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In the Matter of Arbitration *

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Between * Case Number:

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Fraternal Order of Police-Ohio * 23-13-(91-06-03)-0407-

Labor Council * 05-02

*

and * Before: Harry Graham

*

The State of Ohio, Department of *

Mental Health *

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Appearances: For Fraternal Order of Police-Ohio Labor Council

Paul Cox
 Fraternal Order of Police-Ohio Labor Council
 222 East Town St.
 Columbus, OH. 43215

For Department of Mental Health:

John Rauch
 Department of Mental Health
 30 East Broad St., Room 1120
 Columbus, OH. 43266

Introduction: Pursuant to the procedures of the parties a hearing as held in this matter on October 9, 1991 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were not filed in this dispute and the record was closed at the conclusion of oral argument.

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

Was the two day suspension of Alan Nance for just cause?
 If not, what shall the remedy be?

Background: Certain of the central elements of the events

leading to this proceeding are in dispute between the parties. There are aspects of the background upon which the parties agree. The Grievant, Alan Nance, is a police officer employed at the Pauline Warfield Lewis Center which is located in the Cincinnati, OH. area. That facility provides treatment for mentally ill people. It houses people with various degrees of mental illness. Residents of the Center are classified by the staff as 1, 2 or 3. People classified as 1 are those of the greatest concern to the Department. They have the potential to injure themselves and others should they leave the premises without authorization. People classified as a 2 are of moderate risk. Those patients classified as a 3 are at the lowest risk.

Among the people resident at the Center in November, 1990 was Melville Bosse. On November 8, 1990 Bosse left the Center without authorization. He was AWOL. In due course the staff of the Center notified the Cincinnati Police Department with whom they have an arrangement for cooperative activities in such situations. In some fashion Mr. Bosse secured use of an automobile and in due course led police on a high speed chase. During that chase he struck two police officers with the car. In response, shots were fired and Mr. Bosse was struck twice. Continuing on for some while, he ultimately struck a utility pole and was pronounced dead at the scene.

As might be expected, this event received widespread

publicity in the Cincinnati area. Concerns were expressed in the media and by public officials as to how a dangerous patient was able to walk away from the Lewis Center unimpeded. Newspaper reporters covered the story at great length. In particular, Al Salvato, a reporter for the Cincinnati Post, wrote several articles about the event. In the course of his efforts he came to contact the Grievant, Mr. Nance. On November 17, 1990 a story appeared in the Post which purported to quote Mr. Nance in several places. In other parts of Mr. Salvato's story Mr. Nance's remarks were paraphrased.

The Department took a dim view of Mr. Nance's statements as quoted in the newspaper. It felt that he was in violation of institutional directives and the Ohio Revised Code which protect the confidentiality of patients. In response, it administered a six day suspension. The Department offered to modify the suspension if Mr. Nance would enter an Employee Assistance Program. He agreed to do so. Upon its completion, the Department reduced the suspension from six to two days.

The two day suspension was protested through the grievance procedure of the parties. No resolution of the dispute was reached and the parties agree that the issue is properly before the Arbitrator for disposition on its merits. Position of the Employer: The State views a breach of patient confidentiality to be a very serious offense. In its view, it

is the worst possible offense that can be committed against a patient and his family. It is as bad as abusing a patient in the State's opinion.

Examining the circumstances of the contact between Mr. Nance and Mr. Salvato, the reporter for the Cincinnati Post, the State asserts they show the Grievant's determination to breach patient confidentiality. In the course of his research for his articles Mr. Salvato telephoned Mr. Nance. He was unable to reach him but left a message and asked that Nance return his call. Nance did so. The State asserts that the Grievant should not have returned Mr. Salvato's call.

Pointing to the newspaper article of November 17, 1990 the State points out that Mr. Nance is quoted directly. Particular emphasis is given to the following:

"At the hospital he's always been peaceful" Nance said. "Lewis Center did everything right - by the book. What happened to him is not the fault of Lewis Center. It's not the fault of the police. It's not his family's fault. It's Steve's (Bosse's) fault."

In the State's opinion, that the Grievant characterized Bosse's behavior at the hospital is a serious breach of patient confidentiality, warranting substantial discipline.

