IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

SEIU DISTRICT 1199

Grievant: Christopher Carnes, Discharge

DRC – 2015-00323-11

BEFORE: Robert G. Stein, Arbitrator

FOR THE EMPLOYER:

Don Overstreet, Labor Relations Officer 3
Warren Correctional Institution
Department of Rehabilitation and Corrections
770 West Broad Street
Columbus OH 43222

FOR THE UNION:

Amanda Schulte, Organizer
SEIU District 1199
1395 Dublin Road
Columbus OH 43215

INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the terms of the collective bargaining agreement ("Agreement") (Joint Ex. 1) between SEIU/District 1199, The Health Care and Social Service Union ("Union") and The State of Ohio, Department of Rehabilitation and Correction ("Employer" or "Department"). That Agreement is effective for calendar years 2012 through 2015 and included the conduct which is the subject of this grievance.

Robert G. Stein was mutually selected by the parties to impartially arbitrate this matter, pursuant to the terms of Article 7, Section 7.07(A) of the Agreement as a member of a panel of arbitrators chosen by the parties. A hearing was conducted on December 15, 2015 and January 26, 2015 at WCI, located in Lebanon, Ohio. The parties mutually agreed to that hearing date and location, and they were each provided with a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. The hearing, which was not fully recorded via a written transcript, was closed upon the parties' individual submissions of post-hearing briefs.

ISSUE

The parties framed and stipulated to the following as a statement of the issue to be resolved:

Was the Grievant, Christopher Carnes, removed from his position as a Psychiatric Nurse for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

See Stipulations of the parties – Grievance Details

BACKGROUND

Christopher Carnes ("Carnes" or "Grievant") most recent hire date as a Registered Nurse with the Department was on January 28, 2013. At the time of his termination he was employed at Warren Correctional Institution ("WCI"). He had a previous period of employment with the Department as a Correctional Officer for approximately ten (10) years and as a Nurse for several additional years with the Department in various institutions and at a private medical facility in trauma and intensive care units. In the winter of 2014/15 the Grievant was investigated and eventually terminated by the Employer on January 30, 2015 for violating the following work rules:

1. **Rule #38** –Any act, or failure to act, or commission not otherwise set forth herein which constitutes a threat to security of the facility, staff, any individual under supervision of the Department, or a member of the general public.

2. **Rule #43**-Abuse of any inmate/patient under the supervision of the Department.

3. **Rule#44**-Threatening, intimidating, coercing, or use of abusive language toward any individual under the supervision of the Department.

The Grievant had no prior discipline in his record at the time of his termination, and was terminated from his employment based upon the findings of the Employer that the Grievant had violated the above rules on December 25, 2014, *"…when while working in the Residential Treatment Unit (RTU) for mentally ill inmates, you purposely picked up a roller/stand containing vital signs equipment and deliberately shoved the end of the roller/stand toward the face of a seriously mentally ill inmate/patient who was handcuffed and sitting in a chair."*

In order to avoid redundancy regarding a description of this incident, a more detailed account of what occurred on December 25, 2014, including a description of the inmate and who was present will be included in the summary of the Employer's and the Union's position described below.

As previously stated, the Grievant was terminated on January 30, 2015 and the Union subsequently filed a grievance in opposition to the Employer's action. After passing through the requisite steps of the grievance procedure in Article 7, the matter remained unresolved and was then in accordance with Article 7.06 submitted to by the Union to arbitration for final and binding resolution.

SUMMARY OF THE EMPLOYER'S POSITION

PROCEDURAL ARBITRABILITY

The Employer argues the grievance is procedurally defective in that the Union failed to advance the grievance to arbitration in accordance with the timelines contained in the Agreement. It cites Article 7.06 of the Agreement which states in pertinent part:

"The Union may request arbitration of the grievance within sixty (60) days of the date of mediation, but no more than one hundred eighty (180) days of the filing of the grievance"

The Employer argues the Union did not follow this provision and illustrates the chronology of the grievance as follows:

The timeline of the grievance is as follows: (Joint Exhibit #2-Grievance Trail and Management Exhibit/Procedural Objections Tab 5-Calendar)

- *On January 30th, 2015 the grievant was removed.*
- *On February 9th, 2015 a grievance was filed by Union Delegate Rick Benner.*
- *On February 27th, 2015 a step 1 hearing was scheduled and held with the grievant and the Union (the 18th day after the initial filing of the grievance).*
- *On March 24th, 2015 the grievance was answered and denied by Don Overstreet, LRO 3 (the 43rd day after the initial filing of the grievance).*
- *On April 28th, 2015 an ADR/Mediation hearing was held at SEIU-1199 with no resolution (the 78 day after the initial filing of the grievance).*
- *On May 1st, 2015, OCB Representative Victor Dandridge listed the disposition of the Mediation for both parties (the 3rd day after Mediation).*
- *On September 1st, 2015 Sheri Wood, SEIU-1199 Representative/Scheduler initiated the Union's first request to arbitrate the grievance.* ***(204 days after the initial filing of the grievance and 126 days after the date of Mediation).***

The grievance is procedurally defective in two ways. The first being it is beyond the 180 day time frame bargained upon in the collective bargaining agreement. The grievance was filed on February 9th, 2015. The first request by the Union to arbitrate the grievance wasn't until September 1, 2015. That is 204 days after the filing of the grievance resulting in Twenty-four (24) days over the agreed to time frames.

The second is that on April 28th, 2015 a Mediation hearing was held at SEIU-1199 concerning the grievance. Once again the time frame negotiated and bargained upon in the contract to request Arbitration for the grievance was exceeded. The CBA states that "The Union may request arbitration of the grievance within sixty (60) days of the date of mediation. However, in this case the request to arbitrate wasn't made until September 1st, 2015 resulting in 126 days after the date of mediation (66 days beyond contractual agreement).

The specific requirements contained within the 2012-2015 Contract obligate employees and the Union to file timely at the appropriate steps in the grievance process.

The Employer avers that it gave the Union notice that it would raise the issue of procedural arbitrability more than thirty days prior to the first day of arbitration. (Employer Exh. 1) Therefore, there was forewarning and nor an attempt by the Employer to surprise or ambushed the Union at arbitration. Additionally, the Employer contends that is there no history or practice between the parties of treating timelines in a lax manner. In support of the chronology of the instant grievance, the timelines contained above and the history of the parties following an orderly procedure the Employer references the hearing testimony of witnesses from the Ohio Office of Collective Bargaining, Carrel (Scheduler), Dandridge (Labor Relations Administrator), and Nicholson (Labor Relations Administrator).

