#309

ARBITRATION
BETWEEN

STATE OF OHIO,
DEPARTMENT OF MENTAL HEALTH
(MILLCREEK PSYCHIATRIC CENTER
FOR CHILDREN)

and

OCB Gr. #23-11-880304-0003-01-04
(Jeffrey Moore's Discharge)

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

APPEARANCES:

For the Agency:

Rodney Sampson, Asst. Chief of Arbitration
Office of Collective Bargaining
Columbus, Ohio

For the Union:

Linda K. Fiely, Associate General Counsel
OCSEA Local 11, A.F.S.C.M.E., AFL-CIO
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Arbitrator

Background:

This case was heard in Columbus, Ohio on January 20, 1989, and in Cincinnati, Ohio on February 13, 1989 and March 7, 1989.[1/] Thereafter the parties filed helpful post hearing briefs. The Union filed a Reply brief concerning the alleged Agency asserted confidentiality of certain documents.

Statement of the Case:

This case arises from the discharge of Jeffrey Moore, a Therapeutic Program Worker at the Millcreek Psychiatric Center for Children of the Ohio Department of Mental Health, effective February 19, 1988. He was hired at Millcreek on April 27, 1987. It was an incident occurring on January 26, 1988, which led to the Grievant's discharge. This incident triggered the following notice to Mr. Moore of a Pre-Disciplinary Conference, dated February 1, 1988:

> Please be advised that a pre-disciplinary conference has been scheduled for you on 2/3/88 at 2:30 in my office. The subject of the meeting will be charges of patient abuse and neglect of duty to wit:
>
> On 1/26/88 at approximately 7:00 P.M., you did utilize an unapproved hold in order to subdue a patient, and during the use of that hold, you caused the patient to strike his head against the wall. At this time, the patient lost consciousness and was carried by you and another staff member to the seclusion room.
>
> It is further charged that prior to this incident, you fell asleep a number of times during a period while you were charged with monitoring patient behavior.
>
> Witnesses to the incident were:
> (1) Billy F. (Patient)
> (2) Robert S. (Patient)
> (3) Jeffrey Wydner
> (4) Sandra Wydner
> (5) David B. (Patient)

[1/] Testifying at the hearing were: Sandra Wydner; Jerry A.; Sharon Orso; Nellie Bess; Van Spencer; John Quigley; Eric Staples; Ron Chabot; Orlando Sloan; Jeffrey Moore, Grievant; James Willis; Merrice Thomas; John W.; Ronald Phillips; Donna Bowler; Jerry Galvin; and Penny Lewis.

The pre-disciplinary hearing scheduled above was in fact held. Following said hearing, the Agency's Director, Pamela S. Hyde, issued on February 19, 1988, to Mr. Moore, an "Order of Removal," reading in relevant part as follows:

> "This will notify you that you are removed from your position of Child Care Worker. The reason for this action is that on 1/26/88, you physically abused patient Billy F. while on living unit 50.
>
> The Superintendent will notify you of the date of your removal. . . ."

The Superintendent, in a memo dated February 8, 1988, had recommended Mr. Moore's "removal," identifying the "specific work rule or policy violated" as "patient abuse (Institutional Directive A-57)." The "incident . . . leading to the recommendation" was described by the Superintendent in his memo as follows:

> "On 1/26/88 patient Billy F. was found playing an Atari game in the dayroom of the unit. The patient was told by Mr. Moore to cease the play. Billy did so in a manner that gave Mr. Moore to understand that Billy was upset and losing control. Mr. Moore chased Billy into Billy's room where, according to patient Robert S., Mr. Moore grabbed Billy in a half nelson hold about his neck and lifted him off the floor to carry him to the dayroom. Visitors Jeff Wydner and Sandra Wydner witnessed the activity. Mr. Wydner saw the patient carried to the quiet room as did Ms. Wydner. Ms. Wydner as well as patients Robert S., Jerry G. saw Billy's head strike the doorway as he was being brought into the dayroom. All stated that Billy was making choking sounds and appeared to have difficulty in breathing. When checked by staff Billy showed two lumps on his head."

Following his removal, Mr. Moore filed the following grievance:

> "Contract Articles/Sections Allegedly Violated: 2.01, 24.01, 25.01, 25.08, and any other applicable articles.
>
> Statement of Facts . . .
>
> While attempting to place a patient in seclusion the patient became aggressive and in the process claimed he was abused by Mr. Moore. In the preliminary disciplinary hearing we were not given the opportunity to review the witnesses' statements. As a result of the alleged abuse, Mr. Moore was terminated. . . .

Remedy Sought: That Mr. Moore be made whole. . . ."

The Step 3 Grievance Hearing Response, dated April 15, 1988, reads in pertinent part as follows:

"FROM: Teri Decker, Step 3 Designee

SUBJECT: Step 3 Grievance Hearing Response

GRIEVANCE: 23-11-(03-04-88)-003-01-04

DATE OF HEARING: March 23, 1989

PRESENT: Jeffrey Moore (Grievant), Jerry Galvin (OCSEA Steward), Penny Lewis (OCSEA Staff Representative), John Quigley (LRO, MPCC), Donna Brown (Observer), Teri Decker (Step 3 Designee)

ISSUE: Was there just cause to discharge Mr. Moore for patient abuse?

BACKGROUND: Mr. Moore asserts that while attempting to place a patient in seclusion, the patient became aggressive and in the process got hurt. Mr. Moore was discharged for patient abuse on February 19, 1988.

The union contends that the following contract sections have been violated:

2.01 - Non-Discrimination. The union states that the discharge was discriminatory in nature.

24.01 - Standard (of Discipline). It is argued that just cause has not been established to support the discharge.

25.08 - Relevant Witnesses and Information. This section is cited because the union and the employee did not receive witness statements at the pre-disciplinary hearing.

The employee and the union questioned a number of issues with regards to the witness statements. They indicated that the statements were confusing and misleading.

The employer stated that when Mr. Moore attempted to gain control of the patient he choked him (the patient) to the point of passing out. The employer indicated that the patient abuse was cause for dismissal.

DECISION: The questions raised by the union concerning the witness statements were investigated. No evidence which would disqualify the statements was found. There is sufficient evidence to substantiate just cause in the removal of Mr. Moore.

Grievance Denied.

4/15/88 /s/ Teri Decker
Date Teri Decker, Step 3 Designee"

The Agency's pre-arbitration Step 4 response was as follows:

"Following is the Step 4 response to the above referenced grievance.

The Office of Collective Bargaining concurs with the findings in the Step 3 response. Your grievance is denied.

Sincerely,

/s/ Dick Daubenmire
Contract Compliance Chief"

At the outset of the hearing, the parties entered into the following Fact Stipulations:

"Mr. Moore (herein the Grievant) was hired on 4/27/87 as a TPW at MPCC.

Joint Exhibit 10 [the Incident Report] and Investigation Report completed by Security were denied to Union until 1/13/89. Copies were then given to the Union. The Employer denies the Union access to the attachment referred to in Joint Exhibit 10.

Investigator interview tape was available for Union's review on 1/17/89. A copy was not released to Union.

The 1/26/88 incident that led to Grievant's removal occurred at approximately 7:00 p.m.

When Grievant and Billy F. were in Billy F.'s bedroom, patient Robert S. was also in the bedroom.

Grievant had no prior discipline.

The matter is properly before the Arbitrator."

It is also noted that, in the company of various representatives of the parties, the undersigned viewed the physical area of unit #50 where the incident leading to the Grievant's removal took place.

In addition, the parties entered into the following "Stipulations Regarding Union's Requests For Documents":[2/]

"Re: Grievance pertaining to the Removal of Jeffery Moore

1. It is the employer's assertion that the following documents which were included in the Union's requests for discovery of documents do not exist with respect to this case:

1) Incident report prepared by Orlando Sloan regarding this incident or any circumstances surrounding this incident; O. Sloan did not submit a formal incident report. He did write a statement which was provided to the Union.

2) Medical report for Billy Fields dated January 26, 1988 other than Nurse Orso's report;

3) State Highway Patrol report(s) and/or recommendations as no State Highway Patrol investigation was initiated by the agency;

4) Unusual incident reports;

5) Quality Assurance reports; and

6) Client advocate reports.

2. The following documents have not been provided during the entire grievance process by the Employer to the Union:

1) Copy of client's daily log sheet;

2) Copy of quiet room report for Billy Fields dated January 26, 1988.

3) Any medical, nurse, social work, psychological, psychiatric and hospital records, chart and social work records regarding patient B. F. resulting from the incident which occurred January 26, 1988;

4) All medical, psychological and psychiatric evaluations and reports, clinic notes, social work notes, nursing notes, behavioral records, and chart notes for patient B. F.;

[2/] See Attachment 1 (Joint Exhibit #11).

5) All psychological and psychiatric evaluations and reports regarding all patients or former patients the employer intends to have testify or in any other way rely upon (including statements) to support its position that termination was appropriate in this case, i.e. patients Goley, Sturgill & Benell;

6) All social work records, correspondence, letters, memoranda, chart records and/or any other documents pertaining to and/or regarding Mr. and Mrs. Wydner's perception of the care received by Jerry G. while he was hospitalized at Millcreek and/or efforts to remove him from the hospital;

3. The Employer asserts that the documents listed in paragraph 2 above were not released to the Union because it considers the documents confidential medical records; documents which are not relevant to the case; and documents which were not relied upon for the imposition of discipline."

In their post-hearing briefs, the parties' advocates accurately summarily set forth the operative "facts" in the case. The Agency's summary is somewhat terse. The Agency asserts that:

"The investigation revealed a construction of the events to be as follows:

1. Billy was in the Day Room or recreation room and had been there for some time waiting his turn to play on the Atari Game with another resident. Mr. Moore, when he noticed him in the room, questioned him as to why he wasn't in activity therapy at that time. Billy told him that his leg was hurting him as a result of a previous injury and that was why he wasn't there. The Grievant then told the boy that if he wasn't going to participate in activity therapy then he couldn't play on the Atari game. The boy then tossed the handles or "joy stick" of the game into the box next to the game where they are to go. He then went across the hall to his bedroom. His roommate was in the room at this time.

2. The Grievant then followed Billy into his room and told him that he had to take a "time out" for destroying state property referring to the tossing of the "joy sticks" into the box. (No evidence or testimony indicates any damage to property.)

3. The Grievant alleges that the boy refused verbally and then began to leave his room in compliance with his order then "just clocked out." He then stated he attempted to restrain him and carry him to the "Quiet Room" for the "time out." He testified that he was slipping down before he got out of the room, while in the hallway was not secure . . . that he was "wiggling and stuff" . . . and that he completely lost his grasp of him and that he fell on the floor, kind of to the side . . . and may have hit his head while in the room. He then stated that he then got up and went willingly to the "Quiet Room."

4. Billy's head was hurting and he requested assistance. He was examined by the nurse in charge of Unit 50 and was found to have sustained two visible injuries to the head, one on the top of his head and another on the front of his head, noted in her report as being a large knot approximately 1/2 inch high and 1 and 1/2 inches in length. The boy was treated for the headaches he described."

It is the Agency's contention that:

" . . . The administrative investigation conducted by management medical staff found consistency and credibility from those involved and/or witnessing the event to warrant a request for disciplinary action. The subsequent findings of Labor

Relations Officers at various stages found the same. The Office of the Director found that the facts indicated that abuse had been committed to a resident, and that discharge was the appropriate action to take, based on the procedures to be followed as outlined in the following:

1. Institutional Directive A-57 Patient Abuse
2. Institutional Directive A-22 Disciplinary Action
3. Therapeutic Handling of the Aggressive Resident (THART) Manual."

