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IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

#1646

In the Matter of

OHIO DEPARTMENT OF MENTAL HEALTH

and

DISTRICT 1199, SEIU

Grievance No.
23-13-020423-008-02-11
Removal of Leo D'Souza, M.D.

ARBITRATOR'S

OPINION AND AWARD

This Arbitration arises pursuant to Agreement between DISTRICT 1199, SEIU, the "Union," and the OHIO DEPARTMENT OF MENTAL HEALTH, "ODMH" or the "Employer," under which SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator, whose decision shall be final and binding.

Hearing was held on February 10 and 11, 2003 in Cincinnati, Ohio. The parties stipulated the matter was properly before the Arbitrator. The parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Post-hearing briefs were timely received from the Union and the Employer on February 23, 2003 and March 3, 2003, respectively.

APPEARANCES:

On behalf of the Union:

Mary Ann Hupp, Administrative Organizer, District 1199, SEIU, 1395 Dublin Road, Columbus, OH 43215

On behalf of the Employer:

Brian D. Walton, Labor Relations Officer, Ohio Department of Mental Health, 30 East Broad Street, Columbus, OH 43215

ISSUE

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

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

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ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed

in Section 4117.08 (C)(1)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this Agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

ARTICLE 6 - NON-DISCRIMINATION

6.01 Non Discrimination

Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining units on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, union affiliation and activity, handicap or sexual orientation, or discriminate in the application or interpretation of the provisions of thie Agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States or the State of Ohio. In addition, the Employer shall comply with all the requirements of the federal Americans with Disabilities Act and the regulations promulgated under that Act.

The Employer and Union hereby state a mutual commitment to equal employment opportunity, as regards job opportunities within the agencies covered by this Agreement.

6.02 Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed, or coerced in the exercise of rights granted by this Agreement.

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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:

A. Verbal Reprimand

B. Written Reprimand

C. A fine in an amount not to exceed five (5) days pay

D. Suspension

E. 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.

8.03 Pre-Discipline

Prior to the imposition of a suspension or fine of more than three (3) days, or a termination, the employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story. This opportunity shall be offered in accordance with the "Loudermill Decision" or any subsequent court decisions that shall impact on pre-discipline due process requirements.

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FACTS

Grievant, Leo D'Souza M.D., Ph.D., was employed as a staff psychiatrist at Summit Behavioral Healthcare ("SBH") in Cincinnati, a residential treatment facility of the Ohio Department of Mental Health. Grievant's employment was terminated effective April 11, 2002. At the time of his removal, he had approximately 8 years of service.

The Order of Removal letter dated April 9, 2002, states Grievant had:

> **...been found guilty of Dishonesty (theft in office), Patient Abuse (non-therapeutic intervention inconsistent with departmental training), and Failure**

of Good Behavior (engaging in conduct which violates the Ethics Act Chapter 12) in the following particulars to wit:

Incidents have been confirmed whereby you have clocked in at SBH as working in your position as a psychiatrist while appearing during those same hours at Probate Court representing yourself as an "independent psychiatrist" under contract and paid by the Court.

Incidents have been substantiated which reflect non-therapeutic interventions as a psychiatrist administering treatment to patients at SBH.

An investigation has revealed that you initiated the discharge of an SBH patient to a group home at which you have an affiliation.

This action is a violation of Hospital Policies HR-101, Disciplinary Action and ODMH Policy 00-47, Ethics Policy.

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In a March 7, 2002 Notice of Pre-Disciplinary Conference, the Employer informed Grievant of the particulars of the Dishonesty allegation:

...On or about March 6, 2002, Liz Banks, Chief Executive Officer, went to treatment team meeting on Unit D. When you did not appear for the meeting 9:15 a.m., Ms. Banks posed the question to staff and was informed that you were at Probate Court on Unit H. Ms. Banks then asked who the patient was and was advised that you were not with any patient from Summit Behavioral Healthcare (SBH). Upon hearing this information, Ms. Banks requested an investigation into this matter.

It is alleged that you are contracted as an "independent psychiatrist" for Probate Court and that you are scheduled to work in Probate Court every Tuesday morning and that you also fill-in for other doctors on days other than Tuesdays. Further, you are compensated $150 for each "initial consultation" and $150 for each "forced medication case" you handle. According to the Probate Court Deputy Clerk, you report between 8:45-9:00 a.m. every Tuesday morning and usually remain until noon.

During the month of February, 2002, you worked as an independent psychiatrist at Probate Court on [8] dates....

Based on the information obtained from Probate Court and payroll it appears that you have clocked-in as being on duty at SBH during the same time lines that you have appeared representing yourself as a contract consultant for Probate Court thereby receiving compensation from both sources....

In an April 2, 2002 Notice of Pre-Disciplinary Conference, the Employer informed Grievant of the particulars of the Patient Abuse and Failure of Good Behavior allegations:

<u>Issue I: Patient Abuse</u>:

On or about March 12, 2002,[1] you had an intervention with patient Jeff R on Unit BW. It is alleged that you "borrowed" a butter knife from one of the staff and took patient Jeff R to the conference room where you discussed performing his sex change operation.

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[1]The record is unclear whether this incident occurred on February 23, 2002 or March 12, 2002. The date is not a material issue, however.

On or about March 18, 2002, you were treatment team leader on Unit D. Patient Michele K discussed a shoulder injury to the team[sic] which she felt required an orthopaedic surgeon. During this interview Michele K stated that you were not a real doctor and started to escalate. It is alleged that both you and the patient became engaged in a loud conversation during which you "mimicked" the gestures that this patient uses as a form of sign language.

