#1598

OPINION AND AWARD

In the Matter of the Arbitration Between
Ohio Department of Rehabilitation–Correction Chillicothe Correctional Institution

-AND-

Ohio Health Care and Social Service Union District 1199/SEIU

APPEARANCES

For CCI

Don Anderson, LRO
Kaye Carnein, LRS
Jeffery Wells, Mental Health Administrator
Tina Krieger, ODRC Legal Counsel
Jan Murray, Registered Nurse
Virginia Lamneck, Deputy Warden, Operations
Harry McQuiniff, Registered Nurse
Mike Randle, Assistant Director of Administration (Former Warden, CCI)
Richard Corbin, OCB
Lisa Hill, Psychiatric Nurse Supervisor

For the Union

Lee Alvis, Advocate, SEIU
Tammy Eshelman, Grievant
Violet Parker, Registered Nurse
Diana Burring, Registered Nurse

Case-Specific Data

Hearings Held
May 22 and April 30, 2002

Grievance

No. 27-03-(04-23-0)-963-02-04

Case Decided

July 28, 2002

Subject of Dispute

Fighting/Copying Confidential Information

Award

Grievance Denied in Part/Sustained in Part

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I. Procedural History

This dispute involves Chillicothe Correctional Institution ("CCI"), an agency of the Ohio Department of Rehabilitation and Correction ("Employer" or "CCI") and District 1199/SEIU ("Union"), the representative of Ms. Tammy Eshelman ("Grievant").[1] The Parties selected the undersigned from their permanent panel of grievance arbitrators to hear this matter and agreed on April 30, 2002 as the initial hearing date. On that date, the Parties determined that a second hearing date was needed to completely present their evidence in this matter. Accordingly, the Undersigned convened a second hearing in this matter on May 22, 2002. Both hearings were held at CCI, in Chillicothe, Ohio. The dispute contained no outstanding procedural issues, and the parties stipulated that the matter was properly before the Undersigned. The Parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions in this matter. Specifically, they were permitted to: (1) make opening statements; (2) introduce admissible documentary evidence, which was available to all relevant objections; and (3) present witnesses who offered sworn testimony and were duly cross-examined. Finally, the parties elected to submit Post- Hearing Briefs in lieu of closing arguments.

	II. Factual Stipulations
1.	The union timely filed this grievance and the issue is properly before the Arbitrator. Neither party raises any procedural objections.
2.	Neither party raises any procedural objections
3.	The parties agree that the events resulting in removal occurred in the Residential Treatment Unit (RTU) and will take the Arbitrator on a tour of the unit.[2]
3.	The Parties stipulate that the exhibits contain the investigatory interviews and that the witnesses would testify to the same today.

	III. Joint Exhibits
Exhibit Number	Description of Exhibit
1.	Collective-Bargaining Agreement between the Union and the State of Ohio, effective 2000-2003.
2.	Standards of Employee Conduct.
3.	Grievance Trail.
4.	Disciplinary Trail, Charge No. 1.
5.	Disciplinary Trail, Charge No. 2.
6.	Grievant's receipt for Standards of Employees Conduct.

IV.The Facts

The Grievant was a Psychiatric/MR Nurse at CCI for approximately four years before her dismissal on April 18, 2001. As a Psychiatric Nurse, the Grievant's responsibilities included, among other things, administering medications to inmates and keeping medical records of the care and treatment she rendered. Reports containing medical information about inmates are strictly confidential with narrowly limited access by a short-list of employees.

A. Physical Altercation

The first leg of this dispute focuses on a scuffle between the Grievant and a fellow Psychiatric Nurse, Mr. Harry McQuiniff. Shortly before their physical encounter, on the morning of January 14, 2000, the Grievant and Mr. McQuiniff had a verbal clash. Shortly after that encounter, the Grievant entered a secretary's office, where Mr. McQuiniff was listening to a radio, and immediately demanded that he turn the radio off so that she could complete her medical charts. When Mr. McQuiniff refused to comply, the Grievant attempted to reach across him and turn the radio off. Mr. McQuiniff resisted her efforts and a struggle ensued. Although no one witnessed the incident, Mr. Roger Penwell saw the Grievant walk into the secretary's office, and subsequently "heard a loud crash." Mr. Penwell then "went to the office, opened the door and . . . [Mr. McQuiniff] came running out . . . . [and] yelled, you 'fucking bitch.' As . . . [Mr. McQuiniff) came running out the door, a three-ring notebook hit the wall."[3]

