

“IN THE MATTER OF ARBITRATION BETWEEN

STATE OF MINNESOTA)	
“Employer”)	Termination
)	(Priem Discharge)
AND)	
)	
AFSCME COUNCIL NO. 5)	BMS Case No. 06-PA-0953
“Union”)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: December 15, 2006; South St. Paul, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: December 15, 2006

APPEARANCES

FOR THE EMPLOYER: Tony Brown, labor Relations Representative
200 Centennial Office Building
658 Cedar Street
St. Paul, MN 55155
Rochelle Ryks, HST
Melinda Grass, HST
Debra Dimler, CRS
Robert Riggs, CRS
James Campbell, Program Manager

FOR THE UNION: Barbara Sasik
AFSCME Council No. 5
300 Hardman Avenue South
South St. Paul, MN 55075
Sheila Priem, Grievant
Misty Sorenson, Steward

THE ISSUE

Was the Grievant discharged for just cause?

If not, what remedy should apply?

BACKGROUND

The grievance involves the discharge of Ms. Sheila Priem (the "Grievant"), from employment with the Department of Human Services (the "DHS"), Minnesota State Operated Community Services (the "MSOCS") effective July 20, 2005.

The discharge letter asserts that the Grievant is guilty of "...implementation of a number of aversive procedures not authorized by the program, which have been reported as violations of the Vulnerable Adult Act, as required; failure to follow directives from your supervisor; and failure to follow directives from a consumer's guardian." These charges were detailed in the November 22, 2005 Third Step Employer Grievance Response which states: "Specifically, the issues were allowing a consumer to wear a shirt in public that had multiple tears and was tied together, removing food from the consumer and removal of the consumer's cap from his use."

The Grievant was in her classification of Human Services Technician at the time of her discharge. Her most recent employment with DHS began on November 1, 1999 and continued through her discharge in July of 2005. She worked at the home located at 4342 Knotting Hill Lane NW ("Knotting Hill") in Rochester, MN.

One of the residents at the home is D. D is a male in his mid 40's who is a vulnerable adult, is deaf, does not speak and has limited vision. Behaviors exhibit include eating too fast with potential for choking. He has an Abuse Prevention Plan. In that plan, it states he "uses gestures" and has some sign language skills. It also states a concern he "may have difficulty reporting abuse. He has a high tolerance to pain and may not recognize injury."

The hearing record shows that:

- On Sunday, June 19, 2005, two of the Grievant's co-workers, Rochelle Ryks and Melinda Grass noticed that D was sitting in the garage at Knotting Hill with the main garage door open and D wearing a torn shirt that was tied together with knots.
- After the Grievant's shift ended at 3 p.m. that day, the two co-workers removed the shirt from D, and threw the shirt out and put a new shirt on him.
- The next day, Monday the 20th, the two co-workers went separately to their immediate supervisor, Bob Riggs, and informed him what they observed the previous day regarding D. After that meeting, Riggs removed the shirt in question from the trash. In consultation with Riggs' manager, Jim Campbell, a full employment investigation was initiated regarding the shirt incident.
- The investigation was conducted by Riggs and another supervisor, Greg Hall into the incident. Other issues came up regarding allegations regarding the Grievant's behavior. These included reports that the Grievant had removed food from D and had taken his cap and placed it away from his use.

- Riggs concluded his investigation into the allegations surrounding the Grievant's behavior on June 19th and other allegations made during the investigation. Riggs and Hall determined that the allegations regarding the Grievant's job performance were substantiated and were aversive procedures not authorized by the program, were Vulnerable Adult Act violations, and that the Grievant failed to follow directives of the supervisor and of the consumer's guardian.
- Riggs discussed his findings with Campbell. The Grievant's employment history was reviewed showing that she had previously been issued an oral reprimand, a letter of expectation and was issued a three day suspension only weeks before the June 19th incident. Based on the Grievant's employment history and the severity of the allegations, they decided to discharge her from employment.
- AFSCME Council 5 filed a grievance on the discharge on August 1, 2005. A third step grievance meeting was held on October 4, 2005. The grievance was denied at the agency level on November 22, 2005. AFSCME appealed the grievance to arbitration and it is properly here for adjudication.

POSITION OF THE EMPLOYER

The two co-workers who observed D in the garage with the torn shirt testified as to what they observed on June 19, 2005 and other behaviors of the Grievant that they observed and shared with Riggs in the investigation. They stated that they arrived at Knotting Hill separately and parked at different places on the street, yet both were able to see D sitting in the open, attached garage wearing the badly tattered shirt.

