

IN THE MATTER OF ARBITRATION

BETWEEN

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

AND

THE STATE OF OHIO
DEPARTMENT OF DISABILITIES
COLUMBUS DEVELOPMENT CENTER

Grievant: Bobbie Jo Whiteside

Case No. 24-06-10-04-21-0006-01-04

Date of Hearing: August 12, 2010

Place of Hearing: Columbus Development Center
Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Barb Follmann, OCSEA Staff Representative
Also present: Patty Rich, OCSEA Grievance Manager

Witnesses:

Bobbie Jo Whiteside, Grievant
Jaime Cooper, Therapeutic Program Worker

For the Employer:

Advocate: Antoinette Wallace, OCB
2nd Chair: Jessie Keyes, LRS-OCB
Also present: David Ott, Human Resources Director, CDC
Laura Frazier, Labor Relations Manager, DODD
Zach West, OCB Legal Intern

Witnesses:

Amanda Kelley, QMRP, CDC
Mike Snow, Superintendent, CDC
Jasmine, client

OPINION AND AWARD

Arbitrator: Sarah R. Cole

Date of Award: October 1, 2010

INTRODUCTION

The matter before the Arbitrator is a Grievance brought pursuant to the Collective Bargaining Agreement (CBA) in effect between the State of Ohio Department of Developmental Disabilities, Columbus Development Center (CDC or Employer) and the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO (Union).

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Bobbie Jo Whiteside (Grievant), from her position as a Therapeutic Program Worker at the Columbus Development Center. The Employer contends that Grievant violated Articles 24:01 and 24:02 of the CBA by neglecting a client through a disregard for her 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. The employer contends these alleged violations warranted removal.

The Employer removed Grievant on April 20, 2010. The Arbitrator heard this matter on August 12, 2010. During the hearing, both parties had the opportunity to present evidence through witnesses and exhibits. Both parties submitted post-hearing briefs to the Arbitrator on or about August 25, 2010. This matter is properly before the Arbitrator for resolution.

BACKGROUND

The Grievant was a Therapeutic Program Worker (TPW) at the Columbus Development Center (CDC). She had been employed at the CDC for six years. The Employer contends that

Grievant failed to provide the supervision necessary to maintain the health and safety of Jasmine, a CDC client.

The CDC is a place for individuals with low IQs to learn occupational and life skills so that they can be re-integrated into society. Most clients reside at CDC for a short time and do not need close supervision. By contrast, according to Mike Snow, Superintendent of the CDC, Jasmine, the client whose care is at issue in this arbitration, suffers from both mental illness and mental retardation, is difficult to control and has been at the center for well over a year. According to Snow, Jasmine is the most difficult client of the 118 clients who currently reside at the CDC. At the time of the incident at issue in this case, the CDC required Jasmine to have 2 on 1 supervision. That is, two TPWs were required to supervise Jasmine at all times.

Jasmine requires such close supervision because she engages in repeated self-mutilation, particularly focusing on harming her right arm. She repeatedly opens and reopens a wound in that arm. Then she attempts to find, and is often successful at finding, sharp objects and inserting them into the wound in her right arm. In addition, if her right arm wound heals, she attempts to use sharp objects to reopen the wound. She is quick to secret away sharp objects and has successfully inserted a staple, a fire extinguisher pin and other items into her wound. As a result, CDC staff monitor her behavior very closely.

To facilitate this monitoring, CDC staff developed a fairly comprehensive behavior support plan to guide those who care for Jasmine. Jasmine's behavior support plan (JE #17) is six pages long and mandates the care Jasmine is to receive from all TPWs supervising her. Among other things, staff who supervise Jasmine must "remain vigilant and provide very close supervision," they must do "room sweeps frequently each shift so that any incident can be prevented. Once each shift, or sooner if Jasmine is suspected of having something on herself,

staff should do a body check.” Each night “before bedtime,” Jasmine’s bed must be stripped and remade to ensure that nothing is hidden in the linens. Jasmine must also wear protective elbow splints during the day and “at bedtime, she will wear hand splints.”

