

IN THE MATTER OF ARBITRATION

BETWEEN

DISTRICT 1199/SEIU, AFL-CIO

AND

THE STATE OF OHIO/MRDD

Before: Robert G. Stein
Direct Appointment
Case # 24-14-970923-1776-02-11

Principal Advocate for the UNION:

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INTRODUCTION

A hearing on the above referenced matter was held on March 30, 1998, in Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted closing arguments in lieu of filing briefs. The hearing was closed on April 18, 1998. The parties agreed the Arbitrator's decision is to be issued by May 30, 1998, plus five days for mailing.

ISSUE

The parties agreed upon the following definition of the issue:

Was the Grievant's removal imposed for just cause? If not, what should the remedy be?

RELEVANT CONTRACT LANGUAGE/

ARTICLE 8 DISCIPLINE

8.1 See Agreement for specific language (Joint Exhibit 1)

8.2 See Agreement for specific language (Joint Exhibit 1)

BACKGROUND

The Grievant in this matter is Raymond Poole. Mr. Poole was employed for some twenty (20) years at the Warrensville Developmental Center (hereinafter referred to as "WDC"). Warrensville Center is a state residential facility for people who are differently abled by virtue of mental retardation or developmental disabilities.

Mr. Poole most recently held the classification of Vocational Rehabilitation Specialist 2. His responsibilities included supervision of the WDC's on-grounds workshop. In this capacity the Grievant taught the residents of WDC how to perform unskilled tasks. Mr. Poole also had accompanying responsibilities such as report preparation, taking attendance, and maintaining a safe environment for the residents.

On September 23, 1997 the Grievant was terminated from his position for "failure to act/client neglect." The circumstances leading to Mr. Poole's removal are as follows:

On July 18, 1997 client Arlene T. was due at the on-grounds workshop at 9:00 a.m. The Grievant had assumed the responsibility of checking attendance

on that day. Upon completing his attendance check the Grievant found that Ms. Turner was not present. The Grievant then telephoned Arlene's house, House 9/100 at 9:20 a.m. and received a busy signal. The Grievant continued to perform his other duties, in addition to dealing with transportation problems and did not look seek the whereabouts of client Arlene T. At 9:48 a.m. other WDC staff found Arlene unconscious on the floor of the Women's locker room near the workshop. Arlene was pronounced dead at 11:05 a.m. that same morning at South Point Meridian Hospital.

The Employer conducted an exhaustive investigation of this matter and determined the Grievant violated the departmental rule, "failure to act/client neglect." This rule carries with it the penalty of termination for the first offense. The Employer concluded the Grievant's failure to ascertain Arlene T's whereabouts on the morning of July 18, 1997 constituted a failure to follow WDC's attendance policy (Management Exhibit 1).

The Grievant was terminated on August 11, 1997. Mr. Poole filed a grievance contesting the Employer's actions.

EMPLOYER'S POSITION

The Employer's position in this case is clear and concise. The Grievant, Raymond Poole, was an experienced Vocational Habilitation Specialist 2, contends the Employer. The Employer asserts that on the morning of July 18, 1997 he assumed the responsibilities of checking attendance while performing his duties in the workshop. Mr. Poole was aware of the importance of attendance and received training on procedures to follow in the taking of attendance.

After taking attendance and discovering that Arlene T was missing the Grievant called her House, 9/100, but the line was busy. According to the Employer, the Grievant

did nothing else to locate Arlene T. until she was found unconscious some 28 minutes later. The Employer asserts that the 28 minutes that transpired between the Grievant's failed attempt to contact House 9/100 and the time Arlene was found unconscious was a critical period of time. The Employer asserts that if the Grievant had made finding Arlene T a priority in accordance with WDC's attendance policy, it may have helped to save her life.

Based upon the above, the Employer request that the Arbitrator uphold the Grievant's termination and his grievance should be denied.

UNION'S POSITION

The Union does not dispute the fundamental facts in this case. The Union and the Grievant acknowledge that Mr. Poole understood the Daily Attendance Sheet policy and was responsible for taking attendance at the workshop on July 18, 1997. The Grievant admits he made one attempt to call House 9/100 at 9:20 a.m. when he discovered that Arlene T. was absent. However, the Union rejects the Employer's actions in terminating the Grievant as being too harsh and accuses the Employer of failing to consider a number of mitigating circumstances.

The Union asserts that on July 18, 1997 the workshop at WDC was understaffed. There was an employee on sick leave and another employee was attending a staff meeting in another building on the campus. The Grievant and employee, James Marshall, were

responsible for the management and safety of some 18 residents at the workshop that morning.

