

ARBITRATION DECISION NO.:

568

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities
Cambridge Developmental Center

DATE OF ARBITRATION:

March 2, 1995

DATE OF DECISION:

March 20, 1995

GRIEVANT:

Joe Keyser

OCB GRIEVANCE NO.:

24-04-(94-10-20)-0635-01-04

ARBITRATOR:

Marvin J. Feldman

FOR THE UNION:

Steve Wiles
Staff Representative

FOR THE EMPLOYER:

Jim Spain
Advocate
Pat Mogan
OCB, Second Chair

KEY WORDS:

Removal
Just Cause
Abuse of Resident

ARTICLES:

Article 24 - Discipline
§24.01-Standard

FACTS:

The grievant was employed by the Cambridge Mental Retardation and Development Disability Facility for six and a half years. One of the grievant's patients, who was identified as J.W., had a history of physical aggression and destruction of property.

The grievant was discharged for allegedly abusing J.W. These allegations arose out of an incident which

occurred on August 30, 1994. According to Martha Harrington, a quality assurance specialist who witnessed the incident, she saw the grievant abuse J.W. Immediately after the incident, Ms. Harrington made a statement describing what she saw to a security officer. Ms. Harrington testified that J.W. was acting disruptively while other residents were playing a game at a card table. The grievant disciplined J.W. a few times, but to no avail. The grievant then took J.W. to a bedroom. Ms. Harrington followed J.W. and the grievant back to the bedroom where she testified that she saw the grievant restraining J.W. and the grievant proceeded to hit J.W. Ms. Harrington then called a supervisor to see what was going on. The supervisor, Mary Jakubisin, made a statement to a security officer that when she arrived upon the scene, she saw J.W. kicking about and trying to bite the grievant and the grievant was trying to restrain J.W.

The security officer questioned the grievant about the incident and learned that J.W. had several outbursts of physical aggression throughout the shift. The grievant had removed J.W. from the day area and into a bedroom at the suggestion of his supervisor. While in the bedroom, the grievant stated that J.W. was physically aggressive and that J.W. had grabbed him by the shirt and tried to bite him a few times. The grievant stated that he straddled J.W. and grabbed him a few times to prevent him from biting.

The security officer also took a statement from J.W. which was not used because it was incoherent.

As a result of the above statements, the grievant was placed on administrative leave for a five-day period. A pre-disciplinary conference was held for the grievant and the hearing officer, who commented that the parties involved agreed that there was no evidence of physical abuse.

EMPLOYER'S POSITION:

Management pointed out that J.W. was 5'3" tall and weighed approximately 142 points. Furthermore, management believed that J.W., because of his slight build, was not large or strong enough to physically restrain or cause harm to the grievant. In addition, management pointed out that the grievant had worked for a private nursing home previously and had been dismissed for abusing a patient. Management, therefore, believed that the grievant's dismissal should be upheld.

UNION'S POSITION:

The union believed that the grievant was wrongfully discharged for patient abuse. An examination of J.W. revealed that there was no redness or swelling on his body and therefore, there was no indication of abuse. The union also pointed out that J.W. had serious behavior problems and was involved in the destruction of property and physical aggression on a regular basis. J.W. also had the mental capacity of a two-year old and was involved in over seven thousand episodes of anti-social behavior over a twelve-month period. The union believed that the grievant was merely acting in self-defense and he was only trying to prevent J.W. from injuring him. Therefore, management was not justified in discharging the grievant.

ARBITRATOR'S OPINION:

The arbitrator noted that if there is a finding of patient abuse, termination is an automatic remedy. Furthermore, just cause did not apply in this particular situation because client abuse is a contractual violation.

The evidence submitted by Ms. Harrington and the grievant's supervisor was considered and the arbitrator held that Ms. Harrington had no buttressing testimony to substantiate the activity that she allegedly saw on the night that the incident occurred.

The arbitrator also pointed out that although the state claimed that the grievant had been dismissed in the past for abusive conduct to a patient, the Cambridge Development Center has a guideline for hiring people with records of abuse. The arbitrator stated that if the Center knew of the grievant's past abusive conduct, he would not have been hired. Furthermore, the fact that the state brought up the conduct seven or eight years after it occurred, when there is a guideline to the contrary at the developmental center, is insufficient buttressing evidence of its testimony.

The view of the supervisor and Ms. Harrington was the same but they claimed that they saw different things. The prior record of the grievant was impeccable and there was no evidence to support her statements. There must be clear and convincing evidence to support a dismissal, which was lacking in this case.

AWARD:

The grievant was reinstated with full back pay and benefits.

