VOLUNTARY LABOR ARBITRATION

In the Matter of Arbitration	Case No.: 23-18-920128-0759-02-11
Between:	
THE STATE OF OHIO Department of Mental Health Western Reserve Psychiatric Center	
-AND-	
OHIO HEALTH CARE EMPLOYEES UNION DISTRICT 1199 NATIONAL UNION OF HEALTH CARE EMPLOYEES, SEIU AFL-CIO	

IN RE: DISCHARGE GRIEVANCE OF: PAUL CLAREN, RN)

OPINION AND AWARD OF ARBITRATION

Dennis E. Minni, Esquire
Arbitrator
Suite 104
14761 Pearl Road
Strongsville, Ohio 44136
(216)238-0365

Date Of Hearing: Oct. 21 & Nov. 6, 1992

Situs Of Hearing: Ohio Office of Collective Bargaining
Columbus, Ohio

Employer Representatives and Witnesses:

1. Robert E. Thornton.....Advocate
2. Linda Thernes.....Labor Relations Specialist, ODMH
3. Renee Gorby,.....Director of Nursing, WRPC
4. Henry Brown,..... Nursing Supervisor, WRPC
5. Wilbur Vicha,.....Director, Acct. Therapy
6. Hon. Leo Bender,.....Mayor, City of Broadview Hts., OH
7. Kevin P. Weiler, Esq.....Law Dir. " " (Observer)

Union Representatives and Witnesses:

1. Rick Kepler,.....District 1199 Organizer
2. Paul Claren, RN.....Grievant, RN Supvr. I
3. Edward Bohnert, Esq.,....Attorney for Grievant (Observer)
4. Betty Williams,.....Pharm. Attendent (AFSCME Local Pres.)
(attended day #2 only)

ISSUES: (Per Stipulation) Was the six (6) day suspension of the Grievant Paul Claren, RN for just cause? If not, what should the remedy be? And,

(Per stipulation) Did the Ohio Department of Mental Health terminate the employment of the Grievant Paul Claren, RN for just cause? If not, what shall be the remedy?

STIPULATIONS: The parties presented five (5) stipulations of fact on the first grievance, the six (6) day suspension and eleven (11) stipulations on the second grievance wherein Mr. Claren was terminated from his employment.

These stipulations are incorporated into and appended to this Award at this point as amended by the parties on the hearing record as Appendices "A" and "B".

BACKGROUND INFORMATION

The Ohio Department of Mental Health operates the Western Reserve Psychiatric Center, a mental health hospital (hereafter referred to as "WRPC", "Management" or the "Employer"). Certain employees are represented by the Ohio Health Care Employees Union, District 1199 (hereafter "Union" or "1199") which, together with the Employer, have entered into a collective bargaining relationship evidenced by Joint Exhibit 1, ("JX-1") a labor containing the following limitation on selected panel arbitrators in Article 7.07-E-1 which states:

"E. ARBITRATOR LIMITATIONS

1. Only disputes involving the interpretation, application or alleged violation of provisions of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this Agreement."

This limitation is further refined by five duly stipulated facts on the first grievance (six day suspension for leaving work early) and eleven pertaining to the second protest covering the removal of the Grievant. These were executed by the advocates and presented at the hearing. They are incorporated into and set forth as part of this Award as previously stated.

The stipulations provide an outline of the personnel record of the Grievant, a man in his thirties with fifteen (15) years service as a registered nurse ("RN") at the Employer's Sagamore Hills facility in northeast Ohio. His specific classification is Psychiatric Nurse/MR Coordinator.

In a cumulative sense, the conduct proscribed by management is alleged to have risen to a point warranting removal of the Grievant from his employment because of the timing of the two infractions and the egregious nature of the second incident, a matter of criminal justice (Aggravated Assault per ORC 2903.12) which took place off the Employer's premises and did not involve WRPC staff, related patients or property. Proof was offered on both grievances and the parties asked that each one be incorporated into one Award by the Arbitrator. Thus after rendering decision on each grievance it shall be necessary to determine the outcome's effect on the Grievant's continued employment at WRPC.

