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In the Matter of Arbitration
Between
OCSEA/AFSCME Local 11
and
The State of Ohio, Department
of Mental Retardation and
Developmental Disabilities

GRIEVANCE COORDINATOR
Debbie McCament
Case Number:
24-09-20000614-1879-01-04
Before: Harry Graham

APPEARANCES: For OCSEA/AFSCME Local 11:

Michael Scheffer
Staff Representative
OCSEA/AFSCME Local 11
390 Worthington Rd., Suite A
Westerville, OH. 43083-8331

For Ohio Department of Mental Retardation and
Developmental Disabilities:

Ruth A. Rehak
Labor Relations Coordinator
ODMR&DD
30 East Broad St., 12th Floor
Columbus, OH. 43215

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on April 21, 2001 and the record in this matter was closed.

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

Did the Employer have just cause to discharge the Grievant? If not, what shall the remedy be?

BACKGROUND: There is little agreement between the parties over the events giving rise to this proceeding. The Grievant, Deborah McCament, was employed by the State as a Therapeutic Program Worker at the Mt. Vernon, OH. Developmental Center. At the time of her discharge she had fifteen years of service with the State. Her employee evaluations had consistently been satisfactory. During her employment with the State there was one instance of minor discipline on Ms. McCament's record. That was a verbal reprimand for inefficiency. When Ms. McCament was discharged that verbal reprimand was live in her personnel file.

On February 14, 2000 a new employee, Sharon Clark, commenced her duties at the Mt. Vernon Developmental Center. (MVDC) She was classified as an Interim Therapeutic Program Worker. As an Interim Employee Ms. Clark was essentially a floater. She replaced employees on leave. There are several buildings at MVDC in which residents live. One of these is Lincoln Cottage. In due course Ms. Clark was assigned to work at Lincoln Cottage and came to work with the Grievant, Ms. McCament. She came to be offended and concerned with the treatment administered to a resident, R, by Ms. McCament. (Details of allegations against the Grievant are set forth more fully below). In a chance discussion with a Supervisor

Ms. Clark mentioned the use of water to control the behavior of a resident known to be fearful of water. That such would occur startled the supervisor and prompted an investigation. That investigation concluded that Ms. McCament and two co-workers had acted inappropriately towards people in their care. Ms. McCament was discharged. A grievance protesting that discharge was properly filed. It was processed through the procedure of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE EMPLOYER: The State points to the testimony of Sharon Clark and asserts it is credible and must be believed. When Ms. Clark came to work in Lincoln Cottage a resident attacked her. She experienced black eyes, broken teeth and a split lip at the hand of a resident. A co-worker advised her to retaliate. There was an atmosphere of physical violence in Lincoln Cottage. It is against that background that specific incidents testified to by Ms. Clark should be viewed the State contends.

According to Ms. Clark the Grievant and other employees committed various violent actions towards a resident, R. Ms. McCament pulled R by the throat area of his pajamas to get him out of bed. In another incident, the Grievant directed R to clean up after a meal. When he did not do so fast enough

to satisfy Ms. McCament she made as if to strike R. Only when she saw Ms. Clark observing her did she stay her hand.

Another employee, Charlotte Gerstel, was seen by Ms. Clark screaming at R. She was also heard disparaging residents. In this situation the Grievant abused a resident, R. She grabbed and pulled him by the collar. She threatened R with her fist. R is dependent upon caregivers. He is unable to communicate the distress caused by Ms. McCament's actions. Those actions meet the tests of abuse as set forth in the relevant Medicaid regulations.

Ms. Clark was believed by Laurie Hankins, Program Director at MVDC. In discussing the incidents involving the Grievant and R Ms. Clark became emotional in Ms. Hankins presence. She was also emotional when testifying at arbitration. She has experienced serious repercussions as a result of coming forward. The staff at MVDC ostracized her. Her son's car was destroyed by a baseball bat. She received harassing telephone calls. These should be viewed as constituting a pattern of retaliation against Ms. Clark. Further, Ms. Clark was a newly-hired employee when she came forward. She had not yet entered into the pact of silence governing employees at MVDC. She was motivated by sincere concern for the well-being of residents at MVDC.

The Employer is aware that the Ohio Department of Job and

Family Services initially determined that Ms. McCament was eligible for Unemployment Compensation. Upon appeal, that was reversed. (Employer Exhibit 3). The State points out that in any event, the findings of an Unemployment Compensation proceeding are not binding upon an arbitrator. The same status must apply to the investigative report of the Ohio State Highway Patrol. (Union Exhibit 3). That report noted that the Knox County Prosecutor declined to file any charges against the Grievant and co-workers due to the lack of physical evidence. That the Knox County prosecutor declined to file charges against the Grievant should not prevent a finding of just cause for her discharge given what the Employer asserts is the credible testimony implicating her in abuse.

