

IN THE MATTER OF ARBITRATION BETWEEN

THE DEPARTMENT OF MENTAL HEALTH Grievance No DMH-2022-04669-04
AND ADDICTION SERVICES:
NORTHCOAST BEHAVIORAL HEALTHCARE

AND

THE OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION (OCSEA)

Stephen Nelson, Grievant

Arbitrator: Arbitrator Meeta Bass

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PROCEDURAL HISTORY

Northeast Behavioral Healthcare is hereinafter referred to as "NMB or "Employer." Ohio Civil Service Employees Association is hereinafter referred to as "Union." Stephen Nelson is hereinafter referred to as the "Grievant."

The Union submitted Grievance Number DMH-2022-04669-04 to the Employer on March 30, 2018, pursuant to Article 25 of the parties' Collective Bargaining Agreement, effective April 21, 2021 - February 28, 2024. The grievance alleged that the Grievant was removed from service on April 12, 2022 in violation of Article 24. Pursuant to the CBA between the Employer and the Union, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on Wednesday March 8, 2023 at the Northcoast Behavioral Healthcare, Northfield, OH.

The parties' stipulated to the issue as:

Was the Grievant, Stephen Nelson, removed for just cause and if not, what shall be the remedy?

The parties' stipulated to the following facts:

1. This grievance is properly before the Arbitrator.
2. The Grievant was hired by the Northcoast Behavioral Healthcare, a Mental Health and Addiction Services Regional Psychiatric Hospital on March 17, 2016.
3. The Grievant was employed as a Therapeutic Program Worker.
4. On April 12, 2022, the Grievant was removed from his position as a TPW.
5. The Grievant was removed for violation of HR22: Code of Conduct and General Work Rules, violation of Work Rule 4.1- Failure to Follow Policy and Procedure or Instruction, specifically, NBH Policy 03.22. Workplace Violence Prevention Policy and Procedure.
6. At the time of the termination, the Grievant had an active 5-day working suspension dated August 14, 2019 for Code of Conduct and General Work Rules, violation of Work Rules, violation of Work Rule 4.14 - Actions that could potentially harm an employee, patient, or a member of the general public.

During the hearing, both parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument.

EMPLOYER WITNESSES

1. Bernadette Mosley, Labor Relations Officer
2. James Wuliger, former Police Chief
3. Tanishia Williams-Abrams, Police Officer

UNION WITNESSES

1. Joy Alvarez
2. Stephen Nelson

JOINT EXHIBITS

- Joint Exhibit 1. 2021 – 2024 OCSEA Collective Bargaining Agreement
- Joint Exhibit 2. Grievance Trail
- Joint Exhibit 3. Termination letter, effective April 12, 2022
- Joint Exhibit 4. Record of Discipline
- Joint Exhibit 5. Stephen Nelson EHOC
- Joint Exhibit 6. Grievance Settlement referencing five-day suspension
- Joint Exhibit 7. Pre-disciplinary meeting notice
- Joint Exhibit 8. Hearing Officer's Report
- Joint Exhibit 9. Police Investigation Report
- Joint Exhibit 10. Investigating Officer Statement by Officer J. McGuinness
- Joint Exhibit 11. Investigating Officer Statement by Officer Williams-Abrams
- Joint Exhibit 12. Joy Alvarez statement, December 13, 2021
- Joint Exhibit 13. Joy Alvarez statement, January 10, 2022
- Joint Exhibit 14. Joy Alvarez statement, February 17, 2022
- Joint Exhibit 15. Marci Young statement, December 17, 2021
- Joint Exhibit 16. Stephen Nelson statement, January 8, 2022
- Joint Exhibit 17. Statement to Patricia Golian from Joy Alvarez
- Joint Exhibit 18. Deactivation of Badge
- Joint Exhibit 19. Stills from video
- Joint Exhibit 20. Photograph of Joy Alvarez' vehicle
- Joint Exhibit 21. Photographs of Joy Alvarez

Joint Exhibit 22. Stephen Nelson acknowledgement of HR 22 Code of Conduct and General Work Rules, April 27, 2020
Joint Exhibit 23. Stephen Nelson acknowledgement of HR 22 Code of Conduct and General Work Rules, March 7, 2016
Joint Exhibit 24. Stephen Nelson training record
Joint Exhibit 25. HR 22. Code of Conduct and General Work Rules
Joint Exhibit 26. Northcoast Behavioral Healthcare Policy 03.22 Workplace Violence Prevention and Policy
Joint Exhibit 27. Video of parking area the morning of December 13, 2021

MANAGEMENT EXHIBITS

Management Exhibit 1. Five-day Working Suspension for Joy Alvarez, effective July 22, 2022
Management Exhibit 2. Joy Alvarez statement, March 31, 2022

UNION EXHIBITS

Union Exhibit 1A. Email from Bruce Thompson to Bernadette Mosley, October 3, 2022
Union Exhibit 1B. Request for Information from Bruce Thompson to Bernadette Mosley, October 3, 2022

Union Exhibit 2A. Email from Bruce Thompson to Bernadette Mosley, January 10, 2023
Union Exhibit 2B. Request for Information from Bruce Thompson to Bernadette Mosley, October 3, 2022
Union Exhibit 3A. "Meeting with Bernadette Mosley" from Joy Alvarez
Union Exhibit 4B. Statement from Joy Alvarez to "Pattie"

The parties agreed to post-hearing submissions on April 5, 2023 at which time the record was closed.

APPLICABLE PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND POLICY RULES.

HR-22 Code of Conduct and General Work Rules, effective 7.15.2020, is hereby incorporated as if fully rewritten herein.

A. Purpose

The purpose of this policy is to set guidelines and outline suggested disciplinary action for all employees in the Department of Mental Health and Addiction Services (MHAS), (except those in the unclassified service and employees in their initial probationary period).

Level Four (Discretionary Infractions):

Rule 4.1 Failure to follow policies and procedures, or instructions. Specifically: policy and/or procedures, or instructions.

Policy 3.22 - Workplace Violence Prevention Policy is hereby incorporated as if fully rewritten herein.

Purpose:

- A. The Ohio Department of Mental Health and Addiction Services (OhioMHAS) and NBH is committed to providing a work environment that is safe, secure, and free of harassment, threats, intimidation, and violence. A safe environment is fundamental to a productive and positive workplace and one in which both physical and psychological safety are recognized as integral to the provision of quality mental health treatment and services for the patients with whom we have been entrusted. Ohio MHAS and NMB have adopted a zero-tolerance policy for workplace violence. This policy provides guidance to NBH staff on appropriate responses to violence or threats of violence that may affect the NBH workplace.
- B. All employees share in the responsibility of preventing and responding to threats of violence and actual workplace violence. Therefore, cooperation, adherence to, and support of this policy and procedure by all NBH staff is essential. This policy applies not only to employees, but includes patients, visitors, contract and temporary employees, students, and any other individuals who are either on NBH property or otherwise involved with the operations of OhioMHAS/NBH.

Policy

- A. Threats or acts of violence against persons and/or property will not be tolerated by NBH. Threats of violence or workplace violence by

employees will lead to disciplinary action up to, and including termination and the involvement of law enforcement authorities as needed.

Applicability and Prohibited Conduct

A. Workplace violence includes but is not limited to the following:

1. Threats or acts of violence occurring on NBH property, regardless of the relationship between NBH and the individual(s) involved in the incident;
2. Threats or acts of violence not occurring on NBH, but involving someone who is acting in the capacity of a representative of NBH;
3. Threats or acts of violence not occurring on NBH, but involving employee(s) of NBH if the threat or act of violence affects the legitimate interests of the state.
4. Threats or acts of violence resulting in the conviction of an employee or agent of NBH, or an individual performing services on the behalf of NBH either on contract or on a temporary basis, under any criminal code provision relating to threats or acts of violence that adversely affect the legitimate interests of the states.

