#723

In the Matter of Arbitration Between STATE OF OHIO, DEPARTMENT OF MENTAL HEALTH and OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL/CIO	OPINION and AWARD Anna D. Smith, Arbitrator Case 23-10-910703-0130-01-04 John Martin, Grievant Discharge

Appearances

For the State of Ohio:

Linda Thernes; Labor Relations Officer; Advocate
Rodney Sampson; Assistant Chief of Arbitration Services, Ohio Office of Collective Bargaining; Second Chair
Mick W. Musselman; Labor Relations Officer, Massillon Psychiatric Center; Witness
Beth A. Runser, R.N.; Staff Nurse, Massillon Psychiatric Center; Witness by Subpoena
Kristin Hutton, L.P.N.; Staff Nurse, Massillon Psychiatric Center; Witness by Subpoena
Dr. Joseph Kim; Staff Physician, Massillon Psychiatric Center; Witness by Subpoena
Georgean Gibbons; Training Officer, Massillon Psychiatric Center; Witness by Subpoena
Michele Ward; Observer

For OSCEA Local 11, AFSCME:

Dennis Falcione; Staff Representative, OCSEA Local 11, AFSCME, AFL-CIO; Advocate
John Martin; Grievant
Clarence Goodson; Chapter President, OCSEA Local 11, AFSCME, AFL-CIO

Hearing

Pursuant to the procedures of the parties a hearing was held at 9:20 a.m. on December 11, 1991 at the Massillon Psychiatric Center, Massillon, Ohio before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. The record was closed upon conclusion of oral argument at 1:40 p.m., December 11, 1991. This opinion and award is based solely on the record as described herein.

Issue

By agreement of the parties, the issue to be decided by the Arbitrator is:

> Was the grievant discharged for just cause? If not, what shall the remedy be?

Joint Exhibits and Stipulations of Fact

Joint Exhibits

1. 1989-91 Collective Bargaining Agreement
2. Grievance Trail
3. Discipline Package
4. Evaluations of Grievant's Performance, 1988, 1989 and 1990.
5. Call-In Log, September 8, 1990
6. Union request for documents and Employer response
7. Dismissal of Criminal Charges and Release of Liability
8. Grievant's Training Record (THART), March, 1991
9. §2903.33 O.R.C.
10. §2901.01 O.R.C.

Stipulations of Fact

1. Grievant had four years of employment at Massillon Psychiatric Center prior to his removal.

2. Grievance is properly before the Arbitrator.

Relevant Contract Provisions

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.

§24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request 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. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. 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. When the pre-disciplinary notice is sent, 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....

§24.05 - Imposition of Discipline

....

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.

Article 25 Grievance Procedure

§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.

Article 43 - Duration

§43.01 - Agreement

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 Ohio Revised Code Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

Case History

The Grievant in this case, John Martin, was a 4-1/2 year employee at the Massillon Psychiatric Center, Massillon, Ohio, which is a state hospital for the mentally ill who are unable to care for or control themselves. At the time of his removal in June 1991, the Grievant was a Therapeutic Program Worker (TPW) assigned to a ward for aggressive patients. As such, he assisted patients in their daily living and with their therapeutic plan. His 1988-1990 performance evaluations (Joint Ex. 4) were good, but he had a 70-day suspension on his record for "Patient Abuse, Incompetence and Neglect of Duty." He had received the Agency's basic Therapeutic Handling of Aggressive Residents Technique (THART) training upon his employment (State Ex. 7), and an update as recently as March 1991 (Joint Ex. 7). He was informed on hospital policies and procedures (State Ex. 5), more particularly Massillon Psychiatric Center Policy 4.08 regarding patient Personal Dignity and Humane Treatment (State Ex. 3) and the Department's Administrative Rules regarding patient abuse and neglect which identifies dismissal as a possible consequence of such conduct (State Ex. 4).

