

#1734

IN THE MATTER OF ARBITRATION
BETWEEN
THE OHIO DEPARTMENT OF MENTAL HEALTH
AND
THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11 /AFSCME-AFL-CIO

Before: Robert G. Stein, Arbitrator

PANEL APPOINTMENT

CASE # 23-18-(03-06-04)-0052-01-04
Gwendolyn Jones, Grievant

Advocate(s) for the UNION:

Robert Robinson, Field Staff Representative
OCSEA Local 11, AFSCME, AFL-CIO
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Advocate(s) for the EMPLOYER:

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INTRODUCTION

A hearing on the above referenced matter was held on October 24, 2003 in Northfield, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted briefs in lieu of closing arguments. The briefs were received, and the hearing was closed on November 7, 2003. The Arbitrator's decision is to be issued within forty-five (45) calendar days or no later than December 22, 2003.

ISSUE

The parties agreed upon the following definition of the issue: (See Joint Issue):

Was the Grievant, Gwendolyn Jones, disciplined for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

The issue in dispute in this matter involves the termination of Gwendolyn Jones ("Grievant" or "Jones"), a Therapeutic Program Worker (TPW) at the Northcoast Behavior Healthcare ("NBH") Northfield Campus. NBH is a facility of the Ohio Department of Mental Health (hereinafter referred to as "Employer" or "Department"). Ms. Jones began her employment with the Department on June 1, 1987 and had no active discipline on her record at the time of her termination. She was assigned to Unit 22C, which housed approximately twenty (20) patients, and she worked the day shift. Her employment was terminated on May 13, 2003 for violation of an Employer Policy #06.09 Patient Abuse/Neglect.

The parties are in conflict over the actions of the Grievant, while she worked day shift on April 1, 2003. According to the Employer, the Grievant had been found involved in the abuse of a patient, "L. M." The alleged abuse occurred following a verbal and subsequent physical confrontation between the Grievant and L. M. in which they ended up on the floor. Following an investigation of this incident, the Employer

concluded that the Grievant failed to utilize proper techniques in diffusing a potential volatile situation and had punched the Grievant several times in the ensuing physical confrontation initiated by L. M. Following its investigation that involved the interviewing of several witnesses, the Employer concluded Jones had committed patient abuse, and it terminated her employment. The Grievant subsequently filed a grievance claiming she was fired without just cause.

EMPLOYER'S POSITION

The Employer's position in this matter is primarily based upon the statement of witnesses and L.M. It charges the Grievant with committing abuse of consumer L. M. on April 1, 2003. Its arguments are succinctly presented in its post-hearing brief. They are as follows:

"Northcoast Behavioral Healthcare (NBH) removed the Grievant, Ms. Gwendolyn Jones, for violating the hospital policy governing patient abuse and neglect. On April 1, 2003, the Grievant violated NBH policy #6.09 entitled "Patient Abuse/Neglect" on three (3) separate occasions. First, the Grievant used intimidating and disrespectful language toward a patient. Next, the Grievant pulled the hair of patient LM in response to having her own hair pulled by the patient. Finally, the Grievant physically assaulted patient LM by using her fist to punch the patient several times in the face and forehead. By engaging in physical violence against a patient, the Grievant violated NBH policy #6.09 governing patient abuse and neglect. Since the Grievant violated the patient abuse/neglect provisions of the disciplinary grid, NBH removed the Grievant for the protection of both the patients and staff.

Intimidating & Disrespectful Language to Patient

Policy #6.09 governs the entire incident in question. The policy defines abuse as "*any act or absence of action which results or could result in physical injury to a patient.*" The policy further defines abuse and neglect to include "*any intimidating or disrespectful language to a patient.*" On April 1, 2003, patient LM accused the Grievant of sleeping while working on the midnight shift. Initially, the Grievant chose to ignore the patient's statements by walking past her and up the hall; however, the Grievant decided to turn around and confront patient LM. TPW Perkins testified she attempted to steer the Grievant away from the situation by stating she would deal with the upset patient. The Grievant chose to ignore this advice. The Grievant then decided to stand toe-to-toe with the patient and engage her in a yelling match. When the situation began to escalate to a physical altercation called "belly bumping," the Grievant informs the mentally ill patient "I am not afraid of you." The Grievant's own statement (Exhibit A, page 22) proclaims the patient grabbed her hair immediately after making the comment "I am not afraid of you". Thus, the Grievant's intimidating and disrespectful language, in violation of policy #6.09, is the approximate cause of patient LM's actions of initially grabbing the hair weave.

Assistant Nurse Executive Jeff Sims testified the Grievant's comment is not appropriate not prescribed in any of the Crisis Intervention trainings conducted by the Department and could have served as the provocation for the eventual physical assault. As demonstrated throughout the hearing, when staff are faced with an agitated patient and in this case a patient prone to engaging in physical altercations, staff are taught through Crisis Intervention trainings the following: 1) respect the physical space of the patient; 2) do not overreact; 3) ignore challenge questions and insults; 4) allow verbal venting & 5) to not argue or criticize a patient. As the Grievant testified, she worked extensively with the patient in the past and is aware she can become violent. On this date, when the patient started to become physical, the Grievant responded with an intimidating comment about not being afraid of her. The Grievant testified if someone came up to her and said, "I am not afraid of you," she would respond by saying "good you have no reason to be." However, when dealing with an upset, mentally ill patient with a history of physical violence, a comment "I am not afraid of you" is viewed as an intimidating comment. Therefore, but for the Grievant violating policy #6.09 by making intimidating and disrespectful comments to patient LM, this entire incident would not have occurred.

