

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 24-09-20080619-0036-01-04

The Ohio Civil Service Employees
Association, AFSCME Local 11

GRIEVANT: Robyn Dennis

AND

State of Ohio Department
of Mental Retardation and Disabilities

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: June 29, 2009

APPEARANCES FOR THE PARTIES

Management: Laura Frazier, Labor Relations Officer
Management Advocate
Jessie Keyes, Office of Collective Bargaining

UNION: Robbie Robinson, Ohio Civil Services Employees
Association, AFSCME Local 11,
Union Advocate
Tammy Troy, Chief Steward

PROCEDURAL HISTORY

Mount Vernon Developmental Center (MVDC) is hereinafter referred to as "Management". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Robyn Dennis is hereinafter referred to as "Grievant".

Grievance No. 24-09-20080619-0036-01-04 was submitted by the Union to Management in writing on June 19, 2008 pursuant to Article 25 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2006-2009 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Management, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on May 15, 2009 at the Mount Vernon Developmental Center. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing. The hearing was closed on May 15, 2009.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator.

The parties did stipulate to the issue as follows: Was the Grievant, Robyn Dennis, removed for Just Cause? If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE 2006-2009 AGREEMENT

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.

24.06 - Imposition of Discipline

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

STATEMENT OF FACTS

Grievant was a Therapeutic Program Worker at the Mount Vernon Developmental Center, a facility of the Ohio Department of Mental Retardation and Developmental Disabilities that provides for the care of and assistance to persons with mental retardation and other developmental disabilities. She was hired on November 28, 2005. Grievant had approximately two years and six months of service at the time of her removal on June 4, 2008. She had no active discipline in her record. According to her performance review for the November 2006-January 2007 period, she met her employer's expectations in all dimensions. Her performance review for the March 2007-March 2008 period indicated that she met her employer's expectations except for adherence to policy. The performance summary for overall rating states that Grievant "is doing a good job with her direct care duties, and she gets along well with co-workers, individual and management."

Grievant was terminated from her position due to a charge of Neglect arising from the following circumstances:

On May 14, 2008 Grievant worked on Rian 3 providing direct care services to the patients.

On May 14, 2008 at 5:00a.m. Connie Workman, a therapeutic program coworker working the same shift as Grievant, performed a bed check of two assigned patients, and journalized said information onto the patient log.

On May 14, 2008 after 5:00a.m but before 5:15a.m, one patient under the supervision of Connie Workman became ill. Connie Workman cleaned the patient and her immediate surroundings. She then checked her watch in order to note the time of 5:15a.m for the sleep chart. Ms. Workman then returned to her chair, and saw Grievant. Ms. Workman then asked Grievant to relieve her of her duties while she went to the restroom. Grievant

assumed responsibility for two residents under heightened supervision levels while Ms. Workman used the restroom. Prior to leaving her station, Sue Lindsay was not present on the floor.

On May 14, 2008, at 5:10 a.m. Ms. Lindsay parked her vehicle in front of the entrance to Rian 3. She entered the building, and went to the staff desk and reviewed the staff duty sheet. Ms. Lindsay observed Grievant seated in a chair, leaning to her right shoulder with her head down, at a nearly ninety-degree angle. Ms. Lindsay did not see any other workers on the floor. Ms. Lindsay walked down the hallway toward Grievant. She observed her posture. Grievant was slouched over, her arms were tucked into her clothes, and her eyes were closed. Ms. Lindsay called Grievant by her name three times, and Grievant did not respond. She entered into the patients' room to check the patients. She exited the room and then took a picture of Grievant that depicts Grievant sleeping. She placed a call to the supervisor on charge to discuss the incident.

Connie Workman exited the restroom and walked down the hall. She observed the posture of Grievant. She clapped her hands "to get raise out of her;" Grievant appeared to be asleep. Grievant raised her head, and opened her eyes, and then closed them again. Ms. Workman then went to wash her hands, and afterwards, continued to walk down the hall. She walked around Grievant who did not move or respond to her presence and entered the patients' room.

On May 14, 2008 at 5:27p.m Sue Lindsay received the returned call from the supervisor. While on the phone, Connie Workman entered the room. During the course of this conversation Grievant awakens, and resumed her duties.

