

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Mental Health
Oakwood Forensic Center
Lima, Ohio

-and-

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION OCSEA/AFSCME, AFL-CIO
Local 11

Case No. 23-12-(890926)-0144-01-03
State Unit 3

Decision Issued
May 1, 1990

APPEARANCES

FOR THE AGENCY

Teri Decker
Michael Duco
Rick Mawhorr
Donna McClain
Captain Ron Gilroy

Labor Relations Officer
Office of Collective Bargaining
Labor Relations Officer
Witness
Witness

FOR OCSEA

Bob J. Rowland
Yvonne Powers
David Slone
Larry Betz
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OCSEA Staff Representative
Associate General Counsel
Chief Steward
Grievant
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ISSUE: Article 24, §24.01: Removal for patient abuse.

Jonathan Dworkin, Arbitrator
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THE GRIEVANCE

This dispute stems from the removal of an individual who had a sixteen-year record of unblemished service as an employee of the State of Ohio. The cause for discipline is patient abuse. On July 22, 1989, Grievant was one of approximately six Psychiatric Attendants working together to subdue an out-of-control patient. The task was a difficult one. The patient was strong and violent; he fought vigorously against the Attendants. It took at least five to six men to pin him to the floor, shackle his legs, and apply wrist/waist restraints. It is charged that, as soon the patient was under control, Grievant deliberately kicked him in the mouth, splitting his lip and chipping a tooth.

The overriding question is credibility. Grievant's only accuser is a Registered Nurse who witnessed the struggle and reported the alleged misconduct to Supervision. She testified with absolute certainty that, while the patient was being held down in a prone position, she saw Grievant walk from his feet to his head, kick him, and walk back. She stated that the assault was unqualifiedly deliberate.

Grievant denies the charge. He testified with equal certainty that the Nurse's statement was false; that he did not kick, batter, or otherwise abuse the patient.

A parade of witnesses appeared in the arbitration hearing, in person or by affidavit, on Grievant's behalf. All were present at the time and place of the incident, either watching or helping with the patient. Each testified that s/he did not see what the Nurse allegedly saw; and the implication is that they would have seen it if it had happened.

Grievant was placed on administrative leave (with pay) immediately after the Nurse made her report. A pre-disciplinary hearing was conducted on August 10, 1989, and the Order of Removal was issued on September 19. It stated in part:

The reason for this action is that you have been found guilty of Neglect of Duty and/or Failure of Good Behavior - Patient Abuse in the following particulars, to wit: on or about 07/22/89, at approximately 5:25 p.m., you were observed to have kicked patient #683721 in the face while he was subdued and restrained by staff who were holding him on the floor in the commissary. You were observed by a Psychiatric Nurse who presented testimony at your hearing, that she observed you "pop kick" the patient in the face causing more blood to flow from his mouth. This behavior is a violation of Oakwood Forensic Center Corrective Action Policy and Administrative Rule 5122-3-14.

A grievance protesting the discipline was processed through the levels of the contractual procedure and appealed to arbitration. A hearing was convened in Columbus, Ohio on March 16, 1990. It was stipulated at the outset that procedural requirements for both the

discipline and the grievance had been met. The Representatives of the parties agreed that the Arbitrator had authority to issue a conclusive award on the merits of the controversy, within the following guidelines of Article 25, §25.03 of the governing Agreement:

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

THE ISSUE

The parties jointly submitted the Statement of Issue: "Was the grievant removed from his position as a Psychiatric Attendant Coordinator for patient abuse with just cause?" The reference to "just cause" is derived from Article 24, §24.01 of the Agreement which restricts Management's disciplinary authority. The Section requires that discipline be premised upon just cause, and it charges the Employer with the burden of proving that the standard has been met. In most disputes involving removals, suspensions, or reprimands, this provision grants arbitrators a wide range of matters to consider. The term, "just cause" is expansive, amorphous, and often

defined by an arbitrator's individual concepts of fairness and equity. An employee's length and quality of service and individual mitigating circumstances attending a case are traditionally regarded as elements of just cause; and it is not unusual for an arbitrator to modify or reduce a penalty after considering those and similar factors. This dispute is different. When the parties negotiated the just-cause protection of employment, they carved out an exception. They stated in Article 24, §24.01 that an arbitrator may not modify a termination where patient abuse is the cause. The Section provides:

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. [Emphasis added.]

