ARBITRATION DECISION NO.:
431

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

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

DATE OF ARBITRATION:
March 13, 1992

DATE OF DECISION:
April 20, 1992

GRIEVANT:
Harold Diss

OCB GRIEVANCE NO.:
24-04-(90-12-06)-0283-01-04

ARBITRATOR:
Hyman Cohen

FOR THE UNION:
John Gersper

FOR THE EMPLOYER:
James C. Spain

KEY WORDS:
Removal
Patient Abuse

ARTICLES:
Article 24-Discipline
§24.01-Standard

FACTS:

The grievant had been employed as a Therapeutic Program Worker by the Department of Mental Retardation and Developmental Disabilities for 15 years and at the Cambridge Developmental Center for 5 years. On August 11, 1990 the grievant was feeding a client who has a history of throwing and spitting food on the workers and other clients and is otherwise abusive. After the meal the grievant asked another TPW to bring a bucket of water to clean the patio where they had fed the clients. The TPW heard the bucket being dumped out and returned to see the client drenched with water. Later in the day a nurse asked how the client's clothes had become soaking wet. The grievant explained that the client had spilled two glasses of water on himself. The employer was informed in October, by two other employees who were working in the cottage in August, that the grievant had dumped a bucket of water on a client on August 11, 1990. The

grievant was removed for client abuse on. November 27, 1990.

EMPLOYER'S POSITION:

There was just cause for the grievant's removal. Two TPWs who worked in the cottage with the grievant stated during the investigation and at arbitration, that the grievant had dumped a bucket of water on a client. Additionally, a nurse who saw the client later in the day stated that his clothes were soaked with water and the grievant admitted to the nurse that he had thrown a bucket of water on the client. The grievant's explanation that the client spilled two glasses of water on himself at lunch was not credible. The acts which the grievant committed were abusive to the client and removal was the appropriate discipline. Because the grievant was found to have abused the client, the penalty cannot be modified if the arbitrator finds abuse.

UNION'S POSITION:

There was no just cause for the grievant's removal. The grievant explained that the client had spilled two glasses of water on himself at dinner. His explanation is more credible than the witnesses because they implicated the grievant to retaliate against him. The two TPWs who reported the event did not do so until five weeks after the event and only after the grievant reported that they had abused a client. Additionally, one witness did not see the grievant dump a bucket of water on a client, but stated she heard the water being poured out. The other witness stated she had seen the grievant dump the water on the client but cannot recall the event now. That the client spilled two glasses of water on himself is a reasonable explanation for the client being wet. Lastly, the grievant was found not to have abused the client by a court in a criminal case brought by the state over the same incident.

ARBITRATOR'S OPINION:

The employer did prove that the grievant poured a bucket of water on a client. The grievant's explanation that the client spilled two glasses of water on himself was not credible. One witness saw the incident and reported it, and is credible despite her statement that she cannot recall the incident now. Another employee gave the bucket of water to the grievant, heard the water being poured out, and saw the client soaking wet afterwards. The fact that neither reported the incident for five weeks, and only reported the incident allegedly in retaliation for the grievant reporting other incidents of abuse, does not detract from their credibility. The nurse who asked about the client being wet indicated that the client was extremely wet. Two glasses of water spilled on a client would not have been enough to account for the client's wetness. The fact that the employer proved that the grievant poured a bucket of water on a client constituted abuse as defined by the contract. That the grievant was not found guilty in court of criminal charges does not lead to the conclusion that abuse cannot be found at arbitration. The burden of proof in court is higher than at arbitration, therefore the evidence produced at arbitration is sufficient to prove abuse.

Although the grievant was proven to have abused the client, just cause is required to be applied in all cases by section 24.01. "[T]he 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." Because of the grievant's length of service and above average evaluations, termination for the offense was too severe. The employer's own disciplinary grid allow for a 20 suspension up to removal for a first offense of abuse. Therefore, despite having abused a client, there was not just cause for removal.