Failure to follow Crisis Intervention Training

The Grievant received her last annual training dealing with Crisis Intervention techniques in December 2002. During this annual training, NBH employees are taught "hair pull releases" which are techniques utilized when patients pull a staff members hair. The techniques are part of the Crisis Intervention curriculum manual and can be found in Exhibit E in the arbitration documents. There are numerous techniques to utilize when dealing with a patient pulling an employees hair. Most of the techniques entail grasping the patient's hand coupled with a twist or bowing maneuver to separate the patient's hand from the employee's hair. In this instance, the Grievant describes patient LM initially attempting to reach for her hair weave, but she successfully blocked the first attempt. Apparently when patient LM reached for the hair weave the second time, she succeeded in locking onto the hair. Instead of following the prescribed techniques outlined in the Crisis Intervention manual, the Grievant responds to having her hair pulled by performing the offensive maneuver of pulling the patient's hair. The Grievant is not going to end the physical altercation by pulling on patient's LM hair. Instead of following the Crisis Intervention techniques and getting her hair unlocked from the patient's grasp and leaving the situation, the Grievant engaged in an offensive tactic designed to inflict the pain she was feeling onto the patient

When the patient pulled the Grievant's hair and locked on, the Grievant failed to follow the guidelines from her Crisis Intervention training by using the "hair pull release" techniques. On cross-examination, the Grievant admitted she failed to follow the guidelines as established in the Crisis Intervention manual when dealing with "hair pull releases." By her admission, the Grievant violated NBH policy #6.09 & the "Patient Abuse or Neglect" provision of the NBH disciplinary grid.

The Grievant also violated policy #6.09 by engaging in an offensive maneuver when she pulled the patient's hair in retaliation for the patient pulling her hair. Policy #6.09 states "*At no time shall any employee use force in an offensive manner against a patient.*" The pulling of a patient's hair in response to having one owns hair pulled is an offensive measure. There is simply no way to describe the pulling of a patient's hair as a defensive measure. There is no provision in the Crisis Intervention manual that teaches, permits or allows an employee to respond to the pulling of their hair with a response of pulling the hair of the patient. Employees are allowed to use a minimum amount of force to neutralize a situation; however, the force may not be offensive. In this instance, force is not necessary in response to the pulling of hair. If the Grievant followed her training, she could have broken away immediately from the patient to safety. The Grievant caused the situation by provoking the patient and then acting in an offensive manner designed to hurt the patient. NBH policies that prohibit employees from engaging in offensive measures are designed for the protection of mentally ill patients.

The Grievant testified the patient jokes with her by attempting to pull her hair weave from time to time. The incident on April 1, 2003, is then no different from any other time joking around with the patient. However, joking around with a mentally ill patient is dangerous, especially when the patient possesses a history of physical violence toward staff and other patients. Thus, this "mutual joking" to the patient is simply another day on the unit. The Grievant started the physical altercation when she took the "mutual joking" to the next level by pulling the hair of the patient in an attempt to inflict the same pain on her as she received from the patient. Policy #6.09 prohibits staff from acting in an offensive manner and in a manner that is punitive to a patient.

Finally, the techniques taught in the Ohio Department of Mental Health (ODMH) Crisis Intervention trainings are the only techniques approved for use by the Department. The use of any techniques outside or inconsistent with these methods increases the likelihood that injury could occur and therefore could be considered abusive. The techniques taught in the Crisis Intervention trainings are nationally recognized and were developed by experts in the field. They are designed to enable employees to gain control of difficult situations while minimizing the risk of injury to employees and patient. It is not up to the Grievant to decide whether or not they want to use the Crisis Intervention techniques. In this case, the Grievant failed to utilize these techniques and therefore violated NBH policies and engaged in behavior considered patient abuse.

Punching Patient LM in the Face & Forehead

The Grievant violated NBH policy #6.09 by punching patient LM in the face and forehead. Policy #6.09 also defines "abuse" as *"All acts of physical violence against a patient."* Patient LM testified the Grievant approached her, pushed her down, and then punched her several times in the face. Her testimony is supported by the statement she provided in Exhibit A, page 7. Ms. Dorothy Edward's statement (Exhibit A, page 16) supports the facts as outlined by the patient. Exhibit A, page 17, last question at the bottom "Who threw the first punch", is answered by Ms. Edwards "Gwen threw the first punch when LM reached and for her hair." The statement also described the Grievant as initially walking past the upset patient, but eventually circling back to address patient LM. Ms. Edwards states "Ms. Jones threw several punches after the hair weave came off." Patient LM's testimony and statement and the statement of Ms. Edwards are also corroborated by Ms. Perkins testimony and statement. Ms. Perkins states the Grievant initially avoided the situation by walking past the upset patient and then up the hall. However, the Grievant eventually circled back to confront the patient. As explained in her statement on page 13, Ms. Perkins was asked, "Did you try to separate them," to which she responded, "I could not do anything because they were punching each other." Moving on to Exhibit A, page 14, Ms. Perkins is asked, "Did Ms. Jones hit Ms. Mathis with her fist," which is answered with "yes they were fighting." The patients on the unit witnessed the incident as well. Patient JE (Exhibit A, page 25) states he witnessed the Grievant punch patient LM three (3) times with her fist. Patient TD (Exhibit A, page 26) states she witnessed the Grievant hit patient LM with her fist once or twice. Thus, five (5) people support the version of events that led to the removal of the Grievant.

Punching a patient is an offensive measure strictly prohibited by NBH policy. The NBH disciplinary grid allows for a removal if an employee acts in a verbal or physical manner or fails to act which is inconsistent with the rights of patients or is degrading to a patient or which may result in a psychological or physical injury. The Grievant acted in a physical manner by punching the patient several times in the face area. The Grievant caused physical injury to the patient as the patient testified the Grievant "bruised her forehead." A violation of the patient/client abuse or neglect provision of the disciplinary grid allows for a removal for a physical act and for causing injuries on the first offense. ODMH simply cannot tolerate its staff assaulting patients.

In addition to violating the rights of patients and violating numerous Departmental policies, an employee who is comfortable using physical violence against patients is a dangerous employee who poses a liability for their actions for NBH & ODMH. On April 1, 2003, the Grievant did not hesitate to act in an offensive manner in violation of policy. She started by pulling the hair of the patient when the patient pulled her hair. Then the Grievant continues her offensive attack by inflicting several blows upon the patient. The patient states the Grievant punched her several times in the face. Ms. Edwards states the Grievant threw the first punch in response to having her hair pulled. Ms. Perkins stated she attempted to break up the fight but could not as both parties were fighting. The Grievant admitted to violating the Crisis Intervention training by pulling the patient's hair, but proclaims she never assaulted the patient. This version of events simply is not credible. The Grievant crossed the line of appropriate actions when she pulled the patient's hair and stayed across the line when she punched her in the face in retaliation for the hair pull.

The patient testified the Grievant assumed a position on top of her while they were on the floor and the Grievant proceeded to punch her in the face. The Grievant's statement (Exhibit A, page 19) states, "I reached **down** to turn her head away from me several times because she was trying to bite me." This statement supports the fact the Grievant assumed a position on top of the patient when they reached the floor. LPN Cox also mentions in her statement (Exhibit A, page 9) "Gwen was on top of LM and got up when people were coming to assist." The aforementioned statements demonstrate the Grievant did not need to use any force to protect herself. Rather, when the Grievant pulled the patient to the floor, the Grievant assumed a position on top of the patient where she could easily inflict offensive blows. The numerous staff in the area including the ward staff, maintenance repair workers and custodial staff responded to remove the Grievant from the situation to protect the patient.

An employee is entitled to use the minimum amount of force to neutralize the attack. First, the Grievant attacked the patient by pulling her hair, taking her to the ground and punching her in the face. Next, the amount of force necessary to neutralize the pulling of hair is described in the "hair pull release" section of the Crisis Intervention manual. Nowhere in the Crisis Intervention manual does it describe "pull the hair" or "punch in the face" if a patient

pulls staff's hair. Finally, by sitting on top of the patient while inflicting blows to her face is not force design to neutralize the attack. These tactics are purely offensive in nature designed to punish the patient through the use of physical force. The Grievant never needed to use any force to handle this situation she caused with her statements and actions in violation of her trainings and policy. The Grievant should have walked away to avoid the upset patient; however, she walks up to the patient to provoke the situation. The Grievant should have walked away when the patient began to "belly bump" her; however, the Grievant chose to stand toe-to-toe with her and tell her she is not afraid of her. The Grievant should have used the "hair pull release" technique when patient LM grabbed her hair; however, the Grievant responded by pulling the hair of the patient. The Grievant should have removed herself from the altercation once the parties ended up on the floor; however, the Grievant chose to assume a position on top of the patient to inflict offensive blows. By ignoring her training and acting in a manner to cause physical harm to a patient, the Grievant violated NBH policy #6.09.

Union Witnesses

The union presented five (5) witnesses with five (5) different versions of the events that took place on April 1, 2003. The different versions were not minor. The different versions were not using different wording to describe the same action. Rather, extreme fundamental differences were presented by each of the union's witnesses. Custodial Worker Matthew Ramsey testified he intervened in the situation by "tackling the patient to the floor." When questioned why the patient needed to be tackled to the floor, Ms. Ramsey stated "for the protection of both the Grievant and the protection of patient LM." However, upon reviewing the statement of Mr. Ramsey, he states "the next moment, they were on the floor." When questioned if he assisted in taking the patient to the floor or whether the Grievant alone took the patient to the floor, Mr. Ramsey could not recall the correct version of events. Therefore, Mr. Ramsey simply is not a credible witness.

MRW Kowicki's statement (Exhibit A, page 37) supports the version of events as described by management. First, Mr. Kowicki confirms both the Grievant and patient LM were yelling at each other immediately prior to the physical altercation. Mr. Kowicki then confirmed the Department's Crisis Intervention training does not teach employees to yell patients as a method of dealing with upset mentally ill patients. MRW Kowicki further testified he and the other MRW and Mr. Ramsey immediately assisted in breaking up the altercation after both parties fell to the floor. The Grievant proclaims she never yelled at the patient. The Grievant also stated staff was not in the immediate area to assist when both she and the patient landed on the floor. Therefore, Mr. Kowicki's testimony and statement contradict the version of events as described by the Grievant.

