#780

d 10/19/01

REVIEWED BY

OCT 18 2001

GRIEVANCE COORDINATOR

VOLUNTARY LABOR ARBITRATION TRIBUNAL

* *

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 23-07-010326-01-06
and	*	
	*	
OHIO DEPARTMENT OF	*	Larry Palmer, Grievant
MENTAL HEALTH	*	Removal
	*	

* *

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Robert Robinson, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Mental Health:

Brian D. Walton, Labor Relations Officer
Ohio Department of Mental Health

Jeff Wilson, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on August 8, 2001, at Northcoast Behavioral Healthcare in Northfield, 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 and presented one issue on the merits, which 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 Health (the "State") were Tim Higginbotham, Maintenance Supervisor; Jean Sumlin, Telephone Operator; and Linda Thernes, Labor Relations Officer. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Sharon Williams, Account Clerk 2; Mary Wilson, Training Officer and Chapter President; and the Grievant, Larry Palmer, Jr. A number of documents were entered into evidence: Joint Exhibits 1-7, State Exhibits 1-6 and Union Exhibits 1-5. The oral hearing was concluded at 1:15 p.m. on August 8. Written closing statements were timely filed and exchanged by the Arbitrator on August 20, 2001, whereupon the record was closed. On August 24, the record was reopened to receive the State's comments to the Union's written closing, and the Union's reply. The record was closed again on August 30. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

Before being removed from his position on March 19, 2001, the Grievant was a Maintenance Repair Worker 2 at the Northcoast Behavioral Healthcare Systems' North Campus in Cleveland, Ohio. At the time of his removal, he had 23 years of service with the State and a clean discipline record..

The incident leading to the Grievant's removal occurred on February 5, 2001. Telephone Operator Sumlin testified that Grievant came to her shortly after 8 a.m. asking her to page his

supervisor, Tim Higginbotham. She did as he asked. When she got no reply, he asked her to tell Higginbotham that he was going out to pick up some medication for himself. Then he left. After Higginbotham got the message, he went looking for the Grievant but could not find him or his car, nor did he respond to radio calls. Sumlin testified she next saw the Grievant in the lobby about 1 p.m. At about 1:30, Higginbotham learned from Sumlin that the Grievant had returned, so he went to the maintenance shop where he found the Grievant with his co-worker, Bob Czerwinski. Higginbotham asked him about some jobs and inquired where he had been, then told him he would have to put in for the time. Higginbotham testified he wasn't angry; he just wanted to protect himself by having the proper paperwork submitted. According to Higginbotham the Grievant became angry and said he was going off on FMLA leave, but first he wanted the coveralls Higginbotham had gotten for him. The two men went towards Higginbotham's office, the entrance to which is behind a wall, preventing observation from the maintenance shop. According to Higginbotham the Grievant said "Don't say another fucking word," to him then took a karate stance, hit him in his left eye with his right hand, told him again, "Don't say another fucking word or I'll kill you." Higginbotham testified he got around the Grievant and hurried out. He thinks he may have said something like, "I can't believe you hit me and threatened my life over this." Followed closely by the Grievant, he headed for security to get someone to escort the Grievant out of the building.

The Grievant told a different story. He testified he left the building between 8:45 and 8:30 a.m., drove three blocks to the drugstore, and returned about 9:30 or 9:45, went about his duties, and then made up the time at lunch. Around 1:15 or 1:30 p.m. he was in the maintenance shop talking with Bob Czerwinski when Higginbotham came in, upset about something regarding his girlfriend. As the two walked towards Higginbotham's office, Higginbotham said, "You think you can do anything you want." While Higginbotham unlocked his office door he got angrier and started cursing. Then he turned around, took a pair of pliers out of his pocket and lifted his arm as if to strike the Grievant. The Grievant testified he deflected the blow with his

right hand and saw Higginbotham's hand fly back towards his own face. He thinks this is how Higginbotham was injured. He also said he was shocked. He did not try to hit Higginbotham; he was sick that day. He is a third-degree black belt, so could have done real damage had he wanted to do so. He did not threaten Higginbotham either. When Higginbotham left the area, he was saying the Grievant hit him. The Grievant followed him, but they were not running, just walking and talking on their way to security.

