

STATE OF OHIO AND OHIO CIVIL
SERVICE EMPLOYEES' ASSOCIATION
LABOR ARBITRATION PROCEEDING

189

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, DEPARTMENT OF MENTAL RETARDATION
AND DEVELOPMENTAL DISABILITIES, WARRENSVILLE
DEVELOPMENT CENTER (WARRENSVILLE TOWNSHIP, OHIO)

-AND-

OHIO CIVIL SERVICE EMPLOYEES' ASSOCIATION,
LOCAL 11, AFSCME, AFL-CIO

GRIEVANCE: Fontelle Burley (Discharge)

CASE NUMBER: G-87-1930

ARBITRATOR'S OPINION AND AWARD

Arbitrator: David M. Pincus

Date: June 6, 1988

APPEARANCES

For the Employer

Steve Schumacher
Jason Hooks
Jim Wagner
Jennifer Dworkin

Superintendent
Labor Relations
Office of Collective Bargaining
Office of Collective Bargaining

For the Union

Fontelle Burley
Robert Bailey
Carla Wilkes
Dave Pope
Betty Williams
Linda Fiely

Grievant
Chapter 61, President
Witness
Witness
Witness
Associate General Counsel

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Department of Mental Retardation and Developmental Disabilities, Warrensville Developmental Center, Warrensville Township, Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit #11).

The arbitration hearing was held on April 29, 1988 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitration if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

ISSUE

The stipulated issue in this grievance: Was the Grievant, Fontelle Burley, disciplined by termination for just cause? If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."

(Joint Exhibit 11, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

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

Section 24.02 - Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand;
- C. Suspension;
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

...

Section 24.04 - Pre-Discipline

"An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. 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. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges."

Section 24.05 - Imposition of Discipline

"The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment."

(Joint Exhibit 11, Pgs. 34-36)

JOINT STIPULATIONS OF FACT

1. GRIEVANT FONTELLE BURLEY WAS HIRED ON 5/23/77 AS A TEACHER'S AIDE AT THE BROADVIEW DEVELOPMENTAL CENTER
2. ON 7/20/86 SHE WAS LAID OFF AT BROADVIEW
3. ON 7/23/86 SHE WAS ARRESTED ON CHARGES OF AGGRAVATED TRAFFICKING OF COCAINE IN SUMMIT COMMON PLEAS COURT. ON 9/18/86 PLEAD GUILTY OF AGGRAVATED TRAFFICKING OF COCAINE.
4. ON 2/18/87 THE ISSUE OF THE PROPRIETY OF THE LAYOFF WAS ARBITRATED
5. ON 3/11/87 THE AWARD WAS GIVEN TO RE-INSTATE THE GRIEVANT
6. ON 4/27/87 SHE WAS TO REPORT TO WARRENSVILLE AS A HOSPITAL AIDE PURSUANT TO THE ARBITRATION AWARD
7. ON 4/27/87 UPON REPORTING TO WORK SHE WAS PUT ON PAID ADMINISTRATIVE LEAVE PENDING THE OUTCOME OF A PRE-DISCIPLINARY MEETING REGARDING THE DRUG TRAFFICKING CONVICTION
8. ON 4/30/87 A PRE-DISCIPLINARY MEETING WAS HELD TO CONSIDER THE CIRCUMSTANCES
9. ON 6/12/87 THE GRIEVANT WAS REMOVED FROM SERVICE.
10. GRIEVANT HAS NO PRIOR DISCIPLINARY RECORD
11. THIS GRIEVANCE IS PROPERLY BEFORE THE ARBITRATOR.
(Joint Exhibit 2)

JOINT STIPULATIONS CONCERNING EMMA BENSON

1. Emma Benson was hired at Broadview Developmental Center on January 30, 1979 in the position of Hospital Aide.
2. Emma Benson was promoted to Residential Care Supervisor on March 13, 1985.
3. Emma Benson was convicted of a felony on drug-related charges which involved association.
4. Emma Benson was on probation at the time of her hire.
5. Emma Benson's application indicated that she was convicted of a felony.
6. Emma Benson has worked continually at Broadview Developmental Center since her hire.