TEXT OF THE OPINION:

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. 24-04-(10-20-94)-635-01-04

THE STATE OF OHIO

The Employer

-and-

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

OPINION AND AWARD

APPEARANCES

For the Employer:

Jim Spain, Advocate
Martha Harrington, Quality Assurance Specialist
Pat Mogan, OCB, Second Chair

For the Union:

Steve Wiles, Staff Representative
Joe Keyser, Grievant
Kris Lang, Trainer
Bob Johnson, Local Union President

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I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the contract of collective bargaining, the parties having been unable to resolve their differences prior to arbitration. The hearing in this cause was scheduled and conducted on March 2, 1995, at the conference facility of the employer in Cambridge, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that the witnesses should be sworn and sequestered, that the matter was properly before the arbitrator on the merits of the issue and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS

Certain persons are placed under the care of the State of Ohio because of mental retardation and because of developmental disabilities. One such person who will hereafter be referred to as J.W., was under the care of the State of Ohio at its mental retardation and developmental disability facility at Cambridge, Ohio. J.W. was described by a psychologist as follows:

"Jerry is a 49 year old male Caucasian who resides in Steele Cottage, Side B. He is 5'3" tall, and weights 142 pounds. He is ambulatory although he sometimes experiences difficulty in walking. He is partially verbal, and it is often difficult to understand what he is saying.

Records indicate that Jerry was born prematurely, and weighed less than 3 pounds and was in an incubator for two months. He apparently experienced neglect, and was hospitalized at 8 months of age due to anemia. During a hospital stay in 1945, he was diagnosed as being mentally retarded. Jerry was committed to Orient Developmental Center on 1-9-49. In April 1983, he was moved to Buckeye Community Services Home in Logan, Ohio and attended Hocking Valley Industries for day programming. He later moved to Cambridge Developmental Center on 9-25-87.

Psychological assessment by Dr. Robinson in February 1990, (Slosson Intelligence Test) indicated that (J.W.) Jerry was functioning in the Profound range of retardation, with a mental age of 2 years one month, and a numerical IQ of 13.

The Vineland Adaptive Behavior Scale was also administered in February 1990, and results indicated Profound deficit in all 3 areas of (1) Communication, (2) Daily Living, and (3) Socialization resulting in a Composite Adaptive Behavior function which is profound.

Jerry (J.W.) has exhibited a number of maladaptive behaviors. These include pacing the floor, and sitting and rocking. The most serious behaviors are Destruction of Property and Physical Aggression. In regard to physical aggression, Jerry (J.W.) will often assault a new staff member who comes onto the ward -- one with whom is not familiar. The target behavior of PA and DOP have been identified as the ones to address in this Individual Behavior Program."

As was indicated above, J.W. had serious behavior problems and was involved in destruction of property (DOP) and physical aggression (PA). A tab was kept on both his physical aggression and his destruction of property and for a twelve month period beginning in February of 1994, his table of physical aggressions and destruction of property at the facility revealed the following:

	<u>2/94</u>	<u>3/94</u>	<u>4/94</u>	<u>5/94</u>	<u>6/94</u>	<u>7/94</u>	<u>8/94</u>	<u>9/94</u>
1) PA	565	834	562	458	214	276	1085	600
2) DOP	116	157	294	72	29	87	288	155
	<u>10/94</u>	<u>11/94</u>	<u>12/94</u>	<u>1/95</u>	<u>2-1 thru 2-15</u>			
1) PA	905	760	186	464	230			
2) DOP	386	211	53	190	86"			

This graph was found in J.W.'s file under "target behavior data" and was the official file at the Cambridge facility of J.W. The employer could not refute the contents of that activity. J.W. was also described as being 5'3" tall and weighing some 139 pounds.

The grievant was discharged for alleged abusive activity towards J.W. He was employed at the Cambridge facility for a total of some six and a half years prior to the incident. On the night in question, namely August 30, 1994, the grievant was employed at Steele A cottage, second shift, a shift in which an episode occurred, all of which triggered the activity in this particular case. The grievant up until that time of

August 30, 1994, had had acceptable performance evaluations. After the shift began an individual by the name of Martha A. Harrington paid a visit to Steele A cottage at which place she found both the grievant Mr. Keyser and J.W. as well as others. Ms. Harrington was a quality assurance specialist and she described herself as a pre-examination person to determine whether or not there were any violations of federal or state regulations which would deprive the facility of federal or state monies when inspected.

Martha A. Harrington, during that inspection revealed that she saw the grievant abuse J.W. As a result of reporting the alleged abusive conduct of J.W. by the grievant she was asked to give a statement concerning that event immediately after it occurred to the security person on duty. That security person was called immediately after the incident. The statement was given to the responding security officer at the facility and that statement in pertinent part was transcribed and revealed in pertinent part, the following:

M.H.: When I walked into the Cottage, two staff who I guess ... a female staff and a male staff were there and Jerry had been reaching out and striking and like I said earlier they had taken him over to the couch and they sat him down. Then what they did was they came back to the table where the rest of the individuals were playing either a shape or colored bingo and after probably less than five minutes, the male staff person said ...yelled over to Jerry... he really didn't yell, he said to Jerry, 'would you like to come back with us?'

