#1027

VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

- AND -

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME

GRIEVANT: EDWIN TOGBA

GRIEVANCE NO.: 24-6-(2004-28-08)-0015-01-04

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: APRIL 24, 2009

Appearances

For The Employer

Donald M. Snow	Superintendent
Connie Erlenwein	LPN
Jennifer Havens	TPW
Patrick (PO)	Client
Lisa McKinley	Area Manager
David Ott	Human Resource Administrator
Laura Frazier	Labor Relations Administrator
Marissa Hartley	Second Chair
Antoinette Wallace	Advocate

For The Union

Edwin Togba	Grievant
Lloyd Williams	Chapter President
Henry Quansah	TPW
Anita Brown	TPW
Bobbie Whiteside	TPW
William Anthony	Advocate

INTRODUCTION

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panel between the State of Ohio, Ohio Department of Mental Retardation and Developmental Disabilities, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period March 1, 2006 to February 28, 2009 (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit written closings. The parties selected this option, and submitted written closings in accordance with guidelines established at the hearing.

JOINT ISSUE

Did the Grievant, Edwin Togba, commit an act of abuse, which resulted in the removal from his position as a Therapeutic Program Worker? If not, what shall the remedy be?

JOINT STIPULATIONS

1. The Grievance is properly before the Arbitrator
2. The Grievant began his employment as a part-time permanent Therapeutic Program Worker on 11/25/07.
3. The Grievant was removed on 4/25/08.

4. The Grievant had no current discipline on file at the time of removal.
5. The Grievant was removed for violation of the following work rules of MRDD's Disciplinary Grid: Abuse.
6. Management and Union agree to arbitrate charge of abuse, the only charge that resulted in the Grievant's removal.
7. The Contract between the State of Ohio and OCSEA 2006-2009 is included as an exhibit by reference.

CASE HISTORY

Edwin Togba, the Grievant, worked as a Therapeutic Program Worker (TPW) at the Columbus Developmental Center (CDC) at the time he was removed from his position on April 25, 2008.) He had approximately five months of service with no active disciplinary action on file.

On March 14, 2008, the Grievant had three residents in his care in the living area. While using the phone for non-personal reasons, a resident named PO was insisting on using the phone to call his mother. In this living area, there were only two phones available; the other phone was being used by another resident. PO continued to curse the Grievant and became quite agitated.

The Grievant got off the phone and sat in a chair by the phone. PO knocked the Grievant's hat off, spit in his face and picked up a chair in a threatening manner. He made a motion as if he was going to throw the chair at the Grievant who was a mere five feet away.

The previous facts are not in dispute. The following review of events, however, are in dispute and underlie the Employer's removal decision and the Union's rebuttal.

The Grievant decided to redirect PO to his room. PO was walking down the hallway towards his room while still holding the chair.

In the Union's opinion, nothing happened while the redirection took place. The Employer, however, maintained the Grievant was physically abusive causing bruising and torn clothing.

Similarly, the Employer alleged the altercation continued as the protagonists arrived at PO's room. PO put the chair down, entered his room and continued to curse and called the Grievant vile names.

In an attempt to maintain a safe environment for everyone including the other residents, the Grievant decided to close PO's door. For several minutes P.O. and the Grievant attempted to gain control of the door. Again, the Employer alleged PO's forearm was hurt during the incident. The Union, however, alleged no physical abuse took place as PO eventually eased up on pulling the door, calmed down. As a consequence, the Grievant let go of the door.

On April 18, 2008, the Employer issued an order of removal. It stated in pertinent part:

XXX

> This will notify you that you are removed from your position as a TPW effective 4/25/08. The reason for this action is that you have been found guilty of **Abuse, Inconsiderate Treatment and Dishonesty.**
>
> In the particulars to wit:
> On March 14, 2008, you were involved in an incident with resident PO while working as a Therapeutic Program Worker in the Broadview

building. During this incident you committed continuous acts of Abuse as supported by the marks on the resident's face from being slapped, bruises/discoloration on the resident's forearm from having the door closed on him as well as by the scratches on the resident's shoulder and his ripped shirt that also occurred during the encounter. You were uncooperative with the CDC Police during the investigation in that you were dishonest in answering questions.

XXX

(Joint Exhibit 2)

On April 28, 2008, the Grievant and Union contested the previously mentioned disciplinary action. The grievance states in pertinent part:

XXX

Edwin Togba was not being abusive to the resident. He misunderstood the term "verbal re-direction for physical re-direction. In other words, he mistakenly wrote physical re-direction, which should have been verbal re-direction to his room. We believe the action is too harsh. He has no previous discipline on his record.

XXX

(Joint Exhibit 1)

Neither party raised procedural nor substantive arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE[1]

The Employer's Position

The Employer opined the Grievant was properly removed for a series of abusive actions. He knew of the possible consequences associated with misconduct of this type (Joint Exhibit 7). The Grievant, moreover, received training dealing with resident profiles, abuse and neglect, and Unusual Incident Reporting procedures (Joint Exhibit 20).

