

ARBITRATION DECISION NO.:

424

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health
Pauline Warfield Lewis Center

DATE OF ARBITRATION:

January 28, 1992

DATE OF DECISION:

March 3, 1992

GRIEVANT:

Anita Robinson

OCB GRIEVANCE NO.:

23-13-(91-08-29)-0474-01-04

ARBITRATOR:

Anna Smith

FOR THE UNION:

Penny Lewis
Staff Representative

FOR THE EMPLOYER:

George R. Nash
Advocate
Lou Kitchen
Second Chair

KEY WORDS:

Removal
Insubordination

ARTICLES:

Article 24-Discipline
§24.01-Standard

FACTS:

The grievant was a Licensed Practical Nurse at the Pauline Warfield Lewis Center, a state hospital for chronically mentally ill adults. She was removed from employment on August 21, 1991 for insubordination. The grievant had been disciplined on four prior occasions for neglect of duty and dishonesty.

On April 4, 1991, grievant was attacked by a patient while working in Unit K-West; the grievant was given time off and returned to work on May 6, 1991, and the patient was subsequently discharged. On June 9, 1991 it became necessary to reassign the grievant from duty on Unit 6 to Unit K-West. The grievant was

properly selected by the Hospital Aide Supervisor on the basis of seniority to be reassigned.

The grievant objected to the reassignment testifying that she had flashbacks to the April 4 incident, heart palpitations, and other emotional symptoms. The grievant's steward arranged to have another employee switch work assignments with her; however, the employee that the grievant was supposed to switch assignments with was already working overtime. Consequently, the grievant's supervisor found the arrangement to be inappropriate. Testimony conflicts as to whether the arrangement was ultimately approved by the Nurse Manager. The Manager denied the existence of any conversation between herself and the steward and stated that she repeatedly told the grievant that she must either report to K-West or go home; in fact the grievant did elect to go home.

The grievant was subsequently removed for insubordination. Evidence, undisclosed to Management at the time of the removal, indicated that grievant sought advice from an agency psychiatrist in April 1991 and treatment for post-traumatic stress in July and August 1991. This information was neither made available to Management at the pre-disciplinary meeting nor more than three weeks prior to the arbitration.

EMPLOYER'S POSITION:

Evidence clearly establishes that grievant was insubordinate in refusing her ward assignment, and repeatedly and willfully disobeying direct orders. The grievant's behavior undermined the authority of her supervisors, the employer's exclusive right to manage the workplace and the employee's obligation to take direction. The proper means of redress would have been to comply with the direction, then file a grievance concerning directions believed to be violative of the bargaining agreement. Only orders which unusually jeopardize an employee's health or safety justify deviance from the established procedure. Further, the patient responsible for the assault was no longer assigned to Unit K-West; therefore, grievant's alleged illness was a mere pretense to avoid the assignment. This belief is supported by the fact that no mention of grievant's treatment for post-traumatic stress or counseling was made until Step 3. Based upon the grievant's disciplinary history the removal was progressive and within the bounds of reasonableness.

UNION'S POSITION:

Management failed to establish grievant's insubordination; the grievant was given a choice to either switch assignments if necessary, work K-West or go home; the grievant chose the latter option. The grievant's behavior was not demeaning to supervisors. Institutional Directive A-22 supports the position that the grievant's behavior was not a major offense because it had no detrimental effect on hospital operations; therefore, removal is too harsh a penalty. The employee involved-received disparate treatment in that the employee she was to switch assignments with and the steward were not disciplined.

ARBITRATOR'S OPINION:

Despite conflicting testimony, the Arbitrator found that the grievant received at least one direct order to work K-West after learning that the patient who had previously assaulted the grievant had been discharged. That finding is evidenced by the grievant's decision to go home sick and to seek the steward's intervention. The grievant erred in failing to follow the established "work now, grieve later" policy. In the alternative, the grievant should have taken sick leave, then grieved the employer's assignment. The Arbitrator found that the grievant's behavior undermined the employer's authority to direct the employees, activity in the workplace.