Mr. McQuiniff immediately reported the incident to Shift Captain Steve Clever,[4] but the Grievant remained in the secretary's office for sometime after the incident without reporting it. Later that day, the Grievant admonished Mr. McQuiniff for reporting the incident.[5] Furthermore, upon mentioning the incident to her supervisor, on January 14, 2000, the Grievant did not reveal that she and Mr. McQuiniff had actually tussled. Also, at approximately 7:20 a.m. on January 14, 2000, the Grievant telephoned Ms. Lisa Hill, Psychiatric Nurse Supervisor, at home to report the incident.[6]

Physical examinations performed on both the Grievant and Mr. McQuiniff shortly after the encounter revealed that both were slightly injured. During direct examination in the arbitral hearing, Mr. McQuiniff

testified that the Grievant attempted to choke him and, in doing so, "tore the hide right off my neck." Nevertheless, medical examinations performed directly after the struggle revealed that Mr. McQuiniff suffered only a scratch on his neck near his larynx and that the skin in that area was unbroken. Registered Nurse Jan Murray testified that he saw scratches or abrasions on Mr. McQuiniff's neck.\7 Similarly, Nurse Scott Bolte said Mr. McQuiniff "had what appear to be a fingernail going across his throat going from the left side of the Adam's apple out. It was a pretty good scratch but was not bleeding as it *did not break the skin.*"\8 Finally, photographs of Mr. McQuiniff's neck revealed no broken or punctured skin.\9

Three caregivers examined the Grievant. One found no marks or other signs of a struggle on her body,\10 but the other two examiners found red marks on the back of both of the Grievant's arms and on her back.\11

B. Copying Confidential Documents

The Grievant copied confidential documents in connection with grievances she filed against Ms. Hill. On or about November 19, 1999, Ms. Lisa Hill, leveled several disciplinary charges at her, which caused antagonism between them and caused the Grievant to file at least two grievances against Ms. Hill.\12 Because the grievances against Ms. Hill were sent to mediation, Michael Randle, the Warden of CCI at that time, forestalled the processing of disciplinary charges against the Grievant until the completion of the mediations, which began on July 23, 2000.\13

Although the grievances were not settled during that mediation, progress was made, and the mediator suggested further investigation of the Grievant's charges against Ms. Hill. As a result, the Grievant copied numerous documents she thought would prove her allegations against Ms. Hill. However, at least some, if not all, of those documents contained medical information about inmates. Also, when copying the information, the Grievant neglected to blot out the inmates' names and numbers.

Medical records of inmates are confidential and are only faxed out of CCI for Quality Assurance

Reviews, pursuant to Ohio Revised Code 5120.211\14 and the Ohio Department of "Rehabilitation and Correction's Confidentiality of Mental Health Files Policy,"\15 which governs access to inmates' medical records.

On July 24, 2000, MS. Virginia Lamneck, Psychiatric Nurse Supervisor, observed papers and keys protruding from the Grievant's purse, which was sitting unattended on a table. The papers were photocopies of confidential documents containing confidential information about inmates' mental health and medication error reports.\16 Also, on July 24, 2000, Ms. Lamneck instructed the Grievant to cease and desist copying "any DRC records of inmate confidentiality for you, personally. . . . You were to bring any DRC inmate records of a confidential nature back to the institution tomorrow or your next scheduled work day."\17 During the arbitral hearing on April 30, 2002, Mr. Jan L. Murray, a Psychiatric Nurse, credibly testified that he found copies of various confidential documents in the Grievant's file in the 4-h housing office on September 9, 2000.\18 Mr. Murray subsequently informed Mr. Kevin Scott, I. I. S., that the Grievant had photocopied confidential information for her grievances.\19 However, Mr. Murray never saw the Grievant photocopying confidential documents.

Nevertheless, preponderant evidence in the arbitral record convinces the Arbitrator that more likely than not the Grievant copied confidential records after July 24, 2000, when she was ordered to cease and desist. During her investigatory interview on January 29, 2001, the Grievant admitted photocopying a medication error report after she was ordered not to do so, claiming that the report was not for personal use,\20 and then admitting that it was for her own use.\21 Specifically, the Grievant stated, "Yes, I copied the medication error report for my own use. So I made a mistake."\22 In contrast, during her investigatory interview on February 2, 2001, the Grievant claimed that she did not know whether she had copied confidential documents after July 24, 2000.\23 Even so, she tacitly admitted photocopying a medication error report after meeting with Ms. Lamneck on July 24, 2000 and that she

might have placed the wrong date throughout that report.[24]

