#895

IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA/AFSCME, Local 11	)	CASE NO. 23-10-(92)-10-26-(0167-01-04)
	)	
	)	GRIEVANT: RICKIE BLACKWELL
and	)	
	)	
	)	OPINION AND AWARD
State of Ohio Massillon Psychiatric Hospital	)	
	)	

APPEARANCES:

On Behalf of the Union

Robert Robinson	Union Advocate
Rickie Blackwell	Grievant
Clarence Goodson	President, Local Union
Scarlett Ray	Witness
Alphonso Ray	Witness
Dr. Paseos	Witness

On Behalf of the Employer

Linda J. Thernes	Labor Relations Officer
Shelley Ward	Labor Relations Specialist
Mike W. Musselman	Labor Relations Officer
Marguerite J. Garrison	Witness
Linda Herzog	Witness
Gene Chicoine	Witness

LAWRENCE R. LOEB, Arbitrator
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I. STATEMENT OF FACTS

The Grievant, a Licensed Practical Nurse, who had been employed at the Massillon Psychiatric Center since June 8, 1987, reported for work at the beginning of the third shift on July 24, 1992. When he arrived at the Hospital, he was informed that he would be working in other than his regular area. When the Grievant arrived in the ward to which he was assigned, he discovered that there was a problem with a patient who was loudly demanding that the Staff Psychiatrist purchase food for him. The Grievant explained to the Psychiatrist that it would be inappropriate for her to do so because it would cause problems in the future with other patients. She, therefore, refused the patient's demands with the result that he became extremely agitated and very vocal. Although the patient returned to his room he refused to settle down. As a result, the decision was made to give the patient a shot of Thorazine. Since the Grievant was the only medical person assigned to the unit that night, it was his responsibility to carry out the Physician's orders.

The Grievant prepared the syringe and then approached two Therapeutic Program Workers (TPW's) to assist him in carrying out the Doctor's orders. The Grievant and the two TPW's entered the patient's room which, at the time, was occupied by not only the patient who was standing up near his bed, but by a second patient who was in a bed on the opposite side of the room. The Grievant approached the patient while one of the TPW's went around the bed and the other stayed near the bottom of the bed ready to assist if necessary.

The Grievant explained to the patient why he was there and sought the patient's cooperation. At first, he thought he had it because the patient made a gesture as if he was going to lower his pants in order to receive the shot. However, the patient suddenly became aggressive, swinging his fists at the Grievant. The Grievant blocked the blows, but the patient continued forward,

tripping over his own feet and falling to the ground. According to the Grievant, the patient, a 69-year old male weighing approximately 169 pounds, fell heavily on his left side and rolled to his right. According to what the two TPW's later said, the patient fell on his right side at which time the Grievant, who was on his knees next to the patient, raised his left hand, balled it into a fist and slammed it down into the patient's left chest area. The second patient who was in the room later reported seeing the Grievant take both hands, clasped his fingers together to make a double fist and then strike the patient on the left side of the patient's chest. For his part, the Grievant denied striking the patient, explaining that the patient continued to try to strike him even though he was lying flat on the floor and that all he did was block the blows.

Whatever happened, the Grievant finally was able to give the shot to the patient who then got up and got into bed. The Grievant and the two TPW's left the room after the incident was over. The Grievant wrote his description of it in the patient's progress notes. At approximately 3:15 a.m., the staff members heard the patient moaning in his room. When he was questioned, the patient indicated that he had pain on his left side and general discomfort, but adamantly refused to be examined by the Grievant. He also refused to be examined at 3:40 a.m. by the Registered Nurse who was on duty that evening. When she questioned the patient, he responded with multiple complaints of pain which changed from the left shoulder to the right side, to his left side, to his right shoulder, to his lower back and his rib cage. Not only did he refuse to allow the Registered Nurse or anyone else to examine him or even remove his shirt and sweater, but he became verbally abusive and threatening when the Nurse tried to persuade him to at least allow her to listen to his lungs. The Staff Psychiatrist was notified of the situation and she ordered a second shot of Thorazine to be given to the patient. His progress notes reveal that he had no difficulty turning over, but

that after he received the shot he started letting out moans, yet continued to refuse to allow the staff to treat him.

