#701

VOLUNTARY LABOR ARBITRATION TRIBUNAL

* *

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 23-18-980706-0040-01-04
and	*	
	*	
OHIO DEPARTMENT OF	*	Betty Williams, Grievant
REHABILITATION &	*	Removal
CORRECTIONS	*	

* *

APPEARANCES

For the Ohio Civil Service Employees Association:

Robert Robertson, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Mental Health:

Linda J. Thernes, Esq., Attorney/Labor Relations Officer
Georgia Brokaw, Labor Relations Officer
Ohio Department of Mental Health

Rhonda Bell (Second Chair)
Ohio Office of Collective Bargaining

Corrected

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MENTAL HEALTH	*	Removal
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HEARING

A hearing on this matter was held at 8:15 a.m. on April 28, 1999, and continued at 8:20 a.m. on April 29 at the Northcoast Behavioral Healthcare System's South Campus in Northfield, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Mental Health (the "State") were Director of Nursing Susan Kajfasz; Rebecca Goodwin, R.N.; Mary Lyons, R.N.; Staff Psychologist Kishan Gupta; Patient Care Coordinator Tom Hagesfeld, Ph.D.; Mary Maher, L.S.W.; Staff Psychiatrist Daksha Trivedi, M.D.; Clinical Area Supervisor (CAS) Pam Chasteen; CAS Linda Guarnieri, and Geneva Hill (by subpoena). Testifying for the Ohio Civil Service Employees Association (the "Union") were CAS Inder Sharma; CAS Annie Travossos; Therapeutic Program Worker (TPW) Yancey Jones; TPW Jimmy Jones; TPW Denise Gorr; Allison Nedal, R.N.; TPW John Kestner; TPW Kathryn Jenkins; TPW Edith Bynum and the Grievant, Betty Williams. Also in attendance was Juanita Brown, Chapter 7715 President. In addition, the parties stipulated that Charlene Cintavy and Cherri Gregory would testify the same as Denise Gorr and Jimmy Jones about staff assignments, posted programs and shift reports. A number of documents were entered into evidence: Joint Exhibits 1-4, Management Exhibits 1-2 and Union Exhibits 1-13. The oral hearing was concluded at 5:10 p.m. on April 29, 1999. Written closing statements were timely filed and exchanged by the Arbitrator on June 1, 1999, whereupon the record was closed. The

record was reopened on June 21 to receive the State's motion to strike evidence from the Union's post-hearing brief. The record was again closed on June 28 upon receipt of the Union's reply. This opinion and award is based solely on the record as described herein.

STATEMENT OF THE CASE

Northcoast Behavioral Healthcare System (NBHS) is a state psychiatric hospital for the severely mentally disabled and forensic population of northeast Ohio. It now consists of three separate campuses plus the Community Support Network. Since the Mental Health Act of 1988 wherein funding for state hospitals was shifted to community agencies, NBHS has had to compete with private agencies for patients on the basis of quality of care and per diem rates. The goal of NBHS is to return its patients to the community as quickly as possible, but most of its patients have very little impulse control and have been unable to function independently in the community. Hence, staff needs to provide as structured and calm an environment as possible. Treatment teams determine the type of care and treatment appropriate for each patient assigned to them. Nurses are responsible for directing that care.

At the time of her removal in June of 1998 for multiple offenses in violation of a last chance agreement, the Grievant, Betty Williams, had been an employee of the State of Ohio since April 30, 1975, and local chapter president from 1990-1996. She originally served in the capacity of Custodial Worker and then as Hospital Aide. She spent most of her state service as a Pharmacy Attendant, but when the pharmacy was abolished in October 1995, she exercised her contractual bumping right and moved into direct patient care as a Therapeutic Program Worker. In 1994 she began to accumulate the active discipline currently on her record:

September 22, 1994	Written Reprimand	Neglect of Duty - Media contact
January 24, 1995	Written Reprimand	Failure of Good Behavior - Verbal outburst/abusive language
June 30, 1995	2-Day Suspension	Failure of Good Behavior - Verbal outburst (threatening supervisor)
October 23, 1995	6-Day Suspension	Insubordination - Demeaning/ abusive treatment of management
April 21, 1996	6-Day Suspension	Insubordination - Refusal to obey instructions/orders; 2-year last chance notice.

In December of 1996, the Grievant was removed from her position, but she was reinstated on August 2, 1997, by order of this Arbitrator, taking up her duties once again as Therapeutic Program Worker on the day shift in the 26-bed cottage 22-D, which houses forensic patients. She soon began to have difficulties in her work relationships again.

September 17, 1997

On September 25, CAS Inder Sharma, the Grievant's supervisor, requested a pre-disciplinary conference for her, charging her with insubordination and violation of dress code. With respect to the insubordination charge, Sharma said that when he issued her a direct order to take a competency examination on September 17, she "yelled, screamed, and pointed her finger in [his] face in [the] patients' area and said 'who the hell are you to give me direct orders'" (Management Ex. 1). The Grievant testified that when Sharma first called her that morning, she was doing vital signs and said she would call him back. But he came to the cottage anyway to give her a direct order that was pointless since she had already arranged to take the test that morning. The dress code violation involved wearing a cap while working on the unit. The case went to a pre-disciplinary meeting on December 1, but the State decided not to pursue the matter. The State did, however, encourage her to enter EAP for anger management. Noting she had a last chance

agreement from April 21,1996, still active, it also placed her on final warning. The Grievant believed her problems were caused by others, and so did not seek the suggested help with her anger.

