#1723

IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/ODMH

Before: Robert G. Stein

Grievant(s): Pamela McIlwain
Case # 23-07-030206-0004-01-04
23-18-020524-0072-01-04
Termination

Advocate(s) for the UNION:

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Advocate for the EMPLOYER:

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INTRODUCTION

A hearing on the above referenced matter was held on July 10th, September 2 and September 11, 2003 at the North Coast Behavioral Center located in Northfield, Ohio. The parties agreed that the issue is properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. The parties submitted written closing arguments in lieu of making oral closings.

ISSUE

Was the grievant, Pamela McIlwain, discharged for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference see Agreement for language)

ARTICLES 24

BACKGROUND

The Grievant is Pamela McIlwain ("Grievant", "McIlwain"), a Therapeutic Program Worker (TPW) at the North Coast Behavior Center

("NCB"). Her employer is the Ohio Department of Mental Health ("ODMH", "Employer" "Department"). McIlwain has been employed with ODMH for approximately fifteen (15) years and was terminated on 1/20/03. She was charged with the following:

Violation of time and attendance policy:

On 2/11/02 and 2/17/02 she was late for work

Insubordination:

On February 22, 2002 she was found to have disobeyed a directive of her Supervisor, Doug Kern, to remain at her work site and not to leave in order to get some lunch. Employees work a straight 8-hour shift and do not get a lunch.

Insubordination and giving a false statement:

In February of 2002, telephone records at the Grievant's worksite indicate the she has made a significant number of personal calls. She denied making said calls, but it was later determined that several calls were made to her home and her sister's home.

Failure of Good Behavior:

The Employer determined that on March 1, 2002, the Grievant called co-worker, John Martin, an Uncle Tom and made other insulting remarks about Martin in front of patients.

Dishonesty: punching the time in for another employee:

On April 9, 2002, it was reported that the Grievant punched in another co-worker, Felica Earl's, time card for the start of her shift. Payroll records indicate that Earl was entered at the Group Home, when in fact she was at the Northfield campus at the time.

Clinical non-compliance with the EAP agreement:

In June and August of 2002, the Grievant was found to be out of compliance with her attendance at an EAP program.

Insubordination:

The Grievant was found to have failed to follow the directives to complete the "TPW Standards of Performance" and return them within six (6) days. Furthermore, she was found to have failed to submit other forms related to post-orientation.

Based upon the above, the Grievant was discharged by the

Employer. In response she filed a grievance claiming the Employer did not have just cause to terminate her employment.

SUMMARY OF EMPLOYER'S POSITION

The Employer's position in this matter is succinctly stated in its brief. It reads as follows:

EMPLOYER'S CLOSING STATEMENT

Arbitrator Stein, the state has shown through testimony and documents that the Grievant was removed with just cause. The evidence provided was largely undisputed and was clear and convincing. This was not a case involving a single incident of egregious conduct – there are multiple charges, and each charge standing alone may not substantiate removal. However when considered together, the charges form a compelling reason to remove the Grievant. The evidence shows both that the state had good reason to remove the Grievant and that it acted fairly in doing so. In fact, management was willing to give the Grievant another opportunity to continue her employment with the Department of Mental Health. She was reassigned to a different setting with a different supervisor, and signed an agreement to participate in EAP, but she continued her pattern of disregard for authority. The nature of the charges; the numerosity of charges; the Grievant's refusal to comply and her continued insubordination, led to her eventual removal. She held her fate in her hands. She and she alone had total control of the outcome.
The charges were as follows:

Violation of the time and attendance policy:
The Grievant was late for work on 2/11/02 and 2/17/02. The state's evidence showed that the hospital policy is clear - (2) times late in a pay period is cause for discipline. The Grievant never denied that she was late, but she states that other employees have been excused from tardiness while she has not. Supervisor Kern's testimony and the documentary evidence showed that his practice was consistent with hospital policy, and that, to the best of his ability, he was fir and consistent with all employees. The Grievant did not prove that he singled her out or that he otherwise acted unfairly in enforcing the policy. The Grievant was late; does not deny that she was late and did not present any documentation to excuse the lateness. Instead, she merely complained that others have been able to get away with being late and she was not permitted to do the same.

Insubordination:
Supervisor Kern convincingly testified that on February 22, 2002, at approximately 11:10 AM, the Grievant left a voice mail message on his pager stating that she was going to the store to get some lunch – for herself. Supervisor Kern immediately returned the call and explained to the Grievant that she worked a straight 8-hour shift, and that the request to leave the site to get lunch was disapproved. The Grievant responded that she would take a patient with her and that this could be counted as an outing. Supervisor Kern explained that taking a patient on an outing while taking care of personal business was not appropriate and was not approved. The call ended, but shortly afterward, Supervisor Kern received another page and another message was left from the Grievant this time stating that she had left for the store with a patient. Supervisor Kern attempted to return the call, but the Grievant had already left the premises. He instructed employee Martin to document in the logbook that the Grievant had left with a patient and to note her return. Employee Martin did as instructed. The Grievant's version of these events is incredible. The Grievant presented testimony from more than one witness that she knew she did not get a lunch so therefore she certainly would not request a lunch. However when the Grievant testified, she was no longer clear about

