

#1234

IN THE MATTER OF THE ARBITRATION *
BETWEEN: *
*
OHIO DEPARTMENT OF MENTAL *
RETARDATION AND DEVELOPMENT *
DISABILITIES *
* Case # 24-07-(02-25-97)-
AND * 641-02-12
*
*
SERVICE EMPLOYEES INTERNATIONAL *
UNION, DISTRICT 1199 *

OPINION AND AWARD

ARBITRATOR: Dr. Mollie H. Bowers

APPEARANCES:

Representing the Employer: Carolyn Borden-Collins, Labor
Relations Coordinator

Representing the Union: Harry Proctor, Administrative
Organizer
David Regan, President District
1199 SEIU, AFL-CIO

District 1199 of the Service Employees International Union (the Union) brought this matter to arbitration challenging as without just cause the February 14, 1997, decision of the Ohio Department of Mental Retardation and Development Disabilities (the Employer) to discharge Fred Cullip (the Grievant). The hearings were held September 17, 1997, at 8:00 and October 14, 1997 at 9:00 a.m. in the Conference Room at the Gallipolis Developmental Center. Both parties were represented. They had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the other party. At the close of the hearing, the parties agreed to submit post-hearing briefs, which were received in a timely manner. The entire record has been carefully considered by the Arbitrator in reaching her decision.

ISSUE

The parties stipulated the issue in this case to be:

Was the Grievant's removal imposed for just cause? If not, what shall the remedy be?

FACTS

At the time of his removal, the Grievant had worked for the Employer approximately twenty years and held the position of Psychiatric Nurse at the Gallipolis Development Center (the Center or the GDC). On February 14, 1997, Director Jerome C. Manuel issued the Grievant a notice of removal for ~~Improper~~ Conduct: Failure to accept authority or supervision/Fighting on state property. The particular facts relied upon therein consisted of the following:

On or about January 02, 1997 at approximately 2:45 p.m., in building 6049, you were insubordinate by being argumentative and using abusive language toward Barbara L. Caldwell, your immediate supervisor.

On or about January 02, 1997, at approximately 2:45 p.m., in Building 6049, you struck Barbara L. Caldwell on the face with your hand/arm, causing her bodily harm.

Barbara ~~Barbi~~ Caldwell is the Director of Nursing at the GDC and had been the Grievant's Supervisor for approximately six and one half years. She testified the Grievant entered her office on January 2, slamming closed her door, automatically locking it. Caldwell related the Grievant's asking her if he would be paid overtime for work he had performed the day before. She testified

she was sitting¹ in her desk chair and recalled thinking this was the first time she heard about the overtime, which is normally pre-approved.

According to Caldwell, the Grievant said he had worked «forty «f[uck]’ing» minutes [of overtime] and you have the nerve to complain there is no sheets on the table.» Caldwell stated she apologized for the sheet problem, but expressed concern about the Grievant’s taking a supplies problem «out of the chain of command» to her Supervisor, Theda Covey. She recalled the Grievant reacted to her by becoming «more agitated» and she rolled her chair back into the angle of her work station. Caldwell stated, as they talked about aspects of the supplies issue, the Grievant became «really angry», saying «you stupid bitch, this has got to stop». With that remark, Caldwell said she asked the Grievant to leave, saying «I’ll have to call someone, then, to escort you out of here.»

Caldwell testified the Grievant knocked the telephone out of her hand as she picked it up. She said he also struck her on the right side of her head with his right hand, causing a slight cut/laceration above her right eye as her glasses flew off and landed on the floor. She related putting her hand to her head and trying to get up, but the Grievant was «standing over» her. She

¹In an Employee Clinic Report which Caldwell filled out that day, she said she was sitting at her desk when the Grievant entered. In a statement dated January 8, she said she was standing at the computer printer.

denied falling backward or forward, and hitting her head on the telephone/desk during the incident. According to Caldwell, she told the Grievant "I'm going to have to call for help", to which the Grievant replied "You big baby." Caldwell then screamed and yelled "I need some help in here" and heard someone outside her office try to open the door. She said the Grievant opened the door and R N Supervisor Jane Campbell and Dental Assistant Alonzo Burris were standing there. She told them the Grievant "hurt (or hit) me".