In closing the Employer states the following:

In light of arbitrable precedent and the plain language of the 2012-2015 Contract, the appropriate remedy for this grievance is to find this grievance procedurally defective and not arbitrable because it was not processed timely. The Employer respectfully asks that you find the grievance procedurally defective and not arbitrable and thus deny the grievance in its entirety. (Employer's brief, p. 6-7)

MERITS

The Employer's basic contention is that it did have "just cause" to terminate the Grievant's employment based on its investigation and findings of fact in this matter. The Employer contends that on December 25, 2014 Inmate M (A707-431) was involved in a use of force ("UF") incident involving having been sprayed with OC spray (a chemical/Mace) agent after he created a disturbance in his cell. At the time Inmate M was diagnosed as having schizophrenia with delusions often manifested

by violent episodes. The disturbance Inmate M has created was described by the Employer on page 9 of its brief as follows:

Physical force had been utilized on inmate Moore … in order to gain control of a violent episode where he was laying on his back and aggressively kicking the plexi-glass door covering of his mental health observation cell. Upon exiting the cell, it was discovered that Moore had been collecting his own feces in a cup within the cell. This "cocktail" is often used to throw on staff as a form of assault.

Following the UF incident at around 2:25 p.m. Inmate M was escorted to the Residential Treatment Unit ("RTU") at WCI. The RTU is a secure mental health treatment unit managed by a mental health treatment team. The Grievant Carnes was a psychiatric nurse on that team and was one of two nurses working in the RTU, the other being Nurse Teresa Cunningham ("Cunningham"). Inmate M was handcuffed and a belly-belted and was eventually ordered to sit in a chair in the hallway in order to avoid contaminating the nursing office with the after effects of having had OC spray used on him. This area of the RTU is monitored by video cameras and the incident in this matter was captured on one of the cameras. Inmate Moore was escorted to the RTU by two correction officers, CO Paul Caver ("Caver") and Lt. John Wood ("Wood").

Once Inmate M was seated in the hallway, Caver stood behind him and Wood stood off to the side in front of him closer to Nurse Cunningham. Cunningham, the treating nurse following the Use of Force incident previously described above proceeded to complete paperwork on her examination of Inmate M. Meanwhile the Grievant was in the area eating an afternoon meal as he spoke with the correction officers nearest to Lt. Wood. The video cameras in the RTU do not record audio, but it was clear from the video that the Grievant was both talking to Wood and was

saying something to Inmate M as he continued to eat his afternoon meal. Inmate M remained quietly seated as Nurse Cunningham took his vital signs using a rolling portable cart, then she moved a little distance away in the hallway and from where the inmate was seated to presumably record her findings. At that time there was no indication that Inmate M was physically hostile or was being disruptive. He was cooperative with the examination conducted by Cunningham.

After what appears to be words directed toward the inmate by the Grievant, the video then shows the Grievant picking up the portable vital signs cart that was just used by Cunningham and shoving it at the head of the Grievant causing him to flinch backwards in his chair. According to the Employer, when Cunningham completed her examination, Inmate M was returned to his cell after which he again acted out by flooding his cell. The Employer's investigation of this matter was triggered by the submission of a letter by Nurse Cunningham to her supervisor on December 29, 2014 indicating that management should review the video. Subsequently Carnes was placed on administrative leave and an investigation ensued. The Employer's concludes with the following:

This case is about patient abuse and the threat of physical violence towards a severely mentally ill patient. It is about an individual's aggressive, threatening, and deliberate behaviors that transcended his effective ability to be a patient advocate as required by his nursing licensure. Ohio Administrative Code (Management Exhibit #2 OAC 4723-4-06) specifically outlines that "A licensed nurse ***shall*** *implement measures to promote a safe environment for each patient." (Emphasis added) And they "****shall*** *treat each patient with courtesy, respect, and with full recognition of dignity and individuality." (Emphasis added) The OAC continues with specific prohibited acts such as: "a licensed nurse shall not Engage (Emphasis added) in behavior that causes or may cause physical, verbal, mental, or emotional abuse to a patient" and "a licensed nurse shall not Engage in behavior toward a patient that may reasonably be interpreted as physical, verbal, mental, or emotional abuse." Christopher Carnes was removed because of his abusive actions towards one of the very patients that he was hired to assist in treating.*

During the investigatory interview on 12/30/14, Christopher Carnes confesses that he did indeed perform this aggressive act and in his own words was "ashamed" of his actions and that they were "not in good judgement". Mr. Carnes openly admits during the interview that the actions towards the patient were an attempt to "scare" and "frighten" him.

… The employer heavily opposes the assertion that this was merely an incident involving horse-play, even going so far as to demote the supervisor who witnessed the incident and failed to intervene or report it as required. A defense rebuttal was made as to this not being a case of abuse because the individual was not physically assaulted during the incident. The abuse charge levied against the grievant (Rule 43 Joint Exhibit 3E page 31) specifically deals with patient abuse other than physical abuse which is listed as Rule 42 in the employee code of conduct. As expert testimony clearly demonstrated … abuse can come in many forms. … sometimes more serious and destructive forms of mental, emotional, and psychological abuse…. a licensed medical professional whom works and has been trained in the specific area of mental health treatment is held to higher standard, and knows the severity of the possible psychological effects that such an abusive and threatening act can cause a patient with these kind of mental disorders.

Based upon the above and all the evidence and testimony, the Employer strongly argues it had just cause to terminate the Grievant and requests that the Union's grievance be denied.

SUMMARY OF THE UNION'S POSITION

PROCEDURAL ARBITRABILITY

The Union vigorously asserts the both parties to the collective bargaining relationship, which has spanned decades, have not strictly adhered to the timelines contained in the Agreement and therefore this important matter should not be prohibited from being arbitrated on a technicality.

