VOLUNTARY LABOR ARBITRATION TRIBUNAL

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#1703

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 23-18-020925-0142-01-04
and	*	
	*	
OHIO DEPARTMENT OF	*	Debra Grier, Grievant
MENTAL HEALTH	*	Discipline
	*	

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APPEARANCES

For the Ohio Civil Service Employees Association:

Robert Robinson, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11

For the Ohio Department of Mental Health:

Bradley A. Nielsen, Human Resource Administrator
Ohio Department of Mental Health

Neni Valentine, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:00 a.m. on May 28, 2003, at the offices of Northcoast Behavioral Healthcare in Northfield, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Mental Health (the "State") were Michel F. Farivar, M.D., Chief Clinical Officer; Vicki Montesano, Workshop Program Evaluator; Jeffrey Sims, Associate Nurse Executive; and Officer Donald Stehlik. Also in attendance for the State were Linda Thernes, Labor Relations Officer, and Roger Beyer, Human Resources Director. Testifying for the Ohio Civil Service Employees Association (the "Union") were Sharon Williams, Chief Steward; Diane Banks, Recreation Therapist; Mary Wilson, Training Officer; Edmonia Antoine, Therapeutic Program Worker and Chapter Secretary and Steward; Mary Bell, Therapeutic Program Worker; Starla Takacs, R.N.; Kevin Eisemon, LPN and Chapter Vice President; and the Grievant, Debra Grier. A number of documents were entered into evidence: Joint Exhibits A-C, State Exhibits D-J and Union Exhibits 1-5. The oral hearing was concluded at 4:20 p.m. on May 28. Written closing statements were timely filed and exchanged by the Arbitrator on June 3, 2003, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Grievant is a Therapeutic Program Worker (TPW) at the Northfield Campus of Northcoast Behavioral Healthcare, a facility for the treatment and care of the mentally ill. Her duties involve direct supervision of patients under the care of the Department, administering interventions and consequences of treatment plans, helping patients develop basic living skills,

and the like. The job does not require a college degree (although that is preferred) and the Grievant does not have any post-high school education. She has been employed by the Department since 1980 and is union chapter president.

The grievance arose when Ms. Grier received a five-day fine for violating fraternization and inappropriate socialization policies set forth in the Code of Ethical Behavior (Policy 01.10) and Relationships Between Staff, Volunteers, Consultants and Patients/Clients Which Compromise Therapeutic Relationships (Policy 02.25). At the time this discipline was administered, the Grievant had a verbal and written reprimand and a 2-day fine on her record. However, before the instant case was heard, the 2-day fine was overturned by another arbitrator, thus rendering the two reprimands stale. The Grievant therefore came to this arbitration with no active discipline on her record.

The matter for which the Grievant was disciplined came to management's attention when a co-worker, Workshop Program Evaluator (WPE) Vicki Montesano, reported that the Grievant told her a patient, KM, had come over to the Grievant's house after being discharged from Northcoast and that they had slept in the same bed. KM had difficulty sleeping, Montesano testified, and this was the Grievant's way of helping her feel safe and get through the night. Montesano testified she does not have a good relationship with the Grievant and that it was during a conversation the two of them had about trying to find a way to work together that the Grievant told her about her outside relationship with KM, who had since been readmitted. She said she agonized about what she had been told for days before yielding to her fear for her license and reporting what she had learned. Associate Nurse Executive Jeffrey Sims and Chief Clinical Officer Dr. Michel Farivar testified they had been aware of some "low level" boundary issues between the Grievant and KM and had some growing concerns but that this went over the line. If the patient was a personal friend of the Grievant, they said, she was obliged to report it and should not have been part of the patient's treatment. Boundary issues are especially problematic with borderlines such as KM because they tend to use special relationships to split

staff. Dr. Farivar testified he had noticed KM's emotional tone change radically when he or one of the staff approached her during one-on-ones with the Grievant. He also said he had seen the Grievant bring food in from the outside and coax KM to eat it in the staff area. This feeds into the creation and sustaining of a special relationship and the Grievant had been spoken to about it by the treatment team.

