#1011

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO DEPARTMENT OF	*	
MENTAL RETARDATION &	*	
DEVELOPMENTAL DISABILITIES	*	Anna DuVal Smith, Arbitrator
	*	
and	*	Case No. 24-03-911202-0461-01-04
	*	October 19, 1994
OHIO CIVIL SERVICE	*	Audrey Reed, Grievant
EMPLOYEES ASSOCIATION	*	Arbitrability
LOCAL 11, AFSCME, AFL-CIO	*	Discharge

Appearances

For the Ohio Department of Mental Retardation & Developmental Disabilities:

Ed Ostrowski, Chief of Labor Relations, Ohio Department of Mental Retardation & Developmental Disabilities, Advocate
Pat Mogan, Ohio Office of Collective Bargaining, Second Chair
Tamala Solomon, formerly Labor Relations Officer, Broadview Developmental Center, Witness
Dennis Pike, Trooper, Ohio Highway Patrol, Witness
Jack Duns, formerly Quality Assurance Director, Broadview Developmental Center, Witness
Charles Steadman, formerly Therapeutic Program Worker, Broadview Developmental Center, Witness
Ignacy Gorka, formerly Therapeutic Program Worker, Broadview Developmental Center, Witness

For the Ohio Civil Service Employees Association:

Robert Robinson, Staff Representative, OCSEA/AFSCME, Advocate
Paul D. Caldwell, President, OCSEA Chapter 1860

HEARING

A hearing on this matter was held at 9:10 a.m. on September 26, 1994, at the Office of Collective Bargaining in Columbus, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. The Grievant did not appear. Two issues were presented for final and binding determination, an issue of arbitrability and an issue on the merits of the case. Pursuant to §25.03 of the 1989-91 Collective Bargaining Agreement, the hearing was bifurcated on the issue of arbitrability. The Arbitrator ruled from the bench that the matter is arbitrable, for reasons set forth below, whereupon the parties presented their cases on the merits. The hearing concluded at 3:30 p.m. whereupon the record was closed. This opinion and award is based solely on the record as described herein.

ISSUES

As stipulated by the parties, the issues before the Arbitrator are:

Is the discharge of Audrey Reed grievable under the Collective Bargaining Agreement?

If so, was Audrey Reed's discharge for just cause and, if not, what shall be the remedy?

ARBITRABILITY

At the time of her removal for Resident Abuse/Neglect on November 27, 1991, the Grievant was a Therapeutic Program Worker (TPW) at Broadview Developmental Center,

a State facility for residential care of the mentally retarded and developmentally disabled. She had previously received a 45-day suspension for the same offense, and had returned on June 24, 1991 (Joint Ex. 4B) under what the Employer characterizes as a "last chance" agreement (Joint Ex. 4A). Pertinent portions of this agreement are:

> 2. The employee agrees that if, at any time within a two year period beginning with the employee's return to work from her forty-five (45) day suspension, she violates any of Broadview Developmental Center's policies and procedures (relative to abuse), the employee if found guilty of the offense after a pre-disciplinary conference will be removed, or may resign in lieu of removal.
>
> ....
>
> The employee acknowledges that she is fully aware that although she has entered into this agreement such agreement is in no way precedent setting. This agreement shall not be introduced, referred to or in any other way utilized in any subsequent proceedings, grievances, arbitration, litigation or administrative hearings(s).
>
> The employee and the Union waives [sic] any and all rights as a result of the events which formed the basis of this agreement, including the right to file a grievance through the grievance process, arbitration, or through administrative appeal or through the institution of legal action.

Tamala Solomon, Labor Relations Officer at the facility at the time this document was executed, and signatory, testified that the Grievant and the Union knew that if the Grievant were found guilty of another offense she would have no right of appeal.

Paul Caldwell, who was Vice President of the Chapter at the time, but not a signatory to the document testified that he talked to the Grievant about it at the time. He said it was a settlement agreement wherein the Grievant obtained a quick resolution of the matter, in exchange for which she accepted a 45-day suspension and waived her right to grieve that suspension. That is, the waiver was limited to that particular disciplinary action and to no subsequent ones.

Arguments of the Parties on the Arbitrability

Argument of the Employer

The Employer argues that its case on the meaning of the "last chance" agreement is unrebutted, as the Employer called its signer while the Union, which might have subpoenaed its own, did not exercise that right. The Employer further argues that the language of the agreement is plain on its face. Paragraph 2 is meaningless without a restriction on the right to grieve. If any clarification is needed, it is provided by the last paragraph. The Grievant knew she had given up this right, as Solomon attested.

As to the Union's claim of surprise, the Employer points to the Step 3 response, which it says contains a reference to the matter.

The Employer goes on to point out that among the joint exhibits are proof of the Grievant's criminal conviction for patient abuse, that case law requires the arbitrator to accept as true facts established by criminal convictions, that state and federal law prohibit the Department from employing a person convicted of the Grievant's crime, that the Collective Bargaining Agreement prohibits the Arbitrator from overturning a removal where patient abuse is found to have occurred, and that this and other arbitrators have upheld the terms of last chance agreements.

