ROBERT BROOKINS
LABOR ARBITRATOR ◆ PROFESSOR OF LAW ◆ J.D. ◆ PH. D.

December 7, 1998

Ms. Leslie Jenkins
Arbitrator Scheduler
Division of Human Resources
Office of Collective Bargaining
106 N. High Street, 7th Floor
Columbus, OH 43215-3009

Grievance	23-18-971014-1497-04
Grievant	Charlene Franklin
Employer	Northcoast Behavioral Healthcare Systems

Dear M. Jenkins:

Please find the enclosed the arbitrator's opinion in the above referenced matter. Thanks for the opportunity to serve you.

Sincerely,

Robert Brookins

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#1333

OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN
Northcoast Behavioral Healthcare Systems

-AND-
OCSEA/AFSCME, Local 11

APPEARANCES

For the State
Linda Thernes, Labor Relations Officer
George Gintoli, Chief Executive Officer
Marlo C. Chin, Administrative Assistant 2
Roger Beyer, Human Resource Specialist
Rhonda Bell, Labor Relations Specialists
Quintin Geary, Police Lieutenant
Steven R. Penwell, Police Officer II
Rick Wells, Trooper/Investigator/Ohio State Highway Patrol
Will Ruggs
Sandra Whatlen Wilson, Training Officer

For the Union
Robert Robinson, Staff Representative
Charlene Franklin, Grievant
Debra K. Grier, Therapeutic Program Worker
Betty Williams, Therapeutic Program Worker
Maty A. Wilson, Activity Therapist
Edmonia, Antoine, Therapeutic Program Worker

Case-Specific Data
Hearing Held
September 9, 1998

Grievance #
23-18-971014-1497-04

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Termination

TABLE OF CONTENTS

I. The Facts

The Northcoast Behavioral Healthcare System (NBHS or the Employer) is a branch of the Ohio Department of Mental Health and includes a North campus in Cleveland, Ohio and a South Campus in Northfield, Ohio. NBHS treats mentally challenged as well as forensic (criminally insane) patients and, therefore, has legitimate concerns about drug-related problems and risks. Approximately 60 percent of its non-forensic patients and 80 percent of its forensic patients have embraced some form of substance abuse. Moreover, from 2-16 percent of NBHS' patients are readmitted because of either failure to take proper medication or having access to drugs. A major mission of NBHS is to return its patients to the community as productive citizens. In addition to controlling drug problems and attempting to meet its goals, NBHS must also meet the standards of two agencies of accreditation: the Joint Commission on the Accreditation of Health Care Organizations and the Health Care Finance Administration. These circumstances, among others, oblige NBHS to vigorously enforce its Drug-Free Workplace Policy.

Ms. Charlene Franklin (the Grievant) was employed by the NBHS for approximately eighteen years when she was officially terminated, on October 6, 1997, for "Failure of good behavior, Possession of illegal drugs; Criminal conduct."[1] The Grievant was a Therapeutic Program Worker when she was terminated.

During her eighteen-year tenure with NBHS, the Grievant had at least constructive knowledge of NBHS' position with respect to controlled substances in the work place. For example, NBHS has long posted a sign at the entrance to the hospital stating: "Notice it Is Illegal to Convey Drugs of Abuse, Weapons, or Intoxicants onto These Grounds." In addition, NBHS reviewed its Drug-Free Workplace Policy with the Grievant and other employees during in-house training sessions.

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[1] Ohio Revised Code, Section 2921.36——knowingly conveying prohibited items onto the premises of a Mental Health Institution.

The basic facts giving rise to the Grievant's removal are not disputed. On September 18, 1997, at approximately 10:00 a.m., the Chief Executive Officer of NBHS, Mr. George Gintoli, met with other employees in an all-staff meeting. During this meeting, and apparently unbeknownst to anyone there, a canine unit from the Ohio State Troopers entered upon the premises to conduct a random search of employees' automobiles for controlled substances. At approximately 11:15 a.m., while Mr. Gintoli was still in the meeting, Lieutenant Quinten Geary notified him that the search was imminent.[2] Sergeant Geary then joined Police Officer, Steve Penwell to assist with the search. Upon learning of the search, Mr. Gintoli immediately announced in the meeting that the search was imminent and that employees who wished to move their cars should do so immediately. Shortly thereafter, some employees left the meeting, but the Grievant remained.

The search began in the parking lot behind cottage 22D, which is one of the smallest parking lots on the campus and, on September 18, 1997, accommodated approximately 20-23 cars. As the canine unit moved around the parking lot, the dog twice alerted on the Grievant's automobile. Lieutenant Geary then asked Officer Penwell to fetch the Grievant from the administration building. Officer Penwell found the Grievant still in the administration building and escorted her to the parking lot where Trooper Jedel told her that the canine alert constituted probable cause to conduct a more extensive search of the automobile. When Trooper Jedel asked the Grievant to unlock the car, she discovered that she had forgotten her keys and, consequently, was escorted back to her unit to get them. After she returned, Trooper Jedel asked the Grievant if he would find anything in the car and she stated that a "roach" was in her front ashtray. In fact, Trooper Jedel and Trooper Wells discovered twelve "roaches" throughout the Grievant's automobile. The search covered approximately seventeen automobiles but was discontinued after the canine unit discovered marijuana in the Grievant's car;

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[2] For approximately 4 years, NBHS policy has required the CEO to be notified when a canine unit is about to conduct random searches on the premises.

therefore, the dogs did not sniff some of the cars in the parking lot. When subjected to a Narcotics Identification System Test, the "roaches" tested positive for marijuana. A subsequent test verified these results.