STATEMENT OF FACTS

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either are necessary to understand the Arbitrator's decision.

The Employer hired the Grievant on March 17, 2016. The Grievant worked as a Therapeutic Program Worker at all relevant times of this grievance. On December 13, 2021, the Grievant worked his scheduled shift in Unit E2. During his lunch break, the Grievant went to Unit C-1 to ask his coworker/girlfriend for the passcode to her phone that he had in his possession. Another staff witnessed his arrival at the unit to ask for the passcode. The coworker denied him the passcode and the Grievant left.

Grievant and his coworker/girlfriend's shift ended at approximately the same time. The screenshots and video confirm Grievant and his girlfriend/coworker interacted in the parking lot past the administration building after their shift ended. The video depicts that at approximately-

7:37:05am the vehicle driven by Grievant pulls off the main facility roadway and stops in single row parking facing north.

7:37:14am vehicle driven by coworker off the main facility roadway and parks parallel to and on the south side of the vehicle driven by Grievant.

7:37:37am Grievant gets out of his vehicle and opens the passenger side door of coworker's vehicle and is standing by the open door.

7:38:19am Grievant gets into passenger side door of coworker's vehicle and closes the door.

7:44:23am the passenger door of the coworker's vehicle opens.

7:44:37am the passenger door of the coworker's vehicle closes.

7:44:56am the right-side rear turn signal comes on the coworker's vehicle.

7:44:58am the coworker leaves the driver side of the car and runs towards the building leaving the vehicle door open. Grievant gets out of the passenger side of the vehicle.

7:45:11am the coworker continues to run towards the building, she turns to look behind her.

7:45:13am Grievant gets into his vehicle and drives towards Sagamore Rd. The coworker continues to run towards the building.

7:45:18am the coworker continues to run towards the building.

Upon entering the building, the coworker informed Officer at the desk that the Grievant had pulled her hair and that she wanted to make a report. The Officer then escorted the coworker to the NBH police department, where Officer Williams-Abrams worked. Officer William-Abrams received a phone call from staff stating an unattended vehicle with an open door in the parking lot. Officer Williams-Abrams confirmed that the coworker owned the vehicle and then sought and was granted permission by the coworker to secure the vehicle. Officer Williams-Abrams observed the right-side rear blinker of the vehicle flashing, the motor running, and the driver's side door open. Once she entered the vehicle, she observed a purse on the driver-side floor and keys inside. Officer Williams-Abrams secured the vehicle and returned the personal belongings to the coworker. The coworker made the following written statement.

"On December 13, 2021 at 3:55am. Steve Nelson TPW came to CI to ask for my passcode to my phone, I told him no and he became angry after asking for it several times. Then I proceeded to enter CI nursing station and he pinched above my right elbow area. After work, 7:40am he still had my phone and came into my car after he asked me to pull over, He insisted that I give him my passcode. I said no several times, he became angry and pulled my hair back and forth several times and put his other hand to my throat saying he's gonna slit me like a gill if I report him to the police. I ran out of my car into the building. We have been friends for several years. I am presently a supervisor for his children appointed by the court."

NBH police department proceeded with domestic violence protocol. Officer Williams-Abrams provided the coworker with the hotline number and restraining order information. After the meeting, Officer Williams-Abrams escorted the coworker to her vehicle to search for the cell phone, which was not found and then escorted her off the department premises.

The coworker later went to Seven Hills Police Department to file a report and was redirected to the NBH police department. NBH police department then informed the coworker that the Ohio State Highway Patrol could assist her. The coworker recontacted the NBH police department to state that Grievant had left the cell phone on her vehicle outside of her residence.

On March 3, 2022, the date of the prehearing conference for the Grievant, the coworker sent an email to the union steward. She wrote:

Hi Pattie,

I just wanted to take a few moments to explain what happened on 12/13/21. I ran out of my car because I became very upset with Steve. We were arguing about the passcode on my phone, our relationship breaking up and me helping to supervise his kids. There were no physical threats or violence. I ran to the police station to report him as a way of getting back at him for yelling at me in the car. I never planned or intended for him to get into trouble or to lose his job over this argument. I think the whole ordeal was a misunderstanding and I overreacted. This was the first time we had a big argument and it brought me back to the day when I was abused by my past husband. He said things I'm sure he didn't mean to say and I probably did too. I believe we are going to continue to be best friends and always be there for each other. If you have any questions, please feel free to email me or call me at 440-773-5568.