MRW Slaby states (Exhibit A, page 34) he witnessed the staff persons arms "flailing as if to defend herself and then she was out of my sight." MRW Slaby testified he witness the patient reach for the Grievant's hair weave, but then the Grievant successfully moved out of his sight. This statement does not support the Grievant's, MRW Kowicki's or Custodial Worker Ramsey's version of events. All of the aforementioned individuals stated the Grievant pulled the patient to the floor or the patient dove to the floor immediately after the initial hair pulling incident. MRW Slaby states the Grievant immediately moved away from the patient after the initial attempted hair pull. When questioned why he felt the need to intervene in assisting to subdue the patient if the Grievant did not appear to be in danger, MRW Slaby did not respond. MRW Slaby further states the Grievant swung her arms at the patient in an attempt to defend herself; however, he never made clear why she needed to defend herself by swinging her arms. In fact, there is not one intervention taught in the Crisis Intervention training that allows employees to wildly swing their arms or "flail" their arms in an indiscriminate manner. MRW Slaby's version of events, while different from the other union witnesses' version of events, supports the fact the Grievant responded in a manner prohibited by NBH policies. The "flailing" or swinging of arms is a strictly offensive maneuver specifically prohibited by policy #6.09. MRW Slaby's version of events support the fact the Grievant did not respond appropriately when having her hair pulled by the patient. Instead of using one of the many hair pull releases techniques, the Grievant immediately resorted to arm "flailing" and swinging.

LPN Cox also paints a different picture than the rest of the union's witnesses. First, based upon her statement (Exhibit A, page 8), Ms. Cox contends the Grievant responded to the upset patient in a calm manner. This version of events is contrary to the version described by management witnesses and union witness Kowicki. Next, LPN Cox initially expressed some concern about the incident between patient LM and the Grievant before it became physical. She even asked other staff if they "were going to do anything to stop it." The Grievant testified she often engaged in conversations with the patient like the one that led to the physical altercation on April 1, 2003; thus, the conversation was "no big deal." However, LPN Cox also worked on the unit for almost a year with patient LM and the Grievant. If this type of incident did occur on a regular basis as described by the Grievant, LPN Cox would not approach this episode with such caution or with questions of interventions. LPN Cox states "Gwen was on top of LM." This account also supports management version of events. LPN Cox further states (Exhibit A, page 9) "I just saw both their arms in

the air like blocking each other.” Finally, LPN Cox states both parties were wrestling and grabbing each other when they fell to the floor. These statements describe additional offensive techniques prohibited by NBH policies.

Grievant

The Grievant admitted she failed to follow the Crisis Intervention training techniques taught to address patients pulling staff hair.

Next, the Grievant contends she did not punch patient LM with her fist. Rather, she states she merely acted in a defensive manner and attempted to remove herself from the situation. The facts simply do not support this version of events. First, the Grievant is asking you to ignore the five (5) witnesses that were in the immediate area when the incident took place. Management’s five (5) witnesses testified or provided statements that reflect the same exact version of events from April 1, 2003. The Union’s five (5) witnesses could not. In the statements of all five (5) management witnesses, all state a verbal argument led to the pulling of hair, which led to a physical altercation that included the Grievant punching patient LM in the face area several times with her fist. The Union’s witnesses state both parties were yelling, only one party was yelling. The union’s witnesses’ state we took the patient to the floor, the patient was on the floor when we arrived. The union’s witnesses’ state both parties immediately went to the floor, the Grievant was able to move away. The bond the union’s witnesses’ do share is total inability to describe what happened between the pulling of hair and when the parties were finally subdued. Phrases like the “next moment” and the “next thing” are used by union witnesses to describe the entire incident between patient LM pulling the Grievant’s hair and the end of the physical altercation. Management contends the Grievant and the union witnesses cannot describe what occurred between these two (2) incidents because to do so would be to state the Grievant acted in an inappropriate manner by punching the patient with her fist.

The Grievant admits she did not follow the techniques taught in the Crisis Intervention manual dealing with the pulling of hair. If the Grievant responds to the pulling of her hair by pulling the hair of the patient, it is easy to infer the Grievant responded by being pushed or hit by pushing back or punching back. The Grievant is asking the arbitrator to believe she only violated the policy a little bit by pulling the patient’s hair, but not in an egregious manner by punching the patient. The Grievant fails to demonstrate behavior that could cause anyone to believe she acted in an appropriate manner after the incident escalated from the pulling of hair. The Grievant proved she simply would not be out done by anything the patient did on the date in question. The Grievant could not let the patient have the last word, so she confronted her. The Grievant could not let the patient think she intimidated her, so she stood toe-to-toe with her. The Grievant could not let the patient think she feared her, so she told her “I am not afraid of you.” The Grievant refused to vacate the situation after being “belly bumped.” When the patient finally pulled her hair, she pulled the patient’s hair back. When the patient attempted to fend off the Grievant, the Grievant did not finally compose herself by not retaliating against the patient. Rather, the Grievant continued on by unleashing punches upon the patient.

The Grievant and the union could not produce any evidence to support a motive why the management witnesses would lie about the version of events. Ms. Perkins has thirty-four (34) years of trusted service and admitted she wished she did not work on the day on question because she did not want to become involved. The patient admitted sometimes she can become violent, but on this day, she did not want to fight. The patient said other than the pulling of hair, she is the victim of the punching. The fact that this patient may often engage in violent behavior does not allow NBH staff or the Grievant carte blanche when dealing with her. Because she has been violent in the past does not justify the use of offensive force on this occasion because hair is being pulled. The patient stated she did not want to fight and no one testified they witnessed the patient punching the Grievant. In fact, only the opposite is true. Management’s five (5) witnesses observed the Grievant punch the patient. The rest of the witnesses described the incident either in vague generalities or with implicit omission.

The union submitted the Juliette Dunning arbitration decision in an attempt to define what is considered “abuse.” The arbitration decision rejects both the union and management versions of abuse argued at that time. The decision leaves open an arbitrator’s ability to define abuse on a case-by-case basis. In this case, the NBH disciplinary grid defines “abuse”. The NBH policy defines abuse as acting in a manner inconsistent with the Crisis Intervention training and a physical act against a patient. Since these two (2) separate provisions of the disciplinary grid are met, the Grievant participated in behavior considered patient abuse.

Summary

The Grievant admitted to failing to follow the Crisis Intervention techniques taught by the Department when dealing with a patient pulling the hair of a staff member. The Grievant last received training in Crisis Intervention techniques in December 2002. Five (5) separate individuals, including patient LM, either stated or testified the Grievant used her fist to punch patient LM in the face area repeatedly. The union countered this evidence by presenting five (5) fellow bargaining unit members who essentially saw nothing between the hair pull and the end of the incident. The

evidence demonstrates a pattern of inappropriate behavior on the part of the Grievant from confronting the patient by standing toe-to-toe, to provoking the patient with her comments of "I am not afraid of you", to the pulling of the patient's hair in response to having her own hair pulled, to the eventual punching of patient LM as a form of punishment for pulling her hair. The Grievant did not need to protect herself from the patient. Time and time again the evidence shows she had an opportunity to vacate the situation; yet, she chose to continue on to cause the physical altercation.

The Grievant did not need to respond to the initial accusations about sleeping from the patient. TPW Perkins stated she attempted to steer the Grievant away from the situation as she feared a confrontation. The Grievant did not need to respond to the patient by standing toe-to-toe with her. The Grievant did not need to respond to the "belly bumping" by standing her ground. The Grievant did not need to make comments to the patient with the sole purpose of intimidating the patient and causing the altercation. Finally, the Grievant did not need to pull the hair or punch the patient. In all of the aforementioned instances, the Grievant possessed the ability to remove herself from a potentially hostile situation; however, she ignored the advice from her co-workers and all aspects of common sense by continuing with her behavior in violation of hospital policy. The Department cannot afford to keep an employee who possesses so little regard for training and the rules that govern the treatment of patients. These rules are designed for the protection of mentally ill patients at NBH. The Grievant possessed sixteen (16) years of service and an extensive background with the patient in question. Perhaps no other employee at NBH knew of the danger involved in behaving in the manner in which the Grievant chose on April 1, 2003. The Grievant knew the rules, knew the patient; yet, decided on a course of action that caused the patient physical harm and the Grievant's removal. The Grievant made several poor decisions on April 1, 2003. Perhaps the poorest decision involved turning around and returning to confront the upset patient. But for the aforementioned decision to confront the patient, the Grievant would still be working for NBH today.

The Grievant's actions violated the NBH disciplinary grid and just cause is present. Pursuant to article 24.01 of the OCSEA collective bargaining agreement, if the arbitrator finds there has been an abuse of a patient 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. Therefore, we respectfully request that you deny this grievance in its entirety."

UNION'S POSITION

The Union and the Grievant view the facts in this case very differently. The Union's position, like that of the Employer, is dependent upon the statement of the Grievant and the statements of several witnesses. The Union's arguments are succinctly stated in the Union's post-hearing brief. They are as follows:

"There is nothing in management's case to support discipline let alone abuse. The state has ignored the Arbitration decision of Arbitrator David Pincus in the 1987 Juliette Dunning G87-0001 (A) case. However, in the Juliette Dunning (A) decision the definition of abuse was articulated for the departments of Mental Health and Mental Retardation to follow. OAC 5123-3-14 (C) (1) ABUSE MEANS ANY ACT OR ABSENCE OF ACTION INCONSISTENT WITH HUMAN RIGHTS WHICH RESULTS OR COULD RESULT IN PHYSICAL INJURY TO A PATIENT, EXCEPT IF THE ACT IS DONE IN SELF DEFENSE OR OCCURS BY ACCIDENT. Northcoast Behavioral excludes the underlined part in their definition, which is unacceptable. Their definition makes charging staff with abuse easy as it takes away rights given because of accidents or in self-defense. The other definition is ORC 2903.33 (B) (2) and it states "Abuse" means knowingly causing physical harm or recklessly causing physical harm to a person by physical contact with the person or by inappropriate use of physical or chemical restraint, medication, or isolation in the person. If this definition is applied appropriately, there is no way abuse can be justified in this case.

The states three witnesses leave much to be desired. One of which, Dorothy Edwards did not show to testify. Therefore her questionable statement cannot be accepted as factual. These charges came 13 days after the incident from patient who has a history of fabricating charges against staff (additional joint stipulation #6). A patient who would have surely made the accusation had it been true.