Linda F. Fiely
OCSEA/AFSCME Local 11

Tim Wagner
Office of Collective Bargaining
(Joint Exhibit 2)

CASE HISTORY

The Warrensville Developmental Center, the Employer, is located in a suburb of Cleveland, Ohio. The Employer's mission consists of the habilitation, rehabilitation, education, and housing of all levels of mentally retarded residents. Approximately two-hundred-and-sixty (260) residents are cared for by the facility. The facility, moreover, is organized in an open setting, or campus arrangement, with seven (7) thirty-two (32) bed houses, and two(2) sixteen (16) bed houses.

Fontelle Burley, the Grievant has been employed by the Department of Mental Retardation and Developmental Disabilities for approximately eleven (11) years. She was originally hired by the Broadview Developmental Center in 1977 as a Hospital Aide, and in 1979 she was promoted to a Teacher Aide position.

On July 20, 1986 the Grievant was laid off as a consequence of an abolishment decision initiated at Broadview Developmental Center. A few days after the lay off, on July 23, 1986, the Grievant was arrested at her home for aggravated trafficking of cocaine. Subsequently ,the Grievant was convicted of aggravated trafficking, a felony of the third (3rd) degree. She was initially adjudged by the Court of Common Pleas to be imprisoned for two (2) years. The imposition of this sentence was suspended, the Grievant was placed on probation for a period of four (4) years, and she served a period of thirty (30) days in Summit County Jail (Joint Exhibit 5). It should be noted that the Grievant served her jail term while she was on lay off status.

On April 17, 1987 the Superintendent of Broadview Developmental Center informed the Grievant that she was reinstated pursuant to an arbitrator's award concerning the propriety of the lay off decision at Broadview Developmental Center. The arbitrator required the Grievant's reinstatement to an available Hospital Aide position within a specific geographical location. As a consequence, on April 27, 1987, the Grievant was reinstated from lay off status and transferred to

the Warrensville Developmental Center as a Hospital Aide (Joint Exhibit 4, Pg. 1).

On the above mentioned reinstatement date, the Grievant was temporarily placed on paid leave from her duties as a Hospital Aide at the Warrensville Developmental Center (Joint Exhibit 4, Pg. 3). Steven Schumacher, the Superintendent, initiated this action after being informed by John Beattie, Chief of Labor Relations, of a potential felony conviction. The Grievant was informed that she was being placed on administrative leave in compliance with Ohio Revised Code Annotated 5123.081 and Article 24.05 (See Pgs. 4-5 of this Award for Article 24 - Discipline, Section 24.05 - Imposition of Discipline).

An Administrative Hearing Notice was issued by Schumacher on April 27, 1987 indicating that a Pre-disciplinary Conference was to be held on April 30, 1987. Notice of a potential disciplinary action was provided specifying the Grievant's felony conviction as potential justification. The Employer, more specifically, alleged that the felony presented a direct, substantive, and material relationship with the duties to be performed by the Grievant at the Warrensville Developmental Center (Joint Exhibit 4, Pg. 4).

The Conference was held on the above specified date. The following Order of Removal was issued on May 13, 1987, resulting in the Grievant's removal on June 12, 1987:

"...

The reason for this action is that you have been guilty of Failure of Good Behavior. In accordance with ORC 5123.081

in the following particulars, to wit: on or about 7/23/86, you were convicted of Aggravated Trafficking, a third (3rd) degree felony, in the Court of Common Pleas, County of Summit, and sentenced to two (2) years in the Ohio State Reformatory for Women. The sentence was suspended. You served thirty (30) days in the Summit County Jail and were placed on four (4) years probation.

Such a conviction bears a direct, material, and substantial relationship to the duties of your position and would greatly affect your ability to properly perform your responsibilities.

P.C. 4/30/87

..."

(Joint Exhibit 4, Pg. 4)

On June 15, 1987, the Grievant contested the Removal Order (Joint Exhibit 4, Pg. 4) by filing a grievance. The grievance contained the following relevant particulars:

"...

