

IN THE MATTER OF ARBITRATION BETWEEN

State of Minnesota,

Employer,

and

AFSCME Council 5, AFL-CIO,

Union.

DECISION AND AWARD

BMS CASE NO. 08 PA 1439

ARBITRATOR:

Stephen A. Bard

DATE OF HEARING:

January 21, 2009

PLACE OF HEARING:

Brainerd, Minnesota

DATE OF DECISION AND AWARD:

January 30, 2009

GRIEVANT:

Carrie Rosemont

APPEARANCES:

For the Employer:

Ms. Becky Wodziak
Labor Relations Representative
State of Minnesota
Department of Finance
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For the Union:

Mr. Robert L. Buckingham
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INTRODUCTION

This matter came on for arbitration before Neutral Arbitrator Stephen A. Bard, on January 21, 2009 , at 9:00 a.m. in Brainerd, Minnesota. The Employer was present with its witnesses and was represented by Ms. Becky Wodziak The Union was present with its witnesses and was represented by Mr. Robert Buckingham .

Testimony and exhibits were taken at the time of the hearing and at the conclusion thereof the parties made final oral arguments and agreed to waive submission of post-hearing briefs. The parties waived any time limits in the Collective Bargaining Agreement for the submission of the Arbitrator's Decision and Award and stipulated that there were no issues of timeliness or arbitrability and that the matter was properly before the Arbitrator for a decision on the merits.

ISSUES

1. Did the Employer have just cause to dismiss the grievant?
2. If not, what is the remedy?

RELEVANT CONTRACT PROVISIONS

The Collective Bargaining Agreement requires "just cause" for the imposition of discipline by the Employer..

FINDINGS OF FACT

The Arbitrator finds that the following facts are either not in dispute or have been

established by a fair preponderance of the evidence by the party having the burden of proof.

1. The grievant, Carrie Rosemont, is a 26 year employee of the State of Minnesota. For most or all of that time she has worked for the Department of Human Services (“DHS”) either in a clerical capacity or as a “Human Services Technician.” (“HST”). An HST is an individual who delivers hands on care to patients or residents in a treatment facility operated by the DHS through one of its divisions known as “MSOCS.”
2. The DHS provides care services for eligible persons with many diverse types of mental and physical developmental disabilities. For the last several years the DHS has been in the process of replacing large residential treatment centers with smaller residential sites designed to house 3 or 4 residents with long term care. These sites are designed like homes with special features to accommodate individuals with extreme disabilities. One such facility is located in Baxter, Minnesota and shall be referred to as the Lynndale home. The Lynndale home has the capacity to house four residents.
3. The residential homes are funded through the counties and are competitive with private facilities. Because of the extreme “fragility” of the residents, the homes are staffed 24/7 with “awake” staff. When the Lynndale home is occupied by four residents there are two staff people on duty at all times. At present there are only 3 occupants of that home and because of budgetary restrictions these 3 residents are serviced by one HST per shift.
4. There are presently 135 such residential sites statewide. Again, because of budgetary issues, it is impossible to have full time supervisors present continually at each site. Therefore, observation and direct supervision of staff is necessarily intermittent. At present the Lynndale home is part of a group supervised at the top by a Residential

Manager named Doreen Eiesland. Mrs. Eiesland oversees 26 residential sites which are directly supervised by eight supervisors.

5 The position description for an HST states that the primary responsibilities of an HST are "...to provide respectful, comprehensive, and person-centered direct care services to individuals in the residential homes provided by MSOCS." In addition, some of the required abilities and responsibilities of an HST are described as follows:

"The employee will:

- *Demonstrate respect for the ideas and opinions of others,,,,,
- *Demonstrate the ability to disagree with others in a respectful manner.....
- *Negotiate and uphold positive and productive peer relationships....
- *Listen to other points of view in a respectful manner....
- *Understand who the internal and external customers are, and must use a variety of effective strategies in responding to their needs in a respectful and professional manner.

6. The Grievant was assigned to the Lynndale home as an HST in 2002. During her employment there the home housed four residents with extreme medical and developmental disabilities. Only one of the residents was somewhat verbal and ambulatory. Two residents are completely non-verbal, are tube fed, and can do virtually nothing for themselves. One resident had some spastic movement of his hands. All the residents required significant and continual supervision and care.

7. The residents of the Lynndale home are all considered "vulnerable adults" within the meaning of the Minnesota Vulnerable Adults Act (Minn. Stat. 626,557, *et seq*) (hereinafter "the Act"). All of the staff at the home are considered "mandated reporters" under the Act which requires them to report any acts of apparent or suspected abuse or neglect of

vulnerable adults. "Abuse" has multiple definitions under the Act which include but are not limited to the following:

*Hitting, slapping, kicking, pinching, biting or corporal punishment of a vulnerable adult.