Just what constituted what the Agency's advocate has characterized as "the administrative investigation" could be clearer, but in any event it is certain that it includes what is embodied in the Statement concerning a type of incident styled as "Patient Abuse" dated January 27, 1988, and given by the Director of Nursing Nellie G. Bess to Security Officer Van Spencer which reads as follows:

> Sharon Orso, RN, reported to me at 7:45 p.m. that visitors were on the unit and had witnessed an incident of a staff member (Jeff Moore, TPW) attempting to put a client (Billy F.) into quiet room. These visitors were upset by what they had seen and wanted their son (Jerry G.) taken out of the hospital. They were afraid for his safety. I called Jerry's doctor, Dr. Kuller, and informed him and asked if client was on a 72 hour hold. Dr. Kuller stated that his 72 hours were up but he wanted him to stay if the parents could be persuaded. I told him I would talk to them and try to encourage them and would call him back and let him talk to them if I were not successful. I went to the unit with Sharon and talked with Jerry G.'s mother (Sandra Wydner) and a female and male friend of hers. Two staff members were present, Orlando Sloan, HAC II, and Sharon Orso, RN. These visitors reported having seen a male black man physically abuse a patient and were afraid to leave Jerry in the hospital. I assured visitors that we were committed to the care of her son and would take all measures to protect him. I was, with all I said, unsuccessful and suggested they speak to Dr. Kuller. I asked Orlando to show them to my office. I stayed on unit for a few more minutes and told Sharon to get Jeff into the staff room or anywhere on the unit where he would be seen by patients or visitors and that I would be back later. I took visitors to nursing office and called Dr. Kuller. Dr. Kuller spoke with

Mrs. Wydner for several minutes, and when finished stated she was going to leave her son in tonight. She stated that Dr. Kuller had told her to remove him tonight AMA may result in difficulty getting him into another facility. She also stated that she felt I would look into the matter tonight to make it safe for her son on the unit. I assured Mrs. Wydner that I would initiate some kind of investigation this evening with it continuing in the morning. I asked them again what they had observed on the unit. Mrs. Wydner stated: A staff member, tall black man, was choking a patient with his arm around patient's neck, the patient was gasping for breath as if choking. Then the staff member rammed patient's head into the wall very hard and took him into the quiet room. She continued to state that the staff member was still on the unit and had not been removed. We went back to the unit and she said goodbye to her son (Jerry G.). Her son at this time asked if they were going to leave him there to be abused. She told son that I was going to make sure that didn't happen. Son began to escalate a little and I asked mother and visitors to leave--they did. I called all of the unit staff together--put all patients in day room, Billy was in quiet room with door open, Angela Clayborn was asked to monitor unit for 5 min. until I had spoke to staff. Informed staff that physically wrestling with patients in front of visitors was not appropriate. Unless patient was harming self, others or physically destroying property this could have waited until visitors were gone or visitors should have been removed from the immediate area. Informed further that putting patients in quiet room should be done by more than one individual for client and staff protection. During this meeting, Sharon Orso, Orlando Sloan, Jeff Moore, Charles Thompson, Rebecca Hollins, Eric Staples were present. After meeting dismissed, I spoke with Jeff Moore alone. I informed Jeff that Peter Steele had placed him on administrative leave and he was to call Peter at noon on Thursday. I told him to complete his incident report and leave in the least conspicuous way. I then had security called and Van Spencer arrived. He and I interviewed Billy F. and Robert S. regarding the incident. Photos (2) were taken of Billy head and statements were taken from each. Billy was examining his head, examined and two lumps (reddened) found. Body exam for bruises or marks on his body. None found. He did however complain on touching his right upper outer arm area to pain (slight pain). He further complained of a headache. Sharon Orso was informed of headache by patient. When I return to desk I asked Sharon if she had contacted Dr. Kuller about Billy condition, she stated yes. I asked if it had all been charted, she said yes. I took the incident report, which Jeff had completed and Sharon had signed and commented on and placed it under Peter Steele door. Jeff did speak with me briefly about the incident. He stated that patient had thrown the Atari game and he had asked him to take a time out which was refused. Jeff then attempted to put patient in a hold which he wrestled out of ending up with Jeff's arm around his neck. Jeff then dropped patient and when patient got up he asked him if he could see his fingers to check out that he was alright."

One must look to Security Officer Spencer's official report for the substance of the interview of Billy F. and Robert S. referred to by Director Bess, when she states that: "I then had Security called and Van Spencer arrived. He and I interviewed Billy F. and Robert S. regarding the incident. . . ." Doing so, Spencer's report discloses the following:

Details of Investigation

On 1/26/88 at 9:00 PM the R/O received information from Nellie Bess, Nursing Director concerning an alleged patient abuse complaint involving Pt. F. of Wd. 50 and Employee J. Moore, TPW. The information was reported to Ms. Bess by S. Orso, R.N. that evening around 7:45 PM. According to the report, 3 visitors (S. Wydner, Jeff and Noragail Wydner) witnessed an employee, Moore, choking and ramming a patient's head into a wall to the extent that S. Wydner (Pt. Jerry A.'s Mother) was in fear of her own son's safety at MPCC. Ms. Bess responded to the unit and spoke with Mrs. Wydner regarding Mrs. Wydner's complaint. Mrs. Wydner stated they had witnessed a child being abused and she was extremely upset over what transpired. Ms. Bess was able to calm the situation and took appropriate measures. Peter Steele, Superintendent was notified and J. Moore was placed on administrative leave pending investigation of the matter. Prior to his departure, Moore wrote an account of the incident on the attached statement. Moore did mention briefly to Ms. Bess that Pt. F. had thrown an atari game against the wall and for that reason he told Pt. F. to go into the quiet room. Patient F. had allegedly refused and Moore put him in a hold (Type not stated) and somehow Pt. F. wiggled loose and Moore ended up with his arm around Pt. F.'s neck. (Refer to Ms. Bess' statement) Moore dropped Pt. F. and checked to see if he was all right. This was all that Moore said to Ms. Bess about the incident. There was no other

information given to Ms. Bess by the other staff working. (E. Staples, TPW, M. Thomas, TPW, C. Thompson, TPW, O. Sloan, HACII, and S. Orso, RN) At 9:15 PM a Campus Police investigation was conducted and Pt. F. was interviewed with Ms. Bess present. Pt. F. stated he felt he had been abused by J. Moore and gave a detailed account of the incident as follows: Tonight around 7:00 PM Billy had refused to go to evening recreation because his right knee was hurting from a previous injury last week. (See Attached UIR) He entered the TV Room (Next to Nursing Office) and saw patients B. and S. playing the atari game. Moore was also in the room sitting in a chair dozing off. After about a 20 minute wait for his turn to play, Billy started playing the game and Moore awakened and asked Billy why he was not at recreation. Billy replied because his knee was hurting and Moore told him since he did not attend recreation he was not allowed to play the game. Billy got up and tossed (Underhanded) not hard, the joy sticks into a box. Moore then told Billy to go to the quiet room for destroying state property. Billy refused and went to his bedroom #315 directly across the hall from the dayroom. Moore followed him into his room and again told Billy to go into the quiet room. At this time Pt. S., Roommate, was lying in bed in the room. Billy again refused and started to remove his walkman radio headset from his shirt pocket. At this point, Moore suddenly grabbed Billy around his neck in a headlock type hold and picked him off the ground, Billy's back was against Moore's chest, causing Billy to choke immediately. Billy was gasping for air and Moore proceeded to carry Billy (In the same hold) out in the hallway. Billy then blacked out and the last thing he recalled was seeing the hallway walls and another peer (Maybe Pt. A) on the phone and a

man sitting in a chair. When Billy regained consciousness he was lying in the dayroom floor and heard O. Sloan asking him if he was alright. Billy got to his feet and walked into the quiet room. He could not answer Sloan because his throat hurt. Billy could not recall if any staff were around when the incident occurred. While in the quiet room, approx. 30 minutes, Billy complained to the RN, Orso, that his head was hurting. She examined him and noted a large red knot, 1-1/2" wide by 1/2" high, on the right side of his head and a smaller knot on the right temple area. (See Attached UIR) Billy's nose was also bleeding. (See J. Orth's statement) He was given an ice pack for his head by Ms. Thomas. Billy did not know how he received the injuries or recalled bumping his head. At the time of the interview, two hours later, Billy was examined by Ms. Bess and the R/O and the lumps and red areas were still visible. The lump on Billy's head had gone down considerably from the previous size. There were no other marks or red areas noted elsewhere. The interview ended with Billy saying he did not deserve to be treated the way he was.

On the same date at 10:00 PM Pt. S. was interviewed in the presence of Ms. Bess and his statement is summarized as follows: (See Attached Statement) Robert was in the day room playing the atari with another peer, B. Billy came in and started playing after he finished. Moore was in the room and asked Billy if he had permission to play. Robert then left the room and laid down in his bedroom. Shortly afterwards Billy entered the bedroom and Moore entered seconds later. Moore told Billy to go to the quiet room and Billy refused. Billy then reached for something in his pocket and Moore grabbed Billy by his jacket. Billy jerked away and Moore grabbed Billy in a headlock around his neck. Billy immediately started choking and gasping for

air. Moore then carried Billy off in the same manner with Billy's feet completely off the ground towards the day room. While Moore was entering the day room he either dropped Billy or Billy struggled free and Billy's head hit the door frame hard. Robert noticed Billy's eyes roll back in his head when this happened. Moore then regained the same hold and dragged Billy from Robert's view.

The Union's post-hearing brief summary of the operative "facts" is considerably more plenary than that of the Agency. The Union asserts that:

"On January 26, 1988, Mr. Moore was assigned to Unit #50 on the second shift. Unit #50 was a locked ward housing adolescent boys. The incident that led to Mr. Moore's removal started in the T.V. room (also known as the day room) where Billy F. was playing Atari with some other patients who were friends of his. Patients David B. and Robert S. were two of the patients playing Atari. Many of the residents were off the ward participating in various programs. Based on a patient's assigned "level" they are given privileges which take them off the Unit to participate in structured programs. Low level assignments restrict the individual to the Unit. The individuals who Billy F. was playing with were restricted to unit activities. It was Mr. Moore's understanding that Billy F. should have been off the unit at that time. Therefore, he questioned Billy F. as to why he had remained on the Unit. Billy F. told him he had hurt his knee and had been excused from program activities. Jeff left the day room to check Billy F.'s records. He also checked to see if this information was posted in accordance with general procedures. Mr. Moore could not find any supporting documentation that Billy had been excused from programming that date. Mr. Moore went back to the day room and advised Billy F. that he would have to participate in off-unit activities. He advised Billy F. he was

not permitted to play Atari. Billy F. became angry and verbally agitated. Billy raised his voice and used foul language. He also tossed or threw the joy stick from the Atari game and it hit the wall. Billy F. was told by Mr. Moore he would have to go to the "quiet room" to cool down. The "quiet room" is used as a method of behavior intervention to place a patient in an unlocked room (with the door open) away from stimuli to give the person time to think about inappropriate behavior and quiet down. It is different from "seclusion" to the extent that the behavior necessitating the intervention and placement in the quiet room is not as escalated or serious as that which necessitates seclusion; to place a patient in a quiet room a doctor's order is not required as it is for seclusion, and seclusion results in total isolation behind a locked door. Billy F. refused and exited the day room and walked into his bedroom (#315) which was situated across the hall from the day room. Mr. Moore also left the day room and crossed the hall to enter the boy's bedroom.

As Mr. Moore was travelling through the hall into the boy's bedroom, Orlando Sloan, Hospital Aide Coordinator, entered the unit and passed Mr. Moore in the hallway. He testified that he observed Mr. Moore walking into room #315. Mr. Sloan at that time did not notice anything unusual. Mr. Sloan proceeded to the medical chart room and into the staff room. At this time, Mr. Moore did not believe there was a problem with Billy which necessitated assistance from Mr. Sloan. Ms. Sloan's assistance was not requested.

After Mr. Moore entered Billy's room he again advised him he would have to go to the quiet room. Patient Robert S. was also in the bedroom at the time. There were five (5) metal beds in the room. Mr. Moore walked over to Billy to place his hand on his shoulder in order to

escort him to the "quiet room." Billy swung his arm around and became physically agitated. Mr. Moore brought his arms around Billy to place him in a "baskethold" in an effort to exert physical intervention and control over him. Mr. Moore believed that it was dangerous to remain in the room. He believed the five (5) metal beds posed a threat of bodily injury to the patient. Mr. Moore began to move Billy F. out of the room into the hallway using the baskethold.

