

#1818

**OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio Department of Mental Retardation and Developmental Disabilities
Gallipolis Developmental Center
-AND-
Ohio Civil Service Employees Association AFSCME Local 11**

Appearing for Gallipolis Developmental Center

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Appearing for OCSEA

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Matthew Gilmore, Grievant
Carrie Jackson, TPW
Kimberli Jolley, TPW
Sherri J. Rankin, Custodian
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CASE-SPECIFIC DATA

Grievance No.

Grievance No. 24-07-(01-07-04)-0994-01-04

Hearing(s) Held

November 17, 2004 & January 25, 2005

Closing Arguments Received

March 18, 2005

Case Decided

April 17, 2005

Subject

Patient Abuse

The Award

Grievance Sustained

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

Table of Contents

I. The Facts	3
II. The Issue	5
III. Relevant Contractual and Regulatory Provisions	6
IV. Summaries of the Parties' Arguments	7
A. Summary of the Agency's Arguments	7
B. Summary of the Union's Arguments	8
V. Discussion and Analysis	9
A. Evidentiary Preliminaries	9
B. Special Testimonial Arrangements for Ronald	10
C. Assessment of the Evidence	10
D. Ronald's Competence as a Witness	11
1. Ronald's Historical Pentchant for Deception and Mendacity	12
2. Ronald's Investigatory Statements	13
a. Internally Consistent Elements of Ronald's Investigatory Statements	13
b. Internally Inconsistent Elements of Ronald's Investigatory Statements	14
(1) Who was in the Breakroom and the Day Room	14
(a) Joint Exhibit 15a	14
(b) Joint Exhibit 15b	14
(c) Joint Exhibit 15c	15
(d) Joint Exhibit 15d	15
(e) Joint Exhibit 15f	15
(f) Joint Exhibit 15g	15
(2) Ronald's Views of the Breakroom	16
(a) Joint Exhibit 15j	16
(3) Why the Grievant Allegedly Hit Client/Did Client Guzzle Water?	16
(a) Joint Exhibit 15c	16
(b) Joint Exhibit 15i	16
c. Externally Inconsistent elements of Ronald's Investigatory Statements	17
(1) Marks on the Client	17
(a) Joint Exhibit 15i	17
(2) Ronald's Retractions	18
(a) Joint Exhibit 17a-c	18
VI. The Award	19

1
2
3
4
5
6
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8
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I. The Facts

The parties to this disciplinary dispute are the Gallipolis Developmental Center ("GDC" or "Agency") and OCSEA, AFSCME Local 11 ("Union"), representing Mr. Matthew Gilmore ("Grievant"). When he was removed, the Grievant was classified as a Therapeutic Program Worker ("TPW") with approximately seven years of service with the Agency, had a satisfactory record of job performance, and no active discipline.

The Agency's broad mission is to afford a residential setting and active treatment for clients by encouraging them to function at their fullest capacities and to address their disabilities. Equally important, the Agency seeks to treat its clients with respect and dignity. The Agency's staff is broadly classified as direct care and support units, numbering approximately 470 and responsible for 235-240 clients with mental and physical disabilities ranging from mild to severe. The primary care staff is the larger group with Therapeutic Program Workers ("TPW"), comprising the largest segment of primary care staff. As primary care staff, TPWs work closely with clients, administering a wide range of care, including medication, nutrition, physical hygiene, and recreation. In short, clients place considerable trust and dependence on TPWs, and the Agency has a zero-tolerance policy for client abuse. Termination is, therefore, the mandatory penalty for a first offense of abuse. Finally, the Agency affords TPWs biannual training that enables them to perform their duties. The Grievant last received training about "Disciplinary Action" on or about July 29, 2003.¹

The instant dispute arose on October 29, 2003 when Mr. Theodore D. Staton overheard Mr. Bernie H. ("Client") tell his peers, that, "[T]he colored guy [the Grievant] had woke him up while he was asleep on the couch and beat the hell out of him and made him stay awake on the C/D side."² The Client was known to make statements to impress others, knew Mr. Staton was in the area, and looked in Mr. Staton's direction immediately after making the accusation. Mr. Staton filed an Unusual Incidental Report ("UIR") that same

¹ Joint Exhibit 33.

² Joint Exhibit 38.

1 day.¹³

2 The UIR prompted the Agency to launch an administrative investigation into the Client's allegations
3 against the Grievant. During that investigation, the Agency obtained statements from the Client, various
4 TPWs, and Mr. Ronald J. ("Ronald"), the Client's roommate, who claimed to have actually observed the
5 Grievant beating and choking the Client on October 29, 2003 at approximately 11:00 PM in the breakroom.
6 The testimony of Ronald and the Client formed the basis for the Agency's disciplinary decision. Based on
7 those testimonies, the Agency leveled the following charges at the Grievant:

8 On or about October 29, 2003 at approximately 11:00 p.m., you cursed and
9 threatening [sic] client Bernie H, shoved him against a wall in the break room of
10 Living Area 6047 and hit and slapped him on or around the chest and face. Later in
11 the shift, you woke him up, told him that you were not going to let him sleep, took
12 him to another side of the Living Area and kept him awake until approximately
13 5:00am, thereby denying Bernie sleep and access to his bed."¹⁴

14 During the Grievant's predisciplinary hearing on December 16, 2003, the Agency produced documents
15 and written statements but no actual witnesses to support its accusations against the Grievant. The Agency
16 videotaped the Client and Ronald, describing the incident¹⁵ and had them to assist in recreating the incident.
17 Finally, the Agency stated that the nature of the Client's disability precluded him from either appearing at
18 or testifying during the arbitral hearing.