The Union filed its grievance on June 19, 2008 alleging a violation of Article 24.01, and any other articles that may apply. The grievance was not

resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

POSITIONS OF THE PARTIES

MANAGEMENT

Management contends that Grievant assumed responsibility for two residents under close supervision while her co-worker used the restroom. Grievant fell asleep, and thus failed to provide the required supervision level to the residents. By sleeping on duty, Grievant disregarded her duties in failing to provide the two patients with the heightened supervision necessary to maintain the health and safety of the patients. Said failure to provide supervision constitutes patient neglect. The Center's policy authorizes management to remove an employee found to have engaged in patient neglect on the first offense.

Management contends that the heightened supervisory level due to the medical conditions of the patients outweighs the mitigating factors of lack of sleep due to the lack of child care, pregnancy, and medication that causes drowsiness alleged by the Union. Management argues that both patients had trachs. One patient has a history of pulling or dislodging her trach. The other patient had just vomited prior to Grievant providing relief to her co-worker. The failure to maintain close supervision could have resulted in a life and death occurrence for the patients who were the subject of this grievance.

Management contends that the discipline was commensurate with the offense, that the removal was just, and was neither arbitrary nor capricious. Management distinguishes the present grievance as a break in service, which constitutes neglect due to the heightened supervision, rather than a sleeping on duty infraction for residents under general supervision. Due to the heightened supervision involved, the charge of neglect is appropriate

and was in accordance with the Center's discipline grid and collective bargaining agreement.

Management requests that Grievance No.24-09-20080619-0036-01-04 be denied.

UNION

Union asserts that discipline is supposed to be corrective in nature. The Ohio Department of Mental Retardation (all institutions) has not removed an employee for a first offense of sleeping on duty, especially when no incident or travesty occurred, and cites other sleeping on duty related discipline actions to support its position. The removal of Grievant in instant case constitutes disparate treatment.

Union further argues that the Center's discipline grid carries a separate charge for sleeping on duty. Grievant was performing her duties at the time of the incident when it is alleged that she was sleeping. Management characterized and issued a charge for neglect of duty rather than sleeping on duty. The Department has charged for sleeping on duty in similar cases in the past. Management failed to provide notification to the chapter and members of its intent to change prior discipline practice. Grievant therefore had no forewarning that she could be discharged for sleeping on duty as a first offense.

Union contends that Management failed to take into consideration mitigation factors. Grievant was treated for depression, and her physician had not determined the right dosage of medication. The current prescribed medication caused drowsiness. Grievant has difficulty in hearing in her right ear, and due to the humming noises cause by the machines it is difficult to hear. On the date in question, Grievant had problems with day care, and was not able to get sufficient rest prior to reporting to work. Grievant was pregnant at the time of the incident. Grievant is a 2-½ year employee with

no prior discipline. These factors warrant a lesser discipline, if a violation of policy, is determined.

Union requests that Grievance No.24-09-20080619-0036-01-04 be sustained, and that Grievant be reinstated to her position as a therapeutic worker, the termination be stricken from her record and that Grievant be made entirely whole with all benefits restored, including seniority credits, lost overtime, and health expenses she may have accumulated.

DISCUSSION

It is well established in labor arbitration that where, as in the present case, an employer's right to remove an employee is limited by the requirement that any such action be for just cause. The employer has the burden of proving that the removal of an employee was for just cause. "Just cause" is a term of art in collective bargaining agreements. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was disciplined. Another element is that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided, and a requirement that there be a reasonable relationship between an employee's misconduct and the punishment imposed.

Grievant is charged with patient neglect. The agency policy defines patient neglect as "when there is a disregard of duty resulting from carelessness or willfulness in failing to provide an individual with any treatment, care, goods, supervision or services necessary to maintain the health and safety of the individual." Grievant assumed the heightened supervision duty for two patients while her coworker took a restroom break. The heightened supervision relationship was necessary for the health, safety and welfare of the patients. Management has satisfied its burden that

grievant fell asleep. When Grievant fell asleep, she was no longer providing the required care and services (supervision) she was obligated to provide to the patients. The definition of patient neglect encompasses both willful and careless acts. The circumstances surrounding the incident demonstrate an act of carelessness rather than any intentional or willful action by Grievant to avoid detection. In summary, the Arbitrator is persuaded and finds that Management satisfied its burden of proving that Grievant failed to maintain the close supervision for one patient and one-on-one supervision of the other.

As noted above, just cause requires that an employer administer discipline even handedly. Management submits the removal order of another therapeutic program worker Will Houston to support its position that the Agency charges neglect for sleeping on duty while assigned to a one-on-one supervision. This case is distinguishable from the instant case. The removal in Houston arose when the worker failed on three occasions to notify the nurse of changes in the medical condition of the resident during the same shift and observed in a recliner with his eyes closed while assigned on a one-on-one supervision. The worker had a previous verbal reprimand.

