STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES' ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

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

-and-

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

GRIEVANCE: Juliette Dunning (A)
(Bifurcated for consideration of issue concerning the definition of "abuse" as used in Section 24.01 of the Agreement)

CASE NUMBER: G87-0001(A)

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: October 31, 1987

APPEARANCES

For the Union

Russel Murray	Executive Director, OSCEA
Daniel Smith	General Counsel, OSCEA
Tom King	Director of Field Services AFSCME, International
Kenneth Tardiff, M.D.	Associate Professor of Psychiatry and Public Health, Cornell Medical College
Cecil B. Monroe	Chief Steward, YDC
Carol Bowshier	Staff Representative

For the Employer

Eugene Brundige	Deputy Director for Labor Relations, ODOT
John W. Ferron	Attorney
Patrick Rafter	Deputy Director, MR/OD
Kathryn Haller	Legal Counsel, ODMH
Ed Ostrowski	Labor Relations Coordinator, MR/DO
Mike Fuscardo	Labor Relations Specialist
Anton J. Haess	Labor Relations Specialist
Gary C. Jones	Operations Director, YDC
Cheryl D. Hoskins	Assistant Attorney General
Laurel D. Blum	Assistant Attorney General
John M. Davis, MD	Medical Director, ODMH
David Hammer, Ph.D.	Clinical Psychologist
Susan Ganger	Medicaid Coordinator, ODH
Charlie Wilson	Professor, Ohio State University
Kathryn Holden	Attorney, OCB
Michael P. Duco	Law Clerk, OCB
David Levine	Law Clerk, OCB
Steve Funk	Intern, ODOT
David Norris	Labor Relations Specialist
Janet R. Barbre	Summer Associate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Department of Mental Retardation and Development Disabilities, hereinafter referred to as the Employer, and the Ohio Civil Service Employee Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986-July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on May 15, 1987, June 22, 1987, June 25, 1987, and July 9, 1987 at the Office of Collective Bargaining. The Parties had selected Dr. 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 that they would submit briefs.

The Parties stipulated to the following matters at the hearing. First, the Parties agreed to bifurcate the hearing for purposes of defining the term abuse as it is used under Sec. 24.01 of the Agreement (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard), and that a future hearing would be held to determine whether Juliette Dunning's removal was for just cause. Second, the Parties mutually agreed that the contract interpretation award would have statewide application and would not be limited to the Department of Mental Retardation and Developmental Disabilities. Third, the Parties agreed that the Arbitrator was empowered to select either Party's proposed interpretation or to develop a reasonable definition of his own which is supported by the evidence presented at the hearing (Employer Brief, Pg. 26). The Parties, therefore, agreed that the latter option would not violate Section 25.03 of the Agreement (See Pg. 6 of this Award for Article 25 - Grievance Procedure, Section 25.03 - Arbitration Procedure) which discusses the power of an arbitrator to add to, subtract from or modify any of the terms of the agreement, and the imposition of an obligation on either party which is not specifically required by the expressed language of the Agreement. Last, through mutual agreement, the Union presented its side of the case first without biasing its position regarding the burden of proof issue. The

Parties agreed to provide arguments regarding the proof issue in their post hearing briefs.

ISSUES

By the Parties mutual stipulated agreement, the following issues were raised:

1. For purposes of the first portion of the bifurcated arbitration which party, the Employer or the Union, bears the burden of proof or persuasion in advancing its position before the Arbitrator?
2. For purposes of all departments covered by the Collective Bargaining Agreement (Joint Exhibit #1), what is the definition of abuse as used in Section 24.01 of the Collective Bargaining Agreement (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard)?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."
(Joint Exhibit 1, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 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."

Section 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. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. 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 employee's 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 this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

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Section 24.05 - Imposition of Discipline

"The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision

to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment."

...

(Joint Exhibit 1, Pgs. 34-37)

ARTICLE 25 - GRIEVANCE PROCEDURE

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Section 25.03 - Arbitration Procedure

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Only disputes involving the interpretation application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

(Joint Exhibit 1, Pg. 40)

ARTICLE 43 - DURATION

Section 43.01 - First Agreement

"The Parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws."

...

Section 43.03 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

(Joint Exhibit 1, Pg. 62)

CASE HISTORY

On May 15, 1987 a hearing was initiated to determine the propriety of a removal order issued against Juliette Dunning, the Grievant. At the time of the altercation the Grievance was employed as a direct care worker at the Northwest Ohio Development Center in Toledo, Ohio. The Order or Removal specified that the Grievant was guilty of residence abuse. It, moreover, contained the following particulars in support of the removal:

> "...
>
> ...On or about 9/17/86, you verbally harassed a resident while she was doing the dishes, used behavior modification threats that were not approved for said resident, and put her into an abusive head lock-type hold, when said resident rebelled.
>
> ..."

(Joint Exhibit 2)

The Employer alleged that the Grievant was properly dismissed in accordance with the discipline standard contained in the Agreement (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard).

During the course of the arbitration hearing, preliminary evidence and testimony were introduced regarding the nature of

the particulars described in the Order of Removal (Joint Exhibit 2), and the manner in which they conformed with the definition of abuse specified in Section 24.01 (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard). A series of conversations ensued between the advocates and their superiors.[1] The Parties mutually agreed that the hearing should be bifurcated for the purpose of interpreting the term abuse as it is used under Section 24.01 (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard). This decision was based on a number of related points. First, the definition of abuse impacts an arbitrator's ability to modify the termination of an employee committing abuse against a patient or another in the care or custody of the State of Ohio. Second, the Parties' stipulation concerning the statewide application of this interpretation required evidence and testimony dealing with matters outside the scope of the particulars surrounding the Juliette Dunning grievance. Third, the Union represents the majority of direct care workers in a number of units (i.e. mental health, mental retardation, youth services, and corrections) (Article 1 - Recognition, Section 1.01 - Exclusive Representation, Joint Exhibit 1, Pg. 1). The Parties, therefore, recognized that this particular issue would continue to reappear

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[1] The advocates at this stage of the hearing consisted of Ms. Linda Filey representing OSCEA and Ms. Cheryl Hoskins representing the Department of Mental Retardation and Developmental Disabilities. Mr. Jack Ferron and Mr. Dan Smith, General Counsel for OSEA, did not participate at the initial hearing which took place on May 15, 1987. It should be noted, however, that Mr. Smith did advise Ms. Filey about the propriety of this bifurcation decision.

in future disciplinary cases (Union Brief, Pg. 2). Last, bifurcation of the hearing was necessary because moving ahead with the merits could have detrimentally impacted the arguments presented by the Parties concerning the Dunning grievance. In other words, the Parties required a determination on the threshold issue dealing with the definition of abuse, so that they could fashion appropriate arguments when dealing with the merits.

THE BURDEN OF PROOF ISSUE

The Position of the Employer

It is the position of the Employer that the Union has the burden of proving a number of points. First, that the Parties actually agreed to a specific definition of the term abuse which is specified in Section 24.01 (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard). Second, that the Union's proposed definition is preferable to the definition proferred by the Employer and should, therefore, be adopted (Employer Brief, Pg. 7).

The Employer argued that it is a well established arbitral principle that an Employer bears the burden of proof or persuasion in arbitration cases dealing with discipline or discharge. The Employer, however, noted that this particular case involved a contract interpretation issue. As a consequence, the Union as the complaining party bears the burden of proof (Employer Brief, Pg. 7).

In further support of its position, the Employer proposed a reserved rights theory which allegedly placed a greater burden on the Union (Employer Brief, Pgs. 7-8). The Employer maintained that the Management Rights Article (See Pg. 4 of this Award for Article 5 - Management Rights) contains language which retains all the inherent rights to manage and operate facilities; unless these rights are expressly abridged by other articles and sections contained in the Agreement. The Union's argument, therefore, that the Parties agreed to language which potentially restricts the Employer's ability to terminate those involved in patient abuse, conflicts with the reserved rights language previously alluded to (Employer Brief, Pg. 8).

Finally, the Employer noted that the above analysis makes sense in light of the issue under analysis. A ruling, more specifically, in the Union's favor would require the Employer to prove a negative hypothesis (Employer Brief, Pg. 8). Such an undertaking would require the Employer to prove that a specific definition was not mutually agreed to by the Parties. I would also allegedly necessitate the Employer to prove that the Parties did not mutually agree to limit the Employer's management rights.

The Position of the Union

It is the position of the Union that the Employer bears the burden of proof or persuasion in advancing its position before the Arbitrator. The Union offered a number of contract interpretation arguments which alluded to the proof issue.

The Employer's interpretation would result in a significant forfeiture by the Union, and therefore, the Employer has the

burden of proving that such an application was the intention of the Parties (Union Brief, Pgs. 8-10). The language, more specifically, proposed by the Employer would provide it with unlimited discretion in selecting an appropriate penalty for a particular infraction. Excessive discretion would also result because the Employer would not be required to consider mitigating factors which potentially modify termination decisions.

The Union's interpretation, however, would not necessitate a forfeiture but would reinforce existing arbitral practice (Union Brief, Pg. 9). That is, an arbitrator would only be authorized to modify penalties associated with actions which merit modification. The Union, therefore, argued that its interpretation would insure that an appropriate penalty would result after an in-depth analysis of the entire circumstances was undertaken by an arbitrator.

Equity considerations were also offered by the Union in support of its burden of proof argument. Since the Employer proposed the language in dispute, the Union maintained that any ambiguity should be construed against the Employer (Union Brief, Pgs. 10-11). The Union, moreover, claimed that equity principles placed the burden on the Employer to use language which did not leave the matter in doubt.

THE BURDEN OF PROOF OPINION AND AWARD

It is very difficult to provide general principles concerning the application of the doctrine of "burden of proof"

in the field of labor arbitration.[2] The difficulty of providing general propositions deals with the alternative meanings attached to the term, and the lack of clarity concerning careful definition. Three (3) alternative concepts are often involved in any discussion concerning this matter: the burden of pleading, the burden of producing evidence, and the burden of persuasion. The burden of pleading principle is rarely controversial in arbitration hearings because there are no technical rules with respect to stating a cause of action or a defense.[3] Disagreements concerning the application of the alternative concepts in the arbitration context do, however, exist. These disagreements are often engendered by confusion surrounding the question of going forward with the evidence with the separable question of who has the burden of persuasion.

Insofar as the term "burden of proof" is used to mean the burden of producing evidence the principles seem quite clear and are consistently applied by arbitrators. It is now widely accepted that in the arbitration of challenged disciplinary or discharge actions, the employer should proceed first with its case in support of the challenged actions.[4] A similar approach is also suggested in other types of cases where the employer has initiated an action which has adversely affected the grieving

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[2] Elkouri and Elkouri, How Arbitration Works, 4th ed. (Washington: BNA Books, 1985), at 324.

[3] Fleming, The Labor Arbitration Process, (Urbana University of Illinois Press, 1965), at 68.

[4] ID.

employee.[5] Some examples of such cases include the following: a violation of seniority language when dealing with promotions or layoffs; the managing of a new or altered machine, where contract language contains manning language; and demotion of an employee for lack of job competence. In these types of cases, the challenged action has been initiated by the Employer based on the relevant facts it considered for determination purposes. Thus, in these types of cases, employers have the burden of producing evidence because it aides in the search for truth in the arbitration process; and there may be no other way of getting the facts in the record.

