

ARB Decision #1001

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – OHIO VETERANS' HOME AGENCY

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Kathy Bowman

Case No. 33-00-20070822-0143-01-05

Date of Hearing: April 22, 2008

Place of Hearing: Sandusky, Ohio

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OCSEA-OFFICE OF
GENERAL COUNSEL

APPEARANCES:

For the Union:

Advocate: Robert Robinson, OCSEA Staff Representative

2nd Chair: Carolyn Smith, Chapter President

Witnesses:

Vanessa Brown, Account Clerk

Robert Robinson, Staff Representative

Kathy Bowman, Grievant

For the Employer:

Advocate: Buffy Andrews, Labor Relations Officer

2nd Chair: Joe Trejo, Office of Collective Bargaining

Witnesses:

Joe Trejo, Office of Collective Bargaining

Craig Selka, Food Service Manager

Donna Green, Labor Relations Officer

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: June 5, 2008

INTRODUCTION

This grievance is before the Arbitrator pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2006 through February 28, 2009, between the State of Ohio, Ohio Veterans' Home ("OVH") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the ten (10) day suspension of the Grievant, Kathy Bowman ("Bowman"), for violating the OVH Correction Action Standard AN-06, Failure to Follow Policy/Procedure – No. 10-Div-S (e.g., failure to follow policy, procedure, or program which was implemented specifically for resident safety or well being; failure to report abuse) and I-04, Failure to Fully Cooperate in an Investigation (e.g., truthfully and completely answering questions) or making false statements to investigative officials (including but not limited to any verbal or written statement).

The Grievant was disciplined on August 17, 2007, and she appealed the discipline in accordance with Article 24 of the CBA. This Arbitrator heard the grievance on April 22, 2008, and both parties had the opportunity to present evidence through witnesses and exhibits at the hearing. The parties agreed to post-hearing oral statements, and the record was closed on April 22, 2008. The matter is properly before the Arbitrator for determination.

BACKGROUND

The Grievant received a ten (10) day suspension for failing to fully cooperate during an investigation and failing to report conduct of co-workers who accepted

monies or gifts from residents of the Ohio Veterans' Home. The Grievant worked in the Dietary Department and reported to Craig Selka ("Selka"), Food Service Manager.

In November 2006, the Employer was conducting an investigation of employees in the Dietary Department who were accused of accepting money or gifts from residents. The individuals involved were either current and/or former employees of OVH. JoAnn Grissom ("Grissom"), Robin Criswell ("Criswell"), Molly Clark ("Clark") and Mary Wright ("Wright") were identified as the individuals under investigation. They were suspended while the investigation was occurring. On November 17, 2006, the Grievant was interviewed by Selka and asked, in part, the following question:

Q. "Are you aware of any employee receiving money or gifts from a resident?"

A. I haven't seen anything like that." (Joint Exhibit (JX) 4, pp. 11-12).

As a result of the investigation, several employees including Grissom were removed from service. Grissom's discharge grievance was heard by Arbitrator John J. Murphy ("Murphy") during an arbitration hearing on April 11, 2007. Arbitrator Murphy's decision was offered into evidence and utilized by both parties throughout the hearing in support of their respective positions. Both parties agreed that certain background information, underlying issues and policies involved were comparable to the issues in this hearing. During the Grissom hearing, the Grievant testified that she was aware of an employee who had accepted money from a resident but did not report it to Management.

On May 29, 2007, the Grievant was re-interviewed by Donna Green ("Green"), Labor Relations Officer, in response to the testimony she presented in the Grissom hearing. Grievant was asked, in part, the following questions:

Q. "Did you testify that you knew about relationships that were taking place at the Vets Home?"

A. Yes.

Q. Did you testify that you seen [sic] money exchange hands between Harriett Connelly and Steve Jett?

A. I might have.

Q. Why didn't you report this when you seen [sic] this happen?

A. Didn't report anything. There were other employees who saw what was going on as well." (JX 4, p. 9).

Because of her arbitration testimony and the responses she provided when she was re-interviewed, the Grievant was charged with violation of OVH Corrective Action Standard I-04 and AN-06. The pre-disciplinary meeting was held on July 27, 2007, and just cause was found by the Hearing Officer.

Management contends that the November 17, 2006 statement was inconsistent with the Grievant's arbitration testimony and her May 29, 2007 statement. The Union contends that the questions asked during the investigation are not the same as those asked during the arbitration hearing because the arbitration questions dealt with past conduct while the investigatory interview questions pertained to current knowledge involving Grissom, Crissell, Clark and Wright. The Union further contends that Management knew of past relationships between employees and residents and they were not charged with any violations of OVH policy.