Argument of the Union

The Union argues that the Employer should be barred from raising the arbitrability issue since it made no such claim until the Friday prior to the arbitration hearing. It further claims that its witness did rebut the Employer's testimony on the meaning of the settlement agreement's waiver, which it says applies only to the 45-day suspension. The Union goes

on to note that language in this agreement makes the document inadmissible in any subsequent proceeding.

The Union does not deny that the Grievant was convicted, but it points out that the case is under appeal.

In sum, the Union contends that the matter is arbitrable.

Opinion of the Arbitrator on Arbitrability

The Employer's action in this case is grievable and therefore arbitrable. Taking first the admissibility of the "last chance" agreement, it is somewhat puzzling that the Union would raise this argument inasmuch as the document was entered into evidence as a joint exhibit. Be that as it may, it appears to me that the restriction on introducing the agreement in subsequent proceedings refers to its use to establish a procedure for this level of discipline in another patient abuse case. Thus, the "employee acknowleges that...such an agreement is in no way precedent setting" means it can't be relied upon to get a similar deal in the future.

As to the Grievant's right to file a grievance, the last paragraph clearly states the waiver applies to "all rights as a result *of the events which formed the basis of this agreement*" (emphasis added). Since the events that gave rise to the instant grivance occurred after the agreement was signed, they could not possibly have formed the basis for it. Therefore, the waiver does not apply.

The Employer also argues that paragraph 2 makes no sense without a restriction on the right to grieve. I disagree. What paragraph 2 is about is the penalty for a subsequent violation of the same or similar rule.

In sum, nowhere in the agreement do I find a waiver of the Grivant's just cause or due process rights when she is again charged with violating an abuse policy, only that a subsequent violation will cost her her job, that she will not grieve the suspension, and that the agreement is not to serve as a precedent.

Far from the agreement being "plain on its face" that the removal is nongrievable, it is clear to me quite the contrary. Moreover, the employer's "plain on its face" Theory does not square with the tardy discovery of the alleged flaw. It is reasonable to assume that someone in management would have noticed such plain meaning sometime in the grievance process and made the objection then to preserve its right. On the contrary, the third step response unequivocally states "There were no procedural objections."

The Employer's collateral estoppel argument is misplaced as well. Although conviction of patient abuse may be admitted and weighed, it is not necessarily dispositive of the grievance. An arbitrator is more than a fact-finder, for just cause includes elements beyond guilt or innocence of the accused. Holding that a conviction for patient abuse bars arbitration because the arbitrator is powerless to modify the termination would deny the Grievant and Union protection of the just cause rights guaranteed by the Contract, for it would preclude the arbitrator from fashioning a remedy for procedural violations. This would have the effect of excising from the Collective Bargaining Agreement substantial due process guarantees. The record discloses no such intent by the parties.

MERITS

The incident that gave rise to the Grievant's removal occurred during the third shift (10 p.m., Sept. 7 - 6:30 a.m.), September 8, 1991, when she was working on the men's side

Patrol, a metal slotted spoon matching the welts on the resident's thigh was found in an area accessible only to facility staff. The attending physician did not testify, nor was any statement offered of his opinion as to when the injury occurred, although hearsay evidence was offered to the effect that the physician was unwilling to put his estimate in writing.

As a result of the investigation, the Grievant was removed on November 27, 1991 for Resident Abuse/Neglect and indicted on December 3 for Patient Abuse, R.C. 2903.34. She was found guilty of the criminal charge on April 23, 1992 and sentenced to Ohio Reformatory for Women for a period of one year, but the case is on appeal. A grievance protesting the removal was timely filed on November 27 and, being unresolved at Step 3 of the grievance procedure, moved to arbitration, where it presently resides for final and binding decision.

Arguments of the Parties on the Merits

Argument of the Employer

The Employer contends this has been an unusual and difficult case to try because of the length of time since the incident, the Grievant's absence and the Union's failure to supply the criminal transcript and appeal brief pursuant to §25.03 of the Collective Bargaining Agreement. The Employer has had to reconstruct much, but it nevertheless says it has met its burden of proof.

Regarding the Grievant's guilt, the State points to the criminal conviction based on the reasonable doubt standard, which it says stands until overturned by an appellate court, citing §2945.75 O.R.C. Acknowledging that the principles of *res judicata* and *collateral estoppel* are often confused, the Employer reminds the Arbitrator that although arbitral

deference is not given to acquittal, the situation is different for conviction (*City of Lebanon v. District Council 8, AFSCME*, Pa.Cmwlth., 388 A.2d 1116; *State of Ohio v. OCSEA (Tokar, Grievant)* Parties's No. 27-17-92-0323-0138-01-03 (Goldberg, Arb.); *State of Ohio v. OCSEA (Key, Grievant)* Parties No. G86-585 (Klein, Arb.).

The Employer contends that it also proved its case through the unrebutted testimony of Ignacy Gorka. He has no reason to lie, says the Employer, having left State employment. Regarding the Union's contention that Gorka should be held accountable because his acceptance of the residents implies they were in good condition, the Employer says he was on the men's side for 10-15 minutes and he did a walk-through inspection. He saw nothing amiss and the subject resident was asleep.

