

Frankland #3

In the Matter of the Arbitration Between:

Union

-and-

Employer

Re: Employee 1 Discharge

OPINION AND AWARD

The undersigned, Kenneth P. Frankland, was mutually selected by the parties to render an Opinion and Award in its case number A9509-1640-04. Hearing was held at City A on October 22, 2004. The parties filed post hearing briefs by November 17, 2002 and thereafter the record was closed.

ISSUE:

Did the employer have just cause to discharge Employee 1?

PERTINENT PROVISIONS:

Article III, Section 3.2, 3.2 (f), (h)

Detroit Central City Personnel Policies and Procedures Manual, p.38 Disciplinary and Discharge Guidelines

Table of Exhibits

Joint 1 - Contract October 1, 2000 - September 30, 2005

Joint 2 - Grievance chain

Joint 3 - Personnel form

Joint 4 - Grievant license

Employer 1 - Witness subpoenas

Employer 2 - Waiver of Confidentiality

Employer 3 - DCC agreements by grievant re conflicts and confidentiality

Employer 4 - DCC Policies and Procedures

Employer 5 - Michigan Mental Health Code 330.1708, 1748, 1755, 1744, 1776, 1778, 1780
Employer 6 - Administrative Rules, Board of Social Work
Employer 7 - HHS Privacy rights of recipients
Employer 8 - NASW Code of Ethics
Employer 9 - not received
Employer 10 - Person 3 statement
Employer 11 - Person 2 letter November 13, 2003
Employer 12 - Person 1 memo 11/13/03 to PCS
Employer 13 - PCS reports
Employer 14 - not received
Employer 15 - Person 6 resume
Employer 16 - Grievant traffic record
Employer 17 - Grievant criminal history record
Union 1 - Phone book addresses
Union 2 - Grievant referee schedule
Union 3 - Grievant boys referee schedule
Union 4 - Grievant referee rating data
Union 5 - Photographs grievant house

Statement of Facts and Proceedings

The grievant is a facilitator employed by Detroit Central Community Mental Health, a non-profit agency providing services for mentally ill and substance abuse clients. Person 1 is the President and CEO. She explained the role of the agency and the duties of a facilitator primarily to assist recipients in obtaining the services available at the agency. In particular the agency receives HUD funds for the homeless and provides subsidies for rent and supportive services for the homeless. Facilitators are case managers and often provide individual clients with transportation and similar services. They often make appointments and drive recipients about the city in an agency vehicle.

Facilitators must be state licensed as Social Work Technicians. (Grievant registered 4/16/02 Joint Ex 4) Grievant was originally hired 9/15/97, left and was rehired 3/31/98 as a coordinator. He received a copy of the Personnel Policies and Procedures Manual, Confidential-

ity of Client Information acknowledgment, Code of Ethics for professionals in behavioral health care, Conflict of Interest Statement, Recipient Rights Staff Orientation materials and received a Certificate of Completion of recipients rights training from Company A in ethics and confidentiality. (See, E- 3)

Grievant was assigned to recipient Person 2. Person 2 has signed a waiver of confidentiality for this matter (E-2). July 25, 2003, Person 2 complained to the Agency that Grievant was violating his rights and requested a new facilitator but did not want to file a recipient rights complaint. Person 3 summarized the meeting in a three page memo (E-10) and was temporarily assigned to Person 2.

Essentially, Person 2 met a young lady at a hospital and when Grievant took him home, Grievant asked many questions about her especially if she had another friend for him. Later, Person 2 his friend and another girl met Grievant at a basketball game and Grievant took all to lunch and then to his home. Grievant talked to the other girl in another room and she came out as if in shock with bad news. Both ladies talked in private and then his friend looked the same way, shocked, traumatized and she then changed her attitude toward him. Person 2 thought Grievant had divulged confidential information about his medical condition, HI-V positive. He was betrayed. Person 2 was well aware of his illness and would not jeopardize anyone.

Both Person 1 and Person 4 outside Recipient Rights Advisor were advised but did not investigate because of Person 2's then lack of interest.

