

ARBITRATION DECISION NO.:

443

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of MRDD, Gallipolis
Developmental Center

DATE OF ARBITRATION:

April 23, 1992

DATE OF DECISION:

June 6, 1992

GRIEVANT:

Marsha Clary

OCB GRIEVANCE NO.:

24-07-(91-10-28)-0439-01-04

ARBITRATOR:

Clarence D. Rogers

FOR THE UNION:

Richard Sycks

FOR THE EMPLOYER:

Michael Fuscardo

KEY WORDS:

Removal
Patient Abuse
Violation of Client's
Treatment Plan

ARTICLES:

Article 24 - Discipline
§24.01-Standard

FACTS:

The grievant worked at Gallipolis Developmental Center. The grievant was removed after a Program Supervisor claimed that she saw the grievant abuse a patient by striking him in the back. An investigation confirmed that lacerations, redness and blood were found on the patient's body. The grievant's explanation was that she intervened to prevent the patient from banging his head against a window. Apparently, the client became upset when the grievant refused to give him chewing tobacco. The grievant admitted using physical force to stop the patient but denied striking or abusing him or calling the grievant an "idiot".

EMPLOYER'S POSITION:

The State urged the Arbitrator to uphold the removal. Because force was used to modify a client's behavior and such force was not a part of the client's individual program plan, the State argued that the acts of force constituted client abuse. The State offered the testimony of a Program Supervisor who stated that she saw the grievant strike the patient in the back with a closed fist and remark "idiot" as the grievant was walking away. The State offered the testimony of a second Program Supervisor who stated that the proper method of intervention was to try verbal intervention first. If unsuccessful, the grievant was required to try to get the patient away from clients or objects with which the client was violently interacting. The witness stated that under any circumstance the force used by the grievant was improper and violative of the client's plan. The witness added that using a harsh tone and grabbing a client's shirt was considered abuse.

UNION'S POSITION:

The State failed to prove that the incident in question was client abuse. Moreover, violation of the client's plan alone did not constitute client abuse; therefore, the grievance should be sustained. The Program Supervisor, who supposedly witnessed the client abuse, was unable to identify the alleged victim during the investigation. Instead, she ordered examinations of two patients who she felt fit her description of the victim. The second Program Supervisor said that the client was under a program for aggression and that the client was prone to inflict injury upon himself. This same witness confirmed that the client suffered from seizures, that it was not unusual for the client to have bruises and abrasions and that the grievant was a good employee.

The RN who examined the two clients stated that she did not recall any injuries to the client's back; the injuries she noted were on the front of the shoulder. The LPN who assisted with the examinations stated that there was no way of knowing how the client's injuries were caused. The facility Police Officer who conducted the investigation testified that no one was able to corroborate the alleged assault nor the remarks supposedly made by the grievant. Three TPW's testified as well. The first, who was only 2 to 3 feet away during the alleged abuse, stated that she did not see nor hear the grievant abuse the client. All three TPW's contended that the shirt offered into evidence by the State at the hearing was not the one worn by the client on the evening in question. The third TPW noted that the two clients looked nothing alike.

ARBITRATOR'S OPINION:

The Arbitrator emphasized the importance of following client intervention plans, but recognized that a client's plan was only the ideal method of intervention. The Arbitrator acknowledged that it was impossible for any plan to provide a solution for every circumstance which might arise. The Arbitrator noted that staff members were required to react quickly and reasonably in a variety of difficult situations. The Arbitrator felt it necessary to consider all the circumstances in determining whether the grievant breached her duty of good judgment. In so doing, the Arbitrator held that the State failed to convincingly demonstrate that the grievant physically abused the client. Further, the Arbitrator held that the grievant's violation of the client's plan alone was insufficient to warrant her removal.

AWARD:

The grievant was reinstated with benefits and seniority. Her removal was reduced to a 90 day suspension.

TEXT OF THE OPINION:

VOLUNTARY ARBITRATION PROCEEDINGS BEFORE CLARENCE D. ROGERS

In the Matter of Arbitration
Between

DEPT. OF MRDD AND GALLIPOLIS

DEVELOPMENTAL CENTER

and

**OCSEA, LOCAL 11 AFSCME,
AFL-CIO**

CASE NO.:

24-07-(91-10-28) 0439-01-04

DISCHARGE OF:

MARSHA CLARY

OPINION AND AWARD

APPEARANCES:

FOR THE EMPLOYER

MICHAEL FUSCARDO,
LABOR RELATIONS SPECIALIST
RODNEY SAMPSON, ASST. CHIEF,
CONTRACT COMPLIANCE
CHARLES WILDER,
COMPLIANCE OBSERVER
DONALD WALKER,
GALLIPOLIS D.C. LABOR
RELATIONS OFFICER
ROBIN BLEDSOE,
GALLIPOLIS D.C. LABOR
RELATIONS OFFICER
JANET SNYDER, WITNESS
ROBERT WERRY, WITNESS
SHERRY MITCHELL, WITNESS
LISA HOGAN, WITNESS

FOR THE UNION

RICHARD SYCKS,
STAFF REPRESENTATIVE
SHARON BROWN, STEWARD
MARSHA CLARY, GRIEVANT
CLARENCE KIRBY, WITNESS
VIRGINIA DONNES, WITNESS
ANGELA MANNON, WITNESS
DANNY BROWN, WITNESS
I. SUBMISSION

This hearing in this cause was scheduled and conducted at the offices of the Gallipolis Developmental Center, 2500 Ohio Avenue, Gallipolis, Ohio on April 23, 1992. The parties stipulated that the matter was properly before the Arbitrator and that there were no procedural problems which would interfere with proceeding to hearing. Post-hearing arguments were to be submitted on May 1st, but by mutual consent

time was extended to May 4, 1992. This Opinion and Award was due 30 days thereafter. By mutual consent, time was extended to June 8, 1992.

II. ISSUE

The stipulated issue is: "Was the Grievant removed for just cause? If not, what shall the remedy be?"

III. BACKGROUND

The Grievant, Marsha Clary, was discharged after an allegation of patient abuse was made by Janet Snider, a Program Supervisor at the Gallipolis Developmental Center. Ms. Snider said she observed the Grievant strike Randy C. with a closed fist. An investigation was conducted which verified that there were lacerations, reddened areas and blood found on certain parts of the body of the alleged victim.

The Grievant said the patient was banging his head on the window and she intervened in an effort to prevent further injury to him. Grievant said she used physical force to remove him from the window, but did not strike or abuse the patient as alleged.

IV. EVIDENCE PRESENTED

The first witness called by the State was Janet Snider, who has been employed since August, 1989 as an Administrative Assistant and Program Supervisor. She is responsible for coordinating the services of the clients, which includes the goals, needs and services of the individual clients.

On August 11, she was Administrator on call. She went to living area #6049-5 on the 5th floor by using the stairway. As she walked toward the office area, she said she saw the Grievant take a step toward a client who was standing in front of the office area and strike him in the back with her closed fist. Grievant then directed the client to sit down. Grievant walked towards Snider, shook her head, looked at the floor and said "idiots". After she struck the one client and directed him to sit down, she then said: "You, you, you, sit down". Snider said there were other staff persons present whom she did not see until she got closer to the office area.

When she entered the office, Virginia Donnes was on the telephone. The other staff person, whom she did not see until she approached the office area, was Angela Mannon. She later saw Danny Brown. She said she did not confront the Grievant at that time because she said she was shocked and could not believe she saw Grievant strike a client. She left the area and went to the second floor to call her immediate supervisor to get instructions on how to deal with the problem and how to proceed with the investigation. Her supervisor told her to call security and Dr. Dey. She called Officer Kirby, who told her to go back to the 5th Floor in the company of another staff person to identify the client who was the victim of the assault. Snider, Officer Kirby and Sherry Mitchell, the registered nurse on call, went to the 5th Floor together. Officer Kirby announced that he was doing an investigation and immediately removed the Grievant from the 5th floor.

Ms. Snider was asked to look over the clients and point out the victim, since she did not know the names of the clients. She said she was unable to identify which particular client it was because she saw two clients who she felt fit the description of the person who was assaulted. She then asked that both persons be examined by the nurse to determine which, if either, had any injuries. She was told that the person who had apparent injuries was named Randy C..

On cross examination Snider acknowledged that in one of her statements she did not mention that the Grievant called the clients, "idiots". The witness stated that to the best of her knowledge, there was not another witness to what she saw and she listed the two staff persons who were in the area as witnesses on the investigation form without the direct knowledge that they had seen anything. Snider acknowledged that in her statement she said the Grievant had struck a client wearing dark clothing.

The next witness was Bob Werry, a Program Supervisor for GDC who has worked there 17 years. As part of his duties he writes programs, trains the staff on policies and programs for the current year and handles paperwork for meetings on the clients. He said Randy C. is 29 years old and mentally falls within the

range of profound mental retardation to severe profound mental capacity. At times he may be verbal, but his verbalization is mostly eclectic, i.e., he repeats what others say to him and mimics other people. Usually when Randy approaches the office area he is seeking some kind of chewing tobacco. The treatment program in place for Randy at that time was designed for Randy's self-interest behavior and for aggression. The program was set up to prevent him from injuring himself when he gets into that mode. If Randy displays a self-interest behavior, staff is to intervene immediately for that behavior. First they should verbally try to redirect Randy away from the behavior which is occurring. If that should fail, then they are to try to get Randy away from clients or objects that he is acting up with in order to prevent injuries.

Under his program, staff is authorized to hold Randy's hand for up to one minute to see if he will stop his action. Also, Randy is to be redirected away from the situation and taken to a quiet area; away from other clients. If he is aggressive, he should be taken away from the circumstance which he is in. If a staff person were to see Randy C. banging his head on a window, the staff person should go up to Randy and tell him to stop in a verbal voice and if he does not stop, they should use some kind of intervention to prevent the client from hitting his head against the window; to keep from doing damage to himself and to the window. The client should be redirected and an attempt should be made to get the client involved in some other activity. The purpose is to get his mind off that behavior and get him into some other activity. If he is acting out with his hands, the proper physical intervention would be hold his hands for not more than one minute. The staff should stay with the client until the client settles down, be it 15 minutes or hours. The witness said that the behavior programmed for Randy C. called for verbal intervention. Physical intervention was not relative to his program. Werry said if Grievant had followed the program, there should have been no physical intervention to the extent that there was. He said although some physical intervention may have been needed, his investigation indicates that the wrong physical intervention was used. Werry said Grievant followed the program up to the point where she grabbed his shirt to turn him around; that force should not have been necessary with Randy. Grabbing a resident by the shirt, using a harsh tone of voice, is considered abuse. The witness testified that at the pre-disciplinary hearing Ms. Snider demonstrated that Randy was struck in the back shoulder area. Werry stated that Randy is a person who suffers from seizures; and it is not at all unusual for him to have bruises and abrasions on his body.

Werry said the Grievant was a good employee and he had no problems with her. She followed the client's work scenario well. The only negative thing he could say was that at times the Grievant displayed a boisterous voice.

Sherry Mitchell, the registered nurse who was called to examine Randy, testified that Jan Snider wanted two clients to be examined because she was not sure which client was the victim. She examined Gregory but found no injuries. She then examined Randy. She found a laceration on his head and other areas on his arm and left mid-back. They shaved him, prepped him, cleaned up the area and then dressed and bandaged the lacerations. There was moderate, fresh bleeding, which was not dry and crusty. Her opinion was that the injury looked recent. He had a reddened area on his left side mid-back, small abrasions on his right shoulder, and a dark blue bruise on his right upper arm.

The witness stated that Jan Snider told her that Randy was struck in the back. She does not recall any injuries to the right rear back of Randy's shoulder. The injury that she noted was the right interior shoulder, which was the front area of Randy's shoulder.

Lisa Hogan was the next witness. She testified that as an LPN she was called in to assist the registered nurse. She observed a laceration on the right side of his head and bright red bleeding. She said she has no way of knowing how the injuries were caused.

Clarence Kirby, a police officer for the facility, testified that he initiated the investigation of August 11, 1991. The investigation was the result of receiving a call from Snider indicating that she had observed client abuse. Kirby called the superintendent, who advised him to place the Grievant on administrative leave forthwith. The officer testified that the other staff persons present did not observe or corroborate the statements of Janet Snider. He said neither the physical assault nor the alleged words were corroborated by any witness. Kirby testified that he went back to the scene to take pictures and confiscate a shirt which was worn by Randy. He sealed the shirt in the evidence bag in which it has remained since that time.

Virginia Donnes, a Therapeutic Program Worker, testified that the clients in that area act out and have to

be controlled. When they act out, the workers have to follow the behavior modification program. She stated that it is common for the residents to act out in that area. Donnes stated that she has been kicked and scratched while on the job. On the day in question, it was noisy because it was around supper time. She and others were in chairs watching wrestling on television. She received a phone call and went into the office to answer it. She was facing a wall when the incident occurred. Jan Snider did not tell her that she had seen a patient abused and she did not witness same. She became aware of the charges only when Kirby questioned her. She stated that the shirt Randy was wearing that night, which she gave security, is not the same shirt shown at the hearing. She did not hear or see Marcia Clary strike Randy or call him an idiot; and she was only two or three feet away. She said if a patient acts out, there should be intervention. The next witness was Angela Mannon, who has been employed for 8 years as a Therapeutic Program Worker. She stated that she was sitting in the lounge area watching television with some of the other staff and patients. She became aware that Marcia Clary was charged with abuse when Security questioned her and asked that she make a statement. She said she was present when Randy and Greg were given physical examinations. Each patient was examined twice. The examinations consisted of reviewing the head, face, arms and hands of both patients. She said that Sherry Mitchell looked at Jan Snider and shook her head, "no". The witness was asked to go get a washcloth. When she got back, there was a third physical examination being conducted on Randy. This time she saw him with his shirt off. She said the shirt presented to her at the hearing is not the shirt that she presented to Kirby on the evening in question. She did not see Randy being struck by the Grievant nor did she hear the Grievant say anything to or about Randy.

On cross examination, she said when SIB occurs staff is required to intervene. If there is patient behavioral program for the patient, staff must follow the program for him/her.

The next witness was Danny Brown, a Therapeutic Program Worker for 5 years at Gallipolis. He knew Jan Snider from a previous situation where she was his son's Social Worker. On the day in question, he had small talk with Snider. They talked about his son and whether or not there were any citations for Medicaid violations, since there was an area with only four beds. Snider did not tell him that she had observed any person being abused. He became aware of this allegation only when security escorted Grievant out of the living area. He did not see Randy hitting his head or any parts of his body on the door or window, nor did he observe anyone abusing Randy. He said Randy's shirt was dug out of the dirty laundry. The shirt that Randy was wearing that night was not the same shirt that was introduced into evidence. He said Randy and Greg do not look anything alike.

The Grievant, Marcia Ann Clary, testified that she has been employed at the center for a total of 7 years. She was in her regular, daily work assignment on the day and time in question. The staff and clients were watching television and getting ready for supper. Randy C. walked up to a window and asked for chewing tobacco. Grievant told him he could not have any tobacco. Randy then stepped up to the window and began hitting his head on the window. The Grievant told him to quit and come to her. She walked up to him and took his wrist; he jerked away and hit his head again. She tried to intervene by grabbing his shirt to pull him away from the window, since everything else in his behavior program had failed. She said when Randy is acting out, his behavior program calls for: (1) tell him to stop in a firm voice; (2) attempt to separate Randy from the object with which he is acting out; (3) hold his hand if he is hitting his hand; (4) intervene immediately if he is harming himself. As this was happening, the Grievant noticed a person in the hallway, who turned out to be Jan Snider. Snider said nothing to Grievant about what she saw. Grievant said she was unaware of any allegations of abuse until she was confronted by the security person, who asked her if she had struck an individual that day. She denied that she struck Randy or called anyone a idiot. She said the shirt produced at the hearing was not the shirt Randy was wearing that night.

