

WORKSHOP CASE # 3

Issue

Whether the Collective Bargaining Agreement was breached when the employer discharged an employee for alleged physical abuse of a consumer under his care.

Background

The Program Support Manager is responsible for the processing/coordination of the review of all allegations of consumer abuse. Cincy Center operates the facility under contract with the a County Board of Developmental Disabilities ("A County DD"), which is one of Cincy Center's governing agencies. Cincy Center is required by law to report any allegation of abuse to A County DD within 24 hours. A County DD then must report the allegation to the Ohio Department of Developmental Disabilities ("ODODD") within 24 hours, and must also conduct an independent investigation of the incident, or it may involve law enforcement agencies.

When A County DD's investigative responsibility is triggered, it conducts its investigation through its Investigative Agents. Investigative Agents have the sole responsibility of conducting these investigations. As explained more fully below, Ohio law requires County Boards of DD to employ Investigative Agents, and requires that they be independent, as well as highly trained and qualified.

On or about January 12, 200N, one of the residents at Cincy Center, consumer "XX" reported that an employee had hit him in the chest. All parties agree, including the Employee, that hitting or otherwise harming a resident is abuse, and grounds for termination of employment. It was also agreed that, if the A County Board of DD substantiates abuse after investigation, the employee is uniformly, and without exception, discharged.

"HP", the Qualified Mental Retardation Professional ("QMRP"), first learned of "XX"'s abuse allegation on January 12, 200N during a conversation with "XX". "HP" testified that this came as a complete surprise. In fact, "HP" initially thought "XX" was referring to a bout of chest pain he had experienced several days prior. "XX" said "no", and indicated, by hitting himself in his chest with a fist, that he had been hit. "HP" asked "XX" if one of the other residents of Cincy Center hit him. He said "no". "HP" asked him if a flying object, such as a ball, had hit him. "XX" said "no". "HP" named all the other residents in "XX"'s home, in an attempt to see if something else had happened between "XX" and another resident. "XX" replied "no" to each name. He continued to make the motion of hitting himself in the chest. "HP" asked him directly if someone had hit him. He confirmed that someone in the home had hit him. "HP" confirmed all of this with "XX" using the "DynaVox" device. Having exhausted all other possibilities, "HP" asked "XX" if the person was in the home. He said "yes". "HP" asked "XX" to tour the home with her and asked "XX" to point to the person that hit him. As they approached the TV.

room, “XX” stopped, put his hand up and motioned to say “shhh”. “XX” then went around the corner and immediately pointed out an Employee, who was alone on a couch in the TV. room.

“HP” ruled out all other possibilities in her conversation with “XX”, and was left with a clear allegation of abuse against the Employee. Pursuant to Cincy Center’s policies, A County DD’s policies, and Ohio law, “HP” completed an incident report, which was then forwarded to the A County DD. An Investigative Agent (IA) was assigned by the A County DD to investigate the incident. She determined that the abuse occurred.

The Union and the Employee agree that abuse constitutes grounds for discharge, and that Employer uniformly terminates the employment of employees who are substantiated to have abused residents. Rather than challenge this undisputed fact, the Union appeared to argue three points:

- “XX” routinely falsely accuses staff of misconduct;
- “XX” has difficulty communicating; and
- the Employee was not assigned to care for “XX” during the relevant time period, and thus could not have committed the abuse.

Applicable Provisions of Contract

Section 9.01, Article IX, Discipline and Discharge: “No non-probationary employee shall be disciplined, suspended or terminated without just cause.”

Legal Considerations

In accordance with R.C. §5126.313(B), the ODoDD has promulgated administrative rules regarding investigations of major unusual incidents (MUI), namely abuse and neglect. OAC §5123:2-17-02 establishes when a county board must investigate reports of abuse, neglect, and MUIs. This rule is also applicable to providers, such as the Employer. At the time of the incident in question, this rule provided:

Immediately upon identification or notification of a major unusual incident, the provider shall take all reasonable measures to ensure the health and safety of all individuals served. Such measures shall include: . . .

(b) Removal of an employee from direct contact when the employee is alleged to have been involved in abuse or neglect until such time as the provider has sufficiently determined that such removal is no longer necessary. OAC §5123:2-17-02(D)(1).

Immediately upon receipt of a report of a major unusual incident, a county board shall review the incident to ensure that the provider has taken all reasonable

measures necessary to protect the health and safety of the individual(s) and determine whether any additional actions must be taken. OAC §5123:2-17-02(E)(1). The county board must immediately commence an investigation if the MUI alleges abuse or neglect. In doing so, the county board's investigation must be in accordance with the investigation protocol set forth in the appendix to the rule. OAC §5123:2-17-02(E)(2). The provider must cooperate with all investigations conducted by other entities, and shall respond to all requests for additional information made by ODoDD, a county board, or any investigating entity as soon as practicable but within five working days of receipt of the request. OAC §5123:2-17-02(E)(11).

The county board shall provide a written summary of the investigation findings to the individual who is the subject of the report, an advocate selected by the individual, or the legal guardian, as applicable, and the provider at least five working days prior to submission of the county board's final report to ODoDD. The written summary shall include a statement of the facts and findings of the investigation, including all preventative measures implemented in response to the incident. OAC §5123:2-17-02(E)(14).

In addition to the foregoing requirements, a provider must develop and implement a written procedure for the internal review of all major unusual incidents. The provider shall be responsible for taking all reasonable steps necessary to prevent the reoccurrence of major unusual incidents. OAC §5123:2-17-02(F)(1). The county board and the provider shall jointly determine what constitutes reasonable steps necessary to prevent the reoccurrence of major unusual incidents. If the county board and provider are unable to reach agreement, ODoDD shall make the determination. OAC §5123:2-17-02(F)(2). In this case, the A County DD has made it clear that employment termination is necessary in the case of physical abuse.

Questions for Thought/Review:

Is there an arbitrability issue? If so, describe briefly.

Other issues?

Union/Grievant position?

Employer position?

Any special considerations or strange circumstances that might be taken into account?