The Elkouri's provide a two step definition of just cause. The first step is: has the employer submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline? The second step of this analysis asks whether the discharge of the Grievant was appropriate given all of the relevant circumstances.

The aversive actions taken by the Grievant included the removal of D's food, yelling at him, hiding his cap, leaving of the overhead fan on while he was in torn shirt and had indicated that he was cold, and finally having him sitting outside in the garage with the door open wearing a torn shirt.

The testimony describing these events came from two co-workers who had nothing to gain by making these allegations. Both were new employees on June 19, 2005. However both had worked for several years in other settings involving vulnerable adults. Both stated that the shirt that the resident had tied on was totally inappropriate and demeaning to D and immediately removed it from him after the Grievant had left at the end of her shift.

Both Rochelle and Melinda testified that they were "disturbed" by the shirt and the resident sitting in the garage and in plain view when each pulled up on Knotting Hill Lane that they both, independently at the start of their shifts, went to their supervisor, Riggs, to describe

what they had observed. Neither had any animus toward the Grievant and indeed hardly knew her.

While co-workers had nothing to gain by coming forward, the Grievant had everything to gain by minimizing the events regarding the location of the resident and what he was wearing on that afternoon. The co-workers descriptions of events are much more credible than the Grievant's. They both reported being able to have a clear view of the resident from the street when arriving at work. Both stated there was no van or any other vehicle in the portion of the garage where they observed the resident sitting. These two observations by the co-workers occurred two and one half hours apart but agreed in all essential details.

The Grievant claims that D was not easily visible to anyone on Knotting Hill Lane. Yet there is no denial that the resident was in the garage with the garage door open. It was a sunny Sunday. The home is in a residential cul-de-sac where neighbors walk, ride their bikes, walk their dogs, play outside and have every reason to go by the garage and observe the resident in the torn shirt.

The Grievant also claims that there was the van in the garage which blocked the view of D from the street. But this totally contradicts her statement that she had the resident out in the garage while she was working on the rocks in the yard. If the van was in the garage, how can the Grievant be outside and still be observing him? The co-workers stated that D was placed in a position to observe the employees working in the yard. He would not have been able to do so if he were sitting behind a van blocking the view. The Grievant's version of these events thus lacks credibility.

As with D's location, the description of the shirt from the co-workers and supervisors is more plausible than that of the Grievant who stated it was a different shirt he wore as compared to that shown at the hearing. Both co-workers clearly identified the shirt in evidence as the same one they removed from D and as the one they threw out on June 19, 2005. This shirt is the one that the supervisor, Riggs, identified as the one he removed from the garbage on June 20, 2005 and has kept at his home since that time. The shirt in evidence shows why anyone would deny having put it on a vulnerable adult and would argue the three other witnesses are wrong about their identification.

The evidence on the other offenses the Grievant was discharge or also come from the two co-workers. Both described aversive behavior by the Grievant that was inappropriate and in violation of the resident's care plan. The Grievant's explanation of these events is again suspect. As to the allegation she shouted in D's face, the Grievant testified she speaks louder due to her hearing limitations. The co-workers stated they are able to tell the difference between the Grievant's naturally loud voice and yelling. As for removing the Grievant's food and taking his cap, the Grievant claimed these were corrective tactics. Dimler testified that one cannot correct D's behavior where there is no direct tie between the behavior and what is being deprived from the resident. These become aversive behaviors by the Grievant which can only be seen as forms of punishment contrary to policy and D's care plan.

The proven misconduct warrants the discharge of the Grievant. The Grievant has received thorough training on the Vulnerable Adult Act, on proper care for all the residents and knows or should know that the use of aversion methods is prohibited except in limited circumstances that are not applicable in this case. D's treatment plan was accessible and was thoroughly and completely explained to all those who worked with him at Knotting Hill. The Grievant simply did not follow the plan and decided to go off on her own on treating D.

Discharge was the appropriate level. The Grievant's employment record shows she had received coaching and counseling, an oral reprimand and a three day suspension. She knew that pulling food away from a resident was a violation.

The Union brings up a red herring with the discipline issued to Rochelle Ryks. The Employer differentiated today between those two cases and showed the severity of the Grievant's offenses warranting discharge. The discipline of Ryks is of little comparative value as it happened several months after the Grievant had been discharged.

The main reason for the discharge was the clear violations of policy and just common sense in failing to treat D with dignity and respect. As Jim Campbell stated, there is no further training, coaching or discipline to correct the behavior and attitude of the Grievant and to be able to trust that she would ever do those types of behaviors again.

