

**ARBITRATION DECISION NO.:**

557

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Mental Retardation and Developmental Disabilities  
Applecreek Developmental Center

**DATE OF ARBITRATION:**

July 19, 1994

**DATE OF DECISION:**

September 21, 1994

**GRIEVANT:**

Rachel M. Baney

**OCB GRIEVANCE NO.:**

24-02-(93-07-23)-0776-01-04

**ARBITRATOR:**

Mitchell Goldberg

**FOR THE UNION:**

Steve Wiles

**FOR THE EMPLOYER:**

Georgia Brokaw

**KEY WORDS:**

Removal  
Patient Abuse  
Credibility  
Just Cause  
Burden of Proof  
Circumstantial Evidence

**ARTICLES:**

Article 24 - Discipline  
    § 24.01 - Standard  
    § 24.04 - Pre-Discipline

**FACTS:**

The Grievant was employed as a therapeutic program worker by the Ohio Department of Mental Retardation and Developmental Disabilities at the Applecreek Development Center. The Grievant had been employed at the facility for approximately two years prior to her removal. The Grievant was assigned with another employee to a particular residential area called "Living Area 22."

One of the residents for whom the Grievant and the other employee had responsibility was a resident

named John G. The Grievant had worked a double shift on April 25 and 26, 1993, until 6:00 AM on the 26th. On the morning of April 26, 1993, John G. was taken to the hospital where he was diagnosed as suffering from alcohol poisoning. His blood alcohol level was .395. The resident was placed in the Critical Care Unit of the hospital and placed on ventilation support. He remained in a coma for over 24 hours and was eventually discharged on May 4, 1993.

The bathroom cabinet containing hygiene products for the residents was found to be locked and it contained various receptacles of mouthwash and aftershave products which have alcohol as an ingredient.

The Grievant took care of John G. on a regular basis because she had a somewhat closer relationship with him than did the other employee. There were two periods of time in which the Grievant was alone in the living area without the other employee being present. The co-worker did not implicate the Grievant in any manner when she gave a written statement to the Applecreek Developmental Center Security Department on April 27, 1993.

The investigation remained ongoing. On June 1, 1993, the other employee advised Chief Davidson that the Grievant came to her home on Monday evening, April 26th. During the visit, the other employee stated that the Grievant admitted that she gave the resident eight bottles of Scope mouthwash to drink.

The Grievant was terminated for patient abuse, wherein this grievance arose.

### **EMPLOYER'S POSITION:**

The Employer demonstrated sufficient evidence to find that the Grievant was discharged for just cause. The evidence presented at the hearing, which consisted of not only the testimony of the other employee, but also other circumstantial evidence, established the Employer's case against the Grievant, notwithstanding the use of a higher standard of proof in these proceedings.

The act of abuse must have occurred on the third shift. The resident was in good condition well past midnight on April 26th. The Grievant was present when the injury to the resident occurred. The Grievant was the only person on the third shift who had a key to the hygiene cabinets where the personal hygiene products were kept.

The testimony of the other employee was not impeached and was consistent with the other circumstantial evidence. The Grievant's testimony and statements had inconsistencies. The Grievant was obviously motivated to protect her job security, even at the expense of being untruthful.

### **UNION'S POSITION:**

An allegation of physical abuse is tantamount to an allegation of criminal conduct. Accordingly, the Employer should have been required to prove its case by a higher standard or degree of proof than merely a preponderance of the evidence.

The testimony of the Employer's chief witness, the other employee who was working, was questionable and lacked credibility. In her first statement given to the investigators, the other employee made no mention of any mouthwash bottles. A month later, at the pre-disciplinary conference, she testified that the Grievant gave her a detailed account of how she divided the bottles of mouthwash which were in the locker and topped them off.

There were no eyewitnesses to the alleged event, and there were no empty containers found. The degree of proof in this case, therefore, was lacking, particularly when the high standard of clear and convincing evidence should be applied in order to find the Grievant guilty of patient abuse.