The incident that gave rise to Mr. Martin's removal involved a 5'8", over-200-pound male patient on Martin's ward, whose

behavior during the incident was not uncharacteristic of him and who was generally reputed to be a biter. This patient became upset on the evening of April 26, 1991, after his demand for a behavioral treat was denied. Low level intervention techniques were ineffective in preventing his behavior from escalating to curses, threats and an assault on Nurse Runser. It was decided to seclude the patient, place him in physical restraints, and administer medication for his own protection and that of others. Staff had no difficulty getting him to the seclusion room, but while Nurse Runser, TPW Hogan and the Grievant were applying physical restraints, the patient became combative, passing flatus, defecating, spitting and attempting to hit Nurse Runser. He then turned his head to face the Grievant, who was engaged in restraining the patient's right arm, and noisily collected an amount of sputum to spit in the Grievant's face. Thereupon the Grievant either slapped the patient on the left cheek (according to Nurses Runser and Hutton, the latter of whom observed from the door) or covered the patient's mouth with his right hand to block the spit (according to the Grievant). Ms. Hutton testified that the Grievant said, "Let's see if you spit at me again," to which the patient replied, "Let's see if you hit at me again." The Grievant does not recall this dialogue, but testified he may have said, "Don't spit on me again." The patient complained of pain and the nurses saw that his left cheek was reddened and that there was a small laceration at the inside, left corner of his mouth. With the patient secure, the nurses began to document the incident and

the staff physician was summoned. Dr. Kim found a small swelling and mild scratch inside the mouth lip at the left side, and ordered a cold compress, which the patient refused.

An investigation was launched during which witness statements were taken. Labor Relations Officer Musselman testified he thought the Grievant was reassigned. A predisciplinary conference notice was issued May 30, 1991, charging the Grievant with "Patient Abuse/Neglect, Incompetence, Neglect of Duty and Failure of Good Behavior" (Joint Ex. 3). Said conference was held June 6, 1991, with the result that Mr. Martin was removed from his position and State service effective June 27, 1991 (Joint Ex. 3). Criminal charges were also filed, but the case was later dismissed without prejudice on a nolle prosequi based on witness hardship.

A grievance alleging violations of Article 24.01 (discipline standard), 24.02 (prediscipline), 25.08 (discovery) and seniority and benefits provisions of the Contract was timely filed and a Step 3 hearing held. On the discovery allegation, the Employer took the position that the documents sought by the Union were not used to support discipline and were therefore not discoverable (Joint Ex. 2). The grievance remaining unresolved, it was appealed to arbitration. In preparation thereof, the Union requested all relevant documents, specifying particularly the incident report, progress notes on the patient, and the physician's report. The statements of the third witness (TPW Hogan) and the doctor were supplied, as well as the predisciplinary conference report, but the others were denied on the basis of patient confidentiality and lack

of reliance on them in issuing discipline (Joint Ex. 5). Being fully processed without resolution, the grievance is properly before the Arbitrator for final and binding decision.

Arguments of the Parties

Argument of the Employer

The Employer first addresses the Union's procedural objections. It acknowledges that it did not immediately supply the predisciplinary report and recommendations, but did finally do so six days prior to arbitration. It also acknowledges that it never supplied the Unusual Incident Report or progress notes on the patient and is prevented from doing so by the Ohio Revised Code (§5122.31) which protects patient confidentiality. It argues that withholding these documents from the Union did not prejudice the Grievant's case since they were not used to support the disciplinary action.

With respect to the merits of the case, the Employer contends that it did show abuse. Two witnesses testified they saw the slap. These witnesses had nothing to gain and much to lose in reporting what they saw, for the informal code of the institution is not to see or report such incidents. The Grievant's story, claims the Employer, does not ring true. He knew the procedures, patient's history of biting, and the risk of putting a hand over his mouth. He could have ducked or turned his face away to avoid the spit.

The Employer goes on to argue that the extent of the patient's injury is not important. No abuse is acceptable and the institution's employees need to know that. The Employer implores

the Arbitrator to consider whether such conduct would be acceptable to her if her relative were the victim.

The Employer further states that Article 24.01's limitation on the Arbitrator's authority is clear: if abuse is found, the removal must be upheld. But if the Grievant is found guilty of a lesser offense, removal is still the appropriate penalty under the progressive discipline provision because of the prior 70-day suspension.

The Employer accordingly asks that the grievance be denied in its entirety.

Argument of the Union

The Union's position is that the Grievant did not commit abuse. Reacting spontaneously to the situation and using common sense, he merely placed his hand over the patient's mouth to stop him from spitting. All the THART training--and the Grievant had minimal hours--does not teach how to react in such situations. Even the training officer testified that holding the patient's head would be proper as a last resort. Reasonable common-sense approaches to handling aggressive behavior has been supported by Arbitrator Cohen (OMRDD v. OCSEA (Barbara Anderson, Grievant), January 15, 1991). That Management, itself, did not believe the Grievant was a threat to residents is supported by its failure to place him on administrative leave as called for by the Contract and the Ohio Administrative Code. The Arbitrator is referred to the Jeffrey Moore case (Case No. 23-11-880304-0003-01-04, July 31, 1989) in which the Employer did place the Grievant on

administrative leave. The Union further points to the fact that criminal charges were dropped.