AWARD:

The grievant was reinstated without back pay.

NOTE: This decision conflicts with the determination by the Supreme Court of Ohio in the Juliette Dunning case. The Supreme Court of Ohio held that if abuse is found, the arbitrator has no authority to modify the disciplinary penalty meted out by management. It is anticipated that the State of Ohio may attempt to vacate this award.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, CAMBRIDGE DEVELOPMENTAL CENTER

-and-

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

ARBITRATOR'S OPINION

Grievant:
Harold Diss
No: 24-04 (90-12-06) 0283-01-04

FOR THE STATE:
JAMES C. SPAIN
Ohio Department of Mental
Retardation and Developmental
Disabilities
Cambridge Developmental Center
County Road 35
Cambridge, Ohio

FOR THE UNION:
JOHN GERSPER
Staff Representative
OCSEA/AFSCME
1680 Watermark Drive
Columbus, Ohio 43215

DATE OF THE HEARING:
March 13, 1992

PLACE OF THE HEARING:
Cambridge Developmental Center
Cambridge, Ohio

ARBITRATOR:
HYMAN COHEN, Esq.
Impartial Arbitrator

Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295

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The hearing was held on March 13, 1992 at Cambridge Developmental Center, Cambridge, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties pursuant to the Rules and Regulations of the Federal Mediation and Conciliation Service.

The hearing began at 9:00 a.m. and was concluded at 12:15 p.m.

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On or about December 4, 1990 **HAROLD DISS** filed a grievance with the **STATE OF OHIO, DEPARTMENT OF DEVELOPMENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, CAMBRIDGE DEVELOPMENTAL CENTER, Cambridge, Ohio**, the "**State**", protesting his removal from employment for physical abuse of a resident and the failure to report and document incidents of abuse. The State denied the grievance at the third step hearing which is provided in the Labor Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO**, the "**Union**". Since the parties were unable to resolve the grievance it was carried to arbitration.

FACTUAL DISCUSSION

The Cambridge Developmental Center was described at the hearing as an "intermediate residential care facility" for mentally retarded and developmentally disabled citizens of the State of Ohio. Among the staff that is employed by the State at the Cambridge Developmental Center are Therapeutic Program Workers, "TPWs". The duties of a TPW who is assigned to a living area and responsible for the direct care of clients, include assistance in habitation, implementation of training plans, assures that activities in daily life are carried out in addition to being a personal advocate for clients and a "role model" or "best friend" of clients. The Grievant has been employed by the State for a total of fifteen (15) years, the last five (5) of which have been as a TPW at the Cambridge Developmental Center.

The events giving rise to the termination of the Grievant on November 27, 1990 occurred on or about August 11, 1990. On that day the Grievant worked the second shift at Lankenau Cottage with Leota Grimsley, Janie McElroy and Diana Roth, all of whom are TPWs. On that "hot day" in August, the clients were fed on the patio of Lankenau Cottage. At this point it should be pointed out that the accounts of the critical events related by the two (2) State's witnesses (McElroy and Roth) are at variance with the testimony of the Grievant. Thus the stories told by these witnesses who were present at Lankenau Cottage, on or about August 11, are set forth.

While the clients were fed on the patio, McElroy was "doing the kitchen serving". She indicated that a door leads out to the patio through which she carried the food from the kitchen. The Grievant, Roth and Grimsley were feeding the clients, including Client G.G. Client GG has behavior problems which include the refusal to eat and throwing his food and beverages at "meal time". On the day in question, Client CC was strapped to a wheel chair "because he was combative" according to McElroy. The evidentiary record indicates that Client GG was throwing food at the Grievant and spitting his food "at people and on the ground".

When the clients had finished their meal, McElroy said that the Grievant asked Grimsley to fill a "mop bucket full of water" and bring it to him. While Grimsley came through the kitchen, McElroy said that she told her that the Grievant needed water to clean the patio. Grimsley came back through the kitchen with the bucket of water and gave it to the Grievant, according to McElroy. She continued with her testimony by stating that the Grievant dumped the bucket of water on Client CC's head.

After being reminded on cross-examination that in a discussion with Union staff representative John Gersper on February 26,1992 she said that she did not see the Grievant pour the bucket of water over Client GG's head, McElroy said that she "heard" the bucket of water "get dumped" and she "went out the door".

She went on to state that the Grievant held the bucket and that the water "had already been poured" over Client GG who was wearing a helmet. McElroy added that she "heard the water gush" and that Client GG "was wet from head to toe " - - "he was completely wet". She said that the "quantity of water indicated that a full bucket of water was poured" on Client GG.

Turning to Roth's testimony, she said that she was on the patio serving supper to the clients on August 11, 1990. While standing “in front of the door in order to get the food in and out”, Roth said that she heard the Grievant ask Grimsley to get a bucket of water "which she did". After giving the bucket of water to the Grievant, he proceeded to pour the bucket of water over Client GG's head.

Finally, there is the Grievant's story. The Grievant said that he served supper on the day in question when the clients ate their meal on the patio of Lankenau Cottage. While working the shift, the Grievant was classified as “a floater” at the cottage which included such duties as relieving staff on breaks, setting up in the kitchen, and serving meals pursuant to dietary orders.

When the "food cart came in” the Grievant said that he picked up the dishware and utensils. He observed Client GG sitting at a picnic table. Although he did not remember which client was sitting next to Client GG, the Grievant said that he was getting angry at the client. Before serving the meal, the Grievant testified that he removed Client GG from where he was sitting. He did so by getting a chair and placing Client GG "by himself to protect himself and others".

The Grievant went on to state that he did not begin to serve Client GG his meal until he finished serving the other clients. Upon getting Client GG’s tray, the Grievant said that he pulled up a chair and sat directly in front of him with his meal and two (2) glasses of water (“one (1) glass of water and the beverage for the meal”). According to the Grievant he placed one (1) glass of water on the arm of Client GG's chair and the other glass of water was placed between his legs. The Grievant said that he had his plate in his hands. He went on to state that Client GG proceeded “to eat on his own" and he became "upset again". The Grievant indicated that he threw his plate of food on himself and some of the food "ended up on him (the Grievant). Continuing with his testimony, the Grievant said that Client GG knocked over the glass of water which was located on the arm of the chair, on himself and he took the other glass of water and threw it “on himself and me”. The Grievant said that "part of (Client GG's) body was wet from midchest to above the knees". The Grievant denied that he dumped a bucket of water over Client GG's head.

McElroy, Roth and Grimsley who was subpoenaed to appear at the hearing but failed to do so, did not report or document for their supervisor that the Grievant poured a bucket of water over Client GG's head until October 3,1990, some two (2) months after the episode in question. On September 17, 1990, the Agency conducted an investigation into patient abuse. In response to specific questions asked by the investigator concerning her abuse of patients, McElroy admitted her involvement in such incidents. She also indicated to the investigator that she did not know of any other episodes of patient abuse involving other members of the staff. As a result of her admission to the investigator on September 17, 1990 that she was involved in patient abuse. McElroy was disciplined. Roth was also charged with patient abuse by the Agency investigator and admitted to her participation in incidents involving such abuse.

McElroy indicated that she never found out the identity of the person who reported that she had committed acts involving abuse of patients. She added that she did not know whether the Grievant reported her acts of patient abuse to the authorities. McElroy said she “assumed something but there was no proof” that the Grievant reported her to the authorities. Roth denied that there was “any contact" with McElroy and Grimsley before stepping forward on October 3, 1990 and providing information to the Agency on the Grievant's act of pouring a bucket of water over Client GG's head.

As a result of the information provided by McElroy, Roth and Grimsley to their supervisor on the Grievant's conduct on or about August 11, an investigation was undertaken by the Agency which led to the termination of the Grievant on November 27, 1990.