As a result of what took place, the Grievant filled out an incident report stating his side of the events earlier in the shift. M.G., one of the Therapeutic Program Workers, did likewise, failing to make any mention of the Grievant striking the patient in any way. The Grievant, the Registered Nurse and the Staff Physician who were on duty later testified that the second TPW, L.H., also completed an Incident Report although she denied doing so.

The patient's progress notes indicate that he awoke sometime around 6:30 a.m. At the time, he was non-threatening and calmer than the night before, but still refused to allow the staff to examine him. The notes further indicate that he had only slight complaints, mainly about his upper arm. Forty minutes later, the patient was in the day room smoking when he began choking. The nurse removed a large amount of phlegm from his throat after which the patient vomited.

At approximately 8:00 the patient's progress notes indicated that he vomited again, yet continued to refuse to be examined by anyone. The progress notes from 9:00 a.m. state that the patient was complaining of pain in his left chest wall and had tenderness on palpitation although left arm movement was okay. He had similar complaints an hour later, although he was able to take off his shirt and sweater and had no difficulty with a range of motion. Four hours later, the individual completing the patient's progress notes indicated that he had eaten lunch well, but complained of pain moving from one part of his body to another although he manifested no limitations of motion or facial expressions of pain. At 10:30 p.m., the progress notes indicate that the Grievant had been sleeping for approximately two hours and was in no apparent distress.

Later that evening, though, his condition worsened, his temperature climbing to 101^{o} accompanied by complaints of difficulty in breathing. The situation continued to deteriorate with the result that at approximately 5:00

a.m. on July 26, 1992 the patient was transported to Doctor's Hospital where examination revealed that he had a collapsed lung and four broken ribs. Two days later, one of the Therapeutic Program Workers, M.G., provided a second statement to the Employer, again failing to make any mention of the Grievant striking the patient.

Apparently because of the nature of the patient's injuries, the Hospital Administration notified the State Highway Patrol which on July 31, 1992 obtained statements from the Grievant and also later from the two Therapeutic Program Workers. In his, the Grievant repeated the version of the events of July 24, 1992 exactly as he had detailed them earlier in the patient's progress reports and the Incident Report he completed that night. In theirs, the two Therapeutic Program Workers, for the first time, stated that the Grievant struck the patient on the patient's left side with a closed fist. Both women also told the investigating Officer that the patient fell on his right side, not his left as the Grievant had indicated.

In the course of his examination of Therapeutic Program Worker L.H., the investigating officer asked her, "Why are you telling me this version at this time." Her response was, "With _____ being hurt the same he was and what I saw I just don't like to see anyone get hurt. I couldn't have stopped Rick because I didn't know he was going to do it." In response to the officer's inquiry of why she did not tell the Supervisor sooner that she had seen the Grievant strike the patient, L.H. responded, "At the time the 'pop' didn't seem that hard to hurt _____. _____ didn't complaint of being hurt at the time." The other Therapeutic Program Worker, M.G., gave a similar answer when the investigating officer put almost the identical question to her. Finally, M.G. indicated to the officer that she and L.H. had discussed the matter while L.H. was on vacation, which had to be some time between the date of the incident,

July 24, 1992, and August 3, 1992, which was the date that M.G. gave her statement to the investigator.

On August 15, 1992 the Stark County Grand Jury indicted the Grievant for committing abuse against a patient of a care facility in violation of Section 2903.34(A)(2) O.R.C., a fourth degree penalty punishable by up to five years in prison. As defined in the statute, "abuse":

> . . . means knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person . . ..

Three days later the Grievant received notification that he was being placed on administrative leave with pay. On September 9, 1992 he was notified that Management would hold a predisciplinary conference because he had been charged with "patient abuse/neglect" which the notice declared:

> . . . is a breach of Hospital-Wide Policy #3.04 and/or #4.08 and is considered gross misconduct as well as just cause for discipline. (sic)

Section 3.04 which deals with patient abuse/neglect provides, among other things, that in such cases employees are required to report alleged patient abuse to his or her supervisor and to immediately complete an incident report form. Section 3.04 further declares that:

> <u>The following acts are defined according to Administrative Rule 5122-3-14.</u>
>
> "Abuse" means any act or absence of action inconsistent with human rights which result or could result in physical injury to a patient, except if the act is done in self defense or occurs by accident; . . . insulting or course language or gestures directed toward a patient which subjects the patient to humiliation or degradation; . . . tolerating abuse by another patient or employee; concurring in any action which leads to demeaning the patient and/or emotional well being of any patient . . ..