POSITION OF THE UNION

The Employer discharged the Grievant, a six year employee, based on flawed physical evidence and the report of two very new employees. Two new employees who had not even yet read D's Abuse Prevention Plan. The supervisor, Riggs, did not personally witness anything tied to the allegations of the vulnerable adult abuse. All of the reported allegations are a simple matter of interpretation.

What was the Grievant supposed to do? D was ripping his shirts. As a deterrent to not continue the behavior, she had the guardian's permission to tie D's shirts on him.

Is the garage a public area? Absolutely not. D did not sit on the apron of the garage nor in front of the van or anywhere else where the public could see him. The house is on a cul-de-sac. The pictures in evidence see how shadowed the garage is and that the state van was also in the garage where D was sitting there. Note from the pictures the chair in the garage. It is not easy to see the chair even without the state van being parked next to it. Employees park in the street in front of the house all of the time. This fact that makes it even more unlikely that D could have been seen from the street.

The Employer's analysis and conclusions of their investigation summary states in part, "Client being on display in the garage in full view of the neighborhood..." D was not in full view of Melinda – not until she had parked in the driveway, in front of the open garage door and then walked into the garage. That was when she first saw him sitting there. For the Employer to say that by being in the garage, D was on display is an egregious exaggeration.

Because the physical evidence is not consistent with the investigation report, the credibility of the supervisor is, questionable. Supervisor Riggs believed the two reporters when they stated that the shirt was tied in twenty knots. In fact in the Employer's investigative summary it is stated that both of the reporters worked on untying the "at least 20 knots" that were holding the shirt on D.

- Union Steward Sorenson and Grievant testified that the shirt they were shown at the investigatory meeting was striped, not plain like the one in the pictures.
- Supervisor Riggs is adamant that this is the correct shirt but where is the evidence of the twenty knots? For being a shirt of many knots, there is not a knot wrinkle to be seen.
- The e-mail from HR Director Grev says that shirt is the one that was on the consumer in the garage. In the Employer's written response to the third step of the grievance procedure HR Grev said that whether that was the correct shirt or not, was not relevant to the discharge. The shirt is relevant. In this case the physical evidence is not consistent with the report.

As to the dining room issue, the Grievant had tied a ripped shirt (with an open back) on the client in the house. Once again this was with the guardian's permission. The client pointed at the fan, but did not tell the Grievant that he was cold. The second time that he pointed to the fan – he then also signed to Sheila that he was cold and to please turn off the fan. She complied. At no time did she say "too bad" to D. Supervisor Riggs did not observe this occurrence, but instead chose to believe a very new and inexperienced employee's report of what happened.

The Grievant is accused of not following the consumer's Risk Management Plan or Abuse Prevention Plan. The consumer has a cleft palate. If he eats too fast he can choke. The Grievant could not allow D to choke. The RMP says that in order to get his attention (when eating too fast) touch his arm and sign for him to slow down or dish up smaller portions. It is a good plan when it works. If the client is starting to choke, or won't respond to touch, and you can't get his attention and then sign for him to slow down. This is what the Grievant did.

Even though many of the consumers are deaf, staff verbalize with the clients all of the time. The Grievant has a hearing loss which causes her to speak more loudly than others. There were times that she had to lean down and into D's face in order to get his attention to slow his eating. That cannot be considered yelling at D. A loud voice does not equate to yelling.

The Employer is calling these acts "aversive procedures." These actions were not aversive but instead were being safe on behalf of the consumer. The consumer plans are broad and subject to interpretation. Grievant is an experienced six year employee and she learned (like all experienced direct care employees do) how to make the program work.

The Grievant admitted that her last performance evaluation was below standards. At the time of the review, Knotting Hill was a newly opened house. Supervisor Jessica Page at the time

came down heavy on all the employees in the house. The Grievant's previous performance review was at and above standards.

She has prior disciplines, but the prior disciplines have no bearing on this case. There was no basis for this present discipline. Two six week employees should not be expected to recognize what Vulnerable Adult Abuse is. The two employees were not credible reporters.

One reporter, Rochelle Ryks is evidently still struggling with recognizing VA abuse. She has been disciplined three times since she was hired in May of 2005. In November, 2005, Ryks received a written discipline for not maintaining proper boundaries. She was accused of climbing into the consumer's bed and cuddling in order to encourage him to get out of bed. In May, 2006 she received a one day suspension for taking a camera from a consumer's room and hiding it in a kitchen cupboard. Most recently in September, 2006, she received a two day suspension for falling asleep while watching a movie with consumers. An 18 month employee receives three disciplines that are all tied to VA issues and is still working.