The Union contends that a second mitigating factor was Mr. Poole's involvement with a new resident, Scott E., at the workshop on the morning of July 18th. The Grievant testified that Scott was afraid to attend the workshop and the Grievant spent extra time with him on the morning of July 18, 1997 immediately following his unsuccessful attempt to reach Arlene T.'s House 9/100.

The Union identifies a third mitigating factor as being the Grievant's need to resolve a problem with transportation during the 28 minute period between 9:20 a.m. and 9:48 a.m. on July 18th. The Grievant testified he had incoming calls that caused him to be preoccupied with other matters. A fourth mitigating factor is related to disparate treatment. The Union contends Mr. Poole was treated far more harshly than other employees who violated the same rule regarding attendance.

The Union vigorously asserts that the Employer failed to meet its burden of providing clear and convincing evidence that Mr. Poole was terminated for just cause. The Union states that Mr. Poole was a twenty (20) year employee who provided loyal service and had "absolutely no disciplinary history at all." The Union contends, "Despite an extensive investigation, numerous statements and affidavits...the State failed to show in any manner...Mr. Poole did anything inappropriate on 7/18/97."

Based upon the above, the Union urges the Arbitrator to sustain the grievance and to make the Grievant whole in every way including the restoration of all lost wages and benefits.

DISCUSSION

The facts regarding what happened to resident Arlene T. on July 18, 1997 are not in dispute. The untimely death of Arlene is acknowledged as a tragedy that has had a profound effect on both parties in this dispute. In rendering this Award I have kept in mind the impact such an event can have on the Department of Mental Retardation and Developmental Disabilities. MRDD has an extremely important mission to provide a meaningful life for people who require a great deal of guidance and supervision. I have the utmost respect for the people who dedicate their lives to this field.

The parties are essentially in agreement on a number of important facts. Mr. Poole is a long-time employee of considerable experience who has not had his work record blemished by any corrective action prior to the instant matter. The Union made this assertion during the hearing and it was not refuted by the Employer. Secondly, on July 18, 1997 it is also an undisputed fact that Mr. Poole and Mr. James Marshall were working in an understaffed situation in the workshop. One employee was on sick leave and another was attending a staff meeting on the campus until approximately 9:20 to 9:30 a.m.

On the morning of July 18th the Grievant had volunteered to take attendance for the workshop. The parties concur and the witnesses support the fact that WDC had an established Procedure for Daily Attendance (Management Exhibit 1). The Grievant was

aware of the policy. An employee who takes attendance shall report the residents to be absent after 9:15 a.m. However, as with any policy or practice, it is not the words on paper that matter as much as how those words are interpreted and enforced by management. The application of the policy and whether the Grievant's behavior meets management expectations are what must be examined in this case. This is the only way to properly assess whether the Grievant was guilty of failing to act/client neglect.

The pertinent part of the Procedure For Daily Attendance states, *"If the resident is not on the house or in the workshop call the Police Department and Charge Supervisor immediately"* (Management Exhibit 1). At 9:20a.m. the Grievant did not know whether Arlene T. had left her house. The most definitive statement regarding what management expected regarding compliance with the Procedure for Daily Attendance comes from Mr. Poole's immediate supervisor, David Zahs (Joint Exhibit 4, p.25). When asked whether there is something in place for attendance at 9:00 a.m. in the workshop, Mr. Zahs stated in writing,

"When the clients arrive to the workshop attendance is recorded by staff on the attendance sheet. When a client doesn't arrive the house is called usually after waiting until 9:15 a.m., this is contingent on staff being free and able to get through on the phone as the phone is usually busy with incoming calls for shuttle service, county workshop, staff asking questions, morning transportation problems, concerns for lunches and clothing issues, etc. Also the house phone is often busy when a call is made to the unit to check on client status." [emphasis added]

This is a critical piece of evidence in this case! The direction provided by the Grievant's immediate Supervisor is how the Grievant and anyone working for Mr. Zahs would be expected to comply with the Procedure For Daily Attendance. The important

thing to determine is whether the Grievant's actions on July 18, 1997 were in compliance with the parameters of interpretation provided by supervision.

The evidence and testimony support the Union's contention that the Grievant had several phone calls and competing work related demands between 9:15 a.m. and 9:48 a.m. on the morning Arlene T. died inexplicably. The parties also agree that on July 18, 1997, Mr. Poole made one attempt to call Arlene T's campus residence, House 9/100 at 9:20 a.m.

On the morning of July 18, 1997 the Grievant appeared to be occupied with a number of tasks: taking attendance, incoming phone calls, helping a resident who was new to the workshop, and responding to problems with the shuttle. After Mr. Poole finished taking attendance he stated he was involved in three phone calls. One of the calls concerned a resident, Scott E., who was to attend the workshop for the first time. Mr. Poole testified that he managed to talk Scott into coming to the workshop and had to spend some one on one time with him when he arrived at the workshop about 9:20 a.m.

According to Mr. Poole, Scott E. arrived at the workshop immediately after the Grievant attempted to reach someone at House 9/100, Arlene T.'s residence. This was the Grievant's third call after taking attendance and he made it at 9:20a.m. The evidence indicates Mr. Poole was in compliance with the Attendance Policy when he made his first attempt to reach someone at House 9/100. The Grievant testified he spent approximately 10 minutes with Scott to get him acclimated to the workshop. I found the Grievant's testimony to be credible and plausible regarding his work with Scott E. Coupled with the fact that the workshop was understaffed, it was a mitigating factor to explain 10 minutes

of the time between the hours of 9:20 a.m. and 9:48 a.m. It fits with Supervisor Zahs' expectations.

The time between approximately 9:30 a.m. and 9:48 a.m. appeared to be consumed with problems related to incoming calls and the shuttle. The evidence and testimony indicate that Mr. Poole was pulled out of the workshop and was busy doing appropriate work during this 18 minute period. However, there is an important question to be asked at this juncture. Was the Grievant "free and able to get through on the phone line" during this time period? The Employer states he should have tried to reach House 9/100 a second time or call the Police and his Charge Supervisor. From the evidence and testimony it is impossible to be certain just how busy the Grievant was between 9:15 a.m. and 9:48 a.m. However, if the Grievant had been the only one who knew³ that Arlene was absent from the workshop, his failure to make a second call to House 9/100 would have been a more critical failure to act.

However, the evidence supports the fact that at approximately 9:20 a.m. several employees were aware of Arlene's absence and at least two employees had begun to look for her just after 9:20 a.m. Employee Mary Short, who was in the workshop, stated she was informed by the Grievant between 9:20 a.m. and 9:30 a.m. that Arlene T. was missing (Joint Exhibit 4). Marianne Szuhay was also in the workshop at this time (Joint Exhibit 4) and (according to Short) knew Arlene T. was missing at approximately 9:20 a.m. on July 18th.

In addition to knowing Arlene T. was missing, these employees also knew the Grievant had unsuccessfully tried to reach House 9/100. The statement of Wayne Briggs

corroborates the statement of Mary Short that Marianne knew at 9:20 a. m. that Arlene T. was missing (Joint Exhibit 4). He received a call from Marianne Szubay and immediately went looking for Arlene T. at the A/C building. Ms. Szubay's statement appeared to indicate she knew Arlene was missing, but it is was not clear from her statement precisely when she knew Arlene was missing.

In summary, three individuals, James Marshall (who Arlene was assigned to), Mary Short, and Wayne Briggs knew at approximately 9:20 a.m. that Arlene T. was absent from the workshop. Two of these witnesses, Mary Short and Wayne Briggs, also support the contention that a fourth person, Marianne Szuhay also knew at approximately 9:20 a.m. (or at least by 9:30 a.m.) that Arlene T. was absent from the workshop.

The fact that several staff knew of Arlene's absence as early as 9:20 a.m. does not excuse the Grievant from not following up his first call to House 9/100. However, if at least 4 other staff were aware of Arlene's absence within five to 15 minutes after 9:15 a.m. the Grievant's inaction in attempting to reach House 9/100, campus police, or the Charge Supervisor becomes somewhat mitigated. Other employees were in motion to find Arlene.

However, the evidence also indicates Mr. Poole was in the Police Office using the phone to deal with the shuttle problem (see Kathy English statement). It would have been easy for the Grievant to inform Ms. English of Arlene's absence while he was there, yet he did not. The Grievant never explained why he did not inform the police office of Arlene's absence. Although the evidence indicates he was preoccupied with the shuttle problem, I find the Grievant could have informed security while he was in their presence. This action

could have put more people in motion looking for Arlene. I find that it was here that the Grievant violated the Practice For Daily Attendance policy of the Employer.

The extent to which the Grievant's inaction prevented an employee from finding Arlene will never be known. She was seen purchasing a donut between 9:00 a.m. and 9:10 a.m. (see testimony of Lanell Boles, Helen Harris, and Chris E. Roth). It is not clear that the eating of the donut caused her to stop breathing. The cause and manner of Arlene T.'s death is unknown (Union Exhibit 4). When Arlene was found at approximately 9:48 a.m. and she was not breathing, it is not known how long she had been in this state. It is conceivable she may have stopped breathing prior to the Grievant completing attendance taking and making his call to House 9/100 at 9:20 a.m. on July 18th.

