ARBITRATION DECISION NO.:
254

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Mental Retardation
and Developmental Disabilities
Warrensville Developmental Center

DATE OF ARBITRATION:
March 20, 1990
April 4, 1990

DATE OF DECISION:
May 4, 1990

GRIEVANT:
Aparicio Curry

OCB GRIEVANCE NO.:
24-14-(89-08-04)-0186-01-04

ARBITRATOR:
Anna Smith

FOR THE UNION:
Myrl Lockett
Staff Representative
Linda Fiely
Assoc. Gen. Counsel

FOR THE EMPLOYER:
Meril J. Price
Advocate, OCB
Mike Fuscardo
Second Chair, MRDD

KEY WORDS:
Removal
Client Abuse
Improper Restraint
Admissibility of Trial
Documents
Notice of Possible
Discipline

ARTICLES:
Article 24-Discipline

§24.01-Standard
§24.04-Prior Discipline

FACTS:

The grievant was a Therapeutic Program Worker (TPW) employed by the Ohio Department of Mental Retardation and Developmental Disabilities for three years. He was responsible for clients with mild retardation or behavioral problems. The grievant had been instructed on proper manual restraint of clients. The superintendent of the grievant's facility made an inspection. He discovered the grievant and another TPW in a bathroom with a client. He saw what he described as the grievant with his hands around the client's neck, applying a fair amount of pressure. The second TPW was not engaged with the client. The client was struggling to get away and had a distressed look on his face. The superintendent observed the scene for approximately five seconds. The grievant explained that the client had been accused of taking money and he was attempting to find it. At the moment the superintendent entered the cottage the grievant was trying to prevent the client from harming himself. The client was examined the next day and no injuries were found. The grievant was placed on administrative leave pending an investigation and was later removed for client abuse.

EMPLOYER'S POSITION:

There was just cause for removal. The grievant was seen applying an improper restraining hold to a client. The superintendent has consistently stated that he saw the grievant holding a client around the neck. The other witness has changed her original statement of the incident. The grievant has training on proper restraining holds and knew that holding a client around the neck is defined as abusive. Also known is that abuse will result in removal.

The union's argument that the client was not injured and the grievant was acquitted of criminal charges is not persuasive. The burden of proof is lower in arbitration than in court. This was also the basis for objecting to the union's attempt to admit trial testimony as evidence in arbitration. Also, the definition of abuse for removal is that of the facility, not the statutory definition. The grievant was notified of the possible form of discipline through Directive 6-86.

UNION'S POSITION:

There was no just cause for removal. The employer's burden of proof in cases involving criminal conduct is beyond a reasonable doubt or at least by clear and convincing evidence. The employer has met neither. The superintendent witnessed the grievant restraining the client with his hands around the client's neck for only five seconds. The superintendent's trial testimony conflicted with that given at arbitration. The employer was not able to prove any injury to the client resulting from the incident.

The employer engaged in procedural violations depriving the grievant of due process. The grievant had no notice of the possible form of discipline to be imposed. Because he had no prior discipline he had no reason to think that progressive discipline would not apply. This caused the union to be prejudiced in preparing for the pre-disciplinary hearing. The employer did not conduct a full and fair investigation. The employer's only witness also conducted the investigation and recommended removal. The security officer's investigation was inadequate and the medical examination which is required to be made on the same day was not made until one day later. The definition of abuse is that contained in Ohio Revised Code section 2903.33, not the definition contained in facility rules. The grievant may have used poor judgment, but he did not commit abuse, therefore, the arbitrator has the authority to modify the penalty imposed.

ARBITRATOR'S OPINION:

The fact question to be decided is whether the grievant abused the client by choking him. The conclusion that the grievant was choking the client was made by the superintendent of the facility. Although the grievant was holding the client around the neck there is no evidence that he was choking the client. There was no testimony that the client was gasping for breath and no pressure marks were visible in photographs taken forty-five minutes after the incident. Therefore, the grievant could not have abused the client by using an improper hold.

The grievant may have abused the client by engaging in an act inconsistent with human rights which could result in physical injury. The decision turns on whether the arbitrator accepts the grievant's testimony or the superintendent's testimony, due to the lack of any other credible testimony. Both the grievant and the management witness have a stake in the outcome of this arbitration, therefore, both witness' testimony must be subjected to close scrutiny. The fact that the superintendent observed for only five seconds and that there is no evidence of physical injury weighs in favor of the grievant. The grievant may have employed an improper hold or used poor judgment which did not rise to the level of abuse.

The standard for abuse according to the agreement is that found in Ohio Revised Code section 2903.33. According to Arbitrator Pincus in G 87-0001A, the Dunning decision, section 4117.10(A) incorporates the Ohio Revised Code definition into the agreement.

The trial record sought to be introduced was admissible subject to limits. The record may be admitted to impeach the witness at arbitration, therefore, only sections containing his testimony are admissible. However, the arbitrator is not bound by the decision in other forums.

