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REVIEWED BY

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MAR 20 2002

GRIEVANCE COORDINATOR

IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11

AND

THE OHIO DEPARTMENT OF MENTAL HEALTH

**Before: Robert G. Stein
Case No. 23-18-010807-0106-01-05**

GRIEVANT: Oscar Gooden, discharge

Advocate(s) for the UNION:

**Robert Robinson, Staff Representative
OCSEA, Local 11, AFL-CIO
380 Worthington Rd
Westerville OH**

Advocate for the EMPLOYER:

**Linda J. Thernes, Esq.
OHIO DEPARTMENT OF MENTAL HEALTH
30 East Broad Street
Columbus OH 43266-0414**

INTRODUCTION

A hearing on the above referenced matter was held on January 25, 2002 in Northfield, Ohio. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. Following the hearing, the parties submitted written closing arguments. The hearing was closed on February 2, 2002. The Award is to be issued within forty-five (45) days following the date the hearing was closed.

ISSUE

The dispute is defined as follows:

Did the Employer have just cause to discharge the Grievant?
If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference see Agreement for language)

ARTICLES 24 DISCIPLINE

BACKGROUND

The Grievant in this case is Oscar Gooden, a custodial worker with approximately twelve (12) years of service with the Department of Mental Health (hereinafter referred to as "Employer" or "Department"). On July 10, 2001, Mr. Gooden hit a patient, Quincy C. ("Quincy"), who had been

acting out and disrupting the unit. He knocked over papers and furniture during his tirade. Quincy was told by staff to go into a quiet room, but instead went into his own room and continued to knock over furniture.

The Grievant entered Quincy's room and closed the door. At this point in the story two differing versions of the events were presented at the hearing. In one version, conveyed by the Quincy, the Grievant supposedly told Quincy, who was sitting on the bed, that he was angry with him regarding the behavior he was displaying. The Grievant, according to Quincy, then deliberately hit him in the eye with his knuckles.

According to the Grievant, after he entered Quincy's room he was bending down with his back to Quincy and was picking up an overturned nightstand. While lifting the nightstand, he became startled by Quincy's sudden movement, then turned around quickly and accidentally hit the Grievant in the eye with his hand. The Grievant admits he should have filed an incident report, but was unfamiliar with the process to do so. The next day the Grievant returned to Quincy's living area and apologized to him for the incident.

The Grievant was subsequently charged with patient abuse and his employment was terminated. He filed a grievance in response to the Department's actions against him.

EMPLOYER'S POSITION

The Employer's position in this matter is straightforward. It contends the events leading up to the abuse of patient Quincy are not in dispute. At approximately 1:30 p.m. on July 10, 2002, Patient Quincy was highly agitated and was acting out. He was supposedly upset about not being allowed to play bingo due to the fact he got into an argument with another patient. He became highly agitated and disrupted the unit by knocking over furniture and scattering papers. The staff in the unit told him to go to the quiet room, but instead he went to his own room and remained agitated. While in his room he knocked over a nightstand and a hamper.

The Grievant, who had completed his cleaning work on the unit, observed Quincy's tantrum. He entered Quincy's room, even though it was not one of his assigned areas of responsibility to clean as a custodian. He closed the door to Quincy's room. Quincy contends the Grievant displayed anger toward him and hit him in the eye with his hand, which resulted in Quincy's face sustaining a cut and bruise. The Grievant left Quincy's room and the next day returned and apologized to him for the incident.

The Employer rejects the Grievant's contention that the striking of Quincy was an accident. It argues that the Grievant initially cast suspicion upon himself by closing the door after entering Quincy's room. The

Employer argues that the Grievant's behavior then became more suspect when he failed to report the incident to supervision and did not even inform any medical personnel on the unit. The Employer contends that the facts support its contention that the Grievant abused patient Quincy.

Based upon the above, the Employer requests the grievance be denied.

UNION'S POSITION

The Union contends that this Grievant has been forthright concerning his behavior on July 10, 2001 and accepted full responsibility for this incident. The Union also does not agree with the Employer's contention that the Grievant's accidental striking of Quincy resulted in an injury to patient Quincy. It argues that Quincy had no bruises or marks on his face on July 10th, and the first time a bruise appeared on Quincy's face was on the next day. It further contends that the Grievant, a twelve (12) year employee with a good work record, was a friend of patient Quincy.

The Union also argues that the Employer failed to consider the history of patient Quincy. He is known to be aggressive, unpredictable, cunning and capable of perpetrating a lie. The Union asserts that it is unfair to terminate an employee based upon the testimony of a patient. The fact that Quincy's patient record was not made available to the

Union prevents the Grievant from being properly defended in this case, argues the Union. The only mistake made by the Grievant in this matter was his failure to report the incident. However, this error was not the reason he was terminated.

Based upon the above, the Union urges the Arbitrator to sustain the grievance.

DISCUSSION

The Grievant in this case is a twelve (12) veteran of employment with the Agency. Therefore, it is reasonable to surmise that he has seen a variety of behaviors displayed by the resident population of North Coast Behavior Center. He also stated he knew patient Quincy. On July 10, 2001, the Grievant observed patient Quincy's disruptive behavior.

The intervention of the Grievant is somewhat suspicious on its face given the fact that his job responsibilities are custodial and not patient care based. His work was completed in the area where Quincy's room is located, and no one asked him to interact with Quincy. He was not directed to enter patient Quincy's room and had no supervisory directive to be there. Furthermore, by entering Quincy's room alone, the Grievant placed himself in a position that greatly increased the likelihood he would be confronting Quincy.

