#1231

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	OPINION AND AWARD
	*	
OHIO CIVIL SERVICE	*	Anna DuVal Smith, Arbitrator
EMPLOYEES ASSOCIATION	*	
LOCAL 11, AFSCME, AFL/CIO,	*	
CARSON J. KEIFER, GRIEVANT	*	Case No. 24-15-961202-0500-01-04
and	*	
OHIO DEPARTMENT OF	*	
MENTAL RETARDATION AND	*	Removal
DEVELOPMENTAL DISABILITIES	*	

Appearances

For the Grievant:

Lynn Sfara Bruno, Esq.
412 Boardman-Canfield Road
Youngstown, Ohio 44512

For the Ohio Civil Service Employees Assn.:

Dennis Falcione
Staff Representative

For the Ohio Department of Mental Retardation and Developmental Disabilities:

Brian D. Walton
Labor Relatons Officer
Ohio Department of Mental Retardation and Developmental Disabilities

John McNally
Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:10 a.m. on September 24, 1997, at the Youngstown Developmental Center (YDC) in Mineral Ridge, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties from their permanent panel, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter was properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. Testifying for the Employer was Cindy Renner (Program Director, YDC). Robert Sikora, Jr. (Workshop Specialist) and Wayne Bonner, both employees of Mahoning County Board of Mental Retardation and Developmental Disabilities (MC MRDD), also testified for the State by subpoena. Also in attendance was Gary C. Jones, Operations Director of YDC. Testifying for the Grievant were Rosalie Bland (Therapeutic Program Worker, YDC), Marc Farran (Quality Assurance Coordinator, YDC), both by subpoena, and the Grievant, himself. A number of documents were admitted into evidence (Joint Ex. 1-8, Employer Ex. 1-2, and Grievant Ex. 1-2). The hearing concluded at 4:30 p.m. on September 24 following oral argument, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. BACKGROUND

At the time of his removal for client abuse, the Grievant was employed at the Youngstown Developmental Center (YDC) as an Activity Therapy Specialist 1. He had

been employed by the State for approximately ten years, seven of which were in foresaid classification. Until 1994 he met or exceeded performance expectations, but his 1994 evaluation contains several "below" ratings and comments on areas for improvement (Joint Ex. 7). No evaluation was submitted for 1995. He had one disciplinary action on his record, a two-day suspension for improper conduct/failure to accept a directive from a supervisor, and poor performance. This action was grieved in 1995, but the grievance was withdrawn the following year. The Grievant had received training on the physical intervention techniques approved for use (Controlling Outbursts through Preventive Exercise, also known as "COPE") (Employer Ex. 2) and was informed on and agreed to abide by Administrative Rules regarding unusual incidents, client abuse/neglect and restraint of residents (Union Ex. 1).

The incident that led to the Grievant's removal occurred at the MASCO Meshel workshop, which is operated by the Mahoning County Board of Mental Retardation and Developmental Disabilities (MC MRDD) and in whose programs some of YDC's clients participate. Although MASCO Meshel workshop staff is responsible for YDC clients while they are at the workshop, behavioral outbursts by YDC clients may result in YDC staff being summoned to escort the client back to the Center. One such outburst occurred on the morning of October 1, 1996.

The client involved has a history of verbal and physical aggression towards other clients and staff, and is on a program targeted towards modifying these behaviors. He may or may not have already been distraught when he arrived at Meshel that morning, but he did become upset later and eventually became verbally aggressive and started to remove his

clothing despite verbal intervention by Robert Sikora (an MC MRDD Workshop Specialist with eight years of seniority), who was working with the YDC group that morning. The room was cleared of other clients, and furniture was pushed aside. Sikora used physical restraint (a basket hold) when the client became physically aggressive towards him, taking him to a chair, giving him space, and generally letting him settle down. The Grievant and Rosalie Bland, who had been dispatched from YDC to pick the client up, arrived. According to Sikora and Wayne Bonner (an MC MRDD Workshop Specialist 2 with eleven years of experience who was summoned to the area) the client was under control until the Grievant told him it was time to go back to YDC. The client once again became verbally aggressive and spit at the Grievant. Sikora, Bonner and Bland all testified the Grievant then took the client from the chair to the floor and restrained him there, using a hold none of them knew to be proper technique from their training. According to these witnesses, the Grievant was on top of the client's upper body, holding his face while restraining his head on the floor. Bonner and Bland tried to keep the client from kicking. Sikora may have offered assistance, but the Grievant responded that he had it. The Grievant testified he knew from his experience with the client that he was escalating from verbal aggression to physical, so he slid the client off the chair and to the floor to get him into a COPE hold in order to achieve immediate neutralization. He further said he had not been trained on how to take a client from a chair to the floor and that the training he did receive was on calm trainers, not on agitated clients.

After a few minutes, the client quieted down, was released and began to exit the workshop, escorted by Sikora, Bonner and the Grievant, with Bland following. As they got

to the door, though, the client spit at the Grievant again, said Sikora and Bonner, whereupon the Grievant put his arms against the client, pushed him through the door into the hallway and pressed him against the wall. The Grievant testified someone warned him the client had tried to break windows in the hallway area, so he held the client's arms for safety, and it was this that made the client act out again, necessitating neutralization against the wall. In any event, the client then spit on the wall. Sikora and Bonner testified the Grievant put the client's shirt against the saliva on the wall, then lifted him up and down, rubbing his face in a wiping motion and saying, "You are going to clean this up." The Grievant says he used the Grievant's hand, not his face. Both Sikora and Bonner testified they thought the Grievant's actions in the hallway did not constitute proper restraint and Bland testified it was not proper COPE technique as she had learned it. Sikora testified he thought the Grievant was out of control because of the amount of force involved, so he stepped in. A two-person escort was employed to get the client to the van, where the Grievant placed him on the floor between the first and second rows of seats according to Sikora and Bonner, on the second seat according to the Grievant. The party of Bland, the Grievant and the client then returned to YDC.

Sikora filed an Incident Report that same day. Bonner did not, although he testified he did discuss it with the workshop director, John Ryan, that same day and did write a report two weeks later, on October 14. Neither the Grievant nor Bland completed an Unusual Incident Report upon returning to YDC. Bland testified she had been involved in a prior case that caused her to be shunned, threatened and closely watched by co-workers, and to have her property vandalized. Her fear made her reluctant to report what

she had witnessed, though she knew she should have done so. No one called Help Hotline. Youngstown Development Center did not learn of the incident until the case manager at MC MRDD returned from vacation and opened her mail (Joint Ex. 6, Employer Ex. 1). Cindy Renner, Program Director of YDC, testified she first learned of the case late on October 24 by means of a phone call. She requested the report, which she got by fax the next day. She then launched an internal investigation, identifying the staff involved and notifying the superintendent. The Grievant's statement was taken the following Monday, October 28, and Bland's on October 29. The Grievant was placed on paid administrative leave October 29 and informed of a pre-disciplinary conference to be conducted November 1. Quality Assurance Coordinator Mark Farran issued his report of the Major Unusual Incident investigation, which included interviews with and statements of Bland, Sikora, Bonner and the client, on October 31. The pre-disciplinary conference was held on November 1, with the Grievant, his Union representative and attorney in attendance. Neither side called any witnesses. An order removing the Grievant from his position was signed November 21, 1996. A grievance protesting this action was filed November 27, alleging violation of all pertinent articles of the Contract, in particular Articles 2, 24.01, 24.02, 24.04, and 24.05. Being unresolved at lower steps of the grievance procedure, the case was appealed to arbitration where it presently resides for final and binding decision, free of procedural defect.

Meanwhile, the case was investigated by Trooper Gerald Funelli of the Ohio Highway Patrol. He presented the case to Assistant Mahoning County Prosecutor John

Ausnehmer on January 20, 1997. Following discussion of the case, Mr. Ausnehmer declined to initiate criminal charges against the Grievant (Joint Ex. 5).

The Grievant filed for unemployment on November 25, 1996. Benefits were initially suspended by determination that he had been discharged for just cause, but this decision was reconsidered, then appealed and reversed by the Board of Appeals on March 19, 1997. The Employer stipulates it lost all subsequent appeals.

As to MC MRDD, Superintendent Charles R. Holden wrote a letter to Paul Young, Superintendent of YDC on March 17, 1997, in which he explained the delay in reporting the incident and states that "discipline has been issued to staff found to be negligent in their duty to follow established procedure" (Joint Ex. 6, Employer Ex. 1).

III. STIPULATED ISSUE

Did the Employer violate the Collective Bargaining Agreement when it removed the Grievant, Carson Keiffer, for client abuse? If so, what shall the remedy be?

IV. 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 or custody of the State of Ohio, the arbitrator does not have 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.