The Grievant was arrested, charged with, and pled guilty to illegal conveyance of a drug of abuse[3] and admitted to having smoked marijuana from two-three times weekly during the last five-six years. Still, the court permitted her to undergo treatment in lieu of conviction. Specifically, must participate in a drug rehabilitation program for one year during which time she also must remain drug-free. If she successfully completes the rehabilitation training, the court will likely either seal or expunge her record in this matter. However, if she fails to complete the training or to remain drug-free for one year, she could be either imprisoned or placed on probation.[4]

Upon learning that the Grievant's automobile contained "roaches," NBHS immediately placed her on administrative leave and advised her that an administrative investigation would be forthcoming. The Grievant had union representation during the investigation. At some point in the investigation, Officer Penwell's requested that the Grievant submit a statement about the marijuana incident. The Grievant declined the request, and Officer Penwell notified her refusal to participate in an administrative investigation could trigger heightened discipline.

NBHS moved terminated the Grievant with considerable dispatch. On September 19, 1997, the Employer notified her of a pre-disciplinary scheduled for September 23, 1997. The hearing was held as scheduled, NBHS decided to fire her on September 30, 1997, and notified her of its decision on October 6,

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[3] Employer Exhibit 5.

[4] *See* Employer Exhibit 3, p. 2, (3), "If the offender were convicted she would be eligible for probation. . . ."

1997.

II. The Issue

Was the Grievant disciplined for just cause, and, if not, what should the remedy be?

III. Relevant Contractual and statutory Provisions

Policy #3-4- Drug-Free Workplace

Pursuant to Federal requirements the State has adopted the following Drug-Free Workplace Policy. Any employee violating this policy will be subject to discipline, up to and including termination.

7. Any employee who, in any way, *uses, gives, or transfers* to another person a controlled substance or who *sells or manufactures* a controlled substance while at his or her place of employment or at any place where State of Ohio business is or would be conducted will be subjected to *discipline, up to and including termination.*[5]
8. The term *controlled substance* means any drug in 21 U.S.C. Section 8112 and other federal regulations. Generally, there are drugs which have a high potential for abuse. Such drugs include, but are not limited to, heroin, marijuana, cocaine, PCP, and 'crack.' They also include "legal drugs," prescription drugs not prescribed for the user by a licensed physician.[6]

* * * *

4. A *conviction* means a finding of guilty, or no contest (including a plea of no lo contendere) or the imposition of a sentence by a judge or jury in any federal or state court.[7]

* * * *

5. If an employee is *convicted* of violating any criminal drug statute while at the workplace, he or she will be subject to discipline, up to and including termination.[8]

Ohio revised Code, Section 2921.36

"No person shall *knowingly* convey, or attempt to convey, onto the grounds of a detention facility or of an institution that is under the control of the department of mental health the department of mental retardation

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[5] (emphasis added).

[6] (emphasis added).

[7] (emphasis added).

[8] (emphasis added).

and development disabilities any of the following (ORC 2921.36) (2)."[9]

Article 2 - Non-Discrimination

"Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64, 87-30, or 92-287v of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status."

Article 9-Ohio Employee Assistance Program

01-Joint Promotion

"The Employer and the Union recognize the value of counseling and assistance programs to those employees who have personal problems which interfere with their job duties and responsibilities. Therefore, in all agencies covered by this Agreement, the Union and the Employer agree to continue the existing Ohio Employee Assistance Program. . . ."

Article 24.02

The Employer shall follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

A. one or more oral reprimand(s) (with appropriate notations in employee's file);
B. one or more written reprimand(s);
C. a fine in an amount not to exceed five (5) days pay for any form of discipline; to be implemented only after approval from OCB.
D. one or more day(s) suspension(s);
E. termination

APPENDIX M
Drug-Free Workplace Policy

Section 1.Statement of Policy

A. Both parties acknowledge the substance abuse is a serious and complex, yet treatable, condition/disease that adversely affects the productive, personal and family lives of employees.
B. Both parties agree that the emphasis of any drug-free workplace programs shall be to prevent and rehabilitate employees and to abate risks created by employees who are on duty in an impaired condition.

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[9] (emphasis added). Research reveals the following: Section 2921.36 refers to substances listed in section 2921.36(2) which in turn addresses, "Any drug of abuse, as defined in section 3719.011 of the [Ohio] Revised Code." Section 3719.011 (A) defines drug of abuse as. "any controlled substance as defined in section 3719.01." Section 3919.01 (C) states: "'Controlled substance' means a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V. Finally, schedule I, C (Hallucinogens) lists Marijuana as # 19 in a list of controlled substances.

