

#1489

STATE OF OHIO
DEPARTMENT OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

- and -

OHIO CIVIL SERVICES EMPLOYEES ASSOCIATION/AFSCME, LOCAL 11

ARBITRATION OPINION AND AWARD

GRIEVANCE NO. 24-15-(00-05-25)-0608-01-04

Arbitration Hearings Held at Youngstown Developmental Center on
December 12, 2000, January 16, 2001, and February 23, 2001

For the Department

- 1) Ruth A. Rehak
Labor Relations Coordinator
Ohio Department of Mental Retardation
and Developmental Disabilities
30 E. Broad Street, 12th Floor
Columbus, Ohio 43266
- 2) Neni Valentine, 2nd Chair
Office of Collective Bargaining
State of Ohio
106 North High Street, 7th Floor
Columbus, Ohio 43215-3019

Also Present:

- | | |
|---|---|
| 1) Paul Young
Superintendent, Youngstown
Developmental Center (YDC) | 5) Kathy Mayer
Qualified Mental Retardation
Professional, YDC |
| 2) Charity Shodd
Contractor, YDC | 6) Linda Diana
Director of Nursing, YDC |
| 3) Cindy Renner
Program Director, YDC | 7) Dr. James E. Tolliver
Medical Director, YDC |
| 4) Mark Farran
Quality Assurance Coordinator, YDC | |

For the Union

- 1) Dennis A. Falcione
Staff Representative
OCSEA/AFSCME, Local 11
7759 Castlerock Drive
Warren, Ohio 44484
- 2) Norma Jean Flinchum, 2nd Chair
OCSEA/AFSCME, Local 11
390 Worthington Road, Suite A
Westerville, Ohio 43082-8331

Also Present

- | | |
|---|---|
| 1) Helen Francois
Grievant | 3) Dr. James Morris
(On Subpoena)
Director of Psychology, YDC |
| 2) Ruth Aaron
Therapeutic Program Worker | 4) Dr. Ronald Paloski
Family Practice Physician |

FACTUAL BACKGROUND:

This case concerns an incident that occurred on April 25, 2000 at the Youngstown Developmental Center--a center that provides intensive treatment and training for mentally retarded persons who cannot live in a community-based environment. Seventy percent of the residents at the Center are profoundly retarded and eighty percent are not verbal, but understood by the staff that work regularly with them. The Center has a staff of 260 and houses 122 residents in seven dwellings, each of which is divided into living modules for approximately nine residents.

The Grievant was a member of staff in a classification called "Therapeutic Program Worker" (TPW). Staff in this position are the primary service providers to the residents who are sometimes called consumers. They train the residents on daily living skills, including personal hygiene, grooming, etc. They also make daily notes of their monitoring residents with whom they work recording such incidents as "Self Injurious Behavior" (SIB). Finally, it is their responsibility to maintain and provide a safe environment for the residents under their care.

The Grievant had been employed by the Youngstown Developmental Center as a TPW since February 1982. Until the incident of April 25, 2000 discussed in this arbitration, she had not had any prior discipline. As a result of a report by Charity

Shodd--a contract worker employed since February 25, 2000--Mark Farran conducted an investigation for this Center in his capacity as Quality Assurance Coordinator. The investigation concerned an incident of what Ms. Shodd perceived to be abuse of resident by the Grievant in the rest room of living module 7b in the Center. The investigation led to a pre-disciplinary hearing on May 3, 2000 and a recommendation by the hearing officer of a termination of the Grievant for physical abuse.

The superintendent of Youngstown Developmental Center, as the Appointing Authority, notified the Grievant that she was terminated from her position as Therapeutic Program Worker effective May 22, 2000. The notice stated the charge for which the Grievant was found guilty, and provided the particulars concerning the charge. The notice stated:

The reason for this action is that you have been guilty of Physical Abuse in the following particulars, to wit:

On April 25, 2000, you were observed by Charity S. hitting Tammy C. in the back of the head four times with your knuckles (as your hand was clenched in a fist). Charity heard your knuckles hit the base of Tammy's head as well as see it. This is physical abuse.