The employer failed to give the grievant sufficient notice of the contemplated discipline. The employer notified the grievant of a violation of disciplinary Policy #6-86 which contains a list of rules and a disciplinary grid. However, the employer failed to specify which rule had been violated or where the grievant would enter the disciplinary grid.

AWARD:

The grievance is sustained. The grievant was reinstated with full back pay and benefits including holiday pay, less any interim earnings. The grievant was guilty of poor judgment and therefore should receive a written reprimand for that. Lastly, the arbitrator retained jurisdiction for thirty days to resolve any disputes concerning the remedy.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

**THE STATE OF OHIO,
DEPARTMENT OF MENTAL
RETARDATION AND DEVELOPMENTAL
DISABILITIES**

and

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
A.F.S.C.M.E., AFL-CIO**

OPINION and AWARD
Anna D. Smith, Arbitrator

Case No. 24-14-(890804)-0186-01-04
Removal of Aparacio Curry

I. Appearances

For the State of Ohio:

Meril J. Price, Advocate, Office of Collective Bargaining
Mike Fuscardo, Second Chair, Ohio Department of
Mental Retardation and Developmental Disabilities
Alaric Sawyer, Witness & Superintendent,
Warrensville Developmental Center
Ollie Griffin, Police Officer 1, Warrensville
Developmental Center, Witness
Joceyn Brown, Training Coordinator, Warrensville
Developmental Center, Witness
Lee Graber, Self-Employed, Witness
Carol Washington, Therapeutic Program Worker,
Warrensville Developmental Center, Witness
Jason Hooks, Ohio Department of Mental Retardation
and Developmental Disabilities, Observer
Bruce Brown, Office of Collective Bargaining, Observer

For OCSEA/AFSCME Local 11:
Myrl Lockett, Staff Representative and Advocate
Linda Fiely, Associate General Counsel
Aparicio Curry, Grievant
Vera S. Dudley, Therapeutic Program Worker,
Warrensville Developmental Center, Witness
Catherine N. Flowers, L.P.N, Warrensville
Developmental Center, Witness by Telephone

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 10:00 a.m. on March 20, 1990 at the Warrensville Devel-opmental Mental Center, Warrensville Township, Ohio before Anna D. Smith, Arbitrator. Larry A. Weiser, attorney for the Grievant, sought participation in the hearing as advocate for the Grievant or in any other capacity deemed appropriate by the Arbitrator. Both Parties objected to the presence of Mr. Weiser. These objections were sustained by the Arbitrator and Mr. Weiser withdrew. By agreement of the Parties, said hearing was reconvened at 8:45 a.m. on April 4, 1990 at the offices the Office of Collective Bargaining, 65 East State Street, Columbus, Ohio for the express purpose of re-examining the testimony of Mr. Sawyer and receiving closing argument. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. The Union sought to introduce into the record the full transcript of the criminal trial of the Grievant on the charge of abuse. The Employer objected on the grounds of relevance and the Arbitrator sustained the objection. Over the objection of the Employer, the Arbitrator accepted as Union Exhibit 2 selected pages from that transcript of the testimony, in part, of a witness common to both proceedings for the purpose of impeachment. Written briefs were submitted at the conclusion of testimony and the record was closed at 9:15 a.m., April 4, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

Was the grievant, Aparicio Curry, removed for just cause?
If not, what shall the remedy be?

The Employer also requested a rulings on two procedural issues: 1) whether Management was specific

in notifying the Grievant of how much discipline was to be meted out as a result of the incident and 2) the admissibility of a transcript from a criminal proceeding into the record of an arbitration.

IV. Stipulations

The Parties stipulated to the following facts:

1) Aparacio Curry was hired on January 5, 1986 as Hospital Aide at the Northeast Developmental Center.

2) He was reassigned to the classification of Therapeutic Program Worker on March 12, 1989.

3) At the time of the incident, there were no disciplinary actions in Mr. Curry's file.

4) There are no procedural errors and this matter is properly before the arbitrator.

5) Aparacio Curry was acquitted of charges of abuse in the Cuyahoga Court of Common Pleas.

The following documents were received as joint exhibits:

1) State of Ohio/OCSEA Local 11 Contract, 1986-89;

2) Discipline Trail;

3) Grievance Trail;

4) Training Records, 1986-89;

5) Witness statements of A. Sawyer and Aparicio Curry;

6) Performance Evaluations, 1986-89;

7) ODMR/DD Disciplinary Grid (Part of Warrensville Developmental Center Policy #6-86, "Disciplinary Action");

8) ODMR/DD Policies of Warrensville Developmental Center 24-86 (Client Abuse and Neglect), 28-86 (Crisis Restraint), 55-86 (Client Rights and Client Rights Advocacy);

9) §2903.33 and §2903.34, Ohio Revised Code.

