

ARBITRATION DECISION NO.:

613

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Veterans Home - Sandusky, Ohio

DATE OF ARBITRATION:

June 24, 1996

DATE OF DECISION:

August 15, 1996

GRIEVANT:

Sandra Lippert

OCB GRIEVANCE NO.:

33-00-(95-06-08)-0612-01-09

ARBITRATOR:

Nels E. Nelson

FOR THE UNION:

John Hall, Staff Representative

FOR THE EMPLOYER:

Heather Reese, Advocate, OCB

KEY WORDS:

Commensurate Discipline

Burden of Proof

Disparate Treatment

Hearsay

Just Cause

Malum in se Offense

Progressive Discipline

Removal

Right to Union Representation

ARTICLES:

Article 24 - Discipline

§ 24.01 - Standard

§ 24.02 - Progressive Discipline

§ 24.05 - Imposition of Discipline

FACTS:

The grievant was employed as a Clerk 2 by the Ohio Veterans Home. In June 1994 the grievant became involved in a personal relationship with a resident in the housing section of the Home. The events leading to

the grievant's discharge began in March 1995 when the grievant accepted a \$400 loan from the resident. The grievant agreed to repay the loan upon receipt of her income tax refund.

On May 22, 1995, the resident contacted the grievant's administrator in order to obtain his help in collecting the remaining \$375 of the loan, of which the grievant had repaid the resident \$25. The Administrator subsequently informed the Labor Relations Officer of the loan transaction. The Administrator charged the grievant with a violation of the Home's disciplinary rules as the grievant allegedly directed insulting language at the resident as well as accepted a loan from the resident in direct contradiction of the Home's rules. The grievant was placed on administrative leave with pay.

On May 26, 1995, a pre-disciplinary meeting was held to determine whether the grievant had violated the Home's rules. On May 30, 1995, a hearing officer determined that the grievant should be removed from employment with the Home. The grievant was discharged for accepting a loan from a resident in direct violation of the Home's disciplinary rules.

EMPLOYER'S POSITION:

The State argued that there was just cause to remove the grievant. The grievant's actions violated the Home's disciplinary rules which prohibit the "accepting of gifts, gratuities, or other special favors from resident veterans." Since the grievant accepted a \$400 loan from a resident, removal of the grievant was an appropriate penalty.

The State argued that removal was proper since it has removed other similarly situated employees. The State contends that the grievant received the same measure of discipline in comparison to other employees with similar work records, seniority, and severity of offenses.

UNION'S POSITION:

The Union contended that the grievant's removal is not commensurate with the offense charged. The Union argued that the State failed to establish by clear and convincing evidence that the grievant's removal was for just cause. Citing the grievant's 25 years of service and the absence of any previous severe discipline, the Union argued that a higher standard of proof was required in order to adequately justify removal.

The Union accused the State of failing to use progressive discipline since the grievant was never disciplined for the violation. Discharge without a prior suspension should only occur in three limited cases: First, where the employer had established a formal "warnings only" policy; second, where the employer had been "patience personified" and the employee failed to respond to reprimands; and third, where the employee had engaged in a "malum in se" offense, a serious offense such as theft, striking a supervisor, or malicious destruction of company property. The Union contended that the grievant falls outside of these exceptions.

Finally, the Union also contended that the grievant was subject to disparate treatment since similarly situated employees have accepted gifts from residents and neither received discipline nor suffered discharge.

ARBITRATOR'S OPINION:

The Arbitrator stated that the grievant clearly violated the Home's rules by accepting a \$400 loan from a resident. However, the disciplinary action imposed on the grievant was not commensurate with the offense and failed to satisfy the just cause standard. The Arbitrator noted that based on the relationship between the grievant and the resident, the violation of the disciplinary rule was not as serious as it first appeared.

Second, the Arbitrator agreed that the violation of this disciplinary rule does not always result in removal or even discipline. Since the grievant was a long-term employee who has never received severe discipline and has no current discipline in her file, she is entitled to extra consideration in a discharge case.

Finally, the Arbitrator stated that the State failed to establish that the resident suffered any harm as a result of the grievant's violation.