It is the position of management that the appropriate charge for sleeping on duty for heightened supervision is neglect, and the appropriate charge for sleeping on duty for general supervision levels is sleeping on duty is without merit. The Standard Guidelines for Progressive Discipline provides in pertinent part that "when there is a disregard of duty resulting from carelessness or willfulness in failing to provide an individual with any ... supervision." Under this definition neglect includes both general and heightened supervision levels. Management has created an arbitrary distinction in supervision cases arising from sleeping on duty. Management has a range of disciplinary measures to address willfulness and/ or carelessness of employee's conduct with the charge of sleeping on duty.

The Union contends that Management has charged similarly situated workers with sleeping on duty rather than patient neglect, and the present charge of patient neglect constitutes disparate treatment. The essence of disparate treatment is differently disciplining similarly situated employees. However, administering different punishments to differently situated employees is not disparate treatment. Thus, if all other elements of two employees' acts of misconduct were equal, one would expect the employee who had engaged in a serious violation to be disciplined more rigorously than one who had committed a minor transgression. In support of its position, the Union introduced the discipline record of Kyrsten Jones, a therapeutic worker at the Mount Vernon Developmental Center. On December 30, 2007 Ms. Jones was charged for sleeping on duty and fined five (5) days. Ms. Jones, like Grievant, was observed sleeping for ten (10) minutes when her duties were to provide one-on-one supervision for a resident who had a trach. The Union submitted the discipline record for June Looney, another therapeutic program worker, who was charged with failure to remain attentive for two incidents on the same shift when the observations of fellow workers characterized her actions as sleeping. Her coworker noted that this conduct had been occurring for over a two-week time period. Ms. Looney, like Grievant, was on prescription medication that caused drowsiness. In support of its position that all institutions fashion the charge as sleeping on duty rather than neglect, the Union submitted the suspension order for Antone Hatcher, a therapeutic worker at Warrensville Developmental Center, who received a five (5) day working suspension for sleeping on duty. Mr. Hatcher was observed sleeping in a chair for approximately 19 minutes during a time in which he was assigned to be one-on-one with a patient. These disciplines are valid comparables for disparate treatment. The Union has thus established that other similarly situated

employees received suspensions and/or other disciplinary action far short of removal for similar conduct and the removal in the instant case requires remediation.

There is no question that sleeping on duty is misconduct. There is a fundamental problem with how Management treated Grievant in this situation. In order to remedy the disparity in treatment, a modification of the discipline is warranted consistent with the essence of the workplace policy and practice. Management did not charge Grievant with Sleeping on Duty but Neglect. The Standard Guidelines for Progressive Discipline provides for a removal with the first offense for a charge of neglect but provides for five-day time/work suspension or fine to removal for sleeping on duty.

Grievant relieved a coworker who was assigned heightened supervision for two residents for a restroom break and fell asleep for eleven minutes or less. Grievant was prescribed medication for depression that produces drowsiness. Grievant was also pregnant at the time. She did not have sufficient sleep due to problems in daycare on the date of the incident. The patients were not harmed.

It is clear that sleeping on duty in these circumstances is neglect of duty with potentially serious consequences for the residents in the care of the State, and Center. The Union's argument that nothing happened to the patients does not mitigate the threat of danger, which is real and not speculative. Grievant chose to work without adequate sleep, rather than to seek leave, and her choice placed the residents in her supervision, and the Center at risk.

The Arbitrator finds that although discipline is warranted, the removal was without just cause and therefore Grievance no. 24-09-20080619-0036-01-04, is sustained in part.

AWARD

Having heard, read and the carefully reviewed evidence and argumentative materials in this case and in light of the above Discussion, Grievance no. 24-09-20080619-0036-01-04 is sustained in part.

The removal is hereby modified to a five-day suspension. The Grievant is to be reinstated forthwith to her former position of Therapeutic Program Worker and made whole less the five-day suspension. She is granted full back pay and benefits less the five-day suspension including but not necessarily limited to healthcare benefits and reimbursements, PERS contributions, leave balances, and union dues. The Department may deduct any earnings the Grievant had in the interim on account of her dismissal and may require reasonable evidence thereof.

Dated: June 29, 2009

____/s/ Meeta Bass Lyons_____

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio