

ARBITRATION DECISION NO.:

167

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Mount Vernon Developmental Center

DATE OF ARBITRATION:

December 9, 1988

DATE OF DECISION:

January 13, 1989

GRIEVANT:

Thomas Pentecost

OCB GRIEVANCE NO.:

24-09-(88-04-01)-0040-01-04

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

Brenda Persinger

FOR THE EMPLOYER:

Edward L. Ostrowski

KEY WORDS:

Just Cause
Patient Abuse
Automatic Termination
Proper Investigation

ARTICLES:

Article 24 - Discipline
§24.01-Standard

FACTS:

Grievant was employed as a Hospital Aide at Mount Vernon Developmental Center from February 2, 1978, until his dismissal on March 24, 1988, for allegedly abusing a patient. Officer Gouge, a security officer at the facility, witnessed the alleged abuse and testified that he saw the

Grievant use his foot to lift the bed and ram it into the resident's leg. He further testified that the Grievant then pulled the resident from behind the bed and shoved the resident forcefully to the floor so that he "sat down with great force." An hour after the incident, the resident underwent a medical examination which showed no physical evidence of abuse. The resident is described as self-abusive tending to drop-sit spontaneously and with force.

EMPLOYER'S POSITION:

The evidence resulting from the investigation, which consisted of filing an "investigation" report containing Officer Gouge's eyewitness statement and obtaining a medical examination of the resident, established that Grievant abused the resident. Patient abuse warrants dismissal and under Section 24.01 of the Contract, an arbitrator may not modify an employee termination imposed for patient abuse.

UNION'S POSITION:

The Union alleged significant procedural errors at all levels of the grievance process including failure to conduct a fair investigation. Witnesses testified to the difficult behavior of the resident including his refusal to get up and his habit of drop-sitting as well as his habit of pushing his bed against his door so that entrance to the room was difficult. The medical evidence submitted confirms the lack of physical evidence of abuse. Based on the inconsistencies between Officer Gouge's testimony and that of the other witnesses, and Gouge's discipline record including suspensions for failure to inspect, abuse of equipment, and improper conduct, the Union maintains that the Employer failed to meet the burden of proving dismissal for just cause.

ARBITRATOR'S OPINION:

One of the key components of a disciplinary system is the employer's duty to make a "fair and objective" investigation before imposing discipline. The Employer must make a "good faith" effort to determine if accusations against employees are supported by facts by interviewing witnesses and making a careful investigation to see that both sides of the story are available and fairly presented. Here no real investigation was ever conducted. The so-called investigation report was not a report of an investigation by a neutral. Rather, the report contained solely the complaint of the accuser, who himself had a questionable record. The only component of an investigation was the medical examination which produced evidence to call the accuser's report into question. The police chief failed to view or measure the site, interview other persons in the area, or test the accusations against the physical evidence. This lack of investigation by a trained police officer tainted all subsequent disciplinary steps and creates a procedural error fatal to the Employer's position.

Further, the arbitrator found that the Employer did not prove just cause for dismissal due to the inconsistencies in the testimony and the improbability of the testimony offered. Further, the Grievant's description of his actions as non-abusive is consistent with the evidence of the resident's normal behavior.

AWARD:

Grievant reinstated with full back pay, benefits and seniority.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

**Ohio Civil Service Employees
Association, AFSCME, Local 11
Union**

and

**Ohio Department of Mental
Retardation and Developmental
Disabilities
Employer.**

Grievance No.:

24-09-(04-01-88)-40-01-04

Grievant:

(Thomas Pentecost)

Hearing Date:

December 9, 1988

Award Date:

January 13, 1989

For the Union:

Brenda Persinger,
OCSEA Staff Representative

For the Employer:

Edward L. Ostrowski,
Labor Relations Coordinator

Attendance: In addition to the Advocates and the Grievant, the following persons were present at the hearing.

Union:

Dan Smith - OCSEA Counsel
Laurie Stelts - Chief Steward
Karen Longfellow - Witness
Susie Hudepohl, L.P.N. - Witness
Mary Van Houten - Witness
Merdith Tiller, R.N. - Witness

Employer:

David Norris - OCB
Carl R. Machie - MVDC, Labor Relations Office
Bruce Gloseclose - Witness
Joseph M. Roop - Witness

Herbert L. Gouge - Witness

Preliminary Matters

The Arbitrator requested permission to record the proceedings for the purpose of refreshing her memory and on the condition that the tapes will be destroyed or erased on the day that the award is granted. Employer and Union granted permission. The Arbitrator requested permission to submit the Decision for publication. The Employer and Union granted their permission.

The parties stipulated that the matter was properly before the Arbitrator. Sequestration of witnesses was granted. All witnesses were sworn.

Joint Stipulation of the Issue

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

Joint Stipulations of Fact

1. Resident William G. exhibited no physical marks, signs of bruising or areas of loose hair upon medical examination on February 19, 1988.
2. The Grievant would have received a promotion to "Clerical Specialist" if not for the allegations of February 19, 1988 and subsequent events.
3. The Grievant was employed by Mount Vernon developmental center from February 2, 1978 until March 24, 1988.