In addition to copying documents after July 24, 2000, the Grievant disobeyed Warden Randle's and Ms. Lamneck's direct order to return all confidential documents to CCI.[25] Instead of complying with that order, the Grievant gave copies of confidential documents to Mr. Idris Abdurraqib who had been assigned to investigate the Grievant's claims of disparate treatment. Indeed, on August 21, 2000, Mr. Abdurraqib apprised Ms. Hill that the Grievant had given him a completed Quality Assurance Medication Error Report, medication kardexes, and physician's orders.[26] Although the Employer claims the Grievant *faxed* confidential documents to Mr. Abdurraqib, the arbitral record does not support that allegation.[27]

As a result of these violations, Warden Randle decided to initiate disciplinary proceedings against the Grievant for: (1) Copying confidential documents and removing them from CCI without authorization, in violation of Rules No. 1, 7, 8, 21, and 22 of the Standards of Employee Conduct;[28] and (2) Engaging in a physical altercation with Mr. McQuiniff on January 14, 2000, in violation of the following standards of employee conduct: Rules No. 8, 12, 19, and 25.[29] On March 5, 2001, a pre-disciplinary hearing was scheduled for March 9, 2001 to address the foregoing charges against the Grievant. The hearing was convened on that date, and the Pre-disciplinary Hearing Officer found that just cause supported charges that the Grievant violated all of the foregoing Rules.[30]

On March 20, 2001, the Employer issued a Notice of Disciplinary Action informing the Grievant that she would be removed from her employment effective April 18, 2001.[31] That document stated in relevant part:

> On July 24, 2000 and after July 31, 2000 you copied confidential medical records. On October 6, 1999 you signed a 'Statement of Confidentiality." On July 31, 2000 you signed a 'Inmate Confidentiality' memo acknowledging that you had received a verbal directive . . . advising against the copying of confidential documents. On July 24, 2000 you copied confidential documents and gave them to personnel outside of . . . [CCI]. Your actions constitute violation of rules #s 7, 21, & 22 of the Employees Standards of Conduct.

> On January 14, 2000 at approximately 6:25 AM you engaged in a physical altercation with co-worker Harry McQuiniff. Immediately following the incident both you and H. McQuiniff began cursing obscenities at each other. . . . You failed to report this physical altercation to Psychology Supervisor Wesley Sylvia. Your actions constitute violation of rules #s 8, 12, 19, & 25 of the Employees Standards of Conduct.[32]

On April 20, 2001, the Union filed Grievance No. 27-03-(04-23-0)-963-02-04 ("Grievance") challenging the Grievant's removal.[33] On June 13, 2001, the Union had not received a Step-Three Response from the Employer and, thus, notified OCB of its intent to arbitrate the Grievance.[34] Finally, on June 25, 2001, the Step-3 Hearing Officer denied the Grievance.[35]

V. Relevant Contractual, Policy and Regulatory Provisions

Department of Rehabilitation and Correction
Policy 320-05

* * * *

VI. Procedures

* * * *

D. Medical, Mental health and Recovery Services File Access

1. All Medical, Mental Health and AOD Services staff shall have access to their respective areas of an inmate's medical, mental health and AOD services files when acting in the course of their specific duties.
2. Other personnel with access to these files in the course of their assigned duties, but only as their duties require, are limited to the following personnel:
   a.) On-site physicians, physician assistants and other applicable medical at mental health professionals and specialists.
   b.) Dentists
   c.) Nursing staff

* * * *

3. The following personnel may have designated access to medical, mental health and/or AOD files and/or information on a need to know basis by request to the Health Care Administrator in the case of the medical file, Mental Health Administrator or designee in the case of the mental health file, or AOD services supervisor or designee in the case of the AOD service file:
   a.) Warden of the institution or designee;
   b.) Internal investigative staff;
   c.) Departmental and accrediting body audit staff;
   d.) Department legal counsel or other attorneys representing the department;
   e.) Persons authorized by an order or judgment of a court with appropriate jurisdiction.

4. The following personnel may have designated access to medical, mental health and AOD services files and/or information with the inmate's consent as verified by a signed release of information form:
   a.) Parole Board
   b.) Adult Parole Authority (APA) placement and program screening staff;
   c.) Select APA field staff such as those responsible for ensuring continuity of care for inmates leaving the department's physical custody and returning to the community;
   d.) Interagency staff (ODMH, attorney general, etc.)

5. All other access to the medical and mental health files is governed by ODRC Policy 113-03: Records Access and Release.\36

Contractual Provisions

ARTICLE 7 - GRIEVANCE PROCEDURE
7.01 Purpose

The State of Ohio and the Union recognize that in the interest of harmonious relations, a procedure is necessary whereby employees can be assured of prompt, impartial and fair processing of their grievance.

* * * *

ARTICLE 8 - DISCIPLINE
8.01 Standard
Disciplinary action may be imposed upon an employee only for just cause.

8.02 Progressive Discipline
The principles of progressive discipline shall be followed. These principles usually include:
Verbal Reprimand
Written Reprimand
A fine in an amount not to exceed five (5) days pay
Suspension
Removal
The application of these steps is contingent upon the type and occurrence of various disciplinary offenses. The employee's authorization shall not be required for the deduction of a disciplinary fine from the employee's paycheck.

VI. The Issue

Was the Grievant removed for just cause? If not, what shall be the remedy.

VII. Summaries of the Parties' Arguments

A. Summary of the Union's Arguments

1. The Grievant was fired for other than just cause.
2. The Employer's decision to remove the Grievant violates the rules of progressive

discipline under Article 8.02.

3. The Decision to remove the Grievant was tardy and, hence, fatally flawed, under Article 7.01.
4. The rules and policies on confidentiality do not explicitly prohibit copying confidential information.
5. Page five of Policy 320-05 permits internal investigative staff to access inmates' files.
6. The Grievant was authorized to copy the confidential documents pursuant to a mediator's instructions. She thus copied the documents and gave them to Mr. Abdurraqib when he came to the institution.
7. Copying documents to support one's grievance does not constitute "personal use."
8. The Grievant was a victim of disparate treatment and a hostile environment.

B. Summary of the Employer's Arguments

1. The Grievant was fired for just cause.
2. The Grievant photocopied confidential information for her personal use in violation of external law and Policy 320-05, which prohibits the Grievant from photocopying confidential documents for her personal use.
3. The Grievant was aware of the law and policy that prohibit that type of behavior.
4. On or about August 16, 2001, the Grievant faxed confidential records out of the institution to further her personal grievances, after she was specifically instructed not to do that.
5. The Union failed to demonstrate disparate treatment against the Grievant.
   a. First, the employees with whom the Grievant is compared are not in her job classification. As a nurse, the Grievant is ethically bound to assist inmates and not to deliberately violate their rights to confidentiality.
   b. Second, the employees with whom the Grievant is compared were merely arguing and shoving in the bathroom but did not launch an unprovoked assault on one another.

VIII. Analysis and Discussion

A. Instigator of Physical Scuffle Between Grievant and Mr. McQuiniff

It is undisputed that on January 14, 2000, the Grievant and Mr. McQuiniff engaged in a scuffle. Therefore, the bottom-line here is whether the Grievant provoked that physical encounter in connection with her admitted attempt to turn off a radio. The burden of persuasion rests with the Employer to establish by preponderant evidence in the record as a whole that the Grievant provoked the physical encounter.

The arbitral record lacks that quantum of evidence. First, participation in a physical altercation, without more, does not establish provocation. Second, except for the Grievant and Mr. McQuiniff, no

one witnessed the actual tussle. However, in a written statement, Mr. Penwell, who did not testify at the arbitral hearing, said he observed the Grievant go into the secretary's office, heard a "loud crash," observed Mr. McQuiniff run out of the office, and heard him call the Grievant a "fucking bitch" as he left. Furthermore, according to Mr. Penwell, a three-ring notebook hit the wall as Mr. McQuiniff exited the office.\37 At best, Mr. Penwell's hearsay account offers some slight insight into circumstances surrounding the end of the conflict. Even if it were fully credited— and it is not—Mr. Penwell's account hardly establishes whether the Grievant provoked the incident or whether she or Mr. McQuiniff exceeded the reasonable bounds of self defense during the incident.

Nor does an examination of the testimonies and written statements of the Grievant and Mr. McQuiniff resolve the doubts or uncertainty surrounding these issues. For, each of their accounts of the encounter suffers either debilitating, if not fatal, inconsistencies as well as incredible self-serving statements.