<u>Issue II: Failure of Good Behavior</u>:

During March, 2002, patient Mary E's case was reviewed for placement options. You made a recommendation of Forestview Group Home, located at 610 Forest Avenue in Cincinnati, to the patient. After a tour of this facility, the patient made a decision to placed in Forestview Group Home. This is the only location that the patient toured. Forestview Group Home is not a mental health certified home. It is alleged that you have an interest in Forestview Group Home as an attending physician on their staff....

The Union filed a grievance dated April 11, 2002; the Employer date-stamped it as received April 22, 2002. The grievance stated Grievant was "Terminated for unjust cause. Discriminatory practice in retaliation for previous grievance procedures."

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POSITION OF THE EMPLOYER

Dishonesty

On each occasion in February and early March 2002 for which Grievant received compensation for serving as Independent Psychiatrist at the Probate Court, he was also clocked in at SBH. Grievant contended his supervisor, Dr. Ostrowski, was aware of the situation and had never given Grievant instructions regarding how to handle it. While Dr. Ostrowski may have been aware Grievant was serving as the Independent Psychiatrist at the Probate Court, the Union did not present any evidence Dr. Ostrowski knew Grievant worked at the Probate Court while on duty at SBH. It may be true that Grievant was not given explicit instructions from Dr. Ostrowski. But Grievant is a very intelligent man; yet he would like us to believe he was not able to understand the simple concept of clocking in and being on duty at SBH. Surely he knew that when he clocked in at SBH he was getting paid for that time.

SBH Code of Conduct states, "Employees may not retain any payments received from other sources while on State time." At the arbitration hearing, Grievant admitted he was familiar with the SBH Code of Conduct and had received training on it at least twice. The most recent training had been in August 2001.

Grievant claims he asked two staffers to notify the Payroll Department that he was in Court, and that he assumed exception reports were written up for his Court time. The two staffers, however, were not responsible for timekeeping, and indeed, no exception reports were on file for the days in question.

Grievant's claim that he was using flextime is flawed. Flextime is a way to make up for time when you are not on the clock. Had Grievant not clocked in before going to Court, and instead clocked in when he was done with Court, he could have worked enough hours at SBH to make up for his Court time. Grievant stated he had hundreds of hours of unused vacation and personal leave, as if this were reason to just ignore the issue of accounting for his Court time. Grievant does not understand the Employer uses time clocks to give an accurate account of the amount of time the staff spends on duty. In this era of budget cuts and taxpayer accountability, Grievant's behavior was irresponsible and unethical. Even the Union's witness, Dr. Johansen, testified a practice such as this would be considered "double dipping."

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Patient Abuse

Jeff

On February 23, 2002, patient Jeff asked Grievant to perform a sex change operation on him. Grievant borrowed a butter knife from a nurse and walked away with Jeff. Approximately 15 minutes later, Grievant returned the knife to the nurse, saying Jeff had changed his mind. Dr. Senser, the psychiatrist assigned to Jeff's unit, testified this incident could have been very damaging to Jeff.

Grievant claims he took the knife from the nurse so Jeff wouldn't take the knife and hurt himself or others. He claims he walked Jeff to the conference room and had a discussion. Jeff wanted a chicken sandwich, and Grievant allowed to call his mother to ask her to bring him one. Once this occurred, Jeff was calm and Grievant felt it was safe to return the knife to the nurse.

Grievant's explanation of the incident is incredible and self-serving. Grievant would have us believe he felt it was necessary to take the knife away from the nurse even though she was in the nurses' station, which was two walls and two doors away from Jeff. Grievant admitted Jeff had no history of self-abuse. Moreover, Grievant would have us believe he felt the knife was safer with him while he went to the conference room alone with

Jeff, than it was with the two nurses in the nurses' station. Grievant's story is illogical at best.

Michele

At a treatment team meeting, Michele was upset from the start of the meeting. She believed she had several physical ailments and wanted to see a physician. Grievant explained he was her physician. Michele responded she wanted to see a "real doctor." This comment enraged Grievant. He raised his voice, causing Michele's behavior to escalate. He and Michele went back and forth interrupting each other. Grievant told her if she didn't stop interrupting him, she wouldn't "be leaving here." Michele began to use hand gestures, which she believed was sign language. Grievant responded by using similar hand gestures in a mocking fashion, which upset Michele more.

Grievant maintains he was not abusive or inappropriate with Michele. He testified he used a stern tone with her, but did not raise his voice. He used the hand gestures to demonstrate how difficult it was for him to understand what she was trying to say to him.

Again, Grievant's testimony is self-serving and embellished. None of the three staffers at the meeting believed Michele had been abusive to Grievant; only Grievant claimed she had been abusive. None of the

witnesses believed Grievant was using hand gestures for demonstration purposes; rather, they felt Grievant was mocking Michele. Grievant, as a psychiatrist, was the leader of the team of caregivers. He was expected to be a role model for other staff with regard to patient care.

Failure of Good Behavior

This charge stems from an incident during a treatment team meeting in March 2002. The team was meeting to discuss placement options for a patient, Mary, who was soon to be discharged. Grievant recommended the Forestview Group Home. Mary visited only that Home and selected it. Grievant's recommendation of that Home violated the SBH Code of Conduct which states in pertinent part, "Employees will not engage in any transaction with any business entity which has a financial interest that might conflict with the discharge of official duties." Grievant, at the time he made the recommendation of the Home, was a consulting psychiatrist at the Home. Grievant maintains he had minimal ties to the Home, and was not compensated by it for services rendered.

