

**ARBITRATION DECISION NO.:**

144

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Ohio Department of Mental Health  
Portsmouth Receiving Hospital

**DATE OF ARBITRATION:**

August 11, 1988

**DATE OF DECISION:**

September 1, 1988

**GRIEVANT:**

Stephen Jones

**OCB GRIEVANCE NO.:**

23-14-(88-01-04)-0001-01-04

**ARBITRATOR:**

David Pincus

**FOR THE UNION:**

Dan Smith

**FOR THE EMPLOYER:**

Tim Wagner

**KEY WORDS:**

Just Cause  
Notice of Termination  
Drug Trafficking

**ARTICLES:**

Article 24 – Discipline  
    §24.01 - Standard  
    §24.02 – Progressive Discipline

Article 43 – Duration  
    §43.01 – First Agreement  
    §43.03 – Work Rules

**FACTS:**

- Grievant was employed by the Department of Mental Health as a Hospital Aide at Portsmouth Receiving Hospital. On or about May 29, 1987, the Grievant was arrested for aggravated trafficking of

cocaine, attempted trafficking of marijuana, and drug abuse. These activities were allegedly engaged in by the Grievant while he was on extended disability leave. From July 16, 1987, to December 7, 1987, Grievant returned to his normal job status pending the outcome of his trial. On December 2, 1987, the Grievant pleaded guilty to the charge of aggravated trafficking of cocaine and on December 14, 1987, a predisciplinary conference was held in which the Department of Mental Health charged Grievant with failure of good behavior. (O.R.C. Section 124.34) His Superintendent recommended removal based upon the guilty plea, and Grievant was officially removed from his position as a Hospital Aide on December 28, 1987.

#### **EMPLOYER'S POSITION:**

- Grievant was removed for just cause. First, adequate notice was given to Grievant of the possible and probable consequences of criminal conduct through distribution of disciplinary action guidelines and informative staff meetings. Second, Grievant's removal for off-duty misconduct was proper because such activity affects his ability to perform his duties, and adversely impacts the facility's purpose or mission. Third, legislation prohibits the Ohio Department of Mental Health from employing convicted felons under Section 5119.072. Thus, it would be unreasonable to assume that the Employer must be required to continue the employment of an employee convicted of a drug trafficking felony. The rules and penalties have been applied even-handedly and without discrimination to all employees.

#### **UNION'S POSITION:**

- Grievant was not removed for just cause. The Employer did not forewarn Grievant of the probable consequences of his off-duty misconduct. All employees did not receive copies of the disciplinary action guidelines nor did they attend the in-service meetings dealing with those documents. The Employer wrongfully applied O.R.C. Section 124.34 because the Collective Bargaining Agreement takes precedence over Civil Service violations. Further, there was no nexus between the Grievant's off-duty misconduct, his ability to perform his Hospital Aide duties, and the Employer's ability to achieve its mission. The Employer did not apply its rules even-handedly and without discrimination. By failing to discipline other types of misdemeanors, such as driving under the influence of alcohol, the Employer did not adequately forewarn Grievant of the possible consequences dealing with off-duty misconduct. Finally, the penalty was not reasonably related to the offense and was too severe in light of Grievant's good work record and ten years of service.

#### **ARBITRATOR'S OPINION:**

The Grievant was properly removed for off-duty misconduct. There were no notice deficiencies in this matter because drug trafficking is so serious an offense that express notice need not be given that discharge can be the consequence. The Union's argument that O.R.C. Section 124.34 was inappropriately applied is also unpersuasive. The Collective Bargaining Agreement has precedent over conflicting O.R.C provisions. However, in this case, there was no conflict between the Agreement and the Code. Therefore, the application of Section 124.34 was appropriate.

The duties and responsibilities of a Hospital Aide are pivotal to the mission of a mental hospital and such duties cannot be adequately conducted by a convicted drug trafficker. Role modeling is an integral component of a Hospital Aide's job description. The habilitation of the patients could be thwarted or misdirected if a convicted drug felon served as their role model. The Employer has an inherent responsibility to prevent drug abuse amongst its patients and staff members and due to the potential seriousness of drug problems at the facility the arbitrator weighed the following contingencies quite heavily: the availability of unaccounted for cash; the liberal visitation privileges; the use of unprescribed

drugs by patients; and the warnings provided by law enforcement agencies concerning suspected drug trafficking at the facility. The Employer has a right to protect its mission and the interests of its patients and employees from the possibility that an individual charged with drug trafficking will engage in such activity on the facility's property. Finally, the Employer did apply its rules and penalties even-handedly and without discrimination. A felony for drug trafficking cannot be equated with a misdemeanor.

