ARBITRATION DECISION NO.:
660

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Ohio Department of Mental Retardation and Developmental Disabilities

DATE OF ARBITRATION:

DATE OF DECISION:
January 27, 1998

GRIEVANT:
Virginia Montgomery

OCB GRIEVANCE NO.:
24 08 (97 04 09) 0611 01 04

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Penny Lewis, Advocate
Michael Golding, Local President
Michelle Hurt, Local Vice President

FOR THE EMPLOYER:
Georgia Brokaw, Advocate
John McNally, Second Chair

KEY WORDS:
Credibility of Witnesses
Just Cause
Removal
Threats

ARTICLES:
Article 24 – Discipline
§24.01 – Standard
§24.02 Progressive Discipline

FACTS:

The grievant worked as a Therapeutic Program Worker (TPW) in the Montgomery Developmental Center. The Employer removed her on April 2, 1997, for allegedly creating a disturbance, improper conduct, and poor judgment, The facts were largely in dispute. The Employer alleged that the grievant made comments to a co worker, which threatened their supervisor with violence. The grievant was accused of stating that the

supervisor "needs an awakening" and that she may receive a visit from the Ku Klux Klan. The grievant further attempted to gain access to the supervisor's home address from the co worker who had access to this .information. Two weeks after this conversation, the co worker reported it to the proper authorities. There was an investigation during which the grievant denied ever making any reference to the KKK, but she merely stated her intention to file a cause of action for discrimination against the supervisor. The Employer alleges that during the investigation, another co worker carne forward to say that she had also heard the grievant make threats of violence against her supervisors.

EMPLOYER'S POSITION:

The Employer argued that there was just cause to remove the grievant. First , the testimony of the first co-worker, who heard the grievant's comments about the KKK was credible. Her testimony at the hearing was consistent with her statements made at other stages of the investigative process.

Second, the evidence clearly demonstrated that the grievant's actions inspired fear in her co workers. The supervisor who the grievant threatened was visibly shaken when she was told of the threats It is also possible that two supervisors resigned because of the grievant's actions.

Third, the grievant admitted she had a confrontation with her supervisor. She also admitted having the conversations with her co workers and the general subject matter of those conversations. She only denied some specific details of these conversations. She admitted that she wanted to teach the supervisor a lesson, and that she sometimes makes reference to the KKK when she is "worked up" about things.

Last, the statements of the grievant and her witnesses at the hearing were not credible. The statements were inconsistent with each other and inconsistent with other facts surrounding the incident.

UNION'S POSITION:

The Union argued that there was not just cause to remove the grievant. First, the co worker brought forward these allegations were not credible. The first co worker had a strained personal relationship with the grievant and this caused her to retaliate by accusing the grievant of making these threats. There is no other evidence that the grievant ever confronted her supervisors with these threats and the co worker's word is all that exists to support this allegation. Further, the co workers waited over two weeks after the alleged incidents before coming forward. If these threats were truly as serious as the Employer alleged, they certainly would have come forward earlier.

Second, the resignations of the supervisors were not caused by the actions of the grievant. Both supervisors left for personal reasons unrelated to the disputed incident.

ARBITRATOR'S OPINION:

The Arbitrator found that there was not just cause to remove the grievant. First, the co workers who testified against the grievant were not credible. The first co worker had a strained personal relationship with the grievant. This provided her motivation for making these allegations against the grievant.

Also, the co workers both waited quite some time after the alleged incidents before reporting them. The Arbitrator felt that if threats of this serious nature were made, they would have reported them sooner. The second co worker's testimony didn't really establish any wrongdoing. She stated that she thought the grievant's comments were not threatening, but merely distasteful.

Last, the Arbitrator was not compelled by the Employer's argument that the grievant admitted the allegations. The grievant only admitted that she said her supervisor "needed to learn a lesson." This

statement by itself does not constitute a threat.

AWARD:

The Arbitrator sustained the grievance. The Employer was directed to reinstate the grievant with all back pay, minus any appropriate deductions. The grievant's benefits and seniority were also reinstated.

