

#991

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration *
Between *

OPINION AND AWARD

OHIO CIVIL SERVICE *
EMPLOYEES ASSOCIATION, *
LOCAL 11, AFSCME, AFL/CIO *

Anna DuVal Smith, Arbitrator

and *

Case No. 33-00-20061215-0153-01-05

OHIO VETERANS HOME *
*

Robin Criswell, Grievant
Removal

APPEARANCES

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

Robert Robinson, Staff Representative
OCSEA/AFSCME Local 11
390 Worthington Rd., Ste. A
Westerville, OH 43082

For the Ohio Veterans Home:

Buffy Andrews, Labor Relations Specialist
Ohio Office of Collective Bargaining
100 East Broad St., 18th Floor
Columbus, OH 43215

I. HEARING

A hearing on this matter was held at 9:20 a.m. on August 21, 2007 and continued on August 29, at the Ohio Veterans Home in Sandusky, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties by direct appointment 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 Civil Service Employees Association/AFSCME Local 11 ("Union") were Mollie B. Clark, Morton W. Dundersdat, Dennis C. Fletcher, JoAnn Grissom, Edward J. Jermain, Bill Kessler, Alice Mullins, Robert Robinson, Mark Weikle and the Grievant, Robin Criswell. Also present was Holly Canino. Testifying for the Ohio Veterans Home ("Agency") were Lance N. Franke, Donna Green, Russell Hagman, Warren Larue, Craig Selka and Joe Trejo. A number of documents were entered into evidence: Joint Exhibits 1-5, Union Exhibits 1-16 and Management Exhibits 1-9. The oral hearing was concluded at 3:40 p.m. Post-hearing briefs were timely filed and exchanged by the Arbitrator on September 26, 2007, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. BACKGROUND

_____The Ohio Veterans Home and OCSEA/AFSCME are parties to a collective bargaining agreement governing the terms and conditions of employment of employees in various classifications including Food Service Worker. At the time of her removal on December 15, 2006 the Grievant, Robin Criswell, was a Food Service Worker with nine years of service. Approximately sixteen months prior to the allegations leading to her dismissal she had received a corrective counseling for receiving a bag of "gratuities" from a resident (Management Ex. 1) but otherwise had a clean record. The infractions for which she was removed were taking money

from a resident and lying about it in the investigation. The rules she was found to have violated were:

AN-03 MISAPPROPRIATION/EXPLOITATION

Any act intended to exploit, extort or defraud a resident including but not limited to: misuse of authority over a resident, forcing or compelling a resident to cooperate in illegal or immoral activity; attempting to extort or borrow money or property from a resident; or stealing resident's personal possessions.

AN-06 FAILURE TO FOLLOW POLICY (RESIDENT RELATED)

(e.g., failure to follow a policy, procedure, or program which was implemented specifically for resident safety or well being; failure to report abuse)

I-04 FAILURE TO FULLY COOPERATE IN AN INVESTIGATION

(e.g., remaining until all questions are answered, truthfully and completely answering questions) OR MAKING FALSE STATEMENTS TO INVESTIGATIVE OFFICIALS, FALSIFYING OFFICIAL REPORTS, MISREPRESENTATION, OR FRAUD (including, but not limited to, employment application, KRONOS, travel expense reports, official documents, any verbal dialogue or written statement) (Joint Ex. 3)

The incidents which ultimately led to the Grievant's removal first came to light when a resident of the domiciliary, Walter Larue, told the Agency's police department on August 29, 2006 that three kitchen workers (the Grievant, JoAnn Grissom and Mollie Clark) had been accepting money from him, and brought his personal records documenting outlays from \$10 to \$500 at a time totaling \$3,811.76 over six months. Before he made this report he warned Chapter President Mark Weikle and former Chapter President Vanessa Brown what he was going to do. Word of the investigation shortly got out and reports came in saying, amongst else, that "a resident" was harassing "a worker." The Grievant's doctor took her off work for a week which included a period of hospitalization. While she was out someone anonymously sent her husband a note making various scurrilous claims about her. After the Grievant came back to work she and the resident, who was wearing a wire, had a conversation in which she pleaded with him to say he just fabricated his story and also told him she knew she owed him a lot. Amongst else, he asked her why they had to lie.