Where the issue is one of contract interpretation, the party charging a contract violation generally proceeds first with its case. This practice as to order of presentation reflects the view that the issue can be sharpened if the grievant has an opportunity to present his/her claim as to how the contract should be interpreted. The Union in the present arbitration hearing met its burden of producing evidence by initially presenting its contract interpretation arguments.

The burden of proof principle also involves the burden of persuasion. The general rule followed by arbitrators in disciplinary proceedings is that the employer bears the burden of proof.[6] In short, the employer must supply convincing evidence

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[5] Smith, "The Search for Truth - The Whole Truth", Proceedings of the 31st Annual Meeting of NAA, 40, 50-54 (BNA Books, 1979).

[6] Midwest Telephone Co., 66 LA 31 311 (Witney, 1976); Borden's Farm Products, Inc., # LA 607 (Burke, 1945).

that an employee committed the offense for which he was discharged. As a consequence, it is up to the employer to prove that the employee is guilty of the offense in question; and not the employee who must prove himself not guilty of the offense.

Varying rules, however, have been applied by arbitrators in non-disciplinary proceedings. Some arbitrators are of the opinion that in contract interpretation cases, the union has the burden of persuading the arbitrator that the action taken by the employer is inconsistent with some limitation in the collective bargaining agreement.[7] In contrast to this view, other arbitrators are opposed to the use of burden of persuasion concepts when dealing with issues of interpretation. A pertinent observation concerning this position was made by Arbitrator Harry Shulman:

> ... notions of burden of proof are hardly applicable to issues of interpretation. Even courts do not confine themselves to the Parties' presentations in their search for the meaning of the law. Interpretation of the agreement requires, however, appreciation by the interpretor of relevant facts; and the arbitrator must assure himself as well as he can that he has them.[8]

A similar view has been offered by Arbitrator Benjamin Aaron:

> We have thus far considered the questions of the burden of proof and the amount of proof required only in so far as they apply to disciplinary cases in general and to discharge cases in particular. In other types of grievances these issues really have no place at all. Suppose the dispute

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[7] Combustion Engineering Co., 9 LA 515 (Ingle, 1948); International Minerals and Chemicals Corporation 62-1 ARB paragraph 8284 (Sears, 1962); Colombus Bottlers, Inc., 44 LA 397 (Stouffer, 1965).

[8] Shulman, "Reason, Contract, and Law in Labor Relations", 68 Harvard Law Review 999 (1955).

> involves the interpretation of a vacation eligibility provision or the application of the seniority article to promotions. To insist that the complaining party carries the burden of proof in such cases is manifestly absurd. Neither side has the burden of proof or disproof, but both have an obligation to cooperate in an effort to give the arbitrator as much guidance as possible.[9]

For the purpose of the present arbitration case, this Arbitrator is of the opinion that neither party has the burden of persuasion. The issue under consideration arose out of a peculiar set of circumstances. The original grievance dealt with a removal decision initiated by the Employer. Typically under these conditions, the Employer would have the burden of producing evidence and the burden of persuasion. By mutually agreeing to bifurcate the hearing, evidence and testimony dealing with the merits were not fully provided by the Parties and will be placed in the record at a future date. At this stage of the proceeding, therefore, the arbitration hearing does not deal with a per se disciplinary issue but a contract interpretation issue dealing with the definition of abuse as specified in Section 24.01 (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard).

Even though the issue before the Arbitrator deals with a contract interpretation matter, it is the opinion of the Arbitrator that the burden of persuasion does not fall on the Union. If the matter in dispute appeared on its face to support the view taken by either Party, the opposing Party would inevitably be required to persuade the Arbitrator that its view

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[9] Aaron, "Some Procedural Problems in Arbitration", 10 Vanderbilt Law Review 733 (1957).

should be upheld. The term in dispute in this particular instance, however, is latently ambiguous. That is, although the term abuse appears clear on its face, it becomes unclear when an effort is made to apply it to a situation.[10] In an attempt to clarify this latent ambiguity, the Parties proferred numerous arguments in support of their respective positions. Evidence and testimony were provided dealing with contract history, public policy, contract interpretation, and existing Union and Employer employee relations practices. Since both sides have differing versions dealing with the above matters, each side has a like burden or responsibility of providing evidence and testimony supporting its allegations.[11] Thus, neither Party has the burden of persuasion and the burden is no more on one Party than on the other.

THE DEFINITION OF ABUSE FOR PURPOSES OF SECTION 24.01 OF THE AGREEMENT

The Position of the Union

It is the position of the Union that the term "abuse" as used in Section 24.01 (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard) should be defined in terms of the Ohio Revised Code. This definition is contained in a criminal statute, O.R.C. Section 2903.33, and states:

> "Abuse" means knowingly causing physical harm or recklessly causing physical harm to a person by physical contact with

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[10] Midwest Rubber Reclaiming Co., 69 LA 198 (Bernstein, 1977).

[11] Smith, Supra Note 5 at 53.

the person or by inappropriate use of physical or chemical restraint, medication, or isolation in the person.

The Union, moreover contended that the criminal nature of the statute provided for certain common law affirmative defenses such as self-defense or accident (Union Brief, Pgs. 2-4). Several arguments were proferred by the union in support of the above definition.