The Union has shown that the physical evidence is not consistent with the report. Supervisor Riggs is not at all credible in his reasoning for the discharge. He was not a witness to any of the supposed incidents and was all too willing to accept the versions of two six week employees. The two were too inexperienced to be reliable. The continued actions of Ryks – proves that she still has problems recognizing what VA abuse is.

Manager Campbell testified that there are no barriers to reinstatement. The Department of Human Services found no reason to disqualify the Grievant from doing direct care work.

The Union asks that the discharge be overturned and the Grievant be returned to work and be made whole on wages and accruals and benefits including all insurances.

DISCUSSION AND OPINION

The analysis of the record in this case seeks to answer three fundamental questions:

- I. What are the dispositive facts concerning the charges against the Grievant?
- II. Do the proven facts support a finding of just cause for discharge?
- III. If so, are any mitigating circumstances involved which should serve to reduce the discharge penalty?

Findings of Fact

A. The ripped shirt worn by D as he sat in the garage. Discussion and resolution of the conflicting versions of the evidence.

1. Findings: The dispute over whether the shirt presented in evidence was actually the one D wore at the time or whether he wore a different one poses an unnecessary credibility resolution issue. Unnecessary because it suffices that whichever torn shirt he wore was so tattered and unsightly that it struck both Rochelle Ryks and Melinda Grass as demeaning to D to be seen wearing.

What stands out as particularly convincing evidence of the offensiveness of the shirt tied on D is the fact that both co-workers were equally disturbed by his appearance even though they arrived at the scene over two hours apart and thus made separate observations.

Indeed, this review need look no further than the Grievant's own admission that D had so badly ripped his shirt that she had to tie it on to keep it from slipping off his body. Thus, the proven fact that the tattered shirt tied on D as he sat in the garage was substantially demeaning to his appearance renders irrelevant the Union's argument that the co-workers had exaggerated the offensiveness of this inappropriate garment out of ignorance or animus.

B. The extent of D's exposure to the public and to those who resided and those who worked at Knotting Hill.

2. Findings: Much of the argument over whether D was relatively obscured from public view or whether he could have been readily seen by passers-by misses the larger issue – which, simply put, asks whether wearing the ripped shirt caused to be ridiculed or shocked by whoever saw him. The short answer is that his tattered appearance prompted other residents to taunt him by calling him “Mummy” and caused the two co-workers to be offended and in the words of one “shocked” at the sign of his disarray. These exposures to shock and ridicule, standing alone, firmly establish the impropriety of the Grievant's tying the ludicrous shirt on D, as she testified, to teach him to stop his ripping behavior. Thus, this tactic obviously constitutes prohibited aversive, methods of dealing with a vulnerable adult.

The sole reason for reviewing the question of whether or not D could be readily seen by the outside public is to respond to the Grievant's defense that not only was D obscured from public view but that she had his guardian's permission to tie on the ripped shirt as long as he remained in the house.

In the absence of testimony from the guardian, this review must rely on reasonable inferences as to what such permission probably covered and what it never meant to cover. In this regard it would be unlikely that such a caring guardian, as revealed by her input to his personal care plan, would have given permission for D to be seen by anyone in such a state of disarray as to make him the object of pity and ridicule from in-house caregivers and ridicule from fellow residents.

A corollary defense offered by the Grievant insisted that seating D in the open door garage fell within his guardian's approval to tie on his damaged shirt as long as he was kept in the house. This aspect of the Grievant's defense against seating him in the garage with its door open lacks merit.

The argument that the garage is technically a part of the house again misses the consequential point which is that the guardian could only have meant that D was to be shielded from public view if forced to wear a torn shirt. The crucial question, therefore, asks whether or not D could be observed by people passing by while on display in the tattered remnants of a destroyed shirt.

The credible evidence shows that D could, in fact, be seen by any observant pedestrian sitting where he had been seated by the Grievant in the garage. The best evidence in support of such finding was provided by the Grievant who testified that she positioned D in the garage so as to keep an eye on him while assisting in the landscaping work along the right of the door.

The photographs of the area around the area where the work was being done shows that the Grievant could not have contributed much to that activity and still kept eye on D unless he were seated where not only was he within her sightline but where he would simultaneously be observable from the street.

The Grievant's testimony moreover was not the only evidence that D was positioned so as to be readily seen from the street. Both co-workers credibly described how they observed D sitting in his ripped shirt almost immediately after getting out of their cars. The Grievant contends that neither could have made such observations because of the obstruction in sightline caused by the parked agency van.

