

ARBITRATION DECISION NO.:

281

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Columbus Developmental Center

DATE OF ARBITRATION:

July 18, 1990

DATE OF DECISION:

July 27, 1990

GRIEVANT:

Tommie Lawson

OCB GRIEVANCE NO.:

24-06-(89-06-09)-0152-01-04

ARBITRATOR:

Harry Graham

FOR THE UNION:

Maxine S. Hicks

FOR THE EMPLOYER:

Jim Spain

KEYWORDS:

Removal
Client Abuse
Length of State Service
Credibility

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline

FACTS

The grievant was employed as a part-time Hospital Aide at the Columbus, Developmental Center (CDC). On the site of the Development Center there is another facility, Franklinton Industries, which is not operated by the State. It is operated as a non-profit corporation and serves mentally retarded and developmentally disabled people from both CDC and other residents from the area. Patients from CDC move from one facility to the other in the course of a day. On May 12, 1989, an event occurred at Franklinton Industries. Allegedly,

the grievant struck, kneed and cursed a patient. As a result, the grievant was removed from employment by the employer.

EMPLOYER'S POSITION

According to the employer, the grievant came upon a client from the Developmental Center while he was being restrained by an employee of Franklinton. The grievant told the Franklinton employee that he would take over for him. As he did so, the grievant pushed the client vigorously into a wall and then led the client to an elevator where he drove his knee into the client's stomach. At the same time, the grievant told the client to behave or when he was back on the unit he would "fuck him up." Employees from Franklinton who witnessed the event, including the employee who initially restrained the client, filed reports of the incident with their supervisors. Each of these reports consistently described the behavior of the grievant as being abusive.

The employer asserts that during his employment with CDC the grievant received the proper training in patient restraint but did not follow the procedures learned in this training during this incident. The employer argues that, under the contract, if the arbitrator finds that patient abuse occurred, the arbitrator does not have the authority to reduce the discipline. The employer also points out that the grievant has prior instances of discipline including a verbal reprimand, a three day suspension and a ten day suspension. All of this discipline had been issued in the grievant's short 15 months employment with CDC.

UNION'S POSITION

The union contends that the events described by the employer never occurred. The union contends that the grievant did take the client from the Franklinton employee but did not abuse him nor did he tell the client he would "fuck him up." Rather, the grievant maintains that it was the Franklinton employee who made that statement. The union points out that after the incident the client had a medical examination and no bruises or evidence of any sort of abuse was found.

The union points out that over the years there has developed a certain amount of rivalry between staff at Franklinton and employees of the State at CDC. In the union's view, Franklinton staff are jealous of CDC employees because CDC employees receive better pay and benefits. To retaliate for this state of affairs Franklinton employees have harassed CDC employees. This event is another instance of such harassment according to the union.

ARBITRATOR'S OPINION

The arbitrator found it very difficult to believe that such a rivalry between Franklinton and CDC staff as was alleged to have existed would lead to a fabrication of a tale to secure the discharge of the grievant. The arbitrator found little basis in the assertion that personal hostility between Franklinton and CDC employees led to the grievant's discharge. Although at times inconsistent, the testimony and statements of the various witnesses to this incident led the arbitrator to believe that it was more probable than not that the grievant physically abused a CDC client. The arbitrator recognized that there was a certain amount of doubt about this conclusion. However, the grievant was of short service with the State and had accumulated a substantial amount of discipline on his record. The testimony against the grievant was given by employee who showed no animosity towards the grievant. Therefore, the arbitrator concluded the State met its burden of showing just cause for removing the grievant.

AWARD

The grievance was denied.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

**The State of Ohio, Department of
Mental Retardation and
Developmental Disabilities**

Case No.:

24-06-(89-06-09)-0152-01-04

Before:

Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

Maxine S. Hicks
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

**For Department of Mental Retardation
and Developmental Disabilities:**

Jim Spain
Department of Mental Retardation
and Developmental Disabilities
Cambridge Developmental Center
Cambridge, OH. 43725

Introduction:

- Pursuant to the procedures of the parties a hearing was held in this matter on July 18, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. During presentation of the case of the Union a witness upon whom it had intended to rely was found to be absent. In order to complete the proceedings the parties directed the Arbitrator to pay special attention to her statement which is found among the documents to which they jointly stipulated. The contents of Alicia Harmon's statement have been carefully read by the Arbitrator in the course of preparation of this opinion. Post hearing briefs were not filed in this dispute and the record was closed at the conclusion of oral argument.

Issue:

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

“Was Tommie Lawson discharged for just cause? If not, what shall the remedy be?”

Background:

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There is little that is agreed upon between the parties concerning the events that give rise to this dispute. As will soon become apparent from the recitation of the positions of the parties below, a chasm of perception between them exists concerning the facts of this dispute. What little area of agreement that exists between them may be readily set forth. The Grievant, Tommie Lawson, was employed as a part-time Hospital Aide at the Columbus Developmental Center, operated by the Ohio Department of Mental Retardation and Developmental Disabilities in Columbus, OH. On the site of the Developmental Center there is another facility, Franklinton Industries. That facility is not operated by the State. It is operated as a non-profit corporation and serves mentally retarded and developmentally disabled people from both the Columbus, OH. area and the Columbus Developmental Center. It is physically at the same site as the Developmental Center and patients from the Center move from one facility to the other in the course of the day.

On May 12, 1989 an event occurred at Franklinton Industries which prompted this proceeding. Allegedly the Grievant, Tommie Lawson, struck, kneed and cursed a patient, R.S. As a consequence, he was discharged.