December 7, 1997

The next incident began a few days later, on December 6 when the second shift nurse, Rebecca Goodwin, came on duty. At that time, the Grievant informed her that because of evidence of smoking in the bathroom, patients' smoking privileges had been restricted until the lighter or matches were turned in. She also named the patient she suspected. Later that afternoon when Goodwin lifted the restriction, this patient asked her if the Grievant had told her he was the suspect. When Goodwin admitted as much, the patient became angry and said he would talk to the Grievant in the morning. The patient was not secluded, no incident report was made, and no note was placed in the ward book either by Goodwin or by TPW Kathryn Jenkins, who testified she witnessed his hostility. However, this same patient was secluded on December 20, 1997 and on January 3, 1998, after threatening staff. At around 7:30 a.m. the next day, the patient angrily confronted the Grievant, but then backed off. The day shift 22-D supervisor, Nurse Mary Lyons testified he did so when she called his name. The Grievant testified she was the one to calm him down, though Lyons stuck her head out the door and so was aware of the situation. Upset about the breach of confidentiality and compromise to her personal security, the Grievant angrily confronted Goodwin when she came on duty for the second shift, following her into the chart room and yelling at her, according to Goodwin. The Grievant said that if the patient had hit her, she would have hit Goodwin. Goodwin, who acknowledges she was wrong to tell the patient the Grievant suspected him, apologized, but said the Grievant continued to berate and threaten her.

After apologizing several times with no effect on the Grievant's behavior, Goodwin said, "enough" and left the chart room. She further testified the Grievant followed her out and continued to berate her for some minutes in the presence of patients and other staff, an allegation supported by Lyons who was present at the time. TPW Bynum testified she overheard this argument between the Grievant and Goodwin, and that the Grievant did not sound agitated. In her written statement given on December 7, she said she did not hear a threat and that she was trying to avoid their conversation. As for the Grievant, she admits that she said she would have hit Goodwin had the patient hit her, but she did not mean it. She was only frustrated and she has never hit anyone, a claim disputed by outgoing Chief Steward Geneva Hill, who testified she was attacked twice by the Grievant. The Grievant states there was no argument and Goodwin did apologize to her, so she left. But then the patient showed up. Thinking Goodwin would want to make amends, she asked her to tell the patient that it was not true that the Grievant had reported him, but Goodwin just stood there. The patient, she testified was quiet the rest of the day, only glaring at her. She got busy and thought no more about it, so did not, herself, file an incident report.

The Grievant was subsequently charged with failure of good behavior. Following a pre-disciplinary meeting on January 22, 1998, in which she admitted the charge but said she was justified, the Grievant was again removed from state service. However, on March 3, 1998, the removal was held in abeyance for 180 days pending successful completion of EAP, at which time it would be reduced to a 6-day suspension. The Grievant signed an EAP participation agreement

on March 6 and saw a clinical psychologist three times in the next two months.[1] The EAP agreement states in part, "The employee understands and agrees that further occurrences of the problem described in paragraph 1, may result in the immediate implementation of the proposed discipline." Paragraph 1 defines the problem as, "Failure of Good Behavior, Demeaning or abuseful treatment, verbal outburst, engaging in a heated argument." The psychologist's written statement, which was admitted over the hearsay objection of the State, notes that,

> Therapy focused upon her learning to avoid and ignore the difficult people at work and to compartmentalize and depersonalize negative criticism. Rational and irrational thinking patterns were identified to alleviate non-productive thinking and feeling. Because Ms. Williams can be opinionated and assertive, she worked on being more tactful and less strident in her interactions with co-workers.
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> ***
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> In my professional opinion, Ms. Williams made a healthy effort to address a work environment which was hostile, abusive and non-supportive. My evaluation did not indicate Ms. Williams to be threatening or harmful to others. She appeared to be coping as well as possible under some very uncomfortable circumstances in order to maintain her work commitment responsibly. (Union Ex. 11)

March 16, 1998

Before her first session with the psychologist, another incident occurred. Over the March 14-15 weekend, a fragile, manic-depressive patient in her low period had refused to get out of bed or clean her room. She was not scheduled to work on Monday, but got up anyway, thinking she was. She had a money slip and went for the cash, stopping in the pop room for a beverage on her way back. Social Worker Mary Maher testified the patient later approached her, saying that the Grievant had kept her from going to work and using the pop room because she had not performed her duty over the weekend. Staff Psychologist Gupta testified she told him the same thing and was

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[1]March 19, April 4, and April 28.

very upset about it. Nurse Lyons concurred on the patient's emotional state, testifying she was crying. Lyons reported this to the treatment team, which met with the patient who, according to several members of the team (Gupta, Maher and Staff Psychiatrist Daksha Trivedi), said the Grievant was "wild and demeaning" to her. The patient's statement to the client advocate, however, only mentions being upset after being told she could not use the pop room for the rest of the day.

