

ARBITRATION DECISION NO.:

161

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Cleveland Developmental Center

DATE OF ARBITRATION:

July 28, 1988

DATE OF DECISION:

December 29, 1988

GRIEVANT:

Timothy Thomas

OCB GRIEVANCE NO.:

G-87-2403

ARBITRATOR:

Thomas P. Michael

FOR THE UNION:

John T. Porter

FOR THE EMPLOYER:

Edward L. Ostrowski

KEY WORDS:

Standard of Discipline
Just Cause
First Agreement

ARTICLES:

Article 5 - Management
Rights

Article 24 - Discipline
§24.01-Standard
§24.02-Progressive

Discipline
§24.04-Pre-Discipline
§24.05-Imposition

of Discipline

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Disciplinary Actions

Article 25 - Grievance

Procedure

§25.03-Arbitration

Procedures

§25.04-Arbitration

Panel

Article 43 - Duration

§43.01-First Agreement

§43.03-Work Rules

FACTS:

Grievant was employed as a hospital aide at Cleveland Developmental Center from February 4, 1985 until his removal on September 25, 1987. Grievant was dismissed on that date and charged with "harmful neglect."

On July 12, 1987, grievant was giving a resident a tub bath, and left him momentarily unattended. During this time, the resident became submerged under the water and nearly drown. Cardiopulmonary resuscitation was administered, and the resident was removed to Cleveland Metropolitan General Hospital where he died twelve (12) days later.

The Cuyahoga County Coroners issued a verdict stating that "the death in this case was the end result of anoxic encephalopathy and bilateral bronchopneumonia due to near drowning and was accidental in nature."

Grievant's file reflects two (2) prior disciplinary actions. One, a written reprimand for leaving his work station prior to being properly relieved, and two, a written reprimand for "neglect of duty - absent from duty without approval."

EMPLOYER'S POSITION:

The Grievant was removed for just cause. Grievant gave conflicting testimony as to the reasons for leaving the resident unattended. In fact, Grievant had been previously reprimanded for leaving his work area unattended. The resident died as a direct result of Grievant's neglect.

The discipline must be consistent with the offense and commensurate with the employee's disciplinary record. The gravity of the offense in this situation justifies the immediate removal of an employee. The employer need not prove its case by the criminal standard of proof beyond a reasonable doubt.

UNION'S POSITION:

Grievant was not removed for just cause. Grievant had not been trained in the tub bath procedure, and he did not give conflicting reports of how the incident occurred.

The employer has not proved that the employer's actions met the definition of "neglect" set forth in Section 3903.33 (C)(2) of the Ohio Revised Code or in Policy Number P-17. Furthermore, Grievant is not guilty of negligence because his actions were not unreasonable for the conditions in which he was placed. Grievant was working overtime in an area manned by four hospital aids instead of seven staff members formerly assigned to the area.

The Employer is attempting to make a scapegoat of the Grievant to escape responsibility for its own failures. Grievant's actions of rushing to the aid of another resident was not an abuse or neglect, but was an accident. The employer must prove the serious charge brought against the

Grievant beyond a reasonable doubt. Grievant should be reinstated with full back pay and restoration of benefits.

ARBITRATOR'S OPINION:

The Employer has established just cause for the removal of the Grievant. The Employer is not unreasonable in demanding an enhanced standard of care from its employees in this area.

Grievant's claim that he has not been trained in proper tub bath procedure is unpersuasive. Grievant's knowledge of the resident's physical infirmities was enough to put the Grievant on notice that he should not leave the resident unattended and to his own devices in a bathtub.

A criminal standard of burden of proof should not attach to this proceeding because the Grievant was not disciplined for criminal neglect. Because of the severe level of punishment meted out to the Grievant, the evidence was tested with a higher standard of proof than would attach to disciplines of less severity. The Grievant was guilty of negligent disregard and duty imposed on an employee by professional standard and owed to the client by that employee. Grievant failed to exercise due and ordinary care in the circumstances of this case.

AWARD:

Grievance is denied in its entirety. Grievant was removed for just cause.