Higginbotham gave a written statement that afternoon. Pictures taken at 2:20 p.m. show a black eye. He went to the hospital that evening and was treated for the contusion. The Grievant gave a written statement the next day and another on February 20.

Bob Czerwinski, who is the only witness who may have heard what happened, did not testify despite being subpoenaed. He was also a reluctant witness during the investigation, not providing a statement until under direct order. In that statement he says he heard Higginbotham tell the Grievant to put in for the time he was away for the building, but after the two went behind the wall, he only heard muffled talking except for "First you hit me, now you're threatening me." According to his statement, Czerwinski did not see any hitting; he did not recall telling Higginbotham to watch his back (which Higginbotham alleges he did); and he does not feel threatened by the Grievant.

One outcome of the investigation was the discovery that the Grievant did not have a valid driver's license. According to Higginbotham, the Grievant needs to drive state vehicles in his job, and state records show he has signed for gasoline and service on state vehicles from time to time, going back at least to December 1997. The Grievant stated in his February 20 investigatory interview that the last time he had driven a state vehicle was approximately a month prior to the interview. However, the record also reveals that his license was suspended for seven years in 1995 when he caused an accident without insurance. It then expired on January 11, 1998. On September 8, 2000, while still under suspension, he was cited for running a stop sign and driving while under suspension. His case came before Cleveland Municipal Court on February 5, 2001,

where he was found guilty and fined, and had his license suspended until May 5, 2001. The Grievant testified he did not know his license was suspended. Had he known, he would have taken care of it so as not to risk 24 years of state service. When he got the ticket, he signed without reading it. He is not sure if he was in court on February 5, but his case could have come up in a night session, since they are held for people who work. Labor Relations Officer Linda Thernes, who was the Step 3 hearing officer and looked into the Grievant's defenses, testified she telephoned the court and was told that the Grievant's case came up at 9:00 a.m. and that the Grievant was present. The Grievant also offered his current license, issued on April 12, 2001, and his insurance identification card, effective June 27, 2001–December 27, 2001, but testified he never got the May 23, 2001, Bureau of Motor Vehicles notice of suspension (effective June 22, 2001–June 22, 2002) for failure to prove he was insured on the date he was ticketed (September 8, 2000).

A pre-disciplinary hearing was conducted on March 5 following timely notice. The hearing officer found just cause for discipline on three Northcoast Behavioral Healthcare Policy 3.10 violations:

- Neglect of Duty in that the Grievant failed to maintain a valid drivers license yet drove State vehicles;
- Time and Attendance in that he extended a work break and left the work area without approval;
- Failure of Good Behavior in that he struck his supervisor and threatened him.

The hearing officer also cited Policy 3.22, Workplace Violence Prevention.

The Grievant was removed for these violations on March 19, 2001. This action was grieved on March 26, alleging "a pattern of eliminating black employees by NBHS" and that "the false allegations came from a supervisor who has threaten [sic] & intimidated employees since becoming a supervisor." This grievance was thereafter processed without resolution, finally coming to arbitration, free of procedural defect, for final and binding decision.

Regarding the grievance's allegations respecting the supervisor, Chapter President Mary Wilson testified Higginbotham has an "up and down" temperament which she characterized as a "passive-aggressive" personality. Bargaining unit members have complained to her that he treats them in an abrupt, aggressive manner. He has retaliated against a complaint about the building's temperature by overcorrecting to make it way too hot or way too cold. Employees complain, but nothing is ever done. If employees behaved the same way North Campus supervisors do, they would be disciplined. Management's failure to address complaints of sexual harassment by supervisory employees at North Campus led to a lawsuit which was ultimately settled. Ms. Wilson thinks a similar double standard is demonstrated in the instant case. An account clerk, Sharon Williams, testified about several encounters she has had with Higginbotham. In one dispute over payroll, he yelled at her until he was red in the face while standing in the lobby, then later burst into her locked office, kicking the door open, and demanding an explanation. She felt threatened. Another time she returned from some days off to find her office door standing open. She has reported these and other incidents regarding supervisors to management, but nothing was ever done except that she got demoted.

