In the Matter of the Arbitration

- between -

The Ohio Civil Service Employees Association, AFSCME Local 11

- and -

State of Ohio,
Ohio Veterans' Home

Arbitrator: John J. Murphy
Cincinnati, Ohio

For the Employer

Buffy Andrews
Joe Trejo
Office of Collective Bargaining
100 E. Broad Street
18th Floor
Columbus, Ohio 43215

Also present:
Craig Selka
Food Service Manager

Chris Smith
Assistant Superintendent of Operations

Warren LaRue
Resident

Russell Haynam
Resident

Tony Ryderburg
Resident

Cindy Turinsky
Food Service Worker

Linda Laws
Former Food Service Worker

Donna Green
Labor Relations Officer

For the Union:

Robert Robinson
OCSEA, Local 11
390 Worthington Road, Suite A
Westerville, Ohio 43082

Also present:

Kathy Bowman
Food Service Worker

Alice Mullins
LPN

Vanessa Brown
Chief Steward

Bob Boger
Custodian

William Kessler
LPN and Union Steward

Gary Crabb
Food Service Worker

Mark Weikle
Chapter President

JoAnn Grissom
Grievant

BACKGROUND:

The Grievant was terminated from her position as Food Service Worker effective January 19, 2007 by a removal order of the same date. The order stated that she violated three provisions in the Employer's Correction Action Standards. The Standards are a disciplinary grid that is set forth according to topic of impermissible behavior by employees. The Grievant was found to have violated two standards under the topic of "Resident Abuse/Neglect," otherwise summarily referred to as "AN." The particular standards under this topic alleged to have been violated by the Grievant were AN-03 and AN-06. The Grievant was also found to have violated a standard found under the topic "Insubordination," and that was I-04.

The pertinent language in the removal order stated as follows:

> On January 12, 2007 a pre-disciplinary meeting was scheduled in accord with OCSEA/AFSCME Article 24.05. You had alleged to have violated Ohio Veterans Home Corrective Action Standard(s); AN-03); Misappropriation/Exploitation - Any act intended to exploit, extort or defraud a resident including but not limited to: misuse of authority over a resident' forcing or compelling a resident to cooperate in illegal or immoral activity; attempting to extort or borrow money or property from a resident; or stealing resident's personal possessions, AN-06); Failure to follow policy (resident related) (e.g., failure to follow a policy, procedure or program which was implemented specifically for resident safety or well being; failure to report abuse) and I-04); Failure to fully cooperate in an investigation (e.g., truthfully and completely answering questions) . . .

The Union grieved the termination as being without just cause and requested reinstatement for the make whole remedy. The parties stipulated that the grievance was properly before the Arbitrator.

ISSUE:

The parties stipulated that the issue was as follows: Was the Grievant JoAnn Grissom removed from a position as Food Service Worker for just cause? If not, what shall the remedy be?

OPINION:

A.) The Three Major Divisions Between the Parties

Major differences between the parties centered on three matters. The first matterdealt with what the Union called was a "totally defective" removal order. "Arbitrators have noted that within the confines of due process, the Grievant and the Union have the right to know exactly management's rationale for the discipline. In the instant case, there is no specific charge in the removal order." (Union post-hearing brief at 3). The Employer's response was that the Grievant and the Union were given a copy of all the documentation that was used in the investigation. This included the particular policy that was encompassed under Corrective Action Standard AN-06 that makes the failure to follow a resident related policy a violation. (Employer post-hearing brief at 3).

The second division between the parties centered on the level of proof as to whether the Grievant in fact received money from a resident, Warren LaRue. According to the Union, "Management's list of witnesses possessed all the credibility of a desperate liar." (Union post-hearing brief at 4). Furthermore, the primary and best witness for management was a resident, Warren LaRue. However, his records, consisting of index card and entries in his calendar, were confusing, inconsistent with each other and with his bank statements on the matter of providing money to the Grievant. "The inconsistencies created by Warren's handwritten answers, his testimony, the index card, the calendar and bank statement support a finding of innocent on the part of the Grievant." (Union post-hearing brief at 5-6).

