ARBITRATION DECISION NO.:
335

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Mental Retardation and Developmental Disabilities
Warrensville Developmental Center

DATE OF ARBITRATION:
February 22, 1991

DATE OF DECISION:
April 10, 1991

GRIEVANT:
Evelyn Morrison

OCB GRIEVANCE NO.:
24-14-(90-08-22)-0334-01-04

ARBITRATOR:
Hyman Cohen

FOR THE UNION:
Robert Robinson, Staff Representative

FOR THE EMPLOYER:
Bruce Brown, Esquire

KEY WORDS:
Thirty Day Suspension
Neglect of Duty/Client Neglect

ARTICLES:
Article 24 - Discipline
§ 24.01 - Standard

FACTS:

The grievant was a Cook 1 employed by the Department of Mental Retardation and Developmental Disabilities with thirteen years seniority. Her duties included preparing meals according to the diet cards and attending to the special needs of the clients. Among her duties were chopping into bite sized pieces or pureeing food. one client choked on food served for breakfast and, in spite of the direct care employees, efforts, died. The employer determined that the grievant had not prepared the client's breakfast food properly by not peeling and not chopping his banana into bite sized pieces. The grievant was removed for neglect of duty/client neglect. The removal was reduced to a thirty day suspension at Step 3 and the suspension was moved forward to arbitration.

EMPLOYER'S POSITION:

The grievant failed to prepare a client's breakfast according to the diet card which stipulated food be chopped into bite sized pieces. She was aware of the client's special dietary needs. The client choked on his banana which was not peeled or cut into bite sized pieces. There was credible testimony and written statements from direct care employees and management to support this fact. They both saw the remaining unpeeled, uncut banana on the client's tray. The grievant, however, could not remember how she had prepared the client's breakfast on the day he died.

The employer conducted a full investigation by taking statements from all the witnesses to the events. The employer did disclose the documents relied on to support the grievant's discipline at the time of the serving of the pre-disciplinary hearing notice. Lastly, the employer has been fair and considered mitigating circumstances and reduced the grievant's removal to a thirty day suspension. Therefore, there was just cause for the discipline imposed.

UNION'S POSITION:

The grievant did not commit neglect of duty/client neglect by not preparing a client's breakfast according to the diet card for the client. The client choked on food served to him for breakfast and died, however, there was nothing in the

coroner's report to the effect that the client choked on a banana which was not peeled or cut in bite sized pieces. Any misconduct by the grievant was not the cause of the client's death. Additionally, the direct care employee placed the food tray in front of the client without checking the food first. Therefore, there was no just cause for the discipline imposed. The employer failed to prove by clear and convincing evidence that the grievant committed neglect of duty/client neglect.

Mitigating circumstances and procedural errors warrant reduction of the discipline imposed. The grievant was a thirteen year employee with no prior discipline. The penalty in this case violated progressive discipline and was punitive.

ARBITRATOR'S OPINION:

There was just cause for the discipline imposed on the grievant. The prior statements and testimony of the direct care employees and the nurse present when the client choked on his breakfast. Because the grievant stated during the investigation that she could not remember what the client had for breakfast that leaves the witnesses, statements uncontested. Therefore, it was proven by clear and convincing evidence that the grievant committed neglect of duty/client neglect by not preparing the client's breakfast according to his diet card. She did not cut his food into bite sized pieces and as a result the client choked to death.

The employer did consider the fact that the grievant was a thirteen year employee with a good work record. She was removed originally and that discipline was reduced to a thirty day suspension. The employer's investigation was complete and fair and the grievant was not prejudiced by the employer's nondisclosure of one witness' statement.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

STATE OF OHIO, DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, WARRENSVILLE DEVELOPMENTAL CENTER

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO

ARBITRATOR'S OPINION
Grievant: Evelyn Morrison

FOR THE STATE:
BRUCE BROWN, Esq.
Advocate
Ohio Department of
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Office of Collective Bargaining
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77 N. Miller Road, Suite 204
Fairlawn, Ohio 44313

DATE OF THE HEARING:
February 22, 1990

PLACE OF THE HEARING:
Warrensville Developmental
Center, Warrensville, Ohio

ARBITRATOR:
HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P.O. Address
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295

*** * * * ***

The hearing was held on February 22, 1991 at Warrensville Developmental Center, Warrensville, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:10 a.m. and was concluded at 4:00 p.m.