### **ARBITRATOR'S OPINION:**

The burden of proof in cases such as this, in which there were allegations of serious misconduct, should be higher than proof by a preponderance of the evidence. Nevertheless, a legal or academic analysis of the theoretical burden of proof was not particularly helpful to a resolution of the specific facts and circumstances of this case. This case came down to a resolution of the credibility of two opposing witnesses, the Grievant and her co-worker.

The circumstantial evidence pointed toward the Grievant, since she was the person with the responsibility for the care of the resident, and she was the person with access to and custody of alcohol products. The

testimony of the co-worker was very credible. The Union could not establish any ulterior motive on the part of the Grievant's co-worker to make untruthful statements. The Grievant, of course, was motivated to protect her job security and to protect her reputation.

When the circumstantial evidence was considered with the testimony of the co-worker relating to the admission by the Grievant, there was no reasonable conclusion other than to find in favor of the Employer and against the Grievant.

**AWARD:**

The grievance was denied

**TEXT OF THE OPINION:**

**ARBITRATION PROCEEDINGS**

IN THE MATTER OF THE  
ARBITRATION BETWEEN

**THE STATE OF OHIO  
OFFICE OF COLLECTIVE  
BARGAINING, OHIO DEPARTMENT  
MENTAL RETARDATION AND  
DEVELOPMENTAL DISABILITIES,  
PUBLIC EMPLOYER**

and

**OHIO CIVIL SERVICE  
EMPLOYEES' ASSOCIATION,  
PUBLIC EMPLOYEE ORGANIZATION**

**GRIEVANCE #:**

24-02-(7-23-93)-776-01-04

**GRIEVANCE OF:**

RACHEL M. BANEY

**AWARD AND DECISION**

This matter was heard on July 19, 1994 in Applecreek, Ohio. Appearances for the State of Ohio: Georgia Brokaw, Assistant Chief Arbitration, Carolyn Collins, MRDD, Labor Relations Officer, Mike Snow, Superintendent, Ross Davidson, Chief of Police, Dr. DeBart, Jim Kovacs, Director of Human Resources/Labor Relations, and Becky Samsa, Witness.

Appearances for the Association: Steve Wiles, OCSEA Staff , Ron Bittner, Chapter President, Glen May, Stephanie Sowers, Ed Lorson, and Rachel Baney, Grievant.

**I. INTRODUCTION**

The State of Ohio and the Ohio Civil Service Employees' Association, AFSCME Local 11, AFL-CIO ("Union" or "Association") are parties to a Collective Bargaining Agreement effective from January 1, 1992 through January 31, 1994. Article XXV of the Contract contains a multi-step grievance procedure resulting in arbitration if the grievance is not resolved. This arbitrator was selected to hear this case from a permanent

panel established under Section 25.04 of the Agreement. The grievance in this case was filed by Rachel Baney on July 23, 1993 after she was removed from her employment for allegedly participating in physical abuse to a resident on or about April 26, 1993. The Association demands as a remedy that the grievant be reinstated to her former employment with full back pay and benefits.

The issue for determination in this case is whether or not the grievant was removed from her employment for just cause. Article XXIV of the Agreement sets forth the standards and procedures with respect to discipline issued to employees. Section 24.01 specifically states that "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." Article XXIV contains a number of due process procedures for the benefit of employees who are charged with misconduct. Under Section 24.04, an employee is entitled to the presence of a union steward at an investigatory interview upon request if there is reasonable grounds to believe that the interview may be used to support some type of disciplinary action. An employee has a right to a meeting prior to the imposition of a suspension or termination. A predisciplinary notice is sent to the employee prior to the scheduling of a prediscipline hearing. The employer must provide a list of witnesses and supply documents used to support the possible disciplinary action. A meeting is conducted by the appointing authorities' designee and the Union is given the right to examine witnesses and offer additional evidence. The agency is required to make the final decision on recommended disciplinary action within forty-five (45) days after the conclusion of the prediscipline meeting, pursuant to Section 24.05. The employee and the Union are entitled to receive a written notification of the final decision of employer's discipline.

Under Section 24.07, no employee is required to take a polygraph test or otherwise be subject to discipline for refusal to take such a test.

The parties stipulated that all procedural requirements of the discipline procedure and/or the grievance procedure have been complied with and that this matter is properly before this arbitrator for a decision.

