#1242

In The Matter of the Arbitration Between

OHIO DEPARTMENT OF MENTAL HEALTH NORTHCOAST BEHAVIORAL HEALTHCARE SYSTEM,	:	**OPINION AND AWARD OF ARBITRATOR GIBSON**
Employer,	:	
and	:	Case No. 23-07-960930-0210-02-12
DISTRICT 1199 HEALTH CARE AND SOCIAL SERVICE UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO	:	
Union.	:	

Appearances:

For the Employer:

Linda J. Thernes, Attorney/Labor Relations Officer, Office of Labor/Human Resources
Michael Duco, Office of Collective Bargaining
Roger Beyer, Labor Relations Officer

For the Union:

Janice D. Stephens, Administrative Organizer, Northeast Ohio, District 1199/SEIU, AFL-CIO
Dr. Lee Wolin, Delegate, Northcoast Behavioral Healthcare System
Dr. R.R.S., Grievant

OPINION

A. Introduction

Pursuant to Article 7 of the 1994-1997 labor contract, Rankin M. Gibson was selected from a panel of arbitrators to hear and determine Grievance No. 23-07-960930-0210-02-12. Having exhausted the internal grievance procedure the grievance was referred to arbitration for a final and binding decision.

A hearing was held at the South Campus, Northfield, Ohio on October 24, 1997, before the undersigned arbitrator, between the hours of 9:00 a.m. and 4:20 p.m. Ample

D. Analysis - Management Rights

At common law, the owners of a private business enterprise and their managers have rights that were and are based substantially upon their ownership of business, property. However, the rights and powers of public employers are based upon the consent of the governed as delegated by their elected representatives to Congress, to the General Assembly, to the City Council, to the Board of Education, etc. In each case, there are numerous limitations by law, and sometimes by contract, upon the exercise of so-called "management rights."

The General Assembly of Ohio in enacting the Public Employees Collective Bargaining Law in 1983 set forth extensive "management rights" of a public employer in R.C. §4117.08. That such rights are not unlimited, see Lorain City School District Board of Education v. State Employment Relations Board, et al., 40 Ohio St.3d 257, 533 N.E.2d 264 (1988).

Acting pursuant to the foregoing authority the State of Ohio on behalf of the Department of Mental Health negotiated an agreement with the Union containing Article 5, entitled "Management Rights", which states:

> "Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08(C)(I)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision. (Emphasis added.)

Specifically with respect to discipline the parties in Article 8 entitled "Discipline" provide:

> **"8.01 Standard**
> Disciplinary action may be imposed upon an employee only for just cause.
>
> **8.02 Progressive Discipline**

In May of 1995 the Employer revised its policy on Corrective Action, as revised, provides in pertinent part:

"POLICY

All hospital employees are subject to corrective action for any violation of internal policy or work rule and for behavior or conduct which falls within the areas listed in Section 124.34 of the Ohio Revised Code (incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty or any other failure of good behavior).

* * *

APPROPRIATE DISCIPLINE

For the purpose of achieving reasonable uniformity in imposing the like corrective action for like offenses, a Standard Guide for Disciplinary Action is appended. The offenses and corrective actions set forth in this guide, may not successfully meet the demands of all situations, but is sufficiently broad to meet most occasions in which some form of corrective action is required. It is stressed that this listing is only a guide. The recommended corrective action for each offense must take into account the circumstances surrounding the incident and be adjusted accordingly".

E. Applicable Quantum of Proof

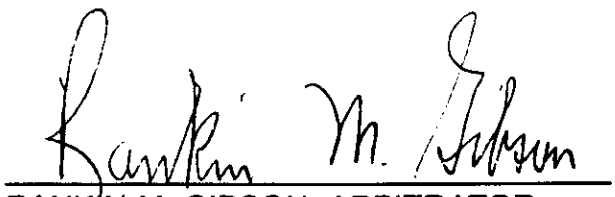
The Union argues that the charges of professional incompetency and patient neglect against the grievant are most serious. It points out that if the removal of the grievant who has been employed by the State for more than 27 years and whose work performance was commendable until the last two years, is upheld it is conceivable that she will never be able to find a comparable position in the health care field. In the Union's view, since proof of the charges is "not clear and convincing" the grievance must be sustained.

Generally, the quantum of proof required in a discharge case is proof by a preponderance of the evidence. See Arbitrator Smith in Kroger Co., 25 LA 906; Arbitrator Erbs in Midland-Ross Corp., 52 LA 959; Arbitrator McIntosh in Duriron Company, Inc., 49 LA 39; Arbitrator Platt in Campbell Wyant & Cannon Foundry Co., 1 LA 254. Evidence is said to preponderate when it outweighs or is more satisfactory than that offered to the contrary. The requirement of a preponderance of evidence is not satisfied if the evidence is in equipoise. In such case the party having the burden of persuasion or proof must fail. 44 O.Jur.3d., Evidence and Witnesses, §1027, et seq. and cases cited.

(1) That Grievance No. 23-07-960930-0210-02-12 of Dr. R.R.S. dated September 30, 1996 be denied; and

(2) That Dr. R.R.S. again be permitted to retire under the provisions of the Ohio Public Employee's Retirement System; and

(3) That the arbitrator's fees and expenses be shared equally by the Employer and the Union.



RANKIN M. GIBSON, ARBITRATOR

DECIDED AND ISSUED AT Columbus, Franklin County, Ohio this 23rd day of December, 1997.

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