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In the Matter of Arbitration

Between

District 1199, SEIU

and

The State of Ohio, Department  
of Mental Health

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Case Number:

23-17-930108-0915-02-11

Before: Harry Graham

Appearances: For District 1199:

Harry Proctor  
Staff Representative  
District 1199, SEIU  
475 East Mound St.  
Columbus, OH. 43215

For The State of Ohio:

Shelly Ward  
Office of Collective Bargaining  
106 North High St., 6th & 7th Floors  
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument on November 17, 1993.

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

Was the Grievant removed for just cause from her position as Psychiatric/MR Nurse Coordinator? If not, what shall the remedy be?

Background: The parties agree upon very little in this situation. What little they agree upon may be succinctly presented. The Grievant, Marianne Williams, was employed at the Toledo Mental Health Center as a Psychiatric/MR Nurse Coordinator. She was initially employed at the Center on December 21, 1987 after spending approximately 25 years as a Nurse. At the time of the events that prompt this proceeding she was working on the third shift at a location known as G2-D.

During the summer and fall of 1992 problems had developed among the staff in the area. Concerns surfaced about issues related to work and the number and type of patients to be handled by various staff members. These concerns were of such serious nature that a grievance had been filed over them. In order to deal with the issues raised by staff a meeting was held at the direction of supervision. This meeting took place on December 2, 1992. Among those in attendance was the Grievant, Ms. Williams and a co-worker, Amy Linser. It was Ms. Linser and another employee who had filed the grievance referenced above. At the conclusion of the meeting Ms. Linser regarded the outcome to be unsatisfactory. In her view the issues of work load had not been resolved. Ms. Williams had a more positive view of the meeting. She felt that management had been made aware of the workload difficulties being experienced by staff.

The next day, December 3, 1992, Ms. Linser reported for work as scheduled. She was on the shift scheduled to commence at 7:00 a.m. Ms. Williams as the duty nurse on the night shift was to make her report to Ms. Linser and then depart the facility. At this point the accounts of events given by Ms. Linser and Ms. Williams differ. According to Ms. Linser she was attacked by Ms. Williams. This version of events is disputed by the Grievant. She claims that Ms. Linser attacked her. Both Ms. Williams and Ms. Linser agree that they had a fight. Ms. Linser summoned assistance and in due course the combatants were separated. Both received medical attention.

Subsequently the State discharged both Ms. Williams and Ms. Linser. Both grieved. Both had their grievances processed to arbitration. That of Ms. Linser made its way through the system before that of Ms. Williams. On October 4, 1993 Arbitrator David Pincus issued an award upholding the grievance of Amy Linser. He directed that she be restored to employment with a make whole remedy. The parties agree that the Grievance of Marianne Williams is now properly before the Arbitrator for determination on its merits.

Position of the Employer: According to the State Amy Linser acted in self-defense. On the morning of December 3, 1992 the Grievant passed in front of Ms. Linser who was seated at her desk. Ms. Williams passed between Ms. Linser and the desk. As

she did so she deliberately jostled Ms. Linser. She then turned around and jostled her again. They stood face-to-face and Ms. Williams invited Ms. Linser to hit her. That invitation was declined. Thereupon, according to Ms. Linser the Grievant grabbed her hair and pulled her around. Ms. Linser lost tufts of hair. In the course of the fight Ms. Williams hit Ms. Linser with a telephone. Ms. Linser broke free and ran down the hall. Ms. Williams followed in hot pursuit. She then attacked Ms. Linser again. Only when people separated the two was Ms. Linser free of her tormentor.

Both combatants were seen by a physician, Dr. Sanford Kimmel. The injuries sustained by Ms. Linser were more severe than those incurred by Ms. Williams. This is indicative of the fact that Ms. Williams was the aggressor in this instance according to the State. When he came to consider the grievance of Amy Linser Arbitrator Pincus concluded that "She (Linser) was attacked by Williams...." (Pincus opinion, p. 11). When he sustained the grievance filed by Ms. Linser Arbitrator Pincus had before him the same evidence as is before this Arbitrator. He concluded that Ms. Linser should be restored to employment because she was attacked by Ms. Williams. This Arbitrator should reach the same conclusion as well according to the State. In its view the testimony of Ms. Linser and Dr. Kimmel support the notion that Ms. Williams was the attacker. As that was indeed the case on the morning

of December 3, 1992 the State urges that the grievance be denied.