TEXT OF THE OPINION: *** * ***

The State of Ohio and Ohio Civil Service Employees Association Labor Arbitration Proceeding

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In the Matter of the Arbitration Between:

The State of Ohio, Department of Mental Retardation and Developmental Disabilities

and

Ohio Civil Service Employees Association, Local 11, AFSCME, AFL CIO

Grievant: Virginia Montgomery
Grievance No. 24 08 (04 09 97) 6f 1 01 04

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: January 27, 1998

APPEARANCES

For The Employer

Sue L. Curtis	Superintendent
Jerome F. Witt	Police Chief
Teresa R. Deel	Secretary
Marsha R. Kerr (Conklin)	Witness
Veronica Brown	Witness
John McNally	Second Chair
Georgia Brokaw	Advocate

For The Union

Virginia Montgomery	Grievant

Michael P. Golding	Local President
Michelle Hurt	Local Vice President
Patricia Taylor	TPW
Augusta Barber	TPW
Carl Weaver	TPW
Debora Wardlow	LPN
Penny Lewis	Advocate

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Introduction

This is a proceeding under Article 25 Grievance Procedure, Section 25.02 Step 5 Arbitration of the Agreement between the State of Ohio, Ohio Department of Mental Retardation and Developmental Disabilities, Montgomery Developmental Center (MDC), hereinafter referred to as "Employer", and the Ohio Civil Service Employee's Association, AFSCME, Local 11, AFL CIO, hereinafter referred to as the "Union", for the period March 1, 1997 to February 29, 2000. (Joint Exhibit 1)

At the hearing, the parties were given the opportunity to present their respective position on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. The parties agreed not to submit briefs.

Stipulated Issue

Was the removal of the Grievant for just cause? If not, what shall the remedy be?

Pertinent Contract Provisions

24.01 Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case

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arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

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 reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
D. one or more day(s) suspension(s);
E. termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation record. The event or action giving rise to the disciplinary action may be referred to in a 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 the Article. An arbitrator deciding a discipline grievance, must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

(Joint Exhibit 1, Pgs. 81 82)

Stipulated Facts

Grievant's last day in the vocational unit was February 12, 1997.

Marsha Kerr (Conklin) and Teresa Deel did not write ground incident reports.

Marsha Kerr (Conklin) discussed resigning prior to February of 1997.

Grievant was employed at Montgomery Developmental Center as a Therapeutic Program Worker.

Grievant date of hire was October 31, 1983.

Grievant had the following active prior disciplines in her file at the time of removal:
February 21, 1997 Written Reprimand Poor judgment/failure to follow policy/extending lunch break without approval.

November 10, 1996 Written Reprimand Failure to follow Policy/work rule/poor judgment.

August 22, 1996 Written Reprimand Failure to follow policy/procedure.

December 19, 1995 Written Reprimand Unapproved leave status.

November 20, 1995 Oral Reprimand Failure to follow policy/procedure/tardiness,

May 23, 1995 Written Reprimand Failure to follow policies and procedures.

Marsha Kerr (Conklin) resigned her position on March 14, 1997 as a Police Officer at Montgomery Developmental Center effective April 18, 1997.

Veronica Brown resigned her position on March 10, 1997 as Acting Program Director at Montgomery Developmental Center effective June 20, 1997.

Denise Whatley made bridal shower cake that Deb Wardlow paid for and Denise brought cake to center for staff to eat.

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Veronica Brown was on Bereavement Leave September 19 through September 23, 1996, when her father passed away.

Case History

Virginia Montgomery, the Grievant, has served for over thirteen (13) years as a Therapeutic Program Worker (TPW). The facts, for the most part, are somewhat in dispute. The summary which follows, reflects the Employer's perspective of the disputed incidents. The Union's version will be reviewed in a subsequent portion of this Opinion and Award.

Marsha Kerr (Conklin), a second shift Security Officer, was the Grievant's friend and often talked with her while making her rounds. During the initial week of February, 1997, the Grievant was working in House #4, B wing when one of these conversations took place.

Conklin alleged the Grievant asked her about access to confidential information. Conklin stated she had such access, but would no divulge Information of this sort. Upon further discussion, Conklin determined the Grievant needed Veronica Brown's, the Acting Program Director, home address. When asked why she desired this address, the Grievant replied, "Veronica needs an awakening, and she may get a visit." Further probing by Conklin regarding who might be visiting Brown, generated the following response: "The KKK needs to pay her a visit in her home." The Grievant further stated that if Conklin failed to cooperate, her friends in maintenance would help her gain access.

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For approximately two weeks following the incident Conklin did not repo4to work because she was sick. She eventually returned to work the evening of Wednesday, February 19, 1997. By February 21, 1997, the Grievant's prior remarks generated a great deal of fear regarding Brown's safety. It also caused Conklin to fear for her own safety since the Grievant might retaliate if she learned that Conklin had informed the

Employer about her threatening comments.

