OPINION AND AWARD
Case No. 24-06-(2008-03-07)-0011-01-04

In the Matter of the Arbitration
- between -
State of Ohio
Department of Mental Retardation
and Developmental Disabilities
Columbus Developmental Center
- and -
Ohio Civil Service Employee Association,
Local 11

#1012

Arbitrator: John J. Murphy
Cincinnati, Ohio

For the Employer: Laura J. Frazier
Labor Relations Manager
Ohio Department of MRDD
30 E. Broad Street, 13th Floor
Columbus, Ohio 43215

Antoinette Wallace
David Ott

Victor Dandridge
Office of Collective Bargaining
100 E. Broad Street
Columbus, Ohio 43215

Also Present: Amanda Kelley
Supervisor

Wanda Johnson
Direct Care Employee

Steve Gossing
Direct Care Employee

For the Union: William A. Anthony, Jr.
Staff Representative
OCSEA
390 Worthington Road, Ste. A
Westerville, Ohio 43082-8331

Lloyd Williams
Chapter President

Also Present: Ciara Williams
Grievant

Terri Riley
Stephanie France
Richard Dailey
Direct Care Employees

BACKGROUND:

A.) The Parties

The Employer operates residential centers for persons with mental retardation levels of severe and profound. The persons are unable to live in community-based housing. At issue in this case is the care of such residents in Cedargrove (CG) unit 3. CG3 houses 8 male residents--one suffering from pica, some self-abusive, some aggressive to others. Some need bathroom and eating prompts and assistance.

Therapeutic Program Workers (TPW) provide direct care to the residents. They ensure the safety and provide the active treatment and care for the residents. The locus of care for the 8 residents in CG3 was shared by the Grievant and another TPW, W. Johnson.

CG3 contains a living pod consisting of 2 bedrooms, a living room, and a bathroom. The pod opens to a hallway with doors to a dining room and a door to a laundry room. The dining room and the laundry are shared with another living pod, CG4, staffed by two other TPW's, T. Battle and S. Gossing. The staff of 4 TPW's for CG3 and 4 also share a break room, two bathrooms, and a vending area reached through a separate hallway. A. Kelley, a Qualified Mental Retardation Professional (QMRP) directly supervisors the four TPW's (including the Grievant) who provide care to the 16 residents in CG3 and 4.

B.) The Discharge

The four TPW's under the supervision of A. Kelley were working on Sunday, February 3, 2008, on the first shift--6:15 a.m. to 2:45 p.m. CG3 was the assigned work area for the Grievant and Johnson. The Grievant was discharged for being out of the work area for an extended period of time--approximately 6:30 a.m. to 7:30 a.m. This was found to have violated one of the standards of conduct entitled "Idleness/Failure to Work or Complete Assigned Duties." The discharge was based upon this violation as well as four prior disciplines falling within the Standards of Conduct relating to performance.

The factual basis for the finding of the violation was set forth in the removal letter to the Grievant.

> On February 3, 2008, you were assigned to work in Cedargrove 3, first shift 6:15 am to 2:45 pm. On this day you were out of the work area for an extended period of time. The QMRP entered the Cedargrove Work area at approximately 6:55 am and determined you were not in the work area. She was told that you had been out of the area since approximately 6:30 am. Ms. Kelley waited in the work area until 7:25 am before deciding to go look for you. At 7:30 am, you eventually returned to the work area. You failed to notify the Grounds Office about your extended absence from the work area.

STIPULATED ISSUE:

Was the Grievant, Ciara Williams, disciplined for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS AND RULES OF THE EMPLOYER:

The Union referred to the following provisions found in Article 24--Discipline in the contract.

24.01 - Standard

The Employer has the burden of proof to establish just cause for any disciplinary action. . . .

24.02 - Progressive Discipline

The Employer shall follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. . . .

24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee. . . .

The parties referred to the following provisions found in the Employer's Standards of Conduct, Rules Violations, and Penalties.

. . .

IV. Investigation

During an investigation, employees may be placed on administrative leave . . . at the discretion of the Appointing Authority. . . . Administrative leave . . . will not be of an unreasonable duration and do not constitute discipline.

