

ARBITRATION DECISION NO.

572

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Cleveland Psychiatric Institute

DATE OF ARBITRATION:

April 5, 1995

DATE OF DECISION:

April 11, 1995

GRIEVANT:

Charles L. Newton

OCB GRIEVANCE NO.:

23-07-(93-09-01)-0072-01-04

ARBITRATOR:

Marvin J. Feldman

FOR THE UNION:

Robert Robinson, Staff Representative

FOR THE EMPLOYER:

Kim A. Browne, Advocate
Cindy J. Sovell, Second Chair

KEY WORDS:

Suspension
Patient Abuse
Supervisor Hostility
Credibility
Credibility of Witnesses
Progressive Discipline

ARTICLES:

Article 24 - Discipline
 §24.02 - Progressive Discipline
 §24.05 - Imposition of Discipline

FACTS:

The Grievant was employed as a Therapeutic Program Worker with the Cleveland Psychiatric Institute. The Grievant's duties were patient transportation, escorting the patients to and from the eating area, and giving the patients items for their daily care.

On the morning of May 1, 1993, the Grievant had contact with two supervisors and a patient. According

to the testimony of the Grievant's immediate supervisor, the Grievant acted in a hostile and verbally threatening manner toward a patient. The supervisor further testified that when she was discussing the matter with the patient, the Grievant confronted them and insulted both the supervisor and the patient. The Grievant then spoke with the supervisor of RN's, who relieved him of duty. The Grievant was escorted out of the building with no further incident.

The grievant received a six day suspension as a result of his alleged actions.

EMPLOYER'S POSITION:

Management contended that the six day suspension given to the Grievant was proper. The Grievant acted in a hostile and verbally abusive manner toward a patient and his supervisor. As a result of this action and the Grievant's past history of discipline, the suspension was commensurate with the offense.

UNION'S POSITION:

The Grievant and the Union denied that any of the alleged acts occurred. The Grievant denied being insubordinate to either supervisor, denied being antagonistic toward a patient and denied that he was out of control. The Union further argued that the six day suspension was not progressive discipline.

ARBITRATOR'S OPINION:

The Arbitrator held that the employer has the burden of proof in these matters. A six day suspension was given to the grievant and from the grievant's history of discipline and the evidence presented, it appeared to the arbitrator that the suspension was proper. Both of the supervisors testified to substantially similar facts. Each stated that the grievant was out of control, was disruptive, was abusive to a patient, was abusive to the supervisors, and was disruptive to the entire activity that the psychiatric institution was to accomplish.

The Union could offer no evidence whatsoever other than the grievant's declaration that he was not guilty of the acts complained of. In other words, it is apparent from the record of this case that there was good and sufficient evidence from both testifying nurses, one buttressing the other, that the grievant's activity was abusive. The arbitrator found the grievant's testimony not to be credible, because the arbitrator held that it was self-serving.

According to the Arbitrator, the argument that progressive discipline must be followed at each step for every type of activity is not accurate. The fact is that discipline for serious cases of insubordination and abuse directed toward patients and supervisors does not necessarily have to follow the progressive discipline rule as set out in the contract.

In this particular case, there was insufficient evidence upon which to change or modify the decision of the employer.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. 23-07-930901-0072-C1-04

STATE OF OHIO

The Employer

-and-

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

The Union

OPINION AND AWARD

APPEARANCES

For the Employer:

Kim A. Browne, Advocate
Cindy J. Sovell, Second Chair
Linda Thernes, Agency Representative
Sandra Rahe, Chief Executive Officer
Carol Peters, Director of Nursing
Gloria Kamara, RN Supervisor
Susan BreMiller, Registered Nurse
Tom Mercer, OCB Observer
Howard Schulman, Attorney for Susan BreMiller
Karen Crist, Attorney for Susan BreMiller

For the Union:

Robert Robinson, Staff Representative
Annette Charles, Chapter President
Charles L. Newton, Grievant
Thomas P. Aldrich, III, Attorney for Grievant

MARVIN J. FELDMAN

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I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted at the office of the local union in Fairlawn, Ohio, on April 5, 1995, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that certain procedural issues would be presented in due course; that the witnesses should be sworn but not sequestered and that post hearing briefs would be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. PROCEDURAL ISSUES

There were several procedural issues presented by the union. One such procedural issue involved the alleged failure of the State of Ohio to present certain requested discovery documents to the union. On March 15, 1995, the advocate in this particular matter for the State of Ohio received the following request from the union:

"March 15, 1995

Kim Browne
Office of Collective Bargaining
106 N. High Street
Columbus, OH 43215

RE: Arbitration Concerning the Six Day Suspension of Charles Newton #23-07-(93-09-01)-0072-01-04

Dear Ms. Browne:

In accordance with Article 25.08 of the OCSEA/State of Ohio Contract, I am requesting the following information relevant to the above referenced case.