The Union asserts in its brief:

In making its objection, the Employer failed to consider the procedural protection for the Union that the parties bargained. This protection is also in Article

7.06 and states, "When the Union demands arbitration, such notice shall also serve as a request for mediation unless otherwise designated by the Union." The parties agree that the grievance was mediated, and in order to mediate a grievance, it must first be appealed by the Union to mediation. This means that the Union had to have demanded arbitration in order for the grievance to go to mediation. Employer Procedural Objection Exhibit 4, page 3C, shows the various steps and corresponding dates of the grievance. The first section under "Resolution Steps" shows the "Union/Member Response" as "Appeal." This means the grievance was heard at Step 1[1]; it was denied by the Employer; and the Union appealed it to mediation. The "Result Submission Date" is the date on which the Union submitted the appeal, and that date was "3/24/2015." Union grievance-scheduler Lisa Hetrick, Union Public Division Director Josh Norris, and Union Organizer Amanda Schulte all testified that when the Union appeals a grievance to mediation, that action also serves as the demand for arbitration. Employer witness Alicyn Carrel stated that the mediation request used to serve as the demand for arbitration, but for reasons she was unable to identify, she said that was no longer the case. Ms. Carrol was simply not familiar enough with the Union's actions in the grievance system to know that her testimony was wrong.

According to Elkouri & Elkouri: How Arbitration Works, Sixth Edition, "A general presumption exists that favors arbitration over dismissal of grievances on technical grounds." (page 206) After considering the parties' lack of following the timelines in the past and the fact that the Union testified that it requested arbitration within the contractual timelines, the Employer's procedural objection should be dismissed. The grievant deserves an arbitration ruling.

The Union avers the testimony of its witness, Lisa Hetrick and Josh Norris support the fact that the parties have worked well together and have on many occasions exceeded the Agreements timelines in attempting to resolve grievances. By way of illustration of the parties being flexible regarding timelines the Union cited nine (9) recent cases with the following introduction:

Ms. Schulte testified that the Union pulled all the State of Ohio and 1199 arbitrations from the last five years from the State's database. The Union found nine arbitrations, and none of the nine met the contractual scheduling timeline that the State says exists. Also the State did not make timeliness objections in these arbitrations. The State pointed out that it was not possible to tell when the request for arbitration was made in all nine grievances submitted by the Union. Ms. Schulte responded that if the Union had attempted to schedule each of the grievances within one hundred eighty days of filing, then that meant that the parties took an incredibly long time to agree on hearing dates. It would have meant that the Union sent possible dates to the State, and the hearing was not scheduled for the following number of days past the one hundred and eighty day time limit:

[1] The electronic grievance system refers to 1199's Step 1 hearing as "Step 2," so every place the system uses "Step 2," it really means "Step 1."

1. *177 days over the time limit*
    a. *Union Exhibit 1, 357 days from grievance submission to arbitration minus 180 days*

2. *434 days over the time limit*
    a. *Union Exhibit 2, 614 days from grievance submission to arbitration minus 180 days*

3. *39 days over the time limit*
    a. *Union Exhibit 3, 219 days from grievance submission to arbitration minus 180 days*

4. *295 days over the time limit*
    a. *Union Exhibit 4, 475 days from grievance submission to arbitration minus 180 days*

5. *603 days over the time limit*
    a. *Union Exhibit 5, 783 days from grievance submission to arbitration minus 180 days*

6. *104 days over the time limit*
    a. *Union Exhibit 6, 284 days from grievance submission to arbitration minus 180 days*

7. *93 days over the time limit*
    a. *Union Exhibit 7, 273 days from grievance submission to arbitration minus 180 days*

8. *112 days over the time limit*
    a. *Union Exhibit 8, 292 days from grievance submission to arbitration minus 180 days*

9. *224 days over the time limit*
    a. *Union Exhibit 9, 404 days from grievance submission to arbitration minus 180 days*

The Union concludes,

"*If the Union violated the one hundred and eighty-day timeline in Mr. Carnes' grievance, then it also violated the timeline in the nine most recent arbitrations available between the Union and the State."(Union Procedural brief, p. 3-4) Even if the State's interpretation of the arbitration request timeline was correct, it never objected in the past because, as testified to by Mr. Norris and Ms. Schulte, the parties have a long history of ignoring the contractual arbitration timelines. Several reasons exist for the parties' mutual willingness to abstain from following the timeline. One is that often the State cannot produce requested documents within the legally accepted timeframe of two weeks. Sometimes public records requests can take months to obtain, thus delaying the arbitration. Additionally the Union often requests hearing dates from the Employer two to three times over the period of several months before the Employer and arbitrator agree to a date.*

Based upon the above the Union avers the grievance should be forwarded for a determination on the merits.

MERITS

As included in its opening statement, closing brief, and other representations made at the arbitration hearing, the Union's basic contention is that the Employer has failed to meet its burden of proving with sufficient evidence that it did have "just cause" to terminate the Grievant's employment based on the evidence and facts in this case. In making this assertion the Union addresses first provides its version of the incident as follows:

… on December 25, 2014. … Trintan Moore, an inmate at the Warren Correctional Institution (WCI), was lying on the floor of his cell and was repeatedly kicking his cell door. ODRC Lieutenant John Wood gave Mr. Moore a direct order to stop kicking his cell door. When Mr. Moore continued kicking the cell door, Lt. Wood followed ODRC policy and sprayed Mr. Moore with Oleoresin Capsicum spray, a very potent type of pepper spray commonly referred to as OC spray. Mr. Moore was then taken to the nurse's station. Any time an inmate is sprayed with OC spray, he must be examined by a medical professional due to the potentially harmful effects of the spray, such as elevated heart rate and breathing difficulties. …

When Mr. Moore arrived at the nurse's station, Mr. Carnes and Nurse Teresa Cunningham were on duty. Ms. Cunningham asked Mr. Moore's escorts, Lt. Wood and Corrections Officer Paul Caver, to place Mr. Moore in a chair in the hallway. She did not want Mr. Moore inside the nurse's office because of the OC spray fumes. Ms. Cunningham pulled out a chair in the hallway for Mr. Moore, and then Mr. Moore

walked cautiously toward the chair with half-closed eyes and sat down. Mr. Carnes was eating his lunch at this time, but he walked into the hallway, continued to eat, and began talking with Mr. Moore. The exchange between Mr. Carnes and Mr. Moore was described by witnesses as horseplay that was in jest and as friendly banter. The joking conversation continued as Ms. Cunningham rolled a blood pressure monitor toward Mr. Moore and prepared paperwork for the examination. Mr. Carnes was still joking around with Mr. Moore, when Mr. Carnes picked up the blood pressure monitor and thrusted it in the direction of Mr. Moore. Lt. Wood and Officer Caver did not react to the thrusting, and Mr. Moore flinched. Lt. Wood then told Mr. Carnes to knock it off. Ms. Cunningham examined Mr. Moore and wrote a report based on that examination that did not mention the blood pressure monitor thrust. Mr. Moore was then escorted back to his cell.