VI. Progressive Discipline

. . .

Prior to the imposition of any discipline, the employer will consider the individual facts of the case, which may be mitigated or aggravated by other factors, and the seriousness of the offense including, but not limited to, the employee's current disciplinary record and length of service.

. . .

The standard guidelines for progressive discipline grid reflect two separate tracks for progression of discipline. A "track" is defined as the grouping of offenses which will be considered same and similar in nature. Continued violations within the same track shall lead the employee through progressive discipline. There is a Performance Track and an Attendance Track. The tracks are separate and distinct for discipline purposes.

Performance Track

Neglect of duty.

Violation	1st Offense	2nd Offense	3rd Offense	4th Offense	5th Offense
Idleness or Failure to Work or Complete Assigned Duties	Oral Reprimand	Written Reprimand	2-Day Time/Work Suspension or Fine	5-Day Time/Work Suspension Or Fine	Removal

OPINION:

This opinion reflects the major divisions between the parties. First, what happened in CG3 between 6:30 and 7:30 am on Sunday morning, February 3, 2008? Was the Grievant absent from her assigned work area for this period of time as claimed by the Employer?

Assuming that the Employer has met its burden of proving its factual allegations, is removal commensurate with this offense? Beyond these questions are the affirmative defenses raised by the Union. The Union has the burden of supporting its allegations that the removal was punitive by the supervisor, A. Kelley; that the removal was not progressive; that the removal was tainted by several due process deficiencies. They included several charges. The daily log for activities and times for the 1st shift for February 3, 2008 was missing. The supervisor was biased against the Grievant. She also took four days to raise with the Grievant the Grievant's alleged absence from the assigned workplace on February 3. Finally, the investigation was unfair and impartial in that it was conducted by the supervisor.

A.) What Happened in CG3 on February 3, 2008 Between 6:30 to 7:30 a.m.?

The shift began with the Grievant making rounds at 6:20 a.m. of CG3 with the TPW from the 3rd shift who was concluding his shift at 6:30 a.m.[1/] One or two of the eight residents had arisen from bed.

The record shows that both the Grievant and Johnson were in the dining room shared with the staff from CG4 at 6:30 a.m. Johnson completed a written statement as to what transpired in the next hour. The statement was made part of the record as included in the investigation by the Employer. Johnson's sworn testimony at the arbitration hearing was consistent with the statement. The statement read:

> On Feb. 3 2008, Ms. Williams (the Grievant) left area about 6:30 am stated she was going to bathroom. At about 6:55, Amanda (the Supervisor) came into kitchen area (dining/kitchen area). Asked if I would make rounds with her and then asked who was working with me; I told her that Ms. Williams was and she was in the bathroom. Ms Kelley sat in the kitchen with me while I was getting food ready for meal replacement. Ms. Williams returned to kitchen area around 7:30 a.m. and stated to me she had diarrhea.

[1/] Johnson testified that she also accompanied the Grievant and the 3rd shift TPW on the review of CG3. This difference in recollection between Johnson and the Grievant is immaterial because making the rounds of CG3 prior to 6:30 a.m. is not related to the problem in this case.

There is an enormous gulf between the testimony of Johnson and the Grievant on what happened between 6:30 a.m. and 7:30 a.m. in CG3. The Grievant testified that she told Johnson that she was sick with stomach problems and was going to the bathroom at about 6:30 a.m. She did not simply say that she was taking a bathroom break. Furthermore, the Grievant stated that she re-entered the CG3 dining/kitchen area at about 7:05 a.m. and observed Johnson and a CG4 employee, S. Gossing, present. The Supervisor was not present.

The Grievant testified that at about 7:15 a.m. she went back to the dining room/kitchen area of CG3 and said to Johnson, I am sick, "and I'm going back to the bathroom." She further stated that the CG4 employee, S. Gossing, was present when she made this statement.