The Union argued that its definition was commonly understood and agreed to during contract negotiations (Union Brief, Pg. 4). Russell G. Murray, Executive Director for the Union and the Union's Chief Negotiator, provided testimony concerning the bargaining history surrounding this clause. Murray noted that the Employer initially proposed the language dealing with patient abuse. He, moreover, alleged that the Employer provided several justifications for this proposal (Union Brief, Pg. 5). First, the Employer was experiencing political problems because several developmental centers were engulfed with scandal dealing with gross neglect of disabled patients (Employer Exhibits 1-5). As a consequence, the Employer desired language in the Agreement which indicated that some action was being taken to resolve these difficulties. Third, recent decisions rendered by the State Personnel Board of Review which reinstated patient abusers were cited as justification for the proposed language. Murray maintained that in response to this proposal the Union proposed the abuse definition contained in Senate Bill 566 (Joint Exhibit 16). This piece of legislation dealt with the criminal prosecution of patient abusers, and the Parties were allegedly convinced that it would become law. Murray testified that the

definition was acceptable to the Employer. These events were corroborated by Tom King, Director of Field Services for AFSCME International and Chief Negotiator for Article 24 of the Collective Bargaining Agreement (Joint Exhibit 1 - Pgs. 34-37).

The Union maintained that the definition of abuse asserted by the Employer contained types of abuse categories which the Parties neither mutually agreed to nor discussed during contract negotiations. Testimony provided by several Employer witnesses was alluded to by the Union in support of this premise. Eugene Brundige, Chief Spokesperson for the Employer during negotiations, disagreed with the Union's Senate Bill 566 (Joint Exhibit 16) allegation, and yet, his testimony indicated that the Parties focused on matters dealing with serious physical abuse (Union Brief, Pg. 6). The Union also noted that King rebutted the testimony provided by Charles Wilson, a consultant and the Employer's Chief Negotiator for Article 24 (Joint Exhibit 1, Pgs. 34-37). King, more specifically, testified that Wilson never provided him with examples of patient abuse which dealt with hypotheticals outside the realm of intentional physical abuse. The Union, moreover, claimed that examples dealing with frequent and minor occurrences were not raised by the Employer during negotiations (Union Brief, Pgs. 6-7).

The Union also alleged that conflicting testimony provided by Brundige and Wilson further reduced the credibility of the Employer's version of the events (Union Brief, Pg. 7). Both of these individuals reviewed discussions which took place at a certain point during the negotiations. Brundige stated that the

above clause was not discussed for any great length of time, while Wilson testified that the clause was discussed extensively by the Parties.

A number of contract interpretation principles were employed by the Union to substantiate its definition of abuse. First, the abuse clause should be interpreted so as to avoid a forfeiture (Union Brief, Pgs. 8-10). The Union claimed that the abuse clause (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard) represents a revolutionary concession because it modifies the traditional notion of just cause incorporated in most private and public sector collective bargaining agreements. This concession, more specifically, deals with the limitation of an arbitrator's authority to modify certain abuse - related penalties. The Union admitted that some form of concession was negotiated by the Parties; it is, however, the degree of the concession that is in dispute. Since two alternative constructions were proposed, the Union maintained that the Employer's version should be rejected because it represents a significant forfeiture. The forfeiture would grant the Employer unlimited discretion by limiting an arbitrator's authority to consider mitigating factors in certain types of patient abuse situations.

Second, the Employer's construction should be avoided because it would lead to absurd and nonsensical results (Union Brief, Pg. 10). Conflicting propositions suggested by Employer witnesses allegedly confirmed the Union's premise. The first proposition dealt with the possibility of unintentional faultless

acts, leading to harmful consequences, resulting in the removal of employees. The second proposition involved assertions that managerial representatives could administer discipline, in a fair and consistent fashion, without the necessity of arbitral review.

Last, the abuse clause should be construed against the Employer since it was the proposing party (Union Brief, Pgs. 10-11). The Union maintained that if the rules of contract interpretation proved to be inapplicable, then principles of equity place the burden on the Employer to use language which does not leave the matter in doubt.

Fairness and reasonableness principles were also argued by the Union. The Union asserted that its proposed definition was reasonable because it served the purpose intended by the Employer (Union Brief, Pg. 11). The bargaining history allegedly indicated that the Employer proposed the contract language to prevent the reinstatement of employees that had engaged in criminal activity resulting in patient abuse. Since the Union proposed a definition which reflected a definition contained in a criminal statute, the Union claimed that a perfect fit existed between the Union's definition and the Employer's intentions.

Adoption of the Union's definition was also based upon the potential deficiencies associated with the administration of the Employer's definition. The Union, more specifically, claimed that its definition was clear and precise, while the Employer's definition was vague and confusing (Union Brief, Pg. 12). The Employer's definition, therefore, would result in inexplicit guidelines engendering confusion in terms of application,

excessive arbitration hearings, and disparate arbitration decisions.

The reasonableness of the Union's definition was also supported on the basis of its potential coverage (Union Brief, Pgs. 12-13). The Union alleged that its definition would apply to all employees in the bargaining unit, and thus, would be applied in a consistent fashion. On the other hand, the Employer's definition would be defined on a department specific basis and would, therefore, lead to inconsistent and unfair results.

The Union argued that the Employer failed to support its allegation that it needed the unfettered discretion to discipline employees accused of patient abuse (Union Brief, Pg. 13). This premise was espoused by Patrick Rafter, Deputy Director for the Department of Mental Retardation and Developmental Disabilities. He testified that it was his policy to remove employees for any type of patient abuse. As justification for this rationale, Rafter noted that the Department's image, the client's interest, and the concern for funding were more important considerations than other mitigating circumstances considered when determining an appropriate patient abuse penalty. Rafter, moreover, noted that many of the difficulties experienced at the Northeast Ohio Development Center during 1985 could be attributed to management's weakness in the discipline area.