S.S.: Who was this male staff person? Do you know him by name?

M.H.: I have later found out that his name is Joe Keyser.

S.S.: Okay.

M.H.: Jerry got up from the couch he was seated at. He walked back over. He sat down at the chair ... the same chair at the table where he had been sitting before and they proceeded to play the game. Within three or four minutes, Jerry reached out with his left hand and slapped a client by the name of Earl on the forehead. At that point, Joe Keyser who was sitting to Jerry's right intervened, pulled his arms down, said, 'Come on Jerry,' and the female staff person came around from the other side of the table. They got Jerry up. Jerry then got weak-kneed like he couldn't walk. They kept saying, 'Stand up, stand up,' and they walked him back over to the same part of the day room area and they sat him down on a chair. At that point, the female staff person went back to the table and Joe Keyser stood there for a minute and then he bent down, no, he squatted down and he was telling Jerry to breath through his nose. Then he was telling him to breath through his mouth which I assumed might have been some sort of program or something for de-escalation. He got up. Joe Keyser got up. He came back to the table, and then again he asked in a couple of minutes whether or not Jerry wanted to come back. Jerry came back again. Within two minutes I would say, Jerry reached out and slapped Earl on the head again. Once again they took him over to the couch and they basically went though the same routine. There was no de-escalation in terms of telling Jerry to breath through his mouth or nose this time. Joe then stood in front of Jerry who was sitting on a couch. His feet were probably shoulder-width apart and both hands were on the hips in what I would consider a very threatening manner.

S.S.: They were on his hips?

M.H.: On Joe's hips ... on his own hips.

S.S.: Joe's hips. Okay.

M.H.: I could not hear if any words were being spoken but it was a threatening and intimidating stance.

S.S.: Okay.

M.H.: Okay. So, at this point Jerry was still escalating and they took Jerry, he then said he was taking Jerry to the bedroom. So he got Jerry up off the couch and they were walking back to the bedroom. I decided to follow and I went back to the bedroom, saw them to go in, and the door started swing close and about the same time that it latched I heard a vocalization from Jerry.

S.S.: Okay.

M.H.: I cannot say whether it was a cry, a scream or what, but there was a noise.

S.S.: Your sure it was from Jerry?

M.H.: It was from Jerry because he had made some noises a little bit earlier.

S.S.: Umm.

M.H.: I opened... I put my hand on the doorknob and I opened the door probably two inches, no more. And, from the angle of where I was standing and I opened the door with my right hand, I could directly in and I saw Jerry on his bed, his arms were being restrained crossed in front of him just below his chin on chest. The staff person Joe was over him with his left knee on the bed.

S.S.: Okay, now was he restraining him with both of Joe's hands on Jerry's hands or how was he restraining him.

M.H.: No. He had ... Joe had his left hand holding him down ... well, he had both hands. He had his left hand down, holding his hands down and Joe's right hand was on top of his own left hand.

S.S.: Okay.

M.H.: Okay?

S.S.: Okay.

M.H.: At that point, Joe raised his right hand and he smacked Jerry on the left side of the head, kind of like in the upper left forehead area.

S.S.: Okay.

M.H.: Twice.

S.S.: All right.

M.H.: At which point I then yelled for Mary because Mary was out in the hall in that doorway between the day room going back into the halls to the bedrooms...

S.S.: Uh-huh.

M.H.: ... and I said, 'Mary, come quick.' Mary came running down. I pushed open the door and by this time the staff person turned around and looked at me. I was looking at the resident. He turned around, and Jerry was okay.

S.S.: Uh-huh.

M.H.: During the time that Jerry was on the bed, he did have his knees raised up and he was kicking a little bit, but he was not kicking or hitting Joe.

S.S.: Did Jerry make any kind of any noise or anything when Joe was hitting him?

M.H.: No. He got angry after ... he hit him once and I would say within five seconds he hit him again and there was no ... he did not cry out.

S.S.: Okay. Was his hands, was it a fist or was it...

M.H.: It was open.

S.S.: ... open hand.

M.H.: It was open."

It might be noted that the statement refers to an M.H. That was Martha A. Harrington's remarks. The statement also refers to an S.S. and those are the initials of the security officer asking the questions on tape, which tape was later transcribed. That first tape was made immediately after the incident. The second tape taken from Martha A. Harrington on September 7, 1994, or some seven or eight days after the incident and the remarks by her on that second tape, which are pertinent to the issue at hand, revealed the following:

S.S.: Okay. So when you peered into the door, what did you see?

M.H.: I could see Jerry's ... Jerry laying on the bed. I could see Mr. Keyser's left leg...

