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Labor & Employment Arbitrator/Mediator
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IN ARBITRATION PROCEEDINGS PURSUANT TO THE

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of	∫	
	∫	
SERVICE EMPLOYEES	∫	
INTERNATIONAL UNION	∫	
DISTRICT 1199	∫	ARBITRATOR'S
	∫	OPINION AND AWARD
and	∫	
	∫	
STATE OF OHIO	∫	
	∫	
Grievance 23-10-20101124-0036-02-11	∫	
Grievant: Jeffrey Bair	∫	

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, SERVICE EMPLOYEES INTERNATIONAL UNION DISTRICT 1199 ("the Union") and STATE OF OHIO ("the State") under which SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator.

Hearing was held June 15, July 7, July 11, and July 22, 2011 at Ohio Department of Mental Health Heartland Behavioral Healthcare in Massillon, Ohio. Both Parties were represented by advocates who had full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument including post-hearing briefs. Briefs were timely filed on August 29, 2011.

APPEARANCES:

On behalf of the Grievant:

S. DAVID WORHATCH, Esq., Law Offices of S. David Worhatch, 4920 Darrow Road, Stow, OH 44224-1406.

On behalf of the State:

ANNE THOMSON, Esq., Chief, Division of Human Resources, Ohio Department of Mental Health, 30 East Board Street, 11th Floor, Columbus, OH 43215-3430.

RELEVANT LANGUAGE FROM THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

(Effective June 1, 2009 through May 31, 2012)

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ARTICLE 8 – DISCIPLINE

8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

A. Verbal Reprimand
B. Written Reprimand
C. A fine in an amount not to exceed five (5) days pay
D. Suspension
E. Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

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PROCEDURAL ISSUE

Is the grievance properly before the Arbitrator for a final and binding Award pursuant to the Parties' Agreement?

PROCEDURAL OPINION

The Grievant made an Article 7 timeliness challenge to the Arbitrator's jurisdiction to hear and rule on the instant grievance. It is the view of the Arbitrator the Grievant waived that jurisdictional challenge when it suggested June 15, 2011 for the first day of hearing due to the Grievant's counsel's scheduling conflict with an earlier date suggested by the State. Thus, the grievance is properly before the Arbitrator for a final and binding Award pursuant to Article 7 of the Parties' Agreement.

SUBSTANTIVE ISSUE

Was the Grievant discharged for just cause pursuant to the Agreement? If not, what is the remedy?

FACTS

The Grievant was employed as a Psychiatric Nurse with the State since November 8, 1999. He was removed from employment effective November 9, 2010, for among other reasons, making highly offensive remarks while on duty on July 14, 2010, while serving as a charge nurse. Specifically, the Grievant (a male Caucasian) asked a (female, African-American) therapeutic program worker who reported to him, "Do Niggers run in packs?" and additionally commented to her that an (African-American) co-worker's "dick is 9 by 7, you know how those people are."

PARTIES' POSITIONS

State's Position

The State had just cause to remove the Grievant from employment. The Grievant's duties as a psychiatric nurse consisted of providing patient care and, when serving as the charge nurse, directing the activities of other nurses and therapeutic program workers. The fact that a therapeutic program worker under the direction of the Grievant was the victim of the Grievant's racially-harassing remarks aggravates the seriousness of the offense and the Grievant's culpability.

The record reflects the Grievant had received training on harassment and/or discrimination and cultural diversity on nine occasions in the four years prior to his removal. Most recently, the Grievant had received training on harassment on June 16, 2010, less than one month before his July 14, 2010 misconduct.

The Grievant's claim that inappropriate comments were pervasive in his work environment does not save him. To the contrary, as a charge nurse, he was in part responsible for the work environment on his unit. Instead of setting an example as an authority figure, or reporting a pervasively offensive environment to management, the Grievant contributed to and created an environment of racially and sexually disparaging comments.

The Grievant's misconduct was of such a severe nature that removal was appropriate even though he had no prior active discipline. Moreover, despite his efforts to create an evidentiary record of employees similarly situated to him who were not removed, his misconduct stands alone. In order to be deemed similarly situated, the Grievant needed to present comparables who had the same supervisors, who engaged

in the same or similar conduct, and who did not have differing or mitigating circumstances. He brought forth no employees who meet the relevant criteria. Indeed, he presented no evidence regarding any supervisory duties of the individuals he attempted to compare himself to.

Grievant's Position

The removal does not meet the seven tests of just cause enunciated in Enterprise Wire Company, 46 LA 359 (Daugherty, 1966) and endorsed in Summit County Children Services Board v. Communications Workers of America, Local 4546, 113 Ohio St.3d 291(2007):

1. Did the company give to the employee forewarning or foreknowledge of the possible or probabl[e] disciplinary consequences of the employee's conduct?

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

3. Did the company, [b]efore administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or management?

4. Was the company's investigation conducted fairly and objectively?

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

113 Ohio St. 3d 291, fn. 1, *quoting* Enterprise Wire Company at 363-364.

Specifically, the State did not warn the Grievant he was subject to immediate discharge; he was left to speculate why his conduct was egregious enough to warrant immediate removal; the investigatory evidence was construed in a light most antagonistic toward the Grievant's interests; progressive discipline was not followed; similarly situated employees committing other serious offenses were not removed; the Grievant's actions did not place the health or safety of patients, co-workers, members of the public, or State property at risk, nor did it compromise the personal or privacy rights of patients and their families. Moreover, the Grievant's constitutional rights to his public employment were violated.

OPINION ON THE MERITS

The question for the Arbitrator is whether the State has carried its burden of proving the Grievant's misconduct constituted just cause for his removal. This is "a largely factual matter for the arbitrator to decide." City of Dayton v. AFSCME, Ohio Council 8, 2005-Ohio-6392, 2005 WL 3240794, *slip op.* at 5, ¶ 22 (2nd App.Jud.Dist., Dec. 2, 2005).

The underlying facts of the Grievant's misconduct are largely undisputed. The Grievant admitted he said to his coworker, "Do Niggers run in packs?" and that another co-worker's "dick is 9 by 7, you know how those people are." As set out in his Post-Hearing Brief, he claims these remarks were "part and parcel of the give-and-take of verbal sparring and kidding around in the work setting," (Grievant's Brief at 27) and "camaraderie-building repartee" (Grievant's Brief at 30). Really?

The Grievant was charged in part with violation of Rule 5.3 of the Ohio Department of Mental Health Work Rule Infractions, which prohibits the "Use of obscene, abusive, or insulting language or gestures towards a member of the public or staff." The remarks made by the Grievant were – without a doubt – obscene, abusive, *and* insulting. The Disciplinary Grid provides for discipline up to and including termination for violation of Rule 5.3.

The co-worker who complained about the Grievant's July 14 remarks was a therapeutic program worker subject to the Grievant's supervision. The Grievant's position of authority over the co-worker to whom he spoke heightens the already egregious nature of the Grievant's misconduct.

The Grievant's attempt to show disparate treatment fails. There is no record evidence any of the employees he attempts to compare himself to were charge nurses or had supervisory authority. This is a crucial distinction between the Grievant and other employees who were found to have committed misconduct.

The State's decision to remove the Grievant, rather than a lesser discipline, was reasonable and consistent with the Parties' Agreement. It hardly needs to be said the Grievant's remarks were deplorable and completely unacceptable in the workplace. The State of Ohio has a legal duty to provide workplace environments where such remarks are not tolerated.

Progressive discipline does not mean everyone gets a second chance. There are situations, such as here, where an employee's misconduct goes against the very essence of how one is to conduct oneself in the workplace. The Grievant, as a charge nurse with the authority to direct the activities of the therapeutic program worker he

made his remarks to, was trained by his employer to have known better. Due to his own exceedingly poor judgment, the Grievant forfeited his right to his employment with the State. The record evidence demonstrates the State met the seven tests of just cause.

AWARD

For the reasons set out above, the grievance is denied in its entirety. The Grievant's removal from employment is upheld.

October 10, 2011

/s/ Susan Grody Ruben
Arbitrator