Because of the investigation's size, the Ohio Office of Collective Bargaining was brought in on October 30 to conduct an investigation. On November 8, the Office's Joe Trejo interviewed the Grievant. At first she denied borrowing or receiving money or gifts from the

resident, but after hearing the recording of her September 22 conversation with the resident, she admitted to having accepted \$50 from him. She also said she had paid him back. Trejo's report concluding that the Grievant had borrowed and accepted money from the resident and was not truthful in the investigation was issued November 28. A week later the Agency issued its pre-discipline meeting notice charging her with violating Corrective Action Standards AN-03 (Misappropriation/Exploitation), AN-06 (Failure to Follow Policy (Resident Related), and I-04 (Failure to Fully Cooperate in an Investigation). The hearing officer found just cause for discipline on all charges, and specifically cited Agency Policy No. 4 on misappropriation of property. This policy states:

It is the basic right of every resident at the Ohio Veterans Home to be free from physical, verbal, mental, and emotional abuse; nor shall they be neglected. In addition, the property of residents shall be respected, protected, and guarded against misappropriation.

The residents of the Ohio Veterans Home are dependent on the services provided by its employees for their health, safety, comfort, and general well being. Thus, employees may be in a position to secure things of value from residents under their care. While under certain circumstances, things of value may be offered voluntarily by a resident to an employee without any use by the employee of his/her official position, the mere acceptance of things of value offered by a resident can create a conflict of interest for the employee. Therefore, employees of the Ohio veterans Home shall not accept loans, gifts of money, or non-monetary gifts of substantial value from residents.

While the Board recognizes that some personal interaction between Ohio veterans Home staff and residents contributes positively to the quality of care provided to residents, employees shall conduct themselves professionally in their dealing with residents, recognizing the potential of a conflict of interest. Specifically, employees shall be prohibited from developing relationships with residents that are sexual in nature.

Every allegation of possible resident abuse or neglect, or misappropriation of a resident's property shall be thoroughly and zealously investigated and reported appropriately as required by state and federal law. Employees found to have abused, or neglected residents, or misappropriated their property, shall be promptly disciplined, to include discharge in egregious cases. In cases where the investigation reveals that the employee misconduct may rise to the level of possible criminal activity, a referral shall be made to the office of the prosecuting attorney. (Joint Ex. 3, p. 16)

The Grievant was removed on December 15, 2006. A grievance challenging this action was filed that same day and subsequently fully processed to arbitration where it presently resides, free of procedural defect, on the stipulated issue of: *Was the Grievant, Robin Criswell, removed from her position of Food Service Worker for just cause? If not, what shall the remedy be?*

III. POSITION OF THE PARTIES

Position of the Agency

The Agency summarizes that the Grievant was trained on the corrective standards as recently as October 25, 2005, and had received a corrective counseling for accepting a gratuity from a resident in May of that year. She was therefore on notice. The Agency took action as the result of a complaint by the resident which triggered an investigation including a wiretap. This established that the Grievant knew she owed the resident "a lot" of money and that she tried to get the resident to lie about it. The Agency urges the Arbitrator to conclude that the Grievant misappropriated money from the resident, failed to follow Policy No. 4 in accepting gifts from the resident and did not answer truthfully in the investigation.

As for the Union's claims, the Agency points out first that the Union could not provide any complaint that was filed and not investigated. Second, the Lippert case is not comparable to the instant case in that the employee was in a different classification, had 25 years of service with no active discipline or counseling, and did not exploit or harm a resident. There have been other cases since Lippert. One employee, Linda Laws, resigned. Two others were removed (Grissom and Clark), and the case against Grissom was weaker than the one before this arbitrator. As for the Union's contention that the Grievant was harassed, this was neither proven nor was it true. The Grievant never reported any harassment and she changed her testimony and brought no corroborating witnesses. In the recorded conversation she had with the resident she said she wanted to be able to meet him and do "things" with him. In arbitration she admitted she had sat in a car with him and had visited him in the hospital. None of these fit a picture of harassment.

The Agency asks that the removal be upheld and the grievance denied.

Position of the Union

The Union claims management is at fault here. It, not the resident, initiated the case and then cooked the investigation. It had the resident follow the Grievant around and harass her, and it pressured him to lie. According to the resident, Veterans Home police and management lied to

him and he had to get an attorney to get them off his back. Now management says he would lie in arbitration to protect the Grievant. Management failed to investigate the letter sent to the Grievant's husband, which implies that it was aware of it and may have been its source. It had to have known the Grievant was being harassed as early as September 5, 2006, because that's when Staff Representative Robinson sent an email about it and Food Service Manager Selka reported he spoke to the Grievant about it within eighty minutes of that report. Yet no investigation was launched until the Grievant was indicted in October. It could not find a resident to incriminate the Grievant and so it had to rely on phone records showing she made calls to him. Yet there is no rule about calling residents. As for the resident's cards documenting alleged outlays to the Grievant, they were not validated. The Union submits that Management's determination of guilt is tainted by their tactics which almost destroyed the Grievant's mental capacity. Because of this, no weight should be given to the recording.

