

FINDINGS, ANALYSIS, AND AWARD

In the matter of arbitration between:

OREGON AFSCME, COUNCIL 75, LOCAL 2376

and

STATE OF OREGON, DEPARTMENT OF CORRECTIONS

Grievant: Jeffrey L. Anderson

Arbitrator: Ronald L. Miller

Award date: August 11, 2010

Witnesses:

Employer: Deb Robertson
Loretta Irving
Heather Villanueva
Hubert Joseph Giblin

Union: Brandon Doeden
Jeffrey Fisher
Tim Woolery
Jeffrey L. Anderson

RECEIVED
AUG 12 2010

GENERAL COUNSEL
DEPT. OF JUSTICE
SALEM, OREGON

INTRODUCTION

The arbitration hearing in this matter was held on March 30 and 31, 2010, at the Oregon State Correctional Institution (OSCI), Salem, Oregon. The State of Oregon, Department of Corrections (Employer or DOC) was represented by Stephen D. Krohn, Senior Assistant Attorney General, Salem, Oregon. Oregon AFSCME, Council 75, Local 2376 (Union) was represented by Allison Hassler, Legal Counsel, Oregon AFSCME, Council 75, Eugene, Oregon.

The parties stipulated that the matter was properly before the Arbitrator on its merits, that there was no issue having to do with the availability of witnesses, and no issue having to do with the availability of documents requested but not provided. The

hearing proceeded in an orderly manner. The parties were given opportunities to make an opening statement, submit evidence, examine, and cross-examine witnesses. Witnesses testified under oath as administered by the Arbitrator. A transcript of the hearing was not made. The Arbitrator taped-recorded the hearing to supplement his notes.

The parties submitted the matter to the Arbitrator on the basis of evidence presented at the hearing and post-hearing briefs. The Arbitrator closed the record on July 12, 2010, following timely submission of post-hearing briefs by the Employer and the Union. The Arbitrator underwent surgery on July 8, 2010; the parties granted additional time for submission of the Award.

STATEMENT OF THE ISSUE

The parties did not agree on a statement of the issue but did agree that the Arbitrator should frame a statement of the issue based upon the evidence. Accordingly, the issue shall be:

Did the Oregon Department of Corrections have just cause to remove Jeffrey Anderson from State Service? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

2009-2011 Collective Bargaining Agreement, between Oregon Department of Administrative Services and Oregon AFSCME, Council 75. (J Ex. 1)

Article 50, Section 1

The principles of progressive discipline shall be used when appropriate. No employee who has completed the initial trial service period shall be disciplined or dismissed without just cause.

FINDINGS OF FACT

- 1) Jeffrey Anderson, the Grievant, began working as an Institutional Registered Nurse at the Oregon State Correctional Institution on February 25, 2002 (E Ex. 1).
- 2) On May 23, 2006, Mr. Anderson was issued a written reprimand for: a) letting an inmate play video games on Mr. Anderson's computer, and b) viewing a dating website that contained sexually suggestive material (E Ex. 6). Additionally, Mr. Anderson's statements regarding these incidents were found to lack credibility. He was warned that future inappropriate conduct would "lead to more progressive discipline up to and including the initiation of pre-dismissal proceedings."

Mr. Anderson did not grieve the written reprimand.

- 3) On January 25, 2008, Mr. Anderson was disciplined with a one-step reduction in salary for three months for: a) inappropriate banter with an inmate that resulted in Mr. Anderson being exposed to the inmate's saliva, and b) retaining in his desk drawer and not returning medication [pills] that an inmate refused to take (E Ex. 10). The letter of January 25, 2008, states in part:

Your behavior has been complacent and shows a blatant disregard for the safety and security of this institution.

In addition, your responses to the above allegations were inconsistent and contradictory in several instances. Because of the conflicting answers you gave in relation to these charges, it is apparent that you are not willing to take responsibility for your actions. Furthermore, your untruthfulness causes management to seriously question your work ethics and your credibility.

Mr. Anderson was warned in the letter that inappropriate conduct would "result in further discipline up to and including dismissal."

Mr. Anderson did not grieve the three-month reduction in salary.

