#1924

ARBITRATION DECISION

March 12, 2007

In the Matter of:

State of Ohio, Department of Mental Health	)	
and	)	Case No.23-06-20060605-0013-01-04 Rex Donnelly, Grievant
Ohio Civil Service Employees Association, AFSCME Local 11	)	

APPEARANCES

For the State:

Brian D. Walton, Advocate
Jessie R. Keyes, Office of Collective Bargaining
Thomas Mickley, Labor Relations Officer
Kathleen Bowers, Therapeutic Program Worker
Joy McFadden, Nursing Supervisor
Darlene Pittman, Team Leader
Steven Agyerman, Witness
Felix Yeboah, Witness

For the Union:

Jerry Buty, Staff Representative
David Long, Research Analyst
Rex Donnelly, Grievant

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Rex Donnelly, was a Therapeutic Program Worker at the Columbus Campus of Twin Valley Behavioral Healthcare for approximately four years. At TVBH, he worked in Home Based Services of the Community Support Network where he provided services for clients in their homes or in group homes. CSN competes with private providers for funding from county mental health boards.

The events leading to the grievant's discharge occurred on the third shift on May 2-3, 2006. When the grievant reported to the CSN office at 3595 Sullivan Avenue at 11:00 p.m, he learned that he was assigned to work at Redmond House, a group home operated by Southeast, Incorporated, a private contractor, where he was to monitor V, a client of CSN.

The grievant called Kathleen Bowers, the TPW who worked with V on the second shift, on her cell phone to ask about events during the second shift. Bowers testified that she tried to tell the grievant that V had been found with two knives and two Tylenol tablets but he was in "complaint mode" over his assignment to V. The grievant denied that Bowers told him anything about contraband during the telephone call but acknowledged that she did mention the Tylenol when he later saw her in the parking lot at Sullivan Avenue.

The grievant arrived at Redmond House sometime after midnight. When he arrived, Felix Yeboah, a Residential Specialist who had been employed by Southeast, Incorporated for seven years, told him that V had been found with knives and Tylenol 3. Yeboah testified that he suggested to the grievant that he should sit where he could see

the stairs so he would know if V came downstairs from his bedroom. The grievant denied ever speaking to Yeboah about where he should sit.

At 12:40 a.m., the grievant called Joy McFadden, the on-call supervisor at CSN. He testified that when he told her about the knives and the Tylenol, she asked why he was waking her up because the contraband had been found and reported at 4:00 p.m. that afternoon. McFadden stated that she told the grievant that it was his job to keep V safe and out of trouble. She stated that she asked the grievant if he understood and hung up.

The grievant thought he had been cut off so he called McFadden back. She claims that she again told the grievant that it was his job to keep V safe and out of trouble. The grievant denies that she gave him any instructions regarding V during either telephone call.

At 12:55 a.m., Caryl Schull, the Director of Redmond House, called McFadden. McFadden testified that Schull told her that Yeboah had called her and complained that the grievant was on the couch in the Red Room watching TV and that he could not see the stairs from where he has located.

McFadden responded by calling the grievant. She testified that she told the grievant that he should station himself where he could see the stairs. McFadden stated that when the grievant said that he was going to contact the union, she said that, if he liked, he could see her at 8:00 a.m. at CSN. The grievant claims that McFadden stated that she would "handle" him in the morning.

On May 8, 2006, the grievant received a Corrective Action Report from McFadden. She charged that he was "rude, disrespectful and argumentative;" that he was "inattentive" to V; and the he "demonstrated in a threatening manner." The grievant

denied the allegations and reported that he had filed a grievance against McFadden a few days earlier.

A pre-disciplinary hearing was held on May 25, 2006. The grievant was charged with Failure of Good Behavior for the "use of abusive and insulting language - being disrespectful; and threatening, intimidating others while on duty" and Neglect of Duty by "sleeping on duty; inattention to duty; and failure to perform the duties of the position or performance at substandard levels." On the same day, James Ignelzi, the Chief Executive Officer of TVBH who was serving as the hearing officer, found both charges justified and recommended the grievant's removal.

The grievant was removed on May 27, 2006, by Michael Hogan, the Director of the Department of Mental Health. He responded by filing a grievance denying the charges against him and claiming that his removal violated Article 2, Sections 2.01, 2.02, and 2.03; Article 13, Section 13.10; Article 24, Sections 24.01, 24.02, 24.03, 24.05, and 24.06; and Article 25, Sections 25.01 and.25.04, of the collective bargaining agreement. The grievant asked to be reinstated with back pay and benefits and that disciplinary action be taken against McFadden and Ed Desmond for "supervisory intimidation tactics."