*Use of repeated or malicious oral, written, or gestured language toward a vulnerable adult, or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening.

8. The Act establishes a procedure by which acts of abuse are to be reported. The system sets up a "common entry point" in each County to which all such acts are required to be orally reported within 24 hours. Once an act of alleged or suspected abuse is reported, an initial determination is made as to whether or not a full scale investigation is warranted. If it is decided that it is, the matter is referred for a complete investigation to the DHS, Department of Licensing, and a written report is ultimately issued with findings and recommendations. The Department of Licensing is responsible for determining whether a person can work with vulnerable adults in a licensed facility and, where appropriate, an abuser can be disqualified from rendering care to vulnerable adults in such facilities..

9. In addition to the mandatory reporting requirement of the Act, the Lynndale home has established an optional or discretionary internal reporting process where staff may report such incidents to their Supervisor. This is encouraged although not required because if the act of abuse or neglect is not reported "internally", the home's managers may have no notice or information about it while the DHS is conducting its investigation. If such a report is made, an internal investigation at the job site can be undertaken and the target of the report can be put on paid "investigative leave" pending completion of the process.

10. As a result of complaints from other staff members to management that the Grievant was using profanity excessively at work, the matter of swearing on the job was placed on the agenda of a staff meeting on October 4, 2004. The Grievant attended that meeting. It was made clear at that meeting that swearing was prohibited at work as was lying on the couch.

11. In December 2005 the Grievant received a written Employee Performance Review. She received an overall rating of having “met expectations” in performing her job responsibilities. However, she was rated as “below expectations” in the job responsibility entitled “The employee promotes coordination and cooperation with co-workers and customers..” The comments to that section of the evaluation stated in relevant part:

“Needs improvement in respect of co-workers, use of respectful language and patience with others, especially new employees.”

The grievant was crying during the conference with her Supervisor about this Performance Review. The problem areas were discussed with her at that time. She was advised that co-workers had complained about her excessive use of profanity and that she had been observed directly by the Supervisor using profanity. She was also advised of complaints by co-workers that she was abusive towards them both in actions and in language. She did not deny the profanity allegations and said she was working on this problem. She felt she was not mistreating her co-workers and expressed a feeling that there were one or two other staff members that were “out to get her.”

12. Throughout her employment at the Lynndale home there were problems between the grievant and other staff members which got worse rather than better over time. In addition to Doreen Eiesland, a total of seven other staff members, all appearing under Subpoena,

testified at the hearing about their relationship with the grievant and her job performance and problems from the beginning of her employment at the Lynndale home in 2002 through her dismissal in 2007. Although the testimony naturally varied somewhat from one witness to the other, the Arbitrator finds that their testimony was credible and consistent, and can be summarized as follows:

- a. The grievant was extremely moody and most of her misconduct took place on days when she was in a bad mood.
- b. The grievant used extreme profanity frequently. On occasion this profanity was directed at co-workers and even residents. It was often used in the presence and earshot of residents.
- c. The grievant would often make rude comments to or about co-workers and was critical of their manner of performing their jobs.
- d. On a number of occasions she threatened other staff members with dire consequences if they reported her conduct to Supervisors. These threats varied from statements such as "I'll get you," "I know where you live," "I know people...it only takes one phone call," and similar such statements. These statements and threats of retaliation were meant to be intimidating and, in fact, did frighten and intimidate some staff members from reporting her behavior to their Supervisor.
- e. She was often very tense and sometimes gave her co-workers the "silent treatment", refusing to communicate with them for all or most of an entire shift.
- f. The grievant was frequently angry and would not take any suggestions or constructive criticism about her job performance. She would always insist on doing things her way and was angry and abusive and used vulgar language to co-workers whom she felt they were getting in her way or not doing things her way.
- g. When angry, grievant would often bang drawers or slam doors. On one occasion she angrily threw a frying pan a few feet into the sink.
- h. On one occasion in February , 2007 grievant was observed slapping the hand of a resident who is known to have spastic hand movements. On another occasion, on or about March 12, 2007, the grievant was observed stating to a resident who was making noise and being disruptive that if he didn't quiet down she would bring in a gun the next morning and shoot him.

i. The grievant was the only staff member whose conduct was the subject of complaints by almost everyone she worked with and her behavior caused a tense or “hostile” work environment. The atmosphere in the workplace has improved greatly since her dismissal.