Down the hallway, there was a telephone near the nurse's station. Patient Jerry G. and his visitors were located in this area with Jerry and his mother, Sandra W., using the telephone. Jerry's uncle and his uncle's wife were seated by the counter which encircled the nurse's station. Jerry G. and Sandra W. testified at the arbitration hearing that Mr. Moore had his left arm around Billy F.'s neck as Mr. Moore carried Billy through the hallway. It is unclear from their testimony exactly how Mr. Moore had his arms around Billy F. as he moved Billy through the hall. Sandra W. indicated that Mr. Moore was behind Billy F. with his right arm across Billy's chest and his left arm around his neck. Jerry G. indicated Mr. Moore was to the left of Billy F. with Billy's right arm behind Billy's back and left arm around his neck. Jerry G. also testified that Billy's arms were free from Mr. Moore's grip in that he said Billy was using his arms and hands to try to remove Mr. Moore's arm from around his neck. Mr. Moore testified that he did lose hold over Billy's arms and hands and he struggled with Billy to regain that hold. Although Mr. Moore recalls reaching across Billy F.'s neck to regain his hold he does not recall maintaining that hold throughout the transport across the hall. Both Mr. Moore and Jerry G. testified that Billy F. was wiggling and thrashing his upper body from side to side as he was being moved through the hallway into

the day room. Jerry G. testified that Billy F.'s head hit the doorway as they passed through. Mr. Moore did not recall Jerry G. hitting his head at that time. The period of time it took them to travel through the hallway was momentary and brief.

After Mr. Moore and Billy F. entered the day room, Mr. Sloan heard noises and saw Mr. Moore and Billy scuffling from about ten (10) to thirteen (13) feet away. When he saw them they were both standing. He testified Billy F. was moving about and Mr. Moore was trying to hold him to control the boy. He approached to help. The boy fell as Mr. Sloan was assisting and reaching for Billy F. Billy F. hit his head on the floor or the molded plastic couch as he fell before Mr. Sloan. Staff asked Billy F. if he was alright. After he indicated he was alright, both walked with him to the quiet room.

Prior to the noise in the day room, other staff had been in the staff room which was situated down the hall beyond the nursing station. Merrice Thomas, TPW, came from the staff room over to the day room only after Mr. Sloan had already arrived in the day room. By the time she was on the scene, Mr. Sloan, Mr. Moore, and Billy F. were walking toward the "quiet room." The Employer called Eric Staples on rebuttal. Eric Staples, another TPW assigned to the unit, testified he was not in the area of the nursing station when Billy F. and Mr. Moore were in Room #315 or when they were in the hallway. The only part of the incident Mr. Staples said he saw was when Billy F. was being escorted by Mr. Moore and Mr. Sloan to the "quiet room."

Sandra W. became agitated and demanded to talk to someone in charge. She indicated she wished to remove her son from the hospital. She indicated she felt Billy F. had been mistreated and she wanted her son released. Mr. Sloan talked to her and asked her to go to the

visitor's room and wait until he could arrange for a supervisor to talk to her. He advised her it was against policy for her to be in that area. . . .

Billy F. told staff his head hurt. The complaints were reported to Nurse Sharon Orso upon her return back to the unit. Nurse Orso had been off the unit on break during the course of the incident. She examined Billy F. at approximately 7:25 p.m. and completed the Supervisor's portion of the incident report that Mr. Moore had generated. She also signed as the supervisor. Her nursing notes indicate that Billy had suffered a raised lump approximately 1-1/2 inches in width and 1/2 inch in height. She also observed a small reddened lump on the side of Billy F.'s forehead. The statements were based on observation and were not measured by the appropriate medical apparatus. At the hearing she testified that she did not observe any other bodily injuries other than a slight scratch on his nose. Tylenol was dispensed and ice was applied to the lump on the top of the head. Ms. Bess later examined Billy F. for bruises and marks on his body other than those indicated and she found none. The Security Officer's report indicate that the lumps had gone down considerably since the first examination. The Employer stipulated that no other medical, psychological or psychiatric examinations were provided in conjunction with or as follow-up to the incident which occurred on January 26, 1988.

Sharon Orso advised Nellie Bess, Director of Nursing, that there was a problem with a parent wanting to remove a patient because of the incident. Ms. Bess called a hospital doctor about whether the child could be released or not upon the parent's request. The doctor had indicated the patient could be released but he preferred that the child

remained hospitalized. Nellie Bess then went to the Unit and spoke with Sandra W. and the other visitors about Sandra W.'s desires to remove her son from the hospital. When Ms. Bess could not convince Sandra W. that her son should remain hospitalized, she arranged for Sandra W. to call the doctor. After Sandra W.'s telephone conversation with the doctor she informed Ms. Bess reported her as further stating "that Dr. Kuller had told [Sandra W.] to remove him tonight . . . may result in difficulty getting him into another facility."

Mr. Moore was placed on administrative leave that evening which continued until the date his removal was effective.

Donna Bowles, Training Director at the facility,

". . . provided testimony with respect to crisis and physical intervention which indicates that Mr. Moore's actions were not inappropriate. She testified that she trained Mr. Moore with respect to THART techniques. She testified her training includes demonstrations of the techniques including the baskethold. She also testified that she teaches employees that the baskethold is one of the most difficult holds to properly execute. She also teaches that the hold could result in injury even when it is properly executed. Although management's witness John Quigley denied that the hold commonly resulted in injury. Ms. Bowles is not alone in her opinion as to the potentiality of injury when the hold is used. She testified that the staff person must exercise their own discretion and judgment to decide when it is appropriate to use physical intervention and how it can best be administered given the particular circumstances. She testifies that in using that discretion and judgment, the staff person must make quick decisions based on the environment, the attributes of him or her self, and the patient. She also testified that the

basketheld was not a hold primarily used to transport a patient, but that she taught that it could be used to move a patient from one location to another if necessary based on the staff person's perceptions of what was in the best interest of safety.

She also testified about her training with respect to the stages of crisis. She discussed the behavior the clients exhibited at each stage and the type of response a staff should appropriately make. At the first stage, the client exhibits "anxiety" and the staff should be verbally responsible to the patient's concerns. The second stage is "defensive" and the staff's response needs to be firm and commanding. . . . The third phase is "acting out" which necessitates physical crisis intervention on the staff's part. . . . The fourth step is the aftermath of physical intervention."

It is also noted that the Grievant worked some 10 years at Youth Services and so far as the record made before me indicates, no incident similar to that under scrutiny here took place. Additionally, the Grievant has not been disciplined since his employment with the Agency and his evaluation reports are good. Fellow employees regard him as having therapeutic relationships with the patients.

It is also noted that an employee of the Department of Mental Health, Frank Thompson, a Child Care Worker, was suspended for two days for the reason that he allegedly "failed to utilize good behavior and that (he) abused a patient in (his) care [i.e., he pushed a patient into a wall]."

Also of note is the fact that in Ohio Department of Mental Retardation and Development Disabilities and O.C.S.E.A. Local 11, A.F.S.C.M.E., AFL-CIO, GR #G87-0001 (A), October 31, 1987, Arbitrator David M. Pincus found that "for the purposes of the Department of Mental Health . . . the Parties shall be subject to the definition of abuse contained in Ohio Revised Code Section

2903.33 (b) (2) and their respective Ohio Administrative Code Sections, that is, . . . 5122-3-14(C)(1)."

In this regard, O.R.C. Section 2903.33 (B) (2) and Ohio Administrative Code provide, respectively, as follows:

Section 2903.33 (b) (2), Ohio Revised Code states:

> "Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the person.

Ohio Administrative Code (Relevant Section), Section 5123-3-14 (C) (1) states:

> "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.

The Agency also brings to my attention the provision of O.R.C. 2901.22 (C) which provides that:

> A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences he perversely disregards a known risk that such circumstances are likely to exist.

It is also noted that Director of Training Bowles indicated in her testimony that in her experience, the baskethold especially when applied to one who is struggling against it, would cause a person observing same, who was unaccustomed to such a hold, to feel sorry for the person being held in the baskethold; and that it was not unusual for persons inexperienced and untrained in Therapeutic Handling of the Aggressive Resident Training (THART) to negatively react to seeing a patient being properly physically restrained.

It was the uncontradicted testimony of Social Worker Jim Willis that Sandra Wydner indicated to him prior to the incident of January 26th that she wanted her son, Jerry A. (sometimes referred to as Jerry G.) to have care at a private facility, Emerson North Hospital, rather than at Millcreek. Wydner indicated to Willis that she believed her son would get better care at Emerson North and that she was trying to get her son admitted there.

Relevant Contract provisions are attached hereto at Appendix I.

The Agency's Position:

The Agency takes the position that the Grievant was discharged for just cause. It is the Agency's position that ". . . Management's decision to discharge the Grievant was based on the multiplicity of errors committed by the Grievant along with improper handling techniques (verbal and nonverbal) as spelled out in the THART manual. . . . The discharge followed a determination that the activity of the Grievant and the resulting serious twofold injury to the head of B.F., thirteen year old former client, was in violation of the Department of Mental Health policies and procedures, and that patient abuse had been committed on the evening of January 26, 1988, at approximately 7:00 p.m."

By way of elaboration the Agency contends that ". . . the Grievant did not follow proper procedures and policies of the Department, when he refused to permit youth client B.F. in either of two locations in Unit 50. Additionally, his actions subsequently were improper under a host of explicitly stated procedures, rules and directives as well as in training, comprehensively administered, and updated with follow-up discussions. It is the employer's position that the Grievant should have gained assistance and not have employed an improper hold after he had made previous errors in not

utilizing verbal techniques to de-escalate the situation with the client. Taken as a whole or in part, the Grievant is a trained Therapeutic Program Worker whose actions were responsible for the youth being improperly disallowed from being able to remain in his room."

In its opening statement the Agency asserted that "the Grievant was properly trained in proper approaches and techniques to be employed when a situation arises where behavior is such that physical contact and/or restraint may be necessary to guarantee the safety of the child care worker as well as the child. We believe those approaches were not used on January 26, 1988, when B.F. made the Grievant expressly aware of a medical problem which Mr. Moore chose not to look into. Had he, what he would have found was that the child was being truthful. That notwithstanding, the youth had the right under the procedure and polices to remain in his room as well as the day room or recreation room in Unit 50. It is the Employer's position that the child was provoked as a result of physical contact initiated by the Grievant, not the child's legitimate concerns, rights, and privileges. Testimony will show no history of aggressive behavior while the youth was a resident of Millcreek. The Grievant's handling of the incident was against the philosophy of prevention and de-escalation of a situation through nonconfrontational approaches. . . ."

The Agency further asserts that "institutional directives A-22 Disciplinary Action, A-57 Patient Abuse and the Contract Article 24.01 Standard, spell out unambiguously the required discharge if abuse is found. . . ."

With respect to the "due process" flaws alleged by the Union to exist, the Agency asserts that no penalty was cited in the pre-disciplinary hearing notice because no decision to issue any discipline whatsoever had been made. Conceding that statements by witnesses adverse to the Grievant had not been

provided to the Union from the outset, the Agency asserts that such was the result of "confusion" at the Agency concerning whether or not such was producible, and that in any event they were produced just before the commencement of the 3rd step hearing.

With respect to the investigation report of Security Officer Spencer, the Agency concedes that it was in fact not made available to the Union early on in the grievance process, not to hamper the Union's case, but to protect the confidentiality of some of the patient interview components. Still further on this point, the Agency points out that the Grievant had Union representation during the course of his investigatory interview. In any event, argues the Agency, the Union was furnished Security Officer Spencer's investigation report one week before the initial arbitration hearing.

Concerning the tape recording of the Grievant's investigatory interview recorded by Spencer, the Agency asserts that it is its policy to not release such tapes to the Union. Furthermore, asserts the Agency, the Union had a representative present at the time of the interview and in addition was afforded an opportunity to listen to the tape.

With respect to the medical records of patients or former patients requested by the Union, the Agency asserts that such are confidential and not producible. These contentions were much elaborated upon in the Agency's post hearing brief. Thus the Agency asserts that

> "the Employer is required by State and Federal law to withhold confidential patient records from unauthorized individuals. Section 5122.31 of the Ohio Revised Code prohibits the Union from gaining access to patient records.
>
> The Union requested several documents that the employer declined to disclose because it considered the documents confidential.

