

ARBITRATION DECISION NO.:

580

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation and
Developmental Disabilities,
Warrensville Developmental Center

DATE OF ARBITRATION:

March 28, 1995

DATE OF DECISION:

July 6, 1995

GRIEVANT:

Bonnie Daniels

OCB GRIEVANCE NO.:

24-14-(94-11-12)-1155-01-04

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Robert Robinson, Advocate
Steve Wyles, Second Chair

FOR THE EMPLOYER:

Carolyn Borden-Collins, Advocate
Pat Mogan, Second Chair

KEY WORDS:

Client Neglect
Failure to Provide Documents
Ambiguous Charges
Just Cause
Removal
Due Process

ARTICLES:

Article 24 - Discipline
 §24.01 - Standard
 §24.02 - Progressive Discipline
 §24.04 - Pre-Discipline
Article 25 - Grievance Procedure
 §25.02 - Grievance Steps
 §25.03 - Arbitration Procedures

§25.08 - Relevant Witnesses and Information

FACTS:

The grievant was employed with the Warrensville Developmental Center part-time as a therapeutic program worker (TPW),

On the night of September 8, 1994, the grievant was responsible for supervising five residents. One of the residents, Kurt H., was a profoundly retarded male with self-injurious behavioral tendencies (SEB). The grievant left Kurt H. in the restroom alone and upon her return, she found feces and blood on Kurt H.'s face and legs, as well as on the bathroom walls, stalls, and toilet seats. The grievant cleaned up both Kurt H. and the restroom and later took Kurt H. to the dining room where other staff persons supervised him. Another employee, a TPW for the next shift, noticed that Kurt H. had a swollen area under his eye and down his cheek. Kurt H. was later taken to a dermatologist where it was determined that Kurt H. was suffering from contact dermatitis resulting from contact with some irritating chemicals,

The grievant was subsequently removed for client neglect for allegedly causing Kurt H.'s facial injuries.

MANAGEMENT'S POSITION:

Management believed that just cause existed to remove the grievant and that Article 24.04 of the contract was not violated because nothing presented by the union supported the notion that the employer intentionally withheld documents or hindered the union in the preparation of its case.

To support its claim of client neglect, management pointed out that the grievant left Kurt H. alone in the restroom and that the grievant failed to wash Kurt H.'s face when he allegedly came into contact with the cleaning agent.

LaWanda Crawl, a qualified mental retardation professional (QMRP) testified that it was common knowledge that Kurt H. needed close supervision or he will injure himself. Moreover, management noted that Kurt H.'s specific supervision needs were kept in a document known as a Behavior Group Scenario, which the grievant should have been aware of.

UNION'S POSITION:

The union was of the opinion that the grievant's removal was not for just cause due to a procedural defect relating to management's failure to make information available as required by the contract and other due process deficiencies.

The union specifically maintained that Section 25.08 of the contract was violated because the employer either failed to provide requested documents in a timely manner or failed to provide information altogether. For example, the dermatologist's report and the investigation notes were not contained in the pre-disciplinary package given to the union. These Section 25.08 violations inhibited the unions ability to properly prepare for the arbitration hearing. Moreover, by fashioning vague pre-disciplinary charges and removal order particulars, the employer never clearly articulated the reasons supporting the removal decision. This violated the grievant's due process rights because a legitimate defense could not be developed. The disciplinary system was further flawed because the investigation process was not fair and objective. For example, the employer never followed up on an anonymous phone call which implicated staff members other than the grievant.

A similar concern raised at the hearing dealt with the articulation of the agency's Eyes On/Close Supervision policy and the actual requirements placed on the staff. The union contended that no policy existed at the time of the incident and that even if such a policy existed, it would have been unreasonable based on the number of residents that the grievant was assigned to.

ARBITRATOR'S OPINION:

The arbitrator held that the employer did not have just cause to remove the grievant based on the fact that the charges were laden with ambiguity. The exact charges used to support the removal changed a number of times throughout the investigation and grievance handling process. This condition results in a clear violation of Section 24.04 which places a clear notice obligation on the employer to articulate "the

reasons for the contemplated discipline and the possible form of discipline." A legitimate defense can never be established if the charges continually shift.

In addition, the arbitrator held that the employer's "close supervision" arguments were defective because the rule or guideline was vague and was not properly communicated. Furthermore, the employer failed to produce a chemical hazard data sheet requiring washing of body parts after exposure to the sanitizer.