what she requested. She does not **recall** a conversation with her supervisor; but she does not deny that it occurred. When presented with a recording of her messages to Supervisor Kern, she became evasive. She would not acknowledge that the recorded messages were hers – she would only say that she did not "**recognize**" the voice on the recording as hers. The State has shown through clear and convincing evidence – both through physical evidence and testimony - that the Grievant left two messages for Supervisor Kern and that her purpose was to defy the clear direction of her supervisor. There is simply no other explanation for the messages other than the one offered from Supervisor Kern. Furthermore, employee John Martin testified that the Grievant left to go get some lunch and documented the return in the logbook. His statement indicates that the Grievant returned to the site with the patient and with a bag of food from a fast food restaurant for herself. The patient indicated to Mr. Martin that he had not eaten lunch and was hungry. The logbook indicates that both the Grievant and the patient were gone for at least 30 minutes. The Grievant's statement indicates that she took the patient on a community outing – not that they went to lunch. She testified that she did not get money from the cash box for his lunch; she states that she paid for his lunch with her own money. The truth is, she went to a fast food restaurant to get lunch for herself; and took a patient with her in an attempt to cover up that fact that she was merely conducting personal business. She did this after clearly being told that she could not; that it was not appropriate to use the patient as an excuse to take care of personal affairs. This was clearly insubordination.

Insubordination and giving false statements during an investigation:

Supervisor Kern testified that sometime in the late spring or summer of 2002, he received a call from Eden Corporation regarding excessive calls on the phone bills. Supervisor Kern testified to the contractual relationship between Eden Corporation and the Department of Mental Health and that excessive telephone costs affect the operational costs of doing business. Those costs could affect the continued relationship between Eden Corporation and the Department of Mental Health. He testified that he in-serviced all staff at all of the homes regarding the appropriate use of the phone; he also sent a memo to all staff regarding the appropriate use of the phone. Supervisor Kern also documented in the Grievant's performance evaluation that excessive in-coming or out-going calls were not acceptable. Infrequent calls of short duration were allowed, but anything else would be cause for disciplinary action. The evidence showed however, that none of these steps were a deterrent to the Grievant. Eden again called Supervisor Kern to complain specifically about Walnut House – the Grievant's work area. Supervisor Kern asked them to send him a copy of the bill so that he could investigate. Supervisor Kern compared the staff schedule with the phone calls and with the telephone numbers he recognized as belonging to staff. As a result, two (2) employees were disciplined – the Grievant and Felicia Earl. The Grievant first indicated in her statement that she used her cell phone for any personal calls and that she never used the house phone except to place calls for patients. She later changed her story to admit that she used the phone when her father was ill. She also claims that her supervisor treated her differently than other employees by overlooking their personal use of the telephone. Much to do was made about the 105-minute phone call that was placed from Kurstyn Allen to another employee at another group home. Supervisor Kern testified that he did speak with employee Allen about the call. Discipline was not taken since employee Allen indicated that the call was work related. Supervisor Kern did warn employee Allen that any call that required 105 minutes was probably a situation that should be discussed with him. Supervisor Kern, as well as the Grievant, also testified that others use the house phone - such as case managers or board employees. Supervisor Kern was only looking at numbers that were familiar to management. There is certainly no disparate treatment in this case. Eden initially complained about all of the homes; training was done along with a follow up memo. Eden then complained again specifically about Walnut House and an investigation ensued. Two employees were disciplined as a result. The 105-minute phone call was explained as work related and not personal. In her statement the Grievant was not truthful about the use of the phone and now seeks to excuse that use through claiming that others should have been disciplined as well, or that the use should be excused because the calls were justified. Again, the Grievant is taking no responsibility for her own actions.

Failure of Good Behavior:

On March 1, 2002, Supervisor Kern went to Walnut House to assist employee Martin in cleaning up the garage and the attic. An inspection was forthcoming and both wanted the home to pass the inspection. When the task was completed and Supervisor Kern left, the Grievant said to employee Martin.... "You always jump when he is here; you ain't nothing but an Uncle Tom". The Grievant does not deny using the

words "Uncle Tom". but states that she told employee Martin he was acting like an Uncle Tom because of an earlier statement he made to her. According to the Grievant, employee Martin allegedly had a discussion about the use of the phone with the Grievant and at some point told her that she would not have done "that" if he were a white man. It was after that comment that she told him he was "acting" like an Uncle Tom. Arbitrator Stein, that story simply does not make sense. What is it she would not have done? How does that relate to acting differently if he had been a white man? And more importantly why did she then accuse him of acting like an Uncle Tom? It does not fit. All statements indicate that the exchange was a heated one, but the Grievant's version does not lend itself to a heated discussion. The truth is, the Grievant referred to the Grievant as an Uncle Tom because he helped Supervisor Kern (who is white) clean out the garage and the attic. She additionally threatened him with the brothers and that she would let them know how he was.

Much testimony from the Grievant indicated how miserable she was while working with employee Martin and that she suffered verbal abuse from him as well as sexual harassment. However, she did not report this until the pre-disciplinary conference. She argues that she told Supervisor Kern and he did nothing, but Supervisor Kern states that the Grievant did not indicate any type of harassment to him until the pre-disciplinary conference. She did not file a complaint with EEO until **after** the pre-disciplinary conference, and the complaint accused employee Martin of sexual harassment only. No mention was made of any of the other allegations made during her testimony at the arbitration hearing. Additionally, evidence was presented showing that OCRC found no probable cause for sexual harassment. Testimony was also offered arguing that the EEO officer at NBH never finds in favor of the employees who file complaints. I would submit to you, Arbitrator Stein, that this Grievant is in no way familiar with all the complaints filed and certainly cannot make that kind of statement with **any** amount of certainty. Additionally, it was the OCRC that made the determination that there was no probable cause in her case, not the EEO officer.

