#1420

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 24-07-980820-779-01-04
and	*	
	*	
OHIO DEPARTMENT OF MENTAL	*	Alan Ward, Jr., Grievant
RETARDATION AND	*	Removal
DEVELOPMENTAL DISABILITIES	*	

APPEARANCES

For the Ohio Civil Service Employees Association:

Barbara Follman, Staff Representative
Herman S. Whitter, Esq., Director of Dispute Resolution
Ohio Civil Service Employees Association

For the Ohio Department of Mental Retardation and Developmental Disabilities:

Carolyn S. Borden-Collins, Manager, Office of Labor Relations
Toni Brokaw, Labor Relations Officer
Ohio Department of Mental Retardation and Developmental Disabilities

Pat Mogan, Team Leader
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 10:20 a.m. on November 23, 1999, at the Gallipolis Developmental Center in Gallipolis, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is 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 or affirmed, and to argue their respective positions. Testifying for the Ohio Department of Mental Retardation and Developmental Disabilities (the "State") were Chip Kirby, Police Department Supervisor; Laura Sexton, Qualified Mental Retardation Professional; Dr. Rebecca Strafford, Medical Director; and Eric Young, Program Director. Testifying for the Ohio Civil Service Employees Association (the "Union") was the Grievant, Alan Ward, Jr. Also in attendance were Robin Bledsoe, Labor Relations Officer, Gallipolis Developmental Center; and Sandra McCreedy, OCSEA Chapter President. A number of documents were entered into evidence: Joint Exhibits 1-7 and State Exhibits 1-4. The oral hearing was concluded at 3:15 p.m. on November 23. Written closing statements were timely filed on December 23, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of his dismissal on August 19, 1998, for physical abuse of a client entrusted to the care of the State of Ohio, the Grievant had been a Therapeutic Program Worker (TPW) of good record at the Gallipolis Developmental Center (the "Center") for two years. The incident leading to the charge of abuse occurred on June 20, 1998. Two pertinent unusual incidents in Living Area 6047 during the evening shift that day were reported. One of these was a client going AWOL. The other was an injury to a 5'8", 185 lb., nonverbal client (Tony P.) reported by the Grievant to have occurred in the dining room at 6:30 p.m. near the end of dinner. According to the Grievant, this client knocked over one chair and fell against another while trying to run into the kitchen to steal food. Observing that the client was limping and had nicks on his lips, the Grievant notified the LPN and filed an unusual incident report. He testified that he was present when the nurse examined the client, and that the client did not flinch or show bruises.

The next day, TPW Tammy Pearson (who did not testify) reported that the Grievant's unusual incident report was erroneous because she had seen the client bleeding at about 4:45. She also told the Grievant at the time that she would not "go down" for him if something happened to the client. When interviewed, she further stated that she had seen the Grievant and another TPW, Mark Brown, strike the client in the past, but had not reported it before because she was afraid of her co-workers. She also felt these staff had set her up with respect to the client who had gone AWOL.

After these allegations were reported to the Center's Police Department Supervisor, Chip Kirby, interviews were conducted and statements taken from other witnesses. Brown

(who did not testify and who is no longer employed by the State) supported the Grievant's report that the client's only injury was the result of falling over some chairs. He also denied slapping the client and stated that Pearson threatened to take other staff down with her if she got in trouble over the AWOL client. When the Grievant was interviewed, he repeated his previous claim that the client had tripped over some chairs. Like Brown, he claimed Pearson had threatened him about the AWOL incident.

Kirby also interviewed clients on the Grievant's side of the living area. One of these, Bernie H., has good use of language. He did not testify during the arbitration hearing, but a videotape of his interviews was admitted into evidence without objection. In his first interview, he said that the client Tony P. was hurt by another client, Tony D., who had been told by the Grievant to "take care of him" and that TPW Brown had been watching. He said that Tony D. had thrown a chair at Tony P., hit him with his fist, pushed him down on the floor and pushed him back on a chair. He said variously that this happened after supper, during supper, and before supper, at about 4 o'clock while they were watching a baseball game on television.

The next morning, June 22, the client was examined again and found to have a swollen left ear, a healing laceration on the inside of his upper lip, bruising on the left side of his upper abdomen, three different sites of trauma blending into each other on the upper left side of his chest, two bruises on his upper left arm, and one on his upper right arm. Dr. Rebecca Strafford testified these injuries were not consistent with a fall except possibly down a flight of stairs. There were large, widely separated injuries and none to his lower body. On cross-examination she explained that it would take some time for bruises to become visible on this

client, who is African-American, because of the dark pigmentation of his skin. Kirby testified that multiple injuries on several planes of the body would be unusual for a simple fall and more consistent with repeated strikes to the body.