The arbitrator, in sum, held that the grievant did not neglect Kurt H. even though the mystery surrounding Kurt H.'s injury may never be resolved.

AWARD:

The grievance was sustained and the grievant was reinstated to her former position with full back pay, benefits, and seniority.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION
PROCEEDING UNDER THE AUSPICES OF
THE FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF THE ARBITRATION BETWEEN:

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

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 11, AFSCME, AFL-CIO
GRIEVANT: BONNIE DANIELS (REMOVAL)
GRIEVANCE NO.: 24-14-(11-12-94)-1155-01-04

ARBITRATOR'S OPINION AND AWARD

ARBITRATOR: DAVID M. PINCUS

DATE: JULY 6, 1995

Appearances

For the Employer

Alaric W. Sawyer, Superintendent
Nancy Geiger, Program Director
LaWanda Crawl, QMRP
Jocelyn T. Brown, Training Coordinator
Ruby Homan, Labor Relations Officer
Pat Mogan, Second Chair
Carolyn Borden-Collins, Advocate

For the Union

Bonnie Daniels, Grievant
Paul D. Caldwell, Chapter President
Gerald Harris, Chief Steward
Gregory Williams, Observer

Deborah Weaver, TPW
Liz Williams, TPW
Margaret A. Boye, TPW
Steve Wyles, Second Chair
Robert Robinson, Advocate

Introduction

This is a proceeding under Article 25-Grievance Procedure, Section 25.02-Step 5 entitled Arbitration, and Section 25.03, entitled Arbitration Procedures of the Agreement between the State of Ohio, Ohio Department of Mental Retardation and Developmental Disabilities, Warrensville Developmental Center., hereinafter referred to as the "Employer," and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the "Union," for the period of March 1, 1994 through February 28, 1997, (Joint Exhibit 1).

The Arbitration hearing was held on March 28, 1995 at the Warrensville Developmental Office, in Highland Heights, Ohio. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both parties indicated they would submit briefs.

Stipulated Issue

Was the Grievant's removal for just cause?
If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

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 custody of the State Of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

24.02-Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. One or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. a fine in the amount not to exceed two(2) days pay for the discipline rated to attendance only; to be implemented only after approval from OCB;
- D. one or more day(s) suspension(s);
- E. termination

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an performance evaluation report

without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonable possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a disciplinary grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

(Joint Exhibit Pgs. 68-69)

24.04 - Pre-Discipline

An employees shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension, a fine or termination. The employee may waive this meeting, which shall be scheduled no earlier than -three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. An employee .who is charged, or his/her representative, may make a written request for a continuance of up to 48 hours. Such continuance shall not be unreasonably denied. A continuance may be longer than 48 hours if mutually agreed to by the parties. Prior to the meeting, the employer and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the Pre-disciplinary notice is sent the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The Employer representatives recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

(Joint Exhibit 1, pg. 70-71)

Section 25.08 Relevant Witnesses and Information

The Union may request specific documents, books, papers, or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such requests shall not be unreasonably denied.

(Joint Exhibit 1, Pg. 23)

CASE HISTORY

At the time of her removal from State service, Bonnie Daniels, the Grievant, was employed as a part-time Therapeutic Program Worker (TPW), she worked as a second shift staff person on House 4/200 at Warrensville Developmental Center, Highland Heights, Ohio. The Center is a 256 bed intermediate care facility whose primary mission is to train and assist residents in an attempt to foster an independent life style; in an environment which minimizes restrictions and optimizes individual growth opportunities.

On September 12, 1994, LaWanda Crawl, a Qualified Mental Retardation Professional (QMRP), received a call from Sylvia Russell, a Residential Care Supervisor, (RCS). Russell informed Crawl about an anonymous telephone call she had received regarding an incident on House 4/200. The caller indicated that

second shift staff had sprayed the face of Kurt H. with a bleach solution. As a consequence of this call, the Center initiated an investigation which resulted in the placement of four (4) second shift House 4/200 TPW's on administrative leave. The following individuals were placed on administrative leave: Lizzie Williams, Bobby Harris, Margaret Boyd, and Bonnie Daniels.

The investigation which ensued, however, failed to totally support the caller's allegations. It was determined Kurt H. had, indeed, been sprayed in the face with some form of irritant causing his skin to bleach white on certain portions of his face. Yet, the Center was unable to determine which individual or individuals had perpetrated Kurt H.'s condition.