The Grievant did not testify about her relationship with her co-employee Johnson. This was curious because the Grievant's testimony occurred after Johnson's extensive description of their relationship. Johnson displayed a concern for her co-employee, the grievant. She testified that they had worked together for about a year, and --in Johnson's view--had a fairly good working relationship. Johnson stated that the Grievant did leave her assigned area in the past for periods of 30 to 40 minutes, and that she (Johnson) did not report these instances. Johnson testified that she spoke to the Grievant

about these absences and the consequences. In answer to the Grievant's question, "Why do you want me to be here (in the assigned area)?" Johnson's answer was: "You have children at home, and I don't want to you to get into trouble and lose your job and put me in the middle of it." Johnson concluded that this was the situation that she was now facing as she had to testify at the arbitration hearing.

Johnson also exhibited a desire to protect the Grievant. She testified about a conversation with the Grievant after she had submitted her written statement requested during the Employer's investigation. The Grievant asked her why she had written the statement. She testified that she answered the Grievant question:

> I wrote it because I was asked to do it. Kelley (the Supervisor) was with me from 6:50 to 7:30. What did you want me to say?

None of Johnson's comments about her relationship with the Grievant were denied or explained by the Grievant. We are left with the sad conclusion that the Grievant told Johnson that she was going to the bathroom at 6:30 a.m. and did not return to the assigned workplace until one hour later.

There is in this record considerable reference to the practice of TPW's notifying their co-employee of the need for a bathroom break, absenting themselves for that purpose and returning to the workplace--all without any notice to a

supervisor. There is also in the record a "Read and Sign" which was signed and dated by all the TPW's in CG3 and CG4. The document states:

> Staff should only be off their assigned areas for their assigned breaks. There is no reason to visit other living areas during your shift. If you need to leave your area for a specific reason, please notify your co-worker as well as (your supervisor) or grounds office supervisor.[2/]

All of the witnesses for both the Employer and Union agreed that the Read and Sign document requiring notice to a supervisor did not apply to momentary bathroom breaks.

The Grievant appeared to recognize that even her version of facts did not include a momentary absence for a bathroom break. Pressed to explain why the Grievant did not telephone the grounds office supervisor on the morning of February 3, she testified at two points that she and Johnson had an agreement. "I had a deal with Johnson and I told her I would be gone for a long time." Johnson directly rebutted this suggestion of an agreement between her and the Grievant. "There was no agreement between us about her being in the restroom for a long period of time."

2/ The grounds office supervisor refers to an office staffed on a 24-hour 7-day a week basis. The office is staffed by a supervisor to receive telephoned notices by employees of the need to be away from their assigned area. Should this need occur when the direct supervisor is not present, the TPW telephones the grounds office supervisor.

This resolution of the conflict in testimony between Johnson and the Grievant influences the appraisal of other conflicts in the record. The Grievant testified about a conversation she had had with TPW Battle in a hallway just outside a door to the dining room shared by CG3 and 4, and just in front of a door to the laundry room. Battle also testified about the conversation and stated that she saw the Grievant at the conclusion of the conversation go through the door to the dining room of CG3 and 4. She further testified that she saw Johnson and Gossing sitting in the dining room but the supervisor Kelley was not present in the dining room.

Both Johnson and Gossing who were sitting in the dining room testified that they never saw the Grievant and Battle engaged in a conversation in the hallway just outside the door to the dining room. Johnson stated that she would have seen Battle and the Grievant because this portion of the hallway by the laundry room is immediately at the door to the dining room. Johnson also stated that the premises were quiet at this time in the morning and most of the residents were not up yet. Therefore, she would have heard any conversation at this part of the hallway.

Battle incredibly testified that "they (Johnson and Gossing) could not hear us (Battle and the Grievant) talking." This is incredible because at the same time Battle testified

that the premises are quiet in this area at this time in the morning.

We are, therefore, left with the conclusion that the Grievant told her co-worker that she was taking a bathroom break at 6:30 a.m., left her assigned work area, and did not return until 7:30 a.m. This is a period of absence from her assigned workplace that is not covered by the privilege to take momentary bathroom breaks. It is a period of absence from the workplace for which the Grievant had a duty to notify her supervisor who was sitting in the CG3 dining room from 6:55 to 7:25 a.m. with a return at 7:30 a.m. Failing to notify her supervisor would then give rise to a duty by the Grievant to notify the grounds office supervisor who is available 24 hours a day 7 days a week. We now turn to the affirmative defenses raised by the Union.

