

ARBITRATION DECISION NO.:

549

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health
Massillon Psychiatric Center

DATE OF ARBITRATION:

June 22, 1994

DATE OF DECISION:

July 5, 1994

GRIEVANT:

Edith Wolfe

OCB GRIEVANCE NO.:

23-10-(93-12-22)-0203-01-04

ARBITRATOR:

Mollie Bowers

FOR THE UNION:

Robert Robinson

FOR THE EMPLOYER:

Linda J. Thernes

KEY WORDS:

Removal
Due Process
Criminal Charges
Credibility
Just Cause
Admissibility of Evidence

ARTICLES:

Article 24 - Discipline
§ 24.09 - Employee Assistance Program

FACTS:

The Grievant was a Therapeutic Program Worker at the Massillon Psychiatric Center. The Grievant was terminated for calling a bomb threat into the Center.

A bomb threat was received by the Center, on the Grievant's day off, and then the threat was traced by phone trap to the Grievant's home phone. When the Grievant arrived at work the following day, she was interviewed by the State Highway Patrol concerning the incident. After the interview, the Grievant was

charged with "Inducing Panic" and "Making False Alarm" for which she paid a fine and received two years of unsupervised probation. The Grievant was later terminated for the offenses.

The Grievant testified that she did not recall what had transpired on the evening the bomb threat occurred and, thus, did not know why she was taken to the police station and interviewed. Grievant further testified that she was not read her Miranda rights nor was she offered an attorney by the investigator. The Grievant denied that she made the calls in question and claimed that she did not sign the statement of guilt voluntarily.

The witness for the management testified that the Grievant initially denied making the bomb threat, but eventually acknowledged that "probably, maybe" she did make them. Another witness for the state testified that the Grievant was asked before the interview if she wanted Union representation, but declined. In addition, the Grievant voluntarily wrote and signed the statement of guilt.

For three years prior to the incident, Grievant had been drinking "most every night". Grievant had attended Alcoholics Anonymous meetings and was meeting with a therapist. In addition, there were a number of other stressful happenings in her life such as severe, on-going medical problems with one of her daughters and a son, and her husband was transferred to another location and was only home for short periods of time.

EMPLOYER'S POSITION:

The State argued that the Grievant made the bomb threat and that therefore there was just cause for the Grievant's termination. The state further argued that the bomb threat had a harmful effect on the care and treatment of patients. In addition, during the evacuation caused by the bomb threat patients could have been injured. Also, that there are no mitigating circumstances concerning the discipline and the state was under no obligation to offer the Grievant an EAP agreement.

UNION'S POSITION:

The Union did not dispute the fact that the phone calls were traced to the Grievant's home. The Union contended that the Grievant was not afforded her Miranda rights prior to the interview. In addition, the Union argued that problems which the Grievant was experiencing both before and after the discharge should serve to mitigate the discipline.

ARBITRATOR'S OPINION:

The arbitrator found that there was just cause for the Grievant's termination and that the Grievant's conduct both before and after the discharge was not sufficient to modify the discipline in question.

The arbitrator found that the Grievant was guilty of the offense charged by the State. In addition the arbitrator also found that the Grievant was read her Miranda rights and was given sufficient opportunity to secure union representation in the interviewing process, but that she refused to do so. The arbitrator further found that the Grievant's work record and family situation did not constitute mitigation for the misconduct with which the Grievant was charged.

The arbitrator also stated that the management was under no obligation to offer the Grievant an EAP agreement under Article 24.09 of the collective bargaining agreement. There was also no evidence or testimony produced to show that the State exercised its discretion in determining to remove the Grievant in an arbitrary manner. Therefore, the Grievant was not subject to disparate treatment.

