

IN THE MATTER OF ARBITRATION
BETWEEN
NORTHCOAST BEHAVIORAL HEALTHCARE-
NORTHFIELD, OH
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11
AFSCME. AFL-CIO

Arbitration Date: July 21, 2011

Grievant Eddie L. Williams III: # 23-18-20101008-0067-01-04

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Marlo Cain
Labor Relations Officer
ODMH-Northcoast Behavioral Healthcare
30 East Broad Street, 14th Floor, Suite 1180
Columbus, Ohio 43215

Advocate for the Union:

George Yerkes
OCSEA, AFSCME Local 11
390 Worthington Rd., Suite A
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I. HEARING

The hearing was held at Northcoast Behavioral Healthcare on July 21, 2011. The hearing commenced at 9:02 A.M. and concluded at 11:50 A.M.

The joint issue before the arbitrator is "Was the Grievant discharged for just cause? If not, what shall the remedy be?"

Testifying for Northcoast Behavioral Healthcare (the "Employer") were Patricia Davis, Nursing Supervisor; Wendy Ivory, Human Capital Senior Analyst; and David Colletti, Chief Executive Officer.

Testifying for the Ohio Civil Service Employee's Association, Local 11 AFSCME (the "Union") was the Grievant, Eddie L. Williams III.

II. STATEMENT OF THE CASE

The Grievant, Eddie L. Williams III was removed from his position as Therapeutic Program Worker for being Absent Without Approved Leave (AWOL) on June 26, 2010. The Employer contends that Grievant was 1.5 hours late for work in violation of the Code of Conduct and General Work Rules, specifically Rule 2.4.

The Grievant timely filed a Grievance asserting that his removal was not for Just Cause and seeking reinstatement and to be made whole.

The matter is properly before the Arbitrator.

III. THE EMPLOYER'S CASE

The Employer's first witness was Patricia Davis, Nursing Supervisor. Ms. Davis testified that some of her duties were to assist with the daily operation, training and staffing. She said she had been there ten (10) years until her position was abolished.

Ms. Davis testified that on Saturday, June 26, 2010 she arrived at work between 6:15 and 6:30 A.M. She testified that the Grievant was to be at work at 7:00 A.M. but did not show up until 8:30 A.M. Ms. Davis testified that the Grievant called her at 7:55 A.M. and told her he had overslept and should he still come in? Ms. Davis said "Yes". She said the Grievant had made no prior arrangements to be late, and that employees were required to submit a Request for Leave.

Ms. Davis testified that she had to rearrange staffing as the Grievant was the only Therapeutic Program Worker (TPW) on his Unit. This Unit has twenty (20) patients.

Ms. Davis was then shown Exhibit JE3 Page 2 and said it was the Absent Report. She testified that Supervision uses this to document absentees, and that this Report is routine. Ms. Davis testified that she used this form for the Grievant's absence. Ms. Davis testified that Employees were required to call-off one (1) hour prior to the start of their shift. Ms. Davis said time is important and times are recorded on the Absent Report.

Ms. Davis identified the Exhibit as her report and testified she sent out an E-Mail on the Grievant's absence to Nursing Leadership.

On Cross-Examination Ms. Davis testified that on June 26, 2010 she was an RN in TWL as a Supervisor.

She testified that she got Grievant's call in the Admissions Office and that she was in

charge that day. Ms. Davis testified that she wasn't sure if anyone was mandated. Ms. Davis was asked to whom the E-Mail to Nursing Leadership was sent. She testified that the E-Mail was sent to Jeff Sterns, Pam Cox, Ken Burkhardt, Linda Ray and Sonny Dillon.

Ms. Davis was asked why her Absent Report had "No Call No Show" when Grievant had called?

On Re-Direct Ms. Davis testified that she had received a call from the Unit that Grievant wasn't there and she put "No Call" on her report right away. She also testified that she had to do some transition.

On Re-Cross Examination she was asked if she had written over time of the Grievant's Absence Report? She testified that she had corrected it to 7:55 A.M.

On Re-Direct Ms. Davis testified that she did not receive a call from the Grievant at 6:35 A.M.

The Employer's next witness was Wendy Ivory. Ms. Ivory is a Human Capital Senior Analyst. Ms. Ivory works in Labor Relations.

Ms. Ivory was shown JE-3 Page 1 which is the Order of Removal. Ms. Ivory testified the Grievant violated Rule 2.4 of the Employee Rules of Conduct which is AWOL. Ms. Ivory testified that the Grievant arrived to work at 8:30 A.M. which made him AWOL for 1.5 hours. She testified that Management had notified her at Human Relations. Ms. Ivory testified that the payroll is two (2) weeks behind. Ms. Ivory testified that she talked to witnesses and then sent a report to the Director in Columbus.

