

#1061

VOLUNTARY LABOR ARBITRATION
PROCEEDING UNDER THE AUSPICES OF
THE STATE OF OHIO AND THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES
(APPLE CREEK DEVELOPMENTAL CENTER)

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO
GRIEVANT: LINDA BEYL
GRIEVANCE NO.: 24-02-(10-27-94)-976-01-04

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: JULY 14, 1995

Appearances

For the Employer

Donald Michael Snow
Jim Kovacs
Golith A. Musser
Joseph W. Clinger
Toni Brokaw
Georgia Brokaw
Carolyn Borden-Collins

Superintendent
LRO
Unit Director
Director of Staff Development
Observer
Second Chair
Advocate

For the Union

Linda M. Beyl
John Schneider
Ronald Bittner
Steve Wyles

Grievant
Chief Steward
Chapter President
Advocate

Introduction

This is a proceeding under Article 25-Grievance Procedure, Section 25.02-Step 5 entitled Arbitration, and Section 25.03, entitled Arbitration Procedures of the Agreement between the State of Ohio, Ohio Department of Mental Retardation and Developmental Disabilities, Apple Creek Developmental Center., 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 the period of March 1, 1994 through February 28, 1997, (Joint Exhibit 1).

The arbitration hearing was held on April 25, 1995 at the Apple Creek Developmental Center, in Apple Creek, 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 they would submit briefs.

Stipulated Issue

Did the Grievant abuse a resident of Apple Creek Developmental Center?

If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 24-DISCIPLINE

24.01-Standard

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

Abuse cases which are processed through the arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

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 oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. a fine in the amount not to exceed two(2) days pay for the discipline rated to attendance only; to be implemented only after approval from OCB;
- D. one or more day(s) suspension(s);
- E. 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 performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonable possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a disciplinary grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

CASE HISTORY

Ms. Linda Beyl, the Grievant, had realized over eighteen (18) years of State service at the time of her removal; approximately twelve (12) years were spend as a Therapeutic Program Worker (TPW) at Apple Creek Developmental Center, Apple Creek, Ohio. The presently disputed matter involves her activities on October 1, 1994 while assigned to Jonathan Hall, 14 Male, on the third shift.

Apple Creek Developmental Center house over 200 clients with mental retardation and developmental disabilities. Many clients are afflicted with multiple disabilities. The primary

mission of the Center is to protect and enhance the clients' quality of life through promoting normalization and training in a home environment.

The facts for the most part are in dispute. On October 1, 1994, at approximately 1:50 a.m., Edith A. Musser, the Unit Director, was making rounds on Jonathan Hall walking down the 14 Male bedroom hallway as she heard the Grievant yell: "Go to the dayhall, go to the dayhall and the nurse will check you." Musser recognized the Grievant's voice and was going to see what precipitated the outburst, and caution her about her yelling behavior.

As she arrived at the bathroom's doorway, Musser stated she observed the Grievant walking behind Kenneth F., a mentally retarded client with a fused knee. The Grievant purportedly raised her right arm in an overhand motion, brought her hand down and hit Kenneth F. in the right shoulder. This motion, moreover, resulted in an obvious "thudding" sound.

Kenneth F. lost his balance and was falling in a seated position with his left leg straight out in front of him, and his right leg bent at the knee. Musser yelled: "Linda," and almost simultaneously the Grievant grabbed the client in an attempt to stabilize his position and prevent a complete fall to the bathroom floor. Musser assisted the Grievant and their intervention caused Kenneth F. to regain his balance.

The Grievant, again, directed Kenneth F. to the dayhall and told him to sit down. Musser asked the Grievant why the nurse was called and she stated she wanted the nurse to look at Kenneth F.'s eyes which were reddened and puffy.

Musser followed Kenneth F. into the dayhall and the Grievant continued to clean the bathroom. In the dayhall, Musser looked at Kenneth F.'s eyes and shoulders. She noticed no apparent marks on his left shoulder, but determined that the top of his right shoulder was

"reddened." There also appeared to be a scratch along the posterior portion of his back.

Marcia Boreman, a Supervisor, entered the dayhall shortly after Musser's examination. She was asked by Musser to examine Kenneth F.'s shoulders. Musser and Boreman departed to the RS office, and Musser called Becky Hicks, a LPN, and asked her to examine Kenneth F.'s shoulders and to report her findings. Musser initiated another telephone call to Michael Snow, the Superintendent. She brought him up to date regarding the incident. He asked that the Grievant be interviewed by the Center's Police Department, and then placed on administrative leave.

Following a Pre-Disciplinary Conference conducted on October 14, 1994, the Grievant was removed on October 26, 1994. The order of removal contains the following relevant particulars:

XXX

The reason for this action is that you have been guilty of physical abuse/unapproved behavior intervention/poor judgment in the following particulars, to wit: on 10/1/94 at approximately 1:50 a.m., Ms. Musser, Unit Director, heard loud noises coming from the bathroom area of living area 14 Male. When Ms. Musser reached the bathroom doorway, she observed Ms. Beyl strike a client named, Kenneth F. in the right shoulder area with her right hand.

XXX

(Joint Exhibit 2)

On October 26, 1994, the Grievant filed a grievance (Joint Exhibit 3) which formally contested the above-mentioned termination. The parties were unable to settle the disputed matter. Neither party raised procedural nor substantive arbitrability concerns. As such, the disputed matter is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

In the opinion of the Employer it had just cause to remove the Grievant for actions resulting in physical abuse of Kenneth F. Her actions violated an Operational Directive (Employer Exhibit 2) and Medicaid Regulations (Employer Exhibit 2).

Snow testified that two (2) charges remained on the Removal Order (Joint Exhibit 2) inadvertently. These charges dealt with unapproved Behavior Intervention and Poor Judgment. He emphasized his recommendation for removal was solely based on the physical abuse charge. A charge which does not require the factoring of mitigating circumstances such as tenure, progressive discipline or prior performance record. He argued that the Department, and his facility, have consistently imposed a removal penalty for any documented abuse-related misconduct. Snow, moreover, remarked an abuse determination does not require a finding of intentional harm or an examination of the severity of the inflicted injury.

The Employer opined the Grievant received prior notice regarding proper intervention protocols, behavior which constitutes physical abuse and the probable consequences associated with any misconduct, Joe Clinger, Director of Staff Development, testified the Grievant received documented training in the following areas: sensitivity training, behavior modification techniques; proper interventions; and physical abuse (Employer Exhibits 6-8). As such, the Grievant should have known how to properly redirect Kenneth F. and should have realized that a blow to a shoulder does constitute physical abuse.

Musser's credible and consistent testimony provided sufficient proof that the Grievant is guilty as charged. Her testimony has been consistent throughout the entire process leading to

removal. Musser had a clear and unstructured view of the entire incident and saw the Grievant strike Kenneth F. on the right shoulder. A clear and unambiguous act of physical abuse.

She viewed the incident while standing in the center of the bathroom's doorway; approximately one (1) foot removed from the actual entrance. Her opportunity to observe was bolstered because the door to the bathroom was propped open by a large domino.

Physical evidence also supported Musser's physical abuse allegation. Hick and Boreman provided statements (Joint Exhibit 4) which corroborated the existence of a reddened area on Kenneth F.'s shoulder, as well as the scratch attributed to the Grievant's physical abuse. Clinger, moreover, in his capacity as a Certified Emergency Medical Technician Instructor, described how the realized injury was consistent with the act of physical abuse as described by Musser. He based his conclusion on Kinematics, a physics theory dealing with the distribution of energy.

For a number of reason, the Employer viewed the Grievant's version as incredible and lacking veracity. First, she stated at the hearing that she was not yelling but using her normal loud voice. Several witnesses statements (Joint Exhibits 2 and 4), however, indicated they heard the Grievant yell at Kenneth F. from a considerable distance. Second, her testimony conflicted with her statement (Employer Exhibit 9) regarding the actions she engaged in to redirect the client. Third, the "farting" sound engendered by her cupped hand could not have resulted since the client was wearing a T-shirt. Fourth, the Grievant's description of the events, especially thea amount of force used, could not have resulted in the client's documented injuries. Last, the Grievant's redirection defense is flawed since there was no urgency to re-direct the client since she did not actually observe him exiting the bathroom toward the bedroom area.

The Position of the Union

The Union posits the Employer did not produce sufficient evidence to prove that the Grievant physically abused Kenneth F. The Grievant's actions in no way constituted abuse as defined in Ohio Revised Code Section 2903.33(B)(2). She did not knowingly cause physical harm, or recklessly cause serious harm. The Grievant, moreover, did not use any method of restraint, medication, or isolation in her contract with the client.