The other section mentioned in the notice, Section 4.08, provides in pertinent part:

> All patients have a constitutional right to personal dignity. Hospital employees should provide humane treatment to all patients consistent with that right. Any violation of this policy constitutes patient abuse.

Like every other employee at the Massillon Psychiatric Center, the Grievant was well aware of the Employer's policy towards patient abuse and neglect having received notification of it when he was hired. The mechanism for notifying the Grievant and all other new hires of the Employer's policy on patient abuse is the Employee Agreement which declared in pertinent part:

> 1. Abuse and neglect of any patient may be cause for dismissal.
>
> 2. Injuries to patients shall be reported immediately to a physician and an "Incident Report" (DMH-ADM-005) form prepared.
>
> 3. Any employee having knowledge of patient abuse and neglect, or having reasonable cause to believe such activity is taking place, shall report it to his immediate supervisor. Failure to report an incident of abuse and neglect shall be cause for disciplinary action.

Six days after the close of the predisciplinary conference, Management's designee concluded that there was just cause to support the charges leveled against the Grievant. The Agency's Director concurred and on October 1, 1992 signed the order for the Grievant's removal from his position of Licensed Practical Nurse with the State. The Union, on the Grievant's behalf, protested his removal in a timely fashion. When the parties weren't able to resolve the matter in the preliminary steps of the grievance procedure, it proceeded to arbitration.

Prior to that time, the Union, pursuant to Section 25.08 of the parties' Collective Bargaining Agreement, demanded that Management turn over a copy of the

Incident Report concerning this matter. Management refused to do so, arguing at arbitration that the report was irrelevant to the outcome of this matter since it had not been used in the process which led up to the Grievant's removal and the contents of the report were private because they dealt with a patient. Section 25.08, which the Union relied upon, provides in pertinent part:

> 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.

Approximately two months before the arbitration took place the Grievant stood trial on the criminal charges in the Stark County Common Pleas Court. In the course of the trial, the Grievant, the two Therapeutic Program Workers, the Registered Nurse, Staff Psychiatrist and the patient who was in the room at the time the incident took place all testified as did the patient himself. Almost immediately after the conclusion of the trial the jury returned a not guilty verdict which caused the Union to press for the Grievant's immediate reinstatement. Management refused to change its position, however, with the result that the matter ultimately proceeded to arbitration in which all of the same people testified with the exception of the patient who suffered the broken ribs.

In the course of his testimony, the Grievant indicated that the July 24, 1992 incident was not the first time that he had been involved in a physical altercation with a patient and that on a number of occasions in the past he had been forced to subdue much bigger and much more violent individuals than he was faced with on the night in question and that at no time in past had he ever hit any of those patients or any other patient for that matter. He further indicated that in one such incident he suffered a fracture to the bone on the little finger of his left hand which caused him to be off work for some period of time. He

also stated that he would have remained off work pursuant to his doctor's orders for an even longer period except that his benefits ran out. Finally, with regard to his left hand which was his dominant hand, the Grievant indicated that sometime after his return to work he re-injured it when he was forced to again subdue another patient. The Grievant had reported the first injury to his hand, but not the second one. As a result of those injuries, he claimed both at his trial and at arbitration that he was incapable of making a fist with his left hand and that he could not even use the hand to give a shot properly. He did indicated, though, that in spite of the injury to his hand he continued to operate the karate school that he owned, but which he was ultimately forced to close because enrollment fell off after he was indicted and news of the action appeared in the local press.

To counter the Grievant's claims that he was physically incapable of rendering the blow that Management believed had caused the patient's injuries, the Employer elicited testimony from a martial arts expert who indicated that, in his opinion, an individual trained as a martial arts expert could have, in spite of the injury the Grievant described, punched the patient and not suffered any significant problems as a result of delivering that blow.

It was upon these facts that this matter rose to arbitration and award.