The union steward shared the email with the hearing officer. The Employer later questioned the coworker about the March 8, 2022 email. The

coworker explained that there were no physical threats or violence. The coworker expressed that she had PTSD, and once the conversation escalated into an argument, her fight-or-flight instincts were triggered. Coworker informed them of a history of abuse by the deceased husband. On July 2, 2022, the Employer disciplined the coworker for violating OhioMHAS Policy HR-22, Code of Conduct, and General Work Rule 3.3 Dishonesty.

Employer charged the Grievant with the violation of OhioMHAS Policy HR-22 Code of Conduct and General Work Rules, specifically: Rule 4.1 - Failure to Follow Policies and procedures or instruction, NBH: 03.22 - Workplace Violence Prevention Policy and Procedure and terminated his position as a therapeutic program worker. At the time of his removal, Grievant had a five-day working suspension on his record for violation of Rule 4:14: Actions that could potentially harm an employee, patient, or member of the general public. According to the grievance procedure in the CBA, the Union filed a timely grievance challenging the Grievant's discharge. The Employer denied that grievance, which led to the Union initiating the instant arbitration proceedings.

POSITION STATEMENTS

POSITION OF EMPLOYER

Employer contends that the Department trained the Grievant on HR22 Code of Conduct and General Work Rules, specifically: Rule 4.1 – Failure to follow policies and procedures or instruction, specifically, NBH Policy 03.22 – Workplace Violence Prevention Policy and Procedure. The Employer asserts that the evidence established that Grievant had received the MHAS – Workplace Violence Annual Training in March 2017, August 2018, June 2019, April 2020, and December 2020. The Employer also asserts that evidence established that Grievant received HR22 Code of Conduct training in July 2020 and July 2021. The Employer further asserts that the Grievant received training on the Code of Conduct in March 2017 and April 2020. The Employer concludes that Grievant knew of the policy and procedures of the Department.

Employer also contends that the Department had just cause to terminate Grievant. Employer argues that the evidence established that Grievant's actions meet the definitions from NBH Policy 03.22 - Workplace Violence Prevention Policy and Procedure of "threat." Employer opines that the coworker's original statement that Grievant grabbed her hair, shook it back and forth, threatened to kill her, and put his hand on her to prevent her from leaving the car is the most credible because her actions, statements to the officers, and video support the original statement. That statement is supported by the two officers who spoke to the coworker about her behavior and what she told them when she ran inside. The Employer also opines that the recantation at the request of the Grievant is not credible. The Employer believes that the evidence supports a violation of Rule 4.1.

Employer further contends there was just cause to terminate the Grievant. Employer points out that Rule 4.1 is a discretionary charge per HR22 and carries a range of discipline from a written reprimand to termination. At the time of the incident, Grievant had an active five-day working suspension for dragging a patient by the leg to a quiet room. The Employer explains that the policy states NBH will not tolerate threats or acts of violence against persons and/or property. Threats of violence or workplace violence by

employees will lead to disciplinary action up to, and including, termination..." Employer states that it has a zero tolerance for workplace violence, and management decided to terminate the Grievant. Employer argues that even though Grievant and his coworker still have a relationship, this relationship does not change the fact that the Department had cause to terminate Mr. Nelson. Employer opines that the penalty of termination is appropriate given these circumstances.

Lastly, the Employer requests that the grievance be denied.

POSITION OF UNION

Union contends that the Employer did not establish workplace violence. Union argues the evidence showed that the coworker recanted her statement, and the remaining circumstantial evidence does not support the charge of workplace violence. The Union points out that the coworker explained that she and the Grievant had a disagreement, and the disagreement triggered a memory of a traumatic experience that she suffered from her ex-husband. Union argues there was no eyewitness testimony or evidence that the Grievant committed any misconduct. Union concludes there was no just cause to discipline the Grievant.