Finally, the arbitrator was not persuaded that a reasonable expectation for rehabilitation had been established in this case. The Grievant had only been in Alcoholics Anonymous for three months and the arbitrator held that this time period was not sufficient to show that she had made a permanent change in her behavior.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

IN THE MATTER OF THE ARBITRATION BETWEEN**State of Ohio, Massillon Psychiatric
Center**

-and-

OCSEA/AFSCME, Local 11**Grievance No.:**

23-10-(93-12-22)-0203-01-04

Grievant:

Edith Wolfe

ARBITRATOR:

Mollie H. Bowers

APPEARANCES:**For the State:**

Linda J. Thernes

For the Union:

Robert Robinson

This case was brought to arbitration by the OCSEA/AFSCME, Local 11 (hereinafter, "the Union") to protest, as without just cause, the termination of Edith Wolfe (hereinafter, "the Grievant") by the State of Ohio, Massillon Psychiatric Center (hereinafter, "the State or the Center"). The Hearing was held on June 22, 1994, at 10:00 a.m. in Room 210 of the Center. Both parties were represented. They agreed, at the outset of the Hearing, that this case is properly before the Arbitrator. The parties had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the parties made oral argument in support of their respective positions. The entire record has been thoroughly and carefully considered by the Arbitrator in determining what the outcome of this case shall be.

ISSUES

The parties agreed that the following issues shall be decided as a result of this proceeding:

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

The mission of the Center was never defined for the Arbitrator. It is a fact of record that Building C-2 is at issue in the instant case. Other facts are that approximately 128 patients and approximately 69 staff at C-2 were involved in the incident which gave rise to the Grievant's termination. Based upon the un rebutted testimony of Ms. Shirley Sampsel, Nursing Supervisor, the Arbitrator gleaned that Building C-2 houses a variety of "acute, chronic" psychiatric patients, about fourteen of which are believed to be insane and cannot leave the ward, under so-called "normal" circumstances without one to one supervision and, then, only with a police escort.

There is no dispute that the Grievant had been employed as a Therapeutic Program Worker at the Center for approximately six years at the time of the incident in question. She had been assigned to Building C-2, on a full-time basis, about three years prior to her termination and had had periodic, temporary assignments to Building C-2 since then. The Grievant testified that, while she was on the C-2, "the Staff got along, we talked," but the Staff that had been on C-2 for some time formed a "clique" which "outsiders" (meaning those newly or temporarily assigned) were not able to penetrate.

It is a fact of record that, on October 26, 1993, a bomb threat was called in to the Center. Fire Safety Officer, James Johnson, testified that he was contacted at home and responded to the Center.^[1] No specifics were provided by either party regarding this threat or how it was dealt with other than that "Code Brown" procedures (i.e., bomb threat) implemented. Immediately following the bomb threat of October 26, a "trap" was placed on calls to the Center.^[2]

The Grievant worked the 3:00 to 11:00 p.m. shift and November 1, 1993, was her day off. At approximately 10:43 p.m. on November 1, the Center Dispatcher, Dissa Henson,^[3] received a bomb threat pertaining to Building C-2. Ms. Henson stated that she had no difficulty understanding that the caller was referring to C-2. Her testimony is corroborated by that of Mr. Johnson that "Code Brown" procedures were implemented. As testified to by Nursing Supervisor Sampsel, 69 staff persons evacuated the 129 patients in C-2 without incident, injury or escape; "a remarkable accomplishment," in her estimation. This witness also testified that patients and staff were fearful of returning to C-2. The telephone trap identified the Grievant's phone as the origin of the bomb threat and of a subsequent call to the Center that evening.^[4]

On November 2, the Grievant came to work on time. She was asked to get her coat and was taken to the Center police station. The Grievant was first interviewed by State Highway Patrol Investigator Richard Graber. He testified that he was involved in the case the previous evening and that he verified with Ameritech that the calls came from the Grievant's home. Investigator Graber stated that he did not go to her home the night of November 1, because he needed more background information and there was no reason to believe she was going to leave the area, so risking a home visit in the middle of the night was unwarranted.

