

ARBITRATION DECISION NO.:

45

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Columbus Developmental Center

DATE OF ARBITRATION:

DATE OF DECISION:

September 1, 1987

GRIEVANT:

Pamela Maynard

OCB GRIEVANCE NO.:

G-87-0778

ARBITRATOR:

Andrew J. Love

FOR THE UNION:

Carol Bowshier

FOR THE EMPLOYER:

Michael Duco

KEY WORDS:

Just Cause
Client Care
Credibility Of Evidence

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
Article 25 - Grievance
Procedure
 §25.03-Arbitration
Procedures

FACTS:

Grievant was a hospital aide at Columbus Developmental Center. She was suspended for

three days for (1) failing to complete feeding duties for two clients and (2) feeding a client in the living area. Both are in violation of instructions. Whether or not these were indeed the facts was at issue. The Employer did not confront Grievant prior to the pre-disciplinary hearing.

EMPLOYER'S POSITION:

Three other hospital aides submitted written statements to Grievant's supervisor, all three stating that Grievant on numerous occasions did not feed clients.

UNION'S POSITION:

(1) Grievant has never failed to feed a client. (2) Grievant fed client in kitchen so that there would be witnesses to the feeding. (3) The three witnesses had a personal vendetta against Grievant. These three facts were corroborated by a disinterested employee.

ARBITRATOR'S OPINION:

Due to the personal vendetta of the three persons, the State's evidence is lacking. Grievant and the disinterested employee were very credible.

AWARD:

3 Days backpay, grievance upheld.

TEXT OF THE OPINION:

ARBITRATION

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

AND

**O.C.S.E.A. LOCAL 11
A.F.S.C.M.E. A.F.L.-C.I.O.**

(Pamela Maynard Grievance)

ARBITRATOR:

Andrew J. Love

APPEARANCES:

For Ohio M.R.D.D.:

MICHAEL DUCO

For O.C.S.E.A./A.F.S.C.M.E.:

CAROL BOWSHIER

CASE NUMBER:

G87-0778

DECISION AND AWARD

The issue presented in this proceeding is whether the three (3) day suspension of the Grievant by the Columbus Developmental Center (hereinafter "CDC") November 21, 24, and 25, 1986 was without "just cause" and therefore in violation Section 24.01 of the parties' collective bargaining agreement. In addition, an other issue presented for consideration is the nature of the remedy itself. The parties stipulated to the following joint exhibits: The parties' contract; the incident documents; the suspension order and receipt; the Grievant's trail; the disciplinary record the Grievant; the disciplinary policy; and orientation materials. The parties also stipulated that gross client neglect is a criminal act punishable by law. The facts are as follows:

The Grievant, a nine (9) year employee and a Hospital Aide, was suspended on November 14, 1986 for neglect of duty, to wit: on October 7, 1986, she failed to complete assigned feeding duties for two clients; and on October 8, 1986, Grievant failed to feed a client his breakfast meal and that she fed another client on the living area in violation of instructions that all clients are to be fed in the dining room. The dates of suspension were November 21, 24, and 25, 1986.

Deborah Sue Chandler, testified to her duties, which includes supervising Hospital Aides in CDC unit A. She testified that she comes on duty for the first shift, beginning at 6:15 A.M. She testified that the first set of trays containing breakfast food for clients are generally in the living area of the clients at approximately 7:30 A.M. to 7:45 A.M. Hospital Aides then feed the clients on a group by group basis. For example the first group eats as soon as the first of trays arrive. The second group then eats after the first group of clients has completed breakfast.

On October 8, 1986, Ms. Chandler stated that Donna Haynes, Hospital Aide Supervisor, arrived in the living area approximately 8:20 A.M. Ms. Haynes stated to Ms. Chandler that she observed a client assigned to the Grievant with a tray without any evidence of food in front of him. This client in question is of slight height and build, approximately 5' 3" tall and 100 pounds.

Ms. Chandler testified that she saw the client in question at approximately 11:30 A.M. She stated that she did not put the client on a bus to attend school off grounds because Mary Garren, a Hospital Aide, reported that this client had not eaten breakfast. This report was given verbally to both Ms. Chandler and Ms. Haynes. Ms. Chandler then brought the client to the office and ordered food for him. The client ate two breakfasts in her presence.

Ms. Chandler further testified that she examined trays purportedly belonging to the client. She stated that she saw no evidence of food on them.

Ms. Chandler stated that she received three written statements from other employees, namely Mary Garren, Denise Crum, and Mary O'Rourke. Those statements, which allege various failures by the Grievant to feed clients, constitute the bulk of the basis upon which the Grievant was ultimately suspended. by CDC. Ms. Chandler testified that she then apprised her supervisor, Robert Basinger, about these allegations. She further testified that she took no statement from the Grievant as to these allegations before the pre-disciplinary hearing which was scheduled at a later time.

Donna Haynes, Hospital Aide Supervisor II, testified that she was asked by Mary Garren to check the dining room to see if one of the clients assigned to the Grievant was eating his breakfast. When she arrived at the dining room area, Ms. Haynes testified that she observed the Grievant leaving said dining room with another client. She observed the client in question alone in the dining room with no food on his tray. Furthermore, she stated that the client in question had no bib on. Ms. Haynes testified further that she has worked with this client before and he is a messy

eater. She stated that this client eats his two breakfasts in approximately 20 to 30 minutes.