Alaric W. Sawyer, the Superintendent, and several Union Representatives, Paul Caldwell, Chapter President, and Robert Robinson, Staff Representative, had several conversations surrounding the disputed incident. At one point, the Union Representatives felt they had surfaced a plausible explanation surrounding Kurt H.'s injury. They maintained that Lizzie Williams' statement (Joint Exhibit 2) had indicated she had observed another client running out of the restroom on or about the time Kurt H. could have been sprayed with the irritating agent. Sawyer informed the Union Officials that this explanation was insufficient since he felt the client was incapable of using a spray bottle.

Without any definitive evidence supporting a neglect charge, discipline was imposed based on several admitted acts of client neglect. Two (2) of the TPW's placed on administrative leave, Margaret Boyd and Bobby Harris, were returned to work without any discipline imposed. Lizzie Williams received a ten (10) day suspension for an independent act of client neglect involving her admission that she left Kurt H. alone. The level of discipline imposed was viewed as commensurate based on Williams' prior disciplinary record. The Grievant, however, was removed based on an active twenty (20) day suspension for client related misconduct, and two admissions which will be described in subsequent positions of the case history.

On September 8, 1994, five (5) clients were in the Grievant's cluster during the second shift: Joel M., Burt W., Jerome B., Rahim S., and Kurt H. a primary focus of this dispute deals with Kurt H.'s behaviors during the second shift and his general behavioral profile.

Crawl described Kurt as a profoundly retarded male with several self-injurious behavioral tendencies (SIB). He rectal digs and wall-bangs. His rectal digging behavior can take place almost without prior warning. At one time, Kurt H. had a behavior program which addressed his rectal digging problem. His behavior had allegedly improved and was no longer designated as a targeted behavior. Kurt H. is no longer in a one-to-one supervision assignment. On third shift Kurt H. is assigned to a two client cluster with one staff person supervising this group. On first and second shifts, Kurt H. is in a regular cluster group with three to four other clients. Even though his rectal digging has purportedly improved, Crawl proposed that he must be closely supervised, that is, within eye sight at all times. With respect to the wall-banging behavior, Kurt H. slams himself against walls usually resulting in self-inflicted injuries to his face.

The facts for the most part are not in dispute. At approximately 8:00 p.m. on September 8, 1994, the Grievant escorted Kurt H. and Joel M. to the bathroom. The Grievant testified Joel M. was with her because his hip was bothering him and she wanted to monitor his condition. Kurt H. was in the bathroom for hygiene purposes. While Kurt H. was toileting, with his stall door partially open, the Grievant left the restroom to get some pajamas from several clients' rooms, and turned back their bedspreads. This actively took a number of minutes.

When she returned to the restroom, she found feces and blood on Kurt H.'s face and legs. He had also smeared the bathroom walls, stalls and toilet seats with blood and feces.

Since P.M. hygiene was scheduled during this same time period, the Grievant cleaned-up Kurt H. and decided to clean-up a portion of the restroom so other clients could engage in hygiene activities. She obtained the assistance of another TPW, Liz Williams, to watch Kurt H. and Joel M. while she retrieved a sanitizer, a mop and bucket, bleach and water from the staff office.

The Grievant retrieved and cleaned one-half of the restroom so that the other clients could receive hygiene assistance. The Grievant maintained after she had cleaned-up Kurt H. and a portion of the bathroom, Kurt H. began to wall-bang. She redirected his behavior after he came in contact with the recently disinfected surfaces and continued to provide her other clients with relevant hygiene assistance.

Williams provided similar assistance to her clients. The Grievant stated Kurt H. was with her throughout this portion of the evening.

Once P.M. hygiene was completed, the Grievant took Kurt H. to the dining room and had other staff persons supervise him. She then returned to the restroom and finished her cleaning activities.

Nothing submitted into the record indicates the documentation of an injury to Kurt H. during the first or second shift. Liz Parks, a first shift TPW, reported Kurt H.'s injury after A.M. hygiene had been completed. She noted a swollen area under his eye and down his cheek. He was eventually examined by the nurse on duty. When his condition worsened, Crawl took the Grievant to a dermatologist for consultation. He purportedly concluded that Kurt H. was suffering from contact dermatitis resulting from contact with some irritating chemicals.

The Grievant was removed on November 12, 1994. The removal order contains the following relevant particulars:

"The reason for this action is that you have been guilty of Client Neglect in the following particulars to wit: That on Friday morning, September 9, 1994, client Kurt H. was discovered with an injury to the left side of his face caused by an unidentified irritant. During your shift on September 8, 1994, Kurt H. was a client in your Cluster.