Joint Exhibits

#1 The Agreement

#2 The Grievance Trail

- A. grievance - 1 page
- B. 3rd step grievance sign-in sheet - 1 p.
- C. 3rd step response and cover letter - 2 pp.
- D. 4th step response - 1 p.

#3 The Discipline Trail

- A. removal order - 1 p.
- B. notice of Appointing Authority decision - 1 p.
- C. pre-disciplinary hearing recommendation - 4 pp.
- D. 72 hour notice - 2 pp.
- E. corrective action committee recommendation - 1 p.
- F. fact finding report - 3 pp.

#4 Pentecost statement - 3 pp.

#5 Unusual incident report - 2 pp.

#6 Investigation report - 4 pp.

#7 Gouge statement - 1 p.

#8 Hudepohl statement - 2 pp.

#9 Van Houten statement - 1 p.

#10 Resident abuse and/or neglect - 8pp.

- #11 Annual employee agreement - 1 p.
- #12 Unusual incidents - 7 pp.
- #13 Hospital aide position description - 1 p.
- #14 Diagram of second floor, Rian Hall - 1 p.
- #15 Room Diagram

Facts

The Grievant at the time of the incident was a Hospital Aide at Mount Vernon Developmental Center (MVDC). Grievant worked at MVDC from February 2, 1978 until his dismissal on March 24, 1988. Grievant was dismissed on that day for allegedly abusing a patient on February 19, 1988. The definition of patient abuse is found in 5119-3-14; Client abuse/neglect (Joint Exhibit #10).

On February 19, 1988, Mr. Gouge, a security officer, after having a cup of coffee in Rian Hall, decided to "patrol" the upper floors of that building. During the course of his patrol, he entered Sub-Unit 4. While passing the room of the resident William G., Officer Gouge observed actions on the part of the Grievant which the Officer characterized as "abuse". At the hearing, Officer Gouge testified (1) that the door to the room was 75-80% open, (2) that the resident was sitting on the floor somewhat behind the bed which was pulled out from the wall on an angle, (3) that the Grievant grabbed the resident by his hair twice, the second time pulling the resident to his feet "by his "hair", (4) simultaneously, the Grievant used his foot to lift the bed and ram it into the resident's leg, (5) that the Grievant then moving the bed again with his foot, pulled the resident from behind the bed to in front of a dresser where Grievant shoved the resident to the floor forcefully so that the resident sat down with great force. Officer Gouge indicated that this incident took only a short time and that the Grievant had his shirt off during the incident. Subsequently, the Officer left the floor and went to the Security Office in another building. He taped recorded his observations which were typed and signed by him by 11:35 a.m. that morning in a document entitled "investigation report" (see Joint Exhibit #6).

Cross examination revealed a number of inconsistencies between the typed statement and the Officer's current memory and testimony. However, the Officer/witness maintained the basic elements of his story:

1. the door was wide enough open for him (the Officer) to see all the room and its occupants;
2. the Grievant used his foot to lift and move the bed on two occasions;
3. the Grievant's shirt was off;
4. the Grievant abused the resident.

Officer Gouge also stated

1. that he did not intervene even though he knew intervention was, under policy, his first duty because the incident was over too quickly, and
2. at the time of the incident, he made no report on the floor to the R.N. or other personnel.

Subsequent to this occurrence, at 9:00 a.m. Officer Gouge signed an Unusual Incident Report (Joint Exhibit #5). As a consequence, apparently, of that report, the resident was taken for a medical examination. That examination which was within one hour of the alleged incident revealed no evidence of abuse. The R.N. (Ms. Tiller) from the Unit accompanied the resident to that examination. She observed the examination and saw no signs of abuse. A second observer was L.P.N. Hudepohl. She testified that she examined the resident when he was on the floor and found

no evidence of abuse. She indicated that she had had prior experience with hair-pulling injuries and could find no hair loss, no redness, and no other customary marks. The R.N. (Vivian Violet) who did the actual examination did not testify; her conclusions are in writing on the incident report (Joint Exhibit #5) and confirm the lack of physical evidence of abuse.

Officer Gouge reported his observations directly to his Supervisor Police Chief Roop. Chief Roop testified that his investigation encompassed two acts: 1) the filing of the "investigation" report containing Officer Gouge's eyewitness statement (Joint Exhibit 6 and 2) sending the resident for a medical examination. He indicated that he had "no need to visit the site because he knew it so well" and that he sought no other witnesses nor interviewed other personnel on the floor at the time of the incident. Mr. Gloseclose also testified; Mr. Gloseclose is the Mental Health Administrator II who was Unit Manager of the Rian Hall Unit where the incident happened. Mr. Gloseclose described the conduct, behavior, and status of the resident. He said the resident is ambulatory but basically verbally non-communicative. He is self-abusive, and his primary behavior involved "drop-sitting" spontaneously and with force. Mr. Gloseclose also testified that he relied heavily on the investigation conducted about the incident as found in the "investigative report" (Joint Exhibit #6).

