ARBITRATION AWARD

#802

In the Matter of	)	
	(	Gr.: George Robinson
The State of Ohio	)	#23-18-911230-0751-01-04
- and -	(	at: Western Reserve
Ohio Civil Service Employees	)	Psychiatric Hospital
Association, Local 11, AFSCME,	(	
AFL-CIO	)	

Arbitrator:	Lawrence I. Donnelly Panelist
For the Employer:	Linda Thernes Labor Relations Officer
For the Union:	Steven W. Lieber Staff Representative
Date of Hearing:	July 21, 1992
Place of Hearing:	OCSEA Offices Columbus, Ohio
Transcript:	None Taken
Post-hearing Briefs:	None Filed
Hearing Closed:	July 21, 1992
Publication:	Permitted by both Parties
Date of Award:	July 31, 1992

BACKGROUND

This case involves the termination from employment of Mr. George Robinson. Since June 11, 1984, he had been employed with the Western Reserve Psychiatric Hospital (hereafter referred to as Employer). At the time of separation, he was working as a Therapeutic Program Worker. For bargaining purposes, the bargaining unit of employees including the Grievant is represented by the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO (hereafter referred to as Union). The Employer is part of the Department of Mental Health in the State of Ohio. As such, it is party to a state-wide relationship with the Union, governed at the time of the termination by a State-wide Agreement, effective July 1, 1989 through December 31, 1991 (entered as Joint Exhibit 1).

Events leading up to Mr. Robinson's termination can be appropriately grouped into three stages. First, between August 18, 1989 and December 15, 1990, he had been disciplined four times; these moved progressively from oral reprimand, through written reprimand and two-day suspension, then to a six-day suspension (records entered in Joint Exhibit 2). Second, in July, 1991, he received a notice of removal-in-abeyance, contingent upon participation in an Employee Assistance Program. The removal order was based upon absences in April and May as well as Mr. Robinson's involvement in an incident with a patient on May 31. Because he agreed to participate in the EAP, the original removal was held in abeyance (records entered in Joint Exhibit 2). Third, Mr. Robinson was terminated on December 12, 1991 because of additional absences as well as non-performance of conditions of his involvement in the EAP (records entered in Joint Exhibit 3).

On December 19, 1991, Mr. Robinson grieved his removal from State employment. The Grievance was discussed through the Grievance Procedure of the Parties according to

Article 25, ¶ 25.01 and ¶ 25.02. The Parties stipulate it properly flowed through their Procedure to arbitration. They further stipulate that it properly rests for determination before this Arbitrator, who was properly selected from their Panel under ¶ 25.04. The authority of the Arbitrator in this case is delineated in ¶ 25.03.

> 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.

ISSUE AND REMEDY

By written stipulation, the Parties agree to this statement of issue/remedy.

> WAS GRIEVANT DISCIPLINED FOR JUST CAUSE, IF NOT WHAT SHOULD THE REMEDY BE?

ANALYSIS AND OPINION

As a preliminary, the Arbitrator notes that the Grievant was not present at the hearing. He was unavoidably elsewhere. The Parties agreed to move forward.

The Union does not question that the Grievant was aware of and understood the rules and regulations applicable in his case. Several documents pertinent to this point are included in Joint Exhibit 2. These are: first, Center Policy #2-3, SICK LEAVE & REPORTING OFF, effective 8/90; second, Center Policy #2-13, CORRECTIVE ACTION, effective 4/90 (accompanied by STANDARD GUIDE FOR DISCIPLINARY ACTION, PENALTIES); third, Center Policy $16-1, PATIENT ABUSE/NEGLECT - DEFINITION AND PROCEDURE TO USE REFERENCE, effective 12/89; and, fourth, two documents

signed by the Grievant relative to dealing with patients.

The Arbitrator further notes that none of the disciplinary actions against the Grievant between August 18, 1989 and December 15, 1990 were grieved. Under ¶ 24.02 the Employer thus followed progressive discipline in the Grievant's case; the Employer moved from verbal reprimand through a written reprimand to two suspensions of 2 days and 6 days. The latter occurred between January 4 and January 10, 1991. Attendance problems were a reason in each disciplinary action. Further, this suspension was imposed and not grieved even through the Grievant had received an otherwise acceptable performance review on July 27, 1990. So, as the Arbitrator moves into the second stage of background, the Employer can be judged to have acted properly under the Agreement in its disciplinary treatment of the Grievant.