November 13, 2003 Person 2 met with Person 1, Person 3 and an attorney for Michigan Protection and Advocacy and gave them a written statement (E-11) about the alleged breach of confidentiality by Grievant and asked action be taken against Grievant Person 1 testified that

Person 2 also said Grievant dated a cousin of his friend, used him in a lawn service and sold articles from the back of the Agency van. The Agency turned the investigation over to Company A contracted to do recipient rights reviews (E-12) and Person 4 filed a complaint for Person 2. She interviewed Person 2, Grievant, Person 3, Person 1 and others including Person 2's friend he referred to in his statement (Person 5).

Person 4 testified that Person 2 repeated the same information that was first reported to Person 3 and provided a lot of details regarding meeting the girl, Grievant's interest in knowing her, the lunch after the basketball game, going to Grievant's house, the girls looking shocked and Person 2 believing Grievant told about his condition. He gave specific about Grievant's house and talked about the lawn service and that Person 2 did lawns. Person 4 had two statements and said all of Person 2's comments were consistent. Sayers told her that she was at Grievant's house with Person 2 and Grievant told her Person 2 was sick but didn't say with what and Person 2 also told her he was sick but not what condition.

Person 4 sent her reports to Person 1 on December 2, 2003 requesting remedial action on XXXXX a violation of Mental Health Code 330.1748, breach of confidentiality and on XXXX a violation of Mental Health Code 330.1708 recipient did not receive services suitable to his condition when Grievant took Person 2 to his residence for a personal visit.

December 4, 2003 Person 1 issued her report of remedial action being discharge for both violations. Neither the Recipient Rights Office nor the funding Agency objected. Grievant had been suspended without pay on November 13 and filed a grievance November 17 and was discharged December 4, 2003. Grievance procedure was followed and the case moved to arbitration.

Position of the Parties

Employer

Employer argues Grievant committed three offenses, a personal relationship with recipient Person 2, he had a business relationship with recipient and he breached the confidentiality of Person 2's medical records. Commission of any of these would create just cause, and the Union agreed. Although the employer's position during the hearing was that Grievant committed all three violations its brief focused upon a personal or business relationship but did not concentrate on the breach of confidentiality issue.

Union

The Union argues that the discharge was predicated upon the Recipient Rights recommendation and report and Recipient rights must investigate thoroughly to guard against false accusations made against a care giver. They argue Recipient Rights did not perform a fair, complete and impartial investigation to protect recipient as well as protect the care giver from fraudulent claims and the investigation in itself was defective. Particularly, Grievant denied any personal or business relationship with Person 2 and that he did not divulge confidential medical information about Person 2 to anyone.

Discussion

Discharge cases are always difficult because it is the capitol offense of employment relations and of necessity the proofs must be established to merit the severe consequences. In this case, the Union challenges many of the factual accusations since the complainant and primary accuser Person 2 was not available to testify. This was so because Person 2 has liver malfunction issues and was interviewed in the hospital by Person 4 and the Agency felt his physical health

and emotional well-being would be compromised with the stress of a hearing and confrontation with the Grievant. I did not permit an offer to submit an affidavit of Person 2 because the Union would be unfairly disadvantaged by no ability to cross-examine a document that often contains self-serving statements and is usually drafted by an attorney. Also, it would not permit me the opportunity to evaluate the credibility of a witness as I do when the person testifies in person. Having made this decision, it is incumbent upon the employer to carry the burden of proof by other means.

Here, the primary information starts with Person 2's first complaint that was memorialized by Person 3's notes of the July 25 meeting, and then much of the same information was given to Person 1 verbally by Person 2 and in writing on November 13. Thus, at least two key people heard first hand from Person 2 and they were able to testify in specific detail as to facts reported by Person 2. Each is a professional in the system and had no particular bias against Grievant and no reason to embellish or read more into the comments than appeared on the surface. I found both of them to be credible witnesses and their testimony could be relied upon. Nothing on cross-examination of their testimony diminished their credibility.

By far the most important source of information in this case is the testimony of Person 4 and her reports (E-13). Because of the sensitivity and confidentiality involved in these programs and the requirements of state and federal law the employer contracts with an outside agency to do investigations Company A.

Person 4 testified she has conducted 300 investigations and about 65% were substantiated by the standard of preponderance of the evidence, that is it is more likely that a right was violated than not and that standard was used here. She interviewed Person 2 while he was being

treated in the hospital for kidney failure and received the same information from him as he had given in his two earlier written statements. Person 2 had been to Grievant's home on Street A around 12th and 14th street and Street B, with a wooden porch, living room with pictures on a table. He was taken there in the company van along with Person 5. Later after a basketball game, Grievant took Person 2, Person 5 and her cousin to the Street A house. At this time the ladies had the conversation with Grievant, appeared shocked and Person 2 believed they were told about his condition. This information was reviewed with Person 3 and he confirmed the essence was the same as Person 2 told him.