The Union introduced witnesses who were working in that area and/or with the particular resident. Ms. Van Houten, a 14 year employee, was the Grievant's Supervisor. She testified in detail to the difficult behavior of the resident including his refusal to get up and his habit of drop sitting. She also testified that on a regular basis the resident pushed his bed against the door so that entrance to the room was difficult. She described the bed as heavy and very difficult to move for two reasons: 1) at that time, the bed had no wheels, and 2) the floor in the resident's room had metal tracks on the floor which severely impeded the bed's movement. Ms. Tiller, the R.N. on the Unit, also testified. She confirmed that the resident often pushed his bed against the door. She stated that on the morning in question, the bed was pushed against the door allowing the door to open only 45°. A third witness was L.P.N. Hudepohl who testified that Officer Gouge stood outside the door in question at the time of the alleged incident for over 10 minutes. A fourth witness was Karen Longfellow, a Hospital Aide on Sub-Unit 4 at the time of the alleged incident. She said that she saw the Grievant several times during the 6:30 a.m. to 8:00 a.m. period and that at those times he did not have his shirt off. She said that at 6:30 a.m. she checked the resident's room and found the bed pushed against the door so that the door would only admit one person moving sideways.

Much testimony was also adduced about the procedural conduct of the Step 3 hearing and the pre-disciplinary hearing. The Arbitrator, having concluded that the issue should be decided on other more direct issues, shall not report that testimony.

Two other pieces of salient evidence were introduced.

1. Officer Gouge has been disciplined as follows:
 - A. 3 day suspension in October 24, 1984 for Neglect of Duty (failure to inspect);
 - B. 10 day suspension on September 19, 1986 for Neglect of Duty (abuse of equipment);
 - C. 20 day suspension on July 13, 1987 for Neglect of Duty (Improper Conduct - Police Officer).
2. The bed in the resident's room had no wheels the day of the incident.

Employer's Position

The evidence of Officer Gouge proves that the Grievant abused a resident in violation of numerous MRDD policies and rules. Patient abuse is a conduct which warrants dismissal. Under the Contract §24.01, an arbitrator is forbidden to modify an employee termination imposed for

patient abuse.

Union's Position

The Union alleged significant procedural errors at all levels of the grievance process including failure to conduct a fair examination. Moreover, the Union maintains that the Employer has not met the burden of proving dismissal for just cause.

Discussion

The Arbitrator has deliberately chosen not to delineate the testimony about the procedures at various points in the grievance process nor to elaborate on the numerous procedural errors alleged by the Union. The reason for this truncated discussion is that a basic procedural error occurred on the day of the incident. In this case, the Grievant was alleged to have abused a patient. Such a charge not only opened the Grievant to dismissal from a career of 10 years, but dismissal for such a reason would be bound to taint his employment opportunities forever. Secondly, such a charge could result in a criminal charge. One of the key components of a disciplinary system is the duty on the employer to make a "fair and objective" investigation before imposing discipline. Accusations against employees are to be carefully considered to see if they are supported by facts. Witnesses should be sought and interviewed, and a careful investigation made to see that both sides of the story are available and fairly presented. The employer must make a "good faith" effort.

The Arbitrator finds that no such investigation was conducted.

No real investigation was ever conducted. The so-called "investigation report" was not a report of an investigation by a neutral, rather the report contained solely the complaint accuser. While the accuser was a security officer, no evidence exists that security officers as a class are less likely to misperceptions or falsehoods. Moreover, this individual security officer had a questionable record. The only component of an investigation was the medical examination which produced evidence to call the accuser's report into question. Subsequently, the police chief investigated nothing. He did not view or measure the site. He did not test the accusations against physical evidence, i.e., the door or the bed. He did not interview other persons in the area. This lack of investigation by a trained police officer tainted all subsequent disciplinary steps. Witness, minimally, Mr. Gloseclose's admitted reliance on the so called investigation report. The Arbitrator finds this procedural error fatal to the Employer's position.

Since a person's reputation is at stake, the Arbitrator will also discuss the substantive evidence. The Arbitrator finds that the Employer did not meet its burden of proving "just cause". Substantial discrepancies in Officer Gouge's story were raised by the testimony of the witnesses. Physical evidence indicates the improbability that the Grievant lifted the bed with his foot and pushed it against the resident. Testimony casts severe doubt that the door was in the position described by the Officer. The statement that the Grievant had his shirt off and was unobserved by other employees lacks believability. Lastly, the Grievant's description of his actions which were non-abusive is consistent with the evidence of the resident's normal behavior. Regardless of the egregious procedural error, the Employer did not prove just cause for dismissal.

Award

The Grievant is to be reinstated with full back pay, benefits, and seniority. Grievance Sustained.

January 13, 1989
Date

Rhonda R. Rivera
Arbitrator