III. STIPULATED ISSUE

Was the Grievant, Larry Palmer, removed for just cause?
If not, what shall the remedy be?

IV. ARGUMENTS OF THE PARTIES

Argument of the State

The State argues that it had just cause to terminate the Grievant. First, it submits that it carried its burden of proof on all charges. The Grievant's testimony on the length of time he was out of the workplace is at variance with statements he gave during the investigation. On the one hand he was gone from 8:30 a.m. until 8:45, on the other hand he was gone from 9:15 until 9:30. In any event, the State contends he could not have driven the three blocks to the drug store and had his prescription filled in the fifteen minutes he contends he was gone. In the second place,

Sumlin, who has a clear view of the entrance, did not see him come through the door until around noon. In the third place, State Exhibit 4 shows he appeared in court on February 5, and his testimony that this was an evening proceeding was rebutted by what Linda Thernes learned from Bailiff Ruiz, who told her the Grievant was present at 9:00 a.m.

As to the charge of Neglect of Duty, there is no dispute that the Grievant's driving privileges were suspended. The only disagreement is about when his suspension began and ended. Again the State questions the veracity of the Grievant, contending his claim of ignorance of the true state of his license is unbelievable. Even if he was not aware his license was suspended in 1995, he had to have become aware of it when he attempted to renew the license in 1998. If he did not try to renew it, then he was driving with an expired license. He also should have been aware of it when he was ticketed on September 8, 2000, and in court on February 5, 2001, when he pled no contest to driving on a suspended license, yet three weeks later he was claiming to the State that he had a valid license. Even at the arbitration hearing he was claiming he has a valid license and was unaware he was under another suspension to June 2002.

Turning to the most serious charge, Failure of Good Behavior in striking his supervisor, the State points to Union claims it views as implausible: that a mere waving of the hand could redirect the supervisor's hand with enough force to cause a black eye and that Higginbotham attacked the Grievant without provocation. As for Higginbotham's interaction with other employees, unlike the Grievant, Higgenbotham admitted his failings (although his account of them differs from the Union's witnesses') and took his discipline. The State urges the Arbitrator to resolve the credibility issue in the State's favor because of the Grievant's lies on the other charges.

Regarding the Union's claim of disparate treatment, the State asserts that the chapter president could not cite any example of a supervisor who struck an employee and was not removed for it. Further, the situation of the Slaby grievance is vastly different than the instant case. The State also objects to the Union's claim of past practice on extended breaks as being

unsupported by the evidence and to the Arbitrator's consideration of a newspaper article the Union submitted with its written closing.

In conclusion, the State submits that the overwhelming evidence supports the charges and the discipline chosen was within the allowable range on the Department's discipline grid and in accord with Northcoast Behavioral's workplace violence policy. The principle of progressive discipline does not require lockstep adherence through the lesser penalties. Some conduct is so severe as to warrant ending the employment relationship summarily. The State asks the Arbitrator to support its position that workplace violence will not be tolerated, and deny the grievance in its entirety.

Argument of the Union

The Union argues that the State did not have just cause to terminate the Grievant. It says first that the charge of the extended break is deceptive. It is clear from the evidence that the Grievant was not trying to sneak out. He had the means to do so had he wanted to. In fact, it was common practice to bend the policy, and even the supervisor did so. This was never an issue until February 5, 2001.

The Union also admits that the Grievant's license was suspended and that ignorance is no excuse. However, the documents are confusing and the Grievant stated that he was unaware his license had been suspended. It is true his answers to questions seem questionable, but the Union believes he simply failed to comprehend what was actually taking place. Even now it is hard to tell what his status is, but it is a fact that licenses can be reinstated for work privileges. In fact, nothing happened and so the Grievant's lapse cost nothing. This should be viewed in light of the CEO's conduct that cost the State millions as the result of a lawsuit. The Union also submits a newspaper article documenting Bureau of Motor Vehicle problems with notifying licensed drivers, which it argues the Arbitrator may consider in the same way she considers arbitration decisions cited by the State.