The Grievant's actions toward employee Martin were offensive and threatening. He made a call to Supervisor Kern immediately after the event and reported what happened. Supervisor Kern then asked the Police Department at NBH to conduct an investigation. The Police Department then gave the packet to the Human Resources Department, and the charge of failure of good behavior was included in the pre-disciplinary packet. The hearing officer found just cause for the charge. Employee Martin adamantly denies the charge of sexual harassment; the charge was investigated and an outside agency found no probable cause.

The Grievant's husband testified that the Grievant talked with him about employee Martin's actions, but Mr. McIlwain was not specific about what those actions were. He testified that he told his wife to report the problems to her supervisor – whatever she told him, he didn't think it warranted any other action. Employee Martin did nothing wrong; all he did was report the Grievant's actions to Supervisor Kern.

Dishonesty:

On April 9, 2002, a coworker, Kurstyn Allen, reported that the Grievant clocked in another employee, Felicia Earl at the start of Ms Earl's shift, which would be at the end of the Grievant's shift. The payroll records indicated that Ms. Earl was clocked in at the Walnut House at her start time when in fact Ms. Earl was on the hospital grounds at the beginning of her shift meeting with Supervisor Kern. The Grievant denies that she clocked in Ms. Earl, and Ms. Earl denies that anyone else clocked her in. However, Ms. Earl was definitely clocked in at the Walnut house as the payroll records indicate. Ms. Earl states that she called the Grievant to talk with her about representation for a meeting that Ms. Earl was to have with Supervisor Kern. The Grievant knew where Ms. Earl was that day. Circumstantial evidence would indicate that the real reason for the call from Ms. Earl to the Grievant; was because Ms. Earl thought she may be late getting to NBH, and asked the Grievant to clock her in. That was why the Grievant was seen clocking twice and that is why the record indicates the clock in was at the Walnut House. Management and the union stipulated that the clocks are accurate as far as determining location for the clock in. Ms Earl argues that maybe employee Allen clocked her in without her permission. If that were true, then the records would show two (2) punches for Ms. Earl on that day and time and only one punch is indicated – from the Walnut House. Management and the union also stipulated that the payroll officer is the only person with access to the numbers on an employee's ID badge, and that he would have testified that he never gave Ms. Earl's number to Supervisor Kern. Ms. Earl testified that she did not give her number to employee Allen. Arbitrator Stein, there is no doubt that this is clear and convincing evidence of dishonesty.

As a result of all of the above charges, the Grievant was re-entered to the hospital grounds and signed a participation agreement to enter EAP and to abide by all the rules and regulations of the hospital. This was a removal in abeyance. However, the Grievant did not comply with the agreement or use the generous opportunity to continue her employment with NBH.

Clinical non-compliance with the EAP agreement:
The Ohio EAP Intake Coordinator, Cynthia Penn, convincingly testified that she called the Grievant on the phone on five (5) different occasions and sent her a letter on three (3) different occasions reinforcing the terms of the agreement. Specifically, the Grievant was to maintain contact with the Intake Coordinator on a weekly basis. Ms Penn testified that despite all of her efforts to remind the Grievant to keep those contacts; she did not do so. The Grievant also entered evidence that her first provider terminated treatment with her due to the Grievant's resistance to that treatment. Ms. Penn testified that the Grievant could have been terminated from the agreement as a result of this failure, but they were willing to give her another chance and match her with a different provider. The Grievant also entered a document that she obtained from EAP detailing her case with them. The document was ostensibly entered to destroy the credibility of the Intake Coordinator by showing that the conversation documented with the Grievant's provider did not take place. The union submitted a letter from the Grievant's current provider that indicated that there had not been any correspondence with EAP. For all we know, the provider could have been referring to no **written** correspondence. Only the Grievant's provider could have testified to the true meaning of that letter. What the EAP document clearly indicates is the lengths to which EAP went to get the Grievant to comply with the agreement, but to no avail. The document indicates the Grievant's resistance to any authority or any desire to accept responsibility for any part that she played in the charges against her.
The Grievant's other evidence also did not support her attack on Cynthia Penn. The Grievant's husband testified that he did obtain one certified letter from the post office but that he did not know from whom the letter was sent, and that the letter blew out the window when he got on the freeway and opened his window. Even if that letter was lost, there were five (5) phone calls and two (2) other letters that were ignored. The union spent a lot of time again attempting to shift the blame to someone else – in this case the intake coordinator. They argued that Ms. Penn should have called the union in order to enable them to prompt the Grievant to do what the Grievant had already agreed to do when she signed the participation agreement. Ms. Penn testified that she did not have a release to speak to any union official. But even if she had had a release, the responsibility was the again the Grievant's – not anyone else. Her job was hanging in the balance and she still flaunted authority. EAP had no choice but to end the relationship and find her non-compliant.