A timely grievance was filed which stated as follows:

The Union grieves the imposition of discipline as without just cause, whereas no credible evidence exists to justify disciplinary action. The client has a documented history of self-abuse; the Grievant was attempting to prevent self-abuse; the Grievant used approved behavioral modification techniques; the client was resistant, thus creating a situation which appeared as though the Grievant used an unapproved behavioral method.

THE ISSUE:

The parties differed on their statement of the issue involved in this arbitration. The Department urged: "Did the Grievant physically abuse a resident of the Youngstown Developmental Center? If not, what shall the remedy be?" The Union urged a more generic statement of the issue: "Did the Employer remove the Grievant without just cause? If so, what shall the remedy be?"

The arbitrator chooses the issue stated by the Department for these reasons. The removal notice, quoted above, contained a bill of particulars--a recitation of facts which the Department then characterized as "physical abuse." The initial focus in this analysis should be whether the facts, as recited in the removal notice, occurred; or, put differently, whether the Department sustained its burden of proving these facts. If the facts did not occur or were not proven, then the case against the Grievant falls.

The Union's statement of the issue is sufficiently broad to encompass other questions that may be raised should the Department sufficiently prove the facts set forth in the removal notice as constituting "physical abuse." These other issues could encompass matters raised by the Union such as whether an injury is necessary to show physical abuse, or whether discharge should automatically flow from a finding of physical abuse.

These collateral issues, however, are dependent upon the resolution of the threshold question of whether the facts alleged in the removal notice as constituting "physical abuse" in fact occurred.

CONCERN FOR PHYSICAL ABUSE OF RESIDENTS:

It is fair to note initially that the Union, State and Department have a high degree of concern for abuse of residents under the care of the Department. Article 24 in the contract between the State and the Union includes what has been described by others as a modification of the just cause standard in cases of termination. The contract removes from the arbitrator assessment of the sanction of termination after the arbitrator has found that a Grievant has abused a person in the care or custody of the State.

In cases involving termination, if the arbitrator finds that there has been abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse. Section 24.01.

The Youngstown Developmental Center follows the Labor Relations Policy Directive of the Department which defines physical abuse and sets forth removal as a sanction for first offense. The definition of physical abuse^{1/} mirrors the

^{1/} Any physical motion or action (e.g., hitting, slapping, punching, kicking, pinching, etc.) by which bodily harm or trauma occurs. It includes use of corporal punishment as well as use of any restrictive, intrusive procedure to control inappropriate behavior for purposes of punishment.

definition of physical abuse found in the federal guidelines for care facilities for the mentally retarded. Facilities, such as the Youngstown Developmental Center are surveyed to "ensure that clients are not subjected to physical . . . abuse" with the possible loss of funding from the State and Federal Medicaid budgets.

It is also clear that the Youngstown Developmental Center takes care that persons in the classification of Therapeutic Program Worker, such as the Grievant, are educated in the concern for abuse of residents. This is extremely important because persons in this classification are the primary service providers to the mentally disabled residents at the Center. The record shows that the Grievant, as a Therapeutic Program Worker, acknowledged receipt of the Center's handbook that states: "abuse or mistreatment of residents in any form or degree will not be tolerated." Furthermore, the Grievant acknowledged in writing an in-service training on February 24, 2000--just two months prior to the incident for which she was terminated. The in-serving training included education in the policy of the Center that states: "It is also essential that each consumer be afforded safety and protection from harm imposed by self or others."

THE BASIS FOR THE DECISION
TO REMOVE THE GRIEVANT

The superintendent explained that he decided to remove the Grievant based upon his review of the internal investigation conducted by Mark Farran and based upon his review of the hearing officer's report after conducting the pre-disciplinary meeting. Both reports were made part of the record, and both set forth interviews with only two persons to the incident that occurred in the rest room of living module 7b on April 25, 2000. Both reports center on statements made by the Grievant and by Charity Shodd.

The remarkable element in both reports is found in the concluding paragraphs of both reports. The report of the pre-disciplinary meeting concluded that "obviously there are two differing versions of what occurred . . .". Similarly, the report of the internal investigation concludes, "based upon this investigation, there is definitely a conflict in statements between Charity and Helen" (the Grievant).

