

#1055

ARBITRATION DECISION

June 19, 1995

In the Matter of :

State of Ohio, Department of Mental Health,)
Pauline Warfield Lewis Center)

and)

Ohio Civil Service Employees Association,)
AFSCME Local 11)

Case No. 23-13-941104-0850-01-04
John Gilbert, Grievant

APPEARANCES

For the State:

Georgia Brokaw, Office of Collective Bargaining, Advocate
Brian Walton, Office of Collective Bargaining, Second Chair
Rita Surber, Management Representative, Pauline Warfield Lewis Center
MA, Patient, Witness
Shirley Glenn, Therapeutic Program Worker
Barbara Srayhorn, Licensed Practical Nurse
James V. Slusher Jr., Highway Patrol

For the Union:

Penny Lewis, OCSEA Staff Representative
Ronald Moore, Chief Steward
John Gilbert, Grievant
Nate Coleman, Chapter President
Doris Johnson, Therapeutic Program Worker
Ed Sartori, Registered Nurse
Diana Denny, Registered Nurse Supervisor

Arbitrator:

Nels E. Nelson

BACKGROUND

The instant case involves the discharge of John A. Gilbert, a Therapeutic Program Worker (TPW) at the Pauline Warfield Lewis Center. The center is a psychiatric hospital for adults diagnosed as having severe mental health illnesses. The grievant has been a TPW for approximately 16 years and at the time of his discharge was assigned normally to work the day shift on the K East ward.

The events leading to the grievant's discharge occurred on September 4, 1994. On that date the grievant was working overtime on the 3:00 P.M. to 11 P.M. shift on the K West ward. At approximately 7:50 P.M. the grievant was sitting in the day room with Doris Johnson, another TPW, who was assigned to care for a patient who required one to one care. Barbara Strayhorn, a Licensed Practical Nurse, and Shirley Glenn, a TPW, were at the nursing station approximately 20 feet from where the grievant and Johnson were seated. Three patients were standing by the nursing station -- WB, MA, and SW. WB was drinking a carton of milk which was part of the evening snack. It appears that at some point in time Glenn told WB that he had had enough milk and that some discussion ensued.

The center contends that the grievant left the day room and went to the nursing station. It claims that he grabbed WB around the neck and pushed him into the concrete wall opposite the nursing station. The center asserts that the sound of WB's head hitting the wall was so loud that Strayhorn screamed and Glenn closed her eyes in empathy with WB's pain. It indicates that MA, who had observed the entire incident, told the grievant that he thought that he used unnecessary force.

The union's version of the events is different. It maintains that the grievant heard a commotion at the nursing station and that he saw WB leaning over the counter of the nursing station threatening the staff with a "balled fist." The union contends that the grievant grabbed both of WB's arms so that he would not harm other employees and that he tried to interact verbally with him but that WB was combative and aggressive. It claims

that WB broke away from the grievant and simply bumped his head against the wall during the physical intervention.

After striking his head WB left the area. Strayhorn went looking for him to see if he had suffered any physical injury. She found him in the day room but he refused to let her examine his head. When Diana Denny, a Registered Psychiatric Nurse Supervisor, came on the unit, Strayhorn reported the incident to her. Denny instructed her to call Ed Sartori, the Registered Psychiatric Nurse covering the K West and East wards, to examine WB. Sartori subsequently examined WB. Strayhorn testified that he told her that WB had a small hematoma on the back of his head but his written statement and his testimony at the hearing indicate that there was no swelling.

The grievant also informed Denny of the incident. She instructed him to complete an incident report. The grievant testified that he filled out the report and Sartori stated that the grievant gave him the report and that he placed it in a basket opposite the staffing office. The incident report, however, disappeared and was never found.

On September 6, 1994 MA met with Chaplain Raymond Menchhofer. MA told Menchhofer that the grievant had grabbed WB around the neck and pushed him into a wall. Menchhofer encouraged MA to contact the Clients' Rights Advocate about the incident. He also filled out an incident report himself.

Menchhofer's incident report led to an investigation by the center's police. The police took statements from the grievant and witnesses including MA and SW. No statement was taken from WB because he was not competent to tell what had happened to him. The police report dated September 20, 1994 reviewed the credibility of the various witnesses and concluded that charges of patient abuse against the grievant were well founded. It also indicated that the grievant had attempted to tamper with the witnesses in the case. The report recommended administrative review for possible corrective action.

