

VOLUNTARY RIGHTS ARBITRATION

In The Matter of Arbitration Between:

State of Ohio, Ohio Department of Mental Retardation and Developmental Disabilities

- And -

Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO

Grievant: Joyce Moore
Case No: 24-14-20051220-3097-01-04

#1935

ARBITRATOR'S OPINION AND AWARD

Arbitrator: Dr. David M. Pincus

Date: August 10, 2006

APPEARANCES

For the Employer

Bill Green	Superintendent
Shari Zuckerman	Health & Safety Administrator
Laura Frazier	Co-First Chair
Kristen Rankin	Second Chair
Tara Hatcher	TPW
Cornell Hale	Co-First Chair

For the Union

Joyce Moore	Grievant
Robert Ellis	Chapter President
Curtis Bishop	TPW
Renee Adams	TPW
Michael Webb	TPW
Margaret Boyd-Lang	TPW
Deborah Robinson	TPW
Kalima A. As'Sami	RCS
Robert Robinson	Advocate

INTRODUCTION

This is a proceeding pursuant to a grievance procedure in the negotiated agreement between State of Ohio, Department of Mental Retardation and Developmental Disabilities (the Employer) and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO (the Union). The arbitration hearing was held on March 1, 2006 and March 17, 2006. The parties agreed to submit post-hearing briefs in lieu of making closing statements.

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses, and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

STIPULATED ISSUE

Joyce Moore, the Grievant, served as a Therapeutic Program Worker (TPW) at the Warrensville Developmental Center (WDC). She was removed on December 19, 2005 with six years of service and no active discipline on file.

On October 9, 2005, the Grievant engaged in an altercation with co-worker Tara Hatcher on 3/100. Upon arriving on shift at 7:00 a.m., the Grievant found a consumer in need of changing. Changing responsibilities caused some disagreement between the Grievant and Hatcher.

The Grievant reported the problem to Hatcher who was working on the "girls side" on the prior shift. She advised Hatcher that Janet had to be changed. Hatcher

responded she had changed Janet at 6:00 a.m. and was not going to change her again.

The Grievant allegedly remarked: "Ok, but it is your responsibility until you get off, I will help you."

Approximately ten minutes later, Kalima As'Sami, a Supervisor, arrived on the unit. She noticed a conversation between first and third shift personnel regarding general responsibilities. While in the dining area, Hatcher approached As'Sami and asked whether she had to change a consumer once it was determined that he/she was "wet." During the course of this exchange, the Grievant left the staff office and entered the dining area. An exchange ensued with the Grievant disputing Hatcher's version. The exchange, more specifically, dealt with whether third shift was required to do this type of work after the first shift arrived "in the house."

As'Sami attempted to clarify the situation. She maintained third shift personnel were supposed to complete these assignments if they surfaced during rounds. She also explained both individuals could complete any necessary assignments, but consumers should not be left in jeopardy.

This explanation did not appear to soothe the situation. The Grievant and Hatcher continued to argue. The Grievant was standing by the counter while Hatcher was discussing the situation with As'Sami at the table. The argument intensified between the Grievant and Hatcher as the Grievant stepped toward the table. As'Sami responded by advising the employees to "stop it," which caused the Grievant to go back to the counter.

At approximately 7:19 a.m., the Grievant left the counter, holding a cup of coffee, and walked toward As'Sami and Hatcher. The altercation continued with an initial round of loud and boisterous verbal sparring engaged in by the protagonists.

An investigation initiated by the Employer determined the Grievant made physical contact with Hatcher's body. As such, the Grievant was removed on December 19, 2005 for the following reasons:

xxx

The reason for this action is that you have been guilty of Workplace Violence, to wit: On 10/9/05, you were involved in an altercation with a co-worker that escalated to physical aggression. This action is a violation of the Center's Policies and Procedures.

The policy referenced is the Department's Violence Prevention in the Workplace procedure, which states in pertinent part:

xxx

Procedure

This procedure established a standard process for the application of the zero tolerance of violence policy (DIR-99-003), *Violence Prevention in the Workplace*.

