

ARBITRATION DECISION NO.:

216

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health
Fallsview Psychiatric Hospital

DATE OF ARBITRATION:

December 4, 1989

DATE OF DECISION:

December 13, 1989

GRIEVANT:

Rebecca Lillie

OCB GRIEVANCE NO.:

23-09-(89-05-23)-0123-01-04

ARBITRATOR:

Harry Graham

FOR THE UNION:

Tim Miller

FOR THE EMPLOYER:

Teri Decker

KEY WORDS:

Removal
Abuse
Mitigation
Self Defense
Employee Abuse

ARTICLES:

Article 24-Discipline
§24.01-Standard

FACTS:

The Grievant was employed as a Licensed Practical Nurse at a Department of Mental Health facility. While she and a co-worker were attempting to restrain a patient who had become violent, the patient bit her on the hand. The Grievant then bit the patient in the upper back in order to get

the patient to stop biting her hand. As a result of this incident, the Grievant was discharged. Accordingly, this Grievance was filed.

EMPLOYER'S POSITION:

The Employer argued that the Grievant's biting the patient constituted patient abuse. Section 24.01 of the Agreement requires that where patient abuse has occurred, no modification of the discharge penalty is possible. There is no doubt here that the Grievant bit the patient. Accordingly, the grievance must be denied. The Grievant had received training in methods to be used when being bitten by a patient. She was to push her hand further into the patients mouth and/or pinch the patient's nostrils to induce the patient to open her mouth. The Grievant used neither of these methods. Initially, the Grievant denied biting the patient. However, when confronted with an odontologist report, which matched the Grievant's dental impression with the bite marks, the Grievant acknowledged biting the patient.

UNION'S POSITION:

The Union argued that the Grievant acted in self-defense by biting the patient. Accordingly, the Employer lacked just cause for removal. When the Grievant bit the patient, she could not follow the procedure of inserting her hand further into the patient's mouth because her hand was immobilized. She was also unable to pinch the patient's nose. In pain and fear of serious injury, and unable to implement her two-year-old training in methods to use when being bitten, the Grievant did what she was able to do to induce release. Testimony of the Training Officer at the Grievant's facility indicated that if the methods the Grievant had been taught to use when being bitten could not be implemented, alternative action was permissible. The Grievant initially denied biting the patient because she was informed that criminal charges were possible against her. However, a grand jury declined to return an indictment against her, which reflects its conclusion that the Grievant indeed acted in self-defense. In both the Ohio Revised Code and the Ohio Administrative Code, self-defense is referenced as a mitigating factor in situations such as this.

ARBITRATOR'S OPINION:

The Arbitrator ruled that the Employer lacked just cause for removal, since there was no finding of patient abuse. Testimony from the Grievant and her co-worker indicated that the Grievant was in no position to push her hand further into the patient's mouth to force release. Similarly, the Arbitrator could not conclude that the Grievant was able to pinch the patient's nose to force release. Given that the Grievant was on the patient's back, with her hand immobilized, it is understandable that she regarded biting the patient as her only option. Her reactions were instantaneous and instinctive. Besides, the struggle evidenced the patient's physical strength. Three people were unable to restrain the patient. At the hearing, the Training Officer at the Grievant's facility indicated that if an employee believed he or she could do nothing else, perhaps a bite would be appropriate. This view was supported by the co-worker involved in the incident. Patient abuse did not occur here. It is more correct to conclude that employee abuse occurred.

AWARD:

Grievance is sustained. The Grievant is to be reinstated. She is to receive all wages and benefits she would have earned. Any income she earned from interim employment or Unemployment Compensation between her discharge and this award may be used to offset back pay. All record of this incident is to be expunged from the employment history of the Grievant, and she is to be credited with seniority as if the incident did not occur.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

OCSEA/AFSCME Local 11

and

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

Case No.:

23-09-(89-06-23)-123-01-04

Before:

Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

Tim Miller

Staff Representative

OCSEA/AFSCME Local 11

77 North Miller Rd., Suite 204

Fairlawn, OH. 44313

For Department of Mental Health:

Teri Decker

Labor Relations Officer

30 East Broad St., Suite 1360

Columbus, OH. 43215

Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham on December 4, 1989. At that hearing both parties were provided complete opportunity to present testimony and evidence. The record was closed at the conclusion of oral argument.

Issue:

The parties are in agreement upon the issue to be decided in this case. That issue is:

Was the Grievant discharged for just cause?
If not, what should the remedy be?

Background:

There is no dispute concerning the facts that give rise to this proceeding. The Grievant, Rebecca Lillie, has been employed at the Fallsview Psychiatric Hospital operated by the Ohio Department of Mental Health since November 2, 1987. She was a Licensed Practical Nurse and performed the tasks associated with that occupation. During her tenure with the State she received good performance evaluations. There is one blemish on her record, an oral reprimand.

