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In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department  
of Mental Retardation and  
Developmental Disabilities

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\* Case Number:

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\* 24-07-(20030902)-0969-01-04

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\* Before: Harry Graham

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APPEARANCES: For OCSEA/AFSCME Local 11:

Penny Lewis  
Staff Representative  
OCSEA/AFSCME Local 11  
390 Worthington Rd.  
Westerville, OH. 43082

For The State of Ohio:

Laura J. Frazier  
Labor Relations Coordinator  
Department of MR/DD  
30 East Broad St., 12th Floor  
Columbus, OH. 43215

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on March 17, 2005 and the record was closed.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the Grievant commit an act of abuse? If not, what shall the remedy be?

**BACKGROUND:** The parties agree upon some aspects the event giving rise to this proceeding. As set forth below, they sharply disagree over the facts prompting the Employer to discharge the Grievant, Brenda Allen.

At the time of her discharge Ms. Allen was a Therapeutic Program Worker (TPW) at the Montgomery Developmental Center in Huber Heights, OH. She was initially employed on July 3, 1989. To her discharge Ms. Allen had compiled a excellent work record.

On January 27, 2004 Ms. Allen was on duty in House 9 of the Montgomery Developmental Center. According to Sandra Ford, Assistant Program Director, she observed Ms. Allen strike a resident, C. Ms. Ford indicated Ms. Allen struck C two times in the head. This was denied by Ms. Allen.

Ms. Allen was discharged effective March 12, 2004. A grievance protesting that discharge was filed. It was not resolved in the procedure of the parties and they agree it is properly before the Arbitrator for determination on its merits.

**POSITION OF THE EMPLOYER:** On January 27, 2004 Ms. Ford arrived at House 9 of the Montgomery Developmental Center at about 6:45 a.m. This was earlier than her normal starting time. She came to work early as Ms. Allen had spoken to her

of her concern about working alone and her need for assistance. When she arrived at the House she saw Ms. Allen in the kitchen, at the sink. With her was C. According to Ms. Ford she saw Ms. Allen slap C twice on the head. She told Ms. Allen to stop. C was medically examined and found to be uninjured. Ms. Ford contacted the Developmental Center police force which investigated the incident.

In this situation there is no doubt that abuse of a resident of the Developmental Center occurred according to the State. Once abuse occurs the Arbitrator has no authority to modify Ms. Allen's discharge per the terms of the Agreement at Article 24.01. A finding of discharge for abuse may not be modified at arbitration no matter what the record of length and quality of service of the dischargee. In this situation as abuse occurred, the discharge must stand the State contends.

Not only does the Agreement prescribe discharge in cases of abuse, Departmental policies do as well. (Jt. Ex 17 a). So too do the Interpretive Guidelines governing receipt of funds from the Medicaid program. The Medicaid Guidelines define Physical Abuse as "any physical motion or action (e.g. hitting, slapping, punching, kicking, pinching, etc.) by which bodily harm or trauma occurs." (Er. Ex. 1, p. J-35). The Guidelines continue to prescribe that individuals not be

subject to abuse by anyone. In this situation Ms. Allen was seen by a responsible management official to abuse C. Under these circumstances her grievance must be denied according to the Employer.

On the day in question Ms. Allen acknowledged being stressed. Various clients of the Montgomery Developmental Center, C and R, had posed difficulties. Under the circumstances Ms. Allen had motivation to slap C. Further, when all concerned visited the site during the course of the arbitration hearing Ms. Allen's version of events was unclear. In contrast, Ms. Ford, the supervisor, was able to describe the events of January 27, 2004 precisely. Ms. Allen asserted she had touched C. In her initial interview she maintained she had grabbed C. Her account of the event is inconsistent. To the contrary, Ms. Ford's account is consistent. It did not change from her initial report through the site visit. The incident involving Ms. Allen was the first time she had witnessed abuse. It made a strong impression on her and her account should be credited urges the State.

C has a Behavior Program. It does not include physical redirection techniques. If Ms. Allen was experiencing difficulties with C the appropriate response would have been verbal, not physical. In fact, the Medicaid Regulations

proscribe physical procedures as punishment. Ms. Allen was aware physical prompts were inappropriate for C. That she used them constitutes grounds for removal according to the Employer. Not only did Ms. Allen slap C, she grabbed her as well. Such actions are inappropriate and constitute grounds for discharge in the view of the Employer.

In her grievance Ms. Allen did not contend that her discharge was inappropriate as she had not committed abuse. Rather, she sought to explain her actions in terms of being stressed. As abuse cannot be tolerated and the Agreement provides for discharge in such circumstances the State urges the grievance be denied.

