

ARBITRATION DECISION NO.:

38

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Toledo Mental Health Center

DATE OF ARBITRATION:

April 28, 1987 and
May 12, 1987

DATE OF DECISION:

August 17, 1987

GRIEVANT:

Donald Deboe

OCB GRIEVANCE NO.:

G-87-0208

ARBITRATOR:

Harry Graham

FOR THE UNION:

Daniel Smith

FOR THE EMPLOYER:

David Norris

KEY WORDS:

Discharge
Just Cause
Burden Of Proof
Pre-Disciplinary Hearing

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.04-Pre-Discipline
Article 25 - Grievance
Procedure
 §25.08-Relevant
Witnesses And Information

FACTS:

Grievant had been employed at the Toledo Mental Health Center for two and one-half years as a direct care worker. During that time he had received a written reprimand and a number of suspensions, ranging in duration up to six days, involving a number of different infractions.

On September 10, 1986, a resident of the Center alleged that Grievant had behaved toward her in a sexually improper manner. An investigation was conducted which eventually led to Grievant's discharge. A grievance was filed seeking reversal of the discharge.

ARBITRATOR'S OPINION:

The record indicates that several procedural improprieties occurred in the conduct of the investigation which led to Grievant's discharge. In particular, when the Union requested statements of witnesses at step 3 of the grievance procedure the Agency only provided a synopsis of those statements. Nowhere in the agreement, specifically Section 25.08, is it acceptable for a requested document to be delivered in the form of a synopsis. The Arbitrator held that the Employer was in violation of the agreement by its failure to provide the requested documents; however, the Arbitrator also held the agreement failed to impose any penalty upon the Employer for that violation. In addition, neither the Union nor the Grievant was compromised in their ability to secure a complete hearing. The Union ultimately secured access to the full text of the desired documents. This compelled a conclusion that the initial issue presented to the Arbitrator concerning the procedure utilized in the Grievant's discharge must be answered for the Employer; that is, the Employer did proceed correctly when it discharged the Grievant.

A great deal of energy was also expended by both sides concerning the proper quantum of proof that should be required by the Arbitrator. The Arbitrator held that it was not possible to quantify the amount of proof needed to sustain a discharge action; however, in each case it was essential that the Arbitrator be convinced of two things: one, that the Grievant committed the act or infraction with which he is charged and two, that the penalty is appropriate.

The record is lacking in any corroborating evidence or testimony to support Grievant's accuser. Whether the appropriate standard of proof is "beyond all reasonable doubt," "clear and convincing," or "preponderance of the evidence," the Employer had failed to meet its burden and has not proved its case. As such, the Employer did not have "just cause" to discharge the Grievant.

Grievant was reinstated to his employment and was to receive all wages and benefits due him as if this event had not occurred. Any back pay award was to be reduced by such interim earnings as Grievant may have had. All reference to this event were to be expunged from the Grievant's personnel record.

AWARD:

The grievance is denied in part and sustained in part.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

**The State of Ohio,
Department of Mental Health**

Grievance No.:
G 87-0208

Appearances:

For OCSEA/AFSCME Local 11:

Daniel Smith
General Counsel
OCSEA/AFSCME Local 11
995 Goodale Boulevard
Columbus, OH. 43212

For The State of Ohio:

David Norris
Labor Relations Specialist
Office of Collective Bargaining
375 South High St., 17th Floor
Columbus, OH. 43215

Introduction:

Pursuant to the procedures of the parties hearings were held in this dispute on April 28 and May 12, 1987 before Harry Graham of Beachwood, OH. At those hearings both parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on August 1, 1987 on which date the record was declared closed.

Issue:

At the commencement of the hearing the parties were able to agree upon the issue in dispute between them. That issue is:
Did the State proceed correctly under the Collective Bargaining Agreement when it discharged Donald Deboe? If so, was his discharge for just cause under the Collective Bargaining Agreement? If not, what shall the remedy be?