When the grievance was denied at step three on July 28, 2006, it was appealed to arbitration. The arbitration hearing was held on January 26, 2007, and written closing statements were received on February 10, 2007.

ISSUE

The issue as agreed to by the parties is:

Was the Grievant, Rex Donnelly, removed for just cause? If not, what shall the remedy be?

RELEVANT 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.

* * *

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 time 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.

* * *

24.05 - Imposition of Discipline

* * *

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

STATE POSITION

The state argues that there is just cause for the grievant's removal. It points out that McFadden testified that the grievant was rude, disrespectful, and argumentative in the three telephone conversations she had with him. The state indicates that she explained to the grievant that it was his job to monitor V and to make sure that he was safe and stayed out of trouble by stationing himself where he could keep track of his movements.

The state contends that the testimony of Agyerman, a Residential Specialist, and Yeboah supported McFadden's testimony. It reports that they overheard parts of the grievant's telephone conversation with her and described the grievant as loud and disrespectful. The state observes that they also stated that the grievant spent almost the entire shift in the Red Room sleeping or watching television. It adds that when Yeboah asked the grievant to move to a place where he could see the stairs, the grievant rudely refused to do so.

The state maintains that the grievant's behavior was contrary to his responsibilities. It indicates that Darlene Pittman, the Team Leader for the Home Based Program, testified that she discussed the assignment at Redmond House at a staff meeting. The state claims that she told the grievant on the telephone that he should treat the assignment like a one-on-one.

The state charges that the issue raised by the union regarding the reporting of contraband is nothing more than a "smoke-screen." It points out that the grievant was not charged with failing to properly report the contraband. The state further notes that it

never alleged that the grievant did anything wrong by contacting McFadden to report the contraband.

The state rejects the union's claim that the grievant's behavior during the telephone conversations with McFadden was not inappropriate. It indicates that the McFadden's testimony that the grievant was rude, disrespectful, and argumentative is true. The state maintains that it is corroborated by the testimony of Agyerman and Yeboah, who stated that they heard him say that his assignment was "stupid;" that he was not a one-to-one;" and that "heads would roll in the morning."

The state challenges the grievant's testimony that McFadden was less than courteous when he called her. It claims that the grievant "has a documented history of arguing with supervisors, failing to accept supervision, and questioning authority." (State Written Closing Statement, page 6) The state further suggests that it is reasonable to presume that the grievant was frustrated when he called McFadden because he was upset by his assignment to Redmond House.

The state rejects the union's claim that the grievant's telephone conversation with McFadden could not have been overhead by Agyerman and Yeboah. It points out that the grievant had no idea where they were when he made the calls to McFadden. The state notes that the proximity of the Meeting Room and the kitchen to the Red Room made it quite possible for them to hear him.

The state discounts the union's argument that the grievant's completion of his CSN Service Log is sufficient evidence to establish that he performed his duties. It questions whether the grievant made four trips upstairs each hour for seven hours because Agyerman and Yeboah testified that they did not see him leave the Red Room more than

once or twice. The state characterizes the grievant's testimony that he took an indirect route to V's bedroom so he would not disturb Yeboah as "transparently self-serving." It further claims that this would not explain why Agyerman would not have seen him.

The state contends that even if the grievant checked on V as he claimed, there was a significant amount of time for which he cannot account. It maintains that since checking on V took at most five minutes, the process would account for only 20 minutes of each hour. The state claims that this leaves 4 ½ hours, which the grievant spent watching TV or sleeping. It charges that "the tax payers and the Franklin County Board would not be pleased to hear that their dollars went to pay the Grievant for a shift of television and napping." (State Written Closing Statement, page 7)

The state discounts the union's argument that the grievant only had to check on V periodically. It acknowledges that the grievant's assignment was not "technically" a one-on-one assignment but insists that it was an unusual situation. The state observes that V came to TVBH through the criminal court system; that he had a history of assaulting staff and other clients; that he would eat restricted items; and that he would look for opportunities to run away. It indicates that Southeast, Incorporated contacted TVBH for assistance and TVBH responded so V would not lose his housing.

The state maintains that the grievant knew that he should treat his assignment like a one-on-one assignment. It claims that if the grievant was confused about Pittman's instructions, he could have asked for clarification. The state notes that Bowers testified that when she was assigned to V, she kept him in sight and that while he was in bed, she stationed herself where she could see the stairs to the second floor. It reports that Agyerman and Yeboah stated that other TVBH employees did the same thing.

The state argues that even if the grievant was confused regarding his responsibilities at the start of his shift, he was instructed by McFadden. It points out that she told him to position himself where he could see the exits and the stairs. The state complains that rather than comply with her instructions, the grievant told her that it was not a one-on-one assignment and threatened to take the matter to the union.

