

ARBITRATION DECISION NO.:

132

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Millcreek Psychiatric Center

DATE OF ARBITRATION:

April 27, 1988

DATE OF DECISION:

June 20, 1988

GRIEVANT:

Roosevelt Thornton

OCB GRIEVANCE NO.:

G-87-2329

ARBITRATOR:

Calvin William Sharpe

FOR THE UNION:

Daniel S. Smith

FOR THE EMPLOYER:

John Rauch

KEYWORDS:

Just Cause
Abuse Of Patient
Termination

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.04-Pre-Discipline
Article 25 - Grievance
Procedure
 §25.08-Relevant
Witnesses And Information

FACTS:

At issue was whether Grievant's discharge was for "just cause," and if not what should the remedy be.

Grievant was employed as a TPW at a Psychiatric Center for Children. On the day leading to this grievance an eleven-year-old patient in the boy's ward had been assigned to his room for a twenty-four-hour period as punishment for misconduct with other patients. The Grievant, whose responsibility was to monitor the halls of the ward, saw the eleven-year-old patient running in the hall. The Grievant instructed the boy to return to his room. The boy, who had a history of aggressive behavior which included biting, allegedly attacked the Grievant. During the struggle that ensued, another hospital employee, close by, observed the incident. She testified that at the moment she looked, she observed the Grievant strike the boy. Another witness, however, testified that the Grievant did not strike the patient.

MANAGEMENT'S POSITION:

The employer argued that abuse of a patient is clearly set forth within the contract as basis for discharge. It argues that the evidence shows that a deliberate punch to the head of the patient constitutes "abuse of a patient" under Article 24.01 of the Contract. While the evidence on whether the Grievant actually delivered a blow to the head of the patient is conflicting, the employer urges that any resolution of the credibility should favor the employer.

UNION'S POSITION:

The Union argued that the patient abuse policy of the employer is subject to exceptions, namely physical intervention by an employee for self defense. Further, the Union contended that the weight of the evidence demonstrated that the Grievant did not deliver a blow to the patient's head, rather, he restrained the patient in a manner appropriate under the employer's policy for dealing with aggressive patients. The Union also maintained that the employer's failure to supply documents as required by Section 25.08 of the contract internally affected the Union's ability to defend the Grievant at earlier steps of the grievance procedure. It contended that Section 25.08 mitigates the language of Section 24.01 which prevents an arbitrator from modifying a discharge penalty in the case of patient abuse.

ARBITRATOR'S DECISION:

In a discharge case it is axiomatic that the employer bears the burden of persuading the Arbitrator that the Grievant committed the acts which justify discharge. The level of scrutiny to be given the employer's evidence often depends upon the consequences attached to a finding of guilt. Where an employee is charged with an assault on a mental patient, an act carrying potential criminal liability, the Employer will be required to prove the Grievant's acts by "clear and convincing evidence." In this instance the employer had failed to meet the burden of proof in light of the conflicting testimony, the patient's aggressive history and the Grievant's outstanding work record.

Accordingly the grievance was sustained. The Grievant was reinstated with full back pay. The back pay amount was reduced by interim earnings of the Grievant during this period.

AWARD:

The grievance is sustained.

TEXT OF THE OPINION:

**STATE OF OHIO
PERMANENT ARBITRATION PANEL**

In the Matter of an Arbitration

--between--

AFSCME/OCSEA

--and--

**THE OHIO DEPARTMENT
OF MENTAL HEALTH**

Case No.:
G87-2329

ARBITRATOR'S DECISION AND AWARD

**Daniel S. Smith
General Counsel
For the Union**

**John Rauch
Manager Labor Relations
For the Employer**

June 20, 1988

**Calvin William Sharpe
Arbitrator**

On October 6, 1987, a representative of the State of Ohio-OCSEA, Local 11, AFSCME AFL-CIO (Union) filed a grievance against the Millcreek Psychiatric Center of the Ohio Department of Mental Health (Employer), claiming that employee Roosevelt Thornton had been terminated in violation of the collective bargaining agreement. Being dissatisfied with the relief secured at earlier stages of the grievance procedure, the union has brought the matter to arbitration. A hearing was held on April 27, 1988, at Columbus, Ohio. Both parties appeared and had a full opportunity to present evidence at the hearing. The parties have stipulated to the arbitrability of the grievance.

