

1504

In The Matter of the Arbitration

-between-

State of Ohio
Ohio Veterans Home

-and-

OCSEA/AFSCME, Local 11

OPINION AND AWARD

Grievance 33-00-(2000-08-10)-1096-01-04

Hearings: February 20, 2001
May 15, 2001

John J. Murphy, Arbitrator

Opinion and Award Issued: June 16, 2001

APPEARANCES:

FOR THE UNION:

Robert Robinson
Staff Representative
OCSEA/AFSCME, Local 11
390 Worthington Road
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Westerville, Ohio 43082

Martha Roesch
OCSEA/AFSCME, Local 11
2nd Chair

Herman Whitter
Director of Dispute Resolution
2nd Chair

Also Present:

Harriet Russell
Vice President, Chapter 2200

Martha Zimmerman
Certified Nursing Assistant

Renee Hill
Certified Nursing Assistant

Laquita Hearn
Nurse Aide

Loveona Monegan
Nurse Aide

Rhonda Palmer
Nurse Aide

Vanessa Brown
Chapter President

Eric Shaw
Nurse Aide

Grievant

FOR THE STATE:

John C. Cook
Labor Relations Officer
Ohio Veterans Home
3416 Columbus Avenue
Sandusky, Ohio 44870

Andrew Shuman
State of Ohio
Office of Collective Bargaining
2nd Chair

Also Present:

Robert Day
Human Resources Administrator
and EEO Officer

Nurse Aide
Complaining Witness

Tracy Kellem
Nurse Aide

Sharon Green
Nurse Aide

Diana Murawski
Registered Nurse
House Supervisor

FACTUAL BACKGROUND:

This case deals with two charges of sexual harassment against the Grievant--a nurse aide at the Ohio Veterans Home. The source of both charges was also a nurse aide; both the Grievant and the Complaining Witness were relatively recent employees with one year seniority for the Complaining Witness and nine months of seniority for the Grievant.

The charges concern separate incidents that were said to have occurred early in July of 2000 in the hallway of Secrest 3-South, a nursing facility for aged veterans who had served in armed conflicts on behalf of the nation. Both incidents also occurred during a thirty minute period from 11:00 p.m. to 11:30 p.m. during which time there is a thirty minute overlap between the second shift of nurse aides and the third shift of nurse aides. The Complaining Witness was a nurse aide on the third shift that began at 11:00 p.m. and ended at 7:00 a.m. The Grievant was a nurse aide on the second shift that began at 3:00 p.m. and ended at 11:30 p.m.

During this thirty minute period of time, the two shifts of nurse aides congregate together by the nurse aide desk and chairs. This area is next to the nurse's station that is centered at a point where three hallways extend in three different directions as spokes from a wheel.

Members of both shifts then participate in "making rounds"--a process that takes approximately ten minutes. The rooms of each of the residents are entered and the patient is checked to see if he

is dry. Monitors and alarms are checked and buttons are checked to be within reach of the residents.

As a result of a complaint from the Complaining Witness on July 14, 2000, the Human Resources Officer conducted interviews and gathered statements from the Complaining Witness, two nurse aides, Tracy Kellem and Sharon Green, and a house supervisor, Diana Murawski. In addition, the officer conducted an interview of the Grievant in the presence of the Union representatives, and received a written statement from the Grievant.

The investigation led to a notice of a pre-disciplinary meeting which set forth the following allegations against the Grievant:

On or about July 3, 2000 you were observed to have put your hand up the back of a female employee's (Complaining Witness Nurse Aide) shorts,^{1/} touching her in an unacceptable manner. This action was witnessed by Tracy Kellem, Nurse Aide.

On July 12, 2000, you were walking behind (Complaining Witness) and Sharon Green, Nurse Aide. You were heard to have stated "I like to walk behind you guys so I can watch your ass." You then proceeded to walk up beside (Complaining Witness) and put your arm around her. You stated "You can do rounds with me." (Complaining Witness) pulled away from you and you pulled her back into yourself stating "Come on, baby, we will do the back hall." Sharon Green removed his hand from (Complaining Witness) and told him that (Complaining Witness) was coming with her.

This is a violation of the Ohio Veterans Home Corrective Standard F-04 . . . Sexual Harassment . . .

^{1/} The shorts are uniform shorts worn during the summer by nurse aides. They fall to two or inches above the knee.