The Employer did meet its burden of proof that the Grievant in part failed to follow Section 3.12 the WDC Procedure for Daily Attendance Sheet on July 18, 1997. When using the practical definition of complying with the Practice For Daily Attendance as explained by the Grievant's supervisor, I find the Grievant was preoccupied with competing work demands and was not "free" to follow-up on Arlene's absence, except when he was in the Police office. When coupled with the other mitigation circumstances of this case, the Grievant's partial non-compliance with policy does not equate to the serious charge of "failure to act/client neglect."

According to Grievant's Supervisor, David Zahs, Arlene T. was assigned to Mr. Marshall on July 18th. In his statement in Joint Exhibit 4 he stated, "As answered in several statements Arlene T. was assigned to James Marshall." If Arlene T. was assigned to Mr. Marshall, why didn't he take a greater role in helping the Grievant to follow up on

Arlene's absence? Presumably having a specific resident assigned to you implies a greater level of responsibility. Mr. Zahs' testimony and statements made it clear that Mr. Marshall was responsible for Arlene when she did not show up, and the Grievant was responsible for calling her House when she was discovered to be absent.

As stated above, I find that the Grievant partially complied with the calling requirement, but was delinquent and failed to fulfill the requirements of the policy. The Employer did not prove negligence, given the mitigating circumstances described above. I do not find the Union's argument of disparate treatment to be persuasive in this matter. The similarity between other instances and the instant matter was not established by the evidence.

Finally, the Grievant's 20 years of service without a discipline on his record must be taken into consideration. A past record can be mitigating or an aggravating factor in disciplinary cases. The absence of discipline from one's record indicates that an employee had at least performed at a minimally satisfactory level for the past 20 years. Had the Grievant's record reflected tendencies to ignore policy (and in particular policies regarding client care) the Employer's case in this matter would have been strengthened. Based upon the evidence before me, it is reasonable to conclude the Grievant had a long record of satisfactory performance which is a major factor in deciding the outcome of this case.

Superintendent Alaric Sawyer stated that "the primary job of all of our employees is to provide an environment safe from harm for our residents." I concur with Superintendent Sawyer's strong stand regarding the issue of resident safety. Negligence in a health care facility takes on a particular significance. However, the evidence and

testimony do not conclusively prove that the Grievant's failure to follow policy contributed or failed to prevent Arlene T's death.

The evidence and testimony in this case lead this Arbitrator to the inescapable conclusion that Arlene T. was a resident with a myriad of problems. She was hospitalized for mental health problems a few weeks prior to her death and required close supervision prior to this hospitalization (see Union Exhibit 3). It is also a matter of record that she had a problem with ingesting large quantities of food if left unsupervised. The evidence also indicated she would eat rapidly and was prone to self-induced vomiting (see Union Exhibit 2 and Joint Exhibit 4, Szuhay statement).

These health problems demonstrate that Arlene was a resident at risk. There is no evidence to suggest the Grievant was aware of Arlene T.'s recent hospitalization for mental health problems or her problems with rapid food ingestion and vomiting. There is also no evidence to indicate that the Grievant knew Arlene had a habit of stopping for food on her way to the workshop.

The Grievant was not responsible for resident Arlene T. while she was enroute to the workshop on July 18, 1997, until it was determined she was not there by 9:15 a.m. After 9:15 a.m. the attendance policy required the Grievant to "check on residents" that are assigned to him. The Grievant had no reason to suspect that Arlene T. was in any danger and in fact at 9:20 a.m. the Grievant had not determined that Arlene T. had even left House 9/100.

In summary, several factors influenced by opinion in this ruling: the supervisor's expectations for compliance with the policy of recording attendance at the time,

understaffing in the workshop, other staff were informed of Arlene's absence at approximately 9:20 a.m., and the Grievant's long work history with no record of discipline for like offenses or any offenses. I find that the Employer has not met its just cause burden. The Grievant did not fail to act, causing client neglect. The Grievant in the main complied with the Procedure for Daily Attendance Sheet as interpreted and enforced by his supervision during July of 1997.


However, I do find that the Grievant exercised poor judgment in not informing the police of Arlene's absence when he was in the police office using the telephone (Joint Exhibit 4). The most appropriate label for this act is a Failure to Follow a Policy or Work Rule.

AWARD

The grievance is sustained.

The Grievant's termination is to be removed from his record and substituted with a 2 day suspension for Failure to Follow Policy or Work Rule (with the same effective date used for the termination). The Grievant is to be reinstated to his position and is to be made whole for all back pay (less two days of suspension without pay, unemployment compensation and other W-2 income realized during his period of termination), benefits, and seniority. The Grievant is to be returned to work as soon as possible, but no later than two pay periods from the date of this Award.

Respectfully submitted to the parties this 30th day of May, 1998.

A handwritten signature in black ink, appearing to be 'R. Stein', written over a horizontal line.

Robert G. Stein, Arbitrator