

ARBITRATION DECISION NO.:

576

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Cleveland Psychiatric Facility

DATE OF ARBITRATION:

April 20, 1995

DATE OF DECISION:

May 23, 1995

GRIEVANT:

Charles Newton

OCB GRIEVANCE NO.:

23-07-(94-09-13)-0109-01-04

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Robert Robinson

FOR THE EMPLOYER:

Linda J. Thernes

KEY WORDS:

Removal
Request for Leave
Commensurate Discipline
Threats
Credibility
Procedural Defect

ARTICLES:

Article 13 - Work Week, Schedules and Overtime
§13.10 - Payment for Overtime, Compensatory Time
Article 24 - Discipline

FACTS:

The grievant worked for the Ohio Department of Mental Health at the Cleveland Psychiatric facility. On June 25, 1994, the grievant left work early because he had a family emergency. The following day the grievant requested that his supervisor sign his request for leave form which granted him compensatory time for the leave that he had taken for his family emergency. The supervisor informed the grievant that she could not sign the form because compensatory time must be requested and approved in advance of the leave.

The supervisor testified that the grievant became agitated and protested. Eventually, the grievant left his supervisor's office.

The grievant went to the supervisor's office a second time on June 26, 1994 again demanding that a request for personal leave instead of comp time be approved. The grievant allegedly became louder and louder and more agitated. Soon after the second visit, the grievant returned to the supervisor's office with a union steward. The grievant and the union steward demanded that the supervisor explain her refusal to sign the leave form. Subsequently, the supervisor alleged that the grievant had violently threatened her.

EMPLOYER'S POSITION:

The State contended that, on three occasions, the grievant demanded that his supervisor sign his request for leave form. The State relied upon Article 13.10 of the Contract which required prior approval for the use of comp time. When the supervisor informed the grievant that she could not sign the form without proper documentation, the grievant became agitated and argumentative. Furthermore, the State contended that on the grievant's third visit to his supervisor's office the grievant threatened his supervisor.

UNION'S POSITION:

The grievant admitted to approaching his supervisor three times about signing his request for leave form. However, he denied that he was loud or argumentative on his first and second visits to his supervisor. On his third visit, the grievant claimed that he did not threaten his supervisor. Rather, he claimed that he said "lets leave peacefully... I don't want any more incidents written up on me."

At the end of the hearing, the Union raised a procedural defect even though it had been stipulated that there were no procedural defects. The Arbitrator stated that if there is evidence that such a defect has substantially prejudiced the grievant, the Arbitrator would not necessarily be bound by such a stipulation. In this case the grievant was not substantially prejudiced.

ARBITRATOR'S OPINION:

This case turns essentially on the credibility and the veracity of the grievant and his supervisor. The most important issue in determining if there was just cause for the grievant's removal was whether or not the grievant threatened his supervisor. If there was clear and convincing evidence that the grievant did threaten his supervisor, then the removal would be justified. The Arbitrator concluded that there was not clear and convincing evidence in this case that the grievant genuinely threatened his supervisor. However, the Arbitrator does believe that the grievant engaged in a verbal outburst and heated argument with his supervisor. Some sort of discipline was justified by the grievant's failure of good behavior. The grievant had been suspended for 6 days for similar behavior. Therefore, the Arbitrator concluded that a 30 working day suspension was just and commensurate with the grievant's conduct.

AWARD:

The grievance was upheld in part and denied in part. The grievant is to be returned to work, however, he will not be assigned to the same supervisor. He is to be docked for 30 days pay and beyond that is to be made whole through back pay and health benefits, etc.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union
and

State of Ohio, Department
of Mental Health

Employer

Grievance No. 23-07-(94-09-13)-0109-01-04

Grievant: C. Newton

Hearing Date: April 20, 1995

Closing Date: April 28, 1995

Award Date: May 29, 1995

Arbitrator: R. Rivera

For the Union: Robert Robinson

For the Employer: Linda J. Thernes

Present at the hearing in addition to the Grievant and the Advocates listed above were the following persons: Evelyn Logan (Union Steward), Annette Charles (Union President), Thomas P. Aldrich (attorney for the Grievant), Ruth Freeman (Personnel Officer), Gloria Kamara (Psych. Nurse Supervisor) (witness).