Both parties agreed mutually that these grievances are properly before the Arbitrator in accordance with their cba.

On January 21, 1992 the Grievant was removed from his position as he was serving jail time pursuant to a guilty plea entered in the Cuyahoga County Common Pleas court involving an altercation he

had with a motorist who turned out to be the Mayor of Broadview Hts., the Honorable Leo H. Bender. Mr. Bender is also Broadview Hts.' Safety Director. He testified that he noticed the Grievant drive past his white unmarked Buick in a light blue Chrysler product on June 24, 1991 in Broadview Hts. The speed limit was 25 MPH and at times the Grievant was alleged to have attained 50 MPH as the Mayor followed and radioed Mr. Claren's license plate number in to his police department. When the road came to a "T" intersection the Grievant stopped with the Mayor behind him indicating by a hand gesture that the Grievant should slow down. Mr. Claren exited his car and approached Mayor Bender who did likewise. Mr. Claren allegedly exclaimed "Who the fuck do you think you are?" The response was "I'll show you who I am", with that Mayor Bender reached with his right hand into the left inside breast pocket area of his sport coat. The Mayor's testimony was that he was extracting his wallet in order to show his photo ID as proof of his offices. Mr. Claren reacting with the expectation that the older man was about to produce a weapon, punched or grabbed at the Mayor yanking him to the ground by his left arm and allegedly continued the offensive by means of punches and kicks to the fallen person. Mr. Claren exited the scene in his vehicle. Later he was apprehended by police after Mayor Bender radioed the situation in from his car as he drove himself to a hospital. He was diagnosed as having a fractured left humerus. Criminal proceedings ensued with the Grievant entering a guilty plea pursuant to advice of counsel. The sentence rendered saw the grievant serve jail time from December 17, 1991 until February 10, 1992 at which point his sentence was suspended with three (3) years probation imposed. He also was ordered to undergo a psychiatric counseling program, move out of and stay out of Broadview Hts. and have no further contact with Mayor Bender or the Mayor's family.

This altercation and criminal case was preceeded by a six (6) day suspension imposed by the Employer for allegedly leaving the grounds twenty (20) minutes early on May 28, 1991 and fifteen (15) minutes early on May 30, 1991. This matter was separately grieved and shall be disposed of with the termination grievance in accordance with the request of the parties for joinder at hearing.

Mr. Claren's previous disciplinary record since his hire date in 1977 shows a written reprimand for insubordination in 1989 and a two (2) day suspension for improper handling, inhuman treatment and improper intervention of patients, also in 1989.

The early quitting allegations were lodged by Rene Gorby, Director of Nursing. Mrs. Gorby corroborated her accusations by enlisting other employees to verify the time Claren was seen leaving the grounds and the time(s) Claren signed out at.

The Grievant presented witnesses as to the times he left, his habit or routine in leaving, his performance commendations as well as a petition in support of his reinstatement from over a hundred

colleagues. It was also stated that the Ohio nursing license held by Mr. Claren has remained in effect throughout the pendency of this case and that he has been able to secure employment as a RN while abiding the outcome of these grievances.

The parties entered a comprehensive list of Joint Exhibits covering their labor agreement ("cba"), the disciplinary record of nurse Claren, grievance documentation, policies of the Center, drawings of the grounds and its roadways as well as their own exhibits.

POSITION OF THE UNION

From its perspective District 1199 argues that there was no compelling proof that Mr. Claren left work early and no basis for disciplining him for the matter with Mayor Bender because it took place outside of his employment and did not concern or harm the Employer.

If his record is analyzed from the correct viewpoint he has not been shown to be an employee whose conduct warrants removal. First, there is conflicting testimony on the suspension case from the key witnesses for the Employer. Mrs. Gorby, had reason to believe the Grievant was an antagonist of hers due to his opposition to staring time and sign in/out changes she had effectuated. Her testimony was flawed because it was not consistent; she confused a car with a van and said the Grievant was on a motorcycle unlike other witnesses. Her position was radically different from that of one of her supporting witnesses in terms of distance from the alleged exiting Grievant. Also, Mr. Claren was accused by Mrs. Gorby some twelve or thirteen days after he allegedly left early. This comports with a desire to retaliate for his stance on the the procedure changes that proved unpopular with most of the nurses.