On September 30, 1994 a pre-disciplinary conference was held. The grievant was charged with patient abuse and neglect of duty on September 4, 1994 and impeding the

subsequent investigation. On October 5, 1994 the hearing officer found that WB, who frequently gestures with his hands and feet, was no threat to the staff and that the grievant did not attempt to re-direct him but simply grabbed him. The hearing officer found that the charge of impeding the investigation could not be substantiated. He recommended appropriate action be taken. This resulted in a notice of removal dated October 21, 1994 and an order of removal effective October 31, 1994.

In the meantime Trooper James V. Slusher of the Ohio Highway Patrol also conducted an investigation. He interviewed witnesses to the incident beginning on September 15, 1994. On October 5, 1994 he interviewed the grievant and concluded that he was not being truthful so he requested him to take a polygraph examination.

The grievant agreed to submit to the polygraph examination and it was scheduled for October 19, 1994. After the polygraph examination had begun, the grievant indicated that he wished to end the examination and make a statement. His statement apologizes to Trooper Slusher for lying to him. It also states in part:

What really happened is [WB] was combative and aggressive and I grabbed him to control him and I pinned him up against the wall. While I was holding him against the wall my right hand was on his neck. He looked at me and banged his head backwards against the wall.

The case was presented to the Hamilton County Prosecutor's Office. According to Trooper Slusher's report, the Prosecutor declined to prosecute the case due to the lack of an injury and the threatening behavior of the victim.

The grievant filed a grievance on November 2, 1994. It charges that he was removed from his position without just cause and claims that he followed proper procedures in handling a volatile situation. The grievance requests that the grievant be returned to his position with full back pay and seniority.

The grievance was denied at step four of the grievance procedure on December 6, 1994 and was appealed to arbitration on February 27, 1995. The hearing was held on April 5, 1995 and written closing statements were received on May 9, 1995.

defense or occurs by accident." It observes that this language is incorporated in Institutional Directive A-48.

The center asserts that in the instant case it must establish only proof of the act of abuse rather than just cause for termination. It acknowledges that in a termination case it normally bears the burden of establishing just cause but stresses that Article 24, Section 24.01 states that "in cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse."

The center argues that MA's testimony that he saw the grievant put both hands around WB's neck and smack him into a concrete block wall without provocation is very credible. It points out that he confronted the grievant immediately after the incident and reported it to Menchhoffer two days later. The center notes that WB's testimony at the hearing was consistent with his written statement and his video taped testimony. It acknowledges that he is a patient but indicates that this does not mean that he fabricates stories about staff members. The center stresses that WB has no bias toward the grievant which might call his truthfulness into question.

The center contends that Glenn's testimony that she saw the grievant with two hands around WB's neck and that she observed him slam the grievant into the wall is also credible. It indicates that her testimony is consistent with MA's testimony and with the earlier statements that she gave. The center stresses that Glenn was adamant in her testimony that the grievant's attack on WB was unprovoked and totally unnecessary.

The center contends that the testimony of Strayhorn confirms the testimony of MA and Glenn. It admits that her back was turned at the exact moment when the abuse occurred but points out that the sound of WB's head hitting the wall was loud enough to cause her to scream. The center notes that although WB would not allow Glenn to examine his head, she testified that Sartori told her that he found a small hematoma on the back of WB's head.

The center maintains that it conducted a proper investigation. It points out that the incident occurred on September 4; the investigation was begun on September 7; the grievant was put on administrative leave on September 10; and the Ohio Highway Patrol was notified on September 15.

The center notes that Trooper Slusher testified that the grievant's deceptive behavior during his interview prompted him to ask him to take a polygraph examination. It indicates that during the polygraph examination the grievant asked to see Slusher and at that point confessed to his inappropriate behavior and signed a confession.

The center contends that no weight should be given to the lack of criminal prosecution of the grievant. It states that it cannot control actions taken by the local authorities. The center observes that Arbitrator Hyman Cohen in State of Ohio, Department of Rehabilitation and Correction, Southern Ohio Correctional Facility and Ohio Civil Service Employees Association, Case No. 27-25-880525 quoted Arbitrator David Beckman in Kroger Co., 79 LA 468 (1982) where he stated:

I am expressly not finding that the Grievants have any criminal guilt. It is not my function to make decisions under the criminal law. It is entirely possible, therefore, that if the facts in this case were subjected to the procedures and tests of the criminal law, a finding of not guilty could be rendered. My function is to determine whether an employment offense was committed and if so whether the nature of the offense is serious enough to terminate seniority. (page 472).