The Employer, on the other hand, primarily relied upon the testimony and handwritten entries by Warren LaRue on his calendar and index card to support the finding that the Grievant had received money from the resident.

The third major conflict centered on the question of lax enforcement of the Employer's Policy No. 4. This is the same policy that was at the bottom of the Union's claim in this case that the removal order was defective--the subject of the first division between the parties briefly stated above. According to the Union, Policy No. 4 simply had not been enforced for eleven

years from 1995 to 2006. (Union post-hearing brief at 15). The Union submitted evidence seeking to establish that many violations of Policy No. 4 had occurred during these eleven years and the policy had not been enforced. Furthermore, management did not put the staff, including the Grievant, on notice that this policy would again be enforced. It had not been enforced until its application in this and another case occurring in the Fall of 2006. The Employer's response is that whenever a complaint is filed concerning the violation of this Policy No. 4, it is investigated; the Union could not "tell us of a complaint that was filed and not thoroughly investigated. (Employer post-hearing brief at 6). The Employer noted that several Union witnesses testified to relationships that had otherwise taken place between residents and employees but none had been reported to management. Moreover, these relationships (a violation of Policy No. 4) known to Union witnesses were never reported to management by the Union witnesses.

There were other conflicts raised between the parties during the course of the arbitration hearing, but the above three conflicts appear to be the ones that are outcome determinative in this case. They are separately discussed below.

B.) The Matter of the Removal Order

In this matter, the Union concentrated on what is not in the Removal Order of January 19, 2007 that sets forth the termination of the Grievant on the same date. The Removal Order does not contain any reference to Policy No. 4. This policy was adopted by the Employer and as the record in this case indicates is the heart of the Employer's case against the Grievant. This Policy--quoted in its entirety below--states that employees "shall not accept loans, gifts or money . . . from residents." The Policy states as its purpose the elimination of "abuse and neglect of residents and the misappropriation of their property." The Policy operates as an expansion and an explication of corrective action standard AN-03--a Standard that was quoted in the Removal Order.

Policy No. 4 is also central to the second standard quoted in the Removal Order. AN-06 makes it a violation to fail to follow resident-related policy. As the Employer's case was developed in this arbitration hearing, it was clear that the particular policy to which this standard related was Policy No. 4.

The Union relied upon an arbitration decision by Arbitrator David Pincus dated January 7, 1990 in OCSEA, Local 11 and Ohio Department of Youth Services. (Case No. G-87-2810). Arbitrator Pincus did coin the phrase "a defective Removal Order" in that

case for principally two reasons. The first reason has no applicability in this case.[1/]

The second reason for the decision more clearly uncovers what is meant by a "defective Removal Order." As Arbitrator Pincus points out (Id. at 20), the problem is whether the Employer failed to provide the Grievant with the proper and timely notice as required in Section 24.04 of the contract between the parties. This section requires that prior to discipline, an employee "shall be informed in writing of the reasons for the contemplated discipline . . ." Essentially, the Union was claiming in this case that it was surprised and was not aware that the Grievant was charged with a violation of Policy No. 4.

Policy No. 4 states in its entirety:

PURPOSE: To eliminate the abuse and neglect of residents and the misappropriation of their property.

POLICY: It is the basic right of every resident at the Ohio Veterans Home to be free from physical, verbal, mental, and emotional abuse; nor shall they be neglected. In addition, the property of residents shall be respected, protected, and guarded against misappropriation.

[1/] In the case before Arbitrator Pincus, the Removal Order cited a section of the Ohio Revised Code rather than particular sections of the contract between the parties. Based upon a decision of the Ohio Supreme Court, the Code cannot be used to supplement or usurp the conditions set forth in the contract. In this way, the defective order before Arbitrator Pincus was blatantly defective.

