#1761

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF MENTAL HEALTH

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Edmonia Antoine

Case No. 23-18-030808-0070-01-04

Date of Hearing: March 18, 2004

Place of Hearing: Northfield, Ohio

APPEARANCES:

For the Union:

Advocate: Robert Robinson

Witnesses:

Edmonia Antoine
Charlene Cintavy
Cynthia Linder
Charlene Franklin
Deborah Grier
Sharon Williams

For the Employer:

Advocate: Georgia M. Brokaw
Bryan Walton, 2nd Chair

Witnesses:

Roger E. Beyer
Barbara Leugers
Parvesh Rempal
Michael Waggoner
Laverne Claxton
Jeff Sims

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: June 3, 2004

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003, through February 28, 2006, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support removal of the Grievant, Edmonia Antoine ("Antoine"), for violating Employer's Policy: Policy 3.10 (Failure of Good Behavior); Policy 3.22 (Workplace Violence); and Policy 3.23 (Absenteeism/Tardiness). The removal involved the making of a threat by Antoine towards a co-worker.

The removal of the Grievant occurred on August 5, 2003, and was appealed in accordance with Article 24 of the CBA. This matter was heard on March 18, 2004, and is properly before the Arbitrator for resolution. Both parties had the opportunity to present evidence through witnesses and exhibits. Both parties submitted post-hearing briefs, with the record being closed as of April 20, 2004.

BACKGROUND

For more than twenty-three (23) years at the time of her removal, Northcoast Behavioral Healthcare System ("NBH") had employed Antoine as a Therapeutic Program Worker ("TPW"). TPW's are part of the treatment team to administer appropriate care for patients assigned to them. NBH is operated by the Department of Mental Health ("DMH") and consists of three (3) separate campuses – Toledo Campus (Toledo), North Campus (Cleveland), and South Campus (Northfield). NBH operates a mental hospital system caring for severely mentally disabled, mentally retarded and forensic patients, a.k.a. the criminally insane. Since The Mental Health Act of 1988, NBH competes with private sector hospitals, i.e. Community Mental Health Boards, and mandates that every employee utilize good faith in administering NBA's policies and procedures. The goal of NBH is to return its patients to the community as quickly as possible.

The grievant was employed at the South Campus at all times relevant to the events preceding her removal.

On August 5, 2003, Antoine was removed by Director Michael F. Hogan ("Hogan") for violation of Policy 3.10, Time and Attendance-Absent Without Proper Authorization (AWOL); Tardiness; Excessive Absenteeism; Policy 3.08 – Leaves; and Policy 3.23 Employee Absenteeism. The attendance infractions in the removal order consisted of three (3) dates: January 3, 2003, February 23, 2003, and March 6, 2003.[1]

Hogan's removal order also indicated that on October 25, 2002, [2] a prior removal was held in abeyance if Antoine would abide by the terms of the Employee Assistance Program ("EAP") agreement and no future rule violations occurred. Antoine was found guilty of using threatening comments at the nursing station on August 25, 2002, when she became upset and stated to the charge nurse, "You better stop fucking with me or you are going to be sorry". Antoine was also tardy on two occasions as well, which was the second charge in the October 25, 2002 removal order. As opposed to removal, Antoine voluntarily agreed to participate in an EAP program and remain free of <u>any</u> policy violations for 180 days.

To facilitate the care of patients, the nursing units at NBH are staffed based upon the level of the patient cared for, i.e. forensic (criminal) or mentally disabled (civil). A multi-disciplinary team consisting of two (2) Psych/MR nurses, TPWs, social workers, and activity therapy specialists are normally assigned to a unit. Additionally, physicians, psychologists and psychiatrists are available for patient care. A unit generally has between thirty-five (35) and forty (40) patients assigned. A Psych/MR nurse is designated as the supervisor or "charge" nurse over the TPWs and other employees on that shift.