Caldwell recalled having a previous disagreement with the Grievant over his performance evaluation for the period 1994-1995. She noted his subsequent evaluation improved with respect to both the Grievant's performance and "attitude". Caldwell also said the Grievant once upset her by telling her, at an unspecified time, "You don't know what's going on" in the lab. There is no evidence the Grievant was ever disciplined for his conduct in either of those two situations.

Photos taken of Caldwell at 2:50 p.m. by Clarence "Chip" Kirby, Jr., Department Supervisor of Police, show a superficial laceration of approximately half an inch under her right eyebrow. Kirby testified he arrived at Caldwell's office after the incident and began an investigation by taking statements from numerous employees, including the Grievant and Caldwell. He presented that information at the Pre-termination meeting held

January 27, 1997. It was Kirby's opinion the Grievant gave two different accounts of how Caldwell received her injury. Kirby said the Grievant originally reported Caldwell started to get up, then fell back and ~~must have~~ hit her head on her desk. At the Pre-termination meeting, Kirby recalled the Grievant saying Caldwell raised her hands and ~~must have~~ hit herself in the head, knocking her glasses off.

Kirby also contacted the State Highway Patrol about the incident. The record shows the criminal charges brought against the Grievant on January 3, by the Gallipolis City Solicitor, were dropped on March 14, at Caldwell's request. She reportedly did not want to pursue the criminal charges and refused to testify in court.

The record contains a statement prepared by Jane Campbell dated January 2. In her statement, Campbell reported LPN Teri Gilliland came into her office yelling ~~Someone needs to go to Barbi's office NOW~~. When Campbell arrived at Caldwell's door, she looked through the glass portion of the door and saw the Grievant standing approximately three feet away from Caldwell, who was seated at her desk. Campbell ~~rattled~~ the doornob and the Grievant opened the door. All Campbell could recall hearing was the Grievant saying to Caldwell ~~you knocked the papers off your desk~~ and her response ~~get [the Grievant] out of my office, he hit me~~, while she was trying to call Security. Campbell

reported the injury on Caldwell face was a small superficial laceration approximately 1/4 inch with minimal bleeding. Campbell noted she called Security about the matter.

Campbell testified, when she entered the office, Caldwell was flailing her hands, and said "Help me, help me, Jane. Get him off me". According to Campbell, she told Caldwell there was no one else in the office at that time those comments were made. Campbell said she contacted Covey and another Department official, because Caldwell continued behaving in an hysterical manner.

Campbell recalled Caldwell telling her that morning, in a loud voice, about the Grievant's complaining to Covey about supplies and about his going outside of the chain of command to make this complaint. According to Campbell, Caldwell told her to bring the Grievant to her office to talk about the supplies problem, which Campbell characterized as ongoing. Campbell never saw the Grievant prior to the incident. She commented when she previously had been Grievant's supervisor, she had no problems with the him, remarking "[I] really admire and respect [the Grievant's] nursing skills."

Christine Mays testified she believes the Grievant is a good Nurse, based upon her work experience with him. She recalled the Grievant entering Caldwell's office. Later she remembered Gilliland saying "Come on, Barbi needed help". When she got to

Caldwell's office, Mays stated the Grievant was holding a notebook in his right hand and his face had a "shocked" expression. She recalled him saying to Caldwell "You know you threw your own papers on the floor." Mays testified the Grievant said "she's saying that I hit her." Mays recalled Mandy Van Bibber, RN asking the Grievant if he had hit Caldwell, to which the Grievant replied "No, I didn't." In her written statement, Mays recounted seeing the Grievant enter and approximately three minutes later leave Caldwell's office, at which time he said to Caldwell "you know you threw your own papers on the floor".

