
STATE OF OHIO

LABOR ARBITRATION TRIBUNE

IN THE MATTER OF ARBITRATION

BETWEEN

DISTRICT 1199

HEALTH CARE AND SOCIAL SERVICE UNION

SERVICE EMPLOYEES INTERNATIONAL UNION

AFL-CIO

and

OHIO DEPARTMENT OF MR/DD

RE: 24-01 (1-24-95) 129-02-11

DISCHARGE: ANTHONY ONUORAH

BEFORE: ROBERT G. STEIN

FOR THE EMPLOYER:

ADVOCATE: DEPARTMENT OF MR/DD

ED OSTROWSKI, CHIEF, LABOR RELATIONS

and

FOR THE UNION:

ADVOCATE: DISTRICT 1199 I.S.E.I.U.

HARRY W. PROCTOR, ORGANIZER

INTRODUCTION

A hearing on the above referenced matter was held on September 21, 1995. During the hearing the parties were given full opportunity to present evidence and testimony. The parties waived post-hearing briefs in lieu of the presentation of closing arguments. The hearing was closed on September 21, 1995. The decision of the arbitrator is based solely on the testimony and evidence presented at the hearing. The arbitrator is to render a decision in this matter by October 27, 1995.

ISSUE

The parties stipulated to a definition of the issue as follows:

Was the discharge for just cause? If not, what shall the remedy be?

BACKGROUND

The Grievant, Anthony Onuorah was employed as a Licensure Specialist with the Ohio Department of MR/DD. He had worked in the Department of MR/DD for some nine (9) years. Prior to working with MR/DD the Grievant worked in state service for some three (3) years.

As a Licensure Specialist, Mr. Onuorah was responsible for surveying anything from large, multi-resident living facilities of one hundred (100) residents to private homes. The nature of his duties required him to work day as well as evening hours. Unaccompanied, his duties would often require him to gain entry to facilities with an unannounced knock on the door. He would then survey the living conditions of mentally retarded citizens (a.k.a. clients), by visual inspection, asking questions and examining documents required to be kept by the community provider. The

Grievant was for all intents and purposes a "state compliance official" and was, therefore, given the respect due such a person by the community providers.

Mr. Onuorah was known to be a particular and strict surveyor and appeared to be respected by his office colleagues. However, prior to his termination, the Grievant had one (1) corrective action in his personnel record. He received a one (1) day suspension in August of 1994 for Failure of Good Behavior/Discourteous Treatment of the Public/Violation of State EEO Policy/Violation of Executive Order number 92-60V, Creating a Hostile Work Environment. The incident occurred on May 25, 1994 and involved a female employee of a residential services facility. In this suspension, the Grievant was warned that further actions of this type could lead to more severe discipline, up to and including discharge. Mr. Onuorah was also required to attend sexual harassment and diversity training in September of 1994. The Grievant did not grieve this disciplinary action. Mr. Onuorah is originally from Nigeria and has lived in the United States for some nineteen (19) years. He is also a Pentecostal Minister.

On November 21, 1994 Mr. Onuorah was surveying "Choice in Community Living," (hereinafter referred to as "Choices") an organization in the Dayton, Ohio area that develops and operates homes and apartments for persons with mental retardation. Mr. Onuorah was there to survey an apartment occupied by residents Greg and Brian. Greg and Brian are educably mentally retarded and are able to live with a great deal of independence.

Mr. Onuorah first arrived at the offices of "Choices" between 3:30 P.M. and 4:00 P.M. and stayed there about one (1) hour before going to Greg and Brian's apartment. Melonya Cook, was an employee of "Choices" and worked in the monitored living program assisting clients like Greg and Brian.

On November 21, Ms. Cook who was first in the offices of "Choices" when the Grievant arrived went to Greg and Brian's apartment to help them prepare dinner. The Grievant arrived at the apartment and conducted his survey while Ms. Cook, Brian and Greg prepared dinner.

During the close of the survey, Ms. Cook went over to the couch where the Grievant was doing paperwork associated with the completion of the survey. She was required to sign documentation as a part of the survey process. Ms. Cook claims that the Grievant began to ask her personal questions unrelated to the survey. After being asked questions, Ms. Cook stated she felt uncomfortable. Ms. Cook then claimed that the Grievant pulled her toward him, forcing their bodies together and kissed her on the cheek. Ms. Cook then stated she pulled away from the Grievant and the Grievant left the apartment. Ms. Cook reported the incident to her supervisor and "Choices" notified the MR/DD department. Ms. Cook also lodged an EEO complaint with the MR/DD department.

The Grievant denied that this incident took place. The MR/DD department subsequently investigated this matter found probable cause on the EEO complaint and terminated Mr. Onuorah on January 17, 1995 for violation of State EEO Policy/violation of Executive Order number 92-60V, creating a Hostile Work Environment (Joint Exhibit 5). Mr. Onuorah subsequently filed a grievance on 1-23-95 claiming he was unjustly removed from his position in violation of Articles 1, 5, 6, 8.01, 8.02, and any other articles of the Agreement (Joint Exhibit 1) which may be pertinent.

EMPLOYER'S POSITION

The Employer claims that the Grievant held a position of trust and responsibility. He was required to act independently and represent the Ohio Department of MR/DD in making sure independent facilities were in compliance with ODMRDD rules. Mr. Onuorah also held a position

of authority with the power to rate a facility and the treatment provided to its residents. If a facility received a negative rating it could potentially lose its license to operate and lose its funding. Mr. Onuorah's job was to ask questions, inspect documents and require facility personnel to provide adequate answers. Accordingly, (argues the Employer) when the Grievant gave direction, persons employed by the inspected facility would willingly comply. Often, these people were young female employees.

On November 21, 1994 the Grievant surveyed the apartment of Greg and Brian operated by the "Choices in Community Living." Ms. Melonya Cook, an employee of "Choices" was helping Greg and Brian prepare dinner while Mr. Onuorah conducted his survey. Mr. Onuorah spent approximately two (2) hours in the apartment.

The Employer asserts that the evidence and testimony of witnesses clearly demonstrates that near the end of the survey process the Grievant began to ask Ms. Cook a series of personal questions. He inquired about her child care arrangement for her newborn, about her babysitter, if she had other children, and if she ever intended to ever have more children. These questions were followed by the Grievant asking Ms. Cook if she had her tubes tied and then stating, she would have more children after meeting a nice man.

After this series of questions, the Grievant rose up from the couch from which he was completing his paperwork and upon which Ms. Cook was sitting. He extended his left hand as both he and Ms. Cook were standing up. Ms. Cook then extended her left hand in order to be able to shake his as a departing gesture. The Employer then argues that the testimony of Ms. Cook and Brian support the fact that the Grievant held Ms. Cook's left hand, abruptly pulled her toward him, held her tightly against his body and kissed her on the cheek. The Grievant held her so tightly against him as to cause her pain. Ms. Cook then pulled away from the Grievant and was shaken. She attempted to promptly report the incident to her supervisor Kristin Hopkins, and

eventually reached her later that evening. Ms. Cook also discussed this experience with Ms. Faith Renner, another employee of "Choices." The testimony of both Ms. Renner and Ms. Hopkins establishes that Ms. Cook was frightened, confused and worried following the Grievant's actions on November 21st.

The Employer emphatically points out that the victim in this incident Melonya Cook and the other witnesses who testified on behalf of the Employer are disinterested third parties with no ties to the MR/DD Department. They have no personal axes to grind. In fact, Ms. Cook currently is a student and is only an intermittent employee of "Choices." Therefore, there is no apparent motive for the "Choices" employees to lie. On the other hand, the testimony of the Grievant is vague, self-serving and its credibility is suspect given the fact he would lie to save his job.

The Employer argues that the Grievant's termination was a result of sexual harassment, the creation of a hostile work environment. This behavior is intolerable in today's workplace as well as being in direct violation of EEO Policy and Executive Order 92-60V in Ohio. (See Joint Exhibit 5a, b). Mr. Onuorah was an employee who only a few months earlier received a one (1) day suspension for a similar incident which did not involve physical contact. He was suspended for interrogating an employee of another facility about her sexual habits, marital status and for judgementally offering advice as to her motives. In this case, the female who was questioned was brought to tears. Mr. Onuorah did not grieve this one (1) day suspension issued August 5, 1994 which also included a future warning for more severe discipline up to and including discharge. Additionally, Mr. Onuorah was required (as a result of the one (1) day suspension) to attend additional training in areas of diversity and sexual harassment. Said training was received in mid September 1994. (See Joint Exhibit 5c).

The Employer argues that sexual harassment and intimidation cannot be taken lightly. Arbitrators in the past have recognized the Employer's obligation in such matters and in support of this statement. The Employer submitted into evidence prior decisions from arbitrators, Alexander, House and Levy. Specifically in quoting Arbitrator Alexander, the Employer refers to the following test to determine whether it acted to terminate the Grievant for just cause:

- 1) Was the employee on notice of prohibited conduct?
- 2) ...and that the prohibited conduct would warrant serious discipline?
- 3) Did the employer establish that the alleged misconduct occurred? and
- 4) that progressive discipline short of removal would be futile or insufficient due to the employee's record, the nature of the offense and its effect on the workplace.

The Employer asserts that all of these tests have been met in its actions as demonstrated by the evidence and testimony presented. Conduct becomes sexual harassment when it creates an intimidating, hostile or offensive work environment as measured by the perspective of the victim; considering the totality of both the harasser's and the victim's conduct, and the nature and character of the work relationship. Societal views concerning harassment have changed dramatically in recent times and employers simply cannot permit this type of misconduct in today's workplace.

Based upon the above, the Employer asks the grievance to be denied in its entirety.

UNION'S POSITION

The Union argues that the Employer acted arbitrarily and capriciously in terminating the

Grievant who was an exceptional employee of nine (9) years with the Ohio Department of MR/DD.

The Union contends that Article 8.02 was violated by the Employer in not applying the principles of progressive discipline. The article reads as follows:

Article 8 Discipline

8.02 Progressive Discipline

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

- A. Verbal Reprimand*
- B. Written Reprimand*
- C. A fine in an amount not to exceed two (2) days pay for discipline related to attendance only: to be implemented only after approval from OCB.*
- D. Suspension*
- E. Removal*

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

The employee's Authorization shall not be required for the deduction of a disciplinary fine from the employee's paycheck.

The Grievant had only a one (1) day suspension in twelve (12) years of service. The one (1) day suspension as outlined earlier in this decision was for Failure of Good Behavior/Discourteous Treatment of the Public/Violation of State EEO Policy/Violation of Executive Order number 92-60V, Creating a Hostile Work Environment. (See Joint Exhibit 4a).

The Union argues that the Grievant's lack of contesting this one (1) day suspension was not an admission of guilt, but rather an adherence to his religious principles of integrity and honesty. The Grievant's religious background of being a minister and associate pastor was for the concern of a co-worker's spiritual needs...he did not deny that he had witnessed to her which is a legitimate concern of those in the clergy. The Union contends that the Grievant by not accepting his discipline would be saying that he indeed did not witness. This would be a lie!

The Union further points out that the Employer did not consider the Grievant's culture and religious background when it took action to terminate him. Mr. Onuorah is an employee with an impeccable work record..."if certain infractions of the state policies cause either party difficulty in the performance of one's occupation, there should be some corrective action taken before termination occurs." The testimony of a co-worker, Linda Reece and Revieta Lampley during the hearing further supports the Grievant's professional conduct as an employee of the state.

The Union also contends that the Employer violated Article 8.01 which reads as follows:

Article 8 Discipline

8.01 Standard

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

The Union argues that the actions of Melonya Cook do not appear to be consistent with a person who was harassed. Why did Ms. Cook sit on the couch with the Grievant? Why did she continue to engage in and not terminate a conversation which she testified "made her uncomfortable?" Why, if physically assaulted, did Ms. Cook not display an immediate verbal or physical response?

This is a case in which it is Ms. Cook's word against that of the Grievant's. The testimony of Greg has to be considered suspect considering the opportunity for Ms. Cook to influence him. Greg is an individual with the mental capacity of a 5 or 6 year old child. Ms. Cook interacts with Greg regularly and could easily influence his responses to questions. Based upon the evidence brought forward by the Employer's witnesses, the Union contends that just cause has not been established. Mr. Onuorah flatly denies embracing or kissing Ms. Cook.

The Union also argues that Article 6 Non-Discrimination (see Joint Exhibit 1) has been violated by the Employer. The Grievant is an African-American Pentecostal pastor, Ms. Cook is a white female. These facts coupled with the national perception of an African-American male being involved with a white female creates the suspicion of the Employer's actions being racially tainted.

Finally, the Union argues that Article 5 Management Rights (see Joint Exhibit 1) were violated by the Employer. Article 5 states in part "...management will not discriminate against any employee in the exercise of these rights." The Union contends that the Employer was arbitrary and capricious in its actions to terminate an employee with many years of service. Mr. Onuorah had only a one (1) day suspension in twelve (12) years and that was for being zealous in his religious practice and beliefs.

Based upon the above, the Union requests that the Grievant be made whole in every way, that all lost wages and benefits be restored, that he be put back immediately to his position and that all disciplinary action pertaining to this arbitration be removed from his personnel file.

DISCUSSION

The issue agreed to by the parties in this case is, **"Was the discharge of the Grievant for just cause? If not, what shall be the remedy?"**

It is quite clear that the parties are fully aware and support efforts at eliminating non-discrimination in the workplace. One needs to look no further than Article 6 Non-Discrimination of Joint Exhibit 1, The Collective Bargaining Agreement to validate this mutual commitment. It's also apparent from the wording in Article 6 that both parties intend to adhere to the law regarding non-discrimination.

The evidence and testimony presented at the hearing did not attack the reasonableness of the State EEO Policy (Joint Exhibit 5B) or the Executive Order number 92-60V (Joint Exhibit 5A) Creating a Hostile Work Environment. These "rules" clearly were intended to be consistent with the law regarding sexual harassment. Additionally, the wording contained in Article 5 Management Rights speaks to the right of the Employer to determine and promulgate "standards of work performance." Therefore, for purposes of analysis it is reasonable to assume that the State EEO Policy and Executive Order number 92-60V, Creating a Hostile Work Environment are sound and reasonable standards by which an employee may be judged.

The evidence (Joint Exhibit C) and the testimony of Mr. Quinn Carter, EEO Regional Program Administrator supports the contention that the Grievant was aware of the standards contained in Joint Exhibit 5A and 5B. The Grievant attended two (2) days of training on September 12th and 13th of 1994, during which a two (2) hour segment was devoted to sexual harassment. Mr. Carter also provided unrefuted testimony that department employees were provided information regarding the above referenced Department policy on sexual harassment in pay envelopes and in departmental postings.

Finally, the Grievant's first corrective action (Joint Exhibit 4A) issued August of 1994 addressed a violation of the same aforementioned policies. Given the testimony and evidence (State Exhibit 1) it is reasonable to assume the Grievant knew about these standards of work performance.

The evidence (Joint Exhibit 4B) also makes it apparent that the Grievant was put on notice and given warning concerning future violation of these standards. The sentence in Joint Exhibit 4A Order of Supervision authored by the Director of the Department Mental Retardation and Development Disabilities clearly states, **"This represents your first suspension on record. You are advised that further actions of this type will result in more severe disciplinary action, up to and including removal."**

In order to evaluate the events of November 21, 1994 and determine what actually occurred in the apartment of Greg and Brian, it is necessary to rely on the testimony and credibility of the witnesses. Ms. Cook appeared to be matter of fact and forthright in her recollection of the events of November 21st and her testimony was consistent with her statement of November 23, 1994. The Union argues that Ms. Cook's testimony should be suspect given the fact she continued to engage in conversation with the Grievant even though she said it made her uncomfortable. However, given the Grievant's position of authority, his role of asking questions and the contextual role Ms. Cook was in requiring her answer questions; not objecting to the Grievant's line of questioning could have been more a function of personality, politeness or relative position (i.e. being surveyed).

