

ARBITRATION DECISION NO.:

39

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health - Dayton Mental Health Center

DATE OF ARBITRATION:

May 27, 1987

DATE OF DECISION:

August 18, 1987

GRIEVANT:

Belinda Woods

OCB GRIEVANCE NO.:

G-86-0431

ARBITRATOR:

Linda DiLeone Klein

FOR THE UNION:

John T. Porter, Attorney

FOR THE EMPLOYER:

Jennifer Dworkin, Advocate

KEY WORDS:

Just Cause

ARTICLES:

Article 24- Discipline

§ 24.04 - Pre-Discipline

Article 25

§ 25.08 - Relevant Witnesses and Information

Article 43

§ 43.01 - First Agreement

FACTS:

EMPLOYER'S POSITION:

UNION'S POSITION:

ARBITRATOR'S OPINION:

AWARD:

CASE SYNOPSIS:

Grievant was employed as a Hospital Aide at the Dayton Mental Health Center. Grievant was removed for failure to properly perform duties and incompetency. Prior to the removal, Grievant had received four (4) written reprimands for absenteeism, tardiness, failure of good behavior, and "causing or contributing to unsanitary and/or unsafe conditions on premises". Grievant was also suspended twice for failure to follow call-in procedures and has been demoted once.

The facts of the incident which resulted in Grievant's removal centered around duties to perform sleep checks. The facts surrounding the death of a client indicated that the Grievant might have been negligent in performing sleep checks.

Management contends that just cause existed for the Grievant's removal. The Grievant's work records demonstrate that Grievant has not been a model employee and the grievance should be denied. Additionally, management asserts that no violation of the agreement occurred when management declined to provide the Union with copies of the incident report and witness statements. The access to such documents is limited in order to ensure and safeguard patient privacy.

The Union contends that the state violated the labor agreement by denying the Union access to the incident report and witness statements. The Union submits that the state failed to prove that the Grievant was incompetent or that Grievant failed to perform duties. A charge of incompetency is inappropriate if the Grievant had not performed job duties as assigned. The Grievant might have been charged with neglect of duty; however, there was no proof submitted by the State to support this allegation.

The Arbitrator states that it is clear from the evidence that the patient's death was not directly related to the Grievant's work performance. There was no evidence that the Grievant failed to perform duties. Additionally, there is insufficient evidence to demonstrate incompetency.

Article 25.08 provides that certain information relevant to the grievance shall not be unreasonably denied to the Union. The documents requested were reasonably available and relevant to the grievance, but management denied the Union access to the information based upon provisions of the Ohio Revised Code and the Ohio Administrative Code. Article 43.01 clearly provides that the provisions of the agreement shall take precedence and supersede those conflicting state statutes and administrative rules. There was no justification for the refusal to provide these documents to the union.

Although the Grievant's record reflects various elements of past discipline which must be considered valid, the Employer nevertheless bears the burden of proving that just cause exists for any ensuing disciplinary action. Despite the Grievant's past record, there was no proof to establish incompetency or failure to perform duties. Grievant shall therefore, be reinstated without loss of seniority or benefits and with full back pay.

TEXT OF THE OPINION:

ARBITRATION PROCEEDINGS
BEFORE
LINDA DILEONE KLEIN

In The Matter Between:

State of Ohio
Department of Mental Health
Dayton Mental Health Center

and

Ohio Civil Service
Employees Association,
Local 11
AFSCME, AFL-CIO

Opinion and Award
Grievance No.: G86-0431
Discharge of Belinda Woods
Heard: May 27, 1987

APPEARANCES

For the Employer

Jennifer Dworkin, Advocate

For the Union

John T. Porter, Attorney
Belinda Woods, Grievant

ISSUES

- I. Was the grievant discharged for just cause ? If not, what shall the remedy be?
- II. Did the Employer violate the Collective Bargaining Agreement by failing to provide the Union with copies of the incident report and two witness statements?

SUBMISSION

The above-referenced issues were submitted to the Arbitrator at a hearing which was held in Dayton, Ohio on May 27, 1987. All interested parties were in attendance for the introduction of evidence and the examination of witnesses. The parties then requested and were granted the opportunity to file post hearing briefs. All pertinent information was received and exchanged by the Arbitrator as of July 30, 1987. Based upon the evidence presented, the following decision is hereby rendered.

