

ARBITRATION DECISION NO.:

283

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Columbus Developmental Center

DATE OF ARBITRATION:

July 12, 1990

DATE OF DECISION:

August 9, 1990

GRIEVANT:

Terry Rice

OCB GRIEVANCE NO.:

24-06-(90-02-20)-0204-01-04

ARBITRATOR:

Linda DiLeone Klein

FOR THE UNION:

Maxine S. Hicks

FOR THE EMPLOYER:

Edward L. Ostrowski

KEY WORDS:

Removal
Client Abuse
Effect of Client's Behavior
History
Burden of Proof

ARTICLES:

Article 24 - Discipline
§24.01-Standard

FACTS

The grievant, a part-time hospital aide at the Columbus Developmental Center, was removed from employment for allegedly abusing a client. The grievant had 3 incidents of discipline: 1) a 3 day suspension for AWOL; 2) a 5 day suspension for AWOL; and 3) a 20 day suspension for Neglect of Duty/Unauthorized Absence/Resident Neglect. The facts surrounding the case are in dispute. The grievant was removed for client abuse.

EMPLOYER'S POSITION

The employer asserted that while a unit manager was making his normal rounds, he heard the grievant ask another employee if she had seen what a client had just done. The unit manager testified that when he turned the corner to enter the hallway he saw the client lying on the floor on his left side, with the grievant standing behind him holding the client's wrist with her left hand. The unit manager testified that he saw the grievant slap the client across the face three times with her right palm. The unit manager testified that the client was just lying on the floor and did not exhibit any aggressive behavior toward the grievant.

The employer contends that the discipline was imposed for just cause, that it was progressive and that it was commensurate with the serious nature of the offense. Department policy defines "abuse" as "any act or absence of action inconsistent with human rights which results or could result in physical injury to a client." CDC policy lists "abuse" as a major offense which may subject the employee to severe discipline, including removal.

UNION'S POSITION

The grievant testified differently regarding the incident. The grievant stated that she, another employee, the client in issue and other clients had been in the living room area when the grievant told the client that it was time to get his coat and go for a walk. The grievant further stated that as she and the client left the living room, the client walked to the water fountain and tried to pull the cover off. According to the grievant, the client fell backward as he was pulling at the fountain. The grievant testified that she tried to help the client get up, but he resisted and swung his arms at her. The grievant stated that she had both hands on the client in an attempt to get him up when she saw the unit manager enter the hallway.

The union pointed out that the client has exhibited "self-abusive" behavior in the past. The union argued that the grievant did not abuse the client; she was merely trying to get the client off the floor, and his resistance may have given the appearance of a struggle. The grievant has worked "one on one" with the client on numerous occasions and there have been no prior problems. Furthermore, the facts of this matter were presented to the Grand Jury and the case was dismissed.

ARBITRATOR'S OPINION

The arbitrator felt that the evidence did not clearly or convincingly establish that the grievant abused the client. Given the client's history, the arbitrator felt that it was entirely possible that the client was resisting the assistance which the grievant was attempting to provide when the unit manager entered the hallway. The arbitrator found that if the client was resisting assistance by swinging his arms at the grievant, it would have been reasonable for her to hold his wrist in an attempt to get him off the floor. Of great significance to the arbitrator was the fact that the client assaulted the unit manager in the office area just moments after the incident at issue. The client's history of abuse and destructiveness, together with the subsequent attack on the unit manager, supports the grievant's contention that he was resisting her attempts to get him off the floor.

Furthermore, there was uncontroverted testimony from the grievant that she has cared for the client on numerous occasions without any problems. In addition, she has frequently volunteered to be assigned to him in the past. Shortly after the client was escorted to the office, he was examined by the nurse, and no evidence of abuse was found. The arbitrator found there was insufficient evidence to uphold the grievant's removal.

AWARD

The grievance is sustained. The grievant shall be reinstated with full seniority and benefits. She is entitled to back wages at the straight time rate for all days she would have been scheduled to work had she not been discharged; there shall be no compensation for missed overtime opportunities.