Contract Article(s) Section(s) Allegedly Violated:

ARTICLE 24, sec.24.01, ARTICLE 24, sec. 25.03 ARTICLE 2. sec. 2.01,2.02

Statement of Facts (for example, who? what? when? where? etc.):

I GRIEVE MANAGEMENT FOR THEIR REMOVAL OF ME ON JUNE 6,1987, BECAUSE NO.(1) DISPARATE TREATMENT- OTHER EMPLOYEES ARE WORKING WHO HAVE SIMILAR JUDICIAL CONVICTION. NO.(2) VIOLATED ARBITRATOR AWARD REINSTATEING (sic) ME TO MY JOB. NO. (3) HAD I BEEN EMPLOYED, I WOULD BEEN ABLE TO AFFORD LEGAL FEES TO FULLY DEFEND MYSELF IN THE CRIMINAL ACTION.

Names of Witnesses:

Remedy Sought:

I PRAY THAT MY REMOVAL BE HELD NULL AND VOID, AND THAT I BE MADE WHOLE.

Signature: Fontelle D. Burley
(Grievant/Union
Representative"

Date: JUNE 15,1987

(Joint Exhibit 3, Pg.1)

A third step grievance hearing was held on August 11, 1987. The Employer denied the grievance in a response dated September 2, 1987. The response contained the following justification for the removal:

"...

Conclusion: Pursuant to Ohio Revised Code Section 5123.081 [Employment of persons convicted of certain offenses prohibited; investigation of criminal records.] "(A) No appointing officer shall appoint a person to fill a position in either the classified or unclassified service of the department of mental retardation and developmental disabilities if the person has been convicted of or pleaded guilty to a violation of the following:

(1) Any felony contained in the Revised Code, if the felony bears a direct and substantial relationship to the position being filled;..." In this case, the appointing officer determined that Ms. Burley's conviction did bear a direct and substantial relationship to the position being filled. Such a determination was made and the denial of employment or removal from a position, in Ms. Burley's case, pursuant to ORC Section 5123.081, was made to prevent the employment of individuals who would be a risk to the safety and security of clients, staff or state property.

Therefore, based on the above, this grievance is denied.

<u>/s/</u>	<u>9/2/87</u>	<u>/s/</u>
Marilyn L. Reiner	Date	John A. Beattie, Chief
Labor Relations Coordinator		ODMR/DD Office of Labor
		Relations

(Joint Exhibit 3, Pg. 3)

The Employer also denied the grievance at the fourth step of the grievance procedure. This denial was documented in the following letter which was dated November 18, 1987:

"...

Dear Ms. Burley:

On October 29, 1986, you were convicted of the crime of aggravated trafficking of drugs, Ohio Revised Code Section 2925.03 (A) (1), a third degree felony.

As a Hospital Aide entrusted with the care and training of severely and profoundly retarded institutionalized individuals, the Department of Mental Retardation and Developmental Disabilities, the taxpayers of the State of Ohio, and the family and guardians of the mentally retarded must have a reasonable expectation that the staff members who care of the clients, can be trusted with the role of caregiver.

Since you have been convicted of trafficking drugs away from the job, management can not be certain that you will not repeat this behavior on the job, possibly even involving the mentally retarded clients. Therefore, your grievance is denied. The discipline is commensurate with the offense and meets the just cause standard.

Sincerely,

/s/

Dick Daubenmire
Contract Compliance Chief

..."

(Joint Exhibit 3, Pg. 4)

On November 2, 1987 the Union informed the Employer that the above referenced grievance was to be taken to arbitration. The grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to terminate the Grievant for off-duty misconduct. The conduct in dispute dealt with a third degree felony conviction of aggravated trafficking of cocaine.

