

**ARBITRATION DECISION NO.:**

116

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Mental Retardation and Developmental Disabilities  
Apple Creek Developmental Center

**DATE OF ARBITRATION:**

January 13 and 14, 1988

**DATE OF DECISION:**

March 30, 1988

**GRIEVANT:**

Kassandra Jefferson

**OCB GRIEVANCE NO.:**

G-87-0366

**ARBITRATOR:**

Thomas P. Michael

**FOR THE UNION:**

Dennis A. Falcione, Staff Representative  
Daniel Smith, General Counsel

**FOR THE EMPLOYER:**

Edward L. Ostrowski, Labor Relations Administrator DMRDD  
David Norris, OCB

**KEY WORDS:**

Just Cause  
Client Abuse  
Authority to Modify Discipline  
Insubordination  
Discovery  
Failure to Provide Transcripts

**ARTICLES:**

Article 5 - Management Rights  
Article 24 - Discipline  
    § 24.01 - Standard  
    § 24.02 - Progressive Discipline

§ 24.04 - Pre-Discipline

§ 24.05 - Imposition of Discipline

§ 24.06 - Prior Disciplinary Actions

Article 25 - Grievance Procedure

§ 25.01 - Process

§ 25.08 - Relevant Witnesses and Information

Article 43 - Duration

§ 43.01 - First Agreement

## **FACTS:**

The Grievant was employed as a Hospital Aide at Apple Creek Developmental Center for approximately six years until her removal effective January 6, 1987, for failure of good behavior, resident abuse, insubordination, and neglect of duty. The incident giving rise to this grievance occurred on November 17, 1986, when the Grievant was involved in an altercation with a resident who resisted an order to remove his tape recorder from the shower room. The evidence presented established that the resident involved was potentially dangerous. He had previously attacked and injured the house manager at a group home and had attacked three males on subsequent occasions. In addition, evidence showed that the resident was very manipulative and would lie to get retribution against a staff member.

## **EMPLOYER'S POSITION:**

The Grievant participated in several loud and abusive exchanges with the resident over approximately a two and one-half hour period. During the course of these exchanges, the Grievant profaned and made repeated derogatory comments about the resident to the resident and others while in the presence of the resident. She threatened the resident with a knife and also threatened to shoot him. In addition, when ordered by her supervisor to a new work assignment, she refused to leave her module. The Grievant also refused to turn in her institution keys, identification and time card as ordered.

The Employer argued that the grievant's actions directed toward the resident constitute "abuse" as defined by Section 5123-3-14(c), Ohio Administrative Code. Therefore, the contract strips the Arbitrator of authority to modify the removal order to a lesser discipline. The Employer further argued that the offenses committed by the Grievant are of such a serious nature that they are sufficient in themselves to constitute just cause for her discharge.

## **UNION'S POSITION:**

The Employer did not have just cause to terminate the Grievant. The evidence established that she did not have a knife in her possession and, therefore, she could not have threatened a resident with a knife. Although the Grievant did argue and use profanity in conversations with her superiors, she did so because she was rightfully upset, confused, and fearful for her personal safety.

The Union argued that the Grievant is not guilty of insubordination. She returned her keys, identification, and time card as ordered. The delay in their return was caused by the Employer's order that Grievant not enter the grounds of Apple Creek Developmental Center. Further, the Grievant did accept and undertake the work assignment transfer ordered by her supervisor.

The Union argued that the Grievant's removal was without just cause and, therefore, she must be reinstated with full back pay and restoration of seniority and all other benefits.