Facts and Contentions

Effective October 3, 1986, the grievant was discharged from her position as a Hospital Aide at the Dayton Mental Health Center. After reviewing the facts surrounding an incident which occurred on August 1, 1986, the Employer determined that the grievant was "guilty of the charge of incompetency" and that removal was warranted for her failure to properly perform her duties that day.

The grievant worked the third shift on Ward 54, which is a medical ward designed to provide round-the-clock nursing care for patients over sixty-five who are low-functioning and in need of continual monitoring. In order to ensure patient safety, the Employer instituted the procedure of making "sleep checks" every thirty minutes between the hours of 11:00 P.M. and 6:00 A.M. The

purpose of the sleep checks is to provide accountability in the nursing area and to monitor each patient's activities throughout the night. To perform a sleep check, the Hospital Aide enters the patient's room and shines a flashlight on the headboard or on the wall behind the bed. The Aide observes the patient to see if he/she is dry, warm, clothed, and covered; the Aide must also determine whether the patient is awake or asleep and whether the patient is breathing or in physical distress. The Aide then records each patient's activity on the sleep chart every half hour; a "slash" by the patient's name indicates that the patient was sleeping.

On August 1, 1986, the grievant was responsible for making sleep checks on Ward 54 from 3:00 A.M. through 5:30 A.M. The sleep chart for the period in question shows that all patients' were asleep on every round made by the grievant.

At 5:40 A.M., another employee discovered that one of the patients on Ward 54 was dead. A doctor was called immediately, and he pronounced the patient dead at 5:55 A.M.

The patient's body was found in bed, unclothed and uncovered. Her body was turned slightly on its right side facing away from the door, and there was dried emesis on the pillow. The patient's body was cool to the touch and some elements of rigor mortis had set in; there were signs of stiffening in the jaw area and in her extremities.

Pursuant to hospital policy, an investigator from the coroner's office was called in and he arrived at 6:40 A.M. He found traces of rigor mortis. He noticed "lividity" on the right side of her face, but he testified that he was unsure whether the "lividity" was fixed. Also, he did not take the "core temperature" reading of the patient's body. He concluded that the patient had died of natural causes, especially in view of the fact that she had serious medical problems. The doctor summoned by the hospital signed the death certificate.

After conferring with a doctor from the coroner's office, the investigator prepared a report which indicated that the patient had expired "c 3:00 A.M."; he testified that this signified that death occurred between 2:00 A.M. and 4:00 A.M. No autopsy was performed to confirm the exact cause or time of death.

There was, however, testimony from a Registered Nurse which established that the patient was alive at approximately 3:00 A.M.. Also, there were two copies of the patient's death certificate submitted into evidence; one cites the hour of death as "unknown", while the other notes "5:55 A.M." as the hour of death.

After considering the condition of the body at 5:40 A.M., the Employer concluded that the patient had been dead longer than the ten minute period between the 5:30 A.M. sleep check and the discovery of the body. The Employer concluded further that the grievant either failed to perform the sleep checks or she did not perform them properly. After investigating this situation in accordance with hospital policy, Management made the determination that removal was warranted based upon the grievant's "incompetency". Management contends that the grievant failed to perform her duties conscientiously, and as a result she jeopardized the health and safety of those patients entrusted to her care. Management submits that the grievant was either unable or unwilling to perform her assigned duties adequately.

The Employer takes the position that the grievant's claim that she performed her sleep checks properly lacks credibility. The condition of the body and the "biological processes that occur upon the death of a human being" belie the grievant's assertions. The emesis or exudate from the grievant's mouth could not have dried within ten or twenty minutes, nor could signs of rigor mortis have appeared within that time frame even if the air conditioning had caused the ward to be too cold and even if the patient had been extremely active for several days prior to her death.

The Union would have the Arbitrator believe that the grievant was a good worker, however, says Management, a review of her personnel record reveals four written reprimands for absenteeism, tardiness, failure of good behavior and "causing or contributing to unsanitary and/or

unsafe conditions on premises.” She was suspended twice for failure to follow call-in procedures and she was demoted once. Also, two performance evaluations reflect her failure to follow instructions in the area of maintaining sanitary conditions for patients. Her work record stands on its own, states Management, and it is not now subject to review..

The Employer maintains that just cause exists for the grievant's removal and requests that the grievance be denied.