The Employer argued that it gave the Grievant forewarning or foreknowledge of the possible or probable consequences of the Grievant's disciplinary conduct. The Employer maintained that the Administrative Hearing Notice (Joint Exhibit 4, Pg. 4) was sufficiently specific and provided the Grievant with proper notice in accordance with the Agreement (See Pg. 4 of this Award for Article 24 - Discipline, Section 24.04 - Pre-Discipline). A greater degree of specificity would conflict with the purpose of the pre-disciplinary hearing which is initiated to determine to what degree discipline is warranted; and to give an employee an opportunity to respond to the allegations under review.

Notice was also provided in an indirect fashion via a number of sources. First, the Grievant received a copy of the Collective Bargaining Agreement (Joint Exhibit 11) and knew her Union Steward. Second, she received a copy of the Pre-discipline Notice (Joint Exhibit 4, Pg. 4) which stated action would be taken. Third, the Grievant acknowledged that she was aware of the Plain Dealer articles (Employer Exhibit 1) and that other employees had been disciplined as a consequence of previous felony convictions. Last, Robert Bailey, the Grievant's Union Steward, had a number of conversations with the Grievant. Since he knew about the 1985 newspaper articles (Employer Exhibit 1), and he testified that he was personally aware of a termination resulting from a previous felony conviction, these circumstances should have provided the Grievant with proper notice.

Notice considerations concerning the criteria employed in rendering the termination decision were also refuted by the Employer. Schumacher testified that a three (3) pronged criteria was used in evaluating the Grievant's off-duty misconduct. Two (2) criteria were initially invoked during a 1985 crisis at the Northeast Ohio Developmental Center. A series of exposes were initiated by a local newspaper which disclosed that a number of previously convicted felonies were presently employed at the facility. The public outcry necessitated a review of the existing personnel files. This review was undertaken with two (2) criteria in mind. If an employee lied on an employment application and the employer discovered that the employee committed a felony within two (2) years upon discovery, then the employee was terminated (Union Exhibit 1). These criteria were developed by the Attorney General's office as a one-time method to deal with the problem of convicted felons on the payroll. Since the Collective Bargaining Agreement (Joint Exhibit 11) had not been negotiated by the Parties at the time of the promulgation, recent Personnel Board of Review rulings provided some guidance concerning the propriety of the criteria. The Employer emphasized that there is a great distinction between these one-time reviews without an Agreement (Joint Exhibit 11) in existence, and the present situation under a Collective Bargaining Agreement (Joint Exhibit 11) which contains a just cause proviso.

In addition to the above mentioned criteria, the Employer referred to a set of criteria contained in the Department's Administrative Rule 5123:1-7-01 (Joint Exhibit (9) which were promulgated in accordance with O.R.C. Section 5123.081 (Joint Exhibit 9, Pg. 8). Section (f) of the Administrative Rule allows the Employer to consider the following factors in determining if the offense engaged in by a job applicant bears a direct and substantial relationship to the position being filled:

"...

- (i) What are the essential elements of the position being filled;
- (ii) Whether the position being filled provides an opportunity for the commission of similar offenses;
- (iii) Whether the circumstances leading to the offense will recur;
- (iv) Whether the individual has committed other offenses since his conviction or his conduct since his conviction makes it likely that he will commit other offenses;
- (v) The number of offenses and the circumstances of each offense;
- (vi) The time elapsed since release;
- (vii) The individual's complete employment history; and
- (viii) The individual's efforts at rehabilitation.

..."

(Joint Exhibit 9, Pg. 4)

Even though this Rule was developed for hiring evaluation purposes, the Employer maintained that this standard was equally applicable for individuals under the employ of the Department.

The Employer acknowledged that the Attorney General's criteria, O.R.C. Section 5123.081 (Joint Exhibit 9, Pg. 8), and the Administrative Rule 5123.1-7-01 (Joint Exhibit 9, Pgs. 1-5) were never distributed by the Employer to the Grievant. It was argued that it would be virtually impossible to distribute these documents to all employees. The Employer, moreover, emphasized that the Union and its representatives, rather than the Employer, have the primary responsibility to inform its members about new and relevant legislative enactments.

