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IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO – DEPARTMENT OF YOUTH SERVICES
AND

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

Grievant: Linda Salters

Case No. 35-03-20030910-0056-01-03

Date of Hearing: April 13, 2004

Place of Hearing: Cleveland, Ohio

APPEARANCES:

For the Union:

Advocate: Victor Dandridge

Witnesses:

Linda Salters

For the Employer:

Advocate: John Kinkela
2nd Chair: Shelly Ward

Witnesses:

Linda Jenks
Alan Pavelschak
Maxine Lyons
Patrice Hudson

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: June 11, 2004

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003, through February 28, 2006, between the State of Ohio, Department of Youth Services ("DYS") 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 removal of the Grievant, Linda Salters ("Salters"), for violating Employer's Policy: Policy 3.10, verbal or written abuse of others by using insulting, malicious, threatening or intimidating language towards a co-worker.

The removal of the Grievant occurred on September 10, 2003, and was appealed in accordance with Article 24 of the CBA. This matter was heard on April 13, 2004, and is properly before the Arbitrator for resolution. Both parties had the opportunity to present evidence through witnesses and exhibits with the record being closed as of April 29, 2004.

BACKGROUND

This matter involves the removal of the Grievant effective September 10, 2003, for violating DYS Directive 103.17 (Joint Exhibit (JX) 1), Rule 3.10 (Verbal or written abuse of others by using insulting, malicious, threatening or intimidating language) on June 11, 2003.

Salters was employed as a school secretary at the Cuyahoga Hills Juvenile Correctional Facility ("Cuyahoga Hills") since June 1, 1980. Cuyahoga Hills serves as a correctional and rehabilitation facility for youth felony offenders from ages 10 – 21. Cuyahoga Hills is a medium security facility that houses up to five hundred (500) youth offenders.

Salters shared an office, known as Room 100, with other employees who were assigned to the school. The office consists of three (3) desks, file cabinets for records and chairs. The

office dimensions were approximately 16 feet by 30 feet¹. On June 11, 2003, Salters returned to the office in mid-afternoon where an incident occurred with a teacher. Jeffrey Sanders ("Sanders") worked at Cuyahoga Hills as a teacher and was in Room 100 using a phone at a desk which was adjacent to Salters' desk. Sanders was informed of his pending lay-off and was talking to a Union representative from the Ohio Education Association when Salters entered the room. It was common practice for employees of the school to use that particular phone in order to obtain an outside phone line. According to DYS, through witnesses Alan Pavelshak ("Pavelshak") and Maxine Lyons ("Lyons"), Salters engaged in the following conduct: use of profanity; opened a desk drawer which hit Sanders' leg; slammed a calendar on the desk in front of Sanders; and snatched a piece of paper from Sanders' hand during the exchange.

Lyons, Assistant Principal, witnessed a portion of the incident and indicated that Salters' voice was raised (JX C, p.24) but that both parties used profanity during the exchange. According to DYS, upon entering her area, Salters demanded that Sanders get off the phone, and when he refused, the Grievant became upset and abusive.

Salters sought Lyons' assistance when Sanders did not leave the area or get off the phone. Upon entering Room 100, Lyons was informed that Salters was ready to leave and lock up the room, but Sanders would not get off the phone. Lyons had to ask Sanders at least three (3) times to get off the phone (JX C, p.21). Lyons provided several statements during the investigation (JX C, pp.18-19; 20-22; 23-29) and concluded that Lyons behavior was inappropriate towards Sanders.

Pavelshak, principal, testified that he participated in the investigatory interviews and had obtained numerous statements from Sanders (JX C, pp.30-42), Sanders believed that he was harassed by Salters' conduct and that she became belligerent and began to use profanity directed at him (JX C, p.30). Sanders indicated that he only used profanity after Lyons appeared and he indirectly referred to Salters. Overall, Sanders stated that Salters' conduct was "...verbally and physically abusive to me. Mrs. Salters has intentionally created a very

¹ During the hearing, a site visit to Room 100 occurred, enabling the Arbitrator to appreciate the desk configurations and spacing within the office.

hostile work environment by using profanity, snatching items from my personal space, pushing me and opening drawers with the purpose of hitting me. All of her actions were unsolicited and gained no response from me" (JX C, p.31).