## **II. FACTS**

The grievant was employed as a therapeutic program worker (TPW) by the Ohio Department of Mental Retardation and Developmental Disabilities at the Applecreek Development Center. The grievant's job was to provide primary care to residents at the facility, including everything from assisting with hygiene to feeding and crisis intervention. The grievant had been employed at the facility for approximately two years prior to her removal. During the two year employment period, the grievant's record was unremarkable, containing only an oral reprimand for tardiness.

On April 25 and 26, 1993, the grievant worked a double shift. She worked the second shift from approximately 2:00 p.m. on April 25th until 10:00 p.m. and from 10:00 p.m. until 6:00 a.m. on April 26th. The grievant was assigned with one other TPW, Rebecca Samsa, to a particular residential area called "Living Area 22".

The two TPWs were responsible for the care of several persons with mental retardation and developmental disabilities. One of the residents for whom the grievant and Samsa had responsibility was John Gamache. Mr. Gamache was a profoundly retarded and disabled person. When the first shift TPWs reported for work on the morning of April 26th, Mr. Gamache was found sleeping at approximately 6:45 a.m. Mr. Gamache was routinely permitted to sleep until about 8:00 a.m. because of his propensity to stay up past midnight before retiring. When the staff members attempted to awake Mr. Gamache at approximately 8:00 a.m., he was found to be cold, unresponsive, and surrounded by a sweet, flowery smell, with brown emesis containing food particles on his bed and his clothes. He was immediately taken to the Wooster Community Hospital Emergency Room for treatment. One of the medical tests revealed that Mr. Gamache was suffering from alcohol poisoning. His blood alcohol level was .395. His diagnosis was as follows: coma; respiratory failure; bilateral aspiration pneumonia; alcohol intoxication; respiratory acidosis; metabolic acidosis; and mental retardation. Mr. Gamache was placed in the Critical Care Unit of the hospital and placed on ventilatory support. He remained in a coma for over 24 hours and was eventually discharged on May 4, 1993.

Mr. Davidson, the Chief of the Police Department of the Applecreek Development Center initiated an investigation on April 26th. The entire residential building, Ruby Hall, was searched for substances that contained alcohol. No empty containers or receptacles which contained alcohol were found. The bathroom cabinet containing hygiene products for the residents was found locked and contained various receptacles of mouthwash and aftershave products which contained alcohol. Mr. Gamache's clothing was obtained and sent to the Highway Patrol for analysis. However, because of the priority for testing requests due to the Lucasville Prison riot, no test results were ever performed or determined upon Mr. Gamache's clothing.

Witness statements were taken from Ruby Hall staff members for all three shifts. None of the statements observed any unusual actions or conduct on the part of Mr. Gamache. As stated earlier, the grievant worked a double shift beginning with the second shift at 2:00 p.m. through 6:00 a.m. on the third shift. The grievant took care of Mr. Gamache on a regular basis because she had a somewhat closer relationship with Mr. Gamache than did Ms. Samsa. Both the grievant and Ms. Samsa stated that Mr. Gamache had an uneventful night. He went to bed about 12:30 a.m. and he was up only one time during the night. There were two periods of time in which the grievant was alone in the living area without Ms. Samsa being present. Ms. Samsa took a lunch break during her workshift. Also, during the shift, a waterbed broke in the next living unit, Living Area 23. There was some confusion in the evidence as to whether or not the grievant spent any meaningful time helping with the clean up of the broken waterbed. However, it is undisputed that Ms. Samsa left Living Area 22 to help with the clean up in Living Area 23 for at least 20 minutes, leaving the grievant alone with the residents in Living Area 22. Ms. Samsa did not implicate the grievant in any manner when she gave a written statement to the Applecreek Developmental Center Security Department on April 27, 1993.