About 4:00 p.m. on February 21, 1997, Conklin did, in fact, contact Police Chief Jerry Witt. She informed him about he conversation that had transpired the early part of February, 1997. Witt contacted Brown and advised her about the potential danger, and precautionary efforts she might take at home and at work. Brown became immediately fearful, called Sue Curtis, the Superintendent, and tendered her resignation.

Once the Superintendent became fully informed of the circumstances surrounding the incident, she initiated an immediate investigation. Sally Clingman, the Risk Manager, interrogated the Grievant on March 3 and March 5, 1997. The Grievant partially admitted to the conversation with Conklin. She, however, denied any reference to the Klan, but instead wanted to file a cause of action for reverse discrimination against Brown. After the March 5, 1997 interview, the Grievant was placed on administrative leave pending completion of the investigation and predisciplinary hearing.

On or about March 5, 1997, another incident involving the Grievant was brought to the Employer's attention. Teresa Deel, a Secretary, advised Police Chief

Witt that she had a conversation with the Grievant approximately one month prior to her discussion with Witt. Deel overheard a conversation the Grievant was having in a small breakroom. The Grievant purportedly stated she was being harassed, and that she dared management to do anything. She, moreover, stated that she knew people in high places that would make them regret getting rid of her. These various statements caused Deel to remark, "Just don't come in here and shoot up the place. " The Grievant replied, "Oh honey, I wouldn't worry about you, it would be the big people. "

Deel testified that she became fearful a consequence of the Grievant's comments. She had heard about the alleged statements regarding Brown, and her direct conversation with the Grievant heightened her anxiety.

On March 21, 1997, the Employer removed the Grievant. The Order of Removal contained the following relevant particulars:

* * *

> The reason for this action is that you have been guilty of creating a disturbance, improper conduct, and poor judgment in the following particulars to wit: You made several threatening comments to coworkers which referenced the Ku Klux Klan, e.g. burning crosses in yards. You requested the home address of a manager because you stated, "she needs a visit from the Klan." You stated to an employee that if you were fired, you would retaliate by shooting people. Your behavior and comments were threatening and created a hostile work environment and resulted in two employees resigning out of fear for their personal safety. Your creating a disturbance, improper conduct and poor judgment were violations of Montgomery Developmental Center Discipline Policy HR 234.00. Since your employment on October 31, 1983, you received a Written Reprimand for poor judgment, failure to follow policy, and extending lunch break without approval on 2/21/97, a Written Reprimand for failure to follow policy, work rules, and poor judgment on 11/10/96, a Written Reprimand for failure to follow

> policy/procedure on 8/22/96, a Written Reprimand for unapproved leave status on 12/19/95, and Oral Reprimand for failure to follow policies and procedures on 5/23/95. You are therefore removed from your position of Therapeutic Program Worker effective. . .
>
> (Joint Exhibit 2)

On April 7, 1997, the Grievant contested the Employer's action by filing a grievance. It contained the following Statement of Facts:

> On April 2, 1997, 1 was terminated for allegedly (Sic) creating a disturbance, improper conduct, and poor judgment. Management can not prove just cause. Imposition of discipline in front of other employees.
>
> * * *
>
> (Joint Exhibit 3)

Neither party raised procedural, not substantive arbitrability issues. As such, the grievance is properly before the Arbitrator.

The Merits of the Case

The Employer's Position

It is the Employer's opinion that it did, indeed, have just cause to remove the Grievant. Evidence and testimony clearly supported the removal for creating a disturbance, improper conduct and poor judgment. These actions were so egregious that attempts to mitigate the penalty based on seniority status should be discounted by the Arbitrator. The nature of the misconduct, moreover, is not viewed as correctable, but rather requires severe disciplinary imposition. Clearly, the imposed

penalty "fits the crime," and reinforces Superintendent Curtis' policy of zero tolerance for threats or acts of violence.

Obviously, the primary focus of the Employer's case rests on Conklin's credibility. Her testimony at the arbitration hearing was consistent with her written statement and other phases of the investigation process. Conklin testified even though she is no longer employed at the facility and was not obligated to appear or testify. Still, Conklin was so strongly opposed to the Grievant's conduct that she felt the record had to accurately reflect what had taken place.