The Employer argued that it obtained substantial evidence or proof that the Grievant was guilty as charged. Circumstances surrounding the conviction were not viewed as relevant to the present proceedings because the Employer was not attempting to retry the case heard by the Court of Common Pleas. All the evidence and testimony introduced to justify the felony conviction were not presented at the Arbitration hearing. The Employer emphasized that the Grievant plead guilty to these charges and could not hide under the veil of improper legal representation.

The Employer maintained that the Grievant's termination for off-duty misconduct was proper because it effects her ability to perform her duties and adversely impacts the facility's mission. A number of arguments were provided in support of this premise.

First, the Employer noted that one needs to distinguish between the use and trafficking of an illegal drug. Although both activities should not be tolerated, a higher standard should

be applied to drug trafficking violations. This distinction is of utmost import in situations where direct care employees, such as the Grievant, are convicted of drug trafficking.

Second, a Hospital Aides' duties and responsibilities are the backbone of the facility in terms of the services provided to residents. Schumacher testified that some of these duties include day-to-day care, providing active training and treatment, and acting as a pseudo-parent. Hospital Aides, moreover, spend a great deal of time interacting with guardians and parents who solicit feedback from providers concerning the status of their children.

Performance of the above duties and responsibilities would be quite difficult if the Grievant, an acknowledged drug trafficker, was returned to work. The Employer maintained that some of the high-functioning residents would be cognizant of the Grievant's felony record. Such an awareness, would hinder the habilitation and rehabilitation services provided these residents by the Grievant. Perceptions dealing with the quality of services rendered would also be negatively impacted. Guardians and parents, more specifically, would have their trust and confidence diminished once the Grievant's criminal record became known to them.

Third, the facility's mission would be detrimentally impacted if a convicted drug trafficker was allowed gainful employment. A ruling in favor of the Grievant would lessen the confidence of a number of "watch groups" who monitor the

residents' care on an ongoing basis. The general public's confidence in terms of the level of care provided would be adversely impacted, which would lead to a number of negative consequences. A public outcry similar to investigations initiated in 1985 by the Cleveland Plain Dealer (Employer Exhibit 1) might engender a new series of investigations concerning resident care at the facility. If families and guardians lose trust and confidence in the care provided at the facility, then they may be inclined to remove their relatives which would negatively impact the facility's census. The retention of a convicted felon would prevent the recruitment and employment of qualified professional staff. Over a period of time, staffing problems could threaten the certification of the facility by Federal and State agencies.

Last, the retention of a known drug trafficker would exacerbate an existing drug problem at the facility. Both Schumacher and Bailey testified that drug related counseling requests via the Employee Assistance Program have increased recently. They also noted that they have jointly undertaken a number of drug related investigations involving bargaining unit members. The Employer also argued that an employee convicted of drug trafficking would attract undesirable individuals to the facility. Schumacher remarked that trafficking activity is difficult to detect because the facility is organized in a campus like arrangement with several entrances. Since medication is also distributed in the wards, employment of a convicted

trafficker in this type of an environment could heighten the previously mentioned drug activity taken place at the facility.

The Employer argued that it has applied its rules and penalties evenhandedly and without discrimination to all employees. The Employer maintained that the Grievant was not similarly situated to the employees investigated in 1985. All of these investigations and determinations were conducted without a collective bargaining agreement in effect. Thus, the standards of discipline in effect differ from the just cause standard contained in the present Agreement (Joint Exhibit 11). Those employees that were not removed in 1985 failed to fall within the guidelines promulgated by the Attorney General's office (Union Exhibit 1).

The Position of the Union

It is the position of the Union that the Employer did not have just cause to terminate the Grievant for off-duty misconduct. A number of arguments were raised by the Union dealing with notice concerns, the lack of nexus between the conviction and the Grievant's ability to perform her job duties and disparate treatment claims.

