

#1180

In the Matter of Arbitration) Grievance No.: DMR -2018-03262-04
Between:)
)
)
)
STATE OF OHIO: DEPARTMENT) Subject: Removal from
OF DEVELOPMENTAL) Employment of
DISABILITIES) Susan Schockling
("Employer"))
)
) BEFORE:
) Arbitrator — David V. Breen
and)
)
)
OHIO CIVIL SERVICES)
EMPLOYEES ASSOCIATION,)
LOCAL 11, AFSCME,)
("OCSEA").)

OPINION AND AWARD

Case Heard: May 16, 2019

Post-Hearing Briefs Filed: June 19, 2019

Award Issued: July 11, 2019

Appearances: On Behalf of the Employer:
Andy Bower
Labor Relations Officer

On Behalf of the OCSEA:
Tim Watson
Staff Representative

BACKGROUND, FACTS AND PROCEDURAL HISTORY

This grievance is covered by a Collective Bargaining Agreement (“Agreement”) between the State of Ohio (“Ohio”) and the Ohio Civil Service Employees Association, AFSCME Local 11 (“OCSEA” or “Association”) effective May 12, 2018 through February 28, 2021.

The Grievant, Susan Schockling, was initially hired in the Ohio Department of Developmental Disabilities (“DODD”) as an Intermittent Therapeutic Program Worker on July 27, 2015. She became a regular Therapeutic Program Worker (“TPW”) at the DODD’s Cambridge Developmental Center (“CDC”) on October 4, 2015. Grievant was working as a TPW at the CDC when she was removed (“discharged”) from employment on September 21, 2018.

The CDC is one (1) of eight (8) DODD operated residential facilities for the care of individuals with developmental disabilities. CDC is classified as an Intermediate Care Facility under the Federal Medicaid Program. At the time of Grievant’s removal CDC served as a home for 51 individuals with developmental disabilities. As a TPW Grievant was responsible for the care of residents while working in the CDC.

On July 10, 2018 Grievant was working her assigned shift starting at 11:00 p.m. in residential cottage, (“Moore A”), along with two (2) other TPW’s, Esther Gearhart (“Gearhart”) and Jacob Kirgis (“Kirgis”). At about 12:25 a.m. on July 11, 2018 Grievant discovered that client (“KB”) was missing from the cottage. A search was conducted both inside and outside of the cottage. KB was found by a supervisor at about 1:45 a.m. outside of the CDC walking along a road about 1.7 miles away.

When KB was in his room a TPW was required to do a room check every 15 minutes. When KB was in a common area constant visual contact was required of him by a TPW. According to the Employer Grievant was assigned to care for KB one-on-one throughout the shift. To the contrary Kirgis, Gearhart and Grievant testified that they worked as a team on the 11:00 p.m. to 7:00 a.m. shift.

They also testified that in Moore A cottage the regular practice was to work as a team on the third shift (11:00 p.m. to 7:00 a.m.) and that supervision was aware of that practice. None of their direct supervisors were called to rebut their testimony. And, most importantly, the CDC's Superintendent, who was in charge of the CDC at the time of the incident, testified that it was common practice for the third shift to work as a team and share responsibilities for the care of clients.

Following an Employer investigation of this incident and pre-disciplinary hearings, Grievant was removed from employment via a written Order of Removal which states in relevant part:

"This will notify you that you are REMOVED, effective 09/20/18.
The reason for this action is that you have been guilty of:

Neglect of a Client E-1: When there is a disregard of duty resulting from carelessness or willfulness in failing to provide an individual with any treatment, care, goods, supervision, services necessary to maintain the health and safety of the individual.

That on 07/10/18, you failed to follow the level of supervision for Keyshawn B. resulting in his elopement from Moore Cottage. He was gone for 1 hour, 20 minutes and found 1.7 miles from the Facility."

The Association filed this grievance on October 2, 2018 claiming that Grievant was removed without just cause. In the grievance the Association requests that Grievant be reinstated to employment and made whole including back pay, seniority, healthcare, retirement, leave account, overtime and Union dues.

The Employer issued a Step 2 grievance response on December 6, 2018 which states in relevant part:

"Facts pertaining to the grievance: The grievant was removed for violation of DODD work rules, Neglect of a Client, E-1, When there is a disregard of duty resulting from carelessness or willfulness in failing to provide an individual with any treatment, care, goods,

supervision, or services necessary to maintain the health and safety of the individual. On 7/10/2018 the grievant failed to follow the level of supervision for Individual Keyshawn resulting in his elopement from Moore Cottage. Keyshawn was gone for 1 hour and 20 minutes and was found 1.7 miles from the facility.