C. Any employees suffering from a substance abuse problem shall receive the same careful consideration and offer of treatment that is presently extended under the State's existing benefit plans to those employees having other mental health and substance abuse conditions.

D. No person with a substance abuse problem shall have his/her job security or promotional opportunities jeopardized by a request for diagnosis and/or treatment.

Policy #3-10 - Corrective Action 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).

The principles of progressive/corrective action will normally be applied for any such violation or inappropriate behavior. The type of corrective action will be based upon the merits of each individual situation and the seriousness of the violation. Emphasis will be placed on prevention and employee development rather than strict punitive intent and in accordance with existing Collective Bargaining contracts.

Types of Action

The range of Corrective Action, based upon the seriousness and the individual circumstances, is as follows:

Step One: Verbal Counseling (Documented)

This is a discussion with the employee regarding the proper course of action or conduct which the employee is expected to follow. A verbal warning is a formal procedure which is documented in written form.

Step Two: Written Reprimand

This is a formal letter to the employee containing a complete description of the offense.

Step Three: Suspension

This is a temporary removal from duty, without pay, imposed for infractions as indicated in the Standard Guide for Disciplinary Action.

Step Four: Termination of Employment

This is a permanent removal from duty imposed for violation as indicated in the Standard Guide for Disciplinary Action.

Training

In addition to any corrective action set forth in Steps One through Three, a specific program of training/retraining may be used where appropriate, to aid in assuring that corrective action be developmental and truly corrective in nature.

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.

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.

Supervisors should consider both mitigating and aggravating factors in recommending discipline. These include, but are not limited to, the severity of the infraction, existence of length of time elapsed from last infraction.

Standard Guide for Disciplinary Action Penalties					
Nature of Misconduct	**First Offense**	**Second Offense**	**Third Offense**	**Fourth Offense**	**Fifth Offense**
FAILURE OF GOOD BEHAVIOR	2-Day Suspension	6-Day Suspension	Removal		
Possession or Use of Illegal Drugs or use of alcohol on premises	Removal				
Obstructing Justice, withholding information from immediate supervisor or other levels of management pertaining to criminal, administrative or patient care matters	2 Day Suspension or 6--Day Suspension	6-Day Suspension	Removal		
CRIMINAL CONDUCT Conviction of an offense that is related to job duties.	No penalty listed for this offense.				

IV. Parties' Arguments

Union's Argument

1. At worse the Grievant violated the spirit of the law.
2. The Grievant is eligible to participate in the Employee Assistance Program under Article 24.09 and Appendix M which is a specific element of just cause. (Closing at 7).
3. The Employer failed to use progressive discipline.
4. The Grievant's termination constituted disparate treatment

NBHS' Argument

6. The Grievant violated the Drug-Free Workplace Policy and Ohio revised Code, Section 2921.36.
7. The Grievant is ineligible to participate in the Employee Assistance Program under Article 24.09 or under Appendix M.
8. The Grievant was not a victim of discrimination; moreover, her situation was not similar to others in question.
9. Reinstating the Grievant is risky.

V. Discussion

A. Preliminary Matters

Before examining the parties' arguments on the aforementioned issue, mention of two other considerations is indicated. First, because this is a disciplinary dispute, the Employer must establish preponderant evidence in the record as a whole to support the charges it leveled against the Grievant. Second, NBHS apparently recognizes no difference between a "roach" and unused marijuana. Conversely, the Union views "roaches" as less reprehensible than an equivalent amount of marijuana in either a bag or an unused cigarette. Therefore, a threshold issue is whether "roaches" constitute marijuana. And, if so, whether "roaches" are the equivalent of unused marijuana such as that in an unused marijuana cigarette or in a bag of marijuana.

As the residue or remnant of a used or smoked marijuana cigarette, a "roach" will invariably contain some unused marijuana and is, therefore, marijuana. However, a "roach" is marijuana only in a technical sense because the marijuana in therein is not very accessible, usable, or marketable. This is especially true where the "roach" has been discarded in an ashtray or other container as refuse. In other words, the marijuana in a "roach" lacks the utility and/or marketability of that in either an unused marijuana cigarette or a bag of the substance. As a result, although possession of a "roach" or "roaches" is technically possession of a controlled substance, that possession is de minimis. Restated, saying that possession of twelve "roaches" is possession of marijuana is equivalent to saying that possession of twelve "empty" beer cans —containing drops of beer—is

possession of alcoholic beverages.[10] Technically it is true. Of course one could conceivably cannibalize the residue of marijuana in "roaches" or the drops of beer in empty beer cans. Nevertheless, users and sellers of the substance are unlikely to rely on discarded "roaches" for their supply.

B. Drug-Free Workplace Policy

1. Section 2

There is virtually no dispute as to whether the Drug-Free Workplace Policy (the Policy) covers marijuana. On its face, section 2 of the Policy clearly covers marijuana: "The term *controlled substance* means . . . . marijuana. . . ."

2. Section 1

Conversely, the parties sharply disagree as to whether the Grievant violated the Employer' s Drug-Free Workplace Policy (or the Policy) by bringing "roaches" onto the premises of NBHS. The Union essentially argues that on its face the Policy does not cover conveying controlled substances onto the premises. Conversely, NBHS argues that the Drug-Free Workplace Policy prohibits such conduct. Finally, to convey controlled substances onto the Employer's property is, for all practical purposes, to possess them thereon.

