

ARBITRATION DECISION NO.:

26

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health
Western Reserve Psychiatric
Habilitation Center

DATE OF ARBITRATION:

March 25, 1987

DATE OF DECISION:

June 5, 1987

GRIEVANT:

Michael Williams

OCB GRIEVANCE NO.:

G86-1040

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Daniel S. Smith
Legal Counsel

FOR THE EMPLOYER:

William Scott Lavelle
Asst. Atty. Gen.

KEY WORDS:

Suspension
Sign-out
Work Area

ARTICLES:

Article 24-Discipline
§24.01-Standard

FACTS:

The Grievant is a TPW a Western Reserve Psychiatric Habilitation Center. The Grievant was given a 6-day suspension for three types of infractions: repeated failure to sign out, a minor

infraction regarding unauthorized telephone use, and alleged abandonment of his work area.

The Grievant had an extensive disciplinary record. In this case, Grievant placed a long-distance call to Canton which was a violation of hospital policy. The Grievant also failed to sign out at the end of his shift on three occasions which is also a policy infraction. Thirdly, Grievant was alleged to have abandoned his work area. Here, Grievant went to play basketball with some patients. This recreational activity is encouraged.

ARBITRATOR'S OPINION:

The Arbitrator found that this was not a violation of policy. Grievant's basketball playing was encouraged and routine. The TPW on duty was aware of Grievant's whereabouts and did not request that he stay.

For these reasons, the abandonment of the work area charge was not proven. Thus, the Grievant was found to have violated two minor rules. Since he had a previous suspension, he was subject to moderate suspension (4 to 10 days). The arbitrator reduced the 6-day suspension to a 4-day suspension since one of the infractions for which he was disciplined was found by the Arbitrator to be unproven.

AWARD:

The suspension was upheld because two of the three allegations were proven against Grievant, Grievant was previously suspended, and progressive discipline was followed.

The suspension was reduced because DMH failed to prove all three allegations. The infractions they did prove were minor. The next step in progressive discipline was moderate suspension which the Arbitrator deemed to be justified. However, the least amount of time allowable (4 days) was found to be a fair modification of the suspension.

TEXT OF THE OPINION:

**IN THE MATTER OF THE
ARBITRATION OF**

Department of Mental Health

vs.

AFSCME/OCSEA Local 11

Grievance No.:

G-86-1040

Grievant:

Michael Williams

Hearing:

March 25, 1987

For Department of Mental Health:

William Scott Lavelle,

Assistant Attorney General

For OCSEA:

Daniel S. Smith, Esq.

Present at the hearing in addition to Grievant, his counsel, and counsel for DMH were Virginia Brauer, Personnel Officer (WRPHC), Ephra M. Paull, Director of Human Resources (WRPHC) and Emmett Talbert (Union President).

Sequestered witnesses were Michael Flinn (Union), Robert Robinson (Union), Marie Trout-Mowder (employer), Rhonda L. Perry Morgan (employer), Joyce Cipriani (employer), Eloise McKinney (employer), Louise Perkins (Union).

Preliminary Matters:

Both parties gave permission to the Arbitrator to record the proceedings for the purpose of refreshing her memory; they acknowledged that the tapes would be destroyed when the decision was rendered. Both parties gave the Arbitrator permission to publish the opinion. Both parties stipulated that the grievance was properly before the Arbitrator. Both parties agreed that the issue was "WHETHER THE SUSPENSION OF THE GRIEVANT WAS FOR JUST CAUSE."

Facts:

Grievant was employed as a TPW at Western Reserve Psychiatric Habilitation Center.

On March 14, 1985, employer's records indicate that the Grievant was counseled with regard to his failure to "call-off". (Exhibit B) The Grievant claimed that he had "called-off". The employer's record indicates that no record was found of any "call-off" received. On April 26, 1985, the Grievant received a letter of reprimand for his failure to keep the unit up to standards. (Exhibit C) (At this time, the Grievant was working for housekeeping.) On October 31, 1985, the Grievant was counseling for coming to work late (over a month's time) 8 times. (Exhibit A) Four times he was late without notice. This discipline was given by Ms. Trout-Mowder.

On December 9, 1985, the records indicate that Ms. Trout-Mowder trained the Grievant (and others) on policies #2-7 and 2-13. (Exhibit L) Policy #2-7 is Attendance Standards and #2-13 deals with Disciplinary Action and lists infractions. (Exhibits M & I)

On March 6, 1986, the records show that Ms. Trout-Mowder trained the Grievant (and others) on policy #14 and policy #2-13. (Exhibit I-2) Policy #14 deals with a prohibition on personal recreation activity by employees which is not part of a patient's program. (Exhibit K)

On March 25, 1986, the employer's records show that Ms. Trout-Mowder counseled the Grievant for being late (three times within a 3 week period), for failing to take vital signs, and for being late with progress notes. (Exhibit D) On this interview sheet, Ms. Trout-Mowder noted "He interacts well with patients, plays ball with them."