*** * * * ***

On or about August 24, 1990 EVELYN MORRISON filed a grievance with the STATE OF OHIO, DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, WARRENSVILLE DEVELOPMENTAL CENTER, the "'State" in which she protested her removal from her position as a Cook I at the Developmental Center because of "neglect of duty/client neglect". At a third step grievance hearing, pursuant to the Agreement between the State and OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, the "Union", the removal of the Grievant was reduced to a thirty (30) day suspension beginning August 22, 1990 through October 3, 1990. As a result of the State's decision at the third step grievance hearing, the instant grievance was carried to arbitration.

FACTUAL DISCUSSION

At the outset of this discussion, it would be useful to set forth facts which were stipulated by the parties. "The Grievant has been employed continuously at the Warrensville Developmental Center since 1978 without any prior incident of discipline." "She was responsible for preparing the breakfast of Resident E. H. on the morning of June 1, 1990." "E. H. choked to death while eating breakfast on June 1, 1990 at approximately 7:30 a.m." "E. H. was required to have all of his meals prepared 'mechanically soft'." The Grievant has been aware of E. H.'s medical need to have food prepared mechanically soft" for about five (5) years." "E. H. had a history of choking during meals which stemmed from his failure to properly chew food." "Because of his predisposition to choke during meals, his physician had modified his diet to provide that he eat only foods which are "mechanically soft". It should be noted that the phrase “mechanically soft" means that the cook is required to prepare the food by chopping it up or by converting the food to a “puree".

As part of her regular assigned duties, the Grievant prepared breakfast for the residents in Houses 3/100 and 3/200 on the morning of June 1, 1990. E.H. resided in House 3/100. In order for a resident to receive the proper menu and properly prepared food, a diet card is prepared for each resident. The diet card contains the resident's name and the type of diet required for the resident and the method of food preparation. The cook prepares the resident's food as set forth on the diet card and places the card on the tray. The direct care staff gives the tray to the resident named on the card. E. H.'s diet card called for a mechanical soft diet which as I have previously explained means that his food was to be cut into bite size pieces or mashed.

The dispute between the parties is essentially over whether the Grievant placed a banana or parts of a banana which was unpeeled, on E.H.'s tray on June 1, after which he choked to death. I turn to consider the evidentiary record with regard to this factual issue.

GRIEVANT'S ACCOUNT OF THE EVENTS OF JUNE 1

The Grievant recalled that E.H.'s meal on June 1, 1990 consisted of "cereal, toast, peanut butter on toast and bananas.' Since E.H. was required to have mechanical soft food, the Grievant said that she "'put the cereal into the bowl, mashed the bananas and cut up toast into bite size pieces,--- smaller than bite size" pieces. The Grievant testified that she then "put the card on his place or tray with his name.”

The Grievant's testimony concerning the food comprising E.H.'s breakfast and her preparation of food is to be contrasted with her responses to an interview conducted by Warrensville Developmental Center Police Officer Randall

Bisbee on June 5, 1990. The questions Bisbee asked and the answers given by the Grievant which were handwritten by Bisbee are as follows:

"Q. What did [E.H.] have for breakfast on Friday 6/1/90?

A. I don't remember now, I told some officer then what it was.

Q. Is [E.H.] on any eating program?
A. He was on one to one, he is on mechanical soft. He is to be supervised when eating.