In addition to noting that there were two differing versions of what occurred in the rest room, the concluding paragraphs also refer to the fact that the Grievant did return to the rest room after the alleged abuse of the resident, and noted that the Grievant suspiciously looked back at a mirror "to see if she could see into the bedroom in which Charity was working."

The extensive arbitration hearing over three days demonstrated that the core of this case is the evaluation of differing versions by the Grievant and Charity Shodd as to what transpired in the rest room in living module 7b on the morning of April 25, 2000. Both Ms. Shodd and Grievant testified, and their versions are summarized below. The Department produced six additional witnesses, none of whom had personal knowledge of what transpired in the rest room; the Union produced three additional witnesses also without any personal knowledge of the key events in the rest room.

We are left, therefore, with the differing versions of Ms. Shodd and the Grievant. They are to be evaluated on the basis of implications from the circumstances surrounding this event, the vantage points of the two direct witnesses, and the opinions of experts. The sad element in this case is that a third party was present in the early morning of April 25, 2000 in the rest room, and that was the resident. The internal investigator noted in his report that he attempted to interview the resident but "she was unable to cognitively state anything about the incident."

The Director of Psychology at the Center, Dr. James Morris, knew the resident since her coming to the Center early in December of 1999. He testified that the resident suffers from profound mental retardation. In addition, she has stereotypic movement disorder--repetitive movements that serve no purpose.

Finally, she suffers from autistic disorder--a variety of deficits: communicative, motor and social. As Dr. Morris concluded, "she lives in a world of her own."

SUMMARY OF GRIEVANT'S AND
CHARITY SHODD'S TESTIMONY:

A) Charity Shodd

Ms. Shodd was employed as a Masso-therapist at the Center by contract for two months prior to April 25, 2000. She was working on a resident who was lying on her bed in a 4-bed room with the door to the room open. She saw the Grievant holding a consumer by her triceps area, entering the bathroom which is directly across the hallway from the bedroom in which Ms. Shodd was working. She could see the consumer and the Grievant enter the bathroom through a mirror by the door to the bedroom.

While working on the consumer in the bedroom, Ms. Shodd saw a sudden movement in the mirror. Again, she looked through the mirror and saw the consumer facing the Grievant in the rest room, about one foot apart. Then the Grievant moved the consumer around so that both were facing a sink. The Grievant then hit the consumer's right side of the rear of her head four repetitious times, using her knuckles and a clenched fist. It was not like a slapping noise, but harder. It sounded like someone hitting a door.

While being hit, the consumer brought both hands up together to block her face. Ms. Shodd never saw the consumer bite or hit herself or be agitated; nor did she ever see the consumer with her hands above her head as if reaching for something.

At that point, the Grievant took the consumer out of the bathroom and passed the doorway to the bedroom in which Ms. Shodd was working. The Grievant looked in and made eye contact and looked surprised.

Shortly thereafter, Ms. Shodd saw the Grievant and two consumers entering the bathroom. They went out of her view through the mirror. Then the Grievant stepped back to the point in the rest room where the incident had occurred and stared through the mirror at Ms. Shodd. Ms. Shodd testified that she felt that the Grievant was checking to see what "I (Ms. Shodd) could see."

B) The Grievant

The Grievant testified that she and two other TPW's were working in living module 7b at about 8:30 a.m. on April 25, 2000. The two other TPW's, Pat Trinchess and Ruth Aaron, were helping residents at the door as they proceeded to transportation. The resident Tammy C. got up from the couch in the lounge, went out the door toward the hallway to the rest room. The Grievant proceeded to follow her and Ruth Aaron yelled, "Watch her." The

Grievant stated that she did not catch up with Tammy C. until she was entering the bathroom.

The Grievant also stated that she knew that Charity was working on another consumer in the bedroom across from the rest room, and she knew this while she followed Tammy to the rest room. She also stated that as she followed Tammy down the hallway to the rest room, she glanced into the bedroom and saw Charity sitting on the consumer's bed in the bedroom.

