ARBITRATION DECISION NO.:
44

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Mental Health,
Western Reserve Psychiatric
Habilitation Center

DATE OF ARBITRATION:
July 24, 1987

DATE OF DECISION:
August 25, 1987

GRIEVANT:
Gerald Gregory

OCB GRIEVANCE NO.:
G-87-0351

ARBITRATOR:
Rhonda R. Rivera

FOR THE UNION:
Ed Morales

FOR THE EMPLOYER:
Daniel S. Smith, Esq.

KEY WORDS:
45 Day Time Limit
Due Process
Progressive Discipline
Failure Of Good Behavior
Removal

ARTICLES:
Article 24 - Discipline
§24.01-Standard
§24.02-Progressive
Discipline
§24.03-Supervisory
Intimidation

§24.05-Imposition of Discipline

FACTS:

Grievant was removed 51 days after the pre-disciplinary meeting. The contract provides that, "the acting agency head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but not more than 45 days after the conclusion of the pre-discipline meeting."

In the pre-disciplinary conference, the Grievant was charged with insubordination, neglect of duty and failure of good behavior. A 2 day suspension was recommended for "uncalled for verbal outbursts with arguments which were demeaning to the supervisor and failure to accept authority of the supervisor." The altercation which led to this recommendation arose when the Grievant, a Therapeutic Program Worker, was questioned by a registered nurse as to the proper placement of a Foley bag. After the exchange, the nurse alleged that during the conversation, the Grievant was yelling at her and was belligerent. She characterized the Grievant as being rude and threatening.

Four weeks after the pre-disciplinary conference, it was noted that the Grievant had a previous discipline record. The previous discipline was a 60-day suspension for sexual harassment of co-workers. This discipline was pre-contract and was upheld on appeal to the State Personnel Board of Review.

Two days after the Grievant had filed his grievance, a psychologist called the institution and represented herself as the Grievant's therapist. She told the Superintendent that the Grievant had reported a desire to blow some people away. No such events occurred.

MANAGEMENT'S POSITION:

Grievant's behavior was improper in the manner in which he raised his voice and was demeaning and threatening to a supervisor. The post-discharge incident clearly indicates that should the Grievant prevail, reinstatement would be an improper remedy. The failure to impose the final discipline within the contract guidelines did not prejudice the Grievant and should be waived. Since Grievant's behavior was similar to that which resulted in a 60 day suspension, removal is justified.

UNION'S POSITION:

The failure to impose final discipline breaches the contract requirement which states that, "The acting agency head shall make a final decision on the recommended disciplinary action . . . no more than 45 days after the conclusion of the pre-discipline meeting."

The post-discharge occurrence involved no behavior on the part of the Grievant. The Grievant had no post-discharge contract with the institution. The evidence is hearsay and irrelevant. The prior discipline was pre-contract and not judged on a "just cause" standard. Moreover, the incident of sexual harassment of co-workers is not similar to the charge involved in this case, i.e., employee/supervisor behavior. Lastly, the supervisor was in effect harassing the Grievant under the contract section covering supervisory intimidation.

ARBITRATOR'S OPINION:

The language of the contract was clearly violated. The final discipline was imposed 51 days after the pre-discipline conference rather than within 45 days as the contract mandated. The clear impact of the contractual language is that due process fairness is presumptively lowered for all employees after 45 days.

Grievance will be substantially upheld not on the merits but on a procedural error of the

employer. Grievant is to be fully reinstated subject to a 2 day suspension on condition that he agrees to see a reputable counselor for at least 6 months in order to work on appropriate interpersonal work behavior.

AWARD:

Grievance sustained in part.

SPECIAL NOTE:

This decision is important because it illustrates the importance of following the contractual language concerning the due process requirement that discipline be imposed not more than 45 days after the pre-discipline conference.

TEXT OF THE OPINION:

IN THE MATTER OF THE
ARBITRATION BETWEEN

Ohio Department of Mental Health

and

OCSEA/AFSCME, Local 11

Grievance No.:
G-87-0351

Grievant:
Gerald Gregory

Hearing Date:
July 24, 1987

For ODMH:
Ed Morales, OCB

For OCSEA:
Daniel S. Smith, Esq.
General Counsel

Present:

In addition to Mr. Morales, Mr. Smith, and the Grievant, the following persons were present: Betty Williams, (OCSEA Steward), Nellie Cline (OCSEA Steward), Daisy McLemore (employee-union witness), Janet Hansen (employee-union witness), Debbie Grier (union steward and witness), Steve Lieber (staff-representative), Steve Chessler (Assistant Attorney General (OCB), Virginia Brauer (ODMH personnel officer), Milan Djuricik (ODMH labor relations specialist), Jean Dunbar, R.N. (management witness), Ann Bak, R.N. (management witness), Frank Richcreek

(union witness, subpoenaed), Hank Brown (union witness, subpoenaed).