Regarding the removal held in abeyance August 25, 2002, Antoine was working the first shift and assigned to the forensic unit known as McKee 3, which has a patient population of thirty-seven men and women. Barbara Leugers ("Leugers"), registered nurse ("RN"), was the

[1] The removal order was amended at Arbitration to reflect that January 3, 2003, was the only date at issue regarding the AWOL infractions. Joint Exhibit ("JX") 3, p 2.
[2] JX 6 indicates that a 2002 removal was held in abeyance as set forth in Hogan's August 5, 2003 removal order. JX 3, p2.

first shift charge nurse on the McKee unit. Around 9:10 a.m., Leugers contacted Antoine in the breakroom, and instructed her to perform the 24-hour checklist and have it completed as soon as possible. Laverne Claxton ("Claxton") was in the break room when Leugers instructed the grievant to perform the checklist.

Upon exiting the break room, Antoine engaged in a heated conversation with Leugers in a loud and angry manner, and used words that were viewed by NBH as threatening.

Parvesh Rempal ("Rempal"), RN, observed Antoine's behavior at the desk with Leugers and indicated that clients were in the area as well. (JX-5, p. 10) An internal investigation occurred, resulting in a finding of violation of Policy 3.10, in that Antoine had exhibited threatening behavior on August 25, 2002. On September 25, 2002, NBH notified Antoine that she would be removed as a result of her conduct towards Leugers, as well as several instances of time and attendance violations that existed regarding tardiness and absent without leave. (JX5, p.1)

Prior to the imposition of the removal, NBH and Antoine entered into agreement that would hold the removal in abeyance for 180 days if Antoine entered into an EAP Agreement and successfully complied with the EAP program requirements (JX-6, p. 2-3). Antoine and her union steward, Sharon Williams ("Williams") executed the EAP agreement on October 25, 2002. Antoine and Williams, as union stewards, were familiar with the EAP process and understood that the program was voluntary, not mandatory.

Pertinent parts of the EAP Agreement provides as follows:

> ***"EMPLOYEE ASSISTANCE PROGRAM PARTICIPATION AGREEMENT***
>
> *The Ohio Department of Northcoast Behavioral Healthcare System and the employee agree to enter in to a contract wherein the employee voluntary agrees to seek assistance from a Health Care Provider under the Ohio Employee Assistance Program (Ohio E.A.P.), to deal with the problem of # 3.10 Failure of Good Behavior, Threatening any employee while on duty and/or on State Property, Use of obscene, abusive or insulting language or gestures, co-workers being disrespectful and/or engaging in heated arguments towards co-workers and violation of HP# 3.22, Workplace Violence Prevention. The employee agrees to participate in a plan for a period of 180 days. Said plan will be developed by the Health Care Provider. The employee agrees to meet all the requirements set forth in that plan. The employee also agrees to verification as to whether or not*

the employee is keeping scheduled appointments and is in compliance with the agreed to plan. Said verification will be made by the Case Monitor assigned in accordance with the employee's health plan contract.....

Provider, and agrees that such follow-up care is to be verified to 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 09/25/02 shall be held in abeyance. Should the employee violate this contract, in any part, the recommended disciplinary procedure will be implemented.

The employee understands and agrees that further occurrences of the problem described in paragraph 1, may result in the immediate implementation of the proposed discipline.

By signing this agreement, the employee and Union agree to waive any contractual time restrictions regarding the imposition of discipline...."

On January 3, 2003, the grievant called off sick without sufficient sick leave balance, making her AWOL for 4.81 hours. As a result of Antoine's failure to remain free from policy violations, her removal held in abeyance was reactivated resulting in the subject matter of this arbitration.

Although Antoine had successfully completed the EAP program on May 2, 2003, Antoine was notified in a pre-disciplinary meeting held on June 24, 2003 that the January 3, 2003 AWOL infraction had re-activated her prior removal since she had violated the time and attendance policy.

At the hearing, the Union presented evidence and/or argument to support several defenses mitigating against the removal. The Union contended that the workplace violence incident was exaggerated, in that Antoine and other African American ("AF/AM") employees were treated differently than their white co-workers who engaged in similar behavior and that disparate treatment was also utilized due to her position as a union officer.

