

ARBITRATION DECISION

May 21, 1998

In the Matter of :

State of Ohio, Department of Mental)	
Retardation and Developmental Disabilities,)	
Warrensville Developmental Center)	
)	Case No. 24-14-(10-06-97)-1782-01-04
and)	James Marshall, Grievant
)	
Ohio Civil Service Employees Association,)	
AFSCME Local 11)	

APPEARANCES

For the State:

Carolyn Borden-Collins, Labor Relations Officer
 Colleen Ryan, Office of Collective Bargaining, Second Chair
 Alaric W. Sawyer, Superintendent, Warrensville Developmental Center

For the Union:

Dennis A. Falcione, Staff Representative
 James Marshall, Grievant
 Raymond Poole, Witness

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, James Marshall, was employed at the Warrensville Developmental Center as a Vocational Instructor 1. The WDC is a 256-bed facility for the developmentally challenged. Some of the clients live on the grounds and walk from a house to the workshop on the grounds where they are paid for performing work. The grievant was employed at the WDC for 19 years. As a Vocational Instructor 1 his responsibilities included teaching tasks to clients, preparing reports, taking attendance, and maintaining a safe environment.

The events leading to the grievant's removal occurred on July 18, 1997. On that day he reported to work at 7:00 A.M. and monitored the shuttle bus until 7:45 A.M. when he went to the workshop where he saw Raymond Poole, a Vocational Rehabilitation Specialist 2, who coordinates workshop activities. Marianne Szuhay, an Activities Aide, arrived at the workshop at 8:00 A.M. but stayed only a few minutes before leaving for a meeting at a residence.

The clients were scheduled to arrive at the workshop at 9:00 A.M. Each client was assigned to a cluster. One of the clients assigned to the grievant's cluster was A. She is a retarded female who lives at the 9-100 house.

On the date in question A did not arrive as scheduled. At 9:20 A.M. Poole attempted to call her house to inquire as to her whereabouts but the line was busy. He then received a number of calls about who was monitoring the shuttle bus and made a number of calls but he made no further attempt to contact A's residence.

Szuhay returned to the workshop at 9:45 A.M. and noticed that A was missing. She called the 9-100 house and learned that A had left for the workshop around 9:00 A.M. and should have arrived at the workshop. Szuhay checked in the C/C Building where she found out that at around 9:10 A.M. A had bought a donut at a bake sale in the lobby. She then went to the locker room near the workshop to check a restroom which A frequently used.

At approximately 9:48 A.M. Szuhay found A lying on the restroom floor. When she was unable to rouse her, she summoned help. Attempts to revive A failed and she was taken to Meridia South Pointe Hospital. A was pronounced dead at 11:05 A.M. She had apparently choked on the donut she had purchased.

An investigation was conducted. Management concluded that when A did not arrive by 9:15 A.M., the grievant was required by the Vocational Department Manual to call A's house to ascertain her whereabouts. It claimed that as a result of his failure to follow proper procedures no one attempted to locate A until 9:45 A.M.

The union contends that the policy actually followed in the workshop was different from that contained in the manual. It maintains that one staff member would complete the attendance sheet and call all of the missing clients regardless of the cluster to which they were assigned. The union asserts that since Poole took attendance on July 18, 1997, he was responsible for calling A's house.

An administrative hearing was held on September 3, 1997. The grievant was charged with "client neglect/failure to act" in violation of the Labor Relations Policy Directive. The hearing officer determined that the grievant failed to follow the attendance procedures and that there was just cause for discipline. The grievant was removed effective October 6, 1997.

A grievance was filed on behalf of the grievant on the same day. It charged that management violated Article 12 and Article 24, Sections 24.01 and 24.02 of the collective bargaining agreement and asked that the grievant be reinstated and be made whole. The step three grievance hearing was conducted on October 28, 1997 by Carolyn Borden-Collins, a Labor Relations Coordinator. On November 18, 1997 she denied the grievance.

The grievance was appealed to arbitration on December 16, 1997. The hearing was held on April 10, 1998 and concluded with oral closing statements.

ISSUE

The issue as framed by the Arbitrator is as follows:

Was the grievant removed for just cause? If not, what is the proper remedy?

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

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate 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 there is just cause for the grievant's removal. It contends that it showed by clear and convincing evidence that the grievant was guilty of "failure to act/client neglect." The state maintains that its written policy requires an employee to call a client's house whenever a client in his or her group does not arrive at the workshop by

9:15 A.M. It stresses that A was in the grievant's cluster but he never called her house or inquired about her when she did not appear.

The state asserts that the grievant was responsible for calling A's house. It acknowledges that the union claims that Poole was responsible for calling because it was understood that whoever took attendance would call the houses of all of the absent clients. The state observes, however, that this procedure was contrary to the written policy.