The contractual limitation on arbitral authority applies to this dispute. The issue stipulated by the parties is not altogether accurate. Grievant is not entitled to a full-blown examination of just cause. In fact, only a trace of the standard remains for him

-- the question of whether or not he committed patient abuse. If the evidence establishes that he did, the Arbitrator will have no alternative but to uphold the discharge and deny the grievance. The Union can prevail only if the Employer fails to sustain its burden of proof. Actually, this controversy must be decided on an "all or nothing basis." There can be no modification or reduction. Either Grievant will be reinstated with wages, benefits, and seniority, or his removal will be affirmed. By adopting §24.01, the parties literally took away just-cause entitlements in patient-abuse cases.

The only issues to be decided are:

1. Did Grievant kick the patient, as alleged?
2. If so, did his act constitute "patient abuse?"

ADDITIONAL FACTS AND CONTENTIONS

Grievant worked at the Oakwood Forensic Center in Lima, Ohio. The Center is a residential psychiatric facility operated by the Ohio Department of Mental Health. Its patients are all prison inmates whose mental or emotional disturbances require acute care. The Center furnishes such care on a short-term basis. Its mission is to restore patients to a degree of health sufficient for them to be returned to the prison system. Patient stays are generally short -- thirty to forty days on average.

Grievant was hired at Oakwood (formerly known as "Lima State Hospital") in 1973. Starting out as a Psychiatric Attendant, he was promoted to the position of Psychiatric Attendant Coordinator and was invested with some quasi-supervisory authority. Although he remained a member of the Bargaining Unit, he served in the role of leadperson. During his sixteen years, he created a very good employment record -- one that is discipline free. It contained no indication whatsoever that, before July 22, 1989, he ever abused patients in his charge or was accused of committing abuse.

The events leading to Grievant's dismissal actually began shortly after 3:40 p.m. with an increasingly volatile confrontation between a patient and another Attendant. The Attendant observed the patient alone in the day hall and realized that, as a level-two resident, he was not allowed out of his unit without an escort. The Attendant ordered the individual to return to "his side of the hall," and the directive was obeyed. An hour later, however, the Attendant had to repeat the order when he again observed the patient unattended in a restricted area. On that occasion, the patient's obedience was more reluctant. He became confrontational and made threats before complying.

Apparently, the patient was angered by the Attendant's exercise of authority and he acted out his feelings in the dining room while at dinner. The Attendant's written statement describes what happened:

At approx. 5:30 pm the unit and I was in the PDR* for supper. This pt.** again asked me if I had a problem. I told him I had lots of problem[s]. Pt. then began cussing and threatening me. Pt. was asked to quiet. Pt. then threatened to get up and beat my ass.

* "PDR" = "patient dining room."

** "Pt." = "patient."

It was then that Grievant intervened. He told the patient to "knock it off" or be returned to his unit without supper. It seems that Grievant's warning somehow triggered a violent response. The patient got up from the table, walked over to Grievant, and started throwing punches. Grievant's training and experience took over. He ducked under the punches, grabbed the patient, and the two fell to the floor. Grievant's shirt was torn and his watch was broken in the fight. While he struggled with the patient, six other Attendants came to his assistance. They had to accomplish two things quickly -- remove the patient from the dining room (where his actions could incite others) and subdue him. It took all six Attendants to accomplish the job. They wrestled the patient out of the dining room through the doorway to the adjacent commissary area. There, they pinned him to the floor. Meanwhile, an Attendant had rushed out to obtain restraint mechanisms. She brought back wrist/waist devices and hobbles for his ankles. One Attendant held his head down while the devices were applied. Then they carried him to his room, strug-

gling and fighting all the way. They tied him "four way" (spread-eagle) to his bed, and the incident ended.

Nothing in the foregoing description is contested or challenged; both parties concede that the patient was violent and posed an extreme danger which had to be met with equally extreme force. The dispute centers upon what, if anything, happened in the commissary while the patient was held to the floor. The State maintains that Grievant kicked him in the mouth. Its allegation is premised entirely upon the report of a Nurse who had gone to the commissary to purchase dinner from the vending machines and happened to be there when the incident occurred. Approximately an hour later, she wrote a report of what she saw:

Just as I started to leave the Commissary Room I heard a noisy commotion in the PDR. I stopped at the door and turned around to look. [The patient] was fighting and the attendants were trying to put cuffs on him. The whole group came out of the PDR into the Commissary Room, where the pt was immobilized, stomach down & head turned to the right, on the floor. Pt's head & neck & shoulders were held in place by [a Psychiatric Attendant]. I saw [Grievant] walk around the "heap," come up to the pt, and give him a quick "pop" kick in the mouth. [Grievant] then turned around and walked back in the direction of [the patient's] feet & the back of the "heap." He then looked up and saw me looking at him - he had an almost defiant look to his eyes & face - but he said nothing.