On May 22, 1991, the Grievant's Supervisor (Wilhemina Tillman) requested a pre-disciplinary conference for the Grievant concerning alleged violations of Center Policy #2-3 and Center Policy #2-13 (Joint Exhibit 2). Then, on May 31, 1991, the Grievant was involved in a "physical scuffle" with a patient which prompted an allegation against him of patient abuse. A pre-disciplinary conference concerning these matters was held before Mr. Gene Briers, Director of Human Resources on June 11, 1991 (Joint Exhibit 2). Ms. Betty Williams, President of Chapter 7715 of the Union, was present. Mr. Briers recommended removal of Mr. Robinson with parenthetical reference to EAP (Joint Exhibit 2). On July 9, 1991, Mr. Michael F. Hogan, Director of Ohio Department of Mental Health, signed an order of REMOVAL FOR GEORGE ROBINSON, directed to the Grievant (Joint Exhibit 2). This was modified on July 26, 1991 by a letter of Mr. George Gintolli, Chief Executive Officer.

In accordance with the Director's Order of July 9, 1991 you are

> being informed that the determination resulting from the pre-disciplinary conference held with you on June 11, 1991 is that removal from state service be held in abeyance for ninety (90) days providing you successfully complete an Employee Assistance Program (EAP). Upon successful completion of the EAP program,the corrective action may be reduced to a six (6) day suspension. However, should you fail to comply with the terms of the Agreement, removal from state service will follow.
>
> You are to sign an EAP Agreement Form with the EAP Officer at WRPH, Betty Lou Milstead, within seven (7) calendar days from the date of this notice and comply with the terms set forth in the Agreement.

On July 26, 1991, Mr. Robinson signed such an agreement (entered as part of Joint Exhibit 5).

In the Arbitrator's judgment, the Employer clearly initiated further disciplinary action against the Grievant at that time. Mr. Robinson was clearly charged in the pre-disciplinary conference. The Employer had documentation relative to his attendance violations (forms entered as part of Joint Exhibit 2). The Employer had several statements about the incident on May 31: namely, report from the Grievant, report from the patient, and reports from six other people. Further, the Employer had a summary report on the Incident. To be sure, the conclusion of several of these reports do not favor the Grievant. Then, a removal letter was addressed to him before the letter from Mr. Gintoli. Within the letter of removal from Mr. Hogan is the following:

> If you wish to appeal this action, you must file a written grievance with the Agency Director within 14 days of notification of this action.

Mr. Gintoli's letter clearly conveys that Mr. Robinson is being disciplined further: removal from state service or possible reduction to a six-day suspension if he successfully completes the EAP program (while removal is held in abeyance).

Yet, no grievance from the Grievant nor the Union was filed about the removal-in-abeyance. ¶ 25.02 within the Grievance Procedure provides in part:

> . . . All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event.

So, here again, the Arbitrator concludes that the Employer initiated the action outlined in Mr. Gintoli's letter as commensurate and progressive under ¶ 24.02. Further, without a Grievance, he concludes that the Employer had established to the satisfaction of the Parties involved on July 26, 1991 its burden of proof for just cause under ¶24.01.

The introduction of the EAP program adds a new dimension to the case beyond work performance. In their Agreement, the Parties address EAP.

> ¶ 24.08 - Employee Assistance Program
>
> In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program the Employer will meet and give serious consideration to modifying the contemplated disciplinary action.

Ms. Betty Lou Milstead testified that the Employer usually reserved the use of EAP while discipline was held in abeyance for removal cases. Further, the Parties agreed that different State Agencies used the EAP Program in different ways. In his analysis of this case, the Arbitrator focuses upon the program as used at Western Reserve Psychiatric Hospital under the Agreement between the Parties.

The Employer claims it terminated the Grievant for his failure to comply with the EAP Agreement and for continued attendance violations. For its part, the Union contends

that the Employer lacked just cause due to flawed investigation of the charges of patient abuse/excessive force. Further, the Employer is invoking a penalty not commensurate to the offense for it fails to consider mitigating circumstances. Finally, the Employer violated ¶ 24.08 as well as the spirit of the entire Agreement by not involving the Union in the EAP activities.

In moving into his analysis of the Issue - was the Grievant disciplined for just cause - the Arbitrator recounts his authority under ¶ 25.03. First, disputes before him must involve "the interpretation, application or alleged violation of a provision of the Agreement." Second, he has "no power to add to, subtract from or modify any of the terms of this Agreement." Finally, he shall not "impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement."