Union contends that Employer did not consider the coworker's Addendum Statement or investigate the same. Union asserts the Employer charged the coworker with Dishonesty, a level 3 discipline, and the coworker received a 5-day working suspension. Union opines that the Employer's failure to consider the coworker's supplemental statement correctly resulted in the Grievant's wrongful termination.

Lastly, Union requests that the grievance be granted and the Grievant be reinstated with all compensation due to the employee, seniority, accruals, and lost monies. Union also requests that the Grievant be returned with the same shift and days off and restored all leave balances and seniority.

Discussion

Employer charged the Grievant with violation of HR22: Code of Conduct and General Work Rules, violation of Work Rule 4.1- Failure to Follow Policy and Procedure or Instruction, specifically, NBH Policy 03.22., Workplace Violence Prevention Policy and Procedure. Article 24.01 of the parties' CBA states that "disciplinary action shall not be imposed upon an employee except for just cause." The just cause standard is based on the principles of due process and fairness in the administration of discipline in the labor industry. Just cause generally encompasses two elements. The Employer must demonstrate that the Grievant committed the offense. Then, if the misconduct is proven, the Employer must demonstrate that the penalty is proportional to the behavior under the totality of the circumstances.

Article 24.01 of the parties' CBA further states the Employer carries the burden of proof in discipline cases but does not address the quantum of proof or the evidence needed to persuade an arbitrator that one or the other party should prevail. In some cases, arbitrators have applied a clear and convincing standard; in other cases, a preponderance of the evidence is sufficient. Generally absent a demonstration of a clear nexus to show a potential injury on an employment record, the lesser standard of preponderance of the evidence is applied. In most cases, if the conduct giving rise to the termination relates to a criminal offense and/or moral turpitude, i.e., sexual harassment, then the clear and convincing standard is applied.

In the instant arbitration, the Employer discharged the Grievant for workplace violence. Its ramifications are severe and will most likely have a lasting effect on his career due to the nature of the offense. The evidence of record indicates that a criminal report was made, but ultimately no charges

were filed. Therefore, this Arbitrator finds applying the clear and convincing standard appropriate.

The videotape of the Grievant and the coworker's interactions on December 13, 2021, presents direct evidence of the events leading up to and after whatever occurred inside the vehicle. Such evidence is circumstantial as to whether Grievant threatened or assaulted his coworker. Evidence is circumstantial when it does not directly prove the existence of a fact but gives rise to an inference or assumption to establish a disputed fact. *Black's Law Dictionary* defines inference as a "conclusion reached by considering other facts and deducting a logical consequence from them."

Notwithstanding, it is not disputed that the incident occurred on NBH property. It is not disputed that the Grievant and coworker were arguing inside the car. The coworker, in her original statement, expressed that the Grievant assaulted and threatened her when he pulled her hair back and forth several times and put his other hand on her throat, saying, "he's gonna slit me like a gill if I report him to the police." On March 3, 2022 (the Grievant's pre-disciplinary meeting), the coworker provided the union steward a statement recanting the material facts of the December 13, 2021 incident. The statement read, "There were no physical threats or violence." She further explained during her interview on March 31, 2022, that she did feel threatened because their conversation escalated to an argument, and "he grabbed and pulled my hair which was in my jacket. Based on my history, my fight or flight response was triggered." The coworker further explained that "he did put his hand on my "collarbone area" to stop me from leaving my car."

In response to her recantation, the Employer charged the coworker with dishonesty and gave her a five-day working suspension. It is noted that this suspension was issued without any further investigation of either the validity of the alleged PTSD and/or the domestic violence by her deceased

husband allegations of the coworker. At the arbitration, the coworker testified to the events of December 13, 2021. During her testimony, the coworker explained and attempted to demonstrate how her hair was in her jacket. She touched her upper shoulder, but the advocate interrupted her demonstration at the hearing. When Defendant placed his hand on her upper shoulder, she pulled away, causing her hair to be pulled. She further stated that no threats or physical violence occurred. Her subsequent reaction was due to her PTSD. At the arbitration, the coworker further expressed that the investigator did not provide her with an opportunity to explain, and she felt that anything she said was simply disregarded.