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**

**THOMAS P. MICHAEL,
ARBITRATOR
COLUMBUS, OHIO**

Grievance No. G87-2403, Timothy Thomas

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Department of Mental Retardation and Developmental Disabilities, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter "Union").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was held at the Office of Collective Bargaining, on July 28, 1988. The record was left open

until August 12, 1988, for production by the Employer of documents related to a 1986 disciplinary action. The parties agreed to allow the Arbitrator to tape record the proceedings and to publish this Opinion and Award. This matter has been submitted to the Arbitrator on the testimony and exhibits and authorities offered at the hearing of this matter as well as the above-noted post hearing documents. The parties stipulated that the grievance is properly before the Arbitrator for decision.

APPEARANCES:

For the Employer:

Edward L. Ostrowski
Labor Relations Coordinator
Office of Employee Relations
Ohio Department of
Mental Retardation and
Developmental Disabilities

For the Union:

John T. Porter
Assistant General Counsel
OCSEA/AFSCME Local 11

ISSUE

The parties stipulated that the issue before the Arbitrator is:

Was the grievant's discharge for just cause? If not, what shall the remedy be?

PERTINENT AUTHORITIES AND CONTRACTUAL PROVISIONS

Section 2901.22(C)

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

Section 2901.22(D)

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that this conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

Section 2903.33(C)(2)

(C)(2) "Neglect" means recklessly failing to provide a person with any treatment, care, goods,

or service that is necessary to maintain the health or safety of the person when the failure results in serious physical harm to the person.

Section 4117.08(C), Ohio Revised Code.

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

* * *

(2) Direct, supervise , evaluate, or hire employees:

* * *

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:

* * *

(8) Effectively manage the work force . . .

CONTRACT PROVISIONS

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

§24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand;
- C. Suspension;
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event, or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§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 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.

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

* * *

ARTICLE 43 - DURATION

§43.01 - First Agreement

The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. 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.

* * *

§43.03 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

FACTUAL BACKGROUND

This case arises on the appeal to arbitration of the disciplinary removal of a hospital aide at Cleveland Developmental Center. Timothy Thomas, the Grievant, commenced working for the Employer at that location on February 4, 1985, and was employed until his removal, effective September 25, 1987 (Joint Exhibit 3a.).

The removal order charged the Grievant with "harmful neglect". The direct basis for that charge was an incident which occurred on July 12, 1987. While the Grievant was giving a tub bath to resident D.B., that resident became submerged under the water when Grievant left him momentarily unattended. Resident [D.B.] was administered cardiopulmonary resuscitation on the spot and was removed to Cleveland Metropolitan General Hospital, where he expired on July 24, 1987, some twelve days after the near-drowning incident. Following an autopsy, the Cuyahoga County Coroner issued the following verdict (Joint Exhibit 8-7):

Upon full inquiry based on all the known facts, I find that the said [D.B.] came to his death officially on the 24th day of July, 1987, in Cleveland Metropolitan General Hospital and was officially pronounced dead at 12:11 P.M., by Dr. Hanzel. There is history that the said [D.B.] was a patient at the Cleveland Developmental Center, 4455 Turney Road, residing in the Phoenix Building, with diagnoses of profound mental retardation and blindness. On July 12, 1987, at about 8:30 P.M., this man was taken to the bathing area and prepared for a bath, by aide, Timothy Thomas. The said [D.B.] was placed in a specialized tub and the aide began filling it with water. Mr. Thomas then left the immediate area, briefly, and on returning, discovered this man upside

down in the tub. The said [D.B.] was removed from the tub, treatment was administered and assistance requested. He was then transported to Cleveland Metropolitan General Hospital where he was admitted at about 11:30 P.M., with a diagnosis of near drowning. Treatment was continued and drug therapy was administered, however this man failed to respond and was pronounced dead at the above time and date. The County Coroner's Office was notified and the Midwest Transportation Company was dispatched. The said [D.B.] then transported to the Coroner's Office where an autopsy was performed. That death in this case was the end result of anoxic encephalopathy and bilateral bronchopneumonia due to near drowning and was accidental in nature.

On September 21, 1987, Director Robert E. Brown executed the subject order of removal (Joint Exhibit 3a.), effective September 25, 1987. The Grievant's personnel file reflects two prior disciplinary action - a written reprimand dated June 6, 1986, for leaving his work station prior to being properly relieved (Employer's Exhibit A), and a written reprimand dated May 28, 1987, for "neglect of duty - absent from duty without approval." (Joint Exhibit 31.).

In addition to the oral testimony and exhibits introduced at the hearing, two witnesses - Carolyn S. McLeroy and Elliott Turner III - testified in the form of written statements by stipulation of the parties. (Joint Exhibits 3f., g., h.).