19 After the Agency removed the Grievant on January 6, 2004, the Union timely responded with Grievance
20 No. 24-07-(01-07-04)-0994-01-04 ("Grievance"), asserting that the Agency failed to meet the standards of
21 just cause and to produce "credible" witnesses to the event.¹⁶

22 On January 23, 2004, the Parties convened a Step-3 grievance meeting, whereupon the hearing officer

¹³ *Id.*

¹⁴ Joint Exhibit 6. The final notice of discipline against the Grievant was incorrectly dated, listing him as being on duty on October 29, 2003 when, in fact, he was not then on duty.

¹⁵ Joint Exhibit 26.

¹⁶ Joint Exhibit 1a.

1 determined that the Agency had not violated the Collective-Bargaining Agreement and, therefore, denied the
2 Grievance.¹⁷ Ultimately, the Parties did not resolve the Grievance, and on May 24, 2004, the Union notified
3 the Agency that it was appealing the Grievance to arbitration.¹⁸ The Parties selected the Undersigned to hear
4 the matter, and on November 17, 2004, the Undersigned commenced the first of two arbitral hearings at
5 approximately 9:00 A.M. at GDC. At the beginning of the hearing, the Parties offered several factual
6 stipulations¹⁹ but there were no procedural objections to the Undersigned's jurisdiction to hear the instant
7 dispute, which was, therefore, properly before the Undersigned. The Agency and the Union were
8 represented by their respective advocates, each of whom had a full and fair opportunity to produce
9 testimonial and documentary evidence in support of their case. All witnesses were duly sworn and fully
10 available for cross-examination. Similarly, all documents introduced into the arbitral record were available
11 for relevant objections.

12 At the end of the first hearing day, the Parties agreed to a second day of hearing and reserved January
13 25, 2005 as the date for that second hearing. All of the foregoing procedures and entitlements set forth for
14 the first hearing day were observed during the second day.

15 At the end of the second-day hearing, the Parties opted for Post-hearing Briefs in lieu of closing
16 arguments and agreed to e-mail the briefs to the Undersigned on or before March 18, 2005. The last brief
17 was e-mailed on March 18, 2005, at which time the record was officially closed.

18 **II. The Issue**

19 The Parties stipulated to the following issue: "Was the Grievant removed for just cause? If not, what
20 shall the remedy be?"

¹⁷ Joint Exhibit 3b.

¹⁸ *Id.* at 1.

¹⁹ "The case is properly before the arbitrator; The Grievant began his employment at the GDC on 7/22/96; The Grievant was assigned to the 6047 living at the time of the incident at issue; The 'Contract Between the State of Ohio and OCSEA 2003-2006' is included as an exhibit by reference; The Grievant has no prior discipline; The Grievant's evaluations."

1 **III. Relevant Contractual and Regulatory Provisions**
2 **“Rights of Persons Residing at GDC.”**

3 Clients have the right to:

- 4 ➤ be treated at all times with courtesy and respect
5 ➤ be free from emotional, psychological, and physical abuse

6 ➤ individuality and personal dignity
7 ➤ be free from “restraint, interference, coercion, discrimination, or reprisal”^{\10}

8 **Disciplinary Actions**

9 G.D.C. Administrative Policy # 2, Policy ID

10 “[I]n situations of a major or severe violation such as abuse, neglect or mistreatment, the employee will be
11 terminated.”^{\11}

12 **Standard Guidelines or Progressive Corrective Action**

13 * * * *

14 Category: Abuse/Neglect^{\12}

15

Offense	<u>1st Offense</u>	<u>2nd Offense</u>	<u>3rd Offense</u>	<u>4th Offense</u>
Physical, sexual, or verbal abuse	Removal	N/A	N/A	N/A

16

17 **III Definitions**

18 A “Major Offense” “An offense which, in and of itself, may constitute grounds for the imposition of a
19 suspension or removal from employment; an incident where disciplinary action *need not* follow the
20 progressive corrective action sequence.”^{\13}

21 K Abuse - The ill treatment, violation, revilement, malignant, exploitation, and/or disregard of an
22 individual, whether purposeful or due to carelessness, inattentiveness, or omission of the perpetrator.^{\14}

23 L. Physical Abuse - Any physical motion of action (e.g. hitting, slapping, punching, kicking, pinching) by
24 which bodily harm or trauma may occur.^{\15}

\10 Joint Exhibit 34b-i.

\11 Joint Exhibit 32b.

\12 Joint Exhibit 32k.

\13 Joint Exhibit 32c (emphasis added).

\14 Joint Exhibit 32d.

\15 Joint Exhibit 32d-e.

1 **Article 24 - Discipline**

2 **24.01 - Standard**

3 Disciplinary action shall not be imposed upon an employee except for just cause. . . . If the arbitrator
4 finds that there has been an abuse of the patient or another in the care or custody of the State of Ohio, the
5 arbitrator does not have authority to modify the termination of an employee committing such abuse. . . .