The Grievant was within his contractual rights to have sought leave time to cover his incarceration period. Other employees have been retained after conviction for serious criminal acts. Mr. Claren was not a "favorite" of the WRPC's administration. His problems outside the workplace were seized on by management to sever his employment. There is no proof that the criminal matter brought to bear any lost business or public concern over the operation of the center. Mr. Claren has been a solid, contributing employee for a substantial number of years and should be allowed to return to continue his nursing career.

Both Grievances have merit and should be granted, giving reinstatement and full back pay and benefits lost to the Grievant.

POSITION OF THE EMPLOYER

The Employer backs its decision to remove the Grievant on its progressive disciplinary system; the acts of leaving early meant Mr. Claren falsified his time card. Employer witnesses gave clear, credible testimony that as to his conduct on the two dates in question. This made a six day suspension appropriate in a remedial sense because his last discipline was a two day suspension. Shortly afterwards, Claren committed a criminal act which he plead guilty to. That gave management great pause due to the violent nature of the incident involving Mayor Bender. Removal from his position is called for due to the sensitive nature of the responsibilities a RN faces with patients in a psychiatric institution. Matters take place on a recurring basis which often require physical contact. Having a convicted felon on staff did not appeal to the sensibilities of management regarding possible future exposure to liability should an incident take place with a patient similar to the attack on Mayor Bender.

The suspension and the criminal matter point to the fact that management followed a fair and equitable policy of progressive discipline. In detailing how this occurred WRPC has met its burden of proof and its decision not to continue the Grievant's employment should be upheld.

DISCUSSION AND ANALYSIS

The burden of proof as to the validity of the early quit accusations is to show by a *preponderance* of the evidence that the Grievant left early and therefore falsified his time card. With regard to the discharge decision, management's goal is to show by *clear and convincing* proof that it had just cause to sever Mr. Claren's employment.

This arbitrator has followed the school of thought which calls for the highest legal standard of proof, *beyond a reasonable doubt* in cases where the Grievant is charged with jobsite conduct which would be a serious crime if committed in society at large. As a proponent of utilizing the law's strictest standard in that situation I consider and give weight to the heavy penalty a sustained charge of theft or violent conduct carries with it in the outside community. A discharged grievant, thus stigmatized, can be precluded from obtaining meaningful employment again. Thus, I prefer that the employer present evidence commensurate with the highest degree of proof as a means of helping to insure that industrial justice provides similar safeguards to what exists in the criminal courts. An erroneous or purposeful accusation of wrongdoing in the workplace carrying such a severe and lasting penalty is most equitably reviewed against the strictest standard of proof.

I would extend use of this degree of proof in cases where an employee is disciplined because of a criminal charge the resolution of which is pending. This would help avoid the situation of a discharge upheld in arbitration followed by an acquittal in court. Labor arbitration and court proceedings are not synchronized by law, agreement or institution. The "speedy trial" pledge of the U. S. Constitution has been interpreted to mean a felony goes to trial within 270 days (9 months); a time within which a grievance may be heard, briefed and an award issued.

These considerations are not present in the case at hand. I employ the *clear and convincing* standard because the Grievant's plea of guilty concluded the matter in the criminal court in a manner more precise than a finding of guilt after a *nolo contendere* plea or acquittal after trial. What remains to be addressed is weighing the evidence on whether the cba's promise of just cause for disciplinary action was met. The guilty plea had to be made with some knowledge of the potential for adversely impacting the Grievant's employment status. It also obviates the need to protect against the anomalies just discussed. Proceeding on the merits of the discharge grievance is possible at this juncture as if the criminal conviction had no bearing on the outcome. Of course it may properly be used as a predicate for taking action against the Grievant.

Mr. Claren was charged with Neglect of Duty for not being at work while incarcerated. Also, management claims the assault conviction bears a nexus to his work responsibilities and therefore just cause to remove him exists.