Rafter's credibility was challenged by the Union on the basis of existing Departmental guidelines, testimony provided by Union and Employer witnesses, and conclusions contained in a

study funded by the Department of Mental Retardation and Developmental Disabilities (Union Brief, Pgs. 14-19). With respect to the guidelines argument, the Union noted that Rafter's testimony conflicted with policies and guidelines promulgated by the Department of Mental Retardation and Developmental Disabilities. Special emphasis was placed on a labor relations policy directive (Joint Exhibit 18) and standard guidelines for progressive and corrective action (Joint Exhibit 19). These documents indicated that some patient abuse categories should be dealt with progressively in terms of penalty determinations. Rafter, moreover, could not reconcile his views of the policies promulgated by the Department; other than exclaiming that the documents had to be revised.

Rafter's testimony was also countered by Dr. Kenneth Tardis, the Union's expert witness (Union Brief, Pg. 15). Tardis testified that removal of employees for patient abuse should be the exception rather than the general policy. He provided specific examples within the domain of patient abuse which should result in automatic removal. In other circumstances, however, Tardis maintained that patient care would be enhanced if management emphasized training which would help employees learn from their mistakes.

The Union maintained that Rafter's views were also rebuffed by Dr. John Davis, Medical Director of the Department of Mental Health (Union Brief, Pgs. 15-16). The Union claimed that Davis' testimony supported the view proposed by Tardis. He allegedly stated that training and counseling were essential, yet, often

deficient because of inadequate funding and staffing difficulties. Davis, moreover, recognized that progressive discipline was an appropriate response in certain patient abuse situations.

A report dealing with the problems surrounding the Northeast Ohio Development Center (Union Exhibit 3) was introduced to contradict Rafter's assertion that the Employer could administer discipline without the imposition of arbitral review (Union Brief, Pgs. 16-17). The Union remarked that this independent study was funded by Rafter's own Department; and contained various findings which indicated that inadequate resources, and inefficient managerial practices, led to the Center's demise.

Additional examples were provided by Union witnesses which allegedly supported the pervasive nature of these deficiencies in other institutional settings. Cecil Monroe, Chief Steward for the Union at the Youngstown Developmental Center, testified about the working conditions his membership had to deal with on a continuous basis (Union Brief, Pg. 18). Monroe alleged that for a number of years his membership had requested intervention and restraint training. In his opinion, additional training was extremely important because the client population has dramatically changed over the years. He also noted that the staffing levels often heightened the stressful nature of the institutional environment which made the delivery of patient services much more difficult.

The Union argued that the Employer's attempt to rebut Monroe's testimony proved to be unconvincing. For a number of

reasons, the Union minimized the testimony provided by Gary Jones, the Youngstown Developmental Center Program Director. First, Jones testified that his knowledge of restraint technique training was based on periodic observations rather than hands-on instruction. Second, Jones admitted that the frequency of training needed to be improved at the facility. Last, Jones' statements concerning the frequency of Monroe's training were not completely supported by the Facility's training logs (Employer Exhibits 19 and 20).

The Position of the Employer

It is the opinion of the Employer that the Parties never expressly adopted the definition of "abuse" as specified in Ohio Revised Code Section 2903.33(B)(2). The Employer provided testimonial and documentary evidence in support of its arguments.

Although both King and Murray testified to the alleged incorporation of Ohio Revised Code 2903.33(B)(2), the Employer claimed that their testimony lacked credibility. The Employer maintained that neither witness could provide a plausible explanation for the Parties' failure to reduce this agreement to writing. These witnesses, moreover, could not proffer a reasonable rationale for the exclusion of any reference to the definition within the negotiated Agreement (Joint Exhibit 1).

The Agreement negotiated by the Parties contains numerous references to the Ohio Revised Code, Ohio Administrative Code, and Federal Statutes. The Employer, therefore, argued that the failure to incorporate any reference of the Bill clearly indicated that the Parties had no meeting of the minds concerning

the adoption of the Union's proposal (Employer Brief, Pgs. 10-12).

Additional credibility concerns dealt with which version of House Bill 566 was adopted by the Parties during negotiations. The Employer, more specifically, noted that several versions of the Bill were reviewed by various legislative bodies prior to the version ultimately adopted in the Ohio Revised Code. Yet, Union witnesses testified that they could not recall which version was incorporated by the Parties (Employer Brief, Pgs. 9-10).

The Employer argued that its witnesses provided more credible and persuasive testimony concerning the bargaining history of Section 24.01 (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard). Both Brundige and Wilson recalled the Union's proposal to adopt the abuse definition specified in the Bill. They, however, emphatically rejected the premise that they accepted the Union's proposal. Rather, both individuals maintained that they reviewed the proposal and rejected it. Wilson, moreover, claimed that on May 5, 1986 he explicitly rejected the Union's proposal because the definition solely dealt with physical contact. He also recalled providing King with several examples which indicated the undue restrictive nature of the proposed definition (Employer Brief, Pgs. 12-13).

Two arbitration decisions were referred to by the Employer in an attempt to reduce the paucity of the Union's argument (Employer Brief, Pg. 12). Both of these cases dealt with alleged patient abuse within the Ohio Department of Mental Retardation

and Developmental Disabilities. In neither case, however, did the Union claim that "abuse" should be defined in a manner consistent with its present argument.

