

November 20, 1987

Grievance Number G87-0554
Walter Phillips, Grievant

Nels E. Nelson

BACKGROUND

The grievant, Walter Phillips, was a police officer at the Cleveland Developmental Center of the Department of Mental Retardation and Developmental Disabilities. On November 13, 1986 around 8:00 A.M. the grievant found a client yelling at another client. Because one client was becoming excited, he told him to go to the lobby area and sit by the time clock. A few minutes later, however, the grievant found that the client had returned and was yelling at the other client. The grievant escorted the client back to the chair by the time clock.

The subsequent events, which are the crux of the case, are in dispute. Robert Duns, who at the time of the incident was in charge of vocational rehabilitation programs at the Cleveland Developmental Center, testified that as he approached the lobby area at approximately 8:15 A.M. he heard the grievant yelling at the client to shut his mouth and pushed him so that he fell behind a partition in front of several vending machines. Duns testified that when he went behind the partition, the client was sitting on the floor with the grievant standing over him telling him to shut his mouth. Duns stated that when the client called the grievant an "asshole," the grievant grabbed him and he placed his arm between them.

The grievant's version of the events is considerably different. He claims that when he placed the client in the chair by the time clock, he kept popping up so he put his hands on his shoulders and pushed him down on to the chair. The grievant testified that when the client got up he made another move so he grabbed him in an effort to control him and they both fell to the floor behind the partition. He stated that they wrestled on the floor but that he used only the force necessary to control the client and that he never let go of him. The grievant said that when he saw Duns, he let go of the client but the client lunged at him and grabbed him again.

The incident ended at that point. Duns took the client to his office and had him examined by a physician who found the client alert and oriented with no acute distress, limitation of movement, bruises, or other apparent injury. The grievant continued on his regular rounds.

As a result of the incident the grievant was removed effective November 25, 1986 for physical and/or verbal abuse of a resident. A grievance was filed by the grievant seeking reinstatement with back pay. When the grievance was not resolved, it was appealed to arbitration.

ISSUE

The issue as agreed to by the parties is as follows:

Did the Department of Mental Retardation and Developmental Disabilities, Cleveland Developmental Center, have just cause to terminate police officer Walter Phillips for client abuse? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 6 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:

E. Suspend, discipline, demote, or discharge for just cause, or layoff, transfer, assign, schedule, promote, or retain employees.

DEPARTMENT POSITION

The Department argues that the grievant is guilty of an extremely serious offense. It maintains that he lost control of himself and physically and verbally abused a client. The Department maintains that he physically abused the client by throwing him to the floor and that he verbally and emotionally abused him by his tactics and by yelling at him. It asserts that because the

grievant is a police officer who is supposed to protect clients he should be held to the highest standards of conduct.

The Department maintains that Duns' testimony is credible. It points out that he has worked for the state since 1975 and has held positions from aide to vocational director. The Department notes that Duns' only role was to complete an unusual incident report and that the decision to terminate the grievant was made by the superintendent. It emphasizes that Duns' testimony has been the same every time he has been called upon to testify and that he has no reason to lie.

The Department contends that its policy prohibiting client abuse is clear. It maintains that abuse is not limited to physical and verbal abuse. The Department points out that the grievant acknowledged reading the policy and that he has attended training sessions regarding client abuse.

The Department asserts that termination was the appropriate penalty. It notes that under its disciplinary policy an employee guilty of physical abuse which has a harmful effect is subject to removal. Patrick M. Herron, the operations director/personnel director at the Cleveland Developmental Center, testified that "harmful" includes conduct detrimental to a client's treatment and the intent to be harmful. He stated that any employee proven abusive has been terminated when it has been harmful.

The Department asks the Arbitrator to deny the grievance. It suggests, however, that if the Arbitrator does reinstate the grievant, unemployment compensation and other forms of compensation should be deducted from any back pay award.

UNION POSITION

The union argues that the Department must prove its case beyond a reasonable doubt. It points out that the grievant has lost his livelihood and his reputation and has suffered as a result of the Department's action. The union points out the Department did not call the client to testify even though Duns testified that he is alert and aware of the world around him. It emphasized that only one witness -- Duns -- testified as to what happened and that the superintendent who made the decision to terminate the grievant did not testify.

