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VOLUNTARY LABOR ARBITRATION TRIBUNAL

APR 25 2001

GRIEVANCE COORDINATOR

In the Matter of Arbitration *
Between *
OHIO CIVIL SERVICE *
EMPLOYEES ASSOCIATION *
LOCAL 11, AFSCME, AFL/CIO *

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

and *

Case No. 24-13-000711-0627-01-04

OHIO DEPARTMENT OF MENTAL *
RETARDATION & *
DEVELOPMENTAL DISABILITIES *

Jane Shock, Grievant

Removal

APPEARANCES

For the OCSEA/AFSCME Local 11, AFL-CIO:

John Hall, Staff Representative
Jennie Lewis, Paralegal
OCSEA/AFSCME Local 11, AFL-CIO

For the Ohio Department of Mental Retardation & Developmental Disabilities:

Brian Walton, Labor Relations Officer
Ohio Department of Mental Health

Toni Brokaw, Labor Relations Officer
Ohio Department of Mental Retardation & Developmental Disabilities

Kate Stires, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9.00 a.m. on February 13, 2001, and continued on February 22 at the Tiffin Developmental Center in Tiffin, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator. The issue on the merits is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Mental Retardation & Developmental Disabilities (the "State" or "Department") were Patrick Herron, Human Resources Director; Joseph Kovesdi, Ph.D., Psychologist; and Therapeutic Program Workers Melissa Perin and Mary Snyder. Also in attendance was Karen Bingle, Human Resources Specialist. Testifying for the OCSEA/AFSCME Local 11, AFL-CIO (the "Union"), were Therapeutic Program Workers Dorie Bour, Deb Tyree and Wade Yeakle; and the Grievant, Jane Shock. Also in attendance was Pat Foist, Chapter President. A number of documents were entered into evidence: Joint Exhibits 1-16, State Exhibits 1 and Union Exhibits 1-4. The parties stipulated to a number of facts, and to Dora Ott's testimony, which, had she been called, would have supported the testimony of other Union witnesses in a number of respects. The oral hearing was concluded at 2:45 p.m. on February 22. Written closing statements were timely filed and exchanged by the Arbitrator on March 9, 2001, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

This case concerns the termination of a direct care worker for physical abuse of a mentally retarded client of the Tiffin Development Center, a residential facility of the Ohio Department of Mental Retardation and Developmental Disabilities. At the time of her dismissal on July 6, 2000, the Grievant had fourteen years of state service, most of which was as a part-time Therapeutic Program Worker ("TPW"). In December of 1998 she was awarded a full-time position in the same classification. Her most recent performance evaluations show her as meeting her employer's expectations. She had no active discipline on her record and had received pertinent departmental training.

The client whom the Grievant is alleged to have abused, "LM," was described as a 5-foot-2, 100-105 pound female. She is unsteady on her feet, exhibits self-injurious behavior, and has seizures, for which reason she wears a protective helmet. LM has a history of targeting favorite people in an attempt to get their attention. She does this by means of physical aggression (such as hitting, spitting and throwing things) or verbal aggression (such as yelling). She was on a behavior modification program to reduce the frequency of these episodes. This program included preventive measures modeled on the success of one particular staff member who retained control by giving the client attention on her own (the staff member's) terms, with the intervention of time out in a quiet location when prevention failed and the client became aggressive. Psychologist Joseph Kovesdi, Ph.D., testified that what was critical when the client exhibited attention-seeking aggressive behavior was to avoid reinforcing it with attention, hence the quiet time. He further testified and client records show that this method of dealing with LM over the years significantly reduced the frequency of her

aggressive behavior from 300 to 20-40 episodes per month. However, the Grievant, who was a particular favorite of LM, had, according to Kovesdi, difficulty implementing the program because she was unable to control her own reactions to the client's aggression. A number of other employees, including the Grievant, testified things were so bad that they sought help from the unit administrator and/or the Qualified Mental Retardation Professional ("QMRP"), but that nothing was done because the written program was unchanged. TPW Deb Tyree suggested that LM be transferred, but this idea was rejected. Tyree also testified that the first shift supervisor, Terry Stocker, said that he would set up the Grievant to get her out of the unit because of the targeting problem, but she did not report this at the time it occurred. The Grievant testified that she was told by the QMRP and her supervisor to just deal with it. One of her part-time co-workers, Mary Snyder, suggested that since the Grievant was unhappy, she might consider transferring to another post. But the Grievant, who had worked in the Nevada building for 12 years, was determined to stay. After some months, a special team meeting was called to discuss the problem. According to Dr. Kovesdi, the consensus was that LM escalated her aggression only when the Grievant was on duty. An idea was floated and ultimately adopted that when the aggression began, the Grievant was simply to leave and other staff would cover for her. The Grievant denies that she was at this meeting, but admits that she was informed of the plan, which she said basically called for her to ignore LM whereas the written program says to give LM attention. The Grievant did not like this plan because, in her view, exchanging staff is only a temporary solution for herself, doing nothing for the client. In any event, before the plan was written into LM's formal behavior modification program, an