Section 1 of the Drug-Free Workplace Policy does not explicitly prohibit the conveyance of controlled substances onto the premises. Thus, section 1 provides:

> Any employee who, in any way, *uses, gives, or transfers* to another person a controlled substance or who *sells or manufactures* a controlled substance while at his or her place of employment or at any place where State of Ohio business is or would be conducted will be subjected to discipline, up to and including termination.

The italicized terms do not explicitly mention conveyance of the prohibited substances onto NBHS' premises. Instead, section 1 explicitly prohibits any form of using, giving, transferring, selling, or manufacturing

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[10] *See, ITT Hancock Automotive v. UAW Local 1660*, 1995 WL 852259 (August 2, 1995) (William P. Daniel, Arb) at 20.

controlled substances on the Employer's premises.

Nevertheless, a more in-depth analysis of section 1 as well as consideration of several other pieces of evidence suggests that the intent and spirit of section 1 do not tolerate controlled substances on the Employer's premises. An Employer hardly advances an in-house, no-drug-sale policy by freely permitting employees to convey controlled substances onto its premises. As a result, it is eminently reasonable to conclude that NBHS's explicit and firm stand against the use, transfer, sale, or manufacture of controlled substances on its property also reflects an intent to prohibit their conveyance onto the premises. Otherwise, section 1 becomes more of a sieve than a barrier and the difficulty of suppressing illegal, on-site, drug sales increases manyfold. That NBHS or any employer would tolerate such a rip in its regulatory fabric is simply incredible.

Furthermore, the Union does not seem to disagree with this broader interpretation. Indeed, the first page of the Union's brief arguably concedes as much: "We acknowledge that the roaches (regardless to the amount) did violate the technical spirit of the law." The only question is whether "the law" was intended to include the Drug-Free Workplace Policy. For example, elsewhere in its brief, and during the hearing, the Union insisted that the Drug-Free Workplace Policy did not address conveyance. Whatever the Union's definition of "the law," the law in this case is incorporated into the Employer's work rules.

Also, the Employer's penalty table supports this broader interpretation of section 1 by providing for removal the first time employees are caught with controlled substances in their possession on the premises.[11] Therefore, the Arbitrator holds that the conveyance of controlled substances falls within the scope of the intent or spirit of section 1 of the Drug-Free Workplace Policy.

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[11] And, as noted earlier, one must, as a practical matter, possess controlled substances to convey them onto the premises.

3. Sections 3 and 5: The Meaning of "Convicted"

The parties also dispute whether the Grievant was "convicted" within the meaning of sections 3 and 5 of the Drug-Free Workplace Policy. Section 3 defines conviction as "a *finding* of guilty, *no contest* (including a plea of nolo contendere) or the *imposition of a sentence* by a judge or jury in any federal or state court."[12] Section 5 provides that employees who are "convicted of violating any criminal drug statute while at the workplace . . . will be subject to discipline, *up to and including termination*."[13]

On its face, section 3 does not define "convicted" to encompass voluntary guilty pleas. Instead, it refers to "a finding of guilty," which suggests an adjudication of guilt by a fact-finder, rather than a voluntary plea of guilty. Nor does nolo contendere encompass a guilty plea. Blacks Law Dictionary defines nolo contendere as:

> I will not contest it'; a plea in a criminal case which has a similar legal effect as pleading guilty. Hudson v. U. S., 272 U.S. 451, 455, 47 S. Ct. 127, 129, 71 L. Ed. 347. Type of plea which may be entered with leave of court to a criminal complaint or indictment by which the defendant *does not admit or deny* the charges, though a fine or sentence may be imposed pursuant to it. Fed. R. Crim. P. 11(a), 12(a). The principal difference between a plea of guilty and a plea of nolo contendere is that the latter may not be used against the defendant in a civil action based upon the same acts.

Thus, pleas of guilty and of nolo contendere are not coextensive. Although thin, the distinction survives scrutiny basically for two reasons. First, the distinction has a lengthy history and some utility in the law. Second, and perhaps more important, if there were a desire to include a plea of guilty within the definition, it could have been accomplished as easily as it was to include "nolo contendere" and "a finding of guilty." The care with which "nolo contendere" and "a finding of guilty" were included suggests that the

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[12] (emphasis added). Joint Exhibit 2, p. 23.

[13] *Id.* (emphasis added).

drafter must have considered and rejected the notion of defining "convicted" to include a guilty plea as opposed to "finding of guilty." Where drafters offer a list of items that defines a given concept, items not mentioned are justifiably interpreted to fall without the scope of the list.[14]

In addition to the reasoning above, there is other evidence to support this conclusion. Employer Exhibit 3 is the decision of the court. Employer exhibit 3 strongly suggests that the Summit County Court of Common Pleas (the court), which heard the Grievant's case, also did not view her guilty plea as a conviction. In fact, the court, "stays all criminal proceedings. . . ."[15] against the Grievant and ordered her to complete a program of rehabilitation. Furthermore, although conveying a drug of abuse (or some iteration thereof) is cited under "arrested offenses," "bindover offenses," and "indicted offenses," nothing is listed under "convicted offenses."[16] This evidence supports the proposition that the court did not treat the Grievant's guilty plea as a conviction.

