In the Matter of Arbitration	*	
Between	*	Case Numbers:
OCSEA/AFSCME Local 11	*	24-07-(5-18-90)-257-01-04, 257-01-04
and	*	
The State of Ohio, Department of Mental Retardation and Developmental Disabilities	*	Before: Harry Graham

#495

Appearances: For OCSEA/AFSCME Local 11:

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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on September 11 and 17, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument on September 17, 1990.

Issue: At the hearing on September 11, 1990 the parties agreed upon the issue in dispute between them. That issue is:

Were the Grievants discharged for just cause? If not, what shall the remedy be?

As is readily discernable from the use of the plural in the issue there is more than a single grievant in this situation. Recognizing that to be the case the parties indicated that differing results might occur for each of the dischargees. They directed the Arbitrator to make a determination individually, rather than considering the discharges together.

Background: The events which provide the basis for this controversy are in dispute. What little the parties agree upon may be succinctly presented. There are two Grievants in this proceeding. Danny Brown was employed at the Gallipolis Developmental Center on July 28, 1986. Marsha Clary was hired at the Center on December 19, 1988. For both employees it represented their second tour of employment at the Center. Mr. Brown has a total of twelve (12) years of service. Ms. Clary has worked at Gallipolis for about five (5) years in total. Neither Brown nor Clary has any record of discipline prior to the event which prompted the State to discharge them.

On February 18, 1990 Brown and Clary were on duty as Therapeutic Program Workers on the second shift. They were assigned to an area known as 49-5. Two other people were on duty with them. These were Tom Christian and Vickie Bishop. That location is the residence of Randy C. who has been a

client at Gallipolis for a number of years.

On March 13, 1990 Vickie Bishop made a statement to supervisory officials at Gallipolis in which she claimed that Brown and Clary had abused Randy C. According to her, Clary had struck Randy C. with a clenched fist. After Randy C. had fallen to the floor Brown had dropped on him, knees first. Thereupon, Ms. Clary stood on Randy C's ankles.

Following an investigation both Brown and Clary were discharged. A grievance protesting that discharge was filed and processed through the machinery of the parties without resolution. They agree that it is properly before the Arbitrator for determination on its merits.

Position of the Employer: The State points to the testimony of Vickie Bishop in support of the discharges under review in this proceeding. Ms. Bishop had been employed for a short period of time at the Gallipolis Developmental Center prior to witnessing the events in question. She and her husband had moved to Gallipolis where he is a student at Rio Grand College. Ms. Bishop did not know the Grievants prior to this incident. She does not intend to make her career at the Developmental Center. She and her husband intend to leave the area upon completion of his studies. These circumstances lend an aura of truth to her testimony according to the State. She has no reason to fabricate her testimony. There is no history of animosity between Ms. Bishop and the Grievants. To the

contrary, she did not know them until the day of the event when she was assigned to work on 49-5.

The record indicates that Ms. Bishop did not come forward with her account of patient abuse for approximately one month after the event. Only after the pangs of conscience became overwhelming did she tell supervision at Gallipolis Developmental Center of the events in question. Ms. Bishop has no wish to ruin the careers of Mr. Brown and Ms. Clary. Her intent in informing supervision of the attack on Randy C. was to salve her conscience. There is no ulterior motive or hidden agenda in her testimony. As that is the case, the State urges it be credited and the discharges of Brown and Clary sustained.

The State also points out that Ms. Bishop's testimony is clear and her account of the incident has remained unchanged during the pendency of this proceeding. According to Ms. Bishop, Randy C. appeared in the doorway where staff were eating. He was directed to sit down on several occasions. When he did not comply with that directive Ms. Bishop saw Ms. Clary walk over to Randy C. and punch him in the jaw. When Randy C. fell to the floor Mr. Brown jumped on him, landing on Randy C's body with both knees. Thereupon Ms. Clary stood on Randy C's ankles. Randy C. experienced a severe beating. That sort of activity is unconscionable and cannot be tolerated according to the State.

Prior to actually striking Randy C. he was abused by Clary and Brown in other ways. When he failed to sit in the chair as directed he was told to sit on the floor. His shoes were taken from him. Those actions constitute abuse. They severely compromise the dignity of clients. As no doubt exists that Brown and Clary acted as alleged by Bishop the State urges the grievances be denied.

Position of the Union: The Union points out that both Grievants have a discipline free record during their tenure at Gallipolis Developmental Center. Neither of them has ever been the subject of discipline. No record exists of any patient abuse being perpetrated by Brown or Clary. As that is the case, the Union urges that Bishop's tale be regarded with skepticism.