The Employer argued that the Parties were in agreement that activities engaged in by an employee which met the statutory definition of abuse (Joint Exhibit 16) would result in termination (Employer Brief, Pgs. 14-15). The Employer, moreover, urged that the Ohio Revised Code and the Ohio Administrative Code legally required the adoption of a definition which is much broader than the definition proposed by the Union. This argument was based on a number of state and federal laws which required the State of Ohio to guarantee that certain minimum standards of care need to be maintained for clients/patients of the Department of Mental Retardation and Developmental Disabilities and the Department of Mental Health (Employer Brief, Pgs. 15-17). These standards also contain a guarantee against all forms of physical and psychological abuse. The Employer noted that Ohio Revised Code Sections 5123.62, 5122.27, and 5122.29 enumerated several pertinent patient/client rights dealing with care and treatment standards. Other sections, moreover contain certain patient/client notification requirements under Ohio Revised Code Sections 5123.63 and 5122.27(6); and provide for a private right of action against the State of Ohio for any violation of these patient/client rights under Ohio Revised Code Section 5123.64(B)(3). The Employer maintained that the adoption of the Union's definition could lead to a perplexing situation. That is, if an employee engaged in

conduct which did not rise to the conduct prohibited by the criminal statute, a patient/client could still initiate a suit on the basis of the rights and obligations previously discussed.

Support for a broad definition was also discussed in terms of requirements established under Title XIX of the Federal Social Security Act (Employer Brief, Pgs. 18-19). The Employer maintained that the Department of Mental Retardation and Developmental Disabilities is required via Ohio Revised Code Section 5123.06 to adhere to the federal standards (Employer Exhibit 9). These standards mandate that all clients be free from mental and physical abuse, as well as chemical and physical restraints (Employer Exhibit 9, Pg. 14). Interpretative guidelines which accompany these standards define mental abuse as "humiliation, harassment, and threats of punishment or deprivations", while physical abuse is referred to in terms of corporal punishment and the use of restraints as punishment.

Susan Ganger, Ohio Medicaid Coordinator, testified that these standards and guidelines are used when State and Federal agencies conduct compliance surveys. Any observed violations may lead to deficiency ratings which may detrimentally impact certification for federal medicaid funding. Ganger also stated that a number of the state's institutions have lost their certification due in part to deficiencies in the client/resident abuse arena.

For the above mentioned reasons, the Employer proposed that the following Administrative Code definition of the term "abuse" should be used for Section 24.01 purposes:

"ABUSE" MEANS ANY ACT OR ABSENCE OF ACTION INCONSISTENT WITH HUMAN RIGHTS WHICH RESULTS OR COULD RESULT IN PHYSICAL INJURY TO A CLIENT, EXCEPT IF THE ACT IS DONE IN SELF-DEFENSE OR OCCURS BY ACCIDENT; ANY ACT WHICH CONSTITUTES SEXUAL ACTIVITY, AS DEFINED UNDER CHAPTER 1907. OF THE REVISED CODE, WHERE SUCH ACTIVITY WOULD CONSTITUTE AN OFFENSE AGAINST A CLIENT UNDER THAT CHAPTER; INSULTING OR COARSE LANGUAGE OR GESTURES DIRECTED TOWARD A CLIENT WHICH SUBJECTS THE CLIENT TO HUMILIATION OR DEGRADATION; OR DEPRIVING A CLIENT OF REAL OR PERSONAL PROPERTY BY FRAUDULENT OR ILLEGAL MEANS.
(Joint Exhibit 14)

It should be noted that the above definition is contained in Ohio Administrative Code Section 5123-3-14(C)(1) which was promulgated for the Department of Retardation and Developmental Disabilities. An identical provision, except that the term "client" is substituted for "patient", can be found in Ohio Administrative Code Section 5122-3-14(C)(1) (Joint Exhibit 13), which was promulgated for the Department of Mental Health.

The Employer emphasized that both of these Ohio Administrative Code Sections (Employer Exhibits 13 and 14) were promulgated several years prior to the Parties' Agreement by authority of the Ohio Legislature (Employer Brief, Pg. 17). Second 5123-3-14(F)(5)(a) and 5122-3-14(F)(5)(a) also reserve to management the discretion to determine the degree of disciplinary action to be taken when a charge of client or patient abuse or neglect is substantiated. Since the Agreement contains no limitation on the Employer's ability to determine the appropriate level of discipline, the Employer argued that this right was reserved to the Employer and should not be limited under Section 24.01 (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard) (Employer Brief, Pg. 18).

In the opinion of the Employer, the professional care staff of the various institutions should not have its judgment questioned if it can be demonstrated that an employee's conduct is violative of the various standards dealing with client rights, abuse, or neglect (Employer Brief, Pg. 22). In other words, the determination of whether an employee's abuse or neglect should serve as a basis for removal must be left to the professionals who are qualified to make such a decision. Arbitrators, more specifically, are viewed by the Employer as lacking the qualifications necessary to address the concepts and practices embodied in patient abuse cases.

The Employer contended that limiting an arbitrator's authority by not allowing for the modification of a termination penalty dealing with patient abuse, would not lead to a denial of due process rights. Such a construction, moreover, would not result in automatic removal of employees in all instances of patient abuse (Employer Brief, Pgs. 22-23). This argument was based upon the corrective action programs and standard discipline guidelines promulgated by institutions (Joint Exhibits 17 and 20). It was also maintained that the Agreement contains other procedural requirements which protect against arbitrary and capricious managerial actions (Employer Brief, Pgs. 24-25).

An alternative definition was provided by the Employer in the event that neither of the Parties' proposed definitions are deemed acceptable by this Arbitrator (Employer Brief, Pg. 26). The following "abuse" definition was proposed for incorporation purposes:

All inappropriate physical contact with and serious non-physical conduct directed at a patient or other in the care or custody of the State of Ohio.

A clarification was offered by the Employer for the phrase "serious non-physical conduct". The Employer, more specifically, noted that this phrase means "having or likely to have an adverse impact upon the psychological, mental or emotional well-being of any patient or other in the care or custody of the State of Ohio" (Employer Brief, Pg. 27). This definition presumes that abuse has taken place if unauthorized physical contact has taken place. The burden, however, would shift to the Employer in cases involving non-physical conduct. That is, the Employer would have to show that as a consequence of abusive conduct, a patient or other in the care or custody of the State of Ohio, experienced psychological, mental, or emotional injury.

