

#1638

IN THE MATTER OF ARBITRATION

BETWEEN

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11
AFSCME AFL-CIO**

AND

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS

Before: Robert G. Stein, Arbitrator

**Grievant(s): Dennis Johnson
Case # 27-19-02-04-16-2874-01-04
Termination**

Advocate(s) for the UNION:

**Robert W. Steele Sr., Staff Representative
OCSEA LOCAL 11, AFSCME AFL-CIO
Westerville OH 43215**

Advocate for the EMPLOYER:

**David Burrus, DRC Labor Rel.
OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS
1050 Freeway Dr. North
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INTRODUCTION

Hearings on the above referenced matter were held on October 15, 2002 and December 3, 2002 in Marion and Columbus, Ohio, respectively. The parties agreed that the issue is properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. The parties submitted written closing arguments in lieu of verbal closing arguments. The case was closed on January 2, 2003.

ISSUE

The parties agreed to the following definition of the issue:

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

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference. See Agreement for language)

ARTICLE 24

BACKGROUND

The Grievant in this matter is Dennis Johnson, a Licensed Practical Nurse, employed by the Ohio Reformatory for Women ("ORW" "Department" "Employer"). On January 29, 2002, the Grievant was assigned the task of conducting annual TB testing on a group of employees who were attending in-service training. Annual TB testing is required of all employees who work in institutions. The Grievant performed the tests, and all but one of the sixteen (16) employees tested subsequently developed adverse reactions in the form of pain, discomfort, fever, neck stiffness, headache, and other physical symptoms uncharacteristic of this type of testing. Several of the employees were worried about their health and safety and sought consultation with their private physicians. The vial used for the injections was never found, and exactly what was injected into the sixteen (16) employees could not be verified. One tested employee was diagnosed with a thyroid problem shortly after the testing and filed a worker's compensation claim that blames his condition on the TB/PPD testing.

The Grievant believes that he used the proper serum for the testing, Tuberculin Purified Protein Derivative ("TB/PPD"). However, he admitted to not checking the expiration date on the vial, and did not record the date or the lot number of the serum. LPN Johnson also conducted the testing

improperly with at least one and possibly all the employees. He gave one employee a subcutaneous injection of the serum instead of properly injecting it into the most superficial layers of the skin. The Employer found that the Grievant failed to follow established protocol in administering the testing. The Grievant claimed that there was no such protocol in writing in January of 2002.

The Employer removed (fired) the Grievant from his position for violation of Rules:

- 8. Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment.
- 36. Actions that could harm or potentially harm the employee, fellow employee(s) or a member of the general public.

At the time of his termination, the Grievant had worked for the Department for approximately nine (9) years and had no prior discipline on his record. The Grievant filed a grievance based on his belief that the Employer did not have just cause to remove him from employment.

SUMMARY OF EMPLOYER'S POSITION

The Employer argues that the Grievant violated basic nursing practices, and that his actions in the instant matter were not a simple oversight or correctable error. The Grievant demonstrated gross neglect regarding his duties, his profession, his employer, and most of all, the health and safety of his co-workers, asserts the Employer. The Employer

rejects the Grievant's contention that he was treated in disparate fashion when compared to other employees. The Employer argues that there was no evidence presented that any other employees were involved in situations that were of a similar nature. The Employer also points out that the Grievant showed no remorse for his actions and simply explained his error by saying, "*I was having a bad day.*" The Employer also surmised that the evasive manner in which the Grievant responded to questions during the arbitration hearing indicates that there may have been other past examples of his inability to follow protocol and procedures.

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

SUMMARY OF UNION'S POSITION

The Union argues that the Employer has failed to prove its case. It is unfortunate that the fifteen (15) employees had reactions to the TB testing; however, the Employer did not prove that the Grievant caused them, contends the Union. Randy Brook's investigation and testimony demonstrated that the Grievant did not know the expiration date of the TB serum he administered to the employees because the used vial could not be found, argues the Union. Moreover, the Employer's investigation did not prove that the Grievant used something other than TB/PPD serum.

The Union also argues that there were no real protocols or

procedures in place prior to January 29, 2002 regarding TB testing. It contends that the Medical Department in the Institution was in disarray and that there was no supervision in place. The Union also asserts that the Employer, and not the Grievant, exacerbated this situation and caused panic among the fifteen employees who had reactions. The Grievant admits to not writing the lot numbers and expiration date of the solution he used to do the TB testing because "a lot of things were going on that day." The Union points out that the Grievant had no previous discipline in his file and that neither Rule 8 nor 36 call for removal for a first offense.

Based upon the above, the Union urges the Arbitrator to sustain the Grievance.

