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IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

In the Matter of **OHIO DEPARTMENT OF MENTAL HEALTH** **and** **DISTRICT 1199, SEIU** **Grievance No.** **23-17-020618-0013-02-11** **Removal of Charles Rafey, R. N.**	**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 July 28, 2003 in Toledo, Ohio. The parties acknowledged this Arbitrator had previously arbitrated a grievance involving the suspension of this Grievant. The parties and the Grievant stipulated the instant 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: the Union faxed its brief on August 13, 2003 and the Arbitrator received it that day; the Employer mailed its brief on August 15, 2003 and the Arbitrator received it August 19, 2003. Accordingly, the hearing was concluded August 19, 2003.

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:

Pat Mogan, Labor Relations Officer 3, 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

. . .

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 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.

* * *

FACTS

Grievant, Charles Rafey, R. N., was employed as a psychiatric nurse at Northcoast Behavioral Healthcare System ("NBH") in Toledo, a residential treatment facility of the Ohio Department of Mental Health. Grievant's employment was terminated effective June 18, 2002. At the time of his removal, he had approximately 2 years of service.

The removal is based on two related incidents that allegedly took place the evening of April 11, 2002. On that day, the Grievant was working the 3:00pm – 11:30pm shift. Barbara Oxner, the Grievant's supervisor, had scheduled a 9:00pm staff meeting for that evening; accordingly, all staff were instructed to complete their lunch breaks before 9:00pm that evening.

Oxner telephoned the Grievant twice to ask him when he would be taking his lunch break. Both times during the conversations, he hung up on her. The Grievant contends he hung up on her both times due to patient emergencies. Such alleged emergencies are not corroborated in the record.

After the two hang-ups, Oxner came to speak with the Grievant in his unit at approximately 6:50pm.. She brought with her staff Police Officer Marshall Swan. Oxner asked the Grievant about the hang-ups and about his upcoming lunch break; he was not directly responsive to her questions. He concluded the conversation by saying, "this conversation is terminated."

At approximately 7:20pm, Oxner, along with Swan and supervisor Lila Gillmore, went again to the Grievant's unit. Oxner gave the Grievant a direct order to take his lunch break at 8:00pm.. Oxner, Swan, and Gillmore left the Grievant's unit. Oxner alleges the Grievant slammed his hand on a desk as they left.

At approximately 8:00pm, the Grievant left his post, telling his remaining co-worker, Leslie Drane, R. N., to notify Oxner the unit was under-staffed. Drane did so, and Oxner sent over relief staff. The Grievant contended for the first time at the arbitration that when he left his post, he stayed within earshot and eyeshot until relief staff came to the unit.

The Order of Removal letter dated June 10, 2002, states Grievant had:

> **...been found guilty of a Failure of Good Behavior and Neglect of Duty in the following particulars, to wit:**
>
> **On or about April 11, 2002 you behaved in a disrespectful manner toward your supervisor. This is considered a violation of NBH Policy 3.10 Guidelines for Disciplinary Action.**

On or about April 11, 2002 you failed to insure a safe environment when you left a co-worker along on the unit and went to lunch before the Nursing Supervisor was contacted. This is considered a violation of Nursing Policy 03.04 Scheduling and Daily Staffing and NBH Policy 3.10 Guidelines for Disciplinary Action.

Suggested discipline commensurate with policy violations can be found in NBH Human Resources Policy 03.10 – Disciplinary Guideline Grid.

As a result of these policy violations you are being removed from your position.

Prior Disciplinary Action
07/28/01 Five (5) day fine – Failure to Follow Direct Order
04/19/02 Five (5) day fine/Last Chance Notice[1] – Misuse of State Property and Sick Time

...

In the Disciplinary Guideline Grid, Failure of Good Behavior – "Being disrespectful and/or engaging in heated arguments towards superiors, co-workers, patients/clients, or members of the public" – a 3rd Offense merits "Five-day Suspension Last Chance Notice or Removal." In the Disciplinary Guideline Grid, Neglect of Duty – "Failure to perform the duties of the position or performance at sub-standard levels" – a 3rd Offense also merits "Five-day Suspension Last Chance Notice or Removal."