> Specifically, the Union requested: (1) a copy of the client's daily log sheet; (2) a copy of the quiet room report for Billy Fields dated 1/26/88; (3) any medical, nurse, social work, psychological, psychiatric and hospital records, chart and social work records regarding patient B.F. resulting from the incident which occurred on 1/26/88; (4) all medical, psychological, and psychiatric evaluations and reports, clinic notes, social work notes, nursing notes, behavioral records, and chart notes for patient B.F.; (5) all psychological and psychiatric evaluations and reports regarding all patients or former patients the employer intends to have testify or in any other way rely upon (including statements) to support its position that termination was appropriate in this case, i.e., patients G., S., and B.; and (6) all social work records, correspondence, letters, memoranda, chart records and/or any other documents pertaining to and/or regarding Mr. and Mrs. Wydner's perception of the care received by Jerry G. while he was hospitalized at Millcreek and/or efforts to remove him from the hospital. . . ."

Citing O.R.C. 5122.31, the Agency asserts that "in reading the plain language of the statute, one can easily conclude that the Union cannot gain access to the requested information pursuant to R.C. 5122.31. It is not disputed that the Union's request is for medical documents. Testimony at the hearing revealed that the client's daily log sheet and the quiet room report contain information about the client's medical and/or psychiatric condition. The Union did not object to this testimony. Items three through five of the Union's request are specific requests for medical files. And, there was testimony presented at the hearing that the information in item six is also a part of the patient's medical file. The Union did not object to this testimony. At any rate, with respect to item six, Ms. Wydner

testified that the reason she wanted to remove her son from Millcreek and into a private facility was to allow him to receive treatment for substance abuse as well as mental illness. She further testified that she could not afford private medical care. At no time did she criticize the care her son received while at Millcreek. Because there was testimony on this issue, any further documentation on why Ms. Wydner wanted her son removed from Millcreek would be cumulative and more prejudicial to the patient than probative to Mr. Moore's case.

Secondly, none of the [statutory] exceptions to disclosure allow the Union access to patient medical records. No patients or ex-patients gave consent to release their records for this hearing. No judge issued a court order to compel disclosure. Further, the Union is not an insurer, nor is it a part of the Department of Mental Health. Therefore, the Union cannot gain access to any of the documents through the exceptions in R.C. 5122.31.

The Union will probably argue that pursuant to Article 43.01 of the collective bargaining agreement, it has the right to the documents requested because the contract takes precedence over and supersedes R.C. 5122.31. However, the employer contends that such a strict reading of Article 43.01 can produce absurd results.

It is the employer's argument that neither the collective bargaining agreement nor Chapter 4117. of the Ohio Revised Code override R.C. 5122.31. The Ohio Supreme Court provides support for this position in State, ex rel. Dispatch Printing Co., et al. vs. Wells, Secretary, Logan Civil Service Commission, et al., 18 Ohio St. 3d 382 (Ohio 1985). In the Dispatch Printing case a reporter wanted to access the personnel files of a police chief who had been demoted to a detective. The keeper of the personnel files refused the reporter access to the files. The respondent argued that the collective bargaining agreement between the City of Logan and its police

force took precedence over the mandates of the public records law found in R.C. 149.43.

The court did not accept the respondent's argument. Instead, the court found that the respondent's argument required an unreasonable construction of Chapter 4117. of the Ohio Revised Code. (State ex rel. Dispatch Printing Co. et al., at 384). "R.C. 4117.10(A) was designed to free public employees from conflicting laws which may act to interfere with the newly established right to collective bargain." (Id. at 384). Therefore, private citizens cannot be empowered to alter legal relationships between a government and the public at large via a collective bargaining agreement. (Id. at 384). Furthermore, rules of judicial interpretation require that statutes be construed to avoid unreasonable or absurd consequences. (Id. at 384).

The Union's request for documents in the present case can be compared to the reporter's request for documents in Dispatch Printing. Article 43.01 of the collective bargaining agreement between the Union and the Department of Mental Health provides in part,

> ". . . 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."

The employer contends that if the arbitrator gives this provision a strict reading, absurd consequences will follow. A patient's right to privacy will cease to exist. Unions will be able to access information that is clearly confidential by statute enacted to protect the patient's interest. In effect, the Union will be able to go on a "fishing expedition" in search of information that, if discovered, would only lead to embarrassment for the patient. It is submitted that the information contained in patient records is specific to the diagnosis and treatment of the individual patient. It is

not information that is used to discipline employees. Instead, when an incident occurs involving an employee and a patient, a separate investigation is conducted. Such an investigation was conducted in the present case. And, the Union had access to the information the employer used in making its decision to discipline Mr. Moore. To allow the Union access to the patient records requested would be more prejudicial to the patients than probative to Mr. Moore's case.

While R.C. 5122.31 protects a patient's right to privacy, it does not interfere with an employee's collective bargaining rights. Mr. Moore had an opportunity to present his case. There was testimony to document the extent of the patient's injuries. Even Mr. Moore testified as to the patient's behavior while at Millcreek. There was also testimony by Mr. Moore and other witnesses about the behavior patterns of the other patient witnesses. It is the arbitrator, however, that must decide whether or not the patient witnesses were credible.

The arbitrator has sufficient evidence from the hearing to make a just decision. An open-ended inquiry into the patient records requested by the Union will prejudice the patients involved more than bolster the probative value of the Union's case. It is the employer's argument that such an invasion into a patient's privacy was not intended by the drafter of the collective bargaining agreement.

In addition to holding that the respondent's argument in Dispatch Printing required an unreasonable construction of R.C. 4117., the court in the same case held that certain documents in a personnel file may be outside the scope of R.C. 149.43 and, therefore, not subject to public disclosure. (State, ex rel. Dispatch Printing Co. et al at 385). The court said that documents which are "personal" in nature, as defined in R.C. 1347.01(e) are outside the scope of disclosure. (Id. at 385.). A determination as to

whether or not disclosure of documents would constitute an invasion of privacy would have to be made on an ad hoc basis. (Id. at 385.).

The Ohio Supreme Court, as well as other jurisdictions support the position that medical records are, by definition 'personal' in nature and, therefore, beyond the scope of disclosure."

The Agency goes on to cite Macomber v. State Personnel Board et al., 243 Cal. Rptr. 631 (Cal. App. 3 Dist. 1987); State v. Hicks, 729 P.2d 1146 (Kan. 1986); State v. Burak, 518 A.2d 639 (Conn. 1986), and Commonwealth v. McDonough, 511 N.E.2d 551 (Mass. 1987) as supportive of its contentions.

The Agency additionally asserts that,

> In the present case, the documents requested are outside the scope of disclosure. Billy F. did not consent to the release of his medical records for purposes of this case. He did not even testify. There was, however, substantial testimony from both sides documenting his injuries and his behavior. Mr. Moore even testified that the patient that was injured was a "good kid."
>
> Patients G., B. and S. were witnesses. They all wrote witness statements. They did not consent to the release of their medical records for the purposes of this case. Further, the arbitrator refused to admit B.'s and S.'s statements into evidence.[3]/

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[3]/ B. and S. were not called as witnesses by the State and hence in seeking to introduce their statements to investigator Spencer the State sought to introduce rank hearsay. In the Report of the West Coast Tripartite Committee, in Problems of Proof in Arbitration, Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators (BNA Books, 1967), at page 189, the Committee observed as follows:

> "unless corroborated by truth-tending circumstances in the environment in which it was uttered, it (hearsay) is unreliable evidence and should be received with mounting skepticism of the probative value as it becomes more remote and filtered. If a witness can testify at the hearing and does not, his statement outside the hearing should be given no weight, indeed should even be excluded if there appears to be no therapeutic, nonevidentiary reason to admit it."

Therefore, B.'s and S.'s account of whether or not Mr. Moore committed patient abuse is not before the arbitrator.[4/] Former patient G. did testify. The Union had an opportunity to cross-examine him. The arbitrator will have to rule on the credibility of his testimony. As G. is not a party to the present case, it is even more intrusive to search his medical records.

The Union also provided its own patient witness. However, the Union did not request his medical records.

Finally, the arbitrator should find that the documents are beyond the scope of disclosure because the documents are those of minor children. The employer contends that confidentiality is a special concern when a minor's right to privacy is jeopardized. It should be Mr. Moore's responsibility to show a compelling reason why he should be entitled to examine medical records of children in Department of Mental Health facilities. The Union

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Directly to the point, there was no "therapeutic, nonevidentiary reason" to admit the statements of B. and S. Furthermore, the very essence of the applicable just cause standard is "fairness," and it strikes me, and most arbitrators, as inherently unfair to rely upon hearsay in a discharge case, thereby depriving the accused of the right of confrontation and cross-examination. Additionally, it strikes me as unfair to mislead the Agency into believing that they have introduced probative evidence by admitting such hearsay in the context found here. Accordingly, the statements in question were denied admission.

Further on this point, the parties' Contract at Section 24.01 expressly, specifically, and in the clearest of language provides that "the Employer has the burden of proof to establish just cause for any disciplinary action." Thus the Agency's administrators, in discharging an employee, as a practical matter must take into account how it is that they intend to "prove" that "just cause" existed for the discharge. Here it appears they were satisfied that such proof could be made out without the testimony of B. or S.

[4/] Strictly speaking, this is not precisely accurate. Thus B.'s and S.'s accounts, among others, were summarized in Security Officer Spencer's investigation report, which was received in evidence.

has not met that burden in this case. All of the information that could possibly be used to ensure the fair adjudication of Mr. Moore's case has been provided to the Union.

Not only does state law prohibit the disclosure of medical records, but federal regulations and hospital accreditation standards [the Joint Commission of Accreditation of Health Care Organizations] also prohibit disclosure. . . .

Millcreek cannot ignore federal law with respect to confidentiality of patient records. Further, Arbitrator Michael has ruled that the collective bargaining agreement cannot be construed to supersede federal law (Case No. G87-0366 (Kassandra Jefferson) March 30, 1988). Neither can the collective bargaining agreement supersede JCAH requirements. Such a result would place an unreasonable limitation on a hospital's ability to deliver services.

In conclusion, the Ohio Revised Code, federal Medicaid regulations, and JCAH accreditation standards require confidentiality of patient medical records. It is the employer's position in the instant case that to disclose such documents would force it to violate the law. Finally, disclosure of the documents is greatly outweighed by the interest in maintaining a patient's right to privacy."

So it is that the Agency urges that the grievance be denied in its entirety.

The Union's Position

The Union takes the position that the Agency has committed several procedural violations of the contract in that it has "failed to comply with the parties' collective bargaining agreement with respect to the way it has given notice of the pre-disciplinary conference and its failure to provide the Union access to information and witnesses throughout the disciplinary

and grievance processes." Thus the Union asserts that the Grievant's pre-disciplinary conference notice ". . . does not meet the requirements set forth in the parties' [Section 24.04] contract. . . . The notice is deficient in that it fails to set forth the possible form of discipline that was being considered by the Employer, i.e., the consequences of the violation if found guilty. Further, due process requires sufficient notice to the grievant . . . [D]ue process fairness requires a grievant to actual notice of the violation and its consequences. . . . Given the generality of the Employer's disciplinary rule with respect to this charge, it is imperative that written notice be specific. The Employer has failed to adhere to the procedurally required notice for which it has bargained. The Grievant was denied due process guaranteed to him by contract and law."

Additionally, the Union contends that the Agency "failed to issue the notice in compliance with the requirements it has set forth in its disciplinary process it has unilaterally promulgated after the parties' contract became effective." In this regard, the Union points to the Agency's disciplinary rule (C) (1) requiring 48 hours notice prior to the pre-disciplinary hearing of "the disciplinary action being considered."

The Union additionally asserts that the Agency failed to provide any documents to the Union at the pre-disciplinary conference, and that this failure was violative of Section 24.05 of the Contract and of (C) (4) of the Agency's own rules. More specifically the Union asserts entitlement to copies of witnesses' statements, copies of incident reports concerning the matter, and copies of investigatory reports such as Security Office Spencer's and Supervisor Nellie Bess's reports. It is the Union's position that deprivation of such documents at that point amounted "to a denial of a fair pre-disciplinary conference as required by the contract and due process."

