Arbitrator reserved ruling on this issue and the parties proceeded to present their testimony and evidence regarding the facts of this case.

It is the determination of the Arbitrator that the motion of the Employer to limit the scope of the hearing is not well taken. The initial grievance (Joint Exhibit 2-A) specifically alleges a violation of Article 24, Section 24.01 of the Contract (Joint Exhibit 1). That contractual provision requires the Employer to demonstrate just cause for any disciplinary action, an issue requiring consideration of all relevant facts surrounding a disciplinary action.

Having determined the arbitrability of the facts underlying Grievant's termination, this decision and award are based on the merits of this dispute. (Contract, Article 25, Section 25.03).

ISSUE

The issue before the Arbitrator is as framed by the Union, namely:

Did the Employer have just cause to terminate the Grievant's employment? If not, what shall the remedy be?

FACTUAL BACKGROUND

Grievant, Theresa J. Swan, has been employed at Apple Creek Developmental Center since June, 1977, and was employed as a Hospital Aide at the time of her termination in 1986. On July 11, 1986, following a pre-disciplinary hearing held in the Office of the Superintendent of Apple Creek, Grievant was told that she was terminated effective immediately. However, a written Order of Removal, as signed by the appointing authority, Director Robert E. Brown, was not served on the Grievant until September 23, 1986, some seventy-four (74) days later. (Joint Exhibits 3, 3-A).

According to the Order of Removal, Grievant was terminated for failure of good behavior, resident abuse and threatening a co-worker. The testimony at hearing established that on June 17, 1986, Grievant was assigned to work in Apple Creek's Module 12, a so-called "hold-back" module for residents who for various reasons have not gone to their regular program areas on that day. On that day, at approximately 10:00 a.m., resident Sandy Saurer was returned from an outside medical facility to module 12, located at Jonathan Hall.

Some short time after her arrival at Module 12, Ms. Saurer, variously characterized as "aggressive", "combative", "fast", and "wiry", approached another resident Robert Turner, who was seated in a wheelchair, and began pulling that resident's hair. Grievant separated the residents and removed Ms. Saurer to an area in Module 12 where an armchair and padded mat were located.

The testimony is in conflict as to the amount of force used by Grievant to restrain Sandy Saurer from returning to the area of Module 12 where Robert Turner was located. The sole eyewitness to testify regarding the incident other than Grievant was Bruce Beachy, another Hospital Aide. He alleged that Grievant threw Sandy Saurer to the padded mat on some five occasions, striking Ms. Saurer's head on the wall and also striking her back on the chair in the process. Grievant testified that she took Saurer into the hallway outside the module on at least two occasions and that she placed Saurer in the chair next to the padded mat on the other occasions. She denied that Saurer had struck her head on the wall of the module.

Several days later the incident was reported by Bruce Beachy and Susan Csonka, another Hospital Aide who had been present in the module. Pursuant to the written statements of Beachy and Csonka, Grievant was questioned by Apple Creek's Chief of Security on June 24, 1986. She signed a waiver of her constitutional rights at that time. (Employer's Exhibit C). There was no testimony presented that she requested union representation at that interrogation.

On the same day that she gave her written statement regarding the incident, Susan Csonka resigned her position. She did not testify at Grievant's pre-disciplinary hearing on July 11, 1986,

and she did not respond to a subpoena signed by this Arbitrator commanding her appearance at the arbitration hearing. Her written statement was not proffered by the Employer.

CONTRACT PROVISIONS

The following statute and provisions of the Contract are relevant to the determination of this case:

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(A) numbers 1-9.

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 patient or another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse.

§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 so 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.

§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-discipline meeting. At the discretion

of the Employer, the forty-five (45) day 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 situation 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.

§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 Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. 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 costs shall be shared.

POSITION OF THE EMPLOYER

Grievant was terminated for just cause. Two eyewitnesses filed written statements charging that Grievant had physically abused resident Sandy Saurer on June 17, 1986, by throwing her to the floor on five occasions, causing her to strike her head on the wall on one occasion and to hit her back on a chair on another occasion. The fact that apparently no permanent or visible harm was inflicted on the resident is irrelevant to a determination as to whether or not patient abuse has occurred.

Admittedly the forty-five (45) day contractual limitation period for the imposition of discipline has not been met. However, that contractual provision is directory in nature, not mandatory. At worst, failure of the Employer to meet that requirement would affect the period of Grievant's entitlement to back pay.

The Employer is in compliance with the contractual provisions relating to union representation.

The security investigation preceded the effective date of the new contract. Grievant was provided with effective union representation at the pre-disciplinary hearing of July 11, 1986, which postdated the effective date of the contract.

