

EXPEDITED ARBITRATION PANEL

IN THE MATTER OF ARBITRATION

Before

Norman R. Harlan, Arbitrator

STATE OF OHIO, MT. VERNON) Case No. 24-09 (08-19-93) 822-01-04
DEVELOPMENT CENTER) Grievant: Richard Hardwick
AND) Re: Three (3) Day Suspension, Work
OCSEA, LOCAL 11, AFSCME) Performance Deficiencies
AFL-CIO) Hearing: August 24, 1994
Award: August 29, 1994

APPEARANCES FOR THE PARTIES

EMPLOYER

Jill Dible, 1st Chair Labor Relations Officer, Presenting
Mike Fuscardo, Labor Relations Coordinator, Ohio Department of
Mental Retardation, Assisting
Arlene Jones, Labor Relations Officer, Mt. Vernon Development
Center, Witness
Ted Durkee, 2nd Chair Labor Relations Officer, Ohio Office of
Collective Bargaining (OCB), Observer

UNION

Steve Wiles, Staff Representative, OCSEA, Presenting
Richard (Rich) Hardwick, Therapeutic Program Worker (TPW), Grievant

THE GRIEVANCE (PARAPHRASED)

The Grievant, Richard (Rich) Harwick, asks that the
discipline be revoked, removed from his record, and he
be paid for the three (3) days he was suspended because
Management did not have just cause for the discipline.

BACKGROUND

Richard (Rich) Hardwick has about eight years of service with the Mt. Vernon Development Center (MVDC or the Center). For several years he has been classified as a Therapeutic Program Worker (TPW). The duties of a TPW include a variety of services intended to provide care and comfort for patients or clients as they are commonly called. This includes serving meals on an individual basis in conformity with a menu prescribed by medical and dietary services.

The Center is a large facility housing close to three hundred severely to profoundly retarded individuals. It is required to follow statutory and administrative guidelines established by the Federal Government and the State of Ohio. Failure to strictly adhere to the "Rules" may result in a number of sanctions, to include the withholding or loss of funds.

On June 20, 1993 Mr. Hardwick was serving clients. He misread the menu and served meat to a client which was not ground as specified by the menu. The client began choking because a piece of meat had become lodged in her throat. Mr. Hardwick applied the Heimlich maneuver successfully which may have saved her life.

An extensive investigation was conducted by Management over a two month period of time. Mr. Hardwick admitted he had made a mistake and had not fed the client as specified by the menu. He was notified August 10, 1993 that he was being suspended without pay effective August 14, 1993. He promptly grieved.

Position of the Parties

MANAGEMENT

1. The Grievant admitted he did not serve the dinner meal as specified by the menu.
2. Mr. Hardwick is an experienced TPW.
3. Mr. Hardwick has been disciplined on two prior occasions for work deficiencies. He was issued a Verbal Reprimand the first time and a Written Reprimand the second time.
4. The Suspension is corrective, not punitive.
5. There are no mitigating circumstances.
6. The discipline is for just cause and the suspension should be upheld.

UNION

1. Management does not have just cause for the suspension of Rich Hardwick.
2. Mr. Hardwick had only worked in area Sub-11 for a short time. His instructions were minimal. He usually did not serve food.
3. On the day of the incident they were short one employee in Sub-11 and that employee was never replaced.
4. Mr. Hardwick is a Union official. Management is upset because of some workers' compensation claims in which he was involved in an official capacity.
5. Other employees have served food inconsistent with the menu and they were not disciplined. Mr. Hardwick is the victim of disparate treatment.
6. Mr. Hardwick immediately applied the Heimlich maneuver and probably saved the client's life.
7. The Suspension should be overturned. Mr. Hardwick should be paid for the three days he was suspended and his record should be expunged.

OPINION

The basic facts are not in dispute. On June 20, 1993 Rich Hardwick misread the menu by serving whole meat to a client instead of ground meat as stated on the menu. The menu shows almost all of the clients required ground meat and he served them properly.

Management applied progressive and corrective discipline. Mr. Hardwick was previously issued a Verbal Reprimand (1st offense) and a Written Reprimand (2nd offense). Both were issued for work related deficiencies.

The Union argued strongly that the Grievant is the victim of disparate treatment. The Arbitrator has addressed this argument on numerous occasions. Simply stated, disparate treatment means employees are issued differing degrees of discipline, or perhaps no discipline, for the same offense -- and it assumes all factors are the same. Such factors could include an identical work record, the same working conditions, the same or similar length of service, the same job performance, and others. It should be apparent rarely are all or most of the factors met and they were not met here.

The Arbitrator closely examined the other incidents placed into evidence by the Union. There was conflicting information related to the "noodle" incident with one patient. There is also no evidence the employees who were involved in this and other incidents had been disciplined twice for poor performance. It is

also of importance that the Verbal Reprimand was issued for Mr. Hardwick's restraining a client with his foot and the Written Reprimand was issued because he struck a resident in the face with his hand. The seriousness of these incidents, particularly the second one, shows Management gave strong consideration to Rich Hardwick's good qualities as shown on the Evaluation entered by the Union. Obviously, Management was lenient. It is also noted the first incident took place in 1992. The second incident took place in May, 1993, less than a month before the 3rd incident which took place June 20, 1993.

The allegations by the Grievant that he was being harassed because of his Union activity related to workers' compensation claims amounted to his opinion which was unsubstantiated by any facts. In his testimony he said he went to a school to learn about workers' compensation and the school was held by the AFL-CIO. No details were presented concerning any specific incidents of alleged harassment.

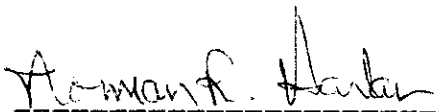
We will close by recommending to Mr. Hardwick that he pay more attention to his job which which admittedly is not an easy job. He stressed in his testimony had had only worked on Sub-11 a few times. He was assigned there in late April, 1993 and the incident here occurred June 20, 1993, a period of three months. The thrust of his testimony was he was new to the area; he had not been well-trained and he was overworked because one employee was absent June 20. Yet, he testified he knew the client's habits, noting she had a special spoon, tried hard and ate rapidly.

Mr. Hardwick has been doing basically the same work for several years. His testimony was inconsistent and was not credible.

The Arbitrator appreciates the Grievant's role as a Union official. It is a difficult duty at times. While Union officials have a duty to represent members who have legitimate interests they must also follow Contractual provisions agreed to by the Union and the Employer. They must also comply with applicable Law and reasonable rules and policies of the Employer which are not inconsistent with Law or the Wage Agreement.

AWARD

The Employer established just cause for the three-day suspension of Richard Hardwick. The Grievance must be and is denied.



Norman R. Harlan, Arbitrator

Steubenville, Ohio

August 29, 1994