The state claims that the grievant's testimony was less credible than the testimony of its witnesses. It indicates that Agyerman and Yeboah were not even employed by the Department of Mental Health; that they came on their own time to testify; and that they had no prior problems with the grievant. The state observes that McFadden had very little interaction with the grievant except when she was the on-call supervisor and that in that capacity, she had no problems with the grievant. It stresses that in contrast to its witnesses, the grievant had everything to gain by giving a less than accurate account of the events.

The state contends that the grievant's behavior fits the charge of Failure of Good Behavior. It claims that the grievant was "disrespectful toward a supervisor, ... engaged in heated arguments, and ... failed to accept supervision." (State Written Closing Statement, page 10) The state adds that given the grievant's disciplinary record, he would be facing removal for this offense alone.

The state charges that the grievant was also guilty of Neglect of Duty. It states that instead of monitoring V, the grievant watched TV or slept while V went in and out of the building. The state insists that "there was absolutely no way the Grievant could have adequately monitored the client by making only periodic checks." (State Written Closing Statement, page 11)

The state cites State of Ohio, Department of Mental Retardation and Developmental Disabilities, Columbus Developmental Center and Ohio Civil Service Employees Association, AFSCME Local 11; Case No. 24-06-0311118-0794-01-04; December 1, 2004. It states that in that case the grievant had a significant history of discipline, including two suspensions, when she initiated a hostile verbal confrontation with co-workers. The state notes that in upholding the grievant's removal, this Arbitrator stated, the department "does not have to continue to employ a person who repeatedly violates the standards of employee conduct." (State Written Closing Statement, page 12)

The state concludes that the grievant's discipline was progressive, commensurate, and for just cause. It asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that there was not just cause to remove the grievant. It contends that the state failed to meet its burden of proving that the grievant was guilty of Failure of Good Behavior or Neglect of Duty. It maintains that the evidence establishes that the grievant had every reason to call his supervisor and that by doing so he followed exactly the worker characteristics outlined in his position description. The union further claims that the grievant's Service Log and the testimony of Bowers, McFadden, and Pittman prove that the grievant checked on V every 15 minutes except during his lunch break.

The union states that the grievant's behavior must be placed in the proper context. It points out that there were three telephone conversations between the grievant and McFadden after 12 midnight on May 2, 2006. The union notes that the first call woke McFadden from a "deep sleep." The union characterizes McFadden's response as "less-than-receptive."

The union maintains that the grievant properly called McFadden. It acknowledges that the grievant knew that V had been found with pills but insists that he knew nothing about the knives before he arrived at Redmond House. The union states that the grievant would have had no reason to call McFadden if he knew that she already knew about the contraband.

The union claims that the grievant was frustrated by the lack of reliable information. It indicates that when the grievant entered Redmond House, he knew about some contraband but he did not know what it was, how V got it, or if the supply had been cut off. The union stresses that the first information the grievant got about the contraband was from the Redmond House nurse and that there was no documentation about the incident for the grievant to review.

The union complains that there is no written procedure for dealing with contraband. It observes that between the first and second shifts there is a formal meeting, attended by supervisors, to communicate information about clients but there is only an informal meeting between the second and third shifts. The union adds that in the case of the meetings between the second and third shifts, "these conversations apparently can take the form of passing in the hall or in the case of [the grievant] and Ms. Bowers on May 2, 2006, passing in the parking lot." (Union Written Closing Statement, page 2)

The union maintains that it is no wonder that the grievant was frustrated. It states that there was a life threatening situation but he did not find out about it from TVBH staff but from the Redmond House staff, who are deemed unreliable by Bowers. The union claims that "given all the circumstances together, including Twin Valley's inept

procedural protocols, [the grievant's] reaction was foreseeable." (Union Written Closing Statement, pages 2-3)

The union suggests that the entire incident could have been avoided. It claims that a written report detailing the circumstances surrounding the discovery of the contraband and indicting that the on-call supervisor had been notified should have been available to the grievant. The union asserts that if such documentation had been available, none of the events giving rise to the grievance would have occurred.

The union questions the testimony of Agyerman and Yeboah regarding the grievant's alleged Failure of Good Behavior. It points out that although the grievant had three conversations with McFadden, they heard only the last call. The union indicates that the testimony of Agyerman and Yeboah should be given "very little credibility" because they heard only one-half of the conversation. It further questions their testimony because they waited more than ten days to make statements.