When Sims learned there was a possibly intimate relationship between the Grievant and KM, he asked that the Grievant be removed from the area and he called the hospital police. An investigation ensued, followed by pre-discipline. The Grievant was found guilty by the hearing officer on July 30 and subsequently fined five days pay. This action was timely grieved on September 14 and fully processed to arbitration where the stipulated issue is: *Was the Grievant, Ms. Debra Grier, disciplined for just cause? If not, what shall the remedy be?*

In arbitration, the Grievant admitted as she has from the beginning that KM had been to her house a number of times and spent the night more than once. She testified KM has been a friend of her family's for about seven years, going back to before she was first admitted to Northcoast. She said KM is like the youth who hang out around her house, eat and sometimes stay over. She testified the incident that led to her discipline occurred in September 2001 when KM, who was not then a patient at Northcoast, came to her house. KM was high on drugs and said she had not slept for three days. The Grievant stated she tried to encourage her to return to the hospital. She thinks this effort was successful because KM was readmitted in October that year. It got late as they lay in bed talking. KM eventually fell asleep. The Grievant denies she kept KM there for sexual gratification. She also denies that their relationship interferes with KM's treatment. She treats all patients the same, with the utmost respect as she would want her own children treated were they in KM's condition. She gives things like soda and cigarettes to patients who don't have any. In her opinion, the unit is dysfunctional. Staff relationships are polarized into the treatment team against the LPNs and TPWs. The treatment team, she said, cannot put anything together with which to interfere. The Grievant testified she never kept her

relationship with KM a secret. It was generally known. Dr. Farivar even asked her how KM was after she visited KM when she was in a general hospital for ECT. In fact, she said, knowing admitted or readmitted patients is not unusual. There are four group homes near where she lives to which a lot of Northcoast patients are discharged.

The Grievant further testified that she never said anything to Vicki Montesano about KM having slept over. She stated she does not speak to Montesano and that Montesano must have manipulated KM with gifts and food to pry information from her. She believes this discipline is in retaliation for an incident that occurred June 25 in which she saved a patient from choking to death while Clinical Nurse Supervisor Amy Frate and Chris Sims just stood by. Two days later she was put on administrative leave and investigated for abuse. She believes this case is part of an historical pattern of setting up union officers for discipline because they vigorously enforce the collective bargaining agreement. This view is shared by a number of present and former union officers who testified about charges brought against them and discipline they received since being elected to union office. Two former chapter presidents were terminated. The Grievant testified that Nurse Amy Frate targeted her from day one, that Dr. Farivar asked her about a week before her investigation began if she was going to write him up for his language around staff, and that the CEO had her further investigated after she told him the investigation on the instant matter was "going to open a can of worms." Officer Stehlik falsely testified that both she and KM knew they were not supposed to talk to each other, she said, because she had complained about him to his superiors. The alleged long-ago hugging of a patient he testified about did not happen but she did not fight the suspension which resulted from that charge since it would have required her to be represented by the then-chapter president.

Regarding training, the Grievant admits she signed documentation of training provided by Nurse Frate on April 29, 2002, regarding consistency of care for KM, but questions the warning she allegedly received on May 11, saying Frate is a stickler for getting them signed and this one does not bear her signature. In-service training on policies is perfunctory, she said, with

the written policy just being put down on the table and employees left to read it then sign and leave.

III. ARGUMENTS OF THE PARTIES

Argument of the State

The State points out there is no question the Grievant allowed the client KM to visit with her in her home, to stay the night and to sleep with her, the parties having stipulated to these facts. It argues the Grievant knew this behavior was prohibited because she received training on the pertinent policies which reference as examples "romantic or intimate personal contact" and are specific with respect to post-discharge contact. What, asks the State, is more intimate than sharing a bed? She was also disciplined for similar behavior in the early 1990s.

The State submits that the Grievant is blatantly defiant, having testified on cross-examination that she would not change anything she did even after hearing the State's witnesses testify that actions such as hers are unsafe and adversely affect the treatment of borderlines. The State surmises that the Grievant's failure to find and provide KM with professional care when she showed up at the Grievant's house may have contributed to her readmission a week later. Other adverse consequences of the Grievant's probably well-intentioned actions include splitting of the treatment team. Her failure to inform Northcoast of the extent of their relationship prevented it from separating them at the facility, thus harming the therapeutic environment.