The Grievant testified that she has had certain personality problems with Mary Garren, Mary O'Rourke and Denise Crum. The problem seemed to have occurred over a matter involving a gentleman who was interested in the Grievant. Denise Crum, one of the persons making allegations against the Grievant, was attracted to this same gentleman. From then on, according to the Grievant, Ms. Crum and Ms. Garren and Ms. O'Rourke refused to associate with the Grievant on a friendly basis. She also testified that none of these individuals work side-by-side with her.

As to the timeliness of the bringing of food trays to clients, the Grievant testified that the trays do not come in at a set time. The time for the arrival of the clients' food is determined by the kitchen staff. She testified that later food arrivals can occur if clients have seizures or other accidents, which can throw off the time for which groups can be fed.

The Grievant stated that she has never denied food from any of the clients assigned to her. She further stated that she has always fed them.

As to the client who she was accused of not feeding on October 8, 1986, the Grievant stated that she has worked frequently with him, as well as the other client who she was accused of feeding outside of the dining room area. She testified that she had previously fed the client who was observed by Donna Haynes in the dining hall. She stated that this client is a messy eater, and for that reason she fed him herself. After she fed him she removed the bib from his neck. She further stated that this particular client will eat continuously unless you stop giving food to him.

The Grievant stated that she had been aware of "false allegations" by Mary O'Rourke and Barbara Washington, who had accused her in the past of not feeding clients. For that reason, she stated that she removed one of the clients from the dining room and left the other client, who had been fed, in the dining room. Her purpose for removing the one client from the dining room, was to feed him in the kitchen, so there would be no question that she was feeding him. Again, according to the Grievant, this was due to the allegations made against her by the previously named persons.

Until she appeared at the pre-disciplinary hearing, no person acting in a supervisory capacity questioned her about any allegations made in reference to not feeding clients.

Vera Vance, also a Hospital Aide, testified that she has had contact with one of the clients in question. She stated that this particular client will eat continuously unless he is stopped from eating. She stated that she knows this when she has fed him and when she has observed other people feed him. She stated that he would eat more than his allotted two trays if he were allowed.

Ms. Vance testified that she knows Ms. Garren, Ms. O'Rourke, and Ms. Crum. On several occasions, these three employees have referred to the Grievant by using expletives. Ms. Vance stated that these three employees had a severe personality conflict with the Grievant and that they did not like her.

Because the allegations which gave rise to the suspension of the Grievant could also be considered a criminal offense, the Grievant has asked the Arbitrator to impose on CDC a higher standard of proof, to wit: proof beyond reasonable doubt. This Arbitrator finds this recommendation not well taken. In a criminal case, the standard of proof beyond reasonable doubt stands in contradistinction to a matter which compels an Arbitrator to decide on matters on the basis of "persuasive evidence". See How Arbitration Works (4th Edition), Elkouri and Elkouri, pp. 324-325. An apt analogy, although not complete, is the distinction between a criminal and a civil (administrative) case. Two standards of proof are at work here. This Arbitrator is not dealing with a criminal matter. He is dealing with something entirely different.

As to the issue of "just cause", this Arbitrator is not persuaded by the evidence presented by the State. First, the alleged incidents are based almost exclusively on circumstantial evidence. There was no testimony that trays containing breakfast food for the clients were left uneaten. Second, when Donna Haynes observed the remaining client in the dining room, she testified that

she saw an empty tray. This was corroborated by the Grievant herself, who stated that she fed the client herself in order that the client would not make a mess. There was evidence that this client has a voracious appetite; in fact, this was corroborated by Vera Vance, a disinterested witness. The only evidence presented that the Grievant did not feed her clients consisted of written statements by three individuals. One or more of those statements allege that, as early as October 4, 1986, the Grievant was not feeding several clients. Yet, these individuals did not notify their supervisors as to this alleged incident. Taking into account the fact (and this Arbitrator is so convinced) that these employees have a personal vendetta against the Grievant, that their written statements can only be taken for what they are worth, and that they were not working with the clients assigned to the Grievant, I find their statements not to be credible.

Moreover, in observing the demeanor and the sincerity of the testimony presented by the Grievant as well as her witness, Vera Vance, this Arbitrator is convinced that the Grievant was well aware of the clients' eating habits. This Arbitrator finds them to be credible. Furthermore, this Arbitrator did not receive sufficient evidence that satisfactorily states that employees are prohibited from allowing clients to eat outside of the dining hall. Even if that were the case, under the circumstances imposed on the Grievant by the three employees, O'Rourke, Garren, and Crum, it is this Arbitrator's opinion that the Grievant had to publicly show that she was feeding a client. This Arbitrator recognizes that the supervisory staff acted properly; however, the circumstantial evidence can be construed either for the Grievant or against the Grievant. In the absence of nothing more than circumstantial evidence, this Arbitrator finds for the Grievant.

Accordingly, the grievance is UPHELD, and back pay is ORDERED for the Grievant in the amount of three (3) working days.

September 1, 1987
DATE

ANDREW J. LOVE, ARBITRATOR

STATE OF OHIO
COUNTY OF FRANKLIN