The State is aware that the Union has strongly attacked procedural aspects of Ms. McCament's discharge and its behavior during the grievance procedure. Those attacks are without merit the Employer contends. First, any assertion that Ms. McCament was unaware of the charges against her is belied by the Investigation Report, (Jt. Ex. 22). It shows with specificity the reasons for her discharge. That the Union was provided a redacted version of Ms. Clark's statements did not hamper its defense. The material given the Union provided sufficient information to show the reason for

the State's action. Complete copies of Ms. Clark's statements were ultimately provided to the Union in August, 2000. In the final analysis, the Union was not impeded in its defense of the Grievant. Several months prior to arbitration the Union had all information it requested. Its ability to prepare for arbitration was not compromised. Were it to be found that the State acted improperly in initially withholding information from the Union, its procedural error is insufficient to prompt restoration of Ms. McCament to employment for that reason alone. In this situation the State contends it has met its burden of proof that Ms. McCament abused a resident in its care. As that is the case, the Arbitrator under the plain terms of the Agreement at Section 24.01 cannot modify Ms. McCament's discharge. It must be sustained the State contends.

POSITION OF THE UNION: The Union claims that the State has failed to prove that Ms. McCament abused a resident of the Mount Vernon Development Center. There is one person who claimed to be an eye-witness to client abuse perpetrated by the Grievant, Sharon Clark. Ms. Clark had two weeks of service when she made the report implicating Ms. McCament in client abuse. Ms. McCament had fifteen years of service and an excellent record. When discharged, she had one minor instance of discipline on her record. The Arbitrator is

confronted with a case of one person's word against that of another. Such a case must fail the Union insists. That Ms. Clark has experienced a great deal of difficulty in her personal life subsequent to this incident is not attributable to the Union. Such is not and cannot be proved.

When R was physically examined after Ms. McCament was implicated in patient abuse R showed no signs of physical abuse. There is no evidence that such ever occurred. The only thing on the record is the testimony of Ms. Clark and the fact that it was believed by a supervisor. Absent evidence of abuse and denial of abuse by a fifteen year employee with a good record, the Grievance must be sustained the Union insists.

The Union also points to some of the documents it received during the grievance procedure and claims they are worthless. In particular, Union Exhibit 2, the transcript of the interview between a Police Officer and Ms. Clark, is substantially redacted. The Union had no way of knowing what material was in the interview. Its course of conduct might have been different had it seen the transcript. For all of these reasons, the Union asks that the grievance be sustained and Ms. McCament be restored to employment with a make-whole remedy.

DISCUSSION: Union Exhibit 2 in this proceeding is the

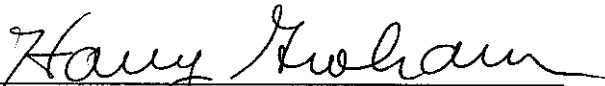
transcript of the interview between Police Officer Fry and Ms. Clark on April 8, 2000. It is 17 pages long. Most pages are entirely blank. Some have snippets of text. Redaction is one thing, Union Exhibit 2 is quite another. It is composed of largely blank pages. The Union has a legal, moral and ethical responsibility to represent its members. It cannot do so when presented with a document the likes of Union Exhibit 2. That relevant material was eventually provided to the Union does not obscure the fact that more than half a year elapsed from the time Ms. Clark was interviewed and provision of more complete text to the Union. A tension exists between the privacy rights of individuals and the right of the Union for information necessary to efficiently and completely represent its members. In this instance, the State far exceeded any rational claim of confidentiality. Provision of 17 largely blank pages to the Union scarcely satisfies its obligation to provide information. At Section 25.01, F the Agreement sets forth the objective of the parties to "resolve grievances at the earliest possible time and the lowest level of the grievance procedure." Obviously that provision of the Agreement cannot be implemented when the State withholds information arguably relevant for grievance processing.

The State has not, and cannot, bear its burden of proof in this dispute. Ms. McCament was discharged on the word of

one person, Ms. Clark. Ms. Clark was determined to be believable by MR/DD authorities. No independent evidence was provided to support her account. The Grievant had fifteen years of satisfactory service on her record when she was discharged. Her accuser had two weeks of service. Never in her fifteen years of service had Ms. McCament been suspected or accused of client abuse. To all accounts her service was entirely acceptable to the Employer but for one minor reprimand. No reason exists to accept the account of Ms. Clark over that of Ms. McCament. This situation involved within it an element of moral turpitude. Consequently the State bears a very heavy burden to prove the allegations against Ms. McCament. There is much learned discussion in arbitration opinions concerning the concept of "burden of proof." Whether or not the standard of "beyond all reasonable doubt" or "clear and convincing" or "preponderance of the evidence" or the standard often used, "convincing the Arbitrator" is relied upon the State has miserably failed to bear its burden. There is simply no reason to accept the account of Ms. Clark over that of Ms. McCament. Absent some corroborating testimony or evidence, conspicuously lacking in this situation, the State cannot prevail. There is no evidence whatsoever that Ms. McCament engaged in client abuse.

AWARD: The grievance is sustained. The Grievant is to be immediately restored to employment. She is to be paid all straight time and overtime wages that would have been paid to her but for this incident. She is to supply to the Employer a record of her interim earning and income from Unemployment Compensation, if any. The Employer may offset its financial obligation to the Grievant by such amounts. All seniority is to be restored to the Grievant. All expenditures for health expenses incurred by her that would not otherwise have been incurred are to be reimbursed to her.

Signed and dated this 7th day of May, 2001 at Solon, OH.



Harry Graham
Arbitrator