

**VOLUNTARY LABOR ARBITRATION PROCEEDING**

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In The Matter Of The Arbitration Between:

The State of Ohio, The Department  
of Mental Health, Toledo Mental Health Center

-and-

District 1199, The Health Care and Social Service  
Union, Service Employees International Union, AFL-CIO

Grievant: Amy Jo Linser (Discharge)

Case No.: 23-17-930108-0914-02-11

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**ARBITRATOR'S OPINION AND AWARD\***

**Arbitrator: David M. Pincus**

**Date: October 4, 1993**

**APPEARANCES:****For The Employer:**

Howard Harris	Clinical Manager
Janet Beaverson	RN-Manager
Shelly Ward	Labor Relations Specialist
Ronald E. Mays	LPN
Debbie Tammarine	Police Officer
Sanford Kimmel	Physician
Marrienne Williams	Witness
Tim Wagner	Co-Advocate
Ellen Beth Smith	Co-Advocate

**For The Union:**

Amy Jo Linser	Grievant
Karen Dale	RN
Christina Evans	Delegate
Lisa Hetrick	Organizer

- \* An Award dealing with the above entitled matter was originally issued on July 20, 1993. Through mutual agreement of the Parties and the Arbitrator, the present document contains the same Award but represents a complete analysis of the arbitral principles, documents and evidence presented during the course of the hearing.

## INTRODUCTION

This is a proceeding under Article 7, entitled Grievance Procedure of the agreement between the State of Ohio, the Department of Mental Health, Toledo Mental Health Center, hereinafter referred to as the Employer, and District 1199, the Health Care and Social Service Union, Service Employees International Union, AFL-CIO, hereinafter referred to as the Union, for the period 1992-1994 (Joint Exhibit 1).

The arbitration hearing was held on June 4, 1993 and June 15, 1993 at the Toledo Mental Health Center, 930 South Detroit Avenue, Toledo, Ohio. 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 that they would not submit briefs.

## STIPULATED ISSUE

Was the Grievant's removal on January 9, 1993 for just cause? If not, what shall the remedy be?

## PERTINENT CONTRACT PROVISIONS

### **ARTICLE 8 - DISCIPLINE**

#### **§ 8.01 Standard**

Disciplinary action may be imposed upon an employee only for just cause.

#### **§ Progressive Discipline**

The principles of progressive discipline shall be followed. These principles usually include:

- A. Verbal Reprimand
- B. Written Reprimand
- C. Suspension
- D. Demotion or Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

### STIPULATIONS

1) Mrs. Linser began employment at the Toledo Mental Health Center on February 27, 1984 where she was classified as a Psychiatric Nurse. On March 25, 1990 she was promoted to Psychiatric Nurse Supervisor I (title changed to Psych/MR Nurse Coordinator through class mod). She was assigned to the first shift.

2) Mrs. Lindser's grievance is properly before the Arbitrator.

## CASE HISTORY

Amy Jo Linser, the Grievant, has been employed by the Toledo Mental Health Center, the Employer, since February 27, 1984. At the time of the disputed incident, the Grievant served as a Psych/MR Nurse Coordinator. In this capacity, she had a number of related duties. The Grievant provided care giving services in a designated patient living area. In this designated area, she enjoyed supervisory responsibilities while serving as a lead worker to other direct care staff dealing in clinical matters. She, moreover, served as a primary role model for patients and staff members. The facility services twenty (20) counties in Northeastern Ohio. The resident population consists of approximately 150 individuals who can be characterized as severely mentally ill. They require around the clock supervision.

Karen Dale, a RN working with the Grievant on day shift on G-2-D Ward, recalled the circumstances which engendered the disputed incident. On August of 1992, a pick a post procedure was implemented. Shortly thereafter, the Grievant and others on the day shift began experiencing patient assignment problems. Marrienne Williams, a RN on the evening shift, began complaining about the work distribution. She began to distinguish the work she was going to perform and what work she decided to disregard. Williams, moreover, accused the day shift personnel of unilaterally altering work assignments.