On July 25, the Nurse was interviewed at length by an Oakwood Personnel Officer and an Ohio State Trooper. The interview was

transcribed and submitted into evidence. It was generally consistent with the earlier statement. However, it did bring out an additional factor. The Nurse told the Trooper she had observed another Attendant pushing the patient's head repeatedly against the floor during the fight. She was uncertain whether the action was deliberate, accidental, or an accepted means of subduing someone who was violent and out of control; so she did not report it. In her mind, the patient could have caused his own head to smash to the floor while an Attendant was exerting pressure to hold it down.

No matter how the patient's head happened to hit the floor, the fact that it did is a critical aspect of this case. The only injuries were to the patient's lip and tooth. The Union surmises that they occurred during the scuffle, not as the result of a kick, which the Union claims never happened and was the creation of the Nurse's imagination.

The State presented the Nurse as its principal witness. Her testimony was unshakable, even when subjected to the most thorough and searching cross-examination. She insisted that she saw what she said she saw. Describing Grievant's conduct, she stated:

I saw him reach up, touch his torn shirt and check his watch. He didn't even look up; he just walked to the patient's head. He just casually kicked the patient in the head and just as casually walked back.

The Nurse noted that Grievant did not appear to be angry, he was

cool and cavalier in his actions. She was asked on cross-examination what she witnessed immediately after the alleged kick. Her response was graphic and did little to bolster the Union's cause. She said, "I saw blood and tissue spurt from his mouth."

The Nurse testified that she was physically sickened by the brutality she had witnessed. In her many years as a Psychiatric Nurse she had seen viciousness and had come upon many suspicious circumstances, but had never observed anything quite so obvious and unmitigated. She did a great deal of soul-searching afterwards.

She was reluctant to make a report and tempted to take the easy way out by ignoring the whole thing. But her conscious bothered her and, finally, she consulted with a Supervisor she trusted. After listening to the account, the Supervisor remarked, "Well, you know you'll have to report it." The Nurse agreed.

Grievant's testimony, that he absolutely did not commit the act, was simple and direct. He recounted his attempts to help the Attendant who was being threatened by the patient, the patient's attack, and his own counterattack. He stated that he was too busy trying to restrain and shackle the patient's feet to leave the task and administer a kick. It took all the strength that he and the others could muster to subdue the patient who was very strong and very violent. Grievant admitted that he was angry over the incident but said he was not hostile or vengeful. The attack by the patient

was an anticipated part of the job of every Psychiatric Attendant, and Grievant maintains that he reacted strictly according to accepted policy.

Grievant's insistence that he never kicked the patient was partially supported by live testimony and a number of written statements. Everyone giving evidence on Grievant's behalf said just about the same thing. Not one saw the incident the Nurse claims to have seen. Each stated that s/he saw nothing happen, but not one could certify, in positive terms, that the alleged misconduct did not happen. Perhaps the best example of this was the testimony of a Psychiatric Attendant Supervisor who appeared as a witness for the Union. He was the one who told the Attendants to subdue the patient in the commissary, away from the other patients in the dining hall. He stated that he observed most of what went on and saw Grievant grab and try to hold the patient's legs. Like the others, he did not see Grievant deliver a kick. But when asked to verify that Grievant did not kick the patient, he conceded his inability to do so. He believed that he was in a fairly good position to witness everything that went on and probably would have seen the kick had it occurred, but he could not be unqualifiedly certain.

There was one other witness who testified through written statements -- the patient. As might be expected, his accounts of the incident were models of inconsistency and exaggeration. He was

interviewed first on July 23, 1989 at 8:45 a.m., the morning after the occurrence. In that interview, he identified Grievant as the person who kicked him:

Q. What happened last night?

A. We were in the dining area for evening meal when [Grievant] told me to sit down and be quiet.

Q. Who were you talking to?

A. I was talking to another attendant . . . I don't know his name, but they call him Red. [Grievant] told me to be quiet or I would have to return to the unit.

