

ARBITRATION DECISION NO.:

238

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Veterans Home

DATE OF ARBITRATION:

February 6, 1990

DATE OF DECISION:

March 7, 1990

GRIEVANT:

John Clemens

OCB GRIEVANCE NO.:

33-00-(89-07-28)-0172-01-05

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

John Hall

FOR THE EMPLOYER:

Edward Morales

Donald Wilson

KEY WORDS:

Patient Abuse

Witness Credibility

Removal

ARTICLES:

Article 24-Discipline

§24.01-Standard

FACTS:

The grievant is a Custodial Worker at the Ohio Veterans Home and was terminated for patient abuse. There are two conflicting stories concerning the incident which led to the removal. The employer's witness viewed on his monitor what he thought was an incident of abuse. It appeared that one employee was exposing her breast to a resident while the grievant would hit the resident on the back of the head or flick the resident's ears each time the resident looked towards the other employee. The other employee was partially hidden by a pillar, but the witness did see the resident's head jerk after every contact. The witness went to the room and told both employees to stop. This incident was reported twenty four days later; the witness was allegedly afraid to report the incident while he was still on probation.

Both the grievant and the other employee denied that they abused the resident. Another Union witness

claimed that the grievant was only flicking flies off the resident's head and at no time abused the resident. It should be noted that this witness has a close, intimate relationship with the other employee who was allegedly exposing herself.

EMPLOYER'S POSITION:

The grievant was flicking a resident's ears and tapping the resident on the back of the head. The witness to this incident indicated that another employee may have been exposing her breast to the resident and it seemed that each time the resident looked at the other employee the grievant tapped the resident on the back of the head. The resident was observed to jerk his head after each contact by the grievant. This is clearly an incident of abuse. The grievant has a long history of discipline and under Section 24.01 of the contract the arbitrator may not modify the termination.

UNION'S POSITION:

The grievant did not abuse a resident. The grievant was brushing flies off the residents head, not flicking the resident's ears or hitting the resident on the back of the head. The arbitrator is also not bound by Section 24.01 which prohibits an arbitrator from modifying discipline for patient abuse. The incident does not equal abuse.

ARBITRATOR'S OPINION:

A determination of what actually happened depends on the arbitrator's judgment of the credibility of the witnesses. The grievant's testimony was unbelievable and her description of her actions were factually impossible. The other witness for the grievant cannot be considered an objective witness given her closeness to the grievant. The employer's witness, in contrast, was credible. Contract Section 24.01 does not allow an arbitrator to modify a termination of an employee who has been found to abuse a patient. The Union's argument that the Ohio Veteran's Home should not be considered in reference to Section 24.01 is moot since the arbitrator would find termination justified in this case regardless of whether or not the grievant was charged with abuse. The arbitrator did comment that "abuse" should not be defined differently for different agencies and 24.01 should be followed in any abuse case. It is the arbitrator's finding that abuse did take place and the termination is justified.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

Ohio Veterans Home
Employer,

and

OCSEA, Local 11
AFSCME, AFL-CIO
Union.

Grievance No.:
33-00-890728-0172-01-05

Grievant:
(John Clemens)

Hearing Date:
February 6, 1990
Award Date:
March 7, 1990

For the Employer:
Edward Morales and Donald Wilson

For the Union:
John Hall

Present in addition to the Grievant and the Advocates were the following people: James Speer, Administrator (Employer's witness), William R. Kessler, LPN (Employer's witness), Loalouise Geiger, RN, Director of Nursing (Employer's witness), Tony Washington, Labor Relations Coordinator, Bob Boger, President Local Union, Amy Esposito, Custodian (Union witness) and Laurie Fox, Nurse's Aide (Union witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

J-1 The Contract

J-2 The Grievance Trail

J-3 The Discipline Trail

J-4 Patient Abuse Policy

J-5 Statement of William R. Kessler

J-6 Discipline Policy

Issue

Was the Grievant's employment as a Custodial Worker with the Ohio Veterans Home terminated with just cause. If not, what should the remedy be?