B.) Was the Discharge Punitive?

The Union concentrates upon the Grievant's supervisor as a source of bias against the Grievant concluding in a decision to discharge the Grievant as punishment. The Union points first to the fact that the Grievant was placed on an administrative leave from November 4, 2007 to January 15, 2008. There then follows two weeks ending in the discharge of the Grievant.

The record shows, however, an administrative leave is not discipline, but is a discretionary decision by the Employer incident to an investigation of any resident abuse.

Nothing in this record connects the administrative leave to the decision to discharge the Grievant for a 1-hour absence from the assigned workplace.

It is misdirected to point to the Grievant's supervisor as the cause of her problem on February 3, 2008. It was not the supervisor's testimony that was the source of the finding that the Grievant was away from her assigned workplace. It was the testimony by co-employees, one of whom demonstrated that she cared for the Grievant and was protective of the interests of the Grievant.

C.) Is Discharge Consistent with the Principles of of Progressive Discipline?

These principles are multifaceted, but in the context of this case, two questions occur. Was the Grievant given fair warning that discharge could result from an excessive absence from the workplace, and is discharge commensurate with the offense?

Discharge is clearly stated to be the sanction for a 5th occasion of a violation of the Standards of Conduct set forth in the Performance Track of the Employer's policy. The Union, however, appeals to the contract between the parties and questions whether the Grievant was given fair notice of the imminence of discharge for this offense, and the proper balance between the offense and the extreme measure of discharge.

The Grievant had been a TPW for less than two years, and during this period of time she had been warned or disciplined for being away from her work area three times before the fateful February 3, 2008 incident. Absence from work area in CG3 and 4 became such a problem that the supervisor required the Read and Sign to be completed by each TPW. In September 2006, the Grievant received a reprimand for being away from her work area. Finally, the Grievant received the 5-Day Penalty and Fines just two weeks before February 3, 2008. One of the three violations that led to this sanction was Idleness/Failure to Work or Complete Assigned Duties. The factual basis for this violation was:

> During the investigation it was also determined that, during your shift on November 23, 2007, you were not actively engaged in work but rather were found to be off the work area performing non work-related items, including completing school assignments on workplace computers.

It is difficult to accept the proposition that this Grievant deserved more attention to the need to notify supervisors of lengthy absences from the assigned workplace.

The nature of the Grievant's work clearly commands notice to supervisors of any extensive absence from the workplace other than a momentary bathroom break. The Grievant's position is not to occupy a desk. The Grievant's duties include ensuring the safety of residents with mental disabilities of a profound and

severe nature, some of whom are self-abusive or aggressive to others.

There is nothing in this record to indicate that an untoward event occurred in CG3 while the Grievant was absent for one hour. This, however, does not lessen the finding that the Grievant exhibited disregard for the performance of her duties of care to the residents, a matter for which she had been amply warned on previous occasions.

D.) If the Grievant Was Suffering From Diarrhea, Would This Mitigate the Sanction of Discharge?

While the evidence is equivocal, the preponderance does point to a finding that the Grievant was suffering from diarrhea during the morning of February 3, 2008.

The Grievant did have diarrhea but this in and of itself does not excuse the Grievant from her duty to notify supervision of her absence and her consequential inability to care for her residents. It does not give her the privilege to wander through the halls, talking to other employees seeking medicine.[3/]

[3/] The record shows that the Grievant did open the door to the dining room shared by TPW's responsible for CG1 and 2, and spoke to Stephanie France and Terri Riley seeking medicine for her upset stomach. On the facts, the Grievant had a duty to inform supervision of an extensive (1-hour) period of absence from her area of care for the residents.

The fact that the Grievant suffered from diarrhea does not mitigate against the penalty of discharge. This mitigatory circumstance must be weighed against the seriousness of the offense. The offense is the failure to notify supervisor of this extensive absence from the workplace thereby permitting supervision to adopt alternative strategies to make certain that the level of care for the residents is maintained.