4) The medical clinic is accessed from the OSCI main corridor through security doors. Upon entering the clinic, there is an inmate waiting area; to the right is an examination room (nurse station); to the left is a security door (locked slam door) leading to a long rectangular room. Upon entering the rectangular room, the pharmacy (med room) is to the left; a blinded window in the pharmacy faces the inmate waiting area. At the far end of the rectangular room is the dental clinic. A glass-enclosed office area adjacent to the inmate waiting area is used for the processing of medical records.

5) Based upon evidence (E Ex. 25), and recorded testimony of both Employer and Union witnesses, standard procedures of the medical clinic include, among others:

- A staff member is never to be alone in the clinic with an inmate;
- Except in emergency situations or when special security is provided, inmates receive medical treatment in the examination room with at least one other staff member present;
- An injection is given to an inmate in the examination room. There are special exceptions to this procedure, such as when diabetic shots are given to multiple inmates who line up in the main corridor under security supervision.

6) On April 17, 2008, an OSCI physician assigned Mr. Anderson to do a medical evaluation of an inmate. Subsequently, because OSCI was concerned that Mr. Anderson might not have performed the medical evaluation, an investigation by the Department of Corrections' Special Investigations Unit was initiated.

7) On April 18, 2008, Loretta Irving, Nurse Manager, while walking through the inmate waiting area, observed a light on in the pharmacy; a blinded window is between the two areas. She walked to the security slam door; it was closed. Through a glass panel in the door, Ms. Irving saw an inmate on the other side. When she unlocked the door and opened it inward, the inmate stepped out of the way. As she passed through the doorway, Ms. Irving saw, to the left, that the door to the pharmacy was open; a light was on in the pharmacy; and Mr. Anderson was inside the pharmacy. Ms. Irving

instructed the inmate to go to the waiting area. After the inmate left, Ms. Irving closed the security door, and asked Mr. Anderson why the inmate was there. Mr. Anderson replied that he had given the inmate an injection.

8) At the time Ms. Irving was in the inmate waiting area on April 18, 2008, a medical records specialist was at work in the glass-enclosed office area. However, during the pre-dismissal hearing (E Ex. 27, page 9), Mr. Anderson was asked, "What other staff were in the area?" He replied, "No one that I know of." When Mr. Anderson gave the inmate the injection, he did not know if another staff member was in the clinic, including the medical records processing area (recorded testimony; also, E Ex. 25 at the bottom of page 4).

9) On April 22, 2008, Ms. Irving observed Mr. Anderson from the doorway of the examination room. Mr. Anderson was seated in the examination room; he had removed one shoe and sock and was showing his bare foot to an inmate. Ms. Irving instructed the inmate to go to the waiting area. After the inmate left, Ms. Irving asked Mr. Anderson what he had been doing with the inmate. Mr. Anderson replied that he was showing the inmate how to apply ointment to the sole of the foot. Mr. Anderson did not actually use ointment during the demonstration.

Two other staff members were in the examination room during Mr. Anderson's demonstration.

10) On May 6, 2008 (E Ex. 13), Mr. Anderson was assigned to an at-home duty station [paid administrative leave]. The notification letter did not state the reason(s) for the at-home assignment.

11) On July 24, 2008, the Department of Corrections' Special Investigations Unit issued a report (E Ex. 16) concerning its investigation into the matter of a medical evaluation of an inmate on April 17, 2008. The report states in part:

On April 17, 2008, [inmate name] was seen by RN Anderson at sick call and then again at approximately 11 a.m. However, the progress notes from Anderson's 11 a.m. and 1 p.m. evaluations were not placed in the

inmate's medical record. [Inmate name] was later, that day, transported to the Salem Hospital and placed under observation and received medical treatment for pneumonia.

* * * * *

Results of this investigation do not support the allegation that Anderson failed to assess [inmate name]. However medical protocol required that the medical files be located and all pertinent documents such as progress notes are placed in the patient's primary medical file for review by the attending physician(s). In this instance the [inmate name] progress notes were placed in an alphabetical file that is used to collect files forwarded from other institutions or non-essential loose documents related to a patient and were missing for several days.

10) On October 3, 2008, Mr. Anderson was issued a pre-dismissal letter (E Ex. 17). The letter makes references to the incidents of April 17, April 18, and April 22, 2008. A pre-dismissal meeting was scheduled for and held on October 23, 2008.

11) During the October 23, 2008, pre-dismissal meeting, the Union argued that the April 18 and April 22, 2008, incidents had not been properly investigated (E Ex. 19; E Ex. 20). The DOC agreed to initiate an investigation of those incidents.