The Grievant testified her practice is to tell patients each day where they are going and what they are doing. She never did tell the patient she was not going to work. If the patient had insisted on going, the Grievant would have just said the patient was not scheduled for it. The only thing she refused the patient was pop, and the patient was not upset about it.

The treatment team met with the Grievant later that day. According to the Grievant, the team tried to talk to her, but Gupta immediately attacked her, screaming and hollering, while the Grievant kept insisting he was lying. The treatment team tells a different version. By their[2] testimony, Gupta tried to impress upon the Grievant that she was not to make unilateral, arbitrary changes to a patient's program, but to follow the team's plan and goals for the patient. These witnesses testified that the Grievant became "defensive," "angry," "hostile," "out of control," "upset," insisted on doing it her own way, and called Gupta a liar. As nothing productive was occurring, the meeting was ended and the team moved on to other business. However, they later signed a memorandum written by Gupta to CAS Sharma about the incident, asking him to "take

[2]Maher, Lyons, Trivedi and Patient Care Coordinator Dr. Tom Hagesfeld, the latter of whom is not a member of the team but who was present for at least part of the meeting for other business.

immediate appropriate action to correct her behavior to maintain the therapeutic atmosphere of this unit as requested in the past" (Joint Ex. 3, p. 12). Sharma filed a request for pre-disciplinary conference on April 7, charging the Grievant with incompetency and failure of good behavior. A pre-disciplinary conference on charges of failure of good behavior and patient abuse/neglect was scheduled for April 29. The Grievant takes offense that she stands accused of patient abuse. She believes this charge was levied because they are after her job and states she saw Hagesfeld and Gupta go into a room together to formulate their story. The pre-disciplinary meeting was rescheduled for May 1, but was postponed again so that the State could re-open its administrative investigation. Meanwhile, the Grievant's troubles continued.

April 16, 1998

Three staff were covering 22-D on the day shift of April 16, Nurse Lyons, the Grievant and a third person. The third person was passing medications when breakfast trays arrived, so Lyons went out to help. Lyons asked the Grievant if she was going to help. The Grievant said no, she was not assigned to meals. According to the Grievant, Lyons got excited. Gupta testified he overheard her refusal, so came out to help, but the Grievant states he did not. No one called a supervisor to issue a direct order, but the Grievant was asked a second time and again refused. The Grievant acknowledges Lyons can change work assignments, but she did not take the request as an assignment. In any case, even though she was going on about her work, she could see if help was needed and none was. It takes no time to pass trays. TPWs John Kestner, Yancey Jones and Jimmy Jones testified they have helped pass trays, even interrupting their work to do so, but are not required to do it unless assigned. The task only takes a few minutes and no help is required. Lyons' statement about the incident was written the following day. It also documents

a refusal to take patients outside for their smoking break, but there was no testimony on this matter.

April 26, 1998

On April 26, the Grievant made out an incident report (in which she alleged a patient had closed a door on her, injuring her arm) and called the police to get an Incident Report Number. Nurse Lyons questioned whether anyone but the charge nurse was to call police for a number, which upset the Grievant, who then verified her authority with another phone call to the police. As it was close to the end of the shift, Lyons turned the incident report over to Nurse Goodwin for completion. Goodwin, in turn, asked the Grievant to sign and date the report as the person notifying police. The Grievant refused and started to walk away. Goodwin asked again in a louder voice. According to the Grievant, Goodwin screamed, "You come back here!" at her. The Grievant left, then returned and began to yell (by the nurses' accounts) at Goodwin to the effect that she was not the Grievant's supervisor, Nurse Lyons was. The Grievant has it that she was asking Goodwin not to treat her as a child. She also testified Goodwin made a remark about "mental staff," an allegation Goodwin denies, but which a tape recording secretly made by the Grievant (and objected to by the State) shows to be true. In any event, the Grievant threatened to sue Goodwin. Lyons testified she thought the situation was escalating because the Grievant's voice was getting louder, she was not listening or responding to what was being said, and she was doing most of the talking. Lyons characterized this as typical. The Grievant says it was justified by their demeaning and degrading way of speaking to her. After about ten minutes, Goodwin called for a supervisor. CAS Pamela Chasteen and CAS Linda Guarnieri responded, arriving five or ten minutes later. The Grievant was still agitated, according to Guarnieri, walking back and

forth, loud, hostile, and threatening to sue Goodwin. Goodwin and the Grievant cross-accused each other of being hostile and argumentative. Chasteen concluded an investigation was called for, so asked for written statements. The Grievant did not want to wait for copies because it was the end of her shift and her ride was waiting, so Chasteen told her she would leave it for her to do the next day. CAS Sharma reminded the Grievant about it the next day, but the Grievant refused, saying she needed to check with her attorney first. She never did write a statement about this incident. Guarnieri talked to the patient who allegedly closed the door on the Grievant's arm. He claimed the Grievant had slammed the door on him, but Guarnieri's examination of his arm revealed no apparent injury, so she did not write an incident report on it. On April 29, Sharma filed another request for pre-disciplinary meeting, charging the Grievant with neglect of duty and failure of good behavior for the April 16 and April 26 incidents.

May 5, 1998

On May 5, the Grievant was assigned to escort patients during smoking breaks, however she refused to take two patients out to the patio, saying they were dangerous. One of these, patient T.Y., had accused her on May 1 of harassing, abusing and menacing him. His statement to the client advocate also charges that she refused to let him back inside after he finished his cigaret. The Grievant testified that arbitration was the first time she heard this patient's charge against her. She, herself, does not trust this patient, whom she says is a stalker. He has accosted her in the laundry room and has told her she is in his brains. On April 26 she wrote a note in the ward book stating that this patient hit her with the door, and for safety reasons she would not take him out to smoke again. The next day she talked to CAS Willo Thomas and CAS Annie Travossos, secretly tape-recording the conversation. The Grievant testified Thomas told her she

did not have to take this patient out again, but she does not know if Thomas documented this permission. In her testimony, Travossos could not confirm or deny anything about it because, she said, she did not pay much attention since it was not about her unit. The quality of the tape recording is too poor in this sector to clearly distinguish what, if anything, Thomas may have said about it.

Also on May 5, Gupta asked TPW Yancey Jones if he would take patients out at 2 o'clock, instead of at the scheduled 2:30 p.m. time, so as not to interrupt groups. The Grievant called from across the room, "No, smoke break is at 2:30." According to Nurse Lyons, who reported the incident to Sharma the next day, this led to another verbal altercation between the Grievant and staff.

Disciplinary Action

On May 14, the pre-disciplinary meeting that had been postponed on May 1 was rescheduled for May 20. To the charges of failure of good behavior and patient abuse/neglect arising from the March 16 incident, the State added additional charges of neglect of duty, failure of good behavior and insubordination for the April 16 incident (refusal to assist with meals, refusal to let clients into the building and refusal to take clients out for their smoke break), the April 26 incident (verbal abuse and threat), and the May 5 incident (refusal to take patient out to smoke and treatment of the same patient in similar situations). The hearing officer found all charges substantiated except refusal to let the case-manager/patient into the building. He recommended progressive discipline according to policy.

A removal order was signed by the Director on June 23, 1998, citing the December 7, 1997 incident that led to the EAP agreement and the charges stemming from the March 16, April

16, April 26, and May 5, 1998 incidents. This action was grieved on June 30. At Step 3, the charges of not allowing the patient to get a pop on March 16 and not answering the door for case manager and patient were dropped. The case was thereafter timely appealed to arbitration where it presently resides, free of procedural defect, for final and binding decision.

In arbitration, the Grievant testified about her troubles at NBHS in recent years. She said they began in 1994 when she had a disagreement with CEO Gintoli over news media on the campus and had filed an EEO charge against him. Since then she has had difficulties with Pam Chasteen, Inder Sharma and Kishan Gupta, the latter two of whom are friends. She likes Mary Lyons although Lyons is incompetent. The Grievant testified there is a conspiracy to get rid of her because she is a woman of principle. She questions what goes on and speaks up for patients, and Management does not like that. Labor Relations Officer Byers told her she would always be treated differently because of her union office. She states she has an excellent relationship with patients and has done a number of things for them such as getting more money for indigents and saving a patient's life. TPW Jenkins testified the Grievant is a good, caring, conscientious worker and not an angry person out of control. Nurse Lyons testified the Grievant does her share on the unit and is good at handling emergencies.

In support of her claim that Management is singling her out, the Grievant testified she had filed many complaints, especially with respect to Gupta's treatment of her, but nothing ever came of them. While patients who threaten or harm other staff are secluded, nothing ever comes of her own complaints about patients. Sharma testified none of the Grievant's complaints proved valid upon investigation.

The Grievant and two other women on the unit filed an EEO complaint against Inder Sharma when he required them (but not male staff) to inform him when they were leaving the unit to use the restroom. This complaint was resolved between the other two and Sharma, but the Grievant was not a party to the resolution because the mediation continued and concluded while she was in the restroom.

Another example of a double standard and Management retaliation at NBHS was testified to by the Grievant and Nurse Allison Nedal. Nedal was assaulted by CAS Chasteen in 1994. Chasteen got a written reprimand for it, but grieved and won her case. Since then witnesses to the assault, TPWs Kestner and J. Jones, testified they have had continuous discipline problems, even up to being removed. In another case, CAS Annie Travossos was attacked by staff Shirley Tolbert. Tolbert was found guilty of assault in court, but the Grievant testified she thought Tolbert was let off the hook at NBHS because she agreed to help Management against the Grievant. Tolbert later missed the appeal date on one of the Grievant's 6-day suspensions and they are no longer friends.

As for Geneva Hill's testimony that the Grievant attacked her, the Grievant testified that, too, is collusive slander, coming out of internal union affairs that have resulted in the Chapter being placed in trusteeship and the Grievant's refusal to be represented by Hill in this grievance. The Grievant admits she pushed Hill, but states that Hill was the aggressor.

STIPULATED ISSUE

Was the Grievant disciplined for just cause? If not, what should the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 11 - HEALTH AND SAFETY

11.03 - Unsafe Conditions

All employees shall report promptly unsafe conditions related to physical plant, tools and equipment to their supervisor. Additionally, matter related to patients, residents, clients, youths and inmates which are abnormal to the employees' workplace shall be reported to their supervisor. If the supervisor does not abate the problem, the matter should then be reported to an Agency/Facility safety designee. In such event, the employee shall not be disciplined for reporting these matters to these persons. An Agency/Facility safety designee shall abate the problem or will report to the employee or his/her representative in five (5) days or less reasons why the problem cannot be abated in an expeditious manner....

...

An employee shall not be disciplined for a good faith refusal to engage in an alleged unsafe or dangerous act or practice which is abnormal to the place of employment and/or position description of the employee. Such a refusal shall be immediately reported to an Agency/Facility safety designee for evaluation. An employee confronted with an alleged unsafe situation must assure the health and safety of a person entrusted to his/her care or for whom he/she is responsible and the general public by performing his/her duties according to Agency policies and procedures before refusing to perform an alleged unsafe or dangerous act or practice pursuant to this Section.

Nothing in this Section shall be construed as preventing an employee from grieving the safety designee's decision.

ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

ARGUMENTS OF THE PARTIES

Argument of the State

The State begins by reviewing the evidence presented, incident by incident. With respect to December 7, 1997, the Grievant did not deny she told Nurse Goodwin she would have hit her had the patient hit the Grievant. This is a statement of physical harm and it frightened Goodwin. This constitutes threat and surely is failure of good behavior. All the other evidence about what Goodwin did, whether the patient should have been secluded, and suggestions of conspiracy is just a smoke screen.

March 16, 1998: Five witnesses testified essentially the same about the Grievant's conduct in the treatment team meeting. Again the Grievant does not deny she called Gupta a liar and again she feels her behavior was justified because she felt wrongly accused. The issue is not whether the patient was scheduled to work that day, but the Grievant's exercise of inappropriate power and control over the patient by telling her her work privileges were removed. Again the Grievant's allegation of conspiracy is unfounded. Gupta was the only member of the team who had constant issues with the Grievant, but all her allegations about him were investigated and found without merit. None of the other four had any reason to fabricate a charge against the Grievant and no proof of collusion was offered.

April 16, 1998: There is no question the Grievant refused to help Lyons pass trays and she did so without justification. Head Nurses have the responsibility and right to give assignments and this was an assignment. The Grievant acknowledges the R.N. has the right to assign duties via the assignment sheet. This authority extends throughout the day to verbal assignments as well. If that were not true, changes could never be made to assignments, an untenable result in a hospital.

April 26, 1998: As a result of Nurse Goodwin asking the Grievant to sign an incident report, the Grievant berated, challenged and demeaned her, then threatened to sue her when she made a remark about mental staff. Again, instead of doing as requested or calling a supervisor, the Grievant took matters into her own hands and feels justified in her behavior because of the way she felt she was treated.

May 5, 1998: The Grievant does not deny she refused to take a patient out to smoke. Again she feels justified in doing so because she was fearful of the patient and had allegedly been

told by CAS Thomas she did not have to, but the tape submitted to corroborate Thomas's exception is too poor in quality to do this. In any case, at the time of refusal, the Grievant did not call Thomas to corroborate her assertions, nor was there any documentation in the ward book or patient's chart. The Grievant simply refused and did so without justification. She does not have the right to determine which patients she will work with. If she had legitimate concerns they should have been brought to the treatment team, which would then have developed a plan to resolve the issue.

The State objects to the admission of the tape. It was made in secret, the Grievant could have manipulated it to her own advantage, it is impossible to authenticate without testimony of the parties allegedly recorded and is of very poor quality. Thomas could have been called, but was not. Electronic recordings admitted in other arbitrations have been made on sophisticated equipment by professional operators for the purpose of gathering evidence in criminal investigations. Typically the parties were aware they were being recorded. While the Grievant's recordings may not be illegal, they are unethical. They tend to show the Grievant aggravated the situations to provoke evidence detrimental to others. The State does not permit video or sound recordings of patients. Also, such recordings would tend to have a chilling effect on staff members. As such, the State objects to their admission into evidence.

The State next reviews the Grievant's record, which includes suspensions, a last chance warning and encouragement to obtain help from its EAP. Soon after the Grievant returned to work in 1997, the State gave her another break, put her on notice again, and again offered EAP. Still the Grievant turned her back. A third break came as a result of the December 7 incident when the Grievant accepted the alternative of EAP over termination, but still claimed the problem

was her co-workers', not hers. She did attend three counseling sessions, but was involved in four more incidents. The State points to the terms of the agreement signed by the Grievant and submits that two of the charges for this removal were specifically for the problem described in Paragraph 1 of the agreement: "Failure of good behavior, demeaning or abuseful treatment, verbal outburst, engaging in a heated argument."

Turning to the Union's arguments, the State contends there is no conspiracy. Three of the Union witnesses (J. Jones, J. Kestner and A. Nedal) called to support that theory had an ax to grind by virtue of their own disciplinary history and two (Nedal and Sharma) brought no such evidence. In fact, by the end of the Grievant's testimony, the "conspiracy" had grown to encompass co-workers, former friends, other union members, and even patients.

The State challenges the Grievant's credibility with Hill's testimony. Hill, who testified under subpoena, had nothing to gain, and she disputed the Grievant's claim she had never attacked anyone, saying she had, in fact, assaulted Hill twice.

