

#824

REVIEWED BY

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF MENTAL HEALTH

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Dennis Donovan

Case No. 23-06-(20020502)-0010-01-03

Date of Hearing: January 31, 2003

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Penny Lewis
2nd Chair: Dalton Bosley

Witnesses:

Dalton Bosley
Tom Mickley
Grievant

For the Employer:

Advocate: W. Pat Mogan
2nd Chair: Nina Valentine

Witnesses:

Gena Niehaus
Gary Carter
Tom Mickley

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: April 3, 2003

APR 07 2003
Cl. 4-7-03
GRIEVANCE COORDINATOR

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2000 through February 28, 2003, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Dennis Donovan ("Donovan"), for failure to follow a direct order. The discipline was issued because the Grievant failed to timely complete an assignment that was critical to the operation of the employer.

The removal of Donovan occurred on April 24, 2002 and this matter was appealed in accordance with Article 24 of the CBA. This matter was heard on January 31, 2003 and both parties had the opportunity to present evidence through witnesses and exhibits. Post hearing briefs were submitted by both parties on or about February 24, 2003.

BACKGROUND

Donovan worked for approximately twenty-one (21) years for the State of Ohio primarily in the mental health environment. From 1981 until 1999 Donovan worked as a psychiatric attendant or as a Health Information Technician 1 ("HIT 1"). The Grievant was a Correction Officer ("CO") until the Twin Valley Behavioral Health Care Unit ("TVBH") in Dayton was closed, which allowed Donovan to bump back into the HIT 1 classification on July 1, 2001.

Donovan was assigned to TVBH Columbus Campus in the Medical Records Department and part of his work duties required him to process incoming patients at the Moritz Forensic Unit. Processing of patients included the labeling and proper storage of incoming patient's personal possessions. The Grievant was required to box and label patient's belongings in the admitting/intake area and complete property "logs" detailing the property of each patient. The property log forms are placed in "Sue's box" (the usual location) for retrieval by the warehouse employees. After belongings are boxed and logged, they are physically stored in another area at TVBH known as the "property room".

The Grievant remained in the Medical Records Department at TVBH from July 1, 2001 until February 24, 2002. Effective February 24, 2002, Donovan was recalled to a CO position. His removal was based upon events occurring during the eight (8) months he worked at TVBH, particularly the last three (3) days. Gena Niehaus ("Niehaus"), Medical Records Administrator, was Donovan's supervisor during this period.

On February 20, 2002, Gary Carter ("Carter"), Warehouse Supervisor, noticed loose clothing and other items in the admitting area that were unlabeled and not properly logged. Carter informed Niehaus of this matter, which prompted an e-mail at 3:51 p.m. to the Grievant. (Joint Exhibit ("JX") 12). Niehaus stated in part "prior to your leaving work on Friday at 4:30 p.m., I expect...the property labeled and be distributed as appropriate..." (emphasis added). Carter received a copy of Niehaus' e-mail. Donovan admits receiving Niehaus' e-mail as well.

On Friday, February 22, 2002, Niehaus and the Grievant had a telephone conversation wherein Donovan indicates that he had completed the job. Carter contacted Niehaus and again reported that the conditions he observed on Wednesday remained unchanged as of Friday. In an effort to ascertain the facts Niehaus, Carter and Tonya Wood ("Wood") visited Donovan in his office and then everyone went to the admitting area around 2:00 p.m.

Donovan appeared defensive and used a tone of voice described as loud by Niehaus upon questioning whether the admitting room was in order. Upon visiting the admitting room, personal property was in disarray and Carter testified that nothing had changed, i.e., Donovan had not labeled the personal property as requested. Given an opportunity to explain, Donovan indicated that the soiled clothing (e.g. urine, feces, etc.) belonged to one patient and that the intake area was a mess when he arrived. According to Niehaus, the Grievant indicated in front of Carter and Wood that, "it would be done by 4:30 p.m.". Niehaus had to leave the facility around 3:30 p.m. on Friday and did not have an opportunity to inspect the admitting area again.

On February 25, 2002, Donovan was no longer classified as a HIT due to his transfer back to a CO position effective February 24, 2002. On the following Monday, Carter visited the

admitting room and indicated the same conditions existed. Wood assumed the Grievant's duties and performed the labeling, boxing and logging; functions that the Grievant failed to do. The Arbitrator had no opportunity to visit the Grievant's office, the admitting/intake area and the property room to obtain an appreciation of the physical dimensions in context with the evidence.

ISSUE

Was the Grievant, Dennis Donovan, removed for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA, ORC AND OHIO ADMINISTRATIVE CODE 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. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

ODMH-GUIDELINES FOR DISCIPLINARY ACTION (JX 4)

Willful disobedience of a direct order by a supervisor
2nd Offense-Removal (page 5)

POSITION OF THE PARTIES

POSITION OF THE UNION

The Grievant is a twenty-one (21) year employee with generally an exemplary work record until his assignment to TVBH Columbus Campus in July 2001. The only active prior discipline was a two-day fine issued for insubordination/tardiness. Even though the removal was for his second overall offense and the disciplinary grid calls for removal, mitigation requires a different result.