Preliminary Matters

The Arbitrator explained to the Grievant's attorney, Mr. Aldrich, that under the Contract that the Union represented the Grievant and that he was no more than an observer within the hearing room and could not participate. The Employer objected to his being present during its part of the case because notice of the attorney's presence had been given and the assistant attorney general representing ODH was not present. The Arbitrator explained that her practice was to record the hearing solely for the use in refreshing her memory and the tapes of the hearing would be destroyed on the day the award was rendered. The Attorney stated that he planned to subpoena the tapes; the Arbitrator declined to record the hearing under those conditions. The Attorney decided not to remain in the hearing room under the conditions as outlined by the Arbitrator.

The parties agreed that the matter was properly before the Arbitrator. All witnesses were sworn. The parties agreed that the Arbitrator might submit the award for publication.

Joint Exhibits

1. Contract 1994-1997
2. Grievance Trail
3. Discipline Package

Employer Exhibits

1. Request for Leave Policy

Union Exhibits

1. Discipline Grid
2. Request for Leave Forms

Joint Stipulations

1. Grievant was a 13+ year employee prior to termination.
2. No procedural defects exist.

Joint Issue

Was the Grievant removed for Just Cause? If not, what shall the remedy be?

Facts

This Grievance arose at the Cleveland Psychiatric facility. On June 25, 1994, the Grievant had left work early, telling his supervisor that he had a family emergency. On the following day, a Saturday, June 26, 1994, during his shift, the Grievant came to the Central Nursing Office at about 10:30 a.m. The Supervisor on duty was Gloria Kamara, R.N. At the time the Grievant entered the Office, the Supervisor was on the phone. According to the Supervisor, the Grievant interrupted her phone conversation and demanded that she sign his request for leave form granting him compensatory time for the leave that he had taken the previous day. The Supervisor stated that she could not sign the form because compensatory time must be requested and approved in advance of the leave. The Grievant wanted, as he admitted, that the leave slip be signed immediately so that he could submit the form to payroll that day. If the leave form was not signed that day, his pay check would reflect the time he missed, i.e. would be less those hours.

According to Ms. Kamara, the Grievant became agitated and argumentative. He made comments such as "What do you mean you won't recommend?" "Stop playing games with me." Ms. Kamara testified that when she tried again to explain that under the rules she could not approve compensatory time for that leave that Grievant became increasingly angry. Ms. Kamara testified that she told the Grievant that she would neither argue with him nor sign the Request for Leave Form. The Grievant continued to protest but eventually left the office.

At 2:10 p.m., the Grievant returned to the Central Nursing Office. He informed the Supervisor that he had spoken to his Union Steward and that the Steward had told him that he was "entitled" to use personal leave. The Grievant presented the Supervisor with a new form that requested personal leave for the prior day's absence. Again, the Grievant insisted upon immediate action so that his pay "wouldn't be shorted." Ms. Kamara told the Grievant that she could not approve personal leave until she had received the proper documentation to support the need for leave for "a family emergency." The Grievant demanded vehemently that the Supervisor sign this form. He accused her of "messing with my money." According to Ms. Kamara, the Grievant got louder and louder. At this time, he allegedly said to Ms. Kamara: "I don't know what's wrong with you, but some people around here bring their problems with them from home and I think that's what is wrong with you." When the Grievant became more and more agitated, the supervisor asked him to leave the office. Then, she said, he refused to leave and planted himself in a chair and asked "what if I don't go? What are you gong to do about it?" The Supervisor said that she asked him to leave two more times. Eventually, he did get up and leave.

Not long after the second visit, the Grievant returned a third time to the Central Nursing Office. This time he brought a Union Steward named Janis Alexander. According to Ms. Kamara, both parties demanded that she explain her refusal to sign the leave form. She explained once more. She said that her impression was that neither the Grievant nor the Steward really listened to her explanation. At this point, Ms. Kamara told the Grievant to leave the form in her box and that she would take it up with her supervisor and get back to him. The Grievant did not like this solution because he insisted that he had to take the leave form to payroll that day. Ms. Kamara said that she could not sign the form without consulting with her superior. According

to Ms. Kamara's testimony, the Grievant then began to blame her for "shortages in other employee's paycheck". Then, he said, according to Ms. Kamara's testimony, "That's why people come back to places like this with their 357 magnum's ... because of people like you!" Ms. Kamara asked him to explain his words. He allegedly stated "Well, yeah, you hear about it all the time ... at the post office, in the papers ... some people go quietly or peacefully and some people go violently." The Grievant then turned his back on her and left.