The Arbitrator upheld the reasonableness of the removal despite the Union's argument that the grievant had never previously refused an assignment, primarily because of the grievant's prior disciplinary record. Further, the Union presented insufficient evidence to establish that the grievant was treated inequitably. Consequently, the Arbitrator found that grievant's removal from State service was not a violation of Article 24.

AWARD:

The grievance is denied in its entirety.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

**STATE OF OHIO,
DEPARTMENT OF MENTAL HEALTH**

and

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
A.F.S.C.M.E., AFL/CIO**

OPINION and AWARD

Anna D. Smith, Arbitrator

Case 23-13-910829-0474-01-04

Anita Robinson, Grievant

Removal

Appearances

For the State of Ohio:

George R. Nash; Advocate

Lou Kitchen; Assistant Chief of Contract Compliance,

Ohio Office of Collective Bargaining; Second Chair

Rita Surber; Personnel Manager, Pauline Warfield Lewis Center

Brenda Parchman; Hospital Aide Supervisor, Pauline Warfield
Lewis Center; Witness

Diana Leasure, R.N.; Acting Director of Nursing,

Pauline Warfield Lewis Center; Witness

JeMargarice Jamerson, R.N.; Nurse Manager,

Pauline Warfield Lewis Center; Witness

For OSCEA Local 11, AFSCME:

Penny Lewis; Staff Representative,

OCSEA Local 11, AFSCME, AFL-CIO; Advocate

Anita Robinson, L.P.N.; Grievant

Laura Turner, L.P.N.; Witness

Vernell M. Little; Former Union Steward, OCSEA Local 11,

AFSCME; Witness

Hearing

Pursuant to the procedures of the parties a hearing was held at 9:15 a.m. on January 28, 1992, at the offices of the Ohio Office of Collective Bargaining, Columbus, Ohio before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. The record was closed upon conclusion of oral argument at 5:15 p.m., January 28, 1992. This opinion and award is based solely on the record as described herein.

Issue

The parties stipulated that the issue to be decided by the Arbitrator is:

Was Article 24 violated when Ms. Anita Robinson was terminated from State service?
If so, what shall the remedy be?

Joint Exhibits and Stipulations

Joint Exhibits

1. 1989-91 Collective Bargaining Agreement
2. Discipline Trail
 - A. Notice of Investigation, June 25, 1991
 - B. Request for Disciplinary Action, July 6, 1991
 - C. Notice of Pre-Disciplinary Meeting, July 12, 1991
 - D. Statement of Brenda Parchman, Hospital Aide Supervisor
 - E. Statement of Anita Robinson, LPN, Grievant
 - F. Statement of Marian Russ, Psychiatric Nurse Supervisor II
 - G. Statement from Ms. Jamerson to Ms. Wamsley, July 10, 1991
 - H. Statement of JeMargarice Jamerson, Psychiatric Nurse Supervisor II, June 9, 1991
 - I. Statement of Vernell Little, Custodial Worker, OCSEA Steward
 - J. Statement of doctor, June 10, 1991
 - K. Notification of Request for Action as Result of Pre-Disciplinary Meeting, August 5, 1991
 - L. Director's Order of Removal, August 14, 1991
 - M. CEO's Effective Date of Removal, August 16, 1991
 - N. Record of Prior Discipline
3. Grievance Trail
 - A. Cover Sheet, Step 3 Request, August 29, 1991
 - B. Grievance #23-13-910829-0474-01-04
 - C. Step 3 Assignment Sheet, September 3, 1991
 - D. Notice of Step 3 Meeting, September 11, 1991
 - E. Step 3 Answer, October 18, 1991
 - F. Request for Arbitration
4. Policies
 - A. Work Assignments for All Nursing Staff, April 22, 1991
 - B. Institutional Directive A-22, Rules of Conduct and Disciplinary Action, January 3, 1989
5. First Shift Work Sheet, June 9, 1991
6. Statement of Lani Eberlein, January 21, 1992
7. Statement of Counselor concerning Anita Robinson, January 11, 1992
8. Statement of Kazell Nelson