The ensuing dispute over whether or not the van was even parked where the Grievant insisted it was located simply has no relevance in light of the fact that the pictures in the record show a substantial range of sightline available from the street – even if it had been partially obscured. More importantly, neither of these witnesses had any reason to fabricate their separate but consistent observation each stated they made from the roadway accessible to both vehicle and pedestrian traffic.

The record cannot capture the guardian's actual state of mind when she gave the Grievant permission to tie the torn shirt on D as long as he remained in the house mainly because the Grievant did not testify as to how she described the condition of the garment in their phone conversation. From the anecdote about the ice cream mess on the clothes of a Down Syndrome child, however, the guardian made clear in the development of D's care plan that it was of prime importance that he be kept in a "presentable appearance."

From the taunts D drew from fellow residents and the shock felt by other HST's at D's appearance in the garage way, it can be readily surmised that his guardian would have strongly objected to his being placed on view to anyone in the pathetic shreds tied to his body on that day. The fact that, by her own admission, the Grievant had meant to break D from his ripping behavior by this aversive tactic proves that she violated the Employer's rules against the use of punishment to modify behavior, and also transgressed the spirit as well as the letter of the very limited approval by his guardian to his wearing a torn shirt out of public view.

B. There remains to be reviewed the other misconducts reported against the Grievant including those for which she had received warnings, coaching and counseling, as well as an oral reprimand and a three day suspension.

3. Findings: Of the more recent incidents cited were the matter with removing D's food to prevent him from eating too fast. Certainly, the Grievant's first responsibility was to keep him from choking but the credible testimony makes clear that she failed to follow the prescribed method of dividing his portions and repeatedly tapping his arm as the approved way of handling D's tendency to eat too fast.

While taking away D's cap to get him to promptly dress does not seem to be as an important infraction, the incidents of yelling in his face do rise to the level of serious offenses against the agency policies requiring that the resident's being treated with kindness and respect. While the Grievant defended this behavior by referring to her own hearing problem in admitting that she sometimes raises her voice loudly, she also acknowledged her awareness of how offensive this could be by stating that she would consciously lower her voice when speaking to Supervisor Riggs. She should have shown the same awareness towards D.

C. 4. Findings: These latter mentioned failings become significant in regard to answering the question of whether these proven offenses constitute just cause for termination or whether mitigating factors need to be taken into account. In point of fact, the Grievant's total employment record does not serve to mitigate the penalty but actually reinforces the irremediability of her conduct.

There can be no question over the fact that the Grievant's relationship with various co-workers has been poor. Neither have her most recent performance evaluations been acceptable. Her evaluation noted several areas of deficiency – particularly in regard to Responsibility 5, Work Rules, Policies, Procedure in which she was rated below standard, and Responsibility 6, Co-workers, where the rater, again, gave her a below standard mark.

The Overall Performance Level of Employee section of the Grievant's evaluation form states: "Performance is unsatisfactory. The employee does not meet job requirements and expectations. Substantial improvement is needed to justify retention in this position." The Grievant attacked this poor evaluation on the claim that the supervisor had been unduly harsh and "had come down hard on everybody." This self-serving declaration, however, is unconvincing in light of the extensive sworn testimony about the Grievant's shortcomings and infractions adduced at the hearing. This testimony basically supports the deficiencies noted in her performance evaluation.

D. 5. Findings: This review ought not close, however, without responding to the Union's challenge to the penalty of discharge as disparate treatment compared to that afforded Ms. Ryks for her relatively poor disciplinary record. In order to show disparate treatment, there must be substantial comparability both in the seriousness of the offenses and in the surrounding circumstances.

Such comparability does not pertain between those of Ms. Ryks and the Grievant. The critical differences arise because those charged against Ms. Ryks involved one boundary issue which in no sense was aversive and the other was of inattentiveness which, in like vein, lacked any element of aversive tactic. By contrast, those offenses proven against the Grievant were mainly for aversive treatment of a resident, with other infractions involving relationship problems with co-workers. By any reasonable measure, those rule infractions by the Grievant were substantially more serious and warranted, therefore, the more severe penalty.

Finally, the Union suggests that Ms. Ryks disciplinary record be considered as a test of her credibility. This suggestion might have had some merit if her infractions reflected in some particular way on her character. Instead, Ms. Ryks' disciplinary incidents relate to a boundary issue and to laxity in falling to sleep on duty. Neither of Ms. Ryks' infractions diminish her credibility as a witness in this matter.

DECISION

Based on the foregoing findings and conclusions, the grievance is denied.

Date 1/25/07

John J. Flagler, Arbitrator