By your own admission, you left client Kurt H. unattended in the bathroom, during which time client Kurt H. engaged in rectal digging and smeared feces and blood all over himself, the bathroom walls, floor and stalls. You cleaned up the bathroom with bleach, water and sanitizing spray. You then witnessed Kurt H. come into contact with the surfaces you cleaned (i.e., wall banging), yet you failed to wash Kurt H. after his contact with the cleaned surfaces. Your actions constitute Client Neglect."

(Joint Exhibit 2)

The Grievant formally contested the removal by filing a grievance (Joint Exhibit 3). Neither party raised substantive her procedural arbitrability claims. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the Employer's position that it had just cause to remove the Grievant. Neither the procedural defect raised by the Union nor other substantive issues dealing with the removal decision were properly supported. As such, the decision should stand and the Arbitrator should not substitute his judgment for that of the Employer.

The Employer did not violate Section 24.04; all contractual obligations concerning discovery were properly fulfilled. The arbitration request was officially tendered on February 21, 1995. As such, the discovery process began as of this date, and any other requests were viewed as premature and outside the scope of Section 25.08 requirements.

Nothing presented by the Union supports the notion that the Employer intentionally withheld documents, and by doing so, hindered the Union in the preparation of its case. The Union offered many allegations, but failed to properly support these claims with sufficient evidence. A letter (Union Exhibit 3) sent by the Employer's advocate to Robinson clearly substantiates the Employer's willingness to cooperate. All documents reasonably available were accessible at the Center by March 23, 1995. The Union's decision to pick up the available information on March 27, 1995 was not in any way precipitated by the Employer's inaction. Also, much of the information requested by the Union was already in its possession prior to the date of the pre-disciplinary hearing. Any other requested information either did not exist or was readily available as of March 23, 1995.

Sawyer maintained he was convinced Kurt H. was sprayed with bleach, and yet, no one was charged with this particular violation since the investigation failed to identify any particular perpetrator. The Grievant, he

stressed, was charged with several violations based on several admitted negligent acts.

Two particular negligent acts were identified in support of this removal. By leaving Kurt H. in the restroom while toileting, the Grievant failed to carry out his program as specified in his Behavior Scenario (Employer Exhibit 2). This behavior constituted client neglect as articulated in the Client Abuse and Neglect Policy (Joint Exhibit 2). The second act of neglect took place when the Grievant failed to wash Kurt H.'s face when he came into contact with the cleaning agent. This event also resulted in client neglect in contravention of the neglect policy (Joint Exhibit 2) and the Chemical Hazard Communication Program (Employer Exhibit 5). Each admitted act of client neglect independently supported the removal decision; especially when one considers the Grievant had active twenty (20) day suspension for client related offense.

In the opinion of the Employer, it obtained substantial proof that the Grievant was guilty as charged. On more than one occasion the Grievant admitted to the specified charges. The admissions surfaced in the statement that she provided to the Center's Police Department (Joint Exhibit 2); testimony she provided at the pre-disciplinary hearing (Joint Exhibit 2); and answers provided while being cross-examined at the arbitration hearing.

These admissions were not, in any way, mitigated by the circumstances surrounding the incident. Crawl and Boyd both testified that Kurt H. was the only client under close supervision status the night of the incident. The Grievant's reference to client Chota's similar status was totally misplaced. The Grievant's actions failed to meet the close supervision requirement based on her whereabouts the night of the incident.

The probable cause of Kurt H.'s facial injuries were documented by a dermatologist who diagnosed Kurt H.'s condition. Crawl accompanied Kurt H. to the physician's office who determined the injuries resulted from a variety of contact dermatitis (Joint Exhibit 2). Crawl questioned the physician concerning the possible cause of these injuries. He noted the injuries could have been caused if bleach had been left on the skin for an extended period of time.

The Employer emphasized the Grievant was not disciplined for Kurt H.'s self injuries behaviors. Neither the rectal digging nor the wall banging behaviors served as the basis for the removal. Particulars contained in the Step 3 Response (Joint Exhibit 3) and the removal order (Joint Exhibit 2) support this conclusion.

The Employer posited that proper notice was provided concerning the possible or probable disciplinary consequences associated with the Grievant's misconduct. The Grievant received training regarding the Client Abuse and Neglect Policy (Joint Exhibit 2) on August 9, 1993.