TEXT OF THE OPINION:

**Arbitration Proceedings
Before
Linda DiLeone Klein**

In The Matter of Arbitration

Between

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

And

**Ohio Civil Service Employees
Association, Local 11 AFSCME
AFL-CIO**

Grievance No.:

24-06-02-20-90-204-01-04

Grievance of Terry Rice

Heard:

July 12, 1990

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APPEARANCES

For the Employer:

Edward L. Ostrowski

For the Union:

Maxine S. Hicks

ISSUE

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

Facts and Contentions

There is a serious dispute between the parties regarding the facts of this case.

The grievant was hired as a full-time hospital aide at the Columbus Developmental Center (CDC) in May 1985. However, in January 1990, she was only working part-time at CDC on the second shift.

According to the Employer, the following facts precipitated the grievant's removal. At approximately 3:15 p.m. on January 5, 1990, Unit Manager Jeff Hogle was making his normal rounds in Parkside 2. As he was walking into that area, Mr. Hogle heard the grievant ask employee Gillispie if she had seen what client Randy B. had just done. Mr. Hogle testified that when he turned the corner to enter the hallway, he saw client Randy B. lying on the floor on the threshold of the doorway to the livingroom. Randy was lying on his left side, and according to Mr. Hogle, the grievant was standing behind Randy, holding his right wrist with her left hand. Mr. Hogle testified that he saw the grievant slap Randy across his face three times with her right palm; Mr. Hogle stated that he also heard the sound of three slaps. Mr. Hogle stated further that Randy was just lying there; he was not being aggressive toward the grievant.

Mr. Hogle immediately intervened and told the grievant to go to the Supervisor's office. The grievant questioned the order and Mr. Hogle reiterated the instructions. Mr. Hogle then escorted the grievant and

Randy to the staff office. When they got to the office, Mr. Hogle informed the grievant that he had seen her slap Randy in the face three times; however, she denied it.

The grievant testified differently regarding the incident at issue. The grievant stated that she, Ms. Gillispie, Randy and other clients had been in the livingroom area when she told Randy that it was time to get his coat and go for a walk. The grievant further stated that as she and Randy left the livingroom, Randy walked to the water fountain and tried to pull the cover off. According to the grievant, Randy fell backward as he was pulling at the fountain. The grievant then asked Ms. Gillispie if she had seen how fast Randy had attacked the fountain. The grievant testified that she tried to help Randy get up, but he resisted and swung his arms at her. The grievant testified further that she had both hands on Randy in an attempt to get him up when she saw Mr. Hogle enter the hallway. She stated that Mr. Hogle told her to go to the office and she questioned the reason for the order. Mr. Hogle repeated his instructions and subsequently escorted her and Randy to the office. According to the grievant, Randy attacked Mr. Hogle while they were in the area of the office.

At this point, security was called and an incident report was made. According to the grievant, she was placed on administrative leave and she later attended a pre-disciplinary hearing. In a Notice of Removal dated January 25, 1990, she was advised that she was being removed effective February 9, 1990 for "resident abuse". The details of the incident as related by Mr. Hogle were set forth in the notice, and three elements of past discipline were cited: 1) a 3 day suspension dated June 27, 1988 for AWOL; 2) a 5 day suspension dated December 19, 1988 for AWOL; and 3) a 20 day suspension dated February 1, 1989 for Neglect of Duty/Unauthorized Absence/Resident Neglect.

The State contends that discipline was imposed for just cause, that it was progressive and that it was commensurate with the serious nature of the offense.

Department policy defines "abuse" as "any act or absence of action inconsistent with human rights which results or could result in physical injury to a client". CDC policy lists "abuse" as a major offense which may subject the employee to severe discipline, including removal. The State submits that its policies are reasonable and that they are specifically related to the goal of providing a safe, humane environment for all persons entrusted to its care. The grievant clearly violated established procedure by striking a client, says the Employer.

CDC has approximately 230 residents with mental retardation or other developmental disabilities, and they need a safe but restrictive living environment since they cannot function outside the Center. Hospital aides receive considerable training on how to care for the residents, and they are advised of Department policies, as well as the consequences of any violation of those policies. Training procedures emphasize that residents should be made to feel that the staff is "family". The State maintains that staff members are fully advised about appropriate interaction with residents; the staff is told to treat the residents kindly, gently and fairly. Striking a resident as the grievant did hardly meets this goal, adds the State.

