

STATE OF OHIO
LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between:

State of Ohio, Office of Collective
Bargaining and the Department of Mental Health,
Employer,

-and-

District 1199, The Health Care and
Social Services Union, SEIU, AFL - CIO,
Union.

OPINION
AND
AWARD

Case No. 23-13-911220-0556-02-11

Appearances: For the Employer - - Renee Coil
Michael Duco

For the Union - - Alec Plymale

REMOVAL OF MELVIN BUTLER

ISSUES

The parties agreed to the issue at the hearing. It is as follows:

"Was grievant removed for just use. If not, what shall the remedy be?"

There were also three other interrelated issues that became apparent during the course of the hearing on December 15, 1992. I believe those issues may be fairly stated as follows:

"Was the grievant confronted with the charges against him prior to his removal?"

Was the grievant afforded an opportunity to offer his side of the story prior to his removal?

Was the offer in accordance with the Loudermill Decision?"

The issues arose out of a grievance filed by Mr. Melvin Butler on December 18, 1991. (Joint Exhibit No. 4) It reads as follows:

"Statement of Grievance. Management removed Grievant from position of Social Worker for unjust cause and Management did not follow the procedure of the 'Loudermill Decision' (Disciplinary action was excessive).

Contract Article(s) and Section(s) 8.01, 8.02, 8.03 (A - 22) and others.

Resolution Requested. The Union requests that the Grievant be made whole in every way including back pay and return to his position of Social Worker."

The grievance unquestionably involves **ARTICLE 8 - DISCIPLINE** of the collective bargaining agreement. (Joint Exhibit No. 1) That contractual provision reads as follows:

"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. Removal

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

8.03 Pre-Discipline

Prior to the imposition of a suspension of more than three (3) days, demotion or termination, the employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story. This opportunity shall be offered in accordance with the 'Loudermill Decision' or any subsequent court decisions that shall impact on pre-discipline due process requirements."

STATEMENT OF THE CASE

The determination of the issues involves, inter alia, a recognition of the facts as they occurred beginning sometime in October of 1988 and culminating in December of 1991. The pertinent facts appear to be as follows:

1. Mr. Melvin Butler was a Social Worker with the Ohio Department of Mental Health (hereinafter sometimes referred to as "ODMH" or the "Department"). He was assigned to work at the Pauline Warfield Lewis Center (hereinafter sometimes referred to as "PWLC" or the "Center").

2. The Grievant was assigned to Unit H. This unit contains geriatric mental health patients. Most of them are mentally disabled adults who cannot be treated in the community. The Center is the least restrictive environment for them.

3. The Grievant's duties, inter alia, included the receipt and use of patients' funds. He was trained in the appropriate procedure for this responsibility. (Joint Exhibit No. 2, Directive A - 65 and State Exhibit No.6)

4. The Center maintains a mini-bank. In reality, it is possible for a patient's social security check, railroad retirement check, or other funds, to be deposited directly into this bank.

5. There is a team of at least three people who periodically evaluate a patient's needs. They complete a form called a Client Needs Assessment. (Union Exhibit No. 2) This form allocates monies to certain accounts (e.g., clothing, personal spending, etc.) for the patient.

6. A Social Worker is allowed to withdraw funds from a patient's account at the bank for the benefit of that patient. The Social Worker completes a Patient's Fund Withdrawal form. (Union Exhibit No. 1) The document is signed by the patient and the Social Worker. It indicates the purpose of the withdrawal.

7. The bank will release cash to the Social Worker upon the presentation of a properly completed form. There must be funds in the appropriate account.

8. The Social Worker is obligated to document the expenditure of these monies. The documents must be kept in the patient's files.

9. Ms. Regina Anderson is an internal auditor for the Department. She was reviewing some records at PWLC in February or March of 1991. She noted that the cash withdrawals for patients in Unit H increased substantially when Mr. Butler had some control

over their funds. Also, it is clear that the cash withdrawals decreased substantially after the Grievant lost control over their accounts. (State Exhibits Nos. 1 and 3)

10. There is a properly completed Patient's Fund Withdrawal form for every cash withdrawal from the bank. There aren't proper records in the patients' files documenting the use of the cash in this case. There is an Official Crime Laboratory Report indicating forgeries in the signatures of a couple of patients, i.e., John Willingham and Thelma Cunnigan. (State Exhibit No. 2) The document examiner did not appear and testify at the hearing.

