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ARBITRATION DECISION

May 27, 1997

In the Matter of :

State of Ohio, Department of Mental Health,)
Northcoast Behavioral Healthcare System)
)
and)
)
Ohio Civil Service Employees Association,)
AFSCME Local 11)

Case No. 23-18-960618-1349-01-04
Betty Willaims, Grievant

APPEARANCES

For the State

Linda Thernes, Labor Relations Officer
Rodney Sampson, Labor Relations Officer
Inder Sharma, Clinical Area Supervisor
Gregory Pratt, Chief Operating Officer
Barbara DiLeone, Acting Director of Rehabilitation Services
Roger Byer, Labor Relations, NBHS
Pamela Chasteen, Clinical Area Supervisor
Mary Lyons, RN
Edwina M. Badjun, Clinical Area Supervisor

For the Union

Herman S. Whitter, Associate General Counsel
Robert Robinson, Staff Representative
Allison Nedel, Psychiatric MR Nurse
Yancey Jones, TPW
Charlene Cintary, LPN
Gaynell Hunt, LPN
Edmonia Antoine, TPW
Betty Williams, Grievant
Shirley Tolvert, Vice President
Cheri Gregory, TPW
Nellie May Phillips-Klein, LPN
Juanita Brown, LPN
Charlene Franklin, TPW
Marie Masturzo, LPN

Arbitrator

Nels E. Nelson

BACKGROUND

The issue is the six-day suspension of Betty Williams. She was hired by the Department of Mental Health on April 30, 1975. At the time of her suspension she was a Therapeutic Program Worker in cottage 22D on the south campus of the Northcoast Behavioral Healthcare System. The grievant was also the local chapter president, a union steward, and a member of the state board of the Ohio Civil Service Employees Association.

The grievant's suspension is based on two alleged incidents. The first incident occurred on February 26, 1996. On that date the grievant reported to work at approximately 7:00 A.M., attended a pre-disciplinary hearing from 8:30 A.M. to 11:00 A.M., and then took a visiting union official on a tour of the facility. She returned to her work area at approximately 1:00 P.M. A few minutes later Inder Sharma, a Clinical Area Supervisor, called the grievant to see why she was not at a crisis intervention class. The grievant testified that she told him that she did not know that she was supposed to be at the class and that she would not be there because she was eating her lunch and needed to take her medication.

On February 29, 1996 Sharma sent a request for a pre-disciplinary meeting to the human resources department. He stated that the unit assignment sheet indicated that the grievant was scheduled for the 1:00 P.M. class and that Mary Lyons, the charge nurse on the unit, told the grievant three times about the class. Sharma claimed that when he called her at 1:05 P.M. and asked her to come to the class, she said she was eating her lunch.

The second alleged incident took place on March 2, 1996. On that date Pamela Chasteen, a Clinical Area Supervisor, claims that she saw the grievant wearing a sweatsuit in violation of the dress code policy. She testified that the grievant told her that she had nothing else clean to wear and that she could not get to the laundromat because her car was not running. The grievant denied wearing a sweatsuit.

On April 21, 1996 the grievant was suspended for six days by Michael F. Hogan, the Director of the Department of Mental Health. He found the grievant guilty of insubordination and the intentional refusal to obey an instruction or order by failing to attend the crisis intervention class on February 26, 1996 and neglect of duty for violating the dress code policy by wearing a sweatsuit to work on March 2, 1996 despite two earlier warnings. Hogan stated that his letter was "a notice of last chance" and warned the grievant that any further violation of the work rules would lead to her removal.

On May 13, 1996 a grievance was filed. It challenged the six-day suspension and the statement regarding a last chance. The grievance complained about "the past practice of receiving notification prior to imposing the discipline" and accused management of "doing a rush job of progressive intimidating discipline without just cause." It asked that the suspension be rescinded, that the grievant be made whole, and that management stop its harassment, discrimination, and disparate treatment of the grievant.

When the grievance was denied at step three on July 8, 1996, it was appealed to arbitration. The hearing began on March 12, 1997 and was concluded on March 31, 1997. Post-hearing briefs were filed on April 14, 1997.