Regarding the charge of fighting and abusive language, the Union contends the evidence shows no one's language was more abusive than the supervisor's. His aggression is well-known. It was attested to by victim Williams and shown by the incident that led to the supervisor's suspension. He also had an altercation with Nurse Supervisor Sims. Management accepts this sort of conduct and refuses to address it. All the Grievant did was in self-defense. No punches were thrown, but Higginbotham acted as if he had been struck and said the Grievant would lose his job over it. His behavior was inconsistent with having been hit. He did not call for help and there was no report he was running to get away from the Grievant.

The Union contends the State's zero tolerance policy applies only to employees, not to supervisor. Slaby's grievance shows he had seven witnesses, but instead of applying the zero tolerance policy, the State forced Slaby into EAP.

The Union points out that the Grievant has a long, clean record with no history of aggression, unlike his accuser, whose testimony was self-serving and who never reported any of the alleged threats by the Grievant. The Union argues that the supervisor's claims are simply unfounded. For this reason and the others given, it asks that the removal be overturned, that the Grievant's seniority be reinstated and that the Arbitrator decide what other appropriate action fits this case.

V. OPINION OF THE ARBITRATOR

The most serious charge against the Grievant is that of striking his supervisor. Such conduct, if true, is so egregious that it could justify termination on a first offense, even of a long-term employee of good record. An employer's burden in such cases is substantial. It must bring clear and convincing proof, not simply a probability that the Grievant committed the offense. For reasons given below, I find the employer did so here.

In this case everything depends on the credibility of the supervisor and the Grievant. There is no question the supervisor was injured while the two men were behind the wall. The only question is how. The men were alone and the only witness within earshot did not testify.

Both the accuser and accused had motive to lie, the accused more so since his 23-year seniority is at stake, the accuser less so, especially if his allegations of threats against him are credible. I first scrutinized the supervisor's testimony carefully and found no markers of mendacity, so turned to the Grievant's. The Grievant testified credibly on direct examination. I was prepared to put this down as a "he said–he said" case, but scrutiny of cross-examination, redirect, etc., and the Grievant's investigatory statements persuade me that his evidence cannot be relied upon. In his written statement and investigatory interviews the Grievant said he left at 9:15 and returned at 9:30. This is at variance with Sumlin's statement and testimony. On direct, he had it at 8:45 or 8:30 until 9:30 or 9:45. When confronted with his written statement on cross, he reverted to the 9:15 time. Then, when questioned on cross about driving under suspension, he was vague, saying he and Czerwinski took the state vehicles in for service together. His co-worker drove, but he signed the bills. But on February 20, while claiming he had a valid license (which he did not) and that it was not under suspension or restriction (which it was), he stated he last drove a state vehicle about a month ago. At the Step 3 meeting he said his license had not come up for renewal (which it had in 1998), so had no way of knowing his license was suspended. The Arbitrator accepts that it is possible for a person to be unaware of an outstanding warrant or a license suspension, but the Grievant here had so many opportunities to learn the status of his license–renewal, Bureau of Motor Vehicles notices, ticket, court–that it is simply impossible to believe he was completely unaware. These inconsistencies in the Grievant's story makes his testimony on other disputed matters unreliable. Thus, support for his version of what occurred behind the wall must come from other evidence, but that evidence (Bob Czerwinski's and Sumlin's statements, photographs and hospital records) supports the supervisor's story at least as well as and sometimes better than the Grievant's. Higginbotham's personality and record is beside the point. He may or may not be verbally abusive. He may or may not be easy to get along with. But there is no evidence he has ever physically assaulted anyone or threatened physical violence. Even if he was verbally abusive that afternoon, this would not justify a

physical attack on his person. I am not insensitive to Union claims of harassment and discrimination, but even if they played a role in this case, other remedies are called for, not violence and threats of violence.

In sum, I find the evidence convincingly establishes that the Grievant struck his supervisor as alleged. Sadly, for he has a long, good record, the Grievant shows no remorse and does not even admit to what he did, let alone commitment to amend his behavior. Without the promise of rehabilitation, he cannot be safely returned to the workplace. I therefore find the Grievant was removed for just cause.

VI. AWARD

The grievance is denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
October 15, 2001

ADS:sss
odmh752