11. Ms. Anderson concluded that about \$12,000.00 has not been properly accounted for in the records by Mr. Butler. It is missing.

12. This matter was referred to the police. The Grievant was indicted. He was found NOT GUILTY by Judge J. Howard Sundermann, Jr. in the Hamilton County Court of Common Pleas on June 24, 1992. (Union Exhibit No. 3)

13. Mr. Butler was placed on administrative leave with pay on September 25, 1991. He was to remain on leave pending the investigation into the allegations of theft in office. (Joint Exhibit No. 3)

14. A Notice of Pre-Disciplinary Meeting was sent on November 8, 1991. It advised the grievant that a meeting was to be held on November 13, 1991 at 1:00 p.m. The Employer furnished a packet of material, which included the charges, a list of known witnesses and copies of known documents concerning the charges, to Mr. Butler prior to the meeting.

15. Mr. Blackwell represented the ODMH at the meeting. He offered the Grievant an opportunity to tell his side of the story. He wanted to hear the Union's position. The Union refused to allow the Grievant to tell his side of the story. So, he terminated the meeting.

16. Ms. Sandra Jenkins, the Center's Chief Executive Officer, concluded that there were sufficient reasons to remove Mr. Butler. She did so on December 13, 1991. The specified reasons were dishonesty, incompetence and neglect of duty.

I

PROCEDURAL ISSUES

EMPLOYER POSITION

The Employer believes that it did comply with the terms of the Loudermill Decision. That decision only requires (1) oral or written notice of the charges, (2) an explanation of the employer's evidence and (3) an opportunity for the Grievant to present his side of the story. Those terms have been met in the case at bar. Further, the pretermination hearing need not be elaborate.

The PWLC did furnish written notice of the charges. It also provided a sufficient explanation of those charges. It provided all of this material prior to the meeting on November 13, 1991. Then, at the meeting, it offered the Grievant a chance to tell his side of the story. He chose not to do so. Therefore, the Center has complied with the minimal due process rights incorporated into the collective bargaining agreement.

UNION POSITION

The Union believes that the Employer never presented an explanation of its evidence nor put forth its case at anytime prior to the arbitral hearing. The District 1199 delegate testified that the Employer did not present any new documents at the pretermination hearing nor did it explain the documents that it forwarded to the Grievant prior to the meeting. In short, the Center did not present a case at this meeting on November 13, 1991.

Further, the Union believes that Management tried to convert the pretermination hearing into an investigative meeting. It used this opportunity to try to interrogate Mr. Butler and build its case against him. This attempt was an improper use of the pretermination hearing procedure.

The Union was entitled to more knowledge of the Employer's evidence prior to the arbitral hearing.

DISCUSSION

There isn't any doubt that Mr. Butler is entitled to a pretermination hearing. Furthermore, this necessary hearing need not be an elaborate hearing. The teachings of the U.S. Supreme Court are clear. The employee is only entitled to: (1) oral or written notice of the charges against him; (2) an explanation of the employer's evidence; and (3) an opportunity to present his

side of the story. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

The first requirement is not in dispute. The Grievant admittedly received written notice of the charges against him. He received this notice on or about November 8, 1991. The hearing was on November 13, 1991. The Employer clearly complied with the first requirement.

The second requirement is in dispute. The Union delegate insists that the Employer did not present any case or present any new documents. The Employer designee admits to some degree of frustration. He was trying to conduct a hearing and the Grievant remained mute.

There is another factor. Prior to the hearing, the Employer sent a packet of material to the Grievant. This packet included a list of known witnesses and copies of known documents concerning the charges. Of course, it also included a written notice of the charges. This material satisfies the second requirement. There was a sufficient explanation of the evidence.

There is a caveat. A written explanation, particularly a minimal effort, may not be sufficient in all cases to satisfy this requirement. The sufficiency will have to be decided on a case-by-case basis. There must be reasonable knowledge of the employer's evidence.

Also, it is doubtful that the Grievant was not aware of the evidence in this arbitral hearing. There was a criminal trial in May or June of 1992. The Defendant was found "Not Guilty". (Union Exhibit No. 2) That trial involved many of the same facts that are involved in the case at bar. Consequently, Mr. Butler already knew most, or all, of the Center's evidence. He saw it adduced at trial and he heard the arguments of counsel. He had reasonable knowledge of the Employer's evidence.

The third requirement provides that the employee must have an opportunity to present his side of the story. The key word is "opportunity". It was offered to Mr. Butler by the Center on November 13, 1991. He received the required opportunity.