6 **24.02 - Progressive Discipline**

7 The Employer will follow the principles of Progressive discipline. Disciplinary action shall be
8 commensurate with the offense. . . .

9 **IV. Summaries of the Parties' Arguments**

10 **A. Summary of the Agency's Arguments**

- 11 1. On October 29, 2003, the Grievant did hit and slap the Client "on or around the chest or face."
12 Subsequently, that same evening, the Grievant denied Bernie "sleep and access to his bed. Therefore,
13 the charge of abuse is appropriate.
14 2. Moreover, the charge of abuse is sustained by credible eye-witness and circumstantial evidence in the
15 arbitral record.
16 a. As the Agency's chief witness, Ronald credibly testified that he actually observed the Grievant twice
17 abuse the Client on October 29, 2003. The testimony of Psychologist Thomas Kimball, an expert
18 in mental retardation, establishes Ronald's competence to testify. Dr. Kimball testified that Ronald
19 can: (1) offer reasonably accurate answers, (2) distinguish between truthfulness and falsity, and (3)
20 recall specific events. Ronald has a cheerful personality and seeks the friendship of others,
21 especially GDC staff.
22 b. Also, Dr. Kimball opined that historically Ronald has misrepresented the truth only where motivated
23 by his own self interest. In the instant case, however, Ronald lacked a motive to falsely accused the
24 Grievant. Because Ronald has the mentality of a ten-year old, he lacks the capacity to fabricate
25 intricate patterns of misrepresentation or to preserve them for almost a year. Also, the quality of
26 Ronald's testimony in the instant case amply demonstrates his capacity to be an effective witness.
27 His testimony was steadfast, forthright, and credible, despite thorough cross-examination.
28 c. Ronald's testimony jibes with other witnesses' testimonies and documentation in the arbitral hearing,
29 regarding his location on October 29, 2003 and the circumstances surrounding the Grievant's
30 abusive conduct.¹⁶
31 d. Nothing in the record establishes that Ronald is a racial bigot, and he specifically denied that
32 accusation. No witnesses specifically recalled hearing Ronald using racial slur's against Blacks.
33 And even though the Client has used racial epithets, the Grievant conceded that the Client really
34 didn't know any better and did not know what he was saying.
35 e. Thus, Ronald's credibility in this case survives his retraction of his initial statement and his history
36 of uttering falsehoods. In fact, evidence in the record shows that TPW Carrie Jackson had the
37 opportunity to and probably did coerce Ronald to alter his testimony against the Grievant.
38 3. It is understandable that other staff who were present when the Grievant abused the Client did not
39 ultimately report the incident. Yet, those staff's versions of the events of October 29, 2003 conflict with
40 Ronald's only with respect to the existence of the abuse. But, given their decision not to file UIRs, one
41 would expect mendacity by the staff, since their failure to file UIRs for observed client abuse would

¹⁶

Joint Exhibit 9-26.

1 subject them to severe discipline.^{\17} By failing to immediately report the Grievant's abusive conduct on
2 October 26, 2003, those staff members, in effect, permanently sealed their own lips.

3 4. The Grievant was aware of his duties toward clients and of regulations governing his relationship with
4 them. On March 1, 2002,^{\18} July 9, 2001,^{\19} and July 29, 2003,^{\20} the Agency in-serviced the Grievant on
5 its abuse policy, including the mandatory penalty of termination for the first demonstrated instance of
6 abuse.

7 5. The Union's Arguments are meritless.

8 a. Although the date on the removal order was incorrect, the Union was fully aware of the correct date
9 through the processing of the Grievance.

10 b. Article 24.02 does not require Management to produce witnesses at a predisciplinary hearing.
11 Instead, that Article requires Management to produce only a list of witnesses to the event in question.

12 c. Nothing in the record supports the proposition that Ronald or the Client conspired against the
13 Grievant. Indeed, Ronald related to the staff, except when he falsely accuse Custodian Sherri
14 Ranking. Also, Ronald testified that he still liked the Grievant, and there was no evidence of ill will
15 between the Grievant and Ronald.

16 d. Although proof of physical injury may be sufficient to establish abuse, it not a necessary element
17 therefor.

18 **B. Summary of the Union's Arguments**

19 1. Management's decision to fire the Grievant violated section 2.02 and 2.04 of the Collective-bargaining
20 Agreement.

21 2. In the instant dispute, the Agency never conducted a fair and impartial investigation, failing to fairly and
22 thoroughly investigate the facts before charging the Grievant with abuse and terminating him. For
23 example, the Agency failed to interview all employees on either the 2nd or 3rd shift. This type of
24 oversight violates one of the seven tests of just cause.

25 3. During the arbitral hearing, the Agency failed to produce key witnesses to its case. Specifically, GDC
26 did not produce Officer Charles Baker or Tracey Young as witnesses, even though both were in the day
27 room during the time that the Grievant allegedly kept the Client up all night. More important, perhaps,
28 GDC did not allow the Client to testify in his own behalf because he obviously is not a credible witness.

29 4. Although several other staff members were in the area when the incident allegedly occurred, they neither
30 saw nor reported anything.

31 a. The abuse alleged in this dispute occurred at the second-to-third-shift change. Approximately, ten
32 staff members were in the area of the alleged incident on October 29, 2003, but no one, except
33 Ronald witnessed anything.