The Union states that the standard for abuse was set by Arbitrator Pincus in the Dunning decision (G87-0001A) and upheld by this arbitrator in Aparacio Curry (Case No. 24-14-890804-0186-01-04). For the Department of Mental Health, §2903.33(B)(2) O.R.C. and §5122-3-14(C)(1) O.A.C. apply. Accordingly, the standard is:

> "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.
>
> (§2903.33(B)(2) O.R.C.)

In the instant case, the Union argues, it was the patient who was striking out and spitting, not the Grievant. The Grievant merely acted in self-defense by placing his hand over the patient's mouth. The patient's minute injury was received by accident. Thus, applying §5122-3-14(C)(1) O.A.C., which excludes self-defense and accidental occurrences, the Grievant did not commit abuse.[1]

If the Grievant acted recklessly, the Employer must meet the standards for serious physical harm contained in §2901.01(E) O.R.C.:

> "Serious physical harm to persons" means any of the following:
> (1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
> (2) Any physical harm which carries a substantial risk of death;

---

[1] "Abuse" means any act or absence of action inconsistent with human rights which results or could result in physical injury to a patient, except if the act is done in self-defense or occurs by accident;.... (§5122-3-14(C)(1) O.A.C.)

(3) Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary, substantial incapacity;
(4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement;
(5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain.

None of these conditions apply in this case, so the Employer has not met the standard. The Union cites Arbitrator Michael in Paul Nixon (G87-1008), who returned the Grievant to work although he recklessly broke the arm of a youth without intent of harm or injury. The same arbitrator ruled in Kassandra Jefferson (G87-0366) that the injury must be serious enough to justify termination.

The Union also raises due process violations which, it argues, warrant sustaining the grievance. First, the removal order cites 124.34 of the Ohio Revised Code. The Code holds Management to a lesser standard than does the Contract, for it does not contain a due process guarantee. Arbitrator Pincus in the Wiley King decision (G87-2810) returned the grievant to work due in part to the employer's citation of 124.34. Arbitrator Rivera in the T. Turner case (Case No. 35-16-900502-0032-01-03) ruled that the employer's use of 124.34 is inappropriate. Additionally, the Ohio Supreme Court ruled in Rollins v. City of Cleveland Heights that the Code cannot be used to usurp or circumvent the Contract.

Second, the Employer violated §24.04 and §25.08 of the Contract by failing to supply all relevant documents in a timely fashion. Three witness statements were not furnished until

December 3, 1991, and the predisciplinary report not until December 5, 1991. As of the date of the arbitration hearing, no unusual incident report has been furnished. Arbitrator Keenan in the above-cited Jeffrey Moore case held that the Union is entitled to these documents prior to the predisciplinary hearing and, at the latest, when the grievance is filed. This arbitrator, herself, ruled that these documents were discoverable once the final disciplinary decision is made and the grievance filed (Santiago Vanegas, Case No. 35-04-9008f30-0042-01-03). In the Woods decision (G86-0431) Arbitrator Klein ruled that management must provide documents used to support discipline at least by the time of the predisciplinary hearing. In Arbitrator Rivera's Turner decision cited above, she ruled that the employer's failure to provide complete witness statements violates the specific mandate of the Contract, and set the termination aside.

In view of all this, the Union and Grievant ask that he be returned to work with all back pay, seniority and benefits, and that he be made whole.

Opinion of the Arbitrator

The record of this case is replete with contractual due process violations by the Employer, but none of them individually or collectively serious enough to warrant voiding the discipline without ever getting to the merits of the Employer's reason for disciplining the Grievant. The procedural objections raised by the Union are considered in turn.

(1) The removal order does cite the Ohio Revised Code. As previously and consistently held by this and other panel arbitrators, citation of the Code on the removal order, is a technical violation and insufficient by itself for overturning the dismissal.

