

ARBITRATION DECISION NO.:

27

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.:

G86-1043

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Daniel S. Smith
Chief Legal Counsel

FOR THE EMPLOYER:

William Scott Lavelle
Asst. Atty. Gen.

KEY WORDS:

Removal
Attendance Rules
Prior Discipline

ARTICLES:

Article 24-Discipline
§24.05-Imposition of
Discipline

FACTS:

The Grievant is a TPW at Western Reserve Psychiatric Habilitation Center. The Grievant was

removed from his position for failure to record vital records, failure to follow the attendance rules with respect to signing out, and alleged unauthorized departure before the end of his shift.

ARBITRATOR'S OPINION:

The alleged violation for leaving early was not proven by the employer and therefore the removal was found to be not for just cause. The removal was reduced to a six (6) day suspension in light of the Grievant's admitted violations and past disciplinary record.

The Arbitrator noted that the key issue was whether the Grievant left early. The testimony of his supervisor and his co-workers was conflicting and presented many inconsistencies. For this reason, the Arbitrator found that the employer failed to prove by a preponderance of the evidence (more than 50%) that the Grievant left early. The Arbitrator stated that the lack of supervisor's personal observations was important to this finding.

The Grievant had also been suspended twice previously for attendance record violations. This was taken into consideration by the Arbitrator but since the most recent alleged infraction remained unproven, it was only determinative in the Arbitrator's choice of a six (6) day rather than a two (2) day suspension.

AWARD:

Full backpay was granted, subject to the six (6) day suspension and the grievant was reinstated.

TEXT OF THE OPINION:

**IN THE MATTER OF THE
ARBITRATION OF**

Department of Mental Health

vs.

AFSCME/OCSEA Local 11

Grievance No:

G-86-1043

Grievant:

Michael Williams

Hearing:

March 25, 1987

For Department of Mental Health:

William Scott Lavelle,
Assistant Attorney General

For OCSEA:

Daniel S. Smith,
Chief Legal Counsel

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), 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 REMOVAL OF THE GRIEVANT WAS FOR JUST CAUSE."

Facts:

The Grievant is a TPW at Western Reserve Psychiatric Habilitation Center. The record shows that on August 7, 1986, the Grievant (with others) received training on Center Policy #5-7 "Patient 24 Hour Safety Check List" (Exhibit X). The training was administered by Ms. Trout-Mowder" (Exhibit Y). On August 8, 1986 an IOC was issued concerning enforcement of "24 Hour Safety Check List" (Exhibit Z). Whether Grievant ever saw this IOC or was trained about it is unknown. The record shows that between 8-18 and 8-26, 1986, the Grievant was trained with regard to Center Policy #2-9 Disciplinary Guidelines (Exhibits P & Q). (See also joint exhibit #4; these two documents contain disciplinary grids which are the same.)

The day at issue is September 23, 1986 (Tuesday). The Grievant was a TPW on the second shift with Michael Flinn and Louise Perkins. Ms. Trout-Mowder is their supervisor; however, she works the 1st shift.

Ms. Trout-Mowder testified that when she arrived on the unit on 9/24/86 she overheard a patient say to Mrs. Perkins "Isn't it sad what the guys do to you, leaving you alone." Ms. Trout-Mowder said that Mrs. Perkins appeared flustered and upset by this remark. Ms. Trout-Mowder testified that Mrs. Perkins told her that she (Mrs. Perkins) had called Central Staffing for help because she was on the unit alone and that, as a consequence, Mr. Blair had been pulled to the unit. According to Ms. Trout-Mowder, Mrs. Perkins also told her that the time out spaces on the sign-out sheet next to Mr. Williams' and Mr. Flynn's names were empty when she left. (See Exhibit AA) Ms. Trout-Mowder testified that she wrote up both Mrs. Perkins and Ms. McKinney for failure to report the alleged absence of the Grievant and Mr. Flinn. (See Exhibits CC and DD).

Both Mrs. Perkins and Ms. Mckinney wrote the following statement on the bottom of the write-up "The above statement is true. I have no other comment." Ms. McKinney testified that she meant that she had not reported any absence but that was because she never knew of any absences. Mrs. Perkins, a hostile witness, would not comment on this issue.

Ms. Trout-Mowder investigated. She found that the sign-in sheet was, at the time she looked, filled in (Exhibit AA). After both Mr. Flynn's name and Grievant's name under time out "11:30" was written, in the same hand. Based on the handwriting, Ms. Trout-Mowder concluded that one person had written both items. Ms. Trout-Mowder then checked the patient 24 hour check up sheet. She found that no check up had been done at 9:30 p.m. by the Grievant. (Exhibit BB) She found that

the 11:30 p.m. check was done by Mr. Blair.

In his testimony, the Grievant admitted that he did not do the 9:30 check list. He claimed that he did do rounds but forgot to record the results. With regard to the sign out sheet, he admitted that he had signed his name early, contrary to rules. He also admitted that he had not filled in the time-out space.

With regard to his whereabouts during the evening, the Grievant denied leaving the shift before 11:30 p.m. He claimed that after putting the patients to bed, he took his lunch at 8:25 p.m. Subsequent time, he claimed, was spent in the retreat room listening to tapes. He said that he actually left the facility at 11:40 or 11:45 p.m. The Grievant said that he never saw Mr. Blair and that he was not there when Mr. Blair arrived. He testified that the third shift always does the 11:30 bed check.