The center claims that WB did not engage in any threatening behavior. It points out that no witness testified that he or she observed any threatening behavior on the part of WB and that no Code Yellow was called. The center stresses that even the union's own witness, Johnson, testified that she "perceived no threat" from WB and that she went into the office at the nursing station at the time the alleged confrontation occurred.

The center acknowledges that Glenn and Strayhorn failed to file incident reports. It points out, however, that they were given pre-disciplinary hearings. The center states that no action was taken because Glenn verbally reported the incident to Denny and Strayhorn knew that the grievant had turned in an incident report to Sartori. It

emphasizes that in any event the failure of Glenn and Strayhorn to file incident reports does not relate to the innocence or guilt of the grievant.

The center indicates that Johnson was also given a pre-disciplinary hearing for allegedly leaving a one-to-one patient on September 4, 1994. It observes that the union's defense of Johnson was that the one-to-one patient was not her responsibility but the responsibility of the grievant. The center indicates that although the grievant left the one-to-one patient unattended in the incident at issue, he was not charged with leaving the one-to-one patient despite the fact that he is no stranger to charges of neglect of duty.

The center stresses that there does not have to be a physical injury for abuse to have occurred. It points out that Hospital Policy HR 101 and Directive A-48 indicate that there does not have to be physical injury in order for abuse to have occurred. The center cites in support of this point Ohio Civil Service Employees Association, AFSCME Local 11 and State of Ohio, Department of Mental Health, Case No. 23-13-920610-01-04 and State of Ohio Department of Mental Health and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL/CIO, Case No. 23-10-910703-0130-01-04.

The center contends that the grievant was not a credible witness. It observes that he persisted in claiming that he was "defending himself or [a] female staff member" even though no witness saw any threatening behavior by WB. The center claims that even if WB was being aggressive or threatening, the grievant was trained in how to handle such situations but chose to ignore his training and instead smacked WB into a concrete block wall.

The center concludes that the grievant knowingly committed patient abuse. It asks the Arbitrator to uphold its decision to remove the grievant. The center states that even if the union convinces the Arbitrator that abuse did not occur, the grievant's removal should be upheld because it is progressive and commensurate based on the grievant's admission to Trooper Slusher of inappropriate treatment of WB and his lengthy disciplinary record.

UNION POSITION

The union argues that the center has not shown by clear and convincing evidence or even a preponderance of the evidence that the grievant was guilty of patient abuse or neglect. It points out that under the Ohio Revised Code and Directive A-48 "abuse" means knowingly or recklessly causing serious physical harm or psychological damage. The union notes that "neglect" refers to recklessly failing to provide a person with necessary treatment, care, or goods and services to maintain the person's health or safety.

The union stresses that if WB was the object of abuse, Strayhorn neglected to file an incident report. It points out that Directive A-48 requires each employee with knowledge of abuse to document it in an incident report and that failure to do so is considered neglect of duty. The union notes that Strayhorn did not write an incident report until she was contacted by the campus police.

The union implies that Strayhorn's written statements do not indicate that the grievant engaged in patient abuse. It reports that in her September 10, 1994 statement she indicated that "the grievant put his hand on client's back of neck removing him from desk." The union observes that in her September 20, 1994 statement to the campus police Strayhorn responded to a question about whether the grievant grabbed WB by the shirt or the back of his neck that "it could have been his neck or the shirt." It stresses that at the arbitration hearing she testified on cross-examination that she did not write an incident report on September 4, 1994 because she did not have cause to believe that the grievant had committed any form of patient abuse or neglect.

The union challenges Glenn's testimony that WB was just standing in front of the nursing station drinking milk and that abuse was done for no apparent reason. It points out that Strayhorn stated that Glenn told WB to "stop drinking so much milk" and that MA testified that Strayhorn was unaware that WB had been told "to quit drinking milk and get away from the desk." The union notes that this is contrary to Trooper Slusher's

before she arrived on the ward. The union notes that Denny stated that the grievant told her that WB had hit his head on the wall while he was trying to restrain him.

The union concludes that the center did not show through clear and convincing evidence that the grievant was guilty of patient abuse or neglect. It requests that he be reinstated to his position of TPW with full back pay, benefits, seniority, sick time, vacation time, holiday pay, missed overtime, and health care benefits.

ANALYSIS

The authority of the Arbitrator in a case of alleged patient abuse is clearly set forth in the collective bargaining agreement. Article 24, Section 24.01 states in part:

In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

Abuse is defined in Institutional Directive A-48. It states that abuse means:

knowingly causing physical harm or recklessly causing serious physical harm to a person by physical or chemical restraint, medication, or isolation of the person, or any act which constitutes sexual activity, as defined under the Ohio Revised Code. In addition, insulting or coarse language or gestures directed toward a resident which subjects the resident to humiliation, degradation, or psychological damage as clinically determined; or depriving a resident or real or personal property by fraudulent or illegal means.

The center's charges against the grievant clearly constitute abuse under Directive A-48. It contends that WB was drinking a carton of milk by the nursing station and was not threatening any staff member or patient when the grievant grabbed him by the neck and intentionally banged his head against a concrete block wall near the nursing station. The center maintains that WB's head struck the wall hard enough to create a loud noise and to lead to a swelling on the back of his head.

The center bears the burden of proving its charge against the grievant with a high degree of proof. The grievant is being charged with a very serious offense which violate the Ohio Revised Code as well as Directive A-48. He has 16 years of seniority and, with a

at least a TPW behind the desk. Later the LPN told me that she heard the sound of his head being hit against the wall she also replied that she screamed. About five minutes after the incident I asked [the grievant] "Don't you think you used a little unnecessary force." His reply was something to the extent that he just got out of control. Then he changed the subject and tried to ingratiate me!

The Arbitrator believes that caution is appropriate in accepting the testimony of a patient against a staff member. However, the Arbitrator believes that MA's testimony ought to be credited. First, his demeanor at the arbitration hearing presented no reason to reject his statement or testimony. Second, MA gave a number of statements as well as testifying at the arbitration hearing. All of his reports regarding the alleged incident are consistent. Third, there did not appear to be any reason for MA to lie about the grievant's conduct. The vague reference to some prior incident about the grievant cautioning him for being in female patients' rooms, falls short of establishing any bias against the grievant. Finally, MA's statements were consistent with those of the grievant's co-workers. No motive was supplied for them to be untruthful or wrong in their testimony.

The Arbitrator would note that although the union challenges the charge of abuse against the grievant, the grievant himself admitted at least some degree of wrongdoing. While undergoing a polygraph examination, the grievant asked for the test to be stopped so that he could speak to Trooper Slusher. At that time he signed a statement. It indicates in part:

WB was combative and aggressive and I grabbed him to control him and I pinned him up against the wall. While I was holding him against the wall my right hand was on his neck. He looked at me and banged his head backwards against the wall.

Quite clearly, this is contrary to the training which the grievant received for dealing with patients.

The union stressed that Glenn and Strayhorn failed to file incident reports apparently feeling that this supported its position that no abuse occurred. The Arbitrator must reject this contention. While he believes that they were remiss in not filing incident

reports, he understands that, as co-workers of the grievant, they might have been reluctant to report the incident until they were asked about it. Most importantly, any shortcoming on their part does not excuse the behavior of the grievant.

The union also pointed out a number of conflicts between the statements of the various witnesses to the events of September 4, 1994. While some inconsistencies exist, the essence of what happened is clear. The fact that some minor discrepancies exist is not unusual. In fact, whenever all of the witnesses' testimony is consistent down to the last detail, the Arbitrator has learned to be suspicious.

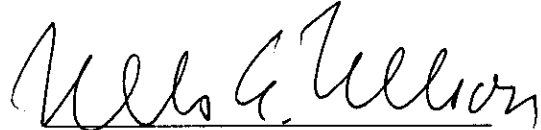
The union's claim that WB is violent must be rejected. Although testimony did indicate that he imitates karate chops and kicks that he sees on television, none of the witnesses characterized him as a threatening or dangerous patient. Significantly, the witnesses to the events of September 4, 1994 denied that WB was threatening, in any way, a staff member or patient.

The union maintained that there was no proof that WB suffered any physical injury. The Arbitrator notes that there is some conflict between the witnesses regarding whether WB had a lump on the back of his head and the size of any lump. The presence or absence of a lump is irrelevant. It is well-established that a patient does not have to have an apparent injury for an employee to be guilty of patient abuse.

Based on the above analysis, the Arbitrator must conclude that the grievant did engage in patient abuse. Even if the Arbitrator would have imposed less severe discipline than termination, under Article 24, Section 24.01 he has no authority to reduce the degree of discipline once it is determined that patient abuse did occur.

AWARD

The grievance is denied.

A handwritten signature in cursive script, appearing to read "Nels E. Nelson", written over a horizontal line.

Nels E. Nelson
Arbitrator

June 19, 1995
Russell Township
Geauga County, Ohio