ARBITRATION DECISION

October 28, 2011

In the Matter of:

State of Ohio, Department of Rehabilitation and Correction, Corrections Reception Center	)
	) Case No. 27-05-20101020-0088-02-11
and	) Robert Dalton, Grievant
	)
Service Employees International Union, District 1199	)

APPEARANCES

For the Department:

Ashley Hughes, OCB, Labor Counsel, Advocate
Buffy Andrews, DRC, Second Chair
Aimee Szczerbacki, OCB, LRS
Neal Nolan, DRC, LRO 2
Paul Shoemaker, Assistant Chief Inspector
Robert Hammond, PhD, Chief, Bureau of Mental Health
Michael Farrell, PhD, Psychologist
Ronald Ross, PhD, Executive Director, State Board of Psychology

For the Union:

Josh Norris, First Chair
Robert Dalton, Grievant & Second Chair

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant is Robert Dalton. He was hired by the Department of Rehabilitation and Correction as a Psychology Assistant at the Mansfield Correctional Institution in December 2005. He was transferred to the Corrections Reception Center at Orient, Ohio, in February 2007. The grievant is represented by the Service Employees International Union, District 1199, and has been a union Delegate and a member of the union's Executive Board.

This case is the second time the Arbitrator has heard a grievance challenging the grievant's removal. The first case arose on February 18, 2009, when the grievant was discharged for violating Rule 5(B) by misusing the state's email system; Rule 15 by engaging in political activity in violation of Section 124.57 of the Ohio Revised Code; and Rule 24 by threatening, intimidating, or coercing another employee. The Arbitrator found that the grievant did not violate Rules 5(B) or 15 and based on the minor nature of his violation of Rule 24, his disciplinary record, and the penalties imposed on other employees who had violated the rule, reinstated him on January 11, 2010, with back pay less a five-day suspension.

The events leading to the grievant's second removal grew out of a discussion he had with Robert Hammond, the Chief of the Bureau of Mental Health. Following the discussion, Hammond sent a memorandum to Virginia Lamneck, the Warden of CRC, stating that the grievant had engaged in a pattern of behavior suggesting "a maladaptive response to a typical correctional work environment" and requesting that the grievant be sent for a psychiatric/psychological Independent Medical Examination to determine his fitness for work as a Psychology Assistant or Psychologist. (Management Exhibit 1,

page 2) He recommended that the examination include a MMPI-2 and a MCMI. On March 30, 2010, Lamneck forwarded his request to Laura Stehura, the department's Chief of Personnel.

The next day the grievant was placed on paid Administrative Leave pending the IME. Michael Farrell, PhD, was selected through MLS National Medical Evaluation Service to do the examination and on April 14, 2010, the grievant was ordered to appear at Farrell's office on May 7, 2010. On April 15, 2010, the grievant asked Sherri Pennington, a human resources worker, to supply information about the events and circumstances that led to the request for the IME. His request was forwarded to Stehura, who told him that the department's legal counsel had indicated that it was not required to supply the requested information. (Union Exhibit 7)

The grievant met with Farrell as scheduled and Farrell issued his report on May 11, 2010. He indicated that the grievant refused to take any objective personality test, including the MMPI-2 and the MCMI, because he had administered them many times and because they were intrusive. Farrell stated that "a definitive opinion (one within psychological probability) regarding a psychological diagnosis per the DSM IV as well as his psychological ability to work as a psychology assistant and/or psychologist cannot be made given his refusal to comply with any objective personality testing secondary to his statement regarding the inappropriateness and invasiveness [of the tests]." (Joint Exhibit 3, page 22) He added that "without being able to make a DSM-IV diagnosis, I am unable to justify any specific impairment which would prevent [the grievant] from working as a psychology assistant and/or psychologist." (Ibid.)

On May 10, 2010, Paul Shoemaker, the department's Assistant Chief Inspector, was assigned to investigate the circumstances surrounding the grievant's IME. He interviewed the grievant on May 26, 2010, and conducted a telephone interview with Farrell on June 29, 2010. Shoemaker issued his report on August 13, 2010. He stated that the grievant reported that Farrell told him that the MMPI was optional and that he never mentioned the MCMI. (Joint Exhibit 3, page 13) Shoemaker indicated that when he asked Farrell if the grievant refused to take the MMPI, Farrell replied that the grievant "was resistant and refused because it was an invasion of privacy." (Ibid.) He concluded that the grievant "did not complete the requirements of the Independent Medical Evaluation" and that he had been warned that a refusal to submit to the IME could result in discipline up to and including discharge. (Ibid.)

On August 20, 2010, the grievant was notified that a pre-disciplinary hearing would be held on September 2, 2010. The notice stated that he "refused to take the MMPI-2 and MCMI part of the test that Dr. Farrell requested [him] to take." (Joint Exhibit 3, page 4) It charged that the grievant violated Rule 7 of the standards of employee conduct by failing to follow post orders, administrative regulations, policies, or directives and Rule 24 by interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

Mark Hook, a Warden's Assistant, who served as the hearing officer, issued his report the same day as the hearing. He stated that the grievant "refused to submit to the MMPI-2 and MCMI components of an independent medical exam." (Joint Exhibit 3, page 2) Hook concluded that the grievant failed to cooperate in the IME and that by doing so, he violated Rules 7 and 24.

On October 12, 2010, the grievant was notified that he was being removed effective October 15, 2010. The notice stated that he "failed to cooperate with the MMPI-2 and the MCMI-3 as [he] was directed by Dr. Farrell … [so that Dr. Farrell] could not give detailed information." (Joint Exhibit 3, page 1)

The grievant filed a grievance protesting his removal. He charged:

> Employer terminated grievant without just cause, nor did the evidence presented by employer meet existing standards of proof. Employer has engaged in violation of rights protected under ORC 4117, violations of existing Cease and Desist order issued by SERB, Section 6.01, 6.02 and others of the CBA, and provisions of the ADA, Tittle VII, and other EEOC protections as well as several ORC provisions. (Joint Exhibit 2, page 1)

The grievant requested:

> Made whole to include reinstatement of position, full back pay with retroactive leave accumulation and full back pay for all employer funded benefits. The union waives mediation. Should grievance progress to arbitration, grievant requests reimbursement for two forensic experts which are required based upon employer's charges and reimbursement for legal expenses outside of those legal costs incurred by the union. The grievant maintains all legal rights provided by Federal and State Laws. (Ibid.)

When the grievance was denied at step one of the grievance procedure on December 23, 2010, it was appealed to arbitration. The hearing was held on August 16, 2011. Post-hearing briefs were received on September 16, 2011.

ISSUE

The issue as agreed to by the parties is:

Was the grievant removed for just cause? If not, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

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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STATE POSITION

The department argues that the grievant violated Rule 24 of the standards of employee conduct by failing to cooperate in an official investigation or inquiry. It points out that Section 123:1-30-01(A) of the Ohio Administrative Code permits an appointing authority to involuntarily separate an employee when substantial credible medical evidence shows that he is unable to perform the essential job duties of his position due to a disabling illness, injury, or condition. The department notes that Section 123:1-30-01(B) of the code requires the appointing authority to request the employee to submit to a medical or psychological examination prior to an involuntary separation.

The department contends that it acted pursuant to these provisions of the OAC. It states that Hammond became concerned about the grievant's ability to work in a correctional setting because:

> [the grievant] went outside the process, whereby an appointing authority places its own employees on administrative leave, and requested

> administrative leave from the Director of a different department, and … exhibited a level of paranoia including accusations that DRC had manipulated tapes of a prior administrative investigation, that if [he] was promoted topsychologist DRC would go after his license, that someone at DRC had hacked [his] email, and that the warden of the Corrections Reception Center was out to get [him]. (State Post-Hearing Brief, page 3)

The department indicates that based on these issues, it sent the grievant for an IME.

The department rejects the union's argument that the grievant was not properly sent for an IME. It acknowledges that the grievant never requested a disability separation. The department stresses, however, that Section 123:1-30-01(A) allows an appointing authority to involuntarily separate an employee who is not fit for duty and 123:1-30-01(B) of the OAC requires the appointing authority to schedule a medical or psychological exam prior to an involuntary separation.

The department dismisses the union's claim that the behaviors identified by Hammond were "legitimate" and not paranoid. It admits that the grievant returned to work on January 26, 2010, and did not receive his man-down alarm until February 18, 2010. The department claims, however, that "this merely shows there was a delay in administering equipment to Grievant." (State Post-Hearing Brief, page 3) It also acknowledges that the union submitted a finding by a forensic audio expert that an investigative tape was altered but points out that the Ohio Inspector General's office rejected that conclusion and a third expert, who was secured by the grievant, could not determine whether the tape had been manipulated. The department adds that contrary to the grievant's testimony, his charge that his email had been hacked was investigated.

The department challenges the union's assertion that the grievant was sent for an IME as a form of harassment or because it was "out to get him." It points out that Hammond, who requested the IME, was not familiar with the circumstances surrounding

the grievant's prior removal; was unaware of the unfair labor practice charges filed by the grievant; did not know about the probable cause finding by SERB; and was unaware that the grievant had charged that his allegations had not been investigated.

The department argues that the IME was independent. It reports that it uses MLS Medical Evaluation Services to select the practitioner to conduct the IME and to oversee the examination process. The department observes that it simply forwards its file to the company which provides it to the practitioner and schedules the employee's appointment. It insists that it "goes above and beyond what is required by the Administrative Code to preserve the independence of the medical evaluation." (State Post-Hearing Brief, page 5)

The department disputes the union's charge that when it submitted Hammond's request for the grievant's evaluation to Farrell, it made the examination "non-independent." It states that Section 123:1-30-03(B) of the OAC requires it to supply the examining practitioner with the facts relating to the employee's perceived illness, injury, or condition. The department insists that it was merely complying with the code when it submitted Hammond's concerns regarding the grievant's behavior.

The department also rejects the union's assertion that Hammond's recommendation that the MMPI-2 and the MCMI be used made Farrell's examination non-independent. It points out that Hammond testified that he recommended an objective test be used in the IME because he felt that a clinical interview alone cannot determine whether an employee is fit for duty. The department notes that he stated that while he recommended these tests, he understood that Farrell could use whatever objective personality tests he wished. It indicates that the practice of recommending objective tests was in place prior to the grievant's IME.

The department contends that Farrell's attempt to use the MMPI-2 and MCMI was not the result of Hammond's recommendation. It observes that Farrell testified that he would have used the MMPI-2 even if Hammond had not recommended it and that in any event, he did not review Hammond's recommendations until after he met with the grievant. The department reports that Farrell stated that he believed that "the Employer recommending that certain assessments be conducted is a non-issue in terms of affecting the independence of the evaluation." (State Post-Hearing Brief, page 7)

The department discounts the union's charge that the IME was not independent because Hammond diagnosed the grievant as having a personality disorder and sent the grievant for an IME only to confirm his diagnosis. It denies that Hammond made a diagnosis and claims that he simply provided a "list of behaviors exhibited by Grievant … [as] required by the Code." (Ibid.) The department stresses that Hammond "was not trying to prove Grievant had a personality disorder … but was trying to determine if Grievant was fit for duty in a correctional environment." (State Post-Hearing Brief, page 8)

The department maintains that the grievant did not fully submit to or cooperate in the IME. It states that Farrell testified that the grievant refused to take any objective personality test and that he indicated the same in his May 11, 2010, report. The department asserts that as a result, Farrell reported that he could not render "a definitive opinion … regarding a psychological diagnosis per the DSM IV as well as his psychological ability to work as a psychology assistant and/or psychologist … given his refusal to comply with any objective personality testing. (Joint Exhibit 3, page 22)

The department accuses the union of "splitting hairs" by claiming that the grievant submitted to the IME. It claims that "submitting to an IME … means doing all that is required in an IME so that the practitioner can make a fitness for duty determination." (State Post-Hearing Brief, page 9) The department indicates that "allowing employees to argue that they should not be disciplined because they did submit to the IME merely by showing up and participating in part but not all of the IME is not what the rule drafters contemplated when drafting the language." (Ibid.)

The department rejects the union's argument that Farrell presented the test as optional. It points out that he stated that he spent more time with the grievant than other individuals because he was trying to persuade him to take the test. The department notes that Farrell testified under oath that "he did not at any time present the personality assessment as optional." (Ibid.) It asks "why would Dr. Farrell state that test was optional and then issue a report stating that without the test he could not render an opinion." (State Post-Hearing Brief, page 10)

The department disputes the union's contention that a fitness for duty assessment can be made without an objective test. It observes that Farrell testified that he needed the test because the grievant was selective in his answers during the clinical interview. The department indicates that Farrell felt that "there were many paranoia observations made based on Grievant's action toward [him] during the IME which was why [he] wanted to conduct an objective personality assessment." (Ibid.) It adds that in any event, neither Hammond nor the union can dictate to the practitioner how to conduct an IME.

The department rejects the union's contention that Farrell should have found the grievant fit for duty because of the statements he made during the IME. It acknowledges

that Farrell testified that "as part of encouraging the grievant to take the objective personality assessment he stated that from the information Grievant provided he probably would be found to be fit for duty." (State Post-Hearing Brief, page 11) The department reports, however, that he also stated that "he never would have given a definite opinion … without full information … [which] included an objective personality test." (Ibid.)

The department dismisses the fact that Farrell's report gave the grievant a Global Assessment Function (GAF) score of 75. It acknowledges that an overall score of 75 indicates there would be no interference with an individual's function. The department stresses, however, that the issue is not the grievant's fitness for duty but his refusal to submit to and cooperate with every facet of the IME, including taking an objective personality test.

The department argues that the grievant violated Rule 7 of the standards of employee conduct by failing to follow the administrative code and written directions. It observes that the IME process is contained in Section 123:1-30-01 and 123:1-30-03 of the OAC. The department charges that the grievant failed to comply with the requirements in these sections of the code.

The department contends that the grievant also violated Rule 7 by failing to follow a written directive. It points out that on April 14, 2010, he received a letter telling him that he was "required to submit to an independent medical examination to determine [his] fitness for duty." (Joint Exhibit 3, page 25) The department notes that the letter warned him that if he did not submit to the examination, he could be charged with insubordination and would be subject to discipline up to and including discharge. It

claims that "the letter is a written directive requiring Grievant to submit to the IME, which included objective personality testing." (State Post-Hearing Brief, page 13)

The department acknowledges that the grievant testified that if the department gave him a direct order to take the objective personality assessments, he would have complied. It asserts, however, that he had already been given a direct order to submit to the IME, which included the objective personality assessment. The department insists the "the Employer should not be obligated to direct [the grievant] to do what was already asked of him." (Ibid.)

The department maintains that since the crux of the case is whether the grievant submitted to the IME, the testimony of the grievant and Farrell needs to be examined. It observes that the grievant testified that he cooperated in the IME but Farrell stated that his answers in the clinical interview were "selective" and that he refused to take any objective personality assessment; that the grievant claimed that Farrell presented the objective tests as optional while Farrell insisted that he never presented them as optional; that the grievant stated that he met with Farrell for 20 minutes while Farrell testified that he spent 1½ hours with him; and that the grievant indicated that Farrell did not mention the MCMI but Farrell claimed that he offered it to him as an alternative to the MMPI-2.

The department argues that Farrell's testimony is more credible than that of the grievant. It claims that Farrell has no motive to lie because he does not work for the department; had no contact with it during the IME process; did not know the grievant; and would be paid regardless of the outcome of the IME. The department asserts that in contrast to Farrell, the grievant had every reason to lie to try to save his job.

The department contends that the grievant lied about a discussion he had with Dr. Ronald Ross, a licensed psychologist who is the Executive Director of the State Board of Psychology. It indicates that the grievant claimed that Ross said he could remain a Psychology Assistant even though he had a Psychologist's license. The department reports that Ross testified that an individual with a Psychologist's license cannot work under another Psychologist and that he never told the grievant that he could do so.

The department maintains that the grievant's removal was consistent with its disciplinary grid. It points out that the grid calls for removal for a fifth violation of Rule 7 and Rule 24 allows for removal for a first offense. The department notes that the grievant's disciplinary record shows that he has received a written reprimand, a two-day fine, and a five-day suspension making his violation of Rules 7 and 24 his fourth offense. It claims that this indicates that the grievant's removal is both progressive and commensurate with his offense.

The department concludes that the grievant's failure to submit to the IME violates the OAC and the standards of employee conduct. It asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that there was not just cause for the grievant's removal. It points out that while he was discharged for his alleged failure to cooperate with the IME, there is no dispute that he attended the examination. The union asserts that for that reason the only issue is whether the grievant "knew the MMPI-2 and the MCMI-3 were a mandatory part of this particular IME and [whether] he deliberately and willfully refused to cooperate in the IME by not completing these testing instruments." (Union Post-

Hearing Brief, page 2) It claims that "the department's entire case rests solely on the determination of whether or not [the grievant] was given fair notice that there was an expectation or understanding that these tests were a mandatory part of this allegedly 'independent medical examination.' " (Ibid.)

The union contends that the tests were not presented as mandatory by anyone in the department or by Farrell. It observes that Shoemaker admitted that he never asked the grievant whether he would have taken the MMPI or MCMI if he had been asked to do so. The union reports that Shoemaker acknowledged that the grievant consistently claimed that the tests were presented as an option and recognized that the letter ordering the grievant to take the IME did not mention the MMPI or the MCMI.

The union maintains that the grievant was never warned about the consequences of not taking the tests. It rejects Shoemaker's claim that the grievant should have known that the tests were mandatory because he is a Psychologist. The union insists that "the burden clearly rests on the state to establish what is mandatory and what is optional." (Ibid.) It claims that the department "clearly failed to meet the forewarning provision of the seven tests of just cause." (Union Post-Hearing Brief, page 3)

The union argues that if the MMPI and MCMI had been used, the examination would not have been "independent." It points out that Hammond specifically identified the exact tests to be used. The union claims, however, that he acknowledged that a Psychologist can perform fitness for duty exams without psychological testing.

The union questions Hammond's request that the grievant be ordered to submit to an IME. It observes that when the grievant returned from his prior disciplinary action, Hammond offered him a position as a Psychologist within the department. The union

reports that the grievant was not interested in the available positions because of their locations. It asks how "at the same time that [the grievant's] fitness for duty was being questioned, he [could be] offered a promotion." (Ibid.)

The union claims that the grievant's six complaints, which Hammond gave as the reason for sending him for an IME, were justified. It points out that the grievant returned to work on January 26, 2010, but did not receive a man-down alarm until February 18, 2010. The union notes that the grievant suggested that the Corrections Reception Center was denying him the use of a man-down alarm so that he could be assaulted. It indicates that Hammond acknowledged that he was unaware of the fact that the grievant had not received an alarm or the validity of his concern.

The union contends that the grievant's claim that the Office of the Inspector General had tampered with his interview tapes was justified. It indicates that it submitted a report from the Legal Services Group where an audio engineer stated that "indicators of manipulation warranted further investigation." (Union Exhibit 8, page 4) The union observes that Hammond testified that he was not aware of the report or the results of the investigation.

The union challenges Hammond's questioning the grievant's charge that someone had hacked into his email account. It indicates that Hammond was unaware that "SERB had found probable cause for [the department] illicitly gaining access to over 5,000 of [the grievant's] emails." (Ibid.) The union claims that SERB's findings give credence to the grievant's concern about his email being hacked.

The union rejects Hammond's suggestion that there was no basis for the grievant's claim that Lamneck was out to get him. It observes that she was the

appointing authority for the grievant and had issued the grievant's last four disciplines. The union reports that Hammond testified that he did not know that Lamneck was the appointing authority.

The union maintains that there was no way the grievant could have known that the tests were mandatory. It indicates that Hammond testified that the two specific tests were a "recommendation." The union states that a "recommendation" is only a suggestion and is not mandatory. It asks "how was [the grievant] to know that [the department] would subsequently attempt to change the rules and impose discipline by claiming that these tests were now somehow mandatory." (Union Post-Hearing Brief, page 4)

The union argues that the IME was not independent. It suggests that the department attempted to influence the outcome of the examination by prescribing the tests to be used as part of the process. The union adds that when Hammond testified that he did not prescribe the tests, it was only "further proof that these two tests were simply recommendations or suggestions and carried no mandatory weight either administratively or medically." (Union Post Hearing Brief, page 5)

The union contends that Farrell's testimony supports its argument that no one told the grievant that the tests were necessary to determine whether he was fit for duty. It offers the following testimony:

> Q. And you testified that during your evaluation, you did advise Mr. Dalton that you did not see any fitness for duty issues with him; is that correct? A. I mean, when he walked in the door, I did not say that, no. By the time—at the end of the hour and a half, whatever time we spent together, that—again, this is going on memory, but to the best of my knowledge, what I said was something along the lines of, you know, thanks for your cooperativeness. I don't –from a matter of conversations here, and your history, I don't see any difficulties along those lines. I would sure like to do the testing, you know." (TR pg 99-100) " Q. Okay. When you were trying to get him to take these objective personality tests, did you tell him that it was your belief he was

> probably fit for duty? A. I believe so,…" (TR pg 96) " Q. What was the substantial credible medical evidence that existed to document Mr. Dalton's inability to perform his essential functions? A. I never said that. In fact, my posing opinion was I don't have any information to justify that he is unable to do his work as a psychology assistant or psychologist. (TR pg 109) (Union Post-Hearing Brief, page 5)

The union maintains that Farrell never told the grievant that the test was mandatory or necessary to complete the IME. It acknowledges that he advised the grievant to take the test and told him that it would look suspicious if he did not take the test. The union provides the following:

> I would advise you to take the test. It is going to look more suspicious if you don't take the test." (TR pg 89) Again, Dr. Farrell didn't say, I won't be able to complete my assessment if you don't take the test, he didn't say, I have to have this test completed in order to provide DRC with a determination of your fitness for duty, he didn't say this is a mandatory part of the examination, he said, "I would advise you to take the test." (TR pg 89) and "I would recommend that you take the testing." (TR pg 88) "Q. Okay. Did you tell Mr. Dalton that without completing the MMPI, you couldn't complete your examination? A. I don't think I said anything to him along those lines- - Q. Did you tell Mr. Dalton that he was ordered to take the MMPI? A. No. (TR pg 120-121) (Union Post-Hearing Brief, pages 5-6)

The union argues that Farrell could have told the grievant that the tests were mandatory. It points out that when the grievant objected to signing the release forms, he told him that he had to sign it in order for the examination to be done. The union notes that Farrell indicated that the grievant then reluctantly signed it. It asserts that Farrell "could have just as clearly pointed out to [the grievant] that the MMPI was just as mandatory as signing the release forms." (Union Post-Hearing Brief, page 6)

The union contends that Farrell's testimony supports its argument that the examination ceased to be independent when Hammond recommended the tests to be used. It reports that he testified that most employers just refer an individual to him and let him decide what tools to use.

The union maintains that the grievant could not have complied with the department's "prescription" or recommendation. It indicates that Farrell testified that regardless of what Hammond recommended, he would not have used both the MMPI and the MCMI because they measure the same thing and are quite lengthy. The union claims that "even if the MMPI was not presented as optional, or if [the grievant] had taken the MCMI, one of the tests would not have been taken." (Union Post-Hearing Brief, page 6) It accuses the department of "setting an impossible task in front of [the grievant] and lying in wait for him … to deliver the predetermined discipline to him." (Union Post-Hearing Brief, pages 6-7)

The union states that it is "extremely concerned" that Farrell lost the grievant's entire file. It suggests that many questions that were not clearly answered might have been had the file been available. The union observes that it is "ironic that the file of a patient who is suspected by his employer of having a paranoid personality … is mysteriously lost." (Union Post-Hearing Brief, page 7)

The union argues that the grievant has had "a target on his back" since he returned to work. It points out that he testified that the harassment included "having an escort all day long on his first day back, calling him in on his day off to sign his settlement agreement over what he was due from the prior arbitration decision, not giving him his keys, not providing him with his spider alarm for nearly 3 weeks, changing his job assignment, [and] refusing to allow him access to the crisis unit." (Union Post-Hearing Brief, page 7)

The union charges that the department refused to tell the grievant what he would be expected to do at the IME or exactly what was required of him. It reports that the

grievant testified that when he requested information from Stehura regarding the events and circumstances that served as the impetus for the IME, she responded that "according to our legal counsel, there is no requirement that an employee be provided with a statement of events or circumstances serving as an impetus to an IME." (Union Exhibit 7)

The union contends that Farrell presented the MMPI as optional. It points out that the grievant testified that Farrell never gave him any reason to believe that the test was mandatory and that he did learn until after the IME that Hammond had suggested the MMPI and MCMI. The union notes that the grievant stated that if the department or Farrell had told him that the test was mandatory or if he had been ordered to take it, he would have complied. It adds that the grievant "was well aware of what the department was capable of in regards to discipline and would not have made 'getting him' that easy." (Ibid.)

The union maintains that the department cannot discharge the grievant pursuant to Section 123:1-30-03(D) of the OAC. It points out that this section states:

> An employee's refusal to submit to an examination, the unexcused failure to appear for an examination, or the refusal to release the results of the examination amounts to insubordination, punishable by the imposition of discipline up to and including removal. An employee will be responsible for the costs associated with an unexcused failure to appear at a scheduled examination.

The union claims that the grievant "did not violate this rule in any way [because] he did not fail to appear for the exam, he did not refuse to submit to the exam, and he did not refuse to release the results of the examination." (Union Post-Hearing Brief, page 8)

The union argues that if the department applies Section 123:1-30-03(D), it must also apply Section 123:1-30-03(A). It observes that Section 123:1-30-03(A) states:

> An appointing authority may require that an employee submit to medical or psychological examinations for purposes of disability separation or a reinstatement from disability separation. The appointing authority shall select one or more licensed practitioners to conduct the examinations.

The union asserts that the grievant could not be sent for an IME because he "was not returning from or applying for disability separation, therefore D cannot apply because A did not apply." (Ibid.)

The union contends that the examination was not independent. It states that if the exam had been independent, Farrell would have simply been asked to assess the grievant and to determine if he was fit to work as a Psychology Assistant or a Psychologist. The union complains that instead Farrell was sent "a specific diagnosis and a specific recommendation of the tests to be administered to support [the department's] suspicions and attempted to convince Dr. Farrell to arrive at a preconceived outcome." (Ibid.)

The union maintains that the six reasons Hammond used as the basis for the request for the IME should have been investigated. It claims that it established that each of the grievant's concerns had merit and were supported by independent sources such as SERB and the Legal Services Group. The union indicates that "not only are [the grievant's] concerns genuine, … the department of corrections is the guilty party on the other end of the charges." (Union Post-Hearing Brief, page 8)

The union argues that the department had to have legitimate grounds for requesting an IME. It cites City of Tampa Fla., 113 LA 296, which states:

> It is clear from reported arbitration decisions that management has the right, unless restricted by the agreement, to require employees to have physical examinations where the right is reasonably exercised under proper circumstances, such as where an employee desires to return to work following an accident or sick leave, or following extended layoff, or where an employee has bid on a job requiring greater physical effort. (Ibid.)

The union also relies on Conchemco, Inc., 55 LA 54 (1970), where Arbitrator Ray held that the right to require an examination "is not an absolute one exercisable at the whim [of the employer]" and that it "cannot be arbitrarily insisted upon without reasonable grounds." (Ibid.)

The union concludes that the department has not met its burden of proof. It states that the grievant "was never given forewarning, despite his attempts and efforts to clarify, that this test was mandatory." (Union Post Hearing Brief, page 9) The union asks the Arbitrator to reinstate the grievant and make him whole.

ANALYSIS

The issue is whether there was just cause for the grievant's removal. The resolution of this issue involves two questions. The first is whether there was just cause for discipline. The second consideration is, if there was just cause for discipline, whether the penalty imposed by the department was appropriate.

The Arbitrator finds that there was just cause for discipline. The grievant was ordered to submit to a psychological/psychiatric IME to determine whether he was fit to work as a Psychology Assistant or Psychologist and warned that if he failed to submit to the examination, he would be subject to discipline. He kept his appointment with Farrell but failed to complete his examination by refusing to take the MMPI-2 or any other objective examination. The grievant's conduct violated Rules 7 and 24 of the standards of employee conduct and Sections 123:1-30-03(A) and 123:1-30-03(D) of the OAC.

The union challenges this conclusion. It argues that the grievant did not know that the tests were mandatory; that he was never ordered to take them; that Farrell presented the tests as optional; that the grievant did submit to the IME; that there was no

basis to order the grievant to have an IME; that the department failed to investigate the grievant's complaints that served as the basis for Hammonds' request for an IMME; and that the examination was not independent.

The record establishes that the grievant knew that the MMPI-2 or some other diagnostic test was a mandatory part of the IME. He was notified by MLS National Medical Evaluation Services that he was scheduled for an IME to determine his fitness for duty. As a licensed Psychologist, the grievant knew that objective tests are a necessary part of a psychological/psychiatric examination. In fact, the grievant claimed that he had administered the MMPI-2 thousands of times.

The Arbitrator rejects the union's argument that the grievant was never ordered to take the MMPI-2 and/or the MCMI. The record indicates that he received a letter from MLS National Medical Evaluation Services instructing him to report to Farrell for a fitness for duty examination and warning him that if he did not submit to the examination, he would be insubordinate and would be subject to discipline up to and including removal. The grievant was ordered to submit to an IME and was not free to pick and choose which parts of the examination he wished to complete.

The Arbitrator cannot accept the union's claim that Farrell presented the MMPI-2 as an option. Farrell testified that he always includes objective tests in his examinations except where the patient is clearly psychotic or unable to complete the examination. Furthermore, he insisted in his testimony that he never offered the MMPI-2 as an option and in fact, spent considerable time attempting to persuade the grievant to take the test or an alternative objective test. Since Farrell has no motive to be untruthful, his testimony

must be credited over the testimony of the grievant whose testimony may be influenced by his attempt to protect his job.

The Arbitrator rejects the union's claim that the grievant did submit to the IME. As indicated above, an objective test was an essential part of the grievant's fitness for duty examination. His failure to complete the MMPI-2 or some other objective test meant that he did not complete the examination. As a result, Farrell's report stated that "a definitive opinion … regarding a psychological diagnosis per the DSM IV as well his psychological ability to work as a psychology assistant and/or psychologist cannot be made given his refusal to comply with any objective personality testing." (Joint Exhibit 3, page 22)

The Arbitrator must dismiss the union's claim that there was no basis for ordering the grievant to submit to an IME. Hammond stated that he observed behavior in the grievant that he believed "suggested an Axis 1 related paranoia or Axis 2 condition." (Management Exhibit 1, page 2) Given that Hammond is a licensed Psychologist, his concerns regarding the grievant's behavior cannot be dismissed. Hammond's decision to request an IME cannot be deemed improper.

The Arbitrator must reject the union's charge that the department failed to investigate the grievant's six complaints that Hammond used to support his request for the grievant's IME. The record indicates that at least some of the grievant's complaints were investigated and held to be unfounded. In addition, Hammond indicated that "the six examples are indicative of the tone of paranoia that permeates many of [the grievant's] descriptions of events across two institutions and part of his interactions with Central Office Staff." (Management Exhibit 1, page 3) In any event, even if the

department failed to examine some of the grievant's complaints, it would not justify his refusal to take the MMPI-2 or some other objective test as part of a fitness for duty examination.

The Arbitrator also rejects the union's claim that the IME was not independent because Hammond attempted to influence the outcome by describing the grievant's behaviors, suggesting a diagnosis, and requesting the use of the MMPI-2 and MCMI. First, Hammond was required by Section 123:1- 30-03(A) of the OAC "to supply the examining practitioner with the facts relating to the perceived disability, illness, injury, or condition." Second, Hammond's recommendation to use the MMPI-2 and the MCMI had no impact on the IME. They are the objective tests routinely used in psychological/psychiatric examinations. Furthermore, Farrell testified that he did not see Hammond's memorandum until after he examined the grievant and he indicated that in any event, he would have used whatever tests he felt were appropriate. Third, the memorandum does not indicate a diagnosis. It suggests that the grievant "has engaged in a pattern that suggests a maladaptive response in a typical correctional work environment" and asks whether the grievant's "current reactiveness is within normal limits of having been a part of a recent investigation or if it is suggestive of either an Axis 1 related paranoia or Axis 2 condition." (Management Exhibit 1, page 2)

The Arbitrator finds that none of the union's claims change the conclusion that the grievant's conduct merits discipline. The grievant knew that he had to take the MMPI-2 or some other objective test a part of his fitness for duty examination but violated the standards for employee conduct and the OAC by refusing to comply with the department's order.

The remaining issue is whether the penalty imposed by the department was proper. Article 8, Section 8.02, of the collective bargaining agreement requires the use of progressive discipline. In the instant case, the parties stipulated that the grievant had received a written reprimand, a two-day fine, and a five-day suspension. Thus, the requirement for the use of progressive discipline has been satisfied.

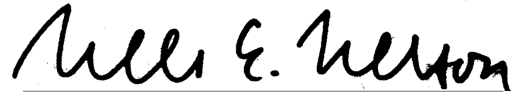
Article 8, Section 8.02, also states that "the application of [progressive discipline] is contingent upon the type and occurrence of various disciplinary offenses." As suggested above, the grievant committed a serious offense. He was ordered to take a fitness for duty examination and refused to take an objective personality assessment, an essential part of the examination, even though he had been warned that a failure to submit to the examination could lead to discipline up to and including removal. The result of the grievant's action was that Farrell was unable to provide a definitive opinion regarding his ability to work as a Psychology Assistant or Psychologist.

The grievant's removal is also consistent with the department's disciplinary grid. Rule 7 calls for removal for a fourth violation and Rule 24 allows for removal even for a first offense. As noted above, the grievant's refusal to complete his IME was his fourth offense.

Based on the above analysis, the Arbitrator must deny the grievance and uphold the grievant's discharge.

AWARD

The grievance is denied.



Nels E. Nelson
Arbitrator

October 28, 2011
Russell Township
Geauga County, Ohio