I. STATEMENT OF THE CASE

A. THE ISSUE

1. Whether the discharge imposed on the Grievant was for just cause?
2. If so what is the remedy?

B. RELEVANT PROVISIONS OF THE 1986-1989 AGREEMENT

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] 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and 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 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 the 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.

[Section] 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.

C. BACKGROUND FACTS

The Millcreek Psychiatric Center for Children is a treatment center for psychological, drug related, and other emotional disorders, treating patients who are placed at the Center by the State of Ohio. The Center operates under the auspices of the Ohio Department of Mental Health. It employs a variety of mental health service workers including therapeutic program workers (TPWS), who are responsible for monitoring the behavior of patients and assisting in the care of patients.

The Grievant, Roosevelt Thornton, had been a TPW before his termination on September 8, 1987. Precipitating his discharge was an incident involving one of the patients at the Millcreek Center.

On August 25, 1987, Bruce Gillick, an eleven-year-old patient in the boys' ward (Unit 52) had been assigned to his room for a 24-hour period as punishment for misconduct with other patients. Shortly after noon on that day the Grievant, whose responsibility was to monitor the halls of the

ward unit, saw Bruce running in the hall. The Grievant instructed Bruce to return to his room, which apparently angered Bruce, the Grievant speculated, since the Grievant had been responsible for Bruce's 24-hour room restriction. According to the Grievant, the only eye witness to the incident during this phase of the confrontation, Bruce became aggressive and attacked him. During the struggle that ensued Angela Cleghorn, who was working at a nurse's station close by, looked out the door of the nurse's station toward the scuffle. She testified that at that moment she saw the Grievant strike Bruce in the head with his fist. The Grievant and another witness, Emma Johnson, testified that the Grievant did not strike the patient.

Shortly after this incident and an investigation by the employer, the Grievant was terminated for abuse of a patient. The grievance followed.

II. CONTENTIONS OF THE PARTIES

A. THE EMPLOYER'S POSITION

The employer argued that abuse of a patient is clearly set forth within the contract as basis for discharge. It argues that the evidence undisputedly shows that a deliberate punch to the head of a patient constitutes "abuse of a patient" under Article 24.01 of the contract. Admitting that the evidence on whether the Grievant actually delivered a blow to the head of the patient is conflicting, the Employer urges that any resolution of the credibility dispute should favor the employer. Accordingly, the employer concludes that the grievance should be denied.

B. THE UNION'S POSITION

The union, on the other hand, argues that the patient abuse policy of the employer is subject to exceptions, namely physical intervention by an employee for self defense. It continues that the Grievant's handling of Bruce Gillick on August 25, 1987, was in self defense. Further, the union argues that the weight of the evidence demonstrates that the Grievant did not deliver a blow to head of Bruce; rather, he restrained Bruce in a manner appropriate under the Employer's policy for dealing with aggressive patients. Thus, the union argues that any credibility resolution should favor a finding that the Grievant never hit the patient.

In addition, the union argues that the employer's failure to supply documents as required by Section 25.08 of the Agreement materially affected the union's ability to defend the Grievant at earlier steps of the grievance procedure. It contends that Section 25.08 affects the language of Section 24.01, which prevents an arbitrator from modifying a discharge penalty in the case of patient abuse.

III. DISCUSSION AND OPINION

In a discharge case it is axiomatic that the Employer bears the burden of persuading the Arbitrator that the Grievant committed the acts that justify discharge. Section 24.01 of the Agreement reaffirms this axiom. The level of scrutiny to be given the Employer's evidence often depends upon the consequences attaching to a finding of guilt. Where an employee is charged with an assault on a mental health patient, an act carrying potentially criminal liability, the Employer will be required to prove the Grievant's acts by "clear and convincing evidence". See generally, O. Fairweather, Practice and Procedure in Labor Arbitration pp. 256-263 (2d ed. 1983).

The Agreement between the parties clearly makes patient abuse a cause for discharge. It also explicitly deprives the arbitrator of the authority to modify the penalty of discharge where patient abuse is found.