In summary, the Arbitrator holds that section 2 of the Drug Free Work Policy explicitly defines "controlled substances" to include marijuana. However, section 3 does not contemplate guilty pleas as convictions and the Grievant was not "convicted of violating a criminal drug statute. . . ." under section 5.

C. Section 5119.071

This section provides in relevant part: (A) No appointing officer shall *appoint* a person to *fill* a position in either the classified or unclassified service of the department of mental health if the person has been

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[14] FRANK ELKOURI AND EDNA ASPER ELKOURI, HOW ARBITRATION WORKS, 355 (1985).

[15] Employer Exhibit 3, p. 1. Apparently, §§ 2951.041(B)(1) and (5)—Employer Exhibit 4—affords the court statutory discretion to stay criminal proceedings and to order a defendant who has pled guilty or nolo contendere to undergo treatment.

[16] Employer Exhibit 3, p. 3.

convicted of or *pleaded guilty* to a violation of the following: (1) Any felony contained in the revised Code, if the felony *bears a direct and substantial relationship* to the position being filled."[17]

Application of section 5119.071 to the instant case raises at least two issues: (1) whether the section applies to the instant case; and (2) if so, whether the Grievant's misconduct is directly and substantially related to the duties of a Therapeutic Program Worker. Resolution of the first issue renders the second irrelevant. Section 5119.071(A) explicitly focuses on appointing "a person to fill a position." Therefore, the Arbitrator must agree with the Union that this section does not apply to the issue of whether to terminate an existing employee.[18]

D. Knowing Conveyance—Ohio Revised Code, Section 2921.36

Section 2921.36 of the Ohio Revised Code (section 2921.36) prohibits, "*knowingly*" conveying, or attempting to convey, onto the grounds of [NBHS]. . . any of the following . . . ORC 2921.36 (2)." [19] As mentioned earlier, Section 2921.36 includes marijuana in its list of prohibited substances. The dispositive issue here is whether the Grievant "knowingly" brought the "roaches" onto the property of NBHS (the property). Specifically, NBHS must adduce either direct proof of knowledge to convey controlled substances onto the property or sufficient circumstantial evidence to support an inference of such knowledge.[20]

1. Knowledge of "Roaches" In the Car

The Union offers essentially two arguments in support of its contention that the Grievant did not

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[17] Employer Exhibit 2 (emphasis added).

[18] Research revealed no judicial decisions that interpreted section 5119.072(A) or (A)(1).

[19] (emphasis added).

[20] The Arbitrator equates knowledge with intent.

knowingly convey controlled substances onto the property. First, it argues that the Grievant had simply forgot that she had left a "roach" in her car until Trooper Jedel asked her if a search of her vehicle would reveal anything. Moreover, according to the Union, the Grievant was unaware that "roaches" were left elsewhere in her car. The Union insists that untidiness and ignorance explain the presence of the "roaches" in the Grievant's car on September 18, 1997 and that the Grievant, therefore, lacked the requisite knowledge.

Section 2921.36 specifically condemns the *knowing* or intentional *conveyance* of controlled substances onto the premises. The Employer's arguments do not squarely address this issue. Indeed, beyond suggesting that possession constitutes constructive knowledge, NBHS spends little of its adversarial energy disputing this point. Instead, NBHS argues that the Grievant knew or should have known that NBHS prohibits the possession of marijuana in any form on its property. That is not the same as arguing that the Grievant *knowingly conveyed* marijuana onto the premises in any form.

With respect to the Grievant's knowledge that possession of "roaches" is prohibited, the record does not clearly establish that she had actual knowledge of that fact, but, the Employer's arguments persuade the Arbitrator that the Grievant should have known that "roaches" were prohibited on the premises. In short, she had constructive knowledge of that fact.

Nor is the Arbitrator persuaded that, when the Grievant drove onto the premises on September 18, 1997, she actually knew that any of the twelve "roaches" were in her car. The strongest evidence of such actual knowledge is the Grievant's admission that a "roach" was in the front ashtray. However, the Union offered unrebutted, credible evidence that, the Grievant had forgot about hat "roach," until Trooper Jedel asked her whether a search of the car would reveal anything. Nothing in the record directly contradicts this proposition, and the Grievant was a credible witness.