The state maintains that Poole could not relieve the grievant of his responsibility for calling A's house. It insists that his job description as a Vocational Rehabilitation Specialist 2 indicates that he has no supervisory responsibilities. The state adds that under Chapter 4117 of the Ohio Revised Code supervisors in the Department of Mental Retardation and Developmental Disabilities are excluded from the bargaining unit.

The state argues that a failure to act is client abuse. It points out that Labor Relations Policy Directive for discipline defines abuse as follows:

The ill treatment, violation, revilement, malignment, exploitation and/or disregard of an individual, whether purposeful, or due to carelessness, inattentiveness, or omission of the perpetrator.

The state indicates that this definition is consistent with the Medicaid guidelines under which it operates.

The state asserts that the arbitration decisions submitted by the union are not relevant. It states that Ohio Department of Youth Services and Ohio Civil Service Employees Association, Local No. 11, AFSCME, AFL-CIO, grievance no. G-87-1008 and State of Ohio, Department of Mental Health (Millcreek Psychiatric Center for Children) and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, grievance no. 23-11-880304-0003-01-04 are not pertinent because they involve other agencies. The state dismisses State of Ohio, Department of Mental Retardation and Developmental Disabilities and Ohio Civil Service Employees Association, Local 11,

AFSCME, AFL-CIO, case no. G87-0001(A) on the basis that Arbitrator Pincus does not set policy for the Department of Mental Retardation and Developmental Disabilities.

The state contends that the Arbitrator does not have the Authority to reduce the penalty it has imposed. It reports that Article 24, Section 24.01 states that "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 the authority to modify the termination." The state concludes that since the grievant committed abuse, his termination must be upheld.

UNION POSITION

The union argues that there was not just cause to discharge the grievant. It acknowledges that a written rule dated July 5, 1994 states that when a member of an employee's cluster is absent, he or she is to call the client's house. The union contends that the rule was never enforced and that Poole had agreed that the employee who takes attendance calls the houses of all of the absent employees regardless of their cluster.

The union rejects the state's contention that Poole is not the grievant's supervisor. It states that the grievant considers Poole to be his supervisor. The union notes that Alaric Sawyer, the Superintendent of the WDC, indicated that the grievant is expected to take directions on some matters from Poole but not others. It maintains that Poole either is or is not the grievant's supervisor and blames the state for creating confusion regarding Poole's status.

The union claims that it does not matter whether Poole is considered the grievant's supervisor. It observes that if Poole is not his supervisor, then it must be David Zahs, a Human Service Program Administrator. The union stresses that the statement that Zahs gave to the WDC police indicates that the procedure is that whoever takes attendance calls regarding all clients who are late.

The union asserts that under the existing procedure Poole was responsible for contacting A's house. It observes that he tried to call her house but the line was busy. The union claims that the testimony of Zahs, Poole, and the grievant indicates that on some days the shortage of staff results in calls not being made to the houses of clients who do not report on time.

The union argues that the grievant is not guilty of abuse. It points out that in State of Ohio, Department of Mental Retardation and Developmental Disabilities and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, case no. G87-0001(A) Arbitrator David Pincus ruled that "abuse" in Article 24, Section 24.01 of the contract is defined by Section 2903.33(B)(2) of the Ohio Revised Code which states:

"Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the person.

The union stresses that in no event does the conduct of the grievant fit this definition.

The union cited several other cases. It offered Ohio Department of Youth Services and Ohio Civil Service Employees Association, Local No. 11, AFSCME, AFL-CIO, grievance no. G-87-1008; State of Ohio, Department of Mental Retardation and Developmental Disabilities Facility: Gallipolis Developmental Center and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, June 2, 1988; and State of Ohio, Department of Mental Health (Millcreek Psychiatric Center for Children) and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, grievance no. 23-11-880304-0003-01-04 where Arbitrators adopted Pincus's decision that "abuse" was defined by Section 2909.33(B)(2) of the Ohio Revised Code and Sections 5123-3-14(C)(1) and 5122-3-14(C)(1) of the Ohio Administrative Code. The union submitted State of Ohio Department of Mental Health, Dayton Mental Health Center and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, grievance No. G86-0431 where Arbitrator Linda DiLeone Klein found that there was no evidence that the grievant

failed to make her required checks on sleeping patients and that the patient's death was not directly related to the grievant's work performance.

The union asks the Arbitrator to reinstate the grievant with full back pay and all benefits and to order that the grievant's record be expunged.