The Union additionally asserts that the Agency failed in its due process obligations when it listed certain individuals in its witnesses in the pre-disciplinary hearing stage and subsequently at the arbitration hearing used additional witnesses in support of its case against the grievant.

It is the Union's position that while at Step 3 the Union secured the witnesses' statements it sought, it was still denied the investigatory reports, the incident reports, and the tape recording of the investigatory interview of the grievant (materials not produced until just before the arbitration hearing), which denials constituted a denial of due process.

According to the Union, at Step 3 it sought to question those patient witnesses who were still hospitalized, but was denied the right to do so, contrary to Section 25.08 of the Contract.

Finally the Union argues that it is entitled to the patient records of those patient witnesses or statement givers who are adverse to the grievant. It goes to credibility, and would additionally demonstrate Billy F.'s "oppositional, aggressive, and prone to acting out" characteristics, asserts the Union. In its Reply brief answering the Agency's bases for opposition to said medical records, the Union contends that "the Employee asserts that it has refused to disclose certain [medical] documents requested by the Union because it is argued [by the State] that disclosure is prohibited by state and federal law. The State was aware that the Union would argue its right to disclosure was founded in Section 43.01 and 25.08 of the parties' collective bargaining agreement." But, asserts the Union, whereas O.R.C. Section 5122.31 provides that "no person shall reveal the contents of a psychiatric medical record of a patient except as authorized by law," the Employer is authorized by O.R.C. Section 4117.10 and Sections 43.01 and 25.08 of the parties' contract to release the requested documents. It

follows, urges the Union, that the Employer is not prohibited to release the documents by state law. Pointing to the Dispatch Printing case relied upon by the Agency the Union characterizes such as "not helpful." Thus, it is the Union's contention that

> "(f)irst it should be considered that the Court in the Dispatch Printing case found that the clear contract language did not prohibit the disclosure of the materials sought when the disclosure was required by law (at p. 384). Clearly, there is a fundamental difference based on the nature of the language found in the collective bargaining agreements. Section 25.08 clearly allows access to relevant documents under the control of the Employer.
>
> The Court also considered whether denying public access to certain records on the basis of the Agreement was within the original design of R.C. Section 4117.10(A); stating that Section 'was designed to free public employees from conflicting laws which may act to interfere with the newly established right to collectively bargain.' (at 384). This matter involves a dispute between the parties to the agreement unlike the Dispatch Printing case which involved a nonparty (the Dispatch newspaper) which sought disclosure of personnel records from the Employer. The Employer claimed the collective bargaining agreement barred disclosure. In the case at bar, disclosure of the documents requested by the Union does promote the intent and design of Chapter 4117. The processing of the grievance to arbitration is a private procedure between the parties which is a creature of the agreement entered into by the parties. To allow the Employer to disregard the terms of the Agreement it bargained for allows the Employer to repudiate the Agreement which amounts to a failure to collectively bargain with the Union contrary to R.C. Chapter 4117.

Even on the basis of the Dispatch Printing case, it is recognized that a balancing of interests is required in order to properly decide whether disclosure is appropriate. The Employer recognizes the need to balance the interests in its discussion of the issues as presented in its brief. The interests which must be balanced are the grievant's right to due process and the patients' privacy interests. The patients' statutorily created privacy rights are not absolute. The due process right of the grievant is a compelling reason for disclosure. This Arbitrator has recognized that competing interests exist with respect to disclosure of certain materials and has resolved this issue in the past by ordering an in camera inspection. [State of Ohio, Department of Rehabilitation and Correction and OCSEA/AFSCME Local 11, Grievance Nos. G-87-0795; G-87-0796; and G-87-0606 (Keenan, December 16, 1987)]."

It is the Union's contention that:

"the Employer's failure to disclose the requested information has hampered the Union's ability to represent the Grievant. It has inhibited the Union's ability to fully explore the witnesses' credibility and to fully cross-examine those witnesses who testified against the grievant.

The Employer argued that because Sandra W. testified regarding why she wanted to remove her son from Millcreek any further documentation on the issue would be cumulative. The Union argues that discovery of this information would allow it to properly defend its position and could be used to corroborate testimony presented by Social Worker Jim Willis, and could be used to properly impeach Sandra W. Both Sandra W. and Jerry G. testified. Having taken the stand and testifying to these

matters opens the records to scrutiny. In effect confidentiality is waived.

Credibility is a key issue in this case. Credibility of the state's witnesses has been called into question by the Union. Sandra W.'s credibility is questioned because of her preoccupation to have her son released from Millcreek to the care of a private psychiatric facility. Jerry G.'s credibility is questioned because at the time of the incident he was institutionalized because of his mental incompetency. The Union further questions the reliability of the witnesses' testimony because the only two (2) eye witnesses to the incident called by the State are related as mother and minor son. There is a certain amount of bias and prejudice apparent from their relationship. Being called as the only witnesses makes the testimony suspect and warrants close scrutiny. Failure to provide the requested documents has inhibited the Union's ability to fully cross-examine the witnesses and impeach their credibility.

The Union also requested Billy F.'s records so as to corroborate testimony presented by the Union which presented him as highly oppositional and untruthful. The Employer's brief highlights the importance of these documents when it is argued by the Employer:

> Some of those witnesses provided scathing attacks on Billy [F], who while not being present could not defend himself and tell his side of the story. <u>But, no evidence or documentation was provided in support of their conditions</u>. (emphasis added). (at p. 12)

The Union was denied the documentation by the Employer. The Union's testimony that Billy F's oppositional behavior was characteristic, was uncontroverted by the Employer. Further, the Employer refused access to Billy F's records. Yet, the Employer uses the lack of documentary evidence supporting the uncontroverted testimony as a sword against the

Union. The denial of access to information on the basis of confidentially is used as a sword and shield by the Employer."

In addition, the Union, citing other arbitration awards under the Contract, argues that "in the past the State . . . has released patient's records when convenient."

Court citations from jurisdictions other than Ohio relied upon by the State are characterized as distinguishable from the case at hand, and hence unpersuasive.

Concerning the Agency's assertions with respect to federal law prescriptions against release to the Union of the medical records requested, the Union argues that a careful reading of 42 CFR Ch. 4, Section 482.24 (10/1/87) upon which the Agency relies

> "does not prohibit release of patient records; the Section merely provides that medical records can 'only be released in accordance with Federal or State laws.' In this instance, State law allows for release as argued above. By providing the requested documents federal law as cited by the Employer will not be violated as claimed by the Employer. As support for its position the Employer relies upon Ohio Department of Mental Retardation v. OCSEA/AFSCME, Local 11, Grievance No. G-87-0366 (Michael, March 13, 1988). Mr. Michael based his findings on a completely different federal regulation, i.e., Section 442, 502 of the Code of Federal Regulations. . . . Simply stated, the requirements are different and, thus, inapplicable to the [instant] case. . . . So it is that the Union "urges the Arbitrator to order provision of the requested documents to the Union. In the alternative, the Union requests that the Arbitrator order an in camera review of the requested documents to allow the arbitrator to balance the competing interests of the parties with respect to the disclosure of the documents."

It is the Union's contention that "the parties have had several battles over the Employer's denial of information under this contract." It cites State of Ohio, Department of Mental Health and OCSEA/AFSCME, Grievance No. G-86-0431 (Klein, August 18, 1987) and The State of Ohio, Department of Youth Services and OCSEA/AFSCME Local 11, Grievance No. G-87-1299 (Rivera, January 5, 1988); and Ohio Department of Mental Health and OCSEA/AFSCME, Local 11, Grievance No. G-87-0351 (Rivera, August 25, 1987).

The Union points out that in the last of the above cited cases Arbitrator Rivera ". . . considered various types of procedural violations of the contract which could be committed by the Employer:

> ' . . . [v]iolations can be of three kinds: (1) Employer violates the explicit procedures of the contract; (2) the Employer fails to follow its own rules set up under the contract; and (3) Employer violates basic notions of essential fairness. In assessing a procedural violation of the third type, the Arbitrator must assess the degree of prejudice to the Grievant and simultaneously the need to persuade the parties to follow the rules. (See R. Fleming, The Arbitration Process, pp. 139-40 (1965)). Compliance with the rules not only benefits the individual but all employees for whom the contract is negotiated. Where explicit contract procedures are violated, the Arbitrator is often compelled to set aside what may have been a substantively correct decision. (emphasis added)

It is submitted that the violations which the Union raises in the case at bar are all three types. A specific pre-disciplinary conference notice and provision of information are requirements of the contract and the Employer's failure to comply in this case has "violated the explicit procedures of the contract." (Type 1) The Employer's failure to provide the notice of pre-disciplinary meeting to the employee and Union at least two (2) days prior to the conference violates the Employer's own rules set up under the contract. (Type 2) Failure to provide this notice and the requested information has effected the Employee's ability to have due process and has impaired

the Union's ability to effectively represent him. The employer has violated "basic notions of essential fairness." (Type 3). Since the Employer has failed to heed Arbitrators' rulings in the past and has continued to interfere with the Union's rights to discovery under the contract, it is clear that the employer needs to be "persuad[ed] . . . to follow the rules".

The Union argues that since the Employer has violated the specific terms of the contract, the Arbitrator is bound to remedy such violations and sustain the grievance regardless of the merits."

On the merits of the grievant's discharge, "the Union submits that the Employer has failed to meet its burden of proof in establishing that grievant's discharge was for just cause. The Union maintains the proper standard of proof for the Arbitrator to apply . . . is beyond a reasonable doubt. The alleged violation of patient abuse is criminal conduct in Ohio as provided in Ohio Revised Code Section 2903-34. . . . In the alternative, if the arbitrator feels that beyond a reasonable doubt standard is too high a standard the Union would have the Arbitrator apply the clear and convincing standard."

It is the Union's contention that "the Employer has failed to prove by the requisite degree of proof that Jeffrey Moore engaged in patient abuse on January 26, 1988." By way of elaboration, the Union asserts that:

". . . on January 26, 1988, Jeffrey Moore became involved in physically restraining patient, Billy F., when Billy began to show signs of physical aggression after he was advised by Mr. Moore that he would have to go to the quiet room for his behavior in the day room. It does not indicate that he initially abused Billy F.

The Employer's two (2) witnesses are not credible in their depictions of the brief encounter they observed between Mr. Moore and

Billy F. It must be considered that they saw only a fraction of the entire interaction that had occurred between Mr. Moore and Billy F. Their knowledge of the incident is a brief and isolated part of the entire interaction that had occurred between the two individuals. This modifies their abilities to give a complete account of what occurred on January 26, 1988.

Also effecting their abilities to accurately perceive and account what occurred is their perspective as people who are not accustomed to the restraint techniques used by the hospital personnel to physically restrain patients. In Figures 7-14 of [the THART Manual], the baskethold is pictorially depicted in a step by step account. It is clear from the pictures (note Figure 12), the demonstrations at the hearing, and testimony of Donna Bowles that certain movements of the hold, especially when applied to a patient who is struggling against the person attempting to apply and sustain the hold, could cause a viewer accustomed to the procedures to feel sorry for the patient. Donna Bowles testified in her experience as trainer, she has found it is usual for people inexperienced and untrained in Therapeutic Handling of the Aggressive Resident Training (THART) to negatively react to seeing a patient being properly physically restrained.

The Union also submits that Sandra W.'s perceptions of the incident were colored by her preoccupation to have her son released from Millcreek to the care of a private psychiatric facility. Social worker, Jim Willis, testified that Sandra W. had wanted her son to have care at another facility and that it had been a common issue even prior to this incident. Mr. Willis testified that she had perceived that the psychiatric care her son would receive elsewhere would be superior to that at Millcreek. It is the Union's contention that her

predispositions in this area caused her to exaggerate the seriousness of the incident. Although she declared her interest in her own son's safety, she did not take him home with her although her son could not have been held at the hospital against her wishes.