In the Greivant's defense the Union makes the following series of arguments which are categorized in separate sections and are identified in Union's Merit brief and can be found in detail in the entire record:

Lack of Substantial Evidence

Abuse

The most serious of these accusations is that of abuse, which permits termination for a first-time violation. At the arbitration hearing, however, none of the Employer's witnesses were able to even come close to giving an explanation of what the agency considers non-physical abuse. The reason a clear definition or explanation was so important is because of the multitude of actions that occur every day by ODRC employees against inmates that outside of the prison context might be considered abusive, but inside a prison, they are often required by the agency. For example the reason that Mr. Moore was at the nurse's station in the first place was that he had just been sprayed with pepper spray, which was done pursuant to ODRC policy. In this type of environment it is crucial that the Employer and members of management have a clear understanding of what constitutes abuse and that they ensure all employees understand this as well.

The Employer's argument for abuse was based on the allegation that Mr. Carnes and Mr. Moore were not joking around and that Mr. Carnes thrusted the blood pressure monitor with malicious intent.

Mr. Carnes explained in both his witness statement and testimony at the arbitration hearing that he and Mr. Moore were joking back and forth with each other and that the thrusting of the monitor was done in the context of horseplay. Lieutenant John Wood was present for the incident in question. In his witness statement, he told Investigator Greg Craft at least eight times that Mr. Carnes was joking around with

Mr. Moore. He made it clear that the conversation between Mr. Carnes and Mr. Moore was friendly banter and that the thrusting of the blood pressure monitor was not abuse in any way when considered in the context of the joking conversation.[2] Corrections Officer Paul Caver, who was also present, had the same impression. In his witness statement he said that Mr. Carnes and Mr. Moore were "just messing around."[3] The surveillance video does not have audio, so the only proof the Employer had that Mr. Carnes' action was not horseplay was the statement and testimony given by Ms. Cunningham. In her witness statement, the information provided by Ms. Cunningham is contradictory to what the three other witnesses stated. Each time she was asked about whether Mr. Carnes and Mr. Moore were talking to each other, she consistently claimed there were no words whatsoever exchanged between them. The investigator asked her about this several times, likely because it is evident from the video that the two men were having some sort of discussion. Each time Ms. Cunningham was adamant that nothing had been said by Mr. Carnes or Mr. Moore.[4] Mr. Carnes' action would look much more like abuse if there had not been any sort of conversation or joking beforehand. When Ms. Cunningham testified at the arbitration hearing, she gave an account that was still different from the other witnesses' accounts, but it was also contradictory to what she had said in her witness statement. At the arbitration she claimed that Mr. Carnes was saying aggressive things to Mr. Moore and might have even been cursing at him. She was unable to explain why she had said something different in her witness statement.

Threat to Security

The Employer lacked substantial evidence that Mr. Carnes' action threatened the security of the facility or anyone involved. Mr. Moore was handcuffed and seated in a chair, so he obviously could not have done anything dangerous in response to the thrusting. Additionally two armed employees, Lt. Wood and Officer Caver, whose jobs were to ensure everyone's safety, were present.

Threatening or Intimidating

Lastly the Employer did not present any evidence that Mr. Carnes' action was threatening or intimidating to Mr. Moore. To the contrary based on the fact that Mr. Moore's eyes are at least half-way closed in the surveillance video and from testimony given with regard to the OC spray, it is very likely that Mr. Moore did not even see exactly what happened. Several Employer witnesses testified that when sprayed with OC spray, it creates an agonizing burning sensation in the eyes until it is rinsed out and that the burning causes the eyes to produce tears. In his witness statement, Mr. Moore was far more concerned with the OC spray than what happened with Mr. Carnes. This was also evident when the warden at the time,

[2] Joint Exhibit 4E, pages 61-64

[3] Joint Exhibit 4D, page 56

[4] Joint Exhibit 4C, pages 46-48, 51

George Crutchfield, testified and stated that when he tried to ask Mr. Moore about the thrusting incident, Mr. Moore only wanted to talk about the OC spray. Mr. Moore was practically traumatized by the OC spray and barely gave Mr. Carnes' action a second thought. His constant referrals back to the OC spray indicate that he was not intimidated or threatened by Mr. Carnes.

LACK OF DUE PROCESS

Double Jeopardy

At the arbitration Investigator Greg Craft read out loud the following part of what he said to Lt. Wood when questioning Lt. Wood about the incident. "Anything that happens within this institution if it is not part of a criminal invest will be part of a public record and this is not something we're going to want to see on CNN."[5] Mr. Craft admitted on cross that if a third party like CNN got ahold of the video and the agency faced a lawsuit as a result, it might reflect poorly on the agency that Mr. Carnes was only given a verbal warning. In other words Mr. Craft admitted that after a verbal warning was given, the agency imposed a more serious punishment when it determined that this was preferable.

The Union pointed out several places in Lt. Wood's witness statement where Lt. Wood said that he gave Mr. Carnes a verbal warning immediately after the thrusting of the monitor, and Mr. Craft agreed that a verbal warning had been given. Lt. Wood also said that his assessment of the situation did not call for anything beyond a verbal warning due to the context of the action. Mr. Carnes also testified that he received a verbal warning from Lt. Wood immediately after the incident and that Lt. Wood told him that a record of the verbal warning would go in Mr. Carnes' file. The actions of ODRC meet the definition of double jeopardy, and therefore the termination should not stand.

Double Jeopardy

At the arbitration Investigator Greg Craft read out loud the following part of what he said to Lt. Wood when questioning Lt. Wood about the incident. "Anything that happens within this institution if it is not part of a criminal invest will be part of a public record and this is not something we're going to want to see on CNN."[6] Mr. Craft admitted on cross that if a third party like CNN got ahold of the video and the agency faced a lawsuit as a result, it might reflect poorly on the agency that Mr. Carnes was only given a verbal warning. In other words Mr. Craft admitted that after a verbal warning was given, the agency imposed a more serious punishment when it determined that this was preferable.

