

ARBITRATION DECISION NO.:

683

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Mental Health

DATE OF ARBITRATION:

DATE OF DECISION:

September 8, 1998

GRIEVANT:

John Kestner

OCB GRIEVANCE NO.:

23 18 (96 11 27) 1358 01 04

ARBITRATOR:

Harry Graham

FOR THE UNION:

Robert Robinson, Staff Rep.

FOR THE EMPLOYER:

Linda Thernes, LRO

KEY WORDS:

Discipline

Just Cause

Suspension

ARTICLES:

Article 24 - Discipline

§ 24.01 - Standard

FACTS:

The grievant is employed by the Ohio Department of Mental Health as a Therapeutic Program Worker. He works at the South Campus of the Northcoast Healthcare Behavioral Systems Facility. On September 18, 1996, Management suspended him for allegedly yelling and being abusive towards his supervisor on June 28, 1996. These facts exhaust the stipulations between the Union and the Employer.

EMPLOYER'S POSITION:

The Employer argued that the grievant was disciplined for just cause. On the day in question, the grievant became verbally abusive towards his supervisor. He yelled and pointed his finger at her. He was highly

agitated at this time, and was trembling with rage. The Employer stated that Cheema, an employee who witnessed this incident, would support this contention. The Employer asserted that the grievant also yelled at Cheema during the incident in question.

The Employer referred to the grievant's prior disciplinary record to support its contention that the grievant had a history of similar behavior. The grievant's disciplinary record included charges of Insubordination, Neglect of Duty, and Failure of Good behavior. It is against this background that the incident of June 28, 1996 should be viewed.

UNION'S POSITION:

The Union argued that just cause did not exist to discipline the grievant. The Union stated that the events of June 28, 1996 did not transpire as related by the Employer in any manner. The Union relied on a written statement prepared by Cheema that reads "I did not see or hear anything [regarding the June 28, 1996 incident]". Cheema never testified at this arbitration. The Union also referred to the testimony of Cipriani, an employee. Cipriani testified that nothing unusual occurred on June 28, 1996. The grievant did not engage in loud conversation with his supervisor. He did not point at her. Cipriani never felt threatened nor did she leave the scene at any time.

Considering the consistent denial of the events as recounted by the Employer, by the grievant and others on the scene, the Union insisted that the discipline administered by the State cannot stand.

ARBITRATOR'S OPINION:

The Arbitrator held that just cause did not exist to discipline the grievant. The Employer must convince the arbitrator that the event that prompted it to act occurred as claimed and that the discipline is proportionate to the offense. In this situation, the Employer cannot do that. The record, including the statement of Cheema and the testimony of Cipriani, does not prompt the conclusion that the grievant acted as claimed. Therefore, the employer has not met its burden.

AWARD:

The grievance is sustained. All record of this discipline is to be expunged from the personnel file of the grievant. He is to be paid straight time pay for all hours lost as a result of this incident.

TEXT OF THE OPINION:

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In the Matter of Arbitration	*
	*
Between	* Case Number:
	* 23 18 961127 1358 01 04
	*
OCSEA/AFSCME Local 11	*
	* Before: Harry Graham
and	*
	*

The State of Ohio, Department of *
Mental Health *

APPEARANCES: For OCSEA/AFSCME Local 11:

Robert Robinson
Staff Representative
OCSEA/AFSCME Local 11
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For Department of Mental Health:

Linda Thernes
Labor Relations Officer Ohio
Department of Mental Health
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INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this case was closed at the conclusion of oral argument.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

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

* * *

BACKGROUND: There is no agreement on the parties upon the events which prompt this proceeding. The little they do agree upon may be presented succinctly. The Grievant, John Kestner, has been employed by the State of Ohio Department of Mental Health for the past 16 years as Therapeutic Program Worker. He works at the South Campus of the Northcoast Healthcare Behavioral Systems Facility. On June 28, 1996 he was allegedly involved in an incident with his supervisor, Debbie Mathys. As is set forth more fully below, he allegedly became abusive towards her. Following the appropriate predisciplinary meeting the Grievant received a six day suspension on September 18, 1996. That suspension was protested in the grievance procedure of the parties without resolution. They agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE EMPLOYER: The Grievant, who is a veteran of many years of service with the State, compiled a record of discipline prior to this incident. Thus, he had received the following:

A written reprimand, Insubordination, Failure to accept supervision, 9/4/94:

A two day suspension, Neglect of Duty, Insubordination, 11/22/94:

A six day suspension, Failure of Good Behavior, Insubordination, 8/8/95.