Donovan denies being insubordinate or disobeying Niehaus' direct orders. Management acknowledges that Donovan tends to problem solve on his own (JX9), and he honestly believed

that he had complied with Niehaus' e-mail of February 20, 2002 and her verbal command on February 22, 2002. The Grievant testified that he had boxed and labeled patient's belongings and the only loose clothing on the counter was due to them being soiled.

The Grievant maintains that the workload in the admitting room was overly backlogged, and he also had to maintain his everyday job duties. According to Donovan, Niehaus was aware of the time constraints he was experiencing in an attempt to balance his work assignments.

Further, once the patient's belongings are properly labeled, the paperwork is then placed in "Sue's box". The paperwork contains the property lists for each patient. Upon leaving this area, the Grievant had completed some of the property lists, which remained in the Admitting Area. This fact was shared with Tom Mickley ("Mickley"), Labor Relations Officer ("LRO"), in a phone conversation on February 26, 2002.

Finally, Donovan did not have a key to the property room and the boxes from the admitting room are supposed to be picked up Wednesday and transported to the Property Room by the Warehouse employees. If boxes remain in the admitting area beyond Wednesday, it's not his responsibility.

The overall state of the evidence fails to establish the burden of proof required to support a removal of a long-term employee.

POSITION OF THE EMPLOYER

TVBH is an institution managed under the auspices of the Ohio Department of Mental Health ("ODMH"). The Columbus and Dayton campuses contained maximum-security forensic units until 2001 when the Caltaldi Unit in Dayton was closed. These two maximum-security forensic units are the only entities in ODMH that utilize correction officers. The result being the Grievant was contractually allowed to bump less senior staff. As a result, Donovan moved from a CO in Dayton to a HIT 1 position in Columbus.

TVBH provides services for Ohio's citizens that have mental illness. Clients are housed and obtain various levels of treatment based upon the severity of their illness. Upon arrival at

the Columbus facility, intake procedures require that an inventory and labeling of all clothing and possessions occur at the admitting/intake area. Possessions are identified as belonging to a particular client before they are taken, usually every Wednesday, to the property room for storage. Procedures require that logs are completed to ensure accountability and accuracy.

The incidents that led to Donovan's removal occurred during the final three (3) days while working as a HIT 1.

The employer submits that the February 20, 2002 e-mail from Niehaus was a direct order for Donovan to inventory (log and label) the client's belongings that had accumulated in the admitting area. On Friday morning (February 22, 2002) Donovan falsely informed Niehaus in a telephone conversation that he had completed the job. Niehaus subsequently spoke with Carter who reaffirmed that the intake area was still in disarray.

Niehaus, Carter and Wood went to Donovan's office to ascertain the facts, at which time he became defensive and ask Niehaus if she was accusing him of being a liar? Thereafter, Niehaus, Carter, Wood and Donovan proceeded to the intake area where Donovan continued to talk loudly, but it was confirmed by Niehaus that Donovan had failed to inventory various belongings. In fact, Carter indicated that the same possessions were in the identical place that he had observed on Wednesday. Niehaus verbally ordered Donovan in the presence of Carter and Wood to complete the inventory by the end of the day. This meeting occurred around 2:00 p.m.

According to the employer the job could have been completed in thirty minutes. The failure to comply underscored by the Grievant's lack of effort to seek clarification if the directive was unclear demonstrates a willfulness to deceive. Moreover, Donovan's refusal to comply on two (2) separate occasions and his lying to Niehaus makes his conduct a serious matter, warranting removal. No evidence was offered to infer Donovan was unaware of what was expected and Carter's undisputed testimony indicated that Donovan agreed to properly label and inventory the belongings and place the property log in "Sue's box" by the end of the day, i.e., Friday.

On Monday (February 25, 2002) Carter inspected the intake area and discovered the area in the same state that it was in on Wednesday and Friday of the previous week. Property logs were not in "Sue's box" and no explanation was provided by the Grievant for this conduct.

As a result of Donovan's disregard of two direct orders with no attempts to comply whatsoever, based upon this discipline being a second offense under the grid, removal was the only option. Despite the egregious conduct, the employer considered the Grievant's length of service and opted to convert the removal to a five (5) day fine and successful completion of an E.A.P program. This offer was rejected by the Grievant, leaving the employer with no choice but removal.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th ed., 1997)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the Department of Mental Health's burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After careful consideration of this matter, including all the testimony and evidence of both parties, I find that the Grievant's conduct warranted discipline, but not removal, provided the

Grievant is able to satisfy certain conditions for reinstatement. The Grievant will be reinstated subject to all of the conditions contained in the award within seven (7) calendar days of receipt of this award, with no back pay or any other economic benefit for the reasons contained below. The removal shall be reduced to a five (5) day fine. However, if the Grievant fails to satisfy all of the conditions of reinstatement, the removal shall stand.

The February 20, 2002, e-mail to the Grievant required him to properly label and distribute patient property prior to the end of his shift on February 22, 2002. The February 22nd date is significant since the Grievant was reclassified as a CO and that was his last day in the intake area. The suggestion being that Donovan felt that since he was leaving this area, Niehaus' commands were superfluous to him. I agree.