- 1) 1993 Admission and Discharge dates of patients Danny White #704033 and Leslie French (not sure of number).
- 2) Progress notes for Danny White and Leslie French for same time frame.
- 3) Any U.I.R.'s involving Danny White and Leslie French for same time frame.

Your prompt attention to this information request will be greatly appreciated.

Sincerely,

/s/Robert Robinson
OCSEA/AFSCME Local 11"

The union indicated and stated by and through Mr. Robinson, their staff representative, that the employer had not complied in providing items in paragraphs 2 and 3 in the March 15, 1995, letter as requested. The employer represented that such items as requested under paragraphs numbered 2 and 3 in the March 15 letter simply were not found in the material at the facility concerning this particular request. The union, by the arbitrator at hearing was given leave to conduct their own search and to thereby cause a resultant postponement of the hearing. The union refused such postponement and indicated and stated in open hearing that they would not be substantially prejudiced by a failure of those items to be produced. The procedural issue of presenting those items therefore dissipated with the union's acquiescence to proceed without them.

The next procedural issue presented by the union involved the fact that the issue that triggered the discipline in this particular matter occurred on May 1, 1993, and that a notice of predisciplinary conference dated June 3, 1993, did not cause a conference to be scheduled until June 17, 1993, or approximately 46 or 47 days after the incident. The union indicated and stated that the allegedly tardy activity of the employer was contrary to section 24.05 of the contract. The pertinent language of the contract found at 24.05 revealed the following:

"24.05 -- Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the prediscipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges."

It might be noted in that particular section that the forty-five day rule applied after the conclusion of the

predisciplinary hearing and does not apply to activities of the employer prior to the predisciplinary hearing. Thus the complaint of the union as to that procedural defect is held for naught because the contractual language does not pertain as a remedy to the alleged contractual violation indicated and stated by the union in this matter.

It might be noted that the grievant had a long list of disciplinary activity at the facility. Section 24.02 of the contract revealed the following:

"24.02 -- Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. One or more oral reprimands) (with appropriate notation in employee's file);
- B. One or more written reprimands);
- C. One or more suspensions);
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

Hereafter it will be noted at length and in full the disciplinary record of the grievant. By way of a third procedural issue, the union alleged and stated that the discipline prior to the current six day suspension in this particular matter was a memo of a June 23, 1993, that involved a written reprimand. The union therefore indicated that if the prior discipline was a written reprimand that the next discipline should not and could not be a six day suspension but rather a lesser discipline.

It might be noted from the evidence that will be revealed in this particular matter that the grievant was found guilty by the employer of insubordination and patient abuse and supervisory abuse. Those charges in and of themselves do not necessarily lead to progressive discipline. Those charges in and of themselves could lead to a termination depending on how serious the activity of the grievant was. Thus, the argument that progressive discipline must be followed at each step of every type of activity is not accurate. The fact of the matter is, that discipline for serious cases of insubordination and abuse directed toward patient and supervisors may not follow the progressive discipline rule as set out in the contract.

It is noted in the contractual clause for example that disciplinary action shall be commensurate with the offense. It merely indicated in the contract further that the employer will follow the principles of progressive discipline. That being the agreed upon language, it must necessarily follow that a very serious event could trigger something more than a verbal reprimand with is the first step etc. From all of that, it might be noted that the arguments raised by the union as to the third procedural argument must be held for naught.

The three issues therefore of procedural defects as raised by the union having been overruled, the matter then proceeded to the issue on the merits.

III. STATEMENT OF FACTS-MERIT

It might be noted that the grievant had garnered a rather lengthy laundry list of-disciplinary activity and that is revealed as follows:

"INSTITUTION: CLEVELAND PSYCHIATRIC INSTITUTE

EMPLOYEE: CHARLES L. NEWTON

DATE OF EMPLOYMENT: MARCH 22, 1982

DISCIPLINARY HISTORY

Memo dated 07/30/93 - 6-day suspension from Director Hogan (patient abuse/insubordination)

Memo dated 06/23/93 - written reprimand from Carol Peters (neglect of duty-calling off sick)

Memo dated 05/11/93 - verbal reprimand from V. Hart (neglect of duty/calling off sick)

Memo dated 01/22/92 - 2-day suspension from Director Hogan (insubordination/demeaning treatment to mgmt/threatening a supervisor)

Memo dated 08/16/91 - written reprimand from Nell Cobbs (violation of smoking policy)

Memo dated 12/04/90 - written reprimand from Nell Cobbs (loud verbal fighting in front of patient with Head Nurse)

Memo dated 05/11/90 - written reprimand from Nell Cobbs (neglect of duty/failure to follow directive)

