

ARBITRATION DECISION NO.:

535

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation and Developmental Disabilities
Warrensville Development Center

DATE OF ARBITRATION:

January 13, 1994

DATE OF DECISION:

February 15, 1994

GRIEVANT:

Dale Walker

OCB GRIEVANCE NO.:

24-14-(93-05-24)-0857-01-04

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Robert Robinson

FOR THE EMPLOYER:

Carolyn S. Collins
Edie Bargar

KEY WORDS:

Removal
Just Cause
Patient Abuse
Credibility

ARTICLES:

Article 24 - Discipline
§ 24.01 - Standard

FACTS:

The grievant was a Therapeutic Program Worker at the Warrensville Development Center, a state facility for the care of the mentally retarded and developmentally disabled. He had over 13 years of service in that department, approximately 3 1/2 months of which were at the Warrensville facility, prior to the incident at issue.

The grievant's performance evaluations since his initial hiring indicated that he had steadily improved and was considered to be an above average employee. Testimony from a former supervisor also indicated that the grievant was particularly adept at working with aggressive clients, remained calm under pressure, and

seldom raised his voice.

The incident which gave rise to this grievance occurred when the grievant was assigned to one-on-one staffing with a 39 year old male client. The client was diagnosed with a schizophrenic disorder, and had a history of violent aggressiveness when he felt his personal space was invaded. On the afternoon in question the grievant attempted to give the client a cup of water, and the client reacted by slapping the cup out of the grievant's hand and kicking him. More violent aggression toward the grievant followed, with the grievant maintaining his composure and attempting to calm the client down. The appropriateness of the grievant's behavior to this point was observed and testified to by other staff members.

The client then left the vocational room and ran to his room in the residence area, with the grievant following behind. It was at this point that the parties differed in their testimony as to what happened next. The grievant was alleged to have hit the client with a shoe, and was discharged as a result. The question as to whether the grievant actually abused the client by hitting him with the shoe was before the Arbitrator.

EMPLOYER'S POSITION:

The supervisor of the client's residence stated that he went into the client's room because he heard the grievant yell for the client to take off his coat. He said he stopped to speak to the grievant about proper voice tone, and as he walked into the room, he saw the grievant hit the client with the client's shoe.

The supervisor claimed that the blow was "with all possible force" and he was adamant that he could not have been mistaken in what he saw. In addition, the client suffered from a skin condition that made bruises hard to detect. The State asserted that the grievant had engaged in patient abuse and the grievant's actions were intolerable and, for that reason, the grievant was removed.

UNION'S POSITION:

The grievant claimed that, once in the client's room, he told the client to take off his coat and then repeated the command in a more firm manner. The client instead removed his shoe and started hitting the grievant with it and kicking at him. The grievant stated that he grabbed the shoe away from the client, and as he did so, the supervisor of the client's residence entered the room. The supervisor then took the grievant from the room.

The Union asserted that the supervisor misunderstood what he saw happening as the grievant took the shoe away from the hitting and kicking client. Later examination of the client showed no bruises. Based on the client's profile and immediate prior behavior, coupled with the grievant's long and successful work record with violent and aggressive persons, the Union argued that the grievant was improperly removed from his job and should be reinstated.

ARBITRATOR'S OPINION:

The Arbitrator stated that the differing versions of the events as set forth by each side were plausible, and that both the grievant and supervisor testified forthrightly. The key to the Arbitrator's decision in this case was the unexplainable lack of bruises on the client, as the Arbitrator gave little credence to the supposed masking effect of the client's acne. The lack of physical proof of injury, coupled with the likelihood that the client was hitting and kicking the grievant as he took away the shoe, left the Arbitrator to evaluate the plausibility of each side's claims.

The Arbitrator found that the client's profile and behavior in the vocational room made it very plausible that he was hitting and kicking the grievant as the grievant tried to take away the shoe. The Arbitrator also found it plausible that the supervisor misunderstood what he saw upon entering the client's room. Finally, due to the plausibility of the grievant's story, coupled with his long record of successful work with violent and aggressive persons, the Arbitrator concluded that the State did not prove just cause for removal for patient abuse.

AWARD:

The grievance was granted, and the grievant was reinstated.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

**OCSEA, Local 11
AFSCME, AFL-CIO**
Union

and

State of Ohio
Office of Collective Bargaining
Employer.