AWARD:

The grievance was sustained in part and reversed in part. The grievant was reinstated with no loss of seniority and the removal was converted to a two-week suspension. However, back pay was awarded to the

grievant less a two-week disciplinary suspension and less any unemployment compensation and interim earnings.

TEXT OF THE OPINION:

ARBITRATION DECISION

August 15, 1996

In the Matter of:

**State of Ohio, Ohio Veterans Home
Sandusky, Ohio**

and

**Ohio Civil Service Employees
Association, AFSCME Local 11**

Case No.:

33-00-(95-06-08)-0612-01-09

Sandra Lippert, Grievant

APPEARANCES

For the State:

Heather Reese, Advocate, Office of Collective Bargaining
Shirley Turrell, Office of Collective Bargaining
Robert Day, Labor Relations Officer, Ohio Veterans Home
Paul Bock, Food Service Administrator, Ohio Veterans Home
Robert Sellers, Director, Ohio Veterans Home

For the Union:

John Hall, Staff Representative
Sandra Lippert, Grievant
Vanessa Brown, President
C. Pettit, Arbitration Clerk
Linda Trautman, Witness
Martha Roesch, Witness
Shirley Lane, Witness
Jeanette Griffaw, Witness
Calvin Miller, Witness
Tom Fahey, Witness
David Larry Vanderhorst, Witness

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Sandra Lippert, was hired by the Ohio Veterans Home of the State of Ohio on January 21, 1970. She worked in the food service office where she was classified as a Clerk 2. In June 1994 the grievant began a relationship with William Frey who was a resident in the domiciliary section of the home. As a resident of the domiciliary, Frey was free to come and go as he wished. He visited the grievant at her home on a nearly daily basis.

The events leading to the grievant's discharge began in March 1995. At that time the grievant received a notice from the telephone company that unless her bill was paid, her service would be disconnected. The state claims that the grievant requested a \$400 loan from Frey to pay the bill. The grievant testified that Frey offered to loan her the \$400. Whatever the case, the grievant did borrow \$400 which was to be repaid when she received her income tax refund.

On May 22, 1995 Frey contacted Paul Bock, the food service administrator. He told Bock that the grievant had borrowed \$400 from him in March 1995 and had repaid only \$25 of the loan. Frey asked Bock to help him collect the rest of the money from the grievant.

Bock arranged a meeting the next day -- May 23, 1995 -- with the grievant and Frey. The grievant admitted that she had borrowed the money from Frey but indicated that she had not repaid the loan because she was still waiting for her income tax refund. She agreed, however, to pay Frey the remaining \$375 on Monday, May 29, 1995.

Following the meeting Bock sent a memorandum to Robert Day, the labor relations officer at the home. He told Day that the grievant had borrowed \$400 from Frey and had become verbally abusive toward Frey at the meeting. Bock charged that the grievant had violated item no. 3 of the disciplinary grid by directing insulting language at a resident and item no. 19(A) by accepting a loan from a resident. Later that day the grievant was placed on administrative leave with pay and was informed that a pre-disciplinary meeting would be conducted on Friday, May 26, 1995. The state charged that the grievant violated item no. 19 of the disciplinary grid by accepting a \$400 loan from Frey and item no. 3 of the grid by directing insulting language at him. The grievant claimed that Frey had offered to lend her money but she had refused until her telephone was about to be disconnected at which time she accepted \$400 with the understanding that it was to be paid back when she received her income tax refund. She admitted losing her temper and saying things she should not have said.

On May 30, 1995 Mark W. Faust, the hearing officer, found just cause for disciplining the grievant for violating item no. 19 of the disciplinary grid but did not find just cause for the charge of violating item no. 3. As a result Day recommended that the grievant be removed and Robert G. Sellers, the director of the home, informed the grievant that she was being removed.

On June 1, 1995 the grievant filed a grievance. It alleged a variety of violations of Article 24. The grievance requested that the grievant be reinstated and made whole. The grievance was denied at step three on June 28, 1995. The case was appealed to arbitration. The hearing was held on June 24, 1996. Written closing statements were received on July 15, 1996.

ISSUE

The issue as agreed to by the parties is as follows:

Was the termination of the grievant, Sandra Lippert, for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 24.01, 24.02, and 24.05.

