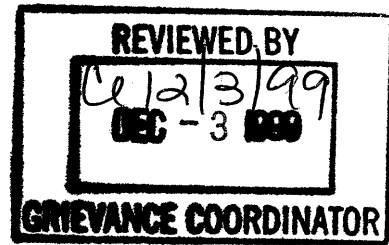


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VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration *

Between *

OPINION AND AWARD

OHIO CIVIL SERVICE *

EMPLOYEES ASSOCIATION *

Anna DuVal Smith, Arbitrator

LOCAL 11, AFSCME, AFL/CIO *

Case No. 24-04-961121-0751-01-04

and *

OHIO DEPARTMENT OF MENTAL *

Brian Hicks, Grievant

RETARDATION/DEVELOPMENTAL *

Removal

DISABILITIES *

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11, AFL-CIO:

Mark Linder, Associate General Counsel
Ohio Civil Service Employees Association/AFSCME Local 11, AFL-CIO

For the Ohio Department of Mental Retardation/Developmental Disabilities:

Brian Walton, Labor Relations Officer
Toni Brokaw, Labor Relations Officer
Ohio Department of Mental Retardation/Developmental Disabilities

Rhonda Bell
Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:10 a.m. on October 27, 1999, at the Cambridge Developmental Center in Cambridge, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Mental Retardation and Developmental Disabilities (the "State") were Shelli Hall, Sue Barzda and Troy McCollister. Testifying for the Ohio Civil Service Employees Association (the "Union") were Melanie Bintz; Beverly Thompson, R.N.; Michael P. Scheffer; Dean Neiswonger and the Grievant, Brian Hicks. A number of documents were entered into evidence: Joint Exhibits 1-8, State Exhibits 1-4 and Union Exhibits 1-2. The oral hearing was concluded at 2:30 p.m. on October 27, 1999, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of his dismissal on November 21, 1996, for physical abuse of a client entrusted to the care of the State of Ohio, the Grievant had been a Therapeutic Program Worker (TPW) of good record at the Cambridge Developmental Center (the "Center") for two years. The event leading to his dismissal occurred on October 21, 1996, when he and a co-worker, Melanie Bintz, were accompanying three clients on a shopping trip to a local

department store. While in the clothing department, one of the clients wandered away from the group. The Grievant went to look for her and found her sitting on a platform under a clothing display with one of her shoes off. He testified he knelt in front of her, shook the shoe, possibly a foot or foot and a half in front of her face, to get her attention (because she has poor vision) and told her she had to put it back on. He may have touched the shoe to her knee, but never her face. In any event, another customer of the store who happened to be walking down a nearby aisle about 20 feet away testified she had a clear view of the two of them and what she saw was the Grievant smacking the client once on the side of her face with the shoe. This was with enough force to throw the client's head to one side and make her grunt. Although the Grievant's back was to her, when he stood up he looked around and she could see his profile. Later on, she saw the client rubbing her face. However, the Grievant's co-worker, Ms. Bintz, testified that when the Grievant and client returned to the rest of the group, a minute or so after they left, she could see nothing unusual: no redness or bruising, and no tearing. She did not see the shoe off the client or a blow, and could not remember hearing any unusual or loud noises.

After observing this incident, the customer got the store management to identify who signed the shopping party's voucher and then reported the incident to the Center, whereupon an investigation was launched. Officer Scott Stoney of the Center interviewed the customer later that same day and again on October 4. His report states that he tried to interview the client but was unable to communicate with her because she is nonverbal. He also took statements from two store employees and Ms. Bintz, and interviewed the Grievant twice on October 2. The Grievant also gave a statement to the Ohio Highway Patrol. Stoney's report

indicates he made drawings of the store and took photographs, but they disappeared from the case file if they were ever placed there. All three clients who were on the shopping trip were examined by a nurse at about 5:15 p.m. the day the incident was reported. No external injuries were found and all appeared and acted normally for them. Nurse Beverly Thompson, who was the LPN on the client's cottage at the time, testified she saw the client when the party returned from shopping and did not notice any redness or injuries on the client, nor did she behave as the nurse had seen her behave after being hit by another client.

On October 8, 1996, the Grievant was charged with mistreatment, inconsiderate treatment and physical abuse of the client. A predisciplinary hearing was timely conducted and the Grievant found guilty of mistreatment and abuse. In light of the Department's Medicaid funding and its mission to protect its clients from harm, its discipline policy calls for removal on a first offense of physical, psychological or verbal abuse. Pursuant to that policy, the Grievant was removed on November 8, 1996. This action was grieved on November 21 and thereafter processed through the grievance procedure without resolution, finally coming to arbitration where it presently resides, free of procedural defect, for final and binding decision.

III. STIPULATED ISSUE

Did the Employer violate the Collective Bargaining Agreement when it removed the Grievant, Brian Hicks, from his position as a Therapeutic Program Worker for client abuse? If so, what shall the remedy be?

IV. PERTINENT CONTRACT AND POLICY PROVISIONS

CONTRACT

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 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(1). (Joint Ex. 1)

DISCIPLINE POLICY

Abuse - The ill treatment, violation, revilement, malignment, exploitation and/or disregard of an individual, whether purposeful, or due to carelessness, inattentiveness, or omission of the perpetrator.

Physical abuse - any physical motion or action, (e.g. hitting, slapping, punching, kicking, pinching, etc.) by which bodily harm or trauma occurs. It includes use of corporal punishment as well as the use of any restrictive, intrusive procedure to control inappropriate behavior for purpose of punishment.

...

Mistreatment includes behavior or facility practices that result in any type of individual exploitation such as financial, sexual, or criminal. (Joint Ex. 2)

V. ARGUMENTS OF THE PARTIES

Argument of the State

The State contends it has sufficient evidence to support the charge that the Grievant abused the client on October 1, 1996. The testimony of the customer, who has no ties to the Center and knew none of the people involved, is credible. She had an unobstructed view, saw and heard the blow, saw the client's head jerk, and heard her grunt. She immediately reported the incident and had no incentive to go through what she has for the past three years if she had seen only a tap as the Grievant claims he issued. The State urges the Arbitrator to compare its steadfast witness testimony with that of the Grievant who waived. His story is inconsistent

in the retelling. He is clear about the events of that morning until he gets to the critical moment, then he is unsure. His acknowledgment of the tap is important for two reasons. First, it is never appropriate to tap a client, nor is such an action a part of this client's individualized treatment plan. Second, his admission of contact adds credibility to the customer's version. The only question, then, is how hard this contact was. In the eyes of the State, the Grievant's claim that it was "just a tap" is self-serving. A tap would not cause a head to jerk backwards, nor would it cause the sounds heard by the State's witness.

Turning to the Union's arguments, the State points out that it is not necessary for there to be injury for an abuse to have occurred (Parties Case No. 23-13-941104-0850-01-04). Second, the claim that the customer may have misinterpreted self-injurious behavior to be the Grievant's actions is a new one, not having been raised until the arbitration hearing. Moreover, it directly contradicts the customer's testimony that she never saw the client hit herself. Third, regarding procedural flaws in the investigation, the State cites previous panel decisions (Parties Case No. 23-13-920610-0617-01-04 and 24-15-961202-0500-01-04) to the effect that minor procedural flaws that do not materially undermine the substantive evidence will not affect the outcome.

The State reminds the Arbitrator that under Article 24.01 she has no authority to modify the penalty of termination if she finds abuse to have occurred. The State submits the Arbitrator cannot ignore a witness who stood firm for over three years versus one whose job is on the line and who waived in his version of events. It asks that the grievance be denied in its entirety.

Argument of the Union

The Union submits that the issue is not one of mistreatment or inconsideration, but of client abuse. The question is whether the Grievant took a shoe and hit the client, for this is what is in the discipline package. Tapping is not.

The Union raises an issue of procedural error, contending that the State's investigation was clearly incomplete, prejudicial and unprofessional. Its significant problems included shutting off the tape during the Grievant's interrogation, missing photographs, blank tapes, wrong dates on reports and badgering the Grievant for hours. Complaints were filed against the investigator later, but he is still employed by the State and could have been called as a witness.

The Union agrees that the witness against the Grievant had no reason to lie, but contends that her story changed over time. For instance, she testified that the client's head moved from right to left, but did not mention this in her prior statements. Moreover, Union Exhibit 1 shows she did not have the proper angle. The only way she could see both the wheelchair and the client was to be standing at the far corner of the north aisle. For that to occur and to be 20 or more feet away, as she testified, she had to be behind one, or more racks of clothing. The Union suggests that this witness is not tall enough to have seen what she claims and that she could not have focused on all three—the wheelchair in the aisle, the client, and her daughter—at the same time. In addition, the right-handed Grievant had the client's left shoe in his right hand. There is no way the customer could have seen his right hand, so what she really saw was the right-handed client slapping herself, as she often does, with her own right hand. This view is consistent with the Union witnesses' testimony that they observed no

redness, bruising or tearing (as the customer also did not) and that when the client slaps herself, her skin does not redden.

The Union submits that the Grievant is the one best placed to say what really happened. He was interrogated for hours. What he said was that, at most, he tapped the Grievant with her shoe. If the State wants to call that a slap, that's fine, but the Grievant demonstrated to the Arbitrator what it actually was. Who is the more credible, asks the Union, the customer who has nothing to gain or the Grievant who has moved on with his life? It is true that the customer went through numerous obstacles to get here, but so did the Grievant. He has been through a living hell and is in arbitration to clear his good name. (The Union submits that the testimony is equi-pose and thus the State's case does not meet the required clear and convincing standard (Parties Case Nos. 35-07-900530-0011-01-03, 24-07-911028-0439-01-04 and 24-04-941020-0635-01-04). It is one of possibility, not probability.)

For these reasons, the Union asks that the Grievant be reinstated to his former position with full back pay, interest, seniority and all benefits to make him whole.

VI. OPINION OF THE ARBITRATOR

Although the Union raises a question about the quality of the investigation, this case really turns on a credibility determination. On the one hand, there is the customer, who had no reason to lie, who testified clearly and confidently, and whose story never changed except in adding detail. She was in a position to see between racks of clothes to the client seated on a platform with the Grievant in front of her and she knows what she saw: the Grievant picked up a tennis shoe in his left hand, smacked the client on the right side of her head, throwing her

head to her left and causing her to grunt. On the other hand, there is the Grievant who, while his job with the State is at stake, has found other employment. He is just as adamant that he never struck the client as the customer is that he did: being right-handed, he picked up the tennis shoe with his right hand, waved it in front of the client's face to get her attention, and may have touched her with it (although he is not sure where), also to get her attention.

Both stories are plausible. Both customer and Grievant were convincing in their expressions of moral outrage over the alleged abuse. Both stories are supported by verbal and nonverbal behavior at the hearing that I take to mean each teller is dismayed that he or she has not been or may not be believed. Each of these two appears to sincerely believe his or her own version to be the truth and may, as a result, have unwittingly added details over time and with retelling that increased the coherent whole of the truth as they know it to be, but that were not objectively true. This may be especially so for the customer, who is certain of everything, even after three years. The Grievant's story is lengthier and more detailed, in part because he was questioned at length about a longer period of time than the customer was. His story also contains some uncertainties and some admissions somewhat against interest. These add to its credibility rather than subtract from it. For example, when he was first interviewed, he provided a great deal more detail about another client than this one. This supports his and his co-worker's claim that there was nothing particularly unusual about the client at issue that day and that at the time he thought the investigation was about the other client. In addition, before he knew the reason for the interview, he volunteered that the client was slapping herself throughout the trip. He mentions that when the client sat down, he helped her up, but he did not remember ever being alone with her. When asked, he categorically denies ever hitting or

striking a client, but admits when asked, “Do you tap her or what?” that he may have done so on her arm. When asked in his second statement whether a client removed a shoe, he names her, but denies that he struck her with it. However, he also admits he may have tapped her with it and mentions some possible locations—knee, head, shoulder, elbow. He also states that the client was not looking at him, “she was just making noises.”

There are several features about this story that cause me to believe it could very well be true. For one, the Grievant is admitting that he may have touched the client. It seems to me that if he were attempting to protect himself, he would be more likely to deny touching her at all, let alone touching her head. Second, before he is really sure that he is suspected of a misdeed, he mentions the client’s self-slapping, which Center records show to have occurred 6-7 times per day in October, a moderate level for her during the 16 months of data submitted. This lends credibility to the Grievant’s statement and could well have been why she was later seen rubbing her face though neither of the escorts reported an unusual incident. Third, he also volunteers that the client was groaning, which the client’s treatment plan and witness testimony also show as being part of her ordinary repertoire of communication. Although this was offered to support his contention that he was having difficulty getting her attention, it also may explain the noise the customer reported. Fourth, the picture he paints with respect to this client is that there was nothing remarkable about this shopping trip. If true, it would explain why his memory of exactly what happened is rather vague and may also make him vulnerable to suggestions planted by an interrogator. In fact, the Grievant does not use the word “tap” until after the interrogator asks, “Do you tap her or what?” and the Grievant’s demonstration was of an attention-getting touch, not of an aggressive strike, hit or blow. Such a “tap” may

not be on the client's treatment plan, but it hardly rises to the level of abuse. Neither does wagging a shoe a foot or 18 inches from her face. Moreover, two other witnesses testified to the effect that nothing unusual about the trip or about the client's behavior during or immediately after the trip. The client's treatment plan and the nurse's testimony speak to this nonverbal client's expression of negative emotion by means of sounds and facial expression, but no one heard her yell, say "I'm mad," or saw her cry. She was said to have grunted in reaction to the blow, but grunts and groans appear to be normal forms of expression for her and not particularly indicative of acute pain.

In sum, while I believe the customer sincerely believes she witnessed the Grievant slapping the client with a shoe and it may have happened as she said, there is a good probability—perhaps as much or more than an equal probability—that she instead saw the Grievant either shaking the shoe or touching it to a body part and/or the client slapping her own face. In the context of the client's grunt or groan, her physical appearance and the customer's lack of familiarity with the client's profound mental retardation, nonverbal communication, and self-injurious behavior, such action and noise glimpsed for a few seconds from 20 feet away could easily have been misinterpreted as shocking physical abuse of an elderly woman by a young man. Seeing the client later rubbing her face would have seemed like confirmation. While I am unable to find the customer clearly wrong, the record as a whole does not provide clear and convincing proof that she was right. She was the sole witness against the Grievant, whose own version is not only plausible, but supported by others. I have no reason to disbelieve and she could have been mistaken. I accordingly find the

Grievant not guilty of physical abuse and that the State lacked just cause to remove him from his position. It therefore violated Article 24 of the Collective Bargaining Agreement.

VII. AWARD

The grievance is granted. The Grievant is to be reinstated forthwith with full back pay less deductions for earnings he had in the interim on account of his unjust dismissal, benefits and seniority. The Grievant shall supply such evidence of interim earnings as the State may reasonably require. The Arbitrator retains jurisdiction for a period of sixty (60) days to resolve any disputes that may arise in the implementation of this award.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.

Arbitrator

December 1, 1999
Cuyahoga County, Ohio