The Union pointed out several places in Lt. Wood's witness statement where Lt. Wood said that he gave Mr. Carnes a verbal warning immediately after the thrusting of the monitor, and Mr. Craft agreed that a verbal warning had been given. Lt. Wood also

[5] Joint Exhibit 4E, page 63

[6] Joint Exhibit 4E, page 63

said that his assessment of the situation did not call for anything beyond a verbal warning due to the context of the action. Mr. Carnes also testified that he received a verbal warning from Lt. Wood immediately after the incident and that Lt. Wood told him that a record of the verbal warning would go in Mr. Carnes' file. The actions of ODRC meet the definition of double jeopardy, and therefore the termination should not stand.

Employer's Reliance on Non-credible Witness

Several of the witnesses called by the Employer at arbitration implied that if Mr. Carnes' action was done in jest and in the context of horseplay, then it was not abuse. Due to the absence of audio on the surveillance video, the Employer had to rely on the witnesses to determine whether Mr. Carnes' action was done in the context of joking/horseplay. Three employees witnessed Mr. Carnes' action. Lt. Wood, Officer Caver, and Mr. Carnes all said in their witness statements that Mr. Carnes and Mr. Moore were going back and forth in a joking manner. For reasons that are unclear, the Employer decided that Ms. Cunningham was more credible than the other witnesses and that her account of what happened was the most accurate.

When Investigator Craft first questioned Ms. Cunningham, she stated that Mr. Carnes picked up the blood pressure monitor out of nowhere and for no apparent reason. After Ms. Cunningham stated this, Mr. Craft said, "Okay, walk me through what led up to that. Help…can you help me understand what transpired here?" When Ms. Cunningham again said that Mr. Carnes just picked up the monitor, Mr. Craft replied, "I need you to describe to me in detail what occurred here because I saw it on video." Ms. Cunningham still did not elaborate on what happened right before Mr. Carnes picked up the monitor, so Mr. Craft asked, "What lead up to this? Was there a verbal confrontation between Mr. Carnes and Inmate Moore prior to this?" Ms. Cunningham replied that there was not. Mr. Craft then said, "So there's no banter or anything between, back-and-froth, between Nurse Carnes and the inmate?" When Ms. Cunningham replied with a simple, "No," Mr. Craft, sounding frustrated, said, "Did Nurse Carnes indicate or did, I mean, did he just, is this just an out of the blue he picks up this piece of equipment and thrusted it at the inmate's head and face with no prior discussion?" Again Ms. Cunningham provided a one-word answer stating, "Yes." At this point Mr. Craft moved on with the questioning, but after Ms. Cunningham said she had no idea that Mr. Carnes was going to thrust the monitor and that she thought he was going to start the exam, Mr. Craft said, "But instead he picks it up. What does he say right then? What does Chris Carnes say right after lunging toward Moore?" Ms. Cunningham replied that she did not know.

Mr. Craft again moved on to other questions, but several minutes later he again asked Ms. Cunningham about whether there was conversation between the two men. He stated, "I know I am kind of rehashing this a bit, but I just want to have clarification that to your understanding, you were what I would estimate two to three feet from Mr. Carnes and Lt. Wood, and Moore is just a few feet away. But, you know, there was no back and forth conversation or bantering between, that you recall, between Chris and Moore that lead up to this incident? Is that correct?" Ms. Cunningham simply said, "Correct." Mr. Craft replied, "And this came completely out of the blue without any instigating or provoking from Inmate Moore?" She again said, "Correct." Mr. Craft

could see in the video that Mr. Moore and Mr. Carnes were conversing with each other, which is why he tried so hard to lead Ms. Cunningham in that direction.[7]

At the arbitration hearing, Ms. Cunningham's testimony conflicted with her previous unwavering statements to Mr. Craft. At the hearing, instead of recounting that there was no conversation between the two men, she claimed that Mr. Carnes was actually saying very aggressive things to Mr. Moore. She said he might have even been using curse words, but she could not recall. She remained adamant, however, that Mr. Moore was not talking to Mr. Carnes.

Ms. Cunningham also testified that after Mr. Carnes set the monitor down, she was fearful that the aggressive conversation would escalate, so she moved the monitor close to her. It is evident from the video, however, that she did not do anything with the monitor. After Mr. Carnes set the monitor down, Ms. Cunningham continued her paperwork. Mr. Carnes can actually be seen pushing the monitor away from himself and Ms. Cunningham. Ms. Cunningham did not go near the monitor until she was ready to use it.

Ms. Cunningham stated in her witness statement that Mr. Carnes called her house and left her a voicemail, and she later called him back. At the hearing, however, she said that she picked up the phone when he called. She also said in her witness statement that she was anxious over Mr. Carnes having her home phone number, but then she said that he probably got it from the list of phone numbers of all the nurses in case one needs called for overtime. This demonstrated that she knew all the nurses had access to her home phone number prior to Mr. Carnes calling her.

None of the witnesses could corroborate Ms. Cunningham's version of what occurred. She contradicted her own statements over and over, and she made several unfounded accusations against Mr. Carnes. As a result, Ms. Cunningham's witness statement and testimony should not have been considered by the Employer when determining Mr. Carnes' discipline; nor should they be considered in this arbitration.

LACK OF PROGRESSIVE DISCIPLINE

"The principle of progressive discipline is one of the most important aspects of Just Cause."[8] *Just cause for discipline requires that the Employer use progressive discipline unless the conduct was egregious. Conduct is considered egregious if it poses a risk of significant harm; if it damages the employment relationship beyond repair; or if it is of a nature that makes it unlikely that a warning or suspension would deter it from happening again.*[9] *In addition CBA Article 8.02 states,*

> *The principles of progressive discipline shall be followed. These principles usually include: A. Verbal Reprimand, B. Written Reprimand, C. A fine in an amount not to exceed five (5) days'*

[7] Joint Exhibit 4C, pages 46-52

[8] Providence St. Peter Hosp., 123 LA 473, 479 (Gaba, 2006)

[9] See *Just Cause, A Union Guide to Winning Discipline Cases*, page 64, Schwartz 2013

pay, D. Suspension, E. Removal. The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

Mr. Carnes had a clean disciplinary record when terminated, so the termination was not progressive from any previous discipline.

LACK OF FAIR NOTICE

Just cause for discipline requires that the Employer provide fair notice of the rules. This includes clear descriptions of prohibited conduct. ODRC failed to provide a clear description of conduct that constituted abuse.

MITIGATING CIRCUMSTANCES

Substantial Length of Service

Mr. Carnes had worked for ODRC for a total of sixteen years. While he did have breaks in service, they were largely due to his pursuance of a nursing license. A long term employee like Mr. Carnes is more likely to respond to corrective action, but the State did not take this into account.