Other aspects of the disputed matter dealing with notice concerns were also rebutted. Crawl testified that the Grievant should have known the degree of supervision required for Kurt H. during the second shift. She stated that it was common knowledge that Kurt H. must be kept under close supervision or he will demonstrate his SIBS. This condition was confirmed by Crawl, Boyd, and other cottage personnel. Kurt H.'s specific supervision needs, moreover, are kept in the Behavior Group Scenario (Employer Exhibit 3). This document outlines Kurt H.'s close supervision requirements, and they apply throughout the course of the day, even though the scenario specifies time specific interventions. The Grievant should have been familiar with these various requirements since she was inserviced on Kurt H.'s needs on August 10, 1994.

Jocelyn Brown, the Training Coordinator, testified the Center had explicit policies regarding the safe handling of chemicals, cleaning products and first aide requirements if one comes in contact with these chemicals (Employer Exhibit 5-9). Safety data sheets (Employer Exhibit 4), moreover, are kept on the cottage and are accessible to staff. Brown also testified that cleaning product bottles are labeled when used by the staff, and that these labels contain relevant information regarding contents and first aide instructions. The record indicated that the Grievant received training in said areas.

The Employer urged that the investigation supporting the removal decision was fair and objective. No action was taken that could not be supported. All participants were placed on administrative leave until the investigation was completed. The removal recommendation was not tendered by Sawyer until the investigation and the pre-disciplinary conference were completed.

The investigation, moreover, was not tainted by certain promises made by Sawyer to Robinson and Caldwell. He never agreed to limit the administered penalty to a ten (10) day suspension if the Union helped provide a plausible explanation for Kurt H.'s injury.

The unequal treatment claim was viewed as equally implausible and unsupported. The two comparables

discussed by the Union did not meet the burden of proof necessary to establish this affirmative defense. Neither Williams nor Schlainet were similarly situated. These coworkers did not have a similar disciplinary history. Scharliet, moreover, in her statement, never admitted leaving Kurt H. alone while he was sleeping. She merely noted she may have left Kurt H. alone.

The Position of the Union

The Union opined the removal was not for just cause. The decision was tainted by a procedural defect relating to information availability and other due process deficiencies.

The Union maintained that Section 25.08 was violated because the Employer failed to provide requested documents until one day prior to the arbitration hearing. Robinson provided evidence and testimony which indicated he requested information as early as November 16, 1994 (Union Exhibit 1). Much of the information requested was not received until one day prior to the arbitration hearing, while some of the information was never received because it was unavailable. Other information, such as the dermatologist report and the investigation notes were never contained in the pre-disciplinary package given to the Union.

These Section 25.08 violations prohibited the Union's ability to properly prepare for the arbitration hearing. Violations of this sort should not be condoned because they result in specific non-compliance with contractual requirements; some penalty needs to be administered as a consequence.

By fashioning vague pre-disciplinary charges and removal order particulars, the Employer never clearly articulated the reasons supporting the removal decision. This strategy violated the Grievant's due process rights because a legitimate defense could not be developed. The pre-disciplinary notice states that the injury to the face constituted client neglect. The Employer's emphasis throughout the grievance procedure, and the removal order itself (Joint Exhibit 2), was on the rectal digging and wall-banging. And yet, the third step response, and theories proposed at the hearing, focused on the Grievant's inattention and not washing Kurt H's face after a wall-banging incident.

Regardless of the theories proposed at the hearing, Employer witnesses emphasized circumstances supporting removal which were outside the realm of the alleged allegations. Both Sawyer and Geiger noted the removal was based on Kurt H.'s rectal digging and wall-banging behavior.

The disciplinary system was further flawed because the investigation process was not fair and objective. Geiger told the Grievant she could be the "fall guy" if she did not implicate Bobby Harris and Lizzie Williams for the bleach spraying incident. This statement indicated the Employer had decided on the outcome of its investigation even before it had been completed.

The Employer never followed up on the anonymous phone call, which took place on September 12, 1994 implicating staff members other than the Grievant. The real culprit might have been identified if some additional leads had been pursued in a timely fashion.

The investigation was too narrowly focused which caused the Employer to ignore certain contradictions. No one ever determined why Schlariet's statements (Joint Exhibit 2) contradicted the findings of first shift personnel upon completion of A.M. hygiene. Schlariet never noticed the injuries, yet they were reported by first shift.

Geiger not only helped coordinate the investigation, but was in constant contact with Sawyer. And yet, she contemplated disciplinary outcomes with Sawyer prior to the final fashioning of the recommended removal decision. By performing these dual responsibilities, she intentionally biased both due process procedural domains.