Alleged Discrimination

The Union attempted to establish the Grievant was discriminated against based upon his nationality, ethnic background, and/or the fact he was trained outside the United States. This is an affirmative defense that

requires evidence. The Union did not provide any material evidence to support this allegation. Moreover, the Union did not provide any evidence to show other SBH psychiatrists have committed offenses similar to Grievant without being disciplined.

Grievant has shown no remorse. Instead, he has offered denials. Because of this, the Employer does not believe Grievant is salvageable. When all of Grievant's offenses are viewed together, it is clear that removal, not progressive discipline, is the appropriate response.

POSITION OF THE UNION

Alleged Dishonesty

The Employer did not provide proof Grievant received pay for the same time periods from both the State for being clocked in at SBH, and from the Court. No paystubs or printouts from the Court were presented.

While Ms. Banks testified that until March 6, 2002, she was unaware Grievant had been presenting to the Court as an independent consultant, he had been doing so for over two years. Moreover, Grievant's supervisor, Dr. Ostrowski knew of Grievant's court attendance.

Ms. Banks testified treatment team members would be wasting time if their team leader, the psychiatrist, was not present at a meeting in a timely

fashion. She admitted, however, that SBH does not have any policy or procedure for a psychiatrist to report his absence or late arrival to a team meeting. Ms. Banks also admitted an extremely lax practice enjoyed by SBH staff, i.e., that the only time SBH employees are required to clock out is when they leave for the day.

Dr. Senser and Dr. Johannsen explained how they would report an absence from a treatment team meeting. Both described exactly the method Grievant used to report his own absences. Neither Dr. Senser nor Dr. Johannsen concluded a treatment team meeting in the absence of the psychiatrist as team leader would be a waste of time.

Police Chief Gary Sitton testified the Deputy Court Clerk told him Grievant received $150 for each initial consultation and for each forced medication case. The Union did not provide a signed statement, however, from the Deputy Court Clerk. The lack of a signed statement leads only to conjecture, as there is no evidence of Grievant's intent to commit fraud. Fraud requires intent. If indeed what Grievant did should be considered wrong, it was not done with any intent to deliberately deceive. Grievant gladly would have made restitution if that had been an option.

Trooper Tracy Callahan testified the Hamilton County Grand Jury did not issue an indictment against Grievant, and the case is closed.

Accordingly, the Court's payroll records should have been available for the arbitration. But they were not, as Trooper Callahan testified the records were sealed. The Union contends the Employer did not diligently seek the Court records because they would have supported Grievant's belief he was acting under the paradigm of flex time.

Grievant's time punches for the period in question shows he worked well over 80 hours in a two-week pay period. For example, he was clocked in for 96.90 hours for the March 6 period. These 16.90 hours exceed the three to six hours per week he spent at the Court. He gave his time to the State, rather than knowingly took time from the State.

ODMH Guidelines for Disciplinary Action state in pertinent part:

> **Supervisors are responsible for the appropriate and consistent application of the work rules, policies, procedures, and directives of the Department and/or laws of the State of Ohio. Supervisors also are responsible for initiating the request for disciplinary action as soon as they are aware of a potential situation.**

Grievant's supervisor, Dr. Ostrowski, was aware of Grievant's Court relationship even prior to Grievant accepting the position. Rather than discourage it due to the appearance of impropriety, Dr. Ostrowski encouraged it as a source for referrals to SBH.

Grievant testified he had no knowledge of the impropriety of any of his interactions with the Court. He also denied he received any training regarding this issue. No documents were admitted into evidence to dispute this testimony.

Alleged Patient Abuse

Jeff

Grievant testified he had the patient's safety at heart. He took the butter knife to make it inaccessible to Jeff. The knife was visible; Jeff could have gotten the knife by jumping over a half-door partition.

Barbara Adams, RN, testified Grievant's care helped Jeff through his psychosis. Both Jeff and his family wished for Grievant to provide continued psychiatric care to Jeff. It would seem odd that an interaction of the allegedly inappropriate proportion as this would justify the request of the patient and his family to continue with Grievant as Jeff's treating psychiatrist. Though Dr. Senser testified Jeff's family is "dysfunctional," family support is still vital in all areas of the treatment plans for mentally ill individuals.

Dr. Senser testified he had never seen Grievant behave unprofessionally or in an abusive manner. He did, however, express "outrage" regarding his assessment of Grievant's interaction with Jeff.

Kelly Wright, RN, testified Grievant had always behaved professionally, and had always been therapeutic with Jeff.

Michele

Ray Crosby, Ph.D, testified Grievant and the patient had a loud interaction at the treatment team meeting on March 18, 2002. Dr. Crosby also observed Grievant making hand gestures similar to sign language. Dr. Crosby admitted, however, that he does not hold any formal licensure in sign language. Accordingly, he does not have the needed credentials to objectively state Grievant's hand motions mocked the patient.

James Verbryke, LSW, testified Michele became upset with Grievant's hand gestures, and Grievant was bothered by Michele's unwillingness to listen to his input. Again, this witness has no formal education in sign language.

Randy Marion, RN, wrote in a statement that there was "no inappropriate interaction" from Grievant toward Michele. Mr. Marion further noted that Grievant "did raise his voice slightly, to gain the patient's attention, but was in no means an abusive/inappropriate intervention." Mr. Marion's statement is clear. No abusive interaction took place on March 18 between Grievant and Michele.

Carol Hesketh, COTA (Certified Occupational Therapy Assistant), wrote in a statement that Grievant "mimicked" Michele's "sign language." This statement lacks in credibility based on the fact there is no evidence Ms. Hesketh holds any special qualifications in either sign language or psychiatry.