The investigation remained ongoing. On June 1, 1993, Ms. Samsa advised Chief Davidson that the grievant came to her home on Monday evening, April 26th, at approximately 10:00 p.m. During this visit, Ms. Samsa stated that the grievant admitted that she gave Mr. Gamache eight (8) bottles of Scope Mouthwash to drink. According to Ms. Samsa, the grievant was making this admission in a somewhat boastful fashion, as if it were amusing. This admission was corroborated during the investigation through another witness who was present when the grievant's statements were made. A statement was taken from Leonard Pittman, a former Applecreek Development Center employee, who was present in Ms. Samsa's home during this occasion. However, Mr. Pittman was not called by either of the parties to testify at the hearing. Therefore, the Association was not able to cross-examine Mr. Pittman with respect to his written statement. Because of these circumstances, the written statement was received into evidence as part of the police investigation; but, Mr. Pittman's purported statements shall be given no weight for purposes of a decision in this case. Insofar as this arbitration is concerned, the determination shall come down to a resolution of the credibility and believability of Ms. Samsa's testimony and/or the grievant's testimony, considered together with the circumstantial evidence presented.

### **III. POSITION OF THE UNION**

An allegation of physical abuse is tantamount to an allegation of criminal conduct. Accordingly, the Employer should be required to prove its case by a higher standard or degree of proof than merely by a preponderance of the evidence. When this higher standard is applied to the facts and evidence presented in this case, there is no reasonable conclusion other than a finding that the grievant is innocent of the charges against her.

The testimony of the Employer's chief witness, Ms. Samsa, is questionable and lacks credibility. In her first statement given to the investigators on June 1, 1993, Ms. Samsa made no mention of any mouthwash bottles. A month later, at the predisciplinary conference, Ms. Samsa testified that the grievant gave her a detailed account of how she divided the bottles of mouthwash which were in the locker and topped them off.

Ms. Samsa also mentioned in her witness statement of June 1, 1993 that she was present in the breakroom when she overheard the grievant tell Randy Perez and Floyd Baker that she had given mouthwash to Mr. Gamache. The investigators, however, interviewed Perez and Baker, and both of them denied that the conversation ever occurred.

According to the statement of Mr. Pittman, the grievant stated that she gave mouthwash to Mr. Gamache

during the time when the waterbed broke in Living Area 23, and Ms. Samsa had to leave Living Area 22 to assist with the clean up. This was sometime between 11:30 p.m. and 1:00 a.m. However, Mr. Gamache's blood alcohol content was shown to be .395, or near toxic at 9:15 a.m., more than eight hours later. This does not seem plausible, considering the weight and metabolism of alcohol by a human being, and the fact that Mr. Gamache was seen awake by Ms. Samsa at approximately 2:00 a.m.

Furthermore, the police investigation of this incident was flawed. The report states that no containers of alcohol were found. However, TPW Stephanie Sowers stated that she observed a filled bottle of Stetson cologne in Mr. Gamache's room on the afternoon of April 25th. Chief Davidson stated at the hearing that he saw the bottle of cologne, but he did not feel that it was relevant. This bottle of cologne was sweet smelling, brown colored, and had an extremely high alcohol content. Similar findings were related to Mr. Gamache when he was found with a sweet flowery odor about him with brown emesis. Chief Davidson listed a complete inventory of the locker with all of the contents, including mouthwash and aftershave with alcohol contents; but, he did not list the cologne bottle which he found to be irrelevant.

Finally, no test results were ever received from the Highway Patrol of Mr. Gamache's clothing, so there was never any actual determination as to what type of alcohol products he consumed. There were no eyewitnesses to the alleged event, and there were no empty containers found. The degree of proof in this case, therefore, is lacking, particularly when the high standard of clear and convincing evidence is applied in order to find the grievant guilty of patient abuse.

#### **IV. POSITION OF THE EMPLOYER**

The Employer proved a sufficient case to find that the grievant was discharged for just cause. The grievant, as well as other employees, were forewarned as to the severity of the discipline to be issued for this type of employee misconduct. The contractual rule prohibiting an arbitrator from modifying a decision to terminate an employee because of patient abuse is a reasonable rule, given the seriousness of these types of circumstances, and it is rule reasonably related to the orderly, efficient and safe operation of the institution. The agency conducted a reasonable investigation in a fair and objective manner. The investigation was ongoing and the predisciplinary hearing was continued in process in order to gather further facts and evidence related to this incident. The discharge decision was reasonably related to the seriousness of the offense. It was in conformance with the grid which contains the stated range of penalties for various offenses, as well as the Abuse and Neglect Operational Directive in Medicaid Regulations.