II. POSITION OF THE EMPLOYER

Although the Union desperately tried to cloud the issue, one thing is clear, the Grievant abused a patient by deliberately striking him in the chest on July 24, 1992. What makes this particular case so terrible is that the Grievant is a martial arts master, skilled in the practice of delivering the kind of blows that would inflict the injuries which the patient suffered, four broken ribs and a punctured left lung. Rather than face facts and admit that the Grievant struck the patient, both he and the Union offered just about every conceivable

explanation for why the Grievant allegedly couldn't have delivered the damaging blow to the patient. When that failed, they attempted to discredit the witnesses who were present when the attack occurred. Neither effort was successful.

The witnesses, two staff members and a patient, all repeatedly and consistently testified that they saw the Grievant strike the patient on the left side of the chest. The staff members were particularly appalled by the Grievant's behavior because in their combined fifty years of work experience they had never seen an attack like one the Grievant delivered that night. They made a mistake, however. They didn't immediately report the Grievant's actions because they did not want to cause trouble for themselves by being labeled squealers in an institution where to be isolated in time of crisis could have serious personal consequences. Given those considerations, their failure to come forward immediately after the incident occurred is understandable. They did come forward, though, after they became aware of the extent of the patients injuries. Once they did, their stories have remained consistent and unshakable.

They paint a picture of a man out of control, using the incident to vent his frustration for the problems he was experiencing in his personal life. In the face of that testimony, the Grievant offered a number of explanations for what happened, all of them in conflict with what the staff members and the patient in the room saw and all of them in conflict with statements the Grievant has given at other times. The only possible conclusion which can be drawn from those inconsistencies is that the Grievant, realizing that he committed a grave mistake, was desperately trying to save his job.

He even went so far as to make the ridiculous assertion that because of an alleged injury to the little finger of his left hand he was physically incapable of striking the blow which caused so much damage to the patient. The desperation in the Grievant's story is patently and painfully obvious. The absurdity of his claims is underscored by his actions from the date he reported

to work until the time he attacked the patient. Throughout that period, he was fully capable of performing all of his duties and responsibilities without complaint and without any apparent disability whatsoever, including writing reports and giving shots. Coupled with those inconsistencies was the testimony of a martial arts expert who indicated that he had suffered injuries similar to the one the Grievant complained about and that those injuries would not have stopped someone with the Grievant's training from inflicting the type of damage the patient incurred.

In the end, there is simply no reason to believe the Grievant and every reason to believe the other three witnesses who watched his unprovoked assault. The State of Ohio has repeatedly declared that it will not tolerate patient abuse at any of its facilities. There is simply no excuse whatsoever for that behavior. When it occurs, the State has consistently acted, dismissing employees who engage in such misconduct. Its commitment to protecting patients in its charge is so strong that it has even negotiated a provision into the Contract prohibiting an Arbitrator who concludes that an employee abused a patient from modifying the discharge penalty the State imposes. That alone should tell the Arbitrator how serious a crime the State considers patient abuse. Since there is no question that the Grievant abused a patient by striking him and breaking his ribs, it is the Arbitrator's responsibility to deny this grievance and allow the discharge to stand.

III. POSITION OF THE UNION

The Employer terminated the Grievant not because he abused a patient, not because he struck a patient, but because Management needed a scapegoat and latched onto the Grievant. Once it did, it moved heaven and earth in an attempt to convict him. It was a pathetic effort which failed miserably in court when the jury threw out the charges against the Grievant. At that point, Management

should have tried to discover what actually happened to the patient. Instead, it blindly continued this witch hunt, pressing for the Grievant's discharge. Its efforts at the arbitration, however, were no better than its efforts at trial and they should be no more successful either.

The Employer's case turns almost entirely on the testimony of two witness, the staff members who were in the room when the alleged assault took place. One of them gave a statement immediately after the incident in which she never mentioned that the Grievant struck the patient. It wasn't until more than a month later that she gave a statement in which she said that the Grievant struck the patient on the left side. She explained her failure to mention the alleged assault by saying that she did not realize when she gave her first statement how badly the patient had been injured. The explanation is an obvious fabrication since the witness gave a third statement, this one two days after the patient went to the hospital. As the patient had been on the TPW's ward she had to know the extent of his injuries at that time. Yet, just two days after he went to the hospital, she said nothing about the alleged assault. What she did say which might explain her change of heart is that when she told someone from the Hospital who came to get a statement from her that she didn't have to give one because she was retired, she was told that she was not retired until the Employer signed the papers, a statement she took as a threat. Considering that threat, is there any wonder that she changed her story and accused the Grievant?

