

#1754

STATE OF OHIO, DEPARTMENT OF MENTAL
RETARDATION AND DEVELOPMENTAL DISABILITIES
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, DEPARTMENT OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES, MONTGOMERY DEVELOPMENTAL CENTER

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME

GRIEVANT: ALTHEA ASADULLAH
GRIEVANCE NO.: 24-08-030523-0893-01-04

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: MARCH 30, 2004

APPEARANCES

For the Employer

Ruth Rehak
Krista Weida
Jim McClain
Gregory D. Darling
Karen Driggs
Kendra Allen
James Sipes
Mary Wellen

Labor Relations Coordinator and Advocate
Labor Relations Specialist
Labor Relations
Interim Superintendent
Target Store Team Leader
Witness
Police Chief
Program Director

For the Union

Althea Asadullah
Latanya LaCaze
Margie Parkey
Ed Morgan
Mike Muncheon
Michael Martin

Grievant
Witness
Food Service Worker
Storekeeper I
Staff Representative
Staff Representative and Advocate

INTRODUCTION

This is a proceeding under Article 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Department of Mental Retardation and Developmental Disabilities, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period March 1, 2000 through February 28, 2003 (Joint Exhibit 1).

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. Both parties submitted briefs in accordance with guidelines agreed to at the Arbitration hearing.

STIPULATED ISSUE

Did the Employer have just cause to Remove the Grievant? If not, what shall the remedy be?

STIPULATED FACTS

1. The case is properly before the Arbitrator.
2. The Grievant's employment at Montgomery Developmental Center (MDC) began on October 1, 1990.
3. Althea Asadullah is formerly Althea Williams.
4. The change to the field trip procedure allowing \$75.00 to be spent on field trips occurred prior to Kendra Allen becoming QMRP at House 7.
5. The parties stipulate that witness, Jennifer Greene would testify identically to witness Margie Parkey; the Union would raise the same objections in terms of her presence at work on the specific dates at issue; the Union would raise the same questions as to whether the witness worked in the months between November 2002 and including February 2003.

PERTINENT 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 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 of an employee committing such abuse. Abuse cases, which are processed through the arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(1).

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. working suspension;
- D. one or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB.

E. one or more day(s) suspension(s);

F. termination

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline, which includes lost wages or fines, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fines or;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

(Joint Exhibit 1, Pgs. 64-65)

CASE HISTORY

Althea Asadullah, the Grievant, has been employed at this facility since October 1, 1990. At the time of her removal, she served as a Therapeutic Program Worker (TPW). In this capacity, one of the Grievant's duties involved escorting clients on shopping field trips; she was one of the few bargaining unit members enjoying the status of "designated shopper."

Periodically, the Grievant and other staff would take residents on shopping trips. Each center resident had approximately \$75.00 of personal funds to spend on clothing

or other personal items. The designated shopper would requisition personal funds and be responsible for these funds. Certain control processes were also in place at the time of the disputed incidents. Designated shoppers had to document completely and accurately funds requisitioned, spent and returned. Receipts for every item purchased had to be submitted upon returning from a trip, while unused funds had to be returned in an envelope.

On March 5, 2003, Karen Driggs, a Manager at a Target store located near the Center, called and advised management about a suspected pattern of fraudulent behavior perpetrated by center staff members. The center investigated these allegations with Driggs' cooperation. It was concluded the Grievant had returned previously purchased items, received cash disbursements, but never returned these funds to the Center; nor re-shopped and purchased new items with these funds.

On May 21, 2003, the Grievant was notified of her removal effective May 22, 2003. The removal order contained the following relevant particulars:

This will notify you that you are removed from the position of Therapeutic Program Worker Effective May 22, 2003

The reason for this action is that you have been guilty of Abuse:

Misappropriation/Exploitation: Failure to Follow Policy (Client Related).

In the following particulars, to wit: "You participated in the following field trips during which clothing was purchased with individuals' money and then returned to Target retail store for cash refunds: 11/05/02, \$119.94; 11/09/02, \$52.63; 01/07/03, \$138.92; 01/11/03, \$124.95; 02/01/03,

\$124.95; 02/04/03, \$117.83; and 02/25/03, \$88.74. None of this refund money was ever returned to the DOCC at the end of the field trip, and the field trip envelope indicated that all of the money in question had been spent and accounted for. You provided no receipts or documentation to show how this money was then used. No clothing purchases were ever placed in the house inventory and no clothing was turned into the Storeroom or given to a supervisor. You were in-serviced on shopping procedures. You also had knowledge of clothing secreted in suitcases and improperly stored in a hallway closet. You also failed to provide active treatment during field trips by not actively involving the clients in the shopping process when returning items.”