On February 28, 1989 there occurred the incident that prompted the State to discharge Ms. Lillie. On that date there was resident in the hospital one K.T., a woman with a history of violent behavior. Her activity extended to attacks upon hospital staff and on herself as well. On occasion she had inserted staples into her body and had once swallowed razor blades. She had bitten hospital staff in the past as well.

On February 28, 1989 K.T. informed Brian Doyle, a Registered Nurse at Fallsview, that she had staples in her room. She also indicated that she possessed a razor. Doyle in turn informed the appropriate medical authorities who directed that K.T. be placed in seclusion. Mr. Doyle, Jeanette Evans, a Therapy Program Worker, and Ms. Lillie attempted to escort K.T. to seclusion. K.T. became violent. Mr. Doyle directed Ms. Evans to go for additional assistance while he and Ms. Lillie attempted to restrain K.T. In the course of their efforts and before help arrived a struggle ensued during which K.T. bit Ms. Lillie's right hand. When that occurred Ms. Lillie bit K.T. in the upper back, just below her neck. Upon learning of that event the State discharged Ms. Lillie. It was of the view that patient abuse had occurred in this situation.

A grievance protesting Ms. Lillie's discharge was properly filed. It was processed through the procedure of the parties without resolution and they agree that it is before the Arbitrator for determination on its merits.

Position of the Employer:

In the opinion of the State the fact that Ms. Lillie bit K.T. constitutes patient abuse. Ms. Lillie had received training in Therapeutic Handling and Restraint Techniques (THART, also known as crisis intervention training). That training was provided to her in November, 1987, shortly after she was employed by the State. In the Employer's view, Ms. Lillie was well acquainted with the methods to be used when being bitten by a patient: she was to push her hand further into the patient's mouth and/or pinch the patient's nostrils in order to induce the patient to open her mouth. Ms. Lillie did not act according to the dictates of her training. Rather, she acted in a most inappropriate fashion, biting K.T.

The State points out that Ms. Lillie has changed her testimony during the course of this proceeding. She initially denied biting K.T. Confronted with the report of a Forensic Odontologist who matched Ms. Lillie's dental impression with the bite marks on K.T. the Grievant acknowledged biting her.

This incident was investigated by the Police Department at Fallsview. As a result, criminal proceedings were commenced against the Grievant. On April 9, 1989 the Summit County, OH. Grand Jury found no cause of action to exist. Charges against Ms. Lillie were dropped. This does not indicate her innocence of the charge against her in this proceeding according to the State. No inference of guilt or innocence should be drawn in the State's opinion. In fact, there exists the continuing possibility of further criminal charges against the Grievant according to the Employer.

The State points out that the Agreement at Article 24, Section 24.01 requires that in instances where patient abuse is found to have occurred by an arbitrator no modification of the discharge penalty is possible. In this situation, the evidence and testimony establishes without doubt that Ms. Lillie bit K.T. As that is the fact, the discharge must be sustained according to the Employer. It

urges that the grievance be denied.

Position of the Union:

The Union points out that K.T. is violent and dangerous. She is a danger to herself and to those about her, including the staff at Fallsview. No dispute exists concerning the fact that a struggle was occurring when Ms. Lillie bit K.T. But, according to the Union, that bite must be evaluated in light of the circumstances surrounding it. K.T. had Ms. Lillie's right hand in her mouth and was biting the area between the thumb and wrist. Ms. Lillie was in pain. When she was bitten she was on K.T.'s back, with her arm around K.T.'s head. Given the position she was in and the manner in which K.T. was biting her she could not follow the prescribed procedure of inserting her hand further into K.T.'s mouth to prompt its release. Her hand was immobilized by K.T. Ms. Lillie was experiencing pain. She was also experiencing fear that K.T. would tear a chunk of flesh from her hand, permanently injuring her. In these circumstances, the Union insists that Ms. Lillie's action must be considered to be self-defense. If self-defense is found, the State lacks the necessary just cause to sustain the discharge in question in this proceeding.

Ms. Lillie initially denied biting K.T. because she was informed criminal charges were possible against her. In fact, K.T. declined to file such charges. When it evaluated the situation, the Summit County Grand Jury declined to return an indictment. This must be viewed as reflecting its conclusion that Ms. Lillie indeed acted in self-defense in this situation according to the Union.

In both the Ohio Revised Code, Section 2903.(B)(2) and the Ohio Administrative Code, Section 5122-3-14-(C)-(1) the concept of self-defense is referenced as a mitigating factor in situations such as this. Given the circumstances surrounding this event, the struggle between staff at Fallsview and K.T. and the pain Ms. Lillie was experiencing as a result of being bitten, the Union insists that her action must be regarded as self-defense.