As noted earlier, the Employer has the burden of persuasion. Therefore, other matters equal, Mr. McQuiniff's loss of credibility due to his testimonial and other inconsistencies are more damaging to the Employer's case than the equivalent inconsistencies by the Grievant are to the Union's case.\38 With these guidelines in mind, the Arbitrator turns now to an assessment of Mr. McQuiniff's credibility as to whether the Grievant provoked the January 14 encounter. On that date, Mr. McQuiniff declared that the Grievant entered the room and said, "Shut that *shit off* so I can concentrate."\39 However, on January 22, 2001, the Grievant's request apparently intensified, for, according to Mr. McQuiniff, she "entered the room and stated "shut that *fucking radio off* so I can sit here and do my charting. . . ."\40 On January 25, 2001, during an investigatory interview, Mr. McQuiniff stated that the Grievant's exact words were: "You are going to have to shut that *fucking radio off* so I can concentrate and do my work."\41

Standing alone, these internal inconsistencies in Mr. McQuiniff's testimony were insufficient to discredit him as a witness. However, when considered in light of the following external testimonial

inconsistencies and other inconsistencies, the Arbitrator can place little credence in Mr. McQuiniff's testimony. First, when testifying during the arbitral hearing, Mr. McQuiniff declared that the Grievant "tore the hide right off my neck."[42] Nevertheless, not one of the three caregivers who examined Mr. McQuiniff reported a break, puncture, or tear in the skin around his neck.[43] Second, some parts of Mr. McQuiniff's testimony are inconsistent with his demonstrated demeanor as a witness. For example, when the Grievant allegedly told Mr. McQuiniff to shut the "fucking radio off" or go elsewhere, he purportedly responded, "[N]ow *mam* you told me to leave the other office, so if someone goes maybe you should."[44] However, during his investigatory interview on January 25, 2001, Mr. McQuiniff allegedly responded, "I'm sorry, if you want to sit in here and chart you are going to have to listen to the radio."[45] Finally, according to Captain Clever's hearsay statement, Mr. McQuiniff simply told the Grievant "No" he would not turn the radio off.[46]

Based on evidence in the record and the Arbitrator's observation of Mr. McQuiniff's demeanor during the arbitral hearing, it is unlikely that Mr. McQuiniff would have responded to the Grievant in the polite manner depicted above. First, Mr. McQuiniff and the Grievant had just verbally clashed before she walked into the secretary's office and ordered him to turn the radio off. Therefore, it is unlikely that Mr. McQuiniff was in a polite mood, least of all with the Grievant. Second, based on Mr. McQuiniff's behavior while testifying in the arbitral hearing, the Arbitrator finds it unlikely that Mr. McQuiniff responded to the Grievant in a gentlemanly or polite manner. On several occasions during his cross-examination by the Union, Mr. McQuiniff became somewhat confrontational. Yet, the cross-examination was not particularly pointed, not to mention scathing. That demeanor, which occurred under less than trying circumstances, neither supports nor engenders confidence in Mr. McQuiniff's account of his statements to the Grievant shortly before their physical conflict, which followed shortly after an earlier verbal conflict with the Grievant.

The nature and number of internal and external inconsistencies in Mr. McQuiniff's accounts of his physical encounter with the Grievant suggest a tendency to exaggerate and to embrace self-serving statements. This consideration together with the fact that the Employer has the burden of proving that the Grievant provoked the physical conflict precludes holding that the Grievant provoked the physical encounter. Again, this conclusion is not intended to imply that the Grievant's account is somehow devoid of inconsistencies.

Nor does any other credible evidence in the record reveal the identity of the inciter. Instead, credible evidence shows only that the Grievant entered the room and demanded that Mr. McQuiniff turn off the radio. When he refused, she attempted to turn off the radio by reaching over or passed him. At this point, Mr. McQuiniff resisted and the matter becomes enshrouded in uncertainty. Mr. McQuiniff claims that the Grievant physically attacked him when he resisted her efforts to turn off the radio. The Grievant claims she sought only to turn off the radio, when Mr. McQuiniff became the aggressor by grabbing her arms and pushing her against a desk.[47] Assuming that the Grievant was entitled to quiet in the office as she works, she was not entitled to become physical merely because Mr. McQuiniff attempted to block her access to the radio. Nor should Mr. McQuiniff have been provoked by the Grievant's mere attempt to access the radio. Again, the question is which party initially launched a physical attack on the other?