The pre-disciplinary meeting was held on July 26, 2000. Prior to that time, the State supplied the Union with a disciplinary packet that included the notice to the meeting as well as the statements by the Complaining Witness, Nurse Aides Kellem and Green, Supervisor Murawski, and the Grievant. At the meeting, the hearing officer received these statements, and the Union submitted statements of eleven other employees. As is typical in such meetings, no live testimony was taken. The hearing officer found just cause for discipline. Her report referred to written statements by Murawski, Kellem and Green as "eye witness" statements. These statements were found to be complete and credible. Statements supplied by the Union were referred to as "character statements (that provided detail of the Grievant's demeanor around some people"

On July 31, 2000 the Director of the Ohio Veterans Home issued a termination to the Grievant for the following reason:

On or about July 3, 2000, you were observed to have touched a fellow employee in an inappropriate manner. On July 12, 2000, you were observed touching a fellow employee in an inappropriate manner and heard directing sexual comments toward these employees. These events are violations of the Ohio Veterans Home Corrective Action Standard(s) F-04 . . . Sexual Harassment.

A timely grievance was filed that challenged the termination as being without just cause. The parties agreed that the grievance was arbitrable and two lengthy arbitration hearing days were devoted to the receipt of testimony and documents from thirteen witnesses.

ISSUE:

Whether the Grievant was terminated for just cause; not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS
AND CORRECTIVE ACTION STANDARDS

Article 2.01

The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

Corrective Action Standard F-04

Acts of discrimination, insult, intimidation or harassment on the basis of race, color, gender (including sexual harassment), sexual orientation, religion, national origin, disability, political affiliation, age, or veteran status.-- Workplace Violence Prevention Policy.

The sanction for first violation is from Written Reprimand to Removal.

OPINION:

A) Summary of Analysis

The State failed its burden of proving the offensive touching--the first charge against the Grievant. This failure was due to the State's inadequate and fundamentally unfair investigation. Despite clear indications that another eye witness was present at the events that were the basis for this charge, the State did not interview this witness. The details of her observations were set forth at the arbitration hearing.^{2/} The State

^{2/} Her short statement was included among several statements supplied by the Union at the pre-disciplinary meeting. This short statement, however, did not encapsulate her observations that were set forth in her testimony in the arbitration hearing.

also failed to identify and interview the only other possible witness to this incident.

When the testimony and statements of these additional witnesses are taken into account, the record is equivocal as to whether the offense of touching took place. Doubt of its occurrence is also based upon the equivocal behavior of the Complaining Witness during the eight days after the offensive touching was alleged to have occurred.

The second charge of sexual comments and unwanted touching of the Complaining Witness on July 12 is also not proven by the State. The eye witness to the first charge overlooked by the State was also an eye witness to the events surrounding the second charge. She was the only witness to the events of both charges, other than the Grievant and the Complaining Witness; yet, again the State failed to interview her. Again, the State could have easily identified and interviewed all possible witnesses to the July 12 event, but did not do so. Finally, the sexual comments, if made, were of the type common in the workplace known to management. The touching of the Complaining Witness occurred without any prior notice to the Grievant that this type of touching was unwanted. Indeed, the touching that did occur on July 12, 2000 was consistent with the usual prior behavior between the Grievant and the Complaining Witness.

B) The Incomplete and Unfair Investigation

1) The Incomplete Investigation

Both of the charges of sex harassment against the Grievant by the Complaining Witness centered on events that occurred during a

special time--the thirty minute overlap between the second and third shifts in Secrest 3-South. Staff from both shifts congregate together at the nurse aide desk with some chairs. Then members from each staff proceed down the three halls that proceed as spokes and enter the bedrooms of the residents to check their condition and status of alarms.

Once the dates are fixed for the occurrence of events centering on sex harassment, it is easy to determine identity of staff members from the second and third shifts who worked on those dates. For example, there was never any dispute that the second charge (sexual comments and unwanted touching) occurred when the members of the second and third shifts were assembled during the thirty minute overlap on July 12, 2000. The Union submitted the list of staff assignments and a summary of this list. The summary, admitted at the arbitration hearing without objection, shows the following members of the second and third shifts worked on July 12, 2000 during the critical thirty minute period from 11:00 p.m to 11:30 p.m.

Second Shift

Hearn
Palmer
Grievant
Shaw

Third Shift

Green
Complaining Witness

There is, therefore, a closed, small group of possible witnesses to the events surrounding the second charge of sex harassment on July 12, 2000. The State chose to interview and

receive statements from the Complaining Witness, her friend on the third shift, Green, and the Grievant.

When the Union received the disciplinary packet that contained only the statements from the Complaining Witness, Green and the Grievant, the Union by its chapter president interviewed Hearn, Palmer, and Shaw and all three testified at the arbitration hearing.