According to Investigator Graber, he explained the information about the telephone trap to the Grievant and asked her if she could explain why the calls had been made.^[5] He testified that she recounted a number of serious health problems with one of her daughters and with her son that had existed for a long period of time, explained that her Husband had been transferred to another location in Ohio and stated that she was under a lot of stress. Investigator Graber stated that, initially, the Grievant denied making the calls, but eventually acknowledged that "probably, maybe" she did make them. He explained that the Grievant was charged with a first degree misdemeanor and, if someone had been injured in the evacuation, the charge would have been a fourth degree felony.^[6]

The Grievant was then interviewed by Mr. Johnson and another Center official whose name and title were not made clear in the record. Mr. Johnson testified that the Grievant was asked, at least twice, before this interview, if she wanted Union representation and declined such representation each time. He also stated that she wrote and signed voluntarily the statement which appears in Joint Exhibit 1.

According to the Grievant's testimony, she had no recollection of what transpired on the evening of November 1, and, thus, had no a priori awareness of any reason why she was being taken to the Center's police station on November 2. The Grievant claims that she was not read her Miranda rights or offered an attorney by Investigator Graber. She testified that she denied making the call(s) and, when she was told they were traced to her home, the Grievant said, "I was in shock. I was surprised. . . But why would the police lie?"

With respect to the second interview on November 2, the Grievant denies ever being offered Union representation. She testified that she did not write or sign the statement that appears in Joint Exhibit 1 voluntarily, but rather, that "I [she] was scared, nervous, in shock. The police said, 'You did it.' That's the only reason I wrote that statement." The Grievant was terminated on December 7, 1993.

The Grievant stated that, for about three years prior to the incident in question, she had been drinking

"most every night" after she got home from work to cope with insomnia. She could not remember anything about the evening of October 26, and denied that she had ever had a black out before November 1, 1993. She further stated that, on the evening of November 2, she called a co-worker whom she knew to be an alcoholic and asked this person to take her first Alcoholics Anonymous (AA) meeting. The Grievant testified that she has not had a drink since then. Union Exhibit 2 is an AA Meeting sign in sheet which shows that she attended 41 meetings between November 4, 1993 and January 28, 1994. [7]

According to the Grievant, she called her insurance company on November 3, and was referred to Therapist Patricia Sacha. Ms. Sacha testified that she has specialized in addiction and family therapy for 15 years and has been a counselor for 20 years. She stated that she worked with the Grievant for three months, until January 28, 1994, when insurance coverage ran out. No urine tests were performed on the Grievant during that time. Ms. Sacha stated that the Grievant had "started accepting she was an alcoholic" and cooperated with her recommendations to stop drinking and attend AA meetings three times a week. [8] The Grievant's Therapist also met with her family. As an expert in employee assistance program (EAP) counseling, Ms. Sacha stated that she did not "consider her [the Grievant] to be a threat to society or to her place of employment."

The Arbitrator asked Ms. Sacha if she understood the meaning of the phrase 'reasonable expectation of rehabilitation,' which is a term of art in EAP matters. She stated that she did. The Arbitrator then asked Ms. Sacha if, as a professional expert, she would consider that there was a reasonable expectation of rehabilitation in the Grievant's case. She answered that there was. The Arbitrator asked Ms. Sacha whether it is a common occurrence that alcoholics have relapses and, if so, when they generally tend to occur. Ms. Sacha answered affirmatively to the question regarding relapses and stated that these tend to occur at 3 and 6 months, 1 year, etc.

Ms. Sacha further testified that she has been involved with EAP agreements, but none involving the Center. She stated that she had twice contacted the Center to discuss the Grievant's case and that she wrote two letters to the Center (one of which appears in Union Exhibit 1, dated December 15, 1993) concerning the Grievant's diagnosis, treatment and prognosis. [9] In the aforesaid letter and at the Hearing, Ms. Sacha testified that she was "frustrated" with the lack of response from the center because, unlike other employers with whom she had dealt, "the Hospital [Center] wasn't interested in seeing what had happened [regarding the Grievant's treatment]." On cross-examination, Ms. Sacha stated that she had obtained a release of information from the Grievant, but had never sent it to the Center.

These are the facts and circumstances which gave rise to the instant proceeding.