Various bargaining unit members purportedly attempted to resolve the matter by discussing the dispute with members of the management team. Chris Evans, a Nurse Coordinator and Delegate, testified a grievance (Union Exhibit 1) was filed concerning the assignment dispute. The actual controversy dealt with the division of acute and chronic care patient assignments on G-2-D. It appears the day shift was being assigned the acute patients,

while the night shift was being assigned all the chronic patients. This division of work was viewed by the Union as unfair because of documentation differences. Chronic patients only require monthly assessments, while acute patients require a nursing assessment, initial treatment plans at 72 hours, 10 days and every 30 days up to the initial year of interment.

A meeting was held on December 2, 1992 in an attempt to resolve the assignment dispute. Williams and the Grievant participated in the discussion. Several witnesses testified that Williams was displeased with the tone and content of the conversation which resulted in an emotional outburst directed toward other bargaining unit members and especially the Grievant. Even though some management representatives felt the meeting resolved the assignment issue, the bargaining unit participants felt a grievance (Union Exhibit 1) would have to be processed to the next level of the grievance procedure.

On December 3, 1992, a physical and verbal altercation took place involving the Grievant and Williams. At approximately 7:00 a.m. the Grievant reported to work unit G-2-D. She entered the chart room/nursing office to take report from Williams concerning the third shift's activities. No one else was present during the discussion. A verbal confrontation ensued concerning the discussions surrounding the December 2, 1992 meeting. The situation, however, escalated into a physical altercation. The Grievant eventually exited the nurse's office and entered the adjacent nursing station. While attempting to notify management personnel about the dispute, and in fear of additional physical harm, an additional physical altercation took place. The Grievant subsequently initiated a Code-H signal which caused other employees and management personnel to enter the ward; the protagonists were separated by several staff members.

It should be noted both individuals realized some degree of physical injury as a consequence of the fight. The nature and severity of the injuries and the manner in which they were inflicted will be discussed in a subsequent portion of this Opinion and Award.

The Employer removed both employees because it was felt they shared equal responsibility for the verbal and physical altercation. The present matter deals with the Grievant's removal.

On January 9, 1993 the Grievant was formally notified of her removal for physical fighting on the premises (Joint Exhibit 2c). She filed a grievance (Joint Exhibit 3a) which formally protested the removal based upon an Article 8.01 violation. A third step hearing failed to resolve the dispute. Since neither party raised procedural nor substantive arbitrability claims, the grievance is properly before the Arbitrator.

### THE MERITS OF THE CASE

#### The Position of the Employer

The Employer opined it had just cause to remove the Grievant for fighting on the premises. The Employer exclaimed both participants provided certain self-serving accounts of the altercation on December 3, 1992; and that the truth may never be known with ultimate certainty. Yet, both employees were willing participants and should receive identical penalties for their like involvement.

Certain aspects of the Grievant's testimony raised credibility concerns, which led to the conclusion that the Grievant's version was fabricated, or at least, inaccurate. First, the Grievant testified two co-workers, Bev Howard and Bill Armstrong, witnessed the altercation which took place in the nurse's office. And yet, her statement (Joint Exhibit 4a) never alleged these

individuals were privy to these observations. Also, if Howard and Armstrong could have verified the Grievant's accusations concerning the beating inflicted by Williams, the Union had an affirmative obligation to provide their testimony.

Second, other testimony presented by the Grievant was not specified in statements (Joint Exhibit 4) gathered shortly after the incident. At the hearing, the Grievant emphasized Williams intentionally bumped into her and remarked "hit me you bitch." None of these assertions were previously revealed.

Third, another potential inconsistency exists with the Grievant's characterization of the altercation which took place at the nurse's station. The Grievant maintained she was brutally accosted by the Grievant as she was attempting to contact others for assistance. Williams allegedly followed the Grievant from the nurse's office, pushed her across the desk, hit her and pulled her hair. Ronald E. Mays, a LPN, an eyewitness to this portion of the altercation failed to corroborate the Grievant's version of the incident. Mays had a good vantage point because he was standing adjacent to the nurse's station. He claimed he only heard a rustling noise and something moving erratically behind the nurse's station. Mays never heard any screaming, but merely saw the Grievant and Williams pulling each other's hair. Mays also refuted another assertion raised by the Grievant. She alleged after she and Williams were separated Williams stated "this isn't over yet bitch." Mays, however, never recalled such a statement.