## **PROCEDURAL ISSUES:**

The Arbitrator held that the Employer did not violate Section 25.08 of the Contract by failing to provide the individual habilitation program of a resident. On November 17, 1986, no current I.H.P. existed for the resident; therefore, the Employer could not violate the Contract by failing to produce a nonexistent document. However, to the extent the request extends to the resident's baseline behavioral program or his prior I.H.P., the Arbitrator concluded that Section 43.01 of the Contract implicitly recognizes that the parties did not intend to contractually supersede applicable federal laws and regulations. Therefore, Section 442.502 of the Code of Federal Regulations, requiring the Department of Mental Retardation and Developmental Disabilities to preserve the confidentiality of a resident's I.H.P., supersedes Section 25.08 of the Contract under the specific circumstances of this case.

However, the Arbitrator concluded that the Employer's refusal to provide a transcript of the resident's interview and witness statements did constitute a violation of Sections 25.08 and 24.01 of the Contract. The Union was entitled to those statements and the Employer can not unilaterally determine that statements of eyewitnesses are not relevant and refuse to produce them. The Union would have no opportunity to determine whether those statements were inconsistent with the oral testimony of the witnesses and would be forced to guess at a witness' testimony when it had previously been reduced to writing. Withholding the statement of the victim of an alleged abuse is particularly prejudicial. Had a witness been unavailable to testify, the Union and the Arbitrator would have been deprived of the key information that the resident had admitted falsely accusing the Grievant of threatening him with a knife. The Arbitrator concluded that the Employer's violations of Section 25.08 also constitute a failure to establish just cause for Grievant's removal as required by Section 24.01 of the Contract.

#### **AWARD:**

The Arbitrator sustained the grievance in part and ordered the Grievant to be fully reinstated with her removal modified to a suspension of one hundred twenty (120) days without pay. The Arbitrator awarded back pay from October 1, 1987, and ordered that the remainder of Grievant's time off between the suspension period and October 1, 1987, be shown in her personnel records as approved leave without pay status. The Arbitrator further recommended that the Grievant not be reassigned to Module 18.

#### **COMMENTS:**

The Arbitrator, relying on the standard set forth by Arbitrator Pincus in case number G-87-0001(A), concluded that the Employer had not met its burden of proof that the Grievant had committed abuse sufficient to establish just cause for termination. The Arbitrator stated that the Grievant's threats to the resident only occurred after the resident's initial outburst which justifiably may have placed the Grievant in fear for her physical well-being. Although the Arbitrator was convinced that the totality of Grievant's actions requires severe disciplinary action, the Employer did not demonstrate that the Grievant's misconduct resulted in "humiliation or degradation" to the resident beyond that attendant to his own loss of self control. The Arbitrator concluded that while the Grievant demonstrated very poor judgment which may arguably constitute "abuse", her relatively unblemished disciplinary record and her state of health constitute more than adequate mitigation against the Grievant's removal. In addition, the Grievant was aware of the resident's history of attacking staff due to his lack of impulse control which renders him dangerous.

The Arbitrator further concluded that the Employer failed to establish the Grievant's insubordination for refusal to accept a direct order or neglect of duty. However, the Arbitrator held that the Grievant's disrespect toward her supervisor is not tolerable and considered this in fashioning his remedy.

The Arbitrator stated that, considering only the substantive aspects of the grievance, he would be inclined merely to reinstate the Grievant but award no back pay to reflect the seriousness of her loss of control toward a resident and disrespect to her supervisor. However, the Arbitrator concluded that an adjustment to the award was necessitated by the Employer's failure to observe the letter as well as the spirit of the parties' agreement on discoverable matters.

**TEXT OF THE OPINION:**

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF MENTAL RETARDATION  
AND DEVELOPMENTAL DISABILITIES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION  
LOCAL NO. 11, AFSCME AFL-CIO

KASSANDRA JEFFERSON, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR  
COLUMBUS, OHIO

Grievance No. G-87-0366, Kassandra Jefferson

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Department of Mental Retardation and Developmental Disabilities, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter "Union").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was commenced at the Office of Collective Bargaining, on January 13, 1988 and concluded at the offices of the Union in Columbus, Ohio, on January 14, 1988. The record was closed on January 22, 1988, upon receipt of materials post-filed by both parties by permission of the Arbitrator. The parties have waived the thirty (30) day time period for issuance of this Opinion and Award. They further agreed to allow the Arbitrator to tape record the proceedings and granted permission for publication of this Opinion and Award. This matter has been submitted to the Arbitrator on the testimony and exhibits and authorities offered at the hearing of this matter as well as post hearing exhibits. The parties stipulated that the grievance is properly before the Arbitrator for decision.