34 b. Officer Charles A. Baker made rounds in the area at approximately 5:00 AM and reported nothing
35 untoward. The report of Officer Charles Baker, on October 29, 2003 (testified to by Officer Chip
36 Kirby) mentioned nothing about the Client being in the same room with the Grievant. Yet, Officer
37 Baker mentioned others that were in the living room on the morning of October 29, 2003.

38 c. James Fellure, and Tracey Young were in the room with Aaron H. ("Aaron") and saw nothing. The
39 Agency declined to charge the Grievant with kicking Aaron in the stomach while he was lying on

^{\17} Joint Exhibit 36d.

^{\18} Joint Exhibit 35.

^{\19} Joint Exhibit 37.

^{\20} Joint Exhibit 33.

1 the living room couch because Management knows all of the alleged claims against the Grievant are
2 contrived.

3 d. TPW Jackson was in the area on October 29, 2003, saw nothing, and testified that Ronald falsely
4 accused the Grievant.

5 e. On October 28, 2003 TPW Kimberli (Tackett) Jolley had one-on-one duty with the Client but
6 testified that she saw no abuse and that the Client never claimed the Grievant assaulted him.

7 f. TPW James Fellure was also in the breakroom on October 29, 2003 but saw nothing amiss.

8 5. Neither Ronald nor the Client is credible as a witness.

9 a. First, he loses credibility because he is a client at GDC. No statement by another person can
10 overcome this weakness.

11 b. Second, Ronald has a history of falsely accusing staff and other clients who resist his demands. For
12 example, Ms. Rankin testified that Ronald falsely accused her of threatening to break his jaw, when
13 she insisted that Ronald obey the rules and regulations of his treatment program.

14 c. Ronald and the Client likely conspired against the Grievant. These clients are roommates at the
15 GDC and had ample time to fabricate misinformation about the Grievant.

16 d. Dr. Kimball testified that Ronald has an eight-to-eleven-year-old intellect and likes to please others.

17 e. O.M.R.P. Laura Ousley testified that Ronald doesn't like the Grievant.

18 f. The Client is not a credible witness. Based on GDC's evaluations, the Client will attempt to get his
19 way by becoming verbally aggressive or threatening to report staff or to have them fired. Also, he
20 can turn his aggression inward toward himself by threatening to accuse staff of abuse. He generally
21 does not create injury other than red marks.

22 g. Also, Ms. Ousley testified that the Client will lie if he does not get his way.

23 h. Officer Kirby testified that clients threaten to lie on staff to get them fired if they resist the clients'
24 demands. Officer Kirby admitted that, in the video, he asked Ronald leading questions. Also,
25 Officer Kirby admitted that, to further his self-interest, Ronald falsely accused Ms. Rankin.

26 6. The Agency focused on the alleged incident that occurred on October 28, 2003 and essentially ignored
27 the alleged incident of October 29, 2003, at which time the Grievant purportedly kept the Client awake
28 all night.

29 7. Management never charged the Grievant with striking Aaron in the stomach a few days before the
30 alleged abuse in the instant case.

31 V. Discussion and Analysis

32 A. Evidentiary Preliminaries

33 Because this is a disciplinary dispute, GDC has the burden of proof or persuasion with respect to its
34 charges against the Grievant. Thus, the Agency must adduce *preponderant* evidence in the arbitral record
35 as a whole, showing *more likely than not* that: (1) The Grievant abused the Client on October 29, 2003.
36 Doubts with respect to that charge shall be resolved against GDC. Similarly, the Union has the burden of
37 persuasion (preponderant evidence) with respect to its allegations and affirmative defenses. Doubts with
38 respect to those allegations or affirmative defenses shall be resolved against the Union. The Arbitrator
39 stresses, however, that since the Agency has the burden of persuasion, it must *affirmatively* prove its charges

1 against the Grievant by no less than preponderant evidence in the arbitral record as a whole. It is not the
2 Union's duty to disprove the Agency's charges. Therefore, if the Agency fails adequately to establish its
3 charges, it cannot prevail, irrespective of the strength or weakness of the Union's case.

4 **B. Special Testimonial Arrangements for Ronald**

5 Shortly before the arbitral hearing on November 17, 2004, GDC's advocate, Ms. Rehak, requested the
6 Arbitrator to allow Ronald to testify under special conditions. Specifically, Ms. Rehak wanted Ronald to
7 testify from behind a translucent curtain during direct examination because he did not want to confront others
8 at the table during that part of his testimony. Predictably, the Union objected to this proposed arrangement,
9 arguing that the Grievant had a right to confront his accusers, that Ronald had been unduly coached as a
10 witness, and that the arrangement would exploit that unfair or improper coaching.¹²¹ Nevertheless, during
11 direct examination, the Arbitrator permitted Ronald to testify from behind a translucent curtain that
12 concealed him from all persons present at the arbitral hearing, except the Arbitrator and Ms. Rehak.

13 In permitting this testimonial deviation, the Arbitrator stressed two very important caveats: First, Ronald
14 would be cross-examined in full view of all persons in the hearing room. Second, in *all other respects* ,
15 *Ronald* would be treated as *any other ordinary* witness. The latter proviso was especially important because
16 Ronald's testimony is a (if not the) primary basis through which the Agency sought to establish its case
17 against the Grievant. Finally, as set forth below, this caveat applies to Ronald's statements during all aspects
18 of his role as a witness, including his investigatory interviews.

