

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 704

OCB GRIEVANCE NUMBER: 23-17-910221-0773-02-11

GRIEVANT NAME: SHARPSTEEN, BETTY

UNION: 1199

DEPARTMENT: MENTAL HEALTH

ARBITRATOR: JOHNSON, MARGARET NANCY

MANAGEMENT ADVOCATE: DECKER, TERRI

2ND CHAIR: SAMPSON, RODNEY

UNION ADVOCATE: CRENSHAW, ERVIN

ARBITRATION DATE: OCTOBER 17, 1991

DECISION DATE: DECEMBER 5, 1991

DECISION: GRANTED

**CONTRACT SECTIONS**

**AND/OR ISSUES:** TWO DAY SUSPENSION FOR DISHONESTY AND FAILURE TO PERFORM ASSIGNED TASKS AS ESTABLISHED BY POLICY OR PROCEDURE

**HOLDING:** IN THE OPINION OF THE ARBITRATOR, THE GRIEVANT WAS NOT TOLD THAT SOMEONE HAD TO BE PRESENT WHEN SHE REVIEWED HER TIMESHEETS IN THE PAYROLL OFFICE. (HOWEVER, SHE IS NOW ON NOTICE THAT SUCH ACTION IS IMPROPER AND COULD HEREAFTER RESULT IN DISCIPLINE.) WHILE EVIDENCE ESTABLISHED THAT GRIEVANT WAS "GUILTY" OF THE SECOND CHARGE, THE ARBITRATOR BELIEVES THE PENALTY IMPOSED WAS TOO SEVERE FOR A FIRST OFFENSE. THE TWO DAY SUSPENSION IS REDUCED TO A VERBAL WARNING AND GRIEVANT AWARDED TWO DAYS BACKPAY.

**COST:** \$ PENDING -



STATE OF OHIO  
LABOR ARBITRATION TRIBUNAL

#704

In the Matter of the Arbitration Between:

OHIO DEPARTMENT OF MENTAL HEALTH	)	
Office of Collective Bargaining	)	
State of Ohio	)	
	)	<u>OPINION AND AWARD</u>
and	)	
	)	<u>GRIEVANCE OF</u>
Ohio Health Care Employees Union	)	<u>BETTY SHARPSTEEN</u>
District 1199	)	
National Union of Hospital and	)	
Health Care Employees, SEIU	)	
AFL-CIO, CLC	)	

This matter came on for hearing on October 17, 1991, in a conference room at the Office of Collective Bargaining in Columbus, Ohio, before Margaret Nancy Johnson, member of the Arbitration Panel selected in accordance with the terms of the agreement between the parties.

Ervin Crenshaw, Assistant to the President, argued the case for the Union. Also present on behalf of the Union were Betty Sharpsteen, grievant, and David Warfield, delegate.

The case for the state was presented by Terri Decker, Labor Relations Office, Department of Mental Health. In attendance for the State were Gary Broyles, Payroll; Marcia Schaefer, Social Work Supervisor; Carol A. Croley, Payroll; and Steve Hansen, Director of Human Resources, Toledo Mental Health Center. *OCB-Sampson*

There were no objections as to the arbitrability of the pending matter upon either procedural or substantive grounds.

The parties have stipulated this matter is properly before the Arbitrator for a final and binding decision.

#### GRIEVANCE

On February 13, 1991, the aggrieved was "suspended for two (2) working days from the position of Social Service Worker II effective February 21, 1991." This action gave rise to the filing of the February 15, 1991 grievance alleging "discipline without just cause." Unable to resolve the dispute, the parties then appealed to arbitration.

#### ISSUE

The stipulated issue in this case is as follows: Was there just cause to suspend Ms. Sharpsteen for two days from Toledo Mental Health Center for two incidents occurring on November 9, 1990?

#### CONTRACT PROVISIONS

The following provisions from the Agreement between the parties are deemed to be pertinent to the within dispute:

#### **ARTICLE 8 - DISCIPLINE**

##### **§8.01 Standard**

Disciplinary action may be imposed upon an employee only for just cause.

##### **§8.02 Progressive Discipline**

The principles of progressive discipline shall be followed. These principles usually include:

- A. Verbal Reprimand
- B. Written Reprimand
- C. Suspension
- D. Demotion or Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

#### STATEMENT OF THE CASE

The State Employer in this case is the Toledo Mental Health Center, hereinafter, "TMHC," "Agency," "Employer," or "State." The TMHC is a psychiatric hospital serving both long- and short-term acute patients.