In this case the Employer alleges that the Grievant abused Bruce Gillick by striking him in the head with his fist on August 25, 1987. While the Union argues that the Employer's patient abuse policy permits an exception for self-defense, the evidence overwhelmingly demonstrates that such a blow to Bruce's head would constitute patient abuse. Thus, the threshold issue in this grievance is whether the Employer has met its burden of proving that the Grievant struck Bruce in the head on August 25, 1987. This issue turns on the testimony of the Grievant, Angela Cleghorn, and Emma Johnson.

The Grievant had been employed at the Millcreek Center for three years as a TPW. He worked the morning shift (6:30 a.m. to 3:00 p.m.) and was only tardy once during his employment. The Grievant had no disciplinary record before this incident. His evaluation for the period October 3, 1984, to October 3, 1985, showed very high marks in all of the performance categories and the following reviewer's comments:

Mr. Thornton exhibits the natural ability and patience to therapeutically help and communicate with the clients and co-workers of Millcreek. Mr. Thornton is responsible to his job duties and writes good reports in clients (sic) charts. Mr. Thornton has been awarded a third shift position but has not received a starting date.

The Grievant also took nine and one-half hours of in-service training on topics that included training on the therapeutic handling of aggressive residents (THART).

The Grievant testified that between 12:30 and 1:00 p.m. on August 25, 1987, he was working in unit 52 when he heard some rowdiness in the hall near Bruce's room. Bruce was in the hall along with several other patients. The Grievant ordered the patients to clear the hall and told Bruce that he should be in his room because of his 24-hour punishment restricting him to his room. The other patients went to the dayroom, leaving the Grievant alone with Bruce in the hall just pass Bruce's room. Instead of going to his room Bruce assumed a crouched position and with his head lowered charged the Grievant. The Grievant tried to hold Bruce down with his hands. At that point, while the Grievant was trying to keep his balance, Bruce fell. Bruce then grabbed both of the Grievant's ankles and began to try to bite the Grievant. Knowing Bruce's reputation of biting and seeing his mouth open, the Grievant tried to hold Bruce's head down with his hand. At the same time Bruce repeatedly attempted to raise his head, the Grievant thought, in order to bite him. During this interchange the Grievant was trying to settle Bruce by saying "calm down Bruce". The Grievant explained that his reaction to Bruce's sudden attack was consistent with THART, since he tried to calm him while using minimal force. He also said that he was concerned for his own safety, since containing Bruce was impossible when he "went on a tear". The Grievant further testified that even after Ms. Cleghorn and Ms. Johnson approached the scene, he did not release Bruce's head because Bruce's hands were free by that time and he was hitting the Grievant. The Grievant claims that he never struck Bruce during this episode. He recalls hearing Bruce yell that the Grievant had hit him in the head. The Grievant speculated that Ms. Cleghorn accused him of striking Bruce, because she misinterpreted his attempt to hold Bruce's head down to avoid being bitten.

Ms. Cleghorn has been an activity specialist for the Employer since August 1987. She assesses all children for activity therapy, gives them activity therapy such as art expression, and documents their progress. Ms. Cleghorn had worked with Bruce, and admits that he was "mildly oppositional", had a tendency to become aggressive, was prone to biting other employees of the Center, and had injured other employees. At the time of the scuffle Ms. Cleghorn was in the nurses station, diagonally across the hall from Bruce's room, charting a patient's progress report. Emma Johnson was also in the room. Ms. Cleghorn heard yelling, scuffling, and cursing in the hallway and

thought assistance was needed. At that point, Ms. Cleghorn testified, she looked out the doorway to the nurse's station and saw the Grievant strike Bruce on the right side of his head with his right hand. After the blow, according to Ms. Cleghorn, Bruce got up and ran to his room holding his head. She testified that Bruce and the Grievant were outside Bruce's room toward the bathroom, located across the three to four feet wide hallway (on the same side as the nurse's station). Bruce was lying on his stomach with his hands around the Grievant's ankles, his head toward the bathroom and feet toward his room. She described Bruce's demeanor as active and not passive.

Though the hall was well lit and Ms. Cleghorn was only approximately thirty feet from the scuffle, her vantage point and the positioning of Bruce and the Grievant at the time created a poor angle and less than a clear view of the action. This may explain some of the discrepancies in her account of the scuffle. For example, in her statement dated August 25, 1987, she said "I believe Bruce was struck on the right side of his head" but at the hearing she described a striking motion that could only have resulted in a blow on the left side of Bruce's head. She finally admitted that she was not sure about the side of the head but claimed certainty that Bruce was stricken with the Grievant's right fist. According to Ms. Cleghorn, after the Grievant struck Bruce he got up and ran to his room. She then went down the hall to make sure the children were in their rooms and noticed other children in the background near Bruce's room. One was Junior Langdon, who was on the phone at the time. Ms. Cleghorn saw none of the events leading up to the alleged striking. She first estimated that the incident occurred at about 10:00 a.m. but later admitted that it could have been in the early afternoon.

Emma M. Johnson, a specialist in Child Psychiatric Nursing and the Center's Coordinator of Quality Assurance and Peer Review, was reviewing records in the nurse's station of unit 52 at the time of the incident. She had contacted the Grievant, whom she knew to be monitoring the floor, to inform him that she would be in the nurse's station. According to Ms. Johnson, after she heard voices and then rustling in the hall she said to Ms. Cleghorn "It sounds like Roosevelt needs some help". Ms. Johnson testified that she and Ms. Cleghorn immediately headed for the door together and that she started out in front of Ms. Cleghorn, but hesitated to let Ms. Cleghorn go first when she speeded up. Both continued moving toward the doorway, and Ms. Johnson testifies that her view was obstructed only momentarily by Ms. Cleghorn who had moved in front of her.

There are several conflicts in the testimony of Ms. Cleghorn and Ms. Johnson. Ms. Johnson testified that she did not see the Grievant strike Bruce and that the momentary obstruction of her view by Ms. Cleghorn was not long enough for the Grievant to strike a blow to Bruce's head. Consistently with the Grievant, Ms. Johnson also testified that the Grievant was holding Bruce's head down and that Bruce did not release the Grievant's ankles until pulled away by her and Ms. Cleghorn. Ms. Johnson also testified that there were no children in the hall at the time, and no patient was using the phone. All other patients were in the dayroom at the time, although they did come to the scene after the scuffle. Ms. Johnson describes Bruce as a heftily built boy who was large for his age and who had had training in self-defense. Ms. Johnson stated that she only knew the Grievant professionally and would consider a fistful blow to the head to be patient abuse.

John Carl Siebern, a TPW of four and one-half to five years, and Ronald Stevenson, a Union Staff Representative and former TPW at Millcreek, both testified that Bruce was the "ward bully" who influenced other patients through physical intimidation. Mr. Siebern, who has more than once been the victim of Bruce's biting and throwing tantrums, testified that Junior Langdon and Brad Stein, two patients who gave statements supporting Bruce's story, were particularly intimidated by Bruce. For this reason and because of the conflicting testimony on whether there were patient witnesses to the scuffle, the Arbitrator discounts the value of the hearsay statements of patients Junior Langdon, Brad Stein, and Michael Rhymer.

The foregoing record reveals contradictions between the key elements of the testimony of Ms.

Cleghorn, the Employer's only witness to the scuffle, and Ms. Johnson. As admitted by Ms. Cleghorn, Ms. Johnson had no reason to color her testimony in favor of the Grievant and is fully credible, yet her testimony contradicts the important parts of Ms. Cleghorn's and is consistent with the Grievant's. Also, while not numerous, there are some internal inconsistencies in the testimony of Ms. Cleghorn as noted in the preceding discussion.

Accordingly, the Arbitrator is not persuaded that the Grievant struck Bruce Gillick in the head with his fist on August 25, 1987. The discharge of the Grievant was without just cause.^[1]

IV. AWARD

The grievance is sustained. The Grievant shall be reinstated with full back pay from August 25, 1987, to the date of his reinstatement. The back pay amount shall be reduced by any interim earnings of the Grievant during this period. If the Grievant declines reinstatement, backpay minus interim earnings will accrue from August 25, 1987, to the date when the Grievant is offered reinstatement. The Arbitrator will retain jurisdiction for thirty days to resolve any issue of backpay that the parties are unable to settle.

June 20, 1988

DATE

CALVIN WILLIAM SHARPE
ARBITRATOR

^[1] Since the Arbitrator finds no just cause for the discharge of the Grievant, it is unnecessary to rule on the effect of any violation of Section 25.08 on the language of Section 24.01 of the Agreement.