**AWARD:**

- The grievance is denied.

**NOTE:**

The Union takes exception to the finding that O.R.C. 124-34 reflects the standards for discipline under the Contract. Stewards should argue that discipline should be imposed for just cause as required in Article 24 of the Contract.

**TEXT OF THE OPINION:**

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STATE OF OHIO AND OHIO CIVIL  
SERVICE EMPLOYEES' ASSOCIATION  
LABOR ARBITRATION PROCEEDING

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IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF MENTAL  
HEALTH, PORTSMOUTH RECEIVING HOSPITAL  
(PORTSMOUTH, OHIO)

-AND-

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

GRIEVANCE: Stephen Jones

CASE NUMBER: 23-14-1-4-88-001-01-04

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ARBITRATOR'S OPINION AND AWARD

Arbitrator: David M. Pincus  
Date: September 1, 1988

APPEARANCES

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For the Employer

George R. Nash	Observer
Teri Decker	Observer
Georgia Brokaw	Observer
Jennifer Dworkin	Labor Relations Specialist
Rick Harlow	Labor Relations Officer
Frank Puntenney, Jr.	Superintendent
Tim Wagner	Advocate

For the Union

Stephen Jones	Grievant
Dave Rhea	Witness
Beulah Davis	Witness
Don Sargent	Field Representative
Dan Smith	General Counsel

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INTRODUCTION

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This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Mental Health, Portsmouth Receiving Hospital, Portsmouth, Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit #1).

The arbitration hearing was held on August 11, 1988 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitration if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

ISSUE

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The stipulated issue in this grievance: Was the Grievant, Stephen Jones, disciplined by termination for just cause? if not, what should the remedy be?

(Joint Exhibit 2)

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PERTINENT CONTRACT PROVISIONS

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ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."

(Joint Exhibit 1, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

"Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse."

Section 24.02 - Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand;
- C. Suspension;
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

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

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Section 24.05 - Imposition of Discipline

"The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than

forty-five (45) days after the conclusion of the predisciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment."

Joint Exhibit 1, Pgs. 34-36)

## ARTICLE 43 - DURATION

### Section 43.01 - First Agreement

"The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws."

(Joint Exhibit.1, Pg. 62)

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### Section 43.03 - Work Rules

After the effective date this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents arising under this Agreement.

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(Joint Exhibit 1, Pg. 62)

## JOINT STIPULATIONS OF FACT

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1. Grievant Stephen Jones was hired on February 12, 1978, as a hospital aide at Portsmouth Receiving Hospital.
  2. On April 25, 1987 till July 13, 1987 Mr. Jones was on extended disability leave.
  3. On or about May 29, 1987, Mr. Jones was arrested on aggravated trafficking charges. On December 2, 1987 Mr. Jones entered a plea (sic) of guilty to the aforementioned charges.
  4. At no time did Mr. Jones miss any work due to the aggravated trafficking charge.
  5. On July 14, 1987 the grievant reported to work but was placed on administrative leave with pay.
  6. On July 16, 1987 the grievant returned to work.
  7. On December 2, 1987 the grievant plead guilty to aggravated trafficking (sic). A third degree felony.
  8. On December 6, 1987 the grievant was again placed on administrative leave.
  9. On December 14, 1987 a pre-disciplinary hearing was held to consider the circumstances.
  10. On December 21, 1987 the grievant was removed from service by the director.
  11. On December 28, 1987 the grievant was taken off of administrative leave and officially removed by the Supt. Mr. Frank Puntteney.
  12. The grievant has had only one prior disciplinary of record. (verbal)
  13. The grievant was not reassigned while an investigation into his criminal conduct was being conducted. The grievant continued to do his regular job assignment.
  14. This grievance is properly before the arbitrator.

