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IN THE MATTER OF ARBITRATION
BETWEEN
THE OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL
DISABILITIES
AND
THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/
AFSCME LOCAL 11 AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 24-02-(09-20-99)-1655-01-04
Dennis Green, Grievant

Advocate(s) for the UNION:

Steve Wiles, Staff Representative
OCSEA Local 11, AFSCME, AFL-CIO
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Advocate(s) for the EMPLOYER:

Tondra L. Brokaw, LRO
HUMAN RESOURCES, OHIO MRDD
Kelly Foster, 2nd Chair
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INTRODUCTION

A hearing on the above referenced matter was held on January 29, 2001 in Applecreek, 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 provided written closing arguments in lieu of making verbal closing arguments. The hearing was closed on March 1, 2001. The Arbitrator's decision in this matter is to be issued by April 16, 2001.

ISSUE

The parties stipulated to the following definition of the issue:

Did Management violate Article 24 of the contract when they removed Dennis Green for physical abuse? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE**BACKGROUND**

On September 16, 1999 the Grievant, Dennis Green, a Therapeutic Program Worker, (TPW) was removed from his position at the Apple Creek Developmental Center (ACDC) for physically abusing Robert B., a resident of ACDC. Therapeutic Program Workers are primary caregivers for individuals who live at ACDC. On July 16, 1999, the Grievant was assigned to Living Area 8 in the Jonathan Residence (Jonathan 8) of ACDC and Robert B. was one of the individuals who resided in Jonathan 8. Mr. Green was working with twelve individuals from Jonathan 8 on the day of the incident.

The incident that led to the Grievant's termination occurred on July 16, 1999. Mr. Green relieved TPW Bridget Ray on Jonathan 8. On that day Mr. Green worked the 2:00 p.m. to 10:30 p.m. shift. Shortly thereafter the Grievant was speaking in a loud and angry tone of voice. At approximately 2:45 p.m., a co-worker, TPW Vicky Seal, discovered that Robert B. had sustained numerous scratches throughout his upper body including shoulder, back, neck, and face. The injuries appeared to be made recently. There were no eyewitnesses who observed how Robert B.

sustained these injuries. After conducting an investigation into the matter, the Employer concluded that the Grievant was the only person who could have caused the injuries, and they initiated removal procedures.

At the time of the incident Mr. Green had over nine (9) years of service and had no discipline on his record. Resident Robert B's Individual Behavior Program (IBP) documentation reveals he is capable of self-injury and physical aggression toward others (JX 4, p. 58-64). The Grievant filed a grievance on September 20, 1999 on the basis that his removal was not for just cause.

EMPLOYER'S POSITION

The Employer argues that the weight of the evidence and testimony in this case points to the fact that the Grievant was the only person who could have caused the injuries to Jonathan 8 resident, Robert B. It contends that on the day in question, July 16, 1999, its witnesses support the fact that Robert B. irritated the Grievant. It points to the testimony of Vicki Seal, Tracey Frost, and Eddie Musser as circumstantial evidence that implicates the Grievant.

Ms. Frost heard the Grievant speaking in a loud voice and saying he was "*not in the mood*" and was "*not going to chase you around all night.*" Ms. Frost spoke to the Grievant about his tone once and when he continued, she returned to Jonathan 8 but could not find the

Grievant. Ms. Seal stated she saw Robert B. at approximately 2:00 p.m. and she did not observe any scratches on him. When she again saw him at approximately 2:50 p. m. she immediately noticed he had scratches on his neck. Upon further investigation she observed that he had "fresh scratches" on his chest and back. Ms. Seal also observed that Robert B. had the impression of a handprint on his chest. Unit Director Edie Musser, who was called and arrived at the area at approximately 2:58 p.m., testified she also observed the injuries to Robert B. including the handprint on his chest.