The Union argued that the Employer failed to provide the Grievant with proper notice in a number of pertinent areas. First, the Union maintained that the Administrative Hearing Notice (Joint Exhibit 4, Pg. 4) was deficient, and thus, in violation of the Agreement (See Pg. 4 of this Award for Article

24 - Discipline, Section 24.04 - Pre-Discipline). The deficiency dealt with the lack of specificity dealing with the anticipated penalty. In fact, the Union claimed that the Notice (Joint Exhibit 4 , Pg. 4) did not even include a possible range of anticipated penalties. This contract language was not viewed as a voluntary requirement but as a mandatory requirement negotiated by the Parties. The Union maintained that proper notice was especially critical in this instance because the Code of Conduct (Joint Exhibit 8) did not specify a penalty for off-duty misconduct.

Second, the criteria employed to terminate the Grievant were also laden with notice deficiencies. The Grievant testified that she never received O.R.C. Section 5123.081 (Joint Exhibit 9, Pg. 8), nor Administrative Rule 5123:1-7-01 (Joint Exhibit 9, Pgs. 1-5). She also maintained that the 1985 criteria were never formally communicated at the time of implementation.

Again, notice deficiencies concerning the statutory guidelines were viewed by the Union as highly critical. These guidelines were promulgated to prevent the employment of individuals who would be a risk to the safety and security of clients. To prevent such a situation, policies and procedures were established to conduct background checks on applicants. Since the Grievant was not an applicant at the time of her removal, the propriety of these guidelines in non-applicant situations was questioned by the Union. Even if these guidelines

were applicable in this instance, the Union emphasized that proper notice should have been provided to the Grievant.

The Union maintained that the Employer failed to establish nexus between the felony conviction and the Grievant's Hospital Aide responsibilities. The Union claimed that if new hires are provided with background checks to determine the potential adverse impact of a prior criminal conviction, then a senior employee's record and circumstances should be given equal consideration. To support this argument, the Union applied the criteria contained in Section (f) of the Administrative Rule and found them wanting in terms of justifying the termination.

The position being filled was virtually identical to the position held by the Grievant prior to her conviction. On or about the time of her arrest, the Grievant performed in an exceptional manner and her most recent performance (Joint Exhibit 7) evidenced her commitment to the Department's mission. If the Grievant was engaging in these elicited activities, then her performance prior to the lay off would have exposed any potential deficiencies.

The position to be filled did not provide the Grievant with an opportunity for the commission of similar offenses. The Union stated that no foundation was provided concerning the Grievant's propensity to sell drugs to coworkers or residents. Schumacher's discussion with the Grievant's probation officer indicated that she was complying with the terms of her probation. One rule of probation dealing with the Grievant socializing with anyone

having a criminal record (Joint Exhibit 10) was viewed with special interest by the Union. Since the Grievant complied with this rule, the Union believed that the Grievant would not engage in drug trafficking on or off the job.

The Union claimed that the circumstances leading to the offense would not recur. The Grievant's daughter, Carla Wilkes, testified that her mother had never engaged in drug trafficking, but that she had engaged in these activities while her mother was working. She also stated that she was no longer living with her mother.

The Grievant's conduct after her conviction does not make it likely that she will commit other offenses. Testimony provided by the Grievant indicated that she worked in a similar capacity prior to the pre-disciplinary hearing. Thus, her conduct clearly indicates that similar offenses will not reoccur.

The Employer should have considered the circumstances surrounding the felony because job applicants are provided with this opportunity. Deference, therefore, needs to be given to the Grievant's work history, her seniority, and the circumstances surrounding the felony.

The Union maintained that the Employer had the opportunity and resources to evaluate the Grievant's fitness for continued employment. A fair and accurate review of the Grievant's conduct subsequent to her guilty plea could have been initiated by the Employer.

Unlike the review of an applicant's employment history, a review of the Grievant's employment history could have been conducted internally without outside input. The Union alleged that such a review would have disclosed an exemplary work record. Testimony provided by coworkers and supervisors supported this premise and minimized the adverse impact hypothesis proposed by the Employer.

The Union contended that the Grievant engaged in efforts at rehabilitation. The Grievant testified that she continued to work after her conviction. She, moreover, refused to take the circumstances surrounding her arrest as a permanent setback and learned to live with it.