Present sense impression can be a strong indication of what occurred. However, it is not conclusive. This is especially so in this case where the coworker states that she suffers from PTSD and was mixing her memories of domestic violence of her late husband and what occurred in the car. She further explained that she was mixing past memories with present reality upon reflection. There was no evidence presented by either party to refute or support her assessment of her state of mind as the incident unfolded.

It is well-settled that not every case must have direct evidence of the incident to be sustained. The direct evidence would have been a third-party eyewitness to the incident inside the vehicle. However, circumstantial evidence can be quite probative and convincing under the right circumstances. For example, circumstantial evidence may be probative and convincing in sleeping and drunkenness cases where employees are not tested for the condition. Inferences are drawn based on credible, reliable evidence to reach a logical conclusion.

If there is but one reasonable conclusion to be reached from the circumstantial evidence, then such evidence can be enough to carry the burden of proof even under a clear and convincing standard. If, on the other hand, an equally plausible and alternative conclusion can be reached from

the implications of the same evidence, the Employer has failed to meet its burden of proof in a clear and convincing manner. This premise is contrary to the substantial evidence standard, where the quantum of proof is whether a reasonable person, considering the record as a whole, might accept it as adequate to support a conclusion, even though other reasonable persons might disagree. The clear and convincing standard means the evidence is highly and substantially more likely to be true than untrue. There is compelling evidence that something occurred in the car to upset the coworker, but the record did not develop what occurred.

Strong inferences tend to resist other legitimate explanations. In her recantation, the coworker disclosed that she suffered from PTSD and explained at the arbitration that the argument triggered her memories of past domestic violence with her late husband. That the Employer charged the alleged victim/coworker with dishonesty when she recanted is not proof of what happened in the vehicle.¹ Without evidence of an investigation into her assertion of having suffered from domestic violence from her late husband resulting in PTSD, the allegation remains credible and equally plausible as an explanation.

Employer reminds this Arbitrator that relationships involving domestic violence are complex and are rarely as simple as one person hurting another and the wounded person leaving. The Employer is now preaching to the choir. This Arbitrator has an extensive background in domestic violence and recognizes the challenges of defending and prosecuting a domestic violence case. Still, this Arbitrator cannot find proof of an assault or threat based on the record presented at the arbitration.

In conclusion, it is readily apparent that the Employer took its duty to maintain a safe workplace, free from violence, and responded

¹ The Coworker explained that she contacted her Union representative about the discipline.

accordingly. The Employer charged Grievant with violating its workplace violence policy based on his coworker's original statements and from viewing the screenshots and camera video of her running toward the building seeking help and terminated him from his position. However, the evidence is inconclusive, with neither acceptance of the charge nor their rejection being more compelling. The coworker's original explanation of the events is as plausible as the coworker's supplemental explanation. Article 24 of the parties' collective bargaining agreement states that the Employer carries the burden of proof and, in this instance, has failed to meet the standard of clear and convincing evidence. When the scales are balanced, a grievance under this standard must be sustained.

AWARD

The Employer did not have just cause to discharge the Grievant, and therefore it violated Article 24 of the parties' Collective Bargaining Agreement. Accordingly, the Employer shall reinstate the Grievant to his former position as a therapeutic worker with seniority unimpaired and make him whole for wages, and benefits lost, less any earnings from Grievant's post-discharge employment. Grievant's personnel records shall be amended to reflect this, and he shall otherwise be made whole for any loss he sustained due to his unjust discharge.

Dated: May 20, 2023

Meeta A. Bass

Arbitrator Meeta A. Bass

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing Award was served on the following individuals this 20th day of May 2023:

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