The Employer argued both participants were equally responsible; neither was a complete victim. Mayes testified he observed two entangled willing participants; he saw no specific aggressor. The physical evidence, moreover, supports this premise. Both participants were physically harmed as a consequence of the altercation. Williams testified she experienced some

swelling around her left eye and had a nail torn during the fight. Her testimony was supported by a police officer and a presiding physician who reviewed her condition at the hearing. Regardless of the documented disparity in the protagonists' physical condition, their culpability and related responsibilities were viewed as equivalent by the Employer.

The Employer urged this Arbitrator to minimize the collateral evidence introduced at the hearing. A court transcript (Union Exhibit 6) was introduced in support of the premise that Williams admitted beating the Grievant. But, for a number of reasons, the Employer sought the dismissal of the evidence. Williams pled to a lesser offense involving disturbing the peace, and admitted to fighting. Williams never admitted to starting the fight. The transcript should not be used to determine the truth of the matter asserted because there was no sworn testimony contained in the transcript. Since an arbitration hearing is viewed as a de novo proceeding, the Arbitrator as a finder of fact, should not rely on a determination fashioned by a judicial body.

The self defense argument was viewed as suspect. Mayes, the only real witness to the allocation, testified he heard no cries for help. Also, the Grievant could have perpetrated the dispute. Rather than taking report from Williams, the Grievant engaged Williams in a discussion concerning the meeting held the previous day. The Grievant, moreover, stated she was scared of Williams. And yet, she entered the nurses office to obtain the report when an alternate location could have been more appropriate; if in fact she was fearful rather than looking for a confrontation.

The unequal treatment claim result by the Union was thought to be equally unsupported. Just because two employees are treated differently does not establish this argument. The Union has an affirmative obligation to establish the Employer has wrongfully treated similarly situated



employees, operating under similar circumstances, by applying differing criteria. The case raised by the Union was thought to be an inappropriate example of unequal treatment. The incident in question failed to include the following critical circumstances: a fight between two participants was never truly established; injuries were not reported; and the locale was not a patient care or visitor area.

Surprise claims, initially raised at the hearing, were properly addressed as a consequence of the procedure agreed to by the Parties. The time period between the first and second day of hearing provided the Union with ample opportunity to review all relevant information that was requested, and then, provided by the Employer.

#### The Position of the Union

In the opinion of the Union, the Employer did not have just cause to remove the Grievant. The Grievant freely admitted an altercation took place, but her involvement was limited to self defense. The Grievant was attacked which limited her options during the course of the initial altercation. She, moreover, attempted to thwart the attack by breaking away and seeking help at the nurse's station. This strategy proved fruitless because Williams merely followed her and re-initiated the attack. Both incidents resulted in several serious injuries which led to the Grievant's temporary disability.

Several technical defects were raised by the Union. Information concerning unequal treatment claims was eventually provided but not when initially requested during various stages of the grievance procedure. As such, the Union did not have an opportunity to complete its investigation in a timely fashion. Medical records were also initially misplaced and only surfaced during the second day of the arbitration hearing. These documents were critical to the Grievant's

defense.

The administered penalty was also viewed as harsh and unreasonable. The Disciplinary Grid (Joint Exhibit 2(G) and (H)) specifies a penalty of six days suspension to removal for physical fighting on the premises. Nothing in this document specifies removal for any incident taking place in a patient area. Also, without any prior type of disciplinary charge for fighting on the premises, the penalty administered was too severe in light of the range of potential penalties specified in the document.

#### The Arbitrator's Opinion and Award

Upon a thorough review and consideration of the entire record including exhibits, testimony and arbitral research, it is this Arbitrator's judgement that the Employer's action removing the Grievant for fighting was not for just and proper cause. This Arbitrator has previously relied upon the following criteria discussed by Arbitrator Roberts when assessing the facts surrounding "fighting" disciplinary cases:

"...

1. An employee may be an innocent and injured victim of an unprovoked assault and not, himself, engage in aggression or hostility. In such a case, the victimized employee has engaged in no wrongful conduct and must be regarded as innocent.
2. Self Defense. When an employee engages in only as much hostile conduct as is reasonably necessary to defend himself from aggression and uses no more force than is reasonably necessary for that purpose, he will generally be found not guilty of fighting or assault. This is a defense of justification which is a complete defense.
3. Provocation. When an employee is the victim of provocation which is foreseeable to provoke an ordinarily reasonable person to a heat of rage and aggression, the conduct of that employee may be excused (as opposed to justified) either partially so as to mitigate against the full degree of penalty, or completely, so as to mitigate against any penalty whatsoever.