PO provided consistent and credible testimony regarding the incident throughout the investigatory process and during the arbitration hearing. He acknowledged the initial altercation in the living area. His review of what followed in the hallway and at this doorway differed dramatically from the Grievant's version. PO maintained the Grievant physically redirected him down the hallway by grabbing his shoulders which caused his shirt to rip. A struggle did take place at the door. PO testified the Grievant shut the door causing injuries to PO's hand, wrist and arm.

Jennifer Havens, a TPW, became involved when someone came to Broadview 2, her work location, stating assistance was needed at Broadview 3, the location of the disputed incident. While walking toward Broadview 3, she

[1] The parties' arguments and the Arbitrator's subsequent Opinion and Award will be limited to abuse allegations in conformance with Section 24.01 requirements.

heard a loud bang. Upon arrival at PO's room, she observed the Grievant sitting in a chair outside PO's room holding the door shut. Havens intervened by relieving the Grievant and talking to P.O. She observed marks on PO's cheek and arm. PO remarked her co-worker on Broadview 3 caused the red mark on his face. Havens, moreover, called the nurse to evaluate PO's condition (Joint Exhibit 13).

Testimony regarding physical abuse was supported by documented medical evidence. LPN Erlenwein was the nurse contacted by TPW Havens. Her nursing notes (Joint Exhibit 18) indicate a red mark on PO's left cheek and three red marks on his upper right arm.

On March 18, 2008, PO participated in a Goodwill workshop. PO reported bruises on his arms to Lisa McKinley who checked his condition. She testified he had bruises on his left forearm and his knuckles were reddish in color (Joint Exhibit 9).

The Employer maintained the Grievant's version was riddled with inconsistencies. The Grievant failed to include several critical facts in the Unusual Incident Report (Joint Exhibit 10) even though he testified to them at the arbitration hearing. The Grievant never walked toward TPW Havens when she entered the area; he was sitting in the chair holding the door closed.

PO did not fabricate nor orchestrate the entire episode so that he could get the Grievant removed. A totally incapable individual, one housed in a State facility rather than the community, is unable to accomplish these outcomes. The witnesses who testified in support of this premise should not be viewed as credible. Neither witness had direct knowledge of the disputed incident. As such, their references to PO's vindictiveness and aggressive behavior toward staff, and his willingness to fabricate stories to precipitate removal decisions, should all be given minimal validity.

The Union's Position

The Union maintained the Employer failed to present factual or credible proof to substantiate the Grievant's removal. None of the articulated charges were properly supported. The Grievant never slapped PO's face while in the living area, physically directed PO to his room, ripped his shirt or scratched his arm while directing PO; nor shut the door on PO's arm.

The record establishes that Po spat on the Grievant's face while in the living area. This circumstance, however, fails to establish that the Grievant responded with a slap to PO's cheek. The Grievant testified he did not view PO's action as haring him nor did he view it as a threat. Rather, the Grievant attempted to diffuse the situation by moving away from PO while PO continued to curse and picked up a chair while moving toward the Grievant.

Similarly, the hallway walk toward PO's room did not involve any abusive misconduct. The Grievant stated he walked in front of PO and attempted to calm him down by talking to him. He viewed this tactic as a defensive measure because he knew PO had a chair in his hand. If PO had decided to throw the chair, he could have deflected it. He acknowledged that his Unusual Incident Report (Joint Exhibit 17) did mention that he physically redirected PO to his room. This phrase, however, should not be interpreted as an acknowledgement that he engaged in abusive misconduct. He testified he never grabbed PO and forced him toward his room.

The Grievant admitted he and PO struggled with the door located at PO's room. The Grievant decided to hold the door so that he could not get out. He testified he was never taught this technique but attempted to prevent a "domino effect." When PO got his arm between the door and the doorframe, the Grievant stopped pulling at the door. As such, the Grievant never intentionally wished to hurt PO. PO's allegation, if true, would have resulted in a much more serious injury such as a fracture.

The Grievant's decision to secure the door is in compliance with the Employer's. Policy and Procedure regarding Behavior Support Treatment Interventions Section IV, 3(c) allows employees/staff to hold the door shut, as long as there is direct constant supervision of the staff (Joint Exhibit 8, pg. 6).

The facts used by the Employer are inconclusive because testimony and documents regarding PO's injuries are inconsistent. Testimony provided regarding the purported injuries was not consistent. LPN Connie Erlenwein, TPN Jennifer Havens and Goodwill Services employee Lisa McKinley did not characterize the injuries in the same manner. Photographs of the injuries at PO's doorway do not conform with the actions allegedly engaged in by the Grievant. If the incident had taken place per PO's version, the marks or injuries on PO's arm should have been vertical rather than horizontal.

Rather than place the blame on the Grievant, the Union offered a theory that PO's injuries were self-inflicted. His Behavioral Support Guidelines (Joint Exhibit 16) indicate:

XXX

> P has been in many treatment programs throughout the country. His Discharge was due to various reasons such as non-compliance or assault behavior. Most recently P was discharged from Alvis House for assaulting staff.

