

ARBITRATION DECISION NO.:

496

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Pauline Warfield Lewis Center

DATE OF ARBITRATION:

February 24, 1993

DATE OF DECISION:

April 21, 1993

GRIEVANT:

Charles Stanley

OCB GRIEVANCE NO.:

23-13-(92-06-10)-0617-01-04

ARBITRATOR:

Nels E. Nelson

FOR THE UNION:

Penny Lewis, Staff Representative

FOR THE EMPLOYER:

Malleri Johnson-Myricks, Advocate

KEY WORDS:

Removal
Patient Abuse
Abusive Language
Unauthorized Breaks

ARTICLES:

Article 24 - Discipline
 §24.01 - Standard
Article 25 - Grievance Procedure
 §25.08 - Relevant Witnesses and Information

FACTS:

The grievant was a hospital aide at the Pauline Warfield Lewis Center. On April 14, 1992, the grievant was discharged for patient abuse and neglect of duty.

The grievant is accused of swearing at and repeatedly shoving a patient on the chest and back. Additionally, the grievant is accused of not only taking a break without his supervisor's knowledge or authorization, but also taking a break for more than the entitled fifteen minutes.

The state removed the grievant citing his physical and verbal abuse toward the patient, and the grievant's

neglect of duty in not notifying his supervisor of his (the grievant's) actions.

EMPLOYER'S POSITION:

A nurse testified that she heard the grievant use abusive language in ordering a patient back to bed while the grievant repeatedly shoved the patient on the chest and back. The nurse testified that she told the grievant that the patient could stay up, but the grievant ignored her. On the charge of neglect of duty, the grievant's supervisor arrived on the floor and found the grievant missing. Upon inquiry, the supervisor learned that the grievant was on break without permission or authorization. Furthermore, the grievant did not return from his unauthorized break for 40 to 45 minutes, when authorized breaks only last for fifteen minutes. The grievant's physical and verbal abuse of a patient warrants the grievant's dismissal.

UNION'S POSITION:

The state has not proved just cause for the dismissal of the grievant. The only witness to the alleged patient abuse asserted that the abuse took place on April 14, 1992, yet did not report the incident until two days later, and even then did not follow proper documentation procedures. The state's witness believes that another hospital aide was present, yet the other witness testified that she did not see the grievant abuse a patient. The charge of patient abuse is the result of personal disagreements between the state's witness and the grievant. On the charge of neglect of duty, because of under staffing it is a common practice for staff not to be able to take their scheduled breaks, so employees take them whenever time permits. The remedy sought for the grievant is reinstatement with full back pay and benefits.

ARBITRATOR'S OPINION:

The testimony of the state's witness is very credible because she was in a position to see what occurred, there was little possibility of mistake, and there was no evidence supporting the union's theory that the state's witness had a motive to lie. On the other hand, the grievant's testimony was very self-serving; the grievant was charged with a serious offense and knew that his job was in jeopardy. The testimony of the other hospital aide is impeachable. Further, the union's position that the state's witness did not follow proper documentation procedures and notification does not change the fact that the grievant engaged in patient abuse.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

ARBITRATION DECISION

April 21, 1993

In the Matter of:

Ohio Civil Service Employees
Association, AFSCME Local 11

and

State of Ohio, Department of
Mental Health

Case No.

23-13-920610-0617-01-04

Charles Stanley, Grievant

APPEARANCES

For the Union:

Penny Lewis, Staff Representative
Charles Stanley, Grievant
Martha Demery, Therapeutic Program Worker
Bessie Jones, Police Officer II
Reno Francisco, Therapeutic Program Worker
Barbara Burden, Chief Steward

For the State:

Malleri Johnson-Myricks, Advocate
Teri Decker, Labor Relations Specialist,
Office of Collective Bargaining
Rita Surber, Personnel Manager/Labor Relations Officer
Rhonda Barrett, Human Relations Specialist I
Wanda Schulz, Psychiatric Nurse Supervisor II
Kent Miller, Police Lieutenant
Dianne Robinson, Registered Nurse

Arbitrator:

Nels E. Nelson
BACKGROUND

The grievant is Charles Stanley. He was a hospital aide at the Pauline Warfield Lewis Center. It is a residential hospital which serves patients with severe mental illness. At the time of his discharge the grievant had approximately five years of service.