> The residents of the Ohio Veterans Home are dependent on the services provided by its employees for their health, safety, comfort, and general well being. Thus, employees may be in a position to secure things of value from residents under their care. While under certain circumstances things of value may be offered voluntarily by a resident to an employee without any use by the employee of his/her official position, the mere acceptance of things of value offered by a resident can create a conflict of interest for the employee. Therefore, employees of the Ohio Veterans Home shall not accept loans, gifts of money, or non-monetary gifts of substantial value from residents.
>
> While the Board recognizes that some personal interaction between Ohio Veterans Home staff and residents contributes positively to the quality of care provided to residents, employees shall conduct themselves professionally in their dealings with residents, recognizing the potential of a conflict of interest. Specifically, employees shall be prohibited form developing relationships with residents that are sexual in nature.
>
> Every allegation of possible resident abuse or neglect, or misappropriation of a resident's property shall be thoroughly and zealously investigated and reported appropriately as required by state and federal law. Employees found to have abused, or neglected residents, or misappropriated their property, shall be promptly disciplined, to include discharge in egregious cases. In cases where the investigation reveals that the employee misconduct may rise to the level of possible criminal activity, a referral shall be made to the office of the prosecuting attorney.

The record, however, in this case shows that Policy No. 4 in its entirety was included in the investigative report that was submitted to the Grievant with the Pre-Discipline meeting notice. The notice begins, "per attached documentation, you are being charged . . ."

There was no evidence in the record to support any suggestion that the Union was surprised or in any way negatively affected by the failure to refer to Policy No. 4 in the Removal Order. The contract requires that the Grievant be made aware of the reasons for the contemplated discipline, and that requirement was met in this case. Indeed, the Grievant acknowledged at the arbitration hearing that "management is alleging I received money from a resident."

C.) The Level of Proof

The question becomes whether the Employer sustained its burden of supplying sufficient evidence to convince the arbitrator that the Grievant did in fact accept money from a resident. On this question, it is interesting to note that the Employer's post-hearing brief concentrated entirely upon the testimony of the resident from whom she was alleged to have received the money and other documents belonging to this resident. This is understandable because other witness-testimony presented by the Employer on this question was woefully inadequate.

For example, the Employer offered the testimony of two employees who had worked with the Grievant--Linda Laws and Cindy Turinsky. However, their testimony did not present any direct evidence of the transmission of money from the resident, Warren LaRue, to the Grievant. Both, however, testified they had seen

the Grievant receive money or a gift from another resident. Their testimony is not to be believed.

This record is replete with evidence that Laws and Turinsky had a serious conflict with the Grievant, and that management was aware of this conflict. A vice president of the Union testified that she had met with management in her capacity as a union officer attempting to deal with the conflict between Turinsky and Laws on one side and the Grievant on the other.

The depth of management's awareness of this conflict is illustrated by the testimony of the food service manager--the supervisor of the three employees involved. This manager testified that he was aware of this conflict and he had met with all three employees concerning the conflict. Indeed, he testified that he was aware of an incident occurring shortly after the death of the Grievant's nephew. He stated that Turinsky, at the place of employment, told the Grievant that she should go and kill another of the Grievant's nephews.

Turinsky did not hide the conflict with the Grievant. She stated, "I had a serious disagreement with the Grievant." The record shows that this disagreement occurred because Turinsky was ordered to work with the Grievant. There ensued damage to dishes caused by Turinsky with both Turinsky and the Grievant receiving discipline. Turinsky received a 3-day suspension while the Grievant received a written reprimand. Finally, it is

interesting to note that Turinsky's written statement to the Food Service Manager concerning the Grievant receiving money from residents was made about two months after the incident occurred between Turinsky and the Grievant out of which Turinsky received a 3-day suspension.

Other testimony supplied by the Employer was equally defective. The Employer offered the testimony of another resident of 11 years, Tony Ryderburg, who stated he saw the Grievant receive money from another resident, Russ Haynam. Not only did Ryderburg concede that he was a friend of Cindy Turinsky, but Haynam was offered as a witness for the Employer and upon cross examination he stated that the Grievant "never asked me for money and I never gave her money."

As noted above, if this testimony by Ryderburg, Laws, and Turinsky was the sum and substance of the Employer's case, it would be woefully inadequate and insufficient to show that the Grievant accepted money from Warren LaRue, a resident. However, the arbitrator is convinced by the testimony of Warren LaRue, which is supported by documentation in the form of index card written by Warren LaRue and notations upon his personal calendar. When the index card and calendar belonging to Warren LaRue are integrated with his bank statement showing certain withdrawals, this record shows that the Grievant accepted money from Warren LaRue.