Background:

As will become evident with the consideration of the position of the parties to this dispute there is a great deal of controversy surrounding the events that gave rise to the discharge of the Grievant, Donald Deboe. Prior to the events under scrutiny in this proceeding Deboe had been employed at the Toledo Mental Health Center for a period of about two and one-half (2 1/2) years. During that time he had been disciplined on several occasions. He had received a written

reprimand and a number of suspensions. These had ranged up to six days in duration and had involved a number of infractions. Most commonly discipline had been administered for attendance problems.

On September 6, 1986 the Toledo Mental Health Center admitted a patient, Stella Petersen. She had been involved in an incident characterized as disorderly conduct, assault and resisting arrest. Her stay at Toledo Mental Health Center was occasioned by concern for her mental health or lack thereof as manifested by her disorderly conduct.

Several days after her admission to the Toledo Mental Health Center, on or about September 8, 1986, Ms. Petersen and Mr. Deboe came to spend some time together. It is at this point that the account of this incident related by the State and the Union differ. According to the State, the Grievant, Deboe, forced his affections upon the patient, Petersen. This occurred on the morning of September 8, 1986. His attentions initially took the form of asking her for a kiss. She refused. He persisted in his request. To accommodate him and to get him to go away she relented and gave him a "peck" which he turned into something more passionate. Later on the morning of September 8, 1986 the Grievant initiated the sections of patient intake process for which he had responsibility. This included the taking of photographs of residents of Toledo Mental Health Center. In the course of this activity Petersen and Deboe found themselves alone together. At this point, Deboe allegedly became sexually aroused, indicated this fact to Petersen and then exposed himself. This sequence of events is denied by the Grievant. Subsequently, several days later Petersen wrote a statement recounting the kiss and exposure incidents that had allegedly occurred.

In order to determine the accuracy of the events recounted by Petersen officials of the Toledo Mental Health Center commenced an investigation. Conducted by Police Officers on the security force of the Center, that investigation concluded that Petersen's account was truthful and that Deboe's denials were false. Accordingly, a pre-disciplinary conference was had with the Grievant. In the opinion of the Union the conduct of that conference was in violation of the Agreement. The Union asserts that documentation in the possession of the State was not provided to it in connection with the conference. The State claims all documents were provided to the Union. It is agreed that the State decided to discharge the Grievant, Deboe, from its employ. That action occurred on November 5, 1986. The following day the instant grievance was filed seeking reversal of the discharge. The grievance was denied at all steps of the procedure of the parties. There is agreement that it is properly before the Arbitrator for determination on its merits.

Position of the Employer:

The State insists it acted correctly both in the manner in which it discharged Deboe and in the action itself. When the Grievant was interviewed by Police Officers Debbie Tammarine and Clarence Schiffler of the Toledo Mental Health Center he was advised that discipline might result. He was also informed that he could request the presence of a Union representative. At Section 24.04 the Agreement indicates that an employee is entitled to the presence of a union steward "upon request." The State informed him of his right to have a steward present at the investigatory interview. He did not ask that a steward be present. No procedural defect can be found in the State's action concerning the availability of a Union representative it insists.

In the course of the investigation of this incident the State conducted a routine check for any outstanding warrants. It determined that the Toledo Police Department had such warrants. It contacted the Department which came to the Toledo Mental Health Center and arrested the Grievant. The arrest was not conducted in the presence of other staff members or patients. He was not degraded or humiliated by the actions of either the Toledo Police or officials of the Mental

Health Center in connection with his arrest. Deboe's arrest took place in connection with events unrelated to this proceeding. It was proper and provides no grounds for overturning the discharge on grounds of a procedural defect insists the State.