(2) Three statements of two witnesses, all available prior to the predisciplinary conference, were not supplied with the predisciplinary packet, nor when sought at Step 3. They were, however, furnished prior to arbitration. The Employer claims these documents were not used and therefore need not have been produced in the predisciplinary process. In view of the fact that Kim's statement merely supports the two nurses' statements and Hogan's is not adverse to the Grievant, the Employer's claim is supported and I find there is no violation of §24.04 (but cf. Vanegas, Case No. 35-04-900830-0042-01-03, wherein statements of the principal witnesses against the Grievant were withheld until eight days prior to arbitration). Since these documents are relevant to the grievance, they ought to have been provided upon the Union's request, which occurred at least as early as Step 3. However, they were supplied when requested in writing and eight days in advance of arbitration. The Union might have called the one witness, but did not do so, and did have an opportunity to cross-examine the other. There is no indication that the Employer's delay compromised the Union's ability to defend the Grievant and, therefore, insufficient grounds to set the removal order aside.

(3) The predisciplinary hearing report and recommendation is also discoverable under §25.08. Again, this document was initially denied, but ultimately provided prior to arbitration. The Employer is urged to furnish such documents upon proper request and to do so promptly to facilitate early grievance adjustment.

(4) The Employer does not deny the existence of an Unusual Incident Report, but claims not to have used it to support discipline and further that it is prevented from providing it pursuant to §25.08 by virtue of statutory protections of patient confidentiality. The statutory claim is misguided, for the parties make clear in §43.01 that except for Ch. 4117 R.C., the contract prevails over conflicting State statutes, and Ch. 4117 does not except the section of the Code cited by the Employer. Therefore, one must look solely to the language of §25.08, which requires production of relevant documents reasonably available. Reports of the incident giving rise to the discipline clearly are relevant to the grievance. Moreover, it is hard to see how an incident report would do more damage to a patient's privacy and the Agency's ability to deliver service than witness statements about the patient's behavior do. Failure to provide this report when requested constitutes another violation of §25.08.

(5) The Union also states that reassignment of the Grievant to patient care was in violation of the Contract and the Administrative Code, and suggests that the Employer did not believe he was a threat to patient safety. The record does not disclose whether the Grievant was reassigned to patient care, only that Mr.

Musselman had no personal knowledge of this. The Union has not carried its burden on this issue.

The most serious of these infractions is the Employer's failure ever to provide the Unusual Incident Report, but in my opinion, even taken with the several other infractions, this did not do such damage to the Grievant's due process rights as to justify voiding the removal without considering the merits of the Employer's case against him. The discussion now turns to the charge of abuse.

In order for the Grievant's conduct to be considered abuse within the meaning of §24.01, it must meet the definitions provided by §2901.01(E) O.R.C. and §5122-3-14(C)(1) O.A.C. As Arbitrator Keenan observes in the case cited above, these definitions are not fully congruent. But if the Grievant knowingly acted in a manner inconsistent with human rights, thereby causing physical harm, his conduct would satisfy both definitions. I am convinced he did.

The Union would have me find that the Grievant acted recklessly and that the harm done was too minor to justify discharge. The validity of this argument rests, in the main, upon whether the Grievant's contact with the patient was a slap on the cheek or a covering of the mouth. Two witnesses, who had nothing to gain by false testimony, saw contact with the left cheek. Injuries received by the patient--reported also by Dr. Kim--corroborate both the facial region involved and the force of the contact. Additionally, all witnesses described the patient as having his head turned to face the Grievant. It is hard to see how

the two nurses could have mistaken a hand covering the mouth (turned to the side) for a hand on the cheek (turned up).

Against this is the Grievant's testimony and statement, which are self-serving, uncorroborated by any witness to the incident, and of doubtful logic. (His statement says the patient tried to bite him, so he applied pressure and immediately removed his hand. His testimony indicated a movement too rapid for this course of events.) I conclude that the Grievant struck the patient.

It is further apparent that the Grievant acted knowingly, not recklessly. There is not the slightest indication that he did not know what he was doing: he was in command of his faculties and the contact did not occur accidentally. Moreover, the slap was of sufficient force to leave a red handprint on the patient's cheek and a minor injury inside his mouth. The Grievant says if he had hit the patient, rather than merely covering his mouth, the injuries would have been greater. I disagree, for these injuries are consistent with a slap intended to stop irritating behavior without causing more than minor pain and injury. The fact that the patient was about to spit on the Grievant does not justify the slap as self-defense, something the Grievant well knows.

I fully agree with the Union's suggestion that many people would not consider this conduct and its consequence serious enough to justify discharge. However, the Contract reserves to the Employer the right to determine whether an instance of abuse is serious enough to warrant removal.

Award

The grievance is denied in its entirety.

Anna D. Smith

Anna D. Smith, Ph.D.
Arbitrator

January 25, 1992
Shaker Heights, Ohio