V. Relevant Contract Clauses

Article 24 - Discipline

VI. Case History

The Grievant in this case, Mr. Aparacio Curry, was employed at the Warrensville Developmental Center since January 5, 1986 as a Hospital Aide and later as a Therapeutic Program Worker. This residential institution provides care for and programs to develop the mentally retarded, some of whom are profoundly retarded with multiple handicaps, some of whom are mildly retarded with behavioral or other problems. Mr. Curry was assigned to House 5/100, whose residents are of the latter category. He enjoyed his work, had received good evaluations (Joint Exhibit 6), and had no prior discipline in his record. As part of his training he received instruction in aggression control skills (administered by Lee Graber), in client rights, and in

behavioral restraint (Joint Exhibit 4). This training included Ohio Department of Mental Retardation and Developmental Disabilities definition of and policy toward client abuse, techniques of redirecting and neutralizing client aggressive behavior, and appropriate manual restraints or holds on clients. Training at the institution also includes information on disciplinary and criminal consequences of client abuse.

On the evening of June 16, 1989, at about 7:45-7:50 p.m., Mr. Alaric Sawyer, who had been superintendent of the facility for approximately three months, was making rounds of the institution. He expected Federal and State surveyors soon to be making an unannounced follow-up visit to one they had made several months earlier that had resulted in some citations. Mr. Sawyer was touring the facility to be sure the issues raised in the previous survey had been corrected. Upon entering House 5/100 he observed residents, but no staff. He inquired about the staff and was directed towards the rear of the house where, he was told, the staff were dealing with a client who had been acting out. In the bathroom he found the Grievant, another therapeutic program worker (Carol Washington) and the client. This client is a mildly retarded male who can communicate through speech, but lacks a good memory and is not always truthful. Behaviorally he is a mischievous and difficult resident with a history of self-abuse. (To preserve his privacy he will be referred to herein as the "client.") Mr. Curry was holding the client and they were engaged in what appeared to Mr. Sawyer to be a physical struggle. Mr. Curry testified that while he was looking for money allegedly hidden by the client, the client grabbed the tub rail and signaled an impending episode of self-abuse. He further testified that he was holding the client for the client's own protection. Mr. Sawyer's testimony, on the other hand, is that Curry had both of his hands on the client's neck and was applying a fair amount of pressure. The client, he said, was struggling to get away and showed distress on his face. Ms. Washington was present but not physically engaged with the client or Curry. Mr. Sawyer watched unobserved for about five seconds. Words were spoken when are in dispute, and the client ran out of the bathroom. Mr. Sawyer interviewed Mr. Curry in the office, who explained the situation as he later testified. Sawyer returned to the bathroom, found no money or any way to slip it under the closet door because of a wood stop inside the sill. Sawyer made a written report (Employer Exhibit 1) which states in part ". . . Mr. Curry's back was also toward me while he held [the client] about the neck choking him with his hands." Sawyer also contacted security for an investigation. The client complained about his shoulder and Sawyer saw a bruise. When and by whom the nursing staff was contacted to examine the client is in dispute. Sawyer put Curry on administrative leave and he left with security staff.

Ollie Griffin, Police Officer 1 at the facility, took statements of witnesses Sawyer, Curry, and Washington beginning at 8 p.m. (Joint Exhibit 5 and Employer Exhibit 1). Washington also filed an Unusual Incident Report (Employer Exhibit 5). Officer Griffin further took the statement of Sebrina Lacey (Employer Exhibit 3), which confirmed that she had reported stolen money to the Grievant and other staff. The client's statement (Employer Exhibit 4) and his picture (Employer Exhibit 6) were also taken. The photograph shows a red mark on his right shoulder. Officer Griffin summarized her investigation in a report offered as Employer Exhibit 7. This report shows that a statement of Norita Daniels was also taken, but her testimony and statement were not offered as evidence in this proceeding.

The testimony of Catherine N. Flowers, L.P.N. assigned to the house, was taken by speaker telephone without objection by either party. She had examined the client's head injury on the day before the incident, June 18. She did not look elsewhere at the time. She testified that although she was in the cottage on the 19th, she was not called to examine, nor did she examine the client on that date. She did examine him on June 20th following a request from security. She found nothing new. She saw a scratch on his back and the same injuries on his head. She does not remember seeing a bruise of medium size. She wrote in her report what she saw. Her findings were not included in the report of Officer Griffin.

A psychology assistant, Paul Polomsky, also examined the client on June 20 and wrote a report (Union Exhibit 1) which was reviewed by Mr. Sawyer.

On June 20, a notice of pre-disciplinary hearing was issued as was a letter informing Mr. Curry that he was placed on administrative leave pending an investigation (Joint Exhibit 2). Said notice states in part "Notice is hereby given that you are being considered for discipline in compliance with discipline policy #6-86." The basis cited was the verbatim text of Sawyer's June 19 staff report submitted as Employer Exhibit 1. Mr. Curry was subsequently removed, effective August 4, 1989, for physical abuse. The particulars cited

were the same as Mr. Sawyer's June 19, 1989 staff report (Joint Exhibit 2). The removal was timely grieved and processed through to arbitration where it presently resides without procedural defect (Joint Exhibit 3).