Several additional nexus arguments offered by the Employer were refuted by the Union. First, certification of the facility would not be impeded if the Grievant was returned to work. the facility was not certified prior to the Grievant's removal and continues in this status today. Second, Schumacher's arguments dealing with the client advocacy groups and the public outcry which might result if the Grievant was returned to work were also viewed as deficient by the Union. Under cross-examination Schumacher stated that at times he made decisions that were not in total agreement with the wishes and objectives of these groups. Third, the adverse impact on the institution's mission as a result of employing a convicted felon runs counter to the Employer's historic policies. The record clearly indicated that the Employer continues to employ convicted felons on the payroll.

Thus, if these individuals do not adversely impact the mission, then the Grievant's felony should not be viewed as a distinguishing pre-condition of employment.

The Union emphasized that the Employer has not applied its rules and penalties evenhandedly and without discrimination to all employees. The Union maintained that at least four (4) employees are presently employed at the facility, yet, they were convicted for felonies during the course of their employment. Special attention was placed on the employment history of Emma Benson (Joint Exhibit 2). At the time of her date of hire she was allegedly on probation for a drug related charge and eventually promoted to a supervisory position. Other employees had previous conviction records and were hired into similarly sensitive positions. The Union maintained that these examples adequately document the inconsistent application of the rule dealing with prior conviction records.

THE ARBITRATOR'S OPINION AND AWARD

In the opinion of this Arbitrator, the Union failed to support its notice arguments. The Administrative Hearing Notice (Joint Exhibit 4, Pg. 4), and the letter notifying the Grievant of her administrative leave status (Joint Exhibit 4, Pg. 3) provided her in writing of the reasons for the contemplated discipline and the possible form of discipline (See Pg. 4 of this Award for Article 24 - Discipline, Section 24.04 - Pre-Discipline). The Administrative Hearing Notice (Joint Exhibit 4,

Pg. 4) adequately documents the criminal convictions and possible nexus concerns. In this Arbitrator's opinion the above mentioned documents also provide the Grievant with pro forma notice of the possible consequences associated with her off-duty misconduct. There are certain examples of employee misconduct for which no express notice need be given that discharge can be the consequence. In other words, drug trafficking is so serious that the Grievant and the Union should have anticipated the consequences (Ohio Crankshaft Co., 48 LA 558, Teple, 1967; Kennecott Copper Corp., 52 LA 822, Roberts, 1969). Such a conclusion is of special importance when one considers the nature of the offense and the job setting involved in the reinstatement request.

The specific standards contained in Section (f) of Administrative Rule 5123:1-7-01 (Joint Exhibit 9, Pg. 4) are not viewed as enforceable in this particular instance. The Rule pertains to job applicants and not to certified employees of the facility. The Employer failed to substantiate the applicability of this Rule in non-job applicant situations. Thus, the Union's notice concerns regarding these specific standards are not viewed as material. This does not mean, however, that neither Party is prevented from referring to these standards, or any other standards, in support of their respective just clause claims. The Parties, more specifically, are not restricted by these standards and can provide any relevant arguments dealing with the adverse impact of the felony.

Although these specific standards are unenforceable, generally, adverse impact standards used to support nexus arguments do not require any formal prior notice. Nexus standards are not viewed by this Arbitrator as work rules. They are, however, propositions argued by both Parties in support of their respective contentions.

The voluntary plea of guilty testified to by the Grievant precludes this Arbitrator from evaluating the circumstances surrounding the arrest and the propriety of the Common Pleas Court's verdict. Arbitrators have generally held that it is not possible to go beyond such a plea. A voluntary plea, moreover, has been accepted at face value as proving the charges in dispute (Northwest Airlines, Inc., 53 LA 205, Sembower, 1969; Tibbetts Plumbing Heating Corp., 46 LA 124, Stouffer, 1966).

