

IN THE MATTER OF ARBITRATION
BETWEEN
OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND
STATE OF OHIO/ODMH

Before: Robert G. Stein

Grievant(s): Donald Watts
Case # 24-08-020806-0869-01-04
Termination

Advocate(s) for the UNION:
Michael Muenchen, Staff Representative
OCSEA LOCAL 11, AFSCME AFL-CIO
Westerville OH 43215

Advocate for the EMPLOYER:
Ruth A. Rehak, Labor Relations Coordinator
OHIO DEPARTMENT OF MENTAL RETARDATION
AND DEVELOPMENTAL DISABILITIES
30 East Broad Street, 12TH FL.
Columbus OH 43266

INTRODUCTION

A hearing on the above referenced matter was held on September 22, 2003 at the Montgomery MRDD Center located in Dayton, Ohio. The parties agreed that the issue is properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits of the case. The parties submitted written closing arguments in lieu of making oral closings.

ISSUE

Was the grievant, Donald Watts, discharged for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference, see Agreement for language)

ARTICLES 24

BACKGROUND

The Grievant is Donald Watts ("Grievant", "Watts"), a Therapeutic Program Worker (TPW) at the North Coast Behavior Center ("NCBC"). His employer is the Ohio Department of Mental Retardation and Developmental Disabilities ("MR/DD", "Employer", "Department"). Watts has been employed with MRDD for approximately eight (8) years and was

terminated on 8/2/02. He was charged with Physical or Verbal Abuse.

According to the Employer's investigation the following events occurred:

On June 22, 2002 the Grievant stated to resident, Chris H. ("Chris") "I'm gonna get this Mother Fucker," and "You're gonna listen to me." The Grievant then went to the activity closet, got an orange ping-pong paddle, and went to Chris' room. The Grievant went inside the room and shut the door behind him. A co-worker, Brooke Myers, overheard the sound of the paddle striking something three to four times and also heard Chris scream after the sound of every strike. Subsequently, Chris reported to several co-workers that the Grievant struck him in the lip with the ping-pong paddle.

The Grievant was terminated for his actions, and he filed a grievance claiming the Employer did not have just cause for its actions.

SUMMARY OF EMPLOYER'S POSITION

The Employer asserts it had just cause to terminate the Grievant for physically and verbally abusing a resident. The Employer concedes that its case is based upon circumstantial evidence. However, it argues the evidence and testimony "*paint a very consistent picture*" regarding the guilt of the Grievant.

The Employer's position in this matter is succinctly stated in its brief.

It reads as follows:

The employer provided testimony and evidence to support the action taken against the Grievant. What is Abuse?

Mary Wellen, Program Director, identified Management Exhibit 7, the Center's Policy P-625, "Abuse, Neglect" and noted its global definition of abuse: "Abuse is any action or absence of action inconsistent with human rights which results or could result in physical or psychological injury to a client." This policy went into effect on June 15, 1990. It was then replaced by Policy 601 [Joint Document 8], which defines abuse identically to the policy it replaced, except for the last word of the policy: it refers to a resident of the Center as an "individual." This policy went into effect on September 6, 2000.

Greg Darling, superintendent of the Center, testified concerning the Individual Rights Inservice that all center employees attend. The outline for the inservice, entered as Management Exhibit 2, specifically defines both physical and verbal abuse and provides examples. These definitions are as follows:

Physical Abuse: Physical force that can reasonably be expected to result in harm or serious physical harm to an individual. Examples: **hitting**; kicking; pinching; pushing; dragging; grabbing; throwing something at someone; pulling hair; using unnecessary physical restraint; having an individual do tasks or run errands for staff." [Some emphasis added]

Verbal Abuse: Using words or **gestures to threaten, coerce, intimidate, harass** or humiliate an individual. Examples: swearing at an individual; name calling; referring to an individual by his/her behavior or disability; using a loud or harsh tone of voice; yelling; screaming; making fun of an individual; **threatening**; using unapproved nicknames." [Some emphasis added]

The Grievant Knew the Definition of Abuse, and that the Penalty is Removal

While the Grievant was charged with violating Policy 601, the sign-off attesting to the Grievant's awareness of this policy could not be located. However, as noted in the previous section, Policy 625 was signed off on by the Grievant on November 14, 1994 [Management Document 8]. The only difference in the definition of abuse in these two policies is in the term used to refer to the residents of the center. Therefore, at the time of the incident giving rise to his removal, the Grievant knew this definition of abuse.