VII. Positions of the Parties

Position of the Employer

The State asserts that it had just cause to remove Aparacio Curry from his job. The facts, it argues, are that Mr. Curry did not use a proper hold on the client and this resulted in an injury to the client. Mr. Sawyer saw the improper hold and has consistently stated what he saw. He did not really know the Grievant and therefore had no reason to portray the incident other than the way he saw it. The other witness to the incident, Carol Washington, has recanted her original portrayal of it. Her most credible version is in the statement given on the night of the incident and this portrayal supports Mr. Sawyer's account.

The Employer goes on to point out that the Grievant was properly trained in the techniques of restraining or otherwise dealing with client behavior that puts them at risk of self-injury. Mr. Graber testified that placing one's hands around the neck of a client is not appropriate under any situation. Ms. Brown's testimony and documents signed by the Grievant show that he knew that choking was defined at Warrensville Developmental Center as abusive.

The State also argues that Ms. Brown's testimony and documents introduced through her show that the Grievant had foreknowledge of the consequences of physical abuse of a client. Moreover, the rule prohibitting client abuse is a reasonable one given the institution's and direct care workers' position of trust and need for dependability. As such, it is a rule that has been consistently applied. Every case of abuse under Mr. Sawyer's tenure as superintendent has resulted in termination.

The Employer draws attention to §24.01 of the Contract which prohibits the arbitrator from modifying the termination of an employee found to have abused a person in the care or custody of the State of Ohio, and cites Arbitrators Graham (G87-2260) and Michael (G87-0813).

The Union positions are rebutted as follows: First, with respect to the claim that the client was not seriously injured and the Grievant was acquitted of criminal charges, the State contends that the standard to be applied here is less than that in a criminal proceeding. The question here is whether an agency's policies and procedures have been violated, not whether a law has been violated. The Ohio Department of Mental Retardation and Developmental Disabilities' definition of abuse is contained in a "Statement of Client Rights," which was signed by the Grievant. This statement gives examples of abuse consistent with O.R.C. §2903.33 and 2903.34. The State cites Arbitrator Pincus (G87-0001(A)) and asks the Arbitrator to review the statute and relevant sections of the Ohio Administrative Code (5122-3-14(C)(1)) referred to in that decision.

Second, the State takes issue with the Union's claim that Management's case is fatally flawed because it did not notify the Grievant of the specific form of discipline to which he was subject. The pre-disciplinary notice cites Directive 686 which contains a disciplinary grid. The Grievant had received this directive as had Union officials. He was on notice from that directive as to what the possible form of discipline might be. In support of its position that this notice was adequate, the State cites Arbitrator Pincus (23-14010488-0001-01-04, 23-02-071488-0064-01-06, and G87-1494) and Arbitrator Rivera (G87-2316).

Third, the State questions the credibility of Witness Washington's testimony. It further argues that the Union claim that the investigation was not properly or fairly conducted is not substantiated by the testimony.

Finally, the Employer requests a clear ruling on the admissibility of a transcript from a criminal proceeding into the record of an arbitration. It argues that an arbitration is a hearing de novo. As such, evidence found elsewhere, particularly under a different standard of proof, is irrelevant. Only in the interest of truth did Management suggest reconvening the hearing to examine testimony of a witness given on the first day of the hearing.

In conclusion, the Employer asks that the grievance be denied in its entirety.

Position of the Union

In asserting that the Grievant was not removed for just cause, the Union raises three questions and posits answers to each.

1. Was the Grievant proven guilty of physical abuse? The Union maintains that the appropriate standard of proof in cases of alleged criminal conduct--as here--is beyond a reasonable doubt or, at a minimum, clear and convincing evidence, and cites authority for both positions (Union Brief p. 6-7). In either case, it contends that Management has not met its burden of proof. The Grievant's version of the events of the evening of June 19 are supported by statements or testimony of the house staff on duty at the time. Mr. Sawyer observed the scene in progress for a short period of time and drew conclusions based on unfounded assumptions. His court and arbitration testimony are at variance with each other. Management was unable to prove that the bruise on the client's shoulder was sustained during the incident or, if so, as a result of client abuse instead of Curry's attempts to neutralize the client's behavior to prevent self-abuse. The client's recently sustained injuries, the nurse's inability to identify new injuries, and ,the lack of injury to his neck all call into question Management's allegation that the Grievant was choking the client or that he was in any way injured as a result of the Grievant's hold on him. Any doubts, the Union argues, must be resolved in favor of the Grievant.