There are just as many holes in the other staff member's story. The biggest is her claim that she didn't give a statement for the incident report that was completed immediately after the events in question took place. However, both the Grievant and the Registered Nurse who was on duty at the time testified that they saw the statement as did the Staff Psychiatrist who was on duty. Further, when the staff member was interviewed by the State Highway Patrol she was asked questions indicating that there was a prior inconsistent statement in

existence. Yet, the woman denied in the face of all of that evidence that she had ever made such a statement. Management could have simply turned over the incident report and settled the whole issue once and for all. It chose not to do so, putting forward as justification for its intransigence some ridiculous argument about how it would be a violation of the patient's privacy if the report was made public. The argument is ridiculous because the Employer introduced the patient's medical records into evidence. What could be more private than those? When that tactic failed, the Employer attempted to discredit the Registered Nurse's testimony, viciously slandering her without any justification. That attack is evidence of both Management's desperation and its determination to convict the Grievant at all costs.

The only weapons the Employer has in its arsenal to accomplish that task are the statements of the two staff members. Neither of them, though, was disciplined let alone discharged for patient abuse even though their failure to report the Grievant's attack is, by definition, patient abuse and should have resulted in their termination just as it resulted in the Grievant's. The very fact that the Employer chose not to move against those two women leads inexorably to the conclusion that Management knew their testimony was worthless.

Their statements have to be weighed against the Grievant's, the Registered Nurse's and the Staff Psychiatrist who was on duty. All three consistently described the Grievant's concern for the patient and his attempt to help the patient when he began complaining of pain later in the shift. More importantly, the only medical evidence in the record came from the Staff Psychiatrist who testified that it would have been virtually impossible for the patient to have suffered the type of injuries he was found to have and not have been in extreme pain and agony almost immediately after his ribs were broken. Given that testimony, it is readily apparent that something happened to the

patient after the July 24, 1992 incident and it was that event which caused him to break his ribs and suffer a punctured lung. Why Management does not want to investigate that matter is beyond the scope of this hearing. All that matters is that the Employer failed to meet its burden of proving that the Grievant committed patient abuse by punching a patient. As a result, he should be reinstated with full back pay and no loss of benefits.

IV. OPINION

It is not possible to discuss the merits of this matter without first resolving a number of procedural issues which the Union raised in the Grievant's behalf. Chief among them is the burden or standard of proof the Employer is required to meet in this case. As the parties are aware, when the Grievant was tried for criminal abuse in the Common Pleas Court, the State was required to establish each and every aspect of its case by proof beyond a reasonable doubt. The standard is extraordinarily difficult to meet, but it has none the less come to be recognized as the appropriate one in criminal cases because the accused stands to lose his freedom or maybe even his life if convicted. Although discharge is often spoken of as the industrial equivalent of capital punishment, few arbitrators have been willing to impose the reasonable doubt standard on employers in such cases because it is so hard to meet. The parties obviously could adopt that standard if they so desired, declaring in their collective bargaining agreement that whenever an employee has been discharged the employer must establish the grounds for the termination by proof beyond a reasonable doubt. These parties chose not to do so.

If few neutrals have been willing to embrace the proof beyond a reasonable doubt standard in discharge cases an equally small number have gone to the other extreme, declaring that an employer need only establish its case by the least amount of proof necessary, a preponderance of the evidence. The majority of arbitrators, including this one, have eschewed those extremes and instead have

adopted a middle position, declaring that because discharge exacts such a heavy toll on an employee, the employer must meet a greater than ordinary burden in order to justify terminating him, but not one nearly as great as the proof beyond a reasonable doubt standard. The name given to that test is clear and convincing evidence. It falls somewhere between the other two, far more stringent than the preponderance of the evidence standard, but significantly less than the reasonable doubt one. It is that standard against which the Employer's evidence is to be tested in this case.