Kirby acknowledged Dorothy Nibert, RN was on his list of persons to interview about the incident but, largely through oversight, he did not do so until July 24, 1997. Nibert testified she did not make a statement initially about the incident because she "didn't want to get involved". She recalled the Grievant saying to Van Bibber and her subsequent to the incident "You guys better stick with me. I just hit Barbi." According to Van Bibber, the Grievant's statement to them was different.

Van Bibber testified she was standing near the hallway with Nibert after the incident, when the Grievant came by and said to them "You guys need to stick by me, because I'm supposed to have hit Caldwell. According to Van Bibber, Nibert stated and reiterated "He shouldn't have done that." Van Bibber said Nibert's comment prompted her to follow the Grievant to his

office, where she specifically asked him if he hit Caldwell, to which he replied "No". Van Bibber gave a statement the next day² to Kirby. It was similar to her testimony in this proceeding. She reported saying to the Grievant "Fred, you hit Barbi?", to which the Grievant replied "Hell no, that's what she's saying." Later she reported the Grievant telling her that he had not touched Caldwell, who had "jumped up from her chair and fell backward."

Kirby stated he initially did not think Dr. Jameshad Nuggud had any information about the incident and did not interview him. Nuggud provided a statement dated July 24, 1997, and testified similarly in this proceeding. He said he only came forward recently with information about the incident. According to Nuggud, he was in an office with two unidentified Nurses on January 2, when the Grievant told them "I don't want you all to leave, I need you all, I hit Barbi". The Grievant testified he could not recall seeing Nuggud after the incident.

Medical Director Dr. Rebecca Stafford testified she saw Caldwell's injury on January 2, and has seen similar injuries before. It was her opinion such injuries are commonly caused by contact with the lens, rim or hinge of a pair of glasses. Stafford opined the injury could not have been sustained from falling backwards. Had the injury been caused by impact with a desk, according to Stafford, there would have been more marks and

²Van Bibber gave a similar statement to the Ohio State Highway Patrol on January 3.

the would have been splayed, rather than a laceration. Stafford observed Caldwell's glasses on the floor and described them as "grossly bent". She did not provide a statement as part of the initial investigation conducted by Kirby.

The record contains statements from other employees Kirby talked with as part of his investigation. The parties stipulated to the statements, avoiding the need to call as witnesses the employees who wrote them. It was also stipulated "if other witnesses for the Union testified, they would say the Grievant was professional and didn't raise his voice." All the written statement are dated January 3, or 7, 1997. In his statement, Alonzo Burris reported hearing "yelling and screaming come from Barb's office ... when the door opened [the Grievant] walked out..."

In her statement, Rita Hager reported seeing the Grievant near Caldwell's door, and heard Caldwell say the Grievant hit her, which "stunned" the Grievant, who "said something to the effect that she's wanting us to believe that." Hager later heard the Grievant say "he hit Barbi (but when he said this, I took him to mean that is what Barbi was accusing him of)". Hager said she heard the Grievant later explain to Dr. Villanueva³ about Caldwell "falling or tripping, hitting her head, but she was accusing him of hitting her" [the rest of Hager's statement is

³Villanueva did not testify in this hearing, nor was a statement apparently ever taken from or furnished on his behalf.

not legible].

Gilliland's statement noted she sought out Campbell for help after she heard yelling from Caldwell's office. She went to Caldwell's office with Campbell and other employees. When the door opened she saw the Grievant standing by it. She left the area, returning to the Clinic.

The Grievant testified he never had been disciplined previously and he had a good work record. He discussed Dr. Villanueva, the physician on duty January 1, being upset with the lack of supplies and his asking the Grievant to report the problem to Covey, who is the head of professional services. The record contains Physician Progress Reports for December 21, 27, and January 1, commenting on shortages of supplies. The Grievant said Caldwell is ultimately responsible for making sure supplies are available. On the afternoon of January 1, the Grievant e-mailed Covey about the supply problem Dr. Villanueva complained about, and sent a copy to Caldwell. The e-mail stated:

THEDA, WE HAD A LACERATION TODAY WHICH DR.V SUTURED IN OUR E.RM.. THE E. RM. IS NOT WELL STOCKED. THERE IS NOT A SINGLE SUTURE TRAY IN THE CABINET. WE WERE FORCED TO MAKE DO WITH ODDS AND ENDS. THIS NEEDS TO BE CORRECTED. LACERATIONS ARE NOT UNCOMMON HERE. IN THE OLD DAYS A MINIMUM OF FIVE SUTURE TRAYS WERE TO BE READY IN THE E. RM GLASS CUPBOARD AT ALL TIMES. THERE WERE NO STERILE GLOVES. THE FIRST SET OF GLOVES I RUMMAGED OUT OF THE CLINIC WERE SO OLD THEY WERE ROTTEN AND HIS HAND WENT RIGHT THRU THEM. WE HAD TO USE A PAN OF INSTRUMENTS TO COME UP WITH SOMETHING TO SUTURE WITH. THERE WERE NO STERILE DRAPES TO COVER THE WOUND. A SUTURE TRAY IS A BASIC. I SPENT A LOT OF TIME TRYING TO GET SOMETHING READY FOR THE PHYSICIAN. DR. VILLANUEVA WAS UPSET WITH THE "LACK OF SUPPLYS". IT REALLY NEEDS TO BE CORRECTED. THANKS.

The record contains an e-mail from Caldwell to the Grievant dated January 2, 1997, at 9:29 a.m., responding to his e-mail to Covey about the supplies problem. It provides, in pertinent part: ¶I personally put 2 large and 2 small suture trays in the ER cabinet on Tuesday. These comments are totally out of the chain of command. What is it you hope to accomplish with this e-mail?¶ [Emphasis in original]

The Grievant sent Caldwell an e-mail response at 9:55 a.m. stating in relevant part:

if you put two small suture trays in Tuesday. The little elves came and got them. Don't get bent out of shape. I'm not making things up. I and the other living area R.N.'s are tired of working without proper supplys [sic]. The point of the E-mail is to get the situation fixed. The physician was upset over the ¶lack of supplys¶ [sic] and asked me to notify Theda [Covey]. I did that and forwarded the same to you. I and the other front Line R.N.s should not be expected to stock and supply the E.Rm. And the Clinic.

The Grievant said after entering Caldwell's office, he closed the door, because he is hard of hearing and he wanted to reduce the hallway noise when he spoke to her about the supplies problem. The Grievant believed Caldwell had been ¶upset¶ over the e-mail messages about the supplies problem, but he did not think he was being insubordinate in addressing those medical concerns to Covey and to Caldwell.

The Grievant said Caldwell was ¶computing¶ when he entered her office. According to the Grievant, he asked if he could speak to her, to which she replied ¶Okay¶, got up, and sat in the swivel seat at her work station. He said he stood in the center of the office throughout the approximately two minute conversation with Caldwell. He characterized his discussion about

working overtime the day before as not ¶argumentative¶, but rather to ¶make a point¶ in response to Caldwell's comments about his not making sure linen had been set out. Additionally, the Grievant said he told Caldwell he had asked the P.M. Nurse to put the linen on the emergency room table.

According to the Grievant, Caldwell did not respond to his explanation of the linen matter. Rather, he stated she was ¶very angry¶ about his by-passing her by e-mailing Covey regarding the supplies problem. He recalled her yelling ¶do you take orders from Dr. Villanueva¶, to which he answered ¶Yes¶, not thinking about chain of command issues at the time. The Grievant said Caldwell ¶screamed¶, ¶I am your Supervisor¶, threw up her hands, jumped from her seat. As she did that, the Grievant said, Caldwell's feet slipped, she fell back in her chair, twisting to the left⁴ and knocked the phone off the hook. He said Caldwell had her hands ¶up to her face¶ and he saw a small spot of blood on her face.

On cross-examination, the Grievant said Caldwell ¶slammed her right hand down when she screamed she was his Supervisor¶, and that was when she began to lose her glasses. According to the Grievant, her glasses completely dropped off, when she jumped up and put her hands to her face.

In his written statement of January 2, the Grievant

⁴On cross-examination, the Grievant described the chair as ¶kind of scooted¶ or ¶jiggled¶.

reported, after Caldwell said he was to take orders from her, she got out of her chair and as she got up she slipped and fell backwards. Her glasses fell over and she struck her head against something as I saw a small cut on her [right] eyebrow. However, the Grievant acknowledged on cross-examination, he did not see her strike her head. He explained the written statement reflected his assumption, based upon the spot of blood near her eyebrow.

The Grievant testified Caldwell screamed for help, saying he had hit her, which froze him for approximately 30 seconds. He recalled hearing some noise at the door, he opened it as Campbell entered, and he left. He denied ever hitting Caldwell or getting any closer to her than approximately five feet. The Grievant said he was stunned by the incident and knew I was going to have to get some help. He remembered seeing Van Bibber at Nibert's office and her asking him what had happened, to which he replied You guys got to stick with me, I supposedly hit Barbi, that's what she is saying.

In his January 3, statement to the Highway Patrol, the Grievant is reported to have said, after Caldwell screamed she was his Supervisor:

she jumped out of her chair. She lost her balance. As she was getting up she fell backwards into her chair, face forward into the edge of her desk area, her glasses dropped off. She turned around, the phone, she jostled off the hook. She turned around screaming. She had a little tiny place on her uh, right eyebrow. She was screaming, you hit me. You hit me.

According to the Grievant, Caldwell had yelled and screamed before. In the January 31, 1997, Pre-Disciplinary Hearing Summary, Hearing Officer John Matthews concluded "There is JUST CAUSE that [the Grievant] was insubordinate to his immediate supervisor, Barbara Caldwell, and that he struck her on the face." As part of his decision, Matthews found, among other things:

The union's stand that screaming/yelling and profanity was typical behavior of Ms. Caldwell was affirmed by witnesses. Ms. Campbell said that Ms. Caldwell could "be physically aggressive in the presence of others;" Ms. Gilliland said it was "more typical than atypical for her (Ms. Caldwell) to scream;" Ms. Mays and Mr. Cullip further supported this type of behavior. However, Ms. Gilliland was the first to hear Ms. Caldwell's yelling on the date/time of the incident, and was the first person to attempt to open the door. When questioned by the Hearing Officer as to why she tried to get into the room if yelling and screaming was typical, Ms. Gilliland said that unlike the other yelling before, this "was the type of yell one would respond to", because it "sounded like Ms. Caldwell needed help." Ms. Campbell also indicated that Ms. Caldwell was in a state of hysteria when she and the others came in the room.

POSITIONS OF THE PARTIES

Employer Position

The Employer contends the removal was for just cause and the grievance should be denied. It maintains the Grievant's insubordinate and physically abusive misconduct was unjustified. According to the Employer, the Grievant "escalated the discussion" with Caldwell to its "heated and violent conclusion." The Employer points out that the Grievant's e-mail about the

supplies problem was provocative by being sent to Covey and by the terms used. The Grievant, the Employer emphasizes, was also the aggressor in the discussion by his using the overtime matter just to make a point. The Employer stresses the Grievant's resentment against Caldwell is evidenced in his response to her 1995 unfavorable evaluation of him, in which he admits to staying mad a long time.

The Employer contends the Grievant's versions of the incident were neither consistent nor credible. It emphasizes the Grievant's self interests undermine his versions of what occurred. According to the Employer, Caldwell's version was consistent, more credible, and offered without prejudice. The Employer points out her version was supported by the credible testimony of Nibert and Nuggud, whereas the testimony supporting the Grievant was offered by Campbell, Van Bibber, and Mays and was motivated by their interest to help their friend, the Grievant. The Employer notes although Nibert's and Nuggud's testimony was not relied upon when the removal decision was made, they corroborate the credible Caldwell account of what transpired. According to the Employer, Stafford's unrebutted testimony about the nature of the injury sustained by Caldwell contradicts the Grievant's accounts about how the injury was sustained.