2. Did the Grievant receive due process? The Union claims several procedural defects. First, Management violated §24.04 of the Contract because the Grievant was not informed of the possible form of discipline. The notice of pre-disciplinary hearing states only that he was "being considered for discipline," not its possible form. Since the Grievant's disciplinary record was clean, he had no reason to believe he would not be subject to progressive discipline. He and the Union were therefore deprived of a fair opportunity to prepare for the pre-disciplinary hearing. In support of its position the Union cites Arbitrators Rivera (G87-1120), Smith (35-03-(08-02-89)0041-01-03) and Pincus (G87-2810).

The Union also contends that the Grievant was denied a full and fair investigation. It rests this argument primarily on the claim that Management's only witness, Supt. Sawyer, also directed the investigation and recommended the Grievant's removal. It cites Arbitrator Rivera's holding in Case. No. 2409-(04-01-88)-0040-01-04. The investigation of the security officer is also alleged to be inadequate, specifically in the statement elicited from Witness Washington which raises more questions than it answers. Third, the medical examination of the client was not conducted on the same day as the alleged injury, as required by the institution's policy. The Union cites Arbitrator Rivera in G87-1299 who modified a discipline because of the failure of the Employer to follow its own disciplinary and investigatory rules.

3. May the Arbitrator modify the removal order if the Grievant is found guilty of wrong-doing? The Union argues that the term "abuse" as used in §24.01 of the Contract should be defined in terms of §2903.33 of the Ohio Revised Code. It finds support from Arbitrators Pincus (G87-0001A), Michael (G871008), Rivera (33-00-(890728)-0172-01-05) and Keenan (G860328). It asserts that the State did not prove that the Grievant knowingly or recklessly caused physical harm. It also cites Arbitrator Cohen in Ohio Department of Mental Retardation and Developmental Disabilities, Gallipolis Developmental Center v. Ohio Civil Service Employees Association Local 11 (Broyles, June 2, 1988) who found the Grievant had made an error in judgment rather than abuse, and so reduced the discharge to a suspension. The Union asserts that if the Grievant in the instant case is guilty of anything, it is poor judgment and being overly zealous in helping co-workers with a client's behavior problem. It therefore argues that the Arbitrator is not constrained by the Contract from modifying the discipline.

Finally, the Union asks that the grievance be sustained, the Grievant be returned to work and made whole, and that the Arbitrator retain jurisdiction for thirty days to insure implementation of the award. As part of the make-whole remedy, the Union seeks overtime pay and holiday pay. It cites precedent for overtime pay from the private sector (Union Brief p. 13) and for holiday pay under the Parties' Contract (Arbitrator Sharpe in Case No. 24-15-(880914)-0019-01-04.)

VIII. Opinion

Admissibility of Record of Collateral Proceeding

The Employer has requested a clear ruling on the admissibility of the transcript of a criminal trial into the record of an arbitration. In the case at bar the Union sought to introduce the entire transcript of the Grievant's criminal trial and the Employer objected on the grounds of relevance. The Arbitrator admitted only those portions of the transcript that contained statements relevant to the truthfulness of testimony given at the arbitration hearing. In other words, the Arbitrator ruled that a transcript is relevant evidence and therefore admissible for the purposes of impeachment. Accordingly, she admitted a witness's trial testimony that was allegedly at variance with his arbitration testimony.

As other arbitrators have held, the results reached in a criminal proceeding do not bind the decision-maker in arbitration (see, e.g. ITT Continental Baking 72-2 ARB p8490, United Parcel Service, Inc. 67 LA 861, Babcock & Wilcox Co. 60 LA 778 and others cited in Hill and Sinicropi, pp. 64-68).[1] The policies at issue (law or collective bargaining agreement) are different; arbitration is less formal, often with a lower ,burden of proof and less restrictive rules of evidence; the parties to the collective bargaining agreement have no control over the collateral proceeding or the qualifications of its trier of fact as they do in arbitration. These and other differences between the two forums make it inappropriate for an arbitrator to rely solely on the outcome of a criminal trial as the basis for his or her decision. Moreover, it should be pointed out that had the Parties wished to do so, they could have bargained for such a restraint on arbitral authority or, indeed, for grievance adjustment rules more in keeping with criminal judicial proceedings. They have not done so. Instead they bargained for arbitration and it is incumbent upon the Arbitrator duly selected by the Parties to "decide the case only on the record before him and not on the record before a court or some other body."[2]

This does not, however, prevent an arbitrator from admitting and crediting facts established in other proceedings under certain circumstances. In the instant case, for instance, Superintendent Sawyer testified in arbitration that one of the client's hands was on the tub rail. The Union claims he testified in the trial that both hands were on the rail and also that he denied the Grievant was choking the client. What Sawyer testified to at the trial goes to the truthfulness of his testimony in arbitration and is, therefore, admissible. The transcript is admissible as evidence of Sawyer's disputed trial testimony.

In summary, it is this Arbitrator's opinion that she is not bound by the outcome of a proceeding collateral to arbitration, but may admit and afford appropriate weight to facts and issues established elsewhere as they relate to the issue at bar.