Preliminary Matters:

Both union and management gave the Arbitrator permission to record the proceedings on the understanding that the tape would be used solely to refresh the Arbitrator's memory and would be destroyed when the opinion was rendered. Both union and management agreed that the Arbitrator's opinion could be published. Witnesses were sequestered. Both parties stipulated that the matter was properly before the Arbitrator.

Facts:

Grievant is a Therapeutic Program Worker (TPW) at Western Reserve Psychiatric Habilitation Center. The Grievant was working the second shift (3:00-11:00 p.m.) on EC-II on October 2, 1986.

Approximately half way through the shift, 2 RNs arrived on EC-2. The exact time of the events is hotly contested between the Grievant and the two RN-supervisors. The time issue will be described below. The event in question is described by both parties in a very similar manner. The two nurses were Mrs. Dunbar, R.N., Supervisor of EC-2, and Ms. Bak, R.N., Supervisor of another area. Shortly after their arrival at the nurses station, the Grievant was called to the station to receive a personal call. Ms. Bak told him to be brief. The Grievant took his call and left. Ms. Bak walked out of the nurses station and down the hall. Mrs. Dunbar remained in the station; she was unable to see down the hall. TPW Walters was also in the nurses station. Ms. Bak, according to her own testimony, walked down the hall "for no particular reason," "just to fill the time while waiting." As she passed one of the patient's rooms, she observed a full Foley bag which was also improperly placed (too high). She looked around. According to her testimony, only one TPW was in sight: the Grievant. She observed that the Grievant was wearing gloves. She called him to the doorway and pointed inside and said "What do you see wrong with the room?" The Grievant replied, "The sheet over his head?" "The clothes on the floor?" "Is there a urine smell?" Ms. Bak repeated her question "What do you see wrong with the room?" The Grievant replied, "Tell me." "Be specific" "Why won't you tell me?" Ms. Bak said "No, I want you to tell me!" Ms. Bak repeated her question a third time. The Grievant replied, "Tell me what it is! I don't have time to play twenty questions. I'm. busy."

Ms. Bak told him that the Foley bag was too high and would cause the patient infection. The Grievant replied, "Is that all it is? It could have been done already."

The Grievant at some point said to Ms. Bak "I do not have to do what you say," and insisted that he was "right."

Ms. Bak told him that he was "making himself vulnerable to discipline."

He replied (he admitted) "You too!"

The Grievant fixed the bag and went back to work.

Ms. Bak alleged that during this conversation that the Grievant was yelling at her and being belligerent. She characterized him as rude and threatening.

Mrs. Dunbar said she could hear a "loud hollering" and after it continued, she stepped out in the hall and saw Ms. Bak walking towards her. At the hearing when asked "who was hollering?", Mrs. Dunbar replied ". . . at first I didn't pay attention . . . noise from the equipment (emphasis added) and patient noise" were constant. Later she paid attention and concluded that "it sounded like an argument." The words between Ms. Bak and the Grievant were observed by three, probably 4, people.

LPN Daisy McLemore was at the end of the hall passing out meds. This position is credible because both Mrs. Dunbar and Ms. Bak stated they were waiting on the unit to talk to Ms.

McLemore and had to wait because Ms. McLemore was passing meds. She said she could not hear everything because a large radio was on the hall floor near her and was playing. She said she overheard the Grievant ask 2 or 3 times, "What is it?", and she heard him say something about "guessing games."

At the end she heard him say, "If that's all it is -- I could have done that a long time ago." She described his manner as anxious not angry. She said he was very loud but that he is by nature loud.

Another TPW Janet Hanson had to pass by Ms. Bak and the Grievant to get materials from a nearby cart. She described the time as the "busiest time of night," "utter confusion," when direct care to patients was at its height. She said the hall was filled with cleaning people and patients, and a radio was playing loudly. She said she thought the machines had stopped as some of the workers were on break. She said she purposely spent little time near the two protagonists as possible. She testified that Ms. Bak by her tone seemed upset and was speaking more loudly than she usually did. TPW Hanson did not remember the Grievant's tone. However, she did remember that he was not being demeaning nor swearing.

Mr. Capps, an independent contractor, who was supervising the cleaning crew also testified that he overheard the two persons. He characterized the discussion as a "loud argument," "the exchange of heated words." He said Ms. Bak was "instructing" the Grievant and he was maintaining that he knew what he was doing and that he was "right"! Mr. Capps described the hallway as noisy: people working, patients walking around, a radio playing. He said the Grievant was not “threatening” but was "arguing his point forcefully.” Capps saw Ms. Bak as a "small weak woman who could not handle the situation." Also on the scene was TPW Thelma Walters. Ms. Walters was in the nursing station when Ms. Bak and Mrs. Dunbar arrived. Ms. Walters said that when Ms. Bak left the nursing station to walk down the hall, she followed her. She testified that she followed Ms. Bak because "I was curious.” They (the RNs) were there to discipline somebody. They came in "in a bad mood," and Ms. Bak walked out as if she were mad and I (Ms. Walters) wanted to see what she'd do next." According to Ms. Walters, Ms. Bak went in a patient's room and came out looking distressed. Ms. Walters claimed that she approached Ms. Bak and asked "Can I help you?" To which Ms. Bak allegedly replied "No, I want (Grievant)." Ms. Walters said she remained in the hall, back against the wall, and overheard the conversation between the Grievant and Ms. Bak. Essentially, Ms. Walters supported the conversation as delineated earlier. Ms. Walters said the hall was noisy, a cleaning machine was running, a radio (boom box) was playing, and the patient's TV was on. Ms. Walters described Ms. Bak's tone as "not loud" but harsh and quick. She said she could see Ms. McLemore at the other end of the hall passing out meds. She said the Grievant was loud, but that he did not threaten or swear. Ms. Walters did not testify at the pre-disciplinary hearing.

Ms. Bak denies absolutely seeing or speaking with Ms. Walters in the hall and does not remember any employee in the hall except the Grievant, i.e., she does not remember McLemore or Hansen. Ms. Bak said she kept asking the same question because "I was wondering why people in the area would leave a Foley bag like that." Ms. Bak was asked why she did not just tell the Grievant what was wrong and give him a direct order. She said because "people should be attuned to these things." She was asked if she were testing him. She said no, she was "amazed”. She admitted she did not know which employee was responsible for the patient or who had put him to bed, i.e., who was responsible for his care. She said she did not investigate further because the ward was under Mrs. Dunbar's supervision. Ms. Bak was asked if she was aware of how much training TPW's received on the proper placement of Foley bags. She said she did not know "but being a teacher myself . . . they should know that a Foley bag should be below the level of the patient's hips."

At the time of the incident, the Grievant maintained that his voice was loud because machines were running, and he had to speak over them. Much of the testimony involved various people's recollections as to when machines were running in order to pinpoint when the argument took place. People on both sides of the issues made contradictory and inconsistent statements. Mrs. Dunbar, a strong proponent of "No machines were running" referred in her testimony to the noise of equipment. Ms. Hanson, a union witness, said the cleaning people were on break so the machines were off. The testimony did not reveal clearly when the discussion took place.

After the incident, Ms. Bak returned to the nursing station where she and Mrs. Dunbar were approached by the Grievant and Ms. Walters who asked if they (the RNs) wanted to speak with them (the TAWs). Dunbar and Bak said no. Subsequently, Ms. Bak left EC-2. At 9:00 p.m., Debbie Grier, a TPW and union steward, asked to speak with Ms. Bak. Ms. Bak called Mrs. Dunbar to be present. Ms. Grier, according to her own testimony, asked Ms. Bak if the Grievant could apologize for speaking loudly and settle the matter. Ms. Bak refused the apology and said "the matter was not one of feelings but of proper patient care!"

About 10:30 Ms. Grier called Ms. Bak and said she had evidence that the machines were running, and hence the Grievant had to speak loudly. Ms. Bak and Mrs. Dunbar went back to EC-2 to check out this information. Ms. Grier and the Grievant had obtained the signatures of the cleaning personnel as to the time they used the machines on EC-2. The two RNs also met Mr. Capps, the cleaning supervisor. Ms. Bak maintains that when she got to EC-2 that the Grievant screamed, hollered, and "lunged" at her. Mr. Capps testified that the Grievant maintained he was right but did not scream, holler, or lunge. Ms. Grier said the Grievant was anxious to maintain his position but did not threaten or menace Ms. Bak. Mrs. Dunbar said the Grievant was pointing and shouting but did not "lunge or threaten" either Ms. Bak or herself.