The events leading to the grievant's discharge occurred on April 14, 1992. On that day the grievant worked on Unit E on the third shift which started at 10:45 P.M. on April 13, 1992 and ended at 6:45 A.M. on April 14, 1992. He worked with Martha Demery, a hospital aide, and Dianne Robinson, a registered nurse.

The grievant is charged with two offenses. First, he is accused of patient abuse in violation of Directive A-48. This charge is based upon the testimony of Robinson. She testified that at 12:15 A.M. a patient got out of bed and attempted to go to the day room but was blocked by the grievant standing in front of him. Robinson claims that the grievant swore at the patient and shoved him repeatedly on the chest and back. The grievant acknowledges that the patient got up but states that he told him that it was not time to get up and that the patient simply returned to bed without any problems.

The second charge against the grievant is neglect of duty. This charge is based upon the testimony of Wanda Schulz, a registered nurse and psychiatric nurse supervisor II. She testified that she went to Unit E at approximately 3:45 A.M. on April 14, 1992 and discovered that Demery was alone on the unit. Schulz stated that she called Robinson, who was responsible for scheduling breaks for the grievant and Demery, and learned that the grievant did not have permission from her to change his scheduled break time. Schulz claims that it was 40 to 45 minutes before the grievant returned to the unit even though he was entitled only to a fifteen minute break. The grievant testified that he was busy and unable to take his break at the scheduled time. He claims that he called Robinson at 3:00 A.M. about his break but that she did not respond so that after getting the permission of Demery he went on his break at 4:00 A.M. and returned at 4:20 A.M. The grievant contends that although breaks are scheduled, employees do not go by the scheduled times but simply ask their co-workers if it is all right to take a break.

The state promptly began disciplinary action against the grievant. On April 16, 1992 he was placed on

administrative leave for the investigation of the charges. A pre-disciplinary hearing was held on May 14, 1992. The grievant was charged with patient abuse for using abusive language and pushing a patient and for neglect of duty for not notifying his RN when he was going on his break which resulted in an employee being left alone on the unit. As a result of the hearing the grievant was informed on June 10, 1992 that further disciplinary action was being requested. On July 3, 1992 the grievant was removed from his position by Michael F. Hagan, the director of the Department of Mental Health.

A grievance was filed by the grievant on July 6, 1992. It charges that there was not just cause for disciplinary action. The grievance states that the grievant never engaged in patient abuse and that Robinson knowingly made a false statement about him. It asks that the grievant be reinstated and made whole and that disciplinary action be taken against Robinson for lying.

The grievance was processed according to the collective bargaining agreement. It was heard at step three on July 20, 1992 and was denied on the next day. The case was appealed to arbitration. The hearing was held on February 24, 1993. At the conclusion of the hearing the parties agreed to submit written closing statements. The statements were received on March 5, 1993 and the record of the case was closed at that time.

ISSUE

The issue as framed by the Arbitrator is as follows:

“Was the grievant discharged for just cause? If not, what is the proper remedy?”

RELEVANT CONTRACT PROVISIONS

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02

ARTICLE 25 - GRIEVANCE PROCEDURE

* * *

25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

STATE POSITION

The state argues that the grievant is guilty of patient abuse in violation of Directive A-48. It points out that Robinson testified that at 12:15 A.M. on April 14, 1992 she was at the nurse's station when she heard the grievant tell a patient to "get your mother-fucking ass back to bed" and observed him shove the patient repeatedly on the chest and back. The state notes that Robinson stated that the grievant hit the patient hard enough so that she heard the smack of his hands on the patient's chest and back. The state claims that Robinson called more than once to the grievant to let him know that the patient could stay up but that the grievant ignored her.

The state contends that Robinson followed the proper procedure. It maintains that she verbally reported the incident to Schulz that night. The state notes that this was followed up by a written report to nursing management the next day. It emphasizes that even if Robinson failed to follow proper procedures, it does

not change the fact that the grievant physically and verbally abused a patient.

The state asserts that Robinson's testimony is credible. It points out that she had a clear view of the incident from the nurses' station. The state maintains that the union failed to establish that there was any reason for Robinson to lie and stresses that the grievant testified that he was friends with Robinson. It claims that on the other hand the grievant's testimony is clearly self-serving.