Definition of Abuse

The Grievant was removed for physical abuse. At issue is the definition of abuse to be applied. The Union maintains that abuse as used in §24.01 of the Contract should be defined in terms of §2903.33 of the Ohio Revised Code, while the Employer seeks a more expansive definition. Both cite Arbitrator Pincus in G87-0001A, hereinafter referred to as the Dunning decision. In the Dunning case the Parties agreed to be bound by the arbitrators interpretation of the term. Using the rationale of Arbitrator Pincus, §4117.10(A) O.R.C. operates to include in the Collective Bargaining Agreement the definition of abuse set forth in §2903.33(B)(2) O.R.C. and, for the Ohio Department of Mental Retardation and Developmental Disabilities, §5123-3-14(C)(1) of the Ohio Administrative Code. (This is consistent with the readings of the Dunning decision given by Arbitrators Michael and Cohen in the cases cited by the Union. Arbitrator Keenan's opinion in the Jones case is not relevant ,because it was given before the Dunning decision by which the Parties agreed to be bound.) Accordingly, the term "abuse" as used in §24.01 is applied herein according to the following definitions:

"Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person or by inappropriate use of physical or chemical restraint, medication, or isolation on the person.
O.R.C. 2903.33(B)(2)

"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.
O.A.C. 5123-3-14(C)(1)
Dunning decision, p. 28

Proof of Physical Abuse

The essential particulars of the charge of physical abuse against Aparacio Curry are that he "held client . . . about the neck, choking him with his hands" (Joint Exhibit 2).

To begin with, that the Grievant was choking the client is a conclusion drawn by Mr. Sawyer based upon what he saw or thought he saw. "To choke" means "to check normal breathing of, by compressing or obstructing the windpipe or by poisoning or adulterating available air."[3] Allowing for the moment that the Grievant held the client about the neck, there is no evidence to support the conclusion that he was being choked. The Grievant has consistently said that he was not choking the client and Washington's statement denies that he was squeezing the client around his neck (Employer Exhibit 2). While Sawyer testified that in the five seconds he observed the incident the client was struggling and the Grievant was applying a "fair amount of pressure," he did not recall the client making any sounds and no pressure marks were found on the client's neck three minutes after the incident. His testimony at the trial in response to questions as to whether he saw the client gasping for breath, breathing hard or choking was that he saw the client trying to "move his hand off his neck" and that there was no indication of choking or breathing hard (Union Exhibit 2, p. 61). Moreover, the photograph of the client taken about 45 minutes after the incident (Employer Exhibit 6) does not show marks on the neck other than the one that was sustained on a prior occasion and Witness Griffin could not testify that there were red marks on his neck when she took the photograph. I must conclude that the Grievant, no matter what else he was doing, was not choking the client.

Was Mr. Curry, then, using an improper hold in such a manner as to physically abuse the client? There is evidence that the client had a bruise on his right shoulder. Several witnesses testified to it and the photograph shows a red mark on the shoulder. Such a mark may have been sustained as a result of the struggle that occurred between the two men, but in view of the client's history of recent self-abuse and Nurse Flowers' testimony that she found "nothing new" on the client when she examined him on the 20th, I cannot conclude with any degree of confidence that the bruise resulted from a struggle with the Grievant. Since this is the only physical harm that may have been caused by the Grievant he cannot, therefore, be guilty of abuse within the meaning of §2903.33(B)(2).

The only portion of the abuse definition given in §51233-14(C)(1) of the Ohio Administrative Code that conceivably applies to the Grievant's behavior is ". . . any act or absence of action inconsistent with human rights which . . . could result in physical injury to a client." Clearly physical contact of the sort claimed by either Party could result in physical injury to the client. The question, then, is whether the Grievant's behavior was "inconsistent with human rights." If the Grievant was holding the client by the neck or trying to force the client into the closet, the conduct is arguably "inconsistent with human rights." Holding by the neck is, by the testimony of Mr. Graber, the Grievant's instructor in aggression control skills and defensive redirection, never appropriate and it is apparent that the Grievant knew this. However, it is not clear that the Grievant was holding the client by the neck or trying to force him into the closet. Curry claims that while he was looking for money (allegedly stolen by the client) in the bathroom closet the client grabbed the tub rail and started to shake, indicating that he was about to head-butt. Because of the hard surfaces of the tub