Ms. Lillie received THART training upon her employment with the State, some two years prior to this incident. She was due for a refresher course but had not had it at the time of the events under scrutiny in this proceeding. The Training Officer at Fallsview indicated that if the THART procedures were incapable of being implemented alternative action was permissible. In fact, that is precisely the situation in this case according to the Union. Ms. Lillie was behind K.T. She was unable to insert her hand into K.T.'s mouth as it was being bitten. In the circumstances surrounding the struggle she was unable to pinch K.T.'s nose to induce her to release her hand. In pain and fear, and unable to implement her two year old training, Ms. Lillie did what she was able to do in order to induce K.T. to release her. That is properly to be regarded as self-defense, not patient abuse according to the Union. As that is the case, reinstatement with appropriate back pay and other emoluments is the only appropriate remedy the Union insists. It urges the Grievance be sustained.

Discussion:

It goes without saying that the weakest members of society who are in the custody of the State must be treated with the utmost respect. The State is charged with a high responsibility when it becomes responsible for the well-being of those who cannot fend for themselves. Those in the employ of the State who provide the necessary care are the front-line representatives of the State and must be held to high standard of conduct. Hence, the strict posture of the State with respect to patient abuse. Such abuse cannot be tolerated in any humane society. The Union recognized as much when it agreed with the State on the proper nature of penalties to be imposed on those who are found to abuse patients. Section 24.01 of the Agreement provides that if there is found to be

patient abuse, discharge is the only appropriate penalty. Neutrals are afforded no discretion to modify penalties. However, in order for the discharge penalty to be implemented, there must be a finding of patient abuse. In the circumstances of this dispute, it is impossible to make that finding.

Testimony of those present at the struggle between K.T. and Ms. Lillie was received from the Grievant and her co-worker, Brian Doyle. That testimony is consistent. It indicates that K.T. had the Grievant's hand clasped firmly between her teeth. Ms. Lillie was in no position to push her hand further into K.T.'s mouth as her arm was immobilized by the grip of K.T.'s jaws. Given the circumstances of the altercation it is also impossible for the Arbitrator to conclude that the Grievant was able to pinch K.T.'s nose in order to induce her to open her mouth. In the circumstances of the altercation, to engage in such second guessing is improper speculation which must not occur in a discipline situation.

Attention must also be given to the physical relationship between the Grievant and K.T. Ms. Lillie was behind K.T. In those circumstances it is readily understandable that she regarded biting K.T. as her only option in order to free herself. That that might be the case was acknowledged at the hearing by the Training Officer of Fallsview. He indicated that the training received by employees might not be appropriate in all circumstances. He went so far as to acknowledge that if an employee believed he or she could do nothing else, perhaps a bite would be appropriate, though he stressed repeatedly that such a circumstance would be highly unusual. This view was supported by Nurse Doyle who testified that it was not always possible to close the nose of a patient who was biting a staff member. In the circumstances facing Ms. Lillie on February 28, 1989 the type of discipline that was administered in this situation is inappropriate. Ms. Lillie was confronted with a desperate situation and took the action that was available to her. Her reactions were instantaneous and instinctive. They occurred at a time she was in pain, fearful of damage to her hand, and during a physical struggle which had evidenced K.T.'s strength. Three people were unable to restrain K.T. Two, the Grievant and Mr. Doyle, were attempting to do so while their colleague, Evans, summoned help. It is impossible to find that 12 hours of training, covering diverse topics, occurring over one year prior to February 28, 1989 is sufficient to overcome Ms. Lillie's instinctive reaction. Ms. Lillie was being attacked and engaged in a desperate struggle. She was not the aggressor. The Summit County Grand Jury found no grounds to hand up an indictment. The Arbitrator can find no grounds to sustain the discharge. Patient abuse did not occur in this event. Rather, it is more correct to conclude that employee abuse perpetrated by K.T. occurred. Ms. Lillie was engaged in self-defense on February 28, 1989. Consequently, the action of the State must be overturned.

Award:

The grievance is SUSTAINED. The Grievant is to be restored to employment with the State in her former position. She is to receive all wages and benefits she would have earned but for this incident. She is to provide to the Employer records of any income from interim employment or Unemployment Compensation that she may have had in the period between her discharge and receipt of this award. Such income may be used to offset the back pay liability of the State. All record of this incident is to be expunged from the employment history of the Grievant and she is to be credited with seniority as if this incident had not occurred.

Signed and dated this 13th day of December, 1989 at South Russell, OH.

Harry Graham
Arbitrator