To meet that burden, the Employer relied almost exclusively on the testimony of the two Therapeutic Program Workers (TPW) who were present at the time of the alleged assault. According to the Employer, their statements were consistent and contained none of the contradictions which infected the Grievant's story. In its closing argument, the Employer touted the strength of their testimony, deriding the Union's assertion that their testimony was filled with inconsistencies and even went so far as to argue that the Union could not point to any in spite of its efforts. All of those claims are meritless.

It is the Arbitrator's responsibility, as the trier of fact, to determine the credibility which will be accorded to each witness. A witness's credibility, that is, how believable his or her testimony is, is a function of a number of factors, not just what the individual says when they testify. Instead, it also includes their demeanor when they testify, whether their statements are internally consistent and whether they are consistent with the statements of other witnesses. In this case, the undersigned can accord the two Therapeutic Program Workers little credibility. Both testified that they saw the Grievant strike the patient on the left side of his chest with his left hand. However, the first, M.G., filled out a statement immediately after the incident in which she failed to mention the Grievant striking the patient at all. Approximately

nine days later she did give a statement to the Ohio State Highway Patrol in which she reported for the first time that she saw the Grievant strike the patient on the left side of his chest.

In explaining the discrepancy, M.G. initially stated that she did not report the Grievant's actions because she did not believe that the patient was injured as badly as he was by the force of the blow. The problem with that explanation is that two days after the patient went to the hospital and his injuries were readily apparent to anyone remotely concerned with the incident, M.G. gave a second statement to Hospital personnel in which she again failed to mention that the Grievant struck the patient. Her silence on July 28, 1992 casts suspicion on her subsequent declarations. This is especially so as she indicated for the first time at arbitration that the reason she did not initially come forward and report the truth of what had occurred on the night in question was because she feared being ostracized as a "squealer" and would not receive assistance from other staff members if she found herself in a difficult position.

M.G. did not offer that explanation when the investigating officer from the State Highway Patrol asked her why she had not reported the Grievant's assault sooner nor did she make that excuse for her silence when she testified about the incident at the Grievant's criminal trial. Coming as it did for the first time in the course of the arbitration hearing, M.G.'s explanation for her initial silence appears to have been made up after the fact for the purpose of covering the obvious inconsistency caused by her July 25th and July 28th statements which failed to mention the Grievant punching the patient.

Were those the only problems with M.G.'s testimony, they would be enough to cast serious doubt on her credibility. Unfortunately, there are two other factors which seriously weaken her credibility. The first is her admission that when she was approached by someone from the Hospital sometime in August to give a statement about the July incident, she refused, telling the Employer's

representative that she had put in for retirement and didn't have to do so. As M.G. related the experience in the course of the arbitral hearing, she was informed in no uncertain terms by the Employer's representative that she was not retired until the Employer signed the requisite forms, a statement she took as a threat. Of greater significance than that incident is the fact that neither she nor the other Therapeutic Program Worker were charged with patient abuse even though their failure to report the Grievant's actions by statute, by rule and by policy constituted patient abuse. When she testified, M.G. indicated that she did not know why the Employer had not proceeded against her.

Considering the Employer's inaction coupled with M.G.'s failure to twice come forward and report the Grievant's alleged assault on the patient and her subsequent change of heart after she had a conversation with the second TPW for a reason that was not supported by the facts at the time it was given, coupled with the coercive nature of the conversation she had with a State employee to get her to submit yet another statement, there are significant reasons to disbelieve her testimony.

Similar problems afflict the testimony of L.H., the other Therapeutic Program Worker who was present at the time the alleged assault took place. Like M.G., she was not charged with patient abuse although she too gave a prior statement in which she failed to report the Grievant's actions. L.H. denied that she had made such a statement. However, her testimony was contradicted not only by the Grievant who claimed to have seen the statement, but by the Registered Nurse who received it as well as by the Staff Psychiatrist who was on duty that night and who also testified that she saw it. Further, when L.H. was interviewed by an Investigator from the State Highway Patrol on August 5, 1992, she was asked, "Why are you telling me this version at this time?" Although L.H. tried to explain away the tenor of the question, her explanation was an abject failure.