19 **C. Assessment of the Evidence**

20 The ensuing discussion and analysis prompts the Arbitrator to hold that the Agency did not fire the
21 Grievant for just cause because the Agency failed to adduce preponderant evidence that the Grievant abused
22 the Client on October 28, 2003 or on October 29, 2003.

¹²¹ Witness never can be over-coached, so long as exaggeration, misrepresentation, or other deceitful conduct are factors.

1 The basis for this holding is that neither Ronald nor the Client ultimately proved to be credible
2 witnesses. Because the Agency produced virtually no circumstantial evidence to support its charges in this
3 dispute, its case rests entirely on Ronald's testimony and investigatory statements as well as the Client's
4 investigatory statement. The outcome in this case therefore turns entirely on the credibility of these two
5 clients, which means the credibility and probative value of their statements and testimony must carry the day
6 for the Agency by convincing the Arbitrator that the Grievant abused the Client. As a result, the ensuing
7 discussion and analysis of the Agency's evidence focuses *entirely* on the credibility of Ronald and the Client.

8 Internal and external consistency are major determinants of any witness' credibility, particularly where
9 written statements are involved. Therefore, when assessing the credibility of Ronald's and that Client's
10 written statement's, the Arbitrator must carefully determine whether those statements are internal
11 inconsistent, and whether they are externally consistent, i.e., consistent with any *testimony* given by the
12 witness who offered the written statement. In some contrast, the criteria for assessing testimonial credibility
13 include internal and external consistency as well as a witness' behavior while testifying. However, internal
14 and external consistency usually trump behavioral irregularities. With these criteria in mind, the Arbitrator
15 now turns first to an assessment of Ronald's competence as a witness and of his historical penchant for
16 truthfulness..

17 **D. Ronald's Competence as a Witness**

18 The following records of GDC reveal that Ronald certainly has the basic capacity to testify in an arbitral
19 hearing:

20 [Ronald] is able to have an adult conversation *responding to questions and offering*
21 *comments.*¹²² His expressive communication skills correlates to the age equivalency of eight
22 years. . . . He used his expressive language *to respond to others, asked questions, and relay*
23 *information.* [Ronald] . . . was able to take turns in social conversation. His remarks were
24 generally on topic and sufficient details were given.¹²³ He functions in the moderate range

¹²² Joint Exhibit 27f (emphasis added).

¹²³ *Id* (emphasis added).

1 of mental retardation with moderate deficits in both cognitive development and adaptive
2 behavior.”²⁴

3 **1. Ronald’s Historical Pechant for Deception and Mendacity**

4 On the other hand, GDC’s records also reveal that Ronald can be less than truthful:

5 It is also been reported that . . . [Ronald] has been *telling small lies*. Team notes that these
6 are not lies that amount to anything but seem to be more of a way for Ronnie to *have a*
7 *conversation with others*.²⁵ Staff report that Ronnie *will lie when confronted with his*
8 *behavior and appears to tell other stories which are untrue to seek attention or inflate his*
9 *sense of importance*. . . . The most recent concern has been . . . [Ronald’s] attempt to
10 *instigate conflict* among both staff and his peers [Ronald] will make comments to his
11 peers with the intention of agitating or irritating them. Comments have also been made to
12 staff concerning his peers with the apparent desire to create conflict. It is suspected that .
13 . . [Ronald] attempts to manipulate these situations as he becomes bored easily and enjoys
14 watching others become stressed.²⁶ Do not send . . . [Ronald] to another staff or peer to
15 relay information, even *simple information*. Staff should also be *cautious of believing* . . .
16 [Ronald’s] *relay of information*, particularly when it is a message from another staff or from
17 his peers.²⁷

18 Furthermore, Ms. Rankin testified that Ronald falsely accused her of misconduct. Under cross-
19 examination, Officer Chip Kirby essentially corroborated Ms. Rankin’s testimony. He classified Ronald’s
20 accusations against Ms. Rankin as “unsubstantiated,” distinguishing “unsubstantiated” from “unfounded”
21 allegations. According to Officer Kirby, “unsubstantiated” allegations are neither established nor rebutted;
22 “unfounded allegations apparently are affirmatively rebutted or disproved. Although Officer Kirby’s
23 distinction makes sense, for purposes of assessing Ronald’s credibility, the Arbitrator must close the “circle
24 of uncertainty” regarding the veracity of Ronald’s accusations against Ms. Rankin. Because the Agency did
25 not substantiate those accusations, the Arbitrator presumes that they were false, thereby giving Ms. Rankin
26 the benefit of the doubt.

²⁴ Joint Exhibit 28c.

²⁵ Joint Exhibit 27d.

²⁶ Joint Exhibit 29a (emphasis added).

²⁷ Joint Exhibit 29b (emphasis added).

1 Another event that raises doubts about Ronald's veracity all credibility involves his claim that he
2 observed the Grievant strike Aaron. The difficulty for Ronald and for the Agency is that Aaron that they
3 deny that the Grievant had struck him. This incident does little to enhance Ronald's credibility as a witness.