Clean Disciplinary Record and Exemplary Job Performance

Throughout Mr. Carnes' time working for ODRC, he never once received discipline. His record was clean. Not only did he not receive discipline, he was honored on several occasions with commendations, one of which was for actions he took that saved lives. Even Warden Crutchfield testified that Mr. Carnes was a good worker and that he felt pride for Mr. Carnes and his work performance.

Prompt, Sincere, and Unequivocal Contrition

Mr. Carnes testified that he immediately threw down the blood pressure monitor after making the thrusting movement because he knew that what he had just done was wrong. In his investigatory interview Mr. Carnes acknowledged that he should not have done it and that it was done in poor judgment. Additionally both Mr. Carnes and Mr. Moore stated that Mr. Carnes apologized to Mr. Moore later that evening. Mr. Carnes did this completely of his own accord, which speaks to his sincere remorse. In a 2003 arbitration with the State of Ohio, an employee made "lewd and suggestive remarks" that were "offensive, uncalled for, and personally harmful" to a co-worker. Arbitrator Stein concluded that demotion, which is equivalent to termination, was too severe based on the grievant's years of service, exemplary work performance, and lack of past discipline. These factors in combination with the grievant's self-realization of the impact of his conduct and the fact that he apologized to the harmed co-worker

resulted in Arbitrator Stein overturning the demotion and changing the discipline to a sixty-day suspension.[10]

Based on the above and the entire record of evidence and testimony, the Union requests that the grievance be granted and the Grievant Chris Carnes be made whole in every way, including but not limited to, reinstatement to his position at ODRC with full back pay and benefits and removal of the termination and all related documentation from his record.

DISCUSSION

PROCEDURAL ARBITRABILITY

The arbitrator's initial role in this particular matter is to determine whether it is procedurally arbitrable and subject to the arbitrator's review and jurisdiction as to its actual merits. Once it has been determined that the parties have submitted the subject matter of a dispute to arbitration, issues which grow out of a dispute and bear on its final resolution should be left to an arbitrator." *John Wiley and Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 908, 918-19 (1964).

The issue of a grievance's arbitrability is a question within the function and jurisdiction of arbitrators to decide. *City of Lincoln, Neb. and Lincoln Firefighters Ass'n, Local 644, Int'l Ass'n of Firefighters*, 00-2 Lab. Arb. Awards (CCH) P 3589 (Berquist 2000).

> In the final analysis, the issue of arbitrability must be determined by the arbitrator. This is especially true when issues of procedural arbitrability are in dispute. Essentially, in such circumstances, the function of an arbitrator is to decide whether or not an allegation of non-arbitrability is sound. This is often compared to the responsibility of a trial judge, who is

[10] See *The Ohio State Troopers Association v. Ohio Department of Public Safety, Division of the State Highway Patrol,* State Arbitration No. 1735, (Stein, 2003)

> asked to dismiss a complaint on motion for a directed verdict or failure to state a sustainable cause of action. Essentially, the decision on arbitrability by the arbitrator is part of his or her duties.

Operating Eng'rs v. Flair Builders, 406 U.S. 487 (1972). "The issue of timeliness is treated as an affirmative defense and, as such, the Employer carries the burden and weight of proving it. The evidence provided by the Union regarding at least nine (9) recent cases that were not managed in accordance with the 2012 to 2015 The Areement deadlines firmly underscore its argument regarding the flexibility with which the parties treated guidelines. Also it is significant to note and supported by the credible testimony of Josh Norris, that as earlier as 2008 or 2009 the state started discussions with SEIU regarding the need for a new electronic grievance management system that entailed several meetings. And, with the cooperation of the Union, which at the time was willing to take the lead among other state unions on this issue leader, the parties eventually adopted a new electronic tracking system to manage grievances that did not go live until August of 2013. As previously stated, called witnesses who provided credible testimony regarding the large number of grievances the state of Ohio and its unions must track. Here the evidence and testimony by witnesses, Carrel, Dandridge, Nicholson, Hetrick, Norris, and Schulte although individually credible, created at best a muddled picture of the parties' treatment of timelines prior to the 2016 Agreement that is in effect now, but was not controlling when the instant matter was in play.

There is a presumption favoring arbitrability . . . since the Steelworkers Trilogy pronounced that doubts should be resolved in favor of arbitrability." *Council of Prison Locals, Local 922, Am. Fed'n of Gov't Employees, AFL-CIO and U. S. Dept. of*

Justice, Fed. Bureau of Prisons, S. Cent. Region, Fed. Corrections Inst., Forest City, Ark., 03-2 Lab. Arb. Awards (CCH) P 3534 (Haltor 2003), citing to *United Steelworkers of Am. v. Warrior and Gulf Navigation Co*., 363 U.S. 574 (1960).

Arbitrators are reluctant to resolve grievances based upon an alleged failure to comply with the time limits set forth in a grievance procedure. *School Bd. of Broward County (Fla.) and Broward Teachers' Union*, 82 LA 2096 (Raffaele 1984). The process of arbitration is intended to permit parties to have their employment issues resolved in a less formal manner than in the judicial system. Reliance upon procedural technicalities in determining a grievance, instead of addressing the substantive issues, does little to further the administration of the parties' Agreement. National policy in the United States favors the arbitration and resolution of existing and recognized disputes. The presumption of arbitrability is so strong that the U.S. Supreme Court has resolved that "doubts should be resolved in favor of coverage." *United Steelworkers of Am.* The presumption of arbitrability is particularly strong when the issue is a procedural one. *St. Vincent de Paul Residence*, 199 LA 1133 (Gregory 2004). Arbitrators have often determined that doubts as to the interpretation of a contractual time limitation should be resolved in favor of arbitration. *City of Rock Island (Ill.) and Am. Fed'n of State, County, and Mun. Employees (AFSCME), Council 31, Local 988, 116 LA 1035 (Wolff 2002); Hayes-Albion Corp., 73 LA 819-823 (1979); Air Force Logistics Command, 85 LA 1179, 1180 (1985); Los Angeles Community College Dist. and Am. Fed'n of Teachers, College Guild, Local 1521, 103 LA 1174 (Kaufman 1995).*

The arbitrator here is keenly aware that the parties have jointly agreed to recognize in their Agreements a goal or obligation for the timely processing of grievances and with the 2016 Agreement that may very may be established. However, in the instant matter that was controlled by the prior agreement and the conduct of the parties therein the Employer failed to prove its case that the grievance cannot precede to arbitration.