Brigit Lanktree, a student intern, wrote in a statement that Grievant was "agitated" in his interactions with Michele. But Ms. Lanktree did not describe any of Grievant's behavior to warrant her observation. Ms. Lanktree did indicate Grievant set limits with Michele when he told her he was " a real doctor." There is no evidence that setting limits on inappropriate behavior is not a therapeutic treatment approach, let alone "abusive" in nature. Ms. Lanktree admitted in her testimony that to "mimic" could reasonably be a perception observed by one individual one way, while another individual with less experience might perceive it in a completely different way. This substantiates that Grievant could have been reinforcing reality to Michele when he made hand gestures.

It is sometimes necessary for a clinician to raise his voice to redirect a mentally ill individual who is out of touch with reality. A mentally ill individual who lacks touch with reality sometimes presents with behaviors to indicate she is upset. This can lead to loud interactions between patients

and their care providers. There is nothing in the definition of abuse to prohibit this practice. Nothing improper has occurred unless a patient is treated in a demeaning manner, which was not the case here.

Grievant explained he had told Michele he did not understand some of her "sign language," and that if she is trying to abuse the team members, that is not acceptable. Grievant denied using hand gestures to "mimic" Michele's gestures. Rather, he used his hands to reinforce to her he did not understand what her gestures meant.

Alleged Failure of Good Behavior

Gerel Payne, President of Forestview Group Home, wrote a letter stating:

> Dr. D'Souza has never been "employed" by our facility, nor does he have any interest in our facility. Dr. D'Souza acts as a consulting psychiatrist to the Forestview. I reiterate, he receives no compensation from the facility.

Grievant admits only to visiting the facility no more than once a month, and receiving sporadic compensation from Medicaid of $15.00 per patient. This hardly seems indicative of an amount of money that would justify a psychiatrist knowingly placing himself in jeopardy of an ethics violation.

There is no ethical breach in recommending a patient tour a facility that may be of benefit to the patient. Mr. Verbryke informed Mary there were

other options available to her. Mary made a decision based on the information provided to her. This was reasoned, informed consent, which is a desired goal in the care of the mentally ill.

Discrimination

There is no evidence Dr. Ostrowski has been disciplined. The Employer has ignored the vicarious liability issues surrounding this case. A Caucasian psychiatrist (Dr. Ostrowski) has not been disciplined, while a psychiatrist of color (Grievant was born in India) has been. Where is the justice in this; where is the Employer's obligation to affirmative action?

Kimberly Whatley, RN at SBH, and a Union delegate, testified there are a number of grievances pending against SBH, mostly from employees who are people of color, alleging disparate treatment.

Ms. Banks testified she visited Grievant's March 6, 2002 treatment team meeting due to the Hamilton County Mental Health Board's direction to expedite the discharge process of patients. Her visit to Grievant's treatment team meeting was the only treatment team meeting she has made in her entire career at SBH. This is odd, given that Grievant was not the only psychiatrist discharging patients.

Sharra Harper, RN, testified she had been instructed by SBH management to monitor Grievant. She wrote in a statement she never

witnessed unprofessional behavior by Grievant. She was not asked to monitor any other doctors; this is indicative of disparate treatment.

Article 6.02 forbids retaliation against any member who exercises contractual rights. No problems regarding Grievant's clinical performance were identified until November 30, 2001, when he filed a grievance regarding denial of his bid for assignment to Unit D. Grievant won that grievance and was granted the Unit D assignment, based upon his seniority and contractual rights.

Summary of Union's Position

SBH stacked charges against Grievant in its mission to terminate his career there. Grievant was given no chance to correct any perceived impropriety. In violation of Article 8.02, the Employer has failed to provide the proof necessary to warrant the dismissal of Grievant. Grievant had no previous discipline in his file. Grievant's performance evaluations rated him as excellent to superior. Grievant performed consistently more than was expected of him. It was stated there was concern Grievant might "burn out" from giving so much to SBH. This hardly depicts a swindler acting with the intent to defraud. This surely is not an example of progressive discipline as depicted in the Agreement, ODMH policy, and SBH policy.

The Union requests all charges be dropped. Further, Grievant should be reimbursed his lost wages, all leave hours that would have accrued, and any insurance and/or medical expenses that would have been covered by his State medical insurance policy. Grievant should be promptly reinstated to his previous position, with no break in seniority. Moreover, the negative entry made by SBH into the National Physician Data Bank should be immediately corrected. Grievant should be allowed to enjoy his career at SBH without fear of further harassment or retaliation. He should be made whole in every way.

OPINION

This is a serious matter. A removal with no prior active discipline is not commonplace. The Employer has charged Grievant with four separate charges which must be examined both individually and as a group.

The Employer, of course, has the burden of proof in a just cause termination. Here, because there are multiple charges, the Employer must prove Grievant committed some or all of the misconduct of which he is accused, and that removal is appropriate for the charges that are proven. As the Union contends Grievant was discriminated against, the Union has assumed that burden of proof.

Proof of Misconduct

Probate Court

The parties stipulated that in the period from February 12, 2002 through March 6, 2002, Grievant served as the independent psychiatrist for the Hamilton County Probate Court on 9 separate days. In other words, on approximately 9 our of 17 workdays, he spent approximately 1 or more hours in Court, providing non-SBH services.[2]

The Union accurately points out the Employer did not provide paystubs from the Court. The Union contends the Employer did not diligently seek the Court records because they would have supported Grievant's belief he was acting under the paradigm of flex time. The Union has assembled a thorough defense. By identifying a hole in the evidence, it attempts to chip away at the Employer's proof. The Arbitrator finds, however, this hole in the evidence does not lead to the conclusion Grievant believed he was using flex time.