DISCUSSION

The parties stipulated that the issue to be decided by the Arbitrator is as follows: "Was the Grievant removed for just cause in accordance with Article 24.01 of the collective bargaining agreement? If not, what shall the remedy be?"

From the evidence presented at the hearing, the testimony of McElroy and Roth of the event of August 11, 1990 at Lankenau Cottage is at variance with the account provided by the Grievant. Their testimony is in sharp conflict. Thus, it is important to determine what happened, which witnesses to believe and what testimony to accept. In short, credibility issues are at the core of the dispute between the parties.

After carefully examining the evidentiary record, I am persuaded that the Grievant poured a bucket of water over Client GG's head on or about August 11, 1990. I find that the testimony provided by McElroy and Roth on the events in question is more plausible than the account given by the Grievant. I have given great weight to various details of the events provided by both McElroy and Roth which support the plausibility of their stories. Thus, McElroy said that doing "kitchen serving", Grimsley came through the kitchen floor and said to her that the Grievant needed water to clean the patio". McElroy went on to state that on her way back through the kitchen, Grimsley carried a bucket of water. Moreover, McElroy saw Grimsley hand over the bucket of water to the Grievant. Roth said that while serving supper on the patio, the Grievant asked Grimsley to get a bucket of water “which she did”. Furthermore, although McElroy did not see the Grievant pour the bucket of water over Client GG's head, she observed the bucket go out the door. After the bucket was handed to the Grievant, she “heard” the bucket get dumped and she “went out the door”. Further into her testimony, she “heard” the water “gush" and she observed Client GG to be "wet from head to toe". Roth was on the patio in front of the door and saw the Grievant dump the water over Client GG's head.

I find that the testimony of McElroy and Roth establishes what happened on or about August 11 at Lankenau Cottage. I do not believe that both McElroy and Roth fabricated their testimony in indicating that the Grievant requested Grimsley to get a bucket of water. Apparently, Grimsley was under the impression that the Grievant wanted the "mop bucket” to clean the patio. To conclude that McElroy and Roth plotted and constructed a story about a bucket of water that the Grievant requested Grimsley to obtain for him which he proceeded to dump over Client GG's head, while clients were eating supper on the patio of Lankenau Cottage is unreasonable. The manner in which McElroy and Roth testified about the events was credible and trustworthy. The various details of their testimony convinces me that their story is convincing.

Roth's testimony was especially persuasive. She observed the Grievant pour the bucket of water over Client GG's head. She quickly added that she "wished that she had not” seen him do it. Roth's regret in disclosing what the Grievant did was obvious by the manner in which she testified. She indicated that she “was not proud” of her “part in this" and that she "did not want to see” the Grievant “lose his job”. I cannot believe that the pain and difficulty with which Roth testified was feigned. Her testimony was convincing and buttressed by McElroy's testimony.

On the other hand, I found the Grievant's testimony about the events that occurred on the patio of Lankenau Cottage unconvincing. The Grievant described Client GG as a “hostile” person who has a tendency to throw food at "meal time". He added that he has "a tendency to throw objects, such as books, at the staff and other clients". The Grievant indicated that Client GG also kicks, hits and spits in the face of people. Indeed, before the episode in question took place, the Grievant said that Client GG was sitting at a picnic table and getting angry at a client that he was unable to identify. He therefore removed the Grievant and placed him away from the Clients to protect himself and to protect others". The Grievant indicated that Client GG Grievant indicated that Client GG was wet because the Grievant became angry again and knocked over two (2) glasses of water; one (1) glass which he placed between his legs and the other glass of water he placed on the arm of his chair. Despite the Grievant's elaborate description of Client GG's behavior problems and hostile attitude, which he said that he displayed on the patio, the Grievant nevertheless placed two (2) glasses of water in locations, where it was reasonably foreseeable that Client GG would knock them over so that the water would spill on him. I find it difficult to comprehend why the Grievant would place the glasses of water where he did, given Client GG's hostile attitude and conduct at “meal time". Indeed, I find that his story is not credible.