12) On October 30, 2008, Deb Robertson, Human Resources Manager, Health Services Division, Department of Corrections, submitted an Informational Report (E Ex. 22). Ms. Robertson interviewed various staff members of the OSCI clinic regarding the April 17, April 18, and April 22, 2008, incidents. Ms. Robertson did not interview Mr. Anderson for this Informational Report.

13) On November 28, 2008, the DOC informed the Union, by letter to Tim Woolery, Council Representative (E Ex. 23), that disciplinary charges against Mr. Anderson related to the April 17, 2008, incident were withdrawn. However, disciplinary charges related to the April 18 and April 22, 2008, incidents were retained. The letter states in part:

We have considered the due process concerns you raised and in response have decided to start over with a new investigatory process into these incidents.

Benita Martin-Walls, Department of Corrections, Human Resources Department, was assigned to conduct an investigation. Mr. Anderson remained on paid administrative leave.

14) On February 24, 2009, Ms. Martin-Walls submitted an Investigative Report (E Ex. 25) concerning the April 18 and April 22, 2008, incidents. Ms. Martin-Walls interviewed Mr. Anderson, Ms. Irving, Nurse Theresa Giffin, Nurse Sean Banks, and Nurse Gamelba Rust. The Investigative Report states in part:

During the investigation there were discrepancies as to what was considered to be a safe and appropriate area to give injections to an inmate. Nurse Anderson said he had given injections inside the Dental area several times and had observed Nurse Manager Irving giving injections in the same area. I interviewed other clinical staff and asked them if they had ever observed anyone including Nurse Manager Irving give injections inside the Dental and med room area. The staff said they had not and it would never be a safe area to give an injection to an inmate. The staff also said they would never give an injection to an inmate if they were alone in the clinic. Two of the staff said they had observed Nurse Manager Irving giving an inmate an IV infusion in the Dental area. The staff described the procedure was conducted in a controlled environment as the inmate was lying in a dental chair and there were other staff in the clinic.

15) On April 1, 2009, Mr. Anderson was notified by letter (E Ex. 26) that a pre-dismissal process was initiated against him related to the April 18 and April 22, 2008, incidents.

16) On April 28, 2009, a pre-dismissal hearing was held concerning the charges related to the April 18 and April 22, 2008, incidents (E Ex. 27).

17) On June 11, 2009, Mr. Anderson was notified that he was removed from State Service, for "just cause," effective July 1, 2009 (E Ex. 30). Having concluded that Mr.

Anderson's conduct violated safety and security procedures on April 18 and April 22, 2008, Heather Villanueva, Administrator, Health Services, wrote in part:

Even if the Department desired to try and continue to work with you on your boundary issues with inmates, you did not express an understanding of the seriousness of your behavior nor were your responses credible in light of the information gathered in two separate investigations conducted by two separate human resources managers. Your actions placed you, your co-workers, volunteers and inmates at risk. When standards are known, violated and then followed by untruthful denials, there is no basis to repair the loss of trust in the employment relationship.

18) On June 16, 2009, Mr. Anderson filed a grievance in this matter (U Ex. 1).

ANALYSIS AND CONCLUSIONS

The burden of persuasion in this case rests with the Employer. Given the seriousness of the charges against Mr. Anderson and the discipline assigned, dismissal, the charges must be established by clear and convincing evidence, a high quantum of proof. This standard of proof is sufficient to assure that Mr. Anderson is given the benefit of any favorable evidence on his behalf, or lack of sufficiency by the Employer.

For the reasons set forth below, the Arbitrator is persuaded that the Employer met its burden with clear and convincing evidence. The Department of Corrections had just cause to dismiss Mr. Anderson even though the charges related to the April 22, 2008, incident are not sustained.

Over many decades, arbitrators have adopted and applied, in one form or another, the "Seven Tests for Just Cause" which were first formulated by Arbitrator Carroll R. Daugherty in Enterprise Wire Company, 46 LA 359 (1966). The "Tests," in modified form, are applied to the facts of this case.

APRIL 18, 2008, INCIDENT

Standard procedures of the OSCI medical clinic

Although they are not written, there is substantial evidence that the following standard procedures were established and were to be followed by OSCI medical staff.

