

#804

IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING
STATE OF OHIO
DEPARTMENT OF MENTAL HEALTH

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
CHAPTER 7715, AFSCME

ARBITRATION AWARD

Thelma Walters, Grievant

CASE NUMBERS: 23-18-911021-0734-01-04 - Removal
23-18-910805-0702-01-04 6 day susp.
ARBITRATOR: John E. Drotning
HEARING DATE: June 24, 1992

I. HEARING

The undersigned Arbitrator conducted a Hearing on June 24, 1992 at the Western Reserve Psychiatric Center, 1756 Sagamore Drive, Northfield, Ohio. Appearing for the Union were: Mr. Robert Robinson, Betty Williams, Deborah Grays, Cynthia Henderson, Camille Clark, and the grievant, Thelma Walters. Appearing for the Employer were: Linda Thernes, Esq., Stan Wilder, Betty Lou Milstead, Mary Royse, and Geneva Barker.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 6/24/92. The discussion and award are based solely on the record described above.

The parties jointly stipulated that:

1. Grievance is properly before the Arbitrator
2. Grievant employed at Western Reserve since 1985

II. ISSUE - SIX DAY SUSPENSION

The parties agreed that the first issue involves a six day suspension and the exact question is:

Was Grievant suspended for just cause? And if not, what shall the remedy be?

The parties also jointly submitted exhibits marked Joint Exhibits #1 -#4. In addition, the parties stipulated that:

The dates and time for call off from work are accurate.

A. TESTIMONY, EVIDENCE, AND ARGUMENT

1. MANAGEMENT

a. TESTIMONY AND EVIDENCE

Management called Betty Lou Milstead, the Labor Relations Officer, who testified that she deals with discipline and schedules pre-disciplinary meetings, etc. Milstead testified that she is aware of this grievance.

Milstead said that employees have been disciplined for being late and she went on to say that at least seven employees were disciplined for being late.

Milstead said that at the Western Reserve Psychiatric Hospital there are 200 black employees and about 25 white employees.

Milstead said that tardiness is equivalent to a late call off and tardiness means one is late whereas a late call off means an employee does not come to work and does not call in.

In this case, Grievant Walters was late in calling off.

On redirect, Milstead said that the tardiness policy involves three instances of late reporting and if that occurs within a thirty day period, employees can be disciplined.

Milstead said that employee Banister was disciplined for tardiness and she is a white employee.

Management also cross examined Union witnesses. Ms. Betty Williams, the President of Chapter 7715, testified she is not aware whether all the employees noted on Joint Exhibit #4 were disciplined.

b. ARGUMENT

Management asserts that the facts of this case are not in dispute and the grievant did not deny that she violated Center policy 2-3. Her basic argument is disparate treatment and Management argues that there is no case for disparate treatment.

Management goes on to say that there have been several disciplinary cases in the the Nursing Department for late call offs. Moreover, the cases that the Union cited involved tardiness which is a totally different infraction with a different set of rules than late call-offs.

The grievant in this case, notes Management, is involved in a seven day a week, twenty-four hour a day operation and advance notice must be given by employees if they are unable to come to work.

Both parties, notes Management, recognize the importance of advance notice and that is the purpose of Article 29.03. In this case, the grievant was on notice as evidenced by the recent training on this very subject, but she still did not comply.

For all these reasons, the Employer asks that Grievant Thelma Walters be issued a six day suspension.

1. UNION

a. TESTIMONY AND EVIDENCE

Ms. Betty Williams testified that she had worked for the Western Reserve Psychiatric Center for 17 years and she was a pharmacy attendant and also President of Chapter 7715.

Williams said that she represented Grievant Walters and the latter had mitigating circumstances.

Williams said that she was aware of the tardiness and late call-off policy. She said discipline has not been fair or across the board.

Williams testified about Union Exhibit #1 which is a standard guide for disciplinary penalties and she also testified about Union Exhibit #2 which involved an employee, Robert Evans.

Williams went on to say that Joint Exhibit #4 only involved white employees.

On redirect, Williams said that she knew Arthur Cole and he had been disciplined as noted on Joint Exhibit #5.

Williams said that Cole had no attendance problem but rather he was late four days and he received a six day suspension.