Q. For someone like [E.H.] how is toast or bananas prepared?

A. Like this--bite sized pieces [was 16 pieces]. [Grievant showed Bisbee 16 cut up pieces of toast].

Q. Are the bananas peeled or does staff handle that?

A. Sometimes they are--except for D. & [E.H.]--those. would be peeled & mashed. The others aren't always peeled

Q. Do you recall how [E.H.'s] breakfast was prepared on Friday?

A. I just told you. I didn't remember."

Bisbee indicated that he "normally transcribes statements" by writing the "statements used and words used" which are "reasonably close" to what the person interviewed has said to him. The Grievant acknowledged that Bisbee's account of the June 5 interview is an accurate statement today and then." It should be pointed out that the Grievant signed the statement at the conclusion of the interview.

Bisbee acknowledged that before "making her statement" on June 5, the Grievant told him that she "could not give" him a statement because she was busy getting breakfast prepared". He "told her that it would not take long". The Grievant said that Bisbee "came in the middle of breakfast" and that she "did not have the time" to give him a statement. She testified that she was "concentrating on the card menu" and what she was doing, namely, "fixing breakfast to go out". The Grievant acknowledged that she told Bisbee that she could not remember" what she served E.H. for breakfast on June 1.

I cannot conclude that on June 5 the Grievant's inability to remember what she served E.H. for breakfast and how it was prepared was because she was preparing breakfast for the residents and did not have the time to tell Bisbee. The answers to these two (2) important questions asked by Bisbee were that she "did not remember". Had the Grievant said that she "did not have the time to answer these critical questions," it would have been consistent with her testimony.

The context of Bisbee's interview of June 5 must be underscored. E.H. had died while eating his breakfast meal on June 1. Although he was a "choker" and known to be one by the staff, it is assumed that the unfortunate tragedy of June I was not a frequent occurrence at the Developmental Center. The Grievant must have realized the importance of the interview. As she related, "two officers tried to question her". Her role in the events of June 1 must have been understood by her, in light of the fact that E.H. died while eating breakfast.

Turning to the June 5 interview, although the Grievant said that she did not have the time to answer questions because she "was fixing breakfast", nevertheless, she was able to fully answer questions on E.H.'s eating program, how his toast or banana was prepared and whether "the bananas are peeled or does the staff handle that?" The Grievant provided complete answers to these general questions raised by Bisbee. However, it is significant that when the Grievant was asked specific questions about the food that comprised E.H.'s breakfast on June 1 and how his food was prepared, she replied that she could not remember, because she was preparing breakfast for the residents. I find it troubling that her responses to questions by Bisbee were selective--she answered Bisbee's questions of a general nature, but she could not remember the answers to the specific questions about E.H.'s breakfast on June 1. If she had the time to answer the general questions of Bisbee, I find it hard to believe that she did not have the time to respond to his specific questions.

Furthermore, at the hearing some eight (8) to nine (9) months later, the Grievant indicated briefly and concisely the various items of food contained in E.H.'s breakfast and how the food was prepared. She said "I put cereal into a bowl, mashed the bananas, cut up toast into bite size pieces--smaller than bite size" pieces. As the Grievant and the other Union's witnesses indicated there appeared to be nothing unusual about E.H.'s breakfast on June 1. Indeed, to set forth E.H.'s breakfast on June 5 in words, should take no longer than ten (10) or fifteen (15) seconds. There was nothing complex about the breakfast menu for E.H. on June 1. It consisted of dry cereal, milk, toast and a banana. Furthermore, her answers to the questions on E.H.'s breakfast ,And how it was prepared on June 1 would take no longer than the answers which she gave to Bisbee's general questions on June 5.