POSITION OF THE STATE

The state argues that there is just cause to remove the grievant. It points out that in February 1995 she

borrowed \$400 from Frey indicating that she would pay it back from her income tax refund. The state indicates that in May 1995 the grievant had repaid only \$25 and had never contacted Frey to tell him that she had not yet received her income tax refund. It stresses that Frey was repaid only after he sought the assistance of Bock.

The state charges that the grievant's conduct violated policy no. 1032 which "prohibits employees from accepting gifts, gratuities, loans or special favors from residents." It notes that the policy indicates that an employee who violates the rule "may be discharged." The state claims that the grievant's action also violated item no. 19(A) of the disciplinary grid which prohibits "accepting gifts, gratuities, or other special favors from resident veterans." It stresses that the grid lists "removal" as the appropriate penalty.

The state contends that subsequent to her meeting with Bock and Frey the grievant discussed the repayment of the loan with her friends among the residents. It claims that as a result residents shouted obscenities at Frey, directed obscene gestures at him, and refused to sit with him at meals. The state emphasizes that this can be interpreted as detrimental to Frey's well-being which is precisely what policy no. 1032 is intended to eliminate.

The state maintains that it has removed similarly situated employees. It points out that Fred Lanier, a food service worker, was removed on November 11, 1995 for borrowing \$20 from a resident. The state notes that Ken Harvey, a hospital aide, was terminated on March 14, 1995 for soliciting funds from a resident. It indicates that in both cases the employees were charged with violating item no. 19(A) of the disciplinary grid.

The state rejects the union's contention that the grievant was the object of disparate treatment. It maintains that the burden is on the union to establish disparate treatment. The state cites State of Ohio, The Ohio Department of Mental Health, Western Reserve Psychiatric Habilitation Center and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, Case No. 23-18-880713-0104; OCSEA, Local 11, AFSCME, AFL-CIO and OCB, Ohio Department of Mental Health, Grievance G23-06(89-11-13)-01-21-01-03; and State of Ohio, Department of Rehabilitation and Correction, Lancaster, Ohio and Ohio Civil Service Employees Association, OCSEA/AFSCME, AFL-CIO, Local 11, Case No. 27-24-(03-20-89)-18-01-03 in support of this position.

The state contends that the cases offered by the union do not establish disparate treatment. It admits that Linda Trautman's children received \$60 from a resident but it points out that her case differs from the instant case because it did not know about the gift until she came forward three years later, the gift was not solicited, and no resident complained or was harmed. The state acknowledges that Calvin Miller kept \$16 he won at a bingo game where he had taken a van load of residents but notes that he was charged with violating item no. 19 of the disciplinary grid rather than item no. 19(A). It states that several housekeeping employees who received gift certificates from a resident were told that it was all right to keep them but still returned them promptly. The state observes that Sellers accepted tickets to a race track from a resident but stresses that the tickets were worth less than \$5 and the minutes of the board of trustees meeting from December 13, 1984 indicate that it is not inappropriate to accept items of limited value from residents. It disputes the union's contention that Day and other employees are accepting a gift when they accompany residents to activities such as basketball games because someone in authority needs to accompany the residents. The state concedes that Felicia Fresch received a baby bed from a group of residents without being disciplined but claims that it believed that the bed had been returned.

The state concludes that the grievant violated policy no. 1032 and item no. 19(a) of the disciplinary grid which calls for removal. It contends that the union failed to show that the grievant was disciplined in a different manner compared to other employees with respect to their prior work records, seniority, and the seriousness of their offenses. The state asks the Arbitrator to deny the grievance in its entirety.

POSITION OF THE UNION

The union argues that the grievant was denied union representation at the meeting with Bock and Frey on May 23, 1995. It states that the issue to be discussed was the type of issue which normally would be discussed with a union representative present. The union claims that Bock admitted that he knew that discipline might result from the meeting but he did not inform the grievant of that fact. It asserts that as a

result, the grievant never thought to request union representation.

The union contends that the grievant's removal is not commensurate with her offense. It points out that the purpose of policy no. 1032's ban on gifts, loans, and special favors is to avoid the appearance of impropriety and eliminate the possibility of disparate care for wealthy residents. The union notes, however, that the state presented no evidence that there was any impropriety or disparate treatment in the instant case.