With respect to the Union claim of disparate treatment, the State submits that neither Chasteen nor Tolbert had any discipline in their files and so are not similarly situated to the Grievant.

The State concludes saying that the Grievant "got" herself by failing to follow policies and not contacting a supervisor or filing a grievance when she disagreed. Instead, she took matters into her own hands, attacking those with whom she disagreed. This is unprofessional in any setting and especially inappropriate in a therapeutic milieu. NBHS needs quality staff in order to compete effectively. The Grievant would not have lasted as long in a private setting. The State's

standards should be no lower. For these reasons, the State asks that the grievance be denied in its entirety.

Argument of the Union

The position of the Union is that the State did not have just cause to remove the Grievant. In fact, this removal, like previous disciplinary actions against the Grievant, was the result of a concerted effort by the State to get rid of her.

The Union contends the Grievant's history at NBHS shows the Grievant has been targeted by Management. She was discipline free for nearly 11 years. Then, after 4 years as Chapter president, she had an irreconcilable difference with the CEO which produced 11 pre-disciplinary meetings, 8 disciplines including 2 removals and numerous EAP suggestion in the next 4 years. Each case came down to her word against numerous others. At her first removal arbitration, she said she had never been accused of patient abuse. Now she is. This, says the Union, is no coincidence. During the same period, all her complaints received superficial investigations and none of her concerns about the working environment were addressed. In addition, Management sent a message to other employees when it disciplined witnesses against one of its supervisors. The Grievant was truly alone. It is no wonder she was edgy and excitable when having conversations with people she could not trust. Their actions made her, an assertive person, seem out of control and disrespectful. Management knew her well and used this against her, however its referral of her to EAP backfired when the psychologist acknowledged the Grievant was in a hostile, abusive and non-supportive work environment.

The Union next reviews the charges against the Grievant, incident by incident. On December 7, 1997, the Grievant did make an inappropriate remark but did not intend to do harm.

Her remark was born in frustration. She had to handle the patient alone since no one came to assist. In addition, Goodwin's smirk when she apologized meant the apology was a sham. The Union points out that Goodwin's passing of information to the patient put the Grievant in harm's way and claims this was intentional. Then Management used the Grievant's unfortunate remark as an excuse to remove her or force her into EAP, knowing they could come up with additional charges. Having just come back from a financially disastrous unjust removal, the Grievant had no choice but to accept.

March 16, 1998: With respect to the charge of verbal abuse, the Union points out that Management never explained what the verbal abuse of the patient was. The Grievant was correct in telling the patient that she could not go to work. Indeed, letting her go if not scheduled would have resulted in discipline. Therefore, what the Grievant did was not unilateral or arbitrary. The Union also points out that Gupta, himself, misused the patient for he stated she was nearly ready for discharge when, in fact, she was not discharged until almost a year later. Moreover, contents of the letter were only what Gupta related to the team, not what they, themselves, had observed. It is true that the Grievant had a confrontation with Gupta, but she was only responding to his charge of patient abuse and not in conflict with the entire team. The Union wonders how Management can expect the Grievant to have poise and control when it allows others to do as they please.

April 16, 1998: With respect to not assisting at meals, the Union contends testimony showed that TPWs are not obliged to help unless specifically assigned. The Grievant was not assigned to meals and was performing other assigned duties. In addition, no direct order was issued. With respect to her refusal to take clients out for their smoke break, the only one she has

refused to take out was T.Y. and that was because he represented a threat to her safety, something she documented in the ward book. She said she would take out clients if they had a behavioral plan to address the problems, but no such plan was written for this patient.

April 26, 1998: The Union contends the tape recording shows there was no argument and nothing was said that was verbally abusive. Moreover, the Grievant's comment about a lawsuit was in response to one of the nurse's referring to her as "mental staff." The fact that the charges against the Grievant were co-signed by Chasteen and Guarnieri shows that the Grievant needed to tape record these meetings that ultimately came down to her word against that of people with titles. The Union argues that this tape-recording should be admitted and given appropriate weight, citing two OCSEA v. ODRC cases (G-87-0813 and G-87-2389) and 42 O Jur 23d §190.

May 5, 1998: The tape recording shows that Supevisor Thomas told the Grievant she did not have to take this patient out to smoke. The fact that this exception was not charted only proves that the supervisor did not follow through since TPWs cannot chart. Management is at fault here for another reason, and that is that it never addressed the Grievant's safety concern with a behavioral plan, though it had time to do so between April 26 when the Grievant made an entry about it in the ward book and the May 5 incident. The Union also relies on Article 11.03 of the Contract which protects employees from discipline when refusing to perform unsafe or dangerous acts.

The Union submits that in its zeal to remove the Grievant, the State has resorted to stacking petty charges. It is so desperate it even brought in a former Union official against whom the entire Chapter has filed charges for collusion with Management. While it agrees that NBHS needs quality staff, it says this must be from top to bottom, and there is ample evidence of real violence

(by managers such as Chasteen, Buckley, Tolbert and Carmichael) that received a slap on the wrist while witnesses were disciplined and the Grievant was removed for alleged verbal threats.