The Grievant chose to remain silent. He refused to speak. This was his right. No one could or should force him to speak against his will.

The fact that Mr. Butler chose to remain mute does not negate the fact that he had an opportunity to present his side of the story. An employee can not voluntarily remain silent and thwart the employer's disciplinary procedures by claiming that he didn't get to tell his side of the story. He had the opportunity. Therefore, the PWLC complied with the third requirement.

The procedural answers can be summarized as follows:

(1) The Grievant was confronted with the charges against him prior to his removal.

(2) The Grievant was afforded an opportunity to offer his side of the story prior to his removal.

(3) The offer was in accordance with the Loudermill Decision.

Therefore, the Employer is not in violation of ARTICLE 8 - DISCIPLINE, Sec. 8.03 Pre-Discipline in the case at bar.

II

MERITS

EMPLOYER POSITION

The Grievant was properly removed from his position as a Social Worker because of dishonesty, incompetence and neglect of duty. This conclusion is reached as a result of the large amount of discrepancies in the handling of patients' funds. A total of \$12,694.04 in discrepancies was identified by an internal auditor over a 15 month period.

The patients are all in Unit H. There was a minimal level of activity concerning their bank account funds prior to the day that Mr. Butler was assigned to this unit. From that day forward, there were substantial withdrawals from the patients' accounts. The activity decreased after he was removed from this unit. The Grievant did not properly document the use of these monies. He was trained in the proper procedures.

The discrepancies or inconsistencies involve at least six areas: (1) patients not available when withdrawals were made; (2) incorrect personal spending withdrawals; (3) signature falsifications; (4) improper cigarette withdrawals; (5) improper activity therapy withdrawals; and (6) improper family pass withdrawals. These items involve major offenses that justify removal.

UNION POSITION

Mr. Butler did not steal any monies from anyone. There wasn't any theft. This same case was tried in court. The Defendant was found NOT GUILTY. (Union Exhibit No. 3) The State is now engaging in a retrial in arbitration a case that it lost in court. The

Employer did not prove its case in the Hamilton County Court of Common Pleas and it did not carry its burden of proof in the arbitral hearing on December 15, 1992.

The internal auditor reached various conclusions from some statistics which indicated increased withdrawals from patients' accounts when the Grievant was assigned to Unit H. She concluded that the spending did not agree with the needs assessment forms. Therefore, there was a discrepancy. She never identified any funds that this Social Worker converted to his own use. Furthermore, all withdrawal requests and expenditures were found to be mathematically correct.

The Union believes that the removal was unjust, unfair and unequal. There are other PWLC employees who have handled patients' funds in a similar fashion. Those employees were not disciplined in any way. Furthermore, the Employer could have resorted to various forms of progressive discipline including warnings and/or suspensions. It was improper to remove the Grievant without any prior warnings or suspensions. Also, District 1199 believes that discharge is too severe in light of a previous arbitral award involving Jane Cox. (Union Exhibit No. 4) A lesser penalty is appropriate if any penalty is to be imposed on this employee.

DISCUSSION

The standard is just cause. The collective bargaining agreement is clear. The appropriate standard is stated with specificity in ARTICLE 8 -DISCIPLINE, Sec. 8.01 Standard. (Joint Exhibit No.1) It reads as follows:

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

That standard must be the standard in any discussion of discipline imposed upon an employee by the Employer.

The standard in a criminal case is proof beyond a reasonable doubt. That standard was used by Judge J. Howard Sundermann of the Hamilton County Court of Common Pleas. He heard and decided the case as Mr. Butler waived his right to a trial by jury. The verdict was NOT GUILTY. (Union Exhibit No. 3) The decision of Judge Sundermann is not res judicata. The standards are different.

The language in ARTICLE 8 - DISCIPLINE, Section 8.02 Progressive Discipline is not nearly as clear as the above quoted contractual provision. This section reads as follows:

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

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

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses."(emphasis supplied)

The fact that the provision says "usually" leads to the conclusion that there may be some unusual circumstances wherein the four step progressive procedure will not apply. Also, the last sentence in the section recognizes "contingencies" that depart from the normal progressive discipline principles.

The Institutional Directive: A-22 contains a similar paradox. (Joint Exhibit No. 2) The attachment to that directive contains a multitude of general guidelines. Then, it states that Management retains the right to deviate from these guidelines when mitigating circumstances warrant such action. Also, the Rules of Conduct contain definitions of Minor Offenses and Major Offenses. It is not necessary to discuss this distinction in any significant detail. It is clear that - - if there was an offense in the case at bar, it was a major offense.