Further, Sandra W.'s testimony at the hearing displayed several inconsistences with her prior written statement and the testimony of Jerry G. She had told Van Spencer, investigating officer for Millcreek, that she saw Billy F.'s head shoved into the wall by Mr. Moore. At the hearing, she testified that she had not seen Billy F's head hit the door frame but that she heard a "thud". At the hearing, the Officer testified Sandra W. had told him Mr. Moore had rammed Billy's head against the door. Sandra W.'s statement indicates that Billy F. slammed his bedroom door when he went into his bedroom and that she heard loud noises coming from the bedroom prior to Billy F. and Mr. Moore coming into the hallway, but Jerry G. indicated he did not recall hearing any noise. He testified that Billy F. was struggling and moving his upper body and head from side to side when they were in the hallway. Sandra W. testified that he was not moving or struggling. The testimony with respect to how Mr. Moore had his arms and body positioned with respect to Billy F. differed. Jerry G. testified that Billy's hands were free and he was using his hands to pull at Jeffrey Moore's arm. Ms. Wydner testified Billy's arms were at his sides."

Pointing to Director of Training Bowles' testimony concerning the use of a baskethold, the Union asserts that "clearly . . . Mr. Moore's actions were not inappropriate to the circumstances of this case. He attempted to execute one of the most difficult holds sanctioned by the hospital in accordance with this best judgment at that time. He did not purposely place the patient in a strangle-hold. He attempted to maintain the hold over a

patient who was struggling with him and jerking his head and upper body from side to side. In trying to regain control over Billy F.'s arms and body his arm could very likely be expected to cross over the neck area."

"The Employer's evidence," asserts the Union, "does not establish by the appropriate weight of the evidence that Mr. Moore committed an infraction upon which discipline can be imposed."

The Union further argues that:

"alternatively, if the Arbitrator finds that Jeffrey Moore is guilty of an infraction subject to discipline, he is not guilty of 'abuse' as the parties used the word in Section 24.01 of the . . . Agreement. . . .

The parties have commissioned Arbitrator Pincus to set forth the definition of "abuse" as used in Section 24.01. The resulting decision in Ohio Department of Mental Retardation and OCSEA/AFSCME, Local 11, Grievance No. G-87-0001A (Pincus, October 31, 1987).

The Union argues that the criminal statute's definition of "abuse" is the appropriate definition the Arbitrator should require to limit his authority to modify the penalty. The criminal statute relating to abuse is used in training. The employees are trained as to the elements of abuse as defined in the statute. It is the Union's position that the parties intended to modify the Arbitrator's authority only in those most serious cases where the Arbitrator has determined that the Employer has engaged in criminal abuse as defined in O.R.C. Section 2903.34."

It is the position of the Union that:

". . ., based on Mr. Moore's training, it is unreasonable to conclude that his actions in using the baskethold under the circumstances of this case were caused by an intention to harm Billy F. Based on his

experience and training, the Grievant could not have known or understood that he was committing the offense of patient abuse as provided in Section 24.01, by doing what he did on January 26, 1988. The Employer has authorized this difficult hold known to commonly result in harm. The Employer has committed its case to the discretion of direct care staff with limited education and training in the field of mental health. Mr. Moore's use of discretion and judgment in this instance do not amount to intentional abuse. . . .

Based on the facts of the case at bar, if the Arbitrator finds Mr. Moore guilty of an infraction which is subject to discipline, he should determine that Mr. Moore is not guilty of abuse. He should then determine that the discharge should be modified to a lesser penalty."

Furthermore, argues the Union, "if the Arbitrator finds Mr. Moore guilty of an infraction subject to discipline, the removal should be modified to a less harsh penalty." Thus, the Union asserts that

". . . (a)n element of just cause is that the Employer is required to establish that it has applied its rules consistently. In this case, the Union has raised an issue of disparate treatment in the way Mr. Moore was disciplined. The Union cited another example where an employee had intentionally shoved a patient through a doorway and received a two (2) day suspension. This grievant was found to have engaged in physical abuse and received a less harsh penalty than Mr. Moore.

Another element lacking in this case is a fair investigation. The report completed by the Security Department indicates that the investigatory officer construed the facts in such a way as to resolve any inconsistencies against the Grievant. He testified he only interviewed those patients who Billy F. told him had witnessed the

incident. He failed to write a follow-up report concerning his discussions with TPW Ron White and patient Todd G. He failed to talk to a THART expert in order to more fairly judge the Grievant's statements. Based on statements presented in his report, the Union submits that his judgment was biased against the Grievant so as to deprive Mr. Moore of a fair investigation.

The procedural issues previously discussed are also elements of just cause which the Employer failed to establish in this case. Procedures and rules have not been followed in this case which has resulted in unfairness to the grievant as argued previously. . . .

Further, the discipline has not been imposed in a progressive, corrective manner as required by the contract.

Section 24.02 provides in part:

> [t]he Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Further, Section 24.05 provides in pertinent part:

> [d]isciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Union argues that removal is too harsh in this case and asks the Arbitrator to modify the penalty."

In sum, the Union requests ". . . that the grievance be granted and that the grievant be reinstated with full back pay. Alternatively, it is requested that the grievance be sustained in part and that the Grievant be reinstated with back pay deemed fair and appropriate. It is also requested that grievant be awarded all benefits including seniority rights."

The Issue

The parties characterize the issues in the case differently. Thus, the Agency asserts that the issues are:

"1. Was the discharge of the grievant for just cause under the Agreement?

2. Did the grievant receive a fair and objective review of the incident from the investigatory stage through the process of Arbitration or Step 5 of the grievance procedure?

3. Did the actions of the grievant contribute to the actions of client Billy F. regarding whether he had the right to remain in his bedroom or the Recreation Room, based on his knee hurting?

4. Was the grievant's case prejudiced or the Union's ability to represent the grievant compromised by the Department's withholding of confidential medical records not relevant to the case and designated as confidential records of clients?"

The Union asserts that the issues are:

"1. Did the Employer have just cause to remove the grievant? If not, what is the remedy?

2. Did the Employer violate the collective bargaining agreement by failing to provide the Union with copies of the security investigative report, incident report and witness statements at the pre-disciplinary hearing?

3. Did the Employer violate the collective bargaining agreement by failing to provide the Union with the security report, incident report and the investigatory interview tape at the Step 3 hearing?

4. Did the Employer's Notice of the pre-disciplinary conference violate Section 24.04 of the parties' collective bargaining agreement?

5. Whether failure to provide access to the Union to hospital records of Billy F. and patients from whom statements were taken violates the collective bargaining agreement?"

In my judgment, the issues in the case are best framed as follows:

1. Were there due process type contractual violations in the case and if so, do they have an impact on the case?

2. Was the grievant discharged for just cause and if not, what is the appropriate remedy?

Discussion and Opinion

It is noted at the outset that the parties, as is their right, have elected to litigate this case to the fullest, calling forth numerous witnesses, introducing voluminous documentary evidence, and passing the witnesses back and forth and back again, for direct, and cross, and re-direct, and re-cross examination etc. etc. This exhaustive treatment required three days of hearing and due to conflicting schedules of witnesses and/or advocates these hearing dates encompassed some two months. Thereafter the parties filed exhaustive briefs. Moreover, they set before the undersigned numerous decisions of other panel arbitrators for the undersigned to consider. Then too, the undersigned was referred to the decision of numerous Courts. Additionally, as per an understanding of the parties reached at the hearing, the Union was given leave to file a Reply brief to whatever case citation the Agency might rely upon in its post-hearing brief in support of its position that the medical records of patients not be made available to the Union on the grounds of confidentiality. The point to be made is that these efforts have created a most voluminous record, which in turn creates an arduous task for all: for the parties to review and brief and for the Arbitrator as well. It is hoped

that in the future the parties will cooperate more fully and coordinate more closely in the pre-arbitration stages and further will endeavor to narrow the number and scope of the issues brought to arbitration.

First addressed is a problem of focus, namely, just what is it that the Agency relies upon as the basis for the grievant's discharge? This problem arises by virtue of the fact that notwithstanding the pre-disciplinary notice of hearings, and the notice of discharge's delineation of physical abuse of a patient as the basis of the grievant's discharge, the Agency, in its post-hearing brief argues a "multiplicity of errors" was the basis for the grievant's discharge. This is an extremely important distinction. Thus a discharge grounded on a "multiplicity of errors" may well not stand up under the applicable just cause standard if but one of the multiple "errors" relied upon is not made out. Iowa Power & Light Co., 76 LA 482, 487 (Gradwhol, 1981). Furthermore, clear and convincing evidence, and not simply a preponderance of the evidence is required to make out an "abuse" case. And finally, if it is an abuse case which is involved, and not simply the cumulative effect of a multiplicity of "errors," and the "fact" of "abuse" is proved, then the Arbitrator's power to modify the termination-for-abuse decision is nonexistent. Clarification of this blurred focus requires a return to fundamentals, and in this regard the Arbitrator is guided first and foremost by what the Agency itself expresses as the basis for its action, and not by its advocates' characterizations. In this regard all of the Agency's internal memorandum and its notices to the grievant in the matter make clear that the singular reason for the Agency's discharge of the grievant was its perception that he had physically abused patient Billy F. Thus the notice to the grievant of the pre-disciplinary hearing recites that the charges are "patient abuse and neglect of duty." The "neglect of duty" charge was based on allegations of having fallen asleep on duty. This

latter factor had been dropped from the case. Thereafter the notice of removal recites that "the reason . . . is that . . . you physically abused patient Billy F. . . ." In his recommendation for discharge, the Superintendent cites "patient abuse" as the "rule violated"; and in its Step 3 response (also adopted at Step 4), the Agency identifies the issue as "was there just cause to discharge (grievant) for patient abuse," and concludes that there was. It is therefore clear that the Agency discharged the grievant for what it perceived to be an instance of physical abuse of a patient, and not for a "multiplicity of errors."

Next addressed is the Union's denial-of-due-process contentions. As has been seen, the Union contends that, if found, said alleged due process failures must be remedied by way of voiding the grievant's discharge. Such a result is sanctioned by many arbitrators. However, I adhere to the view that it depends on the particular circumstances, on a case by case basis, as to whether or not any particular due process shortcoming, or the cumulative weight of several such shortcomings, warrants voiding of the discipline imposed, without ever reaching the merits of the Employer's substantive reasons for the imposition of discipline. This view was excellently espoused by Arbitrator Melvin Lennard in Kaiser Steel Corporation, 78 LA 185 (1982), the reading of which I recommend to the parties. In sum, the Kaiser opinion stands for the proposition that the seriousness of the due process violation and the adequacy of a remedy, short of voidance of the Employer's discharge action, are the touchstones for any disposition of due process shortcomings. In any event, first to be determined is whether any due process violations of the contract as alleged, exist. Directly to the point, some of the Union's due process allegations are found to have merit; some not. They are taken up hereafter seriatim.

While it is true that Section 24.04 provides for pre-disciplinary written notice of the reasons for contemplated discipline "and the possible form of discipline," and further that the notice furnished here did not expressly specify the possible form of discipline, given the gravity of the misconduct alleged, physical abuse of a patient, I find that it was so self-evident that discharge was well within the realm of possibility as a form of discipline, that a specific spelling out of same was not necessary to comply with Section 24.04. Similarly, its self-evidentness renders unpersuasive the Union's additional contention to the effect that the failure to expressly spell out the possible form of discipline is at odds with the due process concepts inherently embedded in the applicable just cause standard.

Having set up its own procedural rules unilaterally, it was incumbent upon the Agency to follow them. Having committed itself to 48 hours notice of a pre-disciplinary hearing, and failing to give same, the Agency, as alleged, fell short of a procedural due process standard it set up for itself.

With respect to the failure to provide witnesses' statements, investigatory reports, and incident reports at or before the pre-disciplinary hearing, and the assertion that "such deprivation of documents . . . amounts to a denial of a fair pre-disciplinary conference as required by the Contract and due process," because the "specific" governs and takes precedence over the "general," one must look to Section 24.04 which deals specifically with, indeed is titled, "Pre-discipline," for any obligation to provide such documents. Directly to the point, no such obligation is set forth in 24.04. To the contrary, only a list of witnesses and documents "that will be relied upon in imposing discipline," need be

furnished. This comports with the generally accepted view that pre-disciplinary hearings are usually not considered to be "full blown."[5/]

However, as the Union alleges, the Agency's unilaterally promulgated Directive A-22 dealing with Disciplinary Action, clearly provides at III. Procedure (B) (3) (C) (4) that "no later than at the time of the [pre-disciplinary] meeting, the employee . . . will be granted the opportunity of reviewing evidence utilized in the case." This unilaterally self-imposed procedural requirement was simply not met here and the failure to do so clearly constitutes a due process shortcoming.