Joint Stipulations of Fact

A) Prior to termination, the Grievant was employed as a Custodial Worker.

B) The Grievant's active disciplinary history included the following actions prior to termination:

LEVEL OF DISCIPLINE:
OFFENSE

1) Written Reprimand;

Refusal to comply with written or oral instructions of supervisor, Use of malicious, abusive or threatening language to resident veterans and/or employees.

2) Verbal Reprimand;

Absenteeism

3) Written Reprimand;

Absenteeism

4) Verbal Reprimand;

Unauthorized Break

5) Verbal Reprimand;

Violation of the Home's Sick Leave Policy

6) Written Reprimand;

Violation of the Home's Sick Leave Policy

7) 3 Day Suspension;

Absenteeism, Refusal to comply with written or oral instructions of a supervisor

8) 5 Day Suspension;

Absenteeism

9) 5 Day Suspension;

Neglect of Duty, Extending Break

C) There are no pending grievances or appeals concerning the prior disciplines listed above.

D) The grievance is properly before the Arbitrator for consideration and no procedural defects exist with the disciplinary process.

E) The Grievant's date of hire as a permanent Custodial Worker was May 25, 1986. The Grievant's employment was terminated effective July 27, 1989.

Facts

This incident arose at the Ohio Veterans Home in Sandusky, Ohio. The mission of the Veterans Home is to safeguard and care for disabled and elderly U.S. war veterans. Many of the Home's residents are in need of constant medical care. Many are mentally incompetent. Some suffer from substance abuse. However, all of the residents are entitled to great respect for the services they rendered to this country.

The Employer alleged that on June 6, 1989, the Grievant abused a patient; for this infraction, the Grievant was terminated.

On June 6, 1989, the Grievant was in his assigned work area on 1 South. At 3:00 p.m., approximately, Amy Esposito, a worker from another unit came to 1 South to borrow supplies. While on 1 South, she stopped to visit with the Grievant who was her live-in significant other. The Grievant and Ms. Esposito were both in a dining room where a number of residents were seated, some watching T.V. Mr. Kessler, an LPN, arrived at approximately 3 p.m. to begin duty. He said he heard the resident "Carl" yelling. He went into the dining room and saw Ms. Esposito and the Grievant seated at the table with the resident "Carl". Since "Carl" had stopped yelling and nothing appeared to be wrong, Mr. Kessler proceeded to the desk. Again, he heard the resident "Carl" yelling out. He looked at the TV monitor on the desk which showed most of the dining room. He testified that the Grievant was sitting on the back of his chair, slightly to the left of the resident who was seated at the table and that Ms. Esposito was standing, partially blocked from view by a pillar. Then Ms. Esposito raised both arms above her head while gripping a white cloth. Mr. Kessler said he believed she was exposing her breast area to the resident "Carl". Every time the resident "Carl" appeared to look at Ms. Esposito, the Grievant would make a flicking or tapping motion behind the resident's head. The resident jerked his head each time in apparent pain, anger, or annoyance. To Mr. Kessler, the Grievant appeared to be flicking the resident's ears and tapping on his head. These actions were repeated 4-5 times while Mr. Kessler was watching. Mr. Kessler went to the dining room, stepped into the area, and ordered the two staff members to stop "messaging" around with the resident. Mr. Kessler did not report this incident until 24 days later. He said he was at the time of the incident a new employee on probation and that he was afraid to report the incident even though he was on notice that reporting abuse was within his duties. He said that ambience in the unit was to "not rock the boat". When he was directly asked by the Director of Nursing some three weeks later, he reported the incident. Mr. Kessler was not disciplined for his failure to report the incident in a timely manner.