Insubordination:
On June 7, 2002, the Grievant was directed to complete the "TPW Standards of Performance" and return the completed forms within six (6) days. Supervisor Pason testified that when she discovered that the forms were still in the Grievant's mailbox, she notified the shift supervisor to advise the Grievant to get the forms and make sure she completed them. Supervisor Pason then gave the Grievant an extension to June 17, 2002. When the forms were still not returned, Supervisor Pason gave the Grievant a request for information form. The request for information was the first step to discipline for failing to submit the forms when instructed. The Grievant finally returned the forms on June 20, 2002 attached to the request for information. It was not until she was staring discipline in the face that she responded, but it was well outside the timeframe the forms were initially requested. Supervisor Pason also testified that she asked the Grievant on three (3) separate occasions for the General Orientation checklist – that form was never submitted to Supervisor Pason. The Grievant on one occasion stated that she had a copy of the form and would provide it, but she never did. The Grievant testified to various excuses – she was in orientation; she could not get to her mailbox or she never saw the forms. Arbitrator Stein, she simply did not comply with the requests.
The Grievant clearly shows a pattern of steadfast resistance to authority. She was given a chance to stop making personal phone calls after the training, the memo and the notation on her performance evaluation, but she did not. Supervisor Kern made it clear to her that she could not take patient Phillip out on 2/22/02, but she did it anyway. She was given an extension to submit the standards of performance to her supervisor; but she ignored that request until she was facing discipline. She was given three (3) opportunities to submit the General Orientation checklist and she never complied with that request. She was given a chance to keep her job despite all the charges she faced from the CSN program, and she

refused to comply with EAP. She slandered her coworker because he does comply with authority, not because he made her life miserable. Employee Martin assisted management when it was needed; came to work and did his job, and the Grievant saw this as being an "Uncle Tom". Her credibility was severely damaged after her dishonesty about punching in her coworker.
The Grievant testified that Douglas Kern, John Martin, Kurstyn Allen, MaryAnn Pason and Cynthia Penn have all lied about her. Cynthia Penn does not know any of the other employees, and they do not know her. MaryAnn Pason is a supervisor in the hospital and has no connection to Douglas Kern, except that they are both supervisors. John Martin and Kurstyn Allen are bargaining unit members and testified without being coerced and of their free will. And yet, the Grievant would have you believe that all of them have lied about her.
The bottom line is that we cannot trust this Grievant and cannot count on her to abide by the rules and regulations of the hospital or the CSN. She was given the opportunity to change her ways, but she did not. Her judgment and suitability as a TPW working with mentally impaired patients is questionable at best. She is unable to work with coworkers and certainly unable to take direction from supervisors. We truly believe that management has done its part to keep this Grievant employed – she ended the relationship when she refused to take advantage of that chance. There was just cause for the discipline and the discipline was commensurate with the offense.

Based upon the above, the Employer requests the grievance be denied.

SUMMARY OF UNION'S POSITION

The Union's position is succinctly summarized in its post hearing brief. It is as follows:

UNIONS CLOSING STATEMENT

Arbitrator Stein,

You have heard the testimony and seen the documents in this case. The union feels that management has failed to justify the re-entry of the grievant into the hospital as well as the removal. To force the grievant into an EAP program based on a concentrated group of suspect allegations was not fair. Then the removal based on a Misunderstanding-involving EAP was not appropriate for a 16-year employee with no active discipline of record. In addressing the six initial charges, the AWOL was finally removed 16 months after the initial charges and six months after the removal. However, this allegation as well as the tardy charge was used to justify forcing the grievant into EAP. The grievant and Ms. Earl talked about the harassment of John Martin towards the grievant and how Mr. Kerns supported Mr. Martin. Ms. Wilson talked about the constant problems with Mr. Kerns harassing female employees since his appointment to a manager position. The grievant acknowledged that she might have made some mistakes, as she is only human. But she has not or ever would intentionally disobey orders or be insubordinate. And it would be way out of character for her to commit 6 infractions in TWO MONTHS after 16 years of none.

The issue of management intentionally violating article 25.08 of the contract demands repercussions. The arguments given for withholding the telephone bills were they needed a court order and that was not the case. Out of curiosity the

grievant called EDEN house on the day before the arbitration and EDEN house faxed her a copy of a bill. This same information was assessable to management if they really wanted to prevent disparate treatment against the grievant. The union only wanted to show that others had really made calls but only the grievant and Ms. Earl was being held accountable. Another factor showing disparate treatment is the fact that management investigated to find the grievants sister's phone number in medical records (Joint 1 pg. 59). It would seem those records are confidential and no supervisor should have access to them. It also shows that only a partial investigation was done. One to convict the grievant and not on to assure no disparity of treatment. The testimonies show that it would have been easy for management to pinpoint the other calls to staff that worked alone but chose not to.

Management also used the arguments of (1st) confidentiality an then (2nd) stolen logbooks to keep that information out of the hands of the union. This becomes more important given the fact that management used arguments in the step three hearing to support their case by changing testimony. I believe that it also goes to the credibility issue. Because management learned those documents supports the grievant. Those documents were never stolen and the information was not confidential as they included a copy of one in the pre-d package. Furthermore these documents would have shown that the staff on both first and second shift would take the residents out and use the term lunch. This did not mean that they were taking a lunch they were not entitled to. It was just a figure of communication. Management only admitted this after they were aware of what we had in our possession.