S.S.: Okay, Jerry laying on the bed ... let ... did you see Jerry's whole body or Jerry's legs or Jerry's what.

M.H.: I saw Jerry's leg. I could see most of Jerry's whole body except for maybe from... I mean, I could see most of his body except for where Joe was leaning over him a little bit.

S.S.: Okay.

M.H.: I mean, it wasn't like I was just looking at... I couldn't get a full complete view.

S.S.: Uh-huh.

M.H.: But, I mean I saw his head and face. I saw his chest because I saw where his arms were crossed at the wrist and were restrained underneath his chin on his chest.

S.S.: Okay, so if Joe was over him, what part didn't you see?

M.H.: Ah, probably didn't see Jerry's...

S.S.: From where you were looking inside the door, now.

M.H.: Right. Left shoulder. I did not see his left side. I probably didn't see... I did not see his left shoulder. I probably didn't see... I didn't see his left side and the left hip.

S.S.: From the angle which you were at ... or you state that Joe was restraining Jerry with his arms crossed over his chest ...

M.H.: Uh-huh.

S.S.: ... over Jerry's chest.

M.H.: Uh-huh.

S.S.: And, Joe had a hold of Jerry with his...

M.H.: He had both hands.

S.S.: Which were restraining Jerry's arms across his chest.

M.H.: Right.

S.S.: Okay. Was he ... was Joe kind of leaned over him...or restraining him?

M.H.: Yea, he was leaned over what would be, where I would assume, where Jerry's left shoulder was. I mean, he was kind of leaning over the left shoulder and the left, what do I say, upper chest.

S.S.: Okay.

M.H.: Is that the best way to describe it?

S.S.: Uh-huh.

M.H.: Ah, and Mr. Keyser had his right hand on top of his own left hand and both of those hands were holding Jerry's arms which were crossed at the wrist.

S.S.: Okay. So you couldn't see Jerry's chest at that time?

M.H.: I could not, I could only see what, I mean, his arms were covering his chest.

S.S.: Uh-huh.

M.H.: I could see up to the point where the arms were crossed.

S.S.: But, you couldn't see above that?

M.H.: I could see the right side and I even saw... I saw his face.

S.S.: Did you...

M.H.: He wasn't leaning...

S.S.: Did you ... did you... did you see his whole face or just the right side of his face?

M.H.: I would say, I probably saw his chin. I saw the right side of his face and I could see between Mr. Keyser's head and shoulder. I could see through that area. Okay?

S.S.: Uh-huh.

M.H.: I could see through that area and I could see Jerry's... the whole of Jerry's face because of where I

was and when Joe was leaning over him, he wasn't blocking him entirely. That doesn't...

S.S.: Okay. If you're standing outside the door and peering in, okay, and Joe's on Jerry's left side with his knee on his bed, leaned over him, you would be looking at his back ... correct? Joe's back ... correct?

M.H.: I saw ... on Mr. Keyser I would have seen... I did not look directly on his back because the angle of his body. I did see what would be part of the left side of Mr. Keyser.

S.S.: Okay...

M.H.: Okay?

S.S.: So he was not ... his back was not directly towards you?

M.H.: His back was not square at me. It was at an angle slightly.

S.S.: Okay.

M.H.: And, I assume that that was because of the way he had his knee on the bed and everything. His back was not at a ... was not exactly perpendicular, or not perpendicular, square with my face.

S.S.: Okay. After you had seen that Joe was in there, what did you observe?

M.H.: He had ... Mr. Keyser was restraining... like I said, he had his ... he had his right hand on top of his left hand and he was holding down Jerry's arms which were crossed.

S.S.: Okay.

M.H.: I saw Mr. Keyser take his right hand, raise it and bring it up and down ... up a little bit and down and he hit with an open hand. He raised his arm up and he brought it down and he hit Jerry on the upper-left side of his head.

S.S.: Okay. Which hand did Joe use?

M.H.: His right hand. Twice."

Martha A. Harrington testified to substantially the same at hearing.

Going back for a moment to the day of the original incident, the security guard also interviewed Mary Jakubisin who was the supervisor of Steele A cottage at which J.W. was a resident, at which the grievant worked at the time of the incident and the cottage at which the incident occurred. Ms. Jakubisin in pertinent part revealed the following in her statement on that date:

"**S.S.:** Martha Harrington, you're referring to?

M.J.: Yes. Yes sir, I am. And, I immediately responded and went back to the door. The door was closed and I ... Marty said ... made the statement, 'I just saw staff hit a client.' I, at that time said, 'Are you sure?' And, she said, 'Yes, I am.'

S.S.: Okay, I'm going to stop right there for a minute Mary. Okay.