It is undisputed Grievant spent parts of those 8 or 9 days working as the independent psychiatrist at the Court. It also is undisputed Grievant received $150 for each initial consultation and for each forced medication case. The only thing that would be proved by the Court paystubs, then, is

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[2]Despite the parties' stipulation, Grievant testified he had no non-SBH cases on March 6. Whether he did or not does not affect the analysis of his conduct.

how many initial consultations and forced medication cases Grievant testified to on those 8 or 9 days.

Even if Grievant is given the benefit of the doubt, i.e., that he testified to only 1 case on each of the 8 or 9 days, that would still be in direct conflict with SBH and ODMH policy. SBH Policy HR-126, the Code of Conduct, provides in pertinent part:

> Employees may not retain any payments received from other sources while on "State Time."

ODMH Policy 00-47, the Ethics Policy, provides in pertinent part:

> ODMH emphasizes the importance, too[,] of avoiding the appearance of impropriety. ODMH employees, as [S]tate of Ohio employees, hold a position of trust and are expected to maintain the highest of ethical standards.

The content of these policies is not herein challenged. Moreover, though Grievant testified upon direct examination he had not been trained on these policies, upon cross-examination, he conceded he had.

There is no dispute in the record that Grievant did not clock out when he went to Court to serve as an independent psychiatrist. In other words, he was on "State time" when he provided non-State services to the Court. Grievant did testify he notified two staffers to notify the Payroll Department he was in Court, and he assumed exception reports were written up for his

Court time.[3] But when Grievant was asked on direct examination:

> **Did you report your Probate Court time to Ms. Bunthoff and Ms. Wamsley?**

he responded:

> **Yes, though I didn't have to tell them again and again.**

And he elaborated on cross-examination:

> **I told her [Ms. Bunthoff] a couple times. She said she'd tell whoever the timekeeper is.**

Thus, Grievant, by his own testimony, indicates he did not report his Court time on a consistent basis. Moreover, as the Employer has pointed out, these two staffers were not responsible for timekeeping, and indeed, no exception reports for Grievant's Court time were on file. Finally, though both staffers were called to testify by the Employer, both parties chose not to ask them if Grievant had ever asked them to file exception reports for his Court time. The Employer has established Grievant did not clock out; thus, it is the Union's burden to establish Grievant used a back-up method such as requesting exception reports to be filed. On this record, it was not convincingly established Grievant did so.

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[3]"Court time" herein refers to time Grievant spent in the Hamilton County Probate Court as the independent psychiatrist on non-SBH matters. Grievant also had many occasions to testify at the Hamilton County Probate Court on SBH matters; his time spent in Court on SBH matters is not in any way in dispute or the subject of this grievance.

For Grievant's Court time to be in the context of flex time, Grievant would have had to be either clocked-out or exception-reported-out for his Court time. He definitely was not clocked-out, and as stated above, record evidence that he believed he was exception-reported-out was less than convincing. Accordingly, flex time is not at all consistent with this record.

The Union contends SBH had a lax practice regarding clocking out which would excuse Grievant's failure to clock out. While it is true Ms. Banks testified employees do not need to clock out for their 30-minute lunch periods, she also explained payroll computations account for the daily unpaid 30-minute lunch period. She also testified that ordinarily, employees are required to clock out if they expect to be gone longer than 30 minutes for lunch and when they leave for the day. Such testimony falls short of supporting the Union's contention that clocking out practice at SBH was so lax as to excuse Grievant from having to clock out for his Court time.

The Union also contends Grievant had the permission of his supervisor, Dr. Ostrowski, to do what he did at the Court. The Union is absolutely correct it was common knowledge Grievant served as the independent psychiatrist at the Court. Indeed, it was a compliment to SBH that it had a staff psychiatrist chosen by the Court to be its independent psychiatrist. There is no question Dr. Ostrowski knew Grievant served at the Court on non-

SBH matters.

While the Union established Dr. Ostrowski knew Grievant served as the independent psychiatrist to the Court, it is not established in the record Dr. Ostrowski knew Grievant was clocked in at SBH while he was testifying at the Court on non-SBH matters. The Union correctly points out Dr. Ostrowski, as Grievant's supervisor, was responsible for:

> the appropriate and consistent application of the work rules, policies, procedures, and directives of the Department and/or laws of the State of Ohio. Supervisors also are responsible for initiating the request for disciplinary action as soon as they are aware of a potential situation.

Dr. Ostrowski's knowledge of Grievant's failure to clock out is really the "$64,000 question" in this arbitration. The Arbitrator has no way of knowing if Dr. Ostrowski knew. This is because neither party called him as a witness, though he was still employed at SBH on the date of the arbitration hearing. Indeed, given that it was apparent at the hearing that Dr. Ostrowski's testimony could be key, the Arbitrator asked the parties why he did not testify. Both parties chose not to answer.