Management Tim Wagner

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Union Don Sargent

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(Joint Exhibit 3)

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#### SEQUENCE OF EVENTS:

1. GRIEVANT WAS ARRESTED ON MAY 29, 1987
2. GRIEVANT WAS ON DISABILITY FROM 5/9/87 TO 7/13/87
3. HE CAME BACK TO WORK ON 7/14/87
4. HE WAS PUT ON PAID ADMINISTRATIVE LEAVE FOR 7/14/87 AND 7/15/87
5. HE WAS RETURNED TO WORK PENDING THE OUTCOME OF HIS TRIAL ON 7/16/87 TO 12/7/87
6. ON 12/2/87 THE GRIEVANT PLEAD GUILTY TO A FELONY OF AGGRAVATED TRAFFICKING OF COCAINE
7. ON 12/7/87 HE WAS PUT ON PAID ADMINISTRATIVE LEAVE PENDING THE PRE-DISCIPLINARY MEETING
8. ON 12/14/87 A PRE-DISCIPLINARY WAS HELD
9. ON 12/28/87 GRIEVANT WAS REMOVED

FOR O.C.S.E.A. Don Sargent

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FOR O.C.B. Tim Wagner

(Joint Exhibit 4)

JOINT STIPULATIONS CONCERNING ED MONTGOMERY

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1. Ed Montgomery was hired at Portsmouth Receiving Hospital in 1969 the position of hospital aide.
  2. Ed Montgomery resigned on 1976.
  3. Ed Montgomery was convicted of a 2nd degree felony charge of murder.
  4. Ed Montgomery's application indicated he was convicted of a felony.

Management Tim Wagner

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Union Don Sargent

(Joint Exhibit 5)

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CASE HISTORY

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Portsmouth Receiving Hospital, the Employer, is located in Portsmouth, Ohio. The Employer's mission consists of providing psychiatric care for adult patients with the hope of their eventual return to the community. Although patients must have a primary psychiatric related diagnosis prior to admission, approximately fifty percent (50%) of all admitted patients have

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secondary substance abuse problems. Approximately eighty-four (84) patients are cared for by the Facility, and it employs one-hundred-and-thirty-five (135) employees.

Stephen Jones, the Grievant, was hired on February 12, 1978 as a Hospital Aide. The most important job duties performed by Hospital Aides fall within the domain of direct patient care. Some of these duties include the following activities: basic nursing procedures; washing and drying of clothes or assisting patient; observe reactions and chart same; storage and accounting for articles belonging to patient, and providing role model to patients (Joint Exhibit 8).

On or about May 29, 1987 the Grievant was arrested for aggravated trafficking of cocaine, marijuana, and drug abuse. These activities were allegedly engaged in by the Grievant while he was on extended disability leave. Upon his return to work on July 14, 1987, Frank Punttenney, the Superintendent, placed him on administrative lave while he received advice concerning the Grievant's appropriate job status. The Superintendent was advised that the Grievant should be returned to normal job status pending the outcome of his trial for the above mentioned charges. As a consequence, the Grievant enjoyed his normal job status from July 16, 1987 to December 7, 1987.



On December 2, 1987 the Grievant plead guilty to the charge of aggravated trafficking of cocaine which is a third degree felony (Employer Exhibit 1). As a consequence, the Grievant was

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placed on probation for a five (5) year period. This guilty plea also engendered an additional administrative leave action by the Employer pending the outcome of a pre-disciplinary hearing.

On December 14, 1987 a pre-disciplinary conference was held. The Grievant was charged with failure of good behavior, an alleged violation of Section 124.34 of the Ohio Revised code. This charge was based upon the Grievant's guilty plea to a felony charge of drug trafficking. The Superintendent recommended removal based upon the plea, and an assertion that continued employment would be a violation of the public trust and a detriment to the patients housed in the Facility (Joint Exhibit 7).

On December 21, 1987, the Director of the Ohio Department of Mental Health, Pamela S. Hyde, issued the following Removal Order:

“ . . .

This will notify you that you are hereby removed from the position of Hospital Aide at the Portsmouth Receiving Hospital.

