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In The Matter of the Arbitration Between

OHIO REHABILITATION SERVICES COMMISSION,	:	
	:	**OPINION AND AWARD OF ARBITRATOR GIBSON**
Employer,	:	
and	:	
		Case No. HR-BAM-26-96
DISTRICT 1199 HEALTH CARE AND SOCIAL SERVICE UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO	:	OCB # 29-02 (03-28-96) ~~498~~-02-12 478
	:	Jean McRoberts
Union.	:	

Appearances:

For the Employer:

Darla J. Burns, Esq., Staff Attorney
Pat Mogan, Office of Collective Bargaining
Ginger L. Howard, Area Manager, ORSC
John Medert, BVR/RSC

For the Union:

Harry W. Proctor, Administrative Organizer, District 1199
David Whitman, Delegate/Steward/BVR/ORSC

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OPINION

A. Introduction

Pursuant to Article 7 of the 1994-1997 labor contract, Rankin M. Gibson was selected from a panel of arbitrators to hear and determine Grievance No. HR-BAM-26-96-OCB 29-02 (03-28-96) 498-02-12 protesting the discharge of D.J.M. for neglect of duty, dishonesty and insubordination. Having exhausted the grievance procedure the dispute was referred to arbitration for a final and binding decision.

A hearing was held in Columbus, Ohio at the Office of Collective Bargaining on January 13, 1997, before the undersigned arbitrator, between the hours of 9:00 a.m. and

2:00 p.m. Ample opportunity was afforded both parties to offer proofs. Both parties submitted written closing statements, the latter of which was received on February 13, 1997.

B. Background Facts

Pursuant to certification of the State Employment Relations Board in 1985 the Employer, by Article 2 of the Contract, recognizes District 1199 as the sole and exclusive bargaining agent for all employees employed in the classifications listed in Appendix A of the contract with respect to all matters pertaining to wages, hours, terms and other conditions of employment.

In December, 1974, D.J.M., a welfare worker, transferred to Ohio Rehabilitation Services Commission (ORSC) as a Vocational Rehabilitation Counselor (VRC) 3. In January of 1976 due to classification changes in the VRC series, her classification was changed to VRC 2. In August of 1976 she was promoted to a Vocational Rehabilitation Supervisor 1. In February 1982, as a result of bumping during a lay-off D.J.M. was demoted to VRC 2. In July of 1986 D.J.M. was reclassified to VRC 3, the position she held at the time of her removal. D.J. M. worked out of the Portsmouth, Ohio field office, including Pike, Lawrence and Scioto counties. The Portsmouth office is supervised by the Columbus field office. The supervisor spends about eight days a month in the Portsmouth field office.

On March 27, 1996 D.J.M. was notified of her removal from her position as VRC 3 for neglect of duty, dishonesty and insubordination effective at the close of business March 29, 1996. The notice reads in pertinent part:

> "The reasons for this action are as follows:
>
> Reviews of the cases on your caseload reveal significant deficiencies and violations of the casework manual; a listing of the known violations is attached.
>
> In addition, on or about September 21, 1995, your supervisor was reviewing a Masterlist of your cases; several of these cases did not appear to be present at the office. On September 22, your supervisor spoke to you by telephone and asked you where these cases were; you responded that you had no idea, but speculated that they were cases you had recently had with you while trying to catch up on work. On September 25, 1995, your supervisor was present at your office; you had found, and placed for him to review, all of the cases in question except two (J16402) and (J08163). That afternoon, he instructed you to bring those two cases to him. You stated that you did not have the cases with you and that you had to deal with an immediate problem. Your supervisor told you to take care of the problem,

then get the two cases and bring them to his office; you stated you would do this, as the cases apparently were in your car. You left the building and did not return for approximately fifteen (15) minutes. Your supervisor was then looking for you and was unable to locate you. Approximately twenty (20) minutes later, you came to his office and you gave him the two cases. Upon his review, he determined that both of these cases were significantly stagnant relative to case service and did not contain proper forms, etc.

When asked about this situation at the investigatory interview which was held with you, you misrepresented the events of that date, indicating that your supervisor did not initially request the cases of J16402 and J08163, but that he only asked for fifteen cases, which you provided; you also stated that only later did your supervisor return and request the two additional cases and that you provided them to him.

Also, a review of cases F13215, G12392, G53806, and G12012, in July/August 1995, contained materials (e.g., case notes) that were lacking in your supervisors' review of these same cases in May/June 1995. These documents appear to be backdated."

On March 28, 1996, D.J.M. filed Grievance No. HR-BAM-26-96/29-02 (03-28-96) 498-02-12, reading in pertinent part:

"Statement of Grievance: Supervision has administered unjust discipline and discriminatory treatment.

Contract Articles(s) and Section(s) allegedly violated: To include but not limited to Articles 5, 6, 8.01, 8.02.

Resolution Requested: To be made whole in every way."