incident occurred between the Grievant and LM that led to the charge of abuse and, ultimately, the Grievant's termination.

The Incident

The subject incident occurred some time around 7:30 or 7:45 a.m. on June 18. Working with the Grievant that morning to get clients showered, dressed and breakfasted for the day were Melissa Perin, who had just started working at Tiffin Developmental Center the month before, and Mary Snyder. Perin testified that she and the Grievant were in the kitchen with a number of clients, including the aforesaid LM. When the Grievant started to leave the kitchen, LM became upset and prepared to fling her bowl of cereal. Perin approached and LM jerked the bowl away, spilling cereal and milk. The Grievant handed something to LM to clean up the spill, then left the kitchen. LM became angry and threw her chair towards another client, but lost her balance and fell under a table, leaning against its base with her legs sticking out. When the Grievant came back, she asked LM to get up, but LM refused. Again the Grievant told LM to get up, but LM just screamed. Perin testified that at that moment the Grievant kicked LM's left leg with her right foot, then reached under the table, grabbed LM by her clothing near her collar and started to pull her out from under the table. Perin testified that LM was not struggling, but became limp and played dead. She further testified that she was upset by what she saw and turned away. She could not physically assist because she had not yet been trained to, but she did not call for assistance either.

Mary Snyder entered the kitchen at some point during these events. She testified that she saw LM on the floor and that Perin explained that LM had thrown her chair at another client. Snyder also noticed the spilt milk and cereal, so she cleaned it up, then left to dispose

of the towels in the laundry. When she returned in a minute or less, she saw the Grievant hit LM with her open hand on the upper back or shoulder area, then drag her with her arms over her head, pulling her about twelve feet to her table. Snyder testified that LM cowered after the blow and was not fighting the Grievant. She further testified that she was horrified by this and made eye contact with Perin, but said nothing, then left to tell the supervisor.

The Grievant reports the incident differently. According to her, she was doing paperwork at one of the tables in the kitchen while LM began to eat her breakfast. When two other clients came in with Perin, LM “went off” on them. The Grievant heard Perin tell LM that if she was going to be nasty, she had better leave, and then she heard Perin remark, “Now look what you’ve done.” When the Grievant looked up, she saw milk on the floor and LM “crab-walking” towards one of her peers. The Grievant got up and stood between them, whereupon LM kicked her and then scooted under the table, sitting “Indian style.” The Grievant said “Let’s go,” but LM refused, so the Grievant reached under the table, looking away to avoid being spat upon. LM was kicking, but the Grievant managed to get hold of her shoulders and drag her out about a foot. Then the Grievant put her own shoulder under LM’s armpit and hoisted her. Her intent was to drag her through the door, but LM was too heavy, so the Grievant sat her in her chair. LM twisted out of the Grievant’s grasp and fell to the floor, scraping herself. The Grievant tried to redirect her attention by getting towels to clean up the milk that was still on the table. They did hand-over-hand on the floor, then the table. Then the Grievant escorted LM to the day room. When the Grievant returned to the kitchen, her supervisor was there, saying that she was being relieved. The Grievant testified that as she understood the plan for LM’s targeting, she was to request relief, not just walk off, but she

could not get away to ask her supervisor for relief because she could not find Snyder, and Perin was too new and untrained to be left alone with the clients. She denies abusing LM and thinks Snyder and Perin both falsely reported the incident. She thinks Snyder did so because she coveted a full-time position, and she says Perin did so because she was the one who got LM agitated.