As discussed above, and as is well known, the Employer has the burden of proof to establish Grievant committed the misconduct of which he was accused. On this record, the Employer has proved Grievant did not

clock out when he went to Court on non-SBH matters. If the Union wants to show as either a mitigating factor or as a justification that Grievant's supervisor condoned this conduct, then the Union must assume that burden of proof. The only testimony on this point was from Grievant, and it did not address specifically whether Dr. Ostrowski knew Grievant was not clocking out:

> **Q. Did Dr. Ostrowski give you any directions about the Probate Court?**
>
> **A. Dr. Ostrowski did not give me any directions. We did not have a designated timekeeper to deduct the hours. I was at Probate Court for 1-1/2 hours usually. I have never been in Probate Court beyond 11am. Dr. Ostrowski never told me to clock out before going to Probate Court.**

Accepting this as true, that Dr. Ostrowski did not instruct Grievant to clock out, does not answer the question whether Dr. Ostrowski knew Grievant made it a practice not to clock out. To condone a practice, one must have some knowledge of the practice. It is not established on this record Dr. Ostrowski knew Grievant did not clock out. Should Dr. Ostrowski, as Grievant's supervisor, have known Grievant was not clocking out? Yes. But this is not Dr. Ostrowski's arbitration, it is Grievant's. In the absence of proof that Dr. Ostrowski condoned Grievant's practice of serving as the

independent psychiatrist for the Court while still clocked in at SBH, the responsibility for the practice remains with Grievant.

Grievant claims he was unaware his failure to clock out was a problem. The Union elaborates Grievant had no intent to defraud. Giving Grievant the benefit of the doubt, it is still difficult, if not impossible, for the Arbitrator to excuse Grievant's behavior. Grievant is an intelligent, highly-educated man. Receiving compensation from one entity while being on the clock for another entity -- double-dipping -- is just common-sense wrong. It strains the imagination to view Grievant's practice as acceptable or excusable.

It was a violation of SBH Policy HR-126, the Code of Conduct, for Grievant to double-dip. Moreover, his double-dipping also is inconsistent with ODMH Policy 00-47, the Ethics Policy, which requires State employees to maintain the highest ethical standards and to avoid even the appearance of impropriety.[4]

The Union contends because Grievant often worked over 80 hours in a 2-week pay period, he should be excused for not clocking out for his non-

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[4]The Union contends it could not have been a conflict of interest for Grievant to serve on non-SBH matters at the Court because Dr. Ostrowski condoned it even before Grievant started serving as the Court's independent psychiatrist. Indeed, the record indicates Dr. Ostrowski felt it was a plus for Grievant to so serve, as he could be on the lookout for referrals to SBH. Grievant's service as the Court's independent psychiatrist is not the point, however. Grievant was not charged with a conflict of interest. Rather, he was charged with Dishonesty/Theft in Office – i.e., double-dipping.

SBH Court hours.[5] If Grievant had been working in the private sector, perhaps some sort of after-the-fact arrangement could have ensued. Grievant, however, was working for the State of Ohio. The Employer accurately points out we live in an era of taxpayer accountability. While there is no question from the record Grievant was a highly-dedicated employee who worked very hard, neither the Employer nor the Arbitrator have the discretion to ignore the unacceptability of Grievant's repeated failure to clock out when he provided non-SBH services to the Court.[6]

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[5]Pursuant to Article 24.02 of the Agreement, psychiatrists are not eligible for overtime pay or compensatory time.

[6]Grievant's approach to timekeeping, as well as his dedication to his work, is demonstrated by the following testimony on cross-examination:

> Q. You don't deny you were clocked in at SBH when you worked at the Court as the independent psychiatrist?
>
> A. I was on grounds for 12 hours. [The Court is on SBH grounds.] In the 8-year span I worked, I worked at least 500 extra hours each year. I don't owe anything to the State. My concern was only to the patients. The duty of a physician is a tremendous burden. I respect my duty. I knew all along I had more than enough time.
>
> Q. You did receive payment for your independent psychiatrist work at the Court?
>
> A. Yes.
>
> Q. How is this not double-dipping?
>
> A. I'm paid for 80 hours. Which 80 hours do you want to pay?

Jeff

Grievant was charged with Patient Abuse toward Jeff, specifically a non-therapeutic intervention inconsistent with Departmental training. The following is undisputed: Grievant was walking through Jeff's unit on February 23 or March 12, 2002. Grievant had formerly been Jeff's psychiatrist, but was assigned to a different unit by this time. Jeff, an 18-year-old, had a fixation about his gender identity and often had told Grievant and others that he wanted a sex change operation. As Grievant was walking by on the day in question, Jeff said to Grievant something to the effect of, "How about my sex change operation?"

According to the Employer, the Grievant, in response to Jeff's remark, borrowed a butter knife from Donna Bailey, RN, who was in the unit eating lunch with Kelly Wright, RN. Grievant then escorted Jeff to a nearby conference room, and laid him out on the conference table. At that point, Jeff said to Grievant something to the effect of, "I've changed my mind." SBH became aware of the incident because Jeff related it to various staff members.

According to Grievant, as Grievant said, "How about my sex change operation?" Grievant noticed Ms. Bailey was nearby buttering a piece of bread with a plastic knife. Grievant felt Jeff might grab the knife and harm

himself or others, so Grievant took the knife from Ms. Bailey and put it in his pocket. He then walked down the hall with Grievant. Jeff asked permission to call his mother to ask her to bring him a chicken sandwich from Penn Station, his favorite meal. Grievant let Jeff make the phone call. "And that was the whole incident," according to Grievant.

Grievant conceded Jeff had no history of harming himself or others. Grievant also conceded there were no other occasions when he confiscated a knife in a unit to keep it away from Jeff or any other patients. Moreover, there was an approximately 5-foot partition between Jeff and Ms. Bailey. Grievant testified he perceived a danger that day, however. Grievant was asked on cross-examination what he eventually did with the knife:

> Q. You gave the knife back to Donna [Bailey]?
>
> A. Yes.
>
> Q. And left the nurses alone with Jeff?
>
> A. She [Ms. Bailey] told me she would hide it.

Ms. Bailey was not called as a witness. The Union presented a non-percipient witness, a nurse, who testified Grievant had always been therapeutic with Jeff.