There were two plastic plants hanging in the bathroom above the two wash bowls from hooks in the ceiling of the rest room. The plastic plants were hanging about halfway down the wall above the wash bowls.

Tammy C. reached both of her hands for one of the plastic plants. The Grievant reached up to Tammy's hands, and brought them down and turned Tammy in a three-fourths circle so that Tammy was facing the door to the bathroom. Tammy then brought her left hand to her mouth to bite her hand and brought her right hand up to hit herself in the back of her head. The Grievant testified that she brought her hands down, but Tammy again repeated this self-abuse, and again the Grievant brought Tammy's hands down.

All of the above occurred sometime between 8:25 and 8:30 a.m.--fifteen minutes prior to the end of the Grievant's shift at 8:45 a.m.

Tammy then walked out of the bathroom by herself and moved in a fast way toward the lounge with the Grievant following her. The Grievant then testified that she normally takes Tammy, another consumer, Jennifer, and the consumer, Dorcas, with whom Charity was working to the bathroom to toilet them. The Grievant stated that she takes Tammy to the bathroom because Tammy cannot be left alone. Since Dorcas was with Ms. Shodd in her bedroom, the Grievant took Tammy and Jennifer to the bathroom. The Grievant then took Jennifer to one of the two toilet stalls and took off her Attends and put them in the trash box. The Grievant then went to the wash bowl, washed her hands, and used the paper towels hanging on a wall protruding from the side of the rest room about two feet alongside the counter containing the wash bowls. She tried to get the paper towels out of the roller and looked up toward the bedroom in which Ms. Shodd was working.

The Grievant stated that, "I did not strike Tammy, and I have never struck a consumer."

THE DEPARTMENT DID NOT MEET ITS BURDEN OF PROOF THE FACTS OCCURRED WHICH THE DEPARTMENT CHARACTERIZED AS "PHYSICAL ABUSE"

While most collective bargaining agreements are silent on which party has the burden of proof in disciplinary cases-- leaving the matter to general arbitrable principles--the contract between the State and the Union avoids even a hint of ambiguity on the question of burden of proof. Section 24.01 of the contract requires "just cause" before the imposition of

disciplinary action upon any employee. The section goes further, however, and expressly allocates the burden of proof to the Employer. "The Employer has the burden of proof to establish just cause for any disciplinary action."

The Department did not meet its burden of showing the facts to have occurred that the department characterized as "physical abuse" justifying the removal of the Grievant. There are elements in the record that supports the Grievant's version of what transpired in the rest room of living module 7b at approximately 8:30 a.m. on April 25, 2000. The same elements raise questions about the version of these events as recited by Charity Shodd.

1) Shodd's Vantage Point

Shodd was working upon a consumer in a bed from which she did not have a straight view out the door of the bedroom across the hall into the rest room. Rather, the testimony was based on her observations made as she looked into a mirror located about 25 to 29 feet from the bed. The mirror was twelve inches wide and six feet long, and was positioned by the door of the bedroom where she was working on the consumer. The mirror in the bedroom was about six feet across the hall from the entrance to the bathroom, and there was another approximate six feet distance from the entrance to the rest room to the wash bowl area where the events took place.

The key difficulty from this vantage point was that the view inside the rest room was incomplete. Ms. Shodd acknowledged as much in that she agreed that she could only see parts of the first incident when the Grievant was in the rest room with the consumer, Tammy C. Ms. Shodd agreed that she never saw the hanging plastic plants, never saw Tammy bite or hit herself or be agitated, and never saw Tammy with her hands above her head as if reaching for something. During a visit to the rest room in the presence of the advocates and the arbitrator, hooks were in the ceiling above the two sink bowls, and Ms. Shodd acknowledged that they could have been used to hang the plastic plants.

With respect to the second incident when the Grievant was in the rest room with Tammy and another consumer, Ms. Shodd acknowledged that she did not see the Grievant wash her hands or put Attends in a barrel. Ms. Shodd acknowledged that the Grievant and two consumers were out of her sight as she looked through the mirror for approximately thirty seconds. Furthermore, tests of the view from the vantage point of Ms. Shodd the rear bed looking through the mirror showed that one could not see one of the wash bowls; nor could one see the towel rack on the wall to the left of the wash bowl.