The union stresses that Agyerman and Yeboah offered their "opinion" that the grievant's "demeanor was inappropriate." It reports that both of them acknowledged on cross-examination that their opinions were based in part on their own country's customs, including the fact that the conversation took place in front of "strangers." The union states that "upon further examination, 'strangers' did not mean the same to these witnesses as it did to [the union], therefore raising the issue that their 'opinion' was processed through something akin to a cultural filter." (Union Written Closing Statement, page 3)

The union argues that the grievant was not guilty of Neglect of Duty. It indicates that while the witnesses agree that the grievant was to "monitor" V, they did not agree on

what that meant. The union points out that McFadden and Pittman agreed that it would not include watching V while he was sleeping because doing so would be too disruptive. It claims that they also agreed that "the CSN Service Log filled out by [the grievant] for that shift showed that [the grievant] had checked on the client 4 times per hour and that that was adequate monitoring." (Union Written Closing Statement, page 4)

The union contends that the grievant complied with the instructions he was given. It points out that he kept V "safe and out of trouble" during his shift. The union discounts Yeboah's complaint about V "being up and downstairs smoking" because it is not against Redmond House rules. It further notes that the grievant monitored V while he watched TV and was with him when he was on the porch smoking.

The union maintains that the grievant followed the same procedure on May 2-3, 2006, as in the past. It asserts that, as on other occasions, the grievant and Agyerman and Yeboah each selected a downstairs location where they could observe clients as unobtrusively as possible. The union claims that there was no conclusive evidence that the grievant was assigned to watch V on a one-to-one basis, which would have required him to follow him around.

The union denies that the grievant slept at any time during his shift. It acknowledges that McFadden got a call form Schull at 12:55 a.m. indicating that Yeboah had complained that the grievant was sleeping. The union claims, however, that a detailed chart of the 12:00 midnight to 1:00 a.m. hour, prepared by the grievant, showed that the grievant had a conversation with Carrie Barnes, the nurse at Redmond House; engaged in three conversations with McFadden; and made four checks on V, which

would have left no time for him to sleep. It insists that Yeboah was "mistaken or possibly misunderstood what he was seeing." (Union Written Closing Statement, page 5)

The union maintains that it was impossible for the grievant to have slept at 4:50 a.m., after his break, as alleged by Yeboah. It points out that the grievant's Service Log indicates that he took his break from 2:00 a.m. to 3:00 a.m. so that it is unclear what break Yeboah had in mind. The union adds that the log indicates that the grievant checked on V at 4:50 a.m. It asserts that "it is very tough to walk in from the porch and sleep on the couch in the Red Room at the same time." (Ibid.)

The union concludes that the state did not meet its burden of proving just cause for the grievant's removal. It asks the Arbitrator to reinstate the grievant with full back pay and benefits.

ANALYSIS

The grievant was removed for Failure of Good Behavior and Neglect of Duty. The charge of Failure of Good Behavior is based on McFadden's testimony that the grievant was rude, disrespectful, and argumentative in three telephone conversations he had with her on May 3, 2006. It is also supported by the testimony offered by Agyerman and Yeboah that the grievant was loud and disrespectful in speaking to McFadden.

The testimony provided by McFadden is entitled to substantial weight. The record indicates that she had no reason to be untruthful. McFadden testified that she had only dealt with the grievant when she was the on-call supervisor and that when she had served in that capacity, she had no problems with him. The grievant did not suggest any reason why McFadden would have fabricated the charges against him.

While the testimony provided by Agyerman and Yeboah may be entitled to less weight, it has some probative value. They appear to have been surprised by the way the grievant addressed his supervisor and, even allowing for cultural differences alluded to by the union, their testimony suggests that the greivant's conduct was not proper. As with McFadden, it is important to note that there is no reason to believe that Agyerman and Yeboah were not entirely honest in reporting what they heard.

The allegations against the grievant appear to be consistent with his past behavior. On January 30, 2004, he received a verbal warning for Failure of Good Behavior for "persistent questioning outside the expected chain of command." The grievant received a five-day working suspension on December 17, 2004, for another Failure of Good Behavior for being disrespectful when he "challenged [his] supervisor regarding a direction [he was] given in an argumentive and disrespectful manner."

The union's claim that McFadden was "less than receptive" to the grievant when he called at 12:40 a.m. must be rejected. While it is not unreasonable to suspect that she may have been unhappy about being called at that hour, the union could offer no evidence in support of the grievant's testimony. Given the grievant's obvious interest in protecting his job by presenting his behavior in the best possible light, his version of the three telephone conversations must be considered less credible than McFadden's account of the conversations.

