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STATE OF OHIO AND OHIO CIVIL
SERVICE EMPLOYEES ASSOCIATION
LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF MENTAL HEALTH

- and -

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

GRIEVANT: Michael Owens (Discharge)

OCB CASE NO.: 23-18-901009-0556-01-05

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: February 5, 1991

APPEARANCES

For the State

Keith Dixon	Training Officer
Donnzella Robinson	Client Advocate
Betty Lou Milstead	Labor Relations Officer
William Choh	Physician
Paul Kirschner	Second Chair
Linda J. Thernes	Advocate

For the Union

Michael Owens	Grievant
Annie Calvin	Custodial Supervisor
Betty Williams	Chapter President
Earl Brown	Psychiatric Attendant
Arthur Cole	Custodial Worker
Deborah Grays	Clerk 3
Vera M. Dean	Therapeutic Prog. Worker
Thomas L. Springs	Activity Therapist I
Robert Robinson	Advocate

INTRODUCTION

This is a proceeding under Article 25 Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the Ohio Department of Mental Health, Western Reserve Psychiatric Hospital hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1989 to December 31, 1991 (Joint Exhibit 1).

The arbitration hearing was held on November 19, 1991 at the Western Reserve Psychiatric Hospital. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing, the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated they would submit briefs to be postmarked not later than December 23, 1991.

STIPULATED ISSUE

Is the matter in dispute arbitrable or barred on substantive grounds because of a settlement entered into by the Grievant, Michael Owens?

If the matter is arbitrable, was the Grievant, Michael Owens, terminated for just cause, and if not, what should the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 2 - NON-DISCRIMINATION

Section 2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States of the State of Ohio or Executive Order 83-64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation. Nor shall either party discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

Section 2.01 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

(Joint Exhibit 1, Pgs. 2-3)

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

Section 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. One or more verbal reprimand(s) (with appropriate notation in employee's file);

B. One or more written reprimand(s);

C. One or more suspensions(s);

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.

(Joint Exhibit 1, Pgs. 37-38)

ARTICLE 25 - GRIEVANCE PROCEDURE

Section 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.

(Joint Exhibit 1, Pg. 45)

CASE HISTORY

Michael Owens, the Grievant, was employed by Western Reserve Psychiatric Hospital, the Employer, for approximately two years prior to his removal. He served as a custodial worker during this time period. The disputed matter, moreover, took place in Cottage 22-D; the Grievant's assigned work area. In his capacity as a Custodial Worker, the Grievant was required to perform the following activities: general cleaning of wards; mopping and sweeping of floors; cleaning of windows; dusting and emptying of trash.

On August 22, 1991, the Grievant was assigned to the previously mentioned cottage. Although the facts are somewhat in dispute, the Grievant's general version of the contested events follows below.

After lunch, the Grievant made his usual rounds on the ward when he noticed a patient, Larry B., standing by the door leading

to the patio smoking a cigarette. The Grievant asked Larry B. if he would smoke on the patio. Larry B. refused to comply and stated: "You don't tell me where to smoke. I smoke where I want to smoke." As the Grievant walked toward Larry B. to unlock the door leading to the patio, Larry B. stated again :" You don't tell me where to smoke, I smoke where I want to smoke." Larry B. proceeded by following a relatively routine, and well-established, behavioral pattern; he dropped to the floor and onto his knees. Once again, Larry B. repeated his previous remarks regarding his smoking options. As this encounter continued, the Grievant noticed a cigarette lighter at Larry B.'s side. Later on in the day, the Grievant gave Vera Dean, a Therapeutic Program Worker (TPW), the lighter. He also stated Larry B. must have been the one "passing out lights" during the course of the day.

The Grievant testified he had an additional confrontation with Larry B. After the initial confrontation, the Grievant continued his rounds by walking into the dining area. As he walked from the dining area to the sitting area, Larry B. once again confronted the Grievant. He stated: "I smoke where I want to," and dropped to the floor in close proximity to the Grievant's position. As the Grievant purportedly attempted to step away, Larry B. grabbed his leg. A struggle ensued with the Grievant attempting to pull his leg away. Each attempt, however, resulted in a tightening of the hold on the Grievant's leg.

The Grievant eventually freed himself from the hold. Larry B. allegedly got off the floor, jumped on a bench and said: "Did you

all see him kick me, did you all see him kick me?" The Grievant testified he walked away and continued with his duties because Larry B. did not appear to be hurt.

Donzella Robinson, a Client Advocate, was contacted by Larry B. shortly after the incident. He provided her with a general description of what had taken place. Robinson alleged she questioned Larry B. repeatedly about the kicking incident and the Grievant's involvement. She had never previously associated the Grievant's name with prior allegations of patient abuse.

Throughout the interview Larry B. had trouble sitting and showed signs of distress. As a consequence, Robinson contacted EMS to transport him back to the unit so his physician could conduct an examination. After an examination, Larry B. was taken to Brentwood Hospital for X-rays. The X-rays disclosed two fractured ribs. Robinson interviewed patients in the ward, while the Western Reserve Psychiatric Hospital Police Department interviewed the staff.

Based upon the previously described investigation, a pre-disciplinary conference was held on August 27, 1990. Information reviewed at this meeting led Martha B. Knisley, the Director, to remove the Grievant because he had been found guilty of Physical Patient Abuse. In accordance with the Director's determination, the Grievant was formally removed on September 27, 1990 (Joint Exhibit 3).

On October 1, 1990, the Grievant contested the removal by filing a grievance. It contained the following Statement of Facts:

"...
September 27, 1990 I was removed from State Service for alleged patient abuse. The incident which took place was not patient abuse; because alot took place was not maliciously, or done on purpose. I explained to the police officers and the hearing officers as to how the patient could have received injured. I am required to wear steel toe shoes that the state and my supervisor provided for me to wear. The patient (L.B.) had grabbed my leg, and was pulling it. I only tried to free myself, and keep from falling and injuring myself or the patient. There are employees who have done worse and nothing was done to them (white) Michael Owens (BA).
..."

(Joint Exhibit 2)

On November 2, 1990 a Step III Grievance Hearing was held by the Parties. The Step III Designee denied the grievance. She established the Grievant had intentionally kicked Larry B. in the ribs. Various mitigating circumstances were not viewed as probative or persuasive in terms of modifying the administered penalty. (Joint Exhibit 2).

It should be noted a collateral criminal proceeding was initiated on or about September 10, 1990 with Cuyahoga Falls Municipal Court; the Grievant was charged with assault. A settlement was entered into on January 15, 1991. The journal entries indicated the charges were dismissed and the Grievant agreed not to contest his dismissal (Joint Exhibit 9).

The Employer assumed the alluded to release precluded the Grievant from contesting his dismissal. The grievance, moreover, was scheduled for arbitration and the Grievant refused to withdraw the matter from consideration. The State of Ohio asked for the charges to be refiled. Since the Grievant was never placed on probation and new evidence was not introduced, further action could

not be contemplated by the court. As a consequence, the charges had to be dismissed a second time. Journal entries authored on August 14, 1991 indicate the matter was dismissed without prejudice. The Grievant, moreover, signed a release not to sue (Joint Exhibit 12).

THE SUBSTANTIVE ARBITRABILITY ARGUMENTS

The Position of the Employer

The Employer argued the grievance is not arbitrable because the matter was settled in Municipal Court. The Grievant, more specifically, agreed to withdraw the grievance in consideration for the dismissal of the assault charges. A settlement of this sort was not thought to be unique in light of the offense, and the patient witnesses used to establish the violation. It was entered into to protect the patient witnesses.

The Grievant never denied entering into the agreement. The Employer, moreover, asserted he was not under duress; the timing of the various filings failed to support this contention. Fear of going to jail was not viewed as sufficient justification for breakin an agreement freely entered into by the Grievant.

The Position of the Union

The Union argued the agreement entered into by the Grievant and the Cuyahoga Falls Municipal Court was invalid and nonbinding.

The agreement (Joint Exhibit 9) was null and void because it was reached while the Grievant was under stress and duress. As such, the choice or alternative offered resulted in an improper

inducement. The Grievant never had a choice when one considered the alternative of dropping criminal charges versus abandoning any attempt to recapture his job.

The Cuyahoga Falls Municipal Court refused to enforce the prior agreement (Joint Exhibit 9); all charges against the Grievant were dropped (Joint Exhibit 12). The Arbitrator should issue a similar finding in line with the court's determination.

For a number of reasons, the initial settlement was viewed as defective. The Union should have been a party to the agreement. The settlement served as a grievance adjustment which requires authorization by the Union. Once a grievance is filed, it belongs to the employer and the Union. As such, abandonment of a grievance by an employee cannot preclude a union from processing the grievance.