The reason for this action is that you have been guilty of a failure of good behavior as outlined in Section 124.34 of the Ohio Revised Code in the following particulars, to wit:

On December 2, 1987 you entered a plea of guilty to a felony charge of Aggravated Trafficking in Drugs in the Scioto County Court of Common Pleas. A criminal offense such as Aggravated Trafficking in Drugs is an offense to which this facility will not tolerate. Your decision to behave in such a manner as described above is in violation of Section 124.34 of the Ohio Revised Code concerning failure of good behavior while under the employ of the State of Ohio. The Portsmouth Receiving Hospital would be negligent in its duty to both patients and the public in allowing you to continue your employment.

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The Superintendent of Portsmouth Receiving Hospital will notify you of the effective date of your removal.

. . .”

(Joint Exhibit 7)

On December 28, 1987, the Superintendent notified the Grievant that he was officially removed from his position as a Hospital Aide.

On January 4, 1988 the Grievant filed the following grievance contesting the Order of Removal:

“ . . .

OCSEA and the grievant is (sic) appealing the removal of Steve Jones from his Hosp. Aide position at Portsmouth Receiving Hospital. The grievant was removed 12/28/87 for failure of good behavior Sect. 124-34 of O.R.C. The Union is appealing this removal under Art. 25, Section 25.07 of the Contract.

. . .”

(Joint Exhibit 6)

On January 8, 1988 the Grievant was notified of a Third Step Hearing to be held in response to his grievance. A meeting was subsequently held on January 19, 1988. The Employer denied the grievance in a letter dated February 4, 1988 contending that it did not violate the various contract provisions asserted by the Union. Similar attempts to resolve the grievance at the Fourth Step proved uneventful and the Union requested arbitration in a letter dated April 4, 1988 (Joint Exhibit 6).

The grievance is properly before this Arbitrator..

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### THE MERITS OF THE CASE

#### - The Position of the Employer

- It is the position of the Employer that it had just cause to terminate the Grievant for off-duty misconduct. The conduct in dispute dealt with a third degree felony conviction of aggravated trafficking in drugs.

The Employer argued that it gave the Grievant forewarning or foreknowledge of the possible or probable consequences of the Grievant's disciplinary conduct. Notice was allegedly provided via a number of related, but distinct, sources. First, the Superintendent testified that the Union's Central Office received a copy of the Employer's Guidelines For Disciplinary Action and Standard Guide For Disciplinary Action (Employer Exhibit 2). These documents contained offense categories dealing with criminal conduct and O.R.C. Section 124.34 which deals with removals for failure of good behavior and malfeasance. Thus, the Employer maintained that receipt of these documents provided the Union with constructive notice that employees could be removed if they engaged in activities for which the Grievant was charged. In a like fashion, the Superintendent testified that the probable consequences associated with these activities were also contained in the above mentioned documents. He noted that they indicate that the disciplinary action imposed for criminal conduct, patient abuse or neglect, acts of discrimination or violation of a statute would be commensurate with the offense. That is, the

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Penalties would be imposed based upon the circumstances surrounding the incident.

Second, notice was provided to all employees, including the Grievant, in a staff meeting held on or about September, 1986. The Superintendent testified that the disciplinary policy and grid (Employer Exhibit 2) were discussed, and that all employees were provided with access to these documents and copies of same if they initiated a request.

Third, the Grievant had specific knowledge concerning the disciplinary policy and grid (Employer Exhibit 2) because he was a party to a grievance which was filed contesting the propriety of these policies (Employer Exhibit 3). Rick Harlow, a Labor Relations officer, maintained that the Grievant was involved in the resolution of this grievance, and thus, he was aware of the offenses and consequences contained in the policies (Employer Exhibits 2 and 3); and that the policy was in effect at the time of the grievance.

The Employer also argued in the alternative that traditional notice requirements were not necessarily applicable in this particular instance. Activities such as drug trafficking, more specifically, are so serious that the possible consequences associated with this type of off-duty misconduct do not have to be communicated but should be anticipated by the Union and the Grievant.

The Union's procedural arguments dealing with the applicability of O.R.C. Section 124.34 were also contested by the

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Employer. For a number of reasons, the Employer maintained that the Removal Order was not procedurally defective. First, the Union failed to offer any evidence or testimony dealing with the intent or applicability of O.R.C. Section 124.34 in disciplinary matters. Second, since the application of O.R.C. Section 124.34 is not expressly excluded by other terms and conditions contained in the Agreement, its application is deemed enforceable. Last, a recent arbitration award (Dennis Key, G86-585) suggests that the commission of a felony has been considered by the Employer, to be encompassed by this provision.