The Union also cross examined Betty Lou Milstead who testified that Union Exhibit #1 is a new form of discipline. Milstead also said that discipline must be fair.

On recross, Milstead testified that Ms. Bannister was tardy and in effect, Bannister was short about twenty-eight out of the eighty hours she should of worked over a two week period.

b. ARGUMENT

The Union argues that Walters was suspended without just cause. It goes on to say that others have violated the same attendance/tardiness policy that this grievant was disciplined for. The real difference in this case is skin color and, therefore, the Union is arguing for a fair, impartial way in handing out discipline.

The Union goes on to say that the attendance records of employees Tramsak, Bannister and Wave put them near termination if the attendance/tardiness policy had been followed while Wismar, Kowicki, and Fowler could have been fired.

Thus, in this case, even though grievant Walters offered mitigating circumstances for her problem, she was still disciplined and, therefore, her suspension should be overturned and the grievant should be made whole.

B. DISCUSSION AND AWARD

The question is whether the six day suspension of Grievant Thelma Walters is for just cause? On July 19, 1991, Thelma Walters was suspended for six working days. It is also clear from Joint Exhibit #2 that Walters had received in-service training as well as sick leave and reporting off policies. That document also notes that one of the training objectives was to eliminate late call-offs and on seven occasions between April and May of 1991, Walters made late call-offs and as a result, she

received a two day suspension. Prior to this time, Walters had a written reprimand on March 5, 1990 and she also received a two day suspension on April 30, 1990 for patient neglect.

It is also clear that Grievant Walters was aware of the call-in policy; she had been re-trained three days prior to committing the first of the seven calling off late infractions between April 3, 1991 and May 4, 1991.

The Union claim that Walters' discipline was unfair because she was treated differently than white employees is not persuasive. Even President Williams in her testimony did not testify that Walters was treated differently than "other" employees.

As a consequence of repeatedly failing to call in on time, Walters was issued a six (6) day suspension and that decision is consistent with Contract language. Therefore, Walters' grievance must be denied.

III. ISSUE - REMOVAL

The parties also submitted documents with respect to the second issue involving Grievant Walters which is as follows:

Was Grievant terminated for just cause? And if not, what shall the remedy be?

The parties jointly submitted exhibits marked Joint Exhibits #5 - #9. The parties also jointly stipulated to the following facts:

1. The patient was injured on September 4, 1991.
2. Injury was a 1 cm cut above the left eye.

A. TESTIMONY, EVIDENCE, AND ARGUMENT - Removal

1. MANAGEMENT

a. TESTIMONY AND EVIDENCE

Ms. Mary Royse, a registered nurse, said she had worked at the Western Reserve Psychiatric Center for two and one-half years on second shift.

On September 4, 1991, Royse said she received a "call" and she walked to a doorway and saw Thelma Walters strike a patient in the face while that patient was being held by another employee. Royse reiterated that she observed Grievant Walters strike the patient and Royse said she was right next to Walters when the incident occurred.

Royse said she went to Cuyahoga Municipal Court and a prosecutor told her about a plea bargain arrangement and Walters would have to quit her job. That, said Royse, was the deal agreed to by the parties.

Ms. Geneva Barker, an employee at the Western Reserve Psychiatric Center, testified that she tries to get clients ready so they can go out into the community.

Barker stated that she had worked with Thelma Walters.

Barker said she observed the incident involving on 9/4/91. Client A, said Barker, was totally out of control on the day in question. She went on to say that she observed a staff person take Client A to another bathroom and that staff person had client A under control. Barker said that a co-worker swung her arms and hit Client A in the eye and the client was injured.

Barker said the other co-worker was controlling the client.

Barker testified that Grievant Walters said to the client: "You will not do to me what you did to the other person".

Barker went on to say that there was no reason for Grievant Walters to hit the client.

Barker said it has been very difficult for her to work at the Center since that statement was made.

Management called Betty Lou Milstead for rebuttal purposes who testified she has prepared disciplinary cases. Milstead said some white employees have been fired.

Milstead noted that the Western Reserve Police Department conducted an investigation then went to the Chief Executive Officer of the Western Reserve Psychiatric Hospital who decides the issue.

Management also cross examined Union witnesses.