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[1]There is a question in the record regarding whether the Last Chance Notice was removed as part of the disposition of the 4-19-03 suspension. As discussed below in the Opinion, the status of the Last Chance Notice is not dispositive in this matter.

The Union filed a grievance dated June 17, 2002; the Employer date-stamped it as received June 24, 2002. The grievance was stated as "Unjust Removal." The Union alleged Article 8.02 had been violated, and requested Grievant be reinstated to his position and be made whole.

POSITION OF THE EMPLOYER

The State presented evidence to prove there is just cause for discipline on both of the charges. The Grievant's record of active discipline includes 2 5-day disciplines. The 2nd of these disciplines includes a last chance notice.

Failure of Good Behavior

Supervisor Oxner's testimony, corroborated in part by Officer and Swan and the Grievant, establish the Grievant was rude and disrespectful to Oxner. It is undisputed the Grievant hung up on Oxner twice in one hour. The Grievant claimed he hung up due to the coincidence of two different emergency situations. There were no such coincidences, and this alibi serves only to undermine the Grievant's credibility. Had either of these "emergencies" occurred, they would have been documented in the unit log and/or by unusual incident reports. Neither of these documents were introduced into evidence because they do not exist. Neither was there any

corroborating evidence from other staff members. Also, one could reasonably expect the Grievant would have called back Oxner following the resolution of these "emergencies." The Grievant hung up on Oxner because he was tired of following her orders.

In the pre-disciplinary meeting, the Grievant said some of Oxner's decisions were "irrelevant." This thought alone fixes the Grievant as thoroughly disdainful of and disrespectful toward Oxner.

The Grievant's uncooperative and surly attitude is again manifested in the rudeness and disrespect he displayed toward Oxner during her two visits to his unit that evening. She first asked about when his break and about his hanging up on her. His initial reply, "I answered you the first time," was not responsive, but was an insolent, rude, and disrespectful attempt at a put-down. When she reminded him all lunches must be completed before 9:00pm, he said, "I guess I won't get one." Again, he is refusing to cooperate by not giving his supervisor the courtesy of a straight and compliant response. Remaining in character, the Grievant turned away and walked into the doctor's office. He had not been excused, nor had he asked to be excused. Any doubt as to the Grievant's disdain for Oxner must be erased when considering the Grievant's next response, "I am terminating this conversation!" Such a boldfaced affront is outrageous. No supervisor should

be expected to tolerate the disrespect and rude insolence Oxner was subjected to, culminating in the Grievant deciding to "terminate" the conversation.

The Grievant behaved this way with the knowledge he had 2 5-day disciplines on his active discipline. Only after a frustrated Oxner gave him a direct order to take his lunch at 8:00pm did the Grievant finally acknowledge he would do so.

There is just cause for discipline based on these facts, and the Grievant had progressed through the discipline track to the point of termination for any offense. His termination was a case of self-destruction, and this grievance must be denied on these facts alone.

Neglect of Duty

At approximately 8:00pm, the Grievant went to lunch, leaving Drane alone on the unit with approximately 20 potentially psychotic patients. The testimony of Drane, Kathleen Anthony, and Carol Ayers establishes all staff have been trained that one is never to leave another staff along on a unit, and that this has long been a mandatory practice at NBH.

The Grievant knew he was abandoning Drane, and that this was a policy violation. He callously did so anyway. The Grievant contends Oxner's direct order had put him in a no-win situation. But the Grievant could have,

and should have, easily solved the dilemma by contacting Oxner and/or the Campus Police to obtain relief rather than leaving Drane alone on the unit. He had done this before.

The Grievant contends when he left the unit, he stayed only 30 seconds away, within sight and earshot of the unit. There are several facts discrediting this self-serving bit of fiction. The Grievant did not include this important contention in any written statement he offered during the investigation; he did not mention it in the pre-disciplinary meeting; nor did he mention it to Drane when he left the unit. We all heard it for the first time at the arbitration hearing.