Ms. Kamara said that his threat was frightening and that given the Grievant's demeanor and agitated manner that she took it quite seriously.

The Grievant paints a different picture. He says that he did go to see the Supervisor three times. He denies that he was loud or argumentative the first time he was there. On the second trip, he agrees that Ms. Kamara said that she'd need her supervisor's approval before she could approve leave. He denied any loud discussion on the second trip and stated categorically that he did not accuse her of "playing games" or "messing with my pay." He said he went back the third time with his union supervisor because he wanted to get the leave approval in to payroll so "my check would not be shorted." He authenticated Union Exhibit #2 and 2(a) as copies of the leave requests that he submitted. On the third visit, he claims that what he said was "lets leave peacefully ... I don't want any more incidents written up on me." He stated that the statement about the 357 magnum did not take place.

On cross examination, he stated that he did not write a statement about the incident because no one asked him. He then stated "I do not write statements. I do not sign logs either. I only write grievances." He said he could not remember any supervisors who approved comp time without prior approval. He claimed he did not disagree with Ms. Kamara about the comp time. He was asked why he continued going back if she had made it clear that she could not approve comp time without prior approval and that she would not approve the personal time without her supervisor's approval. The Grievant became quite animated and vehement that he needed the approval that Saturday so that payroll could process it. He needed it that day, he said, because he was off on the following Monday. He said he wanted to walk the approval through himself.

He was asked "why go back if she had said no twice?" Because he said "my check would be shorted." The Grievant was asked if he had ever had discipline from Ms. Kamara before. He said, "only once, but we had prior exchanges, she interrupted a conversation of mine."

However, on cross examination he stated that he did not feel that Ms. Kamara had any personal feelings against him. The Grievant was asked directly and specifically if Lt. Brossard had approached him as part of the investigation and asked him to make a statement. He said, "No, she didn't." He was also asked if he had filed a grievance over the denial of the personal time. He said he had not. He said he went back repeatedly because of "her decision about my four hours."

The Grievant was shown the record of his discipline (Joint Exhibit 3) and asked to review it in connected with the Discipline Grid.

On August 18, 1989, he received a Written Reprimand for Not Following Instruction. On the Grid, this conduct merited a Written Reprimand for a First Offense. On May 11, 1990, he received a Written Reprimand for Not Following Instructions; this conduct could have received a 2 day suspension. On December 4, 1990, he received a Written Reprimand for fighting in front of patients. This conduct could have received according to the Grid, a six day suspension or removal.

On June 19, 1991, he received a Written Reprimand for Failure to Complete an Assignment. As the third instance of this type of conduct, he could have received a 2 or 6 day suspension or removal. On February 5, 1995, he received a 2 day suspension for insubordination.

On May 11, 1993 and June 24, 1993, he received written reprimands for attendance. Lastly, on November 8, 1993, he received a 6 day suspension for neglect of duty. The Grievant admitted this record but claimed that a number of these disciplines were unwarranted.

The Employer called Ms. Logan as a hostile witness. She was outside the central nursing office as the Grievant left. She admitted hearing the word "peacefully" but nothing else. Ms. Logan obviously did not want to testify and was not forthcoming in her answers.

In rebuttal, the Employer introduced Lt. Brossard who testified that she approached the Grievant during

the investigation, and he refused to talk to her or to make a statement.

The Employer also introduced the Leave Policy for Cleveland Psychiatric Hospital that indicated that for the approval of "personal time for emergency leave" that verification could be requested. The Employer also pointed to Article 13.10 of the Contract where prior approval is required for the use of comp time.

