

ARBITRATION DECISION NO.:

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UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:Ohio Department of Mental Retardation and Developmental Disabilities
Cambridge Developmental Center**DATE OF ARBITRATION:**

November 7, 1997

DATE OF DECISION:

December 21, 1997

GRIEVANT:

Brian Hicks

OCB GRIEVANCE NO.:

24 04 (96 11 21) 0751 01 04

ARBITRATOR:Nels E. Nelson

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FOR THE UNION:Michael P. Scheffer, Staff Representative, Presenting
Steve Wiles, Staff Representative
Robert Johnson, Chapter President**FOR THE EMPLOYER:**Brian Walton, Labor Relations Officer, MRDD
Wendy F. Clark, Labor Relations Specialist, Office of Collective Bargaining

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KEY WORDS:Abuse of a Patient
Credibility of Witnesses
Criminal Charges
Evidence: Medical
Grievant's Testimony
Injury
Just Cause
No Contest Criminal Plea
Removal**ARTICLES:**Article 24 - Discipline
§24.01 – Standard**FACTS:**

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The grievant was a Therapeutic Program Worker (TPW) at the Department of Mental Retardation and Developmental Disabilities (MRDD). At the time of his removal, he had two years of State service, and was employed for the entire time at the Cambridge Developmental Center.

The events giving rise to the grievant's termination occurred on October 1, 1996. On that date, the grievant and another MRDD employee took three clients shopping. While at a department store, a client sat down on a bench and took off one of her tennis shoes.

There was conflicting testimony as to what happened next. A registered nurse (RN) testified that she saw the grievant hit the client on the side of the head with the client's shoe. The RN stated that she observed the client's head move and heard the client grunt as the shoe hit her. The grievant claimed that he shook the shoe at the client as he told her to put her shoe back on. He stated that he may have touched her cheek with the shoe to get her attention but he denied hitting her. The Employer investigated the incident, and found that the grievant had abused the client, therefore, the employee removed the grievant. This resulted in the filing of a grievance.

EMPLOYER'S POSITION:

The Employer argued that the grievant was guilty of physically abusing a client. It pointed out that tile witness had a clear view of the grievant hitting the client on the side of the head with a shoe. The witness did not know the grievant and had no reason to fabricate her story.

The Employer acknowledged that the client involved does slap herself, however, that does not matter because it is never acceptable for an employee to strike a client. The Employer also acknowledged that there were no bruises or marks on the client, but that this is because she was not examined until 6 1/2 hours after she was struck. The Employer pointed out that abuse can occur even when no injury is visible.

The Employer also pointed to the grievant's plea of no contest to a misdemeanor charge equivalent to patient abuse. While the Arbitrator is still bound to decide the issued based on the evidence presented at the hearing, the grievant's plea adds to the credibility of the RN's testimony.

The Employer maintained that an Arbitrator's authority is limited in cases involving patient abuse. It pointed out that Section 24.01 of the Agreement indicates that if an employee is terminated for patient abuse and the Arbitrator finds that abuse did occur, the Arbitrator has no authority to modify the penalty.

UNION'S POSITION:

The Union argued that there was no physical evidence to support the allegation of abuse. It stated that the client was examined immediately after the incident, and that no swelling, redness, bruise, or other type of injury was evident.

The Union also claimed that the grievant's plea in court was not an admission of guilt. It claimed that the grievant decided to plead "no contest" to the misdemeanor charge because he could not afford the \$2500 that a trial on the assault charge would have cost. In addition, the grievant had originally been indicted on a felony assault charge, but the charge was subsequently amended to a misdemeanor. In regard to the lessening of the charge, the Union noted that "the court found it in their best interest to change the charge to one in which no physical harm was found to have been bestowed upon the client."

The Union acknowledged that the Arbitrator cannot modify the penalty where abuse is substantiated, but that the Employer must meet the burden of proof under the just cause standard . The Union stressed that the

Employer failed to prove by any standard that abuse took place.

ARBITRATOR'S OPINION:

Rather than dismissing cases where there is only one witness to an alleged act of abuse, the credibility of the witness and the accused employee must be closely examined and the surrounding circumstances must be taken into account. The testimony of the RN appears to be very credible. First, she had a clear view of the client and the grievant. Second, she reacted immediately to what she testified she saw by attempting to learn the grievant's identity. Third, the witness was an RN and should be expected to have good powers of observation. Fourth, she had no idea who the grievant was so she had no incentive to be untruthful.