V. ARGUMENTS OF THE PARTIES

Argument of the Employer

The Employer argues that the main issue is whether the Grievant abused the client. It contends it presented credible testimony and evidence to carry its burden of proof. Trained professionals testified the Grievant had no reason to restrain the client to begin with, that he pushed the client's face to the floor using unnecessary and excessive force, and slammed him to the wall, pinning him there with his hands behind his back and lifting him by his arms to his tip-toes.

Against the testimony of eyewitnesses and the opinion of professionals (including a certified trainer) that these techniques were not proper, stands the Grievant's denials and unacceptable excuses. The Grievant tries to present himself as a good employee who was only trying to do his job under adverse conditions. He claims no one assisted him, but MASCO Meshel staff testified their offer was rebuffed. He relies on the client's history of aggressive behavior, but the Grievant was familiar with the client, was trained in how to handle aggressive outbursts, and had probably encountered such incidents before in his seven years as an Activity Therapy Specialist. As to the immediacy of the investigation and action taken, this should not be an issue, claims the Employer, as it has no bearing on the guilt of the Grievant, the only YDC staff present testified she was afraid to report it because of her experience in a prior case, Meshel staff who were derelict in reporting the incident were disciplined, and YDC acted as soon as it knew of the incident. YDC should not be held accountable for something over which it had no control. Regarding the Grievant's claim that the lack of criminal charges and outcome of unemployment proceedings should

bear on the outcome of this case, the Employer argues the arbitrator has an obligation under the Collective Bargaining Agreement to provide a review independent of collateral proceedings.

In support of its position, the Employer offers the Arbitrator Nelson's *Gilbert* decision (Parties' Case No. 23-13-941104-0850-01-04) which it contends is very similar to the instant one, there being no evidence of injury to the client, no immediate report, and no criminal charges filed. Yet the arbitrator in that case held injury is not a necessary element of abuse and, while he believed the employees were remiss in not reporting the incident, he held this did not excuse that grievant's behavior.

In conclusion, the Employer asks the Arbitrator to weigh the testimony of its two credible witnesses who had no reason to lie, who have worked in the field for a number of years and know the difference between proper and improper handling of clients. Against this is the self-serving testimony of the Grievant who did not deny taking the client to the floor or pinning him to the wall, but only gave a slightly different version of what occurred. It reminds the Arbitrator she has no authority to modify the discipline once she finds abuse has occurred, and asks that she deny the grievance in its entirety.

Argument of the Grievant

The Grievant argues that since the Employer filed criminal charges against him, his Constitutional rights to due process were violated when he was not permitted to confront the witnesses against him. Those witnesses, he contends, are less credible than he. He has many more years experience than the two witnesses from MASCO Meshel, he was familiar with the client and knew what was to be done. They were hesitant to testify, even to the

point of having to be accompanied to the arbitration hearing by their supervisor. They were just trying to save their jobs by doing as directed by their supervisor. The third witness, from YDC, was discredited by the investigator who contradicted her sworn testimony that she was told what the others said about the incident. She was the only person present in the van and the only one who saw the entire incident, yet her testimony is inconsistent and she was hesitant to testify. Two witnesses came forward long after the fact, and the statements of all the witnesses changed over time, each adding details in the retelling. By April 1997, they were virtually identical. If the incident was so serious, why were there no reports filed and the Help Hotline not contacted? And why was the client not examined by a nurse?

The Grievant maintains that the first statements are true and establish that he did not commit abuse. The client had been agitated for several hours when the Grievant arrived. The room, with clothes tossed around, furniture pushed to one side, and clients removed, signaled there was a problem. The client was aggressive and the Grievant took him to the floor not to harm him, but to protect himself and those in the room from physical violence. The statement of the client is unreliable, says the Grievant, but even he does not claim he was abused. The words he used were, "hard COPE."

In the view of the Grievant, YDC not only did not prove the charge, but if he were guilty, then YDC is too because it allowed him to stay and interact with the client for four weeks. He is a long-service employee of good work record whose life has been ruined by charges found false by both the county prosecutor and State unemployment board. The Arbitrator should not allow her mind to be clouded by the attempted submission of stale

discipline, and she should disregard testimony about discipline of MASCO Meshel employees that was stricken from the record on objection of the Grievant. She should find the Grievant not guilty, too, and return him to his former position and make him whole.

VI. OPINION OF THE ARBITRATOR

As the Ohio Supreme Court held in the parties *Dunning* case (59 Ohio St. 3d 177, 572 N.E. 2d 71), the parties' just cause standard for disciplinary action is modified by the third sentence of Article 24.01 for termination cases involving abuse. Therefore, the task before me is to determine whether the Employer met its burden to show by a high degree of proof that the Grievant committed abuse. In my opinion, it did.