The Employer argued that it obtained substantial evidence or proof that the Grievant was guilty as charged. In the opinion of the Employer, the circumstances surrounding the conviction were not viewed as relevant because the Employer was not attempting to retry the case heard by the Court of Common Pleas. The Grievant's guilty plea was the principle outcome scrutinized by the Employer in justifying the Grievant's removal.

The Employer maintained that the Grievant's removal for off duty misconduct was proper because it effects his ability to perform his duties, and adversely impacts the facility's mission. A number of arguments were offered in support of this premise.

First, the Employer distinguished between the use and trafficking of illegal substances. A higher standard for the later activity was proposed even though the Employer underscored its limited right to intrude on any employee's off-duty misconduct. Such an intrusion, however, was deemed as warranted

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in this particular instance because of the Grievant's direct care responsibilities.

Second, the Position Description (Joint Exhibit 8) specifies certain job duties dealing with a Hospital Aide's role model requirements. Puntenney stated that these responsibilities are crucial to the mission of the facility and that the BFOQ male designation in the Description (Joint Exhibit 8) underscores its importance. He maintained that the facility employed a certain percentage of male Hospital Aides to ensure that male patients had appropriate male models to meet their personal and developmental needs. Patient specific developmental goals would be hampered if a known drug trafficker was re-employed by the facility.

Third, although patients confined to the Hospital are only admitted with primary psychiatric maladies, many of them have secondary problems dealing with alcohol and drug dependencies. Again, the habilitation of patients with these secondary disorders could be jeopardized if the Grievant was involved in various treatment team activities.

Fourth, many of the patients are very high functioning and have access to money as well as liberal visitation privileges. Both of these conditions exposed patients to potential drug trafficking overtures if Hospital Aides or other staff members were engaged in these illegal activities. Puntenney explained that the facility had an elaborate procedure for tracking deposits and expenditures from individual cash accounts. These

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procedures, however, cannot account for other possible cash sources, at the disposal of patients, that are not brought to the facility's attention. Visitation privileges, and partial and full walking about privileges increase the probability of potential exposure when a known drug trafficker is providing direct care services.

Fifth, the facility's mission would be detrimentally impacted if a convicted drug trafficker was allowed gainful employment. A number of citizen groups closely scrutinize the services rendered on the patient's behalf; their major function involves the monitoring and protection of patient rights. If the Employer continued the employment of an admitted drug trafficker, their confidence in terms of the level of care provided would be adversely impacted.

Sixth, the publicity associated with the incident involving the Grievant could detrimentally effect the facility's ability to perform its mission and objectives. Several witnesses testified that the incident was reported in the local newspaper. Although the facility was not named in the article, the Grievant's name and the circumstances surrounding the incident were well documented. Puntenney alleged that the size of the community heightened the potential negative impact engendered by the article; which would reduce the trust and confidence in the care provided by the facility.

Seventh, Puntenney stated that the retention of a known drug trafficker would exacerbate an existing drug problem at the

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facility. He maintained that some patients have been found to be under the influence of unauthorized

drugs. Charges were not pressed in these instances because of inconclusive evidence. On several other occasions, the Sheriff Is Department has informed the facility that possible drug trafficking was being conducted at the Hospital. Surveillance measures were initiated by the Sheriff without positive results. The facility, because of the above mentioned incidents, initiated a procedure to abate the possibility of illegal drug trafficking. Puntenney testified that he directed all afternoon and evening staff to park their vehicles in the front of the building.

Last, legislation precludes the Ohio Department of Mental Health from employing convicted felons via the enactment of O.R.C. Section 5119.072. The Employer, therefore, maintained that it would be unreasonable to assume that the Employer would be required to continue the employment of an employee convicted of drug trafficking felony. Such a requirement would undermine the public trust and, as a consequence, the mission of the facility.