Turning to the Union's case, the State contends all is smokescreen. Its disparate treatment argument fails because all examples given involved situations different from the Grievant's. The Grievant was not disciplined for providing sodas or cigarettes; she was disciplined for fraternization. Every case cited by Union witnesses wherein staff took clients home occurred more than fifteen years ago before the current revision of the policy and with the approval of the treatment team. Moreover, they involved a social event or meal, not sleeping together. The Grievant, herself, admitted in her investigatory interview that she knew of no other staff fraternizing with discharged patients.

As for the Unions's claim of anti-union motivation, it is unproven, says the State. It points out that Wilson was a union official for fifteen years without discipline, Eiseman received only a verbal reprimand in his 2½ years as a union official and this was for an argument with a nurse. The Grievant, herself, was disciplined long before she became a union official and the two reprimands she has received since for were attendance infractions. What is more, the June incident is totally irrelevant to the case. Not only did internal and external investigations exonerate Clinical Manager Frate, but the Union did not complain about her until August and September after it realized the potential for disciplinary action against the Grievant.

Finally, the State questions the Grievant's credibility. Management witnesses testified KM opens up only with the Grievant, so it is unlikely she would share personal information with Vicki Montesano. Officer Stehlick was unaware that the Grievant had reported him and he seems to be telling the truth about the Grievant's indiscretion in 1994 leading to the 2-day suspension. The Grievant, herself, admits letting the patient into her home and her bed, yet cries conspiracy and collusion. She also gave confusing testimony about when this incident occurred. She said it happened in July or September of 2001, but this would have meant KM waited a year before acting on the pre-discharge promise that she could visit after she was discharged. The State believes the visit occurred between her discharge on January 8, 2002, and her readmission on April 26, 2002, because the boundary issues necessitating the April 29 consistency training upon her readmission were first noticed between October 2001 and January 2002. The State submits that the Grievant was not telling the truth about the date of the incident.

The State concludes that the Grievant knowingly and consciously decided to violate policy, having decided that she knew best what was good for KM. The State cannot allow this. The disciplinary grid permits removal on a first offense, but the State mitigated the penalty because of the Grievant's many years of service. It accordingly asks that the grievance be denied.

Argument of the Union

The Union argues that the State did not have just cause to discipline the Grievant. It accuses her of violating policies which it does not enforce and for which training occurs only twice, once at general orientation and once at the initial TPW training, neither of which apply to the Grievant. Preferential treatment of patients goes on all the time and is still occurring. The 1990 or 1996 incident was totally different than the one here because the patient was institutionalized at the time. In any event, it was a false charge orchestrated by the chapter president at the time. Moreover, what occurred here happened nine months before the charge when the patient was a citizen with no guarantees she could return to the institution. The Department of Mental Health is not like the Department of Rehabilitation and Correction where former inmates are under continual supervision.

As chapter president, the Grievant must address issues such as the WPE classification and inappropriate behavior of management and other employees. The Union submits that the allegations against the Grievant are in retaliation for her performance of these union duties. Management witnesses lacked dates and times, made demeaning remarks about the Grievant's lack of a college education, reported undocumented conversations and ignored the clinical manager's negligence in handling the incident of the choking patient. Each and every one had a motive to make false allegations.

The Union vehemently proclaims that the Grievant is a mother first and behaved accordingly. She saved two lives, KM's and the choking patient's, but none of this is given the recognition due. By the State's logic, KM would be better off dead than for the Grievant to make a decision the State arrogantly says she is unqualified to make. The Grievant, however, sees things differently and would do again as she did then. If the State's approach for handling a patient who shows up at your door in such a condition is so simple, where is the written policy to explain it? In the Union's view, it is the existing policy that should be questioned, not the

Grievant's actions. Management's interpretation would stigmatized patients for life, separating employees from family members and personal friends for life.

For all these reasons, the Union asks that the discipline be overturned, and the Grievant's record cleared, and the five days pay be returned.