The Grievant attended the Individual Rights inservice on March 13, 2002 (just three months before the incident!). Joint Document 9, pages 2 and 3 is the posttest the Grievant took at the end of the inservice; he scored 100% on the exam.

The Grievant was aware that violation of the policy prohibiting the abuse of residents could lead to removal. Joint Document 25, Policy 229.00, Discipline, advises on page 1 that, "For major breaches in behavior (such as abuse, neglect, improper conduct), the principles of progressive correction [sic] action do not necessarily follow as listed above. The employee will be disciplined based upon the seriousness of the offense." And the department's standard penalty for abuse is removal.

The Grievant's Conduct Constituted Abuse

Verbal Abuse

According to the Grievant's removal order [Joint Document 12], he was charged with being guilty of "Physical or Verbal Abuse" on June 22, 2002. Brooke Myers, management's witness, testified as to the activities that were taking place at the start of the shift: she was drawing with two residents in the dining area while the Grievant was watching baseball on television with another resident in the living area. Another resident, Chris H, was in and out of the living area. According to Myers' testimony and her statement, "Donald [the Grievant] was just trying to get him [Chris, the resident] to stay up front." "He [Chris] was wanting to go back to his room." Chris was, "over and over again, saying 'I want to go back into my room.'" [Joint Document 10, p. 1] The Grievant admitted during his testimony that he was in the living area, watching baseball on TV at the start of the shift. How frustrated he must have been, trying to watch baseball with a resident continually distracting him from the

television! The Grievant told Chris, "You're gonna stay up here."

Suddenly, Chris jumped up and "just ran down the hallway to his room." Myers' testimony supports that the Grievant was very angry. He got up. "I'm gonna get this Mother Fucker" he said, referring to Chris. "You're gonna listen to me." [Joint Document 10, p. 2]

The Grievant went to the activity closet. Myers knew he did because she heard the door of the closet open and close. You will recall, as demonstrated by Myers, that this door had a distinctive opening and latching sound; the other two doors in that vicinity swung rather than latched. While she did not observe the Grievant remove the paddle from the closet, given her location in the dining area, she did observe the Grievant walk up the hall with paddle in hand. "He walked real fast." [Joint Document 10 p. 3] Myers observed the Grievant walk into Chris' bedroom, then shut the door behind him.

Arbitrator Stein, the act of following a resident into a room with a paddle in hand in these circumstances is verbal abuse. We can readily infer the Grievant's mood: he referred to the Grievant as a "Mother Fucker" and said aloud as if to the Grievant, "You're gonna listen to me." His comments and the speed of his walk up the hall behind Chris make it abundantly clear that he was angry and/or frustrated. Given his heightened emotion, why would the Grievant obtain a paddle to take with him into Chris's bedroom and close the door behind him? Certainly not to engage Chris in a game of ping-pong! No, we can reasonably believe that the Grievant's intent was to punish Chris for disobeying him or to threaten/intimidate him. There is simply no other plausible explanation.

Using that paddle to make the loud, threatening noises that Myers heard is also verbal abuse. This is true whether the Grievant struck Chris four times, just one time—perhaps smacking the paddle on the door frame to make a loud noise the other two or three times—or had he not struck Chris at all. Chris's cries after each hit show that he was startled and frightened. Remember, Arbitrator Stein, the definition of Verbal Abuse that the Grievant learned:

Verbal Abuse: Using words or **gestures to threaten, coerce, intimidate, harass** or humiliate an individual. Examples: swearing at an individual; name calling; referring to an individual by his/her behavior or disability; using a loud or harsh tone of voice; yelling; screaming; making fun of an individual; **threatening**; using unapproved nicknames." [Emphasis added]