On March 27, 1986, Ms. Trout-Mowder sent the Grievant a memo for "failure to sign out". (Exhibit R)

On April 10, 1986, Ms. Trout-Mowder sent a Letter of Reprimand (First) for violation of Policy #2-13, items #7, #8, #10, #24 and #27. (Exhibit E)

#7: Being away from assigned work area without permission.

#8: Abuse of break time or lunch periods.

#10: Violating normal safety practices or improper use of equipment.

#24: Abandonment of work area.

#27: Conduct of a serious nature which constitutes either a neglect of duty or failure of good behavior, or both.

The reprimand alleged that (1) on one occasion the Grievant spent half the evening off the unit, (2) on 6 separate occasions he abused lunch time, and that on one occasion he left one (1) staff alone on the unit. Ms. Trout-Mowder said the letter was labeled "First" by error because she was unaware of prior written reprimand.

On May 16, 1987, Grievant was suspended for three (3) days after being found sleeping on the job on three (3) separate times. (Exhibit F)

All of these disciplinary actions and trainings were found in the employer's records. Ms. Trout-Mowder testified to those instances in which she was involved. Her testimony was consistent with the records.

The suspension in May was unappealable under the prior contract.

Telephone records indicate that a call was placed to Canton (456-5812) for 5 minutes during the time period covering the Grievant's shift. (Exhibit S) The ward record shows a call placed to 456-5812 and the record indicates that the call was that of a patient, Earl Robinson, on the Grievant's ward. (Exhibit T) Ms. Rhonda L. Perry Morgan, telephone operator, testified that Mr. Robinson asked her to place a long distance call for him. When she asked for the number, he became confused and when she asked him the location, he placed his hand over the mouthpiece and consulted someone. He then came back with the number. Ms. Morgan then placed the call and heard Mr. Robinson get someone. However, she then heard him turn the phone over to the Grievant. She broke in and warned the Grievant that he should not be on the phone. She reported that subsequently she checked the line. She said that the Grievant talked for about 3 minutes and another employee talked for 2 minutes. She testified that Mr. Robinson was never on the phone after he initiated the call. The Grievant testified that he placed the call solely for the benefit of the patient. The Grievant said that the patient was agitated and needed to talk to a former TPW. The Grievant indicated that the former TPW was a personal friend of his and that is how he knew her number. He denied talking to her except to facilitate Mr. Robinson's conversation. Ms. Morgan also testified that on the day prior to this particular incident that the Grievant had attempted to persuade her to place a long distance call and bill it to his home. Such a call violated hospital policy. Ms. Morgan testified that she had refused to place the call.

On May 24, 1986, May 26, 1986, and June 5, 1986, the Grievant did not sign-out. (Exhibits U, V, W) The Grievant admits that he did not; he says that he "forgot". He claimed that failing to sign out was a common personnel failing. Ms. Trout-Mowder testified that others indeed did forget to sign out occasionally; however, Grievant's failures indicated an unacceptable frequency.

On June 8, 1986, the Grievant was 1 of 2 TPW's on 23E. Ms. Cipriani, the other TPW, testified that the Grievant left her alone on the unit and went to play basketball with patients. Ms. Cipriani testified that the basketball court was beyond the range of her vision and that her position was beyond the range of the Grievant's hearing. To reach the basketball court, one must go through patient bedrooms and 2 doors which are generally closed (and often locked). Ms. Cipriani testified that the Grievant had "a habit of leaving without telling anyone where he was going". She said when he appeared to her to be leaving the unit she told him that "if you aren't back in 20 minutes, I will page you." He, according to her testimony, grinned and said "oh". She said she made herself "plain to him". She said his absence angered her; she waited 20 minutes and had him paged. He did not respond. She testified that she waited another 20 minutes and paged again. When no response occurred, she called the supervisor. She said she could not look for the Grievant because then the patients would be unsupervised. The supervisor called Hank Brown

who indicated that he was coming to talk to the Grievant. Shortly thereafter, the Grievant returned. When Ms. Cipriani informed the Grievant that Mr. Brown was coming, he allegedly cursed her. According to Ms. Cipriani, Mr. Brown came and sent her to 23D while he talked to the Grievant. Then two hours later, he (Brown) told her to return to 23E, that he had talked to the Grievant.

The Grievant claimed that going to the basketball court was not "leaving the unit". He claimed that he left all the doors open between the building and the basketball court so that he could hear Ms. Cipriani if she called for help. He said he did not respond to the page because no speaker system was on the basketball court. The Grievant testified that he was expected to and encouraged to play basketball with the patients. He testified that in full view of Ms. Cipriani he asked E ward patients if they wanted to play and that he then went to D ward where Mrs. Perkins was on duty and took some of her patients also. Grievant denied cursing at Ms. Cipriani and said that Brown had only talked to him for a few minutes.

Ms. Trout-Mowder testified that the basketball courts was "off" the unit. She further testified that playing basketball with the patients was encouraged if sufficient staff was present. She testified that one TPW alone was insufficient because patient's were unpredictable.

Mr. Robinson, a TPW, testified that leaving one TPW alone was routine because of reduced number of TPW's. He indicated that often TPW's took patients to snack areas and other areas outside the unit. The proper procedure he said was to 1) inform the remaining staff and 2) ask the other ward to open its doors.

Mrs. Perkins, TPW, who was on duty in 23D also testified about the incident on the basketball court. She said the Grievant did come to get patients from D ward to play. She testified that such an occurrence was routine. She then opened the doors to E unit. She testified that she could have heard any outcry for help. She also testified that on "D" ward if only two staff persons no one can leave. She also testified that the bedroom doors to the basketball court were usually closed. She admitted that the Grievant went to school with her sons.

Discussion

The Grievant was suspended for three types of infractions. (Exhibit G/3) First, he forgot to sign out three times. These infractions are admitted by Grievant. He said he simply forgot. The main function that signing out serves is an administrative-payroll function. Under Policy #2-7, the employee who does not sign out will not be paid for those hours unless he/she gets a supervisor to verify that he/she worked. Policy #2-7 does not specify any particular discipline for not signing out beyond the no-pay rule. Failure to sign out, however, is among the 27 listed offenses specified in Policy #2-13. No. 1 specifies "violation of any attendance standard". Moreover, on March 27, 1986, the Grievant had been specifically warned when he previously violated the policy.

Second, the Grievant was charged with violating policy #4-6 on Telephone Use. The Arbitrator finds that the Grievant did violate that policy once. The testimony of the telephone operator was believable and consistent. The Grievant's testimony on this issue was less credible. Policy #4-6 specifies no specific discipline for its abuse. Policy #2-13 does not list telephone abuse among the 27 specific infractions. Grievant committed a minor rule infraction.

Thirdly, Grievant was accused of leaving "your assigned area with one female staff member to care for 24 patients to play basketball with a patient." Presumably, this infraction would violate #24 found in policy #2-13. Certainly, if the lone staff member was placed in danger such an infraction had potential for serious problems. The Arbitrator finds no clear violation of policy. In the past, the Grievant had been praised for playing basketball with patients. (See Exhibit D.) Moreover, Mrs. Perkins testified that the Grievant's basketball playing was a routine behavior. The TPW on duty knew where the Grievant was going. She did not directly request him not to leave. The paging

was an exercise of pique because she knew that no sound system was placed near the basketball court. The argument as to whether the basketball court was "on" or "off" the unit was an exercise in semantics with each side assuming the proper position. No clear cut written policy was provided to the Arbitrator which deal with the issue. While Ms. Trout-Mowder may have a clear cut policy, she was not on duty at the time of the incident. Moreover, she testified that using the basketball court was "ok" if staffing was sufficient. The doors between D and E were opened to enhance safety according to Mrs. Perkins. The Arbitrator finds that the Grievant did not by a preponderance of the evidence violate a staffing rule nor place the other TPW in danger.

Thus, the Grievant violated 2 minor rules, one 3 times, the other once. However at the time of the violations, Grievant had a track record of rule violations. In his first department, he had one oral counseling and one letter of reprimand. In his second department, he had two oral counselings dealing with lateness, failure to take vital signs, and late progress notes. He had a memo on failure to sign out. He had a second letter of reprimand for abuse of lunch hours and leaving the unit twice in an improper manner. Finally, on May 28, 1986 the Grievant was suspended for 3 days for sleeping on the job.

Under policy #2-13, a range of disciplinary action is specified. Grievant had received discipline at Steps 1, 2, 3 and 4 when the failure to sign out and the telephone abuse occurred. The Arbitrator does not acquiesce in the Union's position that each and every different infraction of a minor rule must begin again at a Step #1 position. Were that the case, an employee could violate rules repeatedly as long as he or she carefully chose a different infraction each time.

The Grievant violated rules. He was subject to discipline. He was given a Step 5 discipline-- moderate suspension (4 to 10 days). However, one of the infractions for which he was disciplined has been found by the Arbitrator to be unproven. Hence, the suspension shall be modified from 6 days to 4 days, the lightest moderate suspension.

Decision

Grievance denied; penalty modified to 4 days.

Date: June 5, 1987

Rhonda R. Rivera, Arbitrator