Citing numerous cases of employee-resident relationships, the Union contends that the fraternization policy has not been enforced for years. Management may claim it knew nothing about these, but everyone else did. Other employees with resident relationships have not been charged nor have they been harassed. Three who were discharged have been put back to work and another just fined.

Finally, the Union relies on the Grievant's record which contains only a counseling for having accepted magazines which were about to be discarded, and now her admission of having accepted \$50 from the resident before the counseling. It asks that the removal be overturned, and the Grievant reinstated and made whole to include wages, benefits, seniority, lost holiday pay and overtime opportunities.

IV. OPINION OF THE ARBITRATOR

As in the Grissom case the parties here are divided on numerous points, but they tend to cluster in two areas, one being the relationship between the Grievant and the resident and the other being Management's enforcement of the so-called fraternization policy.

Taking the relationship first, the evidence clearly established the Grievant had an improper relationship with the resident in that she used him as a source of funds over a period of several months at least. The substance of the secretly recorded meeting with the Grievant cannot be denied. Moreover, despite his mental function deteriorating in the months preceding the hearing, he was able to validate his signature on his August 29, 2006 interview report. The Union suggests that in the recorded meeting the Grievant was just going along with the resident in an attempt to pacify him. Yet it is clear that she is begging him to change his story in order to exonerate her and that he labels what she wants him to do as a lie. Against the evidence of the recording and the resident's authentication of his statement is the Grievant's denial, hearsay testimony and improper attempts to contact and actual contacts between the Grievant and witnesses while the arbitration record was still open. Even Chapter President Weikle's admission that residents told him they were going to do "everything possible" to get the Grievant back to work calls the residents' testimony favorable to the Grievant into question. The fate of the Grievant therefore depends on the Agency's enforcement of the policy and rules it used to remove her.

In the related Grissom case, Arbitrator Murphy held that lax enforcement of the employee-resident personal relationship ban undermines enforcement of other provisions of the policy including the ban on accepting money from residents. This arbitrator agrees. The policy at issue even discusses, albeit briefly, the conflict of interests created in this work setting by gifts, loans and sexual relationships between residents and staff. It is not broken into parts as are the rules. Thus, if supervisors are aware of employees engaged in one kind of these transactions yet turn a blind eye, saying nothing to those directly involved or those reporting them, some employees are going to believe the policy itself just does not matter even if they are trained on it. Management's actions have to be consistent with the published policy and rules, and similar cases have to be treated in a like manner for them to have value in guiding employee conduct. Since the 1995 *Lippert* case that resulted in a ten day suspension, Linda Laws received a ten day

suspension after she came in on her own volition to report her infraction, and then later resigned after a resident reported her for another infraction. Some cases on employee-resident relationships settled, did not go to arbitration, or resulted in a removal for a different infraction. Another employee was married to a resident in the chapel. However, her husband credibly testified that they had no sexual relations prior to their marriage and that they knew she could be fired for it if they did. This establishes that at least some employees knew and respected the policy and rules. On the other hand, Union officials provided evidence of two employees who became pregnant by residents. One of these even had relationships with more than one resident involving sex or money. These may not have come to the attention of the current labor relations officer until this group of related cases, but Management has to bear the responsibility of failing to report such matters for investigation. In other words, I find Management knew or should have known of these other incident and failed to take action.

In one respect, at least, the Grievant here is differently situated from Grissom in that she previously had a counseling for receiving a bag of gratuities from a resident. She clearly did not take it seriously because it only involved magazines that were going to be discarded. While she should have learned from this that accepting gratuities from residents is a disciplinable act, because of the lax enforcement of far more serious infractions elsewhere in the agency she could not have expected removal for borrowing money from this resident. As with Grissom, her removal therefore lacked just cause and must be set aside. Serious discipline is nevertheless warranted to carry the message. Moreover, her case is aggravated by her contact and attempted contacts with witnesses against her during the arbitration. For this reason, she is reinstated to her former position but without back pay or benefits.

V. AWARD

The Grievant, Robin Criswell, was removed from her position of Food Service Worker without just cause. She is to be reinstated to her former position forthwith. The request for back

pay and benefits is denied. The Arbitrator retains jurisdiction on the sole matter of remedy for sixty (60) days.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
February 5, 2008

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