

Decision and Award in the matter of Arbitration between:

**State of Ohio, Mental Health And Addiction Services
(Summit Behavioral Healthcare)**

And

**Ohio Civil Service Employees Association
Local 11, AFSCME, AFL-CIO**

Grievance # DMH – 2016-00363-4

Grievant: Wilburn Tyrone Capell

E. William Lewis, Arbitrator

Date of hearing: October 20, 2016

Date Decision issued: November 25, 2016

Representing the Employer:

Ms. Marlo Cain, LRO
Mental Health & Addiction Svs.
30 East Broad Street
Columbus, Ohio 43215

Marlo.Cain@mha.ohio.gov

Representing the Union:

Mr. Mal Corey, Staff Representative
OCSEA, Local 11
390 Worthington Road #A
Westerville, Ohio 43082

mcorey@ocsea.org

By mutual agreement between the parties, the Hearing was convened on October 20, 2016, at 9:10am. The Hearing was held at the Summit Behavioral Healthcare facility(SBH), 1101 Summit Road, Cincinnati, Ohio. All witnesses were sworn.

In attendance for the Union:

Mr. Mal Corey	Advocate, Staff Representative
Ms. Anissia Goodwin	2 nd Chair, OCSEA
Mr. Wilburn Tyrone Capell	Grievant(Therapeutic Program Worker) (witness)
Mr. Yancey Jones	OCSEA, Chapter 3180, President

In attendance for the Employer:

Ms. Marlo Cain	Advocate, Labor Relations Officer
Mr. Victor Dandridge	2 nd Chair, OCB(Labor Administrator)
Ms. Melissa Brooks	Labor Relations Officer 2, SBH(witness)
Ms. Liz Banks	Chief Executive Officer-SBH(witness)

The parties were asked to submit exhibits into the Record. The following were submitted as Joint Exhibits:

Joint Exhibit #1	Contract between THE STATE OF OHIO & THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
Joint Exhibit #2	Tab. # 2—Grievance Trail
Joint Exhibit #3	Tab. # 3—Discipline Trail and Discipline Packet

Joint Exhibit #4	Tab. # 4-Composed of: Acknowledgement & HR-22(HR-101) Code of Conduct & General Work Rules
	<ul style="list-style-type: none">- HR -125 Employee Absenteeism- Grievant's Education & Training Records/ My Learning Pointe

Joint Exhibit #5	Tab. # 5—OAKS Employee History
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The following were submitted as Management Exhibits:

Management Exhibit #1	Tab. # 6 Composed of 31 pages
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The following were submitted as Union Exhibits:

Union Exhibit #1	Letter to Mr. Joshua McClain-Re: Unapproved Absence
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Union Exhibit #2	Records request from Melissa Brock Mal Corey
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Union Exhibit #3	Hours and earnings info. RE: J. McClain
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Union Exhibit #4	Note from Kathern Capell dated 4/26/2016-Re: Alleged phone call to SBH(stipulated that the wife of Grievant wrote the note)
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Union Exhibit #5	Performance Review of Wilburn Capell-Nov. 2010
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Union Exhibit #6	“ “ “ “ August 2013
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Union Exhibit #7	Award to Tyrone Capell for being nominated for 2014 Marianne Russ Award
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Union Exhibit #8	Thank you letter to Tyrone for participating in TPW video project
Union Exhibit #9	OAKS-Employee History Report-Re: McClain, Joshua 5/23/16
Union Exhibit #10	Letter to Mr. C. Diagana-Re: unapproved absence 1/9/2015
Union Exhibit #11	Interoffice communications to C. Diagana Re: Investigatory Interview & Employee Statement 1/26/15
Union Exhibit #12	Letter and document showing that Tyrone Capell Was in a program alcohol addiction treatment 16 Pages(stipulated to by the parties as to their Accuracy)
Union Exhibit #13	Letter to Wilburn Capell, signed on 1/15/16 by Liz Banks(CEO)-Removing him, Effective date absent
Union Exhibit #14	Fedex fax-to Erin Gordon(HR) from Wilburn Capell Applying for Disability Leave Benefits, on 1/14/2016.

BACKGROUND:

The State of Ohio, Summit Behavioral Healthcare(SBH), hereinafter known as the Employer/State, provides psychiatric hospital services in the Southern Ohio area. It is a 291 bed State hospital with nearly 85% of their patients being forensic type. The Ohio Civil Service Employees Association, Local 11, hereinafter known as the OCSEA/Union, represents approximately 150 Therapeutic Program Workers in their SBH bargaining unit.

The Grievant, Mr. Wilburn Tyrone Capell, was employed by SBH from August 10, 2010 until his removal on January 26, 2016. Mr. Capell held the position of Therapeutic Program Worker(TPW) throughout his employment.

Evidence and testimony showed that Mr. Capell was involved in a traffic accident on December 4, 2015. He was charged with driving while under the influence(OVI) and incarcerated in the Hamilton County Jail for eighteen days. Also, his drivers license was suspended for three years(Jt.3,pg. 19)

Mr. Capell did not report to work on 12/6/15(ME.TB-6,pg. 1). Nor did he report to work for eighteen scheduled shifts in December 2015. Management alleges that there was no communications from Mr. Capell during his incarceration. Therefore, a letter was sent to his address on 12/14/15 from SBH, ordering him to report to work on December 17, 2015. Failure to do so, would result in disciplinary action(Jt.3,pg.4). The Union alleges that Mr. Capell's wife left a message with SBH on December 7, 2015, reporting him off. However, per the Union, she got no call back from SBH(UE-4).

Notice of a Pre-Disciplinary(PD) Hearing was sent to Mr. Capell's residence on 12/29/15. The PD Hearing was scheduled for January 7, 2016, and postponed until January 11, 2016(ME-6,pg.2 & Jt.3,pg.8). The Hearing Officer found just cause for discipline.

On January 26, 2016, a letter of removal was delivered to Mr. Capell by two SBH Police Officers. Mr. Capell refused to sign as to receiving the letter(ME-6, pg.22). Mr. Capell was charged with three Rule violations: Rule 3.6-Failure to adhere to professional standards and/or licensing requirements; Rule 4.1-Failure to follow policies & procedures. Specifically: policy and/or procdures-HR-125 Employee Absenteeism; Rule 5.6-Job abandonment (absent three or more consecutive workdays without appropriately calling off and/or notifying the work site)ME-6,pg. 22 & UE-13).

A grievance was filed on 1/27/16, by Yancey Jones, Chapter President. The

grievance claimed that the Grievant, Mr. Capell, was terminated without just cause and without regard to disability. The grievance was scheduled for Arbitration(Jt.3,pg.2). The parties jointly stipulated that the grievance was properly before the arbitrator.

ISSUE:

The parties jointly stipulated to the issue as follows:

Was the Grievant removed for just cause, and if not, what should the remedy be?

RELATIVE CONTRACT LANGUAGE:

ARTICLE 5 – MANAGEMENT RIGHTS

The Union agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively of the Employer.

Additionally, the Employer retains the right to: 1) hire and transfer employees, suspend, discharge, and discipline employees;

ARTICLE 24 – DISCIPLINE

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

24.05 – Pre-Discipline

Sentences # 11 and 12, read as follows:

Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses of the event or act known of at the time and documents known of at that time used to support the possible disciplinary action.

ARTICLE – MISCELLANEOUS

44.04 – Work Rules

After the effective date of this Agreement, Agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them.

MANAGEMENT POSITION:

The Grievant was removed from his position as a Therapeutic Program Worker on 1/26/16. He was removed for violating Rule HR-22-Code of Conduct & General Work Rules. Specifically, he was charged with violating Rule 3.6-Failure to adhere to professional standards and/or licensing requirements(failure to meet and maintain minimum qualifications of the position & failure to report any status change to license). Additionally, he was charged with violating Rule 4.1: Failure to follow policies and procedures, Employee Absenteeism HR -125(Job Abandonment), and Rule 5.6: Job abandonment(absent 3 or more working days without appropriately calling off and/or notifying the work site.

Mr. Capell was arrested on 12/4/15 and incarcerated, for OVI & a number of other charges. He did not report for work on 12/6/15 through 12/31/15. The Grievant did not contact or notify SBH regarding his absences. There was no contact or communications from Mr. Capell. He did not report for the eighteen December scheduled shifts, and thus he clearly abandoned his job.

As a result of his OVI arrest his driver's license was suspended for three years.

Consequently, he did not meet the minimum qualifications for the TPW classification, of possessing a valid driver's license, nor did he report his license status change.

Mr. Capell was notified in writing, on 12/14/15 to report for work on 12/17/15 or face disciplinary action. He did not report and there was still was no communications regarding his status.

The Union's argument that Mr. Capell has a disability, thus a mitigating circumstance, should not be considered. His disability claim was not filed until 1/12/16, after the PD and his incarceration. He was searching for an outlet, argues Management. A disability claim does not excuse the Grievant from complying with the Employer's policies and procedures.

The Grievant was held to the same standards that all SBH employees are held. The Union's references to other employees not being similarly treated, does not apply here. Those referenced situations were not similar circumstances.

The Employer claims that just cause was established and the discipline was equivalent to the violations. Management requests that the removal be upheld, and the grievance be denied in its entirety.