The Union also contended that the pre-disciplinary hearing occurred almost six (6) months after the January 3, 2003, AWOL infraction in violation of Article 24.02, and that NBH did not initiate the disciplinary process as soon as possible. The Union also asserted that Antoine was forced into the EAP program under the guise of the Workplace Violence policy even though other variable acts of threats by co-workers did not require them to enter into an EAP agreement.

Active discipline of record included a written reprimand issued July 16, 2002, when Antoine stated, "I'm gonna hurt somebody", after, the Grievant was required to attend a TPW Recognition Day program. Jeff Sims ("Sims") testified that Antoine was upset and had to be physically restrained by co-workers. The Union presented evidence that participation was voluntary, not mandatory, and that management, through Sims, misrepresented the purpose of the TPW day which caused confusion as to whether or not Antoine was required to attend the program.

ISSUE

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

RELEVANT PROVISION OF THE CBA AND DMH
ARTICLE 24 – DISCIPLINE

24.01 – Standard

> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

24.02 – Progressive Discipline

> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.
>
> Disciplinary action shall include:
> A. one or more oral reprimand(s) (with appropriate notation in employee's file);
> B. one or more written reprimand(s);
> C. working suspension;
> D. one or more fines in the amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB.
> E. one or more day(s) suspension(s);
> F. termination

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

Hospital Policy 3.10- Guidelines for disciplinary action (In part)

"Failure of Good Behavior: Threatening any employee while on duty and/or on state property, use of obscene, abusive or insulting language or gestures to co-workers; being disrespectful and/or engaging in heated arguments toward co-workers constituting a violation of hospital policy 3.22 Workplace Violence Prevention."

Hospital Policy 3.22 – Workplace Violence Prevention Policy (In part)

" 1. Workplace violence is defined, as any act perceived to be threatening, menacing or harmful to an individual, group of individuals or the organization. Workplace violence includes internal employee or patient/client situations and external factors resulting in violence or threats of violence such as domestic disputes or danger presented by strangers.

2. NBHS takes the position of zero tolerance, reflecting its intent to promote a physically and psychologically safe workplace free of threats, intimidation and physical harm. Proven acts of violence by employees will lead to disciplinary action up to, and including, termination and the involvement of law enforcement authorities as needed."

Hospital Policy 3.23 – Employee Absenteeism and Tardiness (In part)

"Hours absent with a negative sick leave balance will be without pay and the employees' ADM-4258 (Request for Leave Form) will be disapproved.

Tardy is defined as being late thirty(30) minutes or less

Any absence that is more than thirty (30) minutes is considered absent with out leave (AWOL)"

Hospital Policy – 3.08 Leaves (In part) Use of Sick Leave

*"**USE OF SICK LEAVE***
Employees may use sick leave for the following reasons:
1. Illness, injury or other health problems or the employee…."

Approval of Sick Leave

"In order to be approved, an employee's request to use sick leave must follow proper notification and documentation proved uses….

Upon returning to work from sick leave the employee shall complete a Request for Leave Form and submit it to his/her supervisor... use of vacation leave for sick leave purpose will not be approved except in instances when the employee has an approved FMLA or has filed worker's compensation or disability leave."

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

The record supports the position that Antoine threatened RN Leugers on McKee 3 on August 25, 2002. Investigatory written statements of RN Leugers, RN Rempal and TPW Claxton all support the proposition that Antoine threatened Leugers in front of clients, by stating words to the effect, "...you better stop fucking with me....just one more time....you'll be sorry..." (JX6, pp. 18-22). Rempal further added that Antoine's tone of voice and finger pointing indicated threatening conduct to her. (JX6, p. 22)

Leugers testified that she was shaken and frightened and immediately informed the manager on duty, Michael Waggoner ("Waggoner"). Waggoner in turn contacted both NBH campus police and Sims, Assistant Nursing Executive regarding this matter.