POSITION OF THE EMPLOYER

The Grievant, Timothy Thomas, was removed for just cause. Grievant was a trained hospital aide with two and one-half years of experience who left a blind, retarded and totally helpless client unattended in a tub. The Grievant gave conflicting testimony as to the reasons for leaving resident D.B. unattended. He told one co-worker, Mildred Allen, that he had left the bathroom area to get towels although his written unusual incident reports (Joint Exhibits 3d. and 3e.) do not make mention of that fact. In fact, Grievant was previously reprimanded for leaving his work area unattended (Employer's Exhibit A).

Resident D.B. died as a direct result of Grievant's neglect. No reasonable person in the position of Grievant would have left resident D.B., who had almost no voluntary muscular control alone and unattended in a bathtub.

The Union erroneously contends that the Employer must prove its case by the criminal standard of proof beyond a reasonable doubt, citing the definition of "neglect" set forth in the Ohio Criminal Code. That definition is not applicable to the civil neglect charge against the Grievant. Cleveland Developmental Center Policy Number OP/P-5 (Joint Exhibit 6g.) requires that discipline be consistent with the offense and commensurate with the employee's disciplinary record. That policy statement recognizes that the gravity of some offenses justifies the Employer in immediately removing an employee (Joint Exhibit 6g., section VI, B. 3; Appendix A, section I.). The Employer cannot be expected to continue to employ an individual directly responsible through his neglect for the death of a resident.

POSITION OF THE UNION

The Employer did not have just cause to remove Timothy Thomas from his position as a Hospital Aide. The Grievant was ordered to give resident D.B. a tub bath, a procedure for which he had not been trained. There is no discrepancy between the unusual incident reports completed by Mr. Thomas and his written statement regarding the accident involving resident D.B. The testimony of Mildred Allen contradicting the Grievant's version of events is not credible and should be disregarded.

The events of this case do not meet the definition of "neglect" set forth in Section 3903.33 (C) (2), Ohio Revised Code. Nor do they constitute "neglect" as defined in Policy Number P-17 (Joint Exhibit 6f.), which defines neglect as "a purposeful or negligent disregard of duty imposed on an employee by statute, rule, or professional standard and owed to a client by that employee." There has been no suggestion that Mr. Thomas purposefully caused injury to resident D.B. Nor has there been any showing that he is guilty of negligence in the tort concept of that term. Mr. Thomas' actions were not unreasonable for the conditions in which he was placed. He was working overtime on his second work shift on his normal day off in a work area which was manned by four hospital aides instead of seven staff members formerly assigned thereto. In addition, he was performing a service for the injured resident which the Employer had ordered him to undertake without providing the proper training.

The Employer is attempting to make a scapegoat of the Grievant to escape responsibility for its own failures. While the Grievant may have made the wrong decision in rushing to the aid of another resident, that act does not constitute either abuse or neglect. As found by the Cuyahoga County Coroner and evidenced by the fact that a charge of involuntary manslaughter against Mr. Thomas was dropped, the injury to resident D.B. was accidental, not due to abuse or neglect.

The Employer must prove this serious charge beyond a reasonable doubt. Additionally, Policy Number OP-P-5 (Joint Exhibit 6g.) is an unreasonable policy in violation of §43.03 of the Contract since that disciplinary policy does not distinguish between abuse and neglect in determining penalties, which are based solely on whether or not the resident is harmed.

The Grievant should be reinstated with full back pay and restoration of benefits. He should be assigned to Warrensville Developmental Center since Cleveland Developmental Center is now closed.

OPINION

Upon thorough review of the record of this unhappy incident this Arbitrator has concluded that the Employer has established just cause for the removal of the Grievant, Timothy Thomas.

First of all, at least in the context of the residents assigned to Phoenix 2, it cannot be concluded that Policy Number OP/P-5 is an unreasonable work rule. Those residents, according to the testimony of Arthur Laney, were severely, profoundly, multiply handicapped residents with very low intelligence and unable to do much to care for themselves. As such, it is of no moment to them whether they are exposed to the risk of injury because of abuse, other purposeful acts, recklessness or merely simple negligence. The danger to the residents is the same and, as applied to Phoenix 2, the employer is not unreasonable in demanding an enhanced standard of care from the staff assigned to that unit.