Reviewing disciplinary actions compels the use of a three-fold test. The first or threshold part of this test is to determine if a disciplinable event took place. Next, it must be decided if the Grievant committed the act(s) warranting discipline. Finally, if the first two questions are affirmatively determined it remains to be decided whether there are any mitigating or off-setting factors sufficient to modify or reverse management's action toward a grievant.

Applying this test to the early quit grievance I conclude that there is not a preponderance of evidence in the record to support it. Actually the first and second questions merge into one since Claren was accused of driving off the premises early by himself. So if the party seen driving out of the grounds on the two dates was not leaving early a disciplinable event did not occur. If the party was leaving early the second question comes into play as to whether or not it was Mr. Claren. I could assume for argument's sake that someone left early on those days. It would then devolve into whether or not that someone was Paul Claren, RN. This is why I conclude there is a merger; or choose to proceed on the second question.

Reviewing the testimony and drawings presented I note some major flaws in the Employer's proof. First, although Mrs. Gorby had the presence of mind to seek corroborating witnesses, both her and Mr. Hank Brown's testimony are inconsistent. Her signed memo (UX-1) states that Mr. Claren left "...in a van" on May 30th. However she testified on direct that she saw the Grievant "in an old blue sedan", on that date. The attempted rehabilitation was that she does not know cars from vans that well. I find it interesting that the memo, written some twelve days later, does not identify the vehicle by color (blue) and "in need of repair" as she testified at the hearing a good deal later.

As to the May 28th allegation, her intent to verify that it was Mr. Claren she saw leave (on a motorcycle sans helmet) was by means of having Hank Brown check Claren's sign out sheet entry. However, Mr. Brown could not initially recall why he was on the third floor of McKee Hall on that date. Later, on redirect he changed his testimony, recalling that Mrs. Gorby sent him to specifically check on Claren's sign-out entry.

Wilbur Vicha, although credible did not see Claren and only verified that Mrs. Gorby asked him the time on May 28th.

Another flaw is the alleged distance Gorby and Brown claim they were from Claren when they spotted him. There is quite a difference between ten (10')feet and forty to fifty yards!

The Grievant had several witnesses testify as his habit of leaving with them after 4 PM but nothing conclusive on May 28 or 30 developed from this testimony.

I do not know how long it took Mr. Brown to get to the third floor of McKee, look at the sheet and then observe the Grievant from the window but if Mrs. Gorby instructed him to do so at 3:40 PM right after she testified she saw Claren on the motorcycle either Brown reached his vantage point in a flash or Mr. Claren brazenly drove around and around the campus so that Brown could leave Gorby's location, get to the third floor of a building on foot, check the sign-out sheet and still see the Grievant leaving the premises on his bike.

Mr. Claren admits he owns a motorcycle, denies he had it at work on those dates but has on occasion so it could be common knowledge among colleagues that he has one. However neither Gorby or Brown could state the color of this cycle or describe it with any degree of particularity. (Brown was not certain if the person he saw on the cycle wore a helmet or not; Gorby was emphatic that the rider was helmetless).

On balance, I find the Union's proof to be more credible on this issue and since the Employer has the burden of proof I conclude it has not been met. Accordingly, there being no proof it

was Claren allegedly leaving early on either date there was no just cause to suspend him. I revoke the six day suspension and award him pay for those six (6) days provided he was ready and able to work on those days. Perhaps more importantly, the suspension shall be stricken from his personnel record and no future disciplinary action may be based on it or attributed to it.

Given the eradication of the six (6) day suspension from the Grievant's work record it remains to weigh the evidence presented on the second Grievance. The key determinations are just cause for removal based on Mr. Claren's absence (Neglect Of Duty) and a sufficient nexus between the assault and his duties so as to pose a risk to the patient community he was required to serve.

The denial of vacation/sick leave request actually could be a grievance in and of itself. The most compelling points advanced by the Union are that the Grievant's wife, in seeking to utilize a time off benefit in his behalf, disclosed Mr. Claren's incarceration to management. This means there was no attempt to hide the truth or seek time off for an impermissible reason. The fact of the matter is that the cba makes granting such a vacation discretionary with the Employer. Limitations are found in Art. 10.03 Scheduling, where a thirty (30) day lead time in making the request is needed if the grant of vacation is to be done by state seniority. If not made with thirty days' notice they may be granted at the Employer's discretion. Further, such requests are expressly stated not to be "unreasonably denied". Another condition management may base its decision upon is the number of employees to be off at a given time.