Physical Abuse

The record further shows that the Grievant also committed physical abuse. Once he was behind closed doors with Chris, Myers heard three or four times a sound like that of a paddle striking something. A few moments later, Nurse Ron Blair and Designated On-Call Coordinator (DOCC) Beth Van Matre arrived at Chris's room. They both testified that Chris was sitting on his bed, rubbing his lip, saying "my lip, my lip." With no prompting, Chris said, "Donald hit me" and "with a board, with a board." While there was no swelling to Chris' lip that day, the Nursing Notes [Joint Document 5] for Chris noted swelling to the upper lip on the two following days, June 23rd and June 24th. Nurse Blair testified that the swollen area corresponded with the area that Chris was rubbing immediately after the incident, and that it is not at all unusual for swelling or bruising to first appear one or two days following a trauma. He also testified that the swelling visible to Chris' lip was consistent with trauma to the lip, such as the trauma of being hit with a hard plastic paddle. Nurse Blair, again referencing the Nursing Notes, said they showed no indication that the lip became swollen for any other reason in the day between the trauma and the first appearance of swelling.

Brooke Myers referred to Chris' Interdisciplinary Progress Notes [Management Document 4]; they, too, show no indication that the lip became swollen for any other reason. Every indication is that Chris' lip became swollen as a result of exactly what Chris and Myers said happened: the Grievant hit him in the lip. There is simply no other plausible explanation.

This is undoubtedly physical abuse, as the Grievant learned it: "Physical force that can reasonably be expected to result in harm or serious physical harm to an individual. Examples: hitting..."

Clearly, Arbitrator Stein, the record shows that the Grievant committed both physical and verbal abuse.

Management's Main Witness Is Reliable and Credible

Brooke Myers is credible as a witness. She testified that while she and the Grievant were co-workers in House 3, she did not like the Grievant. She made no attempt to hide this in an effort to make herself look better. She testified that she had no reason to lie or to try to get the Grievant in trouble.

Others' reports of Myers' demeanor and comments show no reason to doubt her credibility. DOCC Van Matre testified as to how Myers sounded during her initial call to her for help: Myers sounded "harried and frightened." Upon her arrival at House 3, Myers met Van Matre outside the building. Van Matre's statement [Management Document 5, p. 1] reveals that Myers was "very upset and shaken" and "on the verge of tears." This is exactly how one would expect Myers to sound and to appear upon just having observed an incident involving resident abuse. After the Grievant joined them on the patio, Myers told Van Matre, "Donald's going to kill me." Myers' fearful demeanor was confirmed during Nurse Blair's testimony.

When the Grievant passed her upon leaving the building, led by Van Matre to the administration building, Myers testified that the Grievant whispered to her, "Did you say anything to her?" Her statement reflects her surprise that he would ask her this in front of the DOCC. [Joint Document 10, p.6] The DOCC's statement and testimony supported that the Grievant was concerned about what Myers had reported; Van Matre recalled hearing the Grievant ask Myers, "Did you tell them?" as they passed Brooke on the way to the administration building.

Further, Myers' testimony about the Grievant's repeated phone calls to her after the incident is corroborated in three instances:

- DOCC Van Matre testified that through the window in the office in which she was awaiting a call, she saw the Grievant pacing and using the work phone. She then spoke to Myers about trying to locate the paddle, and Myers informed her that the Grievant was calling her at the house. Van Matre went out and told the Grievant to stop calling the house, and he said simply, "okay." [Management 5, p. 2]
- When Van Matre then went to the house to check on staff and residents, Brooke was on the phone; she handed Van Matre the receiver and asked that she "tell him to stop calling me." Van Matre put the phone to her ear; it was the Grievant. She told him to stop calling the house, and he said, "oh, alright!" [Management 5 p. 2]
- The Grievant himself admitted to three calls to Myers.

Myers' testimony about the calls, that the Grievant was urging her to take his phone number, that they needed to get their story straight, and that she should tell Chris over and over that he didn't do it, is more credible than the Grievant's claim that he was just trying to find out what was going on.

Myers testified in a straightforward manner, without hesitation. Her testimony was consistent with the statement she provided on the day of the event, more than a year ago; any small discrepancies are due to the length of time that has elapsed since the incident and the pressure of having to testify against a former co-worker.