The record shows that Warren LaRue made a complaint concerning kitchen workers accepting money from him. On August 29, 2006 he was interviewed by the police chief of the Employer and produced his index card. The text version of the interview completed by the police noted that he had made two payments for and on behalf of the Grievant, each in the amount of $500. About six weeks after the interview, Mr. LaRue signed a statement with his signature on October 17, 2006 and noted that he did not wish to make any changes in the statement.

Mr. LaRue authenticated the index card at the arbitration hearing as his index card, and they contained two entries of $500 to the named Grievant with two different dates.

Mr. LaRue also authenticated at the arbitration hearing a copy of entries from his calendar. While the calendar does not contain any entries concerning the Grievant and money on the two dates set out on the index card, the calendar does include a handwritten notation by Mr. LaRue of the Grievant's name followed by "500." The Grievant's bank statement was also made part of the record, and again, without match on dates, the bank does show at least two withdrawals of $500.

There is testimony by another resident who had observed Mr. LaRue over the years and considered him "a good bookkeeper." The fact that the exact dates do not coincide on the index card, calendar, and bank statement is not determinative of the finding

in this case. We are dealing with an 81-year-old gentleman. The dates are sufficiently proximate and the Grievant is named in both the index card and the calendar in relation to money. This is a sufficient basis to convince the arbitrator that the Grievant did in fact accept money from the resident, Warren LaRue.

D.) Lax Enforcement by the Employer

The centrality of Policy No. 4 is clear in this case. Both the recommendation to the Director of the discipline of the Grievant as well as the recommendation to the labor relations officer by the pre-disciplinary meeting officer demonstrates the centrality of Policy No. 4. In both, findings for the violation of AN-06, I-04, and AN-03 are based in the fact that Policy No. 4 was violated. In both documents the following sentence appears:

> The Hearing Officer found that just cause does exist for (the violation of) AN-06, I-04, and -03 in the fact that OVH policy was violated.

Parsing Policy No. 4 through its statement of purpose and the first paragraph shows the following: Residents have the right to be free from abuse and the right to have their property guarded from misappropriation. The second paragraph of the policy essentially states that there is no "innocent" acceptance by employees of money from residents. "Therefore, employees of the Ohio Veterans Home shall not accept loans, gifts of money,

or non-monetary gifts of substantial value from residents." Based upon the analysis set forth above, the Grievant has been found to have accepted money from the resident, Warren LaRue.

The third paragraph deals with "personal interaction" between staff and residents. This paragraph contains a specification of a conflict of interest that could arise out of this personal interaction. "Specifically, employees shall be prohibited from developing relationships with residents that are sexual in nature." The Grievant was not charged with having a personal relationship with Warren LaRue; rather, she was charged of accepting money from him.

Several Union witnesses testified about relationships between staff and residents, some of which included acceptance of money by staff. The first question becomes whether the Union may show lax enforcement of Policy No. 4 by showing relationships of a sexual nature were tolerated by the Employer in a case where a Grievant is charged with accepting money from a resident. On this question, it is noted that both the recommendation to the Director from the labor relations officer and the recommendation for discipline by the pre-disciplinary meeting officer quote only the second paragraph under Policy No. 4--the one dealing with the acceptance of money. Can the Union widen its claim of lax enforcement of Policy No. 4 by reference to incidents where the Employer did not enforce the policy as

applied to relationships between employee and staff of a sexual nature?

The answer to this question is yes for the following reasons. First, Policy No. 4 does not have separate sub-divisions. It is set forth as one policy. Secondly, the pre-disciplinary hearing packet that was supplied to the Grievant contained a copy of the entire Policy No. 4. The material provided the Grievant did not limit the policy's applicability to her to that paragraph dealing with the acceptance of money. Lastly, while the Employer noted that it relied only upon the paragraph dealing with the acceptance of money in applying the charges, the labor relations officer testified that Policy No. 4 is one policy and any violation of any part of this is a violation of the policy itself.

We next turn to the question arising out of the cross-examination of the Union witnesses who testified about relationships between residents and employees or about the acceptance of money by employees. The cross-examination was primarily on whether or not the Union witness had reported his or her observations or knowledge of the relationship or money exchanged to management. The answer by the Union witnesses was primarily negative. However, the evidence does show that management was aware of several relationships of a sexual nature and took no action. The cross-examination of the food service

manager is telling in this respect. The manager acknowledged that he had been aware that staff had had ongoing relationships with residents. He read aloud in his testimony the paragraph in Policy No. 4 that prohibits employees from engaging in a relationship of a sexual nature with residents. He acknowledged that one employee married a resident in December of 2005 in the chapel of the Employer. He acknowledged that Linda Laws had a relationship while in the dietary department, and the same was true with respect to another employee, Harriet Connelly. He testified that he understood that the relationships about which he was aware meant relationships of a sexual nature.

The final question arising from this record deals with whether or not the enforcement of Policy No. 4 was dependent upon the filing of a complaint with management apart from the mere knowledge of management that a violation had occurred. Must there be a complaint filed with management prior to the application of Policy No. 4. The record also raises a related question of whether Policy No. 4 has any applicability on facts where there is no showing of harm to the resident, either from the relationship or the gift of money to the employee.

The text of Policy No. 4 does not contain any such conditions to the application of the policy. Moreover, imposition of such conditions would negate some of the text

found in Policy No. 4. The text in the paragraph dealing with the acceptance of money contains the following sentence:

> While under certain circumstances, things of value may be offered voluntarily by a resident to an employee without any use by the employee of his/her official position, the mere acceptance of things of value offered by a resident can create a conflict of interest for the employee.

This sentence envisions a purely innocent acceptance of money. On the one hand, the resident makes the offer of the money freely and voluntarily. On the other hand, the offer is made to an employee and there is no evidence that the employee has in any way imposed upon the resident by virtue of his or her status as an employee. It can be said in such a transaction there appears to be no harm to the resident; furthermore in such a transaction, a complaint is unlikely. Yet this transaction is covered by the unqualified prohibition as follows:

> Therefore, employees of the Ohio Veterans Home shall not accept loans, gifts of money, or non-monetary gifts of substantial value from residents.

E.) "Just Cause" As Applied to This Case

Just cause does not support the decision to remove the Grievant. The lax enforcement of Policy No. 4 lulled the employees into a sense of toleration by the Employer of acts that would otherwise be a violation of the policy. This lax enforcement negates the expectation by the Grievant that termination would have occurred as a result of the acceptance of the money from Warren LaRue. The lax enforcement, however, does

not extend to the total nullification of the right of the residents to be free from abuse and to be free from the misappropriation of the property of the residents--in the case the money belonging to resident LaRue.

The Grievant testified that she was aware of the policy and the disciplinary grid associated with the policy. The question becomes the appropriate penalty given both the lax enforcement of Policy No. 4 by the Employer and the knowledge by the Grievant of the policy and the supporting disciplinary grid. The age of the resident, and the amount of money involved, calls for a lengthy suspension, and it is set forth below.

Lastly, with respect to the make whole remedy that would apply after the ending date of the suspension, the Union requested overtime and appended to its brief payroll earning statements for ten 2-week pay periods for the Grievant. Viewed as evidence on the overtime issue, this evidence cannot be considered because it was not submitted at the hearing. There was testimony by Union witnesses about the availability of overtime in the food service department. However, this record is inadequate for the arbitrator to reach the basic question of whether overtime should be awarded and how should it be computed. Consequently, the make whole portion of the remedy following the completion of the suspension will not include any element of overtime.

AWARD:

The grievance is upheld in part and rejected in part. It is upheld in that the Employer did not have just cause based upon this record to terminate the Grievant. It is rejected in that the Employer did have just cause to suspend the Grievant for a lengthy suspension for her proven act of accepting money from a resident. The suspension is for three (3) months and begins on the date of the Grievant's termination by the Employer--January 19, 2007. The suspension ends on April 19, 2007.

The Grievant should be made whole for her lost wages and other benefits under the contract from April 19, 2007 to the date of her return to work. The Grievant should be returned to work within ten (10) calendar days from the date of the receipt of this Award by the Employer.

Date: June 10, 2007

John J. Murphy
Arbitrator