**POSITION OF THE UNION:** In the opinion of the Union Ms. Ford's account of events of January 27, 2004 is riddled with inconsistency. At various times she indicated Ms. Allen had struck C on the "side" and the "back" of her head. Given such inconsistency, her account should not be credited in the Union's view.

Consideration must be given as well to Ms. Allen's situation on January 27, 2004. She was working alone. She had expressed her concern about doing so to Ms. Ford. No assistance had been provided.

More to the point, Ms. Allen has steadfastly denied striking C. She touched C's neck. (Jt. Ex. 13 F). Unbeknownst

to Ms. Allen, Ms. Ford was on the scene. She exclaimed that Ms. Allen had hit C. The Grievant was astonished at that exclamation. She did not believe she had struck C. While this was occurring another resident, R, had wandered off as was his custom. Ms. Allen went after him. At all times Ms. Allen has denied striking C in any manner. In her statement (Jt. 13 K) she denied tapping or striking C. She acknowledged grabbing C by the shirt to redirect her. This is permissible.

The Union contends that the Employer cannot prove Ms. Allen committed abuse. The Grievant has fifteen years of good service. She has not been a discipline problem for the Employer. As the State cannot prove Ms. Allen acted as charged, the Union contends that it cannot be determined that abuse occurred. It urges that the Grievant be restored to employment with a make-whole remedy.

**DISCUSSION:** In discipline and discharge disputes normally it is the Employer that bears the burden of convincing the arbitrator that the grievant did the deed with which he or she is charged and, if so, that the penalty is appropriate. This situation is different per the terms of the Agreement at Article 24.01 which prescribes discharge if abuse of a person in the care of the State is found to have occurred. Close scrutiny of the State's claim in this situation is necessary.

Ms. Ford, the chief witness on behalf of the Employer, is

a veteran of service with the State. She has a responsible position at Montgomery Developmental Center. At arbitration she testified credibly and forthrightly about her perceptions of the event of January 27, 2004. The minor discrepancies pointed out in her account of events, eg. that C was struck on the side or the back of her head, are insufficient to call into question her version of events. Such discrepancies are a matter of semantic hair-splitting. Were it the case that Ms. Ford's testimony stood alone the conclusion would be inescapable that Ms. Allen acted as charged and that her discharge was mandated under the Agreement.

Obviously Ms. Ford's testimony does not stand alone. It is sharply contradicted by the Grievant. Just as Ms. Ford asserts C was struck by Ms. Allen, the latter denies it. Ms. Allen, the Grievant, has fifteen years of service with the State. To this situation her work record was exemplary. At arbitration her testimony was cogent, detailed, and forceful. Under these circumstances there is no basis to prefer the testimony of Ms. Ford over that of Ms. Allen. It cannot be concluded with any degree of confidence that the abuse referenced in Section 24.01 of the Agreement occurred. It is stressed that this conclusion should not be read to imply that either Ms. Ford or Ms. Allen were untruthful at arbitration. Rather, it is the case that there is no rational

basis for preferring the testimony of one over that of the other. In such situations the case of the Employer must fail.

As I have oft observed, the standard of proof in a discharge dispute is not easily determinable. The precise division into such classifications as "beyond all reasonable doubt," "clear and convincing" and "preponderance of the evidence" are unhelpful guides for the arbitrator. It is required that the Employer prove the charge against the Grievant by some standard. The arbitrator must be convinced the Grievant acted as claimed by the Employer for discharge or discipline to stand. In this situation the State cannot do that.

**AWARD:** The grievance is sustained. The Grievant, Brenda Allen, is to be promptly restored to her employment at Montgomery Developmental Center. Back pay at the straight time rate is to be made to her through December 21, 2004 per the stipulation of the parties at the hearing. The Employer may offset its back pay obligation to the Grievant by any income she may have received from Unemployment Compensation and interim wage earnings. Upon request the Grievant is to supply records of any monies received from Unemployment Compensation and/or wage income. Any such income may be used to offset the backpay obligation of the Employer. All seniority is to be restored to the Grievant together with the



attendant pension credit. All expenditures for health incurred by the Grievant and her family that would have been covered by health insurance are to be reimbursed to her. All reference to this incident is to be removed from her personnel file.

Jurisdiction is retained for sixty (60) calendar days from the date of this award to resolve any questions concerning remedy.

Signed and dated at Solon, OH. this 4<sup>th</sup> day of April, 2005.

Harry Graham  
Harry Graham  
Arbitrator