There was no previous statement offered into evidence against which to compare Greg's testimony. During his testimony, he confused time references and was unable to identify the Grievant who was in the hearing room. However, his recollection of the Grievant and Ms. Cook sitting on the couch, getting up together and seeing the Grievant kissing Ms. Cook (just before

the 6:00 p.m. news came on television) did appear to be genuine. The Union contends that both Greg and Brian could have been easily influenced to view the events this way given their mental retardation and their close relationship with Ms. Cook. Although, this argument merits consideration and there was opportunity for Greg to be influenced, his limited testimony did appear to be his own and what he observed does provide support of Ms. Cook's account of the Grievant's physical actions. The testimony of Kristin Hopkins and of Faith Renner (via telephone) represents a recounting of what they were told by Ms. Cook on November 21, 1994. Their testimony has value in substantiating the reactions of Ms. Cook and the apparent state of mind she was in when she contacted them. Their statements taken following the incident and their testimony at the hearing demonstrated consistency and appeared to be truthful.

There was no apparent prejudicial relationship which existed between these employees of "Choices" and the Grievant. They appeared to simply have the professional business relationship of provider and evaluator of services. In fact, from the evidence contained in the evaluation in Union Exhibit 1 and from the tenor and demeanor during their testimony, one receives the impression that prior to November 21, 1994 all the witnesses from "Choices" had a positive regard for Mr. Onuorah.

In response, the Union had equally credible witnesses who testified concerning Mr. Onuorah's character and conduct in the office. The words courteous, gentlemanly, polite and caring were used to describe the Grievant. The testimony of these witnesses has value in describing the Grievant's behavior in the office, but does not lend any clarity to the events of November 21st. As further evidence, the Union submitted survey evaluations of Mr. Onuorah's work which supported the contention that he conducted himself in a professional and courteous manner (Union Exhibit 1). It is noted, that two of these surveys were filled out by Faith Renner and Melonya Cook.

In evaluating the relative weight and credibility of the witnesses in this case the testimony and whether the Grievant's actions constituted sexual harassment requires a detailed examination of his behavior with Ms. Cook on November 21, 1994.

Joint Exhibit 3E helps detail the events in the following sequential fashion:

2) While sitting on the couch in the "Choice" apartment of Greg and Brian, the Grievant appeared to be watching Ms. Cook. 3) The Grievant subsequently invited Ms. Cook over to the couch to sign the survey report (Joint Exhibit 3E, p. 3). He then asked her: Where her baby was?; 4) Why her baby was not at daycare; 5) Whether Ms. Cook's private babysitter watches lots of kids; 6) Whether Ms. Cook has other children; 7) When Ms. Cook indicated she had just one (1) child, the Grievant asked, "why, don't you want more children?" 8) The he said, "I am sure you will have more some day; and again he asked, 9) "Why, don't you want more kids?" When Ms. Cook said, I just don't, Mr. Onuorah said, 10) "Are your tubes tied?" When Ms. Cook answered no, he then said, "Well, then you'll have more kids. You'll meet a nice man" and then laughed. 11) After an intervening question about the survey report, and an earlier statement by Ms. Cook about adoption, the Grievant asked 12) "Why would you adopt a child?" When she responded by saying she was adopted, the Grievant stated 13) "You must have very good adopted parents to be so responsible and intelligent." 14) After Ms. Cook changed the subject from her to another co-worker, the conversation between Mr. Onuorah and Ms. Cook shortly came to an end. 15) Mr. Onuorah said "thank you" and put out his left hand to shake her hand. She extended her left hand and they both stood up shaking hands. Mr. Onuorah then pulled Ms. Cook toward him they continued to shake hands and her arm was between them. He then put his other arm around Ms. Cook and hugged her very tightly, pressing her whole body against his. Her chin hit his shoulder, causing her pain and discomfort. 16) He then kissed her on the right cheek and Ms.

Cook let go of his hand and walked away to stand by Greg and Brian. 17) Mr. Onuorah then let himself out.

The State of Ohio Sexual Harassment Policy defines sexual harassment as follows:

"Sexual harassment is defined as any unwelcome or unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when any one of the following criteria is met:

1. submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment.
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals; or
3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive work environment.

Executive Order 92-60V essentially mirrors this policy.

The Grievant was removed for violating this above Executive Order and policy as it relates to creating a hostile work environment described in paragraph 3 above. A review of the EEO guidelines, and the developing arbitral decision making in this area leads to the conclusion that a work environment becomes hostile when a reasonable person, and more recently a reasonable woman would consider the conduct of the individual to unreasonably interfere with her work performance resulting in the creation of an offensive work environment.

The testimony of Ms. Cook, Greg, Faith Renner and Ms. Cook's supervisor, Kristen Hopkins is very credible. Under direct and cross examination they all appeared to be consistent, sincere and truthful. There is no evidence to indicate that they had conspired against the

Grievant, that their actions were racially motivated or they were acting out of malice. Although the Grievant denied most of what Ms. Cook stated happened, his testimony in denying these events is not believable. Too many people with no apparent motive to be untruthful have created a detailed accounting of the events surrounding November 21, 1994. The reactive in person and telephone conversations initiated by Ms. Cook and the meetings and timely follow-up actions of both Ms. Cook and her employer in pursuing redress in this matter further support Ms. Cook's account of the events. Additionally, the effort and personal expense Ms. Cook apparently endured to arrange to be at the hearing and testify lends credibility to her testimony and determination in having her story heard.

Based upon the above, the Grievant did violate Executive Order 92-60V, the State of Ohio EEO Policy by verbally and physically creating a hostile and offensive work environment in the setting of a provider agency. The evidence and testimony presented in this case does not support the Union's contention of a violation of Article 5 or 6. In the current racially charged atmosphere existing in this country, one should never dismiss this argument but always give it due consideration. However, given the evidence of a hostile work environment being created by the Grievant especially through his physically embracing and kissing Ms. Cook, it is reasonable to assume Ms. Cook would not welcome the verbal and physical advances of anyone holding Mr. Onuorah's position. There is no evidence to prove that race, culture or religion were factors in this case.

The contention by the Union that there has been a violation of Article 8 and 8.02 is also not supported by the evidence and circumstances.

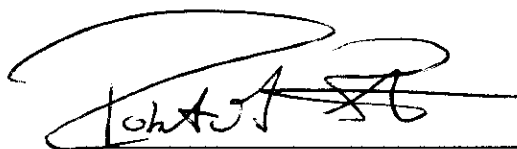
Mr. Onuorah's behavior, had the effect of causing serious damage to the image and reputation of the Department of MR/DD. The independent nature of the work of a Licensure Specialist requires a person to conduct himself with the highest of ethical standards. A person in this position enters peoples homes on a regular basis and is exposed to an environment in which the physical surroundings are less regulated and more informal. The Employer cannot control the environment or provide protection to anyone in it. It is therefore necessary that a person holding this position perform his work with a significant amount of personal and professional integrity and self control. Mr. Onuorah had recently received corrective action for the same offense and had received retraining regarding sexual harassment. He knew the rules, the types of behavior considered to be sexual harassment, was warned what could happen if the rules were violated and had the opportunity to conduct himself properly. In the past he had proven he was capable of acting professionally, unfortunately on November 21st he did not.

In spite of his nine (9) years of service with the Department of MR/DD, Mr. Onuorah's misconduct involving an employee of a provider agency in a private apartment of two (2) mentally retarded people provided just cause for his termination from employment.

AWARD

Grievance denied.

Respectfully submitted this 26th day of October, 1995 in Akron, Ohio.

A handwritten signature in black ink, appearing to read "Robert G. Stein", written over a horizontal line.

Robert G. Stein
Arbitrator