With respect to the contention that witness Jerry A. was relied upon by the Agency but did not appear on the witness list furnished, the Union is technically correct. Thus, the Union was unaware at the pre-disciplinary hearing that A. was being relied upon and hence denied an opportunity to exercise its "comment, refute or rebut" prerogatives. This constituted a due process type shortcoming.

With respect to the Agency's failure to produce witnesses' statements to the Union until Step 3, and its failure to provide incident reports, investigative reports, and make the tape of the grievant's interview available for listening[6/] until just before the hearing, it is clear that

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[5/] In so finding the Arbitrator recognizes that his decision on this point is at odds with Arbitrator Klein's view that "Article 24.04 requires the Employer to provide documents which are used to support possible disciplinary action; such information should be provided at least at the time of the pre-disciplinary meeting." State of Ohio, Department of Mental Health and OCSEA/AFSCME, Grievance No. G-86-0431 (Klein, August 18, 1987). With all due respect to Arbitrator Klein, I find that her construction is patently erroneous and hence not followed.

[6/] The Agency is correct in its contention that it need not relinquish the tape or furnish a copy to the Union. A Union representative was present throughout the actual interview and the Union was afforded an opportunity to listen to the tape and take notes.

except for the tape recording, the Agency was in violation of Section 25.08, as ample arbitral precedent under the Contract, and cited by the Union, suggests. Thus clearly these matters were "relevant to the grievance." Since they were in fact eventually produced its equally clear that they were "reasonably available." Protestations by the Agency at this juncture in their relationship that there was "confusion" as to the obligation to produce such materials for the Union, are unpersuasive. The critical language of 25.08 operating here is "relevant to the grievance under consideration." Upon the filing of the grievance, and therefore commencing at Step 1, the Union may request and not be unreasonably denied, relevant books, papers, or witnesses. Thus the tardy production of these materials constitutes a due process failure as alleged.

Concerning the denial of the Union's request to question patient witnesses still hospitalized at the time of the Step 3 meeting, the record fails to identify who these patients might be, and hence I am unable to make an informed judgment as to their merit, or lack thereof, of the Union's contention.

Finally, with respect to the Union's request for the medical records of patient witnesses against the grievant, for reasons which will become apparent hereinafter, I find this issue need not be, and is not addressed.

In my judgment the shortcomings and failures of due process found above are not so serious or irremedial as to warrant the voidance of the Agency's discharge action without ever reaching the merits. Accordingly, I move on to the substantive merits of the Agency's reason for the grievant's discharge.

Following the Pincus award referred to above, it has become necessary for the Agency to establish that the grievant has physically abused a

patient as the term "abuse" is defined in O.R.C. 2903.33 (B) (2) and the Ohio Administrative Code, Section 5123-3-14 (C) (1).

In my judgment the statute and the enabling administrative code provisions are not entirely congruent. Thus, the administrative code appears to be more expansive than the statute, specifying as it does with certain important exceptions, that "abuse" means any act or absence of action inconsistent with Human Rights which results or could result in physical

injury to a client." (emphasis supplied) The interjection of the concept of Human Rights clearly embraces more than the more restrictive statutory concepts of knowing (i.e., intentional) conduct or reckless conduct causing serious physical harm. Another contrast is that whereas the statute is couched in terms of acts of commission only, the administrative code is expressly couched in terms of acts of omission as well. Yet another contrast is apparent and that is that whereas the statute requires "serious" physical harm if reckless conduct is involved, the administrative code requires only physical injury or the potential for physical injury in connection with acts or omissions "inconsistent with Human Rights," and presumably encompassing reckless acts or omissions.

These tensions between the statute and the administrative code are meaningful here because under the statute "serious physical harm" must result before merely reckless conduct can be relied upon to establish abuse, and no such "serious" physical harm is present here. However, under the administrative code's provisions reckless conduct simply causing "physical injury," without regard to its seriousness, would support a finding of "abuse." There is however clearly one area where there is congruity: in the administrative code it is express, and in the statute implied. Thus in the administrative code "accidental" conduct, even if causing physical

injury, is excused and prohibits a finding of abuse. Since knowingly or intentionally causing physical harm, the statutory standard, is inherently incompatible with the concept of accidentally causing physical harm, by clear implication the "accidental" exception is likewise present under the statutory standard.

The foregoing discussion brings one to the very crux of this case which is, did the grievant, from the very outset, grab Billy F. around the neck in a headlock as patient Robert S. and Billy F. reported to Security Officer Spencer (or a half-Nelson, as the Superintendent described it) or did he commence with a baskethold as the grievant testified, which because of Billy F.'s resistance, degenerated into a neck hold? This query is critical because if the grievant commenced with a neck hold, a hold both parties agree to be inappropriate, then "abuse" may well be made out, but if he commenced with a baskethold with a subsequent degeneration to a neck hold one has an "accidental" situation and hence no "abuse" is made out. A neck hold from the outset would be indicative of "knowingly causing physical harm" [O.R.C. 2903.33 (B) (2)] or an "action inconsistent with Human Rights which results in physical injury" [Ohio Administrative Code, Section 5123-3-14 (C) (1)]. However, a baskethold at the outset, which degenerated to a brief neck hold due to Billy F.'s struggling and resistance, would be indicative of an act causing physical injury which "occurs by accident," which as noted above, exculpates the grievant from a finding of abuse under both the Statute and the Administrative Code.

Which hold the grievant initially used with Billy F. is a question of fact. At the hearing before me the grievant testified (and demonstrated) that he initiated a baskethold. Neither Billy F. nor Robert S. testified. Rather the Agency elected to proceed with former patient Jerry A. and his mother as their principal witnesses. The difficulty here is that neither of

these witnesses witnessed the critical beginning of the physical contact between the grievant and Billy F. Of course, the grievant has a strong self-interest and bias in the matter, but given the grievant's demeanor, his unblemished work record, his training in THART techniques, and his lengthy former employment with Youth Services, and hence work-related contact with disturbed and troublesome youth, no viable basis exists to disbelieve him. I find the grievant credible. In this state of the credible and reliable record evidence, it must be found that the grievant commenced his physical contact and restraint of Billy F. with a baskethold, which only subsequently, due to Billy F.'s struggling and resistance, degenerated into a neck hold. The neck hold was "accidental." Also, in the course of his struggling and resistance, Billy F. hit his head and was injured. He received two lumps and maintained a headache. This too must be found to be an accidental consequence. Indeed in the hearing before me, Ms. Wydner did not testify, as per her statement to Security Officer Spencer to the effect that the grievant rammed Billy F.'s head against the door frame. And, since the entire period of restraint was extremely brief (as no one asserts otherwise), the grievant cannot be faulted for the brief accidental neck hold. So it is that no case of physical patient abuse is made out.

The Arbitrator would feel remiss, however, to not analyze the case in terms of the record hearsay evidence of Billy F. and Robert S., who both claimed in their report to Security Officer Spencer that the grievant commenced his restraint of Billy F. with a neck hold. It's clear the Agency believed that this "hearsay" would carry its burden of proof. Under this analysis, the grievant's credibility is pitted against that of Billy F. and Robert S. Those factors which bolster the grievant's credibility have already been outlined. However, little exists to bolster the accounts of Billy F. and Robert S. Thus, only the conceded fact that Billy F. was in a

neck hold while in the hallway as observed by Agency witnesses Jerry A. and his mother, supports Billy F. and Robert S. Here the contention would be (albeit not expressly articulated by the Agency) that since he was in a neck hold there, the neck hold was initiated in Billy F.'s room and from the outset. As noted above, however, this inference is undermined by the equally plausible inference [and indeed found to be a fact] that the neck hold resulted from the grievant's struggle against a basketheld. Furthermore, in the face of this paucity of objective supportive data, there is much which undermines the credibility of witnesses Billy F. and Robert S., and thereby paralyzes the probative value of their hearsay evidence. Thus one starts with the proposition that Billy F. and Robert S., as patients of the institution, are not model youth. Disturbed and troubled one would have to be very cautious in crediting their accusations of misconduct by one in authority over them. This is especially so where, as here, motivations to discredit the authority figure exist. In this regard it need not be belabored that Billy F. who was injured in the incident, would harbor such feelings. But so would Robert S. for as the Union points out, the Grievant was instrumental in keeping Robert S., Billy F. and another patient apart one from the other. The most serious erosion comes from within the report to Spencer itself. Thus Robert S., who at best could be said to have some measure of dispassion in the matter, reported to Spencer that in the hallway Billy F. struggled free from the grievant after which "Moore then regained the same hold [i.e., a headlock around his neck]." Even the Agency's own witnesses fail to corroborate this account. So it is that no credence can be accorded to the hearsay evidence of Billy F. and Robert S.

There being no "abuse," the Union's disparate contentions that others were treated less harshly than the grievant by discipline less than discharge for physical patient abuse, simply doesn't come into play.

Further, in light of the foregoing disposition, the matter of the production of patient records would, even if indicating the evidence the Union anticipates, at best be cumulative and hence I find it unnecessary to resolve the parties' conflicting contentions.

Finally, notwithstanding the insufficiency of the evidence of physical abuse here, it is found that the grievant's conduct was not without fault. And as the Elkouris in their learned arbitration treatise, How Arbitration Works,[7] have appropriately observed ". . . there is a line of cases in which the [employer's] evidence was held inadequate to establish the offence for which the employee has been disciplined but was held to be adequate to establish a related lesser offence for which an appropriate penalty . . . was in order."

In my view, the testimony of the grievant himself and that of Mrs. Bow ls make manifest that the grievant exercised very poor judgment in not seeking assistance with Billy F., and in initiating, by himself, any physical restraint in the bedroom. Thus, as the grievant himself described and acknowledged, the bedroom where Billy F. went had five beds in it. As the Arbitrator observed, the rooms are small to begin with. These metal beds indeed created a danger for any physical struggle. Given the attitude of hostility expressed by Billy F. in inappropriate language and behavior at that point, the grievant had to have known that Billy F. would struggle and

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7/ How Arbitration Works, Elkouri and Elkouri, 4th Edition, 1985, BNA Books, Inc., Washington, D.C., pp. 676-677.

resist any physical restraint. Moreover, the grievant's training informed him that a baskethold itself could result in injury. These circumstances taken together lead inexorably to the conclusion that the grievant exercised poor judgment in the matter. He ought to have refrained from undertaking any physical restraint of Billy F. by himself and sought help. In failing to do so he negligently performed his job duties. The patients at the institution are youths in trouble. They deserve the best efforts of the staff.

The grievant's substandard performance was a serious matter and therefore deserving of severe discipline. I find a sixty (60) calendar day suspension, effective from the effective date of the grievant's discharge (and therefore after the period of the grievant's administrative leave) to be appropriate. However, the Agency's due process failures must be remedied. At this point in the parties' relationship, not only is "confusion" as to its due process obligations not persuasive, but it has become recidivist in its failure to abide by contractual and/or self-imposed procedural due process matters. It is therefore deemed appropriate to reduce the sixty (60) day suspension imposed here by fifteen (15) days, thereby rendering the suspension deemed to be served as a suspension of forty-five (45) calendar days.

The Agency is directed to reinstate the grievant to his job with full seniority, and make him whole for benefits and straight-time wages lost as the consequence of his removal.

This make-whole remedy contemplates the possibility that the grievant earned wages during his period of unemployment at the Agency. The State is authorized, therefore, to deduct the gross amount of such wages from its back-pay obligation. Grievant shall, upon request, furnish the Agency with

documentary evidence of wages earned, including tax returns, pay receipts, and the like.

Award

For the reasons more fully noted above, the grievance is sustained in part and denied in part. The grievant did not physically abuse patient Billy F. as alleged, and hence his discharge is set aside and the grievant is to be reinstated. Because his conduct was not without fault, the grievant is to be regarded as having been suspended for the period noted above, and the remedy more fully set forth above shall be implemented forthwith.