I cannot accept the Grievant's explanation that she did not have the time to respond to Bisbee's questions about E.H.'s breakfast and how the food was prepared. In light of the evidentiary record, I am persuaded that E.H.'s banana was not cut up into bite size pieces by the Grievant on June 1. I have concluded that the banana was in its peel and cut in

half. This conclusion is supported by my appraisal of the testimony given by Therapeutic Program Worker Lettye Johnson who served E.H. his breakfast on June 1 and Therapeutic Program 'Worker Sandra Colosimo, who with Lettye Johnson attempted to assist E.H. when he had difficulty breathing and was choking to death.

EVENTS OF JUNE 1, 1990 - -
LETTYE JOHNSON AND SANDRA COLOSIMO

Lettye Johnson, a Therapeutic Program Worker, served Client E. H. his breakfast on June 1, 1990. I find that the statements that she provided during the investigation soon after E. H.'s death as well as tier testimony at the hearing to be of great weight.

Lettye Johnson provided two (2) statements on the events of June 1 to Police Officers employed at the Developmental Center. Her initial statement was given to an Officer Arnold on June 1 soon after the death of E.H. Her second statement was given to Bisbee on June 6.

On direct examination Bisbee testified concerning the statement provided by Lettye Johnson on June 6. Officer Arnold was not a witness at the hearing. As a result, except for Lettye Johnson's June 1 statement constituting part of a joint exhibit, there was not much, if any evidence by the State, during its case in chief, concerning her June 1 statement. However, as part of the Union's case, Johnson's testimony consisted primarily of testimony about her June 1 statement. She failed to testify about her June 6 statement which was given to Bisbee. Lettye Johnson's testimony fully implicated her June 1 statement on the events of that day. Moreover, since she was the direct care employee who served E.H. his breakfast on June 1, her role is crucial in determining whether the Grievant properly prepared E. H.'s breakfast by cutting up the banana on his tray into bite size pieces.

In Lettye Johnson's statement given to Arnold on June 1, she indicates that she was serving "breakfast alone" on that day. After she placed the food in front of E.H. she went to the next table where she "stopped" a resident from stealing another resident's food. Lettye Johnson then "turned around" to see E.H. “standing behind [her] pointing to his mouth * *." According to her statement, E.H. “appeared to be choking". “She notified the staff who had just walked into the room from another building (“‘C/C building”) that E.H. was choking. Lettye Johnson went on to indicate to Officer Arnold that she and Sandra Colosimo, another Therapeutic Program Worker, performed the Heimlich maneuver on E.H. They could not get him to sit on a chair. They "finally got him to the floor" and she "ran” to "get a nurse" while Colosimo "started CPR". Lettye Johnson found “Dorene” a nurse who "took over" and started CPR. Immediately thereafter, "911” was called.

On June 1, 1990, Lettye Johnson was asked by Arnold: "was [E.H.]'s toast or banana cut up” and she answered: "No, it was only cut in half ". She was also asked by Officer Arnold: "Did any of the bananas have the peeling on them? Lettye Johnson replied: "All of them had peeling on them. I had to peel them".

Before focusing on Lettye Johnson's June 1, 1990 statement that the banana was "not cut up" but "was only cut in half”, it would be useful to consider her subsequent statement given to Bisbee on June 6. Bisbee indicated that he requested her to provide another statement in order to obtain "additional information from her". Bisbee's written statement of the exchange with Lettye Johnson on June 6 is set forth as follows:

"Q. What was left on E. H.'s plate after he started choking?

A. He didn't have nothing left.

Q. Was his banana peeled?

A. No.

Q. How do you know who gave E.H. the right plate of food?

A. It had the dietary card. All were the same.

Q. How long after you set Eli's food in front of him then went to the next table, was E.H. choking?

A. I'm not sure. I put his food down, stopped a resident from stealing toast. I turned back around & E.H. was choking.

Q. Was E.H. breakfast the last one served?
A. No. One of the first."

Thus, in Lettye Johnson's second statement, she indicated that E.H.'s banana was not peeled. In her previous statement on June 1, she indicated that "all of them [the bananas] had peeling on them" and she "had to peel them".