IV. OPINION OF THE ARBITRATOR

At the outset it must be clarified that this case is not about a hospital caregiver running into a former patient on the street or in a grocery store and speaking to her, or having a brother who dated a patient some time in the distant past. Nor is it about participating in an approved birthday party for a patient, or giving one cigarets and soda, or even visiting a patient in another hospital. This is a case of a caregiver taking a former patient into her home, allowing her to spend the night, taking that patient into her bed and sleeping alongside her, all without the knowledge and consent of those with the authority to approve or disapprove such contact. There is absolutely no question this happened, for the Grievant freely acknowledges it and is, in fact, proud of it. The only question is whether discipline is warranted for it.

Union witness complaints about the quality of training notwithstanding, the Grievant cannot claim ignorance of the policy. Her signature on the training report acknowledges she was trained on Policy #02.25 as recently as June 14, 2000. Even if she only read the policy at the time, she would have seen that "this policy is applicable to all staff...and is in effect both on and off the hospital grounds, while the patient is on hospital rolls and *after discharge*" (emphasis added). This policy directs staff to "avoid any relationships or behaviors with any patient/client that could be interpreted as being sexually, financially, or emotionally exploitative or otherwise damaging, or could otherwise jeopardize objective treatment and/or clinical judgement." It also gives "any romantic or intimate personal contact" as an example. Sleeping in the same bed with another person is clearly intimate personal contact and could be interpreted as being sexually exploitative (even if there was, in reality, no overt sexual act) or otherwise damaging, particularly when the patient or former patient is in crisis as KM is said to have been at the time.

The Arbitrator believes the Grievant has compassion for KM and meant well, but she should have known better. She had long experience and was trained on "managing personal and professional boundaries" and "crisis intervention," the latter of which included a component on over-involvement and counter-transference. She should not have permitted such intimate contact and she should have reported the relationship, especially once the patient was readmitted.

The Union argues that the policy was not enforced and questions its value, implying it is inhumane and undermines rather than supports the mission of Northcoast to treat with dignity and respect. Many examples of alleged favoritism and fraternization were given and the point was made that staff and patients intermingle in the surrounding community. None of the examples given bear close relationship to the case here. The closest were two marriages that occurred many years ago and under circumstances not explained to the Arbitrator other than that they predated the current policy. As for the humaneness of the policy, the policy does not require staff to shun former patients. What it does require is avoidance of behavior potentially harmful to its clients and former clients or that could be interpreted as such. The fact that both parties took care to make sure the Arbitrator understood the Grievant was not accused of having had sexual relations with KM shows that even the Union and Grievant acknowledge that her conduct could have been misinterpreted as something even they could not deny was harmful. Additionally, the Union's position does not allow for the fact that something harmful to one patient may be benign for another. So, taking a patient home for a visit may be therapeutic for one, harmful to another. The point is that it is for the treatment team to make these decisions, not the Arbitrator or the Grievant except to the extent that the treatment team chooses to consult them.

The Union also contends that this discipline was in retaliation for the Grievant's union activity and for reporting alleged staff misconduct. In any prolonged conflict it is difficult to allocate responsibility to one party or the other for any act of aggression because each such act is both preceded and followed by aggression from the opponent. Here, it is not necessary to

untangle that knot. In fact, except for the level of discipline, it is not even necessary to question motive, for the fact remains that the Grievant admits what she did and there is no evidence management sat on its knowledge waiting for an opportunity to use it as a weapon. The Grievant committed an act for which discipline is warranted. Management learned about it after the fact, second or third hand. Then it investigated and took action. The only question, really, is whether management overstepped the bounds of reason in choosing the penalty.

The Grievant is a long-term employee. Mangement considered this in deciding to impose a five-day fine. However, it also took into account a two-day fine for failure of good behavior which has since been overturned. Because of the latter, I have given serious consideration to reducing the five-day penalty to two. Since the Grievant remains insistent that she behaved properly in this matter, however, I am not persuaded that such a reduction would have the desired corrective effect. For this reason, I uphold the employer's chosen penalty as well as its findings of fact. While the Grievant's compassion for her patients and zeal for protecting the labor agreement are commendable, one cannot turn a blind eye to the violation of the code of ethics and fraternization policy.

V. AWARD

The Grievant was disciplined for just cause. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
August 8, 2003

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