Summary

The grievance should be denied in its entirety. The Employer need establish only that the Grievant violated either of the work rules with which he is charged; the Employer has proven he violated both of them.

The Grievant is incorrigible. He testified he has no culpability for the incidents for which he was disciplined. The extensive previous discipline imposed on him in only 2 years of service has had no discernible corrective effect. Even the fact that the Grievant was on a last chance notice when these events took place April 11 did not affect the Grievant's conduct. The Grievant accepts no responsibility for the sorry state of his relationship with

Oxner. Drane no longer trusts the Grievant because he demonstrated his lack of concern for her safety. NBH and its employees should not be forced to work again with the Grievant.

POSITION OF THE UNION

The removal was imposed without just cause. The lack of just cause was exposed through the testimony of several credible employees. Oral and written testimony have cast considerable doubt regarding the true circumstances that occurred on April 11, 2002 in the interaction between the Grievant and Oxner.

Failure of Good Behavior

The Employer presented Oxner as its key witness. She provided testimony that revealed a troubled history of interaction between the Grievant and her. She attempted to portray a history of intimidation and aggressive behavior by the Grievant. Curiously though, testimony provided by other key witnesses reflected a good employee, one who had a therapeutic relationship with his patients and a professional demeanor toward other staff.

Oxner accused the Grievant in her written statement of frightening her during their April 11 interaction: "We turned to leave and Mr. Rafey made a loud, threatening noise with his hand on the desk." Oxner's written

statement quickly loses credibility. Under questioning by the Union at the arbitration hearing, she conceded she had not actually seen the Grievant strike anything, as she had her back to him. She did, however, in a histrionic manner, break into tears while testifying, complaining of having been afraid of the Grievant. She offered, however, no objective evidence to validate that fear.

Oxner has been consistently unable to validate her fear of the Grievant. At the arbitration, she conceded the Grievant had never verbally threatened to harm her or her family physically, nor threatened her personal property. Where, then, does her overwhelming sense of fear originate?

Swan portrayed quite a different picture of the April events. In his written statement, he stated he heard Oxner give the Grievant a "direct order" to take his lunch at 8:00pm. Oxner asked the Grievant if was going to do that; "he smiled and said he would, but the unit would need staffing. Ms. Oxner stated she would take care of that."

In another written statement by Swan, he further denied Oxner's claim that the Grievant behaved in a loud, threatening manner. He wrote, "Mr. Rafey was not rude, loud, disrespectful or threatening and the suggestion that he was is a false suggestion that is atypical of Mr. Rafey's character."

Swan testified to having had occasion many times to observe the

Grievant's conduct at work. Swan described the Grievant's conduct as consistently professional in his interactions with the patients, staff, and visitors. Swan further testified he had never heard other employees complain about the Grievant. He did testify, however, he had heard other employees complain about Oxner's style of supervision. This testimony directly contradicts Oxner's testimony, where she does not perceive herself as having problems with supervision.

Ayers conceded she had never observed the Grievant behaving in an aggressive manner. She saw only professional conduct from the Grievant. She also testified she knew of several employee complaints relating to Oxner's style of supervision and her ability to communicate effectively with her subordinates.

Young testified she stood by her written review of Oxner's performance evaluation of the Grievant: that there was "a disproportionate weight being placed on [certain] performance issues in regards to the number of performance dimensions with 'below' ratings and the percentage of time represented in the annual review period." Young's written review of Oxner's performance evaluation of the Grievant also stated, "the statement in the description of measurement section needs to be changed to delete the use of 'aggressive' behavior as there was no objective evidence to support the

use of this term which does carry negative connotations beyond any argumentative behavior."

These contradictions to Oxner's evaluation of the Grievant point to a troubled relationship between them, and are indicative of a subjective evaluation by a supervisor with accusations that have "no objective evidence" to substantiate them.

Neglect of Duty

Swan's written statement established Oxner and the Grievant spoke at 7:20pm. . That gave Oxner 40 minutes to arrange for relief coverage at 8:00pm.. Surely, that is a reasonable amount of time for a prudent supervisor to make that relief coverage available.

Ayers testified the training the Grievant had received regarding staff coverage had taken place at a routine orientation. No testing was done that would have required the Grievant or any other employee to demonstrate the training objectives had been achieved.

Drane testified the Grievant had left the unit to go to lunch as he had been ordered to do by Oxner not 40 minutes before. She reported to Oxner there was no relief staff once the Grievant took his lunch break. Drane testified there was no event taking place with the patients at that time to cause her concern.

Kathleen Anthony denied having made the statement to the Grievant during a meeting regarding a previous incident that he "would not last" or that he "would not keep his job here." In truth, however, the Employer had an already jaded perception of the Grievant prior to the evening of April 11. On that evening, the Grievant was placed into a no-win situation that led to his ultimate removal without just cause for nothing more than following a direct order that had been issued in a dramatic fashion by his supervisor.

The Grievant testified he had pointed out to Oxner that being assigned lunch at 8:00pm would create a staffing shortage on the unit. As 8:00pm arrived, he left the unit and asked Drane to contact Oxner that no relief was yet present on the unit. He stated, "I was never more than 30 seconds away at any time." He would have "been able to hear" any commotion that may have transpired on the unit while Drane was the sole staff person there; he also would have "seen" any disturbance as well. The Grievant testified he went only as far as the doctor's office adjoining the unit where he "was able to look right through the glass in the door; I was able to see onto the unit at all times." The Grievant explained this is not the area where he normally takes lunch, but he chose to be there due to his concern for Drane being alone on the unit.

The definition of "working alone" with regard to Union members was

first initiated within the Ohio Department of Rehabilitation and Corrections after a terrible tragedy where a case manager was killed in the line of duty while interacting with an inmate in a secluded place. The ensuing policy is that each employee is to have at least one additional staff within eyeshot or earshot at all times. The Employer did not enter into the record any policy that expands upon this requirement. And as demonstrated by the Grievant's testimony, he was never out of eyeshot or earshot of the unit that night before additional staff arrived to provide the needed coverage.

Summary

The Grievant was separated from a job that he undertook with pride, and with a concern for his patients' well-being and his co-workers' safety. The Grievant was not under a last chance notice, as that notice is not mentioned in the settlement agreement of the Grievant's previous grievance. The Grievant has no history of problems with any of his peers. He does have a history of problems, some of which have resulted in discipline, with his immediate supervisor. Oxner, however, has repeatedly been unable to validate her accusations of the Grievant's inappropriate behavior.

There is a complete lack of objective evidence to warrant the removal. The Grievant should be restored to his position, his lost wages should be reimbursed, leave time that would have accrued should be credited, any

medical expenses the Grievant incurred since June 18, 2002 should be reimbursed, and the Grievant's seniority should be reinstated with no break in State service. The Grievant should be made whole in every way.

OPINION

The Employer, of course, has the burden of proof in a just cause termination. For the removal to be sustained, the Employer must prove Grievant committed the misconduct of which he is accused, and that removal is appropriate for the charges that are proven. The removal is based on 2 charges that stem from 2 related incidents that took place the evening of April 11, 2002.

Failure of Good Behavior

The Failure of Good Behavior charge is based on the Grievant having "behaved in a disrespectful manner toward your supervisor." These behaviors included: hanging up the telephone twice on Oxner, and being rude and unresponsive to her questions when she came to his unit to speak to him.

The Grievant contends he hung up twice on Oxner that evening due to two separate patient emergencies -- angry voices coming from the TV room, and a patient undressing. There is absolutely no corroboration in the record, however, regarding such emergencies. Nor did the Grievant call back Oxner

after the alleged emergencies concluded to explain why he had hung up on her.

Such lack of corroboration, along with the Grievant's failure to make any attempt to contact Oxner after the alleged emergencies concluded lead to a conclusion by the Arbitrator that there were no such emergencies during Oxner's two telephone calls to the Grievant. Perhaps these two events occurred that evening, but not during Oxner's telephone calls. Accordingly, the Arbitrator finds the Grievant hung up twice on Oxner that evening as part of his ongoing disrespect of Oxner.

Regarding the Grievant's rudeness and unresponsiveness toward Oxner when she came to his unit that night, the Grievant admits he said little to Oxner and that at one point he said, "this conversation is terminated." Such conduct by an employee toward his supervisor is unacceptable. In virtually all workplaces, there is a chain of command. Here, Oxner was the Grievant's direct supervisor. It is not acceptable for an employee to be unresponsive to questions from his supervisor. It is not acceptable for an employee to decide when a conversation with his supervisor is over. While it is clear from the record that Oxner and the Grievant had a poor working relationship, it still is unacceptable for the Grievant to have behaved toward his supervisor as he did on the evening of April 11.

Neglect of Duty

The Grievant admits he learned at orientation that an essential rule of this workplace was not to leave a co-worker alone on a unit. Yet it is undisputed that this is what the Grievant did on the evening of April 11.

The Grievant claimed that when he left Draper alone on the unit, he stayed within earshot and eyeshot until relief staff arrived. If indeed this were true, it certainly would be an important fact. Yet the Grievant failed to make this contention until the 11th hour – i.e., at the arbitration, upon cross-examination:

> **Q. There were a half dozen manic patients and you left Leslie [Drane] alone?**
>
> **A. I took certain steps to ensure her safety. I was only 30 seconds away. I told Leslie to call Barb [Oxley]. In case anything did arise, I stayed nearby.**

Such belated information causes the Arbitrator to question its veracity.

The Grievant contends that even though relief staff had not shown up in his unit at 8:00pm, he could not stay there past 8:00pm because Oxner would then discipline him for disobeying her direct order. If this indeed is why the Grievant chose to leave the unit, he made a gross error in judgment. It would be clear to any reasonable employee that a cardinal safety rule – not leaving a co-worker alone in a unit – trumps an order from a supervisor regarding when to take lunch. Indeed, the Grievant put more importance on

playing out the next chapter in his own ongoing battle with Oxner, than he did on Draper's safety.

Conclusion

As set out above, the Arbitrator finds the Employer has proven Grievant committed the misconduct of which he was accused. The record amply demonstrates that: 1) the Grievant was grossly disrespectful to his supervisor on repeated occasions on the evening of April 11, 2002; and 2) he left his co-worker alone on the unit on April 11, 2002.

This was the Grievant's 3rd offense. He had had 2 previous 5-day fines. It is important to note the Grievant had been employed for only 2 years while this was all taking place. For a 3rd offense, the disciplinary grid provides for a 5-day suspension or a removal. 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.

The parties are in disagreement whether there was an active last chance notice in operation on April 11, 2002. The Arbitrator notes ODMH Policy No. 98-55 states in pertinent part: "The last chance notice is not a

mandatory or an additional step required prior to an employee being removed from service." In any event, it is clear from the record the Grievant knew his job was in peril on the night of April 11. Moreover, the disciplinary grid provides removal as one of the options for a 3rd offense, with no last chance notice required. Accordingly, whether or not the last chance notice was still active on April 11, 2002, the Grievant was subject to removal. His serious misconduct during the evening of April 11 sealed his fate.

There is no question Grievant is a dedicated psychiatric nurse who works well with his patients. There also is no question on this record, however, that Grievant was unacceptably rude to his supervisor. As part of this rudeness, to prove a point in his ongoing battle with Oxner, he left his co-worker alone on the unit. The Grievant contends he had no choice but to leave the unit at 8:00pm, given Oxner's order to do so. The Grievant could have easily, however, before he left his unit, called around to find relief staff, as the record shows had been done on other occasions. Moreover, based on the complete record, the Arbitrator does not credit the Grievant's claim that he stayed within earshot and eyeshot of the unit until relief staff came to the unit.

Whether or not Oxner is the most effective of supervisors, it was the Grievant's duty to conduct himself without overtly disrespecting her

authority. It also was his duty not to leave a co-worker alone on the unit. Though the Union left no stone unturned in its defense of the Grievant, the removal ultimately was caused by the Grievant's self-destructive conduct and lack of respect for authority.

AWARD

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

DATED: September 18, 2003

Susan Grody Ruben, Esq.
Arbitrator