These willful violations of article 25.08 have to be addressed. Numerous arbitrators have held that management cannot withhold documents using bogus rationales to get around the intent of article 25.08. That it is the arbitrators that decide those documents relevance, not management.
On the tardy allegations, we listened to Mr. Kern's ramblings as to why he could not approve 7 minutes late for the grievant because of policy. But could approve (Union #1) every request for Kurston Allen, approve Ms. McAdoo's request for tardiness because of a time change, John Martin's alleged battery problems lateness (which Mr. Martin said he turned in no documentation), approve Ms. Earl's initial request for attending staff funeral. Ms. Allen's request on union (#1 page 3) should have automatically placed her into discipline as it was turned in almost one month late. Yet the grievant is the only one denied until Ms. Earls last request was denied. That one had appropriate documentation but she was not siding with Mr. Kerns against the grievant and paid the price. One of which should have automatically placed her into the disciplinary process by virtue of untimely submittal. Appropriate approval would have eliminated the rationale for discipline. Management argued that Human Resource brings charges for tardy violations but (joint 1 page 1) shows Doug Kerns bringing this charge against the grievant for the pre-d hearing. What transpired was disparate treatment because of Mr. Kerns desire to initiate discipline for the grievant.

On the insubordination charge at the group home, taking the resident to lunch. The documents show that there has always been a procedure that staff took patients out to lunch. Everyone did this. While management stipulated to this, it was only after the third step when they found out what we had. Unfortunately, management was able to take the information requested and see the flaws in their charges and address the arbitration in a different manner than had previously been presented. The positions argued by Mr. Kerns and Mr. Martin reflects what the documents would have shown and that is what the grievant did on that day had been the practice. That is why the efforts were made to keep those documents out of the Union's possession. Mr. Kern's assertion that the grievant called him and asked him

for a lunch break she knew she was not entitled to is asinine. Mr. Kerns is a supervisor that she knew was out to get her and had disapproved time for her that was approved for others. The grievant stated she never talked to Mr. Kerns. Both Ms. Earl and the grievant testified he would not return their calls. However, Mr. Martin boasted that Mr. Kerns returned his calls. That was because Mr. Martin and Mr. Kerns had the same goal and that was to eliminate the grievant. The alleged Tape recording introduced has no validity. This is something the grievant denies. We don't know where it came from, when it was produced or the authenticity of it. We do know that there was no date or time included with the alleged recording that was played at the hearing. We do know that no tape was offered to support this allegation in the pre- d hearing (joint 1 pg. 5), the pre-d hearing officers report (joint 1 pg. 20) or third step hearing officers report (joint 2 pg. 6). At the hearing the tape was played with no date or time attached to it. It could very well be a mixture of conversations mixed together to form an alleged tape recording. AND IF WE ARE TO BELIEVE THE TAPE IS AUTHENTIC, MANAGEMENT AGAIN VIOLATED ARTICLE 25.08 BY WITHHOLDING ALL REQUESTED INFORMATION RELATING TO THESE CHARGES..

The personal phone calls again show disparity in what happened. These records were also withheld from the union. Yet Mr. Kerns testified he had seen a number of telephone records. This lends support to the belief that there were accessible. If Eden house was concerned about the calls, those bills or copies were available to management if they wanted them. Furthermore again using information obtained at the pre-disciplinary hearing, management added another wrinkle to their argument. This time they have talked to Kerston Allen about the 105-minute call. Prior to this arbitration hearing there was no investigation into Ms. Allen's use of the phone. In (Joint 2 pg. 9), the third step haring officer acknowledges that they did not look into the other calls. Then at the arbitration hearing Mr. Kerns testifies that he talked to Kurston Allen about the 105-minute call. According to him, she said she was talking hospital business. That defies belief. Kurston had received the same training as the grievant but she was given another chance. That call was not the only one made by Ms. Allen and management knew it. That is why they came with the make shift lie to justify calls they had not investigated. Arbitrator Stein, anyone can tell this is cover up testimony. Testimony to cover their lack of investigating, as this was a witch-hunt for the grievant. The other staff disciplined was Felicia Earl and that was because she was not supporting Mr. Kerns. Had Ms. Earl been siding with Mr. Kerns, that discipline would not have happened.

On the charge of calling her co-worker an "Uncle Tom". The grievant maintained from the onset that she never called him an "Uncle Tom". She stated she told him to stop acting like an "Uncle Tom" and that was only after responding to the derogatory remark he made to her. There is a major difference being those two statements. Contrary to Linda Thernes belief of Mary Wilson and Sharon Williams not being qualified to speak on the differences. People of color are better qualified to speak on it because they have lived the names and know the differences. They both felt the remark "If I were a white man you would have acted differently" has a more negative implication than "Stop acting like an Uncle Tom". Ms. Wilson even spoke of other staff telling her that Martin had called staff member Gloria Bell, blackie as she is darker than him. The grievant testified Mr. Martin called her an assortment of names ranging from Carrot Top, Ms. Thing, and Mother Teresa etc. That Mr. Martin's retaliations to her complaints and Doug Kerns not properly addressing the situation this led to the problems she experienced.

Management did not even consider the grievants version of the incident. John Martin's allegation was all that mattered. The pattern is quite clear. Allegations by John Martin and Kurston Allen against the grievant were taken as factual. Nothing

the grievant said or did would change that. It is not coincidental that both Martin and Kurston called to report to Doug Kerns something the grievant had allegedly did that went against their belief??? That is as fishy as it gets.