Ms. Ivory was referred to JE-3 Page 3 and identified it as the Fact Finding Statement

completed by the Grievant. She testified that the Grievant said he had overslept and had to take two (2) buses to work. The Grievant had asked if he could make up the time, and the answer was "No".

Ms. Ivory then read JE-5 Page 5 and said it was the Department of Mental Health's Leave Policy. She then read JE-5 Page 8 and testified that Direct Care Staff are required to call off one (1) hour before the start of their shift. This concerns sick leave.

Ms. Ivory reviewed JE-5 Page 1 and said it is the Department of Mental Health's Employee Absenteeism and Tardiness Policy. Ms. Ivory testified the Grievant violated paragraph A which is AWOL part 1 which is Failure to report to work without proper notice or authorization.

Ms. Ivory was then shown Exhibit Management (M)1 which is a statement from Linda Rhea who was the immediate Supervisor of the Grievant and Manager of his Unit. Grievant had no pre-approved leave. Ms. Ivory testified that the Grievant had told her of problems with the loss of his father but there was no leave form filed before leave. The Grievant said he had overslept. Ms. Ivory said that over-sleeping was not an emergency.

Ms. Ivory then read JE-3 Page 5 and said it was Grievant's punch in - punch out report. She testified that the Grievant punched in at 8:28 A.M. and clocked out at 1:30 P.M.

Ms. Ivory testified that AWOL is a hardship to Management as it effects staffing and continuity of care. It is important for Direct Care Staff to be there.

Ms. Ivory then read JE-5 Pages 1- 4 and testified that two (2) Tardys in one pay period means discipline. She then read JE-3 Page 10 which is Grievant's Discipline Trail. The Grievant

has a written reprimand; a two (2) day fine and a five (5) day suspension all for AWOL.

Ms. Ivory next read JE-3 Page 11 and testified that is Grievant's Written Reprimand and all offenses are attendance violations. She was then referred to JE-4 Page 1 and said this is Grievant's sign off on receipt of Rules. She also read JE-3 Page 2 which is the Policy that sets guidelines.

Ms. Ivory next reviewed JE-3 Page 6 which shows the Progressive Discipline Steps and testified that Demotion is only for Exempt employees.

Ms. Ivory then read JE-3 Page 2 which is the Discipline Grid. The Grid at Level 2 after a five (5) day suspension calls for termination. She then testified that there was consideration given to Grievant's seniority but he had already had several chances.

Ms. Ivory was then asked why the Pre-Disciplinary hearing was held September 2, 2010. Ms. Ivory responded that the payroll reports are two (2) weeks behind and Fact Finding was done in July.

Ms. Ivory also testified that the Grievant was accused of patient abuse and there was a lengthy investigation. It was concluded that the Grievant was not guilty of the abuse charges. She testified that is why the Pre-Disciplinary hearing was held in September. Ms. Ivory testified that she spoke to the then Chapter President about the delay on several occasions.

Ms. Ivory testified that Article 24.06 of the Collective Bargaining Agreement says Management has sixty (60) days after the Pre-Disciplinary hearing to notify the Grievant and the Union and Notice was given October 8, 2010.

On Cross-Examination Ms. Ivory testified that thirty (30) minutes late is AWOL. She was

asked if all employees were disciplined for this? She replied "All I know about".

She then read JE-3 Page 5 which is the punch report. The Grievant worked forty-eight (48) hours. Ms. Ivory testified that there are other Supervisors than Ms. Rhea in M-1 that Grievant could have talked to about his father. She was then asked, "Did you ever talk to the Grievant that you were holding up the Pre-Disciplinary hearing because of the police investigation?" Ms. Ivory answered "No".

Ms. Ivory then testified that Grievant left at 1:30 P.M. June 26, 2010 on prior approved leave. Employees have seventy-two (72) hours to ask for leave after they return to work.

The Employer's next witness was David Colletti, the Chief Executive Officer. Mr. Colletti has been here eighteen (18) years. He has been a Social Work Supervisor, a Campus Administrator and has been CEO for two (2) years. Mr. Colletti is the Appointing Authority over the hospital.

Mr. Colletti testified that employees are removed on a case by case basis and this is monitored by Human Relations. He also testified that Direct Care Staff have to be timely and punctual.

Mr. Colletti testified that the Grievant was reported as AWOL on June 26, 2010. He testified that this was referred for Review and a recommendation made to him after the Pre-Disciplinary meeting. Mr. Colletti then testified that he makes the decision.

Mr. Colletti testified that AWOL has an impact of safety. He said Staff needs to Communicate at shift change. He then testified that Grievant's seniority had been taken into account and there were prior attempts to correct his behavior.

IV. UNION'S CASE

The Union's witness was Eddie L. Williams III, the Grievant. The Grievant read Union (6) 1 which is a letter from United National Security indicating the Grievant has had a part time job with the Company for thirteen (13) years. The Grievant testified he has worked for the Employer for twenty-five (25) years as a Direct Care TPW. He testified his duties include making rounds, dispensing meds and patient hygiene. He worked the 7:00 A.M. to 3:30 P.M. shift. The Grievant testified he did not receive Unemployment Compensation and had no other jobs but United. He worked at United from 4 - 11 P.M. He testified that United gave him no extra hours after his removal. He also said he depended on the income from both jobs.

The Grievant then read Union-2 Page 28 where his Evaluation said he was a valuable member of the team. Grievant then read Union-2 Page 59 which is an Evaluation dated March 23, 2006 which was an Unsatisfactory Rating which was to be reviewed in ninety (90) days.

The Grievant then read Union-2 Page 69 which is a review from August 2, 2006. This shows his Performance is improved and he now meets standards. The Grievant then read Union-3 the schedule for June 26, 2010 and testified three (3) others were scheduled to work.

The Grievant then testified his father became ill in 2005 with Cancer. He said it did not affect his attendance. The Grievant then read Union-4 which is his December 22, 2007 Leave Balance. He said his father couldn't care for himself and they took turns taking him to the hospital. His Supervisor was Mary Ann Pason.

The Grievant then reviewed Union-5 which is a September 21, 2008 sign slip showing the Grievant at the hospital. The Grievant then read Union-6 which is a Fact Finder's Report and

no discipline was given to the Grievant.

The Grievant then read Union-7 which is his father's obituary and said he took extra time for bereavement . He then read Union-8 Page 14 which is Bereavement Leave and testified he did not ask for Counseling. He also said Management did not suggest the Employee Assistance Program.

The Grievant testified that he overslept June 26, 2010 and that he had taken medication. He read Union-9 which is a Doctor's statement that Grievant was under a Doctor's care in June 2010 and that the Doctor had prescribed a muscle relaxer.

The Grievant testified that he called in at 6:35 A.M. and talked to Pat Davis. He punched in at 8:30 A.M. He testified he caused no overtime or mandation. He said he gave Pat Davis a request for leave. The Grievant testified June 26, 2010 was a Saturday. During the week it takes him an hour and a half to get to work and two hours on Saturday because the bus schedules are different. He said July was the first he heard of Discipline with the Fact Finders Report.

The Grievant testified he doesn't know if he was being investigated for anything else. Management never told him the Pre-Disciplinary hearing was delayed because of other investigation. He testified he now has dependable transportation. The Grievant testified he left work at 1:30 P.M. on June 26, 2010 and no one took his place.

On Cross-Examination the Grievant read Union-3 and said he was the only TPW on his Unit and the only one scheduled to work. He was shown Union-9 which is the Doctor's statement dated yesterday. The Grievant said he went yesterday to get a Doctor's statement covering June 2010. This Document was not presented at the Pre-Disciplinary hearing but he told Management

he was on meds.

The Grievant was shown JE-4 Page 1 which is his sign off on the Code of Conduct and Work Rules. This shows arriving late is a policy violation.

On Re-Direct he read JE-3 Page 3 and said it was prepared by Management.

V. OPINION AND AWARD

The Employer argues in its Closing Argument that the Grievant contacted Pat Davis, the Nursing Supervisor at 7:55 A.M. and not 6:35 A.M. as he claimed. The Grievant was advised to report for duty as scheduled. The Grievant had not made prior arrangements to arrive late to work on Saturday, June 26, 2010. The Employer's evidence from Pat Davis is that the protocol is a call off must be done one (1) hour prior to the start of the shift.

The Employer argues that the Grievant failed to comply with policy when he failed to properly notify Nursing Supervision about his delayed arrival.

The Employer has evidence that there are approximately twenty (20) beds on the Grievant's Unit and he was the only TPW assigned to that Unit. The Employer argues that the Grievant's delayed arrival caused it hardships.

The Employer cites the testimony of Wendy Ivory, the H R Director, that the Grievant was in AWOL status for 1.5 hours. The Grievant said on his Fact Finders Report that he overslept and had to take the bus to work. The Employer cites Ms. Ivory's testimony that the Grievant violated Policy 3.23 but the only charge in the Order of Removal is a violation of 2.4.

The Employer's evidence from Ms. Ivory is that Grievant did not have a pre-approved

leave request for Saturday, June 26, 2010 from 7:00 – 8:30 A.M.

The Employer's Evidence is also that it is mandatory for direct care staff to report in a timely manner or the Employer has a negative impact.

The Employer cites Ms. Ivory's overview of Grievant's Disciplinary Record which is a written reprimand, a 2 day fine, and a 5 day working suspension. The Employer contends that the Grievant has had ample opportunity for improvement and has failed to do so. The Employer points out that with each discipline the violations were explained to the Grievant and the Grievant was well aware the next violation would lead to removal. The Employer also argues that the Grievant's tenure was given adequate consideration.

The Employer also argues that Removal is in line with the Discipline Grid.

The Employer also uses Ms. Ivory's testimony to rebut the Union's timeliness argument. The Employer's evidence is that there was a patient abuse allegation against the Grievant and Management considered merging the alleged patient abuse with the AWOL infraction. The patient abuse was unsubstantiated and the Employer argues it proceeded on the AWOL within the time lines. The Employer also kept the Chapter President advised of the situation.

The Employer also points out that the Grievant was placed on Pattern Abuse/Physician Verification on three occasions and the Grievant had called off seven shifts in one month from July 13 to August 13, 2009. The Grievant also maintained minimal sick leave balances.

The Employer argued that Mr. Colletti, the CEO's testimony showed Grievant was given consideration for twenty-five (25) years of service. The evidence stressed the need for punctuality to support patient care, safety and daily operations. The Employer argues that other employees in

similar circumstances with that of the Grievant have been removed.

The Employer points out that the Physician statement about muscle relaxer had never been presented as a defense until the Arbitration hearing.

The Employer says it has spent an excessive amount of time and money on Grievant's unacceptable behavior.

The evidence is that there were only four (4) employees scheduled in Grievant's Unit on June 26 and Grievant's AWOL caused a hardship on the Employer. Abuse and misuse of leave compromises patient care and results in excessive costs.

The Union's opening salvo in its Closing Argument is the Grievant's lengthy seniority. The Union also argues the Investigation was unreasonably late. The Union argues that Ms. Ivory's discussions with the Chapter leadership were anecdotal and that the Grievant was never notified of the reason for delay. The Union points out that the Grievant did not receive a Fact Finding Report until a month after the event and that a whole host of Supervisors were notified by E-mail of Grievant's late arrival on June 26, 2010.

The Union points out that the other investigation concerned allegations of patient abuse and were not connected to the AWOL charges. The Union contends that the AWOL charges and the other charges cannot be joined for disciplinary purposes. The Union claims, therefore, the delay is unreasonable.

The Union argues that the Employer's focus on the phone call is irrelevant. The Union then argues that if the phone call is relevant that the Grievant called in at 6:00 A.M. because he arrived at 8:30 A.M. and it is a two hour bus ride.

The Union also argues that as Grievant had over slept he couldn't have made prior arrangements by a request for leave.

The Union then points out that the doctor's slip showing the Grievant was on medication makes his statement about over sleeping due to the muscle relaxant credible.

The Union addresses the Employer's argument about staffing concerns by showing there is no evidence of overtime or mandation required because Grievant was late for work. There was also no evidence of any impact on the safety and security of the facility and no evidence of response type situations.

The Union argues that the Grievant is diligent about filing Request for Leave Forms and claims he filed one on June 26, 2010 which is missing. This fact is unrebutted by management.

The Union also argues the Employer has ignored Grievant's years of service and any mitigating factors. The Union contends the Grievant's active discipline coincides with his father's illness and passing and that the Employer was aware of this.

The Union then argues that the Employer ignored the seventh test of Just Cause. The Union bases this on Mr. Colletti's non-elaboration of his consideration of Grievant's seniority.

The Performance Evaluations of the Grievant are used by the Union to show Grievant is a good Employee. The Union argues that if attendance is so important to the Employer, why isn't it mentioned in the Performance Evaluations.

The Union argues that seniority is a critical role in Just Cause. The Union has both attached to its Closing Argument and quoted in its Argument, Arbitrator's Decisions stressing the value of seniority in a discipline case.

The Union concludes that the totality of circumstances show the Employer was devoid of mitigation or compassion and Just Cause was not proven.

On June 26, 2010 the Grievant was AWOL for 1.5 hours. The Arbitrator finds that the phone call is in fact relevant. This is because the Charge says in pertinent part “you failed to notify Nursing Supervision of your tardiness to work”. The question of Notice, or lack thereof is important.