Kirby's investigation continued with TPW Keitha Williams, who had been working overtime that evening. In her interview she stated that Pearson mentioned "something to do with a client being hit," and named Tony P. She thought this was before dinner, and when she saw the client before dinner, he was sweaty, acting groggy, and leaning to one side (Joint Ex. 4-34), but she did not see any acts of abuse. This witness, like the other staff and clients in Living Area 6047 that day, did not testify in arbitration.

Pearson was interviewed a second time. In this interview, she again stated she had seen Brown strike the client. She also said the Grievant was sweating when he came to get Williams for a phone call before dinner and that he explained it was because the client "was blowing" (Joint Ex. 4-25). In her second interview later that day, Williams corroborated what Pearson said about the Grievant's physical condition and his explanation for it.

During that same day, Program Supervisor QMRP Laura Sexton informed the investigator that Bernie H. had more information, so Kirby interviewed him a second time with Sexton's assistance. In this interview, Bernie H. stated that the Grievant and Brown held Tony P. down and "took care of him" because he had been trying to steal food (a targeted behavior of this client's program). They "kicked the shit out of him" after shift change, around 4 or 4:15, he said, but did not hurt him too much. Tony P. "got his mouth busted." The client described and demonstrated Tony P. being kneed, kicked, and swung at with a two-handed fist (Joint Ex. 4-45, State Ex. 4). He also insisted he was telling the truth about this. Sexton, who

works with this client on a daily basis, testified she believes this second explanation to be the true one because, amongst else, this client has a history of making false accusations to benefit himself, but then later recanting. He seemed more at ease in the second interview, did not avert his eyes as much, and volunteered emphatically three times that he was telling the truth. As for the first version, he said that while it is true that Tony D. is aggressive towards others, the fact that Tony P. and Tony D. live in the same house indicates an absence of continual problems between the two.

On July 28, the State conducted a pre-disciplinary hearing for the Grievant on two counts of Physical, Psychological or Verbal Abuse, a Category A offense calling for removal on the first instance. The hearing officer found insufficient cause for one count, but just cause for the second count, striking "client Tony P. with your feet and/or knees." The Grievant was accordingly removed from his position of Therapeutic Program Worker, effective August 19, 1998.

This action was grieved on that same date and thereafter processed through the grievance procedure without resolution to arbitration, where it presently resides, free of procedural defect, for final and binding decision. In arbitration, the Grievant again denied that he hit the client, whom he said was his favorite, despite being a difficult client.

III. ISSUE

The parties presented separate formulations of the issue, from which the Arbitrator constructed the following:

> Did the State violate Article 24 of the Collective Bargaining Agreement when it terminated the Grievant for abuse? If so, what shall be the remedy?

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 3770.0291). (Joint Ex. 1)

V. ARGUMENTS OF THE PARTIES

Argument of the State

The State argues that it proved the Grievant abused the client, Tony P. It submits that there is a causal link between Bernie H.'s second explanation of what occurred and Tony P.'s injuries. No such link exists either in the Grievant's explanation or Bernie H.'s first account. With respect to the Grievant's story, State witnesses testified that Tony P. is too big to fly across chairs. Moreover, there were no injuries to his lower body as would have occurred had he tripped and fallen. With respect to Bernie H.'s first account, the actions he described Tony D. taking (throwing a chair and punching in the mouth) would have had to be repeated and applied with a great deal of force to have caused Tony P.'s injuries and they would not have injured the inside of his arms. In addition, as testified by QMRP Sexton, these alleged actions are inconsistent with Tony D.'s personality. By contrast, Bernie H.'s second account is consistent with Tony P.'s behavior and injuries. The abuse was the result, he said, of Tony P.'s attempts to steal food, a documented behavior of this client. The injuries would have been the effect of some sort of impact and could have been caused by the kicking described by Bernie H.

The State contends that Bernie H.'s testimony is more credible than the Grievant's. The Grievant had an incentive to distort the facts and did indeed testify beyond what a reasonable person can believe. It is simply not plausible that Tony P. tripped and fell because his injuries are not consistent with such an occurrence. As for Bernie H., his mental retardation is no reason to discount his testimony as the Union so cavalierly does. The State has been open about his two versions of what happened and it has presented substantial evidence why the second one is credible. The record establishes that his false accusations have always involved himself as he makes things up for personal gain. When he does this, he always recants. This, submits the State, is exactly what occurred here: he told one story, then recanted it with the truth. The State points out that in his second statement, Bernie H. was specific and accurate on many facts independently established, he had more frequent eye contact with the interviewers, and he declared his truthfulness. The fact that he accepts abusive actions as the norm indicates that he was not trying to get the Grievant in trouble, but simply reporting a normal occurrence in that living area.

Finally, the State submits that the Grievant's removal was consistent with Department policies. His conduct fits the guidelines on physical abuse for which discharge is appropriate. It reminds the Arbitrator that the Collective Bargaining Agreement does not permit her to modify the termination in such cases and asks that she deny the grievance in its entirety.

Argument of the Union

The Union argues the State did not meet its burden to prove by clear and convincing evidence that the Grievant committed the act alleged. Its evidence is circumstantial and speculative, lacking credible direct witness testimony of what occurred. Its entire case rests on

the videotaped statement of the client Bernie H. The Union did not object to the introduction of the tape because it believes it speaks for itself: the client gave two different stories, each emphatically told, and each contradicting the other. To begin with, the client did not come forth to make accusations about what occurred. Police Department Supervisor Kirby approached him after hearing accusations by a TPW who is no longer with the Department and whose motives are questionable on account of what was going on in that living area that day. Second, the four witnesses who did testify at the arbitration hearing all said that Bernie H. is known to lie, has lied to them, and could be bribed. Third, QMRP Sexton, who opined that the second interview was the credible one, has an interest in having it held so because she was the one who conducted it, despite it not being in her job description nor having had any training in investigatory interview techniques. The Union submits that Bernie H. acts to please her and would say whatever he thought she wanted to hear. It points out that his eyes shifted during both interviews, not just the first one.

The Union contends that, contrary to the State's claim, the Grievant's statement about Tony P. tripping and falling over some chairs was not undermined by Dr. Strafford's testimony. She did not witness him running full force into two chairs, which the Union submits is more than the "simple fall" Strafford said could not cause his injuries. Moreover, she did not examine him for two days. Her testimony does not rule out the possibility that Tony P.'s injuries were obtained through more than one incident and she did not tie his injuries to the Grievant. Only the statement of the unreliable witness, Bernie H., does so.

The Union concludes that the State was reckless and irresponsible in pursuing this discharge for abuse. It asks that the grievance be sustained and the Grievant reinstated as

Therapeutic Program Worker within two weeks of the award with no loss of back pay, benefits, service credits, seniority, shift differential, and overtime opportunities. It further requests restoration to the Union of unpaid dues.

VI. OPINION OF THE ARBITRATOR

The only real task for the Arbitrator here is a credibility determination. Three vastly different accounts for how the client sustained his injuries were provided. The question is, are any of them true?

I cannot find that the injuries documented on June 22nd and 24th were the result of falling over chairs, even if the client had run headlong into them. First, I do not see how, given the Grievant's hand-drawn diagram, he could have reached "full force" speed by the time he encountered the first chair, and it seems unlikely that anything less than full force would produce the injuries exhibited in the diagram and photographs. Second, there were no lower body wounds as one would expect in a trip-and-fall case. Third, that multiple planes of his upper body, including both inside and outside his left arm, were affected militates against the Grievant's conclusion.

Also undermining the trip-and-fall theory is the fact that no one besides TPW Brown, who also stands accused of abusing this client that afternoon, reported this alleged dining room accident. Bernie H., who was present at the time this would have occurred and who has the verbal capacity to report what he observed, made no mention of it in either of the two interviews in which he was asked about Tony P.'s injuries, despite being probed about dinner time. The Arbitrator is left wondering if such an incident even occurred or, if it did, whether

it was exaggerated to cover what really happened to Tony P. that day. In short, I accept the physician's and investigator's opinion that the client's injuries were not caused by *tripping* and falling over chairs.

Of course, just because the client was not hurt during dinner, it does not necessarily follow that he was abused before dinner or that the Grievant was his sole or co-abuser. Since the LPN who examined the client at 7:25 p.m. that evening only noted limping (missing the "nicks on lip" earlier seen by the Grievant), the only direct evidence for that time and the Grievant's involvement comes from Bernie H. Although this client is only mildly mentally retarded and possesses good receptive and language skills, he presents a difficult question of credibility by virtue of having told two completely different stories of how Tony P. came to be hurt. It was on the basis of this that the Union moved for dismissal at the conclusion of the State's case in chief, arguing that the State had failed to bring clear and convincing evidence of the Grievant's guilt. Because of the nature of the charges and grave consequences of the case's outcome, careful consideration must be given to the client's conflicting stories and what evidence there is for and against each. I therefore denied the motion so as to give the record a thorough review. In so doing, I viewed the videotape and read its transcript a number of times. I also considered what weight, if any, to give the QMRP's opinion of the Grievant's veracity, and searched the record for both supportive and undermining evidence.

My own independent judgment is that the first interview cannot be relied on. To begin with, this version is internally inconsistent with respect to the time of day in which the incident allegedly took place (before, during and after supper), Tony D.'s motivation (he got mad at Tony P., he was told to "take care of him"), and what form the attack took (e.g., the bloody

lip was the result of being hit in the mouth by a fist, it was from a fingernail scratch). The only way the first story can be true is if the one client repeatedly aggressed the other a number of times over several hours while the TPWs watched but did nothing, including writing one or more unusual incident reports, which any TPW of two years seniority would know to do if only for self protection. Even then not all the inconsistencies would be resolved. This possibility is so remote that I conclude, as the QMRP did, that Bernie H. was being untruthful in his first interview.

The second interview does not suffer from the same problem of internal inconsistency that the first one does. Bernie H. is unwavering in fixing the time at around 4:15. He provides anchor points accurately bracketing that time: after the shift change, during the ballgame, and before dinner. Statements of the two female TPWs support the before-dinner time period. Bernie H.'s demonstration and description of the attack are consistent with the injuries documented the morning of the 22nd and photographed on the 24th. The client was held down. He was kneed in the mouth, kicked in the arm, and punched. As for Bernie H.'s nonverbals, I have no reason to overrule the QMRP's assessment. Having worked with the client for a number of years, she is in a better position than I to interpret his nonverbal behavior. The Union argues her investment in the interview she conducted clouds her judgment, but there is nothing she said that I could take issue with and my own independent judgment is that the client was more relaxed and confident in the second interview than in the first. The Union also points out that Bernie H. can be bribed, a fact the State's witnesses concede. However, no plausible theory was offered to explain why the QMRP would induce the client to change his story. TPW Pearson may have had such a motive, but it is hard to see

how she would have had the opportunity to make an offer and plant a new coherent story in his mind between the evening of the 21st when the first interview was conducted and mid-day on the 22nd when the second one was, since Bernie H. states she did not work on Saturday (the 21st) and she was interviewed at home on that date. Indeed, it seems more likely to me that the first story was induced by a bribe or desire to please than the second one was, for only in the first one is Bernie H. fixated on his own rewards and punishments: he had been "bad," he was being "good," he had/did not have/was going to get cigarettes or pop, and his birthday was coming up and he wanted the interviewer to give him money for it. He even mentioned that TPW Brown would buy him pop if he were good. The Union also suggests that Bernie H. may have been telling the QMRP what he thought she wanted to hear. I agree that this is a possibility, but have no reason to believe that he thought she wanted him to accuse staff of abuse. Given his history and their relationship, it seems more likely that he would think she wanted the truth, whatever it was.

Finally, Bernie H.'s behavior program and his file of unusual incidents support the QMRP's testimony that when he falsely accuses staff he depicts himself as the victim in order to obtain something he wants. This is consistent with his social cognitive level of functioning. However, it is evidently an infrequent occurrence since there is only one documented instance of falsely accusing staff,[1] and the self-slapping and pinching (which he sometimes uses to accuse others) occur too seldomly to be deemed self-injurious behavior. In the one

[1]I refer to the incident of April 19, 1995, specifically excluding from consideration the January 19, 1999, incident which appears to be still in the disciplinary system, and is not before me.

documented instance of a false accusation, he did recant. There is thus support for the QMRP's belief that this case is part of a pattern of correcting a prior false statement with a true one.

To summarize, what this case comes down to is one man's word against another's. While the Grievant's story about what happened at dinner time may be true, it does not account for the injuries sustained. Bernie H.'s second statement does. In the context of a vastly different first statement, this witness's second statement must be viewed with a high degree of skepticism. But when it is viewed in the context of all the surrounding circumstances and analyzed for its internal and external consistency, it becomes convincing as a reasonably accurate description of what happened to Tony P. It does not suffer from the problems of the first statement. It is clear, consistent, and fits other known facts. As some would say, it has the ring of truth about it, both in what was said and how it was said. Moreover, while the Union's theory of why the client changed his story is possible, it is highly unlikely under all the facts of this case. The State offered a far more compelling theory better fitting not just the facts of this particular case, but the client-witnesses's history.

For the State to prevail in a case of termination for abuse, it must convince the arbitrator of the employee's guilt. As Arbitrator Harry Graham stated in a previous panel decision, the arbitrator does not have to be completely convinced, but does have to be free of any real doubt. While there is some probability that the client fabricated or was taught a second false story and had some incentive to relate it to his program supervisor and to tell it well, that probability is not large enough to create the requisite doubt. For this reason, I am compelled to find the Grievant guilty of client abuse and to deny the grievance.

VII. AWARD

The grievance is denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
January 21, 2000

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