She was placed on administrative leave that evening and left the building.

V. POSITIONS OF THE PARTIES

EMPLOYER

The discharge should be upheld because the Grievant abused a patient by striking him with her fist and failing to follow the prescribed treatment.

UNION

The grievance should be sustained because the incident in question did not constitute abuse to a client\patient.

VI. CONTRACT PROVISION

ARTICLE 24 - DISCIPLINE

24.01 - Standard

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

* * *

G.D.C. ADMINISTRATIVE POLICY #4-77

III. DEFINITION

A. "Abuse/Neglect" means any act or absence of action inconsistent with human rights which results or could result in physical or emotional injury to a client; or any insulting or coarse language or gestures directed toward a client which subjects the client to humiliation or degradation; or any act depriving a client of real or personal property by fraudulent or illegal means; or any purposeful disregard of a duty or duties imposed or expected of an employee by statute, rule or professional standard and owed to a client by that employee.

VI. DISCUSSION

The care of the patients\clients entrusted to the State is a serious matter. The right of Randy C. (and others who happen to be housed in facilities such as the Gallipolis Development Center) to be free of unwelcome physical contact or abuse is a serious matter. The right of a staff person not to have his\her livelihood taken away by unfounded charges is a serious matter.

A major problem in cases of this type is one of proof. On one hand, an employee who is likely to commit abuse is not going to knowingly do it in the presence of a supervisor. On the other hand, because of the handicaps or mental retardation of those housed in the facilities, it is often difficult to get reliable testimony from the victims of abuse. Therefore, careful consideration must be given to objective findings and issues of credibility or other extrinsic factors.

In this case the objective findings come from the testimony of the two nurses who examined Randy. From that evidence we know that he had certain lacerations, reddened areas and blood. The origin of those injuries is undetermined since Randy suffers from seizures and it is not uncommon for him to self-inflict those kinds of injuries. Also, more than one witness observed Randy bang his head against the windows during the time in question.

The Grievant readily acknowledges that she used some force to keep Randy from causing himself physical harm when he was denied tobacco. The disagreement comes from the Grievant's description of what she did versus the testimony of Ms. Snider, who says she saw Grievant strike Randy's back with her fist. If there was a physical assault, then there is abuse. If there was physical force used to keep the client from inflicting physical harm, then the question becomes whether or not that force was excessive.

It is the State's contention that if force was used to intervene to modify the client's behavior; and if the force used was not a part of the client's Individual Program Plan, then the acts of force constitute abuse. The Union's response is that the Grievant is not charged with violating the Individual Program Plan; and violation of the Plan does not, alone, constitute abuse.

The evidence produced at the hearing makes it clear that the employees at G.D.C. have a very high responsibility to those entrusted to their care. That responsibility should not be taken lightly. When professional staff prepares an intervention plan to be followed at the needed times, much care should be exercised to follow that plan. At the same time, a plan is just that. It is impossible for a plan to present solutions for every and all circumstances which may be presented to a staff person. For that reason, staff must react quickly and reasonably under all of the circumstances no matter how difficult they may be. Common sense and good judgment must be used at all times. But, consideration must be given to the totality of the circumstances in determining whether abuse occurred or whether there was a breach of good judgment.

After a careful review of all of the evidence, I cannot say that this arbitrator is satisfied that there has been a clear and convincing showing that the Grievant physically abused the patient/client. That the Grievant used the word "idiot" seems clear. However, it was said to the supervisor and not to the client.

I do believe there has been sufficient evidence adduced which show that the Grievant failed to follow the proper course of action and did not use good judgment in dealing with the client. Under the circumstances of this case, that violation alone is not sufficient to satisfy the requirements needed to show abuse. However, it cannot be ignored in the disposition of this case.

AWARD

The grievance is hereby sustained in part. Pursuant to the guidelines, the Grievant shall be suspended for ninety (90) days without pay. She shall be reinstated and otherwise receive full benefits and seniority, except for that ninety (90) day period.

CLARENCE D. ROGERS,
ARBITRATOR

JUNE 6, 1992