ANALYSIS

The facts giving rise to the instant case are clear. On July 18, 1997 A did not arrive at the workshop at 9:00 A.M. Poole, who took attendance that day, noted her absence on the attendance sheet and at 9:20 A.M. called the 9-100 house to inquire about her. When he got a busy signal, he turned to other work and made no further efforts to locate her. At 9:45 A.M. Szuhay arrived at the workshop and noticed that A was not there. She called the 9-100 house and learned that A had left for the workshop at 9:00 A.M. Szuhay began to search for A and a few minutes later found her unconscious on the floor of the restroom near the workshop. A was taken to the hospital where she was pronounced dead at 11:05 A.M.

The state's position is straightforward. It observes that the Vocational Department Manual requires an employee to call a client's house when he or she does not arrive at the workshop by 9:15 A.M. The state claims that since A was a member of the grievant's cluster, he should have called her house. It further contends that the grievant's conduct constitutes abuse which justifies removal and stresses that under Article 24, Section 24.01 of the collective bargaining agreement the Arbitrator cannot reduce the penalty it has imposed.

The union appears to challenge the grievant's termination on two grounds. First, it argues that the grievant committed no offense. The union maintains that the workshop is not operating under the rule contained in the Vocational Department Manual but a different procedure where whoever takes attendance calls the houses of all of the missing clients. It claims that since Poole took attendance on the day in question, the grievant was

not responsible for the whereabouts of A. Second, the union contends that in any event the alleged misconduct of the grievant is not "abuse" under the collective bargaining agreement. It indicates that in State of Ohio, Department of Mental Retardation and Developmental Disabilities and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, case no. G87-0001(A) Arbitrator Pincus ruled that "abuse" is defined as in Section 2903.33(B)(2) of the Ohio Revised Code and Sections 5122-3-14(C)(1) and 5123-3-14(C)(1) of the Ohio Administrative Code. The union asserts that the grievant's failure to call A's house does not fall within these definitions of "abuse." Thus, the Arbitrator would be free to modify any penalty imposed by the state.

The Arbitrator believes that the grievant violated the Vocational Department Manual. Section 3.12 instructs employees to "call the house by 9:15 a.m. to check on residents that are assigned to you and are absent." The grievant acknowledges that he did not make any attempt to contact A's house when she failed to show up at the workshop.

The Arbitrator must reject the union's contention that the workshop was operating under a different procedure. He does not believe that employees can agree upon an arrangement contrary to the written rules and procedures. While it might not be inappropriate for the person who takes attendance to call a missing client's house, the responsibility for the client remains that of the employee to whom the client is assigned. This is consistent with Zah's statement to the WDC police which indicates:

The staff person who takes attendance usually follows up with the phone calls. On the morning of July 18, 1997 it was either the responsibility of [the grievant] or Raymond Poole as they were the only two vocational staff in the workshop. Ultimately as stated in inservice given on 7-5-1994 ... it is the responsibility of the staff assigned to that client, in this particular case [the grievant].

The Arbitrator cannot accept the union's claim that Poole was the grievant's supervisor and had the authority to change the procedure for checking on absent clients. Poole's job description and his inclusion in the 1199 bargaining unit make it clear that he was not a supervisor. Furthermore, the grievant's claim that he believed that Poole was

his supervisor is unpersuasive since there was no indication that Poole either issued the grievant's discipline on October 8, 1996 for unauthorized use of a state vehicle or evaluated him.

The Arbitrator, however, must reject the state's contention that the grievant's conduct constitutes abuse. In State of Ohio, Department of Mental Retardation and Developmental Disabilities and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, case no. G87-0001(A) the state and the union agreed that Arbitrator Pincus's decision would define "abuse" for the parties on a statewide basis. He ruled that it would be defined in accord with Section 2903.33(B)(2) of the Ohio Revised Code and Sections 5123-3-14(C)(1) and 5122-3-14(C)(1) of the Ohio Administrative Code. Section 2903.33(B)(2) of the ORC stated:

"Abuse" means knowingly causing physical harm or recklessly causing physical harm to a person by physical contact with the person or by inappropriate use of physical or chemical restraint, medication, or isolation of the person. (Pincus Decision, pp. 16-17).

Section 5123-3-14(C)(1) of the OAC, which applies to the Department of Mental Retardation and Developmental Disabilities, stated:

"Abuse" means any act or absence of action inconsistent with human rights which results or could result in physical injury to a client, except if the act is done in self-defense or occurs by accident; any act which constitutes sexual activity, as defined under Chapter 1907 of the Revised Code, where such activity would constitute an offense against a client under that chapter; insulting or coarse language or gestures directed toward a client which subjects the client to humiliation or degradation; or depriving a client of real or personal property by fraudulent or illegal means. (Pincus Decision, p. 28).

The Arbitrator believes that the grievant's conduct does not fall within these parameters. The ORC's requirement that abuse involves physical harm "by physical contact with the person or by inappropriate use of physical or chemical restraint, medication, or isolation of the person" was not met. The OAC's dictate that abuse

involves an action or inaction "inconsistent with human rights" which could result in physical injury was not satisfied.