The former agreement (Joint Exhibit 9) was also not binding because the Employer was not a party to this document. The Cuyahoga County Municipal Court and the Grievant were parties to the agreement (Joint Exhibit 9). An enforceable settlement agreement would have involved the Union, Employer, and the Grievant. A formalized letter of resignation would have properly terminated the Grievant's employment.

THE ARBITRATOR'S OPINION AND AWARD REGARDING THE SUBSTANTIVE ARBITRABILITY CLAIM

From the evidence and testimony introduced at the hearing, it is my judgement the grievance is arbitrable. The initial agreement

(Joint Exhibit 9) and the terms and conditions contained therein, do not serve as a bar to the legitimate processing of this grievance by the Union.

This Arbitrator can readily understand the Employer's chagrin regarding the nonbinding nature of the initial settlement (Joint Exhibit 9). A proper bar would have resulted if certain precautions had been promulgated by the Employer. A separate and distinct "three party" settlement document should have been promulgated dovetailing the settlement agreement fashioned by the Municipal Court. The Employer, Union and Grievant would have been signatories to this agreement; and proper and binding consideration would have been exchanged. Here, the Grievant and Municipal Court served as parties to the agreement. An agreement which the Municipal Court could not enforce as evidenced by the second Journal Entry (Joint Exhibit 12).

Within this context, it would be improper for this Arbitrator to fashion an outcome unavailable to the Municipal Court. The Arbitrator, moreover, is quite cognizant of the unique role played by any union in the processing of grievances. Typically, once a grievance procedure is initiated, a union, rather than an individual grievant, "owns" the grievance. As exclusive representative of the bargaining unit, it becomes the focal point in any grievance processing decision. Even if the Grievant would have adhered to the terms initially agreed to, this decision cannot preclude an independent decision by the Union to process the grievance to the arbitration stage. A decision of this sort is

based upon contractual obligations and responsibilities negotiated by the Parties. They cannot be mitigated by a criminal charge settlement entered into by individuals outside the collective bargaining relationship.

Based on the above discussion, the grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that patient abuse had been committed by the Grievant. Larry B., the patient, sustained two broken ribs in a confrontation with the Grievant.

The confrontation which took place should have been avoided. The Grievant and other similarly situated employees are not supposed to intervene with patients. The Custodial Worker job description (Union Exhibit 1) does not contain any job specification authorizing such activity. Testimony provided by Keith Dixon, the Training Officer, and Annie Calvin, a Custodial Supervisor, support the view that when confronted by a patient, custodial staff should immediately seek assistance from the nursing staff.

References to teamwork made by the facility's Chief Executive Officer (CEO) were not thought to support the Union's intervention claim. Meeting minutes indicate the CEO was discussing the need for clinical staff to work as a team. Nothing in the minutes, nor testimony provided at the hearing, indicate staff should work outside their classification and intervene with patients.

The Grievant's version seemed incredible for a number of reasons. The Grievant failed to seek assistance from other staff because the confrontation did not appear to engender any negative consequences. And yet, he portrayed his situation as fearful because of physical harm. Dixon rebutted the Grievant's accident assertion. He maintained broken ribs could not result from the foot movements described by the Grievant. As such, the broken ribs evidenced an intentional abusive act perpetrated against the patient.

The Employer questioned the Grievant's credibility because of discrepancies between his written statement (Joint Exhibit 3) and sworn testimony provided at the hearing. The Grievant testified Larry B. wrapped his arms around his leg, while his statement implied Larry B. grasped his leg. The version contained in the statement was thought to be improbable because Larry B's fingers were deformed. Another discrepancy concerned the Grievant receiving and/or removing Larry B.'s lighter. The Grievant maintained he got the lighter at the patio door after Larry B. fell to the floor. The location, however, varied when Vera Dean offered her version of the events. She stated the Grievant had gotten the lighter from Larry B. in the bathroom.

Larry B.'s "bullying" tendencies were rebuked and minimized by the Employer. The Union attempted to discredit the various statements (Joint Exhibit 3) submitted by patient/witnesses because Larry B. was known to force compliance with his demands. The Employer emphasized these allegations were never supported with any

persuasive documentation. Also, the patients' written statements (Joint Exhibit 3) were gathered shortly after Larry B. was taken to the hospital for X-rays. As such, even if he had a "bullying" tendency, the situation did not afford him a reasonable opportunity to bias or prejudice the submitted statements.