## APPEARANCES:

### For the Employer:

Edward L. Ostrowski  
Labor Relations Administrator  
Department of Mental Retardation  
and Developmental Disabilities

David Norris  
Office of Collective Bargaining

### For the Union:

Dennis A. Falcione, Staff Representative

Daniel Smith  
General Counsel  
OCSEA/AFSCME Local 11

### ISSUE

The parties stipulated that the issue before the Arbitrator is:

Did the Department of Mental Retardation and Developmental Disabilities terminate Ms. Cassandra Jefferson for just cause?

If not, what shall the remedy be?

### PERTINENT AUTHORITIES AND CONTRACTUAL PROVISIONS.

Section 2901.22(C), Ohio Revised Code.

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

Section 2903.33(B)(2), Ohio Revised Code.

"Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the person.

Section 4117.08(C), Ohio Revised Code.

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

\* \* \*

(2) Direct, supervise evaluate, or hire employees:

\* \* \*

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:

\* \* \*

(8) Effectively manage the work force . . .

Section 5123-3-14(C)(1), Ohio Administrative Code

“Abuse” means any act or absence of action inconsistent with Human Rights which results or could result in physical injury to a client, except if the act is done in self-defense or occurs by accident; Any act which constitutes sexual activity, as defined under Chapter 1907. of the Revised Code, where such activity would constitute an offense against a client under that Chapter; Insulting or coarse language or gestures directed toward a client which subjects the client to humiliation or degradation; or depriving a client of real or personal property by fraudulent or illegal means.

Section 442.502 Code of Federal Regulations

(a) The ICF/MR must keep confidential all information contained in a resident's records, including information contained in an automated data bank.

(b) The record is the property of the ICF/MR which must protect it from loss, damage, tampering, or use by unauthorized individuals.

(c) The ICF/MR must have written policies governing access to, duplication of, and release of information from the record.

(d) The ICF/MR must obtain written consent of the resident, if competent, or his guardian before it releases information to individuals not otherwise authorized to receive it.

## CONTRACT PROVISIONS

### ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement the Employee 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(C) numbers 1-9.

\* \* \*

### ARTICLE 24 - DISCIPLINE

#### § 24.01 - Standard

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

#### § 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.

#### § 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

#### § 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 pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day 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 situation 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.

#### § 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

### ARTICLE 25 - GRIEVANCE PROCEDURE

#### § 25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievants). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

Those employees in their initial probationary period as of the effective date of this Agreement shall retain their current rights of review by the State Personnel Board of Review for the duration of their initial probationary period.

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it



is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. If a verbal reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal reprimand.

#### § 25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

### ARTICLE 43 DURATION

#### 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.

### POSITION OF THE EMPLOYER

Kassandra Jefferson was terminated effective January 6, 1987, for resident abuse, insubordination and neglect of duty as a result of an incident which occurred in the workplace on November 17, 1986. Over approximately a two and one-half hour period Ms. Jefferson participated in several loud and abusive exchanges with resident "Joe C.". She profaned and made repeated derogatory comments about Joe C. to the resident and others while in the presence of the resident. The Grievant threatened Joe C. with a knife and also threatened to shoot him. When ordered by her supervisor to a new work assignment she refused to leave her module; she also refused to turn in her institution keys, identification and time card as ordered.

Grievant's actions directed toward "Joe C." constitute "abuse" as defined by Section 5123-3-14(C), Ohio Administrative Code. Therefore the Contract strips the Arbitrator of authority to modify the removal order of Ms. Jefferson to a lesser discipline. The offenses committed by Ms. Jefferson are of such a serious nature that they are sufficient in themselves to constitute just cause for her discharge.