The Union argues the inattention charge lacks merit and is unsupported by the record. Notice and reasonable rule issues clouded the propriety of this charge. Caldwell testified he and the Union filed two (2) grievances challenging the Eyes On/Close Observation policy. These grievances contend it is virtually impossible to abide by the policy while being required to supervise clusters of two or more clients. Another aspect of these grievances, and a similar concern raised at the hearing, deals with the articulation of this policy and the actual requirements placed on the staff. The Union contended no policy existed at the time of the incident. The Grievant on the night in question, had a cluster of five (5) clients, one of which was blind, while another was experiencing problems because of an arthritic hip. In addition, she was supposed to have

Kurt H. in continuous visual contact or close supervision because of his self abusive tendencies. An entirely unreasonable requirement which she attempted to comply with considering the other grievances in the pipeline. A refusal on her part could have been viewed as insubordinate conduct. Several other TPW's testified that the disputed policy caused them to treat Kurt H. as a quasi one-on-one client. They took him everywhere while servicing other clients. They followed this informal protocol because they feared being charged with client abuse or neglect if he engaged in self-abusive behavior.

Crawl's testimony further muddled the notice issue. She extensively relied on Kurt H.'s Behavior Scenario (Employer Exhibit 3) to support the claim that Kurt H. should not be allowed out of sight throughout the day. Yet, instructions contained on his IPP (Joint Exhibit 4) and a Small Group Procedure (Employer Exhibit 10) do not support this conclusion.

The charge dealing with the washing of the client's face after the wall-banging incident was strongly contested. No one is sure how Kurt H. received the injuries to his face, nor the actual agent which served to cause the skin irritation. Again, notice, investigation, and proof issues were used to contest the removal based on this allegation.

The Grievant was charged with failing to comply with a hazardous chemical policy and failing to follow proper procedures by not washing the client's face after coming into contact with a chemical agent. Nothing in the record, however, indicates that the spray bottles used to clean the restroom were properly labeled. Brown testified she could not testify with any degree of certainty that the bottled chemical agents were properly labeled on September 8, 1994. Gerald Harris, the Chief Steward, often distributes these bottles to the cottages during the normal course of work. He noted that even though the Center had been cited for not labeling the bottle dispensers, and Brown had implemented a hazardous chemical procedure and training, these dispensers were often distributed without proper labels.

Whether the sanitizer used by the Grievant resulted in the injuries in question was never supported by the Employer. Both Brown and Harris testified the sanitizer is diluted and mixed before it is distributed to the cottages. As such, once diluted, it should not serve as a skin irritant. Brown, moreover, testified that if the wall surfaces were dry no irritation should have resulted. In fact, the same sanitizer is used to clean tables before and after clients eat their meals.

Further notice concerns were raised concerning Kurt H.'s IPP (Joint Exhibit 4). Nothing in this document indicates Kurt H.'s face needs to be washed after wall-banging. Based on the Grievant's twenty (20) day suspension for not following another client's IPP, she would have placed herself in jeopardy if she had initiated an actively outside of the specified intervention protocols.

Substantial proof associating the wall-banging, the chemical agent and resultant injuries was never truly established. When the injury was originally documented by first shift some swelling was noted; nothing peculiar was identified by Center medical staff at the conclusion of their evaluation. Even the dermatologist who was contacted for consultation purposes was unclear of the cause. The dermatologist only discussed the possibility of bleach causing the injuries after being questioned by Crawl.

Two other TPWs engaged in similar behavior, but were not disciplined evidencing disparate treatment with respect to the discipline presently in dispute. Schlarier's statements indicate she provided hygiene assistance to two clients while Kurt H. was out of her sight on third shift. This admission did not result in the imposition of any discipline. Lizzie Williams, moreover, was not disciplined because her one-on-one was out of arms reach. Rather, she was disciplined because Kurt H., an "eyes on client" who she was not directly responsible for, was out of her sight.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony presented at the hearing, and a complete review of the record including all pertinent contract provisions, it is my judgment that the Employer did not have just cause to remove the Grievant. The parties are aware that I do not view abuse and neglect charges lightly; and that I am quite sensitive to the clients well-being since they cannot take care of themselves while in the State's custody. At the same time, however, I refuse to disregard blatant, if unintentional, violations of employees due process rights. These rights are articulated in the Agreement (Joint Exhibit 1) and must also be protected.

Otherwise, . when problems arise in an institution, decisions based on convenience and outside pressures will rule the day leading to irrational and unreasonable outcomes. It is also axiomatic that discipline cases need to be supported by clear and convincing evidence. Any reasonable doubts raised by the proofs need to be resolved in favor of the accused. Here, both charges are laden with sufficient reasonable doubt to justify the Grievant's return to work.