(Joint Exhibit 2)

On May 23, 2003, the Grievant formally protested her removal. The Grievance Form stated in pertinent part:

We hereby grieve the improper removal of the grievant.

(Joint Exhibit 11)

The parties were unable to resolve the disputed matter. Neither party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

It is the Employer's position that it had just cause to remove the Grievant. The Grievant was charged with two basic work rule violations: abuse (misappropriation and exploitation) and Failure to Follow Policy (Client Related). It should be noted the Employer did not allege the misappropriation and exploitation charge barred the Arbitrator from modifying the termination of the Grievant in this particular instance. The Grievant's disputed actions were not viewed as "an abuse of patient or another in the care or custody of the State of Ohio." As such, the prohibitions referenced in Section 24.01 is not in play.

Admissions made by the Grievant support the misappropriation/exploitation charge. She exploited residents by misusing her authority over residents during these various shopping trips. Also, she illegally misappropriated residents' funds by dishonestly appropriating funds for her own use. Seven (7) field trips were identified with \$767.96 of residents' funds unaccounted for, even though the Grievant admitted responsibility for these funds.

The Failure to Follow Policy (Client Related) charge was adequately supported. Documentation (Joint 4-8 and Employer Exhibit 6) and testimony established the Grievant received field trip training. Her actions on the dates in question evidenced a complete disregard for certain policies involving the control and distribution of residents' funds for shopping trips. The Grievant, moreover, failed to abide by an identification protocol (Employer Exhibit 9) regarding the marking of newly purchased clothing.

The Employer opined the Grievant never "re-shopped" with the refunded cash. Items were purchased with the residents' funds, these items were returned for cash, and the cash was misappropriated for the Grievant's own personal use. The Grievant's credibility was highly compromised by her varied and inconsistent explanations throughout the investigation and at the arbitration hearing.

Re-shopped for clothing was neither placed into residents' immediate use nor stored in suitcases in a storage closet. Margie Parkey's testimony was viewed as unpersuasive. She testified she observed the Grievant going on shopping trips, return from these trips and marking clothing, and then seeing residents wear the purchased items. Parkey, however, failed to enjoy direct knowledge of these disputed matters. She admitted she did not know whether she worked on the specific dates in question.

Related problems were raised regarding testimony provided by Ed Morgan, a Storekeeper and Union official. Morgan discussed certain personal inventory forms (Union Exhibits 22-30) completed on behalf of House 7's residents on or about March 2003. He then inferred that inventoried items not purchased by purchase orders were purchased during shopping field trips. Yet, Morgan's analysis failed to conjure sufficient inferences in support of the Grievant's version. The inventories (Union Exhibits 22-30) were defective in terms of timing and did not identify alternative sources of clothing; those not acquired through periodic shopping trips.

Clothing found in two suitcases in a storage closet in House 7's service hallway failed to support the Union's re-shopping theory. Residents have assigned bins and trunks for clothing storage. As such, using suitcases for storage was viewed as highly

unusual. It would be virtually impossible to inventory these items when staff is unaware of this clothing.

A statement (Joint Exhibit 8, pgs. 65-68) authored by Sheila Donnerbach, a Resident Care Supervisor (RCS), further discredited the Grievant's assertion that she typically stored clothes in these suitcases. During the week of March 3rd, she was cleaning out the closet in question and moved these suitcases, which appeared light in terms of weight. Approximately one week prior to the Grievant being placed on administrative leave, she was asked to examine the suitcases; then filled with clothes. The suitcases weighed more when compared with the March 3rd incident.

The contents in the suitcases further discredited the Grievant's alleged clothing storage practice. Karen Driggs examined the clothes found in the suitcases. She maintained only one item, a Hanes product, was purchased at Target. The other items had other sources of origin.

The Union's notice concerns were not supported by the record. Over a period of time, the Grievant was in-serviced on a number of procedures, all of which reflected a strict accountability principle when dealing with residents' money and possessions. Even if the field trip procedure had been modified, the Grievant's prior training adequately informed her that the re-shopping scheme was totally inappropriate. If any ambiguity persisted, the Grievant should have asked her supervisor for some form of clarification.

The Union's Position

The Union opined the Employer did not have just cause to remove the Grievant. Notice issues, reasons supporting the re-shopping option and testimony and evidence

regarding clothing inventories were proposed in support of this premise. Poor judgment and faulty record keeping were admitted by the Grievant. These transgressions, however, fail to properly support the imposed discipline.