The union contends that no evidence of client abuse was offered. It points out that the doctor's report stated that the client was alert and oriented with no acute distress, limitation of movement, bruises, or other apparent injury. The union further noted that Duns could not say if the client suffered any adverse emotional consequences because he left the Cleveland Developmental Center shortly after the incident at issue.

The union claims that the grievant acted properly. The grievant testified that when the client gets agitated he gets violent and that he used only enough force to control him. He maintains that he did not throw the grievant to the floor but that he fell to the floor with him because he did not want to let go of him and lose control. The grievant stated that it is not unusual for employees to be called names by clients and that it does not bother him.

The union points out that the grievant has an excellent record. It notes that he has had no discipline in the three years he has been employed at the center and that last year he was selected as employee of the year. The union further notes that he was a Cleveland police officer for 33 years and that he was promoted by the Cleveland Developmental Center from police officer I to police officer II which involves some supervisory duties.

The union asks the Arbitrator to reinstate the grievant with full back pay. It maintains that it would be inappropriate to deduct the pension he receives as a retired Cleveland police officer from the back pay.

ANALYSIS

In the instant case the grievant was discharged for alleged physical abuse of a client. As in any such case two issues are raised. First, is the grievant guilty of the conduct of which he is accused? Second, is the discharge penalty appropriate?

With respect to the first issue, there is conflicting testimony. The thrust of Duns' testimony is that the grievant was angry because the client was calling him names or swearing at him and pushed him down. The grievant claims that the client was unruly and that he used only such force as was necessary to control him. He asserts that he did not push the client down but that he fell with the client and that they struggled on the floor.

Weighing conflicting testimony is frequently a difficult problem for Arbitrators. In the instant case the testimony of both Duns and the grievant is credible based upon many of the usual criteria for judging credibility. The Arbitrator, however, believes that in the instant case he must accept the testimony of Duns. This is based upon the fact that Duns had no motive whatsoever to lie. He exhibited no hostility or bias toward the grievant and was not even accused of such.

Once the Arbitrator concludes that the grievant did physically abuse a client, the issue becomes the proper penalty. The disciplinary guidelines of the Cleveland Developmental Center set forth two categories of physical abuse. The first category is where the physical abuse is harmful. The penalty specified is from a 20-day suspension to removal. The second category is

where the abuse is not harmful. In this case the penalties range from a written reprimand to a five-day suspension.

In the instant case the Department argued that the physical abuse was harmful and thus removal was appropriate. The Arbitrator must disagree. First, the physical examination immediately after the incident showed that the grievant suffered no physical injuries whatsoever and did not show any signs of stress. Second, there was no testimony that the client suffered any emotional problems or that the incident in any way interfered with his treatment program. Third, the client did not appear to be the sort of individual who would be traumatized by the incident. Unrebutted testimony indicated that the client himself is aggressive and has assaulted other clients. This would not tend to support a claim that he experienced harm as a result of the incident.

Although the Arbitrator might have imposed a different penalty, he believes that he is required to impose a penalty consistent with the employer's disciplinary guidelines. The guidelines specify a penalty from a written reprimand to a five-day suspension for physical abuse where there is no harmful effect. The Arbitrator believes that given that the grievant is a police officer who is charged with protecting clients, the maximum penalty consistent with the Department's own disciplinary guidelines must be imposed. That penalty is a five-day suspension.

The Department argued that if the grievant were reinstated that unemployment compensation and any other income should be deducted from back pay. The Arbitrator believes that it is appropriate to deduct unemployment compensation payments but that the pension that the grievant received from his service as a Cleveland police officer should not be deducted since it was not affected by his employment status at the Cleveland Developmental Center.

AWARD

The grievant is to be reinstated with full seniority and all benefits minus a five-day disciplinary suspension and any unemployment compensation benefits received.



Nels E. Nelson
Arbitrator

November 20, 1987
Russell Township
Geauga County, Ohio