Union Position

The Union contends the Employer failed to show with clear and convincing evidence the removal was for just cause. Consequently, the Union asserts the grievance should be upheld and the Grievant should be made whole for all lost wages and benefits. Only the Grievant and Caldwell know what actually occurred at the time of the incident. The Union argues Nuggud's and Nibert's statements were given well after the removal decision was made and, thus, those statements and the testimony of these witnesses should have no bearing on that decision or on the outcome of the instant proceeding.

The Union maintains Caldwell's versions of the incident were not totally consistent and were contradicted by the Union witnesses. It stresses abusive language is uncharacteristic behavior for the Grievant and he was ~~collected~~ when he left Caldwell's office. In contrast, the Union points out Caldwell was angry about and upset by the Grievant's e-mail complaining to Covey about the supplies which are Caldwell's responsibility. According to the Union, Caldwell's state of mind can explain how she was injured in light of Grievant's account of her knocking off her glasses by throwing up her hands.

ANALYSIS

The Employer has the burden of proving the Grievant's removal is supported by sufficiently reliable evidence he engaged in the misconduct charged in the removal decision. There

is no dispute the charges are serious infractions for which, if proven, discharge would be the appropriate penalty. Physical violence cannot be tolerated in the work environment. Similarly, insubordination involving abusive language of the nature claimed herein can warrant removal for just cause if supported by sufficiently clear and convincing evidence.

The critical issue in this case is whether the Grievant engaged in the misconduct as charged. The only two people present when the alleged misconduct occurred were Caldwell and the Grievant, both of whom are parties at interest and gave very different accounts of what happened. In such circumstances, it is essential to carefully examine the credibility of their testimony, as well as circumstantial evidence which strengthens or weakens the assertions made. Well recognized tests exist for assessing credibility, such as observation of witness demeanor, reasonableness of testimony provided, existence of conflicts with other evidence, and plausibility of testimony when weighed against ordinary experience and common sense. Based upon the record in this case, the Arbitrator finds and concludes Caldwell's version of the incident is neither a sufficiently credible nor a reliable basis upon which to sustain the Grievant's removal.

The fact the Grievant has an interest in the outcome of this case does not automatically discredit his testimony. Caldwell,

too, has her own interest because of her supervisory status and of her responsibility for emergency room supplies. The Employer's contention the Grievant had a long standing animus towards Caldwell because she, not he, got the position she has held for over six years is merely an assumption. If he had been so motivated, then such antagonism would have surely surfaced previously. Caldwell testified about two prior incidents in which the Grievant disagreed with her. Neither of these incidents rose to the level of discipline and, thus, do not constitute evidence of animus on the Grievant's part.

Additionally, the Grievant's testimony he had never been disciplined in his twenty year's service at the facility was not rebutted. In fact, Caldwell said his attitude improved after his last evaluation. That is consistent with the positive testimony of Campbell and other Union witnesses praising the Grievant's professional behavior. Such testimony cannot be discounted merely by the Employer's contention all those witnesses were his friends. No such prejudice was established by the facts of this record. The only other evidence about either Caldwell or the Grievant having the potential to be verbally abusive is contained in the Pre-termination Hearing Officer's finding concerning Caldwell's propensity to yell and curse during business hours.

Both parties recognize the confrontation between the Grievant and Caldwell was a direct result of the exchange of e-

mail concerning the supplies problems. Looking at the correspondence exchanged, a neutral observer is struck by the intensity of Caldwell's reaction in which she was very defensive of her authority and of her role with regard to the supplies in question. She underscored those elements in her e-mail and questioned the Grievant's motive for raising the matter.