The union's attempts to impugn Myers' credibility failed. None of the union's witnesses, other than the Grievant, had any first-hand knowledge of the incident. They were admittedly friends of the Grievant's. While they confirm Myers' admission that she did not like the Grievant, according to the union the reason for that dislike was that Myers believed that it was the Grievant who had reported her sleeping, for which she was subsequently disciplined. Myers herself testified that she knew that the Grievant had not reported her. One of the reasons that she didn't like the Grievant, Myers testified, is that he called her, "little white bitch."

The report [Management Document 3, p. 1] for Myers' pre-disciplinary hearing conducted on April 26, 2002 supports that Myers knew who had reported her; the hearing officer referred to a statement from the Residential Care Supervisor (RCS) that stated that it was Christine Miller (the same Christine Miller who testified for her friend, the Grievant, by phone during the arbitration) who had notified the supervisor of Myers being unalert. This statement would have had to be given to Myers in order for it to be used at the pre-disciplinary hearing without objection.

Miller further alleged that Myers had raised false claims of abuse against co-workers, but testified that they were "fully investigated." Another witness submitted what was admitted to be hearsay evidence on this claim that is otherwise unsupported and cannot be accepted as true.

The Accusation of the Resident Who Was Abused is Credible

Mary Wellen, currently serving as Program Director, described her education and credentials that qualify her as an expert witness in the area of language development. She personally knows the resident who was abused and performed his speech evaluation. [Management Document 6] Wellen testified that Chris understands the vocabulary of a 3 ½ -year old, and can understand the who's, what's, where's, when's and why's in

conversation. Upon reviewing the transcript of Chris's interview [Management Document 1], she affirmed that Chris knew the meaning of the word "hit," knew who "Donald" [the Grievant] is as separate from other staff; knew his lip as distinct from other body parts; knew what a paddle is; knew the meaning of the word "swollen," and knew some colors. Wellen was certain that Chris knew the meaning of the questions he was asked in the interview. Further, Wellen testified that Chris knows the difference between telling the truth and lying, and that he has absolutely no history of lying. It was her professional opinion that you can believe both Chris' report to the DOCC and nurse that the Grievant hit him, and the statement he gave to the interviewer several days later, again stating that the Grievant hit him.

Even if it were true that Chris was highly suggestible and would repeat what was said to him, as a union witness stated, there was no time between the incident and when the DOCC and the nurse entered Chris' room for anyone to attempt to influence Chris. *No one was around to even enter Chris' room during that brief time.* Myers had left the building with all the residents except for Chris to await the DOCC and the nurse outside on the patio. Only the Grievant himself remained inside.

It should also be noted that Chris' statement remained consistent, from his first telling of what happened immediately after he was abused through his interview three days later. In the absence of any evidence to the contrary, Chris' report that the Grievant hit him must be believed.

The Grievant's Denials are not Credible

The Grievant simply denies that any portion of the incident for which he was removed occurred. He peppered his statements and testimony with allegations of a "conspiracy" and that others were "out to get him" but he offered no evidence to support this—because there is none. The Grievant's denial, if true, would leave many unanswered questions, for example, how did the injury to Chris' lip occur? Why would Chris say with such certainty that the Grievant hit him if he hadn't? Myers' testimony answers those questions.

The Grievant is not credible. We can doubt his reliability for these reasons:

1. You will remember the Grievant's claim during his testimony that he knew all his performance evaluations were "pretty good" and that it was his "co-workers [who] have started problems with me...." In reality, however, his performance evaluations reflect that the Grievant was the creator of problems: Management Exhibits 11 through 14 show that the Grievant was so lacking in cooperation, professional conduct and positive working relationships with other staff that he was repeatedly rated as "Below" in the performance dimension of "Team Effort/Cooperation." It was not just one but three different supervisors who found this to be the case.
2. The Grievant's memory of his actions immediately after the incident actually improved as time passed:

Date/Time of Grievant Statement	Grievant's Statement	Location of Statement
6/22/02, 5:24 p.m.	"No, no, I didn't go down through the hall to his room or nothin' like that. But I, <u>I did go to the bathroom.</u> [Note that Joint Document 7 shows the bathroom—a resident rather than a staff restroom-- to be three doors away from Chris' room.]	Joint 2, page 7
6/26/02, 8:50 a.m.	"I just said <u>I walked back by the bathroom ... I just went to check the linen, the, um, clean linen.</u> That's why I walked back to the bathroom, and that was it...." "I just looked in there and was checkin' to see how many towels and stuff we had, and that was it." [Note that Joint Document 7 shows the linen room to be a separate room from the restroom, and one room farther away from Chris' room.]	Joint 3, page 1

6/26/02, 8:50 a.m.	"...I told her that I didn't go in the back and then I remembered that I did go down to the closet..." "I never hit him. <u>I was up front all the time I was at work.</u> " (First the grievant said he remembered he'd gone down the hall to the closet. Four sentences later he seemed to forget this and started asserting that he didn't even go down the hall!]	Joint 3 page 10
Undated; submitted during the investigation	<u>"I was up front all the time I was at work."</u> [The Grievant now denies having gone down the hall at all.]	Joint 4 page 5 [marked as page 5 although actually page 4]

Arbitrators have long held as suspicious a Grievant's memory improving over time because the normal course is for memories to fade and to become less detailed. In this case not only did the Grievant seem to remember more detail but also what he remembered completely changed from statement to statement! His response to cross-examination on these discrepancies was to stammer and sputter; he had no explanation.

Conclusion

It is true that the instant case is circumstantial; no one other than the grievant and Chris, the resident, knows with certainty what took place during this incident. However, all of Management's statements and witnesses paint a very consistent picture supporting that the Grievant, angered by Chris' refusal to stay up front, went to the activity closet, grabbed a ping-pong paddle, followed Chris into his room, and closed the door behind him. The sounds of three or four hits, followed by Chris' cries and a visible injury to Chris' lip resulted. The evidence Management proffered and the testimony of its witnesses are sufficient to prove that the Grievant did, in fact, physically and verbally abuse Chris, a resident of the Montgomery Developmental Center, and that as a result the Grievant was properly removed from his position as a TPW. There is simply no other plausible explanation.

Arbitrator Stein, if you believe that management has made a case only for verbal abuse, as a result of the testimony that the Grievant obtained a plastic paddle and followed Chris up the hall and into his room, shutting the door behind him, you must find that the removal was appropriate. If you believe that Management has made a case only for physical abuse, with all the testimony and evidence regarding Chris' injured lip, you must find that the removal was appropriate. Both of these charges individually carry the penalty of removal.

The grievant was properly removed from his position as a TPW. The employer respectfully asks that you deny this grievance in its entirety so as not to return the Grievant to the Developmental Center to harm another of its residents.

Based upon the above, the Employer requests the grievance be denied.

SUMMARY OF UNION'S POSITION

The Union asserts the Employer did not have just cause to terminate the Grievant's employment. It contends the medical evidence "*directly contradicts any such finding that the resident was struck.*" Furthermore, the main employer witness is clearly a biased employee motivated by her

desire to see the Grievant removed from employment.

The Union's position is succinctly summarized in its post hearing brief.

It is as follows:

Argument:

The testimony from Ms. Brooke Myers is not credible due to bias and inconsistencies.

Ms. Myers had an interest in seeing Mr. Watts removed from the cottage and had a motive for fabricating a patient abuse allegation against him. Ms. Myers admitted on the witness stand that she did not like the Grievant, Donald Watts. The two were different. She admitted on cross-examination that she suggested that he bid out of their cottage and that he refused. Ed Morgan, union steward, TPW Elliot and TPW Miller (U1) testified that they each had separate and distinct conversations with Ms Myers when she blamed Mr. Watts for reporting her for inattentiveness on duty while Ms. Myers denies having ever blamed the grievant for reporting her.