The conclusion that the grievant's conduct did not constitute abuse is consistent with the state's action. The state's Labor Relations Policy Directive lists four major offenses -- abuse, failure to act/client neglect, mistreatment, and inappropriate behavior intervention/inconsiderate treatment. It defines these offenses as follows:

Abuse - The ill treatment, violation, revilement, malignment, exploitation and/or disregard of an individual, whether purposeful, or due to carelessness, inattentiveness, or omission of the perpetrator.

Physical abuse - any physical motion or action, (e.g. hitting, slapping, punching, kicking, pinching, etc.) by which bodily harm or trauma occurs. It includes use of corporal punishment as well as the use of any restrictive, intrusive procedure to control inappropriate behavior for purpose of punishment.

Psychological abuse - includes, but is not limited to, humiliation, harassment, and threats of punishment or deprivation, sexual coercion, intimidation, whereby individuals suffer psychological harm or trauma.

Verbal abuse - any use of oral, written, or gestured language by which abuse occurs. This includes pejorative and derogatory terms to describe persons with disabilities.

Exploitation - any act intended to exploit, extort or defraud a resident, including but not limited to: the misuse of authority over a resident; forcing or compelling a resident to do anything illegal or immoral; attempting to extort money or property from a resident; stealing residents' personal possessions.

Failure To Act/Client Neglect - Including but not limited to failure to act in any manner which results in any potential or actual harm to a resident; failing to report, or covering up resident abuse/neglect/mistreatment.

Mistreatment includes behavior or facility practices that result in any type of individual exploitation such as financial, sexual, or criminal.

Unapproved Behavior Intervention/Inconsiderate Treatment - Includes but is not limited to: deprivation of a meal; subjecting resident to unpleasant tastes or

substances; pranks, or any other act that is inconsistent with generally accepted program practice standards, and which goes beyond failure of good judgment.

The directive then offers a disciplinary grid showing each of these offenses as separate and distinct offenses. The state did not charge the grievant with abuse but with "failure to act/client neglect."

The conclusion that the grievant's offense was "failure to act/client neglect" rather than "abuse" is important. Article 24, Section 24.01 states that "if the arbitrator finds that there has been abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse." Had the grievant been charged with and found guilty of abuse, the Arbitrator would be prohibited from considering the appropriateness of the grievant's removal.

The Arbitrator does not believe that there is just cause to discharge the grievant. First, while the grievant was ultimately responsible for checking on the whereabouts of A, it is undisputed that employees in the workshop had agreed to a procedure that whoever completed the attendance sheet would call the house of a missing client regardless of the client's cluster. The statement Zahs gave to the WDC police indicates that he was aware of the practice and apparently condoned it. Second, the grievant is a long-term employee with a good record. He has worked at the WDC for 19 years and his personnel file contains only a written reprimand for the unauthorized use of a state vehicle. Third, the Arbitrator recognizes that the grievant may have been confused about Poole's authority. Sawyer testified that the grievant was expected to obey Poole's orders regarding client activities but not in other areas. The grievant may not have understood that Poole's authority did not extend to modifying or overriding the Vocational Department Manual.

The Arbitrator, however, believes that a severe penalty is justified. The grievant was aware of the requirement in the Vocational Department Manual that he call a client's house if he or she is absent and had attended an inservice program on July 5, 1994

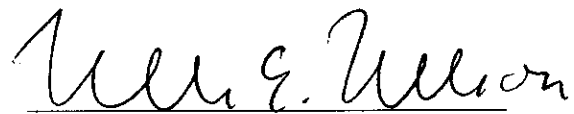
covering this rule. Furthermore, he made no inquiries of anyone as to A's whereabouts. Had Szuhay not arrived at the workshop at 9:45 A.M. and attempted to locate A, it is unclear when she would have been found.

This Arbitrator's decision is consistent with the decision of Arbitrator Cohen in State of Ohio, Department of Mental Retardation and Developmental Disabilities Facility: Gallipolis Developmental Center and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, June 2, 1988. In that case an employee at the Gallipolis Developmental Center who had wired an emergency door closed was terminated for abuse and neglect of duty. Based on the decision of Arbitrator Pincus in State of Ohio, Department of Mental Retardation and Developmental Disabilities and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, case no. G87-0001(A), he found that the grievant was not guilty of abuse. He did find the grievant guilty of neglect and reinstated the grievant without back pay.

The Arbitrator concludes that the grievant is guilty of neglect of duty. Despite the seriousness of the offense, the circumstances dictate that the grievant's termination cannot be upheld. The grievant is to be reinstated without back pay.

AWARD

The grievant is to be reinstated without back pay but with no loss of seniority.



Nels E. Nelson
Arbitrator

May 21, 1998
Russell Township
Geauga County, Ohio