With this in mind, what contractual violations does the Union claim the Employer committed? First off is the standard for discipline, articulated in ¶ 24.01: "Disciplinary action shall not be imposed upon an employee except for just cause." Second, the Union claims the Employer has not met the burden of proof to establish just cause under ¶ 24.01. The Union also claims misapplication of ¶ 24.02: "The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense." Third, the Union claims that ¶ 24.08 was violated because the Employer failed to involve the Union in the EAP with the Grievant.

Both the statement of the Issue and the contractual standard for discipline require the Employer to establish just cause for its action. In the order of removal from Mr. Hogan, dated December 5, 1991 (entered in Joint Exhibit 3), the Employer declares three grounds for its action. First, the Grievant failed "to comply with the conditions identified

in the Employee Assistance Agreement signed on July 26, 1991." Second, the cause of the initial action " "Patient Abuse - mishandling/excessive force; and Neglect of Duty - violation of attendance standards (unapproved leave, late call off)" - was stated and explained in essentially the same way as in the letter of July 9, 1991 (entered in Joint Exhibit 2 and referred to above). Third, since the Grievant was placed on removal-in-abeyance standing, the Grievant "continued to exhibit attendance problems . . . ."

Central to the judgment of just cause relative to EAP are two facts: the Grievant signed an EAP agreement (entered as part of Joint Exhibit 5) and he did not meet requirements under the Program. Before the Grievant had signed the EAP agreement, the Union was present during the pre-disciplinary meeting on June 11, 1991. However, the Union was not present during a meeting about the EAP between the Grievant and Ms. Betty Lou Milstead, Labor Relations Officer. As part of her regular responsibilities with the Employer, she co-ordinates the EAP activities. Along this line, she discusses the EAP with an affected employee as well as the time frames in the program. She testified that she would call the Union into such a meeting if an employee requested. The Grievant did not request the Union to attend his meeting with her. At the conclusion of their meeting, Ms. Milstead said the Grievant told her he would sign the Agreement. This signed agreement is entered as part of Joint Exhibit 5. Neither the Union nor the Grievant filed a grievance about Ms. Milstead's conduct of this meeting. This was not her first experience with an EAP meeting; at least six other employees had previously entered into EAP agreements (entered as Joint Exhibit 4). In no case had the Union nor an employee involved grieved Ms. Milstead. So, the Arbitrator concludes that Mr. Robinson knew what he was signing as a result of the meeting.

Ms. Williams and Ms. Milstead both testified that the Union was not ordinarily present during these EAP meetings. ¶ 24.08 enables an EAP agreement between the Employer and an employeer; such an agreement is not negotiated between labor and management. Further, ¶ 24.08 is silent on the presence of the Union. ¶ 24.08 provides that "the affected employee elects to participate in an Employee Assistance Program." As the Parties agreed at the hearing, this EAP is available state-wide across all agencies for unionized as well as non-union employees of the State. Practice on details varied from agency to agency; but, ¶ 24.08 in the Agreement precisely allows this. Ms. Milstead testified that EAP enables an employee to address some personal-type problem in the course of deferring disciplinary action; the language of the EAP program bears this out. The Parties acknowledged that dealings between an employee and the provider are confidential; the Employer has no involvement in such dealings. Rather, as part of the EAP agreement, the employee agrees to participate in a system that enables the Employer to receive confirmation that the employee is participating in the EAP. This covers the Employer's interest: that the employee is addressing with professional assistance whatever personal problem is generating work-related deficiencies. On Mr. Robinson's form, these deficiencies are identified as "patient abuse and attendance violations." In summary, then, the Arbitrator concludes that the Grievant and the Employer properly entered into an EAP agreement in use through the State. Under this agreement discipline would be held in abeyance while the Grievant participated in the State EAP. The Parties did not require in ¶ 24.08 that the Union be directly involved in this program.

There is no doubt the Grievant did not complete the Program. On his Grievance, he rather chooses to explain why he did not meet the conditions of the EAP agreement.

Ms. Milstead testified that the provider could neither confirm nor deny whether the Grievant complied; the provider simply did not have any of the forms required to be filed by a participant. Ms. Milstead acknowledged that the Grievant had contacted her after his participation began; the Employer also was aware that the Grievant judged he was receiving the run around from the provider both in terms of the type of treatment provided and the forms required. In essence, the Union does not deny that the Grievant failed to successfully complete the Program; rather it urges that the Grievant should be given another chance due to mitigating difficulties in meeting the requirements in the agreement. The Arbitrator does not know anything about prior practice of employees with an EAP agreement after the Program is finished. He knows that one employee completed the program and grieved about the discipline imposed after it was held in abeyance (entered as Employer Exhibit 1). He knows nothing of the other five employees in Joint Exhibit 4. As he reads ¶ 24.08, the Arbitrator finds no requirement upon the Employer in the event of non-completion. Rather, it reads: "Upon successful completion of the program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action." The Arbitrator has no authority to "subtract from" the Agreement the phrase "Upon successful completion." Nor does the Arbitrator have authority to "impose . . . an obligation . . . not specifically required by the expressed language of this Agreement." In the Arbitrator's judgment, the Employer is simply carrying forth on the EAP agreement which requires successful completion of a particular program agreed to in ¶ 24.08 by both Parties. Hence, under the Agreement, the Employer has just cause to activate the discipline held in abeyance because of the failure to meet the conditions of the Agreement. The Employer meets its burden of proof on the first grounds for the

discipline.

As to the Employer's charges about continued attendance problems, the Union does not question the records submitted in Joint Exhibit 3. On his Grievance, the Grievant raises a claim of discriminatory enforcement; but, no substantiation is provided. According to the Standard Guide For Disciplinary Actions, the Employer is both progressive and commensurate in its disciplinary action. The Employer had already taken several corrective steps, including removal-in-abeyance. The Arbitrator has no authority to substitute his judgment for the Employer's in this matter; rather, he affirms that the Employer used the system in place in a reasonable fashion. The Employer had just cause to discipline the continued deficiencies in meeting attendance requirements.

The final basis for the Employer's action, as provided in Mr. Hogan's letter, is the repeat of the grounds leading to the original removal-in-abeyance. Both on the Grievance and in the testimony of Ms. Williams, the Union questions the credibility of some of the accounts of the incident. The Arbitrator places no weight on this. It is obvious from the documentation included in Exhibit 2 that the Employer sought statements from possible witnesses. Their testimony is not consistent. Some testimony is not favorable to the Grievant; other testimony is favorable. It is not the Arbitrator's job to substitute his judgment of relative credibilities for the Employer's. The Employer's job is to discipline, the Arbitrator's job is to assess this action for just cause. Simply because the Employer accepted as credible the testimony from witnesses unfavorable to the Grievant does not render the Employer's investigation and judgment flawed. Further, the time under the Agreement to challenge the Employer's judgment of the incident of May 31 was in June, not in December.

At the hearing, the Union focused a great deal of attention upon the Employer's failure to involve the Union during the Grievant's EAP period. As delineated above, ¶ 24.08 does not require the Union's presence. Under ¶ 25.03, the Arbitrator has no authority to add to ¶ 24.08 of the Parties' Agreement a sentence like "The Employer shall involve the Union in its dealings with an employee who elects to participate in the Employee Assistance Program." The Arbitrator's personal views on this matter are irrelevant; the Agreement does not authorize him. Also, he cannot speak for SERB about unfair labor practices. But, ORC 4117.08(C), exempts several topics from an Employer's duty to bargain; among these is discipline. In this case, the Employer had obviously bargained over EAP; the Parties agreed to an elective plan to be used in the context of disciplinary action. In this paragraph, the Parties do not specify any specific role for the Union. So, as delineated above, the Employer was implementing ¶ 24.08 as written by the Parties.

Both Ms. Williams and Ms. Shirley Tolbert, Steward and Internal Secretary in Chapter 7715, testified about a training program for EAP in April, 1992. In this case, the Arbitrator can place no weight to this. His authority arises under the 1989-1991 Agreement; so too are the limits to this authority. This training program occurred under the Parties 'current Agreement. The Arbitrator clearly has no power under ¶ 25.03 to apply a decision to be reached in April 1992 retroactive to December 1991 (or earlier). If the Parties choose to do something like this, that is their authority. The Arbitrator has no such power. He only has the power to address "disputes involving the interpretation, application or alleged violation of a provision of the Agreement", not some successor Agreement.

In conclusion, then, the Arbitrator has reviewed the testimony and materials provided to him at the hearing. Based on the above analysis, he concludes that, under the Agreement between the Parties, the Grievant was removed from state service for just cause in December, 1991.

AWARD

1. THE GRIEVANT WAS DISCIPLINED FOR JUST CAUSE.

2. GRIEVANCE IS DENIED AND DISMISSED.

Dated: July 31, 1992
July 31, 1992

Signed Lawrence I. Donnelly
Lawrence I. Donnelly