Palvelshak also indicated that prior complaints from co-workers have been received, and that Salters' conduct on other occasions, i.e., threatening to punch an employee, tossing a transcript, had been inappropriate. Simply put, when the Grievant had a good day in the office, no problems would occur. Linda Jenks ("Jenks"), Labor Relations Officer, indicated that Salters' prior incidents of inappropriate behavior had resulted in the following active discipline:

1. November 23, 1999 – 1 day fire (verbal/written abuse of others)
2. November 7, 2001 – Written reprimand (failure of good behavior)
3. July 18, 2002 – 5 day suspension (insubordination)

On the other hand, the Union submits that Salters followed protocol by engaging Lyons into the incident since Sanders and Salters purportedly had had prior conflicts in the office. Sanders was an active participant and received no discipline, even though he had been asked several times by Lyons to leave the area. The significance of that being that Sanders had an active ten (10) day suspension on file and his removal would have been automatic according to Jenks since they were equal combatants in the eyes of the Union.

The Union submits the principle that "equal infractions receive equal discipline" and asserts that the principle was not applied in this matter. The Union alleges that the penalty was punitive, not corrective, since the facts fail to support that Sanders felt threatened by the Grievant's conduct (JX C, p.36).

According to the Union, the facts fail to support a finding that Salters was the instigator to the incident and that the picture projecting Salters' vile behavior is illusory and not supported by the facts sufficient to uphold the removal of a 23-year employee. The Union seeks reinstatement, back pay and any other available remedy to make the Grievant whole.

ISSUE

Was the Grievant, Linda Salters, removed for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA AND CYS 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).

24.02 – Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. one or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. working suspension;
- D. one or more fines in the amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB.
- E. one or more day(s) suspension(s);
- F. termination

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

General Work Rules (in part)

POLICY NUMBER: 103.17

LEVEL THREE: Rule 3.10 Verbal or written abuse of others
Using insulting, malicious, threatening or intimidating language.

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

Salters, a long term employee, continued to demonstrate behavior not conducive of a peaceful and productive work environment despite verbal conferences, warnings and lesser discipline prior to removal.

The incident on June 11, 2003, graphically indicates unacceptable behavior, which included verbal and physical abuse directed toward Sanders. The incident unfolded in two parts, prior to and after Lyon's intervention.

Prior to Lyon's arrival in Room 100, according to Sanders, Salters arrived in the room, and began to act disrespectfully by turning her radio up loud to disrupt his telephone conversation. Next, Salters snatched a piece of paper that Sanders was writing on at the desk where he was seated (JX C, p.30). Salters proceeded to use "...all kinds of profanity..." as well. (JX C, pp.32-33) Finally, Salters pushed Sanders and intentionally opened desk drawers in an effort to strike Sanders' leg. In fact, Sanders indicated in his statement of June 11, 2003, that, "...Mrs. Salters then opened a drawer which bumped my leg. She proceeded to push my leg and my chair out of the way" (JX C, p.30).

After Lyons arrived, Sanders relayed his version of what happened, wherein Salters admitted to telling Sanders to get off the "damn" phone. Lyons stated Salters used other profanity after her arrival, which words, Lyons was unable to recall (JX C, p.20)². Lyons indicated that Salters' voice was raised and that she (Salters) was doing the talking but Sanders never said a word to her. According to Lyons, Sanders was seated with his back to Salters and at some point in the conversation, Sanders said, "stupid ass". Finally, Lyons observed Salters slam a large desk calendar in front of Sanders in an effort to provoke him, but Sanders did not respond or say a word (JX C, p.25).

² Sanders however, stated that Salters told him, "...don't write on this mother fucking thing..." in reference to the calendar.

Sanders who did not appear at the hearing, and was reluctant to testify according to DYS, provided written statements dated June 11, 2003, July 21, 2003, and July 22, 2003, which were admitted into evidence as joint exhibits. The events listed above were verified in Sanders' statements, and in reply to questions and answers provided by DYS, Sanders answered in part:

"3. How exactly was Linda Salters disrespectful to you?"