Ms. Wright testified she was eating lunch on the day in question with Ms. Bailey. Grievant asked Ms. Bailey for her knife saying he needed it to "do

a sex change operation" on Jeff. Grievant walked down the hall with Jeff toward the conference room. When they returned after about 10 minutes, Grievant returned the knife to Ms. Bailey and said that Jeff had changed his mind about the operation.[7]

Dr. Kenneth Senser, Jeff's psychiatrist at SBH after Grievant transferred to a different unit (and Jeff's current psychiatrist at SBH), first heard about the incident from Ms. Wright. Dr. Senser had Jeff's treatment team "question him in a non-leading way." Jeff told the treatment team the incident occurred as described herein by the Employer, but that Grievant "couldn't do the operation because the knife was too dull." Dr. Senser testified he never personally saw Grievant behave unprofessionally or in an abusive manner. He also testified, however, that on a clinical basis, he was convinced the incident took place as described by Ms. Wright and Jeff. He testified he was "enraged" by the incident. "It would have been better to beat Jeff with a baseball bat," he testified, "100 out of 100 psychiatrists would be astounded by what happened."[8]

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[7]Ms. Wright was asked by Campus Police to write a statement regarding the incident. In the statement dated March 14, 2002, she related the incident as set out above by her testimony. She also wrote in her statement, "[Grievant] has never been mean or inappropriate in any way toward Jeff. He has always been therapeutic with Jeff." Ms. Wright's written statement regarding Grievant's consistently appropriate therapeutic interactions with Jeff is inconsistent with her retelling of the butter knife incident. The record did not clarify this inconsistency.

[8]The record does indicate Jeff's gender fixation has receded since the incident, that Jeff and his (continued...)

The only witness who denied the butter knife incident occurred as herein described by the Employer was Grievant. Frankly, his version of his interchange with Jeff that day lacks credibility. Taking the knife from Ms. Bailey though Grievant was on the other side of a partition, never having confiscated a knife before, walking alone with Jeff with the knife in Grievant's pocket, discussing a chicken sandwich with Jeff, then giving the knife back to Ms. Bailey, just doesn't add up. Dr. Senser's and Ms. Wright's testimony regarding the butter knife incident, though remarkable, fits the corroborating circumstances far better than Grievant's version. Remarkable as the Employer's version of the incident is, the Arbitrator finds it to be what occurred.

Michele

Grievant also was charged with Patient Abuse toward Michele, again a non-therapeutic intervention inconsistent with Departmental training. There are only 2 significant disputes regarding Grievant's interaction with Michele at a treatment team meeting on March 18, 2002: 1) whether Grievant inappropriately raised his voice to Michele; and 2) whether Grievant inappropriately mimicked Michele's hand gestures. Grievant testified, "I only

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[8](...continued)
parents liked having Grievant as Jeff's doctor, and wished the relationship could have continued. Ms. Wright testified, however, that Jeff's improvement is due to medication and therapy, and Dr. Senser testified Jeff's family has a history of dysfunction.

raised my voice by .5 decibels in the meeting," and "I moved my hands slightly up and down and told her I cannot understand her." Randy Marion, RN, who was present at the meeting, but did not testify at the arbitration, wrote in a statement that Grievant did not interact inappropriately with Michele, and that Grievant only "raise[d] his voice slightly, to gain the patient's attention" which "was in no means an abusive/inappropriate intervention."

Four others present at the meeting testified Grievant became quite loud with Michele after she questioned his medical credentials, and that he moved his hands in a way that mocked Michele's hand gestures, which she thought were sign language. The Union's main criticism of these testimonies is these individuals were not trained in sign language and therefore were not qualified to assess whether Grievant's hand gestures were mocking Michele.

The Arbitrator finds one need not be trained in sign language to be able to assess whether Grievant was mimicking Michele's hand gestures in a mocking way. On balance, the record establishes Grievant did engage in such behavior, and did inappropriately raise his voice. It may very well be Grievant did not intend his voice level or hand gestures to be abusive; the Arbitrator credits Grievant's testimony that he was trying to bring Michele

back to reality. His means of doing so, however, were non-normative and unacceptable to the majority of the treatment team. Though Grievant, a psychiatrist, was the treatment team leader, most of the other team members had sufficient professional training to be able to assess appropriate interaction between a care-giver and a patient.

Forestview Group Home

Grievant is charged with Failure of Good Behavior; it is alleged he referred a patient upon discharge from SBH to an outside facility with which he was affiliated . SBH Policy HR-126, the Code of Conduct, provides in pertinent part:

> **SBH and its staff will, in their relationships with other providers, educational institutions and payers, refrain from conflicts of interest (e.g., self-referral, exploitation of trainees for primary service activities, etc.).**

It is undisputed Grievant recommended Forestview Group Home to his patient, Mary. The Union contends this was not a self-referral because Grievant was not employed at the Home. In support of this, the Union presented a letter dated April 18, 2002 from Mr. Payne, President of the Home. The letter provides in pertinent part:

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To Whom It May Concern:

> **In response to the allegation that [Grievant] is employed by the Forestview or in any way receives monetary or any other type of compensation, I say "bunk"....[Grievant] has never been "employed" by our facility, nor does he have any interest in our facility. [Grievant] acts as a consulting psychiatrist to the Forestview. I reiterate, he receives no compensation from the facility....**

Though Mr. Payne did not testify at the arbitration, his letter is formidable. The letter does, however, concede Grievant is a "consulting psychiatrist" to the Home. The letter is further undercut by Grievant's own testimony. Grievant explained that while he was not Mary's treating physician at the Home, he goes to the Home once a month to "consult on medications." He further testified, "These are Medicare patients. Eventually, I will get about $12 per patient."