Ms. Myers' fabricated story conflicts with the medical reality. As her story unfolds, she testifies, as she must, that this alleged violent encounter with the resident resulted in immediate injury to the resident's lip. Otherwise, we would be forced to conclude that a healthy, 250lb male in a fit of anger struck a resident multiple times with a hard paddle with such force to be heard a good distance away *without leaving a mark*. So she testified, as she must, about the appearance of a puffy lip shortly after she called the supervisor at 2:45 p.m. Yet, R.N Blair conducted a head to toe examination at 2:55p.m and found *no swelling*. Dr. Fronsta confirmed *negative findings* at 4:00p.m, as did LPN Williams at 6:00p. and RN Blair again at 10:00pm. (J-5)

Ms. Myers fabrication continued to unravel on the witness stand. On cross-examination, she testified she saw the Grievant come back up the hallway after the paddling incident was over. *In his hand was the paddle*. Never before had she stated that she saw the "weapon" in the hand of the "assailant" after he had just used it. This new revelation undermined her earlier testimony about her extensive search of the closet for the paddle. If she saw the paddle in his hand coming back up the hallway why would such a search have been necessary? How could she miss the exchange of the paddle from the Grievant's hand to the activity closet? How could such an important and memorable observation be reported otherwise to campus police? (See **J -10, page 5**) When asked this question on cross-examination, and with no other way out, she fled the witness stand. Furthermore, which descriptions of the "TWACKS" to we believe? In her previous statement (J 10), she described separate and distinct sounds of the paddle, each one followed by a separate scream of OW or Ouch. When testifying, however, she demonstrated a fast succession of strikes testifying that the screams were made *continuously during* the paddling. She also testified that she considered the residents to be like family, yet when someone supposedly curses a resident, threatens harm, gets up, walks right by the table where she is sitting, gets out a paddle, walks down a long hallway and behind closed doors strikes a screaming resident she never goes back there to help during the entire two to three minute episode? Ms. Myers' testimony is incredible and inconsistent with the record. Ms. Myers wanted the Grievant out of the cottage and would lie and coach remarks from a resident to achieve that end.

b. The medical record is inconsistent with a finding of patient abuse

The record reflects the resident was repeatedly checked by medical staff and no sign of injury was observed until 10:00 am on June 23, some 19 hours after the allegation (J5). RN Blair further testified that a high degree of impact would result in an *immediate* physical sign of that trauma.

In *ODMH v Barrington, Wireman*, the Arbitrator concluded that there is no compelling evidence of abuse and, thus, that the grievants are not guilty as charged. The physician was also able to provide specific reasons why the patient's eye injury was not a black eye and thus why there was no evidence that he had been hit 4 or more times.

The swelling that was presented 19 hours later could not be reasonably attributed to such an event as described by Ms. Myers. The swelling had to have been caused by something else. The resident could have been self-injurious. During RN Blair's testimony about the resident's behavior when he approached him in his bedroom at approximately 2:50 p.m., he demonstrated the resident behavior by patting his own lip. With so much attention being paid to the resident about his lip, the resident could have conceivably continued to pat and fool with it over the course of the next 19 hours to have caused some swelling. Further, the resident is aggressive, violent and destructive (M 10) making him at risk to sustain injury through acts of his own volition.

With the investigation going on in the house and with people in and out of his private room he would likely have been in an anxious state as testified to by the qualified mental retardation professional. He would be likely to act in a destructive and /or self-abusive manner during this time.

c. Resident's responses are not credible because they are inconsistent and coached.

The resident did not testify. According to the testimony of Mr. Sipes, the resident gave conflicting statements. At one point he said that Donald *did it* (M1) and at another point replied, *I don't know* (M1) when asked what did Donald do. On a later date the resident reported, *No; Donald didn't hit me* (Jt. 17).

Arbitrator Bowers concluded the alleged victim's interview contains statements that are difficult to find credible. With regard to the injuries, Frazier (the alleged victim) claimed he was beaten and kicked for about four minutes. In view of Nurse Baker's report and testimony, that description is at least a gross exaggeration. Malone v. Ohio Department of Rehabilitation and Correction 643 (Bowers)

Furthermore, the resident had to have been coached by Ms. Myers in order to give the responses he did. How else would he have been able to correctly identify the color orange unless Ms. Myers coached him on the proper color? Ms. Myers had the opportunity and the motivation to rehearse certain words and phrases in order to try to implicate the Grievant.