Grievance No.:
24-14-(5-24-93)-0857-01-04

Grievant:
(Walker, Dale)

Hearing Date:
January 13, 1994

Award Date:
February 15, 1994

Arbitrator:
R. Rivera

For the Employer:
Carolyn S. Collins
Edie Bargar

For the Union:
Robert Robinson

Present at the Hearing in addition to the Grievant and Advocates were Yvette Gaston-Orfi, TPW (witness), Barbara Kennedy, TPW (witness), Jane Russell, AA (witness), Angela Walker, observer, Nancy Geiger, Program Director (witness), Ruby Holman, Labor Relations Officer (witness), Don Singer, OMRP (witness), Ed Ostrowski, ODMRDD Labor Relations, and Melody Snively, ODMRDD Personnel.

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

1. Collective Bargaining Agreement 1992/1994 State of Ohio/OCSEA
2. Discipline Trail
 1. Staff Incident Report (Dated 3/30/93)
 2. Administrative Leave Letter (Dated 3/30/93)
 3. Notification of Pre-disciplinary meeting (Dated 4/8/93) - Pre-disciplinary meeting held 4/12/93 -
Hearing Officer report
 4. Removal Order (Dated 5/10/93)
3. Grievance Trail
 1. Walker Grievance (Filed 5/24/93) (Received on 5/24/93)
 2. Step 3 meeting held on 6/23/93
 3. Step 3 Response (Dated 7/28/93)
 4. Arbitration Request (Dated 6/24/93)
4. Position Description for Therapeutic Program Worker
5. Police Report of Officer Ollie Griffin
6. ORC s2903.33 & s2903.34
7. Warrensville Developmental Center Client Abuse Policy
8. Discipline Stipulation

Union Exhibits

1. Grievant's Evaluations
 - a. 1992
 - b. 1990
 - c. 1991
 - d. 1986
 - e. 1989
 - f. 1983
 - g. 1982
 - h. 1981
2. Statement by Jane Russell dated 3/31/93
3. Statement by Raymond Poole dated 3/31/93
4. Statement by David Zako dated 3/31/93

Employer Exhibits

1. Mission Statement
2. Bill of Rights
3. Table of Organization (Warrensville)

4. Position Description for OMRP
5. In Service Training Document "Residential Services Annual Review"
6. MR/DD Procedure #89-Per-18
7. In Service Training Document TAPS Training
8. Therapeutic Program Worker Personnel Sign-Off sheet
9. Unusual Incident Report
10. Diagram of House 5/200
11. Diagram of Client's Bedroom

Jointly Stipulated Issue

Was the removal of Grievant for just cause? If not, what shall the remedy be? This issue is properly in front of the Arbitrator.

Joint Stipulations

The parties hereby stipulate the Grievant had following active disciplines at the time of his removal.

- 03/28/90 - Attendance/three (3) day suspension
- 06/09/90 - Attendance/six (6) day suspension
- 01/06/91 - Attendance/Written
- 08/13/91 - Attendance/ten (10) day suspension modified to seven day via Settlement
- 06/16/91 - Attendance/Written

Relevant Contract Section

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. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

Facts

The incidents leading up to this Grievance took place at the Warrensville Development Center on March 30, 1993. Warrensville is a state facility for the care of the mentally retarded and the developmentally disabled. The Grievant is a Therapeutic Program Worker who had been an employee of the Department for

over 13 years. His discipline record is stipulated and consisted of discipline for attendance infractions. The Grievant had worked at Broadview Developmental Center until it was closed, and he came to Warrensville approximately 3-1/2 months before the incident at issue. The Union introduced the Grievant's previous evaluations. These evaluations indicated that from 1981 to 1986 the Grievant had moved from a barely adequate employee to an average employee. His 1990, 1991, 1992 evaluations indicated that Grievant had developed into an above average employee in his ability to deal with demanding situations and in his performance of direct care activities. At the Arbitration Hearing, his former supervisor and trainer from Broadview testified. She said that the Grievant never lost his cool and that he had shown an aptitude for working with especially aggressive clients. She said that she had seen a client spit in Grievant's face and receive no reaction from the Grievant. She said the Grievant seldom raised his voice; however, he could be firm when necessary. She testified that he was known for being particularly soft spoken.