### POSITION OF THE UNION

The Employer did not have just cause to terminate the Grievant. The evidence establishes that she did not have a knife in her possession as alleged by the Employer and, therefore, could not have threatened a resident with a knife. Although Ms. Jefferson did argue and use profanity in conversations with her superiors she did so because she was rightfully upset, confused and fearful for her personal safety.

The Grievant is not guilty of insubordination. She returned her keys, identification and time card as ordered. The delay in their return was caused by the Employer's order that Grievant not enter the grounds of Apple Creek Developmental Center; she instead returned those materials through her sister, also employed at Apple Creek. Further, Grievant did in fact accept and undertake the work assignment transfer ordered by her supervisor.

Grievant's removal was without just cause. She must be reinstated with full back pay and restoration of seniority and all other benefits.

## FACTUAL BACKGROUND

Grievant, Cassandra Jefferson, was employed as a Hospital Aide at Apple Creek Developmental Center for approximately six years until her removal effective January 6, 1987. The Removal Order (Joint Exhibit 3) charges her with failure of good behavior, resident abuse, insubordination and neglect of duty.

On November 17, 1986, Grievant was assigned to the secondshift on the men's side of Module 18, which was occupied by sixteen residents. While these residents constitute the highest functioning clients in that building they concomitantly present more severe behavioral problems as a group than other clients in the building.

The Grievant reported late for work at approximately 6:35 p.m. due to an excused visit with her doctor, who was treating her for an ulcer. At approximately 8:00 p.m., Grievant took all the residents to the clinic for their medication. She then took five of the residents including "Joe C." to Module 18 to the shower room. Shortly thereafter the Grievant told "Joe C." that he would have to remove his tape recorder from the shower room. (The evidence is conflicting as to whether the tape recorder was battery-operated or required the use of an electrical outlet. For purposes of this grievance it is not necessary to make that factual determination.) The evidence clearly establishes that "Joe C." resisted the order to remove his tape recorder from the shower room and that an altercation ensued between that resident and the Grievant. All eye witnesses confirm that at one point "Joe C." threw a chair at Grievant; he may also have thrown other objects at Ms. Jefferson.

Prior to the chair-throwing incident Grievant had left the shower room briefly in order to telephone her supervisor, Zella Vanderlin, to report that she was experiencing some problems with "Joe C.". Ms. Vanderlin witnessed the chair-throwing as well as "Joe C." threatening to strike the Grievant with his fist. Ms. Vanderlin separated the adversaries by taking "Joe C." to his bedroom.

Subsequent efforts to pacify "Joe C." and the Grievant failed. The testimony is in sharp conflict as to the details of what transpired for approximately two hours. However there is no dispute that "Joe C." charged into the female side of Module 18 and threatened to enter the module office in order to get to Ms. Jefferson. The resident also made several attempts to break down the metal and glass door to the module office.

The Employer claims that the Grievant used profanity toward the Grievant on numerous occasions. Several witnesses, including Superintendent Jeffrey Speiss, also claim that she made threatening references to "Joe C." being carried out of the building in a body bag. As reflected in the removal order, the Employer claims that Grievant threatened "Joe C." with a knife and also threatened to bring in a gun to shoot that resident.

Grievant admits that she hung up the telephone on Superintendent Speiss. She denies using profanity toward the Superintendent or "Joe C.". She adamantly denies threatening to stab or shoot "Joe C.", possession of a knife in the workplace or ownership of a gun. She admits leaving the workplace to go to her car but alleges that she went there to retrieve her ulcer medication. She admits that she did not return her keys, photo identification and time card for several weeks; however, she states this failure was due to orders that she not enter the institution grounds as well

as by advice of the Union that she not comply with that order. Grievant alleges that she in fact complied with Ms. Vanderlin's order to switch her work assignment to the female side of Module 18. She alleges that she was in great fear for her safety from "Joe C.", who is approximately six feet, two inches in height and weighs at least 200 pounds.