The Employer's reliance on Musser's testimony to substantiate the abuse charge is misplaced since her credibility is subject to dispute. Various statements authored by Musser raise consistency arguments regarding her ability to actually observe the disputed incident. Her review of the events vary with respect to her location inside or outside the bedroom.

Musser's ability to observe the incident is further clouded by the fact a "small" rather than "large" domino was used by the Grievant to prop open the bathroom door. With the small domino affixed, it became virtually impossible for Musser to observe the Grievant and the resident inside the bathroom. The Grievant emphasized she never used the "large" domino to prop open the door.

The size of the domino alleged to by the Employer was strongly disputed by the Union. The domino introduced by the Employer at the hearing was never produced earlier in the predisciplinary nor grievance procedure stages of the process. By introducing the domino in such an untimely fashion, the Employer merely reinforced the futile and incredible testimony provided by Musser.

Musser's actions on the night in question further raise suspicions concerning the severity of the incident, and whether something other than abuse, had, indeed, taken place. She failed

to follow proper procedures by not removing an alleged abuser from the area following the incident. The Grievant, more specifically, continued to clean the bathroom, and only learned about the abuse allegation much later in the morning. Musser also failed to follow articulated protocols by failing to have the allegedly abused client examined by the ranking medical staff on duty. The LPN that examined Kenneth F. clearly did not enjoy the status necessary to conduct a determinative evaluation.

The injuries sustained by the client were minor and were barely visible a few hours after the incident. They fail to support the abuse charge because the Employer failed to provide sufficient proofs that the Grievant intentionally caused these injuries. In fact, the Employer never provided any plausible explanation linking the client's scratch on his back with the Grievant's actions.

Even if Musser's testimony is viewed credibly by the Arbitrator, her testimony serves as an insufficient basis to support a finding of guilty as charged. The Employer had failed to carry the burden of proof necessary to support removal because it failed to provide corroborating testimony or proof that the Grievant caused the client's injury. Musser obviously misinterpreted what she witnessed because she walked into the incident as it ended.

Within this context, the Grievant has provided a plausible alternative explanation of the facts which must be given equal credence, causing sufficient ambiguity surrounding the Employer's charges. The Grievant claimed she was merely attempting to direct the client toward the dayhall so that his eye could be examined by the nurse. She, moreover, did admit she spoke in a loud tone since the resident has a documented hearing deficiency. Finally, she had her hand on the Grievant's shoulder only in her attempt to gain the client's attention.

Collateral evidence was introduced by the Union. The Union noted the Grievant was completely cleared of all charges on a criminal trial (Union Exhibit 3). A most persuasive outcome corroborating the Grievant's innocence. As such, the same result should be reached by this Arbitrator after reviewing the record.

A procedural defect was raised by the Union in an attempt to promote potential mitigation. It was alleged the Employer rushed to judgment. All of the available evidence was entered or considered by the Employer at the predisciplinary hearing.

An alternative outcome was proposed by the Union. At most, the record may indicate the Grievant guilty of poor judgment rather than physical abuse. As such, the Arbitrator should impose a more appropriate lesser penalty based on the record, the Grievant's length of State service and her reputation within the Center in terms of providing competent client care.

THE ARBITRATOR'S OPINION & AWARD

From the evidence and testimony introduced at the hearing, a complete review of the record and all pertinent contract provisions, it is this Arbitrator's opinion that the Grievant was properly removed for physical abuse. Section 24.01 limits the scope of an arbitrator's authority when dealing with abuse cases. A threshold determination needs to be made whether abuse, or something other than abuse, is supported by the record. If the charge of abuse is properly supported, Section 24.01 precludes an arbitrator from modifying the imposed termination based on any procedural defects or any other type of potentially mitigating evidence or testimony. As a consequence of my finding, and the language articulated in Section 24.01, many of the arguments proposed by the Union were not factored in the analysis which follows. These matters include: the Grievant's length of service, potential procedural defects regarding the

investigation process, improprieties regarding removal from the scene of a potential abuser and medical examination by a ranking medical official.

The present matter, moreover, is clearly distinguishable from Arbitrator's Smith case.¹ Here, we do have reliable corroborating evidence and testimony regarding the abuse charge and a causally linked injury. The Grievant, moreover, was unable to provide credible testimony regarding a plausible alternative explanation of the facts as established by the record.

