

#881

ARBITRATION DECISION

December 1, 2004

**REVIEWED BY**  
**DEC - 3 2004**  
**GRIEVANCE COORDINATOR**

In the Matter of:

State of Ohio, Department of Mental )  
Retardation and Developmental Disabilities, )  
Columbus Developmental Center )  
 )  
and )  
 )  
Ohio Civil Service Employees Association, )  
AFSCME Local 11 )

Case No. 24-06-031118-0794-01-04  
Gazelle Smith, Grievant

APPEARANCES

For the State:

Carolyn Border-Collins, Management Advocate, ODMRDD  
John Kinkela, Second Chair, Office of Collective Bargaining  
Brenda Gerhardstein, Manager, Personnel & Labor Relations  
Edward Jones, Witness  
David Ott, Center Representative  
Laura Frazier, LRO 3, Observer  
Jeff Wilson, EEO Manager  
Sheila Jacobs-Ball, Payroll Officer

For the Union:

Victor Dandridge, Union Advocate  
Elizabeth Martinez, Chapter President/Chief Steward  
Gazelle Smith, Grievant

Arbitrator:

Nels E. Nelson

## BACKGROUND

The grievant, Gazelle Smith, was a Therapeutic Program Worker at the Columbus Developmental Center of the Ohio Department of Mental Retardation and Developmental Disabilities. She has hired on June 6, 1998. At the time of her discharge, the grievant had four active disciplines in her file. They consisted of a two-day suspension on April 26, 2001, for falsifying reports; a five-day suspension on June 15, 2001, for inefficiency and making false statements; a written warning on March 7, 2002, for being AWOL; and an oral reprimand on December 7, 2002, for failure to follow policy.

In the summer of 2003 the grievant was involved in two incidents. The state charges that on June 27, 2003, the grievant was argumentative and used vulgar language in a confrontation in the payroll office. The union claims that it was not unreasonable for the grievant to request information from the payroll office about a missing payroll deposit and that her vulgar language was the result of frustration and was not directed to anyone in particular.

The second incident took place on July 4, 2003. The states alleges that on that date the grievant was involved in a confrontation with Edward Jones, a TPW, where she used vulgar language and made racially motivated remarks in front of residents. The union contends that Jones was responsible for the incident and that the state was aware of the tension between Jones and the grievant and that it should have separated them.

As a result of these two incidents, the disciplinary process was invoked. On October 1, 2003, the grievant was notified of a pre-disciplinary meeting. Following the meeting, the hearing officer found that there was just cause for discipline. On October

16, 2003, the grievant was removed for violating the standards of employee conduct by creating disturbances on June 27 and July 4.

On November 12, 2003, the grievant filed a grievance. She charged that she was removed in retaliation for filing an EEO complaint and that her removal was based on allegations that were not proven. The grievant asked to be reinstated and made whole.

When the grievance was not resolved, it was appealed to arbitration. The hearing was held on October 6, 2004. Post-hearing briefs were received on November 2, 2004.

## RELEVANT CONTRACT PROVISIONS

### 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.

\* \* \*

#### 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(state) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. working suspension;
- D. one or more fines in an amount of one (1) to five (5) days, the first time 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.

\* \* \*

## 24.05 - Imposition of Discipline

\* \* \*

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

### ISSUE

The issue as agreed to by the parties is:

Was the grievant removed for just cause? If not, what shall the remedy be?

### STATE POSITION

The state argues that it gave the grievant multiple opportunities to correct her behavior. It points out that Brenda Gerhardstein, the personnel and labor relations manager, testified that had the grievant's inappropriate behavior on June 27 and July 4 been her first violations, she would have received a written reprimand, just like Jones. The state stresses, however, that the grievant had four active disciplines in her file even though she had barely five years of service.

The state rejects the union's charge that it "willfully and purposely targeted the grievant for removal" and that its case is "filled with false allegations" and "disparate treatment." It claims that the union offered nothing to support these contentions. The state indicates that the grievant's removal was the cumulative result of her chronic misbehavior.