The Arbitrator appreciates the union's argument concerning the lack of formal meetings between second and third shifts employees where members of the second shift can brief members of the third shift about developments during the preceding shift. Certainly the union is correct that relying on an informal exchange of information may

lead to problems. While it is possible that a formal meeting where Bowers fully briefed the grievant about the contraband found on V might have avoided some of the subsequent problems, it does not excuse the grievant's treatment of McFadden or his subsequent failure to do his job.

The Arbitrator recognizes that the grievant may have felt frustrated by the events of May 2-3, 2006. The record indicates that he came to work and found out that he was assigned to monitor V at Redmond House, which he apparently believed was a waste of time. When the grievant arrived at Redmond House and learned that V had been found with two knives, he was justifiably upset that he had not been informed prior to that time and by the fact that there was no documentation of the incident available to him. The grievant's frustration, however, does not excuse his rude, disrespectful, and argumentative conduct. This is especially the case since he was put on notice by his verbal reprimand and five-day working suspension that such behavior would not be tolerated.

The second charge against the grievant is Neglect of Duty. The state alleges that the grievant failed to properly monitor V. More specifically, it claims that the grievant should have treated V as a one-on-one assignment; that he failed to follow McFadden's direction to station himself where he could see V if he came downstairs; that he did not check on V four times each hour as he recorded on his Service Log; and that he slept while on duty. The grievant denies each of these allegations.

While the Arbitrator recognizes that V was not designated as a one-on-one, he believes that the grievant knew, or should have known, that V was supposed to be treated like a one-on-one. Pittman testified that she had informed employees in a staff meeting

that V should be treated as a one-on-one and that she told the grievant personally the same thing in a telephone discussion. Very significantly, Bowers testified that she knew from staff meetings and an email that she was to treat V as a one-on-one. She stated that when she was assigned to V, she "shadowed" him, i.e., followed him wherever he went, and that when V was in bed, she stationed herself where she could see the stairs to the second floor.

Even if the Arbitrator were to conclude that V did not have to be treated as a one-on-one, he would still have to conclude that the grievant failed to perform his duties as directed by McFadden. She testified that she told the grievant to sit where he could see the stairs so he would be able to see V if he came downstairs during the night. The testimony of Agyerman and Yeboah indicates that the grievant stayed in the Red Room where he would be unable to see V if he came downstairs. They further stated that V came downstairs three or four times during the night but the grievant only saw him on one occasion. The grievant's testimony that McFadden never told him about sitting in sight of the stairs cannot be accepted. While no problems resulted from the grievant's failure to follow McFadden's directions, there could have been unfortunate consequences given V's tendency to wander away.

The Arbitrator believes that the record also supports the state's charge that the grievant slept while he was on duty. This conclusion is based on the testimony of Agyerman and Yeboah, who as noted above, had no reason to be untruthful. The union's suggestion that there was not enough time for the grievant to have slept or that Agyerman and Yeboah were mistaken or misunderstood what they saw is unpersuasive.

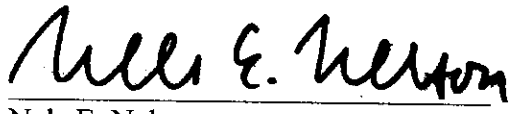
The state also charged that the grievant failed to check on V four times each hour as was indicated in his Service Log. While the testimony of Agyerman and Yeboah that they saw the grievant leave the Red Room only a few times suggests that the grievant did not check on the grievant as often as he indicated in his log, they acknowledged that they might not have seen him. Thus, there is no proof that the grievant falsified his log.

The remaining issue is the proper remedy. It is undisputed that the grievant received a verbal warning and served two five-day working suspensions and that the prior disciplinary actions are related to the charges against the grievant in the instant case. As indicated above, the grievant's verbal reprimand and his five-day working suspension on December 17, 2004, were for Failure of Good Behavior and, more specifically, related to disrespect for and arguing with supervisors. His five-day working suspension on April 20, 2004, was for Patient Abuse or Neglect when the grievant "unnecessarily awakened [clients] in the middle of the night for questioning and a room search based upon [his] erroneous allegation of theft." At that time, the grievant received a last chance notice that any subsequent offense would result in his removal. While the state chose not to remove the grievant for his Failure of Good Behavior on December 17, 2004, it does not change the fact that the grievant was on notice that his job was in jeopardy.

The grievant's record gives the Arbitrator no alternative but to uphold his removal. He was disrespectful, rude, and argumentative in his three telephone conversations with McFadden and then he failed to properly monitor V. These offenses come on top of a verbal warning and two five-day working suspensions for similar offenses in only four years of employment.

AWARD

The grievance is denied.



Nels E. Nelson
Arbitrator

March 12, 2007
Russell Township
Geauga County, Ohio