DISCUSSION

The victims in this situation are fifteen (15) employees who suffered physically and psychologically from their experience. What must be determined in this case is whether there is clear and convincing evidence that the Grievant violated Rules 8 and 36 on January 29, 2002, and whether removal for his actions was for just cause. The Employer's investigation placed some emphasis on the improper location of the TB injections (distance between the bend in the elbow and the site of the injection). However, during the second day of hearing (December 3, 2002), the parties stipulated to the fact that any impropriety on the part of

the Grievant in the placement of the administered injections on the arms of the sixteen employees was not part of the reason he was removed.

Given the totality of the evidence and testimony, it is reasonable to believe that what the Grievant injected into the arms of the sixteen employees may have caused abnormal reactions in fifteen of them. There is also testimony that indicates the technique used by the Grievant in injecting the TB/PPD serum may also have contributed to this situation.

The unrefuted testimony of witness, Dr. Karen Dapper, Clinical Director of Mental Health Services as ORW, substantiated the fact that the Grievant's TB injection on her arm was made too deep. It was a subcutaneous injection rather than just under the surface of the skin (between layers). Dr. Ikenna Nzeogu was interviewed about this incident, and it was his belief that the Grievant may have made subcutaneous injections to more than one staff member (See summary of Dr. Ikenna Nzeogu statement and FINDINGS, p. 9 and 11, Jx 3). While under cross-examination, Employer witness, Melissa Knauss, testified, *"a lot of different reactions can occur from administering a TB test wrong."*

The Grievant admits to not checking the expiration date and the lot number on the vial; however, he insists that what he injected into the staff members' arms was TB/PPD serum. The Grievant provided unrefuted testimony that he has administered hundreds of TB tests in his nine-year career with the Department (See testimony and Jx 3, p. 88). There was no

evidence to indicate there have been any problems resulting from these prior TB tests. The Grievant also testified during the arbitration hearing that just one week prior to the incident he administered TB tests to some ten or twelve people without incident. There was no evidence submitted by the Union to support this statement. However, his assertion was not refuted by the Employer.

What is clear in this case is that the Grievant did not record the lot number or the date of the vial of serum he used to inject the staff members on January 29, 2002. What is not known is best summarized by Major R. L. Brooks, the Employer's investigator in this case. In the findings of his investigation (p. 12, Jx 3) he states:

"As the vial in question has not been located, I have been unable to determine whether the expiration date of the vial had passed, whether the correct serum/solution was administered, whether the correct amount of solution was administered or whether the solution was tainted."

The Employer insisted that the Grievant failed to follow the protocol for recording the Lot # on top of the pages documenting the TB testing/syringes (Jx 3, p. 105). However, the Grievant, along with Union witnesses LPN Teresa Ann Smith (a 14 year employee) and RN Jerri Susan Thompson (a 17 year employee), stated they had not seen a protocol for TB testing until after the date of the incident. The Grievant testified that the forms used to record the testing on each person do not have a space for recording the Lot # or expiration date of the serum used. The

Grievant's statement is supported by a review of the forms used (p. 107-126, Jx 3). Furthermore, the unrefuted testimony of LPN Smith and RN Jerri Thompson support the Union's contention that TB testing protocol was not utilized in the Medical Department of URW prior to this incident and was not even seen by these medical professionals until after January of 2002. The testimony of LPN Smith and RN Thompson, two experienced (14 years and 17 years respectively) nursing professionals who have performed numerous TB tests, persuasively undermined the Employer's contention that the Grievant should have recorded the lot numbers of the vial he used for the TB testing. They testified that they also did not follow this practice.

Union witnesses also provided unrefuted testimony regarding problems with communication and a lack of written procedures and protocols in the URW Medical Department (See Smith and Thompson testimony). The evidence and testimony also uncovered some problems with the storage and care of medications (p. 3, Jx 3). Some medications found during the investigation were out of date and syringes were out of place. It is also noted that the tracking of medication by medical staff was difficult because at that time they were not required to sign a receipt for medications (p. 9, Jx 3).

The Grievant claims he used one vial of TB/PPD serum on January 29, 2002. Some of the employees who were tested said they saw two

vials, and others stated they saw one or did not recall how many were present (e.g. Major R. L. Brooks, and Lt. V. Canode). The evidence and testimony regarding the number of vials used by the Grievant on January 29, 2002 are inconclusive.

According to Melissa Knauss, of the Ohio Board of Nursing, the five rights that need to be answered by a nurse who is administering drugs are:

1. The right drug
2. The right patient
3. The right time
4. The right route
5. The right dose

The Employer argues that, given the reaction of the employees, the Grievant did not make sure he was administering the right drug on January 29, 2002. However, the Grievant stated, "*...there was no doubt in my mind*" that he used the right serum (p. 88, Jx 3). The vial was never found. However, as previously stated, there was some laxness in the procedures and protocols regarding the maintenance and storage of medications. The Employer did not prove that the Grievant used the wrong drug.

However, what the Grievant admitted to was his own error in not checking the expiration date of the TB/PPD serum. What is not known from the evidence is whether using expired serum could have been the

cause of the reactions of the fifteen employees. It is logical to speculate that contaminated serum may have caused such reactions. However, it is not clear how out of date serum would affect people, if at all (See statement summary of Thomas Barthlow, Contract Pharmacist, p. 9, Jx 3).

What is clear, however, is that the use of out of date serum may jeopardize the accuracy of the tests results. Using current TB serum and administering it correctly was the responsibility of the Grievant. In at least one case, that of Dr. Karen Dapper, the Grievant gave a subcutaneous injection, which is not proper. In the opinion of Dr. Nzeogu, the Grievant may have given subcutaneous injections to all the staff members. While it would have been helpful of Dr. Dapper to provide the Grievant with feedback about his error, it does not relieve the Grievant of his responsibilities in proper administration of the testing. He has performed hundreds of these tests and should know the proper technique.

I find the Union's argument regarding disparate treatment to be partially persuasive. The medication errors testified to by Union witness RN Thompson and LPN Smith regarding the administration of the wrong medication to inmates is somewhat analogous to the instant matter, except in magnitude. In their examples of medication errors, the inmates involved suffered no adverse reactions and only a few inmates could have been affected. In the instant matter, fifteen employees suffered from stiffness, burning, swelling, itching, pain, fatigue, body aches, and

headaches for a few days after the TB testing. In one case, an employee traced his thyroid problems to the time immediately following his testing. However, during the hearing Sgt. Thompson stated that he has not received any information that his thyroid problems are related to the TB testing performed by the Grievant on January 29, 2002. His worker's compensation claim was also denied by the Industrial Commission.

What happened on January 29, 2002 was a matter of the utmost seriousness. Fortunately, to date none of the employees have suffered any known lasting physical effects from what they were injected or the method used by the Grievant. However, it is clear from the testimony that some of the employees are still angry and fearful about their own health.

The Employer has the burden in this case to establish the fact that the Grievant's actions were the proximate cause of the suffering the employees who were tested had to endure. While this may have been the case, it is not the only plausible explanation. What the Employer did not prove is that the Grievant injected the employees with a substance other than TB/PPD serum. If it were TB/PPD serum, it is not known whether the serum was out of date or contaminated or whether the amount administered was the correct dosage. There is reason to believe that the Grievant injected the employees too deeply, but it is also not known whether such an error would cause the commonly experienced adverse reactions that the employees suffered. Finally, as previously stated, it is a

matter of record that medication errors that entailed injecting inmates with the wrong solution have been made by other medical professionals in the past and they have not been terminated for such offenses.

Unfortunately, medication errors are a reality in healthcare services. This is why a great deal of emphasis is placed upon the reporting and documentation of such errors for purposes of providing immediate care and to prevent future problems. Although there is reason to believe that the ORW Medical Department was somewhat lax at the time of the instant matter, it does not excuse the Grievant from approaching his work responsibly.

I found the Grievant to be somewhat nonchalant during the hearing. This demeanor was most troubling. It was not indicative of a professional who recognizes the importance of his error and is eager to prevent it from occurring in the future. However, not everyone reacts to the grievance process in a predictable manner, and without documentation to the contrary, it cannot be said that the Grievant was unaffected by being fired and going through the grievance process. What is in the Grievant's favor is his discipline-free record and his nine years of service. Furthermore, there was no evidence to demonstrate that the Grievant's performance evaluations have been anything but satisfactory during the past nine years.

It appears the Grievant was negligent in his approach to his work on

January 29, 2002. However, it appears from the facts that his license renewal as a nurse was unaffected by actions in the instant matter. The Grievant must understand that he was fortunate that no employee suffered any greater harm. It is vital that in the future Mr. Johnson exercise a more precise approach to his work, or face loss of his employment. His Union representation and his record have allowed him another opportunity to resume his profession, providing he learns from his mistakes.

AWARD

The grievance is sustained in part.

The Grievant shall be reinstated to his LPN position with full seniority and one-half his back pay and benefits. The remainder of the time shall be considered a time served suspension for violation of Rules 8 and 36. The magnitude of the suspension is based upon the number of employees affected and the Grievant's demeanor during the hearing. In addition, the Grievant shall attend training or at a minimum be retrained in the protocols and techniques of TB testing with an RN, prior to being assigned this task in the future. The Employer shall determine the most appropriate course of action. If retrained by an RN, his training shall be documented in writing. In addition, the first time the Grievant performs TB testing he shall be supervised and evaluated by a qualified RN in order to make sure he performs the testing in accordance with proper procedures.

Respectfully submitted to the parties this ____ day of February, 2003.

Robert G. Stein, Arbitrator