The Employer's Step 3 response on June 10, 1996 consisting of 14 detailed pages was summarized, by Mr. Mrofka, the Employer's Representative, as:

"It is Management's position that as a senior counselor and past supervisor, the Grievant's performance and behavior cannot be tolerated. She has continually harmed consumers some of the same consumers when she was issued the fifteen day suspension. The Grievant's supervisor has provided her with every opportunity to succeed in her position. The Grievant has not only failed to provide services, but she was also dishonest by creating and backdating information in the records.

The discipline issued was for just cause and is progressive. I can find no violations of the contract, therefore, this grievance is denied."

The parties did not stipulate an issue or issues to be determined by the arbitrator. However, the Union contends that although the grievant may have had "inadequate paper work", that does not constitute just cause for termination; and by the contract, discipline must be progressive, and that the evidence shows that the Employer deliberately set out to harm a 27 year employee. Thus the discipline was punitive not corrective. The Employer contends that the grievant was forewarned of possible disciplinary consequences of her conduct, hat the BVR's rules are related to the orderly, efficient and safe operation of the Employer's business, that grievant did in fact disobey the rules of management, that the investigation was conducted fairly and objectively, that BVR applied its rules, orders and penalties evenhandedly and without discrimination, and that the degree of discipline administered by the BVR is reasonably related to the seriousness of the grievant's proven offenses and record.

C Analysis - Management Rights

The General Assembly of Ohio in enacting the Public Employees Collective Bargaining Law in 1983 set forth extensive "management rights" of public employers in R.C. §4117.08. That such rights are not unlimited, see Lorain City School District Board of Education v. State Employment Relations Board, et al., 40 Ohio St.3d 257, 533 N.E.2d 264 (1988).

Acting pursuant to R.C. §4117.08 the State Office of Collective Bargaining on behalf of the Ohio Rehabilitation Services Commission negotiated an agreement with the Union containing Article 5, entitled "Management Rights", reading as follows:

> "Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08(C)(I)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision. (Emphasis added.)

The employee was afforded ample opportunity when confronted with the charges against her and to offer her side of the story in accordance with the "Loudermill Decision". The basic issue is whether the discharge was imposed for "just cause".

Collective bargaining agreements in dealing with grounds or reasons for discipline or discharge may state generally that no discipline or discharge will be imposed except for "just cause", or may state specific grounds or reasons for discharge, or both. In this case specific grounds or reasons for discharge are not stated. However, this does not mean that there can be no just cause for discharge. Arbitrator McGoldrick in Worthington Corporation, 24 LA 1, 6 in discussing "just cause" for discipline or discharge, said inter alia:

> "Where [there is no reservation of management's rights] it is common to include the right to suspend and discharge for 'just cause', 'justifiable cause', 'proper cause', 'obvious cause', or quite commonly simply for 'cause'. There is no significant difference between these various phrases. These exclude discharge for mere whim or caprice. They are obviously, intended to include those things for which employees have traditionally been fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. They represent a growing body of 'common law' that may be regarded either as the latest development of the law of 'master and servant' or, perhaps, more properly as part of a new body of common law of 'Management and labor under collective bargaining agreements'. They constitute the duties owed by employees to management and, in their correlative aspect, are part of the rights of management. They include such duties as honesty, punctuality, sobriety, or, conversely, the right to discharge for theft, repeated absence or lateness, destruction of company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform non-discriminatory manner ... "

D. Analysis - Neglect of Duty

With respect to the charged neglect of duty, the Employer offered voluminous documents reflecting review of cases assigned to the grievant by her supervisor, detailed reports of supervisors. These case reviews and performance evaluations were introduced as joint exhibits. The Union contends, however, that inadequate paper work does not constitute just cause for termination. There is no claim that the grievant's work load, 84 cases was too heavy to keep current. In fact, the asserted deficiencies in the grievant's work performance generally are not contested by either the grievant or the Union.

Joint Exhibit 19 consists of numerous pages from the Vocational Rehabilitation Manual, containing Policy and Procedure. The manual gives detailed directions for a Vocational Rehabilitation Counselor (VRC) in the performance of her duties. Rule 3304-2-64 OAC which has been in effect since April, 1988 sets forth in great detail the responsibilities of vocational rehabilitation counselors and supervisors in the Federal-State

program of Rehabilitation Services. The Position Description for a Vocational Rehabilitation Counselor details the job duties of such a counselor in the order of importance. Performance evaluations of the grievant's work by two supervisors in 1993 and 1994 and 1995 demonstrate that counselor's duties and inadequacies were reviewed with her. She did not object to the performance evaluations. Without reviewing the details respecting her job performance reviews and evaluations, the details of which the parties are familiar, the arbitrator finds that the grievant has been guilty of substantial neglect of duty for at least three years.

The grievant testifies that she was having serious domestic problems which detracted from her performance, and that at one time she was assigned additional cases of greater complexity. Her case load of 84 cases is not abnormal. Consumer neglect was called to her attention on various occasions. The arbitrator concurs with the Employer that the grievant's substantial neglect of duty was not caused by her lack of knowledge of job requirements. The Union emphasis on the grievant's 27 years of service, is understood. However, wages, salaries and compensation are paid for work. It is universally agreed that a reasonable day's work is required for a reasonable day's pay.

