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 In the Matter of Arbitration *
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 Between * Before: Harry Graham
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 OCSEA/AFSCME Local 11 * Case Number:
 *
 and * 33-00-20040907-1551-01-04
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 The State of Ohio, Ohio *
 Veterans Home *
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APPEARANCES: For OCSEA/AFSCME Local 11:

Robert Robinson
 Staff Representative
 OCSEA/AFSCME Local 11
 390 Worthington Rd.
 Westerville, OH 43082

For Ohio Veterans Home:

Donna Green
 Labor Relations Officer
 Ohio Veterans Home
 3416 Columbus Ave.
 Sandusky, OH 44870

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present evidence and testimony. The record was closed at the conclusion of the hearing in Sandusky, OH on May 18, 2005.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was there just cause to terminate the Grievant, Ernest Taylor? If not, what shall the remedy be?

BACKGROUND: The Grievant, Ernest Taylor, was employed at the Ohio Veterans Home in Sandusky, OH as a Nurse's Aide. His date of hire was June 17, 2002. While employed at the Veterans Home the Grievant compiled a disciplinary record during 2003 and 2004. His discipline was related to attendance problems. Commencing in June, 2003 with a counseling, the Grievant had received several suspensions as well. On August 31, 2004 Mr. Taylor was discharged from his employment with the Veterans Home. On August 13, 2004 there had occurred a confrontation between the Grievant and a resident of the Home, one JR. Mr. Taylor and JR had been conversing. JR called the Grievant a "faggot." Mr. Taylor responded by placing his hand on JR's right shoulder and saying "If anyone is a fucking fag, you are." As he turned to leave the scene, the Grievant picked up the frame of a shirt hamper and swung it about, damaging a ceiling tile in the process. Mr. Taylor was discharged. In discharging him, the Employer cited various of its policies. These included Verbal Abuse, Unapproved Behavior/Inconsiderate Treatment, Poor Judgement and Violence in the Workplace. A grievance protesting Mr. Taylor's discharge was filed. It was processed through the procedure of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE EMPLOYER: During his employment with the Veterans Home Mr. Taylor received thorough training on Resident Rights and Abuse, Out of Control, Communication and Interpersonal Skills, Workplace Violence and Corrective Action. He knew how to act when confronted with JR. That notwithstanding, he reacted inappropriately to JR's comments.

JR is possessed of weak mental capacity. On a standardized test, the Folstein-Mini-Mental Exam, he scored 8 out of a total potential maximum of 25. Given that poor result, special consideration was due him. In fact, Mr. Taylor showed no consideration whatsoever by his actions on August 13, 2004.

Mr. Taylor's co-workers were affronted by his behavior towards JR. They were so upset they filed workplace violence reports bringing it to the attention of the Employer. Under these circumstances the State asserts its action was justified.

During his service with the Veterans Home the Grievant compiled a record of increasingly severe discipline for attendance problems. The August 13, 2004 incident represents the proverbial "last straw." Given Mr. Taylor's discipline record plus the circumstances of the August 13, 2004 event his discharge is warranted according to the Employer. It urges the grievance be denied in full.

POSITION OF THE UNION: The Union points out that at all times Mr. Taylor has acknowledged he erred in his confrontation with JR on August 13, 2004. He has never tried to cover-up the incident.

In fact, another employee of the Veterans Home, Chris Kenne, has had repeated instances of similar conduct. He has not been discharged. This represents an example of disparate treatment that should not be tolerated according to the Union. Given the similar circumstances of Mr. Taylor and Mr. Kenne, it is not possible to justify the discharge of the former and retention of the latter in the Union's view.

On August 13, 2004 Mr. Taylor was provoked. The Union agrees that employees of the Veterans Home are trained how to respond in such situations. That said, JR's behavior was beyond what employees should be expected to tolerate. While not condoning Mr. Taylor's actions, the Union contends they must be examined in the circumstances confronting him on August 13, 2004. When that is done, discharge is inappropriate in its view. It seeks his restoration to employment with full back pay and benefits.

DISCUSSION: Behavior such as that demonstrated by the Grievant on August 13, 2004 is violative of Employer work rules. Mr. Taylor was trained in those rules and had somewhat over two years of service at the time of his discharge. It

must be presumed he was well-aware of the policies of the Veterans Home towards inappropriate language and touching of residents. Beyond the work rules is the ethos of the care-giving community. It is certainly taken as the norm that unpleasant confrontations must be minimized or ignored in the interest of patients or residents. Mr. Taylor's behavior towards JR on August 13, 2004 represents a serious transgression of the work rules of the Veterans Home and the normal behavior expected of care-givers.

Those observations do not end consideration of this matter. JR on his part engaged in very serious provocation of the Grievant. He is not blameless. It was JR who initiated the incident. The Employer may levy discipline on the Grievant for his intemperate reaction to JR. Under these circumstances, his discharge is excessive.

An analogy may be made between this situation and discipline for fighting on-the-job. It occurs that people are discharged for fighting while at work. The Employer may cite a work rule prohibiting such action or a zero-tolerance policy towards workplace violence. However, such events are examined in context. The Union oftentimes argues provocation. Certainly in instances of use of racial or sexual epithets unacceptable in our society such an argument is powerful. It is in this case as well. JR's verbal assault on the Grievant

was unacceptable. It may certainly be argued that Mr. Taylor should not have reacted as he did. Such an argument is akin to arguing for perfectability of humanity. Under the circumstances he faced on August 13, 2004 Mr. Taylor's actions were inappropriate, but understandable. Thus, while serious discipline is due him, such discipline must be short of discharge.

It is suggestive that another employee at the Veterans Home, Chris Kenne, has compiled a record of several instances of workplace violence. He remains employed at the Sandusky facility. There is indeed an element of disparate treatment in this situation.

Under the circumstances presented in this matter the Grievant has opened himself to discipline. It is, however, discipline short of discharge.

AWARD: The grievance is sustained in part and denied in part. The Grievant, Ernest Taylor, is to be restored to employment at the Ohio Veterans Home effective the first pay period following receipt of this award. No back pay is due from the date of his discharge to the date of his restoration to employment.

The parties are to promptly meet and draft a "Last Chance Agreement" to be applicable to the Grievant. His acceptance of that Agreement is a condition of his restoration to

employment. That Agreement is to be in effect for two (2) years following its execution.

Jurisdiction is retained for sixty (60) calendar days from the date of this award to resolve any questions concerning remedy.

Signed and dated this 1st day of June, 2005 at Solon, OH.

Harry Graham
Harry Graham
Arbitrator