The disciplinary policies of the Lewis Center are distributed to all employees. The grid detailing offenses and penalties regarded as appropriate by the Employer specifies a six day suspension or discharge for the first offense of breach patient confidentiality. The Employer was lenient in

this situation. Its imposition of a six day suspension was stayed pending completion of an Employee Assistance Program. Upon its completion, the State lived up to its end of the bargain by reducing the six day suspension to two days. Given the serious offense committed by the Grievant, the two day suspension represents little discipline. Accordingly, it should not be modified by the Arbitrator in the State's opinion.

The Agreement provides that there will occur a pre-disciplinary conference. Such a conference was conducted. There is no element of improper procedure in this situation that would warrant the setting aside of the State's action it asserts. Consequently, it urges that the Grievance be denied.

Position of the Union: The Union points to the process utilized by the State in administering discipline to Mr. Nance and insists it does not meet the requirements of the Agreement. Section 19.04 of the contract provides that prior to administration of discipline there is to occur a pre-disciplinary meeting. Written notice of the meeting, together with the proposed charges, recommended discipline and a summary of the evidence is to be provided to the Grievant. Following the meeting the Grievant and the representative of the Union are to be provided notice of the resolution of the charges. The decision of the Employer is to be made "within a reasonable period of time...." In this situation neither

the Grievant nor the Union received a copy of the decision from the pre-disciplinary meeting. In fact, the decision to suspend Mr Nance was made in May, 1991. This scarcely meets the reasonable time standard contemplated by the Agreement according to the Union.

When the Personnel Director at the Lewis Center discussed the possibility of entering an EAP with the Grievant it was in the context of a bargain. The proposed deal was that Mr. Nance would enter and complete the EAP and in exchange the State would drop all discipline. It did not do so. It reduced the six day suspension to a two day suspension. That is inappropriate according to the Union. The State pledged its word and then reneged on its bargain. Under such circumstances, the Union urges the grievance be sustained.

The Union views the State's assertion that a breach of patient confidentiality is as serious an offense as patient abuse with incredulity. That is especially true in this situation where the patient is dead. In no way was Mr. Bosse harmed by Mr. Nance. In fact, Nance and Bosse were friends. They were known to each other outside of the institutional setting. Nance was protecting his friend's good name and that of the institution if anything. No harm was intended nor did any come to Mr. Bosse from Mr. Nance's alleged statements as quoted in the Cincinnati Post.

The Union indicates that there is nothing in the Ohio Revised Code that prohibits the sort of comments allegedly made by Mr. Nance. Section 5122.31 of the Code prescribes that "all certificates, applications, records and reports" shall be kept confidential. No certificate, application, record or report was provided to the press by Mr. Nance. No discipline may be given to him for his actions in this case the Union insists.

Turning specifically to the Cincinnati Post article of November 17, 1990 the Union points out that it is not entirely accurate to indicate that Mr. Nance called Al Salvato, the reporter. Initially, Mr. Salvato called Mr. Nance. Nance was not at home and returned the call. The State cannot say that the conversation was in any way the responsibility of the Grievant.

In fact, Nance denies making the comments attributed to him in the article. In addition, he made certain comments attributed to him in a context different than that asserted by the State. For instance, in the fourth paragraph of the first column of the article Nance acknowledged completing the report on Bosse's AWOL status. However, he did so only after Salvato indicated that in some fashion he had secured a copy of the report and knew that Nance was the author. No purpose would have been served in denial. In the second paragraph of the second column Nance denies saying that he responded to

the AWOL incident without the assistance of Lewis' police chief. In the third column of the article it is reported that Nance and his co-worker, Beverly Blaze, had a heated discussion over the risk level assigned to Bosse. Nance denies this occurred. At the arbitration hearing, Ms. Blaze corroborated Mr. Nance's account. In the fourth column of the article, paragraph 2 indicates that Nance did not know of Bosse's prior involvement with the police. Nance denies making this statement. The Grievant admits making the statement attributed to him concerning the peaceful nature of the Mr. Bosse. This is not anything to be concerned over according to the Union. Certainly it does not violate patient confidentiality. In the final column of the article the reporter wrote that "Nance then launched his search but was unable to find Bosse. He said Cincinnati police were alerted Thursday about Bosse." According to the Grievant, he never discussed his activities relating to the search for Bosse with Salvato. The State did not produce the reporter at the arbitration hearing. It chose to rely upon the newspaper article as representing the truth in this matter. In the absence of any corroborating testimony from the reporter, the truth of the article should be discounted according to the Union.