Ms. Cynthia Henderson on cross examination said she did not yell for help. She went on to say that she observed six or seven instances where Client A was involved in hitting other patients and employees. She went on to say that Client A hit her and her whole body hurt.

Ms. Betty Williams on cross testified that white employees talk down to blacks. However, she also testified that she did not witness the incident and she cannot state any facts about that incident.

Ms. Camille Clark testified on cross that if a patient is out of control, the registered nurse can get an order to put the patient in a private room.

Clark noted that Client A acted as though she were possessed by a demon and incidents occurred often.

Clark said that she could have put Client A in seclusion. Moreover, she went on to say she did not see Walters hit the patient.

On recross, Clark said that she and another employee could have secluded Client A and Client A is secluded almost every day.

Grievant Thelma Walters, on cross, testified that she was given a disorderly conduct charge and she went on to say she never really went to court. Walters said there was a jury ready to be seated, but nothing occurred.

The judge and her attorney, said Walters, indicated that there was "no patient abuse". She acknowledged she was charged with disorderly conduct and she had to pay a ticket.

Walters said she went into the room with Client A and Client A swung at her.

Walters testified that she has an artificial right eye.

She was asked whether the other employee had control over Client A and she said she did not know.

b. ARGUMENT

Management notes that the Union raised procedural objections and also argued disparate treatment. However, the State presented evidence to show that Western Reserve Psychiatric Hospital employees have been removed for substantiated abuse and it is not simply black employees who are terminated.

The State asserts that it has shown that Grievant Walters abused a client. Two employees testified that they witnessed the grievant strike the client in the face and the client (patient) then sustained an injury above the left eye.

The Employer notes that Ms. Barker was accused of preventing a blue alert but she did not prevent co-worker Camille Clark calling for help.

The Employer also goes on to say that apparently Barker also has been accused of allowing patients to abuse others and not conceding it as abuse.

Management said that the "Hospital street code" is to turn your back on violations so that if X does not turn Y in, Y won't turn X in.

However, in this case, the employees involved did the right thing. All the employees need to hear the message which is that the Employer cannot and will not tolerate patient abuse.

The extent of the injury to Client A is not the critical issue, notes the Employer, but rather it is that no abuse of any kind by employees is acceptable.

Article 24.01 is clear. If there is abuse in this case, the removal must stand but even if the grievant is guilty of a lesser offense, the removal is still appropriate because of Walters past record involving a written reprimand, a two day suspension for patient neglect, and a six day suspension for late call-offs.

Given Walters struck Client A, the Employer asserts that the grievance be denied.

2. UNION

a. TESTIMONY AND EVIDENCE

Ms. Deborah Grays testified that she worked on 22B on 9/4/91 and that at about 3:10 p.m., Client A attacked her.

She said she did not thank Ms. Barker for grabbing and holding the other employee.

Ms. Cynthia Henderson testified that she worked at 22B and that on 9/4/91, she was attacked by the client. The client had been fighting all day long and eventually attacked Geneva Barker. Barker, said Henderson, put the client in another room and she went to her desk and then the client walked in and grabbed her by the throat and said that she was the devil's daughter, etc. and the client threw her to the ground and choked her and they both hit the floor and then, grievant Thelma Walters came in and pulled the client off.

The client went after Walters and Henderson said she could do nothing.

Henderson reiterated that Barker did not help her; only Walters was the one who helped her.

Henderson said that Client A probably attacked six or seven people that day.

Ms. Betty Williams testified that she had worked for 17 years with OCSEA and she went on to say she investigated the case.

Williams said that the client had been involved in numerous incidents on that day, 9/4/91.

Williams said that Royse did not assist her and she went on to say Thelma Walters did not go to the hospital immediately. She went on to say she called the nursing supervisor to take Walters to the hospital.

Williams said that she knows Royse and was aware that there were problems between Walters and Royse. Williams said that she had heard Royse yelling at Walters and she talked to Royse about

her interactions and her slamming the phone down when Walters was on the phone. Royse, said Williams, slandered Walters and Walters name essentially had to come out of the chart.

Williams reiterated that she met with Royse and asked Royse why she was so rude to Walters and she (Williams) said, Why can't you work together. Royse, said Williams, had a southern mentality toward black employees and she tried to resolve issues between Royse and Management.