On March 19, 2010, Grievant and another TPW, Alcasha Shuemak, were responsible for the 2 on 1 supervision of Jasmine. Unfortunately, on that day, Jasmine engaged in at least three “behaviors,” all of which required her TPWs to call a “code yellow.” A code yellow means that additional assistance is needed to care for and subdue the client. The first behavior occurred at 7 p.m. when Jasmine grew agitated and ran outside yelling and screaming. She threw herself on the ground but ultimately was helped back into the building. At 7:30 p.m., she stripped off her clothes from the waist up and thrashed around on the floor of the break room. The behavior continued for over fifteen minutes. As a result, staff moved Jasmine’s bed into the break room and restrained her in her bed. At around 8 p.m., Jasmine regained her composure. The Grievant and the other TPW took Jasmine into the kitchen for a snack. Jasmine ate her snack at a table, sitting with the Grievant and the other TPW. It is disputed whether Jasmine was permitted to go to the sink to rinse her dishes with the Grievant and the other TPW in attendance or whether the TPWs remained seated at the table while Jasmine rinsed her dishes. Jasmine testified that she found a butter knife in the sink and was able to place it inside her arm restraints before leaving the kitchen. Testimony was unclear whether, following her snack, Jasmine asked to go to bed or asked to watch TV. As was common practice, though, Jasmine’s bed was rolled into the TV room, and Jasmine and the two TPWs began to watch TV. Jasmine likely removed her arm cover while under the sheets and began to cut herself with the butter knife. The grievant and the other TPW noticed that Jasmine was moving and repeatedly asked her to place her arms above

the covers. A short time later, concerned about what Jasmine was doing, the Grievant took off Jasmine's covers, discovered the knife and a cut on Jasmine's arm, and called for help.

Following this incident, the CDC called in Columbus police officers to conduct an investigation. The police concluded that the Grievant had engaged in substantial neglect and that the neglect created an opportunity for Jasmine to harm herself. At the pre-disciplinary hearing, a hearing officer reviewed the investigatory findings, consulted the disciplinary grid, and concluded that the Grievant had neglected Jasmine. As a result, the CDC discharged the Grievant on April 20, 2010 (JE 2).

ISSUE

The parties stipulated to the following as the issue in this matter:

Did the Grievant, Bobbie Jo Whiteside, neglect a client by a disregard for her 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, which resulted in the removal from her position as a Therapeutic Program Worker? If not, what shall the remedy be?

RELEVANT PROVISIONS OF THE CBA AND CDC WORK RULES

ARTICLE – DISCIPLINARY PROCEDURES

WORK POLICIES

- 4.14 Corrective Action
- 5.11 Abuse and/or Neglect
- 5.12 Protection from Harm

POSITION OF THE PARTIES

THE EMPLOYER'S POSITION

The Employer removed the Grievant because she violated CDC work policies 5.11 and 5.12 when she failed to prevent Jasmine from obtaining a butter knife and then failed to prevent her from harming herself with the knife. The Employer states that Grievant repeatedly neglected her duty to supervise Jasmine on the day in question and that discharge was the proper remedy for Grievant's breach of the standard of care.

The Employer states that the Grievant was well aware of the disciplinary grid that prohibits neglect of a client, and that she understood the expectations of her work assignment with Jasmine. According to the Employer, working with Jasmine requires compliance with Jasmine's behavior support plan. This plan requires that TPWs, like the Grievant, be especially vigilant when caring for Jasmine. Not only does Jasmine have a 2 on 1 supervision level, but, in addition, TPWs must remain in close proximity to Jasmine at all times to prevent her from obtaining objects that she might later use to harm herself and to prevent Jasmine from actually harming herself.

The Employer states that the Grievant was discharged because of her behavior on the day in question, together with the "implausible statements" Grievant made during the investigation and pre-disciplinary meeting. Following Jasmine's "behaviors" on March 19th, staff should have been even more vigilant than normal in supervising Jasmine. Instead of surveying the kitchen for objects Jasmine could use to harm herself, though, Grievant sat at a table while Jasmine washed her dishes in the sink. It is at that time, the Employer states, that Jasmine was able to secret a butter knife into her neoprene arm sleeves. Following the snack, the Employer contends that Jasmine asked to go to bed and that as she lay in bed in the T.V. room, she began

to cut herself. The Grievant's failure to conduct a body, bed and room search following the visit to the kitchen also amounted to neglect, the Employer alleges, because Jasmine's behavior support plan requires frequent room sweeps and states that, at bedtime, her bed must be "totally stripped and remade to make sure nothing is hidden in the linens." (CDC Br. at 10).

The Employer states that the Grievant continued to neglect her duty toward Jasmine when she did not put Jasmine's hand splints on her before she entered her bed. Jasmine's plan requires that these splints be placed on her hands at bedtime. Finally, the Employer states that the Grievant neglected Jasmine while she was in bed watching T.V. because she did not watch her closely enough to prevent Jasmine from cutting herself with the butter knife.

