

ARBITRATION DECISION NO.:

658

UNION:

OCSEA, Local 11, AFSCME. AFL-CIO

EMPLOYER:

Ohio Department of Mental Retardation and Developmental Disabilities
Gallipolis Developmental Center

DATE OF ARBITRATION:

December 3, 1997

DATE OF DECISION:

January 19, 1998

GRIEVANT:

Jeremy Todd Fisher

OCB GRIEVANCE NO.:

24 07 (97 05 20) 0668 01 04

ARBITRATOR:

Nels E. Nelson

FOR THE UNION:

Richard Sycks, Staff Representative
Monty Blanton, Chapter President

FOR THE EMPLOYER:

Carolyn Borden-Collins, Labor Relations Coordinator, MR/DD
Rodney Sampson, Second chair, Office of Collective Bargaining
Robin Bledsoe, Labor Relations Officer

KEY WORDS:

Abuse of Patient
Just Cause
Removal

ARTICLES:

Article 24 - Discipline
§24.01 - Standard

FACTS:

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The grievant worked as a therapeutic program worker for the Ohio Department of Mental Retardation and Developmental Disabilities at the Gallipolis Developmental Center. Management removed him on May 12, 1997, for physically, psychological and verbally abusing a client.

The events leading to the grievant's termination occurred on March 6, 1997. Gallipolis Developmental

Center Police Officer Johnson testified that he heard the grievant threatening a client by saying "hurry up and get dressed before I hang you with this fucking belt". He further testified that through a reflection from a picture hanging on a wall he observed the grievant push the client and state "now hurry up and get fucking dressed". Johnson also stated that he observed the grievant strike the client twice with his open hand on the back of the client's head.

The grievant denied ever hitting the client. He also stated that the only profanity that was used was when, the client allegedly spat in his face, the grievant threw the client's belt on the floor and said "damn it". The grievant also denied threatening to hang the client with his belt.

EMPLOYER'S POSITION:

The Employer argued that there was just cause to remove the grievant because he violated departmental policy as well as Medicaid guidelines. The Employer argued that a client does not have to suffer injury for abuse to have taken place.

The Employer asserted that the testimony of Johnson was credible because of his detailed description of the events. Johnson's testimony should also be considered credible by virtue of his training as a police officer. Furthermore, the Employer asserted that the grievant was the only person in the area at the time of the incident, who was capable of making abusive statements

Finally, the Employer argued that under Article 24, Section 24.01 of the contract, the grievant's discharge must be upheld. Section 24.01 states "[I] cases involving termination, if the arbitrator finds that there has been abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse.

UNION'S POSITION:

The Union argued that the grievant was not removed for just cause. The only witness offered was Johnson, and his testimony was based on a reflection from a picture hanging on a wall. The Union argued that due to his physical location, Johnson could not have heard or seen the alleged act.

Furthermore, the Union argued that the fact that there was no sign of any injury to the client supports the grievant's position that he did not strike the client. The Union also pointed to the testimony of co worker Minnis who stated that she was working with the grievant at the time in question. She reported no physical/verbal abuse of the client.

ARBITRATOR'S OPINION:

The Arbitrator found that the grievant was removed for just cause. He believed Johnson's testimony to be credible due to his police training as well as a lack of motive to fabricate. The Arbitrator found the testimony of Minnis to not be credible mainly due to her inability to recall specific events. She could only recall Johnson's alleged statement when he allegedly threw the belt on the floor.

The Arbitrator also held that it is well established that abuse can take place without any injury. Therefore the fact that no physical sign of abuse was found on the grievant was not dispositive as to whether abuse occurred.

Therefore, considering the above, the Arbitrator held that he must uphold the grievant's removal consistent with Article 24, Section 24.01.

AWARD:

The Arbitrator denied the grievance in its entirety.

TEXT OF THE OPINION:

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ARBITRATION DECISION

January 19, 1998

In the Matter of :

State of Ohio, Department of Mental Retardation and Developmental Disabilities, Gallipolis Developmental Center

and

Ohio Civil Service Employees Association,
AFSCME Local 11

Case No. 24-07-(05-20-97)-0668-01-04

Jeremy Todd Fisher, Grievant

APPEARANCES

For the State:

Carolyn Borden Collins, Labor Relations Coordinator, MR/DD
Rodney Sampson, Second Chair, Office of Collective Bargaining
Robin Bledsoe, Labor Relations Officer
Schadd Johnson, Police Officer
Eric Young, Program Director
Clarence "Chip" Kirby, Administrative Assistant

For the Union:

Richard Sycks, Staff Representative
Monty Blanton, Chapter President
Jeremy Todd Fisher, Grievant
Maudine Minnis, Witness

ARBITRATOR:

Nels E. Nelson

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BACKGROUND

The dispute involves the discharge of Jeremy Fisher by the Gallipolis Developmental Center of the Ohio Department of Mental Retardation and Developmental Disabilities. The grievant was hired as a therapeutic program worker in 1995. His duties included providing a safe and clean environment for clients and an atmosphere conducive to treatment.