The record also clearly exposes the fear and negative outcomes caused by the Grievant's actions. Witt described the fear and shock on Brown's face when he warned her of the Grievant's potential intentions. Direct examination of Brown further reinforced this perception. Deel testified that the Grievant's comments caused her to fear for herself and other co workers. These feelings caused Conklin and Deel to come

forward and expose the Grievant's conduct in the face of potential retaliation.

The Grievant's conduct also possibly caused two employees to resign. Brown testified in no uncertain terms that her resignation was not based on personal related matters. Rather, the Grievant's threats caused her to leave even though she had no forthcoming employment opportunities.

Certain admissions offered by the Grievant further support the propriety of the administered penalty. The Grievant admitted she had a confrontation with Brown regarding her desire to withdraw from the vocational unit. She, moreover, admitted

to some discussions with Deel and Conklin though the specific content is somewhat in dispute.

The Grievant's credibility is further reduced when one examines the Grievant's statements and those introduced on behalf of the Employer's position. Similar phraseology is found in Conklin's and Deel's statements. These consistencies support the Employer's version as opposed to the Grievant's review of the disputed incidents.

Conklin did not raise her concerns regarding the Grievant's threats because of the controversy surrounding her shower. Wardlow's testimony fails to support the Union's retaliation theory. If Conklin was going to retaliate against the Grievant and Wardlow, why did she fail to get even with Wardlow who cancelled the affair on February 19, 1997? Also, the timing of the conversation between Conklin and Wardlow proved the outcome irrelevant to the present dispute. The conversation took place approximately two weeks after the threat was uttered by the Grievant.

A number of admissions further support that the Grievant made the threats. She admitted that she wanted Brown to be taught a lesson, and that their working relationship was not the best. Transcripts prepared while interviewing the Grievant during the investigation indicate she could have used the phrases "KKK" and "Klu Klux Klan," when she is "worked up about things."

Carl Weaver's testimony was viewed as inconsistent and lacking credibility. At the hearing, he testified the Grievant did state that she wanted to teach Brown a lesson by filing a reverse discrimination suit. During the investigation of the incident, however, Weaver never mentioned the possibility of a suit.

Also, Augusta Barber's testimony was viewed as irrelevant. Even if the Grievant periodically joked with Barber in a racially inferential way, did not in any way reduce the probability that the Grievant uttered the threats which resulted in her removal.

The Union's Position

It is the Union's position that the Employer did not have just cause to remove the Grievant. As such, Section 24.01 was violated when the removal decision was imposed.

The Union opined the allegations were raised by Conklin because of animus caused by a soured relationship. A relationship destroyed as a consequence of a cancellation which caused Conklin to retaliate.

This inference is readily supported by the record. Nothing In the record reflects the notion that the Grievant ever directed a direct threat at Conklin or Brown. Neither their safety nor health were ever placed in jeopardy. Their resignations were not caused by the Grievant's behavior. Rather, they left for various personal reasons unrelated to the disputed incident.

The situation was blown out of proportion by Conklin and Deel. The parties stipulated that neither filed grounds incident reports on or about the times they allegedly encountered the Grievant's threatening conduct. If the conduct was so egregious, their filings should have been immediate. Conklin's inaction was especially viewed suspiciously because she served as a security officer.

Conklin's allegation regarding the Grievant's request for Brown's home address was also questioned. She raised some confidentiality concerns about the Grievant's

request. Yet, she admitted providing Wardlow and the Grievant addresses when they were preparing invitations for her shower.

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, and a complete and impartial review of the record, it is Arbitrator's opinion that the Employer did not have just cause to remove the Grievant. This determination is based on certain credibility issues relating to the proves proposed in support of the removal.

I do not find Conklin's version of the events as credible. As a security officer she was obligated to report the discussion ith the Grievant to her immediate supervisor. And yet, she waited approximately two (2) weeks to raise her concerns regarding the Grievant's threatening statements. Her justifications for tardily reporting the delay do not seem reasonable. If the Grievant had made the "KKK" comments in the tone and manner expressed by Conklin, any reasonable person in her position would have initiated a grounds and/or an unusual incident report.

Conklin's credibility is further tarnished in a number of other ways. Her written statement and her testimony at the hearing do not comport with statements contained in the taped transcript. There is no mention in the transcript regarding the "KKK." There also exist certain representations dealing with requests for Brown's address. Even though Conklin stood fast regarding the Grievant's request, she admitted giving Wardlow and the Grievant addresses for shower invitations they were forwarding. The record fails to reflect whether she was granted permission by her supervisor to

provide these addresses. In my view, an equally egregious security risk to the one purportedly proposed by the Grievant.

The genesis, in my opinion, for the disputed incident involving Conklin is clearly found in the dispute surrounding the shower. Wardlow's testimony surrounding the reasons underlying the cancellation were clear and detailed. She appeared much more credible and forthcoming regarding the incident (February 19, 1997) which took place one day prior to the shower (February 20, 1997), and two days after Conklin authored a written statement (February 21, 1997) implicating the Grievant for uttering threatening remarks about Brown.

Based on Wardlow and the Grievant's testimony, the cancellation of the shower was not a magnanimous event. Wardlow, based on her personal problems with Conklin, cancelled the shower. An event in this Arbitrator's. opinion, which provided her with sufficient motivation to mischaracterize her exchange with the Grievant. Whether she did or did not engage in some form of vendetta against Wardlow is irrelevant to this analysis.

Obviously, the Grievant and Brown did have some disagreement about the Grievant's "volunteer" status in the vocational unit. There also appeared to be some consternation concerning a warning for tardy attendance at a QSTP meeting. Yet, classic cases dealing with verbal or physical threats toward management involve severe forms of directed confrontation. Here, we do not have such a situation. Rather, the Grievant admitted telling Conklin that Brown "needed to learn a lesson." This statement within the previously described context does not constitute a threat

which creates a disturbance. The statement, if in fact uttered, did not possess significantly threatening characteristics requiring removal or any form of discipline. The Employer failed to establish a nexus between the alleged statements and any critical animus toward Brown.

Deel's portion of the disputed matter is equally troublesome, in terms of supporting the removal action. She overheard a conversation the Grievant had with an unidentified co worker in the break room. In a typed transcript taken during the course of the investigation, she characterized the conversation as non threatening, but "just very distasteful." The Grievant made several derogatory comments about MDC in general, and "dared them to do anything to her because she knew people in high places, and she knew people that could do things to make them regret getting rid of her." Deel was the one that triggered any comments by the Grievant after she "jokingly" made the statement about "coming in here and shooting up the place. " She precipitated any comments made by the Grievant when she intervened. Again, if the Grievant responded in the manner depicted, I do not view them as direct threats toward management personnel.

Again, the timing of Deel's allegations, in terms of raising her concerns, quashes the intensity of the Grievant's statements. She admitted she notified her supervisor about the alleged comments only after she heard about the alleged threats made against Brown. She also stated she became more fearful when she recognized that other management representatives became anxious about the Grievant's appearance on grounds for an investigatory interview. These admissions indicate that

her eventual characterization of the events were somewhat inflated by circumstances following her initial

discussion with the Grievant. Otherwise, she would have authored a grounds incident report, and confronted her supervisor with what had taken place.

There also exists another evidentiary defect regarding Deel's portion of the record. Other co workers were in the room when the Grievant discussed her potential actions against "the big people." They did not testify at the hearing to corroborate her version. The pre disciplinary report, moreover, indicates that these co workers were interviewed, "but their interviews were not transcribed.' If these individuals were present and could recall a portion or all of t e conversation, then their testimony could have substantiated, and added credibility to, Deel's recollection.

The particulars contained in the Order of Removal are partially defective. Nothing in the record as it relates to Brown or "higher ups" references threatening comments regarding " burning crosses in yards" She might have made some statements to that effect in general terms during the course of the investigation. Still, none of the statements or transcripts used in support of the removal contain these direct "threats."

Award

The Employer did not have just cause to remove the Grievant for violating Disciplinary Policy HR 234.00: Creating a Disturbance improper Conduct/Poor Judgment. Insufficient proofs were proposed in support of the purported actions. The Employer failed to establish a nexus between the alleged statements and any animus toward Veronica Brown. The statement, if in fact uttered, did not possess

sufficiently threatening characteristics requiring removal or any form of discipline. The actual genesis underlying the dispute was a friendship that had soured involving the Grievant, Conklin and Wardlow.

The grievance is upheld. The Grievant shall be reinstated to her former position with all back pay less any unemployment benefits and other forms of documented compensation. Her seniority shall be restored and all related benefit balances shall be reconstituted to the appropriate levels. She shall not receive any compensation for overtime she would have worked during the contested period.

January 27, 1998 Dr. David M. Pincus Arbitrator
Date