room, the client's recent injuries, a concern for and responsibility towards the client, the Grievant put his arms around the client after trying unsuccessfully to redirect him verbally about four times. His purpose was to pull him off the rail and hold him until his behavior de-escalated. He took him from behind and high, around the shoulders, rather than low towards the waist because he thought the lower hold could result in damage to the client's outstretched arms and joints. Mr. Sawyer claims that Curry was facing the client, had him by the neck, and was pulling him into the closet. The client's statement (Employer Exhibit 4) sheds no light on the matter and is unreliable in any case as hearsay. The psychology assistant's report cannot be creditted on this issue because it is hearsay, too. The only witness to the incident, Carol Washington, tells a confusing story. Her Unusual Incident Report (Employer Exhibit 5) confirms the Grievant's claim that he was investigating the whereabouts of money allegedly taken by the client and that the client "grabbed rail of the bath tub and would not let go." (She also testified that the next sentence regarding an injury was not hers.) Her statement taken by Police Officer Griffin (Employer Exhibit 2) says that the Grievant was trying to pull the client into the back room, that the client was holding on to the tub rail, that the Grievant was holding the client "around the neck with hand." In response to the question "did Aparicio have both of his hands around his neck," the answer is "Yes," but that he was not "squeezing him around his neck with his hands," "he was just pulling him." Her testimony, on the other hand, was that curry's arms were around the client's shoulders but that his hands were not directly around the neck. Her demonstration was consistent with Curry's account and at variance with Sawyer's. On cross-examination she stated that she was nervous because of Sawyer's involvement and agreed that when asked about the client's neck she meant "vicinity of the neck." She did not think she demonstrated what she saw to the police officer.

The Employer contends that Ms. Washington's testimony is in conflict with her statement given shortly after the incident, that the most truthful account must be the signed statement given proximate to the incident, and that her testimony in the arbitration hearing is not to be believed. I disagree that Washington's statement the night of the incident is necessarily the more truthful of the two. If her boss, Mr. Sawyer, thought the client was being abused and Ms. Washington was present, then her job was at risk either from complicity in the alleged abuse, in failing to interrupt it, or in failing to report it. Thus, Washington had a reason to give a self-protective statement on the night of the incident even if it was not entirely truthful. I agree with the Employer that her testimony and demeanor in the hearing were such as to question her credibility. She may have been lying. But her inconsistent and sometimes illogical statements and associated behavior could instead have been the result of having to square two different accounts, the first of which was not entirely truthful and contributed to a co-worker's trouble. It may also be, as the Union claims, that both statements are true, but "around" means "near" and that the questioning of the witness was biased by the fact of the superintendent's previously-made statement. "Around his neck with hand" may also be an incomplete sentence with the missing part being a demonstration or words indicating that his hands were not on the neck (no period is apparent on the copy submitted as evidence). In short, there are a number of reasons why Washington's testimony may be the more truthful version of what she saw. These are enough to cast doubt, especially when combined with her unequivocal on-site demonstration of the incident on the Employer's claim that "her most truthful account must be her statement given at the time." I must conclude that her statement to Police Officer Griffin cannot be relied upon to support Management's position and that her testimony is also of questionable veracity.

If Washington's accounts leave the central factual issue open, we are left with the conflicting testimony of accuser and accused. Both Parties strenuously attempted to discredit the account of each other's witness. In my opinion these efforts were to no avail. Each witness forthrightly and consistently stated and demonstrated what he did, saw and heard. Even admissions of memory lapses and possible oversights by both witnesses served, in my opinion, to strengthen their credibility. Neither was evasive or inconsistent. It is true that the Grievant has an interest in the outcome of this proceeding such as to provide a motive for dishonesty. It is also true that the Employer showed Sawyer to be free of personal prejudice towards the Grievant when he walked into House 5/100 on the evening of June 19. This consideration makes the Grievant's testimony subject to greater scrutiny than if he had no interest in the outcome, but it does not make his account necessarily false. The view that management has no similar interest in the outcome is, in my opinion, erroneous. Authority of the manager and, particularly in a case of client abuse, reputation and

funding of the institution may make it more difficult for the employer to view things from the employee's and union's perspective and to back off a strongly-held position even when that position is erroneous. While the Grievant's interest arguably may tend to tilt the scales more than Management's interest, what it comes down to in the end is whether the Arbitrator believes Sawyer's testimony to be sufficient basis to support a finding of guilty as charged. In this case I think not. As the Union points out, Mr. Sawyer walked into a situation in progress and observed it for a few seconds. All accounts agree that Sawyer saw a struggling client being held and pulled in the direction of an open closet by Curry. The client showed signs of distress and injury. I am persuaded that it is well within the bounds of reason to believe that Sawyer interpreted what he saw to mean that the Grievant was abusing the client when, in fact, the Grievant was trying to protect the client. The Grievant's hands may have been encircling the client's neck and the Grievant may have been forcing the client into the closet, but the witness also may have been mistaken. It would be easy to be so under such circumstances. Without reliable corroborating testimony or a causally-linked injury there simply is not sufficient evidence, particularly when coupled with the Grievant's credible testimony and a quite plausible alternative explanation of the facts that are established, to prove the Employer's claim either beyond a reasonable doubt or clearly and convincingly. I therefore find the charge of physical abuse not proven.