I stood up in his mother-fucking face and said I didn't have to. At this time [Grievant] shoved me and I shoved him back, grabbing his shirt. A bunch of attendants jumped in and threw me to the floor and began kicking me.

Q. Who kicked you?

A. [Grievant] kicked me in the face and chipped my tooth.

Q. How many times [were] you kicked?

A. About four or five times in the mouth.

Q. Then what happened?

A. They brought me upstairs and put me in my room.

When interviewed again three days later, his recollection changed. He said that Grievant "took my head and slammed it into the floor," not that he kicked him. Then asked, "Was you kicked,"

he responded that he was -- several times in his face and head. But when asked if he knew who kicked him, he answered, "No."

*

The Employer urges the Nurse is to be believed. It points out that she risked a great deal by coming forward and breaking the "code of silence." Her courageous act, according to the State, was almost certain to create bitterness among some of her co-workers and subject her to ostracism. The Employer makes a strong argument for crediting the Nurse's testimony over that of the others:

[The Nurse] . . . is the most credible witness in this case. She has nothing to gain by lying about the incident. If anything she has a lot to lose by testifying here today. [The Nurse] is already being harassed by employees at the hospital concerning her statements and has lost much respect from her co-workers. [The Nurse] is very firm and convinced as to what she saw on July 22, 1989; 8 months have elapsed and she is still unswayed in her testimony. It is also important to note that [the Nurse] was initially hesitant to report the incident for fear of others not believing her. But, her honesty and sense of right and wrong compelled her to report the incident even though she knew that she might get a co-worker into trouble. [Employer's Opening Statement.]

The Union asks the Arbitrator to give special attention to the severity of the charge against Grievant. Patient abuse is not only cause for removal under the Collective Bargaining Agreement, it is a felony under the laws of the State of Ohio. That is why the State

Highway Patrol joined the Center in the investigation. The Trooper was gathering information to determine whether or not a criminal complaint should be filed. The Highway Patrol decided to take no action because the evidence against Grievant was so flimsy. The Union urges the Arbitrator to adopt the same approach. In its judgment, this dispute should not be decided on the bases of personalities of witnesses or the impression of certainty the Nurse was able to convey in her testimony. Article 24, §24.01 of the Agreement places the burden of proof squarely upon the Employer and the Union argues that the burden should be exacting in this case -- that the Arbitrator should be satisfied with nothing less than "proof beyond a reasonable doubt." Any lesser standard would be tragic if accompanied by a mistake in judgment. Grievant has dedicated most of his working life to this Institution. If he is forced to leave his job under the cloud of patient abuse, he is likely to have nowhere to go -- no way to earn a living.

The Union points out that, when this case is reduced to its essence, it is the word of one employee against Grievant and a host of others. There is no justifiable reason for believing one witness and rejecting the testimony of everyone else. If the Arbitrator were to take that approach, according to the Union, his action would relieve the State of its contractual obligation to prove its case against Grievant.

In conclusion, the Union asks that the grievance be sustained, that Grievant be returned to the job he has performed so well for sixteen years with appropriate restoration of wages and benefits.

OPINION

1. Burden of Proof. The testimony is in hopeless conflict. Neither Grievant nor his accuser said anything internally inconsistent -- which could be seized upon to demonstrate that one or the other lied. It is not uncommon, in disputes such as this, for parties to look to an arbitrator for a determination of truth. Unfortunately, arbitrators are not able to meet such expectations. It is likely that the truth in this case will never be known by the Arbitrator or anyone else except Grievant himself and the Nurse.

The Union seems to contend that this lack of demonstrated truth signifies the State's failure to meet its evidentiary burden of establishing Grievant's guilt "beyond a reasonable doubt." The Arbitrator frankly cannot define that degree of proof; he does not know exactly what it means. Other arbitrators do not know either. The literature of arbitration reveals that legalistic terms such as, "proof by a preponderance of evidence," "proof by clear and convincing evidence," and "proof beyond a reasonable doubt" are used interchangeably by arbitrators. There is almost always a doubt as to an

aggrieved employee's culpability in a removal dispute where facts are in disagreement, and that doubt may never be resolved. Nonetheless, such grievances are as often denied as they are sustained. The reason is that arbitrators make judgments based on probabilities; that is all they can do since they cannot know the truth.

The State's burden in this case was to establish, to a high degree of probability, that Grievant committed the misconduct which led to his removal.