ISSUE

The issue as agreed to by the parties is as follows:

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

RELEVANT CONTRACT PROVISIONS

Article 24 - Discipline

24.01 - Standard
Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

24.02 - Progressive Discipline
The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensuarate with the offense.
Disciplinary action shall include:

A. One or more oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
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. one or more day(s) suspension(s);
E. termination.

* * *

24.05 - Imposition of Discipline

* * *

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

STATE POSITION

The state argues that the grievant was insubordinate when she refused to obey instructions or orders. It contends that when she initialed the assignment sheet at 7:57 A.M. on February 26, 1997, she learned that she was scheduled to attend a mandatory crisis intervention class at 1:00 P.M. The state maintains that Lyons had told her about the class as she was getting the staffing arrangements on the telephone from Chasteen at 7:20 A.M. and that she told her about the class again at 7:40 A.M.

The state charges that the grievant refused to obey Sharma's order to come to the crisis intervention class. It states that he called her at 1:05 P.M. and asked her to please come to the class and that he expected her to come. The state stresses that the grievant responded that she was not coming because she was having her lunch.

The state rejects the union's contention that the grievant was never given a direct order to attend the class. It acknowledges that no one said "this is a direct order" but emphasizes that the grievant was aware of the fact that she was required to attend the class. The states observes that everyone on the unit was aware of the class and did attend

except for the grievant. It maintains that the grievant chose to give a union official a tour of the facility and then to eat lunch rather than go to the class.

The state charges that on March 2, 1996 the grievant violated the dress code policy. It points out that Chasteen testified that she saw the grievant wearing a brown sweatsuit and that when she questioned the grievant, the grievant told her that she had nothing else clean to wear and had no way to get to the laundromat. The state notes that Lyons stated that she was working with the grievant on March 2, 1996 and that the grievant wore a dark brown sweatsuit.

The state maintains that the grievant was aware of the dress code policy. It reports that the union was provided with a copy of the dress code policy prior to its implementation and that the union filed a grievance against the policy. The state indicates that the grievant filed a charge with the Ohio Civil Rights Commission relating to the policy. It asserts that the grievant had indicated that she had no intention of complying with the code.

The state rejects the union's claim that the grievant did not violate the dress code policy. It contends that Chasteen and Lyons have nothing to gain by "inventing" the violation. The state observes that none of the grievant's co-workers were called to refute their testimony.

The state challenges the assertion that the grievant had medical problems which required her to wear loose fitting clothes. It points out that the dress code policy expressly prohibits wearing sweatsuits. The state emphasizes that the grievant never sought an accommodation for her alleged condition under the Americans with Disabilities Act.

The state contends that the grievant had been warned about violating the dress code policy. It states that in December 1995 Gregory Pratt, the chief operating officer, told the grievant that she was not allowed to wear a sweatsuit to work. The state stresses that on January 26, 1996 when Pratt saw the grievant in a sweatsuit at a pre-disciplinary

meeting, he sent her a memorandum indicating that she must comply with the dress code policy and that failure to comply would necessitate progressive discipline pursuant to the personnel policies.

The state acknowledges that the union presented 11 witnesses who testified that they regularly saw other employees violate the dress code policy without being disciplined. It points out, however, that the 11 witnesses are a small sample of the total number of TPW's and LPN's at the south campus. The state notes that each of the witnesses was either a co-worker of the grievant or a union official and most of them testified that they had "problems" with management.

The state rejects the argument that the grievant was subject to disparate treatment. It contends that the union failed to show that employees who committed the same or similar offenses as the grievant were not disciplined. The state maintains that it demonstrated that the employees who were alleged to have committed the same offense as the grievant were given a warning like the grievant but unlike the grievant did not commit a second or third offense.

The state challenges the argument that the grievant's discipline was the result of anti-union animus. It recognizes that the union contends that the grievant was disciplined because she "was union" but observes that every employee is "union." The state notes that Shirley Tolvert, the union vice-president, testified that she was vocal in dealing with management but admitted that there was no discipline in her file.