Proof of Other Wrong-Doing

The hold that the Grievant claims he was using on the client--around the torso with his left arm under the client's left arm and right arm over the client's right shoulder--may have been an improper hold but not so egregious an act as to rise to the level of abuse as defined by the Dunning decision. The Employer states in its brief (p. 3) that its expert witness, Mr. Graber, testified that one would never have to grab a client above the waist. The Arbitrator's notes do not contain this statement, although he did give a negative reply to a series of questions about whether he taught a hold around the shoulders to prevent head-butting. He also emphatically stated that it was never appropriate to put hands around the neck. The thrust of his testimony and documents supplied (Employer Exhibit 8) was that physical contact was to be minimized, "directed in towards the front center line of the body, and are only implemented to make dangerous behavior ineffective and unable to cause injury." He was not questioned specifically about the hold the Grievant claims to have used. Warrensville Developmental Center Policy #27-86, "Behavioral Restraint," (Joint Exhibit 4) is no more illuminating. It indicates some approved manual restraints including bear hugs and holding limbs, but it does not mention--either to approve or disapprove--the hold the Grievant claims to have used. The record, in short, does not support a finding of unapproved behavior intervention or other serious wrong-doing. At the most, he showed poor judgment in dealing with the client's alleged theft without consulting his behavior program.

Notification of Possible Form of Discipline

At this point, the procedural issues are moot. However, the Employer has requested a ruling on one issue raised by the Union, namely the adequacy of the Employer's notice to the Grievant. Both Parties have argued the matter and cited several decisions, all of which the Arbitrator has read. All of the cases cited by the Union can be distinguished from the case at bar. In Arbitrator Rivera's Carter decision, the Employer's notice was deemed deficient because the Employer changed the charge to a more serious one carrying a higher degree of penalty without informing the Grievant. Arbitrator Smith in the Garrett decision found lack of foreknowledge because the effective date of a new and higher standard was not made clear and prejudice was shown to the Grievant's case as a result. In Pincus's King decision, the notice alluded to violation of a section of the Collective Bargaining Agreement and to the Ohio Revised Code, but never formally specified the charge or its consequences. The latter case is most similar the case at bar, but the arbitrator found other procedural defects.

The Employer's reliance on Arbitrator Rivera's Sebree decision is not totally well-placed. It is true that she felt that more specificity than given might indicate pre-judgment (p. 16), but the notice that was given indicated possible discipline (suspension or removal), a list of specific charges (e.g. "Neglect of Duty--Major")

with reference to the agency's work rule and disciplinary grid directive, and evidence on which the charges were based (p. 9-10 and 15-16).

In the Pincus Hurst case, the notice was deemed sufficiently specific because it "designated the specific penalty contained in the Employer's Disciplinary Actions Directive No. A-301." In the Harris decision, the notice was not held to be flawed despite the Employer's escalation from suspension (as notified) to removal, although Arbitrator Pincus opined that "any modification needs to be within certain reasonable parameters based on the circumstances" (p. 29). Finally, in the same arbitrator's Jones decision, no notice was required because the offense (drug trafficking by a hospital aide) was so serious that its consequences should have been anticipated without prior notice (p. 19). It should be noted that the pre-disciplinary notice in this case was specific as to the basis (plea of guilty to felony charge of drug trafficking) of the Employer's charge (failure of good behavior) (p. 8).

A problem with the notice in the instant case is that while it refers to disciplinary policy #6-86, which contains a list of rules and a disciplinary grid of infractions, it does not indicate which rule or rules were allegedly violated. An employee could well be left in the dark as to where to enter the grid to determine possible form of discipline. In this case, however, the charge of choking a client is so serious that the Grievant should have known that his job was at risk. I therefore find that the Employer did not violate §24.04 of the Contract.

Remedy

The Union asks that as part of her make-whole remedy, the Arbitrator grant overtime and holiday pay. Holiday pay lost as a result of his unjust removal is due the Grievant, as are all other contractual benefits. Overtime pay is another matter. In the absence of overtime required by the Contract or evidence as to the Grievant's attendance and overtime record as well as overtime worked by other employees in his classification and house during his absence, determination of overtime pay is too speculative to be considered "earnings lost."

IX. Award

The grievance is sustained. Aparacio Curry was not removed for just cause. He is to be reinstated forthwith to his former position and made whole for all pay and benefits, including holiday pay, lost as a result of the Employer's violation of the Contract. Back pay is to be reduced by such interim earnings as the Grievant may have had and he is to supply the Employer with such evidence of earnings as it may require. The Grievant was guilty of poor judgment and he is to receive a written reprimand for same. The Arbitrator retains jurisdiction for thirty (30) days to resolve any issues arising over the remedy.

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
May 4, 1990

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[1] Hill, Marvin Jr. and Sinicropi, Anthony V. Evidence in Arbitration. Washington: Bureau of National Affairs, 1980.

[2] Id. p. 64 citing ITT Continental Baking Co., 72-2 ARB p8490 (High, 1972).

[3] Webster's New Collegiate Dictionary. Springfield, Mass.: G & C Merriam, 1979.