- A staff member is never to be alone in the clinic with an inmate.
- Except in emergency situations or when special security is provided, inmates receive medical treatment in the examination room with at least one other staff member present.
- An injection is given to an inmate in the examination room. There are special exceptions to this procedure, such as when diabetic shots are given to multiple inmates who line up in the main corridor under security supervision.

Foreknowledge of standard procedures

Based on his extensive training and years of work at OSCI, Mr. Anderson knew, or should have known, these standard procedures. Further, Mr. Anderson knew, or should have known, that violation of these standard procedures could result in discipline up to and including termination.

Mr. Anderson acknowledges that he was not in the examination room when he gave the inmate an injection. Mr. Anderson contends that he and the inmate stood in the doorway between the waiting room and the dental clinic when the injection was given.

Mr. Anderson testified that several times prior to April 18, 2008, he had given injections at that location (recorded testimony). Further, during the investigation by Ms. Martin-Walls, Mr. Anderson stated that he had observed other nurses doing the same thing several times (E Ex. 25, at page 3). Similarly, during the pre-dismissal hearing on April 28, 2009 (E Ex. 27 at page 10), Mr. Anderson stated that giving injections in the dental doorway location "... is routinely done by other nurses and I can get affidavits from each and every one of the nurses." Nevertheless, at the arbitration hearing, Mr. Anderson provided no affidavit or witness to support his contention.

There is no evidence that other nurses have given injections while standing in the doorway between the waiting room and the dental clinic. To do so would violate another standard procedure: the security slam door is closed and locked at all times, except during passage.

Violations of standard procedures

When Ms. Irving unlocked the security slam door leading to the dental clinic and entered the room, the inmate stepped out of the way. As she passed through the doorway, Ms. Irving saw, to the left, that the door to the pharmacy was open, a light was on in the pharmacy, and Mr. Anderson was inside the pharmacy. When Ms. Irving asked Mr. Anderson why the inmate was in the area, Mr. Anderson replied that he had given the inmate an injection.

There is conflicting and imprecise evidence as to the specific place where Mr. Anderson and the inmate stood when the injection was given. Nevertheless, in the course of giving the injection at that general area of the room, Mr. Anderson violated standard procedures.

- By his own admission, Mr. Anderson did not know if another staff member was in the clinic.
- Mr. Anderson did not use the examination room for medical treatment, in this instance, giving an inmate an injection. Rather, Mr. Anderson permitted the inmate to be at an inappropriate location where safety and security might be compromised.

APRIL 22, 2008, INCIDENT

The basic facts related to this incident are not disputed: Mr. Anderson was seated in the examination room; he had removed one shoe and sock; he was showing his bare foot to an inmate and demonstrating how to apply ointment to the sole of the foot. Mr. Anderson did not actually use ointment during the demonstration. Two other staff members were in the examination room at that time.

The Employer has no written policy dealing with modeling for treatment, nor is there a standard procedure for such modeling. Employer and Union witnesses testified that modeling treatment is not uncommon at the clinic; however, as a Union witness noted, there are "implied limitations" (recorded testimony). Witness assessments of Mr. Anderson's modeling include: "not the norm," "unorthodox," "unusual," "not professional," "compromising," "potentially unsafe" (recorded testimony).

In the absence of prior counseling or training about modeling for treatment, the Employer has not established that Mr. Anderson's conduct was sufficiently inappropriate or unsafe to warrant discipline, rather than counseling or training.

DUE PROCESS

Approximately 15 months elapsed between the April 2008 incidents and the termination of Mr. Anderson's employment on July 1, 2009. There is no evidence that Mr. Anderson or the Union obstructed or caused delay. Rather, this matter moved slowly and with extensive consideration in the Department of Corrections. Additionally, the Human Resources Department was undergoing personnel changes during this period.

It is not unreasonable that the Department of Corrections first investigated the April 17, 2008, incident (medical evaluation of an inmate); potentially, this incident could have led to the most serious of charges against Mr. Anderson. Starting May 6, 2008, Mr. Anderson was placed on paid administrative leave (at-home duty station).

The investigative report of the April 17, 2008, incident was submitted on July 24, 2008. On October 3, 2008, Mr. Anderson was given notice that his conduct during the incidents of April 17, April 18 and April 22, 2008 could result in his dismissal.