The client involved in the incident "K" is diagnosed with "Schizo-Affective Disorder." He is an adult male 39 years old. His profile states that K does "not like his personal space invaded and will hit and kick if he feels someone is too close." He was described by management witnesses as dangerous to himself and others and very aggressive. He had previously seriously bitten staff. As a result of his aggressive nature and behavior, he was assigned one-on-one staffing, that is, he had to have an individual staff member assigned to him at all times.

On the day in question, the Grievant was assigned to one-on-one with "K." At approximately 3:00 p.m., the Grievant, the client, other clients, and other staff were all in the vocational room. According to the Grievant, he attempted to give the client a drink that was required every 1/2 hours because the client was having surgery the next day. The client hit the cup in the Grievant's hand and spilled the water. The client began kicking the Grievant. The Grievant gave the client "verbal prompts" to calm down. The client temporarily calmed down. He began acting out, hitting the walls and yelling. Again, the Grievant gave him verbal prompts, and again, the client seemed to calm down. Then, the client began kicking the Grievant again. At one point, the Grievant held the client's arms down to calm him. All these incidents were observed by other staff, and they all made statements. Their description of the Client's behavior and the Grievant's behavior are consistent with the Grievant's testimony. The other staff all stated that the Grievant behaved appropriately in face of the client's behavior and that the Grievant's voice tones used toward the Client were not loud.

The Grievant asked the client if he wished to leave. The client said he did, got his coat, and started running for the residence. The Grievant used a verbal prompt, and the client slowed down. This problem was repeated. The Grievant went into his residence and went into his room with the Grievant right behind him.

According to the Grievant, the client sat on his bed with his coat on. The Grievant said that he told the client to take off his coat with no reaction and then he repeated in a more firm manner the same direction: "take off your coat "K"." According to the Grievant, the client took off his shoe and started hitting the Grievant with the shoe and kicking at the same time. The Grievant said that he grabbed the shoe away and as he did so, he discovered someone else was in the room behind him. The Grievant said that he thought it was another resident but when he turned that it was Mr. Singer, a supervisor. Singer said to the Grievant "We can't have that here," and the Grievant allegedly said "What?". After that, the Grievant said that Mr. Singer took him (the Grievant) out of the room.

Mr. Singer, the supervisor of the client's residence, states that he heard someone yell "K take off your coat." He said that the yell was so loud that "I stopped in mid stride." He said he was going to speak to the person who yelled about proper voice tone when he heard the same statement again. He said he then entered the client's room and saw the Grievant hit the client with the client's shoe "with all possible force." Mr. Singer said "we can't have that here." and took the Grievant from the room.

A nurse was called to examine the client and found no bruises or other injuries. Mr. Singer said that bruises would have been hard to find because the client suffered from a skin disease that would obscure bruises.

Discussion

The question before the Arbitrator is did the Grievant abuse a client by hitting him with a shoe? The Supervisor claims that he saw the Grievant strike the client "with all possible force" and that he was prompted into the room by the loudness of the Grievant's voice. He is adamant that he could not be mistaken in what he saw. The Grievant claims that he did not strike the client and surmises that what Mr. Singer saw was he (the Grievant) grabbing the shoe away from the hitting and kicking client.

Both of these stories are plausible. Both parties testified forthrightly. However, the Arbitrator found the testimony that the Grievant struck the client with ALL POSSIBLE FORCE to be an unexplainable statement when no bruise of any sort occurred. The testimony on the client's acne was make weight. Secondly, given the client's profile and immediately prior behavior, the Grievant's testimony that the client was hitting and kicking him seemed highly plausible. That the Grievant would have to grab the shoe away to stop the hitting also seemed plausible. Could Mr. Singer have misunderstood what he saw? This Arbitrator finds that conclusion also very plausible. The plausibility of the story coupled with the Grievant's long record of successful work with violent and aggressive persons leads the Arbitrator to the conclusion that the Employer did not prove just cause for termination for abuse.

Award

The Grievance is granted. The Grievant is to be reinstated and made completely whole as to all pay, benefits, time, seniority, etc.

RHONDA R. RIVERA, Arbitrator

Date: February 15, 1994