Also pointing to the Grievant's guilt is the doctor's estimate of time of injury, which was within the Grievant's shift when she was working alone.

The Employer also reminds the Arbitrator that she can draw an inference from the Grievant's failure to appear at the arbitration hearing.

As to the discipline meted out, the State says removal is entirely appropriate. It is uncontested that proven abuse is grounds for discharge, and this ocurrence was a mere three months following a previous incident that resulted in a 45-day suspension. The Grievant knew when she negotiated the last chance agreement that another proven case of abuse would cost her her job.

The Employer contends it has established the required nexus through federal and state law that prohibits it from hiring a convicted felon (§5123.08 O.R.C.) and would cause it to lose its Medicare stipend (citing federal rules and HCFA surveyor). Clearly the

Grievant cannot be returned to work, so the Arbitrator is without a remedy should she disregard the jury's decision. Even if she could overturn the removal, the Grievant is not entitled to back pay since she failed to mitigate the Employer's liability when she delayed her appeal.

In conclusion, the State prays for the grievance to be denied in its entirety and does not join in the Union's request for the Arbitrator to retain jurisdiction pending outcome of the appeal of the criminal conviction

Argument of the Union

The Union believes the Employer has not met its burden to establish by clear and convincing evidence that it had just cause to remove this 15-year employee from her position. It argues that the conviction should not be weighed because it is being appealed. Two union members recently won their cases on appeal, which shows it is premature to sustain a removal based on criminal conviction until the appeals process is complete. The Union also points out that the Employer does not let an acquittal stand in the way of arbitration, neither should the union be asked to waive its rights because of a conviction.

The Union contends that the evidence against the Grievant is circumstantial. No concrete evidence that the Grievant inflicted the injury was offered. While she could have done it, so might have the chief witness against her or someone else entirely. Estimates of the time of injury vary and Gorka did not follow proper procedure when the resident was handed off to him. Checking the resident was particularly called for because of the noises heard earlier that morning. Not only did Gorka have opportunity, but the different stories he told over time weaken his credibility. On top of this, the State brings statements

allegedly made by the woman working with Gorka that night and the doctor who examined the resident, but these were not brought forth at the pre-disciplinary conference or Step 3 meeting. The Union concludes that the case against the Grievant is weak and further flawed by an inadequate investigation.

As to the Grievant's failure to appear, the Union says she could not attend because it would have jeopardized her new job.

Regarding the documents sought by the Employer, the Union claims it would have liked to review the transcript and brief, too. It tried to get them, talking both to the Grievant and her attorney, but the attorney refused. The Union cannot supply what it does not have.

In sum, the Union asks that the grievance be sustained, the Grievant returned to work and made whole. In the alternative, it suggests that the Arbitrator consider retaining jurisdiction to reopen the case should the Grievant's appeal be won.

Opinion of the Arbitrator on the Merits

The Union correctly observes that the evidence against the Grievant is circumstantial. However, the web of this evidence places the Grievant at the center and rules out plausible alternative theories. This conclusion is reached without consideration for the criminal conviction or for the hearsay statements allegedly made by the physician and Gorka's co-worker.

No doubt has been raised about the resident's condition when the Grievant came on duty or his activity during the preceding shift, and the Grievant accepted the hand-off, which the Union points out makes her accountable. On the back side of the shift, the resident was

either asleep (Gorka) or lying quietly on the couch (Grievant) when Gorka agreed to cover the Grievant's side of the cottage. Ten or fifteen minutes later, when Steadman came on duty, the resident was asleep. It is beyond the realm of possibility that the resident could have received a blow sufficiently hard to leave the marks indicated on the photograph and been found peacefully sleeping such a short time later. Clearly, the injury occured during the Grievant's solitary shift.

Gorka, himself, was a credible witness. Although he may have had a motive to lie at the time the incident occurred, he has none now, being employed elsewhere. I have no problem with his later statements being more detailed than his earlier ones. The Grievant's is, too. People frequently recall at a later time things they previously overlooked or dismissed as insignificant. On the whole, his story hung together and survived vigorous attempts by the Union to discredit it. In the absence of even a single witness, not even the Grievant, to rebut Gorka's story, his confident recounting of it, and his lack of motive for lying, it must be, and is, accepted at face value. I am convinced the Grievant did, in fact, abuse the resident as charged.

The Union claims an incomplete investigation flaws the Employer's case. It is true the investigatory packet does not contain statements from the doctor of Gorka's co-worker. Inasmuch as the doctor was apparently unwilling to make a written estimate of the time of injury, it is hard to see how this could have been included. As far as the co-worker is concerned, her statement, too, would have made for a more complete investigation, but just cause does not require employers to leave every stone unturned. The investigation must be timely, even-handed and thorough, and this it was.

Turning now to the penalty, the Employer is well within its right to remove the Grievant. Even if I had authority to restore her job, I would be unable to find the Employer abused its discretion. The Grievant had a history of discipline for patient abuse, well knew the consequences of another proven act, and even agreed to them.

The Grievant's discharge was for just cause.

AWARD

The Grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
October 19, 1994