Significantly, Ms. Vanderlin testified that she had encountered no prior disciplinary problems with the Grievant. She further admitted that "Joe C." attacked three males on subsequent occasions. The evidence also establishes that "Joe C." had previously attacked and seriously injured Cheryl Cook, who was then house manager at a group home in Canton, Ohio, where "Joe C." was residing. Ms. Cook testified that several outbursts by "Joe C." while in that setting resulting in his being confined to a hospital psychiatric unit pending his return to Apple Creek.

The evidence establishes that "Joe C." is not only potentially dangerous but manipulative as well. The most insightful testimony into that resident's behavioral patterns was furnished by James W. Hellman, who has acted as "Joe C.'s" Psychiatric Assistant for the last two years. Mr. Hellman testified that "Joe C." was very manipulative. He stated that he was commissioned by the Employer to interview "Joe C." several days after the incident as part of the investigatory process and that his notes of that interview were furnished to the security unit of Apple Creek. During that interview "Joe C." admitted that he had falsely accused the Grievant of having a knife during the November 17, 1986, incident. Hellman further stated his opinion that "Joe C." would lie to get retribution against a staff member. The uncontradicted evidence establishes that the Employer refused to provide the Union with a transcript of the aforesaid interview until the second day of the arbitration hearing when this Arbitrator held that the document was discoverable under § 25.08 of the Contract.

## PROCEDURAL ISSUES

- I. Did the Employer violate § 25.08 of the Contract by failing to provide to the Union the individual habilitation program of a resident whom the Grievant is accused of abusing?
- II. Did the Employer violate § 25.08 of the Contract by refusing the Union access to witness statements or other documents reasonably available from the Employer and relevant to the grievance under consideration?

## PROCEDURAL DECISIONS

- I. The Arbitrator finds that the Employer did not violate § 25.08 of the Contract by failing to provide the individual habilitation program of a resident.

This issue was brought to the Arbitrator's attention by means of a pre-hearing written motion to provide documents filed by the Union. Arguments were heard by the Arbitrator on January 13, 1988, immediately preceding the hearing on the merits. The Employer takes the position that individual habilitation plans ("I.H.P.") are confidential under state and federal law and not subject to discovery. Further, the Employer argues, § 43.01 of the Contract specifically provides that the Contract only supersedes confiding provisions of state law while conflicting federal law provisions still take precedence over the contract.

The Employer cites § 442.502 of the Code of Federal Regulations for the proposition that the Department of Mental Retardation and Developmental Disabilities is required by federal regulation to preserve the confidentiality of a resident's I.H.P..

As stated by the Employer the Union has made no attempt to obtain the consent of "Joe C.'s"

guardian to release his I.H.P.

The evidence adduced at the arbitration hearing establishes that there was not a current I.H.P. for "Joe C." in existence on November 17, 1986. Therefore, the Employer could not violate the Contract by failing to produce a non-existent document. To the extent that the Union's request could be deemed to extend to the baseline behavioral program of "Joe C." or to his I.H.P. from the Swiss Avenue House the Arbitrator finds that § 43.01 of the Contract implicitly recognizes that the parties did not intend to contractually supersede applicable federal laws and regulations. Therefore, it is found that § 442.502, C.F.R., supersedes § 25.08 of the Contract under the specific circumstances of this case.

II. The Arbitrator finds that the Employer violated § 25.08 of the Contract by refusing to provide a transcript of the investigatory interview of "Joe C." and the witness statements of Sterling Apling and Gary Weller. This violation also constitutes a violation of § 24.01 of the Contract and will be considered in fashioning a remedy in this matter.