Section 24.04 of the Agreement provides that the Employer must provide a list of witnesses "and documents known of at the time used to support the possible disciplinary action." The State provided the Grievant and the Union an opportunity to review and take notes on the documents it used to support its discharge action. This behavior is in accord with the spirit of Section 24.04. The Grievant received due process in every respect in the course of the investigation leading to his discharge. Not only did the State exceed its contractual obligations in this instance, even if it erred, a point it does not concede, no harm befell the Grievant. His appeal rights have been implemented intact. Furthermore, the proper standard to apply is the test of fairness. Has the Grievant been dealt with fairly? The State insists the answer to that question must be affirmative.

On the merits of the discharge, the Employer asserts it has met the standard of "just cause" for discharge set forth in the Agreement. The Grievant received and acknowledged receipt of the relevant policies concerning patient abuse. He had been disciplined on several occasions prior to this event. He was aware that further instances of discipline could subject him to termination. Not only has the State followed progressive discipline in this instance, the offense committed by Deboe was of such magnitude as to justify discharge without any prior discipline on his record. Patients and their families must have assurance that when in the custody of the State people will be free from physical and psychological violence. The State cannot retain in its employ a person who abuses, rather than cares for, patients in its custody.

When interviewed by Officers Tammarine and Schiffler the Grievant manifested signs of his guilt. He became red faced. When the questions and his answers were read back to him, he agreed it was accurate. He signed the text of the interview, indicating he agreed with its contents. Given this record it is inappropriate for the Union now to argue that Deboe's discharge was unjustified asserts the State.

There is a discrepancy in the account of this incident provided by the Grievant. In his statement to Officers Tammarine and Schiffler on September 12, 1986 the Grievant indicated he took admitting photographs of Stella Petersen on September 8, 1986. That date fell on a Monday. At the arbitration hearing he testified the events under review in this proceeding occurred on September 10, 1986, a Wednesday. In fact, testimony from Petersen indicates that the alleged action committed by the Grievant occurred on September 8, not September 10, 1986. This indicates the Grievant is untruthful and his testimony should be disbelieved.

At the hearing it was obvious to all in attendance that Deboe stuttered when he spoke. When in conversation with Petersen during her stay at Toledo Mental Health Center as well as in conversation with co-workers, this was not a problem. In fact, his verbal facility improved during the course of his testimony. Petersen was able to understand him without difficulty when he extracted a kiss from her as well as subsequently.

In the circumstances surrounding this event, discharge is appropriate and the State urges its action be upheld.

Position of the Union:

The Union asserts that the Employer acted improperly both in respect to the manner of its action and with respect to the discharge itself. Pointing to the Collective Bargaining Agreement at Section 24.04 the Union indicates that while it requires that the Employer provide relevant documents, it failed to do so. All documents used to justify the discharge of Donald Deboe were not furnished either to him or the Union at the pre-disciplinary conference. Furthermore, at Section

25.08 the Agreement provides that:

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration.

Such a request was made at Step 3 of the Grievance Procedure but was not honored by the State. Summaries of documents were made and presented to the Union in oral fashion by the Employer. This does not satisfy the requirements of Section 25.08 of the Agreement in the Union's opinion.

In addition, the Union urges that the Grievant's statement to Police Officers Tammarine and Schiffler be disregarded. In contrast to testimony received from them, the Union asserts the Grievant was not informed of his rights to have a Union representative present during the course of their interview with him. Local Union officials were not aware of the incident or the charges against Deboe until after the investigation had been completed and the Employer had satisfied itself of his guilt.

This dispute involves the allegation by the State of a serious incident of moral turpitude. Should the discharge be sustained the Grievant will have a difficult time securing employment. As this is the case the Union urges that the Employer be held to a very high standard of proof. The appropriate standard is proof beyond all reasonable doubt. In the alternative, the Arbitrator should require the evidentiary standard be that of "clear and convincing." To impose any lesser standard, such as "preponderance of the evidence" is a disservice to the Grievant in the Union's view. Application of a more stringent standard of proof must result in failure of the State's case according to the Union. This dispute centers upon credibility. Stella Petersen testified that the Grievant forced his affections upon her and secured a kiss. Then he exposed himself to her according to her testimony. He denied that either the kiss or the exposure incident occurred. The Union insists that Petersen's account is not worthy of belief. In support of that view it points to the Grievant's speech impediment. Petersen testified that Deboe spoke to her in September, 1986 without any trace of difficulty. In fact, he has severe problems speaking normally, as was evident at the hearing when he testified. He stutters a great deal. It is inconceivable that Petersen could be entirely truthful in her account considering that Deboe stutters and she testified he spoke without difficulty. That Deboe stutters consistently was corroborated by other witnesses at the hearing.

