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REVIEWED BY

VOLUNTARY EXPEDITED LABOR ARBITRATION TRIBUNAL OCT 23 2002

GRIEVANCE COORDINATOR

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 24-14-100401-2339-01-04
and	*	
	*	
OHIO DEPARTMENT OF MENTAL	*	Aaron Jenkins, Grievant
RETARDATION &	*	Suspension
DEVELOPMENTAL DISABILITIES	*	

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Dennis A. Falcione, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Mental Retardation & Developmental Disabilities:

Jeffrey V. Wilson, Labor Relations Coordinator
Ohio Department of Mental Retardation & Developmental Disabilities

Neni Valentine, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 1:40 p.m. on October 8, 2002, at the Northcoast Behavioral Healthcare System's Northfield Campus in Northfield, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to their collective bargaining agreement. The case was submitted under the expedited procedure of the Agreement but the parties mutually agreed to waive that procedures' limitation on number of witnesses. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. No transcript was made. Testifying for the Ohio Department of Mental Retardation & Developmental Disabilities (the "State") were Eucharia Eweroke, Vedia Satchel, Duane Todd and Mike Griffin. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Patricia McKissick, Robin Scott, Willie Haymon and the Grievant, Aaron Jenkins. Joint Exhibits 1-30 were entered into evidence. The oral hearing was concluded at 6:50 p.m. following oral summations on October 8, 2002, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. BACKGROUND

The Grievant has been employed by the Ohio Department of Mental Retardation and Developmental Disabilities at its Warrensville Development Center ("WDC") since March 6, 1995 and has been a Therapeutic Program Worker ("TPW") since 1998. He has two active disciplines on his record, both for AWOL/Failure to Follow Policy: a two-day suspension on August 16, 2000 and an oral reprimand on April 27, 2001. On May 23, 2001, a co-worker, TPW Eucharia Eweroke, filed a sexual harrassment complaint against him with the WDC's EEO officer, Mike Griffin. At the conclusion of his investigation, Griffin wrote a report stating he found it probable that some of the Grievant's interactions with his accuser were inappropriate. A pre-disciplinary meeting was convened on July 30, 2001, the result of which was a finding of just

cause for discipline. A five-day working suspension order with an undated counter signature of Director Kenneth W. Ritchey was faxed from the Columbus office on September 13. The offenses cited were Improper Conduct/Creating a Disturbance. The Department's Standards of Employee Conduct provide for five days to removal for either improper conduct or creating a disturbance as a third offense. This disciplinary action was grieved on October 4. A third step meeting was held on November 27 at which time the parties agreed to waive the timeline for the third step response. The third step answer denying the grievance was issued on December 12. The appeal to arbitration was dated January 18, 2002, but the case was set for mediation 1½ months later on March 7. Being unresolved, the case came for expedited arbitration on October 8, 2002, as aforesaid, with two issues to be resolved: *Is the grievance properly before the Arbitrator? If so, was the five-day working suspension for just cause and, if not, what is the remedy?* The position of the State is that the grievance is not arbitrable because it was not appealed to arbitration within sixty days of mediation as called for by Article 25.02. Second, if the grievance is arbitrable, the State had just cause to suspend the Grievant. The Union's position is that the grievance is arbitrable because the appeal was well within the ninety-day post-Step 3 response filing window and even before the mediation date. However, the Union counters that the discipline is procedurally flawed because the suspension order was not served on the Grievant within forty-five days after the pre-disciplinary hearing. It further contends that the suspension was unjust because the investigation was not fair and there was no substantial evidence of guilt. It asks that this suspension be expunged from the Grievant's record.

III. OPINION OF THE ARBITRATOR

Is the grievance properly before the Arbitrator?

As ruled from the bench, the grievance is arbitrable because it was appealed within ninety days of the Step 3 response. The fact that it was appealed before the mediation meeting does not invalidate the appeal.

Was the suspension order untimely?

As ruled from the bench, the suspension order was not untimely because the Agreement calls for a "final decision on the recommended disciplinary action," not service on the employee, within forty-five days of the pre-disciplinary meeting. Although the director's signature was not dated, the date the order was faxed is indicative that the decision was made and signature affixed on or before September 13, thus meeting the 45-day requirement.

Was the investigation fair and objective?

Neither a lack of witness statements about alleged events to which there were no witnesses, nor witness statements unauthenticated by the alleged interviewees, nor the investigator's summary supporting his conclusions harmed the Grievant because no evidence was irretrievably lost or tainted and the Grievant had a full hearing *de novo* from the Arbitrator, who reviewed and evaluated all evidence admitted into the record, giving each the weight it was due. Nothing done or not done by the investigator is sufficient to modify or vacate the disciplinary action, but some of the statements he collected cannot be and are not relied on because they are hearsay or were repudiated by the interviewee

Was there substantial evidence of guilt?

No. The case boils down to the testimony of one person against another. To be sure, there are reasons to find one witness more credible than the other. Two supervisors, for instance, corroborate the complainant's demeanor and the Grievant's behavior at the charge office. However, no witness testified that they saw any improper behavior or interactions consistent with what the complainant reported, or supported her story of past affronts in any way. Nor did the complainant make a record of them at the time they allegedly occurred. The steward's testimony was simply unhelpful. She even admitted in her handwritten notes that her memory may have been affected by family problems occurring at the time. In any event, a high degree of proof is necessary to sustain a charge such as this and the evidence presented does not rise to that level.

IV. AWARD

The five-day suspension was not for just cause. The grievance is granted.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
October 17, 2002

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