It is the position of the Arbitrator that the Employer did not apply its rules and penalties evenhandedly and without discrimination. The testimony provided by Schumacher indicated that three (3) basic criteria were employed in determining the Grievant's guilt. Two (2) criteria were promulgated by the Attorney General's office, while the third criterion dealt with nexus concerns. Although the Employer maintained that the two (2) criteria promulgated in 1985 were used on a one time basis, Schumacher's testimony did not support this premise; he adamantly declared that all three (3) criteria were employed in the decision making process.

If one applies the Attorney General's criteria, the Grievant does not fall within the domain of these guidelines. She did not lie on her application, but her felony conviction was discovered within two (2) years of its occurrence. Both of these criteria had to be met to establish guilt for off-duty misconduct under these guidelines. A number of other examples were provided at the hearing where employees were retained because they failed to meet both of the Attorney General's guidelines. These examples varied in terms of vintage and the employees had various job classifications. Some of these employees, however, were employed as Nurse Aides at the time of discovery. All of these individuals, moreover, were convicted felons with criminal records laden with equally egregious behaviors.

The Grievant's situation, however, differed dramatically from the previous reviews undertaken by the Employer. Nexus considerations were not considered while the previously mentioned criteria were applied in a systematic manner. The Employer did not sufficiently justify the disparate treatment resulting from the application of these differing standards. Arguments dealing with the standards employed by the Personnel Board of Review did not explain why nexus was considered a critical factor in the Grievant's case, yet other employee's records were reviewed without this element factored into the decision making process.

Even though this Arbitrator has determined that disparate treatment was established by the Union, disparate impact, or nexus, was established by the Employer. The following factors

have been widely accepted as criteria for determining when off-duty criminal activity justifies discharge or other form of discipline: the behavior harms the Employer's reputation or product; the behavior renders the employee unable to perform the job satisfactorily and/or leads other personnel to refuse to work with the employee (W.E. Caldwell Co., 28 LA 434, Kesselman, 1957; Polk County, Iowa, 80 LA 639, Madden, 1983; Lamb Glass Co., 32 LA 420, Dworkin, 1959; Pearl Brewing Co., 48 LA 379, Howard, 1967).

The duties and responsibilities of a Hospital Aide are pivotal to the mission of any mental health facility. The majority of the responsibilities are related to patient directed tasks which involve frequent contact with patients and their guardians. Thus, the Grievant's off-duty misconduct, is reasonably correlated to her access to these individuals and the quality of care she provides the residents. These residents are highly impressionable and high functioning residents may gather inappropriate perceptions regarding the propriety of the Grievant's activities. Hospital Aides, moreover, need to exercise a great deal of judgment when rendering critical services to the mentally disadvantaged. Obviously, the Grievant by her actions and/or lack of attentiveness concerning the drug trafficking taking place in her home, has evidenced certain judgment frailties which might jeopardize future patient care.

This Arbitrator is also deeply concerned about the drug use presently taking place at the facility. Although the examples supplied by Bailey and Schumacher are few in number, drug use

and/or trafficking of drugs seems to be an ever present problem. Reinstatement of a known drug trafficker might send the wrong signals to existing drug users. They may view such an action as condoning these activities.

Although job related adverse impact seems to exist, this Arbitrator cannot disregard the disparate treatment activities which were previously described. As a consequence, this Arbitrator concludes that the Employer did not have just cause to discharge the Grievant. This Arbitrator, however, is highly sensitive to the severity of the Grievant's off-duty misconduct and refuses to condone such activity. The Grievant's untarnished work history, and testimony provided by the Grievant's coworkers and supervisors were also given some weight by this Arbitrator. Their testimony was highly credible in terms of the Grievant's performance and commitment prior to her lay off and her subsequent arrest. An evaluation of these various factors leads to a conclusion that there is a strong probability that this type of misconduct will not reoccur.

AWARD

The grievance is sustained in part and denied in part. The Grievant is to be conditionally reinstated without back pay and with loss of seniority. The Grievant will serve a one (1) year probationary period from the date of the Award. During this

period any similar activities engaged in by the Grievant either on or off the job will result in automatic dismissal.

Date: June 6, 1988



Dr. David M. Pincus
Arbitrator