9. Statement of Dr. Harris, January 27, 1992 1991
10. Assignment Canvass Memo, February 22, 1989
11. May, June & July 1991 Work Sheets
12. September 1991 Work Sheets

Joint Stipulations of Fact

1. Ms. Anita Robinson began State employment February 2, 1987.
2. At the time of this incident Ms. Robinson was a Licensed Practical Nurse (LPN) at the Pauline Warfield Lewis Center.
3. Ms. Robinson was assigned to Unit 6 and worked the first shift, 6:30 a.m. - 3:00 p.m.
4. Reassignments are permissible in accordance with Article 13.05.
5. Overtime has been hired to work ward K-West.
6. This case is properly before the Arbitrator.

Relevant Contract Provisions

Case History

As stipulations establish, the Grievant, Anita Robinson, was an LPN on the first shift at the Pauline Warfield Lewis Center at the time of her removal from State service on August 21, 1991. This institution is a State hospital for about four hundred acute and chronic mentally adults. Ms. Robinson had been in State employment for over four years and had two written reprimands (neglect of duty), a two-day suspension (neglect of duty), and two six-day suspensions (dishonest and neglect of duty, respectively) on her record when this case came to arbitration.

The incident that gave rise to Ms. Robinson's removal had its genesis in an event that occurred on April 4, 1991. On that date the Grievant was assaulted by a patient while she was working on Unit K-West. As a result of this attack, Ms. Robinson was off from work until May 6, 1991, when she returned without restriction. A little over a month later, on the morning of June 9, the LPNs assigned to K-West were off, so reassignments were necessary. The Hospital Aide Supervisor, Brenda Parchman, did not canvass for volunteers, but assigned the least senior LPN from the unit most able to provide the coverage. It is the Center's practice not have overtime worked on this particular unit so as not to jeopardize the unit's Medicare certification. It therefore avoids placing overtime staff on this ward unit except in emergency situations. Ms. Robinson, who was originally scheduled to work Unit 6 and was not working overtime that day, was one of those LPNs reassigned to K-West. When Ms. Robinson arrived for work and discovered she was to work on the ward where she had been attacked, she became upset. In written statements and oral testimony she said she had a flashback to the assault, was overwhelmed by her feelings, experienced heart palpitations, shortness of breath, and the like. JeMargarice Jamerson, the Nurse Manager coming on duty and the Grievant's supervisor, checked with staff on K-West and learned the patient who assaulted the Grievant had been discharged. Ms. Jamerson so informed the Grievant and told her her assignment was K-West, but the Grievant still said she could not work there because she felt claustrophobic. She would go home, she said. Ms. Jamerson said this was alright and the Grievant left the staffing office. Ms. Jamerson then pulled an

LPN from another unit to work K-West. Instead of going home, the Grievant called her Union Steward, Vernell Little. The Steward was familiar with employees switching assignments under another supervisor, and so when she was unable to work something out with Parchman, went in search of someone willing to switch with the Grievant. A. Charleston, who was working overtime on Unit BE-1 was agreeable. The Steward called Ms. Parchman and told her about the arrangement, but Parchman indicated this was inappropriate.

At this point, the various versions of the events that morning diverge. Union witnesses say that the Steward and Grievant went to the staffing office where Jamerson told them overtime could be worked on K-West only if necessary. The Steward testified that she replied it was "absolutely necessary," and that that ended the matter. Ms. Jamerson denies this exchange took place, testifying that she learned the switch had actually taken place sometime later from the Steward. Upon learning this, she called Unit BE-1, confirmed that Robinson was there and told her that if she was staying at work, her assignment was K-West. The Grievant again allegedly said she was going home. All accounts agree that at approximately 7:45 a.m., the Grievant called from Unit BE-1 to report an injured patient needing an R.N.'s assessment. Ms. Jamerson went to the unit, took care of the patient, and yet again told the Grievant her assignment was K-West (the Grievant testified she was told she had to go home if she was not going to K-West). At this point, the Grievant did turn over her keys and signed out at 8:25 a.m. A doctor's return-to-work slip indicates she was treated on June 9, 1991, and fit for work on June 10, 1991.

Ms. Charleston was reported to the other Nurse Manager on duty and Ms. Little was written up, but neither was disciplined. Ms. Robinson, however, was charged with and ultimately terminated for insubordination. There is evidence she was in treatment for post-traumatic stress disorder in July and August 1991 (Joint Ex. 7) and, in fact, sought advice from an Agency staff psychiatrist in April following the patient's assault on her (Joint Ex. 9). These facts were not brought out at the pre-disciplinary meeting nor was supportive documentation obtained until three weeks before arbitration. The grievance that was filed protesting the removal remained unresolved and so was moved to arbitration, where it presently resides for final and binding decision.

Arguments of the Parties

Argument of the Employer

The State contends it has shown that the Grievant was insubordinate in that she refused her ward assignment, repeatedly and willfully disobeying direct orders. This undermined the authority of the supervisors. It points out that the right to manage the workplace is vested in the employer and that it is the obligation of the employee to take direction, then later grieve orders believed to be in violation of the agreement. The orders given the Grievant did not place her health or safety in unusual or abnormal jeopardy such as would excuse her failure to follow the "work now, grieve later" principle. The patient who had assaulted her was not even on the unit to which the Grievant was assigned.

The State disputes any Union contention that it treated this employee differently from other employees in ordering her to work on a ward where there had been a problem with a patient. In other cases, the employee was not moved off the ward. Either the patient was moved or dealt with through the treatment team, with the employee returning to the unit within days. Moreover, the cases brought out by the Union were more seriously threatening to the employee involved. This arbitrator is referred to a decision by Arbitrator Rivera discussing disparate treatment (Case No. G23-06(891113)-01-21-01-03).

The State disputes the Grievant's claim that she was ill, because she continued to work. Instead, it believes she was merely avoiding an assignment she did not like. The State further points out that no mention of post-traumatic stress disorder, counseling or EAP was made until Step 3. The only thing mentioned the morning of the incident was the Grievant's fear of a patient. If the Grievant really was in treatment at the time, why did she not bring it up then, or at the pre-disciplinary hearing? The Employer contends the Grievant only went into EAP when her job was in jeopardy and argues that Management cannot be faulted for making its disciplinary decision based on facts known of at the time.

The Grievant's disciplinary record shows Management to have shown tolerance, the State claims, and the Grievant to have shown a disregard for work rules and an inability to correct her behavior.

The Employer asserts the removal was progressive, despite the violation being of a different rule from the ones previously broken by this employee, and cites Arbitrator Rivera in Case No. 31-11890330-16-01-06.

In sum, the State claims the penalty for the established violation was within the bounds of reasonableness and believes that it should not be disturbed. It asks that the Arbitrator find just cause for the removal and deny the grievance in its entirety.

Argument of the Union

The Union contends the State has not shown the Grievant was insubordinate for the Grievant never received a direct order. Instead, she was given a choice: switch assignments only if necessary, work K-West, or go home. The Grievant chose the latter. Indeed, the Union states, Ms. Robinson has been reassigned to almost all units at the facility and has not refused one reassignment. The Grievant was also not demeaning to her supervisors.

Regarding Management's claim that the Grievant's reassignment would not place her in a position of abnormal risk of health or safety because the patient was not on the ward, the Union argues that each employee is affected differently. This employee's psychological well-being was threatened. Even Management witnesses said the Grievant looked bad that day. Moreover, assignment changes have been made to accommodate smoking preferences. What is more important, the Union asks, smoking or psychological stability?

Institutional Directive A-22 says that a major offense is one affecting "the safety or the security of the staff or patients, or which have a seriously detrimental effect on the efficient operation of the hospital." On June 9, 1991, both LPNs were doing their jobs, the only difference being that they were on different units. Thus, the Union claims, there was no detrimental effect on hospital operations. This is supported by the fact that Ms. Charleston worked overtime on K-West many times.

The Union also points out that the other two employees involved--Charleston and Little--were not disciplined. It argues in any case that removal is too harsh a penalty and asks that the discipline be overturned, or at least modified, and that the Grievant be made whole, granted back pay, benefits and seniority.

Opinion of the Arbitrator

Whether the Grievant is guilty of insubordination turns on whether she knew, or ought to have known, that Ms. Parchman's and later Ms. Jamerson's words constituted an order for which there were disciplinary consequences if she did not obey. At the outset, I must say that this case represents an extraordinarily difficult problem of credibility and factual determination. It essentially boils down to the word of a supervisor against that of the aggrieved, and there are corroborating witnesses for only some of the conversations that allegedly took place the morning of June 9. As a result, my opinion as to what occurred has thin spots of belief. Nevertheless, I am able to conclude with a high degree of certainty that the Grievant did receive at least one direct order to work K-West, and that it was given after she learned the patient she feared had been discharged. Two witnesses attested to this, and the Grievant's own testimony indicated she knew she was to go to K-West. That she knew there were consequences for not going is established by her decision to go home sick. If her anxiety was purely associated with K-West (a conclusion argued by the Union), then it would not have been aroused had she thought she had a choice of assignments. Since it was aroused, she must therefore have known she had no choice and was under a direct order. This conclusion is also supported by her decision to get her steward to intervene in her behalf, something that would have been unnecessary if the Grievant thought she was free at that time to choose her ward without fear of discipline.

I also believe that the Grievant came to the erroneous understanding from the Steward that it was acceptable to switch with Ms. Charleston. How the Steward came to this understanding herself cannot be readily ascertained, for accounts differ. The Steward, however, is the only witness who states that there was

a meeting of all three--Jamerson, Little and the Grievant--in which Jamerson allegedly said "only if necessary." (Ms. Jamerson denies hearing of the switch until later and the Grievant stated that the Steward informed her of the arrangement.) At this point the Grievant made a mistake: being under a direct order and knowing she was subject to discipline if she disobeyed, the prudent thing to do was to verify that the order had been rescinded by Management. As it was, she went to BE-1 under direct contravention of her supervisors' orders and hospital policy to avoid overtime on the Medicare-certified unit. This is not to say that the Steward deliberately led the Grievant astray. More likely invalid assumptions were made or misunderstandings arose in the confusion that morning with so many people involved. This only underscores the necessity for a clear chain of command. To permit a non-supervisor's beliefs to countermand a manager's direct order would be to undermine the negotiated authority of the workplace and create confusion as to who has the right of direction. This is to the detriment of all--management, employees, and patients. Management was within its rights to discipline here.

At this point some comment on the practice of switching assignments and method of making temporary reassignments is in order since so much testimony was devoted to these topics. It is clear that there is much disagreement as to the meaning of portions of the Contract's provision on reassignments, §13.05. Since this issue is not before this Arbitrator for resolution, no opinion is offered. What is relevant to the discipline of this Grievant, however, is whether her behavior was appropriate if she believed that Management made the assignment improperly or unfairly denied her request to change it. Clearly the answer to this must be no. If she thought the assignment improper, the correct thing to do was to work the ward, then grieve the propriety of the assignment. If the thought of going on this ward made her so emotionally distraught that she became ill and felt unable to fulfill the assignment, then she should have gone off sick and then used the grievance procedure. In no event was working a different assignment than the one given justified without the expressed consent of the supervisor.

It is unfortunate for the Grievant that this violation comes after a history of progressive discipline. Following several suspensions, discharge is within reason. While the Arbitrator notes that the Grievant has not previously refused a reassignment and that the refusal here was motivated by seemingly uncontrollable situational anxiety, the prior opportunities to conform her behavior cannot be overlooked, nor can her disregard for the legitimate alternative remedies of sick leave and the grievance procedure.

The Union also raises an issue of disparate treatment in that the other two employees were not disciplined. Insufficient evidence was presented to show how these two--who were not under direct orders--were similarly situated to the Grievant here. The claim of disparate treatment is therefore unsupported.

In sum, Article 24 was not violated when the Grievant was removed from State service.

Award

The grievance is denied in its entirety.

Anna D. Smith, Ph.D.
Arbitrator

March 3, 1992
Shaker Heights, Ohio

ODMH145