The events leading to the grievant's termination occurred on March 6, 1997. Gallipolis Developmental Center Police Officer Schadd Johnson testified that at approximately 8:00 P.M. he was walking down a hallway in Living Area 6039 when he heard the grievant threaten a client by saying "hurry up and get dressed before I hang you with this fucking belt. " He stated that he proceeded down the hallway where he peered into a room. Johnson indicated that in a glass covering a picture on the wall he saw a reflection of the grievant and a client in the bathroom. He claimed that he observed the grievant push the client, stating "now hurry up and get fucking dressed." Johnson asserted that the grievant then struck the client twice with his open hand on the back of his head.

The grievant offers a different account of the events. He testified that after the client had showered, the client asked him for his belt which he wanted to wear over his pajamas. The grievant stated that when he refused to give the client the belt, the client spit in his eye, He indicated that he said "damn it" and threw the belt on the floor. The grievant denies hitting the client or threatening to hang him,

Whatever the case, Johnson entered the bathroom. He told the grievant that he was under arrest and handcuffed him. Johnson took the grievant to the Gallipolis Developmental Center police station where he was interviewed by Clarence "Chip" Kirby, an administrative assistant in charge of the GDC police.

A pre disciplinary meeting was held on April 7, 1997. The state charged that the grievant had physically, psychologically, and verbally abused a client. The union denied **1**

the charges. However, the hearing officer concluded that there was just cause for discipline. On May 12, 1997 the grievant was terminated.

The grievant filed a grievance on May 20, 1997. It charged that the grievant's removal did not meet the just cause standard. The grievance requested that the grievant be reinstated and made whole. It was denied at step three on August 7, 1997 The grievance was appealed to arbitration on September 12, 1997 The hearing was held on December 3, 1997. Written closing statements were received on December 19, 1997

ISSUE

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

Did the Grievant commit acts of physical and/or verbal abuse against a resident of the Gallipolis Developmental Center? If not, what shall the remedy be"

RELEVANT CONTRACT PROVISIONS

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 abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify, the termination of an employee committing such abuse.

STATE POSITION

The state argues that the grievant's removal is consistent with departmental policy. It contends that his actions constitute physical and verbal abuse as defined by departmental policy and Medicaid guidelines. The state maintains that under these policies and guidelines a client does not have to suffer an injury for abuse to have taken place. It

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observes that the grievant received training in the relevant policies and knew that an act of abuse would result in removal.

The state asserts that the grievant was the only person in the area at 8:00 P.M. on March 6, 1997 who was capable of making the abusive statements. It reports that the only other male in the building was in the female side of the house away from the area where the yelling occurred. The state indicates that none of the clients, including the victim of the grievant's abuse, are able to verbalize a complex sentence such as "hurry up and get dressed before I hang you with this fucking belt."

The state argues that the specificity of Johnson's testimony is axiomatic. It points out that Eric Young, the program director, testified that the client sometimes wishes to wear his belt when it is not appropriate. The state notes that Johnson had no reason or opportunity to know about the client's pre-occupation with his belt. It contends that "the detail[ed] testimony of Officer Johnson surrounding [the client's] 'belt' is so specific that he could only have known it by the manner in which he testified." (State Written Closing Statement, page 4)

The state contends that the testimony of Maudine Minnis, a therapeutic program worker, failed to discredit Johnson's testimony. It acknowledges that she testified that she heard Johnson say that he saw the grievant abuse a client through a window. The state observes that the grievant stated that he was in the bathroom with the client while Minnis was in the bathroom showering another client and that when he became frustrated with the client, he threw the client's belt on the floor and said "damn it.." The state questions why Minnis testified that she did not hear or see any of this. It charges that her "selective memory emanates from the unwritten yet historical 'code of silence' which runs rampant in institutional agencies." (State Written Closing Statement, page 5).

The state argues that Johnson's testimony is credible. It notes that he is a trained police officer and that his testimony was very specific. The state observes that when

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Johnson did not know the answer to a question, he admitted it. It stresses that the union did not establish any animus or ulterior motive on the part of Johnson

The state challenges the veracity of the grievant's testimony. It contends that protecting his livelihood provides the grievant with an incentive to distort the truth. The state further maintains that the grievant's testimony that the picture on the wall was "somehow different" and that Johnson's testimony "would have been ego" ' was conclusionary.