Profanity, radio turned up loud, rude, unprofessional, pushed me

10. You stated Linda Salters became belligerent. Explain and be specific.

Violated my personal space

15. Did you feel threatened by Linda Salters' behavior?

I felt violated and disrespected and I felt that was her intention... (JX C, pp.35, 37-38)

As a result of this incident, as well as previous discipline, DYS submits that 'just cause' exists to support Salters' removal. Regarding Salters' active prior discipline, Jenks testified that each of the incidents involved conduct/behavior demonstrating failure to comply with reasonable work rules. As examples, on July 18, 2002, Salters received a 5-day suspension for being insubordinate to a supervisor; on October 3, 2001, she received a written reprimand when she threw a folder at two supervisors; and on August 17, 1999, Salters received a three (3) day fine when she used threatening language towards a supervisor.

Salters' refusal to admit any wrongdoing and placing blame on others for her behavior is a significant part of the problem. On rebuttal, Patrice Hudson ("Hudson"), former Chapter President of the Union, testified that she discussed with Salters the option to participate in the Employee Assistance Program ("EAP") to no avail. As a result of Grievant's continued behavior, removal was the only option.

POSITION OF THE UNION

The Grievant, a twenty-three (23) year employee was not removed for "just cause". The incident of June 11, 2003, indicates that while Sanders was an equal participant in what occurred, he was not disciplined for his role.

Sanders admitted to using profanity and ignoring Lyons' request on three (3) separate occasions to leave the area, which escalated the events that occurred thereafter. In fact, Salters attempted to quash the incident by seeking out Lyons for assistance.

According to Salters' written statement dated June 20, 2003, Sanders was physically in the way and prevented her from doing her job. Sanders had been on the telephone for approximately 20 to 25 minutes prior to Salters seeking Lyons' involvement. After Lyons' arrival, Sanders told Salters to mind her own business and called her names such as "stupid ass", "ignorant ass", and "dumb ass" (JX C, p.43). Salters further indicated that due to Sanders' unwillingness to leave, she was forced to call B. G. Bower, Superintendent, for assistance even after Lyons' arrival (JX C, p.43).

Sanders, who also used profanity and had an active ten (10) day suspension on record, received no discipline. The pending layoff of Sanders should not have eliminated him from discipline.

Salters testified that she asked Sanders several times to move out of the way so she could retrieve a file from the desk drawer. Salters was adamant that she did not use profanity at any time, hit his leg, or threaten him in any manner. Salters challenged Lyons' testimony and Sanders' statements as being untruthful.

Regarding the alleged calendar incident, Salters disputes Lyons' testimony and denies slamming the calendar in front of Sanders. Salters further testified that her radio volume was the same as usual and no past complaints were brought to her attention regarding the volume.

With respect to her past conduct, Salters testified that the prospect of receiving counseling sessions or an offer to voluntarily participate in an EAP program was never discussed with her.

The Union also argues that the length of Salters' employment should serve as mitigation, and since Sanders instigated the incident and received no discipline, Salters' removal was punitive and without just cause. The Union seeks reinstatement with back pay and any other remedy to make Salters whole.

BURDEN OF PROOF

It is well accepted in discharge and discipline-related grievances that the employer bears 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. such as "beyond reasonable doubt," "preponderance of evidence," and "clear and convincing") commonly used in non-abatable 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 DYS'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 the Grievant's guilt. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSION

After careful consideration of the evidence in this matter, including all of the testimony and evidence of both parties, I find that the grievance must be denied. My reasons are as follows:

This case, to great extent, is about accountability and honesty regarding the incident of June 11, 2003. The Grievant denies any wrongdoing and asserts that any evidence contrary to her version are lies. To believe Salters' version of the events would require this Arbitrator to discredit DYS witnesses and any corroborative written records detailing what occurred.

Recognizing that self-interest shapes witness's prospective, an analysis of who has a reason or motivation to be untruthful is the sorting process required to find credible evidence.

The Grievant was the only witness offered by the Union to refute the testimony of Jenks, Lyons, Pavelshak and Hudson. The Union relies solely on the testimony of Salters to contest the factual disputes associated with the June 11, 2003, incident as well as the evidence regarding her past conduct of a similar nature.