Memo dated 08/18/89 - written reprimand Nell Cobbs (neglect of duty/failure to follow work assignment)

Memo dated 05/26/88 - 6-day suspension from Pamela Hyde (neglect of duty/abuse of sick leave)

Memo dated 08/13/87 - written reprimand from Rosalyn Mechem (insubordination/failure to follow instructions)

Memo dated 08/13/87 - written reprimand from Rosalyn Mechem (insubordination/neglect of duty)

Memo dated 03/19/87 - verbal reprimand from V. Hart (failure to supervise patients)

Memo dated 12/11/86 - 6-day suspension from Pamela Hyde (neglect of duty/unauthorized absence)

Memo dated 05/13/86 - 5-day suspension from Ella Thomas (failure of good behavior/hostile & abusive behavior towards staff & security)

Memo dated 04/29/86 - counseling session (refusal to complete fire logs)

Memo dated 03/04/86 - 3-day suspension from Ella Thomas (neglect of duty/unauthorized absence)

Memo dated 02/04/86 - 2-day suspension form Ella Thomas (neglect of duty/unauthorized absence/abuse of sick leave)

Memo dated 08/28/85 - written reprimand from Rosalyn Mechem (neglect of duty/unauthorized absence/abuse of sick leave)"

In sum and substance the grievant testified that he did grieve or protest several of the disciplinary activities on the list but the grievant further admitted that none of those protests caused the discipline to be changed and that therefore the listing of his discipline at the facility is complete as listed hereinabove. The grievant was employed in the nursing department of the psychiatric institution and was known as a TPW or therapeutic worker. His activity was to become involved in patient transporting, escorting the patients to and

from the eating area and giving the patients at the facility items for their daily care. All of the patients at the psychiatric hospital were psychotic and all of the patients supposedly were out of contact with reality. The mission of the hospital and staff was to hopefully stabilize and return the patients to the community. The average monthly intake and discharge rate was approximately 350 patients and the work load at the hospital was described as busy and difficult.

On the morning of May 1, 1993, on the first shift the grievant came in contact with two nurses who were his supervisors. One was a registered nurse. She testified. Her name was Susan BreMiller. She testified substantially to the facts that were revealed in her statement written by her at or near the time of the incident. Her statement revealed the following:

"At approximately 845 AM pt 704033 approached C. Newton, TPW to ask for a razor to shave. Newton replied, 'You know what time it is - your supposed to do it earlier, you can't do it now.' Newton later stated, 'You can't shave till after meds.' 704033 had addressed C. Newton as 'Sir, but Newton got up from his chair, stood very close to 704033 & shouted in his face, 'You call me Mr. Newton. I don't give a damn about you patients - when I get up in the morning all I care about is myself.' Shortly after, when 704033 was describing the incident to the charge nurse (myself) in the front nursing office, C. Newton entered the office & confronted myself and 704033 in a hostile and threatening manner. When asked to leave office by myself, he refused, called me 'an ugly bitch' & referred to 704033 as 'crazy.' Newton was acting in such a hostile and verbally threatening manner that I called the supervisor (Kamara) and security. 704033 was so upset and agitated by the incident that he requested PRN medication for agitation."

While Ms. BreMiller was the grievant's immediate supervisor, the supervisor of nursing also made herself available on the floor immediately after Ms. BreMiller complained to the supervisor of RN's. That person's name was Ms. Gloria Kamara. She also wrote a statement at or near the time of the incident and testified substantially the same at hearing. Her statement revealed the following:

"Writer was called to the floor to speak with patient White, Danny who then related that employee C. Newton TPW was acting in a verbally abusive, demeaning and intimidating manner toward him and other patients. Pt gave me written statement (yellow sheets attached). I explained to the patient that his allegations would be taken very seriously and that all patients were entitled to be treated with respect and dignity. I then attempted to speak to employee to resolve this issue. Employee became loud, angry and argumentative with me and would not stay in the office to listen. He walked away and started walking up and down the ward hall, glaring at me. Mr. Newton then obtained a schedule of time of ward activities and began to post it on the bulletin board. A group of patients approached him to see what he was doing and asked Mr. Newton a question regarding the posted schedule. Mr. Newton yelled at these patients in an angry, annoyed sounding loud voice, 'Just shut up, don't say anything to me just get away from me!' At that point, I told Mr. Newton to leave the floor and that he needed to get himself under control. Mr. Newton then stated 'I don't need to get under control, you need to get under control. I will leave the floor when my break time comes.' I told him I was reassigning his break time and gave him an order to leave then. Mr. Newton still refused. Because this employee was becoming more hostile and angry to patients, charge nurse, and supervisor and would not accept temporary reassignment, Mr. Newton's presence on ward 4L was extremely detrimental to the therapeutic environment. I then called Security for input and intervention. I did not reach Security immediately because the officer was in admissions. I was then paged to come to admissions for an assessment of a new patient. I left 4L instructing charge nurse to carefully watch Mr. Newton; to report any escalation of his behavior and to continue to counsel the two patients as needed who had originally gotten so upset because of employee's behavior.