In addition, the Union points out that just as Deboe had difficulty recalling with precision the day the incident allegedly occurred, testimony of Petersen, his accuser was inconsistent as well. In describing the room where Deboe allegedly exposed himself she indicated she was not seated where she could see the door to the room. In her interview with Police of Toledo Mental Health Center she testified she could see the doorway.

It is necessary to consider the mental condition of Ms. Petersen in evaluating her credibility. She was diagnosed as suffering from paranoid delusions and delusions of grandeur. She engaged in a struggle with police which was the proximate cause of her commitment to Toledo Mental Health Center. Her record indicates such mental instability as to compel her testimony to be discounted. Given these circumstances, the Union urges the Grievant be restored to employment and made whole.

Discussion:

The record indicates that procedural improprieties occurred in the conduct of the investigation leading to the discharge of Donald Deboe. In particular, when the Union requested statements of witnesses that it regarded as relevant at Step 3 of the Grievance Procedure only synopsis of those

statements were provided. Section 25.08 of the Agreement refers to provision of "documents." The Agreement nowhere makes reference to synopsis of documents as being acceptable. The conclusion is inescapable that the Employer is in violation of the Agreement by its failure to provide documents requested by the Union. Examination of the Agreement does not indicate that there is any penalty imposed upon the Employer for that violation. Nowhere does it indicate that if the State fails to provide documents requested by the Union in full that the Union automatically prevails on whatever grievance may exist between the parties.

Testimony from Police Officers Tammarine and Schiffler indicates that the Grievant was provided notice of his right to have Union representation at his interview with them. He indicates this was not the case. Obviously testimony from either Deboe or the Police Officers is in error. However, it is unnecessary to attempt to resolve the discrepancies between the various witnesses on this point. Whatever procedural violations may have been committed by the State, they were minor in nature. They in no way compromised the ability of the Grievant to secure a complete hearing in the Grievance Procedure through its final step, arbitration. The procedures negotiated by the parties were substantially observed in this instance. The Union ultimately secured access to the full text of all documents it desired. The Grievant has had complete recourse to the panoply of Union officials whose task it is to protect him and ensure that his rights under the Agreement are observed. These officials range from people at the facility, the Toledo Mental Health Center, to Union staff at its state headquarters in Columbus. The Grievant was provided a thorough and competent defense by the Union. All documents desired by the Union were provided by the State. The Union cannot credibly argue that the Grievant's defense was compromised in any fashion by the minor procedural errors of the Employer. This compels a conclusion that the initial issue presented to the Arbitrator, concerning the procedure utilized in the discharge of Donald Deboe must be answered affirmatively. That is, the State did proceed correctly when it discharged him.

In this dispute as in many others involving the propriety of discipline, a great deal of energy has been expended by the parties concerning the proper quantum of proof that should be required by the Arbitrator. It has been stated that when moral turpitude is the basis for discharge the employer should be held to the standard of proof beyond a reasonable doubt.^[1] This is the most stringent standard that may be applied. On the other hand, some neutrals have argued that a lesser standard of proof is sufficient to sustain discharge, even in instances of alleged moral turpitude.^[2] This arbitrator has come to regard that debate to be sterile. It is not possible to precisely quantify the amount of proof required to sustain a discharge action. To be more accurate in this case as in so many others, what is required is that the neutral be convinced of two things. One, that the grievant committed the act or infraction with which he is charged and two, that the penalty is appropriate.