The Union cites many other incidents it contends demonstrate why the Grievant believes she was the victim of an orchestrated collusion. Among these are: many of Sharma's charges were based on Chasteen (who is Sharma's immediate supervisor), Kajfasz or Gupta (a fellow countryman); the Grievant is the only one who has had to arbitrate discipline for clothing policy violations, of which Kajfasz is the worst offender; Nedal was disciplined for testifying on behalf of the Grievant; Chasteen has had a secret hand in most of the Grievant's discipline; some charges against the Grievant have been thrown out as outright lies; Management can violate policy with impunity (for example, Gupta taking a statement from a patient without a client advocate); and the police reports show their biased perspective towards the Grievant. If the Grievant crossed the line, it was because she was dragged, asserts the Union.

This facility has convicts, indicted crooks and aggressive thugs parading as managers and employees who are above the law, concludes the Union. The Grievant's work has been commendable. She has nearly 25 years of state service and wants to be able to retire. To justify what was done to her by Management will declare open season on employees at the hospital, all of whom are watching for what this Arbitrator will do. The Union asks that the removal be overturned in its entirety and the Grievant be made completely whole, including all incurred medical expenses, missed holidays she would have been entitled to, and anything that would correct the disciplines incurred from the December 7 incident to the eventual removal.

OPINION OF THE ARBITRATOR

Admissability of Evidence

The State objects to the admission of two pieces of evidence offered during the oral hearing. With respect to the psychologist's statement, I note first that the State was the party eager to have the Grievant rely on the professional opinion and advice of a counselor and, in fact, forced the Grievant into the relationship. Second, while the Union might have subpoenaed the psychologist, it is traditional in arbitration in general and in these parties' relationship in particular, to admin medical experts' written statements and weigh them according to the purpose for which they are offered and the lack of opportunity to cross-examine. I do so in this case. In particular, Dr. Casper's conclusions about Ms. Williams' work environment do not appear to be based on anything but Ms. Williams' own statements and so are entirely disregarded. The balance of her statement is given consideration, but not the weight it would have had Dr. Casper testified herself.

The tape-recording is also admissable and is given weight according to its degree of authentication. Although I share the State's concern regarding a chilling effect on employee communications, this does not make it inadmissable. The only question for me is its reliability. Here I have several concerns. One is that it is incomplete and thus does not reflect the events that occurred before and after the Grievant turned the machine on or off. Second, since she was recording in anticipation of defending against a termination, the Grievant had motive to manipulate herself and others to her own advantage. Since it was a secret recording, she also had the opportunity to do so. Third, not all the alleged speakers testified at the hearing, in particular, Willo Thomas. Moreover, the quality of the recording during that particular segment is very

poor. Thus, while I admit the tape and have listened carefully to it several times, it has not always been helpful in determining the facts of this case.

As to the documents submitted for the first time with the Union's post-hearing brief, it is inappropriate to submit evidence after the close of hearing because it deprives the opposing side of an opportunity of rebuttal. The documents offered are not new evidence. The Union could either have submitted them at the hearing, moved for a continuance, or asked that the record be kept open to receive supporting documents. Any error made by the State in failing to inform the Union in advance of its intent to call Ms. Hill on rebuttal if necessary (which it did to impeach the Grievant on her answer to a question put to her on cross) was harmless. There was no prejudice to the Union, for it had the Grievant there to impugn Hill's credibility. It might also have requested a continuance if it felt it needed additional opportunity to defend. The State's motion is granted.

The Merits

Although the stipulated issue of this case is amenable to an arbitrated decision, the underlying source of the dispute is well beyond this form of dispute resolution. Everything in the case, from the documented history of the Grievant through the character of witness testimony to the arguments of the parties points to an intractable conflict. The responsibility for the origin of the hostility cannot be determined from the record before this arbitrator, but it is evident that both parties are responsible for maintaining it – the Grievant for refusing to acknowledge her own role in failing to amend her behavior and use agreed-upon systems for righting the wrongs she believes she has suffered, and Management for creating the opportunities for her to feel and, in some cases, be wronged.

This case also presents some challenges for finding facts and drawing inferences. No member of management, indeed, no person who opposes the Grievant, escapes the charge of collusion. Even those reluctant to testify are said to be under the power of a corrupt management. The discipline of the Grievant's co-workers is either offered as evidence of Management's corruption and a "Red Badge of Courage" or as a reason for them to lie in defense of the Grievant. The Grievant's political enemy is either to be believed because she has nothing to lose or to be disbelieved because she has already lost much. The EAP agreement and the offers that preceded it are either evidence of Management giving the Grievant a break or evidence of it setting her up. Charting a course through these waters is a treacherous business, but it must be done.

Taking each incident and charge in turn, there is no question the Grievant did say she would have hit the nurse had the patient hit her. What the nurse did that provoked the Grievant's words was wrong and the nurse was employed at NBHS long enough to know it. Why Management initiated discipline against the Grievant and not the nurse is one of several unanswered questions of the case, but if the nurse had an otherwise clean record, admitted her mistake and apologized for it, some degree of difference in discipline outcome would be justified because the Grievant had a record and claims she was justified in making such a statement. She was not. It was threatening even if not in the present or future tense, unprofessional (especially if patients were present) and not justified. The Grievant had many other ways to handle her complaint, among them speaking appropriately to the nurse in a problem-solving mode and writing up an incident report. In other words, her displeasure was justified, but her actions were not. As for the fairness of the EAP agreement, Management's motives for offering it as an alternative are

irrelevant. The Grievant accepted the terms knowing the quality of her case and must be held to them.