XXX

> 3. P may engage in SIB including biting his arms, scratching his face and picking or biting his nails severely. These behaviors occur as a result of him not getting something he wants.

XXX

(Joint Exhibit 16)

PO did not get his way regarding the phone in the living area which precipitated his accusations. PO, moreover, self-inflicted a series of injuries to support his allegations. In fact, at the arbitration hearing, PO testified he really disliked the Grievant "a whole lot, and the Grievant makes him really mad and he will do anything to get him in trouble."

This theory was supported by several of the Union's witnesses. TPWs Bobbie Whiteside, and her sister Anita Brown, testified about PO's abusive nature, and his abusive tendencies when challenged about his telephone usage.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, a complete and impartial review of the record including the parties' written closings, it is this Arbitrator's opinion that the Employer properly removed the Grievant from employment. Section 24.01 extensively limit's the scope of an arbitrator's authority when dealing with abuse cases. It states:

XXX

...the arbitrator does not have authority to modify the termination of an employee committing such abuse.

XXX

(Joint Exhibit 1, pg.81)

As such, the threshold issue becomes a factual determination by an arbitrator whether abuse can be supported by the record. Here, the record supports three abuse incidents: the living area incident, the hallway altercation and PO's doorway episode. Either one of these events in isolation could have led to proper termination; let alone three incidents involving the same protagonists. Witness credibility and circumstantial evidence are the cornerstones of the analysis which follows. These circumstances are typical of abuse cases where the protagonists are the sole witnesses to an alleged abusive episode. Here, the Employer was able to establish sufficient proof that abuse took place.

The Employer established the Grievant slapped PO in the living area. The Arbitrator, unlike the Grievant, is unwilling to minimize the event. PO knocked the Grievant's hat off, spat in his face and lifted a chair and walked toward him. And yet, the Grievant failed to include most of these critical facts in his Unusual Incident Report. A critical inconsistency which should have been noted. He wished to deflect these circumstances to avoid being charged with abuse; Havens and Erlenwein testified they observed red marks on his left cheek.

Other than denying the charge, the Union failed to rebut this charge. No other individual could have inflicted these blows. The SIB defense, moreover, was not adequately supported.

The Grievant did physically redirect PO down the hallway which caused the tear of PO's shirt. The Grievant's entire review of this episode is inconsistent and lacks credibility.

After the incident in the living area, the protagonists walked down the hallway. The Grievant maintained PO walked behind him with a chair in hand. This is one version maintained by the Grievant. In his Unusual Incident Report, however, the Grievant noted he physically redirected PO down the hallway. Assertions that the Grievant misspoke and did not understand what he said seem self-serving. The second version, moreover, appears more valid because it supports PO's version and other testimony. Havens testified PO's shirt was torn upon her arrival at the scene. Again, the SIB defense is unsupported by the record.

PO's chair usage added an additional inconsistency. At first, the Grievant stated he did not see PO lift up the chair and walk out with it into the hallway; even though he testified he felt threatened in the living area because PO walked toward him with the chair in his possession. The Grievant also stated he walked in front of PO knowing he could deflect the chair if thrown by PO. Again, an unconvincing justification under the circumstances.

While struggling with PO at his bedroom doorway, the Grievant inflicted injuries to PO's left forearm area resulting in physical abuse. There is no doubt a

struggle ensued; the Grievant admitted to that reality. There was also an admission the Grievant saw PO's arm between the door and the doorframe. With all these admissions, however, the Grievant claimed he was merely attempting to keep the door closed to prevent a "domino effect" with the other residents by calming PO. Again, inconsistent observations regarding the same incident leading to major credibility concerns.

Havens and Erlenwein independently observed and documented the bruising to PO's left forearm. A few days later McKinley observed similar faded injuries

The SIB argument was again offered in this instance. Reliance was placed on PO's Behavioral Support Guidelines (Joint Exhibit 16) which summarize behaviors similar to those exhibited by PO during the incident. Even if the Union was able to establish a similarity in behaviors, they cannot be used to mitigate a factually supported abuse charge. This same conclusion neutralizes testimony provided by Whiteside and Brown regarding prior similar instances.

The Union attempted to label the evidence as inconclusive based on a bruise analysis. Whether the bruises were horizontal or vertical, the relevance of the distinction was not sufficiently articulated or supported by the record.

Work Rule Section 4, C (3), was misinterpreted by the Union in this instance. The Grievant did not initiate a time-out by removing PO to "a separate non-reinforcing room." So this provision fails to support the Grievant's actions.

Without any record explaining this provision, the Arbitrator is left with this conclusion. Nothing helped to distinguish or equate PO's bedroom from a "non-reinforcing room."

AWARD

The grievance is denied. The Employer properly terminated the Grievant for abuse.

4/27/09

Chagrin Falls, Ohio

Dr. David M. Pincus, Arbitrator