Only the Grievant made an incident report after this incident was over, as she had to go to the hospital to receive treatment for her injuries. There is no documentation to validate patient L. M. claims she had a ring dug into her forehead making marks and bruises. If there were documentation to support L. M. claims the state would have produced it. There was medical staff as well as managerial staff present and no one reported abuse occurred. Even Louis Perkins and Dorothy Edwards who later alleges abuse did not make a report. According to Ohio Administrative Code 5123-3-14 (C) (1) and their policy, Ms. Perkins and Ms. Edwards would have been guilty for not reporting but neither was charged for such.

L. M. was approximately 380 pounds at the time of incident. She has lied on many staff and was not only the aggressor but she initiated all of the action. This came in the form rambling comments, belly bumping and then grabbing the Grievant's hair and throwing punches while on the ground. Second-guessing the Grievant (and staff) is a favorite past time of insensitive administrators and advocates. However, once locking onto the Grievant hair, patient L. M. was capable of breaking her neck without fast EFFECTIVE reactions (self defense). Self-defense is not limited to the yearly training given that employees may or may not recall during crucial situations. Webster's dictionary defines self-defense as the right to defend oneself with WHATEVER force is reasonably necessary against actual or threatened violence. The union agrees that if possible and remembered at the time staff could use their training. However, we don't believe staff should allow potential indecision as to what is and is not management's version of appropriateness, to cause them serious injury or loss of life. This advocate is appalled by the insensitivity shown to employees in the line of danger. Especially when the ones making such decision NEVER endanger their well being. Terena Cox said it best when she answered to the state's advocate; you have to be in that position to understand what she was talking about.

Louis Perkins statement and testimony is full of holes. She talks of trying to get the Grievant to leave the patient while she handles her. This is disputed by Andy Kowicki, Anthony Slaby and Mathew Ramsey who testified no one was in the area as they were running down the hall. They came as running as the incident started and no one was in sight. Treena Cox testified that when she heard the noise and came out of the med room, she saw Ms. Perkins sitting in a chair not standing by the Grievant and patient as Perkins indicate. Furthermore none of the union's witnesses saw Perkins assist during the incident. The reason is simple Perkins never assisted. It is questionable as to whether Perkins help instigate the attack on the Grievant. When asked if L. M. had made the remark "you're dead" to the Grievant, Perkins reply was I can't say if she did or didn't or something like that.

Louis Perkins talks about the punches and how close she was

She did admit that talking a patient down is something that they are taught to do and it is a judgement decision. Even though Jeff Sims gave testimony somewhat the opposite Dorothy Edwards talks about how the Grievant was throwing punches and incriminates the Grievant throughout her statement and testimony. Again no one sees this alleged action but Dorothy. Even the patients that were in the area don't agree with Dorothy's recollection of the incident. Andy, Anthony, Mathew and Terena disagree with Dorothy's version of the incident. Ironically Treena Cox testified she heard the commotion and came out of the med room. She asked Dorothy was going on and Dorothy's reply was "they are just talking". Ms. Cox then asked if they (Dorothy and her) were going to do anything and Dorothy replied "they will be okay". The patient then immediately grabbed the Grievant and the incident started. It is not ironic that a new person saw an immediate need to come to the staff's side but the older employee choose to ignore it. Again, no one sees Dorothy assist during this altercation. The reason is again simple, Dorothy as well as Perkins may have been the cause of this attack.

The testimony of Andy Kowicki, Anthony Slaby and Mathew Ramsay is that they were already on the unit when the loud talking started. Mathew indicated to one to put away their putty knife because he sensed trouble. They saw everything from start to end. They all said the Grievant threw no punches, and was merely trying to protect herself. None of them saw Louise Perkins anywhere in view as they were coming to assist. Mathew said he covered the patient's stomach, Andy got the shoulders and Anthony got the legs and they all said Treena Cox assisted but none saw Louis Perkins and Dorothy Edwards. They were all certain the Grievant did nothing to abuse the patient or even fight the patient. Andy also clarified his statement in that it took 13 days to ask for a statement. Had they asked when it happened where and how they arrived on 22c would have been clear. They had answered a number of alerts by the time statements were asked for this one.

However, they all agreed they were on the unit at the start of this incident. The Grievant testimony was clear and precise. She went from start to finish. She explained what she said and why it was said. Nothing she did was out of context. Talking to a patient that is escalating is a TPW's job, to try and talk them down. They can't run every time a patient gets loud or they would be running all day. Her presence on all of these management committee's is because of her value and the good job she did. It is always easy to second-guess someone, that is the benefit of hindsight. The assault committee still show her on video to the staff for training.

Many managers feel she was don't wrong even if they can't openly say it. Not only was she an asset to the facility but she came to work and did her job. Arbitrator Stein she was fired for patient abuse and they includes their definition of abuse. The Grievant handled herself admirably under trying circumstances. She followed what she thought she had been trained to do. Anyone can second-guess any situation. When asked by the hearing officer if she would do anything different, she replied she would run. However, constantly running could get her into trouble for not trying to talk the patient down. Management can't have it both ways. We ask that the Grievant be reinstated with full back pay and benefits. The she be made completely whole and the disciplined be removed from her file.