D Significant proof is needed to meet Employers burden

Under Article 24.01 of the Collective Bargaining Agreement, the employer has the burden of proof to establish just cause for the removal of the grievant from employment. Termination constitutes "economic capital punishment" and heightens the burden of proof on the employer to produce evidence sufficient to warrant discharge.

The act with which the grievant is charged-physical abuse-is a serious one requiring a significant quantum of proof to sustain the Employer's decision. Any real doubt must be resolved in favor of the employee. Ohio Dept of Youth Services v Starks 300 (Smith)

Removal from a position is the most serious workplace discipline. Removal under a charge of abusing a young person in custodial care will follow an employee for life. Such a charge must be supported by clear and convincing evidence. Livingston v Ohio Dept. of Youth Services 301 (Rivera)

The Arbitrator concluded that the State failed to meet its burden of presenting sufficient credible evidence and testimony to prove that the grievants abused the patient and that their termination was for just cause. ODMH v Barrington and Wireman (Bowers)

Conclusion:

The Removal Order (Joint 12) is not supported by credible evidence. The medical evidence directly contradicts any such finding that the resident was struck multiple times in the lip with a hard paddle. A bias coworker motivated by her desire to see the Grievant removed from their work area made false statements and induced the resident to repeat back phrases in order to achieve her desired result.

Based on all of the evidence and testimony the Union urges the Arbitrator to grant the grievance by rescinding the record of patient abuse, returning the Grievant back to work, and by making him whole for all lost pay, benefits, and seniority.

DISCUSSION

The discharge of an employee is the most serious form of punishment an employer can invoke. Furthermore, the stigma attached to a sustained charge of patient abuse can seriously impact an employee's ability to obtain future employment that involves caregiving. In the instant matter, I find that the combination of strong circumstantial evidence and witness credibility favoring the Employer's version of the events provided sufficient evidence to prove that Mr. Watts verbally abused resident Chris. However, there was insufficient evidence to prove the charge of physical abuse.

The Employer's case, by its admission, is built upon circumstantial evidence. However, it is also a case where witness credibility is a crucial factor. No one viewed the Grievant physically abusing resident Chris on June 22, 2002. However, this case does have of eyewitness testimony that convincing portrays the Grievant's aggravated demeanor, his abusive remarks, and his intimidating behavior directed toward resident Chris on June 22, 2002.

Management witnesses Meyers, Van Matre, and Blaire all provided credible and consistent investigative statements and testimony. Their testimony was consistent with the known facts and with each other's version of the events, without appearing to be contrived or rehearsed. In

contrast, the Grievant's statements (Jxs 2, 3, 4) and his testimony at the arbitration hearing were inconsistent, variable, and generally unconvincing. Union witnesses provided character testimony, but were not witnesses to the events of June 22, 2002. Furthermore, the motive for revenge attributed to witness Meyers (i.e. her prior discipline, Mx 3), appears to be more related to information provided by employee Chris Miller than the Grievant (See also Meyer's testimony).

In Joint Exhibit 2, the Grievant claimed he had never gone to Chris's room but went to the bathroom. In Joint Exhibit 3, the Grievant stated he walked "*...back by the bathroom*" and then in the same statement contradicted himself a second time. He said, "*I remembered I did go down to the closet*" and then said "*I was up front all the time I was at work.*" In his hand written statement the Grievant never mentioned going down the hall to go to the bathroom or the closet, but stated "*I was up front all the time I was at work*" (Jx 4). In his testimony at the arbitration hearing Watts stated he went to the linen closet.

Furthermore, his conduct immediately following the incident (e.g. calling House #3 four times, see Jx 10, p. 8, Meyer's statement, and Mx 5, p. 2, Van Matre's statement) further discredited his proclaimed innocence. For example, why would Watts be so interested in going into the Chris's room when Van Matre and Blaire arrived at House #3 (Mx 5, p.

1)? The Grievant testified that Meyers, and not he, had primary responsibility for Chris that day and that he "...*had no reason to intervene or say anything to, uh Chris*" (Jx 3, p. 3). The Grievant called Meyers repeatedly and was told to say:
"*...you need , you need to go back there and tell Chris ...that I didn't do it, and keep repeating it to him, that he, that I didn't hit him*"(Jx 10, p. 7).