M.J.: Marty had shouted for help, or for Mary, she didn't say help, she said Mary. I went back. At that time

she made the statement, she said, 'I just saw a staff person hit a client.' I said, 'Are you sure?' and she said, 'Yes, I'm sure.' Immediately, I wrapped on the door with my left hand, at the same time pushing it open with my right hand around the door handle and I walked in and I observed Joe Keyser and Jerry Wamack on the bed.

S.S.: Which ... which room would this be in?

M.J.: I'm not sure the number ... 100, I believe. Then Jerry was kicking the ... just kicking every place. His head was up at the top of the bed and Joe had ... Jerry's arms were liked crisscrossed across his chest and Jerry was repeatedly attempting to bite Joe. Joe had his left hand was trying to hold Jerry's hands crisscrossed across his chest. His right hand was on Jerry's forehead trying to keep his teeth from reaching his hands. I immediately grabbed Jerry's legs and held them down in a straight position, and I asked Joe, I said, 'What's the problem?' At about that time, someone, another staff member, could even had been a client or whatever, came into the door and Jerry began to chill out and calm down. I asked Marty, I said, Marty said something to get out into the hall or whatever, and I said, 'Okay, Marty, we need to... I need to talk with you.'

On the second date of statement taking, Mary Jakubisin revealed pertinent remarks. That second statement was taken on September 7, 1994, and that statement revealed the following in pertinent part:

S.S.: When you entered the room with Jerry and Joe, could you see Jerry's (J.W.) upper body?

M.J.: No. I could see was Joe's buttocks and upper back. I had to step into the room before I could see Jerry's (J.W.) face and upper body."

Mary Jakubisin did not testify at hearing but her statement was stipulated to as being the testimony that she would have stated at hearing had she testified. The union called her as a witness but she did not show.

On August 30, 1994, the date of the incident at approximately 5:56 p.m. the security person also took the statement of the grievant and the grievant made some very pertinent remarks in that particular statement. Those remarks revealed the following:

S. S.: Okay. What we're going to be talking about is allegation of witnessed abuse today on Steele Cottage concerning client, Jerry Wamack. Do you have any idea what I am talking about?

J.K.: I may ... well, yes, I do know what you're talking about. It wasn't abuse though.

S.S.: What occurred?

J.K.: What occurred? Jerry had had several outbursts of physical aggression throughout the shift. Probably a total of, I believe, six. After the fifth one, I had taken him back to the day area and Mary Jakubisin, my supervisor, suggested that I have him go to his bedroom and relax. Well, after he became calm in the day area ...or yea, the day area; I asked Jerry if he'd like to go lay down and he said yes. There was a lot of clients in the hallway so I escorted Jerry to his bedroom. Well, when I got Jerry up off his chair, I noticed that the Quality Assurance woman got up and come toward the hallway, but she followed me and Jerry down toward his bedroom. Me and Jerry went into his bedroom. I sat Jerry down on his bed. I asked Jerry, I said, 'Jerry, are you okay?' He grabbed me by the shirt and pulled me down towards him and tried to bite.

S.S.: Okay.

J.K.: We went back ... he went back on his back on his bed and I ended up straddling him.

S.S.: Okay, Straddling him? You mean you were over him?

J.K.: Correct. I was straddling him. I had my left knee was down along his right ... along his right side of rib cage, on the ... the knee was on the mattress. My right shin ... my knee had most of the weight on the mattress, but it was over top of his upper arm. I had my left hand was holding his ... it would be his right arm. Jerry attempted to bite. I took my hands and grasped him by the forehead, it was a rapid movement because he was trying to bite. I grabbed him by the forehead and shoved it back. His head was on the mattress.

S.S.: All right. Was it an open hand?

J.K.: It was just like this. It was an open hand. Open hand, just like this, shoved it back on the mattress. I said, 'Jerry, calm down and change the channels.' I released. He attempted to bite my arm again. I immediately, again, not wanting bit, grabbed his forehead and pushed it back.

S.S.: Okay.

J.K.: All this time, I knew she was ... the Quality Assurance woman was watching me.

S.S.: Was it a slapping ... was it a slapping motion or what ... I mean...

J.K.: Well, it was a quick motion to keep from being bit.

S.S.: Okay. Did you smack him or what?

J.K.: If ... no.

S.S.: Was there a smacking sound to it?

J.K.: There could have been Scott, I was just trying to keep from getting bit.

S.S.: Okay.

J.K.: I didn't ... if it made a slapping sound I sure didn't mean for it to make a slapping sound. I was trying to keep from getting bit."

J.W. also had a statement taken of him but his statement was not productive. It was some four lines long and in full revealed the following:

"S.S.: Jerry, has a staff person ever hit you on Steele Cottage?

J.W.: That girl hit Jerry in the eye.

S.S.: Jerry, do you know a staff person that has red hair on Steele Cottage?

J.W.: No response.

NOTE: This client became very uncooperative so no further questions were asked at this time."

From all of that and on that date of August 30, 1994, the grievant was placed on administrative leave under the following memo:

"Effective immediately, you have been placed on administrative leave through authorization of the Appointing Authority or Designee due to a pending or on-going investigation. This status is a five (5) day operation (Monday through Friday) except for those designated as a holiday. Due to this status, your scheduled days of work may have to be adjusted to maintain a forty (40) hour week. You are expected to be available for contact between the hours of 8:00 a.m. - 4:30 p.m. Should you need to be unavailable for more than one (1) hour during that time period, please contact the Superintendent's Office at extension 344. Should you have any questions concerning this directive, please direct your concern to the Labor Relation's Office."

A notice of predisciplinary conference was forwarded to the grievant on September 15, 1994 and the conference was scheduled for September 19, 1994. At the disciplinary hearing, the officer in charge of that hearing, namely Brenda Gerhardstien who was a human resource administrator made some comments. Her comments revealed the following:

"All parties agree that no injury, redness, or physical evidence exists to determine abuse. The statements by the parties involved are in most instances consistent with themselves but compared to one another, Ms. Harrington does have some different recollections of the incident than the other witnesses. However, only two parties were witness to the Alleged Abuse and Unapproved Behavioral Intervention.

Once Ms. Harrington opened the door to client J.W.'s room, Mr. Keyser was by his own admission on top of client, J.W. with his legs and hands pinning client, J.W. to his bed. Both Ms. Harrington and TPW Keyser admit that Mr. Keyser used two quick movements with his open hand to the client's forehead that Ms. Harrington states made a slapping sound she could clearly hear. Mr. Keyser states it may have made a slapping sound.

The client by all accounts is not large or strong and is very slow and has an unsteady gait to the point that he needs assistance to walk. To believe that this client forced TPW Keyser on top of him and created a situation that Mr. Keyser could not physically avoid is not plausible or reasonable to believe. Mr. Keyser could have and should have separated himself from the client, yet he did not. He put himself in a position to fail. By his own admission, the intervention was quick and 'might have been hard.'

The client's Individual Behavior Program does include a target behavior of physical aggression, but to my understanding is to be controlled by placing the client in a chair and manually restrained. Mr. Keyser's restraint as witnessed by Ms. Harrington was not appropriate or warranted."

The finding of that hearing officer revealed the following:

"FINDING

The issue of credibility is the major focus. Ms. Harrington is a trained Central Office employee that travels from institution to institution to assist Center's with quality assurance issues and Medicaid/Medicare standard review. She is a trained professional in the area of client rights and protection from harm. Ms. Harrington is a witness who from her expert point of view, observed Abuse/Unapproved Behavioral Intervention.

TPW Keyser's testimony is self-serving at best.

This Hearing Officer concludes there is just cause to support the charges of Unapproved Behavioral Intervention which falls under the Grid Category of client abuse."

It is interesting to note that the union at that particular hearing made the following pertinent commentary:

"The Union presents that everyone else on the work area reflected a different story than Ms. Harrington.

Staff present that Mr. Keyser was not intimidating client, J.W. Client J.W., had approximately five aggressive acts towards other clients and staff within a short period of time and the Cottage RCS, Mary Jakubisin, gave TPW Keyser a directive to take client, J.W. back to his room to relax. Mr. Keyser and other staff knew Ms. Harrington was on the area to observe and watch. Ms. Harrington followed client, J.W. and TPW, Joe Keyser back to J.W.'s room. TPW Keyser states he knew Ms. Harrington was watching so why would he do anything wrong. Mr. Keyser states once client J.W. sat on his bed, J.W. grabbed him (Keyser) by the shirt and pulled him on top of him, which caused TPW Keyser to lose his balance. As Mr. Keyser tried to release himself from client, J.W., the client then tried to bite him. Being bitten before, TPW Keyser, immediately placed his right hand onto the client's head in two rapid pushes, pushing the client's head back twice to avoid being bitten on two separate but repetitious biting attempts.

The Union presents that Ms. Harrington's only statement that is consistent with anyone else's is that Mr. Keyser did push the client's head back twice as Ms. Harrington said, but Ms. Harrington was not in a position to see client J.W.'s head trying to bite TPW Keyser or see client J.W.'s head move.

The Union and Mr. Keyser present that Ms. Harrington jumped to conclusions about what she thinks she saw without getting a clear picture and was upset to the degree that she could not remember any facts consistently from interview to interview and was not close to consistent with all other witnesses, both Exempt and Bargaining Unit."

Additionally, the union's position stated as follows in that write-up:

"The Union presents that there are two stories pertaining to the incident that occurred on Steele Cottage the day in question. The story as presented by the TPW staff on the work area, medical staff on the work area, and the Cottage RCS on the work area are consistent and believable. The second story is the one presented by Central Office Quality Assurance staff, Ms. Martha Harrington.

Ms. Harrington presents that she, after watching Mr. Keyser in a very intimidating manner interact with client, J.W., followed Mr. Keyser and client J.W. to the client's room. Ms. Harrington states that Mr. Keyser didn't know she was following him. She proceeded back to the client's room and slowly opened the door to J.W.'s room, approximately two inches, in order to not disturb the client. Ms. Harrington states she witnessed TPW Keyser slap the client while Joe positioned himself on top of the bed and client, and with his right open hand to the left forehead of the client with a 'slapping sound.' Ms. Harrington immediately closed the door and called for Cottage RCS, Mary Jakubisin to come for help. Approximately thirty seconds later, RCS Jakubisin came to the client's (J.W.'s) door and asked Ms. Harrington, 'What's wrong?' and Ms. Harrington replied, 'I just saw a staff hit a client.' The RCS asked, 'Are you sure?' Ms. Harrington's reply was 'Yes, I am.' Ms. Harrington states that she and the Cottage RCS opened the door and saw TPW Keyser and client, J.W., getting up off the bed. Ms. Harrington turned and left the area."

The matter was then forwarded to the third step grievance hearing and on December 8, 1994, Ed Ostrowski, who is the chief of the office of labor relations at the Ohio Department of Mental Retardation and Developmental Disabilities reviewed the case and his write-up revealed the following:

"On November 22, 1994, a Third Step hearing was held regarding the above-captioned grievance. Present were Steve Wiles, OCSEA Staff Representative; Ellen Roe, Chief Steward; and Bob Johnston, chapter Vice President. Management was represented by Jim Spain, CaDC Labor Relations Officer. It was mutually agreed to extend the timelines so that the hearing of this grievance is timely.

Issue: Alleged violation of Article 24.

Union Position: The Grievant was removed from his position for client abuse. Management did not have just cause to remove the Grievant.

Management Position: The Grievant was removed for just cause.

Finding of Fact: On August 30, 1994, the Grievant was observed slapping a client while pinning him to his bed. A witness from the Office of Quality Assurance, said she had witnessed the Grievant acting in an intimidating manner toward the client and followed them, unnoticed, as the Grievant took the client to his bedroom. She opened the door and observed the Grievant on top of the client on the client's bed. She then observed the Grievant strike the client on the forehead. The union maintains that other witnesses have stated that the Grievant was not aggressive with the client, but that the client had numerous aggressive acts toward other clients and staff that day. The Grievant maintains that he was on the client because the client grabbed him by the shirt and pulled him down on him. The client proceeded to try to bite him twice and the Grievant responded by pushing the client's head back.

The Grievant is a six-year employee with no prior discipline.

Conclusion: A trained, reliable witness observed the Grievant slap the client on the head. The Grievant himself admits he was struggling with the client. There was just cause to remove the Grievant. Grievance denied."

A grievance was filed. That grievance contained a recitation of the activity of the employer and requested full reinstatement of the grievant to employment, demand of all back pay and benefits from the date of his removal and in all other regards to make the grievant whole. It might be noted that a definition of the acts of client abuse are found in policy number P-7 revised in July of 1994 and paragraph III, entitled, Acts of Client Abuse, revealed the following pertinent material:

"III. ACTS OF CLIENT ABUSE/NEGLECT

A. Staff of this facility must not use physical, verbal, sexual or psychological abuse or punishment. These acts will include, but not be limited to the following:

1. Any act of verbal abuse (ridiculing, shouting, swearing) and any other action that could be damaging to a person's self-respect;
2. Any act of physical violence against a client;"

Further Article 24 of the contract of collective bargaining in the first paragraph which is pertinent to the matter at hand revealed the following:

"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. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02."

Also in use at the facility was policy number P-17, under date of July, 1994, which revealed the following guideline to be used at the Cambridge Developmental Center:

"II. GUIDELINES

A. The facility will ensure that employment of individuals with a conviction or prior employment history of child or client abuse, neglect, mistreatment or inappropriate socialization with clients will be prohibited."

Thus from all of the evidence presented in the hearing in this particular matter as well as all of the evidence presented in the statement of facts hereinabove, it is noted that J.W. although middle aged had a mental capacity of only a two year old. It is also noted that he was severely destructive of property and he was severely aggressive and he was known to bite and slap and kick. In a twelve month period during which period the instant incident allegedly occurred, J.W. was involved in some seven thousand episodes of serious antisocial conduct. The grievant in this particular case had taken J.W. to his room because of the antisocial conduct of J.W.; all with the permission of the house supervisor. The grievant stated that he was pulled on the bed by J.W., that J.W. was attempting to bite him and that he, the grievant, was forced to hold the hands of J.W. and protect himself against being bitten. The grievant gave that statement to the security guard immediately following the incident and testified to it all through the course of the proceedings.