This Employer discretion was exercised although the number off did not exceed the limit of three (3) employees at the time. The WRPC explanation for this given by Ms. Thernes was that the Employer's "philosophy was not to grant the use of sick leave" and that she did not recall seeing a leave of absence application from the Grievant. The policy, UX-5 mentions at the very end unpaid leaves; so that concept must have been in the contemplation of the parties as a possible method of covering an absence.

The denouement of all this is that I am convinced that Management acted unreasonably in denying the leave; whether paid accrued vacation time or leave without pay. At least to the extent that they exercised their discretion without a cogent work related reason for the denial and then termed the situation one of Neglect Of Duty, as that term is commonly used in Ohio Civil Service law, making it a predicate for removing the Grievant. WRPC was not inconvenienced by Claren's absence, his seniority was among the highest and he did not act in a surreptitious manner or otherwise try to conceal the reason he was absent. Claiming that his absence hurt the operation or its scheduling is a weak argument since the ability to avoid the impact of Claren's absence was given by Claren or his spouse at the very onset of his problem. He had the

vacation time "in the bank" in order to protect his seniority at least against being absent without authorization. So the decision by Management appears to have been an effort to insure Claren would become subjected to removal.

The best argument WRPC has for termination of Claren is what they term the "nexus" theory. Ms. Ternes testified that "if he did it outside he could do it inside". Patient abuse is a problem at the WRPC; Management's concern saw this as exposure to future liability should Mr. Claren be returned to work.

I must note that the record is devoid of any evidence that Paul Claren caused the public, patients or others to come to hold WRPC in a lesser light or cease to do business with or socially or professionally interact with the Center. In fact, the second day of hearing was arranged so that subpoenae for witnesses to the incident with Mayor Bender could be enforced and that testimony obtained. This did not transpire. This left a record with the key evidence in equipoise. As Mayor Bender demonstrated his conduct before me, I could see how Mr. Claren felt a weapon was about to produced by a non-uniformed person in an civilian (unmarked) vehicle after following and stopping behind him then waving his hand for him to stop or slow down. I believe Claren said and did what Mayor Bender testified he did. I also credit Claren's view that he felt Bender was drawing a gun on him. Claren's hasty retreat after fighting the Mayor fits in with his fear of a weapon. I realize hindsight is 20-20; but the Mayor should have realized that he was not exhibiting any offical police status in either his dress, vehicle or his statement, "I'll show you who I am" as he reached into his breast pocket with his right hand. He had radioed the speeding incident in; he could have called for more police support and remained in his car. At the very least he could have said he was the Mayor/Safety Director and ask what was the need to speed past his car.

This altercation was indeed unfortunate. If he overreacted, Paul Claren paid a price to society for it. If he merely resorted to self-defense that too, brought a result which punished him for his decision. That outcome came about due to things he had some choice about. The theory that he poses a greater threat to patients after the fight and thus should be removed does not find support in this record. The Union noted several cases of continued employment for employees having problems with the law on the outside. In fact, several days after the second hearing in this case a patient at WRPC murdered another patient. (His fourth murder!) A petition in support of the Grievant was presented with over one hundred signatures.

If the job 's requisites are at times physically demanding, contact with patients is unavoidable. Indeed it may be necessary to save a life. Based on Mr. Claren's disciplinary record as it now stands he is not subject to discharge either in a progressive

sense or based on the facts of the incident with Mayor Bender.

I conclude that Management's burden of proof has not been met with regard to the removal Grievance. In denying Management's removal of the Grievant I considered the first of the three questions referred to earlier as to whether a disciplinable event took place and find such not to be the case. That management failed to establish the substantive validity of its rationale of "nexus" is very evident to me. When that result is viewed with the dearth of proof that the Employer suffered some harm from the Grievant's conduct in society, the removal cannot be sustained.