(I) Definition of Workplace Violence

Any act of violence or the threat of any such act including conduct against persons or property that is sufficiently severe, offensive, or intimidating to alter the conditions of state employment, or to create a hostile, abusive, or intimidating work environment for one or more employees of the Ohio Department of Mental Retardation and Developmental Disabilities (ODMRDD). Prohibited workplace violence includes, but is not limited to, the following:

- * All threats or acts of violence occurring on state property, regardless of the relationship between the state and the individual involved in the incident.
- * All threats or acts of violence not occurring on state property, but involving someone who is acting in the capacity of a representative of ODMRDD.
- * All threats or acts of violence not occurring on state property, but involving an employee of ODMRDD if the threats or acts of
- * Any threats or acts of violence resulting in the conviction of an employee or agent of ODMRDD, or of an individual performing services on the department's behalf on a contract or temporary basis, under any criminal code provision relating to threats or acts of violence that adversely affect the legitimate interests of the state.

xxx

(Joint Exhibit 27a)

It should be noted that the applicable Standards of Conduct specify removal for a first offense of Violence in the Workplace (Joint Exhibit 40).

On December 20, 2005, a grievance was filed contesting the Employer's action.

It states in pertinent part:

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Grievant disagree (sic) with removal order effective 12/19/05 for alleged Workplace Violence. Grievant made no effort to be aggressive during misunderstanding and attempting clarification of duties. Grievant (sic) only actions was (sic) to protect herself from harm on 10/9/05.

xxx

(Joint Exhibit 5a)

Neither side raised procedural nor substantive arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

It is the Employer's position that it removed the Grievant for just cause. Clearly, the record indicated the Grievant committed an act/threat of violence in violation of the Violence Prevention in the Workplace Policy (Joint Exhibit 27).

The Grievant violated the policy (Joint Exhibit 2) and related work rules (Joint Exhibit 4) by her actions on October 9, 2005. Superintendent William Green's testimony supported this notion. The Grievant entered the dining room aggressively and interrupted as Hatcher was conversing with her Supervisor. As the dispute continued, the Grievant continued to yell and pointed her finger toward Hatcher.

The Grievant's aggressive actions culminated in a complete loss of self control. She lunged toward Hatcher and threw a left hook causing her to contact Hatcher's body.

Superintendent Green remarked the Grievant's actions fell within the definition of workplace violence articulated in the policy. The Grievant's actions exhibited a threat of physical violence and/or caused bodily harm.

Clear and unambiguous notice was provided regarding the consequences associated with the Grievant's misconduct. Over a six year period, the Grievant received training indicating any act or threat of workplace violence would result in termination (Joint Exhibit 28).

Hatcher's testimony was consistent, believable and reliable. The initial phase of the investigation disclosed consistent statements contained in the taped interview and the

hand-written statements. This review of essential circumstances, moreover, corroborated testimony provided at the arbitration hearing. Thus, all those involved in the episode, concur with Hatcher's review of the events up to the alleged lunge and swing.

The prior evidence and testimony is clearly supported by submitted video evidence; particularly camera angles one and nine. These various camera angles identify the Grievant as the aggressor engaging in clearly threatening behavior. Unlike the Grievant, Hatcher's position throughout the disputed episode remained constant; she never moved towards the Grievant. Hatcher's actions resulted in a two-day fine for creating a disturbance.

The Grievant's testimony lacked veracity. Several critical circumstances were given various inconsistent versions. First, the Grievant changed her testimony regarding whether the Supervisor addressed the problem regarding "changing" responsibilities. Second, the Grievant never walked away from the dining area to get her coffee, but had it in her hand throughout the episode. Third, the Grievant provided three versions dealing with the portion of the episode before the lunge and swing. Fourth, the Grievant continued to insist the entire conversation was "not out of control" and "never loud." This review was contradicted by the Supervisor's version and Hatcher's testimony.

The charge was not triggered by a biased investigation. None of the witnesses testifying on behalf of the Union noted that they were harassed and intimidated by the assigned investigator.

The Grievant's attempt to direct Hatcher was inappropriate. The Supervisor opined employees should never direct each other, but come to her when problems or disputes arise.

The Union's Position

The Union opined the Employer did not have just cause to remove the Grievant. Based on the arguments articulated below, the Grievant's removal should be reversed; and at a minimum the Grievant should receive the same discipline imposed against Hatcher.

In the Union's view, the investigation of the event was biased in Hatcher's favor, and therefore, unfair in content and outcome. Questions and answers, during a series of investigatory interviews, clearly evidenced a prejudicial bias against the Grievant. Rather than letting the interviewees testify freely in terms of their observations, the interviewer attempted to establish the record by directing the interviews. He filled voids in the interview when he failed to elicit responses he deemed to be appropriate. He, more specifically, asked similar questions until he established certain preconceived outcomes.