At the hearing Lettye Johnson said that she recalled the first statement--in other words her statement which was given to Officer Arnold on June 1, 1990. She went on to state that at the prior arbitration hearing on February 1, she recanted the part of her June 1 statement in which she indicated that E.H.'s banana "was only cut in half ". Moreover, at

the instant arbitration hearing she said that her statement that E.H.'s "banana was only cut in half " was "untrue".

I do not find Lettye Johnson's testimony credible nor trustworthy. She indicated that she recanted her statement about E.H.'s banana being cut in half because "her job was on the line". She added that the State was "going to put it on somebody and [she] knew it was going to be [her] since [she] was alone * *." Lettye Johnson further explained that she was fired before for what another staff did." However, she was returned to her job and received "back pay".

I am persuaded that E.H.'s banana "was only cut in half" as Lettye Johnson indicated on June 1, and as she stated on June 6, the banana was unpeeled when Lettye Johnson placed E.H.'s tray in front of him. I find it hard to understand why Lettye Johnson waited from June 1, 1990 to February, 1991 to first recant her statement that E.H.'s banana "was only cut in half" on June 1. Thus, for roughly seven (7) months, between June, 1990 and February 1991 she realized that she stated to Arnold that the banana on E.H.'s breakfast tray which she placed in front of him was improper. She knew that E.H. was a "choker" and was required to be on a mechanical soft diet. By placing the tray before E.H. on June 1 she acted improperly and contrary to the diet required for E.H. Yet Lettye Johnson did not retract her admission against interest for roughly seven (7) months.

In recanting her statement of June 1, Lettye Johnson said that she did so because she believed that her "job was on the line." I do not believe that the credibility of Lettye Johnson's testimony is enhanced because she disclosed her reason for recanting her June 1 statement. Her initial statement was an admission against interest. I have inferred that the motive for altering what she said to Arnold was that she realized that as the direct care employee, the State would focus on her complicity in the events of June 1. The State did just that by first removing her from employment after which it suspended her for thirty (30) days. She changed her statement roughly seven (7) months later to minimize her involvement by recanting her previous comment to Arnold that the banana was "only cut in half."

At the hearing, Lettye Johnson failed to explain her statement to Bisbee on June 6, some five (5) days after E.H. died, that E.H.'s. banana was not peeled. Indeed, "the finding of fact" by the State at the third step grievance hearing indicates the following: "Ms. Johnson, the TPW who served Client E.H. his tray stated that the bananas came from the kitchen cut in half and were not peeled. Ms. Johnson further stated that she threw some of the bananas away because she did not have time to peel them and cut them up. As a result, one Client E.H. ,choked and died during breakfast on June 1, 1990". The "2nd step hearing response" by the State dated October 19, 1990, was based upon a hearing which took place on September 13, 1990, some three (3) months after the events of June 1. At the hearing, Lettye Johnson did not dispute the State's finding of fact based upon the third step grievance hearing. Thus, in September 1990, Lettye Johnson had still not recanted her June 1 statement which constitutes a violation of the State's Rules by serving E.H. a banana which was not consistent with a mechanical soft diet.

In light of the evidentiary record, Lettye Johnson's motive in recanting her June 1 statement was only too apparent. That she disclosed her reason for recanting by indicating that her "job was on the line" is only stating the obvious reason for changing her version of the events which she set forth to Arnold. The disclosure of Lettye Johnson's reason for changing her earlier version leads me to conclude that the earlier version is an accurate account of the condition of the banana on E.H.'s tray on June 1. It must be underscored that Lettye Johnson had first been removed from employment because of her violation of the State's Rule and then, as with the Grievant, her removal was reduced to a thirty (30) day suspension. On June 6,1990 she stated that E.H.'s banana was not peeled. Three (3) months later at the Grievant's third step grievance hearing Lettye Johnson again stated that the bananas "came from the kitchen cut in half and were not peeled". I have concluded that the evidentiary record supports the State's finding of fact that the banana that was placed in front of E.H. on June 1 was unpeeled and cut in half.