The Employer further maintains that no violation of the Labor Agreement occurred when Management declined to provide the Union with copies of the incident report and witness statements.

The Unusual Incident Report was prepared during an investigation into the patient's death by the Quality Assurance Department. Incident reports are governed by Section § 122-3-13 of the Ohio Administrative Code, and access to such reports is limited in order to ensure and safeguard patient privacy. The report is not used to support disciplinary action, therefore, Management contends that it acted reasonably when it denied the Union's request for a copy of said item. The information gained by the Quality Assurance Department is also kept confidential in order to protect quality assurance committee members from a charge of misuse of confidential information. Section 2305.24 of the Ohio Revised Code supports Management's position in this regard.

The State contends that documents which are not used to support disciplinary action need not be given to the Union. Article 25.08 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 request shall not be unreasonably denied". The State submits that this provision does not signify that the Union shall have access to all documentary evidence, especially in view of the fact that the Ohio Revised Code and the Ohio Administrative Code hold that documents of the quality assurance committee are confidential. Furthermore, the Employer complied with Article 24.04 of the Labor Agreement by providing a list of its witnesses as well as the documents used to support the removal action.

The documents requested by the Union were not used to support the action taken; therefore, the grievant has not been adversely affected by the denial of access to the incident report and the witness statements in question.

The State requests that its position on the procedural issue raised by the Union be sustained.

The Union, however, contends that the State violated Articles 24.04, 25.08 and 43.01 of the Labor Agreement by denying the Union access to the incident report and the witness statements. The Union asks the Arbitrator to find that the State should have provided those documents to the Union.

As it pertains to the merits, the Union submits that the State failed to prove that the grievant was incompetent or that she failed to perform the required sleep checks every thirty minutes.

Management suggested that the grievant did not perform sleep checks properly and that she filled out the sleep chart ahead of time. In fact, the Unit Director testified that the grievant had completed the sleep chart through 6:00 A.M., but a close look at the document itself shows that the chart was filled out only until 5:30 A.M. This assertion by Management casts doubt on the credibility of the testimony of its witnesses, says the Union.

The position of Management in this case appeared to be based upon the inadequate and incomplete information gained by the coroner's investigator. The investigator performed only one of three tests which he could have utilized to determine the time of death. He checked for rigor mortis, but did not check to see whether the lividity was fixed and he did not take a core temperature of the body. He also stated that he was not an expert at establishing the time of death. Furthermore, there is conflicting evidence re-garding the recorded time of death. The

investigator placed the time as occurring between 2:00 A.M. and 4:00 A.M., and the coroner's report reflects that she expired "c 3:00 A.M."; however, says the Union, the patient was known to be alive at 3:00 A.M. Also, the death-certificate's time of death was changed from unknown to 5:55 A.M.

The investigator arrived on the scene one hour after the body was discovered, and it is possible that signs of rigor mortis could have developed during that hour, claims the Union, especially in view of the cold temperature in the room and the patient's extreme activity in the days preceding her death.

Even assuming that the grievant failed to perform her sleep checks, the Union argues that the charge of incompetency is inappropriate. If she did not perform her functions as assigned, she might have been charged with neglect of duty; however, there is no proof to support this allegation, adds the union.

The Union maintains that the State failed to prove that the grievant was guilty of incompetency, and the Union requests that she be reinstated to her job with full back wages.

OPINION

It is clear from the evidence that the patient had a long history of mental illness and physical illness. In the days immediately preceding her death, she was in an agitated state and had to be restrained. Based upon the patient's medical history, it was concluded that her death was from natural causes, consequently no autopsy was performed. It is also clear from the evidence that the patient's death was not directly related to the grievant's work performance. The allegations of Management suggest that the body would have been found earlier if the grievant had performed her sleep checks properly, but there was no allegation that the grievant's actions contributed to this death in any way.

There were no eyewitnesses to establish that the grievant failed to make sleep checks every thirty minutes. There was no evidence to establish that the grievant failed to make her required rounds between 3:00 A.M. and 5:30 A.M. Management claimed that the sleep chart appeared to have been completed ahead of time and the Unit Director claimed that it was filled out through 6:00 A.M., but the document submitted into evidence reflects that the sleep chart was filled out only through 5:30 A.M., as contended by the Union. An allegation of improper recording of information thereon cannot be considered as "proof" that she performed her duties incompetently.