It is against this background that the incident of June

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28, 1996 should be viewed according to the State. On that date the Grievant was on duty at the Nursing Station of Unit 22 F. He became verbally abusive towards his supervisor, Debbie Mathys. He allegedly yelled at her and pointed his finger at her. He allegedly accused her of "playing favorites" He was highly agitated at this time, trembling with rage. According to the State when a co worker, Nurse Cheema arrived on the scene, he told her to leave. When she did not do so, he yelled at her. Nurse Cheema subsequently asked the supervisor, Ms. Mathys, to write up the Grievant for his abusive behavior.

As the State urges this incident be viewed, there is no doubt that the Grievant acted as claimed. He has a prior history of discipline for similar outbursts. Given that background the State contends the discipline under review in this proceeding was appropriate. As that is the case, it urges the grievance be denied in full.

POSITION OF THE UNION: The Union disputes the account of the incident set forth above. It points out that Ms. Mathys did not write up the Grievant. That was done by John Gerbetz, Psychiatric Nurse Supervisor. At the time of the incident Mr. Gerbetz was romantically involved with Ms. Mathys. They have subsequently married. He initiated discipline at her request. Given the nature of their relationship that is at best

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questionable in the Union's view.

The events of June 28, 1996 did not transpire as related by the State in any manner according to the Union. On that date the Grievant spoke to Ms. Mathys about a co worker, LPN Estelle Denson. He was concerned that she had a double assignment. At this point, Ms. Mathys responded that his concern over Ms. Denson was misplaced as Ms. Denson was an "old black lady" and "a spook." Mr. Kestner was affronted by her remarks. She subsequently apologized to him.

The Grievant did not ask Nurse Cheema to leave the Unit on June 28, 1996. Included among the various documents in Joint Exhibit 2 in this proceeding is a statement of Nurse Cheema. Dated July 10, 1996 it indicates she was ordered to provide it. She wrote in reference to the alleged incident of June 28, 1996 "I did not hear or saw (sic) anything." Another person on the scene, Joyce Cipriani, wrote on July 10, 1996 that June 28, 1996 was "uneventful." She supplemented her statement on July 18, 1996 with the notation "I did not see or hear anything." At the arbitration hearing Ms. Cipriani testified that nothing unusual occurred on June 28, 1996. The Grievant did not engage in loud conversation with Ms. Mathys. He did not point at her. She never felt threatened nor did she leave the scene at any time. Given the consistent denial of the events as recounted by the Employer by the Grievant

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and others on the scene, the Union insists the discipline administered by the State cannot stand. It seeks an award striking it from Mr. Kestner's record and restoration of pay.

DISCUSSION: Truth is an elusive concept. In this situation the account of events is so divergent it is difficult

to believe the parties are speaking of the same incident. In essence, the only witness against the Grievant is Ms. Mathys. No particular reason exists to disbelieve her account of events. It was not shown by the Union that she and the Grievant disliked each other or had a history of acrimonious relations. On the other hand, her account is directly contradicted by not only the Grievant, but his co-workers who were present on the day in question. Ms. Cheema did not testify at the hearing. Her contemporaneous statement is on the record. (Joint Ex. 2). In it, she flatly contradicts the account of events given by Ms. Mathys. So too does Ms. Cipriani. She testified at the hearing forthrightly that the Grievant was not abusive or out of control on June 28, 1996. She was present at all time relevant to this controversy. Had anything out of the ordinary occurred she would have seen and heard it. Nothing of the nature as alleged by the State transpired according to Ms. Cipriani. The same testimony was provided by the Grievant. It might be argued by the Employer that his testimony should be discounted as self-serving. Of

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course, it is. That does not necessarily mean it is untruthful. In this situation, it is supported by testimony from co-workers who were on the scene.

Over the years and in countless arbitration decisions there has been a torrent of discussion about the "burden of proof" in discipline cases. Arcane and erudite prose has been written to throw light upon the concept and to place in proper context the responsibility of the Employer to prove its case to the arbitrator. Those discussions are, in the final analysis, sterile. The Employer must convince the arbitrator that the event that prompted it to act occurred as claimed and that the discipline is proportionate to the offense. In this situation the Employer cannot do that. The record, including the statement of Ms. Cheema and the testimony of Ms. Cipriani, does not prompt the conclusion that the Grievant acted as claimed. He may have, but convincing evidence to that fact was not presented by the State. The most that can be concluded is that the Employer has not proved its case. AWARD: The grievance is sustained. All record of this discipline is to be expunged from the personnel file of the Grievant. He is to paid straight time pay for all hours lost as a result of this incident.

Signed and dated this 8th day of September, 1998 at

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Solon, OH.

Harry Graham
Arbitrator

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