Moreover, physical evidence from examination of their bodies neither supports nor refutes either of their accounts. Mr. McQuiniff's neck was scratched, but that hardly establishes the Grievant as the aggressor. And the Grievant had red marks on her arms and back which do not prove that Mr. McQuiniff was the aggressor. Either of them could have been acting in self-defense, as both claim to have done. Under these circumstances, the Arbitrator holds that the Employer failed to establish that the Grievant provoked the physical encounter between her and Mr. McQuiniff. Finally, under these circumstances, the Grievant has no duty to prove the affirmative defense of self-defense, since preponderant evidence does not reveal her to be the instigator in this instance. As far as the record shows, both she and Mr.

McQuiniff could have been equally at fault.

B. Properly Reporting the Physical Altercation

The Employer also charged the Grievant with failing to immediately report her physical struggle with Mr. McQuiniff, in violation of Rule 25. Evidence in the record supports this allegation. First, the duty to immediately report that incident obliged the Grievant to report it on January 14, when it occurred. The Grievant claimed that she reported the incident to her supervisor, Mr. Wes Sylvia. However, in an investigatory interview, Mr. Sylvia said that at approximately 6:40 a.m. on January 14, 2000 he spoke with the Grievant. Following is the relevant part of that conversation: "[The Grievant] . . . said that there had been a *disagreement* between her and . . . [Mr. McQuiniff]. . . . She *never mentioned that anything had gotten physical* during the disagreement. . . ." \48 Thus, according to Mr. Sylvia's hearsay statement, the Grievant did not apprise him of her scuffle with Mr. McQuiniff. However, at 7:20 a.m. on January 14, 2000, the Grievant did advise Ms. Hill of the physical altercation as evidenced by Ms. Hill's testimony during the March 20 arbitration hearing and by her statement during an investigatory interview on February 25, 2001.\49 In that statement, Ms. Hill said she instructed the Grievant to "write an incident report and . . . to report to medical."\50

The foregoing evidence establishes that the Grievant did substantially comply with Rule 25. First, that Rule does not explicitly require that an employee report violations to any particular member of management. Nor is it clear that the Grievant had actual or constructive knowledge of such a specific obligation. Second Ms. Hill did not advise the Grievant to report the incident to a specific member of management. Therefore, her decision to report the incident to Ms. Hill at 7:20 a.m. on January 14, 2000 reasonably satisfied the requirements of Rule 25.

C. Violation of VI D-2c of DR&C's Policy No. 320-05

Here the issue is not whether the Grievant copied confidential files and removed them from CCI

without authorization. Clearly she did. Instead, the issue is whether the Employer's policies or external law or both prohibited her from copying the policies. The second issue is whether she copied the information for her personal use. The Union argues that because neither external law nor the Employer's policies explicitly prohibit employees from copying confidential information, the Grievant committed no wrongful act in copying the information.

The Arbitrator disagrees. Section VI D-2c of Department of Rehabilitation and Correction's Policy No. 320-05 states in relevant part: "Other personnel with access to these files in the course of their assigned duties, but only as their duties require, are limited to the following personnel: Nursing staff."\51 Although the policy does not explicitly forbid photocopying, it does specifically prohibit accessing confidential information for situations not "in the course of [selected employees'] . . . assigned duties, but only as their duties require." Even if the act of photocopying files did not constitute "accessing" (and it does), one must surely "access" files to photocopy them. In either case, the Grievant clearly accessed confidential files. The only remaining issue is whether she accessed them "in the course of . . . [her] assigned duties, but only as . . . [her] duties require[d]." To ask the question is to suggest the answer: Nothing suggests that the Grievant, as a Psychiatric Nurse seeking to prevail on her personal grievance, photocopied the files in the course of her assigned duties. Indeed, even the Grievant herself admitted that she made a mistake.\52 Furthermore, since the Grievant had no authority to copy the documents in the first instance, she also lacked authority to forward them to Mr. Abdurraqib, thereby providing him with *access* to the information.\53 Nor could a mediator clothe her with such authority in violation of the Employer's policies and external law.\54 Consequently, the Arbitrator holds that the Grievant violated at least Section VI D-2c by photocopying confidential documents without proper authorization to support allegations in her grievance.

D. Whether the Grievant was a Victim of Disparate Treatment

The Union claims that the Grievant was a victim of disparate treatment, but evidence in the record

does not support that claim. First, the Union claims that the Grievant was treated differently with respect to the granting of leave. However, the record does not establish either a particular incident or a pattern in which the Employer discriminatorily denied the Grievant's leave requests. Conversely, the Employer adduces preponderant evidence of a pattern of granting the Grievant's requests for leave.\55 Nor does evidence in the record demonstrate that the Grievant was a victim of disparate treatment regarding the quantum of discipline imposed on her for the proven misconduct of copying confidential material without authorization. The Union's evidence focuses on other employees who allegedly were not disciplined as severely as the Grievant for scuffling among themselves. However, since the Arbitrator has not held that the Grievant provoked the conflict, the Union's claim lacks viability. As a result, the Arbitrator cannot sustain the Union's claim of disparate treatment in this instance.