The exact charges used to support the removal changed a number of times throughout the investigation and grievance handling process. This condition results in a clear violation of Section 24.04 which places a clear notice obligation on the Employer to articulate "the reasons for the contemplated discipline and the possible form of discipline." A legitimate defense can never be established if the charges continually shift.

The Removal Order (Joint Exhibit 2) contains allegations dealing with the Grievant leaving Kurt H. in the restroom which resulted in rectal digging behavior. She is also charged with cleaning the bathroom with sanitizer and bleach, observing Kurt H. wall-banging and not washing his face (Joint Exhibit 2). At the arbitration hearing, however, the Employer emphasized the Grievant was not charged with client neglect because her actions allowed Kurt H. to engage in self-abusive behavior. Rather, she was charged with neglect because she left her "eyes on" client out of her sight and failed to wash his face. The Employer clearly narrowed its focus at the hearing perhaps realizing, after the fact, that the other charges could not be supported. A reasonable reading of the Removal Order (Joint Exhibit 2) indicates that the Grievant was charged with violations exceeding those proposed at the hearing. By failing to properly support the other charges, the Employer dismally failed in its attempt to support the removal decision. Amendments of this sort are totally unwarranted at the arbitration stages of the grievance procedure.

The modification of specific charges not only took place at the arbitration hearing, but at lower stages of the process. Neither the Notice of Pre-disciplinary Hearing nor the Pre-disciplinary Hearing Report, (Joint Exhibit 2) discuss the Grievant's failure to wash the Grievant. Rather, they emphasize the potential for client neglect and the injuries realized by Kurt H. The Third Step - Response (Joint Exhibit 3), again, contains particulars limiting the removal to the following:

XXX

All evidence points to the client sustaining an injury while in the grievant's care. At this Step 3 meeting, the grievant admitted to the following: 1. she was familiar with the client's self-abusive behavior, 2. the client must be kept in eye sight at all times to avoid self-abusive behavior, 3. the close supervision requirement of the client is documented on the house, 4. she, the grievant, left the client unattended. The grievant's admission, her prior discipline history for a client related offense and her assigned responsibility of the client all weigh into the severity of the discipline imposed. The removal was for just cause. Grievance denied.

XXX

(Joint Exhibit 3)

This excerpt indicates that removal was based on the Grievant's failure to closely supervise Kurt H.; Kurt H.'s self-abuse behavior resulting from the Grievant's negligence; and failure to wash him which resulted in documented injuries. Obviously, this response was not limited to the lack of supervision and failure to wash theories proposed at the arbitration hearing.

This review of the various imposed charges clearly indicates the Employer decided to change the focus of its case, in midstream, without providing proper notice. Testimony provided by Sawyer and Geiger support this conclusion. They, in no uncertain terms, stated the removal was partially based on the rectal digging and the injuries resulting from wall-banging a sanitized wall surface. And yet, at the arbitration hearing, the Employer proposed theories in support of the removal that did not include the self-abusive behaviors.

The Employer's "close supervision" arguments are also defective because the rule or guideline is vague, lacks specificity, and was not properly communicated. Crawl's testimony underscored the ambiguity surrounding this policy. There appears to be no written policy advising employees what constitutes "eyes

on, "close supervision" or "close observation." Examination of Kurt H.'s IPP (Joint Exhibit 4) and Behavior Scenario (Employer Exhibit 3) surfaced some of the existing ambiguity. The IPP introduced by the Employer (Joint Exhibit 4) specifies Kurt H.'s rectal digging as being monitored and controlled with a one-on-one on second shift and or first shift weekends (Joint Exhibit 4). This document and the guidelines contained therein, were modified at a later date by another document (Employer Exhibit 10) which was in Crawl's office and available for review but not attached to the IPP. It changes Kurt H.'s status from one-on-one to a scenario group D on first and second shift. Those assigned to group D are "required to monitor Kurt H. closely and redirect any rectal digging or hyperactivity." Whether "monitoring" Kurt H. "closely" is equivalent to "constant visual" contact or any of the other similar directives provided by the Employer is abundantly unclear.

Further confusion resulted when Crawl attempted to justify the "constant visual" contact requirement by referencing Kurt H.'s Behavior Scenario (Employer Exhibit 3). This document specifies interventions that need to be implemented during the course of the day. Even though this document designates the need to "closely supervise" Kurt H. between 10:30 a.m. - 11:30 a.m., she stated this requirement was continuous regardless of the time frame involved. Again, nothing introduced at the hearing supports the premise that constant visual contact needs to be continuous.