Antoine was placed on administrative leave during the investigation, which included obtaining written statements from thirty-two (32) clients as well. (JX6, pp. 33-68) On September 16, 2002, during the pre-disciplinary conference, the grievant was informed of the charges against her, which were based upon the incident with Leugers, as well as two incidents of tardiness on August 18, 2002, (by three (3) minutes) and on August 24, 2002 (by two (2) minutes). The Grievant, was represented by Williams, her union steward, at the pre-disciplinary meeting.

Based upon the investigation, the evidence indicated that Antoine's behavior was threatening, violating policies 3.10 (Failure of Good Behavior) and 3.22 (Workplace Violence). Furthermore, on August 18, 2002 and August 24, 2002, Antoine violated policies 3.10 (Time and Attendance), 3.08 (Leaves), and 3.23 (Employee Absenteeism and Tardiness), by arriving at work tardy on both days.

Hogan issued the removal notice on September 25, 2002, for Antoine's violations of the above referenced policies, but on October 16, 2002, Roger Beyer ("Beyer") notified Antoine that her removal would be held in abeyance pending her successful completion of the EAP program at which time the removal would be amended to a five (5) day fine. Beyer further stated, "...[however] should you fail to comply with the terms of the agreement, or **commit further policy infractions**, implementation of the removal will follow." (JX3, p.10), emphasis added.

On October 25, 2002, Antoine voluntarily signed the EAP agreement (JX3, p.15); the action in abeyance pending EAP notice (JX3, p.11), and the Ohio EAP Participation Agreement Procedure – Employee Responsibilities (JX3, p.14). It is undisputed that Antoine as a union steward, had training on matters related to the CBA, NBH's hospital policies and possessed greater knowledge of labor matters due to her affiliation with the OCSEA. (NBH post-hearing brief, pp.3-4).

The Union and Antoine understood that the EAP agreement was a contract entered into in good faith with full knowledge of its terms. Finally, Antoine was aware that by executing the EAP agreement, she waived any contractual time restrictions regarding the imposition of discipline. (JX3, p.15) In other words, NBH was not obligated to comply with the strict initiation of discipline under Article 24.02 due to the express language to the contrary in the EAP agreement.

On January 3, 2003, Antoine did not have enough sick leave to cover her absence, placing her in a negative sick leave status of 4.82 hours. Eugene Briers ("Briers") Human Resources Manager testified that when employees have a negative sick leave balance, potential charges of AWOL will occur and this practice was clearly communicated to all employees on October 24, 2001. (Employer, ("ER")1) Briers further indicated that employees received a paycheck every two (2) weeks, which contains leave usage and balances remaining in all categories. Antoine was responsible for monitoring her sick leave balances, and as an employee with over 23 years of service with minimal sick leave balances on the book; Antoine

was aware or should have known the status available sick leave. Briers added that NBH enforces a zero tolerance policy regarding incidents of workplace violence.

Briers' testimony added that, while under an EAP agreement, NBH would hold the removal in abeyance during the 180-day period if only minor rule violations occur. Past practice allowed other employees to conclude the EAP 180-day process, even though other policy violations had occurred during the 180 days. NBH points to former employees Pamela McIlwain ("McIlwain") and Debra Grier ("Grier") as examples.

Both McIlwain and Grier were allowed to conclude the 180-day timeframe despite other violations within the 90 days, and then removed. The Union was aware of this practice and had never challenged NBH's practice of honoring the 180-day timeline prior to imposing further disciplinary action. In addition to past practice however, the express language in the EAP agreement of the parties waives "...any contractual time restrictions regarding the imposition of discipline."

Therefore, NBH was not required under Article 24.02 to issue discipline regarding the January 3, 2003, sick leave infraction in a timely manner. Finally, the Union has failed to demonstrate that Antoine was harmed as a result of the alleged procedural violation of Article 24.02.

Although NBH recognized that a considerable amount of the hearing and post-hearing documents raised allegations of disparate treatment, the Union bears the burden of proof and has failed to satisfy any evidentiary standard applicable in this matter.