STATE POSITION

The State maintains that it has proven just cause for the Grievant's termination. It cites the evidence provided by the telephone trap as proof that the bomb threat call on November 1, 1993, originated from the Grievant's home. The State also points to the Grievant's own testimony to show that she was the only person at home on the evening of November 1, 1993. It also asserts that a thorough, proper and timely investigation was conducted by both the Highway Patrol and the Center of the incident and that these investigations confirmed the Grievant's culpability for the misconduct charged.

According to the State, the discipline of termination is appropriate in this case. It emphasizes that a bomb threat at the center is of special significance because the patients in Building C-2 are "criminally insane" and require extraordinary care and supervision under normal circumstances, much less if they have to be evacuated. The State also asks the Arbitrator to note judiciously that it was the staff's commendable performance on November 1, which resulted in the fact that there were no injuries to anyone and that none of the patients escaped during the evacuation, even though it was impossible to provide the supervision C-2 patients are required to have. Additionally, the State contends that the bomb threat had a harmful effect on the care and treatment of C-2 patients, among other things, by making both patients and staff fearful of returning to the Building.

It is also the State's position that there are no circumstances, either before or after the incident in

question, which should mitigate the discipline imposed. In so arguing, the State points out that the Grievant is neither a long service employee nor did she seek any assistance for the family problems she had and which only came to light in the course of the investigation of this case.

The State's position remains the same with respect to the Grievant's post-discharge conduct in seeking assistance for her problem with alcohol. It points out, first, that she only sought such assistance **after** she knew she had been identified as the caller who placed the bomb threat on November 1, and would be terminated for her action. The State contends that the Grievant is now simply trying to find a way out of discipline imposed legitimately.

Second, the State rejects Ms. Sacha's attempt to discredit the Center for allegedly not being interested in the Grievant's progress while she was under her care. It emphasizes that Ms. Sacha admitted that she never provided the Center with a release of information signed by the Grievant.

Third, the State cites the permissive language contained in Article 24.09 of the collective bargaining agreement to assert that it was under no obligation to offer the Grievant an EAP agreement, in lieu of discipline, in the instant case. As further support for this position, the State provided an award of this Arbitrator in Grievance Number 31-12-(10-6-92)-18-01-06 upholding this interpretation of the language contained in Article 24.09.

According to the State, it has also established a motive other than and/or in addition to the Grievant's alcoholism, for the bomb threat she called in to the Center on November 1, 1993. The State maintains that the Grievant was angry about/wanted revenge for the treatment she claimed to have received from so-called 'regular' staff members in Building C-2 when she was assigned there three years ago and during her temporary assignments there since then.

For the foregoing reasons, the State asks that this grievance be denied in its entirety.

UNION POSITION

The Union does not dispute the fact that a telephone trap traced the calls made to the Center, on November 1, 1993, to the Grievant's home. It also does not dispute the facts and circumstances of record concerning the evacuation of Building C-2, and the effects on both patients and staff of said evacuation. Rather, the Union's defense concentrates on due process considerations and on both pre- and post-discharge factors which it claims should mitigate, if not rescind, the discipline imposed in the instant case.

With respect to due process considerations, the Union emphasizes the Grievant's testimony that she was afforded neither Miranda rights nor Union representation prior to being interviewed on November 2, 1993. In view of this testimony, the Union maintains that the Grievant must be believed that the only reason she signed the statement contained in Joint Exhibit 1 was that she was under duress.

According to the Union, circumstances concerning the Grievant prior to the November 1, incident are also very pertinent as mitigation against the penalty meted out in the instant case. It cites, as two examples, that she had worked for the Center for "seven" years and had an "excellent work record." Equally importantly, the Union stresses that she achieved this record while coping with the severe, by any definition, medical problems of both one of her daughters and a son, and with the absence of her Husband, necessitated by the transfer of his employment location, some time prior to the incident in question.

The Union also cites as mitigation, the Grievant's post-discharge conduct. In this regard, the Union asks that consideration be given to the fact that the Grievant acknowledged her problem with alcohol on November 2, and also acted immediately by seeking the assistance of a co-worker in becoming involved in AA meetings.