IX. The Penalty Decision

A. Timeliness of the Discipline

Before one discusses the propriety of removal as a penalty in this case, some discussion of the tardiness of that penalty is indicated.\56 The record shows that on or about July 24, 2000, the Employer discovered the Grievant had copied confidential information. And on or about August 21, 2000, the Employer learned that the Grievant had given confidential documents to Mr. Abdurraqib.\57 Yet, the Employer waited until January 29, 2001 to initiate disciplinary proceedings against the Grievant for that misconduct. Warden Randle explained that he postponed the discipline to try to resolve the Grievant's allegations against Ms. Hill. On its face, that rationale is not entirely objectionable. The difficulty for the Employer, however, lies in Article 7.01 of the Collective-Bargaining Agreement, which provides in relevant part: "The State of Ohio and the Union recognize that in the interest of *harmonious relations*, a procedure is necessary whereby employees can be assured of *prompt*, impartial and fair processing of their grievance."\58 Two salient purposes for prompt processing of grievances or disciplinary charges are to preserve evidence and to remove the dispute from the parties' midst as soon as possible. The parties

thought enough of this commonsensical consideration to reduce it to writing. The Employer had the option of either withdrawing the proposed disciplinary action or processing it. But Section 7.01 does not permit the Employer, in this case, to merely forestall proposed disciplinary action for approximately six months before launching disciplinary action against the Grievant. Deterrence is fostered by prompt and fair disciplinary action.

Nevertheless, the Employer's procedural error in delaying the discipline does not excuse the Grievant's misconduct in copying and dispensing confidential information in this case. And the existence of that misconduct warrants some measure of discipline based on aggravative and mitigative circumstances in this case.

1. Aggravative Factors

The largest aggravative factor is the nature of the act itself: The unauthorized copying and distribution of confidential material. Further aggravating the situation is the Grievant's position as a nurse whose duty implicitly, if not explicitly, includes protecting the confidentiality of patients medical records. Her actions, therefore, raise reasonable concern about (but does not irreparably damage) her trustworthiness as a professional.

2. Mitigative Factors

The first mitigative factor is that during the arbitral hearing Ms. Hill twice stated that the Grievant was a very good nurse and had no problems, save those in the instant dispute. Second, the Employer unjustifiably delayed the initiation of the disciplinary process, a procedural error what redounds to the Grievant's favor. Third, the Arbitrator is unconvinced that either the Grievant's record or the nature of her misconduct justifies ignoring the tenets of progressive discipline set forth in Article 8.02. Fourth, the Employer established only one of the two charges leveled at the Grievant, though the established charge is serious. This balance of mitigative and aggravative factors convinces the Arbitrator that removal was unreasonable and that the Grievant deserves a second chance to rehabilitate herself.

Accordingly, the Grievant is to be reinstated *forthwith* as a Psychiatric Nurse without loss of seniority but without backpay. Furthermore, this reinstatement is probationary in character. That is, the Grievant must remain free of *all* misconduct for a period of eight (8) months from the date of this award. Should she fail in this respect, the Employer may set aside this reinstatement and *remove* the Grievant, upon *proof* of the alleged infraction, irrespective of considerations of progressive discipline, under Article 8.02.

X. The Award

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Joint Exhibit No. 5d, at 14.

Robert Brookins

For all the foregoing reasons, the Grievance is hereby **Granted in Part and Denied in Part**

\1 Referred to collectively as the "Parties."

\2 The Arbitrator did not tour the RTU.

\3 Joint Exhibit No. 5d, at 14.

\4 Joint Exhibit No. 5c, at 2.

\5 Joint Exhibit No. 5d, at 14.

\6 Joint Exhibit 5e, at 1-5.

\7 Mr. McQuiniff's statement is in Joint Exhibit No. 5b.

\8 Joint Exhibit 5e, at 15 (emphasis added). Also, Ms. Beth Bennett examined Mr. McQuiniff and reported that he "had a scratch on the center of his throat, about 2.5 inches in length." *Id.* at 18.

\9 Joint Exhibit No. 5i-r.