..."<sup>1</sup>

The contested disciplinary action will be evaluated in light of the above-stated criteria.

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<sup>1</sup> Alvey, Inc., 74 LA 834, 838 (Roberts, 1980).

Fighting cases where protagonists provide the primary testimony are quite difficult from an analysis standpoint. The presented versions are typically factually inconsistent which often necessitates reliance on circumstantial evidence and related credibility concerns. And yet, this Arbitrator, like many others, fully credits circumstantial evidence because it has great validity. In fact, circumstantial evidence is essentially a form of direct evidence, and may be entitled to greater weight than "eye-witness" accounts. Arbitrator Krimsley in A.P. Refractories Co.<sup>2</sup> Summarized the prevalent view regarding this matter:

Circumstantial evidence is merely the taking of known facts determining if they raise reasonable inferences or concepts concerning the occurrence under investigation.

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...

Therefore, known circumstances surrounding the questionable event, merely another term for circumstantial evidence, are fit into a pattern so that we can reconstruct the event involved. The question, therefore, is not whether circumstantial evidence is valid, but what does it mean<sup>3</sup>.

In my judgement, the removal was not substantiated by the Employer. This Arbitrator basically credits the Grievant's version of the events surrounding the altercation. She was attacked by Williams and engaged in only as much hostile conduct as was reasonably necessary to defend herself from Williams' aggressive conduct. The Grievant, however, used no more force than was reasonably useful for the purpose of self-defense. As such, she is not guilty of fighting and her response, under the circumstances, is viewed as justified.

Two major facets of Williams' version caused considerable doubt; rendering her entire account into question. Testimony and supporting documentation dealing with the telephone in

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<sup>2</sup> A.P. Refractories Co., 67-1 ARB ¶ 8338 (Krimsley, 1967).

<sup>3</sup> Id. at 4207

the nurse's office and the blow Williams purportedly received to her eye conflicted with Williams' accounts.

Williams maintained she and the Grievant were "nose-to-nose" when the Grievant initiated the physical portion of the altercation by shoving Williams. Williams responded by shoving the Grievant and grabbing her hair. At some point during the altercation the Grievant punched Williams in the left eye with a closed fist.

The record, however, fails to support the notion that the Grievant punched Williams with a closed fist. Dr. Richard Kimmel, a physician on duty at the time of the incident, examined Williams the morning of the incident. He filed a report (Employer Exhibit 1) and discussed his evaluation at the hearing. He determined that Williams had some redness over the lateral or outside position of the left eye with no visible hemorrhaging. Under direct examination Dr. Kimmel provided some insight regarding the possible cause of this injury:

- E. Can you give me any idea of how - what kind of injury that could have resulted from?
- W. Well, in that case you're hypothesizing and I think that type of injury can occur from having some sort of very local trauma to the eye. In other words, you could get, I suppose, poked in that part of the eye.
- E. Could it have resulted from blow to the eye with a fist?
- W. That's harder to say. It was pretty localized and most of the injury -- I would have to say that most of the injuries. I've seen to the eye that result from the fist usually are associated with some other evidence of bruising or swelling, along those lines. Unless it was just a glancing blow in which a part of the fist struck the eye.

He basically affirmed these observations while being cross examined.

Debbie Tammarine, a police officer, conducted an investigation of the incident and documented her findings in a Crime Report (Joint Exhibit 5(D)). She noted there was apparent

redness and puffiness in the area identified by the physician.

Based on this testimony, I am convinced the Grievant did not punch Williams. It appears far more probable that Williams realized the minor eye injury during the course of the struggle. The physical altercation was quite severe and it is highly probable that Williams received this minor injury while the Grievant attempted to thwart off Williams' attack.

Another inconsistency deals with the versions regarding the role of the telephone during the dispute. Williams maintained she threw the phone after the Grievant departed from the nurse's office, while the Grievant stated the telephone was used as a weapon to inflict severe bodily harm. Again, Williams would have this Arbitrator believe she merely threw the telephone in a fit of frustration and rage. The record provides little support for this contention.

Dr. Kimmel's physical findings (Union Exhibit 7) discloses a number of physical ailments realized by the Grievant as a consequence of the altercation. The Grievant had hair loss over the left portion of hair scalp with some swelling. He also observed redness at the right upper back, lacerations at the right arm and shoulder, a scratch to the right side of the neck and a laceration on the right little finger. Dr. Kimmel also determined the Grievant could only turn her head about sixty degrees to the right.