E. Analysis - Dishonesty

Without question honesty or integrity is an important condition of employment. This is particularly so where an employee's lack of honesty can cause additional expenses to be incurred by the Employer or where an employee's dishonesty can cause a failure to deliver the rehabilitation program to a client or consumer.

As shown by Joint Exhibit 5 the Employer attaches considerable importance to the circumstances on September 25, 1995, with respect to the location of two cases (J16402) and (JO8163). The Employer considers this incident a serious misrepresentation. The circumstances surrounding the location of these two cases are somewhat ambiguous. In the arbitrator's view, back dating information placed in a client's case file between the supervisor's review of case files in May and June of 1995 and his review of those case files in July and August of 1995 is a kind of misrepresentation which could cost the Employer additional funds or the consumer client to lose necessary funds for vocational rehabilitation, could be more serious. Back dated entries certainly raise serious credibility concerns. However, the Employer presented no direct evidence as to whether the back dated entries were true or false.

F. Analysis - Insubordination

The word "Insubordination" is a noun covering the conduct of a subordinate who has not submitted to a supervisor; or is disobedient, or mutinous. Based on the review of the evidence and arguments, the arbitrator is unable to find proof of insubordination by the grievant. True she failed to meet all of the detailed requirements of the VR Manual

and administrative rules, and the counsel of her supervisors, but there is no evidence that her failure was caused by disrespect or with a disobedient attitude.

G. Analysis - What Consideration Should Be Given To The Fifteen Day Work Suspension In 1994

In March of 1994 the grievant was suspended March 14, 1994 through April 1, 1994 for neglect of duty, dishonesty and insubordination. The notice of suspension warned that "Future occurrences of the same or similar nature may result in additional discipline, up to and including removal". Consideration of this prior disciplinary action is objected to because of its warning that future occurrences of the same or similar nature will result in additional discipline up to and including removal. The Union contends that consideration of the notice of possible removal is barred by §36.03 of the Contact reading as follows:

> **36.03 Removal of Documents**
>
> Records of disciplinary actions and all documents related thereto shall be removed from the personnel file two (2) years after the effective date of the discipline providing there are no intervening disciplinary actions during the two (2) year period for same or similar offenses, except that written reprimands and all documents related thereto shall be removed after nine (9) months if there are no intervening disciplinary actions during the nine (9) month period for same or similar offenses. The retention period for records pertaining to suspensions for periods in excess of five (5) days may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave.
>
> In any case in which a written reprimand, suspension, or dismissal is disaffirmed or otherwise rendered invalid, all documents relating thereto will be removed from all agency personnel files."

The Employer contends that the arbitrator should not respond to this contention of the Union. The Employer notes that the Union made a statement in its opening statement but that it had no witnesses to support its contention, that the Union stipulated to the existence of the suspension, in its stipulated facts; that the grievant made no such argument in the predisciplinary hearing or at the Step Three grievance hearing. Most importantly the Employer says the fifteen working day suspension was effective through April 1, 1994 and thus was of record when the termination became effective on March 29, 1996.

As the arbitrator reads in §36.03 records of disciplinary action and documents related thereto shall be removed from an employee's personnel file two (2) years after the effective date of the discipline providing there are no intervening disciplinary actions

during the two (2) year period for same or similar offenses. The fifteen day suspension by its terms was in effect March 14, 1994 through the close of business on April 1, 1994. Thus, the discipline and its warning of removal was still in effect on March 29, 1996 when the removal was imposed. No grievance was filed with respect to the fifteen day disciplinary suspension. The suspension was for the same or similar offense resulting in her removal on March 29, 1996. Clearly the grievant had notice that any further occurrence of the same or similar nature could result in additional discipline, up to and including removal.

AWARD

Based on the evidence, the arbitrator finds that the grievant's neglect of duty is substantial and unexcused. Thus the Employer's discharge of the grievant was with "just cause". It is the arbitrator's award -

(1) That grievance No. HR-BAM-26-96 OCB# 29-02 498-02-12 dated March 28, 1996, be denied; and

(2) That the arbitrator's fees and expenses be shared equally by the Employer and the Union.

RANKIN M. GIBSON, ARBITRATOR

DECIDED AND ISSUED AT Columbus, Franklin County, Ohio this 28th day of February, 1997.

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ARB AWARD ROUTING SLIP

Please Read Mike
Rachel

Date: 2/24/97

AGENCY RECIEVED COPY
OF ARBITRATION AWARD

Date: 2/24/97

ARB AWARD ROUTING SLIP

Please Read Brian Eastman
and Forward Bob Thornton

Date: _____

ARB AWARD ROUTING SLIP

TO: Steve Gulyassy
Attached is the latest
arbitration award for your
review-questions-comments
Date: _____

ARB AWARD ROUTING SLIP
Team #1

Please Read Ryan
and Reese
Foward Turrell
Date: _____

ARB AWARD ROUTING SLIP
Team #2

Please Read Mogan
and Walton
Foward McNally
Date: _____

ARB AWARD ROUTING SLIP
Team #3

Please Read Kitchen
and Sovell
Foward Clark
Sampson

Date: _____