Based on the evidence the Arbitrator finds that the Grievant notified Nursing Supervision at 6:00 A.M. on June 26, 2010. The evidence is uncontroverted that it took Grievant two hours by bus to arrive at work and he arrived at 8:30 A.M.

There is no doubt that the Grievant had not made a prior leave request as he had overslept.

The Arbitrator finds there is evidence that the Grievant was taking a muscle relaxer but no evidence this necessarily caused him to over sleep.

The Arbitrator finds there is no direct evidence of a hardship on the Employer caused by the Grievant being late for work. This does not resolve the issue however. The Employer is a 24/7 operation dealing with severe mental health patients. It is the Grievant’s good fortune that no incident occurred that would require overtime or mandation.

The Arbitrator finds the Investigation was not unreasonably late and the Employer complied with Article 24.06 of the Contract. The Union is the Grievant’s representative and there is no dispute that the Union was advised of the reason for delay. Notice to the Union is Notice to the Grievant. There was some delay before the Fact Finding Report was requested but after that

the Contract time lines were met.

The Arbitrator finds there was a Request for Leave filed by the Grievant but no evidence that it was granted. In fact Pat Davis had told the Grievant he couldn't make up the time.

The Union argues that the Employer failed to have evidence of the seventh step of Just Cause. The Exhibit JE2 Page 20 concerning the seventh step lists the Grievant's prior disciplinary record. All of the Grievant's prior discipline are for AWOL.

The Union contends that when asked if seniority was considered Mr. Colletti said "Yes" without any elaboration. The Union argues that the employer should have asked for more detail. However, the Arbitrator must take the case as presented. The evidence is that Grievant's seniority was considered. There is no evidence as to the extent or nature of the consideration.

The Union's argument concerning the Grievant's Performance Evaluations has merit. As the Union points out, the 2009 Evaluation shows, that except for some problems with Nursing Leadership, Grievant's Evaluation is good. There is no mention of AWOL in the 2009 Evaluation even though Grievant had a written reprimand and a two day fine at that time. There is no evidence that the Employer was "lying in wait" for the Grievant.

The most troublesome issue for the Arbitrator is the Grievant's seniority. The Union attempts to blend this argument with that of a lack of compassion by the Employer concerning the illness and death of the Grievant's father. The problem for the Union is that when the Grievant was asked if this affected his performance he said "No". The Union argues that the Employer had at least a moral obligation to advise the Grievant about the Employee Assistance Program. The Employer argues that both FMLA and the EAP were available to Grievant but he

failed to take advantage of either. The seniority sword has two sides. The Grievant was a long term Employee and knew or should have known of his options.

On the seniority issue the Union has filed decisions of other Arbitrators stressing the consideration that must be given to seniority.

The Employer argues that the Grievant has had ample opportunity to improve and fails to do so.

The evidence in JE 3 Page 10 is that Grievant's last Suspension on October 2, 2009 was for AWOL/Pattern Abuse. JE 6 Page 3 shows the Pattern Abuse includes "Seven Shifts called off in one month". The Grievant's conduct seems to deteriorate, not improve.

The Employer has shown that termination is proper and in line with the Discipline Grid.

The only factor in this case that the Union can reasonably claim as mitigation is the Grievant's seniority.

Seniority however, is not a bullet proof defense. The Arbitration cases cited by the Union refer to "great deference" and "merits the benefit of any reasonable doubt".

In this case the Grievant has progressed from a Written Reprimand November 3, 2008, to a 2 day fine February 3, 2009, a 5 day Working Suspension October 2, 2009 to an Order of Removal October 8, 2010. All for AWOL and AWOL Pattern Abuse. Surely the Grievant knew that with this track record the sands of time were running out.

The record indicates at JE3 Page 12 that the Grievant has already had one break because of seniority. Arbitrator, Robert Stein, said the two day fine would be removed from Grievant's record six (6) months early if he could avoid any intervening Discipline.

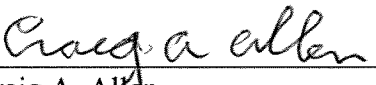
There is further evidence that the Grievant was given consideration for seniority in JE3 Page 14. This is a Grievance Settlement Agreement showing the charge would be removed from the Grievant's file six (6) months early if there were no further infractions in the interim. The Grievant seems unable or unwilling to take advantage of his breaks.

Unfortunately for the Grievant there seems to be no "reasonable doubt".

The Arbitrator finds that the discipline is progressive and in line with the Discipline Grid. The Arbitrator finds that there is evidence that the Grievant's seniority has been considered.

The Grievance is denied.

Issued at Ironton, Ohio on August 19, 2011.



Craig A. Allen
Arbitrator