The Aftermath

After Snyder reported the incident to Supervisor Terry Stocker, he removed the Grievant from Nevada 2 and reported the allegation to the Center's police department. Statements were taken from Snyder, Perin, Stocker and the Grievant. A nurse's examination of the client that morning revealed two small superficial abrasions on the right side of her chin, a round redness the size of a quarter on her left shoulder, a red area 5 cm. in diameter on her left buttock, a 2½" x ½" pink area on the posterior of her left knee, a quarter-sized red area on the center of her back plus other injuries which appeared to be old. Photographs were taken. The Ohio State Highway Patrol was contacted and launched its own investigation, but the prosecutor declined to pursue the case, feeling that he would be unable to meet his burden of proof.

Meanwhile, the Department instituted disciplinary action against the Grievant, conducting a pre-disciplinary conference on June 26. The hearing officer found just cause for discipline, and the superintendent recommended termination. Human Resources Director Patrick Herron testified that the Department must remove employees on a first offense of abuse for consistency of employee treatment and to meet Medicaid requirement. Failure to remove employees guilty of client abuse would cause the Department to lose funding. In his opinion,

the facts of the case fit the Department's definition of abuse, which itself mirrors HCFA's Regulation W127 definition. The Grievant was accordingly removed on July 6, 2000. This action was grieved that same day and thereafter appealed without resolution or procedural defect, coming to arbitration where it presently resides for final and binding decision.

III. ISSUE AS FRAMED BY THE ARBITRATOR

Did the State violate the Collective Bargaining Agreement by removing the Grievant for physical abuse? If so, what is the remedy?

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

V. ARGUMENTS OF THE PARTIES

Argument of the State

The State submits that it presented overwhelming evidence that the Grievant is guilty as charged. Neither of its witnesses to the events had any reason to embellish her story and what they saw and heard—a kick, a slap and dragging—is supported by the documented physical injuries. The Union's argument that these two witnesses were part of a conspiracy fails from lack of proof that they were working with the supervisor in a plot to get the Grievant removed.

The State contends that there is a vast difference between the Grievant's version of events and her co-workers'. In the State's view, the Grievant's story is self-serving and incredible.

Although the Grievant denies wrongdoing, she seemed to express remorse in her interview with the Center's police. In addition, the explanations of the client's injuries provided in

arbitration were never before mentioned by the Grievant, not in the investigation, not at the pre-disciplinary hearing, and not at Step 3. The State submits that the client's behavioral problems do not justify the Grievant's conduct, as the Union seems to argue, but rather provide a motive for abuse.

The State argues that what the Grievant did constitutes abuse. Since 5123-3-14(C)(1) O.A.C. was repealed in 1998, it is reasonable to look to another "properly promulgated agency regulation" per the *Dunning* decision. The Department has been using the definition found in its disciplinary policy since 1994. This definition mirrors the definition in 5123-3-14(C)(1) and in the HCFA guidelines. The Union has not challenged the Department's use of this definition since the O.A.C. definition was repealed. In fact, this Arbitrator has presided over two departmental cases of abuse since 1998 and the Union did not raise the issue. Regardless of the definition—even under O.R.C. 2903.33(B)—the Grievant physically abused the client, for her actions of slapping, kicking and dragging showed that she intended to and did cause the physical harm of pain and red marks on the client's body.

The Union's attempt to show that management was derelict in its duty to support the Grievant is but a smokescreen. In fact, there was a program in place to deal with the client's aggression, but the Grievant was the only one unable to cope in accord with this program. Therefore, a procedure was devised to help her avoid reinforcing the client's maladaptive behavior. This procedure was initially adopted on a trial basis, and eventually (post-incident) added to the client's program. Moreover, the Grievant received the training all TPWs do to help them deal with the inevitable behavioral issues of the clients the Department is committed to serving.

The State summarizes that the issue is not whether LM was a difficult client, whether management failed to support the Grievant in her dealings with the client (which the Department contests), or whether abuse can be justified. Since the original collective bargaining agreement with this Union, the State has made it clear that abuse will not be tolerated. The record is clear: the Grievant committed intentional acts of abuse and was therefore properly removed from her position. The State asks that the grievance be denied in its entirety.

Argument of the Union

The Union contends that the State's witnesses had motivation to fabricate or embellish their testimony and that the contradictions and inconsistencies of their evidence shows that they lied under oath. Perin was a probationary employee who caused the incident by comments she made to the client and who then failed to back up the Grievant by getting assistance from other staff. Her various statements are inconsistent on a number of points such as whether the 32-pound chair was thrown (which the Union contends could not be done by such a small, unstable client) and how it got back to its original position, which foot the Grievant allegedly used and where it landed, whether Snyder was in the room, and the client's position under the table. What is more, although Perin was in the room the entire time, she said that she never saw slapping, hitting or dragging. Snyder wanted the Grievant's full-time position, was hostile towards her and never assisted her during episodes of the client's disruptive behavior. The Union finds inconsistencies in Snyder's statements, too, such as whether the client's program had a procedure in it for the Grievant, whether she spoke to Perin, whether she entered the kitchen, which shoulder was hit, and which hand was used to grab the client by the wrists.

The Union finds it curious that Snyder chose to clean up the spill instead of helping the Grievant since she claimed to know about the plan to relieve the Grievant. Both of these witnesses had a motive to fabricate their stories and an opportunity to collaborate with the first shift supervisor, Terry Stocker, who had made statements about setting the Grievant up. The prosecutor found merit to this information, for he cited it in his letter to the Highway Patrol explaining why he was dropping the case.

The Union contends that management did not properly handle the client's targeting of the Grievant. The psychologist fabricated his testimony to give the appearance that he was doing his job when, in fact, he did not visit the module, and sat silent in meetings with no clue what to do. The QMRP also did nothing to address the Grievant's situation. The program thus failed to address the problem in a manner beneficial to both the client then the Grievant. Management could have temporarily reassigned the Grievant, but it did not even consider this option.

The Union reviews the Grievant's testimony and submits that her version of what happened is the truth. The marks which were found on the client's body can be explained by the client's aggressiveness and the blatant disregard of the Grievant's co-workers. The Union further argues that what the Grievant did does not meet the standard for abuse set by Arbitrator Pincus in the *Dunning* decision. The Ohio Revised Code and Ohio Administrative Code, by which Arbitrator Pincus defined abuse, both require the element of intent: "Knowingly causing physical harm or recklessly causing serious physical harm...." The State has failed to meet its burden for it is undisputed that the Grievant did not knowingly cause physical harm. Instead, the State asserts false and malicious allegations to justify circumventing the law. The

Union insists that the grievance be sustained, the Grievant reinstated to her former position with all back pay and benefits less normal deductions including union dues, and that her record, including "abuse registry" documents, be expunged of the incident.

VI. OPINION OF THE ARBITRATOR

This case turns on whether I believe the two witnesses to the incident or the Grievant. Although there is much about the Union's case I accept, I am convinced that the Department's eyewitnesses were honest in reporting the Grievant's treatment of the client that morning, and that this treatment constituted abuse.

It is true that the full-time position which would become vacant with this termination provides a motive for bearing witness, but it does not follow that the testimony is necessarily false. Such ambition can also provide incentive to disregard a workplace taboo against reporting a co-worker's misbehavior. The same holds for a supervisor's plan to set up an employee with the expectation that the unit would function better without her. The Grievant's supervisor may be so motivated as alleged, but it does not necessarily follow that the Grievant is innocent. What is more, the actions of the Grievant's co-workers can be readily explained by factors unrelated to the alleged conspiracy with the supervisor or their own independent alleged desire to displace the Grievant. First taking Snyder's decision to clean up the spilled milk instead of relieving or otherwise assisting the Grievant, no one placed them in the kitchen at the same time until Snyder returned from the laundry where she disposed of the towels after cleaning up the milk. Thus, for all Snyder knew when she decided to clean up the spill, the Grievant, being absent, did not require assistance or relief. And when Snyder came back and witnessed the struggle for the first and only time, she went immediately to the supervisor on

duty. Perhaps she should have intervened before going to the supervisor, but her failure to do so did not contribute to what already occurred and was occurring when she came back to the kitchen. As for Perin, she was the only staff member present for the entire incident, but she was handicapped by being still incompletely trained and distracted by her need to protect and assist the other clients and by her distress at what she had witnessed. The Union contends that she should have left to get back-up or relief staff for the Grievant instead of staying to help the other clients with their breakfast. Whose responsibility it was to summon relief and when that should have occurred was not made clear. If relief should have been sought after or during the struggle with the client, was Perin to leave the Grievant alone with the clients, including the one the Grievant was allegedly abusing? If before, was it not the Grievant's responsibility to know her own inner state and follow the plan? From her investigatory interview it would seem that the Grievant knew where her responsibility for disengagement lay, but did not heed it. This latter point is really the crux of the matter, for even if other people coveted the Grievant's full-time position in Nevada 2 and other people thought the unit would function more to their liking with the Grievant out of her position, and even if management failed to appropriately address the client's problematic behavior and her relationship with the Grievant, that does not excuse abuse of the client. The Grievant may have been feeling alone, overwhelmed and frustrated in a control struggle with the client, but escalation was neither an effective nor an appropriate response. In other words, all of the contextual facts, proven and unproven, are immaterial if the Grievant knowingly kicked, slapped and/or dragged the client as witnessed by the two co-workers. Their only appropriate role in this case is as aids in making credibility determinations. For this reason, as well as the impact of the outcome of this case on the

Grievant, I have scrutinized the testimony, interview transcripts and written statements of the three TPWs most carefully. It is to the issue of credibility I now turn.