The grievant has been employed by the TMHC since June 15, 1981. At the time of the discipline now in consideration, the grievant was a Social Worker II. The position description for the job held by the grievant includes the following duties pertinent herein: treatment planning, discharge planning, maintaining records, and maintaining community contacts (Joint Exhibit #10).

To establish standards of conduct expected of its employees and uniform work rules, the Executive Council of the TMHC adopted Human Resource Policy 37 (Joint Exhibit #13). Pertinent herein is Rule 4 under Dishonesty: "unauthorized use of . . . state property . . .;" and Rule 2 under Neglect of Duty: "Failure to complete assigned tasks, tasks in position description, or tasks established by policy or procedure."

Policy 37 provides that "Behaviors and actions which violate these work rules may result in disciplinary action as described in TMHC-HR Policy 31." The referenced TMHC policy (Joint Exhibit

#12) defines the disciplinary action process and establishes a five step procedure as follows:

1. Verbal reprimand (with note in personnel file)
2. Written reprimand
3. Two (2) day suspension
4. Six (6) day suspension
5. Demotion or removal

Human Resource Policy 31 also specifically states that "For offenses of a major nature . . . discipline may begin with either a suspension or removal." To assist in classifying violations, a Standard Guide setting forth a graph or grid with categories of wrong-doing and corresponding penalties is attached to Human Resource Policy 31.

On November 9, 1990, two separate incidents involving the grievant occurred occasioning the decision to impose a two-day suspension. The first event took place at approximately 1:30 p.m. when the aggrieved was found in the Payroll Office, standing by a file cabinet with a drawer open. Prior to that time the grievant had asked a Payroll Officer to "pull her time sheets" for her. The Payroll Officer advised the grievant the officer could not "pull the sheets" but told the grievant she could come in to the Payroll Office during business hours and do it herself.

The Payroll Officer who gave permission to the grievant testified that there is no open door policy at the office; but she also testified that she did not tell the grievant an officer had to be present. Rather, she gave the grievant the hours when the Payroll Office was open for business.

Thereafter, the grievant entered the office at a time when the door was closed, the lights were out and a note indicating the officer would be back in five minutes was on the door. When the officer returned from the mailroom, he saw the grievant by the cabinet with a document drawer open, taking notes. After a few minutes, the grievant returned the papers to the drawer and left the office. The officer to whom the grievant had originally spoken was not at work that day. The incident was reported a couple of days later and is cited herein as "going through records without authorization and/or without being accompanied by the appropriate personnel."

On the same day, the aggrieved was involved with the discharge of a patient. The progress notes prepared by the grievant for that day on the interdisciplinary sheets in the file of the patient are alleged to be unprofessional and inappropriate.

Progress notes are a record of the patient's condition and treatment plan. The function of the notes is communication and information pertaining to the status of the patient to be used by the professional care providers in assessing patient needs. The evidence establishes that the progress notes written by a social worker require professional precision and should relate to the clinical care of the patient exclusive of extraneous information not relative to health care. Specific direction on progress notes is provided in the Social Worker Procedural Manual (Joint Exhibit #11).

The content of the progress notes of November 9, 1990 for a patient the aggrieved was endeavoring to transfer to a nursing

home gave rise to the disciplinary action herein (Joint Exhibit #5). The Agency alleges that the progress notes indicate a failure to complete assigned tasks in an appropriate manner. The notes record the difficulties the grievant was encountering in effecting the discharge of the patient rather than matters relating to health care.

The personnel record of the grievant is devoid of prior disciplinary action. However, the evidence establishes prior problems with professionalism and progress notes. On August 11, 1989, the grievant was advised "the progress notes are for documentation of patient issues and behavior, not word for word conversations with family members" (Employee Exhibit #1). On August 25, 1989, the grievant was given a supervisory note with suggestions for future documentation (Employee Exhibit #2). Additional employment information includes two evaluation reports, June 15, 1989, and June 15, 1991 (Employer Exhibits #6 and #5) as well as notes from the work supervisor pertaining to work performance of the grievant (Employer Exhibits #3 and #4).

The grievant was advised of a Predisciplinary Conference scheduled to consider the charges arising from these events. The hearing was held on December 20, 1990, following which a two-day suspension was imposed. The pending grievance was filed, processed through the negotiated grievance steps, and is now properly before the Arbitrator for a final and binding decision.