The evidence against the Grievant comes from three eyewitnesses whose written statements and testimony before this Arbitrator, while not identical, agree in the main about what occurred and whether the techniques used were appropriate in light of what they had been taught. Only one of these witnesses (Sikora) saw the entire episode, each saw what s/he did from a different vantage point, and each described it different words, but their stories are essentially the same: When the client's behavior escalated after YDC staff arrived at the workshop, the Grievant used excessive force in a manner harmful and disrespectful to the client, counter to his training and outside the parameters of the client's therapeutic plan. He did so at least twice, once in the workshop when he put the client on the floor, restrained his upper body and pressed his face to the floor, contorting it with the force of his hold, and again in the hall when he pinned him to the wall and lifted him to his toes with his arms behind him. All three witnesses thought the Grievant was out of control,

one to the point that she was afraid to witness more, one to the point that he intervened though his previous offer to assist had been rebuffed.

The Grievant challenges the competence of these witnesses, however all three are experienced with this client population, and their evaluation of the propriety of the manual restraints used was confirmed by a fourth professional who, while not an eyewitness to the incident, is a trainer in COPE techniques and participated in training the Grievant.

Other efforts to discredit the testimony of these witnesses were similarly unsuccessful. Bland's admissions were against her own interest. Her stated reason for not coming forward immediately, as well as all three witnesses' reluctance to testify against a peer, is understandable, particularly in light of her prior experience. The Grievant offered no credible motive for his allegation that Bland and the other witnesses lied in their written statements or sworn testimony. None of the three had any bias against the Grievant or reason to conspire against him. They are not even employed at the same institution. While it is evident that the affidavits taken for the Employer's appeal of the unemployment decision differ in some degree from the earlier written statements and contain certain similar features among themselves, they are not identical as claimed by the Grievant. What similarity they do have can be accounted for in large measure by their having been evidently taken by the Attorney General's office by telephone. The fact that the witnesses' stories were not precisely the same as in their first statements is also not particularly remarkable. This is to be expected over time and retelling, especially when questioned by different examiners. The fact remains that the original statements, later ones and sworn testimony in arbitration do not differ in their essential elements. Moreover, when questioned about

her affidavit by counsel for the Grievant, Bland did not disavow its substance but said it was a true statement. She remained steadfast in her testimony despite her fear and the vigorous efforts of Grievant's Counsel.

The Grievant also raises issues of procedural improprieties, but also to no avail. The fact that Bonner and Bland did not give written statements for two or more weeks does not mean the incident did not occur as they described it. Neither does the Employer's failure to relieve the Grievant of his duties prior to learning of the allegations and initiating the investigation. Although MC MRDD and YDC staff did not fully meet their obligations in this matter, this did not materially undermine the integrity of the evidence against the Grievant, nor does it excuse his conduct.

The Grievant offers the excuse of self-defense. This defense is unproven. Sikora described the client to be as aggressive as he was earlier. No one described imminent extreme violence or real threat of serious injury. The Grievant testified his experience with the client indicated his physical violence was about to escalate, but this very experience, as well as his familiarity with the client's behavioral program and his training in intervention techniques and self-control, should have caused him to take appropriate, nonabusive measures.

The Grievant suggests the Employer attempted to cloud the mind of the Arbitrator by raising stale discipline and other evidence she excluded from the record. Arbitrators are neither judges nor juries. We must often hear inadmissable evidence in order to rule on its admissability. Mainstream arbitral practice is liberal admission because there is more danger we will hear too little than too much. In both cases it is then our duty to give

appropriate weight, including no weight at all, to what we hear, either on or off the record. Accordingly, none of the evidence ruled inadmissable played any role whatsoever in my decision. Similarly, I gave no weight to the decisions of the assistant county prosecutor or to the State unemployment board. As I have repeatedly stated, an arbitrator's decision must be based on the standards of the Contract and the evidence placed before him or her. Had the parties wished discipline for abuse to be adjudicated in other forums under other rules, they would have bargained for it.

Regarding the Grievant's due process and long-service arguments, having found the Grievant guilty of abuse, I lack the authority under the labor agreement to modify the termination even if I were so-inclined.

VII. AWARD

The Employer did not violate the Contract when it terminated the Grievant for client abuse. The grievance is denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
October 29, 1997