4 GDC's evaluations of Ronald together with his false accusations against Ms. Rankin and the Grievant
5 leave a cloud of logical doubt about Ronald's credibility as a witness. In the final analysis, then, it is
6 Ronald's credibility as a witness, rather than his competence to function as a witness, that is at issue in this
7 dispute.

8 CDC's evaluations and the foregoing incidents clearly indicate that one should exercise considerable
9 prudence, including reference to independent corroborative evidence if any, before relying on Ronald's
10 assertions about any given situation. Against this background, the Arbitrator now examines Ronald's
11 investigatory statements.

12 **2. Ronald's Investigatory Statements**
13 **a. Internally Consistent Elements of Ronald's Investigatory Statements**

14 Except for his retraction or recantation on November 13, 2003, the most internal consistent elements of
15 Ronald's investigatory statements on October 30, 2003 and November 14, 2003 involves his location during
16 the time of the alleged incident and the nature of the Grievant's attack on the Client.¹²⁸ As to his location
17 during the alleged incident, Ronald's October 30 investigatory statement¹²⁹ consistently placed him in the
18 doorway of the breakroom at approximately 11:00 PM on October 29, 2003. Furthermore, except for the
19 Client's express contradiction, Ronald's statement about his location during the alleged attack is largely
20 externally consistent the statements of several staff members.

21 Ronald's October 30 investigatory statement is also internal inconsistent with respect to the nature of
22 the Grievant's alleged attack on the Client. That statement consistently alleges that the Grievant shoved the

¹²⁸ Ronald's November 14 investigatory statement generally reaffirms his October 30 statement.

¹²⁹ Joint Exhibit 15.

1 Client against a wall, struck him with both opened hand and fist, and choked him.¹³⁰

2 These two statements are the high-water marks of internal consistency for Ronald's investigatory
3 statements in this dispute. As set forth below, the internal consistency and, hence credibility, of Ronald's
4 investigatory statements rapidly deteriorates in other areas.

5 **b. Internally Inconsistent elements of Ronald's Investigatory Statements**

6 **(1) Who was in the Breakroom and the Day Room**

7 **(a) Joint Exhibit 15a¹³¹**

8 Ronald first stated that PM staff "Kim, Melvin, and Tina" were in the day room and that they did not see
9 the Grievant smack the Client. He stated that the Client was in the breakroom when the Grievant allegedly
10 "smacked him around."

11 **(b) Joint Exhibit 15b**

12 Then Ronald stated that some staff were indeed in the breakroom "but I don't think there was a kind of
13 chance for them to see what was going on." Having declared that some PM staff were in the breakroom,
14 Ronald agreed that they *could have* seen the Grievant smack the Client. Becoming ever more specific,
15 Ronald then identified **Ms. Kimberli Jolley** as one of the PM staff in the breakroom, even though earlier he
16 had explicitly placed Ms. Jolley in the **day room**. He also stated that **TPW Janice Boyd** and **TPW Tammy**
17 **Smith** *could have* been in the breakroom, after which he stated *with some assurance* that **TPWs Jolley** and
18 **Smith** were in the breakroom when the Client was allegedly attacked. Next Ronald stated for the first time
19 that **Tina** ?¹³² was also in the breakroom, after he had specifically placed **Tina** in the day room. Also, at **15l**,
20 Ronald specifically states that TPWs **Boyd, Jolley**, and **TPW James Fellure** saw the Grievant abusing the
21 Client but failed to intervene, though *they* did ask the Client if he was all right. Note that Ronald had stated
22 earlier that only **TPW Jolley** had inquired about the Client's condition after the alleged attack.

¹³⁰ See Joint Exhibits 15, 15a, 15c, 15d, and 15h.

¹³¹ To avoid inordinate footnoting, the Arbitrator will cite the pages of the various joint exhibits at the beginning of the paragraph that discusses them.

¹³² No last name observed in arbitral record.

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(c) Joint Exhibit 15C

Ronald stated that after the Client was allegedly beaten, Ms. Jolley asked him if he was all right and that the Client said “yes, but I don’t know.” Thus, Ms. Jolley went from being in the day room and observing nothing³³ to being in the breakroom, observing the abuse, and ultimately questioning the Client about his condition. And Ronald went from being unable to recall which staff were in the rooms to recalling not only who was there but what they said and did.

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(d) Joint Exhibit 15d

Here Ronald placed **TPW Fellure** in the breakroom and claimed that TPW Fellure saw the Grievant strike the Client but failed either to intervene or to speak to the Grievant about his aggression.

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(e) Joint Exhibit 15f

After saying that **Tina** was in the day room, then in the breakroom, Ronald placed her back in the A/B day room. Also, Ronald states that the Grievant took the Client to the C/D side, but how would he know this if he did not follow them? Furthermore, there is at least a potential external inconsistency with respect to the Grievant’s having kept the Client up all night. Officer Baker reported that while making his rounds on the C/D side at 5:00 AM on October 29, 2003, he observed the Grievant, TPWs Fellure and Young, as well as a Client, Aaron, in the living room. Notably, the report did not mention the Client. Yet, Ronald (and the Agency) suggest that the Grievant only allowed the Client to return to his room at approximately 5:00 AM on or about October 29, 2003.³⁴

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(f) Joint Exhibit 15g

Officer Matthew Richards asked Ronald “Did you see anything happen after he [Bernie] was taken over to the CD side? Ronald answers: “He had to stay awake all night, I mean he had to stay up.” Again, how would Ronald know this unless he followed the Grievant and Bernie, a claim that he does not make? The

³³ Joint Exhibit 15a.