The testimony of employees, including Cynthia Linder ("Linder"), Charlene Franklin ("Franklin"), Williams and Grier, supported a central theme that AF/AM employees were treated differently than similarly situated white employees in the following areas: disciplinary decisions made by management; application of policies for similar conduct; and failure by NBH to investigate charges of abusive/threatening behavior by whites towards black employees.

NBH submitted documents indicating the investigation and resolution of three (3) charges of discrimination with the Ohio Civil Rights Commission ("OCRC") by Williams for conduct against Mary Tomasik ("Tomasik") in 1996 and Joan Zmina ("Zmina") in 2002.

Tomasik, a white female ("WF"), became Williams' supervisor for approximately five (5) months after being promoted in July 1996. During the latter half of 1996, Tomasik recommended that Williams return to her former position and changed her work hours as well. Williams' EEO manager, Belinda Duncan ("Duncan"), investigated her concerns. Tomasik was accused of threatening Williams, invading Williams' personal space and attempting to provoke her to start a confrontation. The two (2) charges filed with the OCRC were dismissed with a finding of no probable cause regarding Tomasik's treatment of Williams.

Williams also filed a charge with OCRC alleging that Zmina, a white mail ("WM"), failed to address mistreatment she received from co-workers Krish Kish ("Kish") and Jeff Deliere ("Deliere"). The OCRC also issued a finding of no probable cause regarding this charge.

POSITION OF THE UNION

The Union contends that the removal of Antoine was motivated by racial and/or union animus, and the Grievant a twenty-four (24) year employee, had only one written reprimand of record at the time of her removal.

The Union argues that Antoine, AF/AM, was treated differently by NBH in the following matters and manners: (1) the incident with Leugers on August 25, 2002, was exaggerated and not properly investigated; (2) Leuger's written statement of August 25, 2002, fails to indicate that Antoine stated "you'd better stop fucking with me..."; (3) Leuger's written statement indicates that Antoine did not physically threaten her (JX5, p.19); (4) allegations of workplace violence by white employees did not result in immediate placement on administrative leave, i.e., Marie Masturzo ("Masturzo"), Matlida Lamberry ("Lamberry") and Tomasik; (5) African-American employees who disagree are labeled as violent; (6) Waggoner failed to talk to the Grievant on August 25, 2002, and relied solely on Leugers' version of what happened; (7) Waggoner's

statement fails to indicate that Antoine stated to Leugers that "you better stop fucking with me"; (8) Laverne Claxton ("Claxton") never left the break room and could not have heard Antoine say anything to Leugers; (9) Simms, (AF/AM Male) treated Antoine in a disparate matter and being black does insulate one from allegations of mistreatment to other blacks, (10) the Workplace Violence Committee established with union membership to address these kinds of issues were not involved in the Antoine, Franklin or Linder matters and (11) the overwhelming majority of written statements from the thirty-two (32) clients fail to support the alleged threat incident.

The Union takes exception as to how the EAP agreement was utilized in this manner. The EAP agreement is designed to correct specific behavior, which necessitated the participation, not to punitively punish and remove employees for minor incidents during the 180-day program. The discipline held in abeyance should be reinstated only if the employee fails to complete the EAP program or if additional discipline occurs regarding the same infractions.

The Union points out that the reason Antoine was removed was not because she was involved in abusive behavior but she was AWOL for 4.81 hours on January 3, 2003. The justification for sick leave on that date was to attend a mandatory EAP meeting to remain in compliance with the program. The Union does not dispute NBH's payroll accuracy regarding the AWOL hours on January 3, 2003, but raises several arguments regarding the use of a 'minor' rule violation to remove Antoine.

Another threshold argument by the Union was why delay removal for 71 days if a minor infraction automatically results in removal under the EAP? Second, no union member who has completed the EAP process was subsequently removed for an unrelated policy violation. The McIlwain and Reed examples supports the Union's position of past practice, in that McIlwain failed to complete the EAP program and Reed had several policy violations directly related to the behavior that was identified as the problem in the EAP agreement.