Nevertheless, evidence in the record supports the proposition that the Grievant should have known of

the presence of the twelve "roaches" in her car when she drove onto the property on September 18. First, she certainly should have known about the "roach" in the front ashtray because she probably put it there. Second, several pieces of evidence establish that the Grievant should have known about the other eleven "roaches" discovered in her car. On September 18, 1997, the Grievant parked her, which contained twelve "roaches," on the property. Since the "roaches" were in the Grievant's car, they were in her "possession" and were in her possession when she came onto the property. One should be aware of what is in one's possession. In addition, the Grievant smoked marijuana from two-three times weekly during the last five-six years, which suggests that she probably deposited "roaches" in her car from time to time. Therefore, it is not unreasonable to infer that the Grievant should have known that "roaches" were or very well might be in her car.[21] Finally, the evidence suggests that the Grievant apparently lent her car to others. If so, then she has a duty, especially as an employee of NBHS, to inspect the car when she regains possession of it. If NBHS employees could

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[21] Also, evidence of the specific location of the other 11 "roaches" in the Grievant's car would have affected the strength of the inference of knowledge here. One of the Police Investigation Reports states:

> During the course of search the Troopers found 12 (twelve) roaches, these were found in the front ashtray, both rear ashtray's (sic) and in a small matchbox that was found under the passenger seat. Ms. Franklin looked at me and stated that she knew about the roach in the front ashtray but didn't know about anything being in the rear ashtray's (sic) because she doesn't get into the back seat. (Joint Exhibit 2, p. 14.)

In one sense, the strength of the inference of constructive knowledge is directly related to the number of "roaches" discovered in the front ashtray—and, perhaps under the front passenger seat—as opposed to the "roaches" discovered elsewhere in the car. Other matters equal, the Grievant was more likely not only to have smoked marijuana in the front (rather than in the back) seat of her car but also to have observed "roaches" in the front (rather than the rear) ashtrays. It is, therefore, also more likely that she should have known about all "roaches" in the front ashtray, particularly since she was aware of at least one "roach" in there. Ultimately, however, because the Police Investigation Report does not specify how many "roaches" were found in the front ashtray, the Arbitrator lacks a basis for either strengthening or weakening the inference of constructive knowledge here.

escape discipline for having controlled substances on the property in their vehicles simply by establishing that they lent the vehicles to others, then the Drug Free Work Policy would be severely hampered because being caught with a controlled substance in one's car would become virtually meaningless. Clearly, at some level, every employee must bear responsibility for the contents of his/her vehicle. The bottom line is that evidence in the record establishes that the Grievant had constructive knowledge that she of conveyed twelve marijuana "roaches" onto the premises on September 18, 1997.

E. Discrimination

The Union's claim of discrimination rests on comparing the Grievant's treatment in this case with that of Mr. Jimmy Stevens and Ms. Lori Pathias. In a random search by a canine unit on October 21, 1997, dogs alerted on Mr. Stevens car which was parked on the premises. A search of the vehicle revealed approximately .079 ounces of marijuana seeds and stems. NBHS held a pre-disciplinary hearing and sent a packet, which presumably contained the results of that hearing, to the Director of Mental health.

However, Mr. Stevens was neither charged with a criminal offense, disciplined, nor even placed on administrative leave as a result of the incident. The Union claims that, relative to the Grievant, Mr. Stevens received differential—and, more to the point, preferential—treatment. NBHS disagrees. In support of its disagreement, NBHS points out several factors. First, it offered unrebutted testimony that employees charged with criminal offenses are consistently placed on administrative leave. Also, NBHS points out that Ms. Stevens was not disciplined largely, if not solely, because the Director of Mental health failed to act on the case within contractually mandated 45-day time limit.

NBHS does not seriously contend that the Grievant was treated the same as Mr. Stevens. Instead, the Employer argues that the dissimilar treatment flowed from and was justified by the dissimilar circumstances surrounding the two cases. In this respect, NBHS points out that the vehicle in question belonged to Mr.

Stevens' daughter, though Mr. Stevens drove it onto the premises. NBHS also states that prosecutors would not prosecute Mr. Stevens because the vehicle did not belong to him. Nor would the prosecutor prosecute where: (1) the controlled substance was merely seeds and stems; (2) the vehicle did not belong to the employee who drove it onto the premises; (3) the employee (driver) did not know that the controlled substance was in the vehicle; and (4) the employee (driver) was not responsible for the controlled substance being in the vehicle. According to NBHS, these facts precluded State Troopers from charging Mr. Stevens in the incident.

For several reasons, the Arbitrator accepts the accuracy of these allegations. First, although there are inconsistencies in Trooper Wells' testimony on these facts, the inconsistencies do not trigger serious doubts about his credibility. Second, one notes that discrimination is an affirmative defense, and, therefore, the Union has the burden of persuading the Arbitrator of the existence of invidious discrimination. Doubts as to whether a party carried its burden of persuasion are customarily resolved in favor of that party on this particular issue in question. And so it is in this instance. To successfully demonstrate discrimination, which includes showing that the Grievant and Mr. Stevens were indeed similarly situated, the Union must present sufficient evidence to overcome differences such as those presented here by NBHS. The pivotal point here is that some members of management apparently were willing to discipline Mr. Stevens who, for whatever reason(s), escaped between the "procedural cracks" of NBHS' disciplinary machinery. Because the Union did not rebut the differences that NBHS established and because those differences render the Grievant's and Mr. Stevens' cases sufficiently dissimilar to preclude a finding of actionable discrimination, the Arbitrator holds that although Mr. Stevens and the Grievant were treated differently, the Grievant was not a victim of actionable discrimination.