As noted in the Factual Background section of this Opinion an investigatory interview of "Joe C." was conducted two or three days following the incident of November 17, 1986. The Employer, did not refute the testimony of Chris Young, President of the local union at Apple Creek, that he requested that a transcript as well as the statements of Messrs. Weller and Apling at Step 3 of the grievance procedure and that the Employer refused to provide them. The Union was clearly entitled to those statements and the Employer's refusal to comply with that request constitutes a serious violation of § 25.08. Needless to say, when an Employer determines unilaterally that statements of eyewitnesses are not relevant and refuses to produce them, that refusal is at its peril. The fact that Messrs. Weller and Apling testified at the Arbitration stage does not cure the violation attendant to refusal to produce their written statements which were taken more than a year prior to the hearing. The Union has had no opportunity to determine whether those statements are inconsistent with the oral testimony of those witnesses. Further, the Union should not be forced to guess at a witness' testimony when that witness' version of the events has previously been reduced to writing.

The failure to provide the transcript of the interview of "Joe C." constitutes an even more serious contractual violation. The prejudice attendant, to withholding the statement of the victim of an alleged abuse is obvious. Had James Hellman been unavailable to testify the Union and the Arbitrator would have been deprived of the key information that "Joe C." had admitted falsely accusing the Grievant of threatening him with a knife.

When taken in their entirety and in conjunction with the substantive factual findings to follow, the Employer's violations of § 25.08 also constitute a failure to establish just cause for Grievant's removal as required by § 24.01 of the Contract. That violation will be weighed as a factor in fashioning the remedy in this case.

## OPINION

By Contract (Joint Exhibit 1), the Employer has the burden of proof to establish just cause for termination of the Grievant (Section 24.01). The authorities agree that the severity of this penalty places the burden on the Employer to demonstrate by at least a preponderance of the evidence that Kassandra Jefferson was guilty of the charges against her (resident abuse, insubordination, neglect of duty).

The most serious charge leveled against the Grievant is that of abuse of a resident. The term "abuse", as applicable to the Department of Mental Retardation and Developmental Disabilities,

has been defined for purposes of this case by Arbitrator Pincus in Case Number G87-0001(A) (Juliette Dunning). Those definitions are set forth at § 2903.33(B)(2), Ohio Revised Code, and at § 5123-3-14(C)(1), Ohio Administrative Code. The Employer has neither alleged nor attempted to prove that the Grievant caused any physical harm to resident "Joe C.". Therefore, the statutory definition of abuse is not helpful in determining this matter. The above-cited administrative regulation sets forth four independent tests for determining whether abuse has occurred:

- (1) Any act or absence of action inconsistent with human rights which results or could result in physical injury to a client, unless the act is accidental or done in self-defense;
- (2) Sexual activity as defined by Chapter 1907, Ohio Revised Code;
- (3) Insulting or coarse language or gestures directed toward a client which subjects the client to humiliation or degradation; or
- (4) Depriving a client of real or personal property by fraudulent or illegal means.

Definitions (2) and (4) are not applicable to the facts of this grievance.

Further, as Arbitrator Pincus notes (Case Number G87-0001(A), p. 38):

"[A] determination that an abuse has been committed does not automatically guarantee that termination is the appropriate penalty. In other words, the Employer must establish that it had just cause to undertake the termination before it can allege that an arbitrator does not have the authority to modify a penalty."

Stated otherwise, an arbitrator must be satisfied that the abuse, if any, is of a nature serious enough to establish just cause for termination of the employee. For the reasons which follow, this Arbitrator finds that the Employer has not met its burden of proof that abuse sufficient to establish just cause for termination has been committed by the Grievant.