\10 Joint exhibit 5-e, pp. 5-7. Ms. Christine Wiley stated she examined the Grievant on the day of the incident and found no bruises or other marks on the Grievant to indicate that she had been injured during the altercation.

\11 Joint Exhibit 5e, at 18. Mr. Scott Bolte, said the Grievant had a "slight red mark on the back of both upper arms. . . . Across her lower back, she had slightly reddened areas as if she had backed up against the table or desk." *Id.* Similarly, Ms. Beth Bennett, said the Grievant, "had to reddened, (sic) slightly, under each upper arm. On her lower

mid back she had to reddened areas, one on each side. In a small for back there was a straight red line." *Id.*

\12 On December 28, 1999, the Grievant accused Ms. Hill of harassing her in the form of disparate discipline. (Union Exhibit No. 1). On January 12, 2000, the Grievant again accused Ms. Hill of "favoritism" and of subjecting the Grievant to "discriminatory actions." (Union Exhibit No. 2). On June 26, 2000, the Grievant filed a grievance alleging, "Supervisor not following the contract and setting a standard for emergency vacation. Several other nurses have also taken advantage of this practice."(Joint Exhibit No. 4e, at 3).

\13 Union's Post Hearing Brief at 1.

\14 Joint Exhibit No. 4g.

\15 Joint Exhibit No. 4i.

\16 Joint Exhibit No. 4b, at 8.

\17 Joint Exhibit No. 4c. Observe also, that on October 6, 1999, the Grievant signed a document stating that she understood the rules prohibiting making personal copies. *See*, Joint Exhibit No. 4f. *See also*, Joint Exhibit No. 6.

\18 *See* Joint Exhibit No. 4d., Mr. Murray's Incident Report of this incident. The Report was drafted on September 9, 2000.

\19 Joint Exhibit No. 4j.

\20 Joint Exhibit No. 4b, at 2.

\21 *Id.* at 3.

\22 Joint Exhibit No. 4b, at 3.

\23 Joint Exhibit No. 4a, at 2.

\24 *Id.* at 4-5.

\25 Joint Exhibit No. 4c.

\26 Joint Exhibit No. 4h.

\27 Employer's Post-Hearing Brief, at 2.

\28 Joint Exhibit No. 4, at 6.

\29 Joint Exhibit No. 5.

\30 Joint Exhibit No. 4, at 3 and Joint Exhibit No. 5.

\31 Joint Exhibit No. 4, at 4.

\32 *Id.*

\33 Joint Exhibit No. 3, at 5.

\34 Joint Exhibit No. 3, at 8.

\35 Joint Exhibit No. 3, at 1.

\36 Joint Exhibit No. 4i, at 4-5.

\37 Joint Exhibit No. 5d, at 14.

\38 The Arbitrator is well aware of the practice of resolving issues of credibility against grievants who supposedly have more to gain from mendacity relative to witnesses who are not charged with misconduct. However, the mischief in this line of reasoning is that it wholly discounts the role of assigning the burden of persuasion in the first instance.

\39 Joint Exhibit No. 5g (emphasis added. Mr. McQuiniff also gave this specific account when testifying before the Undersigned in the arbitral hearing on April 30, 2002.

\40 Union Exhibit No. 7, at 1 (emphasis added).

\41 Joint Exhibit No. 5b, at 2 (emphasis added).

\42 *See also* Joint Exhibit No. 5b, at 2, where Mr. McQuiniff states "She took the skin off my neck. . . ."

\43 *Supra* notes 6-8 and accompanying text.

\44 Union Exhibit No. 7 (emphasis added).

\45 Joint Exhibit No. 5b, at 2.

\46 Joint Exhibit No. 5h.

\47 Joint Exhibit No. 5f.

\48 Joint Exhibit No. 5e, at 21.

\49 Joint Exhibit No. 5e, at 2.

\50 *Id.*

\51 Joint Exhibit No. 4i, at 4-5.

\52 Joint Exhibit No. 4b, at 3.

\53 Even though Mr. Abdurraqib actually removed the documents from CCI's premises, the Grievant afforded him access to those documents.

\54 This is not to say that both the Grievant and Mr. Abdurraqib could not have properly accessed the information through different channels, but that issue is irrelevant here.

\55 See Employer Exhibits No. 7a-t and 8.

\56 Because the charge arising out of the physical altercation has not been sustained, the timeliness of discipline related to that charge is irrelevant.

\57 Joint Exhibit No. 4h.

\58 Joint Exhibit No. 1, at 9.