

THE MATTER OF ARBITRATION BETWEEN

<hr/>)	
RAMSEY COUNTY,)	
)	
)	
Employer,)	
and)	IGBINOBA DISCHARGE
)	GRIEVANCE
)	
AFSCME COUNCIL 5,)	
)	
Union.)	
<hr/>)	BMS CASE NO: 11-PA-0492

Arbitrator: Stephen F. Befort

Hearing Date: May 9, 2011

Post-hearing briefs received: June 8, 2011

Date of Decision: June 24, 2011

APPEARANCES

For the Union: LoRita Powell

For the Employer: Marcy Cordes

INTRODUCTION

AFSCME Council 5 (Union), as exclusive representative, brings this grievance claiming that Ramsey County (Employer) violated the parties' collective bargaining agreement by discharging Iredia Igbinoaba without just cause. The Employer maintains that it had just cause to terminate the grievant for engaging in the unwelcome touching of a co-worker. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer have just cause to terminate the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 15 GRIEVANCE PROCEDURE

15.9 Discharge. The Employer shall not discharge any permanent employee without just cause. If the Employer feels there is just cause for discharge, the employee shall be notified, in writing, that the employee is to be discharged and shall be furnished with the reason(s) therefore and the effective date of the discharge. The employee may request an opportunity to hear an explanation of the evidence against him/her, to present his/her side of the story and is entitled to Union representation at such meeting, upon request.

FACTUAL BACKGROUND

The Ramsey County Department of Human Services operates Lake Owasso Residence in Shoreview, Minnesota. Lake Owasso Residence is a residential facility for individuals with developmental disabilities. Many of the residents also have a secondary mental health diagnosis with accompanying behavioral problems. Lake Owasso Residence consists of eight resident houses, each of which accommodates eight individual residents.

Iredia Igbinoba has worked as a residential counselor at Lake Owasso Residence since 1998. He has no prior record of discipline. According to the pertinent job description, the basic function of a residential counselor is:

To provide care and treatment to mentally retarded persons in a residential care facility by overseeing and participating in residents' activities and providing instruction in order to enhance their functional skills, behavioral skills and ability for personal care; to perform custodial, foodservice, and laundry duties as needed, and to perform other duties as assigned.

Each house generally is staffed by three residential counselors for each shift. At the time of his discharge, Igbinoba was primarily assigned to work in House # 3.

Natalie Cash is another residential counselor employed at Lake Owasso Residence. She has worked at the facility for the past ten years and is primarily assigned to work in House # 6.

The incident leading to the grievant's discharge took place on January 15, 2010. On that day, a panic alarm sounded alerting available employees to assist at an incident taking place in House # 4. The alarm was called in order to obtain assistance in restraining resident "Q," a 230 pound recent female admittee with aggressive tendencies. Both Cash and Igbinoba responded to the alarm.

After arriving in House # 4, Cash joined four other employees in restraining Q who was on the floor. Cash testified that while she was on her knees holding Q's left arm, Igbinoba entered the room and kicked her three times on the butt. Cash told Igbinoba to stop it, and when he asked why, she told him it was because his feet were wet. Igbinoba then offered to take Cash's place in restraining Q, and, according to Cash, as he bent down to take hold of the resident's arm, he kissed Cash on the cheek.

Three other residential counselors corroborated Cash's testimony in whole or in part. Troy Nelson testified that he saw Igbinoba "bump up" against Cash while she was engaged in the restraint. Christian Donohue testified that he observed Igbinoba "nudge" Cash's rear end with his leg. David Cox testified that he saw Igbinoba kiss Cash as he bent down to take her place. Each witness opined that such behavior appeared to be intentional and inappropriate.

Following this incident, Cash reported the events to her supervisor, Cindy Schipper. Schipper testified that Cash was visibly upset as she described what had taken place. After sending Cash back to House # 6, Schipper met with Igbinoba and placed him on administrative

leave. She also told Igbinoaba that he was to have no further contact with Cash. According to Cash, Igbinoaba called her a few minutes later in House # 6 and asked what was wrong. She testified that she told Igbinoaba that he had acted inappropriately and then hung up.

Cash testified at the hearing that she had experienced unwanted touching by Igbinoaba on about five prior occasions. She also testified that she told Igbinoaba to stop this behavior on at least two occasions. Program Supervisor Ralph Zalazar testified that he observed one of these incidents himself and heard Cash tell Igbinoaba to “take your fucking hands off me.” Both Zalazar and Program Director Bill Stitch asked Cash following that incident if they should speak with Igbinoaba about the incident, but Cash demurred, indicating that she would rather try to handle the matter herself. As a result, Igbinoaba was never warned or counseled by supervisors concerning this alleged behavior.

During the initial investigative interview, Igbinoaba denied engaging in any of the January 15, 2010 touching alleged by Cash. At the arbitration hearing, Igbinoaba again denied the kicking allegation, but acknowledged that he did kiss Cash on the cheek. Igbinoaba testified that he and Cash are friends and that they frequently joke around with behavior that includes touching. He further testified that Cash had never previously told him that his actions were inappropriate.

The Employer terminated Igbinoaba on February 11, 2010 for violating policies on sexual harassment and crisis intervention. The Employer submitted evidence at the arbitration hearing to the effect that Igbinoaba had been trained with respect to both policies. The Employer also submitted evidence showing that it had similarly discharged other residential counselors who had engaged in unwelcome sexual touching behaviors.