The Employer argues that these witnesses support its conclusion that the Grievant was upset with Robert B. on July 16, 1999, and he was the only person who could have caused these injuries. Furthermore, the Employer contends that its conclusions are the same as those determined by Ohio State Trooper, Rick Wells. He stated that there were many inconsistencies in the Grievant's statements which cast suspicion on his actions.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union's defense of the Grievant is straightforward. It argues that the Employer failed *"its burden of proof to establish just cause"* for its

actions to terminate the Grievant, Dennis Green. The Union argues that the Employer failed to consider the fact that resident Robert B. has a long history of physical aggression toward peers and often displays self-injurious behavior. The Union also points out that other residents in Jonathan 8 have become aggressive with Robert B.

The Union contends that the Grievant has a loud voice, a fact that was documented on one of his evaluations (UX 1). It also argues that the Employer could not determine how the injuries to Robert B. were made or who made them. In addition, other TPWs such as Brigitte Ray were alone with Robert B. during the time of the incident, and they were not considered to be prime suspects as was the Grievant.

The Union further contends that the injuries sustained by Robert B. were not readily observable because he was wearing a three (3) button shirt that covered the area of the injuries. Therefore, when TPW Seal initially observed the Grievant at 2:00 p.m., Robert B. may have already sustained the injuries that were discovered some fifty (50) minutes later. The Union also asserts that the investigation against the Grievant was flawed. Many of the questions asked by Trooper Wells were leading and slanted toward finding the Grievant responsible for the injuries sustained by Robert B.

Based upon the above, the Union requests that the grievance be sustained.

DISCUSSION

Substantial circumstantial evidence that is of sufficient weight and probative value can eliminate all reasonable alternative explanations as to how something occurred. It can move a matter from the realm of speculation to one of probability with the same effect that direct or testimonial evidence can have upon an event (See "Problems of Proof in Arbitration", Proceedings of the 19th Annual Meeting of NAA, 98 (BNA, Books 1967)). However, in the instant matter the circumstantial evidence that the Employer relies upon to make its case lacks sufficient probative value to meet a "just cause" burden. The Employer's case leaves too many unanswered questions and does not eliminate other explanations as to what happened on July 16, 1999 with a degree of certainty that is required in a case that involves a discharge.

There is absolutely no question that abuse of individuals under the care of the Department should be responded to swiftly and appropriately. The Department bears a special burden with these individuals and their families. It is reasonable for people in this position to expect the Department to provide a safe and nurturing living environment. By the same token, the workers who care for these individuals are also special in their own right. Theirs is a very demanding job and people who are good at this type of work have the patience and the unusual skill set that is required to have a positive impact on this population of individuals.

The following evidentiary observations create doubt regarding the Employer's case. Witness Sandy Lyons provided a statement during the investigation that led to the Grievant's discharge (JX 4, p. 10). It stated in pertinent part that, *"Robert (Robert B.) was upset in the afternoon, and pacing around the workshop."* This was prior to Robert B. going back to Jonathan 8 at 2:00 p.m. (Higgins statement, JX 4, p. 11). In his statement the Grievant stated that Jonathan 8 resident Robert V. (not Robert B.) was *"...running in and out of the back door"* (JX 4). In her statement during the investigation Vicky Seal stated that Robert B. *"...has been going into his psychotic episodes this past week since returning from his visit home. He's very hyper and anxious."* With what degree of certainty can it be determined that Robert B. did not inflict injuries upon himself or was aggressive toward another resident who retaliated?

The evidence and testimony suggest the Grievant may have been upset about a vacation request, but this does not substantiate the proposition that the Grievant was upset or acted inappropriately toward resident Robert B. The fact that another resident, Robert V. was in Jonathan 8 on July 16th and was running in and out creates doubt as to whom the Grievant was addressing when he said he was not "in the mood" and *"...was not going to chase you around all night."* (Grievant's testimony). Witness Frost stated that she overheard the Grievant refer to *"Robert"* (which is the name Robert V is known by) and *"Bob"* (which is

the name Robert B is known by). There were no witnesses that could establish that the Grievant was upset with Robert B.

There was evidence that Robert B. is self-abusive and has a history of manifesting this abuse in certain specific patterns. His injuries in the instant matter did not fit the pattern, but this does not absolutely eliminate the possibility that Robert B. injured himself or was involved in an incident with one or more residents that resulted in his injury. The Employer also acknowledges that Robert B. may have been irritated on July 16th. The evidence is not conclusive. Robert B. has a history of self abuse aggression that cannot be summarily ruled out from the evidence compiled in this case. Without eye witnesses, a reasonable level of doubt as to what happened and who did it is created by Robert B.'s own history of behavior.

The Grievant's performance evaluations (which contractually have gained greater significance for wage increases) demonstrate that the Grievant's skills in direct care meet or exceed performance requirements. During the past five (5) years he was rated as meets (3 times) and above (2 times) in this category (UX 1). For example, in his most recent evaluation, 1998, the evaluator stated in pertinent part:

"The gentlemen and ladies love to be around Dennis and love the attention he gives them. He knows what they like and how to make their day. He has a lot of love to give and lets it radiate out when working with the individuals. ...Dennis knows how to make them feel like they are cared for and loved in a very special way, beyond what many can do..."

His 1997 evaluation stated that Dennis *"will maintain a proper tone of voice when working with individuals and staff."*

The testimony of the Employer's witnesses established that on July 16, 1999 the Grievant was loud and was probably not maintaining a proper tone of voice with the residents. However, some people have problems modulating their voice even after being told about it repeatedly. Loudness may equate to anger when heard by people who are uncomfortable with such manner of expression. It may easily be misinterpreted as anger where none was intended.

Being too loud is something the Union acknowledged the Grievant must control; however, to draw the conclusion that it substantiates he was angry at Robert B (or anyone else) to the point of being physically abusive is inconsistent with the evaluations he has received during the last five (5) years. Furthermore, the Grievant has no record of discipline that indicates he has any propensity toward violence.

Another incongruity that undermines the Employer's case is the nature of Robert B's injuries. He had scratches on the shoulder, back, chest, neck, and face (JX 4 A). Most of these injuries were covered by his three button shirt, which the parties stipulated he never removed at the Workshop. It is therefore unknown whether Robert B. had any of these injuries prior to the hours of 2:20 p.m. and 2:45 p. m., when Robert B was

under the Grievant's care. If the Grievant caused injuries to Robert B., he had to have inflicted them on him while Robert B. had his shirt removed during the thirty (35) minute period when he was at Jonathan 8 after returning from the workshop, a time when the grievant was not observed by other employees. Yet, the nature of Robert B's injuries are unusual. They suggest a scuffle. If the Grievant scuffled with Robert B, why wasn't there evidence to suggest that the Grievant's clothes or body were affected? There was no evidence presented to suggest that the Grievant had been in a scuffle.

Discharge cases require that an employer present clear and convincing evidence to support its actions. The level of doubt raised by the circumstantial evidence in this case prevents the Employer from sustaining its case. While it is possible that the Grievant did what the Employer accused him of the Employer was unable to demonstrate its probability. He is being accused of acting in a manner that is totally contrary to what his last five (5) years of performance demonstrate.

The stigma attached to being found guilty of physically abusing a resident of an MRDD facility is enormous. It is a serious matter for all parties concerned. Any hint of such behavior must be judiciously policed by the Employer. However, being found guilty of such an act can be devastating to one's work life and to one's personal life. This is why the Union must vigorously, as it did in this case, defend grievants whom it feels

are being wrongly accused. The circumstantial evidence in this case is insufficient to prove Mr. Green was physically abusive.

AWARD

The grievance is sustained.

The Grievant is to be reinstated to his former position and shift and is to be made whole for all lost pay, benefits, and seniority. All record of the Grievant's discharge shall be removed from his personnel file. The Arbitrator shall maintain jurisdiction over this Award for sixty (60) calendar days in order to be of assistance to the parties in implementing this Award.

In order to remove any undue suspicion regarding Mr. Green, it is further ordered that Mr. Green be placed in an assignment where Robert B. is not a resident.

Respectfully submitted to the parties this 16th day of April, 2001.

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

Robert G. Stein, Arbitrator