CDC receives funding from the Federal Government, and the facility must remain certified to continue receiving such funds. If, for example, a government representative would have been monitoring the Center to determine whether day to day activities met certain standards, the occurrence of an incident such as the one at issue could have led to decertification and loss of funds. To ensure continued certification, the State maintains that one of its primary responsibilities is to protect residents from harm and to react immediately in instances of resident abuse.

The State acknowledges that Randy has exhibited "self abusive" behavior in the past; to protect against self-inflicted harm, it is necessary that he receive "one on one" care, which means that there will be one staff member assigned to him at all times. However, the State maintains that Randy was not abusing himself or the grievant on January 5, 1990; he was being passive, not aggressive, when the grievant hit him three times.

The State takes the position that resident abuse is a serious offense which cannot be tolerated. The State asks that the grievance be denied in its entirety.

The Union, however, contends that the grievant did not abuse Randy on January 5, 1990, or at any other time. She was merely trying to get Randy off the floor, and his resistance may have given the appearance of a struggle. The grievant has worked "one on one" with Randy on numerous occasions and there have been

no prior problems, adds the Union.

The Union submits that the Employer has failed to prove that the grievant abused Randy. Furthermore, says the Union, the facts of this matter were presented to the Grand Jury and the case was dismissed.

The Union asks the Arbitrator to grant the grievance and make the grievant whole for all her losses.

O P I N I O N

There can be no doubt that patient abuse, or resident abuse, is a serious violation of CDC policy. Nor can there be any question that residents of CDC are entitled to humane treatment and that hospital aides are required to provide a high standard of care for them.

The Arbitrator recognizes that the penalty of discharge for resident abuse cannot be modified if it is determined that such abuse, in fact, occurred.

In this instance, however, the evidence did not clearly or convincingly establish that the grievant abused resident Randy B.

Both the grievant and Mr. Hogle testified that the grievant had spoken to employee Gillispie about "something" which Randy had just done. According to the grievant, Randy had "attacked" the water fountain and tried to pull the cover off. This indicates that Randy was in an agitated state. Although Ms. Gillispie did not testify, the fact remains that the grievant spoke to her about the resident's behavior; Ms. Gillispie was still in the livingroom with other clients at the time and, apparently, did not witness the incident.

The Unit Manager testified that he did not examine the water fountain in order to determine the validity of the grievant's assertion as to why Randy was on the floor.

The Arbitrator does not doubt that a struggle occurred between the grievant and Randy, however, it was not proven that she abused him. There was testimony from the grievant and the Unit Manager to establish that Randy needed close supervision, or "one on one" care, due to his history of self-abusive behavior. Randy has pulled out his finger nails, beat on walls, and picked at his sores and scabs; he has also kicked and hit others, including staff members. Randy has also been known to damage or destroy property, such as sinks and paper towel containers. In view of Randy's history, it is entirely possible that he was resisting the assistance which the grievant was attempting to provide when the Unit Manager entered the hallway. If he was resisting assistance by swinging his arms at the grievant, it would have been reasonable for her to hold his wrist in an attempt to get him off the floor, thereby leading the Unit Manager to make the assumption that Randy was being abused. Of great significance is the fact that Randy assaulted the Unit Manager in the office area just moments after the incident at issue. Randy's history of abuse and destructiveness, together with the subsequent attack on the Unit Manager, supports the grievant's contention that he was resisting her attempts to get him off the floor.

Furthermore, there was uncontroverted testimony from the grievant that she has cared for Randy on numerous occasions without any problems. In addition, she has frequently volunteered to be assigned to him in the past.

Shortly after Randy was escorted to the office, he was examined by a Nurse, and no evidence of abuse was found.

The Arbitrator finds that there was insufficient evidence to substantiate Management's position in this matter. Just cause did not exist for discharging the grievant.

A W A R D

It is the Award of the Arbitrator that the Notice of Removal be rescinded and expunged from the grievant's record. The grievant shall be reinstated with full seniority and benefits. She is entitled to back wages at the straight time rate for all days she would have been scheduled to work had she not been discharged; there shall be no compensation for missed overtime opportunities.

LINDA DiLEONE KLEIN

Dated this 9th day of August 1990
Cleveland, Ohio