The Arbitrator has no doubt about Grievant's dedication to his work. Specifically, with regard to his work at the Home, the small payments he receives from Medicare seriously undervalue his work. These small payments are, however, evidence of a professional affiliation, albeit a minor one, between Grievant and the Home. Accordingly, recommending the Home to Mary was a self-referral, and therefore a conflict of interest.

Alleged Discrimination

The Union alleges two types of discrimination against Grievant: 1) disparate treatment based on his being a person of color; and 2) disparate treatment based on retaliation against Grievant for having filed a grievance in November 2001 regarding a transfer bid. Discrimination in this context is an affirmative defense; as such, the Union bears the burden of proof.

Discrimination Based on Color

The Union's contention Grievant was discriminated on the basis of color is based on two record facts: 1) Dr. Ostrowski, Grievant's Caucasian supervisor, is still employed at SBH; and 2) there are a number of pending grievance between the parties, many brought by people of color alleging disparate treatment.

There is no question Grievant feels he was treated differently at SBH on the basis of his color. In the context of Grievant not initially winning his bid transfer (see discussion below regarding retaliation), he testified:

> **Dr. Ostrowski told me, "I'm giving this unit to Dr. Fedders." But Dr. Fedders is 3 years junior to me. But I am a foreign graduate and I have a different skin color.**

In the same context, he also testified:

> **I'm not a white lily. The color of my skin does matter quite a bit.**

The only other record evidence regarding alleged discrimination against Grievant on the basis of his color was presented by Ms. Whatley, a nurse at SBH and a Union delegate. She testified on direct examination there are a number of grievances pending against SBH:

> **Q. As a delegate, have you seen a pattern of disparate treatment?**
>
> **A. Yes. Members often cite that as an issue in their grievances.**

On cross-examination, she testified:

> **Q. Isn't it safe to say that 3/4 of the grievances, someone's made that allegation [disparate treatment]?**
>
> **A. Yes.**
>
> **Q. In the past 2 years since I have been covering SBH, in how many cases has disparate treatment been proved in arbitration?**
>
> **A. Some of them didn't go as far as arbitration. They were settled.**
>
> **Q. The claim is made a lot. And it hasn't always been successful, has it?**
>
> **A. It's hard to prove. And the findings aren't always in favor of the member. But the member does still feel there's been some type of disparate treatment.**

Grievant's perceptions, while honestly felt, are not sufficient evidence to establish he was treated differently by SBH on the basis of his color. Nor is the fact there are pending grievances proof of discrimination. The method to prove discriminatory treatment was established by the U.S. Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973): 1) the Union must show Grievant is a member of a protected class who suffered a negative employment action; 2) the Employer must come forward with evidence of a legitimate, nondiscriminatory reason for its actions; and 3) the Union must prove the Employer's articulated reason is a pretext for discrimination.

Here: 1) the Union has shown Grievant is a person of color who was removed from employment; 2) the Employer has come forward with evidence that it removed Grievant due to the 4 incidents discussed above (Probate Court double-dipping, inappropriate behavior with both Jeff and Michele, and self-referral to Forestview); but 3) the Union cannot prove on this record that the Employer's articulated reasons were a pretext for discrimination.

To prove pretext takes more than showing Grievant's subjective perceptions or counting how many grievances are pending for alleged discrimination. Proof is needed that a similarly situated non-minority was treated better than Grievant. The record reflects that no other psychiatrist at SBH has engaged in conduct similar to Grievant's. Accordingly, it is

impossible for the Union to prove a similarly situated non-minority was treated better than Grievant.

Retaliation

The Union contends Grievant was retaliated against ever since he filed a grievance on November 30, 2001. That grievance involved a denial of Grievant's bid to transfer to another unit. The record indicates Grievant was successful with that grievance, and was transferred to the unit of his choice.

The Union put forth evidence that Sharra Harper, RN, was instructed by SBH management to "monitor" Grievant. She was not asked to monitor any other SBH employees. Ms. Harper observed no unprofessional behavior by Grievant.

As further evidence of retaliation, the Union contends Ms. Banks visited only Grievant's treatment team meeting, no others. Her testimony, however, was, "I don't attend treatment team meetings on a regular basis."

Thus, the only record evidence of retaliation is Ms. Harper being instructed to monitor Grievant. Nothing untoward came of this monitoring. Accordingly, on this record, retaliation for having filed a grievance is unproven.

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Conclusion

As set out above, the Employer has proven Grievant committed the misconduct of which he was accused. The Arbitrator finds the Probate Court double-dipping and Grievant's handling of Jeff to be far more serious than Grievant's handling of Michele and his recommendation to Mary to place herself at Forestview. The Michele and Mary incidents merit discipline, but not removal.

The Probate Court and Jeff incidents, are each, by themselves sufficiently serious to warrant removal. While the Arbitrator is mindful that progressive discipline should always be considered first, it is well-recognized certain offenses merit summary termination.

A primary factor in evaluating whether discipline should be progressive or summary is the employee's ability to correct his behavior. Here, Grievant has offered no evidence of rehabilitation. He has shown no remorse for his actions. Rather, he has insisted he did nothing wrong, or that the facts are different from what is shown by the weight of the evidence.

There is no question Grievant is a dedicated psychiatrist and an extremely hard worker. There also is no question on this record, however, that at the time of his removal, Grievant was not functioning satisfactorily in his role at SBH.

AWARD

The removal was for just cause. The grievance is denied.

DATED: April 2, 2003

Susan Grody Ruben, Esq.
Arbitrator