DYS presented the following evidence to support it's version of the June 11, 2003, incident: (1) Lyons and Pavelshak testimony; (2) Lyons' written statements of June 12, 2003 (JX C, pp.18-19), July 15, 2003 (JX C, pp.20-22) and July 22, 2003 (JX C, pp.23-29); and (3) Sanders' written statements of June 11, 2003 (JX C, p.30), July 21, 2003 (JX C, pp.31-34) and July 22, 2003 (JX C, pp.35-42).

What occurred on June 11, 2003, is a matter of dispute between the parties. Examples include whether or not Salters used any profanity, touched Sanders or threatened Sanders during the exchange. Both Lyons and Sanders indicated that they heard Salters use profanity. Salters, at the hearing, denied using any profanity on June 11, 2003. Both Lyons and Sanders indicated that Salters, through her behavior, was the instigator and was trying to cause a confrontation. Once again, Salters denies doing any conduct which could be viewed as abusive towards Sanders.

This case presented the importance of determining credibility with respect to the provocation and aggression of Salters and/or Sanders. I find that Lyons was credible and believable as a witness and was present when Salters used profanity and slammed the calendar on the desk. Whether Sanders' use of the phone provoked Salters or not, does not eradicate Salters' behavior in the presence of Lyons.

Also, the evidence indicates that prior to Lyons' arrival, Salters had physically struck Sanders' with the desk drawer and had physically snatched a paper from Sanders' hand. These acts alone demonstrate that Salters' conduct was intimidating under Rule 3.10. The Union argues that Sanders was not threatened, leaving no violation of Rule 3.10. I disagree.

Rule 3.10 is a quilt for several types of abusive behavior; "...insulting, malicious, threatening or intimidating..." conduct. An analysis of threatening behavior requires the following: a specific threat occurred and Salters had authority to carry it out. See, Walker Mfg. Co., 60 LA 645 (Simon, 1973). In addition, the words, acts or gestures of Salters must be analyzed. I find that Salters intended to and struck Sanders with the desk drawer and pushed him prior to Lyons' arrival. Salters indicated that Sanders was in "her way" and she needed to retrieve a file from the desk where he was sitting. The facts also support the inference that Salters "snatched" paper from Sanders while he was writing on a desk calendar. Both acts, were not provoked by Sanders, but relied solely upon the aggression of the Grievant. It's also clear that Salters was angry and argumentative prior to and after Lyons' arrival. The overall evidence supports the finding that Salters' conduct was intimidating and threatening towards Sanders by words and acts.

Salters' overall testimony was not credible or believable, underscored by DYS rebuttal witness, Hudson, a former Union President. Hudson contradicted Salters' claim that participation in an EAP was never discussed with her. In other words, for me to grant this grievance, the evidence must support that all of the other witnesses were lying except Salters, in areas where credibility is an issue. The foregoing facts and the continued refusal of Salters to 'come clean', warrants no mitigation of the discipline.

Regarding the Union's position that Sanders was an equal participant. This is not supported by the facts. As examples, no facts exists to infer that Sanders physically made any gesture(s) towards the Grievant, made any physical contact with the Grievant, nor appeared angry/argumentative during the exchange.

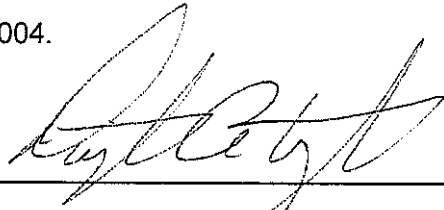
Simply given the Grievant's confrontational style, refusing to acknowledge her role in the June 11, 2003, incident, and her continued aggressive behavior towards employees of DYS, this Arbitrator is convinced that under any evidentiary standard, DYS met its burden of 'just cause' under Rule 24 of the CBA. Furthermore, DYS, in the opinion of this Arbitrator, demonstrated past measured restraint in an attempt to correct Salters' behavior, to no avail.

Finally, a long-term employee cannot seek protection if he/she continually challenges and provokes co-workers or management abusively.

AWARD

The grievance is denied.

Respectively submitted this 11th day of June 2004.

A handwritten signature in black ink, appearing to read "Dwight A. Washington", written over a horizontal line.

Dwight A. Washington, Esq.