### POSITION OF THE AGENCY

The Agency contends that it had just and proper cause to impose the disciplinary suspension now disputed by the Union. The grievant engaged in two forms of employee misconduct in violation of Work Rules issued to all employees of TMHC. The evidence clearly establishes the wrongdoing of the aggrieved on November 9, 1990. The Agency maintains that under the circumstances the discipline assessed was appropriate and reasonable.

The credible testimony of the Payroll Officer was that he found the grievant in the Payroll Office reviewing documents at a time when no officer was present. He had left the office to go to the mailroom. The office lights were out, the door was closed and a note indicating a return in five minutes was posted.

The materials in the Payroll Office are confidential documents. Clearly, the Agency cannot permit anyone to go through the files at will. The records in the custody of the Payroll Office must be preserved and kept intact to ensure proper and accurate accounting.

The grievant had been told that she could review her time sheets but that she had to do so during regular business hours when someone was in the office. She knew how to secure information on her time sheets.

The stealth entry of the grievant into the office when no one was there constituted unauthorized use of Agency property in direct violation of Work Rules set forth in Policy 37. This is a form of dishonesty for which a two-day suspension is appropriate.

The Standard Guide specifically calls for this form of penalty for the misconduct in issue.

In addition, the evidence clearly establishes that progress notes written by the grievant on November 9, 1990 were unprofessional and inappropriate. The content of the notes had nothing to do with the clinical care of the patient. Rather, the grievant recorded problems she was having in transferring the patient, such as faxing difficulties.

The grievant had been repeatedly counseled on the progress notes she was writing. There is no indication that the grievant did not understand what was expected in progress notes and what was to be excluded. Her disregard for the prior instruction constitutes a failure to complete assigned tasks pursuant to established procedure. Under the circumstances this deliberate refusal to conform to expectations warrants a severe penalty.

The Agency did not err in assessing a two-day suspension on the grievant. Her conduct was in violation of established policy.

The grievance should be denied.

#### POSITION OF THE UNION

The Union contends that the conduct of the grievant on November 9, 1990 did not violate established work rules. The grievant did not engage in any act of dishonesty. Nor did she neglect any of her work duties. Accordingly, the disciplinary suspension issued by the Agency is improper and must be removed from the personnel file of the aggrieved.

There is nothing in the evidence which indicates the grievant failed to perform or complete her assigned tasks. On the contrary, the evidence clearly establishes that due to factors beyond the control of the grievant, she was having unusual problems in effecting the transfer of a patient on November 9, 1990. The Union maintains that under these circumstances, with a deadline pending, it is unreasonable and unjust to accuse the grievant of failure to complete assigned tasks.

The grievant deemed the information she was recording on the progress notes to be pertinent. The history of a transfer relates to the care of the patient. Other than the progress notes, there is no other way to record this data.

If the grievant was not writing proper progress notes, she should have been given training. The grievant had no way of knowing why her notes were inappropriate. Without instructions, an employee cannot correct job performance.

There is nothing in the record indicating prior discipline for improper progress notes. The attempt by the Agency to introduce supervisory notes on discussions with the grievant must be rejected. The Union was never proffered this evidence for review prior to the arbitration hearing. The surprise tactic of the Agency is contrary to established practice of the parties.

The Agency also erred in charging the grievant with unauthorized use of state property. There is absolutely no evidence of any misuse of Agency property. The grievant entered the Payroll Office as she had been told to do, during regular business hours at a time when the door was unlocked and an

officer present. There is nothing in any work rule which specifies that this action is improper.

The long delay in reporting this incident undermines the testimony of the officer which is at variance with that of the aggrieved. The officer was, indeed, present when the grievant was in the Payroll Office. Furthermore, the allegations that the grievant had copied something are unfounded and uncorroborated.

The charges in this case are totally improper and unsupported by the evidence. The two-day suspension is without just and proper cause.

The grievance should be sustained.

#### DECISION

In dispute herein is a two-day suspension issued to the grievant, a Social Worker at a Mental Health Care Center maintained by The State. The discipline was assessed for the alleged violation of two work rules: unauthorized use of state property and neglect of duty. Although occurring in tandem on November 9, 1990, the events precipitating the charges are totally unrelated to each other.