The evidence presented at the hearing, which consists of not only the testimony of Ms. Samsa, but also other circumstantial evidence, establishes the Employer's case against the grievant, notwithstanding the use of a higher standard of proof in these proceedings. The act of abuse must have occurred on the third shift. Mr. Gamache was in good condition well past midnight on April 26th. He was found in a coma during the beginning of the first shift on April 26th. The grievant was present when the injury to Mr. Gamache occurred. The grievant was the only person on the third shift who had a key to the hygiene cabinets where the personal hygiene products were kept. It was undisputed that Ms. Samsa did not have a key or access to the cabinets. The grievant had possession of six bottles of Scope mouthwash which she signed out in accordance with the inventory record which was required to account for said products. The grievant was left alone with Mr. Gamache on two separate occasions during her workshift for approximately 1-1/2 hours. This included the time when Ms. Samsa left the unit for a lunch break and the time Ms. Samsa left the unit to assist with the clean up of the waterbed spill in Living Area 23.

The Employer offered the expert testimony of Dr. DeBart, which was substantially unrefuted. Dr. DeBart stated that Mr. Gamache could have consumed four to eight bottles of 12 ounce Scope mouthwash, each of which contained 18.9% alcohol, in the early morning hours of April 26th, and this consumption could have produced an intoxication level of .395 blood alcohol at approximately 9:00 a.m. The Union's expert, Ed Lorson, a clinical chemist, did not substantially refute the testimony of Dr. DeBart in any material respect.

The circumstantial evidence involving the grievant was substantial. The grievant had control of Scope mouthwash containers. The Stetson cologne bottle observed by some witnesses on April 25th was only a 4 ounce bottle, and it was full when it was observed. The consumption by Mr. Gamache of the Stetson

cologne would not have produced the alcohol level registered when he was found in a coma. It is unreasonable to conclude that Mr. Gamache ingested the alcohol on his own without any assistance, considering that he was profoundly mentally retarded with an I.Q. of 20 or less, with developmental characteristics reflecting a minimal overall responsiveness, physical disabilities, slow motor development, and minimum communication skills. Further, it is unreasonable to conclude that Mr. Gamache was capable of smuggling in and concealing a large amount of alcohol, or that he secretly was able to gain access to the locked hygiene cabinet. Moreover, it is unreasonable to conclude that Mr. Gamache was able to hide or dispose of the empty alcohol containers after he consumed the alcohol. The key fact is that no empty containers were found during the investigation.

The above circumstantial evidence is consistent with the testimony of Ms. Samsa in relating the admissions of the grievant. Moreover, the Union was unsuccessful in impeaching Ms. Samsa during her cross examination. The Union could not establish a reason why Ms. Samsa would be untruthful in her testimony. There is no animosity between the two women; and, other than working together, they did not enjoy a close relationship outside of work. Ms. Samsa acted to her detriment when she finally came forward to relate the discussion that she had with the grievant on April 26th at Ms. Samsa's home. Ms. Samsa was disciplined for not only failing to report the grievant's confession at an earlier time, but for also making inappropriate entries on her bedcheck form. Furthermore, Ms. Samsa suffered the retaliation and harassment of co-workers. The grievant could offer no reasonable explanation as to why Ms. Samsa would be untruthful with respect to their conversation.

The grievant's statements were contradictory with respect to the accounting for empty bottles when the grievant restocked the personal hygiene cabinet. At first she stated that there were no empty bottles and then she stated that there was one empty bottle which was discarded in the bathroom trash. However, no empty containers were found during the investigation.

When all is said and done, the testimony of Ms. Samsa was not impeached and is consistent with the other circumstantial evidence. The grievant's testimony and statements have inconsistencies. The grievant was obviously motivated to protect her job security, even at the expense of being untruthful.

## **V. DISCUSSION**

The burden of proof, in cases such as this, in which there are allegations of serious misconduct, should be higher than proof by preponderance of the evidence. This Arbitrator agrees with the authorities cited by the Union which require proof by clear and convincing evidence. Nevertheless, a legal or academic analysis of the theoretical burden of proof is not particularly helpful to a resolution of the specific facts and circumstances of this case. This case comes down to a resolution of the credibility of two opposing witnesses, the grievant and Ms. Samsa. The circumstantial evidence must be examined and analyzed in order to reach the necessary credibility findings. When this is done, the circumstantial evidence leans favorably on the side of corroborating the testimony of Ms. Samsa.

The grievant had access to the personal hygiene lockers. Ms. Samsa did not. The grievant removed six bottles of Scope mouthwash from the supply cabinet. She stated that she used the bottles to refill the mouthwash for other patients, and that she threw away one empty bottle of mouthwash after she redistributed the contents among various bottles. Therefore, the grievant had the ability to assist Mr. Gamache with the consumption of alcohol, redistribute the contents of bottles, and successfully dispose of one or more empty containers. Ms. Samsa testified that the grievant stated to her that she forced Mr. Gamache to consume the contents of eight bottles of mouthwash. There is no evidence that anyone other than the grievant was in possession of mouthwash or other alcohol products. There were only two persons responsible for the care of Mr. Gamache during the time when he consumed alcohol. It is not reasonable to believe, given the mental and physical condition of Mr. Gamache, that he could have secretly obtained and consumed alcohol in amounts that would have produced the blood alcohol level which he registered, and that he could have covered up his actions by successfully hiding empty containers. It is unrealistic to believe that Mr. Gamache could gain access to the locked cabinet. There were times during the workshift when the grievant was alone with Mr. Gamache and she otherwise could have assisted Mr. Gamache with the

consumption of alcohol. It is inconceivable how Mr. Gamache could have consumed large amounts of alcohol without the knowledge of any of the staff members. Therefore, the circumstantial evidence points toward the grievant, the person with the responsibility for the care of Mr. Gamache, and the person with access and possession of alcohol products.

The problem in this case is the apparent lack of any motive on the part of the grievant to cause harm to Mr. Gamache. The grievant's testimony was credible enough on its face; she had a good employment record, and her good character was corroborated with many statements from her friends and acquaintances to the effect that the grievant was a good caregiver and a caring person.

On the other hand, the testimony of co-worker Samsa was also very credible. The fact that Ms. Samsa did not report her conversation with the grievant at an earlier time is explainable and understandable. Employees are usually reluctant to formally accuse co-workers of misconduct. Also, it is believable that Ms. Samsa did not take the grievant's statements as being serious at the time they were made because Ms. Samsa was not aware that Mr. Gamache in fact became comatose from alcohol poisoning. It was after she obtained knowledge of these facts that she disclosed the nature of her conversations with the grievant to the investigator. The Union could not establish any ulterior motive on the part of Ms. Samsa to make untruthful statements. The parties were not particularly close to each other, and there was no animosity that existed. Ms. Samsa related the substance of her conversation with the grievant knowing that she would be disciplined for not reporting it earlier, and knowing that she would incur the wrath of fellow employees who would not look kindly upon her, and who otherwise would consider her disclosure as an act of betrayal. In summary, Ms. Samsa had nothing to win and everything to lose by making her disclosure. The grievant, of course, was motivated to protect her job security and to protect her reputation.

When all is said and done, a judgment must be made as to whether the grievant would engage in this serious misconduct when such would seemingly be out of character and unexplainable, against and compared with the unimpeached testimony of a fellow co-worker who appears to be unbiased and impartial. Ms. Samsa's testimony coincides with circumstantial evidence placing the grievant at the scene in the possession of products containing alcohol, the precise substance which poisoned Mr. Gamache. Someone assisted Mr. Gamache with this overconsumption. When the circumstantial evidence is considered with the testimony of Ms. Samsa relating the admission of the grievant, there can be no reasonable conclusion other than to find in favor of the Employer and against the grievant.

#### **VI. AWARD**

The grievance is denied.

Mitchell B. Goldberg,  
Arbitrator

Date: September 21, 1994