³⁴ Joint Exhibit 23.

1 Client could have **slept** somewhere else as opposed to not sleeping at all. Moreover, Ronald now places
2 TPWs Boyd, Jolley, Fellure, and, **for the first time**, TPW Jackson in the breakroom.

3 **(2) Ronald's Views of the Breakroom**
4 **(a) Joint Exhibit 15j**

5 When asked what views he had of Bernie, Ronald agreed that he was looking at Bernie from the "side
6 and back, kind of." Then, he stated that he was looking at the **front** of Bernie as well as the **face** of the
7 Grievant. However, if the Grievant allegedly launched a frontal attack on the Client, which means that he
8 was facing the Client. It is, therefore, difficult to imagine how Ronald could have seen the faces or **fronts**
9 (as opposed to the profiles) of both men when they were facing each other.

10 **(3) Why the Grievant Allegedly Hit Client/Did Client Guzzle Water?**
11 **(a) Joint Exhibit 15c**

12 Ronald said that after the Grievant allegedly struck the Client, he asked Ronald why the Grievant had
13 hit him, and Ronald replied "I mean I kind of know why. I don't know for sure." Then Ronald states that
14 "he [Bernie] **told me** [Ronald] that he was going to John ---'s side and drink the water. He [Bernie] was
15 cursing and I guess he was going on midnights and drink the water on John Gilkey's side." Here Ronald said
16 the Grievant virtually admitted guzzling water on Gilkey's side. Yet, in **Joint Exhibit 15j**, Ronald says "I
17 asked him [Bernie] if he guzzled water and he said **no** and I said I know you don't because I'm in the same
18 room as he." Based on Ronald's statements the Client admitted to the water and then flatly denied it. This
19 kind of internal inconsistency does not bode well for either the Client's or Ronald's credibility.

20 **(b) Joint Exhibit 15i**

21 Here, Ronald does not say that Bernie told him anything. Instead, Ronald says,

22 [A]pparently *what I was told* (who told him what?) he was, he told Sandy which is day shift,
23 Sandy Halfhill which is day shift that he got, he told Sandy that he got in the water on
24 midnights, went across the hallway and got the water which is John G---'s side. Sandy told
25 the supervisor and I guess that's what happened.

26 This is precisely the kind of he-said-she-said relaying of information against which Ronald's GDC
27 evaluations warned. Furthermore, these assertions seem inconsistent with those in **Joint Exhibit 15c**.

1 **c. Externally Inconsistent Elements of Ronald's Investigatory Statements**
2 **(1) Marks on the Client**
3 **(a) Joint Exhibit 15i**

4 Ronald stated that he thought the Grievant struck the Client "hard," choked him, and struck him with
5 both fist and opened hand.¹²⁵ Yet, immediately after such a presumably violent attack, Ronald observed only
6 a slight redness on the Client's face.¹²⁶

7 The Agency correctly points out that physical trauma such as bruises are not necessary (though they very
8 well may be sufficient) to establish abuse. However, depending on the magnitude of violence in a given
9 attack, one might reasonably expect some clearly discernable evidence of physical trauma. In the instant
10 case, however, the Client claimed that the Grievant "beat the hell out of him," and Ronald specifically
11 asserted that the Grievant shoved the Client against a wall, struck him several times with both his opened
12 hand and *fist*, and choked him. Yet, the Client's face and neck bore no evidence of such a beating either
13 immediately after the alleged attack or during a subsequent medical examination. Both Ronald and TPW
14 Jolley saw the Client immediately after the purported attack and neither reported signs of consistent physical
15 trauma. Ronald said the Client was "a little red in the face."¹²⁷ However, the description of the beating that
16 the Client allegedly received suggests that there should have been some telltale marks on his face, neck, or
17 both.

¹²⁵ Observe that an external inconsistency here is that the Client did not claim that the Grievant choked him. See Joint Exhibit 20c.

¹²⁶ Observe that Nurse Susan M. Green testified that the Client was neither unusually prone nor unusually resistant to bruising, and that the Client had *old* bruises. More important, none who saw the Client immediately after the alleged incident reported any physical trauma that was reasonably consistent with the type of beating that the Client allegedly suffered.

¹²⁷ Joint Exhibit 15i. Also, TPW Jolley offered the following un rebutted testimony: At approximately 11:00 PM October 29, 2003, she gave the Client a cigarette in the breakroom and walked outside, motioning for him to follow her so that she could light it. Despite the beating the Grievant allegedly received after TPW Jolley walked out, he followed her outside almost immediately with his cigarette intact and got it lit. Clearly, the Client's conduct is inconsistent with the beating he allegedly received minutes earlier.