Both Ms. Bak and Mrs. Dunbar wrote up the Grievant. Ms. Bak alleged that the Grievant had been insubordinate, neglected duty, lied, and was incompetent. Mrs. Dunbar alleged insubordination, neglect of duty, and lying. At the Arbitration hearing, Mrs. Dunbar said that the charge of lying was entered because the Grievant lied about the machines being run during the argument. The charge of incompetency was based, she said, on the incorrect placement of the Foley bag. She indicated that the events subsequent to the argument with Ms. Bak were the significant factor in her decision to discipline the Grievant. The subsequent events in her words "escalated and used up the whole evening and wasted everyone's time."

A pre-disciplinary conference was held on October 23, 1986 before Jean Damon, Assistant Superintendent (Patient Services). The Grievant was charged with violation of Center Policy #2-13 (23 & 27), Insubordination, Neglect of duty and failure of good behavior. On November 4, 1986 Ms. Damon recommended a 2-day suspension for "uncalled for verbal outburst with arguments which were demeaning to the Supervisor and failure to accept authority of the Supervisor." Ms. Damon found no direct order and hence no insubordination.

Ms. Damon testified that when she recommended the 2-day suspension, she was unaware of previous discipline. On November 18, 1986, the Superintendent approved the recommendation of Ms. Damon. The approval sheet indicated that a "Record of Discipline" was "attached". No evidence was presented as to whether the Superintendent was aware of prior discipline or exactly what item was "attached". On November 20, 1986, someone noted under the reviewer line that the previous discipline was a 60 day suspension, and therefore the Grievant should be removed. On December 9, 1986, someone (KH) indicated agreement with removal. On December 12, 1986, the Director of ODMH removed the Grievant for "Neglect of Duty" "loud, verbal outburst with arguments which were demeaning to the Supervisor." The letter said that the Grievant "had been previously disciplined <u>for the same or similar incident</u>" (emphasis added). This removal was transmitted to the Grievant by a letter dated 12/12/86 from the Superintendent. On December 16,

1986, the Grievant filed his grievance.

At the hearing, a copy of the previous discipline was introduced. The Grievant was suspended for 60 days for sexual harassment of co-workers. This discipline was pre-contract and was appealed to the State Personnel Board of Review which upheld the discipline.

At the Arbitration hearing, three employees including 2 supervisory personnel testified that subsequent to the suspension, Grievant's attitude and behavior significantly improved. His current supervisor, Mrs. Dunbar, stated that Grievant's work was generally adequate, as was his attitude.

Management sought to introduce post-discipline behavior on the part of the Grievant. The Arbitrator received the evidence solely toward the issue of remedy (See Hill and Sinicropi, Evidence in Arbitration FN #35 at p. 63).

On December 18, 1986, a psychologist called the institution and represented herself as the Grievant's therapist. She told the Superintendent that the Grievant had told her that "he felt like going to Western Reserve and blowing some people away." Subsequently, the medical director spoke with the same therapist and received the same information. No events occurred. The medical director did not investigate the status or qualifications of the caller.

Management's Position

Grievant's behavior with Ms. Bak was improper in that he raised his voice and was demeaning and threatening to a supervisor. The post-discharge incident clearly indicates that should the Grievant prevail, reinstatement would be an improper remedy. The failure to impose the final discipline within the contract guidelines did not prejudice the Grievant and should be waived. This behavior is similar to that which resulted in a 60 day suspension; therefore, removal is justified.

Union's Position

The failure to impose final discipline breaches Section 24.05 of the contract. The section of the contract is clear and unambiguous and negotiated precisely to give all employees due process.

The post-discharge occurrence involved no behavior on the part of the Grievant. The Grievant had no post-discharge contact with the institution or its administrators. The evidence is hearsay and irrelevant. No nexus has been shown between the discipline and the post-discipline evidence. The prior discipline was pre-contract and not judged on a "just cause" standard. Moreover, the incident of sexual harassment of co-workers is not similar to the charge involved in this case, i.e., employee/supervisor behavior. Lastly, the Supervisor was in effect harassing the Grievant and falls under Section 24.03: Supervisor Intimidation.

Discussion

Section 24.05 reads

§24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment. (emphasis added)

The ODMH clearly violated the language of the contract. The final discipline was imposed 51 days after the pre-disciplinary conference rather than within 45 days, as the contract mandated. Management argues that because no actual harm was proven to have accrued to Grievant that the contractual provision should be in essence waived, i.e., ignored by the Arbitrator. The actual harm to an individual grievant is not the central issue. The contract is between ODMH and the Union for the benefit of all the employees. The clear import of the contractual language is that due process fairness is presumptively harmed for all employees after 45 days. To ignore this negotiated and explicit requirement would not merely waive the Grievant's rights but the rights of all the employees.