Turning now to Ms. Pathias' case, the Arbitrator again agrees with NBHS that the relevant and unrebutted facts and circumstances surrounding the cases of Ms. Pathias and the Grievant are sufficiently dissimilar to rebut a claim of discrimination. The relevant facts are: (1) Ms Pathias was not an employee of

NBHS when the canine unit discovered a controlled substance in her; (2) a mere seed of marijuana was discovered in her car; and (2) the prosecutor would not prosecute for possession of a seed of marijuana.

The parties raised an issue of credibility regarding the conflicting testimonies of Trooper Wells and Ms. Edmonia Antoine. Trooper Wells testified that a canine unit discovered only a seed of marijuana in Ms. Pathias' car. In contrast, Ms. Edmonia testified that, while pretending to be someone else, she persuaded Ms. Pathias to admit that Ms. Pathias actually had an ounce of marijuana in her car. Two reasons persuade the Arbitrator that Trooper Wells is more credible here. First, it is difficult to believe that the dogs in a canine unit would not have discovered an ounce of marijuana. Second, assuming that they found an ounce of marijuana, it is equally difficult to accept that police officers and state troopers would not only ignore it but also affirmatively cover it up. Nothing in the record suggests a motive for protecting Ms. Pathias. Therefore, the Arbitrator accepts as factual the differences set forth by NBHS in the Pathias case, including the fact that a single seed of marijuana was found in her car. On their face, these differences are sufficient to preclude a finding that the Grievant and Ms. Pathias were similarly situated to a degree that would permit a finding of actionable discrimination.

Finally, in the cases of Ms. Pathias and Mr. Stevens, the Union focuses on Trooper Well's testimony that marijuana is marijuana, which of course implies that possession of any part and/or amount of the plant is incriminating. According to the Union, this testimony contradicts the fact that neither Mr. Stevens nor Ms. Pathias was prosecuted or disciplined, although both were caught with "marijuana." The Arbitrator interprets Trooper Wells' testimony as nothing more than his personal view of what he thinks the law should be.[22] His

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[22] Also, the nature of the comments in the Union's brief about this testimony would reasonably lead one to conclude that the Union did not accept Trooper Well's statement as mandatory authority in this matter. Instead, the Union seemed to view the Trooper's statement as rather pompous and self serving. *See* Union Brief at 4-5.

testimony about the prosecutor's disinclination to prosecute for a single seed of marijuana reflects the reality of the prosecutor's assessment of both the law and the limited supply of prosecutorial resources. Therefore, this inconsistency in Trooper Well's testimony is not discrediting. Again, the upshot is that although the Union established that the Grievant was treated differentially, it did not establish that the Grievant was sufficiently similarly situated to Mr. Stevens and Ms. Pathias.

F. Grievant's Eligibility for Admission into the Employee Assistance Program and Appendix M

The Union points out that the Grievant should have been accepted into the Employee Assistance Program when she volunteered for it shortly after the "roaches" were discovered in her car. However, the Employer maintains that the Employee Assistance Program was intended to help drug abusers and not employees who convey controlled substances onto the premises.

In Article 9, Section 01 of the contract, the Union and the Employer recognize the value of the Ohio Employee Assistance Program and agree to continue it under the present contract. Appendix M affords some insight into the scope and purpose of the Employee Assistance Program. On its face, Appendix M manifests a clear intent to focus primarily on employees who abuse controlled substances rather than those who bring them onto the premises. The Grievant is an admitted drug abuser. Therefore, the issue becomes whether the conveyance of twelve "roaches" onto the Employer's property effectively deprived the Grievant of the right to participate in the Employee Assistance Program under Appendix M.

Evidence in the record establishes that the Grievant should have been permitted to participate in the Employee Assistance Program. Several factors point in different directions on this issue. First, the Grievant clearly violated the spirit of the Drug-Free Workplace Policy. Second, she "knowingly" conveyed a controlled substance on the Employer's property, on September 18, 1997, inasmuch as she should have been aware that at least some of the twelve "roaches" were in her car when she drove it onto the property.

On the other hand, several weighty mitigating factors tip the scale in favor of admitting the Grievant into the Employee Assistance Program rather than firing her. First, the Grievant's work record is a strong mitigating factor. During her eighteen-year tenure, the Grievant has not accumulated a damaging disciplinary record. And, she has accumulated eighteen years of meritorious service at NBHS during which she has repeatedly gone above and beyond the call of duty in assisting the residents of NBHS. Second, mitigative factors inhere in the violations themselves. For example, the violation of the Drug-Free Workplace Policy is undoubtedly technical in nature. And, the Grievant's "knowledge" of the "roaches" in her car is constructive and not actual.

The Grievant's work record and tenure warrant additional comment in light of the following arguments by NBHS: (1) given the nature and blatancy of her violations, NBHS can no longer trust the Grievant to interact with the residents of the hospital; (2) the Grievant is unlikely to be rehabilitated because she has yet to admit that she has a problem; (3) should the Grievant fail to complete the rehabilitation program, she could be convicted of a felony and perhaps imprisoned; and (4) NBHS argues that the competitive and highly regulated environment in which it operates counsels against retaining employees who bring "roaches" onto the premises.