2. The Probabilities Favor the State. The Nurse's testimony was convincing to a degree that fulfilled the Employer's evidentiary burden. It was free of doubts; it contained no equivocations. The witness was certain that she saw Grievant kick the patient in the mouth. She described the incident in precise detail, with sickening realism. She was resolute in recounting what she observed and why she reported it.

The Nurse dispelled any suspicion that she might have fabricated a case against this employee out of malice. She hardly knew Grievant except as an Attendant Coordinator who seemed to do his job well. She had no anger towards him, no desire to take away his livelihood. It was Grievant's act that angered her and impelled her to react, not his personality or presence. She was totally believable.

Of course, it is possible that the Nurse made up her story;

that she did so to carry out a secret vendetta against Grievant. But it is improbable. There is no evidence to support such a finding. Essentially, the Arbitrator would have to indulge in rank speculation, without a scintilla of confirming documentation or testimony, to discredit the Nurse's accusation. It is not an arbitrator's task or right to base an award on speculation. His/her job is to weigh and apply evidence. The weight of the evidence in this case is much heavier on the Employer's side than the Union's. Accordingly, the finding is that Grievant committed the offense charged.

3. Grievant's Misconduct Constituted "Abuse" as Contemplated by the Language and Intent of Article 24, §24.01. In making this finding, the Arbitrator tried to assess the meaning the framers intended for the word, "abuse," when they negotiated §24.01. In 1988, the Agency attempted to define it in a Policy Memorandum issued to all employees (including Grievant):

Any act or absence of action inconsistent with human rights or dignity, any action which is degrading or humiliating towards a client or any act or absence of action which might result in physical or psychological injury to a client. Abuse includes, but is not limited to, the following actions: physical assault; unauthorized seclusion or restraint; ridiculing, threatening or cursing a client; handling contraband; taking financial advantage of a client; neglecting the care of a client; tolerating abuse by another client or employee; concurring in any action which leads to demeaning the physical or emotional well being of a client; sexual harassment; and any sexual activity between a client and employee.

As can be observed, the Agency's definition is very broad and contains a good deal of subjectivity. What might be degrading in the eyes of one person could be innocent when viewed by another. Moreover, elements such as deliberation, provocation, and state of mind are likely to be material factors in a case-by-case review of abuse charges. Those are glaringly absent from the Agency's Memorandum.

The Arbitrator is not called upon to give the parties a definition of "abuse" which can be used reliably in every case. He believes, however, that a simple analogy will suffice in this dispute: Would Grievant's act have been abuse if it had been committed on a dog rather than a human being?

The question answers itself and leaves no room for embellishment. Grievant's act most certainly constituted patient abuse.

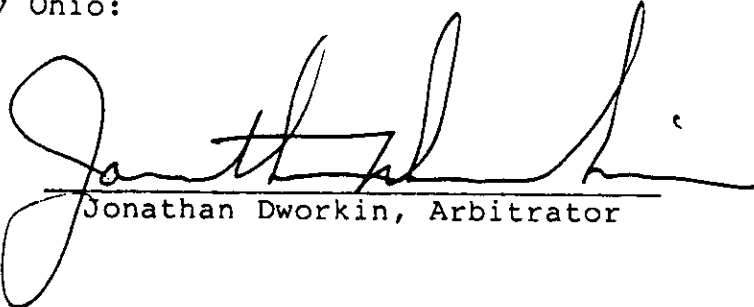
4. Conclusion. If one were to ask whether or not Grievant was discharged for "just cause" according to the traditional meaning of that word, the answer would most certainly be negative. His removal was summary, without any consideration of his many years of high quality service to the Employer. Mitigating circumstances which existed were ignored. But the bilateral negotiated Agreement empowered the Employer to act as it did. By removing arbitral discretion to modify penalties in a case involving patient abuse, the parties either pre-defined just cause or divorced such misconduct

from the protections of just cause. Whichever way the provision is viewed, the result is the same. Section 24.01 prohibits an arbitrator from modifying the discharge penalty when patient abuse is the cause. Article 25, §25.03 requires an arbitrator to apply the negotiated provisions of the Agreement as they were written and intended to be applied, without additions, subtractions, amendments, or alterations. It is a mandate the Arbitrator must obey; one which allows no room for individual concepts of fairness or justice.

AWARD

The grievance is denied.

Decision Issued at Lorain County Ohio:
May 1, 1990


Jonathan Dworkin, Arbitrator