The most succinct summary of the allegations against Ms. Jefferson is found in the notice of the pre-disciplinary meeting served on the Grievant.(Joint Exhibit 5). The resident abuse charges includes a finding that Grievant pulled a knife on "Joe C.", and taunted him with it. The Employer has failed to prove that Grievant was in possession of a knife in the workplace on November 17, 1986. The only witness who claimed to see a knifewas Rita Musisca and this Arbitrator does not find her testimony on that issue credible in light of her earlier written statement (Union Exhibit 3) which specifically disclaims her ability to swear that Grievant had a knife. No other witness confirmed, either orally or in their written statements, that Ms. Jefferson definitely had a knife. Therefore it is found as a fact that the Grievant did not have a knife in her possession as alleged by the Employer.

On the other hand there is no doubt in this Arbitrator's mind that the Grievant used profanity in the presence of the resident and threatened to cut or stab him. However, threats only occurred after the resident's initial outburst which justifiably may have placed the Grievant in fear for her physical well-being. This Arbitrator is convinced that Grievant's actions in total require severe disciplinary action. However, the Employer has not demonstrated that Grievant's misconduct resulted in "humiliation or degradation" to the resident beyond that attendant to his own loss of self-control. While Ms. Jefferson demonstrated very poor judgment which may arguably constitute "abuse" as defined in (1) above, her relatively unblemished disciplinary record and the state of her health on the night of November 17, 1986, constitute more than adequate mitigation against her removal. This conclusion is buttressed by the evidence establishing that "Joe C." suffers from a

lack of impulse control which renders him dangerous as evidenced by his numerous attacks on his caretakers over a significant period of time. The evidence (e.g., Union Exhibit 4), also establishes that the Grievant was aware of "Joe C.'s" history of attacking staff.

The Employer has also failed to prove that Ms. Jefferson refused Supervisor Vanderlin's order to switch to the female side of Module 18. No attempt was made by the Employer to rebut Ms. Jefferson's testimony that she had in fact conducted a bedcheck in the female side after completing the paperwork attendant to the altercation with "Joe C.". Therefore the charge of insubordination for refusal to accept a direct order has not been documented.

Nor has the Employer established that the Grievant's brief trip to her automobile constituted neglect of duty. Her explanation that she went there to retrieve her ulcer medication is credible. Further, her testimony that she informed two other staff members in advance that she was going to get her medicine is unrebutted. Finally, in light of the testimony that numerous staff remained in the module during her absence, there is no evidence that any resident did not continue to receive adequate supervision.

Grievant's failure to turn in her identification and time cards and keys for several weeks is de minimus in light of her testimony that she was following the advice of the Union and the lack of evidence that she made any attempt to enter the grounds of Apple Creek in the interim.

Grievant's disrespect toward her superiors, especially Superintendent Speiss, is not tolerable. Their positions entitle them to great deference and her refusal to afford the degree of respect due her superiors will be taken into account in fashioning a remedy.

Considering only the substantive aspects of this matter, the Arbitrator would be inclined merely to reinstate the Grievant but award no back pay to reflect the seriousness of her loss of control toward a resident and disrespect to her superiors. However, an adjustment to the Award is necessitated by the failure of the Employer to observe the letter as well as the spirit of the parties' agreement on discoverable matters.

## AWARD

The Grievance is sustained in part.

Grievant is to be fully reinstated with her removal modified to a suspension of one hundred twenty days (120) days without pay. Back pay is awarded from October 1, 1987. The remainder of Grievant's time off between the suspension period and October 1, 1987 is to be shown in her personnel records as approved leave without pay status. The Arbitrator does not order but strongly recommends that the Grievant not be re-assigned to Module 18.

Thomas P. Michael, Arbitrator

Rendered this Thirtieth day  
of March, 1988, at Columbus,  
Franklin County, Ohio

## CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was hand delivered to Eugene Brundige, Deputy Director, Ohio Department of Administrative Services, 65 East State Street, Columbus, Ohio 43215; with copies of the foregoing Opinion being hand delivered this 30th day of March, 1988, upon:

Daniel Smith  
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OCSEA/AFSCME Local 11  
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Edward Ostrowski  
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Ohio Department of Mental Retardation  
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Thomas P. Michael