On the charge of allegedly punching in Felicia Earl. You heard their testimony and it was quite factual. The grievant knew where Felicia Earl would be, only Kurston Allen didn't know. Doug Kerns didn't believe that Ms. Earl would be at the meeting on time as he had recently talk to her. He just didn't know Ms. Earl lived that close to Northcoast. But Roger Beyers, LRO statement (joint 1, pg. 79) acknowledges that Ms. Earl was there timely looking for a union representative. There was never a need to punch Ms. Earl in. She had her time card and even without it there is a well-known procedure to assure everyone is credit properly. Realistically, it would be quite stupid for two employees that Mr. Kerns was after, to punch someone in at Walnut house. Especially when the person is meeting with Doug Kerns some 45 to 50 minutes away.

Management wants to insinuate that the supervisor did not have Ms. Earl's last four digits but we really don't know that. We know that he had gotten confidential health insurance information of the grievants sister from human resource. Therefore getting the last four digits from someone is a possibility. Ms. Earl and Kurston Allen worked second shift together. They were very close friends before the problem with Martin, Kerns and the grievant. It is very possible she knew, could have seen or been told Ms. Earl's last four digits. There was nothing to show that the grievant knew Ms. Earl's last four digits. So how do you convict the grievant with that uncertainty? The possibility of Kurston Allen punching in the number and then calling Doug Kerns is more realistic. She was the one who was not aware of Ms. Earl's schedule. Furthermore looking at Ms. Allen's statement and where the time clock is, had the grievant been punching Ms. Earl in, her body in front of the time clock would have blocked any view of the clock. Ms. Allen's statement also indicates a ten-minute difference between the grievant punching Ms. Earl in and herself out but the time sheet show a four-minute difference (joint 1 pages 69 and 70). Sharon Williams worked with kronos and was on the committee to resolve the problems. She testified about the tens of thousands of inaccuracies. She further stated that a person could punch in and the clocks not take. The person punching would not know that punch did not take. Ms. Earl even talked about the problem she had with her badge the date of her third step hearing. At that time the LRO attempted to help her swipe the badge. That Ms. Earl's punch did not show at Northcoast is not as unusual as management wants it to seem. This has been a constant problem and that situation is no different.

Arbitrator Stein, the initial discipline rendered on the grievant was unjust. Of the six charges, on never should have existed. Management admits this but for over 16 months it had been a part of the package. Because of the charge the grievant was never paid her overtime for that day. The tardy charge, the personal telephone calls have serious disparate treatment concerns.

The charges of disobeying a direct order by leaving Walnut house for lunch. This was alleged by Doug Kerns and supported by John Martin. Calling Mr. Martin an Uncle Tom. Mr. Martin, the author of derogatory remarks to the grievant and others called to log a complaint

Kurston Allen calling to report the grievant punching in a co-worker.
These charges stretches the imagination to believe. These charges rely on staff working with Doug Kerns to discipline the grievant. This is the same pattern that Mr. Kerns has used against other female employees in the past. A problem that has existed since he became supervisor. An employee knowing they don't have lunch

breaks will not call a supervisor for one and then leave. Citing that Mr. Martin acts like an Uncle Tom is not negative. Especially when taken in context with what Martin had said to her. Not to mention prior problems she had with Mr. Martin. Then Kurston Allen calling to report a punch in violation by the grievant. An accusation no one can prove one way or the other.

A person with a 16-year history and a clean record deserved much better than this. A calculated attack within a two-month period to take her job. An attack that was taking place while she was experiencing sexual harassment that was allowed to go on unchecked. Talking to the EEO person as Mrs. Thernes suggested is no relief. Especially when it is a person has done nothing in memory for bargaining unit members with concern.

The second part concerns the EAP non-compliance. This was merely a mistake, the kind of misunderstanding that had happened before. Sharon Williams explained and (union #6, pg. 3) verifies that another employee had been placed in a similar position. However, EAP contacted the steward as is protocol and the situation was resolved. That employee did exactly as the grievant. She made all sessions with the counselor but forgot to keep contact with EAP. A simple mistake. Nevertheless with the letter to the steward, the problem was rectified and as Ms. Williams testified that person had not received a letter that had been sent by EAP.

Cynthia Penn testified that she did not have an authorization from the grievant to contact the steward. However in (joint 1, pgs. 132, 133 & 134) STEWARDS WERE PRESENT WITH THE GRIEVANT DURING THE SIGNING OF EAP PAPERS. It must be understood that management gives these forms to be filled out. If the correct form was missing then management MUST shoulder that blame. This little oversight allowed the non-compliance issue to exist. Ms. Penn stated there were letters sent to the grievant with no response (Joint 1 pg. 135 to 139). Those letters went to management, nothing to the grievants union representative. Management should have acknowledged that the union needed notice and the grievant said she did not receive those alleged letters. Ms. Penn said even a certified letter was sent but nothing was presented to verify that. The grievants husband testified that the only certified letter that he had picked up was lost. However, if a certified letter was sent EAP would have received a record of the signature or notice of no pick up. But there was nothing presented to validate a certified letter had been sent. Ms. Penn also testified and (union #7) indicates there were calls to the grievant, Roger Beyers and on 8-6&7-02Colleen Character (the grievants psychologist). The grievant denied much of what was documented and the psychologist, Colleen Character sent a letter to EAP on October 25, 2002 speaking about the grievants progress and questioning why she had not received ANY correspondence from EAP. Since management indicated the grievants account was questionable, don't the psychologist letter (joint 1 pg. 117) raise questions about the validity of the notes kept by Ms. Penn. The psychologist is questioning why she had NEVER heard from EAP. We can debate the pros and cons for time to come. However, this was merely a misunderstanding with Northcoast, EAP and the grievant sharing this blame. As the grievant testified, why would she make all the counseling appointments and then intentionally be non-compliant for a lack of calling. She was stressed, frustrated and disappointed at what had happened. She needed her job and that is why she entered the program, to keep it. She continued even after Northcoast terminated her. There was no intent on her part to circumvent the process and the union could have resolved this with the proper notice they were entitled to.

