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REVIEWED BY

VOLUNTARY LABOR ARBITRATION TRIBUNAL

JUN 23 2004
CL. 6-23-04
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. 24-14-030930-2714-01-04
and	*	
	*	
OHIO DEPARTMENT OF	*	Anthony W. Greene, Grievant
MENTAL RETARDATION AND	*	Removal
DEVELOPMENTAL DISABILITIES	*	

APPEARANCES

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

Herman S. Whitter, Esq., Director of Dispute Resolution
Robert Robinson, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Mental Retardation and Developmental Disabilities:

Tondra L. Brokaw, Director of Employee and Labor Relations
Ohio Bureau of Workers Compensation

Ray Mussio, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:30 a.m. on June 16, 2004, and continued on at the offices of the Ohio Civil Service Employees Association in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They 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. Testifying for the Ohio Department of Mental Retardation and Developmental Disabilities (the "Department") were Deputy Director D. Michael Snow and Colleen Ryan, Investigator. Also in attendance were Karen Reich, Human Resources Specialist 2, Laura Frazier, Labor Relations Officer 3, and Matt Banal, Legal Intern. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Staff Representative Robert Robinson, Paralegal Jennie Lewis and the Grievant, Anthony W. Greene. Also present were Chapter President Cheryl Thomas and Dispute Resolution Extern Corinne DeFallo. A number of documents were entered into evidence: Joint Exhibits 1-5 and Union Exhibits 1-7. The oral hearing was concluded at 12:45 p.m. following oral argument whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of his removal from state employment, the Grievant was a part-time therapeutic program worker at the Warrensville Developmental Center, a facility for the care of and assistance to individuals with mental retardation and/or other developmental disabilities. The Grievant had been there for approximately two years as a primary caregiver for residents of the center. He had no active discipline on his record and, according to his performance review for the October 2001-2002 period, he met his employer's expectations except in team effort (where he exceeded them) and in adhering to procedures (where he was below expectations). As a junior employee (who may be mandated) he consistently worked overtime, though his weekly average declined in 2003.

The Grievant was concurrently employed in a similar capacity at Connections in Ohio, a county-level supported-living provider. In the summer of 2003 the Grievant was investigated by the Cuyahoga County Board of Mental Retardation and Developmental Disabilities (CCBMRDD) and the Cleveland Heights Police Department for an incident of resident abuse allegedly occurring on May 26, 2003 at the Connections facility. When the Department was informed of this investigation, it placed him on administrative leave effective June 5. The CCRMRDD investigator, Jeff Starr, issued his report on June 25, finding the allegation of physical abuse substantiated based on interviews with the resident he was alleged to have abused and two of that resident's. According to his report, the investigator did not interview the Grievant but asked Investigator O'Haire of the Cleveland Heights Police Department to interview him. Also per Starr's report, O'Haire reported to him that the Grievant denied the allegations in a telephone conversation but never came into the station for an interview.

The Grievant testified Connections never took a statement from him or gave him an opportunity to defend himself. He said he called Starr when he learned Starr had been trying to reach him, but Starr did not want to hear his statement and referred him to the Cleveland Heights Police Department. He stated that he tried for two days to reach the police investigator. When they finally connected, he was told he had to turn himself in because of assault charges. When he did so that night the sergeant took his statement and told him to come back the next morning. The Grievant turned himself in as directed the next day and was bailed out. On June 30, before his case came to trial and without any administrative hearing, the Grievant was terminated from employment at Connections in Ohio for consumer abuse.

While he awaited trial, the Department proceeded with its own case, conducting a pre-disciplinary hearing on September 3. The pre-disciplinary packet contains the CCRMRDD investigator's report with names redacted. The hearing officer recommended removal, citing the Grievant's removal letter from Connections in Ohio and Medicaid Rules and Regulations for ICF/MR Facilities, Tag W152, Section 483.420 (d) (1) (iii) Guidelines:

substantiated allegation of abuse, neglect or mistreatment which occurred after October 3, 1998... and which resulted in the termination of that person's employment from another health care facility, becomes a part of the person's employment history and the ICF/MR is prohibited from continuing to employ the individual. [emphasis in the original]

The Grievant was thereafter removed from his position at Warrensville Development Center on September 30, 2003 for violation of ORC 124.34, Failure of Good Behavior. This action was grieved that same day and subsequently fully processed to arbitration, where it presently resides free of procedural defect, on the sole issue of *Was the Grievant removed for just cause? If not, what shall the remedy be?*

Meanwhile, the Grievant's criminal case came to trial where he was found not guilty. He applied for unemployment benefits and was approved on appeal, which decision was mailed June 2, 2004. He is also pursuing a wrongful discharge action against Connections.

At arbitration, the Grievant again asserted his innocence as he has in every proceeding related to this case that is a part of the written record. Additionally, no eyewitnesses to the alleged incident leading to the Grievant's termination were called to testify. Colleen Ryan, a Department investigator who reviews Major Unusual Incidents ("MUIs") in conjunction with processing cases for the abuse registry testified she reviewed this case and concurred with CCBMRDD investigator's conclusion that abuse was substantiated by a preponderance of the evidence. She said a criminal "not guilty" finding was not determinative because the standard of

proof is higher than the administrative standard. Deputy Director D. Michael Snow testified the Department follows the Medicaid standards because failure to do so would threaten its federal funding. In addition, the standards give direction on how to protect the individuals under the Department's care. He said it had no choice but to remove the Grievant because the county investigator substantiated the allegation of abuse.

III. ARGUMENTS OF THE PARTIES

Argument of the Department

The Department argues that the MUI at Connections was substantiated by a preponderance of the evidence. Therefore, he was removed from Connections and subsequently from Warrensville Development Center pursuant to Medicaid Tag 152. The regulations are clear. The Department had no choice. Regardless of what happened in criminal court, the MUI remains substantiated.

With respect to due process, the Department submits that the Grievant's complaint lies with Connections, not the Department because the Department followed the MUI protocol and gave him all due process as outlined in the Collective Bargaining Agreement. Connections, however, is a private, at-will employer and is not subject to the OCSEA contractual requirements.

Argument of the Union

The Union argues that the Grievant was discharged without just cause. Medicaid regulations are not the issue here. The regulations do require disqualification for substantiated abuse of a resident and the Union, like the Department, has an interest in compliance. However, the Arbitrator can find the allegation unsubstantiated without jeopardizing federal funding.

What is at issue is what "substantiated" means. Since this term is not defined in Ohio or Medicaid regulations, the Arbitrator may look to other jurisdictions and to its ordinary meaning. The Union directs the Arbitrator's attention to a dictionary and to what other states provide. It submits that an allegation cannot be "substantiated" without the accused being given the opportunity to refute and rebut it. The Grievant was never given that opportunity until the

criminal trial and unemployment case. The CCDMRDD investigator did not even talk to the Grievant before finding the resident's claim "substantiated," and Connections did not give the Grievant an administrative hearing. Then the Department's MUI investigator made her determination based solely on what was before her, namely the CCDMRDD's investigator's report. The Union asks the Arbitrator to consider the totality of the evidence to include the finding of the criminal court, and the Unemployment Compensation Review Commission's determination, hold that the Department lacked just cause to remove the Grievant and award him a full make-whole remedy as set forth in the Union's opening statement.

IV. OPINION OF THE ARBITRATOR

The Grievant was discharged because an outside entity's investigator reported he substantiated allegations of physical abuse. Labeling allegations as "substantiated" does not make them so. In order to know whether a finding of substantiation is warranted, one must know the basis upon which it was made. Here the investigator's conclusion was based on "the interviews and accounts" of the alleged victim and two roommates. He essentially made a credibility determination without ever interviewing the Grievant. Not until his criminal trial did the Grievant get a chance to rebut his accuser's claims and establish his own credibility because his outside employer fired him without a hearing or even an investigative interview. It simply rubber-stamped the investigator's finding. Because the investigator's finding and subsequent termination lacked even the most fundamental element of due process, the allegations were not sufficiently tested to be deemed "substantiated." Neither the criminal court, which heard testimony from both sides of the issue, nor the Unemployment Compensation Review Commission, which heard from the Grievant and had the investigator's hearsay document with

names redacted (as did the Arbitrator) found the evidence sufficiently strong to meet their required but differing weight of evidence. The evidence submitted in arbitration as described above also fails to convince the Arbitrator. She understands the Department's dilemma, but is bound to hold that the allegations of physical abuse were not substantiated and therefore there was no just cause for removal.

V. AWARD

The Grievant was removed without just cause. The grievance is granted. The Grievant is to be reinstated forthwith to his former position of Therapeutic Program Worker and made whole. He is granted full back pay and benefits including but not necessarily limited to healthcare benefits and reimbursements, PERS contributions, leave balances, and union dues. Because the record establishes that the Grievant regularly worked both mandated and voluntary overtime, he is also granted overtime to be calculated on the average of overtime hours he worked in the year preceding his unjust dismissal. The Department may deduct any earnings the Grievant had in the interim on account of his dismissal and may require reasonable evidence thereof. The Arbitrator retains jurisdiction for a period of sixty (60) days for the sole purpose of resolving any dispute in the interpretation and application of the remedy.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
June 23, 2004