Union position: The union states on page two (2) of her Q and A. 1st question, that the word 'me' was inserted after her answer. The union states the grievant did not right the word 'me', and she was not responsible for Keyshawn. The union states the word 'me' was added to her Q and A afterwards. The grievant states she responded to this question that her and her co-workers were all three responsible for Keyshawn. The grievant stated she responded that her and her co-workers were all responsible on the 1st question and the 2nd question. The grievant stated she was not solely responsible for Keyshawn, it was a team effort. The union states the spacing between the last word of the grievant's answer and her initials are the same on every question except where the word 'me' was inserted. The grievant states she advised the investigator that she did not recall being in-serviced on Keyshawn, but that did not mean she wasn't, just that she did not recall. The union states there are a lot of time discrepancies between the investigation and the video. The grievant states that it says nowhere in the investigation that she assumed responsibility of Keyshawn when her co-workers went on break. The union feels this is a personal attack against the grievant. The union states there were three (3) employees responsible for the supervision of Keyshawn and the grievant was the only one disciplined. The union states the grievant is a three (3) year employee with no discipline. The union states this incident did not impair Keyshawn's ability to sleep or take his medications because he never slept or took his medication before the incident. The union states there have been eloping incidents with Keyshawn since this incident and the employees were not disciplined. The union states while searching for Keyshawn a co-worker made the statement that he had been talking about leaving since seven o'clock that evening, but that co-worker was not made to write a statement nor was she questioned. The union states the first pre-disciplinary meeting was held and they had not been given the chance to watch the video. The union states the pre-disciplinary hearing officer was forceful and accusatory and was even corrected by the management representative at one point. The union states the investigator stated in the UIR that he attempted to find Keyshawn's level of supervision and it was not available anywhere on the cottage, not in his program book or his memo book.

Conclusion: On 7/10/2018 the grievant did fail to follow Keyshawn's level of supervision. This resulted in Keyshawn eloping from Moore Cottage for one hour and 20 minutes. Keyshawn was found 1.7 miles from the Center. Video evidence clearly demonstrates this. There is just cause for discipline."

Thereafter, the grievance was processed through the grievance procedure and appealed to arbitration. An arbitration hearing was scheduled and held with the undersigned Arbitrator on May 16, 2019. Post-Hearing Briefs were filed on June 19, 2019. The record was then closed.

RELEVANT PROVISIONS OF THE AGREEMENT

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..."

ANALYSIS AND FINDINGS

Pursuant to arbitral common law and Article 34, Discipline, of the Agreement the burden of proof in a disciplinary action lies with the Employer. The parties have stipulated the issue as "was the Grievant, Susan Schockling, removed for just cause? And, "if the Grievant was not removed for just cause what shall the remedy be?"

In general "just cause" requires that disciplinary action be fair and equitable. A determination of "just cause" is dependent primarily on the whole bundle of facts in each case. A key factor in the "just cause" analysis is whether

the disciplinary action was imposed in a discriminatory or disparate manner. In this case the Employer discharged the Grievant and issued no discipline to her co-workers who were equally responsible for the care of KB. This requirement of even handed treatment of similarly situated employees is a key component of the "just cause" standard.

The Employer attempts to justify its action of only disciplining Grievant on the basis that she alone was responsible for the care of KB on the shift in question. But, in fact, all three (3) employees worked as a team and were equally responsible for the care of all of the resident clients on the third shift. This team approach was the common practice on the third shift at Moore A cottage. That practice was known by management and that fact was confirmed through the testimony of the Employer's Superintendent who was in charge of the entire CDC and made the final decision to remove Grievant from employment.

That same practice was asserted by the Grievant and the Association during the grievance procedure and should have been carefully considered by management. The Employer in its Post-Hearing Brief cites the testimony of Grievant that they worked as a team and that the three (3) TPW's were all responsible for the care of KB. In disputing her testimony the Employer noted that on Exhibit ME-2, Grievant actually scheduled one-on-one assignments on the third shift. The Employer is correct that Grievant did list some one-on-one assignments on the schedule. But the fact that such assignments were listed does not mean that those assignments were actually carried out. If that was their practice then the Employer should have provided testimony from management that the team practice was not followed.

Even if the Employer genuinely believed that Grievant was the sole TPW responsible for the care of KB on the shift in question, that mistaken belief does not justify her removal from employment while her co-workers remained employed. The Employer's actions simply were not fair, equitable and even-handed under the proven circumstances.

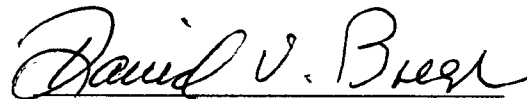
Based on the circumstances of the disparate treatment of Grievant versus her co-workers the Employer has failed to prove that it had "just cause" to remove Grievant from employment. In light of the above finding it is not necessary to determine whether Grievant engaged in neglect of a client. Grievant's removal was not for "just cause" and must be set aside.

This grievance is granted.

AWARD

Grievant shall promptly be reinstated to employment and made whole for any loss of wages, benefits, seniority and other contractual rights. In the event a dispute arises over the implementation of this Opinion and Award, this Arbitrator hereby retains jurisdiction.

Date: July 11, 2019

A handwritten signature in cursive script that reads "David V. Breen". The signature is written in black ink and is positioned above the printed name of the arbitrator.

David V. Breen, Arbitrator