Position of the Union: The Union readily acknowledges that the Grievant and Ms. Linser were involved in a fight on December 3, 1992. Its account of the events differs from that proffered by the State in several important aspects.

According to the Union when Ms. Linser arrived at work on December 3, 1992 she was angry about the outcome of the meeting held the previous day. She vented her feelings to Ms. Williams. Ms. Williams, who had felt the meeting to be productive, became angry in response to Ms. Linser's anger. According to the Grievant, Ms. Linser was the aggressor. She pushed the Grievant who pushed back. Ms. Linser then poked Ms. Williams in the eye. In response Ms. Williams pulled Ms. Linser's hair. The fight continued until they were separated by Toledo Mental Health Center personnel. The Union and the Grievant deny that Ms. Williams was the aggressor.

This account should be given credence as it is supported by testimony Camille Drolshagen, an employee at Toledo Mental Health Center. At the arbitration hearing Ms. Drolshagen testified that Ms. Linser had discussed with her problems that she was having in her relationship with Ms. Williams. According to Ms. Drolshagen's testimony Ms. Linser had indicated that she would confront Ms. Williams over the staffing dispute that existed between them. Consequently, Ms.

Drolshagen was not surprised at the altercation that occurred.

In essence, the Union claims that the State has not proved that the Grievant in this situation was the provacateur. Nor has it proved that she was the aggressor. As that is the case, the grievance must be sustained according to the Union. It seeks an award restoring the Grievant to employment with full back pay and benefits.

Discussion: This situation is fraught with evidentiary difficulties for the State. In order to sustain discipline there must be some proof that the Grievant acted as alleged by the Employer. In this situation the State urges that Ms. Williams was the aggressor in the dispute between her and Ms. Linser. Nothing is on the record to indicate that to be the case other than the testimony of Ms. Linser. Ms. Williams, the Grievant in this proceeding, disputes that she attacked Ms. Linser. The reverse is true according to her. Why she should be disbelieved and Ms. Linser credited is not obvious. There are no grounds to prefer the account of one person over that of the other in this situation.

At the arbitration hearing Ms. Williams acknowledged her role in the fight on December 3, 1992. In her view, she merely responded to provocation initiated by Ms. Linser. The exact sequence of events in this situation will never be known by anyone but the two people involved. It may not even

be known precisely by them. The reality of their actions has been colored by their perceptions that each of them acted reasonably in response to provocation. The only conclusion that can be reached in this situation is that the State has failed to prove its case. There exist absolutely no grounds upon which the Arbitrator can conclude that Ms. Williams was any more culpable than Ms. Linser in this incident. As that is the case, the Grievance must be sustained.

It is obvious from the previous discussion that this Arbitrator does not reach the conclusion reached by Arbitrator Pincus in his decision involving the termination of Amy Linser. In my view there is insufficient evidence to conclude that Ms. Williams attacked Ms. Linser as claimed by Ms. Linser. Both women experienced injuries in the fight. That those of Ms. Linser were more severe than those of Ms. Williams does not prove that Ms. Williams was the aggressor. All that they indicate is that she got the worst of the brawl. In the dispute before him, Arbitrator Pincus restored Ms. Linser to employment. There exists no reason to do otherwise for Ms. Williams.

This situation results in an anomalous outcome from the point of view of the Employer. Two employees were involved in a fight. No discipline will result to either. This result should not be taken to mean that the arbitration community favors on-the-job fights between employees. Rather, it should

be taken to mean that if an employer is going to discipline or discharge employees, it must have sufficient proof to sustain its claim that one or the other was the aggressor or provocateur. In this case that proof is lacking.

Award: The grievance is SUSTAINED. The Grievant is to be returned to employment upon receipt of this award. She is to be paid all straight time monies she would have earned but for her improper discharge. The Grievant is to provide to the State such evidence of interim earnings as it may reasonably require. That evidence may be used by the State to offset its liability to the Grievant. The Grievant is to be credited with all seniority and other benefits she would have earned but for this incident.

Signed and dated this 1<sup>st</sup> day of December, 1993 at South Russell, OH.

Harry Graham  
Harry Graham  
Arbitrator