2) The Probability that Tammy C. Engaged in Self-Abuse and An Angry Resistance to the Grievant's Efforts to Redirect Tammy C.

Tammy C. was admitted to the Center on December 2, 1999. Initial review minutes were made part of the record that set forth her personality disorders and behavioral problems. The notes indicated her tendency toward self-injurious behavior (SIB) in the form of hitting herself or hand biting. The notes also indicate that she resists staff requests with the same self-injurious behavior.

Tamera wants to get her own way. When she does not get her own way, she will yell, scream, bite her finger, and slap her head. She also resists staff requests with the same behaviors.

The same initial review minutes noted the behaviors that were to be targeted for behavior modification techniques.

Behavior to be decreased: Self-injurious behavior (SIB).

Behavior to be increased: Compliance with staff requests.

On March 30, 2000, Kathy Mayer, the team leader of which the Grievant was a member, completed Quarterly Review Notes. These notes repeated the same behaviors--SIB and Compliance--that were to be targeted by behavior modification techniques. These notes also indicated the intervention procedure after self-injurious behavior occurs or is happening.

When Tamera exhibits self-injurious behavior, stop this behavior by interrupting the behavior with physical prompts, physically prompted appropriate behavior, and physically guide compliance.

As noted above, Dr. James Morris, the Director of Psychology at the Center, provided an overview of the main conditions for which Tamera suffers. He also pointed out that she exhibits, at times, PICA behavior which means that she eats inedible objects.

This record of behavioral problems of self-injurious behavior and resistance to re-direction by staff should be coupled with the record of Tamera's behavior on the morning of April 25, 2000. This case centers on the Grievant with Tamera on two separate incidents in a rest room at approximately 8:30 a.m. The first incident was between the Grievant and Tamera; the second involved the Grievant and Tamera and another consumer, Jennifer.

It is clear that the first incident did not involve the Grievant attempting to "toilet" Tamera, or in other words, have Tamera use the rest room facilities in any way. It is clear that Tamera bolted from the lounge down the hallway with the Grievant following her because Tamera was to be kept under close supervision. An idea of Tamera's objective in hurrying to the rest room is seen in the testimony of another TPW working in living module 7b with the Grievant.

At 8:30 a.m., the Grievant had fifteen more minutes to the conclusion of her shift--the third shift. At that time, she was

working in module 7b with two other members of the first shift who began at 6:00 a.m.--Ruth Aaron and Pat Trinchess. The team leader, Kathy Mayer, arrived at house 7 at 8:15 a.m.

Ruth Aaron testified that she awakened Tamera at 6:20 a.m. and assisted her dressing. At 7:30 a.m., Tamera went to the rest room and reached for the plastic plants. When Aaron pushed Tamera's hands down, Tamera started slapping her head and face and biting her fingers. Aaron testified that the same episode involving a rush to the rest room, grabbing the plastic plant, self-abuse and resistance to correction occurred three or four more times within the next hour before 8:30 a.m. At 8:30 a.m., Aaron and Trinchess proceeded to help consumers in their transportation at the door to house 7. It was the Grievant's usual job to then take charge of Jennifer and Tamera.

Based upon these prior events, it is reasonable to conclude that Tamera's objective was eating the plastic plants when she bolted down the hallway to the rest room with the Grievant in chase. Despite the fact that Ms. Shodd could not see the plastic plants, it is clear that two plastic plants were hanging from the ceiling in the rest room above the sink bowls. Kathy Mayer, the team leader, and witness for the Department agree that plastic plants were indeed hanging in the rest room on the morning of April 25, 2000.