This conclusion is supported by the testimony of Sandra Colosimo, a Therapeutic Program Worker. She had been assigned to 3/1OO House on June 1, 1990. Colosimo indicated in a statement which she gave to Arnold that she accompanied a resident to another building. When she returned she assisted Lettye Johnson in serving breakfast to the residents. Colosimo said that Lettye Johnson had served E. H. his breakfast. After E.H. stood up, Colosimo indicated in her statement to Arnold that Lettye Johnson said that he was choking. After the Heimlich maneuver on the Grievant was performed, a nurse was called because E.H. was unconscious. Asked by Arnold whether E.H.'s food was chopped up. Colosimo indicated to him on June 1 that when she "saw the food, some of the banana was whole and some [was] cut in half * *."

Colosimo testified that when E.H. started choking, his banana was not on his plate. Part of E.H.'s banana, she said was on the floor in the peeling. Colosimo stated that "usually" the Grievant "mashes" or prepares bite size pieces of the banana for residents on a mechanical diet. The only time that she recalled that "the banana was still in the peeling" was on June 1.

Among the residents in House 3/100 that Colosimo "attended were K.A. and J.W.", who are required to be on a "ground diet". She explained that a "ground diet" consists of food which is "ground up, diluted with milk and is placed in a blender". However, Colosimo indicated that on June 1, the Grievant did not prepare such food for K.A. and J.W.

Colosimo's testimony supports the statements that were given by Lettye Johnson to Arnold and Bisbee on June 1 and June 6. If there is any doubt about whether Lettye Johnson failed to accurately disclose to Arnold, the condition of the banana which she served to E.H. on June 1, it was cleared up by Colosimo's statement to Arnold on June 6 and her testimony at the hearing. Colosimo indicated to Arnold on June 1 that she observed that "some of the banana was whole and some [was] cut in half". Colosimo's testimony merely reinforces the conclusion that Lettye Johnson's admission that her initial statement about the banana was untrue, is in and of itself, untrue.

That Colosimo indicated to Arnold what Lettye Johnson also disclosed to him about the condition of the banana on

June 1, is not based upon coincidence. The common sense appraisal of the evidentiary record warrants the conclusion that Lettye Johnson's statements to Arnold and to Bisbee on June 1 and 6, respectively, constitute an accurate and credible description of the banana served to E.H. on June 1. It should be pointed out that there was no evidence in the record that Colosimo had any ulterior motive in providing her version of the events on June 1, including the condition of the banana served to E.H., by her statement to Arnold and in her testimony. Moreover, there is nothing in the record to indicate that Colosimo harbored any ill will against Lettye Johnson or the Grievant. Indeed, in her statement to Arnold on June 1, Colosimo attempted to defend, or explain how the unfortunate events involving E.H. could have occurred by stating that “someone else should have been out there (sic) with Lettye Johnson" and that there were two (2) residents under Lettye Johnson's supervision, who steal food. Furthermore, Colosimo also referred to "the 12 or 13 residents" that Lettye Johnson was required to observe on the morning in question. I find Colosimo's testimony which was in support of her statement to Arnold on June 1, to be convincing and trustworthy.

DEBRA BETHEA

Debra Bethea, a Therapeutic Program Worker who served breakfast to residents in House 3/200, that was prepared by the Grievant, testified that none of the bananas that were on the serving trays were peeled on June 1, 1990. She stated that on June 1, the cereal box was not open for the residents, which "is unusual". Bethea testified that the cook's failure to peel the banana "does not generally happen."

A handwritten, signed statement by Bethea, dated “7/2/90" was made a part of the evidentiary record. The statement provides as follows:

"I Debra Bethea on side 3/200, served the Breakfast, cereal was not--open and Bananas (sic) were still in their peelings (sic).'"