The state maintains that the discipline it imposed on the grievant was commensurate with her offense. It points out that she received a written warning on September 22, 1994 for violating NBHS Policy 7-1 when she accompanied media representatives on a tour of the facility after telling the hospital police that the media people were union officials; a written warning on January 24, 1995 for failure of good behavior for verbally abusing a supervisor during a fact-finding meeting; a two-day suspension on June 30, 1995 for failure of good behavior for telling a supervisor she

would "dislocate her brain;" and a six-day suspension on October 23, 1995 for insubordination for demeaning and abusive behavior when she told a member of management that she was "tired of dealing with assholes" and that she was used to dealing with a man rather than a "sissy."

The state indicates that on February 27, 1995 a pre-disciplinary meeting was held to discuss charges that the grievant had left her work area without appropriate notification and engaged in insubordinate behavior but the grievant was simply warned that insubordinate and threatening behavior would not be tolerated and would lead to progressive discipline. It asserts that pursuant to the sequence of written warning, two-day suspension, six-day suspension, and removal set forth in the disciplinary grid, it could have removed the grievant for either of the offenses at issue in the instant case but instead suspended her for six days and indicated to her that it was her last chance.

The state asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that the grievant was not insubordinate. It points out that the grievant testified that when she learned at 6:58 A.M. that she was scheduled for a crisis intervention class at 8:30 A.M., she told Lyons that she could not attend because she had a pre-disciplinary meeting at that time. The union notes that the grievant stated that she was not told about the 1:00 P.M. class prior to the start of the class.

The union rejects the claim that Chasteen's statement establishes that the grievant knew in advance about the 1:00 P.M. class. It observes that although her statement indicates that she overheard Lyons discuss the crisis intervention class with the grievant, she acknowledged that she did not hear the grievant's response to Lyons' comments. The union further notes that on cross-examination Chasteen admitted that she was not 100% sure that Lyons was talking to the grievant. It claims that none of the employees close to

the desk at the time Chasteen was talking to Lyons remember Lyons telling the grievant about the class.

The union charges that the information about the class was added to the assignment sheet to show that the grievant was told about it. It complains that the employer has a practice of adding information to assignment sheets at a later time without the knowledge of employees. The union maintains that the alteration of the February 26, 1996 assignment sheet is reflected by the fact that it is made up differently than other assignment sheets.

The union argues that no direct order was given to the grievant to attend the crisis intervention class. It maintains that at 1:05 P.M. Sharma inquired about the grievant's presence but that his own statement and testimony indicate that no order or directive was given to attend the class. The union notes that the grievant testified that she felt that Sharma's response meant that it was all right for her to eat her lunch.

The union contends that the state did not show that the grievant was insubordinate. It relies on the decision of Arbitrator Rhonda Rivera in G-97-0250. The union points out that in that decision Arbitrator Rivera held that insubordination requires that a direct order be given and that the order be deliberately and knowingly disobeyed. It stresses that in the instant case there was no direct order given so none could have been disobeyed.

The union maintains that the grievant did not violate the dress code policy on March 2, 1996. It points out that the grievant testified that she did not wear a sweatsuit that day and did not tell Chasteen that she wore a sweatsuit because her washing machine was broken. The union claims that Lyons was intimidated by Chasteen and forced to write the statement indicating that the grievant had on a sweatsuit.

The union charges that the state did not conduct a thorough investigation. It claims that the state got a questionable statement from Lyons but made no attempt to get statements from other employees on duty about what the grievant was wearing. The

union notes that some Arbitrators, including Rhonda Rivera in case No. 24-09-(04-01-88)-40-01-4, have held that management should seek out and interview potential witnesses. It maintains that Section 1.01 of the disciplinary policy requires that statements be obtained from all witnesses.

The union complains that the enforcement of the dress code policy was lax. It claims that the state was aware of irregularities and treated similar instances in dissimilar fashion. The union asserts that the state never notified employees that it was going to enforce the policy and that it is now null and void because it has not been enforced.

The union contends that management officials are not in agreement as to what violates the policy. It points out that some officials testified that what the grievant wore at the arbitration hearing violated the policy while others indicated that it did not. The union notes that Edwina M. Badjun, a Clinical Area Supervisor, testified that supervisors could wear jeans and sneakers on weekends while Barbara Deleone, the acting Director of Rehabilitative Services, testified that it would be a violation of the dress code policy.