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also reasonable to conclude that self-injurious
Tamera occurred with the Grievant tried to re-direct
reached hands from the plastic plants. This typical
ous behavior by Tamera takes the form of biting her
apping her head. All of this--re-directing Tamera's
d hands from the plants, re-directing her hands and
n her mouth, re-directing her hands from her head--
sudden, choppy movements, and occurred in a brief
ime.
partment argued in its post-hearing brief that the
f Ruth Aaron was "tainted and not reliable." Aaron's
as, according to the Department, inconsistent with the
f the team leader, Kathy Mayer. Mayer, however,
hat she arrived at 8:15 a.m. on April 25, and went to
les 7a and 7c first. She went to living module 7b at
after the incidents in the rest room had occurred.
Mayer was not present in living module 7b from 7:30
0 a.m.--the period of time in which Aaron was busy
h Tamera's quest for the plastic plants and Tamera's
ous behavior in the rest room.
s testimony is further corroborated by the record
on a daily basis by the TPW's about instances of self-
behavior and non-compliance with staff requests by
uring the entire month of April, 130 instances of self-

injurious behavior were recorded, and of thirty requests by staff, fourteen were resisted by Tamera.

3) The Second Incident in the Rest Room Was Not to Check Shodd's View Through the Mirror

The second incident in the rest room that morning was a critical incident. This is the incident during which the Grievant had two consumers, Tamera and Jennifer, in the rest room as viewed by Charity Shodd through the mirror in the bedroom across the hall. Once the Grievant, Tamera and Jennifer entered the bathroom, there were out of sight of Shodd for about thirty seconds. Then at one point, according to Shodd, the Grievant backed up to the side of the bathroom within view of the mirror that contained the wash bowls and stared at Shodd through the mirror with her arms crossed. The internal investigator Mark Farran testified at the arbitration hearing that Charity Shodd stated to him that the Grievant backed up "to see if Helen (the Grievant) could see Charity in the mirror and reverse."

This characterization of the Grievant's activity in the bathroom during the second incident was important both to the internal investigator and the hearing officer at the pre-disciplinary hearing. Farran concluded his report of his investigation with the view that the Grievant came back to the bathroom during the second incident in order to check Charity Shodd's vantage point through the mirror in the bedroom across the hall. "Additionally, the fact that Helen (the Grievant) did

come back to the bathroom, step back and look to see if she could see into the bedroom lends suspicion as to why she would do that." Similarly, the hearing officer resolved the differing versions of what occurred in the rest room in favor of Charity Shodd in part because of her (Charity Shodd's) description of Helen's suspicion looking back through the mirror . . ."

Other circumstances, not known to Charity Shodd, explain the Grievant's behavior in this second incident. First, the record shows that the Grievant regularly "toileted" Tamera, Jennifer, and perhaps, another consumer, at 8:30 a.m. while the other two TPW's in 7b were busy at the door arranging transportation for other consumers. Therefore, the purpose of the Grievant's proceeding with Tamera and Jennifer to the rest room on the second occasion was not to check Shodd's vantage point. This visit to the bathroom was part of the regular duties of the Grievant.

Second, Shodd could not see one of the sink bowls, nor could she see the bathroom stalls on the other side of the rest room. During the first portion of the time period of this second incident, the Grievant was engaged in placing Jennifer and Tamera in the bathroom stalls. In addition, she removed Attends from Jennifer and threw them in a trash receptacle. All of this conduct is clearly consistent with the regular purpose for which

the Grievant took Tamera and Jennifer to the rest room at 8:30 a.m. each morning.

After placing the Attends in a trash barrel, the Grievant crossed the bathroom and, as expected, washed her hands in the sink bowl. Again, Charity Shodd was not able to see through the mirror the paper towel dispenser that was attached to the wall protruding about two feet from the side of the bathroom to the left of the sink bowl. After one would wash his or her hands in the sink bowl, it would be reasonable to turn to the left to remove the towels and in doing so, one would be in clear view of the mirror in the bathroom across the hall.

All of these circumstances--regularly "toileting" Tamera and other consumers at 8:30 a.m. while the other two TPW's were busy, removing Attends from Jennifer, washing in the sink bowl and turning to the left to obtain paper towels--point away from characterization of suspicious activity by the Grievant. These circumstances explain the Grievant's behavior in the second incident as entirely reasonable and consistent with her regular duty that she performed at 8:30 a.m. each morning.

4) The Absence of Injury and the Questionable
Protective Reaction by Tamera as Perceived by Shodd

Shodd testified that she saw through the mirror the Grievant strike Tamera four repetitious times on the right side of the rear of Tamera's head. Shodd said that she could hear the knuckles hitting the back of Tamera's head from forty-two feet

away and that the sound was like someone hitting a door. She also testified that while being hit, Tamera brought both of her hands up together to block her face.

There are two difficulties with this perception by Shodd of what she saw in the mirror on the morning of April 25, 2000. The first is the expert opinion of Dr. James Morris, Director of Psychology at the Center, and the second the absence of injury in any form, including redness on the head of Tamera.

Dr. Morris testified that he was familiar with Tamera since the date of her admission--five or six months before April 25, 2000. On examination by the Union, Dr. Morris stated that if she (Tamera) were struck in the back of the head, "I think she would have the normal protective reaction of putting hands on her hand rather than in front of her face."

This subject was pursued in examination by the Department in the following questions and answers:

- Q. If one is being struck in the back of the head by an authority figure, is it a normal protective reaction to bring hands up to the face?
- A. I would not think so.
- Q. Why might an individual, profoundly mentally disturbed, struck in the back of her head, bring her fisted hands to her face?
- A. This is not in the normal repertoire of what I have seen in Tamera as a person.

Apart from the incongruity of the report of the striking of Tamera's head with Tamera's reaction, there is an additional

question. The case against the Grievant includes the report of four blows to the head of Tamera with such force that they could be heard forty-two feet away, and that they were harder than a slapping noise. The perplexing circumstance in the record is the undisputed facts that Tamera had short hair and that she was examined by a nurse approximately three hours after the incident in the rest room, and that no bruising, swelling, or redness were found on the back of Tamera's head. In addition, the Director of Nursing examined Tamera at 5:00 p.m. on the same day, and again found no evidence of injury.

The Director of Nursing, Linda Diana, and the Medical Director at the Center, Dr. James E. Tolliver both testified that the occipital area of the head--the posterior part of the skull--can bruise, swell, and produce redness on injury. Dr. Tolliver gave his opinion, however, that it was not unusual not to have a bruise after a blow in the back of the head. He gave as an example the person who bumps the back of his or her head and the people in the room or the area turn and ask, "what happened?".

Dr. Tolliver's hypothetical, however, does not match the reported claims against the Grievant of hitting the back of Tamera's head four times with such force that it could be heard forty-two feet away. It should also be noted that Dr. Tolliver received and read the "unusual incident report" that summarize the report by Charity Shodd of the four hits to the back of

Tamera's head with the Grievant's knuckles. Dr. Tolliver noted that the report also included the absence of any evidence of injury, and that "I didn't see any need to examine Tamera." He concluded that, "No one asked me to examine her."

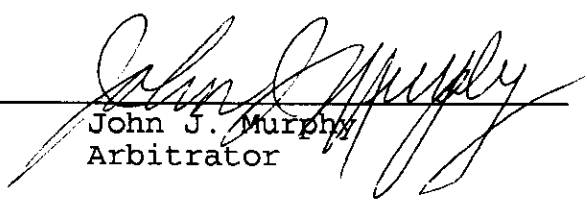
CONCLUSION:

This is a difficult case. There is obvious concern by the Union, State, Department and the Youngstown Developmental Center and its staff for protection of the residents under their care from abuse. This concern cannot, however, overwhelm a careful examination of all of the evidence, documents and circumstances in a record where an employee is charged with abuse. Without laboring this opinion any further, the elements painstakingly set forth above support the Grievant's testimony and question the version of events that were raised against the Grievant.

AWARD:

The grievance is granted. The Grievant is to be reinstated within ten (10) calendar days from the date of this decision to her former position. The Grievant is to be made whole with the restoration of her seniority, contract rights, and wages from the date of her discharge to the date of her reinstatement, minus other earnings and receipts from governmental support systems.

Date: April 21, 2001



John J. Murphy
Arbitrator