1 **(2) Ronald's Retractions**
2 **(a) Joint Exhibit 17a-c**

3 Equally troubling is that on November 13, 2003, after making the foregoing statements on October 29,
4 2003,^{\38} Ronald retracted them, claiming that he was in the day room instead of the breakroom and saw
5 nothing. In this account, Ronald claims that the Client informed him of the Grievant's alleged abuse. Also,
6 Ronald claims he originally believed the Client but later disbelieved him.^{\39}

7 Then, as if recanting his original statement was not enough, on November 11, 2003, Ronald recanted
8 his recantation of the first (October 29) investigatory statement, claiming that everything he had stated in the
9 October 29 investigatory statement was indeed true and that TPW Jackson had persuaded him to recant his
10 October 29 investigatory statement.^{\40} In an attempt to corroborate Ronald's claim, Officer Chip Kirby
11 testified that a staff person (presumably TPW Jackson) either coerced or convinced Ronald to change his
12 original investigatory statement. Apparently, Officer Kirby's reasons for this conclusion are Ronald's
13 accusation against TPW Jackson and that TPW Jackson had one-on-one access to Ronald.^{\41}

14 Ronald's history and performance in the investigatory interviews essentially leave his credibility in
15 tatters. That leaves the bare fact that a staff member had one-on-one access to Ronald, which logic suggests
16 is hardly a rare occurrence. Why then should such access become a basis for inferring that the staff person
17 somehow coerced Ronald to recant his original investigatory statement? Also escalating the confusion and
18 external inconsistencies of Ronald's investigatory statements is the Client's investigatory statement on
19 October 29, 2003 that Ronald was in the day room rather than in the breakroom on October 29, 2003, when
20 the Grievant allegedly attacked the Client. The Client flatly denied that Ronald saw the Grievant attack him

^{\38} Joint Exhibit 15.

^{\39} Joint Exhibit 17a-c.

^{\40} Joint Exhibit 18b, f, and j.

^{\41} See Joint Exhibit 18d-e.

1 in the breakroom.^{¶42} Thus, the Client's investigatory statement on October 29, 2003 corroborates Ronald's
2 November 11 recantation of his original investigatory statement, a fact that certainly does not help the
3 Agency's case.^{¶43}

4 These passages by Ronald and the Client represent the depth of external inconsistency among their
5 investigatory statements. These inconsistencies and Ronald's history of stretching the truth engulfs him in
6 a shadow of incredibility that accompanied him to and undermined his testimony in the arbitral hearing
7 before the Undersigned. It would be difficult indeed for any witness to overcome this magnitude of
8 credibility handicap, irrespective of how credibly that witness testified during the arbitral hearing. Therefore,
9 even though Ronald offered direct testimony that was reasonably consistent and forthright, the Arbitrator
10 cannot discount the credibility problems that plagued Ronald before he took the witness stand.

11 The Client's investigatory statements were as internally inconsistent as Ronald's. Moreover, Ronald's
12 and the Client's investigatory statements were externally inconsistent on pivotal issues, such as Ronald's
13 location at approximately 11:00 PM on or about October 29, 2003, when the Grievant allegedly abused the
14 Client.^{¶44} If anything, the Client's investigatory statements were even more inconsistent and rambling than
15 Ronald's.^{¶45} However, to avoid further lengthening this opinion, the Arbitrator simply points out that no
16 reasonable person would except Ronald's statements, let alone the Client's confused and confusing
17 statements as justification for firing the Grievant.

18 VI. The Award

19 The Agency did not remove the Grievant for just cause, since the Agency failed to produce even a
20 preponderance of evidence (more likely than not) that the Grievant abused the Client. Accordingly, the

^{¶42} Joint Exhibit 19m.

^{¶43} Joint Exhibit 17a-c.

^{¶44} Joint Exhibit 19a-n.

^{¶45} See, e.g., Joint Exhibit 19m where the Client could not decide whether TPW Jolley was or was not in the breakroom when the Grievant allegedly struck him.

1 Grievance is hereby **SUSTAINED**. The Agency shall reinstate the Grievant forthwith with full backpay, less
2 any earnings he earned or with due diligence could have earned. Nor shall the Grievant suffer any loss
3 seniority, which shall remain intact as if he was never removed.

4 Furthermore, the Agency and the State of Ohio shall expunge any and all records of the Grievant's
5 removal in this dispute. The Grievant shall receive all fringe benefits, medical and otherwise, to which he
6 would have been entitled but for his unjustified termination in this case.

7 Although the Union requested that the Grievant receive all overtime he missed because of his removal,
8 there is no evidence in the record to establish the Grievant's *entitlement* to overtime pay, which by its nature
9 can be and usually is highly speculative. Consequently, the Arbitrator holds that the Grievant is entitled to
10 any overtime pay from the time of his removal on January 6, 2004 to the time of his reinstatement pursuant
11 to this award based on the following explicit provisos. The Grievant's entitlement to overtime pay during
12 his separation from the Agency *shall be strictly premised* on his demonstration of the following criteria by
13 clear and convincing evidence: (1) The Agency *clearly* would have offered (or made available) the specific
14 overtime to which the Grievant claims entitlement; (2) but for his removal from the Agency, the Grievant
15 *clearly would have been entitled* to work the overtime offered in section (1); and (3) The Grievant *clearly*
16 *would have in fact and actually* worked the overtime referenced in section (1). The Grievant bears the
17 burden of persuasion on all three of these issues and doubts shall be resolved against him.

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Robert Brookins, Professor of Law, Labor Arbitrator, J.D. Ph.D.