The ruling, for the most part, relies on the credibility of the Grievant's version versus her primary protagonist, Musser. Musser's testimony was highly consistent throughout the arbitration hearing. Her testimony, moreover, closely followed her statements provided during the investigation process. The Union attempted to discredit Musser's testimony by questioning various versions regarding her location inside versus outside the bathroom door. Musser's statements do not contain conflicting versions. She never stated she made her observations within the bathroom. Rather, she consistently stated at the hearing, as corroborated by her statements, that she observed the physical abuse as she stood in the bathroom's doorway. Reliance on Boreman's statements to discredit Musser also appears to be misplaced. Her statements may slightly differ from Musser's version, but the statements provided by Boreman are a bit ambiguous in terms of location. In one statement she talks about Musser entering the bathroom. In another statement, she talks about Musser being in the bathroom. Both statements contain statements allegedly made by Musser to Boreman. And yet, Boreman was never asked to testify to clarify the ambiguity previously described. In fact, the record fails to indicate any questions asked at the hearing to clarify this potential ambiguity. As such, the Union's reliance

¹ Arbitration 24-14-(89-08-04)-0186-01-04,(1989),(A. Smith), OCSEA #:254.

on Boreman's statements when the statements, themselves, are ambiguous fails to support the credibility arguments raised by the Union.

The physical abuse charge was strongly supported by because the Grievant's own testimony seemed suspect. Her testimony caused considerable doubt concerning the plausibility of an alternative explanation to support the reddened marks on the client's back and shoulder.

The Grievant, in no uncertain terms, testified she was not yelling at Kenneth F. while in the bathroom; she was merely speaking loudly, which is her normal tone. Yet, statements offered by another co-worker (Joint Exhibit 4) and Boreman (Joint Exhibit 2) clearly indicate she could be heard at a considerable distance from two separate locations in Jonathan Hall. This condition strongly supports Musser's version of the events, and the reason for Musser's eventful arrival at the bathroom doorway.

The Grievant's need to redirect Kenneth F. also appears quite suspect. In her statement (Employer Exhibit 9), she states: "he walked around me and headed for the hallway door instead of the dayhall door." At the hearing, however, the Grievant stated Kenneth F. had not passed the door to the dayhall; and when she "contacted" his shoulder she did not know if he was going to the dayhall or the door leading to his bedroom. The Grievant, moreover, noted there was no real urgency to redirect Kenneth F. to go to the dayhall. If he had gone to his bedroom right after being told otherwise, a plausible outcome when one considers the lateness of the incident, she would have gone to the bedroom and assisted him into the dayhall.

These admissions totally destroy the Grievant's redirection justification. Based on her own admissions, even if she had redirected the client properly, the redirection attempt might not have been necessary let alone improper in terms of procedure. Obviously, yelling at a client and

grabbing his shoulder with sufficient force to cause some sound are totally improper interventions; they alone justify removal for abuse.


Notwithstanding the severity of the documented injury, there exists a casual link between the injury to the client and the Grievant's actions. Surprisingly, the Grievant's testimony corroborates Musser's observations even though she attempted to place a different slant on the circumstances. She admitted she reached for Kenneth's right shoulder, cupping her hand to avoid injury and "contacting" his shoulder so that it made a "farting" sound (Employer Exhibit 9). She did not, however, admit that her actions resulted in the injury.

The Grievant's version lacks veracity. She did more than reach for the client in an attempt to redirect him. Otherwise, why would she admit to having her hand cupped to avoid injuring the client? The noise which resulted from her actions, and which eventually led to the injury, could not have come about by the actions described by the Grievant. Some significant force had to be applied to generate the "farting" sound. The force of the blow was diffused by the client's T-shirt resulting in a mottled or rash effect on the client's skins. If the injury had occurred while the Grievant attempted to stabilize the client by grabbing him after her attempted redirection, some form of physical evidence would have resulted in the form of finger prints. Neither the Grievant nor Boreman observed such a physical condition shortly after incident. Hick's examination (Joint Exhibit 4) of the client failed to surface any injury that would support the Grievant's version.

AWARD

The grievance is denied. The Employer properly removed the Grievant for physical abuse.

July 14, 1995



Dr. David M. Pincus
Arbitrator