UNION POSITION:

Tyrone Capell was removed on 1/26/16. It was alleged that he violated the following Rules: HR-22, Code of Conduct and General Work Rules; Specifically, 3.16-Failure to adhere to professional standards and/or licensing requirements, 4.1-Failure to follow policies and procedures, and 5.6-Job abandonment.

The Grievant was a five-plus year employee with good performance evaluations, good attendance record, and a clean disciplinary record. Tyrone was a highly regarded employee, having received the Marianne Russ award for his quality of care for hospital patients. He was also selected to represent TPW's in the agency

wide video highlighting the important work of TPW's towards the mission of the MHAS hospitals.

Unfortunately, Tyrone was arrested for driving under the influence on 12/4/15. He was incarcerated and a series of consequential events led to his termination without just cause.

Management claims that Tyrone failed to call off and notify the work site within three workdays of his absence. He was unable to contact the facility due to being incarcerated with restricted access to a phone. However, Tyrone's wife called SBH on 12/7/15 in an attempt to notify them of Tyrone's situation. She was unable to speak to someone, however, she left a message on extension 3, but got no call back.

There are procedural concerns involved here according to the Union. Management failed to inform the Grievant, in writing, of the reasons for the contemplated discipline and possible forms of discipline prior to the Pre-Disciplinary meeting. Also, he was not provided a list of witnesses and documents to be used in support of the discipline. This did not happen claims the Union, and to date Tyrone has yet to receive a disciplinary packet. Thus, per the Union, Management violated Section 24.05 of the CBA. Also, on the day of the 1/11/16 PD Hearing, Chapter President Yancey Jones, was informed by the Hearing Officer, that Management intended to remove the Grievant. Thus, per the Union, the PD was not conducted fairly without bias.

Regarding the specific charges: (1) 5.6-Job abandonment, this Rule suggests an element of intent on behalf of the Grievant. Tyrone had not intended to desert his job. (2) 3.16-Failure to adhere professional standards and licensing. Rule 1.11 carries a lesser penalty for a first offense, such as, loss of driver's license. And (3)- Failure to follow policies and procedures-HR 125 "Employee Absenteeism", this, per the Union, is an add-on to support the Job abandonment charge.

Furthermore, Tyrone sought help by applying to DAS to get into treatment for his alcohol problem. However, after him being approved by DAS initially, it was

Subsequently denied, because he was removed.

The Grievant was treated differently than others similarly situated. On at least two occasions, two other TPW's were considered for Job abandonment. They were in an extended unapproved leave situation and they suffered little or no discipline. If these two were considered salvageable, Tyrone and the Union are asking for the same consideration.

In fact, argues the Union, Tyrone didn't know when he was removed. The removal letter, when delivered did not have the effective date of his removal.

Management, states the Union, casually applied its rules and penalty without considering Tyrone's mitigating circumstances. The Grievant has a clean disciplinary record, and progressive discipline should have been considered. Management did not prove just cause, claims the Union. Thus, the grievance should be granted in its entirety and be made whole, including lost Union dues.

DISCUSSION AND OPINION:

First, the arbitrator will address the alleged procedural violations claimed by the Union. The procedural allegations were not brought forward by the Union to be argued separately. They were identified in their opening statement and addressed during their case presentation. A subject which is normally brought forward for discussion during the processing of the grievance, but was not evidenced in Joint Exhibits 2 or 3. Furthermore, both parties stipulated that the matter was properly before the arbitrator to determine if there was just cause for discipline. Which, if so determined, it generally meets the procedural due process requirements¹.

The Union argues through their first witness and the Grievant, that SBH violated Section 24.05 (Pre-Discipline). They claim that the Mr. Capell was not informed in writing of the reasons for the contemplated discipline. The Grievant testified that

¹ Elkouri & Elkouri, 6th ed. Pg. 1255

He did not get the PD packet before the PD Hearing. However, evidence and testimony showed that the PD packet was sent on 12/29/15, both by registered and regular mail to the Grievant's address on file(ME, pg. 2,3). This was more than a week prior to the scheduled PD Hearing. Obviously, if the employee is not at the work site, the PD notice and accompanying information would be mailed to the employees address on file. Section 24.05 regarding the PD notice states, "When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at the time and documents known at the time used to support the possible disciplinary action." If he was not incarcerated at this time, where was the Grievant? I do not find that Employer violated the notice procedure called for in Section 24.05.

Also, the Union alleges that the Grievant didn't know his date of removal. A minor issue which is not substantiated by the evidence, which in the arbitrator's opinion exemplifies the creditability of the situation. Management Exhibit 6, pg. 22, shows the removal letter was delivered on 1/26/16 by two SBH Police Officers. This exhibit had a removal date of 1/26/16. More importantly, in the arbitrator's opinion, the removal date was acknowledged by the Union when they filed the grievance on 1/27/16. The Grievance identified the removal date as 1/26/16(Jt.#2,pg. 2).