Mr. Butler was charged with dishonesty. The record evidence does not really support this allegation. There isn't any evidence that he falsified any records, told a lie, stole any property or improperly used any property. There are a couple of items that border on dishonesty. But, there was no real proof of dishonesty. (1) The Grievant was somewhat less than candid in a conversation with Ms. Anderson about some cash that belonged to a patient. He said it was in his truck. When the internal auditor volunteered to go to the truck with him to see the monies, he changed his story and said it was in a sport coat at his home. (2) There was evidence of forgeries of some of the signatures of John Willingham and Thelma Cunnigan. (State Exhibit No 2) There wasn't any evidence that Mr. Butler committed the forgeries, was in a conspiracy to commit forgery or had any knowledge of the forgeries. The implication was apparent. The record evidence was insufficient to prove dishonesty.

The Grievant was charged with incompetency and neglect of duty. The definition of these two terms in A-22, Attachment A tends to overlap. Incompetency involves sub-standard levels of performance by, inter alia, not completing work accurately.

Neglect of duty includes, inter alia, failure to complete assigned tasks or task established by policy or procedure. It is these areas that must be analyzed in light of the record evidence.

There isn't any evidence that Mr. Butler improperly obtained any monies. There was a properly executed patients' fund withdrawal form for every dollar given to him by the bank. This completed form states the reason for the withdrawal. It has to coincide with the allocations specified on the client needs assessment form. The social worker does not have total control over the allocations on this form.

The Grievant did not properly account for the monies after he received the cash from the bank. When he spent the funds on behalf of the patient, he is required to document all receipts and expenditures. (Joint Exhibit No. 2, A-65) He did not do so. The testimony of Ms. Saundra Jenkins was clear and unequivocal. The expenditure of funds by a social worker has to be documented. The required documents simply do not exist because they were never prepared by the social worker in the case at bar. The failure to properly document these receipts and expenditures constitutes incompetence or neglect of duty or both.

There is another item that must be reviewed in determining the "just cause standard". The Center has allowed a procedure which leads to anomalous results. The social workers have been allowed to draw funds from one allocation and use them for a different allocation. This might occur when there aren't sufficient funds in the needed areas. So, a social worker might fill out a patient's fund withdrawal form indicating that the monies will be spent for clothing and then spend it for some of the patient's personal needs. The bank will tender the cash to the social worker if there are sufficient funds in the clothing allocation on the client needs assessment form. Of course, the social worker must properly document the eventual expenditures.

This PWLC procedure creates some auditing concerns. It would seem that any internal auditor would question an expenditure of \$70.00 for haircuts for one man in one month, i.e. November of 1990. Also, this same person spent \$176.00 on haircuts from December 1989 to July 1990. (State Exhibits Nos. 1 and 3) There was some evidence that the barber was paid by the State of Ohio and does not charge anything, or very little, to the patients for this occasional service. The procedure creates a problem for all concerned.

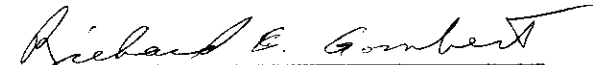
It is clear that Mr. Butler did not properly document the receipt and expenditure of patients' funds. There really isn't any excuse for this deficiency. Nevertheless, the concept of just cause requires consideration of the Grievant's seniority and work history. There wasn't any evidence of any previous discipline of any kind of this employee. He was never warned or told that he was

improperly performing his job duties. He never received a poor evaluation by his superiors. These facts serve to mitigate the penalty. While the result here may appear to be "splitting the baby", the seriousness of the offense and the effect on the Grievant's service and record indicate that such an award is appropriate.

AWARD

The grievance is sustained in part and denied in part. The Grievant was either incompetent or negligent or both in his documentation involving the receipt and expenditure of patients' funds. However, his seniority and clear work record serve to mitigate the penalty of discharge. The Employer shall offer the Grievant reinstatement to his former or equivalent position within ten calendar days of the receipt of this award by the parties. The Grievant must either accept or reject the offer within ten calendar days of the communication of the offer. The Grievant shall not receive any back pay nor shall he receive any credit for the purpose of seniority, pension or any other service related benefit for the time in which he was discharged from the State of Ohio.

Signed, dated and mailed this 22nd day of January, 1993.


Richard E. Gombert
Arbitrator