Even if the remarks attributed to Mr. Nance in the Cincinnati Post were indeed made by him the Union points out

that there was substantial commentary in the local press about Bosse by officials of the Department of Mental Health. The Cincinnati Post of November 24, 1990 paraphrases an interview with the director of the Department of Mental Health as saying that Bosse should have been classified as a high risk patient. Why should she not be disciplined and Nance receive a suspension is a mystery to the Union.

There is no proof that Nance made the statements attributed to him by Mr. Salvato. The State might have produced Mr. Salvato but chose not to do so. Given the absence of any corroborating evidence supporting its case, the Union urges that the assertions of the State be disregarded. When coupled with the procedural irregularities attendant upon the State's administration of discipline to Mr. Nance, the Union insists that it must be concluded that the suspension does not meet the just cause test specified by the Agreement. It urges the suspension be stricken from Mr. Nance's record and that he be made whole.

Discussion: The contractual mandate that the Employer must have just cause in order to impose discipline embodies several elements. The State must show that the Grievant did the deed with which he is charged. It must then show that the penalty imposed is appropriate to the offense committed. But it must first show that it complied with the procedure to which it agreed when it was initially moved to contemplate


discipline. Procedural regularity, compliance with the negotiated mechanism for administration of discipline, is as important an element of just cause as the offense and the penalty consideration. In this situation, the State falls short of meeting its contractual requirements, requirements it must be stressed to which it has explicitly and forthrightly assented and to which it is bound.

Section 19.05 of the Agreement provides that at the conclusion of the pre-disciplinary meeting the Employer "shall" notify the employee and the Union of the disposition of the charges against the employee. Nothing is on the record to indicate that the State complied with that explicit requirement in the Agreement. The record shows that on January 2, 1991 Mr. Nance was sent notice of a pre-disciplinary conference to be held on January 7, 1991. On January 11, 1991 he was notified of the six day suspension that preceded the two day suspension at issue in this proceeding. Neither the Union nor the Grievant received the report of the disposition of charges as prescribed by Section 19.05 of the Contract. This is not some sort of minimal violation of the Agreement by the State. Rather, it is a fundamental disregard of the method for administering discipline to which the State has agreed to be bound. The State has negotiated the means to its end. It must comply with the terms of the bargain it has made.

The State's investigation of the circumstances in which it came to view Mr. Nance as having breached Mr Bosse's confidentiality was less than thorough. In the final analysis, it disbelieved the account of Mr. Nance as recounted on Union Exhibit 1, a tape recorded interview. It believed the account as reported in the Cincinnati Post. Why it did so is impossible to understand. Mr. Salvato was not examined. He was not produced for the Grievant or the Union. A representative of the State had a telephone conversation with Mr. Salvato in which the reporter insisted his account represented the truth. In essence, the State administered discipline to the Grievant based upon a newspaper account. At all times Mr. Nance denied making the statements attributed to him in that account or the context in which they were placed. At the hearing, the testimony of Mr. Nance's colleague, Ms. Blaze, corroborated his account of events of which she was knowledgeable. No reason exists for the State to have disbelieved Mr. Nance and credited an unsubstantiated newspaper account. Through the arbitration hearing the State consistently declined to produce its prime source, Mr. Salvato. When offered a continuance to secure Mr. Salvato for examination it declined the offer. Mr. Nance was disciplined on the word of a witness whose account was received in absentia. The defect with this approach to sustaining discipline is obvious.

Award: The grievance is SUSTAINED. The two day suspension administered to the Grievant is to be removed from his record. He is to be paid all monies lost as a result of the suspension. Such payment is to be made at the straight time rate.

Signed and dated this 23rd day of October, 1991 at South Russell, OH.



Harry Graham
Arbitrator