The state acknowledges that its charge of patient abuse is based upon the testimony of one witness. It claims, however, that the fact that there was only one witness does not negate the fact that the abuse did occur. The state notes that in State of Ohio, Department of Mental Health, Oakwood Forensic Center and Ohio Civil Service Employees Association, OCSEA/AFSCME Local 11, case no. 23-12-890926-0144-01-03 Arbitrator Jonathan Dworkin upheld the removal of an employee based upon the testimony of only one eyewitness.

The state charges that the grievant is also guilty of neglect of duty in violation of Directive A-22. It points out that Schulz testified that she arrived on the unit at 3:45 A.M. and discovered that Demery was alone. The state notes that when she called Robinson, she learned that the grievant did not have her permission to change his break time. It observes that Schulz stated that the grievant did not return for 40 to 45 minutes so that even if he had permission to change his break, he was gone for more than the fifteen minute break time.

The state contends that Schulz's testimony is supported by the testimony of other witnesses. It points out that Robinson testified that she saw the grievant in Unit B-West with his hat and coat around 3:00 A.M. The state notes that Reno Francisco, a union witness, also stated that he saw the grievant in Unit B-West at that time.

The state charges that the testimony of Bessie Jones, a police officer at the Pauline Warfield Lewis Center, is not credible. First, it states that her testimony that she was in Unit E at 12:30 A.M. conflicts with documents and logs that show she was at other places at that time. Second, the state notes that Jones did not provide her testimony or statement about being in Unit E until a grievance mediation session long after the grievant was removed and his removal was upheld at step three of the grievance procedure. It claims that the grievant and Jones concocted her statement to bolster his case.

The state asserts that Demery's testimony did not help the grievant. It points out that her testimony that the grievant took his break around 1:30 A.M. conflicted with the testimony of Robinson, Schulz, Francisco, and even the grievant. The state challenges Demery's claim that she was in visual contact with the grievant all evening. It notes that she stated that she sat in the TV room with her back to the nurses' station so that it would have been impossible to see the grievant in the hallway where the alleged incident occurred. The union observes that Demery is friendly with the grievant and that there was an underlying tone of resentment toward Robinson because she was studying while others were working.

The state rejects the union's argument that the grievant suffered prejudice because the union did not get a copy of the incident report completed by Robinson. It claims that the incident report was used only by the security department and that a separate administrative investigation was conducted. The state notes that all of the documents gathered in that investigation were provided to the union. It stresses that there was no testimony or evidence to indicate that the union's defense of the grievant was hindered.

The state concludes that it has established that the grievant is guilty of physical and verbal abuse of a patient. It points out that under Section 24.01 of Article 24, once the Arbitrator finds that there has been an abuse of a patient, he or she does not have the authority to modify the termination of the employee. The state requests the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that the state has not met its burden under Section 24.01 of Article 24 to establish just cause for the grievant's termination. It points out that the only witness to the alleged patient abuse is Robinson. The union notes that she asserts the abuse took place on April 14, 1992 at 12:15 A.M. but it claims that she did not mention it to Schulz when she spoke to her at 4:10 A.M. and did not report it until April 16, 1992. It observes that Schulz's April 25, 1992 statement only refers to the issue of whether the grievant had permission from Robinson to take his break.

The union charges that Robinson did not follow Directive A-48. It indicates that the Directive requires an employee who has knowledge of patient abuse to document it on an incident report form. The union points out that even though Robinson's statement indicates that the grievant's pushing the patient made him unsteady on his feet, she did not call the campus police. It claims that Robinson is guilty of neglect of duty.

The union contends that the state failed to provide Robinson's incident report. It states that on July 20, 1992 Michael Martin, the chief steward, requested the incident report. The union notes that the minutes to the step three meeting recognize the union's request for the incident report.

The union cites State of Ohio, Department of Youth Services and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, grievance no. G-87-1299. It points out that in that case Arbitrator Rhonda Rivera noted several procedural problems including the failure of the grievant's supervisor to report an incident within 24 hours and to complete an incident report in a timely manner. The union notes that the grievant in that case was reinstated due in part to the state's refusal to supply discoverable documents.

The union also cites Arbitrator Anna Smith In State of Ohio, Department of Mental Health and Ohio Civil Service Employees Association, Local 11, A.F.S.C.M.E., case no. 2310-910703-0130-04 regarding its request for the incident report. It indicates that in this case Arbitrator Smith held that the state was not prevented from supplying an incident report by Section 43.01 of the Ohio Revised Code which protects patient confidentiality. The union notes that she ruled that the state's failure to provide the incident report was a violation of Article 25, Section 25.08.

The union contends that the state attempted to mislead the Arbitrator and the union with the incorrectly dated documents which were presented for the first time at the hearing. It claims that the state attempted to use the documents to show that Jones claimed to be in three different places at the time of the alleged incident. The union maintains that the state indicated that Jones signed the Power Plant log at 12:30 A.M. on April 14, 1992 but it asserts that the alleged abuse occurred on the morning of April 13, 1992.

The union argues that Robinson did not comply with Directive A-2 which is referred to in Directive A-48. It points out that on page one of the Directive patient abuse is defined as a major incident. The union notes that on page three under item one of the procedures section an employee who observes a major or minor incident is required to fill out an incident report and that item two requires an employee to call the campus police for all major incidents. It states that item six on page four requires the RN on duty to notify the patient's parent, legal guardian, or legal custodian within 24 hours and to record the notification on the patient's chart.

The union asserts that the charge of patient abuse is the result of personal disagreements between Robinson and the grievant. It indicates that it made this same argument at the step three grievance hearing.

The union maintains that the grievant's position is supported by Demery's testimony that she did not see the grievant abuse a patient. It notes that Robinson's April 17, 1992 statement says that Demery was present followed by a question mark indicating that she was not sure of Demery's whereabouts. The union points out that when the statement describes the grievant becoming angry it states that Robinson "believes" that Demery was present. It asserts that the state has not proven by clear and convincing evidence that the grievant committed patient abuse.

The union also responded to the charge of neglect of duty. It contends that because of understaffing at the center it is common practice for staff not to be able to take their scheduled breaks so employees take them whenever time permits. The union notes that Demery testified that the grievant did try to contact Robinson before taking his break and that frequently there is only one staff member on a unit. It states that Robinson testified that she saw the grievant with his coat and hat in Unit B-West but she did not go to Unit E or call there to check on Demery.

The union asks the Arbitrator to grant the grievance in its entirety. It requests him to reinstate the grievant and award him full back pay and benefits including overtime, vacation, sick leave, personal time, and holiday pay.

ANALYSIS

The grievant's discharge is based upon two charges. First, the grievant is accused of committing patient abuse in violation of Directive A-48. Robinson testified that the grievant swore at a patient and repeatedly shoved him on the chest and back. She claimed that he struck the patient hard enough so that she heard the smack of the grievant's hands on the patient's chest and back. The grievant denies swearing at the patient or shoving him.

The Arbitrator is placed in the position of having to decide whose testimony he ought to believe. He finds that Robinson's testimony is very credible. First, she testified in a clear and confident manner. She exhibited no doubt about what she testified that she saw. Second, Robinson was in a position to see what occurred. The grievant and the patient were in the hallway in clear view of the nurses' station. It does not appear to be a case of a witness being mistaken about what happened. Third, Robinson had no motive to lie. The union charged that her accusation was the result of "personal disagreements" but provided no explanation of what they were or why they would have been serious enough to lead her to claim that the grievant engaged in patient abuse. Furthermore, the grievant testified that he was friendly with her and that he could offer no reason why she would fabricate the charge.

The grievant's testimony, however, must be questioned. He was charged with a very serious offense and knows that his Job is in jeopardy. This fact clearly gives him a motive to deny that any patient abuse took place while Robinson has no such motive.

The union claimed that the grievant's testimony was supported by Demery's testimony. She stated that she had visual contact with the grievant for the entire shift and did not observe any patient abuse. Demery testified that the patient in question came out of his room and the grievant told him to go back to bed and that the patient returned to his room with no problems.

The Arbitrator does not believe that Demery's testimony undermines Robinson's testimony. First, Demery testified that the incident with the patient occurred between 1:30 A.M. and 2:00 A.M. and her written statement indicates that it happened in the early morning. If the patient came out of his room at 12:15 A.M. as Robinson testified and Demery was sitting in the TV room as she indicated, the patient abuse could have occurred just as Robinson described without Demery knowing about it. Second, it is clear that Demery and the grievant are friends. Her testimony can be viewed as an attempt to help a friend whose job is in jeopardy.

The union also relied upon the testimony of Jones. She stated that she was on Unit E from 12:00 midnight to approximately 12:20 A.M. and that she talked to Demery and the grievant and observed Robinson going in and out of the medicine room by the nurses' station. Jones claims that she did not witness any patient abuse.