With respect to the first charge of sex harassment, the State did not determine the evening in which the alleged offense occurred. Indeed, a letter notifying the Grievant of his termination dated July 31, 2000 refers to the date of this first charge of sex harassment in this manner: "On or about July 3, 2000 you were observed to have touched a fellow employee in an inappropriate manner." Furthermore, the investigator for the State testified at the arbitration hearing that he reviewed who was working on the two shifts on July 5, 2000. As the arbitration hearing unfolded, it became clear that the incident, if it occurred, occurred on July 4, 2000 and the parties so stipulated at the second day of the arbitration hearing.

The date could have been determined, and, had it done so the State could have identified potential witnesses present. The State introduced the testimony at the arbitration hearing of both the Complaining Witness and a nurse aide, Tracy Kellem, and both testified to the presence of the Grievant and another nurse aide, Rhonda Palmer. Indeed, Kellem's written statement dated July 14, 2000, stated that she saw the Grievant "stick his hand up her

(Complaining Witness's) shorts . . . There also was other employees around."

The events surrounding the first charge of sex harassment, therefore, occurred in the overlap time of the two shifts when the Grievant, Complaining Witness, Kellem and Palmer were working. From the summary of staff assignments supplied at the arbitration by the Union, it was clear that the events surrounding this first charge of sex harassment occurred on July 4, 2000. With this determination, there are only five potential eye witnesses to the event surrounding this incident.

Second Shift

Palmer
Lange
Grievant

Third Shift

Kellem
Complaining Witness

Again, the State chose to interview and receive statements from the Grievant, the Complaining Witness, and her friend on the third shift, Tracy Kellem. Again, when the Union received the pre-disciplinary package with only these three statements contained, the Union interviewed Palmer and Lange. Palmer testified at the arbitration hearing; Lange did not.

2) The Missing Eye Witness

One of the most inexplicable aspects of the State's investigation in this case is the failure of the State to interview the only person who, together with the Grievant and the Complaining Witness, was an eye witness to the events surrounding both charges of sex harassment. This person, Rhonda Palmer, was a nurse aide

who worked the second shift with the Grievant on the evening of July 4 and the evening of July 12--the two evenings when the incidents in question occurred. The Complaining Witness brought forward both charges on July 14, 2000, and on the same date her two friends on the third shift, Kellem and Green, were interviewed by the State and supplied statements. Kellem's statement centered on the events that transpired on July 4; Green's statement centered on what happened on July 12.

Green's statement dated July 14, 2000 clearly identified Rhonda Palmer as a likely witness to the alleged sexual comments and unwanted touching.

As we (Complaining Witness and Green) were walking down the front hall with Rhonda Palmer (the Grievant was walking behind), the Grievant made a comment about "he liked to walk behind to watch our asses shake."

The Grievant's statement to the State was dated July 18. It also clearly identified Rhonda Palmer as involved in the events surrounding the July 12 incident.

While the Complaining Witness's statement does not refer to Rhonda Palmer as involved in either incident, Kellem's statement clearly put the State on notice that there were "other employees around" when the events concerning the offensive touching occurred on July 4, 2000. As noted above, had the State checked the work assignments for July 4, Palmer would have been identified as the likely eye witness to the events of July 4.

Palmer was not interviewed by the State. She did, however, appear as a witness at the arbitration hearing, and testified about the evenings of July 4 and 12, 2000.

3) The Unfair Investigation and
the State's Appraisal of the Merits

The incomplete and unfair investigation by the State bled into the State's appraisal of the merits and the State's decision to terminate the Grievant. The consequence of this tainted investigation is that the State had an incomplete record upon which the State based its decision to terminate the Grievant.

The Union did submit a written statement by Rhonda Palmer on a lined form of the Ohio Veterans Home. The form "is to provide the employees with the opportunity to voice an observation, opinion, or complaint." Palmer did state in the form, "I was present on July 12th when (the Grievant) was accused of saying something towards the 3rd shift staff."

The difficulty, of course, is that the form contained writing by Palmer on only twelve of the twenty-two lines. The hearing officer, therefore, did not have the advantage of listening to the expansive comments and observations of this eye witness to both incidents during direct and cross examination at the arbitration hearing.