In-services and trainings is given to the staff on an annual basis. This brief training provide a skeletal basis on how staff should handle situations. This training consists of multiple things over a brief period of time and they don't provide precise information for all such attacks staff may encounter. While it offers a basic expectation it don't prevent staff in potential life and death situations from doing what is necessary to prevent physical harm to themselves. This training is never given with the repetitiveness needed to make staffs responses second nature. Management experts but the lack of training cannot produce the results they desire. Thus staff in crucial situations sometimes revert to what they know to protect themselves. Jeff Sims and management know deep in their hearts, yearly trainings on defensive maneuvers can't make the average employee into professionals. People in the field of martial arts, wrestling and self-defense requires years of training to become effective. However, they expect ordinary employees to achieve that degree of effectiveness. This expectation comes with training given once a year. Trainings that employees may or may not used from year to year."

Based upon the above, the Union requests the grievance be granted.

DISCUSSION

The Employer argues that the Grievant failed to follow guidelines established in the Crisis Intervention manual when dealing with releases from hair pull releases. She failed to apply her training in handling a crisis by not walking or breaking away from the patient and fleeing to safety. Furthermore, the Grievant caused the situation to worsen by provoking the patient to violence and then acting in an offensive manner that was designed to hurt the patient. Based upon this scenario, the Employer argues the Grievant violated NBH policy #6.09 & the "Patient Abuse or Neglect " provision of the NBH disciplinary grid.

In termination cases an arbitrator must determine whether an employer has proved clearly and convincingly that a discharged employee has committed an act warranting discipline (Hy-Vee Food Stores, Inc. and Local 147, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, 102 Lab. Arb. 555 (1994)). After reviewing all the facts, I find the Employer's case fell short of meeting its burden of providing clear and convincing proof that patient abuse occurred in this situation. However, there is little question that the Grievant made some unwise choices and demonstrated poor judgment. Patient abuse is a serious matter that this Arbitrator has dealt with several times in recent years. If the state proves it occurred, the parties in Article

24.01 have predetermined that termination is the only appropriate penalty that may be imposed.

Definitive proof in this case is primarily based upon witness credibility. The Employer provided no physical evidence of injuries to L. M., although she claimed to being punched in the face (Employer witness, Louise Perkins, a long time employee with the Department, stated she saw the Grievant punching L. M. Stated L. M. and the Grievant were *"on the floor fighting.."* (See Exhibit A, p. 12). She also testified in the hearing L. M. and the Grievant were hitting each other. Also in her statement she stated, *"...they were punching each other..."* (See Exhibit A, p. 13). On page 14 of her statement, she did not directly answer the question of whether the Grievant hit L. M. with her fist. She said yes to the question of whether the Grievant hit L. M. with her fist during the fight (See Exhibit A, p. 14).

However, in responding to other questions, Louise Perkins changed one aspect of her story from her statement during the investigation from that of her testimony at the hearing. For example, on page 12 of Exhibit A, she gave the impression she was trying to separate L. M. and the Grievant while they were on the floor. However, during the hearing she testified, *"I did nothing to assist her [Grievant] after the incident started"* (See Perkins testimony under cross-examination). During her testimony she also stated, *"We could hardly see who was punching who."* Yet, in

her statement she did not equivocate on whether the Grievant punched L. M.

Ms. Perkins also testified under cross-examination she did not know where the Grievant hit L. M. and said she did not say it was on the face. In summary, I found Ms. Perkins' testimony to be inconsistent, undermining its reliability. However, on balance she provided testimony that requires corroboration, but portrays a situation where the Grievant was in a serious physical struggle with L. M. and was throwing punches in defense of her person.

Dorothy Edwards did not testify, but in her statement she also indicates the Grievant started throwing punches after being grabbed by patient L. M. Ms. Edwards also stated that the Grievant threw the first punch immediately after L. M. reached for her hair (Exhibit A, p. 17). This statement was not subject to the rigors of cross-examination. However, Edward's statement is supported by the testimony and statement of Louise Perkins, *"after L. M. pulled her hair piece off there were blows passed."* Two patients, J. E. and T. D., provided statements again corroborating the Grievant and L. M. exchanging pushes and punches after being attacked by L. M. These two witnesses did not testify and were not subject to rigors of cross-examination.

L. M. provided testimony that I found to be somewhat self-serving and lacking corroboration. She stated she did not hit the Grievant, which

is in direct contrast to almost all of the testimony and or statements provided by the Employer and the Union. She also never admitted to yelling or using profanity (in contrast to several witness statements). However, one statement made by L. M. was of particularly significance. L. M. was in the best position to validate being punched by the Grievant, yet she said that the Grievant shoved (not punched) her twice after she grabbed her hairpiece twice. Perkins and Edwards described these blows as punches, while the direct recipient of the blows described them as shoves. In her statement, L. M. said she was punched in the face after grabbing the Grievant's hairpiece (Exhibit A, p. 7).

Witness Terena Cox stated L. M. not only grabbed the Grievant's hairpiece, but also grabbed her glasses. She stated that both L. M.'s and the Grievant's arms began flailing and that she felt the Grievant was attempting to defend herself from L. M. (Exhibit A, p. 8). I found Ms. Cox's testimony to be credible and forthright. She had only been employed for eleven (11) months at the time she witnessed the incident. Ms. Cox testified that both L. M. and the Grievant appeared to be blocking each other when their arms were flailing (Exhibit A, p. 10). Union witnesses Slaby, Ramsey, and Kowicki did not see the Grievant punch L. M., but heard the yelling and viewed the physical struggle before providing direct assistance in breaking up the altercation.