NBH indicated that two (2) charges existed for the removal of Antoine in October 2002; (1) failure of good behavior; and (2) being AWOL on August 18 and August 24, 2002. On May 2, 2003, Antoine received notice that she had completed the Ohio EAP Participation Agreement

dated October 25, 2002 and that the matter was closed. (JX3, p.13) For whatever reason, NBH did not conduct a pre-disciplinary until June 24, 2003, and the following attendance related infractions were alleged to have been in violation of policy 3.10 (JX3, p.6) by Antoine at that time:

1. January 3, 2003 – negative sick leave balance (4.81 hours)
2. February 23, 2003 – tardy (twelve minutes)
3. February 17, 2003 – AWOL (thirty-two minutes)
4. March 6, 2003 – tardy (one minute)

Following the pre-disciplinary conference and prior to the arbitration hearing, the parties resolved all of the time/attendance dates except for January 3, 2003; making the remaining incident a minor infraction, that according to the Union, does not justify removal.

Regarding the disparate treatment theories, the Union submitted testimony that African-American employees were subjected to threats by white supervisors and co-workers without NBH applying the same investigative urgency or even-handedness when black employees Williams, Linder or Franklin made complaints to their immediate supervisor or the campus police regarding threatening conduct by whites. An example is the Franklin (AF/AM female) and Masturzo (WF) incident, which occurred in 2002.

On August 4, 2002, Franklin informed the charge nurse that Masturzo allowed clients to have soda cans on the floor, which was against hospital policy due to safety concerns. Masturzo became upset upon learning that Franklin had informed RN Rempal and stated to Franklin, "I'm going to get you for that. I will remember what you did." (Union (UN) Ex.1). Other witness statements[2] confirm Franklin's version that Masturzo's remark was threatening (UN Ex.1). Franklin reported the incident to proper authorities, and only an oral reprimand was issued on August 19, 2002. (Employer (ER) A)

[2] Written statements from employees Surinder Dmilion, Edith Byrum and Ingrid Morton support Franklin's version of what happened (see UN, Ex.1)

Other examples of union animus and/or racial discrimination on the part of the employer, were contained in the testimony of several union witnesses. The overall theme presented that the system is unjust and discriminatory toward African American employees of NBH. The Union seeks reinstatement, back pay and any other remedy to make the Grievant whole.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances that the employer bears the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th ed., 1997)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. such as "beyond reasonable doubt," "preponderance of evidence," and "clear and convincing") commonly used in non-abatable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of NBH's burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of the Grievant's guilt. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSION

After careful consideration of the evidence in this matter including all of the testimony and evidence of both parties, I find that the grievance is granted in part, and denied in part. My reasons are as follows:

NBH indicated that the zero tolerance policy exists regarding incidents of workplace violence. Briers testified that a workplace violence team was established to investigate matters of a serious nature. The workplace violence team involvement in a particular matter is based

upon a multitude of factors. The NBH policy that defines workplace violence provides that it is "...any act perceived to be threatening, menacing or harmful...". (JX9 p.1)

NBH's process to investigate threats can be channeled into separate tracks. One methodology involves the workplace violence team involvement; the other option is for an internal investigation to occur, i.e. complaint, investigation, statements from witnesses obtained, etc., etc. Regardless of the method used, NBH's campus police participates in the investigation by interviewing witnesses, obtaining statements and preserving evidence.

Regarding the most serious of the charges, the incident on August 25, 2002, regarding Antoine's conduct towards Leuger's must demonstrate that a specific threat occurred and Antoine had the power to carry it out. See, Walker Mfg. Co., GO LA 64 5 (Simon, 1973). Leuger also must have feared or had reason to fear for her safety. The use of words, acts or gestures by Antoine must be carefully analyzed in ascertaining the alleged threat.