Moreover, the facts indicated that Donovan intentionally misled Niehaus during their telephone conversation on February 22, 2002 when he stated that he had completed the assignment. Obviously, Donovan had no intent to label and distribute any patient belongings and Niehaus' e-mail and verbal directives failed to move Donovan. The clarity and certainty contained in Niehaus' directives are not in dispute. Nor do the facts indicate any ambiguity that Donovan was confused by what was expected of him. In fact, Carter testified that the Grievant understood both directives and stated on February 22, 2002 after the meeting in the intake area with Niehaus, Woods, et. al. that he (Donovan) would have the job done prior to going home.

The evidence is clear that Donovan did not have the job done and when Carter arrived the following Monday (February 25, 2002) the same mess that Donovan was ordered to process remained. ODMH evidence established that Donovan knew and understood the directives but he intentionally disobeyed the orders. Therefore, discipline is proper based on Donovan's refusal to comply with the direct orders of Niehaus on February 20th & 22nd of 2002. In this matter, ODMH provided unrefuted evidence of the definiteness of its directives and that Donovan was insubordinate.

The fact that the Grievant was a long-term employee along with the fact that he does not have a "bad" active disciplinary record compelled the Arbitrator to consider these facts in determining the appropriateness of the conduct in relation to mitigation.

The grievant's twenty-one years of service warrants a mitigation of the issued discipline. In In re International Extrusion Corporation the arbitrator found that although it would be difficult to fashion a hard-fast rule, long service is properly taken into account as a mitigating factor for minor misconduct. In re International Extrusion Corporation and Cabinet Makers and Millmen, Local 721, January 18, 1996 (106 LA 371). Furthermore, while it may be that a senior employee has no greater rights than a junior employee, the senior's length of service must be recognized when the individual is dealt with by way of termination. In re Arch of Illinois, Captain Mine and United Mine Workers of America, District 12, Local 1392, Voluntary Arbitration Proceedings Case No. 93-12-05-65, February 8, 1995 (107 LA 179). Thus, the grievant's twenty-one years of service are properly considered as mitigating the discipline issued in this instance.

No evidence suggests that Donovan had a pattern of insubordinate conduct or that his behavior was consistent with prior egregious disciplinary problems. In fact, the employer acknowledged his active two (2) day fine for insubordination/tardiness and recommended that just cause existed for removal, but "...that [the] removal [be] held in abeyance upon the conditions of his acceptance of a last chance agreement, and of entering into the OEAP. Upon the successful completion of the EAP, the disciplinary action of removal would be reduced to a five day fine." (JX 2-C)

I agree, in part, with the initial analysis of the employer regarding the appropriate remedy in this matter. However, the Grievant's conduct towards Niehaus was confrontational and defiant regarding her directives. The loud verbal exchanges and refusal to begin his assigned duties was reprehensible and warranted discipline. The argument that Donovan is independent and establishes his own work priorities as justification for his behavior did not resonate favorably

with this Arbitrator. The evidence is unrefuted that Donovan had clear notice of what ODMH expected but he refused to do the work and jeopardize a twenty-year career in the process.

Having decided that ODMH met its burden of proof to prove that Donovan willfully disobeyed two (2) direct orders, the only remaining inquiry involves the remedy, taking into account certain mitigation principles. Although Donovan's work record is not unblemished, in reviewing the Grievant's whole record, evidence supports reinstatement subject to conditions. The Grievant's conduct requires that no back pay or other economic benefit be paid by ODMH. The Grievant must execute a last chance agreement and complete an EAP program under the auspices of the Ohio Employee Assistance Program. Enrollment forms that are required for execution must be completed and the program (OEAP) commenced within thirty (30) days of this award.

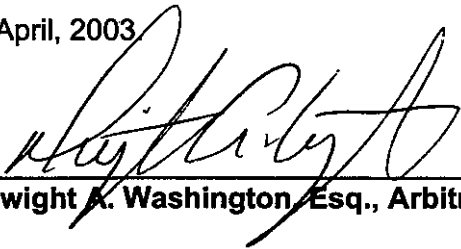
AWARD

The Grievance is ***granted***, subject to the following:

1. The Grievant is to be reinstated within seven (7) calendar days into a CO and/or MIT position in accord with the CBA and his seniority entitlement;
2. The Grievant must enter into a Last Chance Agreement with ODMH within seven (7) calendar days of this award;
3. The Grievant must enroll within thirty (30) days of this award and successfully complete a program under the OEAP guidelines;
4. Upon successful completion of the EAP program the removal shall become moot, but a five (5) day fine shall remain on the record;
5. The Grievant is entitled to no back pay or other economic benefits; and
6. If the Grievant fails to satisfy any of the conditions of reinstatement listed in the Award his removal shall be upheld.

The Arbitrator retains jurisdiction for a period of sixty (60) days to resolve any dispute that may arise in the implementation of this award and/or regarding the enrollment and completion of the OEAP program.

Respectfully submitted this 3rd day of April, 2003



Dwight A. Washington, Esq., Arbitrator