Did Management prove that the Grievant actually violated the rules for which he was charged? The most substantive Rule that was allegedly violated was Rule 5.6- Job abandonment, in the arbitrator's opinion. This Rule states: that if an employee is absent three or more consecutive workdays without appropriately calling off and/or notifying the work site, they are subject to automatic removal for a first offense.

The Employer's witnesses and submitted evidence identifies and claims that SBH had absolutely no contact or communications from the Grievant, regarding him being AWOL on his scheduled shifts(Jt.-3,pg.3,16,17-ME-pg.5). The Union introduced evidence that depicts that the Grievant's wife called SBH on 12/7/15, and left a message. She did not receive a call back from SBH(UE-4). This claim by the Union was not substantiated by Management's testimony or evidence.

The Union's only evidence or claim of attempted Employer contact was a single phone call attempted, on a single day, by the Grievant's wife. What about all the other scheduled days to work without contact? Mr. Capell was incarcerated on 12/4/15 for 18 days(Jt.3pg. 19-ME6,pg.17 & 28). However, there was no creditable evidence or testimony introduced that would have made it impossible for Mr. Capell to contact SBH by some means. Furthermore, a notice was sent to Mr. Capell's home on 12/14/15 ordering him to report for work on 12/17/15. Failure to do so would result in disciplinary action(Jt.3,pg.4). There was no evidence of any response.

According to evidence and testimony, Mr. Capell was incarcerated for eighteen days. His court date was 12/22/15 and there was no evidence or testimony of him being incarcerated thereafter. He had six more scheduled work days after 12/22 and he was still AWOL, without contact with SBH. The first contact with Employer by the Grievant appears to be at the 1/7/16 PD Hearing, as testified to by the Chapter President.

The evidence is clear and convincing to the arbitrator, that Rule 5.6-Job abandonment and HR-125 were violated by Mr. Capell. Mr. Capell was aware of the Rule and was negligent in his duty to comply with the Rule. It is an egregious violation of this Rule to miss eighteen days of scheduled work over a month's time, without contacting the Employer. There are a myriad of reasons why a rule of this nature is necessary to any workplace. Suffice it to say, that an organization could not survive without employees coming to work as scheduled.

The Union further argues that the arbitrator should consider the Grievant's mitigating circumstances. Mr. Capell has a clean work record and was an exemplary employee, per the Union Advocate(UE-5,6,7,8). This is a five year employee and not a long term employee. All employees are reasonably expected to have a good work record and evaluations. Yes, Mr. Capell had some commendations while working, but based on the severity of the infraction, the arbitrator does not consider these factors sufficient to mitigate the discipline.

It was also claimed by the Union, that the Grievant had a disability(alcoholism)(UE-12,14). However, evidence of the claimed disability was not faxed to SBH until 1/14/16, after the PD Hearing. Page 4 of Union Exhibit 14, shows the application for disability leave being signed by Mr. Capell on 12/10/15. According to evidence and testimony, he was incarcerated at the time. The entered date of 12/10/15 is suspect to the arbitrator. Why would the application not be delivered to SBH until a month later? If he could have signed an application such as this, while jailed, why could he not have contacted his Employer from there through a note etc.? This, in the arbitrator's opinion, is further evidence of the Grievant's negligence in following the Rules 5.6 and HR 125. In this case, Management's claim that an alleged disability does not excuse an employee from following policies and procedures, is sustained by the arbitrator.

Was the Grievant treated in a disparate manner? The Union argues that two other employees were charged with Job abandonment and were not removed(UE-1,2,3,9,10,11). These employees were Mr. Joshua McClain and Mr. Cheikh Diagana.

Management's unchallenged testimony stated that both McClain and Diagana went off on approved leave for medical reasons. They failed to provide Management with the necessary documentation for continued absence. They were so notified and they responded in some fashion. Neither of the Union's identified employees were scheduled to be at work, per Management testimony. Management testified that they knew where McClain and Diagana were, and they kept in touch with SBH. Documentation was the only issue.

Although the Rule for Job abandonment may have widespread application, the circumstances may vary as to why an absence might be considered in violation of such Rule. The Grievant was scheduled to work eighteen shifts, and the Employer received no contact from him for over one month. I do not find that the Union's examples are similar enough to constitute evidence of disparate treatment regarding the Grievant.

Although the remaining charges may have merit, they in themselves would not rise to the level of removal for a first offense. However, I have decided that the Job abandonment violation was an egregious infraction and a first offense for a level five violation determination, is removal. Therefore, in the arbitrator's opinion, there was just cause for removal.

AWARD:

The Grievance is denied in its entirety.

This concludes the Arbitration Decision, submitted this 25th day of November 2016.

Respectfully submitted,

E. William Lewis
Arbitrator