Leuger's statement provided to NBH's police on August 25, 2002, in part, describes the encounter with Antoine as follows:

> *"She threatened me repeatedly saying over and over, just one more time...just one more time. This is the 2nd time, just one more time. I was not under the impression it was a physical threat but another kind of threat to get me somehow..." (JX5, p.19)*

Leugers testified that Antoine appeared angry during the encounter and believed that Antoine could damage her car or persuade a client to beat her up. However, Leuger's statement and/or testimony was void of the incriminating words that Claxton allegedly heard, i.e. "...you better stop fucking with me or you are going to be sorry...", that Antoine stated. The Union points out that Leugers, the victim, did not perceive Antoine's conduct as a threat and that the Grievant usually talks loud and uses hand gestures. Furthermore, Charlene Cintavy ("Cintavy") who Leugers claimed was present during the incident (JX5, p.19) provided a written statement (JX5, p.31) and testified at the hearing.

Cintavy testified that she did not hear what occured between Antoine and Leugers and only found out around lunchtime when Leugers told her what happened. (JX5, p.31) On the other hand, Rempal and Claxton's testimony could infer that Antoine's behavior was overall

threatening and/or abusive based upon their opinion. The Grievant denied threatening Leugers and denied stating to Leugers that, "you better stop messing with me or you're going to be sorry." Simply stated the testimony of the eyewitnesses (Leugers, Claxton, Cintavy, Rempal and Antoine) is at sufficient odds to prevent a finding of a violation of failure of good behavior.

The evidence supports a finding that Antoine was angry and argumentative towards Leugers on August 25, 2002, and engaged in inappropriate conduct by engaging in a heated exchange over her work assignment. Based upon Antoine's prior discipline where she was given a written reprimand over the 'recognition day' incident involving supervisor Sims, the apprehension concerning Antoine's behavior towards management was genuine, but did not rise to the level of "...threatening, menacing or harmful..." on August 25, 2002. (JX4, p.2) The grievant was not blameless for her behavior on August 25, 2002, and as a result of her conduct, voluntarily enrolled and completed an EAP program.

The evidence is nonconclusive to support a finding or inference that a specific threat occurred at the nurses station on August 25, 2002. Clearly, Leuger's conduct after the incident with Antoine suggests concern, but not fear for her safety. Leuger's own written statement and testimony failed to convince this Arbitrator that she had reason(s) to fear for her well-being. Moreover, did Antoine have the power to carry out the inferred threats to damage Leuger's possessions or person?

NBH present uncorroborated testimony thru witnesses Sims and Leugers that certain employees believed that NBH was an unsafe environment in that certain employees could solicit patients to physically harm co-workers or damage their property, i.e., cars. However, no evidence was offered to infer that Antoine currently, or in the past, had engaged in such conduct. In other words, no evidence exists to suggest that Antoine had the power to direct clients and/or others to physically harm Leugers or cause property damage to Leuger's possessions.

Having decided that the facts are insufficient to support a violation of NBH policy 3.22, Workplace Violence Prevention, the next inquiry centers upon the effect of the EAP violation of January 3, 2003.

Nothing in the EAP agreement and/or attachments precludes the ability of the union to contest the underlying reasons for the removal, which was held in abeyance. The effect of the discipline held in abeyance simply defers the filing of a grievance under the CBA. (JX3, p.10-15) The conditions set forth in the various documents (Roger Beyer letter dated October 16, 2002; Antoine's receipt of notice and decision dated October 16, 2002; and Antoine's receipt of employee responsibilities) accompanying the EAP agreement must be read together since the documents concern the same transaction. Abram & Tracy, Inc., v. Smith, (1993) 88 Ohio App. 3d253 (10th District, Franklin County). Therefore, all of the documents taken together regarding the EAP participation by Antoine will be viewed in determining the effect of the AWOL violation of January 3, 2003.

By voluntarily executing certain documents (JX3, p.14) associated with the EAP agreement, Antoine was put on notice that she was to refrain from further work rule violations. It is undisputed that Antoine did not have sufficient sick leave balance to cover her absence on January 3, 2003. The reason for her absence is immaterial. The only issue is whether or not she had sufficient leave balance, and if not, what was the impact upon this removal. However, several mitigation principles are applicable to this situation in reviewing the AWOL violation to justify removal. The fact that the Grievant was a long term employee coupled with the fact that NBH originally sought to reduce the August 25, 2002 incident, and the attendance violations to a five (5) day fine subject to the EAP program had logic, and I agree with NBH's original analysis of the appropriate remedy, but for different reasons.

Regarding the Union's claim of disparate treatment either due to union animus or race discrimination, the evidence fails to convince this Arbitrator that the examples provided were sufficiently similar, or adequately explain the involvement of other African-Americans i.e., Sims, Claxton, in this matter. The Union did not meet its burden of proof on the claim of disparate

treatment as to the union animus or race discrimination. However, the record supports the union contention that both Leugers and the Grievant displayed angry and argumentative behavior on occasions. I find Cintavy's testimony credible regarding Leugers' argumentative behavior towards staff, thereby discrediting Leugers' credibility regarding her testimony that she did not use loud/harsh words towards staff. Moreover, the evidence reveals that on the previous day (August 24th), Antoine discovered Leugers allegedly sleeping and was going to inform her supervisor. Leugers' and Antoine's relationship, was at best, strained and no inferance could be drawn that Antoine was the sole instigator of the ill will that existed between both parties.

This matter presented challenges for finding faults and drawing inferences as previously stated. As example, the Union claims that all members of management, who opposed Antoine, operated under the veil of collusion. The employer relies upon the failure of the Grievant to remain free of any rule violation during the abeyance period, and all other evidence attempts to deter from Antoine's behavior is merely illusory. At the end of the day, the burden rests with NBH to establish Antoine's wrongdoing and the state of record as a whole fails to support wrongdoing to support removal.

In addition to the above, the Grievant's twenty-three (23) years of service warrants a mitigation of the removal based upon one AWOL charge during the 180 day abeyance period. The AWOL charge, when compared to the workplace violence allegation, is minor misconduct for this Arbitrator under and EAP agreement. See, In Re International Extrusion Corporation, 1996 (Brisco, 106 LA 371).

The facts indicate to this Arbitrator that NBH acted in good faith by following its practice of removing an employee for further violations of work rules while under an EAP agreement. I find that previous removals held in abeyance, i.e., Debra Grier, Laura Lowe, Charlotte Ruttin and Ronald Mayernick, were reduced upon successful completion of the EAP. Evidence further indicates that Reed and McIlwain's EAP removals were due to failure to complete the EAP or continued violations during the 180 day period. While NBH's practice of allowing employees to

complete the EAP program with subject to removal for violation(s) within the 180 days is somewhat curious, but is not for this Arbitrator to resolve in this proceeding.

Therefore, NBH's implementation of Antoine's removal under the guise that her January 3, 2003, AWOL related back to the tardiness/AWOL charge that was part of the October 25, 2002, agreement was consistent with past practice and this arbitrator is convinced that NBH fixed a penalty it felt was justified. Due to my earlier conclusion that the employer did not meet its burden of proof regarding the August 25, 2002 incident, reinstatement of the Grievant is appropriate. However, based upon the written reprimand issued July 16, 2002 regarding the TPW Recognition Day to Antoine, NBH's mission to enforce it's workplace violence policy, and Antoine's argumentative/angry conduct on August 25, 2002, the evidence supports reinstatement with no back pay.

AWARD

The grievance is granted in part, denied in part. The Grievant was not removed for just cause. The Grievant shall be reinstated within fourteen (14) days of this award, with no back pay or economic benefits. The five (5) day fine shall remain as part of the Grievant's discipline record. The Grievant shall be entitled to her service and/or institutional seniority rights. The Arbitrator retains jurisdiction for a period of sixty (60) days to resolve any dispute that may arise in the implementation of this award.

Dwight A. Washington, Esq.