In support of its position that post-discharge conduct is a major factor in determining the outcome of this case, the Union further stresses that the Grievant also initiated efforts to become involved with expert counseling by Ms. Sacha on November 3, 1993. It emphasizes the testimony provided by Ms. Sacha for two reasons. First, to assert that the Grievant complied with all directions given her, even though these were "more" strict than those given by other rehabilitation programs. Second, to assert that a professional expert in EAP counseling has deemed that the Grievant has a reasonable expectation of rehabilitation, is not a danger to society and/or to her place of employment and, therefore, should be given another chance.

These are the reasons why the Union maintains that the Grievant's termination should be overturned and that, if discipline is warranted at all, that it should be "minor;" consistent with the treatment she received in court. The Union also requests as remedy, that the Grievant receive payment of her "medical bills and wages," and restoration of her "leave balances, and seniority credits" for the period of her termination.

DISCUSSION

After careful consideration of the record, the Arbitrator has determined that the State has proven just cause for the Grievant's termination. The facts are persuasive that the Grievant committed the offense alleged. Furthermore, neither the Grievant's pre- nor post-discharge conduct carried sufficient weight to warrant modification of the discipline in question. The basis for these findings follows.

There is no dispute that the bomb threat of November 1, 1993, was called in from the Grievant's home. Whether or not she remembers making this call, or a subsequent call allegedly to inform the Center that the first call was a "hoax," is immaterial. The Grievant's own testimony is that no one else was at home, but her, on the evening question. The Arbitrator therefore determined that the Grievant was guilty of the offense charged by the State.

The question of whether the Grievant was properly afforded her due process rights during the investigation was addressed next. Neither party asked Highway Patrol Investigator Graber whether he read the Miranda rights to the Grievant before interviewing her. The Grievant claimed he did not. To resolve this matter, the Arbitrator looked to the court proceedings related to the misdemeanor charges placed against the Grievant for her actions on November 1, 1993. She noted particularly that: (1) the Grievant was represented by counsel in those proceedings; and (2) no evidence or testimony was presented at this Hearing that a failure to afford Miranda rights was a consideration in the court's assessment of the case before it.^[10] The ruling is, therefore, that the Grievant's testimony that she was denied Miranda rights is not credible and is unsupported by any evidence or testimony of record.

The Arbitrator also found the Grievant's assertion that she was denied Union representation in the second interview on November 2, 1993, was self-serving and not credible. Mr. Johnson's testimony that Union representation was offered twice to the Grievant, but refused, was given weight in this decision. His testimony was deemed credible because Mr. Johnson is not only a member of the same bargaining unit that represents the Grievant, but also has nothing to gain or lose from the outcome of this case. Since the thoroughness and fairness of the investigation was challenged in no other way, the Arbitrator holds that the State has satisfied this element of proof of just cause for the discipline in question.

A large part of the Union's defense in the instant case focused on consideration of mitigating circumstances in determining what the appropriate penalty should be. It claimed that the Grievant had seven years, service and an "excellent" record which should have been taken into account by the State in determining the discipline imposed.^[11] The Arbitrator was not persuaded partly because six or seven years is not generally defined as long service. Additionally, no evidence or testimony was presented to support the claim that the Grievant's record was "excellent." In fact, Nurse Sampsel gave un rebutted testimony that the Grievant was "average" in terms of dealing with clients.

The Union also claimed that the challenges the Grievant has faced with respect to the severe, on-going medical problems one of her daughters and a son had were mitigating factors. The Arbitrator accepts that the Grievant has been challenged by these problems. She also accepts the fact that when the Grievant's Husband was transferred to another location and was only home intermittently, the demands upon her to cope with her children's problems intensified. While these are regrettable circumstances, they do not constitute mitigation for the misconduct with which the Grievant is charged. There is no evidence or testimony in the record that the Grievant ever sought help, through the EAP or otherwise, for stress, insomnia or any of her problems. Regardless of the magnitude of the Grievant's problems, moreover, they do not provide a supportable rationale for the bomb threat of November 1, 1993, which endangered the lives of 128 patients and 69 staff in Building C-2.