Person 4 also interviewed Person 5. On the second interview, Person 5 did say she knew Person 2 and that both had been at Grievant's house on City A. Grievant told her Person 2 was very sick but not how. On a third interview, Person 5 said it was Person 2 not Grievant that told her he was sick.

Person 4 also interviewed Grievant. He denied taking Person 2 to his house. Grievant does do janitorial work, sells merchandise and has a lawn service. He denied any recipients ever worked for him. He never told anyone outside the agency that Person 2 was sick.

Person 4 concluded the evidence showed a violation of the City A policy of professional ethics and standards and MCL 330.1708 and 1748.

I find that the evidence corroborates the finding of violation of MCL 330.1708 but not 1748. Person 2 did not receive services suited to his condition and was not treated with dignity and respect. The evidence is substantial that Grievant took Person 2 to his house at least twice along with the ladies. Person 2's allegations were consistent to Person 3, Person 1 and Person 4 and he could identify the Street A house with specifics and those were confirmed by Person 5.

She did identify the house. Of added significance is the fact that Person 3 testified that Person 2 while driving with him pointed out the Street A house and said he had been there with Grievant. Person 3 later returned and verified that house was Grievant's.

It is permissible to draw inference from the testimony. I relied on Person 4's expertise and valued her objectivity. Even under strenuous cross-examination the major details regarding going to the house were consistent. I have little doubt that the employer has satisfied its burden of proof.

The Union basically argued that not all facts were verified and that the stories were inconsistent with the testimony of Grievant who denied having Person 2 at his house. However, I seriously question Grievant's credibility. Union submitted photos attempting to negate specific references to the first and second floors and certain furniture in each room. These were taken just before the hearing not contemporaneous with the incidents. Still, these photos tended to confirm the porch and the first and second floor arrangements as Person 2 described in his statements. Also the Union exhibits regarding basketball referee schedules did little but confuse rather than refute that he had gone to lunch and then to his house after refereeing a game. Further, during cross-examination his length of service with the Agency was not exemplary as he testified. During his first tenure, he was driving the Agency vehicle without a valid driver's license and was fired as being uninsurable. Grievant was evasive when confronted with his driving record after denying driving without a license. Also, when Grievant reapplied for a job he did not disclose a felony conviction several months earlier and when confronted at the hearing would not acknowledge the conviction.

I did not have confidence in his responses and my impression was that Grievant was not

forthcoming and that cast a very long shadow over his protestations denying wrongdoing. Therefore, I place little weight on the Union theory of the case and find the Grievant did violate the rights of Person 2 to suitable treatment.

Relative to the confidentiality issue, there is no proof that a confidence was breached. Person 2 inferred that but no proof was presented. Grievant denied it and Person 5 could not confirm it. Her last interview with Person 4 even changed when she said Person 2 told her he was sick but without specifics.

With respect to business relationships, the only statements are those of Person 2 that he did lawn service. Grievant admitted having outside business interest selling merchandise and running a lawn service but apparently those are not prohibited by the Agency. Even though Person 2 said he did lawn work, there was no corroborating information on this. I have no reason not to believe Person 2 but when discharge is at stake more needs to be established by the employer. They did not meet the burden of proof on this.

Having found evidence of one violation was discharge appropriate? Yes. Article II of the Agency Personnel Policies and Procedures Manual states,” Commission of any act(s) which constitute a gross violation of published ethical standards of the employee’s professional discipline, the code of Professional Conducts prescribed by the State National Licensure Certification Agency, or other codes prescribed by funding or regulations agencies.” In E-3, Grievant received a copy of the Manual as well as the Confidentiality Policy and Mental Health Code rights of recipients. A personal relationship is a gross violation of published ethical standards of the Code of Professional Conduct of NASW and gross violation of the Mental Health Code. The Grievant was aware of this and admitted at hearing that he knew he could be

discharged if he had a personal relationship with a recipient. Thus, the discharge was proper.

AWARD

The grievance is denied.

Respectfully submitted,

Kenneth P. Frankland, Arbitrator

Dated: December 30, 2004