13. The grievant’s description of her own behavior has varied significantly at various stages of the grievance process. She has admitted to having a “potty mouth” but claims she has learned to control her use of profanity. She claims other staff people also cursed in the presence of residents and she denies ever threatening or intimidating co-workers. She has made some inconsistent statements about her own conduct and testified that she does not presently remember many of the specific incidents about which the other workers testified. She gave uncontradicted testimony that during the period preceding her termination she was under a lot of personal health and family stress that contributed to her performance issues at work. These included being diagnosed with type two diabetes and suffering a heart attack in November 2006. She started counseling in February 2007 to help her deal with these issues. She has had a job for the past several months at Grand Mille Lacs Casino dealing cards which involves working with the public. There is a zero tolerance policy there for use of profanity by staff and she has had no problems of this nature at all.

14. Between February 15 and March 11, 2007 Doreen Eiesland received e-mail complaints about the grievant from two different staff members. The allegations included the following:

- a. The grievant was lax in following sanitation guidelines
- b. The grievant did her work in an unwilling and “grudging” manner.
- c. The grievant did not properly mentor new employees working with her.
- d. The grievant continued to swear excessively, including frequent use of the “F” word.
- e. The grievant was threatening and intimidating other staff members with retaliation if they reported her misconduct.

- f. The grievant had thrown around pots and pans while swearing in one of her tantrums.
- g. The grievant had stated to an unruly resident that she was going to come in the next day with a hangover and take a gun and shoot him.
- h. The grievant had slapped the hand of a resident she was helping to eat.

15. Unfortunately, none of the staff who observed the above conduct reported it to the common entry point as required by law. As a result, no investigation by DHS was begun in a timely fashion. However, when the complaints reached the attention of Doreen Eiesland an internal investigation of the matters was started and the grievant was put on paid investigative leave.

16. The investigation was conducted by Carmen Zahn, a supervisor at the Lynndale home at the time, and Don Chandler, a program director for MSOCS. The investigators interviewed a total of nine individuals plus the grievant and issued a thorough written report of their investigation on March 29, 2007. The findings included the following:

- a. Five of the nine witnesses interviewed had heard the grievant make a generalized threat.
- b. One witness had heard the grievant swear directly at a resident.
- c. One witness reported hearing the grievant directly threaten a resident.
- d. One witness reported the physical abuse (hand slapping) of a resident.
- e. Eight of the nine witnesses reported hearing the grievant swear at the home.
- f. Eight of the nine witnesses felt the grievant created a hostile work environment.

17. The grievant remained on paid investigative leave after the issuance of the internal investigation report on or about March 29, 2007 until June 14, 2007 when she was sent a letter terminating her employment. The reasons stated for her termination were as follows:

“This action is taken due to maltreatment of a vulnerable adult(s) as well as employee misconduct. Specifically, in February 2007 you allegedly abused Vulnerable adults in your care which has been reported as a violation of the Vulnerable Adult Act. In addition, you are being discharged for exhibiting

Inappropriate behaviors such as using offensive language, threatening co-workers and frequent angry outbursts.”

18. The Union promptly filed a Grievance Report and the grievance procedure was followed thereafter through all the steps culminating in Arbitration.

19. Doreen Eiesland did not discover that the matter had not been reported to the common entry point until October of 2007, several months after the grievant’s employment had been terminated. Upon learning of this, even though it was well after the fact, she requested that the matter be submitted to the Licensing Department of the DHS to determine whether the grievant should be disqualified from caring for vulnerable adults in licensed facilities. The DHS conducted its investigation during which it reviewed documents, interviewed the grievant, but only interviewed one other staff person—the individual who had witnessed the alleged physical abuse and threat to a resident. The grievant told the investigator that she did not slap the resident but was playing a “paddy cake” game with him. The DHS concluded that the time delay in receiving the report limited its ability to pursue pertinent information and affected the credibility of the information collected. Its disposition was “Inconclusive.” It did not determine one way or another whether abuse had occurred but it also did not make any finding that would disqualify the grievant from caring for vulnerable adults in licensed facilities. The license holders of the Lynndale home were fined \$100 for failure of its mandated reporters to report the alleged incident in a timely manner.

POSITION OF THE UNION

The arguments of the Union in support of the grievance can be summarized as follows:

1. The grievant has been an employee of the state for 26 years during 21 years of which she provided care to patients as an HST. There were no complaints of this type until very recently and it is not credible that she would suddenly become so profane, rude, and threatening to co-workers and residents as to merit termination.
2. The DHS did not find she had abused a vulnerable adult nor did it disqualify her from caring for them in licensed facilities.
3. The evidence establishes that all the employees at the home swore from time to time and that the grievant's profanity was not directed at residents.
4. The home never gave her a specific warning that her conduct could lead to discharge. The employer did not give her the required periodic performance reviews, did not do follow up counseling with her and did not give her a proper chance to correct her behavior.
5. The grievant should have been given progressive discipline. The termination of her employment was far too severe for her alleged conduct.
6. She is proving she can control her profanity by holding her present job as a dealer in a casino and dealing with the public without incident.
7. She was under severe personal stress during the period in question which should be taken into consideration as a mitigating circumstance.
8. She should be restored to her position as an HST *at a different facility* and be awarded back pay, sick leave accrual, reimbursement for medical expenses since her termination, and the right to repay her withdrawals from the state retirement system.

