

ARBITRATION DECISION NO.:

603

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation and Developmental Disabilities
Cambridge Developmental Center

GRIEVANT:

Mark Addis

GRIEVANCE NO.:

24-04-(95-08-3I)-0681-01-04

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Steve Wiles

FOR THE EMPLOYER:

Lizabeth J. Dible

KEY WORDS:

Abuse of Client
Mitigation
Physical Restraint of Patient
Removal

ARTICLES:

Article 24 - Discipline
 § 24.01 - Standard
 § 24.02 - Progressive Discipline

FACTS:

The grievant had been employed as a Therapeutic Program Worker at the Cambridge Developmental Center since May 26, 1986. The client involved in the disputed incident is profoundly retarded and essentially unable to verbally express himself. However, he moans when he appears to dislike something and he smiles and makes other vocalizations when he appears to be happy. This client had previously demonstrated an inclination toward Self-Injurious Behavior (SIB). On July 12, 1995, the date of the disputed incident, a Health Care Facility Surveyor was conducting an annual certification survey at Cambridge Developmental Center. At the time of the incident, this surveyor was in the Center's Receiving Building searching for a particular client group she was to observe. While searching for this client group she reportedly observed the grievant strike the client in the abdomen with his right fist.

After observing this incident, the surveyor contacted the facility's Program Director and the Senior Surveyor to advise them of this incident. The surveyor that observed this incident was interviewed the same day by the State Highway Patrol. As a result of an internal investigation, the Employer issued the grievant a Removal Order on August 17, 1995.

EMPLOYEE'S POSITION:

The Employer argued that it had just cause for the grievant's removal based on the Health Care Surveyor's credible testimony, as opposed to the inconsistent version provided by the grievant. In support of this argument, the Employer contended that the surveyor is a trained professional who was able to identify the incident as client abuse. Further, her version is quite believable and an accurate depiction of the events. Lastly, this surveyor has nothing to gain or lose by characterizing the events as she saw them.

The Employer did admit that the client never responded to the punch, nor were there any signs of physical abuse when he was examined. Aside from this lack of evidence of physical abuse, the Employer still contended that abuse did take place regardless of the amount of force inflicted.

UNION'S POSITION:

The Union argued that the surveyor observed that last of a series of interventions that the grievant had used to interrupt the client's self abusive behavior. The grievant has had to interrupt this particular client's abusive behavior on a number of occasions. The grievant was following the proper intervention technique which required him to reach out and grab the client's right wrist, with his left hand, as he was attempting to bring his right wrist to his mouth.

The Union questioned the accuracy of the Health Care Facility Surveyor's observations, because she was a considerable distance from the grievant and the client when the disputed incident occurred. Moreover, the grievant was positioned on an angle to the client which obstructed the surveyor's ability to accurately observe the intervention.

In further support of the grievant's version of the disputed incident, the client did not flinch after the alleged blow. Moreover, the patient did not sustain any type of visible injury. Lastly, after the State Highway Patrol conducted an investigation, and the Prosecutor's office determined that charges were not warranted against the grievant.

ARBITRATOR'S OPINION:

This Arbitrator concluded that the Employer violated the Agreement when it removed the grievant for client abuse. The Employer failed to provide this Arbitrator with sufficient evidence and testimony to sustain the grievant's removal. Specifically, the Employer failed to prove that the grievant punched the client in the stomach. Further, this Arbitrator was inclined to believe the grievant's version over the surveyor's version based on the fact that the surveyor only observed the tail-end of an appropriate intervention and she failed to see the entire episode due to her obstructed view.

The grievant's recounting of the incident and his un rebutted testimony, regarding the client's strength and normal self-abusive behavior tendencies, indicate how the surveyor could have misinterpreted the situation. In further support of the grievant's version, the Employer was unable to provide any causally-linked injury and the surveyor admitted the client never flinched as a result of the blow.

The grievant's work performance history was introduced by the Union as a form of mitigation. During the grievant's 10 year tenure he achieved high employee evaluations in the areas of dealing with demanding situations and directing/coordinating behavior of others. He was also promoted to an interim supervisory position because of these qualities.

AWARD:

The grievance was sustained. The grievant shall be reinstated with full back pay and benefits less ordinary and normal deductions. His seniority shall also be reinstated. Any monies earned during the period that the grievant was without work from date of removal shall also be deducted. If the grievant earned any unemployment compensation fund benefits during this period that too shall be deducted from his back pay award.

TEXT OF THE OPINION:**STATE OF OHIO AND OHIO CIVIL SERVICE**

**EMPLOYEES ASSOCIATION LABOR
ARBITRATION PROCEEDING**

IN THE MATTER OF THE
ARBITRATION BETWEEN

**THE STATE OF OHIO, THE
OHIO DEPARTMENT OF
MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES,
CAMBRIDGE DEVELOPMENTAL CENTER**

-AND-

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, Local 11, AFSCME, AFL-CIO**

GRIEVANCE:

Mark Addis
(Discharge-Client Abuse)

CASE NUMBER:

24-04(8/31/95)0681-01-04

ARBITRATOR'S OPINION AND AWARD

Arbitrator:

David M. Pincus

Date:

April 9, 1996

APPEARANCES

For the Employer

David Lynch, Labor Relations
Randolph White, Client Rights Advocate
Shirley Hebb, HCFS II
Pat Morgan, Office of Collective Bargaining
Ed Ostrovsky, Chief Labor Relations
Lizabeth J. Dible, Advocate

For the Union

Mark Addis, Grievant
Mike Scheffer, Local President
Steve Wiles, Staff Representative

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration/Mediation Panels of the Agreement between the State of Ohio, The Ohio Department of Mental Retardation and Developmental Disabilities, Cambridge 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 March 1, 1994-February 28, 1997 (Joint Exhibit 1).

The arbitration hearing was held on February 20, 1996 at Cambridge Developmental Center, Cambridge, Ohio. The parties 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 not submit briefs.

STIPULATED ISSUE

Was the contract violated when the Grievant was removed for client abuse?

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 or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25.04 shall be heard by an arbitrator selected from the separate panel of abusecase 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 an amount not to exceed two (2) days pay for discipline related 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 a performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of the Article. An arbitrator deciding a discipline 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 1, (Pgs. 68-69))

STIPULATED FACTS

1. The case is properly before the Arbitrator.
2. IBP created 3/24/93 and revised 4/8/94 was in effect at time of the incident.

CASE HISTORY

The Employer provides care and programming efforts for mentally retarded clients. Some clients are profoundly retarded with multiple handicaps, while others are mildly retarded with behavioral or other problems. The Grievant has been employed at the facility since May 26, 1986. On the date of the disputed incident, he served as a Therapeutic Program Worker on the second shift, and was assigned to Brown-A cottage.

Elmer H. is a profoundly retarded client housed in Brown-A cottage. He has certain behavioral characteristics known to those providing on-going care, and identified in his Behavior Intervention/Support Plan (Union Exhibit 3). Elmer H. is essentially unable to verbally express himself. He does, however, make a moaning-like sound when he appears to dislike what he is experiencing at the moment. He smiles and makes other vocalizations when he appears to be happy.

Elmer H. exhibits three (3) challenging behaviors which the Treatment Team has targeted in his Behavior Plan. The most critical behavior for the purpose of the present dispute deals with his inclination toward Self-Injurious Behavior (SIB). A two stage intervention protocol is contained in the Individual Behavior Program (IBP) to counteract or modify the SIB when it occurs. Initially, the care provider is to interrupt an on-going SIB by using brief physical prompting as necessary, and then attempt to get Elmer H. involved in a preferred activity. If the SIB is once again demonstrated while being redirected, the intervention previously initiated is to be repeated. In the event he bites himself a third time within a single episode while being redirected, the second stage of the intervention protocol is to be implemented. Elmer H. is to be manually restrained by holding his hands at his sides in order to prevent hand/arm biting. (Union Exhibit 3).

On July 12, 1995, Shirley Hebb, a Health Care Facility Surveyor working for the Department of Health, was conducting an annual certification survey at Cambridge Developmental Center. These surveys involve observation and review of documents to determine whether facilities are in compliance with health care regulations.

On the date in question, she was doing a survey of clients housed in Moore Cottage. These clients were eventually transferred to the Receiving Building for additional activities. She testified she did not walk over with the clients during the transfer. Hebb stated she walked over to the Receiving Building a few moments after the clients' departure. She hoped to continue her observation of the activities engaged in by the clients.

Hebb entered the Receiving Building and searched for the Moore Cottage client group. She went to the second floor and went down a hallway because she heard some noise in the area. The noise was coming from a hallway leading to the gym. As she turned the corner in the direction of the sound, she purportedly observed a staff person, the Grievant, strike Elmer H. in the abdomen with his right fist. She stated the Grievant was down the hallway by the gym doors with these clients. He was facing Elmer H., who had his back toward the hallway wall but was not up against the wall.

According to Hebb's version, the punch was not inflicted with tremendous force. Also, Elmer H. did not react to the blow, but merely stood there and stared at the Grievant. She did, however, acknowledge a statement allegedly uttered by the Grievant while inflicting the blow. He stated, "now maybe now you'll straighten up."

As a consequence of her observations, Hebb approached the group and asked a number of questions. She asked where the clients resided, and the specific client's name involved in the altercation. The Grievant responded by noting the clients were housed in Brown-A, and provided Elmer H. as the name of the client. Even though Hebb never asked the Grievant for additional information, he explained Elmer H. had a SIB of biting his wrist. Hebb, moreover, acknowledged, the Grievant never overreacted and calmly answered her

questions.

Hebb attempted to contact Dee Corbitt, the facility's Program Director, to advise her of the incident. She eventually reached Corbitt and Jack Wilson, the Senior Surveyor, at Brown Cottage. After reviewing the circumstances with them, she wrote down some notes (Employer Exhibit 3) which summarized the disputed incident. Hebb was eventually interviewed the same day by the State Highway Control. An internal investigation was conducted the following day which resulted in another written statement (Joint Exhibit 2).

On August 17, 1995, the Employer issued a Removal Order. It contained the following relevant particulars:

* * *

This will notify you that you are removed from the position of Therapeutic Program Worker effective 8-31-95. The reason for this action is that you have been guilty of client abuse in the following particulars, to wit: that on July 12, 1995 you did physically punch a client in the stomach.

* * *

(Joint Exhibit 2)

On August 31, 1995, the Grievant contested this administrative action by filing a grievance. The statement of facts contains the following allegations.

* * *

On 8/31/95 the grievant was removed for alleged abuse. Management failed to establish the burden of proof to establish just cause.

* * *

(Joint Exhibit 2)

Neither party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined it did not violate the Agreement (Joint Exhibit 1) when it removed the Grievant for client abuse. The administrative action was supported by Hebb's credible testimony, as opposed to the inconsistent version provided by the Grievant.

The Employer argued that Hebb's version should be given considerable weight because she provided highly credible testimony involving what took place on July 12, 1995. She, moreover, is a trained professional who knew what she saw, and was able to identify the action as a clear act of client abuse. Her version is, indeed, quite believable and an accurate depiction of the events. She had nothing to gain or lose by characterizing the events as she saw them on July 12, 1995.

Hebb testified she saw the Grievant strike or punch Elmer H. in the abdomen with his right hand while standing in front of the gym's door. As the blow was being inflicted she also heard the Grievant remark, "now maybe you'll straighten up." Hebb, moreover, testified that her view was clear and unobstructed as she rounded the corner of the hallway. The Grievant's actions could not be interpreted as a redirection of a self-injurious behavior. She observed this incident in a wide open and well-lit hallway unencumbered by a window or a crack in a closing door.

In the opinion of the Employer, the Grievant's version of the events lacked veracity, was inconsistent and was not supported by the record. The Grievant contrived an obstruction theory to counter Hebb's observations. He noted at the arbitration hearing that Hebb's view was obstructed because he was angled in front of Elmer H. when he initiated a legitimate intervention to prevent an SIB occurrence. He never mentioned this positioning defense at any prior stages of the disciplinary process.

The Grievant, moreover, indicated he saw Hebb as she turned the corner. If he was positioned in an angular fashion as he maintained at the hearing, there is no way he could have seen Hebb as she came around the corner.

The intervention technique alluded to by the Grievant lends credence that a blow was inflicted. He maintained he intervened using his left hand to prevent Elmer H. from biting his right hand. As such, it becomes quite difficult to believe that Hebb somehow misinterpreted the hold as a proper intervention. Several other inconsistencies tend to discredit the Grievant's version of the events. He maintained that he restrained Elmer H. several times in Hebb's presence. And yet, Hebb, a trained observer, failed to mention these additional intervention attempts in her notes and various statements. Hebb has consistently reported one physical touch while she observed the Grievant and Elmer H.

Hebb's note taking activities also became a point of controversy. The Grievant maintained Hebb was taking notes as she was walking down the hallway. Hebb, however, consistently maintained she never took notes while in the hallway. She testified the incident report (Employer Exhibit 3) was written after her discussion with Corbitt, while her written statement (Joint Exhibit 2) was authored the following day during the course of an investigatory interview. Again, this alleged note taking activity never surfaced prior to the arbitration hearing.

The Employer admitted Elmer H. never responded to the punch, nor were there any signs of physical abuse when he was examined. His ribs were not broken, and bruising and redness were never noted by the medical staff. Even without these physical outcomes, abuse did take place regardless of the amount of force inflicted.

The Grievant's demeanor, once confronted by Hebb, was viewed as a non-distinguishing circumstance. A multitude of reasons could account for the Grievant's calm and unflustered demeanor. His outward emotional state does not diminish the seriousness of the abusive conduct.

The Union's Position

The Union argues that the Employer did violate the Agreement (Joint Exhibit 1) when it removed the Grievant for client abuse. The Grievant's version of the dispute should be believed because it was not properly rebutted by Hebb's testimony.

On the day in question, nothing unusual took place. Hebb merely observed the end of a scenario and concluded client abuse had taken place. Prior to her arrival, the Grievant had to interrupt Elmer H.'s self abusive behavior on a number of occasions. When Hebb arrived on the scene, she merely viewed the last of a series of interventions. Elmer H. was taking his arm to his mouth and biting his right wrist. The Grievant was following the proper intervention technique which required him to reach out and grab Elmer H.'s right wrist, with his left hand, as Elmer H. was attempting to bring his right wrist to his mouth. Once the right wrist was restrained, the Grievant relocated the wrist to Elmer H.'s side.

The Union questioned the accuracy of Hebb's observations. She was a considerable distance from the gym when she observed what she thought was abusive misconduct. Her view, moreover, was partially obstructed because the Grievant did not intervene while standing directly opposite Elmer H. Rather, the Grievant was positioned on an angle to Elmer H. which obstructed Hebb's ability to accurately observe the intervention. She could not, therefore, see the client's hands because her line of sight was obstructed.

The Grievant did in fact see Hebb as she turned the corner. He briefly observed her presence prior to initiating the intervention technique in dispute. He knew surveyors were at the facility and figured she was one of the individuals involved with the audit.

The client's reaction, as well as the evidence of physical abuse, support the Grievant's version of the disputed incident. Hebb, herself, noted the client did not flinch after the alleged blow. It appears highly unlikely that a physical blow to the abdomen would fail to invoke some type of response.

Evidence in support, or corroborating, the physical abuse charge was never introduced in support of the removal. Elmer H. never sustained any type of visible physical injury as a consequence of the disputed event. He was examined shortly after the incident, and repeatedly thereafter for a number of days, without any adverse reaction noted in the medical notes (Union Exhibit 4).

Collateral outcomes were introduced by the Union in support of its contract violation claim. The State Highway Patrol conducted an investigation (Joint Exhibit 5), but the Prosecutor's office determined charges were not warranted against the Grievant. Similarly, the Ohio Bureau of Employment Services issued a Determination of Benefits finding on September 27, 1995 (Union Exhibit 5). The claim was allowed since "a

review of the facts establish that there was not enough fault on the part of the claimant in his/her acts . . . to find the discharge justifiable."

The Grievant's work performance history was introduced by the Union as a form of mitigation. During the Grievant's ten (10) year tenure, he achieved high employee evaluations in the areas of: dealing with demanding situations and directing/coordinating behavior of others. He was also promoted to an interim supervisory position because of these qualities.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, a complete review of the record including all pertinent contract provisions, it is my opinion that the Employer violated the Agreement (Joint Exhibit 1) when it removed the Grievant for client abuse. The parties are fully aware of my feelings toward any type of client and patient abuse. My prior awards reflect an understanding of the severe nature of these charges and the importance of protecting client/patient rights within settings similar to Cambridge Developmental Center. These charges, however, are equally severe for any employee faced with allegations of this sort because it virtually eliminates the potential for any continued state service; or any future employment in similarly situated private sector settings.

Regardless of my philosophical viewpoint when dealing with this particular abuse case, or others, I am bound as a third party neutral selected by the parties to interpret the record. A record which must be established by the Employer to sustain a client abuse charge. Here, even if one applies a lenient proof standard based on the preponderance of the evidence, the Employer failed to provide me with sufficient evidence and testimony to sustain this removal. The record, moreover, even failed to sustain a possible penalty modification based on a charge of inappropriate client intervention.

The Employer failed to prove that the Grievant punched Elmer H. in the stomach area. Corroborating testimony was unavailable in this instance, which therefore, required a critical analysis of Hebb's and the Grievant's testimony.

Hebb's testimony is somewhat equivocal in two critical evidentiary domains, which lends credence to the Grievant's version of the events. In my view, she observed the tail-end of an appropriate intervention which caused her to believe abuse had taken place.

I am led to believe that her view was somewhat obstructed or she failed to see the entire episode. This conclusion is based on her testimony regarding Elmer H.'s and the Grievant's hands during the course of the incident. If her view was, indeed, unobstructed she would have seen both sets of hands and her recollection would have been more specific. Under direct examination she offered the following version:

Q: Where was the grievant's left hand as he punched the grievant with right?

A: I believe his left hand was up this way.

Q: And what was he doing with his left hand?

A: I believe that, but I cannot say for sure. In trying to recall the events, Elmer's right hand was up and I believe his left hand was headed toward Elmer's right arm.

Under cross examination she appeared unclear about the client's hands as she remarked:

Q: When you were around at the comer, when this incident took place did you see the client's hands?

A: I couldn't say for absolutely sure, where his hands were. I felt in trying to remember what was happening that his right hand might have been up.

Q: Why wasn't you able to see the hands?

A: I don't know. I wasn't looking for his hands, ya know. It was just a glance.

Q: So you did not focus in on his hands?

A: I didn't focus on his hands. No.

She basically affirmed her previous testimony during re-cross examination by the Union. This Arbitrator finds it hard to believe that Hebb could observe the punch, and be unsure about the location of the Grievant's hands, and the client's hand location.

Hebb's uncertainty about the protagonists' hand positions does, however, support the notion that an intervention was in progress. This supports the Grievant's position of a quite plausible alternative explanation. He was intervening in accordance with the protocol established by the staff.

The Grievant's review of the incident and his unrebutted testimony regarding the client's strength and normal self-abusive behavior tendencies, indicate how Hebb could have misinterpreted the situation. He maintained Elmer H. was quite strong and any restraint or intervention required some strength. As he attempted to restrain Elmer H. his action could have been erroneously perceived as a punch toward the abdomen. The bodily actions are quite similar, and could be viewed as a punch in light of the Grievant's close proximity to Elmer H.

Other circumstances support the Grievant's version of the events. The Employer was unable to provide any causally-linked injury even though Elmer H. was under observation for a considerable period of time. I also find it hard to believe that if a blow was inflicted, regardless of the severity, that Elmer H. did not evidence any physical outcome. Hebb admitted Elmer H. never flinched or "doubled-over" as a consequence of the blow.

This Arbitrator also believes that any blow to the abdomen should have resulted in some form of verbal response, if in fact inflicted. The Employer attempted to rebut this possibility by stating Elmer H. was non-verbal. Yet, this allegation is not supported by the information contained in his Behavior Intervention/Support Plan (Union Exhibit 3). Even though he is unable to verbally express himself, he does moan when he appears to dislike what he is experiencing. As such, the document indicates he is not totally non-verbal and does have the ability to express some affective response. Nothing in the record disputed this fact. Obviously, no individual, regardless of his/her mental predilection, would view a blow to the abdomen as a pleasurable experience. Some response, either verbal or non-verbal, should have been engendered if a blow to the stomach had been inflicted.

Hebb's own testimony further supports the Grievant's position in terms of the Grievant's demeanor. He appeared to be non-threatening, calm and answered all her questions. He might be a good actor, but in the context of the entire incident, his demeanor provides his version with some degree of credibility.

AWARD

The grievance is sustained. The Grievant shall be reinstated with full back pay and benefits less ordinary and normal deductions. His seniority shall also be reinstated. Any monies earned during the period that the Grievant was without work from date of removal shall also be deducted. If the Grievant earned any unemployment compensation fund benefits during this period that too shall be deducted from his back pay award.

April 9, 1996

Dr. David M. Pincus, Arbitrator