Van Matre corroborated Meyer's recollection of being told by the Grievant that she needs to tell Chris that he [Watts] did not hit him (Mx 5, p. 2). The Grievant knew Chris and knew he would repeat what he was told (Jx 3, p. 3-4). There was no evidence or testimony to suggest that Van Matre or Blaire, who were the first to see Chris, prompted him to say that the Grievant hit him (Mx 5, Jx 6). Conversely, the Grievant's conduct smacks of a deliberate attempt to cover-up his conduct. It is also noted that Chris has no history of making false accusations (See Mary Wellen's testimony).

Van Matre, in her statement of June 22, 2002 (Mx 5) and in her testimony, stated that while being escorted out of House #3, the Grievant asked Meyers as he walked by her, "*Did you tell them?*" (p. 1, of Mx 5). In her statement of June 22, 2002 Meyers stated the Grievant walked past her while being escorted by Van Matre and whispered, "*Did you say anything to her?*" (Jx 10, p. 6). While these two statements are not

identical, it is clear the Grievant asked Meyers a question that undermines his credibility. If the Grievant was totally blameless, as he claims (Jx 2, 3, 4, and testimony) then why did he make a remark of this nature to Meyers?

If it weaves a tight enough "web of evidence" that eliminates all other plausible explanations, a circumstantial case can be sufficient to meet a "clear and convincing" evidentiary standard required in such cases (See Problems of Proof in Arbitration,⁹⁸ (*Proceedings of the 19th Annual Meeting, National Academy of Arbitrators 1966*)). However, decades ago, Arbitrator Clair V. Duff, cautioned that the risk of arriving at hasty and false deductions requires one to exercise extreme caution in cases where circumstantial evidence is applied (See *South Penn Oil Co.*, 29 LA 718, 721 (1957)).

After carefully reading and re-reading the documentation in this case, there is sufficient evidence to demonstrate that on June 22, 2002, the Grievant, was frustrated with Chris, secured what appeared to be a "NERF" ping-pong paddle (See Mx 5), made threatening remarks regarding the Grievant ("*I'm going to get that Mother Fucker*" and "*You're going to listen to me*"), entered Chris's room for approximately two (2) minutes and proceeded to intimidate him with the paddle (Jx 10, p. 2).

At a minimum the Grievant struck something, possibly with the

paddle, at least three or four times (Jx 10, p. 3) causing loud noises. It was sufficiently intimidating to cause Chris, who is prone to being anxious when someone enters his room (See testimony of Barbara Green, QMRP for House #3), to repeatedly yell "ouch" or "ow" (Jx 10, p. 4). It is reasonable to surmise that the Grievant was sufficiently familiar with Chris to know how he (Jx 2,) could be intimidated. I find there is sufficient evidence to demonstrate the Grievant lost his temper with Chris, and verbally abused him in accordance with the definition of abuse contained in the Department's policy (Jx 8, III A). This verbal abuse was accompanied by the Grievant intimidating and threatening Chris while brandishing a paddle. The psychological impact of the Grievant's action was evidenced by Chris's repeated screams and subsequent anxiety.

However, the question of physical abuse remains unanswered. While it is certainly possible the Grievant could have struck Chris, as he stated (Mx 1), Chris did not testify, the Union had no opportunity to cross-examine him, and there is insufficient collaborative evidence to prove this occurred. The Employer did not introduce any photographic evidence, and the medical records indicate Chris had only "...*slight swelling noted to upper lip*"(Jx 5) that did not appear to be serious. And, as accurately pointed out by the Union's advocate, "...*the resident [Chris] is aggressive, violent and destructive [Mx10] making him at risk to sustain*

injury through acts of his own volition" (See Union's brief, p. 7). In addition, the NERF ping-pong paddle was not introduced, nor was there any testimony or evidence to demonstrate what kind of harm can be inflicted with this type of instrument.

AWARD

The grievance is denied.

Respectfully submitted to the parties this _____ day of December, 2003.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 4th day of December, 2003.

A handwritten signature in black ink, appearing to read "Robert G. Stein", written over a horizontal line.

Robert G. Stein, Arbitrator