THE ARBITRATOR'S OPINION AND AWARD

It is axiomatic that the primary goal of a "rights" arbitrator is to carry out the mutual intent of the Parties. To determine the mutual intention of Parties requires an arbitrator to construe the language in light of the purpose clearly sought to be accomplished by negotiating such language. This process often necessitates giving consideration to the bargaining history leading to the adoption of the language. By analyzing the discussions of the negotiators as well as their actions during the negotiation process, the bargaining history comprises a kind of practice that provides meaning to the language under consideration.

It is clear from the record that during the negotiations leading to the first Agreement, the Employer initially proposed language linking the definition of patient abuse with limitations on an arbitrator's authority to modify terminations. Both Union and Employer witnesses, moreover, confirmed that the Employer proposed this language because it was faced with political and other urgent contingencies. It is also clear that the Union countered the Employer's initial proposal by suggesting the incorporation of pending criminal statute language (Joint Exhibit 16).

Although the Parties agree that the above sequence of events took place, their views of subsequent events dramatically differ. Murray and King testified that Brundige accepted the Union's proposal, while Brundige and Wilson maintained that they reviewed the proposal but rejected it because its narrow scope did not meet their bargaining objectives. Further confusion concerning the bargaining history involves the content of conversations engaged in by Wilson and King. Wilson, more specifically, testified that he provided King with relevant examples which exposed deficiencies and concerns that the Employer had with the Union's proposal. King, however, disagreed with Wilson's version and adamantly rejected the notion that Wilson provided him with any examples. Other than the above testimony, the record is virtually void of any additional bargaining history. The Parties, moreover, failed to introduce any bargaining minutes dealing with the various conversations which took place during precontract negotiations.

A major argument proffered by the Employer dealt with the Union's failure to reference or incorporate the definition of "abuse" presently specified in Ohio Revised Code Section 2903.33(b)(2) (Joint Exhibit 16). The Employer maintained that the Union's incorporation hypothesis is implausible when one considers the numerous references contained in the Agreement dealing with Ohio and federal law (Employer Brief, Pg. 10). This Arbitrator agrees with the Employer's analysis but the Employer's hypothesis seems equally deficient. The various references incorporated into the Agreement were mutually agreed to by the Parties. As a consequence, this Arbitrator concludes that it is equally implausible that the Parties had mutually intended to incorporate the Ohio Administrative Code language into the Agreement (Joint Exhibits 14 and 15). If they had, some reference to Ohio Administrative Code Sections 5122-3-14(C)(1) and 5123-3-14(C)(1) should have been specified to document the mutual intent of the Parties.

This Arbitrator is convinced that the above bargaining history clearly indicates that the Parties intended to promulgate contract language which linked some form, or degree, of patient abuse with language limiting the scope of an arbitrator's authority. The record, however, fails to support either Parties' version, and thus, the term "abuse" contained in Section 24.01 (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard) is ambiguous in terms of specificity. In fact, there is some indication that the Parties knowingly left a gap in this particular contract provision. Both Wilson and King

testified that it was their understanding that arbitrators would ultimately operationalize the meaning of the term "abuse" in future arbitration proceedings. In this Arbitrator's opinion, therefore, there is no true "intent" of the Parties expressed in the Agreement.

In similar contract interpretation cases arbitrators have discussed the relative strengths and weaknesses associated with legislating and interpreting the agreement for the Parties.[12] One prominent view has been espoused by Dean St. Antoine, who suggests:

> Put most simply, the arbitrator is the Parties officially designated "reader" of the contract. He or she is their joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement.[13]

There is one addendum that this Arbitrator would make to the above view. That is, when one conducts public sector arbitration hearings in the State of Ohio, an additional alter ego that must be considered is Ohio Revised Code Chapter 4117, the Public Employees' Collective Bargaining Law.

Central to the theme of this arbitration case is a portion of Ohio Revised Code Chapter 4117.10(A) which reads as follows:

> "(A) An agreement between a public employer and an exclusive representative entered into pursuant to Chapter 4117. of the Revised Code governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding

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[12] Philadelphia Orchestra Assn., 46 LA 513 (Gil, 1966); Superior Products Co., 42 LA 517 (Smith, 1964).

[13] St. Antoine, "Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny", Proceedings of the 30th Annual Meeting of NAA 29, 30 (BNA Books, 1978).

arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure. Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees. Laws pertaining to civil rights, affirmative action, unemployment compensation, workers' compensation, the retirement of public employees, residency requirements, the minimum educational requirements contained in the Revised Code pertaining to public education including the requirement of a certificate by the fiscal officer of a school district pursuant to section 5705.41 of the Revised Code, and the minimum standards promulgated by the state board of education pursuant to division (D) of section 3301.07 of the Revised Code prevail over conflicting provisions of agreements between employee organizations and public employers. Except for sections 306.08, 306.12, 306.35, and 4981.22[1] of the Revised Code and arrangements entered into thereunder, and section 4981.21 of the Revised Code as necessary to comply with section 13(c) of the "Urban Mass Transportation Act of 1964," 87 Stat. 295, 49 U.S.C.A. 1609(c), as amended, and arrangements entered into thereunder, Chapter 4117. of the Revised Code prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in Chapter 4117. of the Revised Code or as otherwise specified by the general assembly ..."