Dated: July 31, 1989

Frank A. Keenan
Arbitrator

ATTACHMENT # 1

Ohio Civil Service Employees Association

995 Goodale Boulevard Columbus, Ohio 43212 614/221-2409 Toll Free: 1-800-282-0543

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Margaret J. Penn
COMPTROLLER

January 6, 1989

Carlin Dunlop
Ohio Department of Mental Health
30 East Broad Street
Columbus, Ohio 43215

RE: Arbitration concerning the removal of Jeffery Moore
Case No. 23-11-880304-0003-01-04

Dear Ms. Dunlop:

This will confirm our telephone conversation on January 5, 1989 wherein we discussed the Union's requests for information in preparation of the grievance relating to Mr. Moore's removal and your position on which documents the State will not release to us.

Based on our conversation it is my understanding that you will not provide the Union with the following documents because you assert that the documents were not relied upon when the decision to remove was made:

1) Incident reports, unusual incident reports, and/or restraint reports;

2) The transcript and tape of the investigatory interview conducted by Van Spence of Security;

3) Investigation reports;

4) Quality Assurance reports; and

5) Any documents completed by the Superintendent, Security, supervisors, the Client Advocate and/or quality assurance in relation to this incident;

You also indicated that the following documents will not be released because they are considered confidential:

1) Client's and ward's daily log(s);

2) Quiet room report with respect to Billy Fields;

3) Client advocate's report;

4) Nurse's report relating to the January 26, 1988 incident;

5) All medical, nurse, social work, psychological, and hospital records, chart and social work records regarding Billy Fields resulting from the incident which occurred January 26, 1988;

6) All medical, psychological and psychiatric evaluations and reports, clinic notes, social work notes, restraint records, nursing notes, behavioral records, and chart notes for patient Billy Fields (complete hospital records);

7) All psychological and psychiatric evaluations and reports regarding all patients or former patients the employer intends to have testify or in any other way rely upon (including statements) to support its position that termination was appropriate in this case; and

8) All social work records, correspondence, letter, memoranda, chart records and/or any other documents pertaining to and/or regarding Mr. and Ms. Wydner's perception of the care received by Jerry Goley while he was hospitalized at Millcreek and/or efforts to remove him from the hospital.

Because the Union is refused access to this information, I feel Section 25.08 of the contract has been violated and this poses significant procedural problems. As we discussed, the Union intends to argue your denial of this information is the type of procedural and contractual violation that impacts on the merits and justifies modification of the penalty by the arbitrator. As we further discussed, the State has committed other contractual and procedural violations in this case which will also be raised at the arbitration. The Union was denied documents at the prediscipliniary level. The Union was not given all of the requested documents at Step 3. Those documents which were provided at Step 3 were given during the course of the Step 3 hearing rather than in a timely fashion hampering the Union's ability to adequately address the content of the statements. Further, as we discussed, the prediscipliniary conference notice was deficient under the requirements of Section 24.04 of the contract. The Union did not receive a copy of the notice prior to the meeting in accordance with the requirements of the contract (it is my information that only Mr. Moore received a copy) and the notice does not state the possible penalty that could be imposed as a result of the alleged infraction.

If the issue with respect to your denial of requested information can be resolved prior to the hearing, please contact me so that further delay can be avoided.

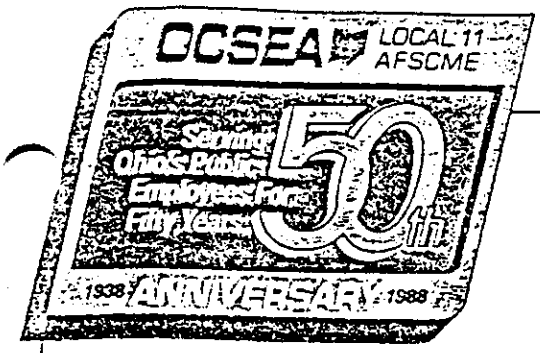
Thank you for your attention to this matter.

Sincerely,

Linda K. Fiely
Associate General Counsel
NYSNA/AFSCME Local 11

LKF:sls

cc: Rodney Sampson
Penny Lewis



December 12, 1988

Rodney Sampson
Office of Collective Bargaining
65 East Broad Street
16th Floor
Columbus, Ohio 43215

RE: Jeffery Moore Arbitration
Employer: Ohio Department of Mental Health;
Millcreek Psychiatric Hospital for Children

Dear Mr. Sampson:

Pursuant to Section 25.08 of the contract, I am requesting true and correct copies of the following documents:

1) Mr. Moore's performance evaluations;

2) Mr. Moore's personnel file (or opportunity to review prior to the day of the hearing);

3) Disciplinary policies and/or grids in effect for the institution and the Department at the time of the incident which resulted in Mr. Moore's termination;

4) Policies, procedures, reports, training documents, handbooks and/or all other documents relating to patient restraint, THART, and/or physical control of patients generally;

5) All statements, reports, recommendations and/or any other document relating to the incident;

6) Any documents resulting from investigation of the incident by department and/or institution representatives, including but not limited to investigations by the Superintendent, Security, supervisors, the client advocate, and/or quality assurance;

7) Any State Highway Patrol recommendations, reports, documents, and/or statements relating to the incident which is the subject of the charge which led to Mr. Moore's removal;

8) All incident report(s), unusual incident report(s) and/or restraint reports;

9) Disciplinary records of employees Jerry Galvin and Frank Thompson;

10) Report(s) and recommendation(s) for the pre-disciplinary hearing scheduled prior to Mr. Moore's removal;

11) Any medical, nurse, social work, psychological, psychiatric and hospital records, chart and social work records regarding patient B. F. resulting from the incident which occurred January 26, 1988;

12) All medical, psychological and psychiatric evaluations and reports, clinic notes, social work notes, restraint records nursing notes, behavioral records, and chart notes for patient B. F.;

13) All psychological and psychiatric evaluations and reports regarding all patients or former patients the employer intends to have testify or in any other way rely upon (including statements) to support its position that termination was appropriate in this case;

14) All social work records, correspondence, letters, memoranda, chart records and/or any other documents pertaining to and/or regarding Mr. and Ms. Wydner's perception of the care received by Jerry Goley while he was hospitalized at Millcreek and/or efforts to remove him from the hospital;

15) Mr. Moore's prior disciplinary record; and

16) All documents management plans to submit in support of its case.

Please call upon receipt of this document so that we can discuss this matter in greater detail.

Thank you for your prompt attention to this matter.

Sincerely,

Linda K. Fiely
Associate General Counsel
OCSEA/AFSCME Local 11

LKF:sls

cc: Penny Lewis
Jeffery Moore
Local President

November 21, 1988

Millcreek Psychiatric Center
for Children
66th Street & Paddock Road
P. O. Box 16006
Cincinnati, OH 45216

ATTN: Mr. John Quigley

Dear Mr. Quigley:

The Union is requesting the following documentation for the December 13, 1988, arbitration hearing for Jeffrey Moore:

1. Copy of incident report written by Jeffrey Moore and Orlando Sloane.

2. Copy of clients' daily log (Ward) sheet

3. Copy of quiet room report for Billy Fields dated January 26, 1988.

4. Copy of clients' advocates report for Billy Fields dated January 26, 1988.

5. Copy of the medical report for Billy Fields dated January 26, 1988.

6. Copy of policy on visitors (procedures)

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION • LOCAL 11, AFSCME AFL-CIO
995 GOODALE BOULEVARD • COLUMBUS, OHIO 43212 • 614/221-2409 Toll Free 1-800/282-0543

Ronald C. Alexander, PRESIDENT; Jean P. Fightmaster, VICE-PRESIDENT; Ronald K. Rhonomus, SECRETARY-TREASURER; Russell G. Murray, EXECUTIVE DIRECTOR; Margaret J. Penn, COMPTROLLER

7. Diagram of location where incident occurred (Day Room, Room 315, Nurses Station, Pay Telephone Area and Quiet Room).

8. Nurse on duty report for incident January 26, 1988.

Your prompt attention concerning this matter will be greatly appreciated.

Sincerely,

Penny Lewis

Penny Lewis
Staff Representative

PL/par

cc: File

APPENDIX I

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.

§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.

§24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline employer representatives who violate this section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

§24.04 - Pre-Discipline

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

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

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

§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-discipline meeting. At the discretion of the Employer, the forty-five (45) day 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.

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

§24.07 - Polygraph Tests

No employee shall be required to take a polygraph, voice stress or psychological stress examination as a condition of retaining employment, nor shall an employee be subject to discipline for the refusal to take such a test.

§24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will give serious consideration to modifying the contemplated disciplinary action.

ARTICLE 25 - GRIEVANCE PROCEDURE

§25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

Those employees in their initial probationary period as of the effective date of this Agreement shall retain their current rights of review by the State Personnel Board of Review for the duration of their initial probationary period.

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. If a verbal reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal reprimand.

§25.02 - Grievance Steps

Step 1 - Immediate Supervisor

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event. If being on approved paid leave prevents a grievant from having knowledge of an occurrence, then the time lines shall be extended by the number of days the employee was on such leave except that in no case will the extension exceed sixty (60) days after the event. The immediate supervisor

shall render an oral response to the grievance within three (3) working days after the grievance is presented. If the oral grievance is not resolved at Step One, the immediate supervisor shall prepare and sign a written statement acknowledging discussion of the grievance, and provide a copy to the Union and the grievant.

Step 2 - Intermediate Administrator

In the event the grievance is not resolved at Step One, it shall be presented in writing by the Union to the intermediate administrator or his/her designee within five (5) days of the receipt of the answer or the date such answer was due, whichever is earlier. The written grievance shall contain a statement of the grievant's complaint, the section(s) of the Agreement allegedly violated, if applicable, the date of the alleged violation and the relief sought. The form shall be signed and dated by the grievant. Within seven (7) days after the grievance is presented at Step Two, the intermediate administrator shall discuss the grievance with the Union and the grievant. The intermediate administrator shall render a written answer to the grievance within eight (8) days after such a discussion is held and provide a copy of such answer to the Union and the grievant.

Step 3 - Agency Head or Designee

If the grievance is still unresolved, it shall be presented by the Union to the Agency Head or designee in writing within ten (10) days after receipt of the Step Two response or after the date such response was due, whichever is earlier. Within fifteen (15) days after the receipt of the written grievance, the parties shall meet in an attempt to resolve the grievance unless the parties mutually agree otherwise.

The Agency Head or designee shall give his/her written response within fifteen (15) days following the meeting.

If no meeting is held, the Agency Head or his/her designee shall respond in writing to the grievance within ten (10) days of receipt of the grievance.

Step 4 - Office of Collective Bargaining Review

If the grievance is not settled at Step Three, the Union may appeal the grievance in writing to the Director of The Office of Collective Bargaining by written notice to the Employer, within ten (10) days after the receipt of the Step Three answer, or after such answer was due, whichever is earlier.

The Director of The Office of Collective Bargaining or his/her designee shall notify the Executive Director of the Union in writing of his/her decision within twenty-one (21) days of the appeal. The Director of the Office of Collective Bargaining may reverse, modify or uphold the answer at the previous step or request a meeting to discuss resolution of the grievance.

A request to discuss resolution of the grievance shall not extend the thirty (30) days in which the Union has to appeal to arbitration as set forth in Step Five.

Step 5 - Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Director of The Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given, in Step Four.

§25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents.Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

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.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

25.08 - Relevant Witnesses and Information

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

July 31, 1989

Mr. Bruce Wyngaard
Director of Arbitration
OCSEA Local 11, AFSCME
1680 Watermark Drive
Columbus, OH 43215

Mr. Eugene Brundige
Deputy Director
Office of Collective Bargaining
65 E. State Street, 16th Floor
Columbus, OH 43215

RE: State of Ohio, Department of Mental Health
(Millcreek Psychiatric Center for Children)
and OCSEA Local 11, AFSCME,
OCB GR #23-11-880304-0003-01-04

Gentlemen:

You will find enclosed the Opinion and Award in the above matter. I have also enclosed my bill.

Thank you for your cooperation throughout these proceedings.

Very truly yours,

Frank A. Keenan
Arbitrator

Enclosures