The Arbitrator is not persuaded by the Union's claim that the Grievant was not properly trained to give a tub bath and therefore should not be disciplined for this incident. The testimony, including that of Union witness Ruth Johnson, established that it had been an established custom at Cleveland Developmental Center for staff to be trained in giving baths by other staff. Ms. Johnson testified that she personally had taught Mr. Thomas how to give tub baths, testimony which directly conflicts with that of the Grievant, who claimed that he had never previously given a tub bath prior to July 12, 1987. Regardless, this neutral is convinced that the issue of tub bath training is irrelevant to determining whether or not the Grievant was guilty of neglect in this case. Grievant's admitted knowledge of D.B.'s physical infirmities was enough to put the Grievant on notice that he should not leave that resident unattended and to his own devices in a bathtub. Indeed, Ms. Johnson's testimony that she would never have left D.B. alone in the tub in order to attend to another resident (as asserted by the Grievant) is a succinct restatement of the standard to which a reasonable

person in the position of the Grievant must perforce have been held. To go a step further, Mr. Thomas' judgment must be questioned in toileting resident F.I. at the same time he was bathing D.B. In so doing, he created the unnecessary risk which placed him in the position of making what the Union has characterized as "a wrong decision" in going to F.I.'s aid. The above dual conclusions of errors in judgment constituting "neglect" are reached even accepting the Grievant's version of the facts. In so concluding it becomes unnecessary to resolve the credibility issue arising from the conflict in testimony as to whether or not Mr. Thomas had left the bathroom to get towels while D.B. was in the bathtub.

Similarly there is no merit to the assertion of the Union that a criminal standard of burden of proof should attach to this proceeding. The Grievant was not disciplined for criminal neglect. The criminal definition of neglect is as follows:

2903.33(C)(2)

(C)(2) "Neglect" means recklessly failing to provide a person with any treatment, care, goods, or service that is necessary to maintain the health or safety of the person when the failure results in serious physical harm to the person.

Critical to that definition is the element of recklessness. That term in turn is defined in §2901.22 of the Ohio Criminal Code as follows:

2901.22(C)

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

The criminal code itself constitutes recklessness a higher degree of culpable mental state than negligence, which is defined thusly:

2901.22(D)

A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that this conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

The committee comment to House Bill 511 of the 134th General Assembly, which included the above-cited definitions, explains the meaning of criminal negligence:

A person is said to be negligent under the section when, because of a substantial slip from the standard of care required of him under the circumstances, he fails to notice or take steps to evade a risk that his conduct may cause a certain result or be of a certain nature, or that certain circumstances may exist. Although the definition of "negligence" in the new code is structured similarly to the definition of ordinary negligence used in tort law, it defines a higher degree of negligence than ordinary negligence. For one to be negligent under this section he must be guilty of a substantial departure from due care, whereas ordinary negligence merely requires a failure to exercise due care.

To reiterate, it is clear that the Grievant was not discharged for a criminal act and, therefore, this Arbitrator has not required the Employer to establish its case beyond a reasonable doubt. However, due to the "economic capital punishment" meted out to this Grievant, the evidence has been tested with a higher standard of proof than would attach to disciplines of less severity. That examination yields the conclusion that the Grievant indeed was guilty of "neglect" as defined by Policy Number P-17 (Joint Exhibit 6f.), i.e., negligent disregard of duty imposed on an employee by professional standard and owed to a client by that employee. This is a finding of civil tort negligence in the classic sense of the failure to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a provident and reasonable person would not do, and which results in injury to another. 70 Ohio Jur. 3d, Negligence, §3, p. 40. In the opinion of this Arbitrator, the Grievant failed to exercise due and ordinary care in the circumstances of this case. That failure ultimately resulted in the death of a resident. For the reasons previously detailed herein, that failure also constitutes just cause for the removal of the Grievant.

AWARD

The grievance is denied in its entirety. The Grievant, Timothy Thomas, was removed for just cause.

Thomas P. Michael, Arbitrator

Rendered this Twenty-Ninth day
of December, 1988, at Columbus,
Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 1988, the original Opinion and Award was mailed to Eugene Brundige, Director, Ohio Department of Administrative Services, Office of Collective Bargaining, 65 East State Street, Columbus, Ohio 43215; with copies of the foregoing Opinion and Award being mailed to:

John Porter, Associate General Counsel
OCSEA/AFSCME Local 11
995 Goodale Boulevard
Columbus, Ohio 43212

Thomas P. Michael