The size difference between patient L. M. who at the time weighed close to 400lbs, and is over 6 feet tall, and the Grievant, who is far shorter and weighs far less poses some question as to the ability of the Grievant to pull L. M. to the ground. Her large frame and weight create the potential for harm to most staff members who are in a confrontation with L. M. She is known to be aggressive. The Grievant testified that at approximately 2:30 a. m., during the third shift preceding the incident, L. M. had attacked a nurse, who subsequently received medical treatment.

The evidence also demonstrates that the Grievant stated to L. M. "*I am not afraid of you.*" And, L. M. bumped the stomach of the Grievant several times, in which she backed-up in response (See Grievant's testimony). Management witness, Jeff Sims, Associate Nursing Executive, testified to what the Grievant should have done in this situation. He advocated walking away, which the Grievant failed to do.

The Under Department Policy #6.09 is the following statement:

" 1. All acts of physical violence against a patient. It is recognized an employee shall be entitled to use force in the amount necessary to prevent a patient from injuring himself or to ward off attack on the employee, a fellow Any patient may report an incident of abuse/neglect verbally or written to any employee.

The force used shall be limited to the minimum amount necessary to neutralize the attack. At no time shall any employee use force in an offensive manner against a patient" (Exhibit C., p. 1).

In this matter the Employer must demonstrate that what the Grievant did does not include a legitimate need to employ defensive

means (not offensive) to defend herself in order to “neutralize the attack” against her. The evidence and testimony demonstrate that L. M., a much larger person who is known to be very aggressive, physically attacked the Grievant. It is also clear that both L. M. and the Grievant fell to the floor while engaged in a struggle. Whether the Grievant forcefully pushed L. M. or hit her with a closed fist in an attempt to fend her off is unclear. However, it is also a fact that witnesses nearby, like Perkins, Edwards, and Cox, did not provide any assistance to help the Grievant “neutralize” L. M.’s aggression. Perhaps, it was the size and reputation of L. M. that caused other female staff, who were closer, to refrain from helping. Help eventually was forthcoming, but it was the maintenance and custodial workers who had to traverse the hall before getting to the scene.

It is also clear that the Grievant, placed herself in a position to be the target of L. M.’s aggression. Her judgment in this matter is seriously suspect. However, a lapse in common sense, the failure to flee, and the improper use of hair release holds do not equate to abuse of a patient. Whether or not the Grievant engaged in pulling L. M.’s hair in an offensive, rather than a reactive defensive (albeit improper) manner is also not clear. The Employer states the Grievant chose to assume a position on top of L. M. during the physical struggle that ensued on the floor. Given the size and weight advantage of L. M., it seems unlikely that the Grievant

had much choice in where she would end up in a physical struggle with patient L. M. I also find that the Grievant's testimony wavered from her statement during the investigation. The Employer points out that Crisis Intervention Training does not teach employees to wildly swing their arms or flail their arms in an indiscriminate manner.

While there may have been a failure of the Grievant to apply the proper Crisis Techniques, the extreme circumstances of the situation, once the fight ensued, must be considered. In addition, it is noted the Grievant has no prior history of improperly handling patients. In fact, she has dealt with patient L. M. for years and there was no evidence to indicate that her past handling of L. M. was improper. The Grievant was literally in a physical struggle with a much larger imposing patient who is notorious for her physically aggressive behavior. It must not be forgotten that L. M. is a mentally ill patient who is institutionalized in part because she cannot function safely in society.

While the Grievant may have failed to utilize proper techniques, to include moving away from the escalating situation, it is not reasonable to fire an employee for employing immediate and reasonable defensive measures that come to the fore to avoid serious injury. Flailing arms may not be a recognized technique, but if they block punches they can prevent injury. I find the Employer did not prove the Grievant's actions, once the physical struggle ensued, were offensive rather than defensive in

nature. Moreover, there was no evidence that L. M. sustained any physical injuries. The testimony of the witnesses conclusively demonstrates that L. M. physically grabbed and attacked the Grievant. It is also plausible that once the Grievant was grabbed by L. M. she had difficulty escaping her grasp without assistance, and she was in danger of being injured, possibly seriously given L. M.'s height and weight advantage. Therefore, it was not unreasonable for Ms. Jones to protect herself from injury as permitted by policy.

AWARD

The grievance is sustained in part and denied in part.

The Grievant shall be reinstated to her position and her seniority shall be bridged from the date of her removal to the date of her return. She shall be returned to her former position and shift, and shall receive all back pay and benefits consistent with the following:

1. The Grievant's termination for abuse shall be removed from her record and her charges shall be changed to Neglect of Duty #3 and #4. Her termination shall be converted to a two (2) day suspension. All other findings of abuse shall be removed from her personnel file and she shall receive all back pay and benefits, less two (2) days, at the appropriate rate of pay. The Grievant shall also be required to be retrained on the proper use of Crisis Techniques.
2. The Arbitrator shall retain jurisdiction over this Award in order to assist the parties in its implementation. Such implementation shall be in accordance with the Collective Bargaining Agreement.

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

Robert G. Stein, Arbitrator