The union rejects the contention that Frey was treated poorly and verbally abused. It states that Day's testimony that he observed two residents verbally abusing Frey because of his role in the grievant's removal is hearsay. The union acknowledges that Frey left the home shortly after the grievant's removal but indicates that Day could not testify that his departure was not due to his violation of the rule against residents at the home possessing firearms.

The union contends that the state must show by clear and convincing evidence that the grievant's removal was for just cause. It acknowledges that a number of prior arbitration decisions have held the standard of proof to be a preponderance of the evidence but notes that some Arbitrators, including Arbitrator Rhonda Rivera in Ohio Department of Taxation v. Ohio Civil Service Employee-, Association, AFSCME, Local 11, Grievance No. G87-0687, have held this standard to be too weak to justify a removal. The union claims that in view of the grievant's 25 years of service and the absence of any severe discipline, the clear and convincing standard is certainly reasonable. It cites the decision of Arbitrator Harry Graham in Ohio Department of Rehabilitation and Corrections v. Ohio Civil Service Employees Association, AFSCME Local 11, Case No. G 86-259, in support of the high standard of proof required where an employee has long service.

The union maintains that the evidence presented by the state to demonstrate just cause for the grievant's removal was neither clear nor convincing. It claims that Day's testimony was inconsistent. The union states that he initially testified that residents collected money for the grievant to use to repay Frey but he later had to admit that the residents did not actually give the money to the grievant. It also indicates that Day stated that Fresch returned a baby bed that residents had given her but the minutes to a January 13, 1994 labor-management committee meeting reveal that she kept it.

The union contends that Day's credibility is also undermined by an incident on December 1, 1992. It indicates that on that date Day was apprehended by detectives as he attempted to sell unused tickets to a Cleveland Cavaliers basketball game which had been provided by the home. The union admits that Day asserted that it was a policy of the home to sell unused tickets and to return the money to the residents' fund but emphasizes that he failed to produce any written record of the policy. It further states that there was no definite proof of Day's intention in reselling the tickets.

The union complains that the grievance trail is full of inconsistencies. It points out that Bock's statement dated May 23, 1995 claims that the loan was made February 1995 but other documents indicate that the loan was made in March 1995. The union notes that Bock's statement charges the grievant with violating item no. 19(A) of the disciplinary grid but Faust's account of the pre-disciplinary hearing states that the grievant violated item no. 19. It emphasizes that this is an important difference because item no. 19(A) mandates removal while mitigating circumstances can be considered under item no. 19.

The union charges that the grievant is being used as an example. It reports that Day's recommendation for the grievant's removal says that she should be removed to "maintain the integrity of the Disciplinary Grid and set a precedent for future violations of like kind." The union maintains that this is contrary to Article 24.05 which states that "disciplinary measures ... shall not be used solely for punishment."

The union argues that much of what the state relied upon to show emotional harm to Frey is hearsay. It characterizes Frey's written statement as hearsay because no reason was given for why he could not attend the hearing. The union claims that Day's testimony regarding Frey's emotional state is hearsay and entitled to little weight. It acknowledges that Bock's statements about Frey's emotional state after the May 23, 1995 meeting fit an exception to the hearsay rule -- Federal Rules of Evidence 803(1) - Present Sense Impression -- but contends that his testimony alone does not demonstrate that Frey was suffering such emotional harm as to show just cause for the grievant's removal.

The union accuses the state of failing to use progressive discipline. It contends that progressive discipline

typically requires at least one disciplinary suspension prior to removal. The union notes that Arbitrator David Pincus in State of Ohio, Ohio Department of Rehabilitation and Corrections, Ross Correctional Institution and Ohio Civil Service Employees Association, AFSCME, Local 11, Case No. 27-23-(8-01-88)-43-01-03, held that a suspension provides notice that the employer will follow through on its warnings and provides an opportunity for rehabilitation. It stresses that the grievant was never disciplined for violating item no. 19 or 19(A) of the disciplinary grid and that there was no indication that corrective measures would be futile.

The union asserts that discharge without a prior suspension is appropriate in only three cases. It points out that Arbitrator Pincus in Case No. 27-23-(8-01-88)-43-01-03 stated that discharge is proper only where the employer has established a formal "warnings only" policy, where the employer has been "patience personified" and the employee has failed to respond to counselings or reprimands, or where the employee has engaged in a "malum in se" offense. The union claims that the grievant's offense does not fall under any of these exceptions so she should have received only a suspension.