The Arbitrator does not feel that the testimony of Jones negates Robinson's testimony. First, Jones testified that she did not observe any patient abuse but this does not mean that no abuse took place. The incident could have occurred while she was talking with Demery in the TV room. Second, serious questions were raised about Jones' credibility by documents that the Arbitrator believes indicate that Jones claimed to be in other locations between 12:00 midnight and 12:20 A.M. Third, her credibility was also undermined by the fact that she did not come forward to testify until a grievance mediation session just prior to the arbitration hearing. She did not appear or provide a statement when the grievant was removed, at the pre-disciplinary hearing, or at the step three grievance meeting. As a result her testimony appears as a last minute attempt to help the grievant who she acknowledges is her friend.

The union charged that Robinson failed to follow the proper procedures for patient abuse as set forth in Directives A-48 and A-2. The Arbitrator does not believe that it is necessary to consider each of the alleged procedural lapses by Robinson. It was not shown that any of Robinson's alleged failures prejudiced the grievant's case in any way. Furthermore, whether or not Robinson filled out the proper forms at the proper times and notified everyone as required by the Directives does not change the fact that the grievant engaged in patient abuse.

The union placed considerable emphasis on the state's refusal to supply Robinson's incident report. Article 25, Section 25.08 requires the state, upon request, to furnish to the union documents reasonably available and relevant to a grievance under consideration. Despite the state's claim that the incident report is

irrelevant because the grievant's removal was based upon an administrative investigation independent of the incident report, it appears that the union's request should have been honored.

This is the same conclusion reached by Arbitrator Anna Smith in State of Ohio, Department of Mental Health and Ohio Civil Service Employees Association, Local 11, A.F.S.C.M.E., case no. 23-10-910703-0130-01-04 which was submitted by the union. That case, like the instant case, involved alleged patient abuse and the refusal of the state to provide an incident report to the union. Arbitrator Smith stated:

“The Employer does not deny the existence of an Unusual Incident Report, but claims not to have used it to support discipline and further that it is prevented from providing it pursuant to Section 25.08 by virtue of statutory protections of patient confidentiality. The statutory claim is misguided, for the parties make clear in Section 43.01 that except for Ch. 4117 R.C., the contract prevails over conflicting State statutes, and Ch. 4117 does not except the section of the Code cited by the Employer. Therefore, one must look solely to the language of Section 25.08, which requires production of relevant documents reasonably available. Reports of the incident giving rise to the discipline clearly are relevant to the grievance. Moreover, it is hard to see how an incident report would do more damage to a patient's privacy and the Agency's ability to deliver service than witness statements about the patient's behavior do. Failure to provide this report when requested constitutes another violation of Section 25.08. (Page 13).”

However, Arbitrator Smith's analysis continues. After recognizing a number of due process violations by the state, she indicates:

“The most serious of these infractions is the Employer's failure ever to provide the Unusual Incident Report, but in my opinion, even taken with the several other infractions, this did not do such damage to the Grievant's due process rights as to justify voiding the removal without considering the merits of the Employer's case against him. (Page 14).”

After reviewing the merits of the case, she concludes that the grievant slapped a patient and upholds his discharge for patient abuse.

The Arbitrator believes that he should adopt the view expressed by Arbitrator Smith. The failure of the state in the instant case to provide Robinson's incident report did not appear to hinder the union in the presentation of its case. It had the statements as well as the testimony of all of the individuals who appear relevant to the alleged abuse. The refusal of the state to provide the incident report in the instant case compared to the seriousness of the patient abuse does not justify sustaining the grievance.

The collective bargaining agreement is very clear regarding how a patient abuse case must be handled by an Arbitrator. Article 24, Section 24.01 states that "if the arbitrator finds that there has been an abuse of a patient ..., the arbitrator does not have the authority to modify the termination of an employee committing such abuse." The Arbitrator must credit Robinson's testimony and rule that the grievant committed patient abuse. Given that conclusion he has no alternative but to sustain the discharge penalty.

The second charge against the grievant is neglect of duty. The Arbitrator, however, does not believe that it is necessary to review the conflicting testimony regarding this charge. He has already concluded that the grievant committed patient abuse and on that ground alone he must uphold the discharge. Consideration of the second charge would simply delay the process and increase the cost without affecting the outcome.

AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

April 21, 1993
Russell Township
Geauga County, Ohio