This mitigatory circumstance must also be weighed against the extensive record of prior warnings and actual discipline of the Grievant for being away from her workplace without notice to supervision. Her prior disciplinary record should have put her on notice of the seriousness of the offense being absent from the workplace without notice to her supervisors.

The Union argued that another mitigatory circumstance was "the fact that her residents were covered." This argument misses the point. It had been determined that two TPW's were necessary to ensure the proper care and safety of eight residents during the day shift. It simply was not for the Grievant to decide that one TPW would sufficiently safeguard the residents.

E.) Is the Sanction of Discharge Tainted by Due Process Considerations?

This inquiry deals with the fact that a daily log of activities and times for the work of the TPW's at CG3 was

missing for the 1st shift on February 3, 2008. In addition, the supervisor took four days to raise with the Grievant the problem of the Grievant's absence from the workplace on February 3, 2008. Lastly, the concern was raised that the investigation was unfair and impartial because it had been conducted by the Grievant's supervisor.

It was stipulated by the parties that this daily log for the 1st shift on February 3, 2008 was missing. The claim was made that this is unfair to the Grievant because it would verify activities and time of same which could be important to the resolution of this dispute. The record does include samples of six such logs, and on the basis of the information contained in these logs, it is difficult to conclude that any elucidation of what transpired on the day in question could occur. None of the logs refer to any absences by any of the TPW's. They are certainly not a report of all of the activities that occur during the course of the shift. An example is:

> Rounds made. Report received. Area and ladies appear fine. Duties completed. It was a good night with no problems to report.

The supervisor did take four days to raise the matter of the Grievant's absence directly with the Grievant herself. This should have been raised at an earlier time, but there is nothing in the record to show that this failure in any way inhibited the

case presented by the Union or enhanced the case presented by the Employer.

The Grievant's absence from the workplace occurred on Sunday--a day that the supervisor normally does not work. The supervisor was at the workplace for the special purpose of providing an annual evaluation to the Grievant. The supervisor explained that she wanted to wait until Monday morning to telephone Human Resources for guidance on how to handle the absence of the Grievant from the workplace. The Grievant does not work on Monday or Wednesday, and the supervisor raised her absence from the workplace early on Thursday morning. While this matter should have been raised by the supervisor at least on Tuesday when both were present at the workplace, there is no evidence that harm to the Grievant resulted from the delay.

The final claim of due process unfairness to the Grievant centered on the initial fact finding[4/] and the investigation. Amanda Kelley, the Grievant's supervisor, conducted both the fact finding and the investigation. The investigation consisted of obtaining written statements from eight TPW's who were on duty in Cedargrove 1, 2, 3, or 4 on the morning of February 3, 2008.

[4/] This is an internal document used by MRDD to record the occurrence of an incident that may or may not result in discipline.

The analysis begins with the observation that the supervisor did not on her own proceed with the fact finding and investigation. She prepared a statement of what had transpired on February 3 and presented it to Human Resources on February 4. Human Resources told her to conduct the investigation, and did not provide her with any assistance from Human Resources. She then completed the fact finding document with the Grievant on Thursday, February 7, followed by interviews of the eight TPW's during the next several days.

With respect to the supervisor's conducting the fact finding, the Union presented evidence from the chapter president, who was also the chief steward, to the effect that normally a supervisor involved in an incident does not conduct the fact finding. There was no elucidation on the meaning of "normally." Therefore, there is no basis to find an internal practice within the Department that excludes a supervisor involved in an incident from conducting a fact finding of the incident. Consequently, there is no basis to find that this Grievant was picked to be a person subjected to a unique fact finding.

With respect to the investigation conducted by the supervisor, all eight written statements including that of the supervisor's and that of the Grievant's, were made part of the stipulated record. Six of the eight persons interviewed

testified under oath at the hearing, again, including the Grievant and her supervisor. It is important to note, however, that--as stated in the analysis of this case on the merits above--the most damaging testimony to the Grievant on her activities on February 3, 2008 was presented by her co-employees, not by the supervisor.

There is no basis, therefore, to conclude that the discharge was tainted by any claim of due process unfairness.

AWARD

The grievance is denied.

Dated: October 20, 2008

John J. Murphy, Arbitrator