The Union's disparate treatment claim was also challenged by the Employer. Testimony provided by Betty Williams, the Chapter President, was viewed as unpersuasive. She never represented the grievant in question, and was uncertain as to the details surrounding the particular grievance.

The Position of the Union

It is the position of the Union that the Grievant was not removed for just cause. This conclusion was based on testimony and evidence regarding the guilt of the Grievant and a series of mitigating circumstances. These various factors led to the conclusion that, at most, an unfortunate accident took place rather than patient abuse.

The Union asserted the Grievant's version of events was highly credible and should be believed. He alleged Larry B. initiated the altercation by dropping to the floor and grasped the Grievant's leg. In his attempt to escape the leg grasp hold, he could have unintentionally harmed Larry B.; his shoes were steel toed in accordance with facility policy. As such, the Grievant's response was instantaneous and instinctive; his actions, therefore, did not substantiate removal.

The Grievant maintained Larry B.'s behavioral tendencies

supported his version of events. He testified the Grievant typically fell to his knees when he failed to get his way. This tendency was overwhelmingly supported by Dean, Grays and Springs. In no way did the Grievant push or trip Larry B. to the ground prior to the struggle.

Larry B.'s physical strength and need to grasp objects with his arms rather then his hands were also emphasized by the Union. Springs had a long term professional relationship with Larry B. He testified Larry B. was extremely physically fit and often flaunted his prowess on the ward. Dr. Choh, a Physician on the ward, discussed Larry B.'s hand deformity. He stated Larry B. had to have grasped the Grievant with his arms because of the way he kept his hands balled up with overlapping fingers.

The Grievant testified he had no motive to strike the patient in a harmful manner. He had a good working relationship with Larry B. Debra Grays, in fact, spoke of the friendship that had developed between the Grievant and Larry B. Larry B., more specifically, played with the Grievant, called him "Peanuts", and helped him with his daily assignments.

The Grievant's actions after the incident further supported his version of events. He felt Larry B.'s comment, "Look, he kicked me", was a joke because he had no idea Larry B. was hurt. These perceptions justified the Grievant's failure to make out an incident report.

In further support of the Grievant's version, the Union submitted Larry B.'s recantation of his allegations. Grays

testified Larry B. approached her and provided her with a written statement (Union Exhibit 2). The statement and the conversation indicated the incident was an accident and he wished to drop the charges. Even though the document was provided at Step III, the Employer never interviewed Larry B. to confirm his admission.

In his fearful state, the Grievant had no alternative but to attempt to break away. Dixon, the Training Officer, contended the Grievant could have screamed for help but this alternative depended on the urgency of the situation. An attempt to secure personal space also depended on circumstances, but was not always possible. His testimony, moreover, underscored many training deficiencies which placed the Grievant at a tremendous disadvantage. Dixon testified there was not training offered on how staff should free themselves from a leg grasp hold. He, moreover, admitted that regular training or regular use were important for successful compliance in crisis situations. This requirement becomes critical when one evaluates the actions of a Custodial Worker. An individual quite rarely required to respond to these types of emergency situations.

Various statements (Joint Exhibit 3) introduced by the Employer in support of the removal were discounted by the Union. Even though the patients who authored the statements were viewed as competent, their versions varied in terms of the circumstances surrounding the altercation. None of these patients, moreover, were produced at the hearing in support of their allegations.

The credibility argument also surfaced another glaring

deficiency dealing with the investigation undertaken by the Employer in support of the removal. It was alleged the investigation was not fair and objective. Robinson testified she interviewed patients, while the police department interviewed the staff. Robinson and the police department then conferred to determine whether there was sufficient proof to charge the Grievant with patient abuse. This process was viewed as extremely deficient. In fact, the police department report was never introduced at the hearing.

The Union opined the Grievant had adequate justification for intervening on August 22, 1991. He merely followed instructions provided by George Gintoli, the Chief Executive Officer, during All-Staff Meetings. Gintoli told Custodial Workers, and others, to assist direct care workers. This perception was held by other witnesses and understood to be the explicit desire of the CEO. Springs discussed an incident (Union Exhibit 1) where he was investigated because he purportedly failed to assist a fellow direct care worker. A requirement Springs felt was totally outside his job classification.