The investigator for the State was questioned why he had not interviewed Rhonda Palmer, who was mentioned in Green's statement as walking down the hall on July 12, 2000 with Green. He was also questioned as to why he did not seek out "the others" mentioned in

Kellem's statement as being present during the July 5 incident. He explained his failure to interview Palmer and the others in this way: "No one came forward until the Union introduced more information at the pre-disciplinary hearing." It is difficult to accept this rationale because the State was put on early notice that other persons were potential eye witnesses to these events. The State, as any employer, has the duty to conduct a fair investigation prior to taking disciplinary action.

C) The Merits

1) The July 4, 2000 Incident

The record for purposes of appraising the merits in this case is the record that was made at the arbitration hearing. The State had the burden of satisfying to the arbitrator that the Grievant offensively touched the Complaining Witness.

The Complaining Witness testified that she saw a resident sitting in a chair by the nurse aide desk, and bent over to speak to him. She felt something under her shorts; she stood up and said "What the fuck." She turned and saw the Grievant with a smile on his face. The Grievant turned to the resident and said, "Wouldn't you like some of that?" The Complaining Witness concluded by stating she was devastated at what happened.

The Grievant testified that the Complaining Witness's testimony was a lie. Her charge that he put his hands up her shorts "never happened." He also denied making the comment to the resident.

There were two other eye witnesses to this transaction. Tracy Kellem, a colleague of the Complaining Witness on the third shift, collaborated the Complaining Witness's testimony. She stated she was a few feet away and saw the Grievant put his hand up under the Complaining Witness's shorts. She also stated that the Complaining Witness stood up straight, but she could not recollect if the witness said anything.

Rhonda Palmer was also present at this incident. The Complaining Witness made a drawing of the incident and there are four persons in the drawing: the Complaining Witness, the Grievant, Kellem, and Palmer. Both the Complaining Witness and Kellem testified that Palmer was a "few feet" away. Both the Complaining Witness and Palmer positioned Palmer at a chair sitting near the nurse aide desk close to the resident with whom the Complaining Witness was talking.

Palmer testified that she observed nothing that suggested anything happened between the Grievant and the Complaining Witness. She did not see the Grievant suddenly stand upright; nor did she hear the Complaining Witness say "What the fuck." The testimony of the Complaining Witness, Kellem and Palmer agree on one essential point: Palmer was approximately the same distance away from the Complaining Witness as Kellem was.

The record, therefore, is equivocal as to whether the offensive touching took place. Also weighing in the balance is the record concerning the Complaining Witness's reaction following this incident. Tracy Kellem testified that the Complaining Witness and

Kellem continued to talk with the resident after the incident had occurred. In addition, Palmer testified about her observations of the relationship between the Complaining Witness and the Grievant after this incident. Palmer did not notice the Complaining Witness avoiding the Grievant as if there had been a prior problem. Palmer also testified--without any contradiction by Kellem or the Complaining Witness--that the Complaining Witness never said anything to Palmer about this incident as Palmer sat a few feet away from the point at which the incident occurred.

It is undisputed that the Grievant did not report this matter to anyone in supervision until July 12, 2000. Kellem also testified that she did not mention the incident to anyone as well. The Complaining Witness explained that failure to report the incident was out of fear and intimidation.

The difficulty, of course, with this testimony is that Palmer observed no change in the relationship between the Grievant and the Complaining Witness in the days following July 4, 2000. The most difficult aspect, however, of the failure to report is the undisputed fact that the Grievant and the Complaining Witness worked together without any other co-employee for an entire eight hour shift from 11:00 p.m. to 7:00 a.m. on July 7, 2000--three days after the incident. The Grievant, with low seniority, was "mandated" to stay over from his second shift assignment to an additional shift in the company of the Complaining Witness. During this eight hour period they folded the personal laundry of the residents together and attended to all of the other duties of the

residents in their bedrooms during the eight hour shift. It strains credulity to find that the Complaining Witness would not mention the offensive touching when she was faced with a management decision to assign the perpetrator to her company for an eight hour shift.

2) The July 12, 2000 Incident

The record contains drawings by the Complaining Witness, Green and Palmer, as to their respective position and the position of the Grievant during the events of July 12. Palmer and the Grievant were the second shift nurse aides who had joined the Complaining Witness and Green--a third shift nurse aide--in the process of doing rounds during 11:00 to 11:30 p.m. on July 12.

Palmer and the Complaining Witness positioned Palmer, Green and the Complaining Witness as walking side by side down a main hallway with the Grievant slightly to the rear.^{3/}

Green and the Complaining Witness testified that the Grievant, while walking behind them, said he liked to walk behind them to see their asses shake. In addition, both testified that the Grievant came up alongside the Complaining Witness and put her arm around his shoulder, suggesting they do rounds together. When the Complaining Witness pulled away, he pulled tighter on the Complaining Witness. Green removed his arm from the Complaining Witness.