Words have meaning. It doesn't matter if they are uttered in jest by a child on a playground, in passion by two lovers in some hideaway or by an Ohio State Highway Patrolman investigating an incident at a State mental hospital. In every case, the words are said with a purpose. Considering the language the investigating officer used, there is only one explanation for the way he chose to phrase his question, there was another statement in existence which contradicted what L.H. was saying to the Trooper at the time. Nothing else makes any sense at all. Under the circumstances, for L.H., in the face of all contradictory testimony as well as the Patrol Officer's question, to maintain that there was not another statement in existence appears to be nothing more than a flagrant deception deliberately practiced.

Not only does that conclusion explain the investigator's words, but it comports with Section 3.08 of the Hospital's policy and Rule 5122-3-13 of the Department of Mental Health which both require that employees witnessing patient abuse must immediately report it. The Employer can't argue it didn't know she was present when the incident occurred because her name appears in the Grievant's reports of the incident and in M.G.'s statement of July 28, 1992. Further, the presence of another TPW is noted in M.G.'s July 25th statement. Under the circumstances, it is asking too much to believe that L.H. did not provide a statement after the incident or that the statement failed to mention the Grievant striking the patient.

The Employer made an effort to rehabilitate L.H. by attacking the Registered Nurse's character. It was a vain act because the failure to offer any evidence whatsoever to support the kind of allegations the Employer leveled against the Registered Nurse only served to reinforce the conclusion that her testimony was accurate and that it was so damaging that the Employer was willing to risk such an attack in order to convince the Arbitrator to pay it no heed. The Employer could have rehabilitated L.H. by producing the incident report of

the incident. It refused to do so, arguing first that the statement was irrelevant because it was not used as part of the predisciplinary process and second that because it discussed a patient it would have been a violation of the patient's privacy if Management released the report to the Union. Neither argument has any merit at all.

As to the Employer's claim that turning a copy of the report over to the Union would have somehow violated the patient's privacy, the argument is absurd considering that the patient's medical records were introduced into evidence at the hearing. The medical records are far more private than the incident report which is simply some third party's description of what happened to the patient. Since those same people testified anyway about what they saw, there was absolutely no foundation whatsoever for the Employer's claim that the report constituted a violation of the patient's privacy.

The State's first contention, that the incident report is irrelevant to the outcome of this matter, is also flawed. The Employer was under a contractual obligation to turn over a copy of the report pursuant to Section 25.08 of the Contract. In no uncertain terms, it gives the Union the right to request documents, books, papers and witnesses available to the Employer which shall not unreasonably deny the request. In this case, the denial was unreasonable.

The Union needed the report in order to determine if L.H. had made inconsistent statements so that it could challenge her credibility when this matter came on for hearing. Further, because the Employer's refusal interfered with the Union's ability to defend the Grievant by providing it with the materials needed to cross-examine so important a witness, its actions come close to justify overturning the discharge on procedural grounds alone. What makes it unnecessary to take that step is the testimony of the Grievant, the Registered Nurse and the Staff Psychiatrist, coupled with the question of the investigating

Patrol Officer which all indicate that L.H. gave a statement immediately after the incident occurred in which she did not say that the Grievant struck the patient. Had there been no such other evidence then the Employer's refusal to turn over the statement would have effectively stopped the Union from defending the Grievant against L.H.'s accusations and in that case would have warranted overturning this grievance on procedural grounds. Since that is not the case, it is necessary to complete the review of this matter.

Because of the credibility problems of its star witnesses, the Employer needed to establish a causal connection between the Grievant's alleged blow and the injuries the patient was found to have when he was hospitalized two days after the incident. Although every advocate wants to present the strongest case possible, had there been no problems with the credibility of the Employer's witnesses, it could have avoided trying to establish the causal connection between the act and the result because the definition of patient abuse doesn't require that the patient suffer massive injuries. Rather, since patient abuse is defined in both Hospital policy 3.08 and Section 5122-3-14 of the Ohio Department of Mental Health's Rules as any act or action inconsistent with human rights or which results or could result in injury to the patient, it would have been enough had the Grievant struck the patient with his fist, regardless of how much damage the blow caused. Were it otherwise, then an employee could repeatedly slap, jab or kick a patient and not be guilty of abuse because none of the blows individually or together was sufficient to cause significant bodily harm. Such a position would obviously defeat the protective shield the abuse laws were designed to afford patients. In this case, though, the weakness of the Employer's witnesses makes such a showing imperative if Management is to prevail.