Mr. Flinn also testified. He testified that he played cards with Mrs. Perkins and some patients until 9:30 p.m. He testified that he assumed the Grievant was in the retreat room. He subsequently testified that between 9:30 and 11:30 p.m. he had seen the Grievant on and off the unit at various times. He testified that at 10:50 p.m. he had left the unit to take out trash and that the bag had broken, necessitating a time-consuming clean up operation. He testified that he had to get disinfectant from cottage 8. He said he returned in time to check out and that the Grievant was there at the time. He also testified that the Grievant told him that Mr. Blair, the relief, had arrived.

On cross examination, Mr. Flinn was shown a written statement which he made on October 7, 1986 (Exhibit EE). The statement contained the sentence "When I arrived back on the unit, all of 2nd shift had left." Mr. Flynn indicated that he meant "all but the Grievant had left."

Ms. McKinney was the LPN on the 2nd shift working both 23D and 23E on the night in question. She said that she had seen the Grievant that evening but "could not recall when." She said she did not report his alleged absence because she did not know he was not there. She also testified that she saw no supervisory personnel during her shift.

Mrs. Perkins, the TPW, who was assigned to work with both the Grievant and Mr. Flinn was called to testify. She was a witness hostile to the Arbitrator and to the counsel for both employer and union. She answered some questions, evaded others, and refused to answer still others. She refused to answer the question of whether the Grievant left early. She said she was on the unit at 11:30 and at twenty-five minutes to 12 (midnight) she was in the office. She did agree that Mr. Blair was pulled on the unit at 11:30. She said no supervisory personnel were on the unit that night and that her job did not include reporting which personnel were on the unit.

No written record or testimony was presented which indicated that Mrs. Perkins actually called central staffing during the shift. Mr. Blair's time sheet indicates that he arrived on 23B at 11:00 p.m., that he signed out at 7:15 a.m., and that he was pulled to 23D. The sheet does not indicate at what time he was pulled to 23D. However, he did initial the 11:30 p.m. bed check in 23D.

Lastly, Ms. Trout-Mowder was recalled and asked to testify as to what the Grievant said at the pre-disciplinary conference. She testified that he said at that time that he was warming up his car at 11:00 p.m. on the evening in question.

Discussion:

The Grievant admits failing to record the 9:30 bed check although he claims to have carried out the task. No evidence either supported or disproved whether he did make that check. The completion of the bed check form is clearly required by Policy #5-7. The August 8th memo clearly states that "falsification of this record and/or failing to complete the patient check rounds will be subject to disciplinary action." The need for a bed check in a mental health institution is obviously essential, and the failure to observe this policy could endanger both patients and staff. The Grievant was trained on this policy on August 7, 1986, only 45 days before the incident. Under the

disciplinary grid of Policy #2-9, such a failure falls under Neglect of Duty: "failure to complete assigned tasks" and subjects the Grievant to a 2 day or 6 day suspension for the first offense, a 6 day suspension or removal for a second offense.

The Grievant admitted signing his name early (before actual time out) and admitted failing to sign out. The exact manner in which the "11:30" was filled in remains unclear. Grievant clearly violated Policy #2-7 on attendance standards.

Grievant is accused of "unauthorized departure before end of shift." This violation would be a major offense requiring a 2 day suspension for first offense, 6 day suspension for second offense, and removal on the third offense. The Arbitrator found the testimony of the Grievant self-serving and lacking in credibility. Mr. Flinn's testimony also created many inconsistencies. The testimony of Ms. McKinney was inconclusive. The failure of Mrs. Perkins to answer direct questions left the issue unresolved. While the employer created a strong inference that the Grievant was not on the unit at 9:30 p.m., the employer did not prove by a preponderance of the evidence that the Grievant left. The lack of a supervisor's observations and the failure to hear Mr. Blair left the issue unproven to the Arbitrator.

The Grievant thus had admitted the major offense of failure to complete vital records and the minor offense of violating Policy 2-7 on attendance rules. The Grievant at the time of these infractions had a long record of discipline for an accumulation of minor violations. (See opinion on Grievance G-86-1040.) He had been suspended twice. The first suspension was unappealable. The second suspension was sustained by this Arbitrator.

Among the minor violations in Grievant's discipline record were a number of attendance record violations.

Given this record, the question is whether a removal was appropriate given the Grievant's past disciplinary history and the gravity of this offense. The contract at §24.05 requires that "disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment". Removal is the most serious remedy available in the arsenal of disciplinary tools and should only be administered as a last resort. If the Grievant had been proven absent from the unit on the night in question, removal would have been appropriate. However, removal is not "just" in this case.

Under the disciplinary grid attached to Policy 2-9, failure to complete an assigned task (a major offense) allows for the first offense a 2 or 6 day suspension. In light of the Grievant's previous record of accumulated minor offenses, the Arbitrator finds that a 6 day suspension is just.

Decision

Grievance is sustained in part, discipline reduced to a 6 day suspension. Grievant is to be reinstated with back pay subject to the 6 day suspension.

Date: June 5, 1987

Rhonda R. Rivera, Arbitrator