In addition to the neglect, the Employer states that several of the Grievant's statements during the investigation and pre-disciplinary hearings were implausible and thus support the Employer's view that discharge was appropriate in this case. The Employer contends that the Grievant's inability to explain how Jasmine obtained a knife while she allegedly maintained a 2 to 1 supervision level is evidence that the Grievant must have been neglecting Jasmine before and during the incident at issue in this case. Moreover, the Employer emphasizes that the Grievant changed her testimony between the pre-disciplinary hearing and the arbitration, claiming during the hearing that she left Jasmine at the sink for 3 to 5 minutes but stating at the arbitration that she was standing next to her at the sink.

Grievant's inconsistent testimony, together with her neglect of duty, the Employer states, justifies her termination.

THE UNION'S POSITION

The Union contends that the unfortunate incident that took place on March 19th could not have been avoided because Jasmine is an “unpredictable, quick and devious” client who has routinely evaded those supervising her to obtain sharp objects and injure herself with them. According to the Union, it is very difficult to find experienced TPWs to work with Jasmine because the TPWs fear disciplinary action will be taken against them when (and not if) Jasmine is able to find a sharp object with which to harm herself.

The Union states that the Grievant did not receive proper training to deal with a client who is mentally ill. Moreover, the Union places some portion of the blame for this incident on the Employer. The Chapter President, Lloyd Williams, testified that he had suggested to the Employer, before this incident, that sharp objects, such as silverware, be removed from the areas that Jasmine frequents. The Union noted that only after the incident at issue in this case occurred did the Employer decide to lock up the silverware in Jasmine's living area.

The Union claims that the Grievant adequately supervised Jasmine on March 19th. On that day, the Union states that the Grievant and her co-worker did check Jasmine's bed during Jasmine's behaviors and did not find any objects. Further, Grievant contends that she and the other TPW flanked Jasmine as she washed her dishes. The Union states that Jasmine then asked the Grievant if she could watch TV. Because Jasmine stays up late, it would have been unusual for her to ask to go to bed (i.e. go to sleep) that early in the evening. In addition, it was common for Jasmine to sit in her bed in the T.V. room to watch T.V. before going to bed for the night. The Union states that the Grievant and the other TPW did not re-search the bed or put on Jasmine's hand splints before Jasmine entered the bed because it was not “bedtime.” Moreover, the Union states the Grievant and the other TPW were watching Jasmine closely while she sat in

bed and that when they could not get her to move her hands outside the covers, the Grievant threw the covers off of her and discovered the knife. As soon as the Grievant discovered that Jasmine had harmed herself, she called for help.

The Union contends that discharge is too severe a penalty for a first offense and, moreover, would result in disparate treatment of the Grievant compared to other TPWs who failed to prevent Jasmine from hurting herself while under their watch. In particular, the Union cited the case of Kim Winkfield who, while supervising Jasmine when Jasmine only required 1 on 1 supervision, allowed Jasmine to go to the bathroom with the door closed. Somehow, Jasmine had obtained a knife, hidden it and then used it on herself when she went to the bathroom. The Union states that Winkfield received only minor punishment for a similar offense and that such disparate treatment cannot be tolerated. The Union requests that the arbitrator overturn the discharge and reinstate the Grievant with backpay and benefits retroactive to the date of the incident.

DISCUSSION AND CONCLUSION

Based upon the sworn testimony at the arbitration hearing, exhibits, and the post-hearing briefs, the grievance is granted but Grievant should serve a 5-day work suspension. My reasons are as follows:

The Employer removed the Grievant for neglecting a CDC client, resulting in bodily harm to the client. While I agree that the Grievant neglected her duties on March 19, 2010, I conclude that, under the principles of progressive discipline and avoiding disparate treatment of similarly situated employees, the Grievant should not have been discharged for this offense.

The Grievant worked at the CDC for six years. During that time, she was a valued employee who appeared to be very hard-working and conscientious. Testimony revealed that

she had worked with Jasmine before and was familiar with her behavior support plan. In addition, the Grievant received training in all relevant policies and was aware that neglecting a patient could result in discharge. She had not, however, received training regarding how to handle a patient suffering from mental illness as well as mental retardation.