The Union objected to Bethea's written statement on the ground that the State did not comply with Article 24, Section 24.04 which, in relevant part, states: "* * When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses in the event or act known at that time and documents known of at that time used to support the possible disciplinary action." The Union claimed that Bethea's statement was not produced at the Grievant's pre-disciplinary hearing; nor was a copy of Bethea's statement submitted at the third step grievance hearing and at the February 1, 1991 hearing.

I have decided not to give much, if any weight to Bethea's handwritten statement. Although Bethea indicated that she wrote the statement she said that she gave it to Ruth Johnson, President of the Union. Bethea then added "I am not sure who I gave it to--I do not know whose hands it got into." Bethea then stated "I do not know who asked for the statement- - I am not sure * *.”

The Grievant's uncertainty as to the identity of the person who asked for her handwritten statement and the person to whom she gave the statement is troubling. The unreliable nature of Bethea's handwritten statement is not aided by the testimony of Joey Williams who held the position of Union Steward at the time of the events in question. He represented the Grievant at the pre-disciplinary conference. Williams said that Alaric Sawyer, Superintendent of the Developmental Center “presented" him with a copy of Bethea's handwritten statement and a copy of "Russell's statement.” Williams went on to state that he "turned in the entire packet to the Union on a Monday night".

I find Williams' testimony lacking credibility. Although he was removed from his position of Union Steward by the Union after the third step grievance hearing, he indicated that he. was not sure of the reasons for the Union's decision. At the time of the hearing he was a part time Therapeutic Program Worker. Williams acknowledged that he opposed informational picketing by the Union in 1990. He also acknowledged that he had applied for a position in Labor Relations at the Developmental Center. Based on the evidentiary record, it is sufficient to state that Williams was not a credible witness.

Reinforcing the conclusion that Bethea's handwritten statement is not entitled to much, if any weight is Sawyer's testimony concerning the statement. He said on direct examination that he received the statements of "Russell" and Bethea and made the statements available to the Grievant and the Union at the pre-disciplinary conference. However, on cross-examination, Sawyer could not recall whether he relied upon Bethea's handwritten statement or whether he even read the statement before he issued discipline against the Grievant. In light of Sawyer's testimony, I am not inclined to give much, if any weight to Bethea's testimony or her July 2, 1990 handwritten statement.

CAUSE OF E.H.'S DEATH

The Union contends that E.H. did not choke on a banana on June 1, or an "inappropriate meal" prepared by the Grievant. In this connection, the Union relies upon the Cuyahoga County Coroners Verdict which was signed by the Coroner on June 1, 1990. In her report, the Coroner indicated, in relevant part, that “[U]pon full inquiry based on all the known facts on June 1st, 1990 at about 7:30 a.m., this man was in the Day Room when he began to choke on food (cereal) * *." Moreover, Nurse Athelene Fort was interviewed on June 2, 1990, the day after E.H. died. During the interview, in reply to Bisbee's questions, which he set forth in his handwriting, she “did the Heimlich and he expectorated some cereal, I tried CPR & he wasn't getting air. I did the finger scoop & removed more food. It was semi-dry cereal. Some air was getting in. We couldn't get a pulse".

There is nothing in the Coroners Verdict and Fort's statement to indicate that E.H. did or did not choke on a banana. The Coroner could have only obtained information about E.H. choking on food from other persons at the Developmental Center who were not identified at the hearing. Furthermore, in her statement to Bisbee on June 2, Fort indicates that E.H. expectorated some cereal when she performed the Heimlich maneuver and that she “finger scooped” and removed “some semi-dry cereal". There is nothing in the record to warrant the conclusion that E.H. was choking solely on "cereal" or "semi-dry cereal". There is no evidence to indicate that in performing the Heimlich maneuver, there was no other food lodged in E.H.'s throat. It should also be noted that there is nothing in the record to indicate that the dry cereal which I have inferred was served frequently to E.H. was required to be mashed. Yvette Gaston, a Therapeutic Program Worker, said that a resident's tray contains an unopened box of cold cereal. As a direct care employee, she opens the box and pours milk into the bowl only when the resident is seated. This procedure, Gaston stated is followed for residents on a mechanical soft diet. The point to underscore is that E.H. had dry cereal on numerous occasions before June 1. However, on June 1, which was the only time that Colosimo could recall that the Grievant did not prepare “bite size food" E.H. died of "asphyxia * *", while eating his breakfast.

In this connection, the Grievant was disciplined for "Neglect of Duty/Client Neglect.” The State did not seek to establish that the Grievant's act or failure to act on June 1, 1990 caused the death of E.H. The State established by clear and convincing evidence that the Grievant failed to comply with the requirement that E.H.'s food be mechanically soft--in other words, she failed to cut the banana into bite size portions or mash the banana on June 1, 1990. The Grievant failed to exercise due care, and thus was negligent in the manner in which she prepared the Grievant's breakfast. By her negligence, the Grievant created a serious risk that E.H. a "choker" would suffer serious harm. There is no question, but that Lettye Johnson contributed to the risk of serious harm that occurred to E.H. by her placement of the breakfast meal in front of E.H. on June 1. The Grievant's failure to prepare E.H.'s breakfast in conformity with the diet card created a situation in which E.H.'s safety was placed in serious jeopardy.

It may very well be true as Gaston indicated, E.H. would choke on properly prepared food or food that was consistent with his mechanical soft diet. Moreover, E.H.'s sister who is at the Developmental Center is a "choker" and his brother died from choking. In this case the Grievant did not properly prepare E.H.'s breakfast which created a serious risk of harm to ER. This is the gist of the State's case which is supported by the evidentiary record.

It may be also true that on June 1, 1990 Lettye Johnson was alone and was unable to supervise and observe the "12 or 13" residents in House 3/100. In addition to the number of residents that Johnson was required to supervise and attend some of the residents steal food from other residents. These conditions do not justify or excuse the Grievant's negligence. In fact, such circumstances make it imperative that the Grievant in her position as Cook, must exercise a proper regard and due care in preparing meals in conformity with the diet card of each resident.

CONCLUSION

I have concluded that the State has established that the Grievant has committed the offense of Neglect of Duty/Client Neglect on June 1, 1990 by failing to exercise due care in preparing E.H.'s breakfast meal. By doing so, she created a risk of serious harm to E.H.

The Grievant has been more than a satisfactory employee during her tenure of approximately thirteen (13) years at the Warrensville Developmental Center. She has not been subjected to any discipline prior to the discipline arising out of the events of June 1. As a witness, she impressed this Arbitrator as an employee who is dedicated to her work and to the needs of the residents.

However, I cannot conclude that the Grievant's record of devoted service to the residents at Warrensville Developmental Center, warrants a lessening of the thirty (30) day disciplinary suspension imposed against her. Based upon the evidentiary record, the Grievant departed from the exercise of due care on June 1, 1990. In light of the environment at the Developmental Center, the Grievant committed a serious offense. As a result, I have concluded that the State's disciplinary suspension should not be disturbed.

In committing the offense of “Neglect of Duty/Client Neglect" the Grievant committed her first offense. Because of the gravity of the offense, I have concluded that the State properly reduced the penalty against the Grievant from removal to a thirty (30) day disciplinary suspension, as a result of the third step grievance hearing. In imposing the reduced penalty, I have concluded that the State acted reasonably and did not abuse its discretion. The State proved by clear and convincing evidence that the Grievant was suspended for just cause as required under Article 24, Section 24.01 of the Agreement.

AWARD

In light of the aforementioned considerations, the grievance is denied.

Dated: April 10, 1991
Cuyahoga County
Cleveland, Ohio

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Impartial Arbitrator
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