The Union points to a number of inconsistencies it argues undermines the testimony of the two TPWs. Some of these are more apparent than real. For example, the witnesses were questioned about diagrams drawn by someone else, and leading questions were put to them. It is thus difficult to separate their views from the questioner's. Some of the inconsistent details are attributed to memory lapses, which both witnesses readily admitted. By contrast, the Grievant testified with ease in great detail and had no trouble remembering well. It was difficult to know whether she has unusual powers of observation at times of stress and excellent memory and/or was simply well-rehearsed. Another difficulty in determining what actually occurred is that neither witness saw the entire incident from beginning to end and each had a different perspective. This explains some of the inconsistencies pointed to by the Union. For example, Perin would not have seen the slapping or hitting and dragging that Snyder did nor would she have seen the position of LM at the time if her back was turned and she was engrossed in helping the other clients. Other inconsistencies are a matter of interpretation. One of these is whether Snyder was in the room. Snyder testified that she "Didn't hardly get in" and "had just got into the doorway," whereas Perin's statement (Joint Ex. 9) is that she "walked in the kitchen as [the Grievant] was trying to get [LM] to clean up milk." If Perin includes the doorway as part of the kitchen, which is reasonable, then there is no inconsistency between the two versions on this point.

The most difficult problem is reconciling the weight of the chair and the client's strength as implied by her size and physical instability. The client was angry, which could

have given her extra strength during the incident. Nevertheless, it is hard to believe that she was capable, even when emotionally charged, to have lifted the boxy 32-pound chair off the ground and to have flung it through the air with such force that it landed fourteen or fifteen feet away. However, I do not think that Perin described or demonstrated an object airborne for fourteen feet. LM's target was possibly fourteen feet away when LN aimed the chair in her direction, and the chair eventually came to rest in the vicinity of Table 2 (as labeled in the Union exhibits), but LM did not raise the chair very high off the floor (per the demonstration) and she lost her balance as a result of "tossing" the chair, so the chair had to have landed nearby and then skidded across the hard-surfaced floor in the direction of the target, finally coming to rest four or five yards away. Yes, LM "threw" the chair, but not as if it were a baseball. And she " 'tossed' it back *towards* [the other client]" (Joint Ex. 11, emphasis added), or "threw her chair over towards [the other client]" (cross-examination). When Perin saw that LM was "going to throw her chair," she moved the other client out of the way (direct and cross-examination). I am persuaded not only that LM was capable of doing this, but also that she did so. With the resolution of this issue, I find that the evidence from the two witnesses clearly and convincingly establishes that the events of that morning proceeded as they described and included intentional, non-self-defensive kicking, open-handed striking and dragging of the client. The Grievant's testimony, while it provided a coherent alternative explanation for the client's injuries, suffers from lack of a corroborative eyewitness and, especially in the context of the hectic atmosphere that morning, too detailed and tight a story to be truly convincing.

I do not disregard the view expressed by the Grievant and other Union witnesses to the effect that management was partly at fault because it failed to address the client's and Grievant's problems. I do not, however, find that view supported by the facts. There was a formal program in place and the record establishes that it had been effective in substantially reducing the client's aggressive episodes. Moreover, no matter how little the psychologist was seen on the unit, he was aware that the Grievant had been unable to implement the program with respect to her own responses to the client. A meeting was held and a plan devised to be implemented on a trial basis. These are not the actions of cold, uncaring and irresponsible professionals. The Grievant may have felt unsupported because she did not understand the dynamics of her interactions with the client or simply because she disagreed with the plan even though she understood it. But even if management had been far less responsive than it was, it is a part of the job of direct caregivers in mental retardation and mental health facilities to deal with the difficult individuals entrusted to their care without battering them. Because the Grievant was unable to do that, the State had just cause to remove her and thus did not violate the Collective Bargaining Agreement.

VII. AWARD

The grievance is denied in its entirety.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
April 20, 2001