On July 10, 2001 there were patient care professionals on the unit who were responsible for Quincy. When the Grievant entered Quincy's room he closed the door. The Grievant states he entered Quincy's room because he heard noises coming from his room (Jx 1, p. 15). The Grievant said he began to pick up furniture that had been tipped over by Quincy (a nightstand and a hamper, Jx 1, p. 13). He then said he was startled by Quincy and swung around and accidentally hit him in the face.

The Grievant's version of the events does not comport with Quincy's accounting of what happened. Quincy states the Grievant entered his room and said he was tired of him always upsetting things and then hit him in the face with his knuckles. Quincy described the Grievant as being angry. In both accounts of the incident, Quincy and the Grievant state Quincy was sitting on his bed when the Grievant entered his room. It is also an undisputed fact that the Grievant apologized to Quincy the next day. Quincy stated in the hearing and in his statement of 7-10/01 that Mr. Gooden, the Grievant, apologized to him and said he was dead wrong and made a mistake. It is also a matter of fact that Quincy sustained an injury to the area around his eye around July 10, 2001.

There are two witnesses that saw what happened on July 10, 2001, the Grievant and Quincy. The Grievant has an interest to protect his job, which is always present in these types of matters. Quincy on the other hand has no apparent interest to protect, but is a resident patient in a

mental health facility. These days to obtain that status it is not uncommon for such a patient to be suffering from a serious mental illness, accompanied by the propensity to display disturbing behavior that society finds to be intolerable. What is in dispute is not whether Quincy was struck, but whether it was intentional. The Grievant claims that he hit Quincy accidentally while Quincy claims that it was a blow struck in anger.

The only way to reasonably address this question is to assess the remaining circumstantial evidence in order to determine whether it effectively renders one of these explanations implausible. The Grievant's presence in the Quincy's room is the first piece of evidence that supports Quincy's account of what happened. The Grievant had no plausible reason for going to his room. It wasn't his work area, and he was not asked to go into Quincy's room. Although this wasn't his work area, it may have been possible that the Grievant simply wanted to see if Quincy was all right. Once the Grievant entered Quincy's room and saw him simply sitting on his bed his curiosity should have been satisfied. However, the Grievant never gave an explanation of why he entered Quincy's room after he observed him simply sitting on his bed. There was no evidence to indicate he had any responsibilities to enter Quincy's room after making sure he was not in any apparent danger.

If the Grievant accidentally hit Quincy, instead of intentionally hitting him, it is reasonable to expect a veteran employee to somehow assist Quincy in some way. He could have at least informed one of the unit's medical personal that an accident just occurred. Unfortunately, assaults are not uncommon in NBH and it is likely that during his twelve (12) years of employment the Grievant has observed many incidents involving injuries to staff or patients (Jx 5). From these observations, it is also likely he was aware how to react to such incidents. Why did the Grievant fail to help Quincy or call someone who could provide assistance? Instead, the Grievant simply left Quincy's room, did not try to help him and said nothing about what had happened until the next day. By that time it is conceivable the Grievant could have been made aware that the incident was reported and he was forced to say something.

When the Grievant did not say anything until the next day he cast considerable suspicion upon his conduct and appeared to be concealing what really happened. If he had immediately reported the incident, he would have helped himself in this case. The fact that the Grievant did not apologize until the next day may have some significance, although people often put off apologies for their behavior (sometimes for years).

The Grievant said movement by Quincy startled him. I find this explanation to be implausible under the circumstances. The Grievant

intentionally entered Quincy's room just after witnessing a tirade by him. He knew Quincy was agitated and was acting out. Being aware of this, it is far more likely that the Grievant would have been very alert and on guard for any possible outbursts by Quincy, and likely would expect one to occur. Moreover, he knew Quincy and what he was capable of doing when he was agitated. The evidence also demonstrates that the Grievant received training in crisis intervention, which has been updated annually (Mx 1). A person with this knowledge and in this situation is not easily startled.

This is an unfortunate situation for this twelve (12) year employee. There was no evidence to indicate that Mr. Gooden has had any history of this type of behavior. However, on July 10, 2001, the only plausible explanation as to what happened is the one provided by the Employer. The Grievant rendered his version of events to be implausible when he failed to report what he stated was an accident. It also noted that the testimony provided by Quincy was consistent with the statement he provided during the investigation some seven (7) months earlier. The testimony of the Grievant and the demonstration of how he accidentally hit Quincy were far less credible.

The Union stated that another patient, T. Young, tried to manipulate Quincy into making more of the July 10th incident than that which occurred. However, there was no other evidence to corroborate this line

of reasoning. The Union also made a strong argument regarding the increased level of violence on staff in NBH and the fact that it has kept employees on edge. This may be the case, but the Union was unable to establish a nexus linking an overall increase in unit violence as a justification for the Grievant's actions on July 10th. In fact, an atmosphere charged with a concern over being harmed by a patient lends more support to a strategy of avoiding unnecessary patient encounters. It provides one more reason why the Grievant should not have voluntarily placed himself in proximity to a patient who had just displayed aggression.

This may have been a situation where an employee has a one-time lapse in judgment during an otherwise satisfactory twelve (12) year career. On the other hand, mental health patients can be particularly vulnerable to abuse. A finding of abuse under Article 24.01 of the CBA leaves an arbitrator with no ability to modify the penalty imposed by the Employer.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 16th day of March, 2002.

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a series of loops and a horizontal line extending to the right.

Robert G. Stein, Arbitrator