Laurie Fox, a nurse's aide, testified that she had been in the dining room at the time of the alleged incident. Mr. Kessler remembered her to be there, talking to a patient, with her back to the center of the room. Ms. Fox testified that she was sitting facing the room the whole time. She maintained that 1) the Grievant did not abuse the patient, and 2) Mr. Kessler never came in the dining area. Moreover, Ms. Fox testified that the Grievant and the resident "Carl" were never out of her sight, that even when she walked around the room collecting bibs and going to the sink area that she was always facing the Grievant and the resident. She did agree that resident Carl did cuss and yell but that such behavior was normal for him. Ms. Esposito also testified. She maintained that the Grievant was merely brushing flies from around the patient's head. She also claimed that Mr. Kessler never came in the room nor spoke to her. Ms. Esposito said she came to 1 South to borrow mopheads and stayed 1/2 hour because "she was caught up in conversation".

The Grievant testified that he never flicked the resident's ears nor tapped his head in an abusive manner. He was merely flicking off flies.

To determine what actually happened depends on the Arbitrator's judgment of the witnesses. Ms. Fox's supporting testimony was incredible. In her testimony, she was adamant that she always had the resident under her eye no matter what else she was doing. This testimony is beyond belief. The Arbitrator concludes that it was impossible for Ms. Fox to carry out her tasks as she maintained. Ms. Esposito's testimony is irrevocably tainted. Ms. Esposito admitted a long standing, intimate relationship with the Grievant. She was hardly an objective witness. The Grievant's testimony was that he was merely flicking flies from the patient's head; the Grievant did remember Mr. Kessler coming into the dining room and asking something to the extent of "is everything ok?"

The Grievant's testimony must be contrasted with Mr. Kessler. Mr. Kessler testified forthrightly. He was very straight-forward and was very credible. The Arbitrator finds that the Grievant did the acts of which he was accused.

The next issue is whether the Grievant's actions constituted "abuse". The Employer points to Ohio Veterans Home Policy Manual #1035 on "Abuse of Patients or Residents". In that document, abuse is defined: "Abuse of a Resident may vary from such acts as teasing; speaking harshly, rudely, irritably, or profanely to a Resident; scolding or ridiculing a Resident; indifference, etc. to actual physical abuse such as striking a patient."

Certainly the Grievant's behavior falls within that standard. Under the disciplinary grid of the Ohio Veteran's Home (Exhibit J-6), the listing at #31 is as follows:

VIOLATION	1st	2nd	3rd	4th
31. ABUSING OR MISTREATING resident Veteran entrusted to the Home's care or failure to immediately report the use of physical force on a Veteran. (MINOR)	Written	3-day sus.	5-day sus. to Removal	
(MAJOR)	3-day sus.	5-day sus. to Removal	Removal	

The Employer has invoked §24.01 of the Contract, specifically the last sentence: "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."

Thus, the Employer claims that having found "abuse" by the Ohio Veteran's Home standards, the Arbitrator cannot modify the Grievant's termination.

The Union argues, with merit, that Ohio Veteran's Home abuse does not necessarily equal the "abuse" in §24.01. The Arbitrator agrees. The word "abuse" in §24.01 is not defined, nor is it referenced to another contract section or the Code. Abuse has varying definitions among agencies. However, abuse in §24.01 is a significant word because once abuse is found, the arbitrator loses the power to modify the termination. Thus, in the context of the contract, the word "abuse" is latently ambiguous - that is, the word has at least two plausible meanings. The duty of the Arbitrator is to define the word as "intended" by the parties. The Arbitrator is clear that abuse in the contract has to be a singular clear standard and cannot be defined each time by a different agency's standard. The finding of abuse under §24.01 is an exceedingly powerful finding and must be a firmly fixed lodestar. The Arbitrator is very persuaded by the cogent opinion of Arbitrator Pincus (No. G87-0001(A)10-31-87) and the persuasive elaborations by Arbitrator Thomas P. Micheal. However, this Arbitrator need make no finding on the definition of "abuse" per se, because the Arbitrator holds that the termination should not be modified. This decision is not forced by §24.01 rather given the Grievant's prior disciplinary record, termination after this offense is both progressive and commensurate. The Grievant has had a continuing, long standing problem working within the rules of the institution. This latest offense, the most serious, after a long series of disciplines, (the last two being (5) day suspensions) creates just cause for termination.

Date: March 7, 1990

Rhonda R. Rivera

Arbitrator