It is significant that the "finding of fact” at the third step hearing which was issued by the State on April 2, 1991 found that "hours later" after the incident, "when questioned by an LPN who noticed the resident was wet, the grievant admitted throwing the bucket of water on the resident". At the pre-disciplinary conference held on October 19, 1990, Hearing Officer David A. Lynch, in relevant part, also established the following

facts”

"* * LPN Eubanks' statement identifies in detail a discussion with Mr. Diss (the Grievant) that discussion acknowledged by Mr. Diss, as having occurred, but he did not state he throw water on the resident. Diss did acknowledge resident GG being wet from a glass of water GG spilled during the meal * *."

The Grievant provided testimony on his discussion with Eubanks who was not a witness at the hearing. He said that after dinner time, she came through the cottage that evening to “pass meds”. The Grievant said that she noticed that Client GG was wet. According to the Grievant, Eubanks “asked another staff employee why [Client GG] was wet” although he "did not overhear" Eubanks' query. The Grievant continued with his testimony by stating that Eubanks discussed with him that Client GG was wet before the clients left the patio area. According to the Grievant he “usually jokes around" with Eubanks and when she asked him why Client GG was wet, he replied: "Do you want the truth or do you want a lie?" He said that she responded by stating that she wanted the truth. The Grievant indicated that he told her that [Client GG] "spilled liquids on himself at supper”.

The Grievant's reply "do you want the truth or do you want a lie" to Eubanks' query as to why Client GG was wet, is to say the least, highly unusual. Client GG's wet condition was so apparent to Eubanks that she wanted to know why Client GG was wet. Based upon common experience which informs judgment to a great extent, knocking over two (2) glasses of water, would not have been noticed to the extent that it would have prompted Eubanks' curiosity. Moreover, the clients were eating or had just finished their supper. The inference that a beverage was spilled on Client GG would have been obvious inference to be drawn had there been, in fact, two (2) glasses of water spilled on Client GG. However, I believe that Client GG was wet from the head down, rather than “mid-chest to above the knees” to prompt Eubanks' query.

In any event, the conflicting testimony of McElroy and Roth on the one hand and the Grievant on the other, intersect at a crucial point, namely that Client GG was wet. It is around that guidepost that I have constructed the most plausible picture of what happened, influenced by the details of the testimony of McElroy and Roth and the manner in which they described the events. On balance, I find that the credibility of the testimony of McElroy and Roth closely conforms to the most plausible picture of what happened.

INVESTIGATION OF SEPTEMBER 17, 1990

It is undisputed that McElroy and Roth admitted to their involvement in acts of patient abuse when they were questioned by an investigator on September 17. Moreover, in answer to the "investigators'" question concerning abuse by other staff members, McElroy and Roth each responded by answering “no” or “not that I can think of”.

Both McElroy and Roth indicated that when each of them were interviewed on September 17, they were not specifically asked about the occasion when the Grievant poured the bucket of water over Client GG's head. It should be noted that the failure by McElroy and Roth to report patient abuse is in and of itself an offense. Thus, both McElroy and Roth were subject to a dilemma on September 17, 1990. The offense that the Grievant committed at Lankenau Cottage occurred on or about August 11. To be silent about the Grievant's offense for roughly five (5) weeks after the episode in question would have constituted an admission of their complicity in the Grievant's act. Their failure to disclose to the investigator on September 17, the events of August 11 does not alter the conclusion that based on the evidentiary record, the Grievant committed the offense in question.

OCTOBER 3, 1990

It is undisputed that on October 3, 1990, Grimsley, McElroy and Roth disclosed to their supervisor that the Grievant poured a bucket of water over Client GG's head. I have concluded that Roth was untruthful in denying that she, Grimsley and McElroy planned on divulging to the authorities what occurred on or about August 11. The evidence warrants the conclusion that Grimsley, McElroy and Roth surmised that the

Grievant provided the investigator with information on acts of patient abuse by them. Thus, I have inferred that to retaliate against the Grievant, Grimsley, McElroy and Roth decided to disclose the Grievant's offense which occurred in August, 1990, to the Agency. The act of retaliation by Grimsley, McElroy and Roth does not diminish the weight of the testimony of McElroy and Roth in describing the events that occurred on August 11. Their "payback" to the Grievant for revealing what occurred at Lankenau Cottage in August, 1990 constitutes a quid pro quo for their belief that the Grievant provided information to the Agency that they participated or were involved in past incidents of client abuse. In disclosing such information to their supervisor, McElroy, Grimsley and Roth implicated themselves in a serious offense, namely, the failure to report abuse for which discipline is imposed. Despite the risk of discipline, Grimsley, McElroy and Roth provided information to their supervisor concerning the Grievant's offense on or about August 11. There is no question but that McElroy and Roth retaliated against the Grievant. However, such action by McElroy and Roth does not warrant the conclusion that the story they provided to their supervisor is not true and was fabricated. McElroy and Roth's motive merely imposes a requirement that their testimony must be given detailed and rigorous scrutiny. After complying with this requirement, I find that their testimony is credible and constitutes an accurate version of What occurred on or about August 11, 1990.

DISCUSSION WITH GERSPER ON FEBRUARY 26,1992

On cross-examination, McElroy acknowledged that she recalled a conversation with Union staff representative, John Gersper on February 26,1992. She was reminded that she said “no" when she was asked by Gersper whether she had witnessed the Grievant pouring the bucket of water over Client GG's head. She indicated that when she spoke to Gersper on February 26, she did not recall “one-half of what happened". After “reading what had happened” to refresh her memory, McElroy said at the hearing that she did not actually see the water poured over Client GG's head. But she added that she saw the bucket go out the door and was handed by GrimsIey to the Grievant. McElroy said that she heard the bucket get dumped and she went out the door.

I have concluded that although she did not observe the Grievant pour the bucket of water over Client GG's head, she saw Grimsley hand the bucket to the Grievant, and "heard the bucket get dumped". As she indicated later in the testimony, she heard the water "gush" and Client GG was "wet from head to toe"--"he was completely wet". I have inferred solely from McElroy's testimony, that the Grievant poured the bucket of water over Client GG's head.

Roth acknowledged that in a telephone discussion with Gersper on February 26, 1992, she was asked if she had seen the Grievant dump water on Client GG. She admitted that she responded by stating that she "did not remember him throwing water” on Client GG but she “saw" him "all wet”. Roth's statement is at variance with her testimony at the hearing in which she said that she saw the Grievant pour the bucket of water over Client GG's head.

I am persuaded by Roth's testimony that she saw the Grievant pour the bucket of water over Client GG's head on the patio of Lankenau Cottage. The Grievant indicated that she wished that she had not seen the act of the Grievant. She went on to state that she was not proud of her part in what occurred on the patio. In what was especially difficult for her, Roth said that "maybe if [she] blocked out what happened" on or about August 11, the incident did not take place, but she quickly added it did happen no matter how much I hate to recall it". Roth indicated that she "did not want to see [the Grievant] lose his job". In light of these weighty considerations I believe that the Grievant indicated to Gersper that she did not remember seeing the Grievant dump a bucket of water on Client GG but she saw him all wet. However, I have concluded that her testimony was truthful at the hearing, when she indicated that she had observed the Grievant pour a bucket of water over Client GG's head.

CLIENT ABUSE

The Grievant's act of pouring a bucket of water over Client GG's head constitutes a -serious act of client abuse. The Grievant's act constitutes a battery and physical abuse against a helpless client in the charge of

the Grievant. The Grievant was also terminated for his failure "to report and document incidents of abuse “[at] Lankenau Cottage". This case involved one incident. It is hardly expected that the Grievant would report and document the very incident of abuse, which he had committed on or about August 11.