Williams said that she saw a white male staff member beat a patient and she saw pictures of that patient and nothing was done to him. Moreover, she said a white male staff person was accused of smothering a patient and that staff person only received a six day suspension.

Williams said that she has tried to work out a policy with Management over various issues and she even noted that there had been an informational picket over disparate treatment.

On redirect, Williams was asked if she knew what happened to Client A and she said she was not present.

Ms. Camille Clark testified she was a therapeutic program worker and had been in that capacity for about 13 years. She testified she recalled the incident on 9/4/91.

Clark said that Client A went over and hit Client B and then Client B threw Client A over the table and chairs. Client A picked herself up and then tried to hit Clients C, D, E, and F.

Client A, said Clark, also hit a secretary.

Clark said that Barker had her hair pulled by Client A and eventually Barker took Client A to seclusion. Eventually, after Barker took Client A into the bedroom, Barker let the door go and Client A ran down the hallway into a secretary's office.

Clark said she and Thelma were at the desk and Walters moved first and got Client A off the secretary. Clark said then Client A tried to hit Walters and she got Client A off Walters and put Client A into the hallway.

Clark continued by saying that another employee, Doug Tillman, took Client A into a room.

Clark said that Walters wanted to pursue a blue alert and she said there was no need and Barker hung up the phone on Walters. Clark said that Walters went into the room where the client was with Tillman and she heard Barker say, "No Thelma, No."

Clark said Nurse Royse did not assist Tillman.

Clark said she was never interviewed by the political advocate or the police.

Client A attacked Barker.

On redirect, Clark said she could have secluded the patient.

She also said she did not know what the phrase, "No, Thelma, No" meant.

Thelma Walters testified that she went to the Administration Building because she heard that Client A was attacking others and had Ms. Barker by the hair. Walters went on to say that she went to the secretary's office and observed Client A hitting a secretary so she grabbed Client A and then Client A hit her.

Walters said that she followed Client A who was with Doug Tillman into another room and then Client A started to hit her and she is blind on the right eye.

Walters said that when the police came for her, it was Client A who was at fault; not her. She testified she was injured in that incident and the doctor said she was bruised on her right shoulder.

Walters said she did not intentionally hit the patient but Client A was foaming at the mouth and attacked her and she (Walters) had to defend herself.

Walters said she was charged with patient abuse in court but the judge ruled the issue as disorderly conduct.

Walters said there was no deal with respect to her losing her job.

Walters said that she has had lots of problems with Ms. Royse and she went on to say Royse had wrote her name in the progress report about sex and that is illegal.

Walters said she had not often worked with Barker but patients attack Barker and she does nothing to them.

The Union cross examined Management witnesses. Ms. Mary Royse on cross testified that she probably saw the end of the interaction and she went on to say that she put Client A into the exam room.

Royse said that a physician checked Client A out.

Royse said that she did not dislike the grievant although she said she had some disagreements with Walters. She said she had complained about the grievant's work ethics with others and she did put a note in the chart to protect the grievant from a claim by a patient. That note, said Royse, eventually had to be crossed off by her.

Royse said she observed Grievant Walters' arm pulled back to strike Client A.

Ms. Geneva Barker, a therapeutic program worker, testified on cross that she was at the doorway entrance to the bathroom and she saw Grievant Walters hit Client A.

Barker said she was never attacked by the patient, that the patient had attacked other persons, at least that is what she was told.

Barker said that she had to grab a secretary in order to keep that secretary from getting involved with Client A and after that situation, that secretary thanked her.

Grievant Walters, said Barker, wanted to call an alert and she hung up the phone and did not do so.

Barker said that Client A was under control and she had been removed from a previous area where Client A had attacked a patient. Barker said that Grievant Walters hit the client and the client then tried to hit Walters.

On cross from rebuttal, Betty Lou Milstead testified that OCSEA white employees have been fired for patient abuse and she identified a Paul B. as one.

b. ARGUMENT

The Union argues that the testimony, documents, and graphics mean that the Grievant was fired without just cause. In this case, Grievant Walters was the victim of R.N. Royse who always harassed the grievant and made disparaging remarks about Walters and actually put a degrading comment in a patient's chart which referred to an unfounded and unproven allegation that Grievant Walters had sex with a resident.

Today, the issue is that Grievant Walters was fired for striking a patient. R.N. Royse had a disliking for Grievant Walters. Royse apparently thought she had seen Walters strike at the patient and she wanted to write the grievant up. In short, it is clear that Royse did not like Grievant Walters.

Ms. Geneva Barker's statement is so confusing as to make it impossible to understand, claims the Union. Grievant Walters hit Client A in self-defense. To say that Walters hit Client A while staff person Tillman held the client in a basket hold is contradictory.

The Union goes on to argue that staff person Douglas Tillman stated that Client A attacked Grievant Walters and that all he could really see were arms moving as he tried to hold on to the client. It was then that Ms. Barker observed the situation, but that was only the tail end.

The Union states that Client A attacked and nearly killed a secretary around 3:10 p.m. and that she was the fourth employee to feel the wrath of Client A yet no one ordered Client A to be secluded for the safety of other patients and staff, asserts the Union.

Grievant Walters was one of two staff persons to assist the client. Moreover, Grievant Walters tried to call for additional help and was prevented from doing so. Walters went to help Douglas Tillman who was containing Client A and when Walters entered that restroom to help staff member Tillman, she was attacked by Client A. It is clear that Walters was retreating with arms flailing, etc.. Moreover, Walters testified that she had tried to ward off the attack with her arms and was trying to protect herself and, in any event, the Union argues that under the Ohio Revised Code, a person is protected if the act is done in self-defense or occurs by accident. Thus, there should be no removal.

The Union points out that if it is found that there is abuse, the penalty cannot be modified.

The Union goes on to say that the Western Reserve Psychiatric Hospital is as confused as anyone as to what constitutes abuse and what does not constitute abuse. For

example, the Union notes a case involving John Kasner in which the client stopped breathing as a result of an incident intervention and there was a six day suspension because of excessive force and non-therapeutic intervention. A Robert Evans was involved with a client who looked as though he had been in a fight with Joe Frazer and there was no action against that staff person. Accusations, argues the Union, must be supported by facts and it cites arbitral awards by Arbitrator Pinckus.

The Union states the testimony indicates that the client had a history of attacking staff and other residents and had been out of control for a number of hours and a total of six or seven patients or staff had already been attacked by this client who had not been secluded. Geneva Barker did not help Grievant Walters when the latter pulled Client A off Cynthia Henderson and Walters tried to give an SOS for help but Barker hung up the phone on the grievant. Thus, there was total confusion in the Grievant's mind as she went back to assist Staff Tillman and Grievant Walters, as a result, was victimized by the staff who did not assist her.

For all of these reasons, the Union asks that the Grievant be returned to work as soon as possible and that all lost wages be paid in accordance with contractual guidelines.

B. DISCUSSION AND AWARD - Removal

The issue is whether Grievant Walters was terminated for just cause? The Employer removed Walters from her position of Therapeutic Program Worker on October 9, 1991 because:

On September 4, 1991 at approximately 3:40 PM you were involved in a physical altercation with a patient. It was reported that while the patient was being restrained by a coworker, you made a comment to the patient which upset her. As a result of your verbal communication, the patient's aggressive behavior re-escalated. Your non-therapeutic interaction caused a physical altercation between you and the patient. As a result, the patient sustained a superficial laceration of the left eye. Based on the subsequent investigation, it was determined you mishandled the patient by using a non-therapeutic intervention and excessive force in this situation. Based on this information, it has been determined that you be removed from state service.

The Employer asserts it has proven Thelma Walters violated Center Policy #16-1, Patient Abuse/Neglect.

The Union claims that the Employer's charge of patient abuse was based on unsubstantiated statements made by RN Royse who did not like the Grievant and on Barker's contradictory comments about the incident. The Union view is that Walters acted in self defense trying to ward off an attack and what observers may have seen was only the tail-end of the encounter. The Union further claims that the Employer had not uniformly applied a concept of patient abuse and, thus, discipline in Walters' situation amounts to disparate treatment.

It is clear that a paramount precept of Ohio Department of Mental Health policy is that patients are "protected from physical and emotional abuse or neglect caused by employees" (see Center Policy #16-1). Thelma Walters had been trained on various aspects of crisis control and had received a two day suspension for patient neglect in 4/90. Even if there were an informal "Hospital street code" whereby staff "overlooked" patient handling which may involve some extent of patient abuse or neglect, Walters knew or should have known the consequences of physical interaction with a patient.

The Grievant admits hitting Client A but she claims that as she was checking to see that Tillman had subdued the patient, the patient swung at her and she had to protect herself. The question is whether Walters' hitting Client A was justified as self-defense or whether it was unnecessary, inappropriate physical contact with the patient?

There were three observers to the brief physical interaction between Walters and the client from the time Walters went into the small restroom auxiliary where Tillman was holding the client. Royse testified she was right next to Walters when the incident happened and she saw Walters strike the patient. Barker testified Walters was protecting herself and drew her left arm up and swung at the client. Tillman, who was not a witness at the Arbitration Hearing, noted in his statement to the investigating officer that the patient started to attack, they had words, arms moved, and the patient ended up with a scratch/cut over her left eye.

The Union claims that Royse and Barker only observed the last bit of the interaction and did not see enough to determine that Walters' action was in self-defense. However, it seems fair to say that Walters was occupied and would have little basis to know who was observing what.

Furthermore, the Union's claim that Royse does not like Walters and they did not work well together is not the basis to reject Royse's testimony. Animosity between employees is not reason to consider Royse's observations incorrect or that her reporting of the incident was because she was in some way "out to get Walters". There is no more reason to believe or disbelieve Royse's observations as there is to believe or disbelieve Walters who obviously has a self-serving interest.

Walters, herself, testified that she was upset over the earlier incident when the client fought with the secretary and she (Walters) had to pull the client away and the client hit her. Barker testified that Walters said to the client, "You will not do to me what you did to the other person." Walters noted in her statement that her remark was made before entering the room and was not directed at the client but to co-workers, but the specific remark as recalled by Barker clearly is directed towards the client. Even if the client did not hear Walters or if Walters said something else like "She won't do to me what she did to X", the implication is that the Grievant's mind set included little professional self-control or restraint against engaging in further physical interaction which started when Walters had to pull the client away from the secretary.

While many of the Union's points about the situation on 9/4/91 may be true, they are not mitigating, determinative factors. Yes, the client had been in earlier altercations with other patients and with a secretary and perhaps could have and should have been placed in seclusion earlier in the day, but that does not excuse Walters physically hitting the client. The client may have been "foaming at the mouth" and acting as if "possessed with demons", but that type of behavior might have put an employee on guard to expect flailing of arms and ranting and raving and to use all "therapeutic" intervention techniques.

A claim of self-defense must be supported by proof of:

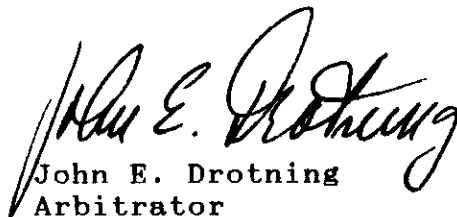
- 1) the existence of a clear and immediate threat of serious danger and 2) the non-existence of any other available means of handling the danger. In this case, Walters did not face danger. That the client was swinging her arms, ranting and raving, and foaming at the mouth does not necessarily mean Walters was in danger. The client was more or less under the control of Tillman. Walters was the only person claiming Client A was free and attacking towards her. Tillman's statement was that he was holding the patient "while they had words"; Barker testified the client was "under control", and Royse said the client was being held.

The obvious alternatives were to avoid verbally or visually agitating the patient by not moving into the room but once in the room, Walters certainly might have moved back from the swinging arms while Tillson maintained control or obtained complete control of the client.

Thus, it is concluded that even if the patient struck out at Walters when she entered the room, there was no self-defense reason for Walters to punch the client in the face. The claim of self-defense fails because there is not proof of immediate danger or proof that no other alternative action existed. The Employer's finding of patient abuse is well founded and there is just cause for its decision to terminate the Grievant.

The Union's claim of disparate treatment is not persuasive given the testimony and evidence provided. The Employer's claim is that it investigated three cases and found differences which explained any disparity in discipline. It also noted that others, not all black employees, have been removed for substantiated patient abuse.

Thus, there is no reason to overrule Management's decision that Grievant Walters be terminated.


John E. Drotning
Arbitrator

July 24, 1992