The Union, for its part, called two additional residential counselors to testify at the arbitration hearing. Both Michelle Eromosele and Mabel Ohenzuwa testified that they had

observed Cash sitting on Igbinoba's lap on occasions prior to the January 15, 2010 incident. Cash denied that she had ever engaged in this type of voluntary physical contact with the grievant, and three witnesses called by the Employer testified that they had never observed Cash and Igbinoba participate in such behavior.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to discharge the grievant. The Employer initially argues that it has adequately proven that Igbinoba engaged in misconduct by making unwanted physical contact with Cash while Cash and other staff were engaged in restraining an unruly resident. The Employer further maintains that discharge is an appropriate penalty because such conduct constitutes a violation of County policies that prohibit sexual harassment and that seek to ensure resident safety. In addition, the Employer asserts that the decision to discharge Igbinoba is consistent with the past practice of the Employer in similar situations.

Union:

The Union maintains that Igbinoba did not engage in any misconduct, both because the grievant denies that he kicked Cash in the butt and because Igbinoba and Cash have a history of engaging in consensual playful behavior. As such, the Union contends that Igbinoba did not engage in unwelcome or offensive conduct. The Union additionally argues that discharge is too severe of a remedy in any event. In this regard, the Union points to the fact that Igbinoba is an eleven-year employee with no history of prior discipline. The Union also claims that the Employer never put Igbinoba on notice that his conduct was inappropriate and could be a basis for future discipline.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the City bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the City has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* Elkouri & Elkouri, *HOW ARBITRATION WORKS* 948 (6th ed. 2003). Each of these steps is discussed below.

The Alleged Misconduct

As its basis for discipline, the Employer alleges that Igbinoba engaged in the unwelcome and inappropriate touching of Cash in House # 4 on January 15, 2010. Cash testified Igbinoba kicked her three times on the butt while she was helping to restrain resident Q and then kissed her on the cheek as he relieved her as a restraint participant. In contrast, Igbinoba, at the arbitration hearing, denied kicking Cash and admitted only to kissing her on the cheek.

I find that the version of events depicted by Cash is more credible for two reasons. First, two eyewitnesses to the incident corroborated her story and testified that they observed Igbinoba purposefully bump (Nelson) or nudge (Donahoe) Cash's butt with his leg. Second, Cash's description of the incident has remained consistent throughout the investigation and subsequent grievance proceedings. Igbinoba's description, on the other hand, has varied from an initial total denial to a later partial denial.

Even if the incident occurred as alleged by the Employer, the Union additionally contends that the touching was not offensive in nature because Cash and Igbinoba have a long

history of engaging in friendly, playful conduct that includes hugging and other forms of touching. According to Igbinoba's testimony at the hearing, Cash has always been the one who initiated such physical contact. In support of this line of argument, the Union points to the testimony of co-workers Michelle Eromosele and Mabel Ohenzuwa, both of whom testified that they had observed Cash sitting on Igbinoba's lap on occasions prior to the January 15, 2010 incident. In contrast, Cash testified that she has never engaged in any voluntary physical contact with Igbinoba, and three witnesses called by the Employer testified that they never observed any interaction of that type.

Thus, the record on this issue also presents a "he said, she said" dichotomy. Here again, I believe that the evidence tips in the Employer's favor based on Cash's testimony that she had previously told Igbinoba that his physical overtures were not welcome. This assertion, in turn, gains in credibility by virtue of the fact that Zalazar testified that he witnessed an earlier incident in which Cash angrily told Igbinoba to stop touching her. Since Cash had previously told Igbinoba to stop making physical contact and repeated that admonition during the January 15, 2010 incident, it is difficult to believe that Cash welcomed the behavior that occurred that day.

Based on the above, the Employer has adequately established the misconduct alleged as the basis for discipline.

The Appropriate Remedy

The Employer argues that discharge is an appropriate remedy because the grievant's conduct constituted egregious violations of two County policies. First, the Employer maintains that Igbinoba's actions violated the County's Sexual Harassment Policy which bans: 1) touching, brushing against, patting or pinching, and 2) verbal or physical behavior that degrades someone based on their gender. Second, the Employer claims that Igbinoba's conduct was inconsistent

with the County's Crisis Intervention Policy which requires employees to treat residents and fellow employees in a safe manner, particularly in emergency situations.

The evidence supports both of these assertions. The January 15, 2010 incident involved unwanted touching that was sexually degrading in nature. In addition, the incident took place during the restraint of an out-of-control resident. The use of horseplay in this context potentially endangered the safety of vulnerable residents as well as that of co-employees.

The Union nonetheless makes two additional arguments in urging a lesser penalty. The Union first points out that Igbinoba is an eleven-year employee with no prior discipline. The Union's second argument is that the Employer never put Igbinoba on warning that his behavior was inappropriate.

While the Union's first argument is well-taken, the second one falls short of the mark. Although Lake Owasso Residence supervisors did not formally tell Igbinoba to change his behavior, Cash clearly did. On two occasions, she told Igbinoba to stop making inappropriate physical contacts.

In the end, the Union's argument for a lesser sanction would resonate more clearly if this was an initial instance of inappropriate behavior. But this behavior had occurred previously and Cash had made it clear that it was unwelcome and needed to stop. In addition, the severity of the misconduct is exacerbated by the setting in which it occurred. By engaging in sexual hijinks while a vulnerable adult was being restrained, Igbinoba jeopardized the safety of all concerned. Finally, and importantly, the Employer produced credible evidence that it has routinely discharged other employees who have engaged in similar conduct. Accordingly, no disparate treatment results from a similar sanction in this matter.

AWARD

The grievance is denied.

Dated: June 24, 2011

Stephen F. Befort
Arbitrator