Misappropriation/Exploitation charges are difficult to support in light of due process defects dealing with proper and sufficient notice. The Employer has initiated a number of field trip shopping procedures through the years. In 2001, Kendra Allen promulgated a procedure for House No. 7, where each resident going field trip shopping received \$75.00 for snacks and clothing. The policy was again revised in October 2002 (Joint Exhibits 3-7, Joint Exhibit 3-8) and in April of 2003 (Joint Exhibit 11-20, Joint Exhibit 11-21). The Grievant, however, was never provided training on the most recent policies and procedures. In 1977, she was trained for shopping trips involving purchase orders rather than cash disbursements. She received in-service training involving field trips in January of 1999.

Circumstances required the Grievant to re-shop for clothing. The Grievant asserted she had residents select snacks and items of clothing; while residents helped pay for the items selected. This participation decision, however, caused problems. Residents often selected wrong-sized clothing. Behavioral problems prevented exchanging these mistakes as they took place. Re-shopping also was necessitated by shopping mistakes identified upon returning to the facility.

These difficulties caused the Grievants re-shopping strategy. Wrong sized clothing was returned for a cash refund, other similar items would be purchased with the cash refund, and then distributed to the appropriate resident. The Grievant did not

exchange clothing because of size differences. It was easier to re-shop since plus sized clothing sometimes cost more than initially purchased junior or petite sizes.

Testimony provided by several House No. 7 staff members supported the Grievant's version of the disputed events. Jennifer Greene, a Registered Nurse, and Margie Parkey, a Food Service Worker, testified to a number of consistent observations. Both saw the Grievant return from shopping trips with items of clothing for the residents. The Grievant was also seen marking the clothes and putting them away. Parkey, moreover, maintained she observed the residents wearing some of these clothes.

Edward Morgan, a storekeeper and Union Steward, provided testimony involving clothing inventories and custody trails. He maintained only clothing items bought via purchase orders arrived at the storeroom for a custody trail. Morgan asserted items purchased with residents' funds never received a custody trail. House No. 7's Storeroom Inventory Sheets (Union Exhibits 22-33), however, clearly support the Grievant's re-shopping theory. These sheets contained clothing labeled with brand names carried by Target Stores. Morgan emphasized these items were purchased using residents' cash distributions and not purchase orders.

The imposed discipline was viewed as excessive and arbitrary. The Grievant enjoyed thirteen years of service at the time of removal. Her disciplinary record, moreover, was clean with no priors and her performance reviews for the period November 20, 1990 to December 13, 2002 (Union Exhibits 1-21) reflected above average ratings. Within this context, it appeared reasonable that some form of modified penalty needed to be awarded based on the Grievant's poor judgment.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, and an impartial review of the record and the parties' briefs, it is this Arbitrator's opinion the Employer had just cause to remove the Grievant.

The residents in this and other similarly situated facilities are for the most part highly dependent. Unable to fend for themselves, their very survival, safety, and personal growth are inextricably linked to their staff's services and sensibilities. Clearly, the Grievant's actions in this instance fall outside the scope of reasonable sensibility. The record reviewed by the Arbitrator supports, in no uncertain terms, the charges of Misappropriation/Exploitation and Failure to Follow Policy.

Certain facts admitted to by the Grievant support the removal decision. Seven shopping trips and related transactions are in dispute, with resident funds totaling \$767.96 unaccounted for in terms of returned cash or clothing purchased. On each of these occasions, the Grievant admitted responsibility for the allocated funds, and admitted returning items for cash. Upon returning to the facility, the Grievant submitted only the unaltered original receipts, and signed forms indicating that all money, except for some pocket change, had been spent. She did not, however, submit a separate receipt reflecting items returned to Target or a separate receipt for re-shopped clothing.

Driggs' analysis of the Grievant's shopping patterns, as exposed by cash register data, raised additional suspicion regarding the Grievant's version of events. At the hearing, she explained that she could virtually predict the items that were going to be returned for cash. They were generally the most expensive clothing items bought

during the shopping exercise. On several occasions, moreover, the returns took place shortly after the initial purchase.

Within this framework, the Grievant clearly exploited these residents by defrauding or stealing the residents' personal possessions. Here, the personal possessions in dispute deal with personal cash distributions allocated for shopping trips. The Grievant absconded with these funds and appropriated them dishonestly for her own use. No other plausible conclusion exists.

The Grievant admitted to returning clothing for cash without providing any objective evidence dealing with re-shopped for clothing purchases. Neither clearly identified purchased items nor any related receipts were introduced by the Union.

Evidence and testimony regarding return receipts and receipts for any re-shopped items also dramatically reduced the Grievant's credibility. Driggs testified Target provides a separate receipt for returned items. These receipts would have validated a portion of the Grievant's position, but she never submitted them to the facility. Similarly, she failed to submit any receipts related to the clothing purchased with the "return" funds she had received from Target.

Inconsistent testimony regarding receipts further tarnished the Grievant's credibility. At the hearing, she noted she kept receipts for a month and then discarded the receipts. On another occasion, the Grievant maintained she kept the receipts, but lost her "blue wallet" (Joint Exhibit 8-16). Finally, the Grievant maintained she never kept the receipts because she always brought the product back (Joint Exhibit 8-17).

Various reasons given as justifications for re-shopping were found unpersuasive. The Grievant blamed behavioral problems by a resident names Teressa, causing re-

shopping requirements. Neither Teresa's nor any other participant's progress notes (Employer Exhibit 1) for the dates in question evidenced any behavioral episodes. Mary Wellen, the Program Manager, testified any behavioral problems arising during a shopping trip should have been documented. Driggs asserted the Grievant's re-shopping practice was atypical. Most customers exchanging a purchased item for another similar item, normally exchanged an item or received a due bill. Few customers returned items for cash, and then, after a brief period of time, returned to Target and re-shopped.

Clothing found in a suitcase located in a storage closet is not viewed by the Arbitrator as re-shopped clothing purchased by the Grievant. Several witnesses remarked residents' clothing was never stored in suitcases. Normally, clothing is stored in bins or trunks. It is equally unlikely to infer these items were readily available for use if stored in a service hallway closet. Also, the clothing did not appear to be newly purchased at the Target store. Driggs' testimony regarding this particular aspect of the case was viewed as highly convincing and credible. She noted the clothing appeared to be either previously worn or purchased at second hand stores. A high percentage of the clothing had labels cut or lined through with a marker. Second hand stores typically follow these practices. New clothes, moreover, have a certain sizing and smooth labels. These suitcase items, however, did not possess these characteristics. Thus, they are not viewed by the Arbitrator as newly purchased by the Grievant.

Much was made of testimony provided by Morgan as he reviewed House No. 7's personal inventory forms completed in March of 2003. He concluded inventoried items not purchased by the purchase order process, had to have been purchased on

shopping field trips. Morgan, however, failed to provide specific testimony, which linked these items with critical aspects of the charges in question.

The charges deal with a particular period of time, involving seven specific incidents. These annual inventories include time periods subsequent to the date of the Grievant's removal, and prior to the initial incident in dispute. Morgan was unable to identify which of the clothes were purchased on any of the disputed dates. This link is critical since clients receive clothing from family members, and are not limited to clothing purchased by purchase order or shopping field trip procedures.

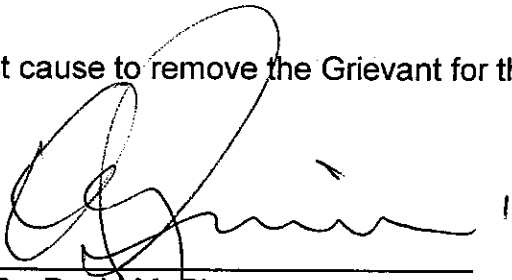
In the Arbitrator's opinion, the record does not support the Union's due process argument regarding notice and in-service training. The Grievant's re-shopping practice is not central to this particular argument. If she had re-shopped and provided the documentation in terms of available receipts and/or the critical items purchased, the Employer would have been hard pressed to support a removal decision. Certain common themes run through any of the training protocols: separation of resident funds, staff responsibility for resident funds, strict accountability for all expenditures and retaining and submitting receipts for all transactions (Employer Exhibits 5, 6, 8 and 10). The Grievant complied and understood all of the requirements except for getting receipts for all transactions. As such, the Arbitrator is convinced the Grievant was properly notified regarding shopping protocols.

The misappropriation/exploitation charge, itself, supports the removal decision. Clearly, the procedures violated in the process amount to Failure to Follow Policy. These matters were discussed in prior portions of this Opinion and Award and do not have to be revisited.

AWARD

The grievance is denied. The Employer had just cause to remove the Grievant for the charges specified in the removal order.

March 30, 2004
Moreland Hills, OH 44022



Dr. David M. Pincus