POSITION OF THE EMPLOYER

The Employer's arguments in defense of its actions are summarized below.

1. The grievant was advised at staff meetings and was counseled during her 2005 performance evaluation about her profanity with no effect on her behavior. She never acknowledged her behavior or its effects on her co-workers and showed no contrition or remorse.
2. The grievant consistently denied behavior which was established overwhelmingly by the testimony of all of the witnesses. She was the only staff member of the home that caused these kinds of problems.
3. This is not the sort of behavior that progressive discipline would cure and, in any event, progressive discipline is not appropriate in a case where she not only verbally and physically abused residents but also threatened co-workers with consequences at work and the physical safety of themselves and their families.
4. The grievant's testimony and version of events was inconsistent almost every time she was called upon to comment on or justify her behavior. By contrast, the other witnesses were completely consistent with their own stories and with one another and had absolutely no motive to lie about these events.
5. It is not the Employer's job to teach decent behavior to its staff. Grievant's supervisors should not have to continuously counsel her not to be rude, vulgar, or threatening. Her job was to create a harmonious and pleasant home environment for the residents and her behavior operated to create a hostile and tense environment instead.

DISCUSSION

BURDEN AND QUANTUM OF PROOF

It is well established that the burden of proving conduct of a type meriting discipline is on the Employer. This is true even where the contract requires "just cause." In cases

involving ordinary discipline or discharge, the quantum of proof required is “a preponderance of the evidence.” *Elkouri and Elkouri, How Arbitration Works, Sixth Edition, pp. 948-949.*

In the instant case the Arbitrator is of the opinion that the Employer carried its burden even if the higher standard of “clear and convincing evidence” were to be applied. The testimony of seven co-workers was consistent and credible and overwhelmingly established the egregious nature of the grievant’s conduct toward them and the residents. By contrast, the grievant’s testimony was inconsistent and not credible. It was apparent to the arbitrator that grievant was in denial about her responsibility for what happened to her. She either lacked the insight to be aware of her own behavior or was deliberately dissembling to protect her job. In either event, there was more than sufficient proof to justify some degree of discipline.

PROGRESSIVE DISCIPLINE

The Union argues that the grievant was not given adequate counseling, was not given warning that her behavior might lead to discipline of any kind, let alone discharge, and was not given the opportunity to correct her behavior. The Arbitrator does not agree with these assertions for the following reasons.

In the instant case there is no express requirement in the CBA for “Step” discipline. Even without such a contractual requirement, however, in appropriate cases Arbitrators have held that before summary discharge is justified the employer should have applied progressive or “corrective discipline.” The guiding principal is that the degree of penalty should be in keeping with the seriousness of the offense. Extremely serious offenses such as open insubordination or theft from an employer are typical of cases justifying discharge

without prior warning or attempts at corrective discipline. Less serious offenses like careless workmanship or chronic tardiness are generally held to require a milder penalty than discharge aimed at correcting the behavior. As might be expected, Arbitrators differ on when conduct is sufficiently serious as to justify summary discharge. The following are some examples of cases where summary discharge was deemed appropriate for a first offense:

- a. Employee driver failed to report an accident (*Interstate Brands Corp.*, 113 LA 161).
- b. Employee had a loaded gun in his locker in violation of work rules (*San Diego Trolley*, 112 LA 323)
- c. Employee threatened a foreman. (*Central Soya Co.*, (74 LA 1084).

The Union's argument fails to convince on three separate grounds. First, the evidence clearly establishes that although the grievant may not have been expressly warned that her conduct could lead to discipline, she was in fact warned about her profanity, her attitude, and her job performance on more than one occasion and ignored the instruction completely. Second, the Arbitrator is persuaded by the Employer's argument that it is not the DHS's job to teach ordinary decent manners, language, and behavior, and that additional counseling on the point was very unlikely to succeed. Finally, and most important, these state facilities cannot be and are not monitored by Supervisors on a full time basis. The DHS must have trust and faith in its staff to carry out their jobs respectfully and professionally. This isn't like other jobs. The welfare and safety of extremely vulnerable adults is at stake and the Employer simply cannot afford to risk the

continued employment of a Human Services Technician whose chronic behavior creates a hostile and potentially dangerous environment for her co-workers and the residents.

DECISION AND AWARD

For the above stated reasons the grievance is denied. The Arbitrator finds that the termination of the grievant's employment was appropriate under all of the circumstances of this case.

Respectfully Submitted

Stephen A. Bard, Arbitrator