Rather than offer any medical evidence to establish the causal connection between the alleged blow and the patient's injuries, the Employer asked the Arbitrator to assume that the connection existed. That is too great a

leap to make in view of the problems with the witnesses' statements and the length of time between the alleged assault and when the patient's injuries were diagnosed. It is not always necessary to have expert opinion to establish a causal connection between an act and the consequences of that act. However, where, as here, the causal connection is not readily apparent, the Employer needed expert testimony to make the connection.

The best it was able to do was elicit testimony from the Staff Psychiatrist that it was possible for the patient to have suffered four broken ribs and a punctured lung as a result of the alleged assault and the pain and discomfort which should have followed such injuries was masked by the shot of Thorazine the patient was given after the incident and by the patient's macho attitude. While all things are possible, both the law and arbitration have long since decided that only those things which are certain, that is those which are more probable than not can and will be considered.

For as much as the Employer tried to make of the Doctor's statements, she held fast to her view that the Employer's explanations were only possibilities not probabilities. Those suppositions did not even go so far as to undercut the Doctor's other testimony that it was highly improbable that the patient could have sustained the type of injuries discovered in the hospital and not been in acute discomfort sooner than he was, indicating that if the patient was the victim of an assault, the assault came at a time after the Grievant was alleged to have hit the patient.

Further, even assuming that the possibilities the Physician agreed may have explained the patient's failure to report the pain and difficulty she expected from a patient with four broken ribs and a collapsed lung, the Employer still failed to establish a causal connection between the alleged blow and the injuries. At best, the alleged blow was one possible explanation for the

patient's injuries. Another was that the patient fell on his left side as the Grievant testified, not his right, as the Employer's two witnesses indicated. The Employer attacked the Grievant's account of the events on the night in question, pointing to discrepancies in his testimony at arbitration with statements that he gave earlier, either to the State Highway Patrol or when he testified in the criminal proceeding. While there are some discrepancies, there were far fewer than the Employer was willing to admit and they are far less significant and far less damaging to the Grievant's credibility than were the discrepancies in the testimony of the two Therapeutic Program Workers. Simply put, of the three people, he was by far and away the most credible. This is true even considering that he had the most to lose if his version of the events of the night in question was not believed.

The Employer would argue that regardless of what the Grievant or the two TPW's had to say about the incident, the Grievant was seen hitting the patient by the other patient who was in the room. According to the second patient, the Grievant locked his hands together and struck the patient with his forearms on the ribs. Whatever happened that night happened quickly and happened diagonally across a dimly lit room from where the second patient was lying in bed. This might explain why the patient's view of the events that night is at odds with everyone else's. Or it may be that what he saw was the Grievant use his forearm to block the punches the patient continued to throw while he was on the floor. Whatever the reason for the second patient's testimony, it does not fit anyone else's descriptions of the events of July 24th. Given that fact, and considering that his view just as easily supports the Grievant's explanation of the events of that night as it does of the two TPW's, it is insufficient to establish the Grievant's guilt.

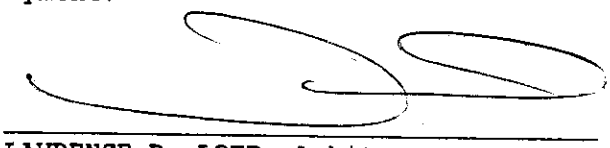
This is especially so where the evidence shows the Grievant has repeatedly subdued larger, more aggressive and more violent patients in the past

and never lashed out at them as he is alleged to have done on the night of July 24, 1992. Further, the Employer was not able to establish any reason for him to have done so.

In the end, there is simply no basis upon which to conclude that the Grievant abused a patient at the Western Reserve Psychiatric Hospital on July 24, 1992. Because there isn't, because the Employer failed to sustain its burden, the undersigned must conclude that it did not have just cause to discharge the Grievant and, therefore, he is entitled to be reinstated.

V. **DECISION**

For the foregoing reasons, the grievance is sustained. The Employer is directed to reinstate the Grievant with full back pay and no loss of benefits, less any sums he earned from other employment.



LAWRENCE R. LOEB, Arbitrator

July 21, 1993
Date