The toileting aspect of this case and the supervision required were also muddled by Crawl's testimony. The IPP under the heading Self-Care Skills indicates "toileting staff assistance" it never states Kurt H. needs to be "closely supervised" or in "visual contact" while toileting. In fact, under cross examination Crawl stated she never wrote a scenario which specified Kurt H. should not be left alone in the restroom.

It is axiomatic that the Employer has a right to establish meaningful rules, but this right carries a corresponding obligation. The rule needs to be clearly defined and an employee needs to have the means to enable him/her to carry out his/her appointed duties. Otherwise, it can lead to a situation where a reasonable rule is unreasonably applied. Clearly, the previous review underscores the various potential interpretations regarding "eyes on" supervision; especially when the Employer develops documents which fail to project certain expectations regarding supervision of clients. It also appears unrealistic to expect the supervision of five clients when one requires "eyes on" supervision, another client is blind, and there is no documented requirement for staff assistance or transferring of responsibilities under certain circumstances.

The face washing charge is also unsupported by the record. This charge, to be upheld, requires proof that face washing was required, and that the Grievant neglected to perform these duties in violation of some directive or reasonable expectation based on her position and the circumstances she had to deal with.

The record is unclear concerning the use of bleach or sanitizer on the restroom walls which Kurt H. "banged" resulting in facial injuries. The Grievant alleged she used sanitizer on the walls and water and bleach to clean other portions of the restroom. The Employer, throughout the hearing, seemed to emphasize a bleach solution was used on the walls in an attempt to draw a nexus between Kurt H.'s injuries and bleach as the irritant causing the documented injuries. Nothing in the record supports the use of bleach to clean the walls. P.M. hygiene care took place shortly after the Grievant washed the walls, yet no witnesses provided any testimony regarding smells in the restroom which could have led to inferences regarding the use of bleach. Reliance on the dermatologist's report (Joint Exhibit 2) fails to support this conclusion. His findings are unclear based on the number of question marks contained in his report (Joint Exhibit 2). He affirmed the possibility of bleach being the possible irritating agent only after being questioned by Crawl. Surprisingly, she never asked the dermatologist if washing the walls with sanitizer could have resulted in similar injuries.

If sanitizer was, indeed, used to wash the walls, the record does not indicate face washing after the wall-banging would have been necessary. Brown and Harris noted the sanitizer is diluted prior to being distributed, and in this state it should not serve as an irritant. In fact, an In Service Training document (Employer Exhibit 8) dealing with Mealtime Do's and Don'ts authorizes the use of Recall II, the sanitizer, to clean the tables before and after meals. This document does not specify that clients need to be washed if they come into contact with the sanitizer. The Employer neither produced a chemical hazard data sheet requiring washing of body parts after exposure to the sanitizer nor identified washing of Kurt H. after wall-banging in his IPP.

Based on this analysis, nothing in the record suggests that the circumstances necessitated washing Kurt

H.'s face nor did any documented policy require this responsibility. As such, the Grievant did not neglect Kurt H. even though the mystery surrounding Kurt H.'s injury may never be resolved.

The record does not support the Union's Section 25.08 claim. A much clearer presentation concerning the documents requested during the pre-disciplinary and post-disciplinary stages of the grievance procedure needed to be identified. Also, I am also convinced the Union was given all documents, etc. that were reasonably available and relevant to the grievance under consideration. Without any clearer identification of documents reasonably available but not provided, I am hesitant to rule that a contractual breach had, indeed, taken place.

The Union's unequal treatment claim is unsupported by the record. Mere reliance on Schlariet's statement (Joint Exhibit 2) does not reach the standards of proof necessary to establish such theory.

AWARD

The Employer did not have just cause to remove the Grievant. She shall be reinstated to her former position with full back pay, benefits, and seniority. Since the Grievant worked "day job" prior to her removal as a part-time employee, subsequent earnings realized after her removal related to her "day job" shall not be deducted from the back pay portion of this Award. These earnings were not generated as a consequence of an employment opportunity realized after her removal, but represent on-going earnings she continued to receive notwithstanding her removal or employment relationship with the State of Ohio. Any earnings realized in excess of her "day job" earnings shall be deducted as part of the back pay remedy.

Dr. David M. Pincus
Arbitrator

July 6, 1995