During the next nine months, the following events occurred:

- October 23, 2008, pre-dismissal meeting;
- October 30, 2008, Informational Report on the April 18 and April 22, 2008, incidents, including commentary on the April 17, 2008 incident;
- November 28, 2008, disciplinary charges against Mr. Anderson related to the April 17, 2008, incident were withdrawn; a new investigation into the April 18 and April 22, 2008, incidents was initiated;
- February 24, 2009, Investigative Report on the April 18 and April 22, 2008, incidents;
- April 1, 2009, Mr. Anderson was given notice that his conduct during the April 18 and April 22, 2008, incidents could result in his dismissal;
- April 28, 2009, pre-dismissal meeting;

- July 1, 2009, Mr. Anderson was removed from State Service.

Assigning discipline in a timely manner is an important component of fair discipline and due process. The nine-month period, between the first pre-dismissal notice and removal, is not plainly unreasonable. The essential question for an arbitrator is not whether disciplinary action was totally free from procedural error or delay, rather whether the process was fundamentally fair. During this period, two investigations of the April 18 and April 22, 2008, incidents were conducted. Mr. Anderson was given ample opportunities during the investigation by Ms. Martin-Walls and the pre-dismissal hearings to explain his conduct and to challenge the statements of Ms. Irving. The investigation by Ms. Martin-Walls was thorough and competent.

There is no evidence that Mr. Anderson's interests were substantially prejudiced during the nine-month period. Although Mr. Anderson had to deal with uncertainty regarding future employment, his income was maintained. Additionally, as the months passed, Mr. Anderson was not at a disadvantage in recalling and explaining his conduct. Mr. Anderson testified that he wrote and used a "log book" about the events of April 18 and April 22, 2008 (recorded testimony).

Mr. Anderson was not denied due process during the procedure leading to his removal from State Service.

LEVEL OF DISCIPLINE

On April 18, 2008, Mr. Anderson violated standard procedures of the OSCI medical clinic. In the course of giving an inmate an injection, Mr. Anderson engaged in serious misconduct.

- Mr. Anderson did not know if another staff member was in the clinic.
- Mr. Anderson did not use the examination room for medical treatment. Rather, Mr. Anderson permitted the inmate to be at an inappropriate location where safety and security could be compromised.

Once charges have been proven, an assessment of "just cause" also entails an examination of the level of discipline assigned.

Prior discipline

On May 23, 2006, Mr. Anderson was issued a written reprimand for: a) letting an inmate play video games on Mr. Anderson's computer, and b) viewing a dating website that contained sexually suggestive material (E Ex. 6). Additionally, Mr. Anderson's statements regarding these incidents were found to lack credibility. He was warned that future inappropriate conduct would "lead to more progressive discipline up to and including the initiation of pre-dismissal proceedings." Mr. Anderson did not grieve the written reprimand.

On January 25, 2008, Mr. Anderson was disciplined with a one-step reduction in salary for three months for: a) inappropriate banter with an inmate that resulted in Mr. Anderson being exposed to the inmate's saliva, and b) retaining in his desk drawer and not returning medication [pills] that an inmate refused to take (E Ex. 10). Mr. Anderson was warned that inappropriate conduct would "result in further discipline up to and including dismissal." Mr. Anderson did not grieve the three-month reduction in salary.

Proportionality

The level of discipline assigned to Mr. Anderson, removal from State Service, is proportional to the severity of proven misconduct and his record of prior discipline. Moreover, there is no evidence that the Department of Corrections was arbitrary, capricious, or discriminatory in the assignment of the removal.

Assignment of discipline among employees

A basic component of fair and reasonable discipline is that the level of discipline should be consistent and even-handed among employees. There is no evidence that Mr. Anderson was unfairly disciplined compared with similarly situated employees.

Progressive discipline

Prior to his removal, Mr. Anderson had been assigned progressive discipline for earlier misconduct, first a written warning, and then a three-month salary reduction. Especially after the salary reduction, Mr. Anderson knew, or should have known, that further misconduct could result in his dismissal. Yet, within less than three months, Mr.

Anderson violated standard procedures of the OSCI medical clinic. In each of these situations, Mr. Anderson ignored safety and security boundaries for himself and others when dealing with unpredictable inmates.

Conclusion

Given the record in this case, there is no basis for the Arbitrator to disturb the discipline assigned by the Department of Corrections.

AWARD

The grievance is denied. The Oregon Department of Corrections had just cause to remove Jeffrey Anderson from State Service.

Ronald L. Miller

Ronald L. Miller

August 11 2010

Date