MERITS

In an employee termination matter, an arbitrator must determine whether an employer has proved with substantial evidence that a discharged employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.,* 102 LA 555 (Bergist 1994). In making this determination, the arbitrator may consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work record, and whether the employer has acted consistently with respect to similar previous offenses. *Presource Distrib. Servs., Inc. and Teamsters Local 284*, FMCS No. 96-10624 (1997).

In the instant matter, the parties have collectively bargained for the inclusion of a "just cause" provision in the Agreement. Even though the parties did not include a definition of the "just cause" standard in the language which they elected to include, commonly-accepted principles routinely used by arbitrators in disciplinary matters "are intended to ensure a higher level of fairness and due process for employees accused of wrongdoing. They are also intended to increase the probability of workplace justice." *Paper, Allied Indus., Chem., and Energy Workers Int'l Union, AFL-CIO, Oren Parker*

Local 8-171, Vancouver, Wash. and Petra Pac, Inc., 05-1 Lab. Arb. Awards (CCH)P 3078 (Nelson 2004).

> "Just cause" imposes on management the burden of establishing: (a) that the standard of conduct being imposed is reasonable and is a generally-accepted employment standard which has been properly communicated to the employee; (b) that the evidence proves that the employee engaged in the misconduct which did constitute a violation of that standard; and (c) that the discipline assessed is appropriate for the offense after considering any mitigating or extenuating circumstances.

Phillips Chem. Co. and Pace, Local No, 4-227, AFL-CIO, 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor 2000).

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for "just cause," but does not define what does constitute "just cause," it is proper for an arbitrator to look at employer policies, rules, statutes, and regulations to determine whether or not a discharge was actually warranted. *E. Associated Coal Corp. and United Mine Workers of Am., Dist. 17*, 139 Lab. Arb. Awards (CCH) P 10,604 (1998).

> "Just cause" is a contractual principle that regulates an employer's disciplinary authority. It is an amorphous standard, ordinarily open to arbitral interpretation on a case-by-case basis. Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances of the misconduct, any mitigating factors, and whether the aggrieved employee received his/her contractual and legal due process protections.

State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County, and Mun. Employees, AFSCME State Council 61, Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001). The purpose of "just cause" is to protect employees from unexpected, unforeseen, or unwarranted disciplinary actions, while at the same time protecting management's rights to adopt and to enforce generally-accepted employment standards. *Phillips Chem. Co. and Pace, Local No. 4-227, AFL-CIO*, 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor

2000). The Employer here has retained specific management rights in the Agreement, including the right to discipline employees for violation of its work rules, policies, orders, and directives so long as its exercise of discretion in utilizing those specific rights is not unreasonable, arbitrary, capricious, or motivated by improper means. *Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264,* 115 LA 190 (Landau 2001).

The existence of "just cause" is generally recognized as encompassing two (2) basic elements. First, the Employer bears the burden of proof to show that the Grievant committed an offense or engaged in misconduct that warranted some form of disciplinary action. The second prong of "just cause" is to demonstrate that the severity of the responsive action taken by the employer was commensurate with the degree of seriousness of the established offense(s). *City of Oklahoma City, Okla. and Am. Fed'n of State, County, and Mun. Employees, Local 2406*, 02-1 Lab. Arb. Awards (CCH) P 3104 (Eisenmenger 2001). The proof must satisfy both the question of any actual wrongdoing charged against an employee and also the appropriateness of the punishment imposed. "Just cause" requires that employer policies and rules be fair and reasonable and that they be equally, even-handedly, and consistently applied. *Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp*., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

Arbitrators do not lightly interfere with management's decisions in disciplinary and discharge matters, but that does not mean to suggest that they will sustain an action found to be unjust or unreasonable. "An arbitrator must review, not re-determine, the disciplinary action imposed by an employer. Arbitrators are not authorized to make a

disciplinary decision on their own, and they should hesitate to substitute their judgment for that of management." *Operating Eng'rs Local Union No. 3 and Grace Pac. Corp*., 01-2 Lab. Arb. Awards (CCH) P 3971 (Najita 2001).

After a thorough review of the evidence submitted and the respective arguments made by both parties, the arbitrator finds that the Employer did not misuse its discretion or act arbitrarily in imposing the challenged discipline against the Grievant.

The arbitrator must undertake a full and fair consideration of all of the evidence presented and determine the weight to which he honestly believes the individual evidence is entitled. It is the role of an arbitrator to observe the witnesses and to determine who among them is telling the truth. *Givaudin Corp.*, 80 LA 835, 839 (Deckerman 1983). In addition to determining the credibility of witnesses, the arbitrator must also determine the weight to be afforded to their testimony, as well as all of the other evidence submitted by the parties. *Minn. Teamsters Pub. and Law Enforcement Employees Union, Local No. 320 and City of Champlin, State of Minn.*, 00-2 Lab. Arb. Awards (CCH) P 3499 (Berquist 1999).

Although there was some conflicting and inconsistent testimony by the Employer's witnesses more than twelve (12) months after the actual incident, said testimony is secondary to what was clearly captured on video which was more than sufficient evidence to support the Employer's findings and prove that on December 25, 2014 the Grievant engaged in absolute thoughtless and reprehensible behavior inflicted upon a helpless and defenseless inmate. The video clearly shows that without provocations of any kind the Grievant thrusted the base of a vital signs cart in the direction of and in the close proximity (6 to 12 inches) of Inmate M's face

while he was handcuffed to a belly chain and seated in a chair in the hallway of the RTU, causing him to flinch. In addition, the inmate's vision was partially impaired following the use of force pepper spray raising the question as to what he perceived coming at him. There is no audio available; however, what is viewed is the fact that the Grievant, who works in a mental health unit in a correctional institution, threatened to inflict physical abuse on Inmate M. The Grievant stated in the investigation he was just attempting to frighten or scare the inmate.

The reason there is a finding in this AWARD of a Rule # 43 Abuse… in addition to a violations of Rule # 44 Threatening and Rule #38…. is due to the circumstances and context of the Grievant's conduct and the fragility of the victim. Inmate M, reportedly a former military veteran, was diagnosed with schizophrenia, a serious mental illness manifested by episodes of violent behavior and delusions.