Ms. Harrington testified that she peeked into J.W.'s room and saw the grievant slap J.W. in rapid succession and she, Ms. Harrington called for the supervisor who immediately came to the room. The only one who allegedly saw the incident was Ms. Harrington.

There is also some evidence placed into the record that the grievant had worked for a private nursing home prior and had been dismissed some seven or eight years prior because of abuse to a patient. It was on the basis of all of that evidence that this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

Firstly, abuse to a patient or client is a violation of contract and the arbitrator does not have authority for modifying that termination as a result of that abuse. If abuse is found, termination is an automatic remedy. It is not a just cause event but rather a contractual violation as the parties agreed upon when they entered into their contract of collective bargaining. Just cause has no meaning in this particular activity.

Determining whether or not the grievant was guilty of abuse to a client is the main issue in this particular case. On one hand, we have the grievant who had adequately stated throughout the procedures that he was protecting himself against a patient who in a period of twelve months encompassing the date of this event had been involved in some seven thousand episodes of destruction of property and violative conduct toward others living at the cottage.

The grievant in this particular case said he has been victimized by J.W. and that J.W. during an episode in the bedroom attempted to bite the grievant and pulled the grievant onto the bed. Ms. Harrington who was there for an inspection stated that she opened the door of the bedroom and saw the grievant abuse J.W. Ms. Harrington did not intervene but rather called the supervisor of the cottage who came immediately.

The supervisor entered the room with Ms. Harrington behind her and the supervisor stated to the security guard immediately after the activity that she could not see the head of J.W. from the angle she was at when she entered the room. A rereading of her statement gave her a different description of view than Ms. Harrington who said she had, looking through a crack in the door allegedly saw the grievant abusing J.W. The fact of the matter is both the supervisor of the cottage and Ms. Harrington had the same angle. Ms. Harrington said she saw the grievant being slapped on the face and the supervisor of the cottage said she could not see the face of J.W. from the same angle moments later. From all of that, we have on one hand an affirmation of abuse activity by Harrington by the grievant; a denial of the ability to see the face of J.W. due to the angle as stated by the supervisor; an allegation of Harrington that the grievant slapped J.W. and a denial by the grievant that that in fact occurred. J.W. was unfit to give a statement.

Further, an examination of J.W. revealed no redness or swelling or indication of any assault whatsoever. That examination was immediately after the incident upon close inspection. From all of this, it appeared that Ms. Harrington has no buttressing testimony whatsoever to substantiate the activity that she allegedly saw in the alleged episode of abuse. The state attempted to buttress Ms. Harrington's comments by showing that the grievant had been dismissed prior some seven or eight years ago for abusive conduct to a patient at a private nursing home. It is interesting to note that the Cambridge Development Center has a guideline for hiring people with records of abuse. If the center knew that why did they hire the grievant? To now bring up that activity seven or eight years after it occurred when there is a guideline to the contrary at the

developmental center is insufficient buttressing evidence of Ms. Harrington's testimony.

There was an investigation by both the State Highway Patrol and the City of Cambridge authorities and those investigations were held for naught. There were no criminal charges placed against the grievant by any authority of any abuse whatsoever and it is apparent from the evidence that there is insufficient evidence in the file to substantiate the activity as complained of by Ms. Harrington.

To review for a minute, there were no marks or redness immediately after the alleged incident; the view of the supervisor and the view of Ms. Harrington were the same and yet each saw different things and there was no buttressing evidence whatsoever to Ms. Harrington's commentaries. The prior record of the grievant at the facility was impeccable. Simply put, there is insufficient evidence in the file to substantiate the charges of the state in this particular case. There must be clear and convincing evidence in order to substantiate a dismissal. Terminations are not lightly taken and they must be supported in the record. Simply put, the evidence in this case does not substantiate the claim of the State of Ohio by any evidentiary standards used. Whether this standard of proof is by clear and convincing, whether it is beyond a reasonable doubt, whether it is by the evidence from the entire record or whether it is by a preponderance, there simply is insufficient evidence in the instant file to substantiate the claim of the State of Ohio. In 91AP902, an Appellate decision in the Tenth Appellate District, State of Ohio, the court stated, in pertinent part:

"The fact that those who deal with troubled youth should be encouraged to use forbearance in dealing with their charges does not make an act of self-defense into an abuse nor does it make the arbiter's decision into an erroneous decision on public policy grounds."

IV. AWARD

The grievant shall be reinstated with full back pay and benefits less any monies earned elsewhere during the period that the grievant was without work from date of layoff. If the grievant earned benefits from some unemployment compensation fund then in that event that too shall be subtracted from his back pay.

MARVIN J. FELDMAN, Arbitrator

Made and entered
this 20th day
of March, 1995.