Disparate treatment claims were also raised by the Union in violation of Articles 2.01, 2.02 and 24.01. A similar patient abuse accusation was levied against Robert Taylor. He was accused of kicking a patient a number of times by a visitor (Union Exhibit 4). Williams testified Taylor told her he was merely trying to get away from the patient while the patient was reaching for him. Taylor was not disciplined but was sent back for crisis control

training. A comparison of both altercations evidenced that Taylor and the Grievant were similarly situated, and yet, the discipline administered was unreasonably disparate.

Taylor's circumstance caused the Union to assert a violation of Section 25.08. The Employer urged a different version concerning the Taylor incident but refused to provide the Union with the pre-disciplinary hearing notes. This material would have confirmed the Union's disparate treatment claim. As such, this report was discoverable under Section 25.08.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a complete review of the record, it is my judgement the Employer improperly removed the Grievant. The Employer failed to provide this Arbitrator with sufficient probative evidence to support the patient abuse charge. For the reasons enumerated below, the Grievant did not abuse Larry B.; an unfortunate unintentional accident took place which resulted in Larry B.'s injury. The circumstances surrounding the incident and the Grievant's actions indicate abuse of a patient had not taken place. As such, in accordance with Section 24.01, I have determined the discipline imposed on the Grievant was not for just cause.

When discipline is administered, the Employer has the burden of proof and persuasion to support the decision. Patient abuse allegations are extremely serious and troubling for all concerned including this Arbitrator. Such allegations, however, need to be

supported by direct and/or circumstantial evidence; proof requirements do not change just because one is dealing with onerous charges.

The facility in its Center Policy #16-1 (Joint Exhibit 3) recognizes:

> "...
>
> that an employee shall be entitled to use force in an amount necessary to prevent a patient from injuring himself or to ward off an attack on the employee, a fellow employee or another patient. The force used shall be limited to the minimum amount necessary to neutralize the attack. At no time shall any employee use force in an offensive manner against a patient.
>
> ..."

Here, in my opinion, the Grievant used a minimum amount of force to ward off an attack by Larry B. While attempting to gain his release from Larry B.'s grasp, he accidently and unintentionally caused the two broken ribs. His actions were instinctive as well as a reflexive response to a legitimate fear for his safety. There is a high probability that steel toed shoes, worn by the Grievant, resulted in the unfortunate accident.

The Grievant's version of the events was more credible than the version proposed by the Employer. It was established by the Grievant and others that Larry B. often dropped to his knees. Dr. Cloh's testimony also indicated why Larry B. had to grasp any object with his arms rather grip it with his hands. Larry B.'s strength and physical prowess were discussed by Springs. None of these conditions were properly rebutted by the Employer.

The Employer's attempt to discredit the Grievant proved

unpersuasive. The alleged conflict between the Grievant's statement (Joint Exhibit 3) and his testimony was not significant in my view. At the hearing, the Grievant maintained Larry B. was on the floor on his side when he successfully grabbed and wrapped one of his legs while attempting to grab both legs. In his statement (Joint Exhibit 3), the Grievant stated: "he grab me by the ankle and reach for my other leg." The distinction made by the Employer appears to be superficial. The circumstances surrounding the incident were virtually identically described at the hearing and in the statement. Even though the Grievant's statement (Joint Exhibit 3) did not specify a "wrapping" action, the descriptions contained in the statement, in addition to the description provided at the hearing, established the relative equivalence of both versions.

The Employer also attempted to discredit the Grievant because of a discrepancy dealing with Larry B.'s lighter. The Grievant's statement (Joint Exhibit 3) and his testimony at the hearing were consistent in terms of content. Even if Vera Dean's version of her conversation is to be believed, such an oversight or inconsistency does not significantly reduce the Grievant's credibility. The totality of his explanation must be analyzed for credibility purposes. In this instance, Dean's assertion does not, in any way, detract from my judgement concerning the veracity of the Grievant's version.

The fact an accident took place is confirmed by several pieces of evidence and testimony. Throughout the hearing, and in the

documents presented, the Grievant has strongly emphasized an unfortunate accident took place on August 22, 1990. Deborah Grays, a Clerk III assigned to ward 22D on August 22, 1990 was interviewed on August 23, 1990. She gave a statement which reviewed her conversation with Larry B. shortly after the incident. Her statement (Joint Exhibit 3) indicates Larry B. told her he was wrestling with the Grievant and was accidentally kicked. This same version was presented at the hearing. Last, but not least, is the note (Union Exhibit 2) given to Grays by Larry B. a few days after the incident. This document, again, supports an accident hypothesis.