A Ohio District Court of Appeals has recently evaluated the statutes' provisions as to the supremacy of state law over conflicting provisions contained in collective bargaining agreements negotiated between public employers and their employees. In State of Ohio, ex rel Darvan v City of Youngstown, et al[14] the District Court of Appeals evaluated a conflict between a portion of Ohio Revised Code Section 124.31(A), which requires that promotions in the classified service shall be on the basis of merit and on the basis of conduct and capacity in

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[14] No. 85 CA 131 (7th Dist Ct App, Mahoning, 1-27-87)).

Finally, the numerous exceptions contained in Ohio Revised Code Chapter 4117.10 do not impact the matter under consideration by this Arbitrator.

It is interesting to note that the Parties recognized the supremacy of Ohio Revised Code Chapter 4117 when they negotiated the Agreement. The Duration Article (See Page 6 of this Award for Article 43 - Duration, Section 43.01 - First Agreement) specifies that at the time of the signing, all conflicting statutes, administrative rules, regulations or directives shall be superceded by the Agreement except for Ohio Revised Code Chapter 4117.

Another critical determination which must be addressed deals with the laws which this Arbitrator has ruled need to be incorporated into the Agreement. In this Arbitrator's opinion, the Parties shall be subject to Ohio Revised Code Section 2903.33(B)(2) and Ohio Administrative Code Sections 5123-3-14(C)(1) and 5122-3-14(C)(1). It should be noted that the rationale for the incorporation of the Ohio Administrative Code Sections is based on the axiom that properly promulgated agency regulations have the "force and effect of law".[16] Ohio Revised Code Chapter 4117.22, moreover, states that the Code shall be construed liberally for the purpose of promoting orderly and constructive relationships.

For the most part, the rulings discussed above are based on evidence and testimony presented at the hearing dealing with the

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[16] Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979); Planned Parenthood Affiliates of Ohio et al. v. James A. Rhodes et al., 477 F. Supp. 529 (1979(

office, and a contract provision. The contract provision, more specifically, did not require that conduct or capacity be a prerequisite for promotion. Instead, the bargaining agreement requires seniority and qualifications with some undefined probationary period. The Court of Appeals ruled that Ohio Revised Code Chapter 4117 prevails over existing laws by virtue of Ohio Revised Code Chapter 4117.10(A).[15]

The above decision and this Arbitrator's review of Ohio Revised Code Chapter 4117.10(A) indicate that this provision provides a mechanism which incorporates existing state law into an agreement when the Parties have failed to promulgate an agreement or an existing agreement makes no specification about a matter. For a number of reasons, the circumstances surrounding the present arbitration case fall within the incorporation guidelines specified in Ohio Revised Code Chapter 4117.10(A). First, the definition in dispute is inextricably connected to a critical term and condition of employment; that portion of the Agreement dealing with disciplinary standards (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard). Second, the Parties failed to negotiate a mutually agreeable specification for the term "abuse". As this Arbitrator previously mentioned the Agreement does not express any true "intent" with respect to the definition of "abuse". If the Parties had negotiated specifications, then the provision negotiated by the Parties would have prevailed over existing state laws by virtue of Ohio Revised Code Chapter 4117.10(A).

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15 ID at 7

Department of Mental Health and the Department of Mental Retardation and Developmental Disabilities. The Parties, however, mutually agreed that the contract interpretation award would have statewide application and would not be limited to these two departments. This Arbitrator cannot justify incorporating the specific standards of abuse discussed above into the employee-employer relationships of the other departments. Additional testimony and evidence should have been introduced to clarify the working conditions in the other departments. The Arbitrator, more specifically, would be fashioning his own brand of industrial jurisprudence by incorporating department specific definitions without additional information. It would, indeed, be inappropriate for this Arbitrator to generalize his ruling without knowing whether the topic is even pertinent to these departments. For example, excessive force is a topic of familiar discussion in corrections departments; but should one equate excessive force with abuse?

It is, therefore, the opinion of this Arbitrator that the "abuse" definitions incorporated via Ohio Revised Code Chapter 4117.10 for the Department of Mental Health and the Department of Mental Retardation and Developmental Disabilities shall not be automatically incorporated for the other departments covered by the Agreement. If these departments have traditionally employed the term "abuse" in determining the propriety of termination decisions, then applicable state laws should be incorporated for the purpose of defining this term.

This contract interpretation analysis would be incomplete if the Arbitrator failed to discuss the inherent linkage between the definition of the term "abuse", and the language contained in Section 24.01 (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.01 - Standard) dealing with the scope of an arbitrator's authority. The Arbitrator is troubled by the interpretations provided by several of the Employer's witnesses regarding this matter. For example, Rafter testified that a ruling in favor of the Employer would reduce costs and the necessity of expert witnesses. The standard specified in the previously mentioned section contains an explicit just cause requirement for any (emphasis added) disciplinary action. The sentence that follows does not modify but supplements the previous sentence. Thus, a determination that an abuse has been committed does not automatically guarantee that termination is the appropriate penalty. In other words, the Employer must establish that it had just cause to undertake the termination before it can allege that an arbitrator does not have the authority to modify a penalty. The purpose of this provision is to prevent an arbitrator from holding that an employee was terminated for proper cause on the basis of certain misconduct, but that termination for such misconduct should be reduced.[17]

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[17] Jones and Laughlin Steel Corp., 46 LA 187 (Sherman, 1966).

AWARD

For the purposes of the Department of Mental Health and the Department of Mental Retardation and Developmental Disabilities, the Parties shall be subject to the definition of above contained in Ohio Revised Code Section 2903.33(B)(2) and their respective Ohio Administrative Code Sections, that is, either Section 5123-3-14(C)(1) or 5122-3-14(C)(1). For the purposes of all other departments, however, all applicable state laws shall be incorporated only if the Parties have traditionally employed the term "abuse" in determining the propriety of termination decisions.

October 31, 1987

Dr. David M. Pincus
Arbitrator