This dispute presents the paradigm of a credibility dispute. In spite of the numerous people called to testify on behalf of the State and the Grievant, only two people are involved in this incident. One is the accuser, Stella Petersen, the other is the Grievant, Donald Deboe. Testimony received from other people is largely irrelevant. The Arbitrator is required to determine who is more believable.

This neutral views the testimony of Stella Petersen with a great degree of skepticism. Clouding her entire story is the fact that she was a resident at the Toledo Mental Health Center receiving treatment for mental difficulties. Her life history indicates a certain pattern of mental instability. In particular, when police arrived at her residence she resisted which resulted in her blouse being removed in some fashion. While at Toledo Mental Health Center by her own admission she told other residents her name was "Rose." She did not use her own name, Stella, in conversation with at least one other resident. Furthermore, in making the serious charges against the Grievant she

waited, again by her own account, two days after the events allegedly occurred. She indicated Deboe's improper activities occurred on a Monday, yet she delayed to the following Wednesday to report them. An additional inconsistency in Petersen's account concerns the physical arrangements of the room in which this incident allegedly occurred. In her account to police at Toledo Mental Health Center she indicated that she could see the doorway. At the arbitration hearing she testified that she could not see the doorway. This is a small discrepancy in the testimony, yet it calls into question her account of events. Petersen also indicated that the Grievant showed little or no indication of a speech problem in his conversation with her. Based on his testimony at the hearing, the Arbitrator views this with disbelief. It was obvious to all in attendance that Deboe has a great deal of difficulty in expressing himself. If Petersen is to be believed, Deboe was, feigning his speech difficulties at the arbitration hearing. That is simply not credible. Deboe has a severe speech impediment of long duration. It is impossible to believe that Deboe and Petersen held a conversation in any normal fashion, even disregarding the alleged content of that discussion.

As is the case with Petersen's testimony, Deboe's testimony is contradictory as well. In particular, he testified throughout this proceeding that he photographed Stella Petersen on Wednesday, September 10, 1986. Petersen, as well as documentary evidence, indicates that whatever transpired between them occurred on Monday, September 8, 1986. This inconsistency is inexplicable.

The record indicates that the Grievant has consistently testified he made no improper advances towards Petersen. This is reflected in his interview with Officer Schiffler on September 12, 1986. (Employer Exhibit 5). There exists before the Arbitrator, as has existed throughout this dispute, the fundamental conflict between the tale told by Petersen and the story told by Deboe. Given the lack of any corroborating evidence or testimony to support Petersen, the Arbitrator must conclude that the State has not proved its case. Whether the appropriate standard is "clear and convincing," "preponderance of the evidence," or "beyond all reasonable doubt," the record indicates the State falls short of bearing its burden. Given the fundamental credibility problems posed by Petersen it is impossible for the Arbitrator to believe her. The best that can be said with assurance is that the State has failed to convince the Arbitrator that the events recounted by Stella Petersen actually occurred. This must result in the Scotch verdict, not proven.

Award:

Based upon the preceding discussion the grievance is DENIED in part and SUSTAINED in part. The State is found not to have been in violation of the Collective Bargaining Agreement in the conduct of its investigation and discipline of Donald Deboe. The State is found not to have had "just cause" to have discharged Donald Deboe. The Grievant is to be restored to his employment with Toledo Mental Health Center. He is to receive all wages and benefits due him as if this event had not occurred. Any back pay is to be reduced by such interim earnings as the Grievant may have had. The Grievant is to supply the Employer with such evidence of interim earnings as it may require. The award includes credit of all accumulated seniority that would have been earned by the Grievant but for this incident. All reference to this event is to be expunged from the Grievant's personnel record.

Signed and dated this 17th day of August, 1987 at Beachwood, OH.

Harry Graham
Arbitrator

[1] Great Atlantic and Pacific Tea Co. 63-1 ARB 8027, Turkus, 1962.

[2] B. Aaron, "Some Procedural Problems in Arbitration" 10 Vanderbilt Law Review, 1957.