Toward the end of the hearing, the Union introduced the issue of a procedural defect with regard to the charge against the Grievant. However, the Union had already stipulated that no procedural defects existed. The Arbitrator would not necessarily consider herself bound by this stipulation if the evidence has revealed a procedural defect that substantially prejudiced the Grievant. The Union's charge went to the issue of Notice. The record is clear that the Grievant knew what the gravamen of the charge was and the potential outcome. This knowledge is sufficient to rebut a finding of prejudice.

Discussion

This case turns essentially on the credibility and the veracity of the Nurse Supervisor and that of the Grievant. The Union introduced no evidence to show that the Nurse Supervisor held any animus toward the Grievant and, in fact, the Grievant himself admitted that she held none. No evidence was introduced for a motive for the Nurse Supervisor to lie -- she gained no advantage nor did she have any motive for revenge. No charge of racism was made. The two persons are of the same race. While they are of different sexes, no charge or evidence indicates that sexism or sexual harassment enters into the situation. No evidence was introduced that the Nurse Supervisor had a bad record or bad hearing. The record shows no bias or reason for her to lie.

Obviously, the Grievant's best interest is to prevaricate. However, every Grievant is in that position. The Grievant did lie on the stand and under oath about having been approached to give a statement. When asked about the payroll issue while testifying, the Grievant became agitated and used some of the very same words that the Nurse Supervisor reported on the day of the incident. The Grievant was obviously high fixated on getting his leave request approved that day and getting the approval down to payroll. He was also obviously fixated on not having "his pay shorted."

The Arbitrator put no stock in the testimony, such as it was, of Ms. Logan. She clearly was on the Grievant's side and determined to not injure him. The one person who could, possibly, clear up the issue, did not testify, although she was a steward. The Union did subpoena her, but she did not show up. The Union claimed that she was in the hospital; however, no evidence was produced to support this view. Her written statement was equivocal and supported neither side.

The Nurse Supervisor was clearly procedurally correct in her refusal to sign the leave slips. The Arbitrator is at a lost to understand why the Grievant returned a third time in the face of her clear and unmistakable refusal to act on that day. The only reason evident from the testimony is the Grievant's absolute and unreasonable fixation on getting the leave slip signed that day. In his testimony, the Grievant revealed his belief that somebody or someone was "shorting" his paycheck and the paycheck of others. His discipline record reveals an indifference and disdain for authority.

The crux of the issue is whether the Grievant did indeed discuss the 357 and violence occurring in other workplaces. If he did, the discharge is clearly justified. Employers cannot have the threat of violence hanging over the workplace; such threats are dangerous not only to the employer's interests but to the safety and interests of all the other employees. In this case, any threat of violence was particularly significant because the workplace is a psychiatric hospital where the patients are often violent. Moreover, the patients are under the guardianship of the State and require protection.

The Arbitrator is aware that discharge is the capital punishment of the workplace. No one should be fired without clear and convincing evidence of their unacceptable behavior. The Grievant in this case was a thirteen year employee, a characteristic worthy of consideration. On the other hand, he had a long and consistent record of discipline, a number of which involved improper behavior toward managerial authority.

The Arbitrator has doubts in this case. The preponderance of the evidence favors the Employer, but the evidence of an actual threat is not clear and convincing. As the Union brief noted, where doubt exists in a case like this, the balance must shift in the Employee's favor. While the Grievant may have been persistent

and irritating, even improperly argumentative, the Arbitrator is not convinced that he genuinely threatened the nurse. This conclusion is not to condone the Grievant's behavior nor to give him license to misbehave. He has a serious discipline record. The Arbitrator does believe that the Grievant did engage in a verbal outburst and heated argument with his supervisor that was inappropriate and disrespectful. This conduct was a failure of good behavior. The discipline merited, putting aside the charge of a genuine threat of bodily harm, a serious suspension. The Grievant had been suspended for 6 days for similar behaviors. The Arbitrator believes that a thirty (30) day suspension is just and commensurate with his conduct.

Award

The Grievance is upheld in part and denied in part. The Grievant is to be returned to work. He is not to be assigned to Ms. Kamara who feels threatened by his presence. He is to be docked for thirty (30) days and beyond that made whole through back pay and health benefits, etc.

Rhonda Rivera
Arbitrator

May 23, 1995
Date