The grievant's testimony, on the other hand, suffered from the same problem that plagues the testimony of all grievants charged with a serious offense. Not only is his current job in jeopardy, but his future employment as well. He has an obvious motive to deny the charges against him.

The lack of physical evidence that the grievant had struck the client was not surprising, as the client was hit with a tennis shoe and was not examined until six hours later. Furthermore, it is well established that a client does not have to suffer an injury for patient abuse to have taken place.

The Arbitrator rejected the Union's argument that the grievant's no contest plea to the reduced charge of "failure to provide for a functionally impaired person" should be ignored because he entered the plea only because he could not afford a jury trial. The \$2500 which the grievant testified that his attorney told him the trial would cost did not seem inaccessible to the Arbitrator, considering the grievant spent two years working for MRDD, and his wife is an RN. Furthermore, any worker in the mental health field recognizes the adverse impact of anything indicating patient neglect or abuse.

The Arbitrator concluded that abuse did take place, and as the Employer noted, the Arbitrator does not have authority to modify the termination of the accused employee.

AWARD:

The Arbitrator denied the grievance, and as a result, the removal order was upheld.

TEXT OF THE OPINION:

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ARBITRATION DECISION

December 21, 1997

In the Matter of:

State of Ohio, Department of Mental Retardation and Developmental Disabilities, Cambridge Developmental Center

and

Ohio Civil Service Employees Association, AFSCME Local 11

APPEARANCES

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For the State:

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Brian Walton, Labor Relations Officer, Department of MR/DD, Presenting
Wendy F. Clark, Labor Relations Specialist, Office of Collective Bargaining, Assisting
Cheri Stevens, Operations Director, Cambridge Developmental Center
Troy McCollister, Labor Relations, Cambridge Developmental Center
Deidre Corbett, Acting Superintendent
Shelly Hall, Witness
Susan Marie Bardze, Witness

For the Union

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Michael P. Scheffer, Staff Representative, Presenting
Steve Wiles, Staff Representative, Assisting
Brian Hicks, Grievant
Robert Johnston, Chapter President
Beverly Thompson, Licensed Practical Nurse

Arbitrator:

Nels E. Nelson

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BACKGROUND

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The grievant, Brian Hicks, was hired by the Cambridge Developmental Center of the Department of Mental Retardation and Developmental Disabilities in December 1994. He began his employment as a part time General Activities Therapist. The grievant subsequently accepted a position as a full time Therapeutic Program Worker. At the time of his removal he had approximately two years of state service.

The events giving rise to the grievant's termination occurred on October 1, 1996. On that date the grievant and Melanie Bintz, a General Activities Therapist, took three clients to a nearby department store to shop for sweatshirts. While at the store, Elizabeth, a 42 year old profoundly retarded female, sat on a low bench and took off one of her tennis shoes.

There is conflicting testimony regarding what happened next. Shelly Hall, a registered nurse at Guernsey Memorial Hospital, testified that she saw the grievant hit Elizabeth on the side of the head with the shoe and observed her head move and heard her grunt as the shoe hit her. The grievant claims that he shook the shoe at Elizabeth as he told her to put her shoe back on. He stated that he may have touched her cheek with the shoe to get her attention but he denies hitting her.

Hall was concerned about what she believed she had witnessed. She contacted the store manager who established the identity of the grievant. Hall called the Cambridge Developmental Center. She told Ralph White, the facility's chief administrator, what she had witnessed.

The state began an investigation. On October 2, 1996, Scott Stoney, a police officer at the center, interviewed the grievant and Hall. He also interviewed Bintz and two department store employees but none of them had observed the alleged incident.

A pre disciplinary conference was held on October 15, 1996. Hearing Officer Sherri Stevens found that the grievant's statement to Stoney indicated that he intimidated Elizabeth by standing over her with a shoe in his hand which justified the charge of

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mistreatment. She further held that there was just cause for the charge of physical abuse because a blow was struck by the grievant. She recommended the deletion of the mistreatment charge against the grievant.

On November 21, 1996 the grievant was removed for physical abuse of a client. This resulted in the filing of a grievance. It charged that the grievant's "removal is not warranted as management failed to meet the burden of proof to establish just cause." The grievance requested that the grievant be reinstated to his position with full back pay and benefits.

At the same time the employer was conducting its investigation a criminal investigation was underway. At some point in time the grievant was indicted on a felony assault charge and was scheduled to appear in the Court of Common Pleas of Guernsey County. However, on May 2, 1997 the charge against the grievant was amended to "failure to provide for a functionally impaired person," a second degree misdemeanor, and the case was transferred to the Cambridge Municipal Court. On June 24, 1997 the grievant entered a plea of no contest. He was fined \$ 100 and sentenced to 15 days in jail which was suspended contingent on no same or similar offense for twelve months.

The processing of the grievance, which had been suspended on February 24, 1997 by agreement of the parties pending the resolution of the criminal matter, was resumed. A step three grievance meeting was held on August 12, 1997. The response dated August 22, 1997 concluded that the grievant struck a client and thus committed abuse and denied the grievance.

The grievance was appealed to arbitration on September 12, 1997. The hearing was held on November 7, 1997 and concluded with closing statements.

ISSUE

The issue as agreed to by the parties is as follows:

Did the Employer violate the Collective Bargaining Agreement when it

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removed the Grievant, Brian Hicks, for client abuse? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

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ARTICLE 24 DISCIPLINE

24.01 Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer had 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 shall be heard by an arbitrator selected from the separate panel of Is case arbitrators established pursuant to Section 25.04.

STATE POSITION

The state argues that the grievant is guilty of physically abusing a client. It points out that Hall testified that she was standing only a few feet from the grievant and had a clear view of him hitting Elizabeth on the side of the head with a shoe. The state notes that she reported that she saw Elizabeth's head move and heard her grunt.

The state maintains that Hall's testimony is credible. It observes that she did not know the grievant and had no reason to fabricate her story. The state emphasizes that Hall was appalled enough by what she saw to take time off from work to testify so that no other clients would be subject to the grievant's abuse.

The state rejects the union's contention that the grievant merely tapped Elizabeth to get her attention. It indicates that Hall claimed that the grievant hit her hard enough to jerk her head backward. The state disputes the claim that the noise that Hall heard was Elizabeth slapping herself because Hall stated that Elizabeth's hands were in her lap.

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The state contends that Elizabeth's behavior is irrelevant. It acknowledges that she slaps herself and engages in finger picking. The state stresses, however, that these facts do not matter because it is never appropriate for an employee to strike a client.

The state acknowledges that there were no bruises or marks on Elizabeth. It points out that she was not examined until 6 1/2 hours after she was struck. The state notes that abuse can occur when there is no injury. It cites State of Ohio, Department o Mental Health, Pauline Warfield Lewis Center and Ohio Civil Service Employees Association, AFSCMF Local 11, Case No. 23 13 941104 0850 01 04, June 19, 1995 in support of this point.

The state observes that the grievant pled no contest in Cambridge Municipal Court to a misdemeanor charge equivalent to patient abuse. It acknowledges that the Arbitrator is still bound to decide the issue based on the evidence presented at the arbitration hearing. The state claims, however, that the grievant's plea adds to the credibility of Hall's testimony.

The state challenges the unions contention that the discipline was procedurally flawed. It observes that the Medicaid surveyors did not find any problems with the center's investigation procedures relating to reports of patient abuse.

The state maintains that the procedural issues raised by the union have no bearing on the case. It cites Ohio Civil Service Employees Association, AFSCMF Local 11 and State of Ohio Department of Mental Health Case No. 23 13 920610 0617 01 04, April 21, 1993 where this Arbitrator stated "whether or not

Robinson filled out the proper forms at the proper times and notified everyone as required by the Directives does not change the fact that the grievant engaged in patient abuse." (Page 14). The state also cites Ohio Civil Service Employees Association, Local 11, AFSCME, AFLICIO and Ohio Department of Mental Retardation and Developmental Disabilities, Case No. 24 15961202 0500 01 04, October 29, 1997 where Arbitrator Anna Du Val Smith ruled that "although the MC MRDD and YDC staff did not fully meet their obligations in this

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matter, this did not materially undermine the integrity of the evidence against the Grievant, nor does it excuse his conduct." (Page 13).

The state argues that it does not tolerate patient abuse. It indicates that Medicaid guidelines prohibit physical, verbal, sexual, or psychological abuse. The state reports that its disciplinary grid calls for removal for the first instance of physical, psychological, or verbal abuse of a client.

The state maintains that an Arbitrator's authority is limited in a case involving patient abuse. It points out that Article 24, Section 24.01 indicates that if an employee is terminated for patient abuse and the Arbitrator finds that patient abuse did occur, he or she has no authority to modify the penalty. The state reports that this modification of the just cause standard has been in the collective bargaining agreement since 1986

The state asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union questions Hall's testimony. It claims that she took events out of context. The union charges that she was unclear about where she was standing. It asserts that her statements indicate that she remembered more three days after the alleged incident than the day of the incident.

The union observes that there is no physical evidence to support Hall's allegation. It states that Elizabeth was examined immediately after the incident. The union reports that she had no swelling, redness, bruise, or other type of injury.

The union rejects the contention that the fact that Elizabeth rubbed her head indicated that she had been injured. It acknowledges that department store employees observed her rubbing her head. The union emphasizes, however, that Beverly Thompson, a licensed practical nurse who is very familiar with Elizabeth, testified that Elizabeth rubs her head all the time. **5**

The union raises a number of procedural objections to the state's investigation. It claims that Stoney badgered and harassed the grievant by asking him the same questions over and over. The union complains that Stoney forced the grievant to stay in the security office for more than four hours and made him remain in the office when he left the room. It charges that he took the grievant's statements out of context and used them against him.

The union contends that the state failed to follow its own policy. It points out that Section IV(A) of Policy No. P 7 states that an employee with knowledge of abuse must complete a "Report of Unusual Incident" form. The union notes that Section III (D) of Policy No. M 11 requires a procedural checklist be attached to

the incident report. It charges that no checklist was attached to the report.

The union alleges that the center's policy on client abuse violates the just cause standard. It contends that the policy is unreasonable because it is "so 'loose' on its interpretation and implementation." The union maintains that an argument can be made that nearly every incident involving a client is abuse.

The union argues that the grievant's plea in court was not an admission of guilt. It claims that the grievant's decision was made because he could not afford the \$2500 that a trial on the assault charge would have cost. The union also notes that "the court found it in their best interest to change the charge to one in which no physical harm was found to have been bestowed upon the client." (Union Closing Statement, page 1).

The union acknowledges that under Article 24 of the collective bargaining agreement the Arbitrator cannot modify the penalty where abuse is substantiated. It indicates, however, that the state still must meet the burden of proof under the just cause standard. The union stresses that the state failed to prove by a preponderance of the evidence, clear and convincing evidence, or any other standard that abuse took place.

The union cites two arbitration decisions in support of its position. It points out in Department of Mental Retardation & Developmental Disabilities, Galipolis Developmental Center and OCSEA, Local 11, AFSCME, AFL CIO, Case No. 24 07 (91

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10 28) 0439 01 04, June 6, 1992 Arbitrator Clarence Rogers held that careful consideration must be given to objective findings when no clear and convincing evidence is available. The union notes that in State of Ohio and Ohio Civil Service Employees Association, AFSCME local 11, AFL CIO, Case No. 24 04 (10 20 94) 635 01 04, March 20, 1995 Arbitrator Marvin Feldman ruled in favor of the grievant, who was accused of patient abuse, because there was no buttressing testimony to support the charges against him and held that there must be clear and convincing evidence to substantiate a removal.

The union requests the Arbitrator to reins to the grievant with full back pay and benefits and to make him whole.

ANALYSIS

The issue is whether the grievant is guilty of abusing a client. Hall testified that she saw the grievant hit Elizabeth on the side of the head with a shoe, observed her head move to the side, and heard her grunt as the shoe hit her. The grievant claims that he shook the shoe at her and may have touched her cheek with it to get her attention.

The union questioned Hall's testimony because there were no corroborating witnesses. While the Arbitrator believes that this is an important consideration, he does not believe that the lack of corroborating witnesses bars discipline in patient abuse cases. The fact is that in many instances there is only one witness to abuse. Rather than dismissing such cases, the credibility of the witness and the accused employee must be closely examined and the surrounding circumstances must be taken into account.

Hall's testimony appears to be very credible. First, she was in a position where she had a clear and unobstructed view of Elizabeth and the grievant. Second, Hall reacted immediately to what she testified she saw by going to the store manager to attempt to learn the grievant's identity. Third, Hall is a registered nurse at a nearby hospital and as

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such should be expected to have good powers of observation. Fourth, she had no idea who the grievant was so she would have no incentive to be untruthful.

The grievant's testimony suffers from the same problem that plagues the testimony of all grievants. The grievant has been charged with a very serious offense for a health care employee. Not only is his current job in jeopardy but his future employment prospects. He has an obvious motive to deny the charges against him.

The union also challenged Hall's testimony because when Elizabeth was examined, she had no injury or even a mark to show that she had been struck with a shoe. The lack of any indication that the grievant had hit her is not surprising given that she was hit with a tennis shoe and was not examined until six hours later. Furthermore, it is well established that a client does not have to suffer an injury for patient abuse to have taken place.

The union charged that the state did not follow proper procedures in its investigation of the alleged abuse. It complained that during his October 2, 1996 interview Stoney badgered and harassed the grievant, forced him to remain in the security office, while he stepped out, and asked him the same questions over and over. The union also asserted that Stoney took the grievant's statements out of context and used them against him.

The Arbitrator does not believe that these complaints can influence the outcome of the case. While the union may feel that the tactics used by Stoney were too harsh, he was investigating serious allegations brought by a credible witness. More importantly, there is no evidence that anything in the state's investigation of the allegations against the grievant in any way prejudiced him.

The Arbitrator must also dismiss the unions charge that the state violated its own policy for investigating and documenting patient abuse. It rebutted the union's charge that Elizabeth was not examined for injuries after the alleged incident as well as most of the unions other allegations. Even if procedures such as the requirement to attach a checklist

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to the incident report were not followed, they would not have prejudiced the grievant and are not relevant to the charges facing the grievant.

The Arbitrator believes that the grievant's plea of no contest to the criminal charge arising out of the alleged incident cannot be ignored. Marvin F. Hill Jr. and Mark L Kahn in "Discipline and Discharge for Off Duty Misconduct: What Are the Arbitral Standards," Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, June 2 6, 1986 stated:

It does not appear to be disputed that a guilty (or nolo contendere) plea should be admitted by the arbitrator as valid evidence against the grievant. It is, after all, an admission against interest and should be accorded whatever weight is justified. The authors believe, however, that the arbitrator should also accept evidence pertaining to the circumstances surrounding that plea... Arbitrator David Feller has stated that, when admitting into evidence a nolo or a guilty plea, he would recognize that "many times people plead guilty in a plea bargain when they think they are innocent" and that he would therefore "allow the grievant to explain her plea if she wanted to." We concur.

The Arbitrator must reject the union's argument that the grievant's no contest plea to the reduced charge of "failure to provide for a functionally impaired person" should be ignored because he entered the plea only because he could not afford a jury trial on the criminal felony assault charge. The \$2500 which the grievant testified that his attorney told him the trial would cost does not seem inaccessible. The grievant spent two years working at the center and the record indicates that his wife works as a registered nurse at the center. Furthermore, any worker in the mental health field recognizes the adverse impact of anything indicating patient neglect or abuse.

The Arbitrator believes that the relevance of the criminal proceedings was acknowledged by both parties. The grievance was filed on November 21, 1996 and was processed through step two. However, on February 24, 1997 the parties agreed to hold the grievance in abeyance until the criminal matter was resolved. The grievant, therefore, had to recognize the relevance of the criminal matter to his employment situation. If the **9**

grievant pled guilty to a lesser charge simply to avoid the expense of a trial, it was a very poor decision.

The Arbitrator must conclude that physical abuse did take place. Hall testified in a credible manner that she saw the grievant hit Elizabeth with a shoe. Her testimony is supported by the grievant's no contest plea to the criminal charges growing out of the incident.

Once it is determined that abuse took place, there is nothing left to be determined by the Arbitrator. Article 24, Section 24.01 states that "if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

December 21, 1997
Russell Township
Geauga County, Ohio

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