No evidence or testimony exists to corroborate Ms. Bishop's testimony. To the contrary, testimony is on the record that the events recounted by Ms. Bishop did not occur. Deborah Thompson is a Licensed Practical Nurse at the Gallipolis Developmental Center. On February 18, 1990 she was on duty and at 49-5 during the period in question. She was at the location where Randy C. was alleged abused. She testified at the arbitration hearing that she saw no unusual incidents that night. She did not see Ms. Clary strike Randy C. Nor did she witness Mr. Brown drop on Randy C. with the entire weight of his body. Not until Ms. Bishop came forward with her

account of abuse committed on Randy C. did she have any inkling that anything was amiss on the evening of February 18, 1990. In fact, nothing improper occurred that night according to Ms. Thompson. No abuse of Randy C. took place.

That Randy C. might have been seated on the floor and not have had his shoes for part of the night is not unusual and does not constitute abuse according the Union. Testimony was received from Bob Werry, the Program Supervisor and supervisor of the Grievants. He indicated that Randy C. often sits on the floor. He does so to protest the directives of the staff that he sit in a chair. As far as can be determined, not only does sitting on the floor constitute a protest by Randy C., he prefers to sit on the floor. There is nothing unusual in that activity and it does not constitute abuse. In addition, clients shoes are routinely taken from them at the end of the day. They are stored away so that clients will not hide them, throw them at other people or perhaps use them as weapons. That Randy C. did not have his shoes on during the evening of February 18, 1990 was a matter of routine, not abuse according to the Union.

There was another staff member present on 49-5 on the evening of February 18, 1990. Tom Christian was detailed to the area along with Vickie Bishop. Subsequent to February 18, 1990 he was removed from State service at Gallipolis Developmental Center. He testified that he witnessed no

unusual occurrence that evening. He specifically indicated he did not see Clary punch Randy C. Nor did he see Brown drop onto Randy C. while he was in a prone position. He was in the area the events allegedly occurred in at the time in question. Nothing of the sort recounted by Bishop took place. The Union urges special credence be given to Christian's testimony. He has been discharged. He has nothing to gain from testifying as he did in the arbitration hearing. To the contrary, he has received intimations that if his testimony supported Vickie Bishop's account of events he might be rehired at Gallipolis. Under those circumstances the Union seeks careful evaluation of Christian's testimony.

Brown and Clary have consistently denied committing any sort of patient abuse on Randy C. They denied it during the investigation, the grievance procedure and the arbitration hearing. They denied it during criminal proceedings brought against them by the State. As neither has any discipline whatsoever on their personnel records the Union urges they be believed rather than Ms. Bishop.

In the Union's opinion the testimony proffered by Vickie Bishop must be viewed skeptically. She did not come forward pure of heart and honest of purpose as depicted by the State. To the contrary, she had reason to fabricate a story against Brown and Clary. Ms. Bishop was called to her supervisor's office and asked about an incident involving her purchase of

the wrong size clothing for a resident. It was during that conversation, when Ms. Bishop might have well believed that discipline was pending against her that she first told supervision about the alleged abuse of Randy C. The Union would have the Arbitrator believe she did so to deflect attention from herself. In addition, the Union points to inconsistencies in Ms. Bishop's account of events. She initially indicated it took place on February 13, 1990. Later she changed the date to February 18, 1990. She also indicated that Ms. Clary struck Randy C. with her right hand, hitting him on his left cheek. This is highly unlikely given the spatial relationship between the right hand and the left cheek of a person facing an aggressor. The Union also points out that Mr. Brown is a big man. If he had dropped on Randy C. with his full weight on his knees as alleged by Ms. Bishop it is very likely there would have been some physical evidence to that effect. In all likelihood Randy C. would have sustained broken ribs. No staff member reported anything amiss with Randy C.'s health. Granting that this alleged incident did not come to management's attention until a month had passed, the Union points out that no evidence of any sort of patient abuse was seen by any staff member in the period following February 18, 1990. No bruises were observed. No physical evidence at all came to the attention of management to support the allegations made against the Grievants.

The Union insists that whatever standard of proof is employed to evaluate the testimony of Ms. Bishop that it does not pass muster under these circumstances. There is simply insufficient evidence to conclude that either Brown or Clary committed any sort of patient abuse on Randy C. As that is the case, the Union urges that they be restored to employment with no monetary loss and all other terms and conditions of employment restored to them.

Discussion: Obviously the State's action in this dispute rests entirely upon the testimony of Vickie Bishop. If her account of events is credited the discharge of both Grievants must stand. Opposed to her account is not only the testimony of Danny Brown and Marsha Clary but also the testimony proffered by others. In particular Deborah Thompson, a Licensed Practical Nurse, was in the area on the night in question. Her presence there was part of the routine nature of her duties. Nurse Thompson testified forthrightly and unequivocally that there were no unusual incidents that took place on February 18, 1990. She did not see either of the Grievants strike Randy C. While it is true that Vickie Bishop may be regarded as a disinterested witness, so too must Nurse Thompson. She does not stand to gain anything from the outcome of this dispute. Her testimony is entitled to great weight.