The Arbitrator is of the opinion that the discipline imposed in this case can be upheld only if either one or both of the alleged offenses, taken separately, would warrant the penalty. The severity of the discipline assessed cannot be justified by an accumulation of charges. The parties herein have negotiated the concept of progressive discipline into the Collective Bargaining Agreement. Their intent in doing so is to provide remedial

rather than punitive discipline. This purpose ought not to be thwarted by the consolidation of charges and the assessment of a single penalty, the severity of which exceeds that which individually would be warranted. Thus, the allegations made by the Agency are analyzed separately and a decision rendered as to whether either event constituted just cause for the two-day suspension; and, if not, whether a lesser penalty is warranted.

a. Unauthorized Use of State Property

The grievant is charged with the unauthorized use of state property. The allegation is based upon the entry of the grievant on November 9, 1990 into the Payroll Office and a perusal of documents kept on file there at a time when a Payroll Officer was not present. The Arbitrator finds that the discrepancies in the testimony of the grievant and the Payroll Officer who found her upon his return to the office, must be resolved in favor of the Payroll Officer. The credible evidence establishes the grievant had entered the office where she accessed confidential documents kept on file even though she knew the office was not then staffed.

The State contends that her conduct constituted unauthorized use of state property. The Union maintains, however, that the actions of the grievant did not violate the cited work rule.

The Arbitrator recognizes that unauthorized use of state property generally consists of an employee exercising control over state owned equipment for his or her own benefit. However, the rule in question may be extended to cover accessing documents if the employee knew or should have known that such conduct was

prohibited. Thus, the question to be addressed herein is whether the grievant recognized her conduct was in violation of Agency policy and could result in disciplinary action of a severe nature.

The posting of signs indicating an area is restricted to authorized personnel would, certainly, have provided the warning necessary to put the grievant on notice. There is no evidence, however, of any such actual notice. Nor can the Arbitrator find from the evidence submitted that the grievant had received constructive notice she could not review documents in the Payroll Office without an officer being present. The testimony of the Payroll Officer clearly establishes that the aggrieved had called the office in an effort to have the Payroll Officer "pull" certain of her time sheets. At that time the grievant was told that the officer could not do it, but that the grievant could review her sheets during regular office hours.

In a statement taken on November 20, 1990 (Joint Exhibit #9), the Payroll Officer giving permission to the grievant stated that she told the grievant someone had to be in the office. The certainty of this statement, however, is substantially undermined when later in the same statement the officer indicated, she did not remember her "exact words." Moreover, the testimony provided at the arbitration hearing is inconclusive as to the exact conditions for accessing the personnel files. The Payroll Officer testified that she told the grievant she could come in and review the documents during office hours and that she gave the grievant those times. She further stated that there were no additional

conditions, just the "normal business hours." On cross-examination, the witness acknowledged she "did not say someone has to be there." Rather, she stated that during certain times she and another payroll officer would be present.

It is under these factual circumstances that the entry of the grievant into the Payroll Office must be viewed. In the opinion of the Arbitrator it cannot be found that the grievant, having been told that she could review her time sheets, acted in violation of Policy 37. The failure of the grievant to wait for the return of the officer was not good judgment. However, in the absence of clear evidence that the grievant knew her behavior would be deemed "unauthorized use of state property," the penalty assessed by the State is too severe.

The Arbitrator finds that the incident of entry into the Payroll Office does not, under these facts, warrant a two-day suspension. The grievant is, however, warned that such conduct is not appropriate and could, in the future, constitute grounds for more severe discipline.

b. Neglect of Duty

The second charge against the grievant arises from the allegedly improper interdisciplinary notes written by the grievant on November 9, 1990, pertaining to a patient assigned to her. The Agency argues that having been repeatedly counselled on appropriate notes in the past, the grievant should have known the interdisciplinary notes were improperly written. It is the position of the Agency that the improper notes constituted a

"failure to complete assigned tasks, tasks in position description, or tasks established by policy or procedure" pursuant to Policy 37, Work Rules.

In the notes in question the grievant related administrative and clerical problems she was encountering in transferring a patient from the center to a nursing home. The Arbitrator finds that the notes are, indeed, improper in so far as they do not pertain to the clinical care of the patient. Rather, the notes relate problems experienced by the grievant in carrying out her job duties in transferring the patient and meeting her deadline in doing so.

The Arbitrator finds further that proper interdisciplinary notes are, indeed, a job duty of the social worker. It is clear that these notes are the "recapitulation of a patient's progress based on the treatment plan" (Joint Exhibit #11). Written at least once a week by the assigned social worker, progress notes relate to the "Patient's clinical response . . ." The Social Worker Procedural Manual (Joint Exhibit #11) contains specific instruction on what the progress notes should include. Moreover, the grievant has received detailed instruction on what should and should not go into a progress note.

The Union contends that documentary evidence of prior discussions with the grievant on proper progress notes should be excluded from consideration herein. It is the position of the Union that the long standing practice of the parties has been that all documentary evidence to be used in an arbitration hearing be presented to the opposing advocate in advance. Thus,



the Union argues the failure of the Agency to provide the purported documentation of discussions precludes its introduction and submission at the hearing.

The Arbitrator agrees that notes written by persons not present at the hearing and of which the Union was not given advance warning ought not to be used as evidence. However, to the extent the written notes corroborate testimony of a witness, such evidence is admissible.

In the opinion of the Arbitrator the testimony of the Social Worker Supervisor adequately establishes that she had addressed deficiencies in the grievant's progress notes. The evidence convinces the Arbitrator that the grievant had received consultation and advice on proper progress note writing prior to the instance of November 9, 1990.

In the opinion of the Arbitrator then, the repeated and continuing failure of the grievant to properly record progress notes constitutes a "failure to complete assigned tasks," a form of Neglect of Duty under Policy 37. The question to be addressed next is whether such neglect of duty constituted grounds for a disciplinary suspension of two days.

Although the evidence establishes the grievant had previously been counselled on progress notes, the record is devoid of any disciplinary action prior to November 9, 1990. Indeed, the testimony of the Social Worker Supervisor was that the grievant had not been formally disciplined because the Agency attempted "to work with the people rather than use discipline." The evidence clearly establishes that the two-day suspension was

the first discipline issued to the grievant for improper notes, and that she had not previously been given either verbal or written discipline on the same.

The laudable desire of the Agency to "work" with its employees in correcting poor work habits is to be commended. It cannot, however, be used as a substitute for contractual requirements. The terms of the Agreement between the parties are obligatory and cannot be set aside. The parties have mutually agreed that "principles of progressive discipline shall be followed." Implicit within this principle is the concept of corrective or rehabilitative rather than punitive penalties. Thus, unless the facts warrant more immediate stringency, discipline will include verbal and written reprimand prior to suspension.

This principle is also incorporated into the Agency's Human Resource Policy. The guidelines for discipline include progressive penalties starting with verbal and written reprimands. The grid setting forth the guide for disciplinary action indicates that an initial penalty starts with a warning.

The Arbitrator is of the opinion that the type of failure at issue in this proceeding is not of the nature to warrant a suspension on the first offense. There is no indication that the progress notes written by the grievant on November 9, 1990 jeopardized the health or safety of the patient in issue. While not professionally executed, the notes did not endanger person or property.

In the absence of evidence that the conduct of the grievant posed a threat to others, the Arbitrator finds that the Agency is bound to pursue the progressive discipline negotiated by the parties starting with a verbal reprimand. The evidence does not warrant by-passing the initial step of discipline which is to serve as official notice that correction is required. The purpose of progressive discipline is to warn the employee that unless remedial action is taken, more severe discipline will ensue. In the opinion of the Arbitrator the facts of this case mandate that verbal and written reprimand be issued for poor progress notes prior to a disciplinary suspension.

The Agency notes that indeed subsequent to November 9, 1990, the grievant incurred corrective discipline, thereby remedying any procedural deficiency in this case. The Arbitrator is of the opinion that this argument fails for two reasons: First, the propriety of the discipline in question must be assessed as of November 9, 1990, the date of the event giving rise to the disputed discipline. Second, the subsequent penalty is the next step in progressive discipline after a verbal reprimand. Such discipline does not justify the imposition of a suspension in the case at hand.

In the opinion of the Arbitrator the two day suspension was an excessively severe penalty for the offenses in issue. The Collective Bargaining Agreement calls for corrective penalties in cases such as this. The Agency is obligated to abide by this policy in assessing discipline. The two day suspension must be reduced to a verbal warning with a personnel notation in the

grievant's file for both unauthorized use of state property and neglect of duty.

AWARD

The grievance is hereby sustained. The grievant is to be awarded pay for two days wages and her personnel file is to be corrected to conform to this opinion and award.

  
Margaret Nancy Johnson  
Arbitrator

Dated and made effective at the Toledo Mental Health Center in Toledo, Ohio, this 5th day of December, 1991.