^{3/} Green positioned Palmer slightly ahead of Green and the Complaining Witness as they proceeded down the hallway.

Palmer testified that she could not remember the Grievant saying anything about their asses. The Grievant testified that he made the comment, "I'm watching your stroll," and that comment was directed at Palmer. Both Palmer and the Grievant further testified that the Complaining Witness did not pull away from the Grievant and that the Grievant did not forcibly hold her.

Finally, credible evidence of what transpired on July 12, 2000 is found in the testimony of a house supervisor, Diana Murawski. She stated that she heard the Grievant say, "I like to see your asses"; the Grievant draped his arm around the Complaining Witness's shoulder; she pushed away and Green removed his arm. Based upon the record as a whole on the July 12 incident, Murawski's testimony of what transpired is accepted as factually accurate.^{4/}

The record does not show that the touching on July 12 was unwanted. The Complaining Witness testified that the Grievant had never touched her prior to July 4. By contrast, several witnesses who were coworkers testified that the Grievant was outgoing and friendly, and that her typical behavior was hugging and touching. At least three witnesses testified that they had observed the Grievant and the Complaining Witnesses putting arms around each

^{4/} The Union sought to establish that Murawski was not present to observe this incident, and if she were, her testimony was racially motivated. Neither position was established in the record. Indeed, one Union witness, Eric Shaw, a nurse aide, was working on the second shift on July 12. While he testified that Murawski was not at Secrest 3-South after 9:00 a.m., he later noted on cross examination that she could have been there.

other or hugging each other. Finally, the Grievant testified that the Complaining Witness never told him not to touch her, and there was no evidence to the contrary. The record also does not show that the Grievant's reference to "asses" was considered offensive by the Complaining Witness at least based on her reaction. The record also shows that this reference to asses was a typical comment made at the workplace known to management at least through the period involved in this case.

All four persons involved in the July 12 incident--the Complaining Witness, Green, Palmer, and the Grievant--testified that immediately after the incident the Complaining Witness jumped on the back of Green. Green testified that it was the manner of a "piggy back" ride that lasted for about three or four steps. Palmer testified that it was in the manner of a sex act in that the Complaining Witness "humped" Green. Finally, all four laughed after the Complaining Witness dropped from the back of Green.

The record shows that there was a loose atmosphere at the workplace and it was not uncommon for references to be made to breasts or asses. The testimony of witnesses show that management was aware of this at least during the period of time involved in this case.

D) Conclusion

Sex harassment is a heinous, intolerable event in a workplace. The arbitrator considers it akin to oppression in that it is practiced by one with some type of power over another person, and, as such, is abhorrent.

The Union and the State are unified in their contractual agreement to prohibit sexual harassment and take action to eliminate it. The agency, Ohio Veterans Home, has made removal a possible sanction for a first violation of the agency's prohibition against sexual harassment.

Complaints of sexual harassment should be investigated fairly and completely. This was not done in this case. As a result the record that unfolded in this arbitration resulted in the inescapable finding that the State did not meet its burden of proving the factual basis for either of the charges of sex harassment.

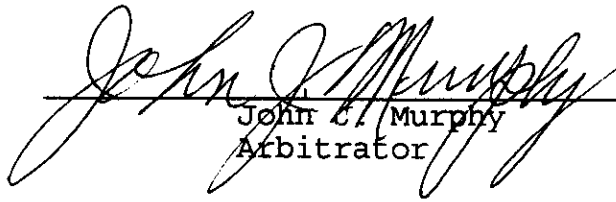
It is impossible to explain the conflict of testimony among the fellow nurse aides on the third and second shifts at the Ohio Veterans Home. Allegations of racism by the Union as an explanation were not supported in the record. There was credible evidence of conflict between the third shift (Shaw, Palmer, and the Grievant) and the second shift (Complaining Witness, Kellem, and Green). These allegations centered on a charge by the third shift that the Grievant and Shaw had left a resident unwashed. This conflict, however, does not logically explain such a momentous escalation to charges of sexual harassment.

We are left, therefore, with the record in this arbitration. The charges of sexual harassment were not proven.

AWARD:

The Grievant is to be reinstated to the position of Nurse Aide with restoration of seniority and other contract benefits since the date of his discharge. He is also to be made whole for the period of time between the date of his discharge and the date of his reinstatement.

Date: June 16, 2001



John C. Murphy
Arbitrator