The written statements of eyewitnesses Beachy and Csonka as well as the testimony of Bruce Beachy constitute evidence supporting the determination of the Employer that just cause existed to terminate the Grievant.

POSITION OF THE UNION

The Employer did not demonstrate just cause for the termination of Grievant, Theresa J. Swan. The witnesses called on behalf of the Employer lack credibility and the Employer has not sustained its burden of proof that Grievant had physically abused a resident. Further, even if Grievant is determined to have mishandled a resident, her actions do not constitute abuse of a patient justifying discharge.

One of the bases for termination set forth in the Order of Dismissal, that of threatening witness Bruce Beachy, was not a subject of the pre-disciplinary hearing and thus could not serve as a basis for disciplining the Grievant.

The forty-five (45) day requirement for a final decision as to a recommended disciplinary action is jurisdictional. After that time period has expired the Employer loses all authority to impose discipline for the activity forming the basis for disciplinary action.

The judgment of the Employer has been improperly affected by the emotional implications of alleged patient abuse. The facts do not support a finding that a patient abuse has occurred and the Grievant should be reinstated with back pay and reinstatement of benefits.

OPINION

The Arbitrator is not unmindful of the difficulties of managing a program dedicated to protecting the physical and mental health and well-being of those members of our society who are unable to provide for their own health and safety. But a charge of patient abuse carries obvious and severe long-range adverse consequences for an accused employee and the determination of the truth of that charge requires at least the quality of proof attendant to other termination cases. In the considered opinion of this Arbitrator the evidence adduced by the Employer falls short of meeting its burden of proof that patient abuse occurred.

Neither of the eyewitness accusers made any charges against the Grievant for several days following the incident of June 17, 1986. Since that time one of those witnesses, Susan Csonka, has refused to make herself available to testify under oath or otherwise regarding those charges. In the opinion of the Arbitrator the hearsay testimony as to her accusations is entitled to little or no weight.

The sole eyewitness to testify for the Employer, Bruce Beachy, recanted his initial accusation when called in for the Grievant's pre-disciplinary hearing, later alleging that he was threatened by the Grievant not to testify against her. When coupled with his initial failure to complain about the alleged patient abuse this Arbitrator is unwilling to make a finding that this employee's testimony rises to the level of even a preponderance of the evidence that physical abuse had occurred.

This conclusion is buttressed by the testimony Of Betty Shearer, the Licensed Practical Nurse at the Jonathan Hall Clinic. She testified that she was called by Grievant to Module 12 on June 17, 1986, to examine Sandy Saurer and Robert Turner, a standard procedure when physical confrontations between residents have occurred. Ms. Shearer, who has worked at Apple Creek for over fourteen years, testified that she found no sign of any physical harm to Sandy Saurer nor did she notice that Ms. Saurer was in any physical pain. Further, she volunteered that she had worked with the Grievant for nine or ten years and that, in her observation, the Grievant had always

treated patients well. She further testified that she had never been interviewed by Apple Creek's security force or anyone else connected with the Employer prior to the arbitration hearing regarding her observations.

Finally, no evidence was presented as to any prior discipline of the Grievant for patient abuse or mistreatment.

The Arbitrator agrees that the charge of alleged threats and coercion toward witness Beachy by Grievant may not serve as a basis for sustaining Grievant's termination since that charge was not the subject of a pre-disciplinary hearing. Nor did the Arbitrator find Mr. Beachy's testimony regarding that issue to be persuasive.

In view of the determination of the Arbitrator that the Employer has not met its burden of proof, it is unnecessary to reach the procedural issues raised regarding the effect of the contractual forty-five (45) day limitation period for issuance of a final disciplinary action by an agency head. However, the Arbitrator respectfully suggests that the parties may wish to consider the inclusion of an express provision in the next contract specifying the effect on the grievance of the failure to meet this time period. In the absence of a "company default" provision in Section 24.05, this Arbitrator would feel compelled to consider all circumstances surrounding the particular grievance at issue including the past practices of the parties in similar situations.

AWARD

The grievance is upheld. Grievant is ordered reinstated with full back pay and restoration of all benefits, rights and privileges retroactive to July 11, 1986.

Thomas P. Michael, Arbitrator

Rendered this Sixth day of
March, 1987, at Columbus,
Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was mailed to Edward H. Seidler, Deputy Director, Ohio Department of Administrative Services, 375 S. High Street, 17th Floor, Columbus, Ohio 43266-0585, with copies of the foregoing Opinion being served by United States Mail, postage prepaid, this 6th day of March, 1986, upon: Cheryl Nester, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215 and Daniel E. Smith, Legal Counsel, OCSEA/AFSCME Local 11, 995 West Goodale Blvd., Columbus, Ohio 43212.

Thomas P. Michael