These considerations do not persuade the Arbitrator that the Grievant, *as a substance abuser*, should be denied access to the Employee Assistance Program. First, Even though she has suffered from drug abuse for a period of 5-6 years, nothing in the record even suggests that she displayed any inclination toward behaving in a manner that could be remotely construed as harmful to either the residents or anyone else at NBHS. Instead, she has amassed a somewhat enviable record as an employee there. Even NBHS admits that "she is a decent employee." Under these circumstances, it is not at all clear that the Grievant's misconduct is likely to threaten NBHS. Nothing even suggests that she has ever attempted to sell or give marijuana to

anyone at NBHS or that she ever reported to work under the influence of marijuana or any other prohibited substance. Instead, but for the instant transgression, she has compartmentalized her substance abuse from her professional life.

Second, the court obviously had some faith in the Grievant's ability to correct her conduct; otherwise, it probably would not have referred her to rehabilitation. Nothing in the section 2951.041 obliges the court to show that type of compassion and leniency. Part of rehabilitation is learning to accept that one has a problem in the first instance. The Grievant might very well need time to come to grips with her problem. But, given that she has done nothing to harm anyone for eighteen years, five to six of which involved substance abuse, one has ample reason to believe that she will hardly be more threatening while actively participating in—and after successfully completing—a rehabilitation program than she was before.

Third, NBHS argues that if the Grievant violates the court's order, she will be ineligible for employment at NBHS. If so, then the way should be clear to remove the Grievant under state law. Also, in that eventuality, as pointed out below, the Arbitrator's remedy should assist NBHS in removing the Grievant. More important, given the nature of the Grievant's violations and the caliber of her work record, she deserves a chance to show that she can turn her personal life around.

Finally, the Arbitrator is keenly aware of the environment in which NBHS must operate and the need to maintain the proper image for numerous reasons. Yet, terminating an eighteen-year employee under these circumstances when the court and this Arbitrator deem her readily susceptible to rehabilitation, could very well cast NBHS as an employer who lacks compassion, an image which is not likely to encourage employee loyalty. There is, however, a more important consideration here. NBHS had the burden of proving that the Grievant was guilty of Failure of Good Behavior, Possession of illegal drugs on the premises, and criminal conduct. Yet, NBHS failed to demonstrate by preponderant evidence in the record as a whole that the Grievant violated

the letter of any of the contractual provisions, work rules, policies, or statutes introduced into the arbitral record in this case. Specifically, nothing in the record establishes that the Grievant violated the letter of either the Drug-Free Workplace Policy or section 2921.36. Nevertheless, given the magnitude of NBHS' interests in maintaining a drug-free workplace—which is fully recognized—the Arbitrator has held that even violations of the spirit of Drug-Free Workplace and the absence of actual knowledge of conveyance *should not* constitute an escape hatch from all discipline.

These considerations persuade the Arbitrator that as a substance abuser, the Grievant should have been admitted into the Employee Assistance Program and that the misconduct that NBHS has demonstrated in this record is insufficient to either bar or discharge her. Appendix M reflects a strong policy to aggressively assist employees who suffer from substance abuse. It contains no provisions for excluding otherwise long-tenured, "decent employees" who violate the spirit of a work rule and who should have known that they were conveying the remnants of previously consumed controlled substances onto the Employer's premises.

VI. The Award

Because the Arbitrator holds that the Grievant engaged in misconduct, the Grievant is subject to some disciplinary measure. At the outset, one recognizes NBHS' right to terminate an employee for a first offense, given the provisions of the Penalty Table. On the other hand, the Drug-Free Workplace Policy provides for discipline "up to and including discharge." Similarly, Article 24.02 states that the Employer shall "follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense." Article 24.02 then enumerates the levels of discipline that the Employer should impose, including, "one or more day(s) suspension(s)" and "termination." Clearly, a broad range of disciplinary measures is available to the Employer, and mitigating factors are not to be ignored. The balance of aggravating and mitigating factors indicates leniency in this particular case.

Specifically, this balance persuades the Arbitrator that a one- month suspension is sufficient corrective discipline in this particular case. However, the Grievant's seniority is to remain unaffected by either the suspension or the discharge. On the other hand, the Grievant's reinstatement is to be *without* back pay. To reward the Grievant with back pay, in this case, is to send the wrong message.

Furthermore, the Grievant's reinstatement is based on the following conditions: (1) she successfully completes the judicially imposed rehabilitation program as well as the Employee Assistance Program; and (2) for one year after completing both of those programs, the Grievant must not violate either the letter or the spirit of any contractual provisions, work rules, statutes, or any other applicable regulations that address the possession, use, sale, or transfer of controlled substances as defined by either state law or the Employer's work rules. If the Grievant fails to fully comply with these conditions, the Employer may to set aside this arbitral reinstatement and summarily terminate the Grievant. The Grievance is, therefore, **SUSTAINED IN PART AND DENIED IN PART**.

Notary Certificate

State of Indiana)

)SS:

County of MARION

Before me the undersigned, Notary Public for MARION County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 7th day of Dec., 1998

Signature of Notary Public: Dana Condra

Printed Name of Notary Public: Dana Condra

My commission expires: 12-03-01

County of Residency: Hamilton

Robert Brookins

Robert Brookins