The state concludes that the grievant's discharge must be upheld. It points out that Article 24, Section 24.01 states:

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 abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse.

UNION POSITION

The union argues that the state failed to establish just cause for the grievant's removal. It points out that the only witness offered by the state was Johnson and that his testimony was based on a reflection he claims that he saw in a picture hanging on a wall six to eight feet from him and fifteen feet from the bathroom door. The union claims that if the incident occurred as Johnson testified, he would have been unable to determine who was in the bathroom or what happened.

The union raises a number of issues with Johnson's testimony. First, it states that where his testimony placed the client and the grievant, he could not have seen both of them in the reflection. Second, the union questions whether Johnson could have heard the alleged threat by the grievant from 18 feet away through a closed door. Third, it charges that if Johnson felt that the client was being abused, he should have acted immediately rather than waiting for 45 seconds as he testified. Fourth, the union complains that

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Johnson humiliated and embarrassed the grievant in front of his peers and clients by placing him in handcuffs. Fifth, it stresses that at the time of the incident Johnson told the grievant and Minnis that he saw the grievant abuse a client through a window.

The union contends that the testimony of Minnis supports the grievant's position. It points out that she was working with the grievant at the time the alleged abuse took place. The union emphasizes that Minnis testified that she did not see or hear either physical or verbal abuse of a client.

The union indicates that the grievant's testimony about what happened never changed. It admits that the grievant threw the client's belt on the floor after he spit in his face. The union states that this action was "reactionary and unintentional" but was not abuse. It asserts that, if anything, the grievant was the object of abuse.

The union observes that there was no sign or symptom of any injury to the client. It points out that all of the clients in the area were examined and none had any injury. The union notes that the client showed no injury from the alleged incident.

The union concludes that the grievance should be granted. It asks the Arbitrator to return the grievant to his position as a therapeutic program worker and to compensate him for lost wages and benefits.

ANALYSIS

The issue is whether the grievant engaged in client abuse. The charge against the grievant is based on the testimony of Johnson. He stated that he heard the grievant threaten to hang the client with his belt, threw an object at him, and hit him twice on the back of the head.

The Arbitrator believes Johnson's testimony is credible. He is a trained police officer who would be expected to carefully observe and note potential criminal conduct including patient abuse. Furthermore, there is no indication that Johnson had any motive **5**

to be untruthful. The grievant's claim that Johnson's ego accounted for his testimony was not explained and was unpersuasive.

The grievant's testimony is less credible. He is accused of patient abuse and knows that the penalty for abuse is removal. It is widely recognized in arbitration that the testimony of a grievant whose job is at stake may be entitled to less credibility than a disinterested party.

The union challenged Johnson's testimony that he heard the grievant threaten the client. While Johnson may have been 15 feet away and separated from the grievant by a closed door, there is no reason to believe that he fabricated his testimony. Any suggestion that someone else made the statement must be rejected since the only males in the area were clients whose verbal skills would not have permitted them to make the statement that Johnson heard.

The union questioned whether Johnson could have seen in a reflection from a glass what he testified he saw. The Arbitrator observed very carefully what could be seen in the glass. While it may have been impossible to identify a particular client, the Arbitrator believes that it would not have been difficult to observe the grievant throw something at the client, push him out of the bathroom, and hit him on the back of the head.

The union placed considerable emphasis on the testimony of Minnis that at the time of the alleged abuse Johnson stated to her that he saw it through a window. It may be, however, that she misunderstood whether Johnson was referring to a window or a glass on a picture. Furthermore, Minnis's testimony is undermined by her inability to recall anything except Johnson's alleged statements even though she was close by the grievant when, by his own testimony, he threw the client's belt on the floor and exclaimed "damn it. "

The union also noted that there was no evidence that the client suffered any injury. While this appears to be the case, it is not determinative of the dispute. It is well established that abuse can take place without any injury.

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The union complained that the grievant was humiliated when he was handcuffed in front of clients and his peers. That claim, however, is not relevant to the question of whether abuse took place. Furthermore, Johnson testified that when he informed the grievant that he was under arrest, he felt threatened by the posture assumed by the grievant.

The union argued that it was the grievant who was the object of abuse. While the Arbitrator can understand the frustration and even anger at being spit on by the client, the grievant's response was entirely inappropriate. Threatening and striking a client cannot be condoned.

Given the above analysis, the Arbitrator must uphold the grievant's removal. Article 24, Section 24.01 states that "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 the authority to modify the termination."

AWARD:

The grievance is denied.

Nels E. Nelson
Arbitrator

January 19, 1998
Russell Township
Geauga County, Ohio

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