It is also a fact that the State is under no obligation to offer the Grievant an EAP agreement under Article

24.09 of the collective bargaining agreement. The clear and unambiguous language of this Article shows that management is not obligated to, but rather has the discretion to enter into EAP agreements in lieu to discipline under certain circumstances. In the instant case, no evidence or testimony was produced to show that management exercised its discretion in an arbitrary and capricious manner or that its denial of an EAP agreement represented disparate treatment of the Grievant.

The final defense mounted by the Union concerned the Grievant's alcoholism and her prospects for rehabilitation as testified to by Ms. Sacha. The Arbitrator understands that denial is an integral part of the disease of alcoholism and, thus, that the Grievant did not seek help for her problem until she knew her job was in jeopardy. Although this is a common behavior pattern among substance abusers, it does not mean that this should be a bar against discipline properly imposed for legitimate reasons.

Furthermore, the Arbitrator was not persuaded that Ms. Sacha's opinion that there was a reasonable expectation of the Grievant's rehabilitation was credible. This witness testified that the program she asked the Grievant to follow was "more difficult" than any EAP program. The Arbitrator took judicious note that Ms. Sacha asked the Grievant to go to three AA meetings a week, whereas it is a well known fact that even AA asks people dealing with their alcoholism for the first time to attend at least ninety meetings in ninety days. Note was also made that another part of the difficult program Ms. Sacha set forth for the Grievant was that she asked her to stop drinking; but never once tested her during the course of their approximately three month involvement. This fact has special significance in the instant case because the Grievant's Husband was home only intermittently and, thus, relying upon the testimony of family members may not provide accurate feedback as to the client's behavior.^[12] Finally, in response to the Arbitrator's question, Ms. Sacha had to acknowledge that relapse is common among substance abusers and that three and six months, one year, etc. are critical milestones for relapses. Since Ms. Sacha worked with the Grievant less than three months and since the Grievant stopped keeping an AA sign in sheet at that time, the Arbitrator rules that reasonable expectation for rehabilitation has not been established in the instant case.

In view of the foregoing analysis, the Arbitrator concludes that the penalty of termination is appropriate for the offense proven.

AWARD

The grievance is denied in its entirety.

MOLLIE H. BOWERS, Arbitrator

DATE: July 5, 1994

[1] Mr. Johnson testified that he is a bargaining unit member and that he was subpoenaed to appear at this proceeding as a Center witness.

[2] Highway Patrol Officer/Investigator, Richard Graber, gave un rebutted testimony about a "trap." He testified that he knew a "trap" was put on the Center's telephone immediately after the October 26, incident and that a "trap" meant that the origin, but not the content, of a call could be traced.

[3] Ms. Henson is a bargaining unit member and was subpoenaed to appear at this proceeding.

[4] The Grievant acknowledged that her daughter was not home on the evening in question, but rather, was staying with her Sister.

[5] Investigator Graber was not asked on either direct or cross-examination whether he read the Grievant her Miranda rights.

[6] No charge sheet was presented as evidence. Union Exhibit 4 is the receipt for fines paid by the Grievant and shows that she was charged with "INDUCING PANIC" for which the total fine was \$150.29, and with "MAKING FALSE ALRM (sic)" for which the total fine was \$145.00. There is no dispute between the parties that the Grievant was also given two years' unsupervised probation.

[7]

This sheet was provided to the Grievant by her Therapist.

[8] Ms. Sacha described these recommendations as "stricter" than any rehabilitation program.

[9] Ms. Sacha testified (See also, Union Exhibit 1) that she had had the Grievant evaluated by Steve Davis, Ph.D. to determine if there was a "secondary diagnosis" for her behavior and that there was none.

[10] It is a fact of law, as this Arbitrator understands it, that if failure to afford Miranda rights was argued successfully by the Grievant's counsel in court, then the result would be a suppression of information obtained under such circumstances.

[11] The State and the Grievant indicated that she had six years' service at the Center.

[12] This is true despite the fact that all or part of the Grievant's Husband's job is as an EAP counselor.