AWARD

The Grievances are granted as stated above. Mr. Claren shall be reinstated with back pay less any interim earnings or unemployment benefits received. He shall have this matter stricken from his personnel file for further disciplinary or other action, his seniority restored and actual placement back in the workforce of WRPC in his former classification in a reasonable amount of time given the Employer's need to schedule him on whichever shift he selects.

I shall retain jurisdiction for remedial purposes for sixty days from the date of this Award, if necessary.

Dated this 24th day of December, 1992 at Strongsville, Ohio.

Respectively submitted,

Dennis E. Minni
Panel Arbitrator

APPENDIX "A"

In The Matter of Arbitration Between OHC&SSU District 1199 and The State of Ohio, Department of Mental Health	Gri 23-18-910708-0686-02-11 6DAY SUSPENSION Mr. Paul Claren FOR THE EMPLOYER: ROBERT THORNTON FOR THE UNION: RICK KEPLER

ISSUE

Was the six day suspension of the grievant Paul Claren for just cause? If not, what shall be the remedy?

STIPULATED FACTS

1) The grievance is properly before the arbitrator.

2) The grievant was employed as a Registered Nurse, at the Western Reserve Hospital from October 24, 1977. At the time of this suspension he was employed in the classification of Psychiatric/MR Nurse Coordinator

3) The grievant's previous discipline, includes:

   1)a written reprimand issued 3-01-89 for insubordination;Patient Mishandling;

   2)a two day suspension issued 7-11-89 for Failure of Good Behavior; Improper Handling, Inhumane Treatment & Improper Intervention of Patients

4) The grievant had satisfactory performance evaluations during the tenure of his employment.

5) The grievant had several commendations in his personnel file which are included in the record.

APPENDIX "B"

In The Matter of Arbitration Between OHC&SSU District 1199 and The State of Ohio, Department of Mental Health	23-18-920128-0759-02-11 Mr. Paul Claren FOR THE EMPLOYER: ROBERT THORNTON FOR THE UNION: RICK KEPLER

ISSUE

Did the Ohio Department of Mental Health terminate the employment of the grievant Paul Claren for just cause? If not, what shall be the remedy?

STIPULATED FACTS

1) The grievance is properly before the arbitrator.

2) The grievant was employed as a Registered Nurse, at the Western Reserve Hospital from October 24, 1977 to the date of his removal January 21, 1992. At the time of his removal he was employed in the classification of Psychiatric/MR Nurse Coordinator

3) The grievant did plead guilty to the crime of aggravated assault as defined in Ohio Revised Code section 2903.12 and was sentenced to six months in the Lorain Correctional Institution.

4) The grievant was off duty and off the premises of the WRPH at the time of the altercation which gave rise to his conviction for aggravated assault.

5) The grievant was incarcerated from December 17, 1991 through February, 10 1992, as a result of his conviction.

6) The grievant was denied approval of the use of sick leave and vacation leave for the time incarcerated.

7) The grievant's sentence was suspended and he was placed on three year probation, 30 day home detention with permission to work, ordered to complete a psychiatric counseling program, was ordered to have no contact with the victim or the victim's family; was ordered not to reside in or enter the City of Broadview Heights, and was ordered to move from that city.

8) The grievant's previous discipline, should the six day suspension for falsification of his time sheet be upheld, includes:

1)a written reprimand issued 3-01-89 for insubordination;Patient Mishandling;

2)a two day suspension issued 7-11-89 for Failure of Good Behavior; Improper Handling, Inhumane Treatment & Improper Intervention of Patients

3)a six day suspension issued 6-27-91 for Dishonesty: Falsification of Timesheet

9) The grievant had satisfactory performance evaluations during the tenure of his employment.

10) The grievant had several commendations in his personnel file which are included in the record.

11) The grievant presented several statements of support for his reemployment from current employees of WRPH.

~~10) The grievant's license as a registered nurse was suspended by the order of the Ohio Nursing~~ Board. The suspension ~~was held in abeyance pending quarterly reports from~~ Mr. Claren and his ~~Employer concerning is status with the Employer.~~