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In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department of  
Mental Health

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Case Number:

23-18-961127-1358-01-04

Before: Harry Graham

APPEARANCES: For OCSEA/AFSCME Local 11:

Robert Robinson  
Staff Representative  
OCSEA/AFSCME Local 11  
1680 Watermark Dr.  
Columbus, OH. 43215

For Department of Mental Health:

Linda Thernes  
Labor Relations Officer  
Ohio Department of Mental Health  
30 East Broad St., Room 1180  
Columbus, OH. 43266-0414

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 case 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 Grievant disciplined for just cause? If not, what shall the remedy be?

**BACKGROUND:** There is no agreement on the parties upon the events which prompt this proceeding. The little they do agree upon may be presented succinctly. The Grievant, John Kestner, has been employed by the State of Ohio Department of Mental Health for the past 16 years as Therapeutic Program Worker. He works at the South Campus of the Northcoast Healthcare Behavioral Systems Facility. On June 28, 1996 he was allegedly involved in an incident with his supervisor, Debbie Mathys. As is set forth more fully below, he allegedly became abusive towards her. Following the appropriate pre-disciplinary meeting the Grievant received a six-day suspension on September 18, 1996. That suspension was protested in the grievance procedure of the parties without resolution. They agree it is properly before the Arbitrator for determination on its merits.

**POSITION OF THE EMPLOYER:** The Grievant, who is a veteran of many years of service with the State, compiled a record of discipline prior to this incident. Thus, he had received the following:

A written reprimand, Insubordination, Failure to accept supervision, 9/4/94:

A two day suspension, Neglect of Duty, Insubordination, 11/22/94:

A six day suspension, Failure of Good Behavior, Insubordination, 8/8/95.

It is against this background that the incident of June

28, 1996 should be viewed according to the State. On that date the Grievant was on duty at the Nursing Station of Unit 22-F. He became verbally abusive towards his supervisor, Debbie Mathys. He allegedly yelled at her and pointed his finger at her. He allegedly accused her of "playing favorites" He was highly agitated at this time, trembling with rage. According to the State when a co-worker, Nurse Cheema arrived on the scene, he told her to leave. When she did not do so, he yelled at her. Nurse Cheema subsequently asked the supervisor, Ms. Mathys, to write-up the Grievant for his abusive behavior.

As the State urges this incident be viewed, there is no doubt that the Grievant acted as claimed. He has a prior history of discipline for similar outbursts. Given that background the State contends the discipline under review in this proceeding was appropriate. As that is the case, it urges the grievance be denied in full.

**POSITION OF THE UNION:** The Union disputes the account of the incident set forth above. It points out that Ms. Mathys did not write-up the Grievant. That was done by John Gerbetz, Psychiatric Nurse Supervisor. At the time of the incident Mr. Gerbetz was romantically involved with Ms. Mathys. They have subsequently married. He initiated discipline at her request. Given the nature of their relationship that is at best

questionable in the Union's view.

The events of June 28, 1996 did not transpire as related by the State in any manner according to the Union. On that date the Grievant spoke to Ms. Mathys about a co-worker, LPN Estelle Denson. He was concerned that she had a double assignment. At this point, Ms. Mathys responded that his concern over Ms. Denson was misplaced as Ms. Denson was an "old black lady" and "a spook." Mr. Kestner was affronted by her remarks. She subsequently apologized to him.

The Grievant did not ask Nurse Cheema to leave the Unit on June 28, 1996. Included among the various documents in Joint Exhibit 2 in this proceeding is a statement of Nurse Cheema. Dated July 10, 1996 it indicates she was ordered to provide it. She wrote in reference to the alleged incident of June 28, 1996 "I did not hear or saw (sic) anything." Another person on the scene, Joyce Cipriani, wrote on July 10, 1996 that June 28, 1996 was "uneventful." She supplemented her statement on July 18, 1996 with the notation "I did not see or hear anything." At the arbitration hearing Ms. Cipriani testified that nothing unusual occurred on June 28, 1996. The Grievant did not engage in loud conversation with Ms. Mathys. He did not point at her. She never felt threatened nor did she leave the scene at any time. Given the consistent denial of the events as recounted by the Employer by the Grievant

and others on the scene, the Union insists the discipline administered by the State cannot stand. It seeks an award striking it from Mr. Kestner's record and restoration of pay.

**DISCUSSION:** Truth is an elusive concept. In this situation the account of events is so divergent it is difficult to believe the parties are speaking of the same incident. In essence, the only witness against the Grievant is Ms. Mathys. No particular reason exists to disbelieve her account of events. It was not shown by the Union that she and the Grievant disliked each other or had a history of acrimonious relations. On the other hand, her account is directly contradicted by not only the Grievant, but his co-workers who were present on the day in question. Ms. Cheema did not testify at the hearing. Her contemporaneous statement is on the record. (Joint Ex. 2). In it, she flatly contradicts the account of events given by Ms. Mathys. So too does Ms. Cipriani. She testified at the hearing forthrightly that the Grievant was not abusive or out of control on June 28, 1996. She was present at all time relevant to this controversy. Had anything out of the ordinary occurred she would have seen and heard it. Nothing of the nature as alleged by the State transpired according to Ms. Cipriani. The same testimony was provided by the Grievant. It might be argued by the Employer that his testimony should be discounted as self-serving. Of


course, it is. That does not necessarily mean it is untruthful. In this situation, it is supported by testimony from co-workers who were on the scene.

Over the years and in countless arbitration decisions there has been a torrent of discussion about the "burden of proof" in discipline cases. Arcane and erudite prose has been written to throw light upon the concept and to place in proper context the responsibility of the Employer to prove its case to the arbitrator. Those discussions are, in the final analysis, sterile. The Employer must convince the arbitrator that the event that prompted it to act occurred as claimed and that the discipline is proportionate to the offense. In this situation the Employer cannot do that. The record, including the statement of Ms. Cheema and the testimony of Ms. Cipriani, does not prompt the conclusion that the Grievant acted as claimed. He may have, but convincing evidence to that fact was not presented by the State. The most that can be concluded is that the Employer has not proved its case.

**AWARD:** The grievance is sustained. All record of this discipline is to be expunged from the personnel file of the Grievant. He is to paid straight time pay for all hours lost as a result of this incident.

Signed and dated this 8<sup>th</sup> day of September, 1998 at

Solon, OH.

  
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Harry Graham  
Arbitrator