The union contends that the grievant was subjected to disparate treatment. It observes that in 1989 Trautman accepted \$60 from a resident for her children and was charged with violating item no. 19(A) of the disciplinary grid but received only a three-day suspension. The union maintains that the Trautman case is similar to the instant case because neither Trautman nor the grievant benefited directly from their action and because both were long-service employees. It notes that Miller, who won \$16 at a bingo game which he attended with residents, was charged with violating item no. 19 and was suspended. The union complains that Miller was given the opportunity to return the money to mitigate his discipline while the grievant was summarily dismissed.

The union argues that a number of employees accepted gifts and received no discipline. It reports that Sellers accepted tickets to a race track and claimed that it did not violate policy no. 1032 because the tickets had nominal value yet the policy does not specify any minimum value. The union observes that Fahey was told that he could keep a \$20 gift certificate he received from a resident because it was of minimal value but the minutes to the January 13, 1994 labor-management committee meeting reveal that Day stated that an employee cannot accept a gratuity of any amount. It acknowledges that it did not provide the minutes to the state prior to the arbitration hearing but points out that the minutes were introduced to rebut the statements by Day and Sellers.

The union asserts that Fresch and Cochran received gifts, gratuities, or special favors of substantial value but were not disciplined. It states that Fresch received a baby bed from residents which she was forced to return but it was later repurchased and she was allowed to keep it. The union maintains that in December 1984 Cochran was not disciplined for borrowing \$2500 from a resident despite a provision in the then current employee handbook stating that "an employee can be dismissed for accepting gifts, gratuities, and other special favors from resident veterans."

The union concludes that the grievance must be sustained. It contends that the grievant's right to union representation at the May 23, 1995 meeting with Bock was violated. The union maintains that the grievant's removal was not commensurate with the offense, was not for just cause, and was not in accord with progressive discipline. It claims that the grievant was also subject to disparate treatment. The union asks the Arbitrator to reinstate the grievant with all back pay, seniority, and benefits.

ANALYSIS

The basic facts in the instant case are undisputed. In March 1995 the grievant received a notice from the telephone company that unless she paid her bill, her telephone would be disconnected. Frey loaned the grievant \$400 to pay the bill with the understanding that he would be repaid when she received her income tax refund. On May 22, 1995 Frey complained to Bock that the grievant had repaid only \$25 of a \$400 loan and requested his help in collecting the remaining \$375. The next day Bock met with Frey and the grievant and as a result Frey was paid in full a few days later.

The Arbitrator believes that it is clear that the grievant violated the home's rules. Policy no. 1032 prohibits employees from "accepting gifts, gratuities, loans, or special favors from residents." It is reflected in item no. 19(A) of the disciplinary grid which bars employees from "accepting gifts, gratuities, or other favors from

resident veterans." Policy no. 1032 indicates that employees who violate the rule "may be discharged." The disciplinary grid indicates that a breach of item no. 19(A) will result in "removal."

All employee discipline is subject to the requirements of the collective bargaining agreement. Section 24.01 indicates that "disciplinary action shall not be imposed upon an employee except for just cause." Section 24.05 states that discipline "shall be reasonable and commensurate with the offense and shall not be used solely for punishment."

The Arbitrator does not believe that the grievant's discharge is commensurate with the offense and does not meet the just cause standard. First, given the relationship between Frey and the grievant and the circumstances under which the loan was made, the grievant's violation of policy no. 1032 and item no. 19(A) of the disciplinary grid are not as serious as it first appears. Frey lived in the domiciliary area of the home where he came and went as he pleased. He needed no assistance and just as easily could have lived in an apartment off the grounds. The grievant worked in the food service office where she would have had no contact with the grievant except that he worked in the warehouse which required him to come to the food service office. They became friendly and Frey visited the grievant's home on a nearly daily basis beginning in February 1994. The relationship apparently became more than casual and there were even discussions about living together should Frey have to leave the home.