The union argues that the policy was not fairly implemented. It indicates that its witnesses testified that not only did they violate the policy without being disciplined but members of management did the same. The union points out that Nellie May Phillips-Klein, an LPN, and Juanita Brown, a TPW, stated that they wore sweats in a number of meetings with Pratt without any questions being raised. It notes that Cheri Gregory, a TPW, frequently wore a hat but was not informed she could not do so until Alison Nedel, an RN who had been disciplined under the policy, complained about it.

The union emphasizes that the grievant was treated differently than John Kessler. It reports that, like the grievant, he had received a verbal warning, a written warning, a two-day suspension, and a six-day suspension but received no discipline when he violated the dress code policy. The union acknowledges that Kessler did not testify because his wife was in the hospital but claims that the grievant as chapter president would have known if he had been disciplined.

The union charges that the grievant was targeted because of her union activism. It indicates that Pratt told the grievant that she would never be treated the same because she "was union." The union asserts that it was common knowledge that the state was out to get rid of the grievant because she stood up to management.

The union asks the Arbitrator to grant the grievance and award the grievant back pay, seniority, and other benefits.

ANALYSIS

The grievant's six-day suspension is based on two alleged offenses. The first charge against the grievant is that on February 26, 1996 she refused to obey an instruction or order when she did not attend a crisis intervention class at 1:00 P.M. In any allegation of insubordination the first question is whether an order was given. In the instant case the assignment sheet for the grievant's unit clearly indicates that the grievant's assignment for the day included attending the 1:00 P.M class. It also shows who would be filling in for her while she was at the class. The grievant gets her orders from the assignment sheet and she was required to attend the crisis intervention class just like she was required to complete other assignments.

The Arbitrator cannot accept the grievant's claim that the 1:00 P.M class was added to the assignment sheet after she saw it. The assignment sheet indicates that two other employees were scheduled for the 1:00 P.M class and two were scheduled for the 8:30 A.M class. The Arbitrator cannot believe that the other employees were properly scheduled while the grievant's assignment was filled in later. If the other employees were not properly scheduled, it is not unreasonable to expect that they would have said so during their testimony at the arbitration hearing.

The union also claimed that the assignment sheet for February 26, 1996 was filled out differently than the other assignment sheets which it submitted. The Arbitrator reviewed the assignment sheets and does not believe that any of the variations noted by

the union have any bearing on the instant case. Nothing in the record except the grievant's self-serving testimony indicates that the 1:00 P.M class was placed on the assignment sheet after she initialed it at 7:57 A.M.

The Arbitrator believes that the state's charge that the grievant failed to follow directions is supported by the testimony of Lyons. She testified that she told the grievant at 7:20 A.M and 7:40 A.M that she was scheduled for the class at 1:00 P.M. The grievant's assertion that Lyons was intimidated by management into making false statements following the incident and lying under oath at the arbitration hearing is not credible.

The state charged that the grievant also refused to follow Sharma's directive to come to the class. Sharma testified that at 1:05 P.M. he asked the grievant to "please come now" and that the grievant responded "I'm not coming -- I'm taking my lunch." The grievant stated that Sharma said to "come join the class" and that she responded that she needed to eat in order to take her medicine.

The Arbitrator must reject the union's contention that Sharma's statement was not a direct order. Even if the grievant's testimony that Sharma asked her to "come join the class" is accepted, it is clear what he was directing her to do. Her testimony that he told her that she could eat later indicates that he rejected eating lunch as an excuse for not attending the class.

The Arbitrator must also reject the grievant's claim that she needed to eat so that she could take her medication. The record contains no indication of the medicine that the grievant was taking or the need to take it at certain times. Furthermore, it appears that the grievant opted to delay her lunch to take a visiting union official on a tour of the facility even though she knew that she had a class scheduled at 1:00 P.M. If she needed to eat to take her medication, she should have arranged to eat in time to be at the 1:00 P.M class.

The Arbitrator must conclude that the grievant knowlingly refused to obey orders. At 7:57 A.M she learned from the assignment sheet that her duties for the day included

attending a class at 1:00 P.M. She was reminded twice by Lyons about the class. When the grievant did not show up for the class, Sharma called her and directed her to come to the class but she refused because she was eating her lunch.

The second charge against the grievant is that she violated the dress code policy. This allegation is based on the testimony of Chasteen and Lyons that the grievant wore a sweatsuit to work on March 2, 1996.