As Arbitrator Tamoush said in a similar case (Los Angeles County, Department of Health Services and AFSCME (council 36 Local 119) Public Sector Arbitration Awards IV-426, at IV-429) "Parties must be able to expect reasonable and logical application of unambiguous contract language." As in that case, "the language (here) is so clear and respective parties' responsibilities so straight forward that full effect must be given to contract requirements. In another similar case, Arbitrator Hammer pointed out "After all, if there truly was no time restraint, what would prevent the Superintendent from waiting 60 days? Or 90 days? Or six months? Or even a year or more? Absolutely nothing!" (East Brunswick Board of Education and East Brunswick Educ. Assn., Public Sector Arbitration Awards IV-132 at IV-133.) Using Hammer's analogy on this case, could final discipline wait a year if no actual harm could be shown to the individual grievant? As Arbitrator Hammer suggested "If the time restraints are too limiting, let the parties negotiate a new time frame" (Id.).

The need for time limits in labor management grievance settlement is well settled. In City of Cincinnati v. IAFF/AFL-CIO, (Public Sector Arbitration Awards IV-340 at IV-341) Arbitrator Rankin Gibson said

"One of the most important aspects of the grievance process is promptness. Failure to settle grievances with dispatch frequently leads to labor unrest. Failure to process grievances timely renders difficult the resolution of dispute by reason of death, retirement, resignation of witnesses and loss of other evidence.

Where the contract contains clear time limits for filing and prosecuting grievances, the failure to observe them generally will result in a dismissal of the grievance if such failure to observe them is protested. Evidence of this principle in industrial jurisprudence has been explained on a number of occasions. See this arbitrator's decisions in Ranco Incorporated, 48 L.A. 974; Nicholson-Cleveland Terminal Co., 51 L.A. 1837; Perfection-Colby Co., 54 L.A. 699; Yoder Brothers, Inc., 62 L.A. 696, and the numerous cases cited therein."

Lastly in an Ohio arbitration appealed to an Ohio court, the court upheld the arbitrator who, in essence, found that the employer had defaulted by failing to adhere to contract time limits. (Ohio Council 8, AFSCME vs. Central State University, et al. 474 N.E.2d 647 (1985).)

Adhering strictly to the concept of default as used in courts would require the Arbitrator to sustain the grievance in whole. Arbitration, however, allows a just and fair result without strict adherence to such concepts.

Within the 45 day limit, Assistant Superintendent Damon recommended a two (2) day

suspension for Grievant. Upon review of the facts, the Arbitrator finds that disciplinary result to have been fair and just under the circumstances. The employer no doubt would argue that such a decision ignores prior discipline. However, that argument highlights the second procedural error on the part of management. Moreover, the evidence is not clear and a fair reading of the disciplinary recommendation suggests that the Superintendent was aware of the prior discipline. Some merit lies in the Union's argument that the prior discipline was pre-contractual and decided under a lesser standard. The purpose of discipline is to rehabilitate, and evidence was adduced that the Grievant's behavior was improved subsequent to his suspension.

Lastly, the substance of the case boils down to failure of good behavior on the part of the Grievant. The original charge of insubordination was dropped by the institution. The charge of "lying" was boot-strapping at best.

Lest the Grievant believe that the Arbitrator condones his behavior, let him note that his grievance will be substantially upheld not on the merits but on a procedural error of the employer. In his testimony, the Grievant indicated that he understood that the proper response is "Do it, then grieve." His understanding should be expanded. Do it, behaving appropriately and with a respectful attitude, and then grieve." Moreover, under a correct procedural posture, Grievant's prior discipline would have borne heavily against him.

The behavior of the nurse-supervisor does not rise to the level of supervisory harassment. In a medical institution such as WRPHC, chain of command and supervisory prerogatives are especially important for reasons of safety and patient care. However, the Arbitrator must question the wisdom of "instruction" using the Socratic method in the midst of one of the busiest patient care times. With perfect 20-20 hindsight, the Arbitrator wonders if Ms. Bak might not have accepted the Grievant's proffered apology and then utilized the opportunity to teach proper Foley bag care?

Award

Grievance sustained in part.

Grievant is to be fully reinstated subject to a two (2) day suspension on condition that he agrees to see a reputable counselor (selected mutually by the Union and Assistant Supervisor Jean Damon) for at least 6 months in order to work on appropriate interpersonal work behavior. The Grievant shall present the Assistant Supervisor with proof of attendance at counseling sessions (schedule to be worked out between Union and Employer). The Arbitrator recommends that Grievant not be assigned to an area supervised by Ms. Bak or Mrs. Dunbar.

August 25, 1987
Date

Rhonda R. Rivera, Arbitrator