The details surrounding the granting of the loan are disputed. The state's version of the events is based primarily on Frey's written statement. It indicates that the grievant came to him and asked him to loan her \$400 to pay her telephone bill telling him that she was due a \$1000 income tax refund. The statement reports that Frey agreed to help the grievant so she would not lose the use of her telephone. It reports that Frey went to the grievant repeatedly to ask her to repay the loan and went to Bock because the grievant had repaid only \$25 of the loan.

The union's version of the events is based primarily on the testimony of the grievant. She testified that Frey repeatedly had offered to loan her money but that she refused to accept any money because "she knew she should." The grievant stated that she relented and accepted the loan to avoid having her telephone disconnected. She claimed that sometime in April 1995 Frey stopped visiting her home and did not visit her at work as he had in the past. The grievant acknowledged that she did not repay the loan until after the meeting with Bock but claimed that she had not yet received her income tax refund.

The Arbitrator must accept the union's claims about the origin of the loan. The grievant testified at the hearing and was cross-examined by the state. Her testimony that Frey offered to loan her money and she initially refused was supported by the testimony of Shirley Lane, an employee of the home, and Jeanetta Griffaw, a neighbor of the grievant, who stated that they were present when Frey insisted that the grievant accept his loan of \$400. The state's version is based on Frey's written statement which is impossible to cross-examine and Day's hearsay testimony about what Frey told him the grievant said.

The intent of policy no. 1032 and item no. 19(A) of the disciplinary grid is obvious. As the state indicated, these rules are intended to prevent wealthy residents from buying, or appearing to buy, special treatment through gifts, gratuities, and favors to the staff. The enforcement of such rules is essential where an unscrupulous staff member could prey on vulnerable residents.

The situation in the instant case appears to be very different from that contemplated by the rules. Frey was not dependent in any way on the grievant and certainly did not appear to be exploited by the grievant. They had a close personal relationship rather than a caregiver-resident relationship. It appears that something happened to change the relationship triggering the demand for repayment.

Second, a violation of policy no. 1032 and item no. 19(A) of the disciplinary grid has not always resulted in a termination or even in discipline. Trautman's children received a gift of \$60 from a resident and she was suspended for only three days. Fresch was given a baby bed by a group of residents. Although she initially was required to return the bed, the minutes of a labor-management committee meeting indicate that it was repurchased and she was allowed to keep it. Fahey and a number of other housekeeping employees received \$20 gift certificates from a resident and were told by their supervisor that Sellers said they could keep them because they were of minimal value. Does a loan of \$400 under the circumstances present in the instant case justify the termination of the grievant while a gift of \$60 merits only a three-day suspension? Is a gift of \$20 of minimal value and consistent with the rules while the grievant's accepting a loan of \$400 merits

termination?

Third, the grievant is a long-service employee. She was hired on January 21, 1970 and had more than 25 years of service when she was terminated. Her record indicates that she has received no serious discipline and currently has no active discipline in her file. It is widely recognized in arbitration that such employees are entitled to extra consideration in discharge cases.

Finally, the Arbitrator does not believe that the state established that Frey suffered any harm as a result of the grievant's violation of policy no. 1032 or item no. 19(A) of the disciplinary grid. While Day testified that he observed two residents directing obscenities at Frey and other residents refusing to sit with him in the dining room, there was no proof that it had anything to do with the grievant's removal or that the grievant caused or encouraged such behavior. The suggestion that Frey left the home because of these actions rather than as a result of his possession of a firearm is simply speculation.

The remaining issue is the proper penalty. The grievant committed a serious offense when she accepted the \$400 loan. She acknowledged that she knew about the rule prohibiting her from accepting the loan and that she realized that she should not take the money. While the grievant's relationship with Frey helps explain why she accepted the loan, it does not justify the violation of an important rule. In fact, events subsequent to the loan establish why it is inappropriate under any circumstances for an employee to accept a loan from a resident.

The Arbitrator feels that a two-week suspension is commensurate with the grievant's offense. Her reinstatement reflects the special circumstances present in the case and the 25 years she has invested in her job. The significant loss of pay takes into account the seriousness of her knowing violation of an important rule.

AWARD

The grievant is to be reinstated with no loss of seniority and full back pay less a two-week disciplinary suspension and less any unemployment insurance compensation and interim earnings.

Nels E. Nelson
Arbitrator

August 15, 1996
Russell Township
Geauga County, Ohio