The charges of failure to return the TPW Standards of performance, Ms. Pason indicates the grievant took the form out of her mailbox on June 7, 2002 (joint 1 pg.). Her mailbox at the North Campus and (union #4) shows the grievant was in

orientation training at the South Campus on that day. She stated she did not get the checklist on June 7, 2002 as indicated. Ms. Pason then said she left it in the grievants mailbox to complete and return by June 17, 2002. While there was descrepancies in the grievant testimony regarding being off on June 17, 2002. Her original statement indicates some confusion but filling the papers out and leaving them by accident. That she forgot she was off the next day (joint 1 pg. 146). However, they were turned in on June 18, 2002. The orientation checklist is something to be done by the preceptor. These are not given to the employee as Ms. Pason indicated. The grievant testified she NEVER had those papers and the training officer concurred. Ms.

Pason's account of what happened is in (joint #1 pg.148). Ms. Pason stated the Grievant was given the forms after orientation. However, in (joint #1 pg.121) Ms. Wilson answers an e-mail from Ms. Pason. She tells Ms.Pason that that the forms are in the mail to her. So Ms. Pason was aware that the grievant did not have those forms. I further question whether the grievant ever received those forms.

In responding to all the allegations the question is was there just cause to remove the grievant after 16 years of decent service. She possessed no attendance problem, no discipline problem and no problem with insubordination. Then during a period of two months she allegedly became insubordinate, unreliable and everything negative. That did not happen and under normal situations. What did happen was her problems with John Martin that she attempted to get her supervisor, Doug Kerns to address. The the retaliation that occurred and the splitting of co-workers to isolate her for discipline.

Once again, the OCSEA AND STATE ARBITRATION INDEX IS REPLETE WITH ARBITRATORS PENALIZING THE STATE FOR VIOLATING ARTICLE 25.08. The decision of relevancy is for the arbitrator to decide and not the state. As well as intentionally withholding documents as was the case in the instant grievance. Arbitrators Rhonda Riveria, Thomas P. Michael, David Pincus, and Calvin W. Sharpe, to name a few have held management accountable for violating this article. In decision G87-1299, Danell Brown, G87-0811Jeff Sparks, G-87-0205, Ralph Bambino G-87-0366, Kassandra Michale G87-1494, Greg Hurst and 24-15-(88-09-14)-0019-01-04, Todd Revis, stiff penalties resulted from violating 25.08.

Arbitrator Stein, it is for these reasons that we ask that this discipline be overturned, that the grievant receive back pay and all lost benefits. That she be returned to the CSN program she came from. We believe that after having heard all the information and seeing the documents, you will agree that removal was an unfair option for management to resort to under the circumstances. There was plenty of blame to go around in this case.

Based upon the above, the Union urges the Arbitrator to sustain the grievance.

DISCUSSION

The Grievant in this case is a long-term employee, who had no discipline on her record until 2002. She worked in the CSN (Community Support Network) from November of 1996 until May 20, 2002, when she re-entered the Cleveland Campus.

It appears from her 2001 evaluation that she and her supervisor, Doug Kern, were having problems. In Management Exhibit 1, Mr. Kern states:

> **"Conduct yourself in a professional manner when speaking to your supervisor. Do not hang up the telephone on your supervisor when you have a disagreement.**
>
> **To conduct yourself in a professional manner at all times when dealing With peers and supervisor."**

Mr. Kerns, the Grievant's supervisor, also states in the comments' section of the 2001 evaluation that justifies the overall rating the following:

> **"Despite numerous attempts by previous supervisor and myself we have not seen any improvement."**

The Grievant received a "Does not Meet" in the areas of Teamwork and Adhering to Procedures in this 2001 evaluation. The Grievant appealed her evaluation. During the appeal process it was altered by the Employer to a more favorable evaluation (Mx 5). However, the evidence also indicates that Mr. Kern was not the only supervisor with whom she had difficulty (Mx 5). So to say that the Grievant's problems

with authority were confined to Supervisor Kern, would not be accurate. She also did not comply with the directives of RNC in a timely fashion. Mary Ann Pason instructed and repeatedly reminded her to fill out a post orientation checklist and a Training Report (Jx 1, p. 139-154).

In 2002, the Grievant was found by the Employer to have violated several rules and regulations, mostly related to acts of insubordination. However, instead of maintaining its position to terminate the Grievant, the Employer, the Union, and the Grievant agreed that the disciplinary action would be held in abeyance in lieu of the Grievant attending the Employee Assistance Program (Jx 1, p. 153). It is clear the Employer was willing to give this long-term employee a last chance to correct her conduct by entering into an understanding with the employee and the Union that the discipline would be held in abeyance if the Grievant was willing to address her problems. In addition to holding the discipline in abeyance, the Employer transferred the Grievant to a new supervisor and a new area, the Cleveland campus. Her 2001 evaluation was also adjusted to "meet" in all areas except achievement (Mx 5).