The Employer attempted to discredit the import of the note (Union Exhibit 2). Unrefuted testimony indicates the note was provided to the Employer at the Step III hearing. And yet, the Employer never interviewed Larry B. concerning the veracity of the document and why he decided to recant his earlier accusations. A thorough and complete investigation would have resolved the concerns raised by the Employer at the hearing. Any reasonable investigator, when faced with such potentially damaging information, would have contacted Larry B. at the earliest possible moment to determine the validity of the document. Failure to do so limits an employer's ability to question the veracity of the document. This is especially true after the author of the recantation has passed on; and cannot be interviewed to determine his reasoning.

It should be noted it was established at the hearing the

statements (Joint Exhibit 3) introduced to support the removal were authored by competent patients. And yet, none of these individuals were produced to provide direct testimony concerning their observations.

The statements (Joint Exhibit 3), themselves, were inconsistent and did not support the abuse allegations raised by the Employer. Larry B.'s statement does not comply with the contents and versions contained in the statements authored by patients Jan B. and Eugene N. Unlike the other two statements, Eugene N.'s statement only contained information concerning a kick. Jan B.'s statement does not even mention a kick but discussed the Grievant placing Larry B. in a hold, slapping and tripping him. Larry B.'s statement, moreover, indicated he took a knee to the face. An observation which was not reported by the other two alleged witnesses to the altercation. Also, medical documentation in support of this particular blow was never introduced at the hearing.

The Employer alleged alternative actions should have been engaged in by the Grievant. In my opinion, these alternative approaches were not feasible based on circumstances confronted by the Grievant. Dixon, himself, controverted a portion of the Employer's argument regarding this facet of the case. He admitted under cross examination the training time provided in the use of hold and other preventive measures was insufficient and somewhat limited. He also testified the training format did not contain any information concerning the handling of leg holds. It is quite

difficult to establish the possibility of relevant alternatives when these very basic conditions were not part of the training format.

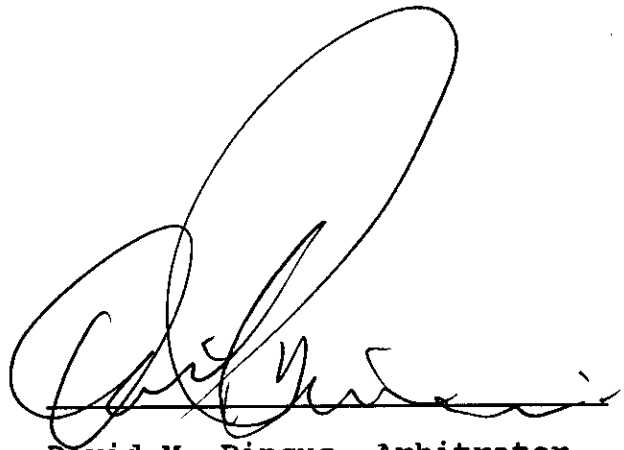
The Employer never properly rebutted the Union's Section 25.08 claim. Justification for refusing the Union's request for the predisciplinary hearing officer notes dealing with the Robert Taylor case was never provided. This type of document is discoverable under Section 25.08, as long as it is relevant to the grievance under consideration. Once submitted as evidence, an arbitrator would have to determine its relevance from an evidentiary standpoint.

This Arbitrator also concludes the Employer treated other similarly situated employees differently. It failed to properly distinguish the Robert Taylor situation (Union Exhibit 3) from the matter presently under consideration. Taylor was allegedly observed kicking patient M.B. two or three times by a visitor while escorting the patient. The Pre-Disciplinary Conference Determination stated "no action be taken in this case." Taylor was, however, scheduled for Crisis Control Update training. Once a claim of this sort is raised and properly supported, the burden shifts and an employer must then provide evidence and testimony in support of its differing disciplinary decision. Here, the Employer failed to meet this burden requirement.

AWARD

The grievance is sustained. The Grievant is to be reinstated to his former position at Western Reserve Psychiatric Hospital with

full back pay he would have received but for the removal in question. All interim earnings received by the Grievant from the date of the discharge shall be subtracted from the back pay amount. The Grievant shall provide all relevant earnings information necessary to determine the accuracy of the back pay award. In addition, the Grievant shall receive all seniority and other benefits he would have earned but for the incident in question. The removal, moreover, shall be expunged from the Grievant's personnel file.



February 5, 1992

David M. Pincus, Arbitrator