The charge of patient abuse/neglect arising from the March 16 incident is unproven. Although I find Maher to be a credible witness, all evidence of what the Grievant said to the patient is hearsay and even her written statement says nothing about being held back from work. Moreover, Maher testified it was not unusual for this patient to be upset. However, the Grievant's angry, hostile and argumentative behavior at the treatment team meeting is proven. In light of the Grievant's long-standing poor relationship with Gupta, I do not rely on his testimony. I have no such problems with Hagesfeld or Trivedi, whose testimony I found to be completely credible. Again, the Grievant's anger is understandable. Even an angry expression of a difference of opinion might be excused in such a setting, but not a heated, confrontational argument that prevents working on the problem for which the meeting was called. As for Gupta's own finger pointing, I observed this habit while he was testifying, but his was not in the accusatory manner the Grievant is said to have used.

The charges for April 16 are dismissed. The record reveals only the charge of refusing to take the patient out and no evidence that the Grievant actually did refuse. As for her refusal to assist with meals, insubordination requires instructions from legitimate authority and knowledge of the consequences, as well as refusal. There is no evidence the nurse did any more than make a request or that the Grievant understood discipline could result from her refusal. Some employees are more amenable to requests than others. Some will understand "I'm changing your assignment." Others will require a direct order to make it clear that "Aren't you going to help with trays?" means "You better, or suffer the consequences."

Some of the factual issues of the March 26 incident are resolved by the Grievant's tape recording, but not all. The recording does not reveal what actually occurred when Goodwin allegedly screamed, "You come back here!" but it does show exaggeration about yelling and screaming after that point, when the Grievant knew she was being recorded but the two nurses did not. Lyons' description of the Grievant was accurate. The Grievant asked politely at first that she not be treated as a child, then she insulted Goodwin, interrogated Lyons about Lyons' work performance, admonished the two nurses, and argued repeatedly. After Goodwin cursed and made the "mental staff" remark (that she later denied), the Grievant taunted her and told her she would sue. The Grievant sounds almost delighted at having caught Goodwin in an indiscretion, which is what she objects to when she perceives she is on the receiving end. By this time, the Grievant had worked twice with the EAP psychologist, but is still exhibiting the behavior said to be typical of her that she saw no need to change. The charge of failure of good behavior, becoming involved in a verbal, heated argument with the two nurses is proven.

Finally, neither the tape nor any written records support the contention that the Grievant was given consent not to take patient T.Y. out for his smoke break on May 5. Nor is there evidence that the Grievant claimed a safety issue at the time she refused. The Union relies on the Health and Safety article, but that provision has a procedure mutually agreed to for the purpose of protecting employer and employee interests, and the Grievant, who is well-experienced as a union officer, did not use those tools. Moreover, I am not convinced that taking this patient out to a patio in view of other persons is an unsafe act "which is abnormal to the place of employment and/or position description of the employee." The charge of neglect of duty is proven.

Having found the Grievant guilty of a number of the charges against her does not mean the Union is entirely wrong in its theory of the case. The Grievant has had to defend against some petty and frivolous charges, while similar or worse violations by others have been ignored or minimized. I am also persuaded that her complaints have not been investigated or otherwise pursued as vigorously as those against her. Given the Grievant's confrontational style and her long-standing personality clash with Gupta and others, I do not doubt that the State has been eager to change her behavior and, having failed at that, to get rid of her. To its credit, it repeatedly encouraged the Grievant to learn other, less disruptive, ways of managing her conflicts at work. To the Grievant's discredit, she never accepted, not even in arbitration, that her own behavior, including her own petty charges against nurses and supervisors cost her support and contributed to the hostility she encountered in the work place. Thus, I cannot say that a penalty less severe than removal would be corrective, for there is no reason to believe that the Grievant is any more prepared to change her ways than she was when I first put her back to work. Moreover, the Grievant made an agreement that further occurrences of the problem of "failure of good behavior, demeaning or abuseful treatment, verbal outburst, engaging in a heated argument" could result in implementation of the March 3 removal.

However, as Management bears some responsibility for the Grievant's troubles and the poisoned working environment, too, merely sustaining the discharge without some recompense to the Grievant for Management's role would sustain the injustice, not just for the Grievant, but for the message sent to all employees, including managers, at the hospital. For this reason, while I find the Grievant was not discharged for just cause, I uphold the removal but award backpay and

benefits from the date of her unjust discharge to the date of this award, which shall be noted on her record as the effective date of her termination.

AWARD

The grievance is granted in part, denied in part. The Grievant was not disciplined for just cause. She is to be paid backpay and benefits from the date of her unjust discharge to the date of this award, which shall be noted on her record as the effective date of her removal. The Arbitrator retains jurisdiction for a period of sixty (60) days to resolve any dispute that may arise in the implementation of this award.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
July 20, 1999

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