An EAP agreement is a contract or an agreement, entered into in good faith. When the Grievant signed the EAP contract she acknowledged its terms.

"The employee by signing this contract acknowledges that s/he has received a copy of this contract, and has been fully informed of the terms and consequences of it, and hereby voluntarily enters into said contract after having been advised by his/her representative, if applicable."

Contained in the EAP contract are the specific conditions and obligations placed on the parties. It states in pertinent part:

"The employee agrees to participate in follow-up care as recommended and/or required by Health Care Provider, and agrees that such follow-up care is to be verified by ODMH by the Case Monitor. ODMH agrees that, so long as this contract is complied with in its entirety, the discipline recommended for this employee pursuant to the letter dated 5/8/02 shall be held in abeyance. Should the employee violate this contract, in any part, the recommended disciplinary procedure will be implemented."

The Union representative signed the contract along with the Grievant and the Employer. It is clear that the Employer was willing to suspend its proposed disciplinary action; however in doing so, it placed responsibility on the employee to work with the EAP contract in order to correct her attitude and performance.

The evidence and testimony demonstrate that in spite of what was at stake, the Grievant failed to comply with the most basic terms of the EAP agreement, remaining in regular contact with the EAP to ensure compliance. I found the testimony of Cynthia Penn to be credible and without apparent bias. She and the Grievant had never met, and there was no motive for Ms. Penn to tell anything but the truth. She stated she attempted to call the Grievant approximately five (5) times and sent her three (3) letters without success. The Grievant was to have maintained contact with the EAP office on a weekly basis (Ux 6). In a follow-up letter to the Grievant dated August 23, 2002 Ms. Penn clearly stated she had not spoken to the Grievant for several weeks over the summer of 02 (Jx 1, p.

156). On September 18, 2002 the Grievant, was sent a second letter from Ms. Penn in which she states she had not been in contact with the Grievant since 7/30/02, more than two and one-half months (Jx 1, p 138). It is clear from the EAP contract that regular contact with the EAP provider is an essential condition of compliance (Jx 1, p. 133-134).

When the Grievant failed to comply with the contact aspects of the EAP program, she broke the contract that held her discipline in abeyance. It is ironic that what the Grievant did to break the contract, failure to comply with directives, is what brought her to the brink of termination in the first place.

For whatever reason, after some fifteen (15) years of employment the Grievant started on a course of defiance of authority that heretofore had never been part of her recorded work history. Her action in defiance of Supervisor Kern on February 22, 2002 was an act of insubordination in direct contradiction to an immediate directive. Regardless of how the Grievant viewed her supervisor, this flat refusal to follow reasonable and proper directives and her blatant defiance of her supervisor's authority is inexcusable. The Employer's investigation contains other examples of defiance of authority. Supervisor Pason provided convincing testimony that the Grievant repeatedly failed to comply to repeated requests to complete forms, a basic task, is yet another example of insubordinate conduct with another member of supervision. P. 148 of Joint Exhibit 1,

demonstrates the extent to which management had to go to ask for a simple task to be completed.

In these examples the Grievant has defied reasonable directives of two supervisors' as well as the EAP provider, after signing a contract promising to comply. When the totality and weight of the evidence and testimony are considered, the Grievant's version of the events and excuses for not following directives lack credibility. The record contains other examples of defying authority, and other minor rule violations for such things as tardiness and making personal telephone calls. Standing alone the minor violations are not serious, but when added to the continued pattern of insubordination they take on greater significance. I do not find that there is sufficient evidence to sustain the charge regarding the Grievant allegedly punching another employees' time card.

As cited above in her 2001 evaluation, and in the subsequent follow-up to it, the Grievant continued in her established pattern of failing to follow directives in a responsible fashion. The pattern remained unchanged after the Employer held the proposed discipline in abeyance, transferred her to a new area and supervisor, and had her enroll in the EAP. The Grievant's record, the Union's efforts, and the Employer's willingness earned Ms. McIlwain a chance to undo what had been done. Unfortunately, she did not seize this opportunity.

The Union raised the issue of fairness regarding the Grievant having to sign the EAP agreement. The Grievant signed the EAP agreement and presumably was not forced to do so. Also, the Union raised the issue of the failure of the Employer to provide the Union in a timely fashion with information in conformance with Article 25.08 of the Collective Bargaining Agreement. This is an important issue and is vital to the Union in assessing its response to the Employer and in preparing a proper defense.

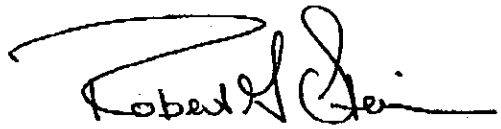
The parties have clearly agreed that all relevant information shall be exchanged. The Employer is reminded that refusing to turn over relevant information in violation of Article 25.08 will be viewed very critically by arbitrators, and is likely to be detrimental to the Employer's case. However, in this particular matter the late provision of information was not material to the outcome. In spite of a vigorous defense by the Union, the Grievant caused herself to be discharged by continuing her pattern of insubordinate behavior, which includes not complying with the contractual requirements of the EAP.

AWARD

The grievance is denied.

However, the charge against the Grievant regarding clocking-in for another employee shall be removed from her personnel record.

Respectfully submitted to the parties this 13th day of November, 2003.



Robert G. Stein, Arbitrator