The Grievant was employed for over fifteen (15) years and had no prior discipline of record. The Union contends that the issuance of discipline was retaliatory because of her arbitration testimony and that just cause is absent in this matter. The Employer

submits that it considered the Grievant's longevity and disciplinary record in assessing this discipline and, as a result, decided that suspension, not removal, was appropriate.

ISSUE

Was the ten (10) day suspension for just cause? If not, what shall the remedy be?

**RELEVANT PROVISIONS OF THE CBA AND
OHIO VETERANS' HOME
CORRECTIVE ACTION STANDARDS**

ARTICLE 24 – DISCIPLINE

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 377.02(1).

**OHIO VETERANS HOME
CORRECTIVE ACTION STANDARDS (in part)**

RESIDENT ABUSE/NEGLECT

STANDARD CODE	CORRECTIVE ACTION	1 ST INFRACTION	2 ND INFRACTION	3 RD INFRACTION	4 TH INFRACTION	5 TH INFRACTION
AN-06	FAILURE TO FOLLOW POLICY (RESIDENT RELATED) (e.g., failure to follow a policy, procedure, or program which was implemented specifically for resident safety or well being; failure to report abuse	Written Reprimand To Removal	5-Day Time/ Work Suspension Or Fine To Removal	Removal	N/A	N/A
I-04	FAILURE TO FULLY	2-Day Time/Work	5-Day Time/Work	Removal	N/A	N/A

STANDARD CODE	COOPERATE IN AN INVESTIGATION (e.g., remaining until all questions are answered, truthfully and completely answering questions OR MAKING FALSE STATEMENTS TO INVESTIGATIVE OFFICIALS, FALSIFYING OFFICIAL REPORTS, MISREPRESENTATION, OR FRAUD (including, but not limited to, employment application, KRONOS, travel expense reports, official documents, any verbal dialogue or written statement)	Suspension Or Fine To Removal	Suspension Or Fine To Removal			
		1 ST INFRACTION	2 ND INFRACTION	3 RD INFRACTION	4 TH INFRACTION	5 TH INFRACTION

**OHIO VETERANS HOME
PROCEDURE NO. 10-DIV-4-S (in part)**

All Staff

1. Upon receiving a report of known, alleged, or suspected abuse, neglect, or misappropriation of property regarding a resident immediately contacts the Charge Nurse.
2. Provide Charge Nurse with as much detail as you know (i.e. Resident name, what, when, etc.)

**OHIO VETERANS HOME
POLICY NO. 4 (in part)**

It is the basic right of every resident of the Ohio Veterans Home to be free from physical, verbal, mental, and emotional abuse; nor shall they be neglected. In addition, the property of residents shall be respected, protected, and guarded against misappropriation.

The residents of the Ohio Veterans Home are dependent on the services provided by its employees for their health, safety, comfort, and general well being. Thus, employees may be in a position to secure things of value from residents under their care. While under certain circumstances, things of value may be offered voluntarily by a resident to an employee without any use by the employee of his/her official position, the mere acceptance of things of value offered by a resident can create a conflict of interest for the

employee. Therefore, employees of the Ohio Veterans Home shall not accept loans, gifts of money, or non-monetary gifts of substantial value from residents.

While the Board recognizes that some personal interaction between Ohio Veterans Home staff and residents contributes positively to the quality of care provided to residents, employees shall conduct themselves professionally in their dealings with residents, recognizing the potential of a conflict of interest. Specifically, employees shall be prohibited from developing relationships with residents that are sexual in nature.

Every allegation of possible resident abuse or neglect, or misappropriation of a resident's property shall be thoroughly and zealously investigated and reported appropriately as required by state and federal law. Employees found to have abused, or neglected residents, or misappropriated their property, shall be promptly disciplined, to include discharge in egregious cases. In cases where the investigation reveals that the employee misconduct may rise to the level of possible criminal activity, a referral shall be made to the office of the prosecuting attorney.

POSITION OF THE PARTIES

EMPLOYER'S POSITION

The Grievant provided different answers during the Grissom arbitration hearing than she gave during an investigatory interview five months earlier. At the arbitration hearing in April 2007, the Grievant testified that she had knowledge that a co-worker had accepted money from a resident, but had not reported it.

However, on November 17, 2006, when asked "... are you aware of any employee receiving money or gifts from a resident?", the Grievant stated that she "hasn't seen anything like that." (Employer's Opening Statement, p. 1). The Grievant admitted that she was aware of Policy 4, OVH Work Rules and her duty to report if she had knowledge of a co-worker who had received something of value from a resident.