Shortly after, I received a call from S. BreMiller RN, charge nurse 4L. She stated 'Mr. Newton is calling the patients crazy up here and he just called me an ugly bitch.' Security officer Sanhogo and I immediately went on the scene. Mr. Newton had his coat on preparing to go off duty. (He had received a phone call alleging that his home was broken into). Officer Sanhogo then escorted him out of the building with no further incident.

An incident report was done. AOD, CEO notified. Security obtained statements from staff and patients. All 4L patients debriefed in meeting held.

/s/ G. Kamara
5-1-93"

Thus in sum and substance Mr. BreMiller indicated and stated that the grievant called her a "ugly bitch". Ms. Kamara stated that the grievant was loud, angry, argumentative and out of control. Both of the nurses further indicated and stated that the grievant upset a patient by the name of Danny White causing Danny White to need medication and that the grievant was a serious disruptive force on the floor at the time and place complained of. Both nurses further stated that security had to be obtained and that the grievant was removed from the facility at that time.

To all that the grievant denied any activity of the nature complained of by Ms. BreMiller and Ms. Kamara. The grievant denied calling Ms. BreMiller any four letter words and denied calling Ms. Kamara any four letter words, denied being insubordinate to either of them, denied antagonistic, disruptive and abusive language toward a patient and denied that he was out of control.

The security officer who removed the grievant from the facility did not testify. The patient has since been released and did not testify. The union chairperson did testify and she stated that she saw the grievant on the way out of the facility with the security officer and that the grievant appeared to be in full control of his faculties.

It was upon those facts, statements, denials, allegations and averments that this matter rose to arbitration for opinion and award.

IV. OPINION AND DISCUSSION

The procedural issues have all been disposed of by previous opinion and discussion and further discussion is not needful at this time.

In a discipline or discharge case the employer has the burden of proof. A six day suspension was rendered against the grievant and from the evidence it appeared that the discipline was proper. Both Ms. BreMiller and Mr. Kamara testified to substantially similar facts. Each stated that at the time and place complained of the grievant was out of control, was disruptive, was ugly, was patient abusive, was supervisor abusive, and was disruptive to the entire activity that the psychiatric institution was to accomplish, namely placing seriously troubled individuals back into their daily lives into the community at the earliest possible moment.

The union could offer no evidence whatsoever other than the grievant's self-serving declaration that he was not guilty of the acts complained of. In other words, it is apparent from the record of this case that there was good and sufficient evidence from both testifying nurses, one buttressing the other, that the grievant's activity was as it was and as complained of by them.

Patient, Danny White, did not testify. However the union agreed to a few written statements as joint exhibits that Danny White executed. One of those statements revealed the following:

"I ASKED MR. NEWTON FOR A RAZOR @ 8:30 AND HE SAID WE KNOW THE RULES AND THAT HE DID NOT NEED TO BE BOTHERED AND THEN HE GOT UP AND INTO MY FACE ABOUT NOT CALLING HIM MR. NEWTON. HE ALSO SAID HE ONLY HAD TO LOOK OUT FOR # 1 HIMSELF AND NO ONE ELSE. LATER ON WHEN I WAS TALKING TO THE NURSE HE CALLED ME 'CRAZY' AND ON AND ON WHICH I DID NOT EVEN LISTEN TO. HE WAS TO BUSY LOOKING @ THE PAPER AND PLAYING HIS LOTTERY TICKETS.

THIS IS NOT THE FIRST TIME MR. NEWTON HAS ACTED THIS WAY TOWARDS ME."

Thus, not only is there good and sufficient evidence from both of the nurses involved but it was further

buttressed by the evidence revealed by Mr. White through the joint exhibit. The employer has the burden of proof in this particular matter and it is apparent from the total evidence of the case as placed into the record that there was good and sufficient evidence to sustain the decision of the employer. There was no evidence of conspiracy, harassment or discrimination whatsoever.

An arbitrator does not create his own industrial justice but only modifies when there is good and sufficient reason in the record upon facts which are pertinent which the employer did not take into account or when there is some new facts not known to the employer at the time that would cause such modification. In this particular case, there is insufficient evidence upon which to change or modify the decision of the employer. The only evidence of defense in this matter were self-serving declarations of the grievant all of which is insufficient to overcome the clear and convincing evidence of two registered nurses and the patient himself.

V. AWARD

Grievance denied.

MARVIN J. FELDMAN, Arbitrator

Made and entered

this 11th day

of April, 1995.