The testimony of the investigator from the coroner's office was inconclusive as it relates to establishing a time of death; his investigation was incomplete. He checked for rigor mortis and found that the patient's jaws and extremities had stiffened, but he did not take a body temperature or check on whether the lividity was fixed. His estimate of the time of death being between 2:00 and 4:00 A.M. was in effect challenged by the testimony of the nurse who saw the patient alive at 3:00 A.M. Furthermore, an hour had elapsed between the time the body was discovered and the time the investigator arrived on the scene and physical changes could have occurred during that period. In addition, one death certificate indicates that the time of death was 5:55 A.M. and this is obviously incorrect because the body was found at 5:40 A.M. A second death certificate lists the time of death as unknown. The Arbitrator must hold that there is insufficient evidence to demonstrate when the patient died.

It is true that there was some physical evidence to suggest that the patient may have died before 5:30 A.M., however, it does not necessarily follow that the grievant failed to perform the required sleep checks. The patient was found leaning to her right side facing away from the door, and it is possible that she appeared to be all right when the grievant entered the room. During a sleep check, the light is not supposed to be directed at the patient's face, consequently, the emesis might not have been noticed. The most that can be said about what transpired is that the

grievant may have not been thorough in her observation; there was, however, insufficient evidence to demonstrate incompetency.

Although the grievant's record reflects various elements of past discipline which must be considered valid, the Employer nevertheless bears the burden of proving that just cause exists for any ensuing disciplinary action. Despite the grievant's past record, there was no proof to establish incompetency or failure to perform the sleep checks every thirty minutes. The grievant shall therefore be reinstated.

The Arbitrator also finds from the evidence that the State violated Articles 24.04, 25.08 and 43.01 of the Labor Agreement in this matter. Article 24.04 requires the Employer to provide documents which are used to support possible disciplinary action; such information should be provided at least at the time of the pre-disciplinary meeting. Prior to the pre-disciplinary hearing and the decision making process which led to the removal, the Employer had an incident report containing certain statements made by the Registered Nurse and a Hospital Aide. It is possible that the report and the witness statements were not the ultimate basis for the imposition of discipline, but they were made available to the Manager who administered discipline and as such must be considered as documents used to support "possible" disciplinary action.

Article 25.08 provides that certain information relevant to the grievance shall not be unreasonably denied to the Union. Hospital policy requires the compilation of an incident report after an occurrence such as the matter at-hand, and witnesses to the incident are required to document what they know about the event. Management obtained the incident report and witness statements, but declined to provide copies to the Union based upon a claim of confidentiality of patient records and protection of doctors and quality assurance committee members. Management cited Section 5122.31 of the Ohio Revised Code and Section 5122-3-13 of the Ohio Administrative Code to support this denial, but a review of Article 43.01 of the Labor Agreement reveals that the parties have agreed as follows: "...To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State Laws."

Articles 24.04 and 25.08 specifically address the issue of providing documents to the Union. The documents requested were reasonably available and relevant to the grievance, but Management denied the Union access to the information based upon provisions of the Ohio Revised Code and the Ohio Administrative Code. Article 43.01 clearly provides that the provisions of the Agreement shall take precedence and supersede those conflicting state statutes and administrative rules.

Section 2305.24 of the ORC provides for confidentiality of patient information and protection of quality assurance committee members and physicians against charges of misuse of certain information. The Union was not asking for confidential information from a physicians statement. The witness statements at issue were from two non-physicians who worked in the area on the night in question, and their statements are relevant to the grievance under consideration. Documents which can be considered confidential patient medical records were released to the Union, but the statements from witnesses who worked in the area at the time of the incident were deemed inappropriate for release. If medical records can be released, then there is no justification for a refusal to provide statements from witnesses working at the time of the death of the patient whose medical records had already been released.

The Arbitrator is of the opinion that the incident report and the statements of the Registered Nurse and the Hospital Aide should have been made available to the Union.

AWARD

It is the Award of the Arbitrator that the grievant be reinstated to her position without loss of seniority or benefits. It is further the Award of the Arbitrator that the reinstatement be made with full back wages, less any earnings or benefits received since her termination.

Linda DiLeone Klein

Dated this 18th day of August, 1987
at Cleveland, Ohio.