It is clear from the record there was an on-going supplies problem as evidenced by Dr. Villanueva's notations about that situation prior to the January 2, incident and by Campbell's testimony on that subject. In that context, the Grievant's raising the supplies problem cannot be considered unreasonable; nor does the Employer assert the Grievant was insubordinate by so doing. Obviously, such problems are in the Employer's interest to know and to correct expeditiously. While the Grievant possibly could have shown greater tact by addressing the complaint to Caldwell first, instead of Covey, that does not make him insubordinate.

Not only was Caldwell upset by the Grievant's complaint about the supplies problem, but also she had to wait until the next day to address the matter with him. The morning of the incident, it is unrebutted, she complained to Campbell in a loud voice about wanting to see the Grievant for going over her head about the supplies problem. Under these circumstances, it is reasonable to conclude Caldwell was very agitated when the

Grievant entered her office to discuss the matter. Again, the Grievant could have been more tactful by not bringing up his groundless overtime ~~complaint~~ at that time, merely ~~to make (or score) a point~~. That behavior was not the basis of the insubordination charge, however.

Other than Caldwell's testimony, there is no evidence the Grievant was as angry or agitated as she was when he entered her office. In that context, Caldwell's version of what occurred is not obviously or necessarily more reliable than the Grievant's. Her testimony is also undermined by her assertion that, after the Grievant allegedly struck her, he ~~stood over her~~ while she screamed for help. It was at that time, Caldwell said she heard someone at the door. The problem with this account is Campbell's testimony she was at the door trying to get in and saw through its window the Grievant standing approximately three feet away from Caldwell. Campbell's testimony is more consistent with that provided by the Grievant that he stood, throughout the encounter, in the middle of the office. Based upon these considerations, it is difficult to credit Caldwell's account of the Grievant assaulting her.

The Employer's reliance upon the testimony of Nibert and of Nuggud is misplaced. Their alleged knowledge of the incident was not relied upon by the Employer in making the decision to remove the Grievant. Rather, it was not until approximately six months

after the incident that they first provided statements regarding the incident. Those statements and their testimony in support thereof have other deficiencies. Nibert's account of the Grievant saying to her that he hit Caldwell is contradicted by Van Bibber's contemporaneous statement, as well as by her testimony.

Nuggud, in his written account, refers to the Grievant saying he hit Caldwell in his presence and that of two Nurses. Neither of those Nurses was identified, nor did they make a contemporaneous statement or testify in this hearing. No explanation was offered by the Employer for these omissions. Nuggud's account also is contrary to the contemporaneous statements of Van Bibber and Mays, in addition to the Grievant's denial that he said he hit Caldwell.

Stafford's testimony essentially verified the undisputed fact Caldwell sustained a cut above her eye caused by some unspecified contact to her glasses. While it may seem crucial to determine what actually caused that contact, for the reasons discussed above, there is no sufficiently clear and convincing evidence the Grievant struck Caldwell causing the injury. Therefore, it is not necessary for purposes of this determination to find precisely what caused the injury. However, it must be noted that upon entering Caldwell's office, Campbell observed Caldwell flailing her hands and behaving in a very agitated manner, repeatedly saying to get the Grievant off her, even

though he had already left the room. Campbell was so concerned about Caldwell's behavior that she reported the matter to Covey and another Departmental official. Under the totality of the circumstances, it is not be unreasonable to conclude Caldwell, being in such an agitated state both prior to and during her meeting with the Grievant, accidentally struck herself causing the injury.

Based upon the foregoing, the Employer has not demonstrated with sufficiently reliable evidence the Grievant committed the misconduct upon which the removal action was based.

AWARD

The grievance is sustained. The removal was not for just cause and shall be rescinded. The Grievant shall be reinstated to his former position and be made whole for any lost wages (minus appropriate deductions) and benefits as a result of the removal action.

Dated: November 26, 1997

Mollie H. Bowers
Mollie H. Bowers, Arbitrator