The dress code is contained in NBHS Policy #3-14. It indicates that employees are "expected to dress in a manner appropriate to their assigned duties and responsibilities." The policy states that "Administrators, Exempt Staff and Office Associates shall dress appropriately with ties, suits, dresses, etc." It specifies that certain attire is "not acceptable and are not to be worn at NBHS." The prohibited attire includes "sweats."

The Arbitrator believes that it is clear that the NBHS has the authority to establish a dress code related to its mission. The policy adopted by the NBHS appears to be designed to create a professional atmosphere and to be consistent with the challenging work environment that employees face. In any event, the union's grievance does not challenge the authority of management to adopt a dress code or the reasonableness of the rules.

The union's contention that the grievant did not wear a sweatsuit on March 2, 1996 must be rejected. Chasteen testified that the grievant wore a brown sweatsuit and Lyons stated that the grievant had on a dark brown sweatsuit. Against this testimony the union offers only the self-serving testimony of the grievant. It did not call employees to testify that the grievant did not wear a sweatsuit on March 2, 1996 or that she never wore sweatsuits to work.

The union's charge that the policy is widely violated cannot be dismissed. The testimony of numerous witnesses convinced the Arbitrator that both bargaining unit employees and supervisors violated the policy on a regular basis. The state was unable to

explain the violations or to show that all of the individuals who violated the policy were warned about violating the policy. The testimony of the state's witnesses about what violated the policy and when the policy applied was conflicting and went far beyond what the policy itself says.

The testimony of Juanita Brown and Nellie May Phillips-Klein should be noted. They testified that they met with Pratt in connection with a labor-management committee while wearing sweatsuits without any mention being made of their dress. Pratt testified that this did not violate the dress code because they were on their own time at the meeting. However, Brown testified that she was being paid and that she was sure that Klein was also paid for the time. Even if neither was paid, there is nothing in the dress code to suggest that employees at a formal meeting at the center are not subject to the dress code.

As indicated above, management of the NBHS has the authority to establish a dress code related to its mission. However, the policy must be clear in its application and must be uniformly enforced. The current policy appears to be neither. It, therefore, would be inappropriate to discipline the grievant for an alleged violation of the policy.

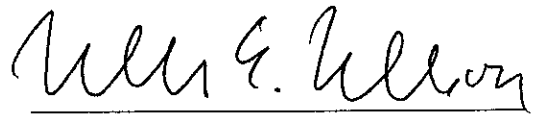
The Arbitrator must reject the union's allegation that both of the charges against the grievant are the result of her aggressiveness as the local chapter president. The fact that the grievant was disciplined for violating the dress code at the same time that others appeared to escape discipline does suggest that the grievant was treated differently. However, the charge that the grievant failed to attend the crisis intervention class as directed is supported by the testimony and evidence.

The remaining issue is the proper remedy. While the finding that one of the two charges against the grievant must be dismissed suggests that the six-day suspension imposed on the grievant ought to be reduced, the Arbitrator cannot do so. First, the grievant has received progressive discipline up through and including a six-day suspension. She received written warnings on September 22, 1994 and January 24, 1995; a two-

suspension on June 30, 1995; and a six-day suspension on October 23, 1995. Neither of the written warnings were grieved. The grievant testified that the two-day suspension was upheld in arbitration. She indicated that the grievance protesting her six-day suspension was not processed by the union in a timely manner. Second, the grievant has been warned regarding insubordination. The grievant's six-day suspension on October 23, 1995 was for insubordination, abuse of a supervisor, and failure to accept authority. In addition, on December 27, 1995 a pre-disciplinary hearing was held about the grievant leaving her work area without permission. Although no charges were filed at that time, the grievant was warned that "insubordinate and threatening behaviors will not be tolerated." The grievant was on notice that she needed to comply with the directions of supervisors.

AWARD

The portion of the grievance protesting the grievant's alleged violation of the dress code policy is upheld. Any record of the charge is to be removed from the grievant's file and is not to be used for purposes of progressive discipline. The portion of the grievance protesting the charge of insubordination is denied. The grievant's six-day suspension is upheld as the proper remedy for her insubordination.



Nels E. Nelson, Arbitrator

May 27, 1997
Russell Township
Geauga County, Ohio