It should be noted that on December 2, 1991, the State's criminal case against the Grievant was dismissed by the Cambridge Municipal Court. The Court's journal entry indicated that although “probable cause existed for the arrest and filing of criminal charges" against the Grievant, “due to the lack of evidence”, the State was unable to "prove the case beyond a reasonable doubt". The Cambridge Municipal Court decision does not constitute an exoneration of the Grievant. The quantum of proof necessary for a criminal conviction as well as the judicial forum is different than the quantum of proof necessary to establish the contractual standard of "just cause" for discipline and discharge within the arbitral forum. I cannot give much, if any weight to the decision of the Cambridge Municipal Court.

PENALTY

The termination of the Grievant implicates Article 24.01 of the Agreement which provides as follows:

"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."

The State argues that if I find that the Grievant has committed an abuse of a patient or another in the care or custody of the State * *, pursuant to Article 24.01, I have no authority to modify the termination. On the other hand, the Union indicates that the correct interpretation of Article 24.01 is found in the Juliette Dunning arbitration decision that was rendered by Arbitrator David M. Pincus on October 31, 1987. In his decision, Arbitrator Pincus commented on the scope of the Arbitrator's authority in discipline cases under Article 24.01, as follows:

“* * The standard specified in the previously mentioned section (Section 24.01) contains an explicit just cause requirement for <u>any</u> (emphasis added) disciplinary action. The sentence that follows does not modify but supplements the previous sentence. Thus, 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. The purpose of this provision is to prevent an arbitrator from holding that an employee was terminated for proper cause on the basis of certain misconduct, but that termination for such misconduct should be reduced.”

I have concluded that the interpretation by Arbitrator Pincus is reasonable and consistent with the language expressly contained in Article 24.01.

Based upon the evidentiary record, I cannot conclude that the State proved by clear and convincing evidence that the Grievant was discharged for just cause. He has been employed by the State for a total of fifteen (15) years, five (5) of which he has served as a TPW at the Cambridge Developmental Center. His evaluations dating back to 1971 on the whole are better than satisfactory. In the absence of evidence to the contrary, I have concluded that the Grievant has been a good employee during his tenure with the State.

Despite these considerations, the Grievant has committed a serious act of physical abuse against Client GG. Client GG did not consent to the Grievant's act of pouring a bucket of water over him. The non-consensual act by the Grievant was demeaning to Client GG and impaired his self esteem. I have inferred that the Grievant poured the bucket of water over Client GG because he was angry about Client GG's behavior in throwing food during meal time". The Grievant's conduct was hostile and humiliating in victimizing a helpless client in his charge. The Grievant's offensive act has the foreseeable consequence of

intimidating Client GG. Although the Grievant's deliberate and hostile conduct was serious, it did not reach the level at which termination is appropriate, given his satisfactory record with the State.

The Grievant has committed the offenses of "physical abuse", "failure to act/client neglect" and “unapproved behavior intervention inconsiderate treatment". Under the State's "Standard Guidelines for Progressive Corrective Action", the guidelines call for a "10 day suspension to removal” for the “1st offense” of “failure to act/client neglect" and "unapproved behavior intervention inconsiderate treatment". The guideline for the "1st offense" of "physical abuse" is “20 day suspension to removal". Due to the serious offense committed by the Grievant, the period of time since his termination by the State shall constitute a disciplinary suspension. The Grievant is to be reinstated without back pay.

AWARD

In light of the aforementioned considerations, the State failed to prove by clear and convincing evidence that the Grievant was terminated for just cause.

However, due to the serious nature of the offense committed by the Grievant, the period of time since his termination from State employment shall constitute a disciplinary suspension.

The Grievant is to be reinstated without back pay.

Dated: April 20, 1991
Cuyahoga County
Cleveland, Ohio

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295