

#1082

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO – TIFFIN DEVELOPMENTAL CENTER
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11
AFSCME. AFL-CIO

Arbitration Dates: January 20, 2011
April 14, 2011
May 16, 2011

Grievant Jennifer Daniel: #24-13-(03-30-10)-0010-01-04

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Cornell Hale
Tiffin Developmental Center
600 North River Road
Tiffin, Ohio 44883

Advocate for the Union:

Thomas Cochrane
OCSEA, AFSCME Local 11
390 Worthington Rd., Suite A
Westerville, OH 43082

I. HEARING

The hearing was held at the Tiffin Developmental Center on January 20, 2011. The joint issue before the arbitrator is “Was the Grievant, Jennifer Daniel, discharged for Just Cause? If not, what shall the remedy be?” The hearing commenced at 9:00 A.M. and recessed at 12:00 P.M.

The hearing reconvened at Tiffin Developmental Center on April 14, 2011 at 9:00 A.M.
(This hearing recessed at 7:00 P.M.)

The hearing was reconvened at Tiffin Developmental Center May 16, 2011 at 9:02 A.M. and concluded at 5:00 P.M.

Testifying for Tiffin Developmental Center (“The Employer”) were Sarah Lawson, Program Director; Stewart Behm, Program Coordinator and Qualified Mental Retardation Professional; Robert Peak TPW, Laura Kopp TPW, Jessica Harp TPW, Meghan Ortmann TPW, Karrie Stearns, Residential Care Supervisor; Carol Lupica, Residential Care Supervisor; Faith Borer, LPN; Stacy Berlekamp, Director of Nursing; Shawn Correll, TDC Police Officer; and Cynthia A. Meeker, Superintendent.

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME (“The Union”) were Mary Smith RN, Misty Parkins TPW, Jennifer Daniel, the Grievant; Faith Borer, LPN; Richard Bentz, Steward and Chapter President.

At the Conclusion of the hearing the parties agreed to submit Closing Argument Briefs by the close of business June 2, 2011.

II. STATEMENT OF THE CASE

The Grievant, Jennifer Daniel, was removed from her position as a Licensed Practical Nurse (LPN) at the Tiffin Developmental Center (TDC) effective March 30, 2010. The Grievant was charged with two incidents of Neglect of a Client and multiple counts of Failure to Follow Policy.

The Employer contends that on November 14, 2009 the Grievant failed to provide two different individuals, in separate instances, the proper care according to their respective behavior service plans (BSP) that were exhibiting self injurious behavior (SIB).

The Employer also contends the Grievant also failed to follow various policies and procedures in the Nursing Department.

The Grievant began her employment with the Center on April 26, 1999. The Grievant had one prior, active discipline, (i.e. Written Reprimand for Discourteous Treatment) at the time of her removal.

The Union filed a Grievance on behalf of Jennifer Daniel. The Union asserts that the Grievant was removed from her position as an LPN at TDC on 3-20-2010 for Alleged Neglect #1 and Alleged Neglect #6. The Union says Grievant was unjustly removed. The Union claims that TDC violated the contract between the State of Ohio and OCSEA.

The Union asserts that the Contract Articles that were violated were: Preamble, Articles 1, 24, 44 and any other Articles that may pertain.

III. The Employer's Case

The Employer's first Witness was Sarah Lawson. Ms. Lawson is the Program Director. Ms. Lawson has ten (10) years with the Department, two of which are here at TDC.

She testified that she oversees the Homes and the Therapeutic Program Workers (TPWs). The TPWs are there 24/7 and see that the needs of the Residents are taken care of. Ms. Lawson said the needs of the Residents are all different due to behavioral and medical needs. She testified that there are individual plans for each individual Resident for Self Injurious Behavior (SIB). TDC has teams that determine the behavior plan. The plans are also approved by the Guardians.

Ms Lawson said the TPWs track the Residents needs and are trained on the plan. TPWs are to use the least restrictive means to control SIB. The Nurses are always part of the team. Ms. Lawson testified that a copy of the plan is posted in the Home and also on the computer. The TPWs know the Residents well. They follow the plan and are the first person gone to.

On Cross-Examination there were no questions of the witness.

The Employer's next witness was Stewart Behm. Mr. Behm is the Program Coordinator and a Qualified Mental Retardation Professional. He has been at TDC for twenty (20) years. He has been the Coordinator for eighteen (18) years. Mr. Behm oversees Utah. Mr. Behm sees to the Programs, Schedules, and Welfare of the Residents. He also does training.

Mr. Behm was asked about Utah. He said Utah houses nine to ten (9-10) men. There is one mild case and the others have severe or profound disability and have SIB. They are aggressive, obsessive and compulsive. Mr. Behm said there is a prescribed way to deal with this which is the Behavior Support Plan (BSP).

Mr. Behm testified that Donald lives in Utah. He said he has worked with Donald and he had two and one-half (2 ½) years at Utah. Mr. Behm said Donald's most prominent behavior is obsessive-compulsive. If Donald has a problem his behavior escalates. He also testified that Donald likes no changes and that anything out of place upsets him.

Mr. Behm said the first sign of Donald's SIB is that he starts to whimper, then he hits his cheek and tries to bite doors, tables and brick walls. Donald's next step is aggression and he tries to bite staff.

Mr. Behm was then referred to JE (JE) 35 which is Donald's Behavior Support Plan. The Plan deals with self injuries and aggression. He said the Plan deals with the prevention of SIB.

Mr. Behm then reviewed JE 5 Page 5 which is Donald's Intervention Plan. He testified that the Plan calls for a PACE hold which is to calm him. The next step is leather restraints and then the Dr. is consulted to give him Ativan.

Mr. Behm testified he went to Utah in August 2008 and got the Plan changed to give Ativan prior to the use of leather restraints. He said over time that Ativan has worked, and that there are no restraints in Donald's plan anymore.

Mr. Behm then was referred to JE 35 Page 5 and he testified that the third step in Donald's Intervention Plan is Chemical Intervention. He also testified that this is Marilyn's BSP and that the third item is a pain reliever . This Plan is different from Donald's. Marilyn's is for discomfort, Donald's is mental.

Mr. Behm testified that if Marilyn continues to hurt herself that the Nurse is to do an

assessment and look for Physical Pain first. He said the Nurse should not skip steps and cannot go from Step 1 of the Plan to Step 6. He said consistency is very important in the Programs.

On November 14, 2009, Mr. Behm testified, that he was at a Heidelberg football game when he got a call from RCS Carol Lupika. Ms. Lupika had called him about Donald and asked about Donald's Plan. Mr. Behm testified that he told Ms. Lupika not to give Tylenol but to go right to Ativan.

Mr. Behm then testified about JE 18 Page 5. This is LPN Faith Borer's statement concerning Marilyn. He testified that the Plan called for a pain reliever such as Tylenol.

On Cross-Examination, Mr. Behm was referred to JE 5 Page 1 and said it was dated October 27, 2009. He was then referred to JE 35 Pages 4 to 7. He testified that there were no dates until Page 7. Mr. Behm was given a copy of the Plan and said the Implementation date was November 30, 2009.

Mr. Behm then read JE 35 Page 2 which is Donald's Consent to a BSP. He testified that a Nurse should be consulted so that she may consult with the Doctor. Mr. Behn then read JE 35 Page 5 and testified that the idea of a BSP is to give the staff a mental check list. Item #3 on Page 5 says the Nurse is to make the decision to call the Doctor or not. Donald cannot communicate in words so he communicates through behavior.

Mr. Behm then read JE 35 Page 6 which is Documentation. He testified that the TPW is to do escort paperwork. Mr. Behm said that he doesn't recall if a Protection from Harm form was done on Donald the date of the incident. He then reviewed the Consent for BSP of September 2009 and said it may be necessary to use anti-anxiety medicine. The TPW goes to the Nurse and

the Nurse decides to call the Doctor.

Mr. Behm further testified that a Team makes the decision as to Donald. If the TPW and the Nurse do not agree the RCS is called. He was then given Union 2 (U-2) and testified that this is a Nursing Department Document. The "MAR" shows the date and time that medicine is given.

On Re-Direct Mr. Behm was asked to "clean up" his testimony on Donald's BSP. He testified that there is a BSP for everyone. Mr. Behm said there is an annual review and the BSP is updated. The Team and the Doctor make changes and then it is reviewed by the Guardian and by Human Rights. After this it goes back to Mr. Behm, and he implements the Plan.

Mr. Behm testified that Donald's Plan was set in September, 2008 and there were no changes. He said he was at a Heidelberg football game when he was called about Donald. The TPW and the Nurses disagreed. He said after shift change the Nurse should have called the Doctor for Ativan.

Mr. Behm testified that the BSP is to be followed as written. He said he had personally made changes in the Plan to avoid incidents like what happened November 14, 2009. The use of physical restraints are not in the plan as medicine worked better.

On Re-Cross Examination Mr. Behm testified not to give Tylenol as it was not in the BSP.

On Re-Direct Mr. Behm testified that Tylenol could be given for pain.

Robert Peak was the Employer's next witness. Mr. Peak is a TPW and has been at TDC for seventeen (17) years. Mr. Peak testified that he is on the Direct Care Staff and has worked at Utah for the past fifteen (15) years. Mr. Peak further testified he works the Day Shift from 6:30

A.M. to 2:30 P.M. and works with Donald every day.

Mr. Peak says he has known Donald for fifteen (15) years. He said Donald has extreme behavior problems as he is compulsive. Donald gets self abusive. Donald hits himself in the face and hits his head against things, hurting himself. Mr. Peak testified that Donald has intense self abusive behavior. Mr. Peak said November 14, 2009 was a typical weekend. He said he was there on that day.

Mr. Peak testified that Donald gets up when he wants and has a routine. Donald gets agitated when he can't find what he's looking for. On November 14, 2009 Donald was agitated and was striking himself.

Mr. Peak testified that he could not re-direct Donald and was concerned for Donald's safety. He said someone called Nursing and a Nurse came and he left. Mr. Peak testified that Karla Stalb and Laura Kopp were present. He said he couldn't remember if he had called Nursing. Mr. Peak said Carol Lupica came and asked about Donald. Ms. Lupica also looked at Donald's BSP. He said Nurse Borer had come to Utah.

Mr. Peak was referred to JE 35 which is Donald's BSP. He said he had looked at this the day of the incident. Mr. Peak read #3 of the Intervention Plan and said the Plan should have been followed. He said he left at 2:30 P.M. and Donald was still upset.

On Cross-Examination Mr. Peak read JE 35 Page 7. He testified that this plan was on the Module even though it has no Implementation Date or Revised Date.

Mr. Peak further testified that Carol read the BSP; and thinks Carol made a phone call. He said he did not hear Carol give an order to anyone about medication. Mr. Peak said Donald

was in his sight most of the time.

He said he was not sure when Nursing was called and that a TPW either called or went to the Nursing station. Mr. Peak also testified that Nurses occasionally give Tylenol.

On Re-Direct Mr. Peak said the Nurses do not show him the medicine and he only knows what it is if they tell him. The BSP is still the same. Mr. Peak said he tried to calm Donald before calling Nurses.

On Re-Cross Examination Mr. Peak testified that use of Ativan requires a Protection from Harm form. This form is signed by the TPW and the Nurse. He also said November 14, 2009 was a very hectic day.

On Re-Direct Mr. Peak said Donald was very upset. He and other TPWs traded off with Donald.

The Employer then called Laura Kopp to the stand. Ms. Kopp said she has been at TDC for ten (10) years of which six (6) have been at Utah. Ms. Kopp has known Donald the entire time. On November 14, 2009 she was on Day Shift from 6:30 A.M. to 2:30 P.M.

Ms. Kopp testified she was there when Donald became very upset and hit himself. She said she took turns with other TPWs working with Donald.

Ms. Kopp testified she walked to the Nurses' Station and the Grievant and Nurse Borer were there. She asked if Donald could have Ativan. The Grievant asked about Tylenol. Ms. Kopp testified she said "No" Ativan. The Nurses then closed the door.

Ms. Kopp testified she then called for a Supervisor. She called for the Administrator on Duty (AOD). She said it was close to the end of the shift and she was concerned for Donald's

safety.

On Cross-Examination Ms. Kopp testified that she went up and asked for Donald to have Ativan. She said Carol Lupica came but spoke to Mr. Peak instead of her. Ms. Kopp said she was not disciplined. Ms. Kopp then read her statement at JE 29. She said she tried to calm Donald before she went to the Nurses' Station.

Jessica Harp was the Employer's next witness. Ms. Harp has been a TPW at TDC for four and a half (4 ½) years. Ms. Harp works the second shift ft Utah from 2:30 P.M. to 11:00 P.M. Ms. Harp testified that Donald lives in Utah and that she knows Donald.

Ms. Harp testified that Donald gets violent towards himself and that the TPWs have to protect him. It is common for Donald to have SIB behavior.

Ms. Harp testified that on November 14, 2009 she arrived early. She said she was sitting in her car and heard Donald screaming before she came in.

Ms. Harp testified that she had spoken to first shift. She said first shift said they had gone to the Nursing station to ask for medicine and were declined.

Ms. Harp said she went to the Nursing station for medicine for Donald and then went back to Utah. She said Donald needed his medicine.

Ms. Harp said the first shift Nurse Faith Borer had clocked out and then came back. Nurse Borer told Ms. Harp to let Donald go outside. Ms. Harp said "Not a good idea". Nurse Borer was not on the clock and couldn't take Donald out. Ms. Harp said things got worse. Staff from other Houses came to help with Donald. She said a van was brought to give Donald a ride.

Ms. Harp testified that Donald had to be brought in against his will and that it was

dangerous. She said she saw the Grievant and Nurse Borer in the hallway. Ms. Harp said she was very upset. The situation was getting more violent. She testified that co-staff got a broken finger.

The TDC police came. Ms. Harp said Donald threw himself against a door. She said there were corners on the door. Ms. Harp said she dove across the hallway and pulled Donald away.

She said she was questioned about the technique and this upset her so much that she left the situation.

Ms. Harp testified that the Grievant came and gave Donald some medicine but she doesn't know what it was.

On Cross-Examination Ms. Harp testified that she received harassing texts. She said she was threatened and that her car and her house were egged so she resigned.

Ms. Harp testified that she has an Associate Degree in Social and Behavioral Science. She said she had been told that prior to her arrival that Nurse Borer had been contacted but did not give Donald medicine.

Ms. Harp was asked about an Escort. She replied that an Escort is when a Resident is removed from an area for our safety. Re-direction is changing behavior by giving another choice.

Ms. Harp testified there was no "hold" on Donald in sense of Policy. She did not like the Grievant's comment about her hold on Donald. She said Karrie Stearns, and TDC Police Officer, Shawn Correll were there too.

On Re-Cross Ms. Harp said Supervisors called for help after she called then other Staff were called.

The next witness for the Employer was Meghan Ortmann TPW. Ms. Ortmann is a TPW

assigned to Utah and works second shift 2:20 P.M. to 10:50 P.M. Ms. Ortmann knows Donald and says he is Self Abusive Intense.

Ms. Ortmann testified that on November 14, 2009 she heard Donald screaming when she got to work. Nurse Borer was passing Tylenol. She testified that the Nurses' Station was close enough that they could hear Donald. Ms. Ortmann said she saw Donald get escorted back from a van ride and she was concerned for his safety.

She further testified that the Grievant came down, called the Doctor and gave Donald Ativan.

Ms. Ortmann said she was injured when Donald was trying to bite the door. Donald grabbed her and kicked her hand. She testified that she went to the Nurses' Station and Nurse Borer taped her fingers. The next day she went for an X-ray and was told her finger was broken.

On Cross-Examination Ms. Ortmann said she spoke to Nurse Borer. She testified the Grievant said she was giving Donald Tylenol. Ms. Ortmann said "He needs Ativan". She said the Grievant did not know the BSP. Nurse Borer saw Donald hitting himself. She further testified that an Unusual Incident Report (UIR) and the Protection from Harm form were witnessed by her. She did an accident report on herself.

Re-Direct - There were no questions on Re-Direct.

Karrie Stearns was the Employer's next witness. Ms. Stearns is a Residential Care Supervisor (RCS). She has been at TDC for eight (8) years of which five (5) have been as an RCS. She works on Utah. Ms. Stearns testified that it is her job to make sure the staff do their

job. She said she knows Donald.

Ms. Stearns testified that on November 14, 2009 Laura Kopp called and told her the Nurse brought Tylenol which is not in Donald's BSP. She said she called Carol to go to Utah. Ms. Stearns said she heard Carol ask for a Police Officer and she went to Utah. She testified she saw Donald get off the bus and be escorted into the building.

Ms. Stearns testified the Nurse came down and gave Donald Ativan. She went to Garza and back to Administration. She said she was AOD and took reports from Staff. Ms. Stearns testified the Grievant gave Donald medicine turned and left. She said Grievant should have given Donald his medicine sooner per the BSP.

On Cross-Examination Ms. Stearns testified that staff stayed to see if Donald calmed down after Ativan was given. Donald calmed down some and she followed staff from the van into the building.

Ms. Stearns testified she heard Carol call over the radio for assistance and that she spoke to Nurse Borer.

Ms. Stearns testified she talked to Grievant when she called in a UIR that there was an inappropriate re-direction on Donald. She further said Carol asked her to contact Stewart before she went to Utah.

The next witness was Carol Lupica. Ms. Lupica is an RCS. She has been at TDC 15 years and has been an RCS for seven (7) or eight (8) of those years. Prior to being an RCS she was a TPW. Ms. Lupica supervises another building.

Ms. Lupica testified that Karrie had gotten a call that staff had requested Ativan for

Donald; however Tylenol was given. Ms. Lupica said she called Stewart and Stewart said "Ativan". Ms. Lupica testified she called Nursing and Nursing said they had a call in to Stewart. She said she called Activities to get a van but Donald didn't calm down.

Ms. Lupica said the Grievant did come and give Donald Ativan.

Ms. Lupica testified that she had asked Stewart "Tylenol" or "Ativan". Stewart said "Ativan". Stewart told Ms. Lupica to tell Nursing. Ms. Lupica testified that Grievant came to the Home to give Donald Ativan. The Grievant told Ms. Lupica "Should have tried a walk". Ms. Lupica Replied "We did" and Grievant left immediately.

Ms. Lupica testified the Grievant failed to follow the BSP and endangered Donald.

On Cross-Examination Ms. Lupica testified that she told the Nurses that Stewart said to give Ativan. She said she can tell the Nurses what Stewart said but can't tell them what to do. Ms. Lupica said she is not their supervisor.

Ms. Lupica testified that there is no confusion in the BSP. She read JE 35 Page 5 Intervention #3. This says the Doctor can order medicine. Ms. Lupica testified that when she was called, staff said Nursing wouldn't give Ativan and that Donald was a danger to himself. Ms. Lupica read her statement which is JE 19. She said she typed this statement the night of the incident. Ms. Lupica said she was in AOD when called by Karrie. Ms. Lupica testified the purpose of the UIRs is to report things such as Residents lose medicine.

Ms. Lupica read JE 52 which is the Protection from Harm form. She testified that there is no Nurse assessment on this form and that the form goes to Nurses and the TDC Police.

On Re-Direct Ms. Lupica testified that JE 19 was her statement and she stood by it. She

said Nurse Borer was with Mr. Peak and knew what the BSP was. She said her statement says Stewart said no Tylenol first.

The next witness was Faith Borer. Ms. Borer is a Staff LPN and has been at TDC 23 years. Ms. Borer said on November 14, 2009 she was on first shift at Utah. She said she usually works at Garza. Ms. Borer said Laura Kopp requested her assistance. TPW Tom called. This was ten minutes before the end of the shift.

Ms. Borer read JE 13 Page 6 and testified that the Grievant told her to give Tylenol. Ms. Borer testified that the BSP are available for review. She testified that the Nurse is to look at the Resident and make a decision. Ms. Borer said she made an assessment.

Ms. Borer testified that staff were giving directions and that she asked staff about Donald. Ms. Borer said she saw no need for Chemical Intervention as Donald was complying with Staff. She left about 2:34 P.M. Ms. Borer testified that Donald was in the kitchen and she then went to the room to see Donald getting dressed. Ms. Borer said she told Carol there was no need for meds.

Ms. Borer then testified that the Grievant gave her Ativan for Marilyn. Ms. Borer told Grievant that Marilyn was "Blowing". She testified that she had read Marilyn's BSP earlier that day. Ms. Borer read JE 13 Page 18 Question 4. She testified she didn't think Marilyn was in pain that is why she gave her Ativan. Ms. Borer read JE 13 Page 21 and JE 13 Page 18 and testified that the Grievant gave her Ativan for Marilyn and that she gave it to Marilyn while she was off the clock.

On Cross-Examination Ms. Borer testified she does not know who typed up JE 13. JE 13

is her interview conducted by three police officers. Ms. Borer testified that she can't say if all of them were recorded as she had several interviews. She also said there was no stenographer present for JE 13.

Ms. Borer was asked "Aren't there other policies beside the BSP?" She was referred to JE 51 which is the Protection from Harm Policy. Ms. Borer testified that both policies were in effect.

Ms. Borer reviewed JE 35 and said you would have to know the individual. She testified that she worked Utah maybe once or twice a month. Ms. Borer further testified that in the BSP you have to identify restrictive procedures and anti-anxiety medicine may be used. Ms. Borer then read JE 35 Page 5 and said the document gives guidance on threat of injuring and other intervention which may be Tylenol. She said Chemical Intervention is the last choice.

Ms. Borer testified that when she saw Donald he was not showing off; he was drinking water and following staff orders on dressing. The staff had advised that Donald had had a shower.

Ms. Borer also testified that TPW Kopp was the first person to tell her of Donald's behavior.

Ms. Borer was then questioned about Marilyn. She testified that she called the Doctor about Ativan. Ms. Borer said the Grievant was doing Donald's priority paper work.

Ms. Borer testified that she saw Marilyn on the patio banging furniture. She tells Grievant that Marilyn is "blowing". Ms. Borer testified she had no TPW contact about Marilyn. She said she called the Doctor about her observations of Marilyn and the Doctor said Ativan.

Ms. Borer then read JE 52 the Protection from Harm. The Nurse is to be notified on this form and she was never contacted, she testified. She said Ms. Lupica had signed the form but she never talked to her about the form. She also testified that nobody else did either.

Ms. Borer testified that it is not optional to fill out the Nurses Assessment on the form and this is blank on this JE. She further testified there is no policy on a Nurses Assessment.

On Re-Direct Ms. Borer was asked “Do you have any reason to be against the Grievant?” She replied “No, I stayed to help Grievant”. Ms. Borer testified that most Residents have a PRN for Tylenol. She was asked if the BSP talks about medicine for out of control, is that for physical discomfort. Ms. Borer read JE 36 #3 and testified that Marilyn’s plan says Tylenol. Items #4 and 5 say use other things than medicine.

Ms. Borer testified she had given Marilyn Tylenol in the morning. At 3:50 P.M. Marilyn was ready to blow. She testified the incident with Donald was causing Marilyn to blow because there was no one there. She said Marilyn was throwing furniture. She then read JE 51, the Protection from Harm form and asked if this conflicted with Donald’s BSP. She replied that she didn’t know.

Ms. Borer testified that staff came and said “Donald needs Ativan”; and wanted us to assess him. Laura was demanding, and she went right away. She testified that Carla was giving Donald cues on dressing. Donald had not eaten or had anything to drink. She said Donald has a bad knee.

Ms. Borer testified she asked staff questions about what she saw Donald doing. She didn’t think Donald was doing anything; and that she stayed and watched for a time. She had

Donald's BSP in the book and she took Tylenol with her.

Ms. Borer said if Donald had been out of control she would have called Grievant for Ativan. She said she told Carol not rational to sedate Donald at that time. Ms. Borer said her assessment is her assessment. Later another Nurse would make her own assessment.

On Re-Cross Examination Ms. Borer testified that Grievant was not relying on her assessment. She said she was mostly there as a Union representative except for her involvement with Marilyn.

Ms. Borer read JE 36 Page 1 and testified that Marilyn was beyond the quiet area. She was then referred to JE 51 and said she was to use the least intrusive method if possible.

Ms. Borer testified that she had punched out and had paper work to do, and she intended to finish it. She said she had done this before and that the Supervisor knew it as the Supervisor had been present when she did it.

Ms. Borer testified that Jessica Harp and Monica, TPWs, were very irrate. Jessica and Monica were on the module keeping Donald inside. Ms. Borer said she asked why and was told there were no staff available.

Ms. Borer testified she asked what if she punched out and came back and sat with Donald? She was told it had to be approved by the AOD. She said Jessica yelled at her: "You can't do that".

Ms. Borer further testified that she told Grievant the staff on Module 4 were out of control. Stewart was called. She said there were problems before between the Grievant and Stewart and they wated someone there to hear phone call with Stewart.

On Re-Direct Ms. Borer testified that Grievant was responsible for Donald and Marilyn after she punched out.

The Employer's next witness was Stacy Berlekamp, the Director of Nursing. Ms. Berlekamp has a Masters Degree in Nursing and has been Director of Nursing at TDC for seven years. She supervises the Nurses and Physical Therapy. She also said Nurses Committees do Policies.

Ms. Berlekamp testified that on November 14, 2009 the Grievant called her with a UIR on Donald. She said when she came in on Monday that she found out more. The Grievant called again and said she had started the medicine path.

Ms. Berlekamp read JE 5, the Grievant's Removal. She reviewed Neglect #1 and testified that Grievant should have done an assessment. She said the Grievant had to be present to do a direct observation. She said the Grievant needed to look at subjective and objective factors.

Ms. Berlekamp testified that the Nurses are to advocate for the patients. The Nurses are to follow the BSP and assess before and after the medication.

Ms. Berlekamp then read JE 35 Page 5 Intervention #3. She testified that the Nurse is to assess and no Tylenol. The Plan is already developed and Nurses are not to go on another's word. Ms. Berlekamp testified that there are legal standards involved.

Ms. Berlekamp read JE 36 which is Marilyn's BSP. She testified that a Nurse gave Marilyn Tylenol in the A.M. and Ativan later. She testified that the Grievant was responsible for the Ativan given to Marilyn by Ms. Borer.

Ms. Berlekamp then was referred to JE 40 the Controlled Substance Record. She testified

there was no entry in the report. The Ohio Administrative Code (OAC) requires reconciliation of drugs by changing shifts.

Ms. Berlekamp then read JE 67 Page 3 and testified that the Chart is a permanent record, and Grievant omitted information. She was then shown JE 68 and testified that Grievant had signed off on Policy.

Ms. Berlekamp read JE 67 and testified that this is the Physician Order Sheet. She said the Grievant did not write the order.

Ms. Berlekamp was then referred to JE 48 which is Doctor's Orders and Transcription. She testified that phone orders are to be written after receipt. Ms. Berlekamp then read JE 49 and testified that Grievant had signed off on her understanding of Nursing Policy. She was then referred to JE 5, the Order of Removal, and testified the Grievant failed to complete documentation on Donald.

Ms. Berlekamp then read JE 63 the Medication Record and said the information was not recorded. She then read JE 41 Page 3 which is the Pharmacy Policy and Testified that orders are to be written when given.

Ms. Berlekamp then reviewed JE 5 and testified Grievant did not timely do a URI on staff pulling on Donald's arm. JE 71 is the URI. She then read JE 69 which is the Abuse and Neglect Policy and testified that staff are to report abuse immediately.

Ms. Berlekamp then read JE 56 and said the Grievant had signed off on the Abuse Policy. She then read JE5 Page 5 and said there was no Nursing Note for Ativan. Ms. Berlekamp then read JE 67 which are the Charting Rules and testified that Grievant had not followed the Charting

Rules. She then read JE 5 Page 2 #6 and said there was no TPW staff input.

She then read JE 51 Pages 8 and 9 of the Protection from Harm Policy and testified that the Nurse will have pertinent staff involvement. Ms. Berlekamp read JE 64 which is Marilyn's MAR and said it should have shown Ativan. She then read JE 67, the Charting Rules and said the Nurse is to record the assessment.

Ms. Berlekamp then read JE5 #8 and said there was no debriefing form for Marilyn. She then turned to JE 51, the Protection from Harm Policy and testified that debriefing was required.

Ms. Berlekamp then testified that Grievant's care was sub-standard. The documentation was not time consuming. She said you must focus on safety and that the standard of care comes from the OAC.

On Cross-Examination Ms. Berlekamp said sub-standard care requires a Complaint to the State Board of Nursing. She filed a Complaint November 30, 2009.

She testified the Grievant contacted her twice on November 14, 2009. The first time was about Donald. The second time was when Grievant said she hadn't started the med path yet. She testified the Grievant did ask for help.

Ms. Berlekamp testified there is no policy on assessments. Nurses are supposed to know how to do an assessment. She also testified that Nurses have to be present to do an assessment.

Ms. Berlekamp then read JE 5 Neglect #1 and testified Grievant failed to do an assessment on Donald prior to Ativan. She would stipulate there is no OAC information in the Exhibits.

She then read JE 9 Page 4 of the Pre-Discipline Hearing Report. She testified that the Nurse on Duty has to do the assessment. This is to be a head to toe assessment. Ms. Berlekamp testified that the legal standard is in the OAC; and that also Associations set Standard of Practice. She was then given Exhibit Union-3 (Union - 3) and said it was a Memo from her on assessment.

Ms. Berlekamp was shown JE 67 the Charting Standards and JE 53 Protection from Harm on Donald. She testified that this has its own Policy and needs to be timely. She then testified that the Grievant did not follow Donald's BSP.

Ms. Berlekamp then read JE 61 & 62 which are Pharmacy Documents. She testified that these Exhibits were not done by the Grievant and that the person who takes the orders writes it and documents it.

She was then referred to JE 45 the Controlled Substance sheets. She was asked if Martha put sticky notes on these sheets and sent them back. She replied "She may have once in a while".

Ms. Berlekamp was then asked about an Escort. She said this was a moving hold on a Resident. She reviewed Neglect #1 and testified Donald was in three (3) behavior holds. She was then shown Union 5 (U5) and said these are Nursing Notes from November 14, 2009. There is an entry at 4:30 P.M. Nurse Annette Krupp charted Grievant's Notes and said they were Grievant's. Ms. Berlekamp said Grievant should have done this herself.

On Re-Direct Ms. Berlekamp said Nurses follow prevailing standards and that there are some policies. She said she also does Coaching and Corrective Counseling.

Recess 7:00 P.M. on April 14, 2011.

Shawn Correll was the "Employer's" first witness on the second day of hearings, May 16, 2011. He has been a TDC Police Officer for about four (4) years. Officer Correll works on the second shift. His duties include Security, UIRs and Protection From Harm. Officer Correll testified that he knows Donald and that Donald can be obsessive. He also said Donald has SIB.

Officer Correll testified that he was on duty November 14, 2009. He testified that Carol Lupica called him for assistance. Officer Correll said that when he arrived Donald was in the van throwing himself around. Attempts to calm Donald were unsuccessful. Officer Correll testified that they were able to get Donald inside and then Donald was given Ativan by the Grievant. He said Donald's SIB was the worst that he'd seen. Officer Correll testified that Ms. Lupica and others were present and there was no improper staff conduct.

On Cross-Examination Officer Correll testified that it is important that Donald stick to a routine. He testified that he, Joe Bogart and maybe some others got Donald into the building. Officer Correll testified that when the Grievant arrived Donald was on the floor thrashing and trying to get back outside. He said TPW Harp pulled Donald away from the door. Officer Correll testified that the Grievant asked if that were a legal hold and no one answered. He said he didn't know what Grievant meant until she explained it to him.

Officer Correll testified he went to the Nurses' Station to talk to the Grievant and Faith Borer about signing the Protection From Harm form. He said he and Grievant went across the hall and then he called his Chief because he and the Grievant disagreed.

Officer Correll testified that Faith Borer spoke up and made it sound as if it was his responsibility to write it up but he didn't agree. He testified that the Grievant wrote it up and he

had TPW Harp pulled from the home.

Officer Correll then testified that he went to the office with Grievant and Faith Borer. Ms. Borer asked about a conflict of interest since he and Grievant disagreed. Officer Correll testified he called the Superintendent and was advised to call another officer.

On Re-Direct Officer Correll said he was not required to know the BSP but he checks it when doing an investigation.

Officer Correll testified that he saw TPW Harper pull Donald and it needed to be done to keep Donald inside. He said he went to the Nurses' Station and heard the Grievant talking to Ms. Borer about abuse but he disagreed. Officer Correll testified that he saw no abuse.

The Employer's next witness was Cynthia A. Meeker. Ms. Meeker has been at TDC for over twenty-eight (28) years. She has been Superintendent going on three (3) years. Ms. Meeker testified that she started as a Volunteer, then went to Activities and then Program Director.

Ms. Meeker then testified that TDC is State Licensed. Ms. Meeker then testified that there is an entire booklet of Rules to be certified as a Medicaid Provider. She said TDC has Residents numbering from a high of Two Hundred Twenty (220) to a low of One Hundred Twenty - five (125). She said the Residents have significant Medical and Mental issues. Ms. Meeker testified these Levels range from Profound, where the Residents can't care for themselves to Mild cases. She said there are Medicaid Mandates concerning Resident treatment and Staff Behavior. She said Residents are required to be treated with respect. Ms. Meeker testified that the employees are trained on expectations. She said she is to be notified of each incident on her cell phone.

Ms. Meeker testified that she got a phone call from Officer Correll concerning the incident with Donald. She testified that Officer Correll was upset because of Donald's treatment. Officer Correll said the Grievant told him if she was to be written up for abuse, so was TPW Harp.

Ms. Meeker testified she couldn't find Grievant and she told the assistant Administrator to find the Grievant and to stay with her. Ms. Meeker testified she met with the Chief of Police on Sunday to review the case. She said if there is abuse the parties can have no Resident contact and that this is a Federal Rule.

Ms. Meeker testified that this was a difficult case because of shift change and that there were lots of witnesses. She testified that she brought in the Director of Nursing from Northwest Ohio Developmental Center to be the Hearing Officer as she didn't know anyone at TDC. Ms. Meeker said the Hearing Officer found two (2) incidents of Neglect.

Ms. Meeker was referred to JE 5 and testified there were two (2) Incidents of Neglect and eight (8) Policy Violations. Ms. Meeker then read JE 11 and said it was the Policy on Conduct and Rule Violations. Ms. Meeker then read JE 11 Page 7A and testified that abuse of a Resident calls for a Penalty of Five (5) days to Removal.

Ms. Meeker testified that the Grievant was willful, not careless. She testified that the Grievant was told by others, including TPWs, the AOD, and the Program Director to follow Donald's plan. She said she can't work with wilfulness.

Ms. Meeker testified that Medicaid looks at every incident report. She said TDC could lose Medicaid Participation. Ms. Meeker testified that Medicaid had no issues with TDC's

treatment of the Grievant.

Ms. Meeker then read JE 11 Neglect. Ms. Meeker testified that there was a thorough investigation. She said it took time as there were Staff involved on first and second shift. One TPW had a finger broken.

Ms. Meeker testified that there was a great turmoil to Donald to have treatment withheld and Donald and the Staff both suffered.

Ms. Meeker then read Management Exhibit 1 (M-1) and testified that it is Medicaid Standard Rules. She said TDC has to follow this Regulation. Ms. Meeker testified that M-1 covers Neglect and the Investigation Actions to take. Client Protection is a Condition of Medicaid. Ms. Meeker testified that M-1 says that if there is serious neglect or abuse to terminate the employee. Ms. Meeker testified that if the Grievant were not removed TDC could be cited by Medicaid.

On Cross-Examination Ms. Meeker was asked if the Medicaid Rules were mentioned to the Union. She replied: "Yes, Medicaid Rules are woven into Policy and the employees are trained on Policies which replicate Medicaid Rules." Ms. Meeker also testified that she did tell the Union about Medicaid Rules as Rules of Work.

Ms. Meeker was asked if the Union was notified by her that Medicaid required firing. She said; "Interwoven in our Policies".

Ms. Meeker was referred to JE 5 Neglect and was asked what would have been a proper assessment of Donald? Ms. Meeker testified that the Nurse looks at Donald and looks for SIB overt behavior. She testified that the TPW's broken finger was a result of no assessment

at 2:20 P.M.

Ms. Meeker testified no one witnessed Marilyn getting Ativan. The Grievant was on duty at 3:50 P.M. Both Nurses denied pulling Ativan. JE 5 says Ms. Borer gave Ativan. Ms. Meeker testified she is not sure what happened with Ativan. Ms. Meeker read Neglect (C2) which doesn't say Ms. Borer was directed by the Grievant. Ms. Meeker testified that Grievant was the Nurse on Duty and had to get the narcotic out of the box. She also said Residents are given a medical exam as part of a UIR.

Ms. Meeker read JE 5 and testified that Neglect 1 and Neglect 6 are both grounds for Removal. She then read JE 9 Page 3 which is Management's Position in the hearing. She was asked: "Is the Grievant being disciplined for not following OAC 4723 standards?" Ms. Meeker replied, "Yes".

Ms. Meeker then read JE 9 Page 4 where the Grievant said she had no involvement with Marilyn. She was asked if the Grievant knew about Marilyn's Ativan. Ms. Meeker testified that the Grievant was not forthcoming and refused to answer questions. Ms. Meeker testified that the Grievant and Faith Borer were pointing fingers at each other and that the Grievant contradicted herself in the Investigation. Ms. Meeker testified that the Grievant said she heard radio traffic but the radio was broken. She said the Grievant changed her story in another interview.

Ms. Meeker read JE 9 Page 9 and testified that RN Ramirez signed for Ativan. Ms. Meeker said that if there are abuse reports to tell the AOD or TDC Police. Ms. Meeker testified that Officer Correll was present when the supposed abuse took place on Donald. Ms.

Meeker read JE 12 which is the Police Report. She testified that the purpose of the Investigation was to look at the events that happened. Ms. Meeker testified that she relied in part on the Police Report.

Ms. Meeker read Union-3 which is a memo from Ms. Berlekamp and was asked if the memo had been rescinded. Ms. Meeker testified that it may not have been in effect as it is three (3) years old and things change all the time. Ms. Meeker was asked if all Residents have BSPs and she replied that “most do”. She testified that Donald and Marilyn have BSPs.

Ms. Meeker testified that the Protection from Harm Policy says to use the least restrictive method but the BSPs supercede the Protection from Harm Policy. She said they have to follow the BSP first as it lays out the treatment. She also testified that Donald and Marilyn cannot communicate.

On Re-Direct Ms. Meeker read JE 5 which is the Removal Order. Ms. Meeker testified that this was a huge Investigation and there was Just Cause for Removal as there were two (2) Neglects.

Ms. Meeker read JE 11 Page 7 and testified the Penalty for Neglect is 5 days to Removal. She testified there were two (2) wilful incidents and failure to follow the BSP. Ms. Meeker testified that the Medicaid Regs feed into the Discipline Grid. Employees sign every year for Rules on Abuse and Neglect.

Ms. Meeker testified that the Grievant was not cooperative in the Investigations. The Grievant and Ms. Borer both denied pulling Ativan for Marilyn. Ms. Meeker testified that Grievant was the On Duty Nurse and Grievant had the keys to the Narcotics box. Only Grievant

and Ms. Borer were at the Nurses' Station.

Ms. Meeker testified that if it were carelessness she could work with the employee but not with wilfulness. She said there was no cooperation and lying.

On Re-Cross Examination Ms. Meeker read JE 9 Pages 15, 16, 17 and 18 and testified it is her handwriting.

IV. THE UNION'S CASE

The Union's first witness was Mary Smith. Ms. Smith is an RN and has been at TDC for sixteen (16) years. Ms. Smith testified that on November 14, 2009 she was working at Garza Residential Home. She said she never went to Utah. Ms. Smith testified that she knew something was going on.

Ms. Smith testified that she and Annette Krupp were working second shift on Garza 4. Ms. Smith said she got a call and went to the Staff Office and was told the Grievant needed help. Ms. Smith called another Nurse at home. She testified that she got a call from Karrie Stearns and was told to stay at Garza. Ms. Smith testified the first call was between 3 and 4 and she doesn't recall when the second call came in.

Ms. Smith testified that she has given chemical restraints to Residents. She testified TPWs do call about Residents and notify her of Residents' behavior and injuries. She testified that she goes down to assess the situation. Ms. Smith testified that TPWs can call but behavior may change before the Nurse gets there.

On Cross-Examination Ms. Smith testified that she goes down to assess the Resident and then calls the Doctor. She said, "You don't just take medicine with you, you call the Doctor."

The Union's next witness was Misty Parkins. Ms. Parkins left TDC the first of this month to become a full time student. Ms. Parkins testified she was a TPW at TDC for about six (6) years. She spent five (5) years on Utah 4. She said she knows Donald and Marilyn a little.

Ms. Parkins testified that she was on second shift on November 14, 2009 and clocked in at 2:20 P.M. She testified that Donald was screaming when she walked in the door.

Ms. Parkins testified that Donald was upset and yelling. She said staff Kopp and Peak were there. Ms. Parkins said she is assigned to Utah and she asked, "What does Donald want?" She testified Donald is obsessive-compulsive and can't change his routine. Ms. Parkins testified that lots of things set Donald off and you have to figure out what Donald wanted. She testified she knew Donald's BSP.

Ms. Parkins read JE 35 and said it was Donald's BSP. She testified she asked what Donald's problem was but it was shift change and she didn't get much information. She testified that Donald was happiest outside. Ms. Parkins read JE 35 Page 4 (f) and testified that Donald was allowed to go outside about anytime. She testified that staff were keeping Donald from going outside. She said Laura called Nursing to get Ativan and talked to Faith as Grievant wasn't there yet.

Ms. Parkins testified that November 14, 2009 was one of her worst days at TDC. She said Donald's screaming upset the other Residents. She testified that in her opinion the trouble with Donald had just started when she got there. She said the Staff were quick to call Nursing on Donald.

Ms. Parkins testified they are to carry a Life Safety Card. The Residents are coded and

Donald has a Red Card which means keep in sight. She testified Jessica had Donald's Life Card. Ms. Parkins testified she said to let Donald out the door as his BSP allows him to go outside. She said Jessica told her Donald was SIB the previous day and so couldn't go out. Ms. Parkins testified they should have let him go out. She said keeping Donald inside is not consistent with Donald's BSP.

Ms. Parkins testified that she suggested taking Donald on a van ride, as this had worked before. She also testified that Tylenol had worked on Donald before and that it gives time to figure out what Donald wants. She said Nursing had given Donald Tylenol many times.

Ms. Parkins testified she told Ms. Lupica to let Donald out the door as there were two (2) staff with him. She said Ms. Borer came right after she arrived. Ms. Parkins testified she talked to Ms. Borer about Donald and that Ms. Borer suggested other ways to deal with Donald other than Ativan. She said the doors were open that separate Utah 3 and 4 and that she was in the hallway and she could see. Ms. Parkins testified she had many interactions with Jessica Harp. She wanted to let Donald out and Jessica Harp wanted to keep Donald in. She testified that the Grievant and Ms. Borer were talking and Jessica screamed at them to do their job.

On Cross-Examination Ms. Parkins testified that you have to find out what's bothering Donald. She was asked, "Will letting him outside calm him if something is out of order, letting him outside wouldn't help." She replied, "It could help. Donald wanted out." She testified that Donald did go on a van ride and she has never seen Donald run for the creek or the road in five (5) years.

Ms. Parkins testified she knows Donald's BSP. The behavior mode causes intervention

and this changes things. She testified she would call Nursing and let them make an assessment and tell her what to do. She testified she doesn't advise what medicine to give them. Ms. Parkins testified that November 14, 2009 was a Saturday and the Residents could sleep in.

On Re-Direct Ms. Parkins testified that for the most part Donald gets to go outside. She said keeping Donald inside caused behavior problems.

On Re-Cross Examination Ms. Parkins read JE 35 Page 4 (f) which says Donald may be refused to go outside. She testified that the sign was always green, never red.

The Union's next witness was Jennifer Daniel, the Grievant. Ms. Daniel is an LPN. The Grievant testified that in November 2010 she got a letter from the Nursing Board Closing the Investigation and telling her the Board did not find fault.

On November 14, 2009 the Grievant reported at 2:20 P.M. and went to the Nurses' Station. She saw Ms. Borer when she arrived.

The Grievant testified that TPW Laura Kopp came to the Nurses' Station requesting Ativan for Donald. She testified that at Shift Change there must be a Narcotics Count. She said there is also a review of medical problems and this takes about five (5) minutes. The Grievant testified that there are written reports and that she had to talk to the first shift Nurse.

The Grievant testified she has been at Utah for nine (9) years straight and has been at TDC eleven (11) years.

The Grievant said she asked Ms. Borer if Donald had been given Tylenol. She testified that a TPW got very irrate and Ms. Borer went down to see Donald. The Grievant said a Doctor has to approve Ativan. The Grievant testified she takes into consideration the TPW's comments.

The Grievant testified that she has Residents who seek her out. Resident Megan is very demanding and she had to give Megan reassurance. She said if she puts Megan on hold she goes to SIB. Megan runs to other buildings and undresses. The Grievant also testified she was trying to get med carts around and get the shift started.

The Grievant testified she doesn't recall if Ms. Borer came back to the Nurses' Station as she had gone to give ice to a patient. She testified Resident Lana stopped her and at some point Ms. Borer clocked out and then came back. The Grievant testified that Ms. Borer told her that she was asking questions about Donald. The Grievant said Ms. Borer told her Donald was just out of the shower and was being compliant. Donald was trying to go outside. Ms. Borer asked Ms. Lupica about Donald. Jessica was complaining about the treatment of Donald. The Grievant testified that Ms. Borer told her she gave Donald Tylenol.

The Grievant testified she heard Donald yelling at shift change and then again about 3:00 P.M. She testified that the windows at the Nurses' Station were open and she could hear noise at Utah. She testified that when she went to give ice to staff member Megan Ortmann Donald was walking up and down the hallway and seemed content. Ms. Borer said she needed Upper Management and she called Stewart at 3:00 P.M. Ms. Borer told the Grievant that she had spoken to Stewart's wife and he was at a football game and would call later.

The Grievant said there was a staff member from Utah 3 standing right beside her when Jessica Harp complained about Grievant talking to Lana. She testified she went back to the Nurses' Station and Ms. Borer was finishing reports. Stewart had not called back yet.

The Grievant was referred to JE 9 Page 16 and JE 12 Page 4. She

testified both of these refer to Ms. Borer and Grievant talking about TPWs. Grievant testified she did not go into an office with Mike Banks and she never had a conversation with him. The Grievant testified that at 2:38 P.M. she was in the office with Ms. Borer and then went to take ice. She said she got back around 3:00 P.M. The Grievant testified that Ms. Borer told her what she was charting and that Stewart hadn't called. Ms. Borer told her Ms. Lupica said she talked to Stewart and then to Grievant. The Grievant said Ms. Lupica did not speak to her prior to her going down to administer Ativan and she saw Ms. Lupica when she went down. She testified Ms. Lupica never told her Stewart wasn't going to call back.

The Grievant testified that when she heard Donald screaming she knew Donald was at his limits and she called the Doctor. She testified the Doctor told her there needed to be a special team meeting to cover weekend problems and told her to give Donald Ativan.

The Grievant testified that she knows Donald. She said she knew he had been given Tylenol to rule out pain and headaches. The Grievant testified Donald was usually fine after Tylenol. That day Donald was very agitated. She said calling the Doctor without observation is done; and that she could tell by Donald's sound he needed Ativan.

The Grievant testified that when she went to give Ativan Donald was on the floor partway out the door. She said Jessica pulled Donald in by his wrist. The Grievant testified she questioned if this was a proper hold. Jessica got mad and left. The Grievant testified everyone was watching Donald and she felt she was the only one to see Jessica use this hold. She said she gave Donald Ativan and went back to the Nurses' Station. She testified that Ms. Borer was still there and she talked to Ms. Borer as a Union Steward. Ms. Borer told her to call the Police and then Officer

Correll came in.

The Grievant testified that Ms. Borer questioned Officer Correll. Officer Correll got uncomfortable and took Grievant across the hall. She said Officer Correll asked if it couldn't be called a re-direction. The Grievant testified she went to tell Ms. Borer and told her she may need Union representation. The Grievant testified she didn't agree and wanted it checked into. She said she thought Officer Correll was changing his story. The Grievant testified that Ms. Borer heard Officer Correll say he saw it. She testified she talked to Officer Correll about ten (10) minutes and that he called the Chief twice.

The Grievant testified she started a UIR on the arm pull. Officer Correll stuck his head in – start your paper work – the Chief will call you. She said Donald came into the Nurses' Station after being outside. Donald was happy now. She testified she checked Donald for injuries as he might have hurt himself trying to get out the door. Donald was very compliant.

The Grievant testified that a UIR requires a Nurses Report. She also said Past Practice is to let the Residents calm down and then check them. The Grievant testified that when Donald is upset you can't examine him, he is too SIB. She said she doesn't recall if she listened to the radio as the battery was dead. The battery was changed.

The Grievant testified that now it's close to 4:00. She contacted Nevada Nurse Deb Harper and asked her to pick up Grievant's houses for the 4:00 meds. The Grievant said she had a stack of paper work and that she talked to Mary Smith and asked for help. Ms. Borer told Grievant she had to ask Stacy if she needed help.

The Grievant testified she was on the phone with Donald's mother about the UIR. She

said Annette Krupp came in – Got called to go to AOD. She testified that Ms. Borer told her she had given Marilyn Ativan when the Grievant was going to see the AOD. This was after the fact.

The Grievant testified Marilyn was outside but no staff notified Grievant of any issues. Marilyn usually gets agitated waiting for meals. The Grievant said she told management she didn't know about Marilyn and Ativan. The Grievant testified Karrie Stearns was in the AOD Office and told Grievant to go to the interview room. Karrie asked Faith if she would take overtime as she was calling and being refused. The Grievant said Officer Correll came in and was questioned by Ms. Borer about a Conflict of Interest. Karrie advised Ms. Borer that she had overtime and Ms. Borer left. Dick Bentz another Union representative came. Officer Correll came back and said another Officer will be in after he gets out of the shower. Now it is 5 - 6 o'clock.

The Grievant testified Officer Rodney Moyer showed up. She said Officer Moyer got agitated and red faced and she felt intimidated by him. She said Mr. Bentz wanted a break as the Grievant was crying. She testified Officer Moyer was in the hallway and Mr. Bentz was trying to comfort her. The Grievant said Officer Moyer and Mr. Bentz got in an argument.

The Grievant then testified that Officer Moyer gave her some paper and told her to write a statement , and she believes Officer Moyer told her to leave. She returned to Utah. She then said the Nevada Nurse said Jonas was banging his head so she went to Jonas.

The Grievant then testified that Karrie Stearns called her to go back to the AOD but she went to assist Nurse Deb Harper with Jonas. The Grievant was asked why she did not respond to an order from Karrie Stearns. She testified it was more important to go to Jonas. She testified that

Jonas was in the bedroom and Nurse Harper was giving Jonas an I V. The Grievant said she treated Jonas's wounds.

The Grievant then testified that she went to the AOD. Officer Moyer was agitated as she had walked out on an Official Investigation. The Grievant testified that she apologized to Officer Moyer.

The Grievant testified that it was after 6:00 P.M. when she called back to the AOD. She said she told everyone including Karrie that she had to do documentation.

The Grievant testified she was sitting in the lobby and Karrie was coming and going. She said she was not allowed to do documentation. The Grievant testified that she told Officer Moyer and he said "It will get done". She said she was stuck in the lobby the rest of the night. She said around 10:00 P.M. Officer Moyer took her keys and took her to her car. Officer Moyer told her to be back at 8:00 A.M.

The Grievant testified she never refused to answer Officer Moyer's questions, he didn't like her answers.

The Grievant then testified that Martha sends documents back with sticky notes. She said this is a common occurrence. The Grievant testified that the sticky notes refer to things like "sign here" and "need more detail". She also testified that it is Past and Present Practice for Nurses to sign for each other.

On Cross-Examination the Grievant testified that she has known Donald her entire time at TDC. She said he has been SIB the entire time. She testified that Donald's BSP used to have holds prior to the current plan. She said she has done assessments on Donald.

The Grievant testified that on November 14, 2009 the Staff had asked for an assessment on Donald. She was referred to JE 13 Page 6 which is the Police Report. The Grievant testified that Officer Hunter questioned Ms. Borer and Ms. Borer said she asked the Grievant about Tylenol.

The Grievant then read JE 12, a Police Report. She testified that there was a question about Ativan. The Grievant testified the answer was that Tylenol was tried on Friday. Use least invasive procedure. She said Donald's BSP called for Ativan. The Grievant was referred to JE 35, Donald's BSP and said it was the Nurses judgment call. The Grievant testified that Donald has had Tylenol before to rule out pain as a behavior cause. She testified that Donald's BSP does not say Tylenol; but Marilyn's BSP does say Tylenol.

The Grievant was then referred to JE 36 which is Marilyn's BSP. She testified that Marilyn's BSP says try a pain reliever first as Marilyn may have physical pain for a SIB.

The Grievant then testified that she had witnessed Donald at 3:00 or 3:05 P.M. She said she took information from TPWs and from Ms. Borer. Ms. Borer told her Donald calm and compliant. The Grievant then testified that the Health and Safety of the Residents is her number one concern. She testified that she thought Jessica's arm pull was improper and abusive. The Grievant was asked: "Aren't you to do an assessment if you think there's abuse?" She answered, "Notify the Police first. Let Resident calm down some". She then testified that when she was talking to Officer Correll, Donald was outside picking up sticks. The Grievant testified that she wanted to do the abuse report in confidence. The Grievant was then asked: "Couldn't you have called Staff to come help with Residents?" She replied, "The Residents want her personal

attention". The Grievant testified that after she talked to Officer Correll she was not bothered by Residents. The Residents were before the arm pull. The Grievant then testified that the Controlled Substance Report was not finished at Shift Change. She said this was against the Rules but it does happen.

The Grievant was referred to JE 12 Page 29 and testified it was wrong not to do the count. She said no one was fired before for this. The Grievant testified that Ms. Borer was on duty until she clocked out so the assessment on Donald was completed. She then testified that Ms. Borer clocked out then came back to do documentation. The Grievant testified that Ms. Borer said she called the Doctor but the Grievant pulled the Ativan for Marilyn but that she did not agree with that. The Grievant testified that Nurses have to use judgment and that she would have given Marilyn Tylenol. She testified that Ms. Borer gave Marilyn Ativan and she was not aware of this until Ms. Borer told her this walking to see AOD. The Grievant testified that forms are to be completed as soon as possible. The Grievant also testified that phone calls and other interruptions slow her down.

The Union's next witness was Faith Borer. Ms. Borer is an LPN and has been at TDC for twenty-three (23) years. Ms. Borer testified that on November 14, 2009 she was on the first shift and that first shift had no problems. She testified that at 2:40 P.M. Laura Kopp comes up to the Nurses' Station and wanted Ativan for Donald. Ms. Borer testified she went to the medical card and asked the Grievant about Tylenol. She said Laura interrupted and said Ativan.

Ms. Borer was referred to JE 35 which is Donald's BSP. She testified that the document is for different activities and problematic behavior. Ms. Borer then read JE 35 Page 2 and

testified that it is the Rational for Support Plan. Ms. Borer testified that it wasn't very specific and there are different things you can try. She also said Donald is non-verbal. Ms. Borer also testified that Tylenol is not an anti-anxiety medicine.

Ms. Borer testified that the Nurse makes the decision to call the Doctor. The Nurse tells the Doctor what has been tried and what is the severity of the case. The Doctor decides on Ativan. Ms. Borer testified that anyone on the staff can contact Nursing about Donald.

Ms. Borer was asked "Did Ms. Lupica come to you about giving Donald Ativan?" She said "No". "Did Ms. Lupica ever tell you she talked to Stewart?" Ms. Borer said "No".

Ms. Borer testified she went to Donald's module. Donald was getting a drink and went to his room to get dressed. She testified that Donald was compliant and not yelling. Ms. Borer testified she decided to give Donald Tylenol.

Ms. Borer testified that Donald had no problems until Laura came to the Nurses' Station. She testified she thought Donald might be in pain as he has a bad leg. Ms. Borer testified that she thought it was physical and not mental and she was to use least restrictive measures first.

Ms. Borer was then referred to JE 51 the Protection from Harm Policy and testified that it takes precedence over other programs. Ms. Borer testified that Mr. Peak and Ms. Lupica were reading Donald's BSP while she was watching Donald. She said Mr. Peak went to punch out and she told Ms. Lupica she wasn't giving Ativan. Ms. Borer testified that Ms. Lupica did not say anything.

Ms. Borer testified that she gives Donald Tylenol and goes back to the Nurses' Station. She said the Grievant was away and she charted Donald's information.

Ms. Borer testified she then saw the Grievant talking to a TPW who told Grievant about Donald. The Grievant returns to the Nurses' Station and Mr. Peak comes in to borrow a pen. Ms. Borer testified she went to Mr. Peak's office to chit chat and then returned to the Nurses' Station. The Grievant was there. Ms. Borer testified it was now 3:00 or 3:10 P.M. and the Grievant had been down to give Donald Ativan. She testified the Grievant closed the door and told her what she saw when she took Ativan to Donald. This is the Jessica arm pull. She testified that the Grievant told her she was not comfortable about what she saw. She testified she told the Grievant to do what she thought was right. She said Officer Correll then showed up.

Ms. Borer testified she asked Officer Correll what he saw. She said Officer Correll said: "I saw Jessica pull Donald out of the door." Ms. Borer said the Grievant said to do a UIR. She said then Officer Correll wanted to see the Grievant in private. Ms. Borer testified the Grievant was with Officer Correll for ten (10) to fifteen (15) minutes and then came back. Officer Correll said he would call the Chief. Ms. Borer testified the Grievant said: "He wants me to call it redirection."

Ms. Borer then testified the Grievant did a UIR and there were lots of phone calls. She said the Grievant had not done any of her shift work. Ms. Borer testified the Grievant was calling for help to get the work done. She said she called Garza and Nevada.

Ms. Borer testified that Supervisor Martha called and she told Martha she was there as a Union Representative. She said Martha said the Grievant had to call Stacie for help.

Ms. Borer testified that she gave Ativan to Marilyn around 3:50 P.M. The Grievant was doing paperwork. Ms. Borer testified that she saw Marilyn alone on the Patio. She said Marilyn

was banging on the lawn furniture. Ms. Borer testified she told Grievant: "Don't look now but Marilyn is blowing." She said she asked the Grievant if Marilyn had Ativan. The Grievant said "Yes" and she called the Doctor and then gave Marilyn Ativan. Ms. Borer said she had enough information to give Marilyn Ativan. She testified that there were no Staff with Marilyn, the Staff were all mad at each other.

Ms. Borer then read JE 36 which is Marilyn's BSP. She testified that earlier she saw Marilyn hitting her head and she gave her Tylenol. Ms. Borer testified that Marilyn had no supervision and she thought Marilyn would hurt herself on the lawn furniture. Ms. Borer testified that she gave Marilyn Ativan.

Ms. Borer testified that she put a sticky note on the Control Sheet so the Grievant could write the time in. Ms. Borer testified that while she and Grievant were walking to the AOD she told Grievant that she had given Marilyn Ativan while off duty. Ms. Borer testified that she knew it was wrong but no one else was available to do it. She said she had to stop Marilyn from hurting herself.

Ms. Borer was given U - 6 which are Interdisciplinary Progress Notes. She testified that Nurses do not make notes in these. Ms. Borer read U - 6 at Page 2 and testified that Marilyn was banging toilet seats and Ativan was given.

Ms. Borer was given U - 8 which is the PRN section of MAR and said this documents dates and times Nurses give meds. She testified that on November 11, 2009 Tylenol and Ativan show on this document. The documents are correct. Ms. Borer was given U - 6 Page 2 which are meds given. She read U - 8 and testified it doesn't show which meds are given. Ms. Borer

testified that U - 6 shows meds given and U - 8 shows meds given which is to tie in to U - 6.

Ms. Borer was given U - 7 Page 1 and testified these are Nursing Notes showing Tylenol and Benadryl. U - 8 does not show this as given. Ms. Borer read U - 7 Page 2 and testified it shows Ativan given at 7:30 A.M. and not charted until 2:20 P.M. Ms. Borer said Nurse Hawkins was not disciplined for late entry. Ms. Borer testified U - 7 Page 4 shows no entry for Ativan. She said U - 7 Page 4 says Ativan given STAT. No Tylenol given. Ms. Borer testified that if Medicine is effective it is to be put on the Chart. She said U - 8 has an entry on Tylenol for November 10. She said U - 7 Nursing Notes do not have an entry.

Ms. Borer then read U -15, the Protection from Harm record. She testified that Staff fills out the initial report and the Nurse checks and signs the forms. She read U - 8 and testified there is an entry on Tylenol on November 11 by U -15 has no entry for Tylenol.

Ms. Borer read U - 8 and testified that on November 12, Tylenol was given but there are no initials. She testified there is supposed to be. She read U -18 and testified on November 18 Tylenol was given but on U -7 there was no entry for Maalox . She testified that U -8 shows Tylenol and Maalox November 18 but U -7 has no entry for Tylenol and Maalox.

Ms. Borer testified that U -9 is the Physician's Order. The Nurses write the Doctor's orders on this. She testified that U -9 Page 1 shows signed by the Nurse November 7, 2009 but signed by the Doctor on November 10, 2009. She said it was probably the week-end.

Ms. Borer read U -10 Protection from Harm Form. U -10 Page 2 shows less restrictive tried. Ms. Borer read U - 8 and testified it is the record on Marilyn for November 7, 2009. She said U - 8 shows Ativan given at 10:00 A.M. She then said the Exhibits show less

restrictive meds not given.

Ms. Borer read U - 10 Page 2 which is the Debriefing Portion. She testified that it says Ativan only as necessary. She said Ativan takes over an hour to be effective and to give Ativan only as necessary. Ms. Borer testified she thought she was right about Marilyn.

Ms. Borer read U - 11 which is a Protection from Harm Form. She testified that for Marilyn it shows less restrictive. She then testified it was hard to fill out all the forms with the same information. She said there was no discipline for failure to do this.

Ms. Borer read U - 12 which is a Protection from Harm Form for Marilyn. She testified Nurse Hawkins has different times by her signature. She said Nurse Hawkins signed at bottom for 9:00 A.M. U - 8 shows no record of meds given on U - 12.

Ms. Borer read U -12 Page 3 which are Preventative Measures, Tylenol, Benadryl, Maalox which show on U - 8. She read U - 13 which shows Ativan and testified there is no entry for Ativan on U -8. Ms. Borer read the Protection from Harm Form for Marilyn on November 11 for Ativan and testified U - 8 shows no entry for Ativan. She then testified that U -8 Page 3 is the PRN Chart.

Ms. Borer then read U-15. She testified this shows Ativan given to Marilyn but it wasn't a crisis. She said Marilyn's Mother wanted to be updated if meds given. She testified that U-15 Page 4 is signed off by LPN Kuebler. Ms. Borer testified that the De-briefing Form was not signed by LPN Kuebler but should have been.

Ms. Borer read U-16 which is the Protection from Harm Form for Marilyn November 14, 2009. The reporting Nurse is Nurse Krupp. She said this is the Ativan given by her. Ms. Borer

read U-18 which is the Physician's "Call Log". Ms. Borer testified that the Grievant wrote the order but Ramirez wrote the order. She testified that Nurse Ramirez was not disciplined. Ms. Borer testified that U-18 Page 2 was signed by Pat Poe. Ms. Borer testified that she was the Steward. Ms. Borer read U-3 which is an Inter Office Memo from Stacie and testified that the Memo was still in effect on November 14, 2009.

On Cross-Examination Ms. Borer testified she read the BSP and consulted the Grievant. She testified she gave Donald Tylenol. Ms. Borer testified she saw Marilyn from the Nurses' Station. Ms. Borer said she called the Doctor and the Grievant got the meds.

The U's next witness was Richard J. Bentz. Mr. Bentz has been a TPW for twenty-six and one-half (26 ½) years at TDC. He has been a Steward off and on for twenty (20) years. For the last ten (10) to twelve (12) years he has served as a Steward.

Mr. Bentz was a Steward on November 14, 2009 and works on Utah 4. He testified that he knows Donald. Mr. Bentz testified for eight (8) or nine (9) years he moved around TDC and is back to Utah. He has known Donald for one and a half (1 ½) years.

Mr. Bentz testified that on November 14, 2009 he was contacted at 4:15 P.M. He said he was contacted by either Ms. Kearns or Ms. Lupica. He testified that he was advised Union representation was needed. Mr. Bentz testified that he got his Union Contract, pen and paper, and went to the AOD office. He said he got sent down the hall. The Grievant and Ms. Borer were in the room. Ms. Borer, the Union Representative, filled him in and Ms. Borer left.

Mr. Bentz testified he waited until Officer Correll came in and called a new Officer. Officer Rodney Moyer came in. He said Officer Moyer gave the Grievant a form to sign about

the interview and then asked questions for about forty (40) or forty-five (45) minutes.

Mr. Bentz testified the questions started with the time line. Then the questions were about why did you do this. The Grievant did well in the beginning. He testified that at the end the Grievant said, "I was doing this. How could I be doing that?" Mr. Bentz testified that Officer Moyer got upset with the Grievant for answering questions with questions. Officer Moyer asked the Grievant if it was abuse and she said, "Yes". Mr. Bentz testified he asked to take a break. He testified that the Grievant was crying and Officer Moyer was badgering her.

Mr. Bentz testified that after the Interview, Officer Moyer turned off the recorder. Mr. Bentz testified he mentioned to Officer Moyer that his questions were not professional. He said Officer Moyer told him he wasn't professional.

Mr. Bentz testified that Officer Moyer told him to get over there. Mr. Bentz went with Officer Moyer to the AOD Office. He said he told them if they needed him to call him.

Mr. Bentz testified that the Grievant was supposed to wait in the room. He testified that the questions were not related to abuse but were mostly about documentation. He said he doesn't remember if the Grievant was free to go or not. Mr. Bentz testified that Officer Moyer bullied the Grievant. He testified he went back to see the Grievant and the Grievant wasn't there. Mr. Bentz testified he ran into Officer Moyer again. Officer Moyer told Mr. Bentz he was the Officer and Mr. Bentz should shut up. Mr. Bentz said he was not present for the second meeting between the Grievant and Officer Moyer.

Mr. Bentz testified that in abuse cases all parties involved are to be taken off the floor and separated. This is always done this way.

Mr. Bentz testified that the Grievant was crying. The Grievant wanted to go back to the Unit as she had so much paper work to do. He testified Officer Moyer said "Someone else will do it."

Mr. Bentz testified that his opinion as a Steward was the Grievant did not know what she was being disciplined for. The Grievant found out the following week that it was the Grievant and not Jessica.

Mr. Bentz testified that he sometimes has not completed his work on time. He said Residents personal belongings have to be inventoried the 15th of the month and he is sometimes late. He has not been disciplined.

On Cross-Examination Mr. Bentz testified there are sometimes several interviews in an Investigation. He said employees were not released until the interview is completed. He read JE 12 Page 15 and testified the Grievant said: "I thought you told me I could go."

On Re-Direct Mr. Bentz testified that he can't say he understood what Officer Moyer meant about "stay or go".

The next witness for the Union was Bruce Amry. Mr. Amry is an LPN. Mr. Amry has been at TDC for five and a half (5 ½) years. He is Chapter President now but was not Chapter President on November 14, 2009. Mr. Amry was asked: "Did you find out when TDC made a submission to the Ohio Nursing Board ." He answered: "November, 2009." He was then asked if any one was disciplined in November 2009 except Ms. Borer and the Grievant and he said "No".

There was no Cross-Examination.

V. OPINION & AWARD

This is a very difficult case.

The parties have done an exceptional job of presenting their respective positions and in their post hearing briefs.

The Employer argues that the Grievant wilfully disregarded Donald and Marilyn's BSP. The Employer points out that these plans are put together by highly trained professionals and that all staff and Nurses are required to know the BSPs. The Employer also points out that the Grievant had 10 years on the job.

The Employer asserts that the Grievant said TPW Harp was guilty of abuse but when Officer Moyer investigated he determined that the Grievant was guilty of neglectful acts.

The Employer also argues that the Grievant failed to follow the BSPs. The Employer points out the testimony of Stacy Berlekamp, Director of Nursing , who testified that Tylenol may not be given when the BSP calls for Ativan. Ms. Berlekamp also offered her opinion that the Grievant failed to do a proper assessment.

The Employer then referred to Stewart Behms testimony. Mr. Behm is the QMRP responsible for over seeing and developing Donald's plan. Donald is obsessive compulsive (OCD). The Grievant claimed Tylenol was the least restrictive but Mr. Behm said it was not the least restrictive as Donald had no medical issues.

TPW Robert Peak and TPW Laura Kopp testified about Donald's behavior which was normal until around 1:00 P.M. Then Donald became upset and the TPWs tried to re-direct. Around 2:15 P.M. TPW Kopp goes to the Nurses' Station for chemical intervention and TPW

Peak calls about the same time for an assessment. TPW Kopp protests Grievant telling LPN Borer to use Tylenol and calls the AOD. The AOD calls Ms. Lupica to investigate and she calls Mr. Behm. Mr. Behm says “no Tylenol, give Ativan”. Ms. Lupica tells the Grievant and LPN Borer and they tell her they have a call in to Mr. Behm. LPN Borer gives Donald Tylenol and says he is compliant. She says there is a standing order for Tylenol.

The Employer also argues that when the second shift arrives TPWs Harp, Ortmann and Elchert all hear Donald screaming.

Ms. Lupica calls for other staff but cannot re-direct Donald. Officer Correll says Donald beyond control of staff. Donald breaks TPW Ortmann’s finger.

The Grievant said use team work for assessment but the employer argues Ms. Berlekamp says this is not proper and the Grievant called the Doctor without a proper assessment.

The Grievant gives Donald Ativan and observes TPW Harp pulling Donald which she thinks is improper. The Grievant seeks advice from LPN Borer.

At about 3:30 P.M. Marilyn “blows” according to Borer. LPN Borer calls the Doctor and the Grievant pulls Ativan. In the Pre-Disciplinary hearing the Grievant denies knowledge of Marilyn or pulling Ativan.

The Employer contends that the Grievant failed to follow Marilyn’s BSP. Mr. Behm said Marilyn was to have Tylenol as she has medical problems. Also the Grievant failed to communicate with Direct Care staff.

The Grievant is charged with eight counts of Neglect and Failure to follow TDC policies. The Grievant claims mitigating circumstances primarily that the Employer refused to let her do

her paperwork. The Employer says the Grievant arrived at work at 2:20 P.M and the Investigation started at 4:28 P.M. so Grievant had time to do her paperwork.

The Union argues the affirmative defense of other Nurses not doing paperwork timely or correctly but the Employer says its examples are not accurate. The Union also argues that the Grievant used least restrictive measures but the BSP supports the Protection From Harm.

The Union argues the Investigation was not thorough but there was a Union Steward present and an Off Duty Police Officer was called in to investigate. In addition eighteen first and second shift witnesses were interviewed. The Grievant was outside the TDC policies.

The Union claims injury due to the length of time until discipline but the Employer says the Grievant was on Administrative leave and there was no harm.

The Employer denies it held up until the Nursing Board made a decision and that the Nursing Board is irrelevant. The evidence used was TDC's.

The Union opens it's argument by saying the Collective Bargaining Agreement (CBA) says the Employer cannot wait four months to do discipline without an explanation.

The Union also contends there was no mistreatment of Donald or Marilyn as the Doctor ordered Ativan. The Union also argues that the Grievant cannot be faulted for actions LPN Borer took with Management's approval.

The Union also argues that document failures were common occurrences and that it was the Employer's fault on November 14 that Grievant did not do her paperwork.

On November 14, LPN Borer said the first shift was quiet. TPW Kopp comes to the Nurses' Station and asks for Ativan but never says Donald SIB. TPW Kopp irrate when Ativan

wasn't given. The Grievant says Donald often vocalizes. The Union cites the Protection From Harm which says use least intrusive and claims this takes precedence. The Nurse decides when to call the Doctor and the Doctor makes the decision. TPW Peak says the Nurse has discretion.

The Union points out the Grievant and LPN Borer say Donald was compliant. Donald was given Tylenol and observed for fifteen minutes. Ms. Lupica does not object to Tylenol. LPN Borer reports to Grievant who then calls Mr. Behm. The Grievant then goes to give ice to TPW Ortmann and observes Donald who is calm.

Ms. Lupica calls Mr. Behm but the Union points out the BSP doesn't forbid Tylenol. Ms. Lupica calls the Nurses' Station but does not tell them Mr. Behm won't return their call. She also did not say Ativan.

Ms. Lupica says Donald became agitated after the Tylenol and was given a van ride. Donald was re-directed into the building. The Grievant came and gave Donald Ativan after calling the Doctor. The Grievant sees TPW Harp pulling Donald by the arm and returns to the Nurses' Station.

Officer Correll arrives at the Nurses' Station and takes Grievant across the hall. Officer Correll wants the TPW Harp incident treated as a re-direction but the Grievant disagrees and Officer Correll calls Chief of Police.

The Grievant then goes to see Donald who is now calmed down. The Grievant gives Donald a medical exam which the Union argues is timely as Donald's earlier condition made it impractical. TPW Elchert agrees the exam could not have been done sooner. The Union contends the Grievant is now behind as evidenced by her calls to the Director of Nursing and RN Smith

for help. Ms. Stearns calls Grievant to the Administration Building.

LPN Borer now tells Grievant Marilyn is “blowing”. LPN Borer calls the Doctor and gives Marilyn Ativan. LPN Borer then goes formally on overtime and goes elsewhere. Officer Moyer interviews the Grievant and it becomes upsetting to Grievant. The Grievant leaves and then is recalled to the Administration Building and not permitted to return to her Nurses’ Station. The Union argues that the Grievant was both kept by the Employer from doing her paperwork and assured others were doing it.

The Union also points out the Nursing Board cleared the Grievant.

The Union then cites Article 24.02 of the CBA as well as all Article 24, 25, 44 and 44.04. The Union also cites the Standards of Conduct and says only one results in a Removal for a first offense.

The Union argues that the Employer never advised it that the Federal Regulations were part of the case. The Union then pointed out that the Regulations in neglect and abuse cases require an internal investigation to be completed in five days, despite Ms. Meeker’s testimony to the contrary.

The Union argues the Regulation is clear and that Ms. Meeker’s testimony that the five days refer to removal not the Investigation is untrue. The Union also points out that TDC reported to the Nursing Board in two weeks. The CBA says “as soon as reasonably possible”. The Union cites State of Ohio v Ohio Highway Patrol and OCSEA G-87-1140 (1988) which held a delay of less time than in this case to be unreasonable.

The Union then argues that both LPN Borer and the Grievant agreed Tylenol is correct.

The Union argues that TDC has no policy on assessments. There is evidence that subjective reports, first hand examination and objective data are to be used.

The Union argues that Ms. Lupica consented to use of Tylenol. The Union also argues that while Ms. Lupica said she had no supervisory authority over the Nurses, the evidence shows that she did.

The Union also argues that in fact the Grievant did do an assessment. She had staff input, a report from LPN Borer, and her own observations. The Union also argues that, barring any evidence of an untruthful report to the Doctor, it is the Doctor's responsibility. The Nurse is under the Doctor's direction.

The Union asserts that the claim of the delay in giving Ativan causing problems is untrue. The Union cites medical records showing Ativan can take thirty minutes to work. There is also evidence in the medical records of Donald receiving Tylenol first before November 14. The Union argues that Grievant did follow Donald's BSP.

The Union then contends that the Grievant cannot be charged with LPN Borer's treatment of Marilyn. The Doctor was called and the Protection from Harm record says Marilyn's BSP was followed. The Union says there is evidence of other times Marilyn was given Ativan before Tylenol.

The Union also says the Grievant knew Ms. Lupica and Ms. Stearns knew LPN Borer was there and their silence is an admission this was all right.

The Union also argues that the fact that LPN Borer and the Grievant remember some events differently is not evidence of lying. The Union also points out that the charges

concerning

- 52 -

the documents, if true, only warrant an oral reprimand. The Union contends that its nine exhibits of medical records show other nurses also do it.

The Union then points out that debriefing is not for medical restraints.

The Arbitrator having considered all the evidence and argues of the parties has concluded the Union is correct.

The Arbitrator is bound by the terms of the CBA. The Employer offered no evidence as to its delay other than to say the Grievant was kept on Administrative Leave. The CBA is silent as to this as a reason for delay. The CBA does have reasons for delay i.e. criminal investigation. The Union has an interest and an obligation to protect its members and Article 24.02 of the CBA is there for a reason. The delay in this case is unreasonable. The evidence is clear that TDC had five working days to do its internal investigation. TDC also sent a report to the Nursing Board in two weeks. It should have timely proceeded against the Grievant. The Grievance is granted.

The Union having prevailed on the timeliness issue, it should be noted that the Union also prevailed on the merits.

The Arbitrator was persuaded by the fact the Nursing Board determined that the Grievant had done nothing wrong. The Nursing Board is the primary enforcement agency of its Licensees. As such, its determination of the Grievant's adherence to the Standard of Care cannot be disregarded. The Employer argues that the Nursing Board determination is irrelevant, but this argument is not well taken.

In addition, TDC employs people in a variety of disciplines, as do hospitals and

Universities. This case involved a serious clash of different disciplines as to what is proper

- 53 -

conduct. The determining factor here is the Doctor. Both Donald's and Marilyn's BSPs had common factors. The Nurse had an Ativan discretion in both plans. The Nurse had to decide to call the Doctor. The Employer had no evidence that the Doctor's decision to order Ativan in both cases was based on false information by the Grievant. The Doctor's orders were therefore legal and binding on the Grievant.. As stated above the grievance is granted..

The Grievant is ordered to return to work.

The Grievant shall receive full back pay less any paid Administrative Leave and any Unemployment Compensation received.

Restoration of all vacation and leaves.

Full pension credits.

Full time credit for determination of FMLA eligibility.

The Arbitrator shall retain Jurisdiction for 60 days.

Entered at Ironton, Ohio this 24th day of June 2011.

Craig A. Allen
Arbitrator