Schizophrenia involves a range of problems with thinking (cognitive), behavior or emotions. Signs and symptoms may vary, but they reflect an impaired ability to function. Symptoms may include:

- ***Delusions.*** *These are false beliefs that are not based in reality. For example, you're being harmed or harassed; certain gestures or comments are directed at you; you have exceptional ability or fame; another person is in love with you; a major catastrophe is about to occur; or your body is not functioning properly. Delusions occur in as many as 4 out of 5 people with schizophrenia.*
- ***Hallucinations.*** *These usually involve seeing or hearing things that don't exist. Yet for the person with schizophrenia, they have the full force and impact of a normal experience. Hallucinations can be in any of the senses, but hearing voices is the most common hallucination.*
- ***Disorganized thinking (speech).*** *Disorganized thinking is inferred from disorganized speech. Effective communication can be impaired, and answers to questions may be partially or completely unrelated. Rarely, speech may include putting together meaningless words that can't be understood, sometimes known as word salad.*
- ***Extremely disorganized or abnormal motor behavior.*** *This may show in a number of ways, ranging from childlike silliness to unpredictable agitation. Behavior is not focused on a goal, which makes it hard to perform tasks. Abnormal motor behavior can include resistance to instructions, inappropriate and bizarre posture, a complete lack of response, or useless and excessive movement.*
- ***Negative symptoms.*** *This refers to reduced ability or lack of ability to function normally. For example, the person appears to lack emotion, such as not making eye contact, not changing facial expressions, speaking without inflection or monotone, or not adding hand or head movements that normally provide the emotional emphasis in speech. Also, the person may have a reduced ability to plan or carry out activities, such*

as decreased talking and neglect of personal hygiene, or have a loss of interest in everyday activities, social withdrawal or a lack of ability to experience pleasure.

Suicidal thoughts and behavior

Suicidal thoughts and behavior are common among people with schizophrenia.

By Mayo Clinic Staff, Jan. 24, 2014

The Grievant committed this unacceptable and intolerable act while on duty in the RTU as a psychiatric nurse. The victim was an inmate with severe mental health or psychiatric problems or deficiencies. The Grievant's abuse of his position in the manner described, while serving in his professional capacity, violated the public trust. Grievant owed the inmate and the general public a duty to act in a professional manner and to not take advantage of his position for personal satisfaction. *Cantrell v. Ohio State Bd. of Emergency Med. Servs*., 2007-Ohio-149 (Fourth Dist. 2007).

"In the context of the custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks." *Fondeca v. Dept. of Rehab. & Corr. Servs*., 51 Ohio App. 2d 180, 183, 367 N.E.2d 901, 903 (1977); *Clemets v. Heston*, 20 Ohio App. 3d, 132, 135-136, 485 N.E.2d 287, 291; *Jenkins v. Krieger,* 67 Ohio St.2d 314, 319, 423, N.E.2d 856, 860, *cert. denied,* 454 U.S. 1124 (1981) 454 U.S. 1124, 102 S.Ct. 973, 71 L.Ed.2d 111).

Among the constitutional safeguards extended to all prisoners, including those convicted of a crime, is protection by the Eighth Amendment from cruel and unusual punishment by prison officials. *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285,

50 L.Ed.2d 251 (1976); Wilson v. Seiter, 501 U.S. 294, 297, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). A later clarification by the U.S. Supreme Court found that the Eighth Amendment "protects against cruel and unusual force, not merely cruel and unusual force that results in sufficient injury. *Hudson v. McMillen,* 503 U.S. 1, 13, 112 S.Ct 995, 117 L.Ed.2d 156 (1992). Actions are repugnant to the conscience of mankind if they are "incompatible with evolving standards of decency. *Id*. at 10. The evidence in the record in this matter demonstrates that the Grievant acted with a subjectively "sufficiently culpable state of mind" and that his conduct was objectively "harmful enough" or "sufficiently serious" to reach constitutional dimensions. *Crawford v. Cuomo*, 796 F.3d 252 (2nd Cir. 2015)

The assertion that the Grievant was a victim of double jeopardy lacks evidence. Wood, who is not a trained health professional and who was demoted following this incident either did not readily grasp the gravity of the Grievant's actions toward Inmate M or he minimized what he had observed. While it was proper to address the Grievant at the moment, it was procedurally improper to give the Grievant a formal verbal warning or counseling without going through the normal managerial vetting process and it failed to take into consideration the scope of what the video tape clearly revealed.

The Union put up a most vigorous and thorough defense of the Grievant in overcoming a arbitrability challenge and in methodically vetting its witnesses and those of the Employer. Yet, it could not successfully challenge the conduct of the Grievant captured on video. The Grievant had the recognized responsibility to minimize the risk of inmate abuse, especially for the targeted inmate who had been

diagnosed with severe psychological limitations or problems. As a nurse, Grievant had the recognized responsibility to promote the inmate's welfare, including his physical and psychological health. Additionally, the evidence reveals the Grievant was familiar with the inmate and his diagnosis and as a licensed RN, the Grievant is held to the Standards of Nursing included in OAC 4723-4-06. The video and investigatory evidence indicate that the inmate who was in this very vulnerable and compromised physical and mental state did not know whether the Grievant was going to physically strike him or whether he was just kidding. Inmate M flinched when the Grievant thrusted the vitals cart toward him, believing he was going to be struck. (See Craft Investigation, p. 2, CO Caver's and RN Cunningham's testimony) And, Lt. Wood grimaced in reaction to what he saw. (See Craft Investigation, p. 2)

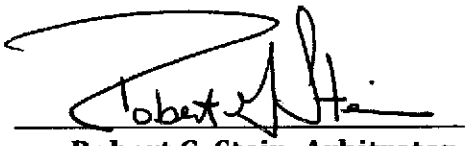
The Union and the Grievant assert this was just horseplay, but horseplay in the work place and elsewhere presupposes a semblance of equity of those who are playing and the necessary component of playfulness. This was clearly not the case. The Grievant held the power and the inmate was powerless, mentally impaired, had just experienced a violent episode, was subjected to by CO Pepper spray and was forced into handcuffs, closely held to his side by a belly chain. There was no playfulness to this incident; it was simply an act of intimidation and the psychological abuse of a powerless and defenseless human being.

Finally, Nurse Cunningham should be commended for having done the right thing in this situation and most importantly for having the courage to report this incident to the Department.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 11th day of May 2016



Robert G. Stein, Arbitrator