OVH is responsible for the health and welfare of veterans who served America during armed engagements with other countries. The Grievant's initial involvement as

someone who might have some information required her to answer all questions truthfully and completely. The Grievant's failure to state in November 2006 that she had knowledge of the co-worker receiving money was a false statement in violation of Corrective Action Standard I-04. Even if her reply is somehow deemed not to be false, she certainly did not fully cooperate during the investigation.

Numerous other employees in addition to the Grievant were interviewed and were asked similar questions on November 15, 16 and 17, 2006. (Management Exhibits (MX) 2, 3, 4, 5, 6 & 7). The Grievant's belief that the question only related to employees currently receiving gifts or money is not shared by others. The following questions were asked on February 19, 2008 during the Employer's re-interview of several co-workers:

Q. "On November 17, 2006 you were asked in an investigatory interview if you were aware of any employee receiving money or gifts from a resident, you answered "No." Do you stand by that answer?

A. Yes.

Q. Did you understand the question to mean any employee during your employment at the Vets Home?

A. Yes.

Q. Did you understand the question to mean current and former employees since you've worked here?

A. Yes." (MX 3).

Therefore, the Union's position that the Grievant answered the question because it was phrased in the present tense, i.e., receiving, and not the past tense, is not shared by other co-workers who were asked similar questions. Also, if the Grievant did not understand the question(s), she could have indicated so on the interview form prior to signing it in either November 2006 or May 2007.

Not only did the Grievant fail to seek clarification on any of the interview questions in November 2006 or May 2007, but she also remained evasive in both interviews. As example, on May 29, 2007, the Grievant was asked:

Q. "Did you testify that you seen [sic] money exchange hands between Harriett Connelly and Steve Jett?"

A. I might have.

Q. Why didn't you report this when you seen [sic] this happen?"

A. Didn't report anything. There were other employees who saw what was going on as well." (JX , p. 9).

Simply, the Grievant's conduct violated AN-06 – Procedure No. 10-Div-S because she failed to follow policy, and her conduct was egregious. The Grievant's longevity and work record were considered prior to implementing the ten (10) day discipline.

UNION'S POSITION

The Grievant, a long-term employee with no prior discipline, received a ten (10) day suspension without just cause. The Union points to three areas that are fatal to the Employer's position: (1) the Employer asked the questions on November 16, 2006 in the present tense, as opposed to the questions which were asked in February 2008, which were in the past tense; (2) Policy No. 4 must be read as a singular policy, and Management was aware of numerous violations without applying discipline in a fair and consistent manner; and (3) as previously determined in the Grissom arbitration decision, Management enforced its rules in a lax manner at all times relevant to this issue.

The Union contends that the key question in the November 16, 2006 interview asks if the Grievant had knowledge of co-workers "receiving" gifts or money, which is in

the present tense, not the past tense. The Grievant was involved in the interview because co-workers Grissom, Criswell, Clark and Wright were under investigation. Her response was truthful. The Employer simply failed to ask the right question(s). If the Employer had asked the same questions that are contained in the February 2008 interviews, but included the following:

- Do you understand the question to mean any employee during your employment? or
- Did you understand that question to mean current and former employees since you've worked here?

a different answer would have occurred.

The Grievant's response to the questions presented her was correct, and no clarification was required because the Grievant was not aware of any employee who was receiving money from a resident. The Grievant believed the interview involved the suspended employees, i.e., Grissom, Criswell, Clark or Wright, and she was unaware if they were receiving money from any residents.

The Union admits that the Grievant was aware of past incidents involving the staff and resident(s) pertaining to gifts, monies and sexual relationships. Vanessa Brown ("Brown"), former local chapter president, indicated that staff, as well as supervisors, knew about past involvements between the employees and residents. Specifically, Selka, the Grievant's supervisor, had knowledge of past incidents that came to light in the Grissom matter as well.

The Union indicates in the Grissom decision that Arbitrator Murphy found that lax enforcement by the Employer in enforcing Policy No. 4 precluded the presence of

just cause for Grissom's removal. The Union further contends the same rationale is applicable here in that if the Employer was aware of past incidents and failed to report them, the Grievant cannot be disciplined for engaging in the same conduct. It is unrefuted that supervisor Selka acknowledged under oath, that an employee married a resident in the chapel at the Veterans' Home. He further acknowledged that employees Linda Laws ("Laws") and Harriett Connelly ("Connelly") had relationships with residents while working in the dietary department. Selka's testimony in the Grissom hearing was more egregious than the Grievant's, and no evidence was offered to substantiate the different treatment received by Selka, who was not disciplined, and the Grievant, who was. Selka's testimony on April 11, 2007, that he had knowledge of the Connelly relationship with a resident, resulted in no discipline. However, the Grievant, who testified on April 11, 2007 she was aware that Connelly had received money from a resident, was disciplined.

Finally, the Union contends that the issuance of discipline to the Grievant was to intimidate her from providing future testimony in the pending Criswell matter or to retaliate against her for her participation in the Grissom arbitration. Either reason renders the discipline improper. The Union seeks that the Grievant be made whole and the ten (10) days removed from her record.

DISCUSSION AND CONCLUSION

Based upon the sworn testimony at the hearing and the exhibits, the grievance is granted. My reasons are as follows:

The purpose of the Employer's standards regarding neglect or abuse is unambiguous. OVH corrective action policies AN-06 and I-04 are based upon the fact

that Policy/Procedure No. 10-Div-4-S was violated when the Grievant did not immediately contact the charge nurse and report the Connelly incident, which occurred prior to her November 17, 2006 statement.¹ It is also undisputed that the Grievant was aware of the policy and its requirements.

The Union and the Employer agree that the policy required an immediate reporting if and when an employee had knowledge of any violation of Policy No. 4, which precludes employees from receiving any gifts of money, non-monetary gifts and/or developing relationships with residents that are sexual in nature. (JX 17). The question exists as to why Selka or the Grievant did not immediately report the Connelly incident.

Although the parties spent a considerable amount of time on the correct use and/or interpretation of the present or past tense of the word "receive," this Arbitrator believes that the enforcement, or lack thereof, of the reporting criteria contained in Policy No. 4 via Procedure No. 10-Div-4-S lies at the heart of this dispute. However, a review of Grievant's answers and her co-workers indicates evasiveness, but not falsification. The written questions contained on the November 2006 interview form are subject to various interpretations and could have been drafted differently by the Employer to obtain the precise information it sought.

The record indicates that, from approximately 1995 until 2006, the Employer did not investigate relationships and/or other improprieties involving gifts or money received by employees from residents. The record is silent on any efforts undertaken by the Employer prior to November 2006 to put its employees on notice that certain

¹ The record is void as to the exact year or month of the Connelly incident, but the record indicates that the Employer from 1995 until the fall of 2006 did not enforce violations of Policy No. 4.

policies/procedures which were previously unenforced would no longer be ignored. In other words, if relationships or exchange of money were tolerated by the Employer under Policy No. 4, were the employees obligated to comply with Policy No. 4? The record indicates that Selka was aware of at least three (3) relationships of a sexual nature that had occurred and were generally known to other employees. Arbitrator Murphy found that the Employer's lax enforcement of its policy ". . . lulled the employees into a sense of toleration by the Employer of acts that would otherwise be a violation of the policy. OCSEA v. State of Ohio, Ohio Veterans' Home, 33-OD-20070122-0012-01-05 (Arb. Murphy, 2007) p. 16. I agree.

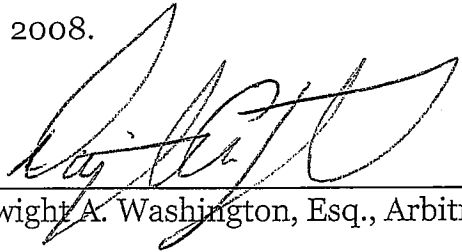
The record indicates that prior to the suspension of employees Grissom, Criswell, Clark and Wright, the Employer had not enforced Policy No. 4 even though the Employer had actual knowledge of violations. On cross examination, Selka admitted that he had actual knowledge of sexual relationships between staff and residents, including Connelly's relationship with a resident. Selka, similar to the Grievant, was required to report the Connelly relationship but failed to do so. The record is silent as to the discipline issued to Selka for failure to comply with the same policies under which the Grievant was suspended. Given Management's lax and/or failure to enforce Policy No. 4² and Procedure No. 10-Div-4-S in the past, just cause does not support the decision to suspend the Grievant for ten (10) days.

Furthermore, the Grievant's failure to report any information under Policy No. 4 prior to November 2006 occurred in an environment indicating that relationships or the

² Policy No. 4 proscribed a variety of prohibited conduct by employees with residents including but not limited to: accepting of loans, gifts of money, non-monetary gifts, and developing relationships of a sexual nature. At the hearing, Policy No. 4 was offered as one policy and separate subsections do not exist to delineate that a violation can occur of only a portion of the policy. Therefore, Policy No. 4 was set forth as one policy, and will be treated as one policy.

exchange of items of value was known and tolerated by OVH Management. Given the facts in this matter, the grievance is granted, and the Grievant will be made whole for lost wages and any other benefit during her suspension.

Respectfully submitted this 5th day of June, 2008.



Dwight A. Washington, Esq., Arbitrator