On March 19th, between 7 p.m. and 8 p.m., while under the Grievant and another TPW's supervision, Jasmine engaged in three behaviors. During the second "behavior," Jasmine stripped herself naked from the waist up, while screaming and thrashing on the floor. At some point, while Jasmine was engaged in her behaviors, the Grievant searched Jasmine's bed and room. At 8 p.m., when Jasmine regained her composure, the Grievant and another TPW accompanied Jasmine to the kitchen for a snack. Witnesses gave conflicting testimony regarding what happened next. Jasmine testified that she was left alone at the sink to wash her dishes, found a knife and put that knife in her arm splint so that she could use it later to cut herself. At the arbitration, the Grievant testified that she was next to Jasmine at the sink while Jasmine washed her dishes and that the other TPW stood on the other side of Jasmine. The Grievant stated that she stood a bit back from Jasmine's side because the dishwasher, which was running at the time, was very hot. The Grievant did not see Jasmine pick up the knife and put it in her arm splint. The parties also disagree about what happened next. Jasmine testified that she asked to go to bed. The Grievant testified that Jasmine asked to watch T.V. The parties agree that Jasmine entered her bed but that her bed had been moved into the T.V. area so that she could watch T.V. while she was sitting in bed, a common practice. Neither the Grievant nor the other TPW searched the bed again before Jasmine entered it. In addition, the parties agree that the Grievant did not put Jasmine's hand splints on before she entered the bed. The Grievant

explained that she only puts those splints on Jasmine when she goes to bed and that it was not bedtime.

Jasmine's BSP states that room and body checks should be frequently conducted. Here, the Grievant searched Jasmine's bed sometime between 7:00 and 7:45 p.m. while Jasmine was engaged in her "behaviors." From 7:45 p.m. until 8 p.m., Jasmine was restrained in her bed in the T.V. room. After Jasmine calmed down, the Grievant and the other TPW accompanied Jasmine to the kitchen to have a snack and then took her back to her bed. I do not think the Grievant neglected her duty when she failed to conduct a bed check before Jasmine entered the bed after the snack. From the Grievant's perspective, an additional bed check would have seemed unnecessary because Jasmine was closely supervised while in bed between 7:45 p.m. and 8:00 p.m. (and the Grievant had searched the bed right before Jasmine entered it). Testimony established that Jasmine had not been near her bed since she calmed down at 8 p.m. The Grievant's decision not to conduct another bed check before Jasmine entered the bed was reasonable and is consistent with Jasmine's BSP, which requires "frequent" bed checks. Moreover, a search of the bed before Jasmine entered it would have proved fruitless because the knife was not hidden in the bed. Thus, I do not find that the Grievant's failure to search Jasmine's bed amounted to neglect.

While an additional body check would have revealed that Jasmine was hiding a knife, it is not surprising that the Grievant did not initiate another check before Jasmine entered her bed because Jasmine had been naked from the waist up a mere forty or so minutes before. While the BSP states that body checks should be "frequent," it does not define the frequency. The BSP also states that body checks should be conducted once a shift unless Jasmine is suspected of having something on her person. Since the Grievant conducted a visual body check of Jasmine

less than an hour before the incident and did not suspect that Jasmine had anything dangerous on her person, Grievant's conclusion that another check of Jasmine's body was unnecessary is reasonable and did not violate the BSP. Thus, the failure to do an additional body check did not amount to neglect.

The parties offered conflicting testimony about the time spent in the kitchen and about whether Jasmine asked to go to bed or to watch T.V. The Grievant's statement that she and the other TPW flanked Jasmine while Jasmine washed her dishes is not credible and is also inconsistent with her testimony at the pre-disciplinary hearing and with Jasmine's testimony. Even if the Grievant had been standing a bit behind Jasmine, it is hard to imagine that she would not have seen Jasmine put a knife into her arm splints. Thus, I agree with the Employer that the Grievant engaged in neglect when she failed to closely supervise Jasmine while in the kitchen.

The confusion over whether Jasmine asked to go to bed or to watch T.V. does not support the Employer's theory of neglect. The Grievant testified that Jasmine typically liked to stay up late and that it was common for her to watch T.V. from her bed. The BSP required an additional search of the bed and the placing of hand splints on Jasmine at "bedtime." Unfortunately, "bedtime" is not defined in the BSP. Because it was common for Jasmine to watch T.V. in her bed, it is understandable that the Grievant and the other TPW would consider a request to go to her bed as a request to watch T.V. Thus, I do not find that failing to place the hand splints on Jasmine before she entered the bed to watch T.V. to be neglect on the Grievant's part.

The final allegation of neglect is that the Grievant did not realize quickly enough that Jasmine was cutting herself. Based on the photograph of the cut and on the Grievant and Jasmine's testimony, it would appear that the Grievant acted fairly quickly once Jasmine did not

remove her arms from under the covers. Thus, I do not find that the Grievant acted negligently regarding the discovery of Jasmine's cutting behavior.

The question is, then, whether the Grievant's failure to closely observe Jasmine while she washed her dishes for a few minutes, which appears to have enabled Jasmine to put a knife into her arm splint so that she could cut herself later, justifies Grievant's discharge. There is no question that leaving Jasmine to wash her dishes for 3 to 5 minutes was negligent. At the same time, it was unwise, and arguably negligent, to permit knives and other sharp objects in Jasmine's living area. Considering these factors together, I cannot find that Grievant's negligent behavior justified her termination. Had the knives been under lock and key, Grievant's negligence would not have caused harm to Jasmine.

The principle that similarly situated employees should be treated similarly is also an issue in this case. Evidence supports the Union's argument that Jasmine is uniquely resourceful when it comes to finding sharp objects and hiding them away for use later. Although the CDC clearly learns from clients' behaviors and adjusts its policies accordingly as incidents arise, in Jasmine's case, the CDC has had to constantly adjust her BSP to address the many innovative actions Jasmine engages in so that she can hurt herself.

When Jasmine first arrived at CDC, she was given 1 to 1 supervision. Kim Winkfield, another TPW, permitted Jasmine to enter a bathroom alone and permitted her to close the door. Somehow, Jasmine had obtained a knife and, while in the bathroom, used it to cut herself. The CDC gave Winkfield a five-day suspension for failing to maintain one-on-one supervision but did not discipline her for allowing Jasmine to obtain a knife. Because Winkfield had not worked with Jasmine before, had received limited training on handling Jasmine and because a BSP was

not yet in place, CDC did not take greater disciplinary measures. CDC emphasized that in the Winkfield case, CDC also could not determine how Jasmine obtained the knife.

In September 2009, Crystal Sommerville received a written reprimand, the lowest punishment for neglect, when Jasmine was able to obtain a fire extinguisher pin and harm herself with it. At that time, Jasmine's BSP required one on one supervision. At the arbitration hearing, the parties agreed that Sommerville's discipline was not greater because it was unclear how Jasmine obtained the pin.

After both of these incidents, commendably, the CDC changed and improved its supervision practices with respect to Jasmine. Because Jasmine's current BSP is dated January 4, 2010 (JE 16) and because the Investigation Report from the incident states that the CDC revised Jasmine's BSP in response to the incident, I conclude that the CDC responds to and adjusts Jasmine's BSP as new issues arise.

Here, the Grievant did not maintain 2 on 1 supervision while Jasmine was at the sink. The primary difference between this case and the other two cases is that the evidence suggests that while 2 on 1 supervision was not maintained, Jasmine was able to obtain a knife. While Grievant's failure to maintain supervision does amount to neglect, I see two problems with upholding her termination. First, the punishment is quite severe as compared to Sommerville's and Winkfield's discipline. It would appear that the primary difference among these cases is the lack of knowledge regarding Jasmine's obtention of a knife. While we may know how Jasmine obtained the knife in this case, I also believe that the CDC should have adjusted its policies following other incidences with sharp objects to make sure that sharp objects were kept away from Jasmine. Permitting knives in a kitchen which Jasmine frequents places a heavy responsibility on TPWs who supervise her because she has repeatedly demonstrated an uncanny

ability to find and use sharp objects. Moreover, the danger the knives presented was known to the Employer -- another employee voiced concerns about sharp objects in Jasmine's living area following the Winkfield incident. In addition, testimony from the Grievant and another TPW, Jaime Cooper, strongly suggests that the CDC has not trained the TPWs on the topic of supervising clients who are both mentally ill and mentally disabled. Additional training on managing mental illness may help TPWs avoid incidents such as this one in the future.

Although I find that while the Grievant committed neglect when she remained at the table rather than attend to Jasmine at the sink, I also find that the CDC was negligent because it permitted sharp objects in Jasmine's living area. Because I find that both parties' actions contributed to the harm to Jasmine in this case, I do not believe that the Grievant's punishment is proportional to her error. Moreover, the distinction among the discipline cases -- that in the other two cases it was unclear how Jasmine obtained the sharp objects -- is not enough to justify such significantly different outcomes.

AWARD

The grievance is granted. The Grievant shall be reinstated and made whole as soon as practical with all back pay, rank and any other economic benefit she would have been entitled to but for her removal except that the CDC is entitled to impose a five-day work suspension upon the Grievant in accordance with CDC's progressive discipline guidelines (JE 14).

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sh Cole", is written above a horizontal line.

Sarah Rudolph Cole
Arbitrator

Dated: October 1, 2010