The Employer argued that it has applied its rules and penalties evenhandedly and without discrimination to all employees. The Employer maintained that little discipline is meted out at this facility and that this was the first case involving off-duty misconduct. Ed Montgomery's case was distinguished from the present grievance. Puntenney stated that the policies dealing with the employment of convicted felons had

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changed since 1969, and that Montgomery retired in 1976. He noted that he has never hired a known convicted felon since he became Superintendent at the facility. The Employer also argued that one could not equate off-duty misconduct such as misdemeanors with felony convictions dealing with drug trafficking.

### The Position of the Union

It is the position of the Union that the Employer did not have just cause to terminate the Grievant for off-duty misconduct.

The Union argued that the Employer failed to give the Grievant forewarning of the probable consequences associated with his off-duty misconduct. Several Union witnesses testified that they never received the Guidelines For Disciplinary Action and Standard Guide For Disciplinary Action (Employer Exhibit 2). They also noted that they did not attend the inservice dealing with those documents. The Union, moreover, alleged that it requested a copy of the Standard Guide For Disciplinary Action (Employer Exhibit 2) at the Third Step of the Grievance Procedure and that the Employer refused to provide this document.

The reasonableness of the rule used as justification to remove the Grievant was also contested by the Union. The Union alleged that the Employer wrongfully applied O.R.C. Section 124.34 because the Collective Bargaining Agreement (Joint Exhibit 1) takes precedence over civil service violations. By employing O.R.C. Section 124.34 rather than other provisions in the

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Agreement dealing with the just cause standard (See Pgs- 3-4 of bthis Award for Article 24-Discipline,

Section 24.01-Standard, Section 24.02-Progressive Discipline, Section 24.05-Imposition of Discipline), the Employer violated the provision dealing with the Agreement's precedential characteristics (See Pg. 4 of this Award for Article 43-Duration, Section 43.01-First Agreement).

For a number of reasons, the Union contended that there was no nexus between the Grievant's off-duty misconduct, his ability to perform his Hospital Aide assignments, and the Employer's ability to achieve its mission. First, the publicity surrounding the incident never tarnished the Employer's image because it was never identified in any of the newspaper articles. Three (3) witnesses corroborated this assertion by testifying that these articles did identify the Grievant and the circumstances surrounding the arrest, yet they failed to mention the facility. Second, Beulah Davis, the Grievant's supervisor maintained that none of the Grievant's co-workers refused to work with the Grievant after the altercation. Third, the Grievant worked at the facility for approximately six (6) months after the altercation which greatly minimized the Employer's nexus hypothesis. Fourth, the Grievant had no access to Hospital medication which reduced the probability of potential trafficking of drugs at the facility. Davis testified that medication on the ward was distributed under a highly controlled procedure and that the medication was inventoried in a secure location. She, moreover, stated that regulations contained in a Procedures

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Manual (Joint Exhibit 10) limited the dispensing and administration of drugs to authorized personnel. Fifth, the Union contended that the testimony dealing with drug use at the facility, potential problems dealing with visitation rights, and availability of monies for drug purchases by the patients, were not fully substantiated. Thus, the relationship between these hypothetical maladies and the Grievant's off-duty misconduct was viewed as farfetched. Sixth, the Grievant never sold drugs at the facility and therefore he will not do so in the future. Seventh, the Grievant's epileptic condition precludes his personal use of controlled substances. As a consequence, this condition minimizes the probability of future use and trafficking of controlled substances. Last, the Grievant's performance evaluations (Joint Exhibit 9), and testimony provided by Davis, indicate that the Grievant was an above average performer. The record did not indicate that this level of performance would not continue in the future which would enhance rather than detract from the Employer's image.

The Union alleged that the Employer did not apply its rules even-handedly and without discrimination. By failing to discipline other types of misdemeanors, influence of alcohol, such as driving under the influence of alcohol, the Grievant was not adequately forewarned of the possible consequences dealing with off-duty misconduct. Driving under the influence, moreover, was viewed by the Union as equally egregious when compared to the Grievant's offense. Patients diagnosed as alcoholics could have their self-esteem and

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skill development hampered if Hospital Aides convicted of driving under the influence were providing direct care services. In addition, the circumstances surrounding the hiring and retention of Montgomery, a known convicted felon, implied that similarly situated felons were not treated in a like fashion.

The Union maintained that the Employer violated the Agreement because the penalty was not

reasonably related to the offense (See Pg. 4 of this Award for Article 24-Discipline, Section 24.05-Imposition of Discipline). The Union argued that the removal decision was too severe in light of the Grievant's good work record (Joint Exhibit 9) and his ten (10) years of service.

### THE ARBITRATOR'S OPINION AND AWARD

After considering the evidence and testimony presented at the hearing, this Arbitrator finds that the Grievant was properly removed for off-duty misconduct.

In the opinion of this Arbitrator, there are no notice deficiencies in this matter. Drug trafficking by a Hospital Aide, involved in the direct care of mentally ill patients, is so serious an offense that express notice need not be given that discharge can be the consequence. The nature of the offense and the job setting involved should have raised certain anticipated expectations dealing with the consequences of the Grievant's off-duty misconduct. Thus, a removal decision within this specific context should have been anticipated without prior notice.

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The above notice ruling minimizes the Union's reasonableness arguments. Clearly, the commission of a felony could be encompassed by the work rule dealing with O.R.C. Section 124.34, which concerns failure of good behavior and malfeasance. The Union failed to provide any rationale for the exclusion of a felony conviction from this offense category. Also, this work rule does not necessarily conflict with other terms and conditions contained in the Agreement (See Pg. 5 of this Award for Article 43-Duration, Section 43.01-First Agreement), and does not necessarily reduce the precedential qualities of the Agreement.

The evidence and testimony introduced at the hearing clearly established that the Grievant's off-duty misconduct justified removal. The following criteria have been widely accepted for determining when off-duty criminal activity justifies discharge or other form of discipline: the behavior harms the employer's reputation or product; the behavior renders the employee unable to perform the job satisfactorily; the behavior leads to the refusal, reluctance or inability of other employees to work with him (W.E. Caldwell Co., 28 LA 434, Kesselman, 1957). When an arbitrator applies these criteria, he/she must be able to reasonably discern that a connection exists between the facts which occur and the extent to which the enterprise is affected. This connection, moreover, must be of such a quality that one could logically expect it to engender some consequence in the

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enterprise's affairs (Allied Supermarkets, Inc., 41 LA 713, Mittenthal, 1963).

The "product" of every mental health facility is the service rendered by the staff to the patients, which impacts the mission of the facility. The duties and responsibilities of a Hospital Aide are pivotal to the mission of the facility; these activities cannot be adequately conducted by a convicted drug trafficker. Hospital Aides' responsibilities in the role modeling area are an integral component of their job description. This condition was credibly documented by the Superintendent, the Position Description specifications, and the BFOQ requirement contained in this document (Joint Exhibit 8). Patients housed

in this facility are high functioning and impressionable; a high percentage of patients are plagued with secondary substance abuse disorders. One could logically expect that the habilitation of these patients could be thwarted or misdirected if a convicted drug felon served as their role model.

Testimony provided at the hearing clearly established the potential seriousness of the drug problems at the facility. The following contingencies were weighted quite heavily by this Arbitrator: The availability of unaccounted for cash; the liberal visitation privileges; the use of unprescribed drugs by patients, and warnings provided by law enforcement agencies concerning suspected drug trafficking at the facility. The Employer has an inherent responsibility to prevent drug abuse amongst its patients and staff members. This condition, \*\*21\*\*

therefore, warrants a finding that the Employer has the right to protect its mission, and the interests of its patients and employees from the possibility that an individual charged with drug trafficking will engage in such activity on the facility's property.

It is the position of the Arbitrator that the Employer did apply its rules and penalties even-handedly and without discrimination. Equating a felony for drug trafficking with misdemeanors is viewed by this Arbitrator as farfetched. The Union also failed to support its unequal treatment hypothesis by comparing the present grievance with the Montgomery incident. The Grievant and Montgomery, more specifically, were not similarly situated. Montgomery allegedly engaged in a felony related matter prior to actual employment while the Grievant was employed by the facility at the time of his arrest. Testimony also indicates that the policies and practices employed by the facility in 1969 differed from the regulations in effect at the time of the present altercation.

#### AWARD

The grievance is hereby denied

Date: September 1, 1988

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Dr. David M. Pincus  
Arbitrator

\*\*22\*\*