The state contends that it met its burden of proof to establish just cause for the grievant's removal. It states that the timekeeping policies were established to reduce

confusion in the payroll office on paydays. The state asserts that if the grievant had followed appropriate procedures, the disturbance on June 27 would never have occurred.

The state maintains that the grievant's derisive remark to Jones violates its rules against "creating a disturbance." It indicates that Jeff Wilson, the EEO manager for the department, explained why the grievant's comment to Jones disturbed the workplace. The state observes that the reasonableness of its rule is axiomatic because it is bound by state and federal laws.

The state argues that it conducted a fair investigation and gathered substantial evidence in support of its action. It points out that its investigation reports include witness statements that attest to the grievant's inappropriate behavior on both of the dates in question. The state stresses that in the grievant's statement regarding June 27, she admits that as she was leaving the payroll office she said, "oh just kiss my ass."

The state insists that it evenhandedly imposed discipline on the grievant based on the seriousness of her offenses and her disciplinary history. It reports that Jones received a written reprimand for his inappropriate conduct on July 4. The state observes that the grievant's removal was based not only on her offenses on July 4 but on the events of June 27 and her prior disciplinary record.

The state claims that the grievant's testimony at the hearing greatly compromised her credibility. It charges that the grievant's "direct testimony was an elaborate tale laden with explanations never before brought up during the removal process." (State Brief, page 6) The state maintains that the grievant's testimony regarding the June 27 incident was "a nonsensical ball of confusion." It asserts that her confusion about June 27 makes her testimony regarding July 4 suspect as well.

The state concludes that it has established by clear and convincing evidence that the grievant's removal was for just cause. It asks the Arbitrator to deny the grievance in its entirety.

### UNION POSITION

The union argues that the grievant was erroneously disciplined. It claims that the incident on July 4 was the direct result of the negligence of Jones. The union states that the grievant had cautioned him about the behavior of L.B., a resident. It indicates that despite the grievant's warning, Jones left L.B. unattended and, as a result, he fled the building.

The union contends that there are three certainties about the dialogue between the grievant and Jones. It maintains that the grievant took the proper course of action by contacting a supervisor to assist in resolving the situation; that the report completed by Officer J. Van Dyne indicates that the residents did not recall the incident or that they were unaware of it; and that the state's negligence played a role in the situation because it was aware of the tension between the grievant and Jones but failed to separate them.

The union questions the state's claim that the grievant created a disturbance on June 27. It claims that the grievant's request for information about her missing payroll deposit was not unreasonable and notes that the grievant was not disciplined for ignoring the "chain of command." The union states that although the "utterance that the grievant made in frustration is not considered polite or professional by any stretch of the imagination, it is clear that the grievant was exiting the area and not speaking to any one directly." (Union Brief, page 2) It stresses that the grievant was honest and forthright in admitting that she made the statement.

The union maintains that the grievant may have gotten confused while explaining why she felt frustrated. It suggests that “management clearly believes that the grievant made this remark after the second time that her payroll was not deposited rather than the third time in which they readily admit took a week to issue her a new check.” (Ibid.) The union reports that the grievant had a right to expect that she would receive her pay in a proper manner and that the state’s failure to do so should be considered a mitigating factor.

The union accuses the state of making a “grand effort” to remove the grievant. It questions the state’s claim that the grievant, who is an African-American, is a racist because she called Jones, who is an African, an “African.” The union characterizes the state’s charge that the grievant stated that she hated white people as “unfounded and untrue.”

The union suggests that the penalty of removal is too harsh. It contends that it is a quantum leap from a five-day suspension to a removal.

The union asks the Arbitrator to grant the grievance and return the grievant to her position with back pay and all lost benefits.

### ANALYSIS

The grievant’s removal was triggered by two incidents. The first occurred on June 27, 2003. On that date, the grievant went to the payroll office to see why her paycheck had not been deposited in her bank account. She got into a dispute with Sheila Jacobs-Ball, a payroll officer. As a result of the confrontation, Jacobs-Ball contacted the CDD police.

The police conducted a thorough investigation. An officer took statements from Jacobs-Ball; Tia Honzell, a TPW who was entering the payroll office as the grievant was leaving; and the grievant. The statement given by Jacobs-Ball indicates that the grievant was hostile and verbally abusive. The grievant acknowledges in her statement that as she left the payroll office she said, "kiss my ass."

The Arbitrator does not believe that there was any justification for the grievant's conduct. While he understands her frustration over not having her paycheck deposited in her bank account, it does not excuse her abusive and aggressive behavior. In addition, although the grievant testified that the remark she made leaving the payroll office was not directed at anyone in particular, it was still clearly inappropriate. Thus, the Arbitrator must conclude that the grievant violated the standards of employee conduct by creating a disturbance.

The second incident took place only a few days later on July 4, 2003. On that date the grievant was involved in a dispute with Jones who worked with her in one of the residences. The record indicates that the grievant called Nora Lindsey, a Residence Care Supervisor, and told her that Jones had threatened her and asked her to call the CDC police. The police responded and took statements from the grievant, Jones, and two other workers and talked to a number of the residents.

The grievant and Jones offered different views of the events. The grievant claimed that Jones became irate with her and followed her and stated that he "did not give a damn about her." Jones charged that the grievant called him a "stupid and arrogant African" and that she cursed him using the words "fuck" and "damn." He also



complained that the grievant threatened to get him fired. Jones was a probationary employee and the grievant was a former union steward and chapter president.

The charges made by Jones were supported by the statement of Alfreda Bangura, a TPW who worked in the same residence as the grievant and Jones. She indicated that the grievant addressed Jones in a strong and aggressive tone of voice and reported that the grievant told Jones "to get the fuck out of her face" and that she threatened him and used the term "African."

The Arbitrator must accept the testimony of Jones. First, as indicated above, it is supported by Bangura's statement. The grievant's claim that Bangura's statement was motivated by the grievant's refusal to process a grievance on her behalf was unsupported. Second, the testimony of Jones and Bangura about the grievant's behavior is consistent with her abusive and aggressive behavior in the payroll office several days earlier. Thus, the grievant was responsible for creating a disturbance in violation of the employee standards of conduct on July 4.

The remaining issue is the proper penalty. As indicated above, the grievant violated the standards of employee conduct by creating a disturbance on two occasions. The offenses occurred one week apart. The confrontation with Jones followed a counseling session on June 18, 2003, where the grievant was told that she needed to be respectful of others and treat her coworkers in a professional manner.

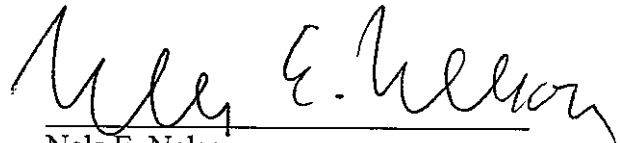
In addition to the grievant's most recent offenses, she had a very poor disciplinary record. She received a two-day suspension on April 26, 2001, for falsifying reports; a five-day suspension on June 15, 2001, for inefficiency and making false statements; a written warning on March 7, 2002, for being AWOL; and an oral reprimand on

December 7, 2002, for failure to follow policy. While the most recent disciplines involve minor offenses, the two- and five-day suspensions are the result of much more serious misconduct.

The Arbitrator must conclude that the state had just cause to remove the grievant. The grievant had just barely five years of service at the time of her removal yet during that time she had been disciplined on four occasions, including two suspensions. Despite the use of progressive discipline, the grievant did not improve her behavior. The state does not have to continue to employ a person who repeatedly violates the standards of employee conduct.

AWARD

The grievance is denied.



Nels E. Nelson  
Arbitrator

December 1, 2004  
Russell Township  
Geauga County, Ohio