Dr. Kimmel testified he could not specifically identify the objects that caused these previously described physical maladies. Officer Tammarine, however, provided some insight based on her experience and observation of the Grievant's condition. She maintained some of the injuries could have been the consequence of the telephone. The base of the telephone could have caused the scratches because of its rough edges. Some of the rounded markings, moreover, could have been caused by the telephone receiver.

This Arbitrator is convinced William's wielded the telephone in an intentional attempt to physically harm the Grievant. Dr. Kimmel's testimony, as well as Tammarine's observations, played a critical role in this determination. Also, the Grievant's consistent testimony regarding the use of the telephone and the circumstance surrounding the event in question led to the inferences noted above.

As I previously noted, the Union adequately established a defense of justification which is a complete defense. The Grievant defended herself by using no more force than was reasonably necessary. Williams, however, engaged in a physical attack which far exceeded the force necessary, or justified, even if she was somewhat provoked by a dispute surrounding the work assignments. The medical documentation specified in Dr. Kimmel's findings (Union Exhibit 7), documented medical treatments engendered by the altercation and unrefuted testimony regarding the extensive hair loss experienced by the Grievant, clearly evidence the excessive force perpetrated by Williams. Williams' injuries, the broken nail and irritated eye, evidence the disparate force utilized by both participants. As such, the Employer's argument suggesting the fight, itself, was the critical feature for analysis purposes is somewhat misplaced. In this particular instance, the physical outcomes are equally important because they provide insight dealing with the propriety of responses engaged in by both protagonists.

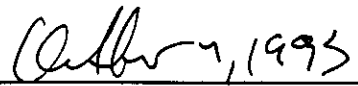
The Employer's attempt to discredit the Grievant by noting inconsistent testimony provided by Ron Mays, an LPN working the third shift, was also unpersuasive. At the hearing, Mays testified he merely heard a rustling noise and something moving erratically behind the nurse's station. This account seems logically inconsistent and conflicts with statements submitted by others in the vicinity of the nurse's station. I find it highly improbable for a person at the

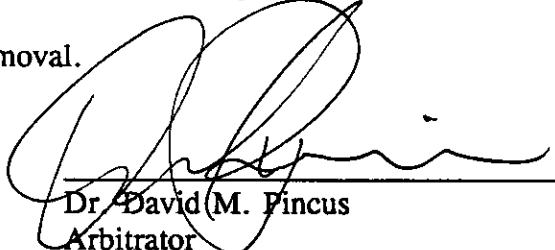
nurse's station to admit to witnessing physical contact without any other testimony regarding dialogue, screams or any other discourse. Several other witness statements evidence much more than a mere rustling noise on or about the time of the disturbance. Oliver Tucker "heard a noise" as he was standing between the water fountain and the nurse's station (Joint Exhibit 4 (J)). William Armstrong heard a verbal argument while he was in the "back hallway" (Joint Exhibit 4(D)). While in the restroom behind the nurse's desk, Terry Topel heard "a disturbance like a couple of patients were getting into it" (Joint Exhibit 4(E)). Raymond Calhoun heard "a very heated verbal altercation, which continued about 5 to 10 minutes" while he was at his locker in back of the nurse's station (Joint Exhibit 4(G)). Eddie Brown saw both individuals "pulling each others hair and locked together like a strangle hold, verbal outbursts and vulgar language..." (Joint Exhibit 4(F)).

This review clearly indicates to this Arbitrator that Mays understated the situation, which dampened his credibility. If other individuals in less advantageous positions heard a much more heated exchange, Mays testimony must be viewed as incredulous and unworthy of any significant probative weight. This Arbitrator can only conclude he was attempting to limit his involvement. Otherwise, his review of the circumstances surrounding the incident would have been more factually consistent.

#### Opinion

The grievance is sustained in its entirety. The Employer did not have just and proper cause to remove the Grievant for Failure of Good Behavior and/or fighting with a fellow employee. The Grievant shall be reinstated to her former position with full back pay, and made whole in terms of all benefits and seniority credits, minus any documented interim earning realized during the course of her improper removal.

  
October 4, 1993

  
Dr. David M. Pincus  
Arbitrator