Hatcher had a spotty performance history prior to the disputed incident. A number of witnesses supported the view that she had problems wherever she worked. She did not know nor understand her work responsibilities, had trouble operating within a team context, and lacked communication skills. Other bargaining unit members, including the Grievant, attempted to assist Hatcher but were often thwarted. Hatcher's

performance evaluations highlighted similar performance deficiencies. The Grievant's performance evaluation ratings, however, were normally ranked at the "meets" or "above" categories.

The Grievant's version seems quite plausible and reliable. Hatcher, in her view, was the aggressor while the Grievant merely acted in self defense. The Grievant alleged she was never agitated or upset with Hatcher. Hatcher, more specifically, engaged in workplace violence while on state property. Hatcher was the provocateur because she hit the Grievant while bringing her hand upwards. The Grievant merely blocked Hatcher's punch.

The Employer alleged that the Grievant struck Hatcher but the evidence and testimony fail to corroborate this assertion. Hatcher never immediately affirmed that she was struck. She voiced this concern a few days after the incident with few direct witnesses ever supporting this outcome. Also, no bruises, swelling or blood materialized as a consequence of the blow. She never went to the infirmary so a medical report evidencing the Grievant's egregious behavior was unavailable.

The security video supported the Grievant's review of events. Various camera angles confirmed the Grievant's notion that Hatcher was the aggressor. Arguing in the alternative, the Union asserted the Employer's time-lapse video recording captured only bits and pieces of activity, not "real time" events. Under this theory, missing frames

caused the Employer not to see what really happened. Missing images do not allow an observer to determine whether force was used.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, a complete review of the record including testimony and exhibits including the security video, it is this Arbitrator's opinion that the Employer had just cause to remove the Grievant. The Grievant's actions on the day in question clearly violated the Workplace Violence policy (Joint 27a). It prohibits "all threats or acts of violence occurring on state property." The Grievant was clearly violent and threatening even if she actually failed to strike Hatcher.

Here, the analysis does not necessarily focus on prior events leading to or following the actual disputed segment. In the video frames in question, Hatcher does turn toward the Grievant while remaining relatively stationary. She raised her hand with her fingers unclenched and pointed toward the ceiling. This motion, in the Arbitrator's view, was neither threatening nor violent. The distance separating the protagonists was significant which veiled or minimized any perceived threat argument. Hatcher never "mugged" nor struck the Grievant. Throughout the disputed segment of activity, she never stepped toward the Grievant. These distinctions distinguished Hatcher's status from the Grievant's.

Again, the Grievant's reactions are readily differentiated from Hatcher's response. The Grievant positioned her feet to strike a blow, lunged toward Hatcher, and swung her

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left clenched fist toward the Grievant. As this course of action transpired, Hatcher was forced to move backward as the Grievant completed her lunge and thrust.

The submitted video and associated camera angles were critical to the Arbitrator's finding. Testimony provided at the hearing by witnesses on both sides of the aisle and related statements lacked conviction and were often contradictory.

Especially troubling was the testimony provided by the Supervisor. She attempted to provide a rather neutral appraisal of the events by siding with protagonists on various segments of their versions. And yet, on the focal critical segment, the actual workplace violence event, she noted her back was turned or her view was somewhat obstructed. The security video does not support her contentions. Her view of events was unencumbered as she was standing as the critical events unfolded.

The Arbitrator does not contest many of the Union's contentions but they fail to modify the imposed removal. Hatcher might have been a problem employee who failed to perform her duties responsibly. The Supervisor might have prevented the dispute by providing clear direction at some prior point. Disagreements between third and first shift responsibilities were, at best, ambiguous. The Supervisor, moreover, could have diffused the incident leading to removal more efficiently by preventing an escalation of events.

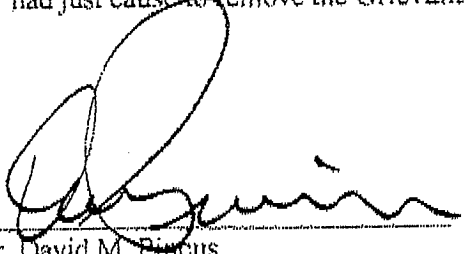
None of these exigencies excuse the workplace violence evidenced by the Arbitrator. Misconduct of this sort cannot be condoned in any public setting maintained and operated by the State of Ohio where it concerns currently housed consumers.

Employees cannot act violently or threaten other employees; the very same actions they attempt to constrain or prevent when servicing the consumer population.

AWARD

The grievance is denied. The Employer had just cause to remove the Grievant.

August 10, 2006
Beachwood, Ohio



Dr. David M. Pincus
Arbitrator