A grievance protesting that discharge was filed and processed through the procedure of the parties without resolution. They agree it is properly before the Arbitrator for determination on its merits.

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Position of the Employer:

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According to the State on May 12, 1989 the Grievant, Tommie Lawson, was involved with a client, R.S., at the Franklinton Industries site. Shortly after 2:00PM the State asserts that Mr. Lawson came upon R.S. while R.S. was being restrained by an employee of Franklinton. In the State's version of events, he told the Franklinton employee, Buss Caldwell, that he would take over from him. He did so, and pushed R.S. vigorously into a wall. Then he led R.S. to an elevator and when they were in it, drove his knee into R.S.'s stomach. At the same time, he told R.S. to behave or when he was back on the unit he, Lawson, would fuck him, R.S. up. This sort of behavior is completely unacceptable in the State's opinion.

This incident came to the attention of the authorities at Columbus Developmental Center as the result of reports filed by employees of Franklinton with their supervisors. Buss Caldwell who was at the scene of the incident and Candy Tinsely who came upon it filed reports. Patricia Capunay witnessed the event as well and testified at the hearing that she saw Lawson push R.S. into the wall very forcefully. In the State's view, the testimony from eyewitnesses is consistent. They had no reason to fabricate the story nor were they attempting to "get" Mr. Lawson.

During his employment with Columbus Developmental Center the Grievant received the proper training in patient restraint. He did not follow the procedures of which he was well aware in this incident. As he committed abuse of a patient discharge is the appropriate penalty. In fact, under the Labor Agreement, if an arbitrator determines abuse of a patient occurred, discharge is the only penalty. An arbitrator is permitted no discretion to alter the discharge penalty once it is determined patient abuse has taken place. As that is the case in this situation, the State insists the discharge under review in this proceeding be sustained.

The State also points out Mr. Lawson has prior instances of discipline on his record. He had received a verbal reprimand, a three day suspension and subsequently a ten day suspension in January, 1989. At the time of his discharge Mr. Lawson had been an employee of the Developmental Center for about 15 months. He had compiled a poor record. Coupled with his action in this situation, the State insists it had ample grounds for discharge.

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Position of the Union:

In the view of the Union the events recounted by the State never occurred. In fact, Lawson did come upon R.S. and Buss Caldwell on May 12, 1989. Caldwell was restraining R.S. He took over from Caldwell and took R.S. to the elevator. R.S. was shaking from his experience. He did not tell R.S. he would fuck him up. Rather, Caldwell made that statement. That version of events is confirmed by the written statement of Alicia Harmon. Furthermore, Harmon's statement indicates that she did not see R.S. grabbed by anyone or pushed up against the wall. After this incident was reported, R.S. had a medical examination. No bruises or

evidence of any sort of abuse was found.

The Union points out that over the years there has developed a certain amount of rivalry between staff at Franklinton and employees of the State at the Columbus Developmental Center. In the Union's view Franklinton staff are jealous of Columbus Developmental Center employees. Employees of the Developmental Center receive better pay and benefits. To retaliate for this state of affairs Franklinton employees have harassed Columbus Developmental Center employees. This event is another instance of such harassment according to the Union. Consequently, it should not be permitted to stand it asserts.

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Discussion:

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Obviously it is difficult to evaluate two accounts of events as different as those presented in this situation. Three people testified against the Grievant. One, Caldwell, has himself been discharged from Franklinton. On the one hand, his discharge taints his testimony. On the other, he certainly has nothing to gain. Similarly, that other people testified to the events as he did lends credibility to his account. It is very difficult to believe that such rivalry between Franklinton and Columbus Developmental Center staff as might have existed would extend to fabrication of a tale to secure the discharge of the Grievant. The Union was unable to show that personal hostility existed between the present and former Franklinton staff members who testified and the grievant. In essence, the Union asks the Arbitrator to believe that the Franklinton staff set out to get the grievant for some unspecified reason and managed to secure his discharge. This furnishes little basis for overturning the discharge as no showing of personal hostility between any of the witnesses or the grievant has been made by the Union.

It is true that the statements and testimony of witnesses to this event are not completely consistent. Some people did not hear the "fuck up" remark. Other people saw the elevator full of people some of whom were in wheelchairs. Some did not. With the exception of Harmon, all statements in Joint Exhibit 3 confirm the fundamental account of events as related by the State. For example, Cecelia Witt indicated she saw the Grievant roughly push R.S. up against the wall. The testimony and statements of the various witnesses to this incident, even when the inconsistencies are taken into account, lead the Arbitrator to believe it is more probable than not that the Grievant was involved with physical abuse of R.S. on May 12, 1989. This conclusion is reached as it is difficult to believe that Franklinton staff could conspire for such a length of time to secure Lawson's discharge. This is especially the case when no animosity has been shown between them and the Grievant. The generalized allegations of the Union concerning jealousy between Franklinton and Columbus Developmental Center employees do not serve to overcome the testimony and statements received at the hearing.

It must be recognized that there remains a certain amount of doubt about this conclusion. However, the Grievant was of short service with the State. He had accumulated substantial discipline on his record. The testimony against the Grievant from Capunay, Caldwell and Tinsley, none of whom were shown to harbor animosity towards Lawson must prompt the conclusion that the State has borne its burden of showing just cause for the action under review in this proceeding.

Award:

The grievance is denied.

Signed and dated this 27th day of July, 1990 at South Russell, OH.

Harry Graham
Arbitrator