Similarly, Tom Christian has testified consistently in

this situation. This was in spite of his obvious reluctance to appear at the arbitration hearing. Christian indicated that he observed no untoward incident on February 18, 1990 while on duty on 49-5. As was the case with Nurse Thompson, Christian has nothing to gain from his testimony in this proceeding. He is no longer employed at Gallipolis. Lending additional credence to his testimony is his testimony at the arbitration hearing to the effect that the investigating officer intimated to him that if he corroborated Vickie Bishop's testimony he might well be reemployed at the Developmental Center in Gallipolis. His testimony indicates that he spurned that inducement to alter his story. He observed nothing that he could or would characterize as patient abuse involving Randy C. by the Grievants on the night in question.

One of the elements of the client abuse which was cited by the State in this situation was the fact that Randy C. was seated on the floor on February 18, 1990. According to testimony received from Bob Werry, the Grievant's supervisor, there is nothing unusual in that. Randy C. likes to sit on the floor to protest the requirement he sit in a chair. As Randy C. routinely sits on the floor his doing so on February 18, 1990 cannot be held against the Grievants.

Certain aspects of Vickie Bishop's testimony prompt skepticism. She indicated that an element of the abuse

committed on Randy C. was the fact that his shoes were taken from him. Apparently residents of 49-5 turn in their shoes to the staff each evening at about 8:00PM. That occurred on February 18, 1990. Randy C.'s shoes were collected for storage as a matter of routine. No element of abuse is connected with that action.

There is additional concern prompted by Ms. Bishop's testimony as well. She indicated that Marsha Clary struck Randy C. with her right hand. Her demonstration and testimony at the hearing showed Clary striking Randy C. on his left cheek. Perhaps this is possible. It is certainly very unlikely given the relationship of the right hand to the left cheek as two people face each other. In addition, there was no physical evidence of any abuse being committed on Randy C. As was apparent to all present at the hearing Danny Brown is large in stature. According to Ms. Bishop he dropped the full weight of his body on Randy C., landing knees first. No staff member subsequently noticed any evidence of such an act. Nothing is on the record to indicate that Randy C. experienced any difficulty breathing as he might from bruised ribs. Nor is anything on the record indicating any staff member observed a bruise on Randy C.'s cheek such as might have occurred from a blow.

The circumstances in which Ms. Bishop reported this event provide grounds for further skepticism. She did not go

to supervision immediately after it occurred. She waited for about one month before telling management about the alleged abuse of Randy C. When she did so, it was not in the context of an approach to supervision to inform them about the incident. To the contrary, supervision had called her to a meeting to discuss her role in an error in a clothing purchase and a possible breach of confidentiality. Nothing exists on the record to indicate that but for her being called into an interview with supervisory authority that she would have brought this incident to management's attention. The Arbitrator is left to wonder whether or not her initial account of the event to management represented an attempt to deflect attention from herself and discipline which might have been pending. Her failure to come forward in timely fashion to bring the alleged abuse of Randy C. to management's attention coupled with the circumstances in which she revealed it prompt her testimony to be disbelieved by the Arbitrator.

In attempting to determine truth a factor often given consideration is the presence or absence of interest. Obviously the Grievants share a great personal stake in the outcome of this dispute. Were they the only witnesses who contradicted Vickie Bishop's testimony her version of events might carry the day. But their testimony was corroborated by Nurse Thompson and Tom Christian, neither of whom has an

interest in the outcome of this dispute. That situation lends credence to their accounts.

As is well known it is the obligation of the Employer to carry the burden of proof in a discharge action. In spite of the great number of arbitration cases over the years which have prompted learned discourse concerning the amount of proof and the evidentiary standards to be employed in discharge actions in the final analysis it is necessary for any employer to convince the tryer of fact that the events asserted to have occurred actually did so. In this situation the Employer has not met that basic task. The testimony of Bishop is contradicted by that of Thompson and Christian. Even setting aside the testimony of Brown and Clary, the Employer has not been able to cast any doubt on the testimony of Thompson and Christian. No evidence ever came to light to indicate that Randy C. experienced abuse at the hands of anybody. The Arbitrator is unconvinced that the fundamental premise upon which the discharges of Brown and Clary were based, that Randy C. was abused on the evening of February 18, 1990, ever occurred. As that is the case, the discharges in question in this proceeding must be set aside.

Award: The grievances of Danny Brown and Marsha Clary are sustained. Both are to be restored to employment at Gallipolis Developmental Center. They are to receive all pay they would have received but for this incident. The Employer

may deduct from that amount any interim earnings received by the Grievants from the date of their discharge to the date of the this award. The Grievants are to supply the Employer with such evidence as it may reasonably require of interim earnings to permit a computation of back pay due to be accurately made. All seniority and other benefits that would have been earned by the Grievants but for this incident are to be credited to them. All record of this event is to be expunged from their personnel file.

Signed and dated this 28th day of September, 1990 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator