

ARBITRATION DECISION NO.:

108

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Mental Retardation and Developmental Disabilities

DATE OF ARBITRATION:

January 20, 1987

DATE OF DECISION:

March 11, 1988

GRIEVANT:

Juliette Dunning

OCB GRIEVANCE NO.:

G87-0001 (B)

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Linda Fiely

John Hall

FOR THE EMPLOYER:

Ed Ostrowski

KEY WORDS:

Just Cause - Patient Abuse

Progressive Discipline

Evenhanded Application

Pre-disciplinary Notice

Arbitral modification if abuse found

ARTICLES:

Article 24 – Discipline

§24.01 – Standard

§24.02 – Progressive Discipline

§24.04 – Ore-Discipline

§24.05 – Imposition of Discipline

FACTS:

Grievant was a Hospital Aide at Northwest Ohio Developmental Center with three and one-half years service at NWODC. On the date of the incident in question, Grievant was assigned to a Life Safety Group in A wing of cottage 604. She was responsible for 8 residents including resident A, a non-verbal mentally retarded person. Resident A returned from a field trip sometime after the normal evening meal time of 5:00 P.M. Resident A routinely set the tables, but due to the field trip, this was done before Resident A returned.

As a substitute task, Resident A was instructed to wash dishes. Resident A did not like to do dishes and was often belligerent when told to do a chore that she disliked. Resident A became unruly and Grievant used physical restraint to subdue Resident A.

The cause of the unruly behavior and the specific facts concerning the outburst and subsequent restraint were in dispute. The testimony given by two cooks differed drastically from that given by Grievant and her immediate supervisor. The cooks' testimony alleged that Grievant verbally abused Resident A and instigated the outbursts, improperly escorted Resident A from the kitchen, and used an illegal takedown in restraining Resident A. The Grievant and the supervisor's testimony stated that Resident A's behavior was a reaction to the dishwashing assignment and that the escort and takedown procedures were proper. After the incident Grievant submitted a Behavior and Unusual Incident Form. She also contacted security, Medical Staff and the Unit Supervisor, who conducted an investigation which indicated that further action was not necessary. The cook's supervisor took the incident to the Abuse Committee, who, after a separate investigation recommended to the Superintendent that Grievant be removed for verbal abuse, inappropriate behavior modification, and physical abuse. The Superintendent conducted an Administrative Conference with Grievant and decided removal was justified. Grievant was removed by an Order of Removal.

EMPLOYER'S POSITION:

The Employer had just cause to remove the Grievant. The two cooks testified that Grievant harassed and verbally taunted Resident A. They testified that Grievant on several occasions asked Resident A "if she wanted to go to the floor". This was an inappropriate behavior modification threat. The cooks' testimony also indicated that Grievant twisted Resident A's arm up behind her back and used an improper back hold to escort Resident A out of the kitchen. The testimony of the cooks was consistent, both with each other and with each other time they testified. Then brief tenure was not a mitigating factor in credibility of their testimony. The witness testimony provided by the Union was inconsistent and laden with memory lapses, thereby failing to rebut the cooks' testimony. The Union's witnesses made no reference to the involvement of Resident B. Grievant failed to follow crisis diffusion guidelines causing escalation of the situation. Grievant admitted receipt of the General Behavior Procedures Handbook which contained those guidelines. Resident A's program contains a section requiring Resident A be given an opportunity to sit in a chair until calm. Grievant did not do this. Instead she forced Resident A to continue dishwashing, aggravating the already tense situation. The case used by the Union to show disparate treatment differed dramatically from the instant case. The charges in that case were all vague and confused as to specific dates and times, and no witnesses initiated formal abuse charges. The prior case involved careless behavior whereas, Grievant's behavior was intentional. There were no procedural defects because Grievant was given sufficient notice concerning the allegations and possible consequences; i.e. removal. Even if there were procedural defects, the Collective Bargaining Agreement prohibits an Arbitrator from modifying a penalty if an Arbitrator finds patient abuse. Introduction by the Union of statutes concerning the definition of abuse are irrelevant and unnecessary. The Grievant was extensively trained on the meaning of abuse as defined in

Administrative Rule 5119-3-14. The Grievant was removed for just cause.

UNION'S POSITION:

The Employer has not met its burden in establishing just cause. The evidence and testimony support Grievant's position that the Resident's behavior was not the result of abusive language on the Grievant's part. The Employer failed to establish that Grievant engaged in physical abuse. The cooks' testimony should be afforded little weight, because they were new to the ward and unfamiliar with the environment and restraint of mentally retarded persons. Additionally, the cottage's configuration restricted their ability to observe the events. The parties agreed that the physical restraint was properly administered, evidenced by the fact that the other four employees who assisted were disciplined. Grievant's actions after the alternation supported her version of the events. She specifically followed the promulgated procedures reporting unusual incidents. Even if Grievant was guilty of wrong doing, it should not be characterized as resident abuse. Grievant may not have employed the proper choice of action according to the Resident's behavior program, but the action did not approach the level of resident abuse.

Additionally, the Employer violated key principles of just cause. Grievant was not given sufficient notice that removal was likely for actions of the nature involved here. The disciplinary policy indicated lesser penalties. The Employer failed to apply rules consistently. Another employee was merely suspended for twenty (20) days for incidents similar to this one.

The Employer did not follow correct procedures in respect to this incident. Various sections of the incident report were not completed, follow-up medical and physical exams were not performed, Resident A's guardian was not notified, and the Client Rights Advocate did not talk to Resident A after the incident. The Employer did not remove Grievant for just cause. Alternatively, the modification of the penalty is only precluded if the Arbitrator find that Grievant engaged in an intentional act which resulted in significant harm, the standard of abuse defined in Section 2903.33 of the Ohio Revised Code.

ARBITRATOR'S OPINION:

The second sentence of Section 24.01 of the Contract concerning modification in abuse cases, supplements and does not modify the previous sentence. A determination that abuse has been committed does not guarantee that termination is the appropriate penalty. The Employer must still establish just cause for the removal. It is clear that Grievant engaged in the charged activities, but Employer failed to establish just cause, because critical principles were violated. Certain prior alleged violations were used to justify removal but were not included in the particulars of the removal order.

It is the Arbitrator's duty to evaluate testimony when it differs widely as it does in this case. To do this, the Arbitrator must consider bias, personal interest in the outcome, and other motives. The Arbitrator gave more weight to the cooks' testimony. They were not tainted by personal bias and no reason was shown why they would testify untruthfully. Their testimony was consistent with each other and with their statements given at the time of the incident. The layout of Cottage 604 confirms the cooks' testimony that they could see the hallway from the kitchen. Grievant's testimony was inconsistent and had omissions, specifically concerning the involvement of Resident B. The supervisor's testimony at the hearing differed from the testimony at the time of the incident. Grievant clearly violated the steps outlined in Resident A's Behavioral Program. At no time did she place Resident A in a chair for a cooling off period.

Although Employer established that Grievant committed the particulars, the Employer did not

satisfy the Contract requirements because notice and equal treatment standards were violated. Three (3) different standards are used when the Employer violates procedure: (1) The whole action is null and void, (2) Procedural problems are significant only if the employee is prejudiced, or (3) Procedure is important, any failure to comply will be penalized, but the action is not necessarily null and void. The Arbitrator chose the third and most prevalent approach. The Contract states that the Employer shall inform the employee in writing of the reasons for and the possible forms of discipline. The various documents referred to by Employer failed to provide adequate notice. The guidelines contained a broad range of penalties. The Employer did not apply rules and penalties evenhandedly. The other employee was only given a twenty (20) day suspension even though he had a three (3) day suspension his record. Grievant had a clean record. The Arbitrator cannot condone the activities of Grievant. Employees in this environment must exercise extraordinary self-discipline. Verbal and/or physical abuse cannot be tolerated. However, procedural defects affect an employee's due process rights.

AWARD:

Reinstatement without backpay but without loss of seniority. (No back pay due to seriousness of conduct)

TEXT OF THE OPINION:

* * *

STATE OF OHIO AND OHIO CIVIL SERVICE
EMPLOYEES' ASSOCIATION LABOR
ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, DEPARTMENT OF MENTAL RETARDATION
AND DEVELOPMENT DISABILITIES, NORTHWEST OHIO DEVELOPMENTAL CENTER
(TOLEDO, OHIO)

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE: Juliette Dunning (Discharge)

CASE NUMBER: G87-0001(B)

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus

Date: March 11, 1988

APPEARANCES

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For the Employer

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Ed Ostrowski	Labor Relations Coordinator, MR/DD
Ruth Rittichier	Human Resource Director, NODC
Ginny Dauer	Client Rights Advocate, NODC
Patrice Felton	Witness
Vickie Blynt	Witness
Cheryl D. Hoskins	Assistant Attorney General

For the Union

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Juliette Dunning	Grievant
Suddie Lee	Supervisor II
Roger Zalewski	Hospital Aide
Peggy Backers	Chief Steward
Betty Edwards	Observer
John Hall	Staff Representative
Linda Fiely	Associate General Counsel

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INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Department of Mental Retardation and Development Disabilities, Northwest Ohio Developmental Center, Toledo, Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employee Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986-July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on January 20, 1987 at Office of AFSCME, Ohio Council 8, 405 Broadway, Toledo, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the 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 hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would submit briefs.

ISSUE

- The stipulated issue in this grievance: Whether the removal of Juliette Dunning was for just cause? If not, what shall the remedy be?

STIPULATION OF FACT

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The Parties stipulated to the following facts at the arbitration hearing:

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1. Certain statements, provided by nurses, contained in Joint Exhibit 5, would have been testified to in a like manner if the nurses were available.
2. The September 7, 1986 incident did not result in any follow-up medical or psychological examinations of Resident A¹ as a result of the incident.
3. The Grievant has no prior discipline in her record.
4. The Removal Order (Joint Exhibit 2) should read September 7, 1986 rather than September 17, 1986.
5. The grievance is properly before the Arbitrator.

PERTINENT CONTRACT PROVISIONS

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ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

"Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another 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." (Joint Exhibit 1, Pgs. 34-35)

Section 24.02 - Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand;
- C. Suspension;

¹Privacy considerations necessitate that residents' names be concealed. As a consequence, residents involved in the September 7, 1986 incident will be referred to in an anonymous fashion.

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D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process." ...

(Joint Exhibit 1, page 35)

Section 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the' imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

(Joint Exhibit 1, Pgs. 35-36)

Section 24.05 - Imposition of Discipline

"The Agency Head or, in the absence of the Agency Head, the Acting Agency Head-shall make a-final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the predisciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a

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criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. once the employee has received written notification of the final decision to impose

discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment."

(Joint Exhibit 1, Pgs. 36-37)

CASE HISTORY

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The Northwest Ohio Developmental center, the Employer, is located in Toledo, Ohio. Individuals are typically placed in these types of settings on a temporary basis. Living skill development is emphasized as well as the elimination of undesirable behaviors. Often times, target behaviors are identified, and behavioral programs individually developed containing specified behavior modification protocols; these are used to eradicate the targeted behaviors. Group home placement represents the ultimate goal of this facility. Juliette Dunning, the Grievant, has been employed as a Hospital Aide by the facility for approximately three and one- **5**

half (3 1/2) years. On September 7, 1986, she worked the second shift and was assigned to Cottage 604. This cottage is divided into A Wing and B Wing. The Grievant testified that she was assigned a Life Safety Group in A Wing that afternoon. Suddie Lee, the Grievant's Supervisor, noted that the Grievant was assigned eight (8) residents; and that Resident A was one of these individuals under the Grievant's supervision. It should be noted that Resident A was involved in an alleged altercation to be discussed in a subsequent portion of this Opinion. Resident A, moreover, has been diagnosed as mentally retarded and is nonverbal. She can, however, utter some sounds and can scream.

Resident A and several other individuals were on a field trip on September 7, 1986. Supper is normally served at 5:00 p.m. but the food was kept warm to accommodate the individuals involved in the field trip.

The Grievant testified that while Resident A was eating her supper, she instructed her that she was to wash dishes in the kitchen. The Grievant maintained that Resident A normally set the tables but that this task was completed prior to her return to Cottage 604. The Grievant felt that the dishwashing assignment was justified and appropriate because it was part of Resident A's behavioral program.

The series of events which transpired are in dispute because varying accounts were provided by a number of witnesses. Patrice Felton and Vickie Blynt, food service employees functioning as cooks, were present during the altercations which allegedly took place in the kitchen area and in

the doorway separating the day

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room and the dining room. They, more specifically, alleged that the Grievant instigated Resident A's outbursts; that the Grievant and Resident A entered and exited the kitchen on two (2) separate occasions; that the Grievant improperly escorted the Resident out of the kitchen; and that the Grievant used an illegal take down when attempting to restrain Resident A.

The Grievant and Suddie Lee, the Grievant's immediate supervisor, provided testimony which dramatically differed from the testimony provided by the two (2) cooks. They alleged that Resident A's aggressive behavior was engendered by her aversive reaction to the assignment; that she ran to and from the kitchen approximately four (4) times; and that the escort and restraint procedures employed by the Grievant were properly administered.

The Grievant testified that she followed procedure by submitting a Behavior and Unusual Incident Form (Joint Exhibit 5) after the incident took place on September 7, 1986. She also testified that she contacted security, the medical staff, and her unit supervisor. These individuals conducted their own investigation which indicated that further action was not deemed necessary. (Joint Exhibit 5).

The cooks' supervisor brought the incident to the attention of the Abuse Committee and an additional investigation was initiated (Joint Exhibit 3). The security department conducted the initial phase of the investigation. Several statements were taken and reviewed by the Abuse Committee. Additional interviews were conducted by the Abuse Committee. These interviews consisted of conversations with the two (2) food service

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employees and the direct care staff on duty at the time of the alleged abuse.

On September 18, 1986, the Abuse Committee interviewed the Grievant regarding the allegations specified above. The Abuse Committee analyzed all of the pertinent information and fashioned the following review which they forwarded to Warren Karmol, Superintendent.

"DATE: September 30, 1986

TO: Warren Karmol, Superintendent

FROM: ABUSE COMMITTEE

- Dan Hyman
- Rae Rehfeldt
- Ruth Rittichier
- Ginny Dauer

RE: ALLEGED ABUSE OF RESIDENT A BY DIRECT CARE, JULIETTE DUNNING - 9/7/86

The Abuse Committee reviewed the Security investigation of this case and then proceeded to conduct their own interviews with the 2 food service employees and the direct care staff on duty at the time of the alleged abuse.

There was a delay in placing Juliette on nonresident duty because the 2 food service people who witnessed the incident were new and had not received any orientation regarding Abuse/Neglect and the Committee needed to make certain that what they observed was indeed abuse. As soon as their statements were taken and submitted to the committee, we reviewed them and immediately placed Juliette on non-resident duty (she requested Administrative Leave).

As other statements were obtained and witnesses questioned, there was obvious contradiction. Therefore, it was necessary to question the two food service staff once again to establish possible, oversights in their testimony, that is, details they may have left out. However, during the second questioning of these witnesses, they held firmly to their original testimony. (Statements attached).

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On the otherhand, (sic) Juliette and Suddie claim they were both in and out of the kitchen, implying they were both involved in handling Resident A relating incidents of her running back into the A wing bedroom and bathroom areas during the whole episode. Glenda Blankenship, a third staff person states she was in A dayroom with her 1:1 person and in response to the question "Did Resident A come into or run through the dayroom?" she replied "Don't know ... cannot remember. If and when she did I was talking to Kathy." Question to Suddie "where were you just before the final takedown?" she replied "I was in the kitchen. Resident A threw a plate in the rinse sink and ran out of the kitchen with a scream. Because of the way she was acting, it's the policy that she be manually restrained". Juliette's statement say "she pushed me, so when she pushed me I then escorted her out of the kitchen and had her arms behind her back and escorted her out of the kitchen and hollered restraints." During our second questioning of the 2 food service staff, they both held to their stories that it was Juliette that stood right beside Resident A and kept harrassing (sic) her and challenging her and that Suddie was not in the kitchen or involved in the programming of Resident A, but rather, was feeding another resident in the diningroom.

ALLEGED ABUSE OF RESIDENT A BY DIRECT CARE, JULIETTE DUNNING - 9/7/86 Page 2

The Committee has given great credibility to the testimony of the 2 food service staff because this was the first day either of these women had seen Juliette and they had no prior knowledge of her or opinion of her work. They quoted things she said to Resident A, such as "do you want to go to the floor?" and admitted that they didn't even know what it meant at the time. Clearly two innocent bystanders who were

offended by what they saw and heard transpire that day.

Therefore, it is the Abuse Committee's recommendation that Juliette Dunning be removed from employment for the following reasons:

- 1) Verbal abuse - harrassing (sic) the resident while the resident was complying with instructions.
- 2) Inappropriate behavior modification - Juliette removed her glasses; placed them on a counter;
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and threatened a takedown... "do you want to go to the floor?".

- 3) Physical abuse - was observed holding Resident A (who was down on her knees) in a position with her one arm behind her back and holding Resident's head in a headlock, while asking her if she was going to wash the dishes good.

opinion - This whole episode ended with Resident A experiencing a hard takedown with four staff having to hold her down. It would appear that this takedown could have been avoided had Resident A been handled properly during the programming of her chore."

(Employer Exhibit 7)

On October 2, 1986, the Superintendent conducted an Administrative Conference. After reviewing the facts and meeting with the Grievant the Superintendent concurred with the recommendation authored by the Abuse Committee. That is, he decided that the Grievant's actions justified removal. He documented his rationale in the following document issued on October 14, 1986:

"EMPLOYEE INCIDENT REPORT

REGARDING: JULIETTE DUNNING

SECTION IV - ADMINISTRATIVE CONFERENCE

COMMENTS AND DECISION: After reviewing all the facts and meeting with Ms. Dunning on October 2, 1986, to discuss the Incident, I have decided that:

- 1) Ms. Dunning did verbally abuse a resident on September 7, 1986 by harrassing (sic) that resident while the resident was complying with instructions;

2) Ms. Dunning did use inappropriate behavior, modification techniques on September 7, 1986 by using negative consequences rather than positive consequences for promoting appropriate behavior and was not following the approved behavior program for this particular resident;

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3) Ms. Dunning did physically abuse a resident on September 7, 1986 in that she was observed holding a resident (who was down on her knees) in a position with one (1) arm pulled behind her back and holding her head in a headlock while asking the resident if she was "going to wash the dishes good";

4) Ms. Dunning did psychologically abuse a resident on September 7, 1986 when she placed that resident in a "no win situation" when she harrassed (sic) this non-verbal resident continually until the resident was unable to control herself and needed to be restrained by four (4) staff persons.

Based upon the above information, and the recommendation of the Northwest Ohio Developmental Center Abuse Committee, I recommend that Juliette Dunning be removed from her position at NODC. Theses incidents, psychologically and physically harmful to a resident placed in our care, cannot and will not be tolerated in our Center.

/signed/
Warren H. Karmol Jr.
Superintendent"

10/14/86
Date

(Joint Exhibit 4C)

The Superintendent's decision was formally documented in an Order of Removal issued on October 17, 1986. The order of Removal contained the following particulars:

"....

The reason for this action is that you have been guilty of Resident abuse in the following particulars, to wit: As or about 9/17/86, you verbally harrassed (sic) a resident while she was doing the dishes, used Behavior Modifications threats that were not approved for said resident, and put her into an abuse headlock-type hold, when said resident rebelled.

Signed at Toledo, Lucas _____, Ohio October 17, 1986
(Date)

Warren H. Karmol, Jr., Superintendent

..."

(Joint Exhibit 2)

On October 29, 1986, the Grievant contested the removal by filing the following grievance:

“ ...

What Happened (state the facts that prompted you to write this grievance)?

I, Juliette Dunning feel I was done unjust (sic) as to being removed from my job because of incident report on Resident A. I feel I did just what I am suppose to do. My coworkers and supervisors (along with nursing and security did not feel I did anything unjust. The statement from the cook (which is included) does not coincide with what happened. ' The cook was scared of Resident A and ran out of the kitchen to get away from her. I know she was afraid of her and I feel she made more out of the situation that what really happened. Resident A is known to go off and become very wild when she has to do something she doesn't want to do. This is a normal behavior for her. The cook doesn't know this because she is new and is not aware of our residents behavior. I was given an EIR for possibly taunting and physically abusing a resident but no one seems to have seen this but the cook. I don't think the cook understands the depth of dealing with mental retardation and handicapped residents not to mention the behaviors they aquire (sic). You are not dealing with normal behaviors that happen outside in the community so naturally they would seem bizzare. Considering my life safety assignment for that day was eight residents, and I was having such problems out of 1 of my residents I acted accordingly. There was no one to help me and I did the best that I could. My coworkers and supervisors saw nothing wrong with the way I handled the situation. I feel I was dealt with much to (sic) severely (sic).

. . .

Employee Signature Juliette Dunning
Steward Signature Marilyn Fletcher

Date 10/28/86
Date 10/29/86”

(Joint Exhibit 2)

On December 17, 1986, John A. Beattie, Chief of Labor Relations denied the grievance. Justification for the denial was specified in the following 3rd Step Grievance Hearing Response.

“ ...

This matter came on for hearing on December 4, 1986. Grievant appeared and was represented by Mr. John Hall, Staff Representative OCSEA/AFSCME. Northwest Ohio

Issue: Article 24

Union Position: The grievant was unjustly terminated for her actions on September 7, 1986.

Management Position: The grievant's discharge was for just cause and commensurate with the offense.

Finding of Fact: On September 7, 1986, the grievant was working as a hospital aide in Cottage 604. The grievant instructed a non-verbal client to wash dishes in the kitchen. Statements from the two cooks present in the kitchen indicate that the grievant verbally harassed the client while at the sink. The grievant forcibly escorted the client into the dayroom. The statement of one witness indicates that the client was forced on her knees with an arm pinned behind her back and the grievant's arm around the clients neck. The grievant and client then returned to the kitchen. The client began washing dishes again; the grievant continued to verbally harass the client. The grievant then forcibly escorted the client into the day room again. The client broke free, and was then manually put on the floor, at which time three other staff members assisted in manually restraining the client.

The statements from the two cooks present in the kitchen throughout the episode are consistent both internally and with the other. All other statements are consistent in describing the forcible restraint of the client by the total four staff members. There exist no statements that directly contradict the two cook's statements, other than the grievant's own statement. Witness Lee's statement is in direct conflict with the grievant's statement on several points.

Conclusion: Based upon the evidence presented at the hearing, weighing the strength and credibility of each witness statement and recognizing the competence of the Northwest Ohio Developmental Center Abuse Committee and the conclusions reached by said committee after full and fair investigation of this very serious charge; the grievance is denied. Northwest Ohio Developmental Center did justly terminate the grievant's employment for verbal and physically abusing a mentally retarded client in her care on September 7, 1986.

/signed/
Edward L. Ostrowski
Labor Relations Coordinator

12-17-86
Date

/signed/
John A. Beattie, Chief
ODMR/DD Office of Labor Relations"

(Joint Exhibit 2)

The Parties were unable to resolve the grievance at subsequent stages of the grievance procedures. The grievance is properly before this Arbitrator.

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THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to remove the Grievant for verbally harassing Resident A while she was going dishes, using improper behavioral modification threats, and placing Resident A into an abusive headlock-type of manual restraint. The majority of the evidence and testimony relied on by the Employer was provided by Felton and Blynt, the two (2) food service employees.

Both of these individuals testified that Resident A was performing the dishwashing assignment

as instructed. They also noted that during the course of two (2) separate altercations the Grievant harassed and verbally taunted Resident A. These taunts allegedly dealt with the Resident's dishwashing procedure utilized by Resident A. The food service employees, moreover, maintained that on several occasions the Grievant asked Resident A "if she wanted to go to the floor"- This statement was viewed by the Employer as an inappropriate behavior modification threat (Employer Brief, Pg. 2)

The cooks provided additional testimony concerning the physical abuse portion of the allegations (Employer Brief, Pg. 2). They, more specifically, testified that on two (2) occasions the Grievant twisted Resident A's arm up and behind her back when escorting Resident A out of the kitchen. These witnesses also noted that on one (1) of the above occasions the Grievant had her arm around Resident A's neck as she escorted her out of the kitchen. **14**

Physical abuse involving a different type of manual restraint was also discussed by the cooks (Employer Exhibit 3). They alleged that during one (1) of the episodes, an altercation took place in the doorway separating the dining room from the day room. The Grievant purportedly forced Resident A to her knees, while holding her in a headlock and trapping the Resident's arm behind her back.

For a number of reasons, the relative inexperience of the cooks was not viewed as a mitigating factor. First, both cooks did not have identical tenure when the incident took place; Blynt had been employed for a few weeks while Felton was a new hire. Since both individuals provided consistent testimony, the notion that their inexperience engendered inaccurate observations was viewed by the Employer as an inaccurate conclusion. Second, the Employer claimed that accurate appraisals of the Grievant's activities did not require an experienced eye (Employer Brief, Pg. 3).

Testimony provided by several Union witnesses failed to rebut the testimony provided by the two (2) food service employees. The Employer, more specifically, maintained that this testimony lacked credibility because it was inconsistent and laden with memory "lapses." Emphasis was placed in the statements provided by Lee (Employer Exhibits 8 and 9) and the Grievant (Employer Exhibit 11), as compared to testimony which they provided at the hearing. These statements contained no reference regarding the presence of Resident B in the kitchen at the time of the altercation. Resident B's involvement and **15**

whereabouts were initially discussed by Lee and the Grievant at the hearing, which seemed contrived and self-serving (Employer Brief, Pg. 3)

Unlike the testimony provided by the Union's witnesses, the cooks' testimony was congruent with the statements they provided during the course of the investigation (Employer Exhibits 1 and 2). They claimed that the following individuals were privy to the altercation: the Grievant, Resident A, and themselves. At no time did they observe Lee or Resident B in the kitchen (Employer Brief, Pg. 4).

The Employer alleged that the Grievant allowed the situation to needlessly escalate because

she failed to follow guidelines (Employer Exhibit 5) dealing with the diffusion of crisis situations (Employer Brief, Pg. 5). Ginny Dauer, Client Rights Advocate, testified that the Grievant violated two (2) critical guidelines dealing with the modification of undesirable behavior. The first guideline cautions staff not to criticize residents even if the residents engage in inappropriate behavior. The second guideline mandates that residents should not be threatened with restraints in an effort to change the residents' behavior. These guidelines were contained in the General Behavior Procedures Handbook (Employer Exhibit 5) which the Grievant admitted she had received and were allegedly discussed in a number of inservice training programs.

Deviations in Resident A's Behavior Program (Joint Exhibit 11) were also discussed by the Employer as evidence of the Grievant's derelict behavior (Employer Brief, Pg. 5).

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Program, more specifically, contains a section labelled "Procedures dealing with inappropriate behavior". It requires that Resident A be given an opportunity to sit in a chair away from other residents, until she is calm, for up to fifteen (15) minutes² (Joint Exhibit 11, Pg. 2). The Employer argued that this protocol was never followed by the Grievant because she forced a continuance of Resident A's dishwashing task while verbally harassing her unmercilessly.

The Employer argued that it did not discipline the Grievant differently from other similarly situated employees (Employer Brief, Pg. 6). Roger Zalewski's case, more specifically, did not establish a disparate treatment practice on the part of the Employer because the two (2) cases differed dramatically. Ruth Rittichier, Director of Human Resources, testified that a number of Employee Incident Reports (Union Exhibits 4, 5, 6, 7, and 8) were issued on June 4, 1986 regarding Zalewski's behavior. She, moreover, stated that discipline was not deemed appropriate for all of the above charges because many were vague and confused as to exact times and dates. In addition, witnesses failed to initiate formal abuse charges at the time of the incidents (Employer Exhibits 10 and 11). Rittichier noted that Zalewski was suspended for twenty (20) days because he used unapproved behavior modification techniques by placing a resident in a corner approximately five (5) to ten (10) times; handled one or more residents roughly or inappropriately; and used profanity in

²The Employer's Brief refers to a five (5) minute "cooling off" period while Resident A's Behavioral Program (Employer Exhibit 5) contains a fifteen (15) minutes proviso.

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his interaction with the residents (Union Exhibit 2, Employer Exhibits 9 and 10).

The Employer distinguished Zalewski's case from the present situation. Rittichier emphasized that Zalewski's infractions were the result of carelessness and improper behavior modification techniques, while the Grievant harassed and taunted Resident A both verbally and physically. She also maintained that the actual takedown did not constitute abuse but that physical abuse took place when the Grievant forced Resident A to her knees, while holding her in a headlock (Employer

Brief, Pg 3).

The Employer alleged that there were no procedural defects because sufficient notice was provided concerning the allegations and possible consequences associated with same (Employer Brief, Pg. 9). The Employer maintained that documents submitted to the Grievant informed her that an investigation for resident abuse was initiated (joint Exhibits 3 and 4D) and that she was placed on notice that removal was a probably consequence associated with such activity (Joint Exhibit 9, Employer Exhibit 3, and Union Exhibit 12). Since the Grievant received the above information the Employer maintained that providing identical information in a single document would be redundant and require the Employer to engage in a useless act. The Collective Bargaining Agreement (See Pg. 4 of this Award for Article 24 - Discipline, Section 24.04 - Pre-Discipline), moreover, only requires that notice be provided in writing, which was clearly accomplished via the various documents introduced at the hearing.

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In a related fashion, the Employer asserted that even if procedural defects did take place, they are immaterial with respect to the particular set of circumstances under review (Employer Brief, Pg. 8). The Employer alleged that the Collective Bargaining Agreement prohibits an arbitrator from modifying a penalty if an arbitrator finds abuse (See Pg. 3 of this Award for Article 24 - Discipline, Section 24.01 -Standard). Since other arbitrators have concluded that procedural defects are only mitigating factors (Ohio Department of Mental Health v. OCSEA/AFSCME, Grievant Gerald Gregory, Grievance No. G-87-0351; State of Ohio, Department of Youth Services v. OCSEA/AFSCME, Grievant Darnell Brown, Grievance No. G-87-1299), these factors cannot be considered by the Arbitrator if it is determined that resident abuse has, indeed, taken place. For a number of reasons, the Employer maintained that the Union's introduction of several Ohio statutes (Union Exhibit 14), for the purpose of defining abuse as it relates to the Agreement (See Pg. 3 of this Award for Article 24, Section 24.01 -Standard), should not be considered by the Arbitrator (Employer Brief, Pgs. 7-8). First, the Union failed to create a nexus between these statutes and the present case because no foundation has been laid for their admittance. Second, the Grievant was never aware of these statutes in terms of substance and content. Last, the Grievant was extensively trained on the meaning and consequences of abusive behavior as defined in Administrative Rule 5119-3-14 (Employer Exhibit 4 and Joint Exhibit 9). Thus, the Administrative Rule definition should be adopted with respect

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to the Arbitrator's ability to modify a penalty (See Pg. 3 of this Award for Article 24 - Discipline, Section 24.01 -Standard). Position of the Union

It is the position of the Union that the Employer has not met its burden to establish just cause for removing the Grievant from her position as a Hospital Aide. This position is based on a number of evidentiary arguments, as well as a number of additional just cause considerations.

The Union argued that the Employer failed to provide clear and convincing evidence that the Grievant engaged in verbal abuse of Resident A (Union Brief, Pg. 4). The Union maintained that evidence and testimony supports the Grievant's version of the events as opposed to the version

proposed by the two (2) food service employees. Both the Grievant and Lee testified that Resident A was highly rebellious on September 7, 1986 because the Grievant assigned her a dishwashing task which she did not like. The above Union witnesses also testified that on more than one (1) occasion Resident A ran out of the kitchen into other parts of the facility. she, more specifically, ran into the day room, bedroom, and bathroom; each time this running behavior took place the Grievant followed Resident A and redirected her back to the kitchen to perform the dishwashing task. The Grievant testified that at no time did she taunt and threaten Resident A, rather, her actions comported with facility procedure. She alleged that her responsibility was to keep Resident A task focused (Union Brief, Pgs. 2-3).

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In support of the above testimony, the Union pointed to past experiences concerning Resident A's behavioral profile and a document which provided additional evidence concerning this matter. The Grievant and Lee testified that Resident A had previously rebelled when confronted with an assignment she viewed as undesirous. Although Resident A liked setting tables, she historically rebelled with aggression when asked to do something she did not want to do, such as doing dishes. The Union emphasized that Resident A's actions coincided with the behaviors the facility was attempting to modify or extinguish via the use of behavior modification techniques. Resident A's Behavior Program (Joint Exhibit 11), more specifically, sought to decrease a number of targeted behaviors such as aggression, screaming, and agitation (Union Brief, Pg. 2).

The Union also alleged that the Employer failed to establish by clear and convincing evidence that the Grievant engaged in physical abuse of Resident A. The Union urged the Arbitrator to place minimum emphasis on the testimony provided by the two (2) food service employees. The Union argued that their observations were not accurate depictions of the altercation because they were new to the ward, had never been trained in appropriate restraint procedures, and had never observed an actual manual restraint prior to the incident in question (union Brief, Pgs. 3-4). Their observations were additionally tainted because the cottage's configuration limited their ability to observe the altercations from the kitchen.

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The relative importance placed on several critical features of the altercation by the cooks, also indicated that their observations were not totally accurate (Union Brief, Pg. 3). The Union noted that the Parties agreed that the actual physical restraint used at the culmination of the incident was appropriate in terms of administration. In fact, none of the other individuals involved in the manual restraint were disciplined and their involvement was viewed as necessary and appropriate. Yet, both of the food service employees allegedly testified that they were bothered by this restraint. Felton was so concerned that she called Blynt to witness the altercation.

The Union maintained that Felton did not respond in a similar manner to the first instance of restraint which limited the veracity of her testimony (Union Brief, Pg. 3). Felton, more specifically, did not call Blynt out to witness the scene of the first restraint. Both food service employees, moreover, testified that they did not discuss the first restraint, while they did discuss the second restraint which involved several employees on the ward. Also, Felton's testimony regarding her observations of the first restraint were not supported by other individuals in the area at the time of

this particular incident (Union Brief, Pg. 3).

The Union argued that the Grievant engaged in certain activities after the alleged altercation which supported her version of the events. The Grievant, more specifically, followed the procedures promulgated by the facility for the handling of unusual incidents (Union Brief, Pg. 4). She completed the

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Unusual Incident Form (Joint Exhibit 5) and contacted security and the nursing office. It should be noted that representatives of the previously mentioned departments, as well as Kathy Litton, the Unit Supervisor, reviewed the form and signed off.

The Union also maintained that if the Grievant was guilty of wrongdoing, the behavior engaged in should not be characterized as resident abuse (Union Brief, Pg. 4). Lee testified that she observed the Grievant's interaction with Resident A and did not view her activities as abusive. The Grievant, moreover, emphasized that she was attempting to meet the requirements in the Behavioral Program (Joint Exhibit 11) to the best of her ability. These abilities were based on minimum training in the area of behavior modification for the mentally retarded.

In addition to the above arguments, the Union asserted that the Employer failed to prove just cause because it violated a number of critical principles (Union Brief, Pgs. 5-7). First the Union alleged that the Employer did not provide forewarning of the possible penalties associated with the Grievant's wrongdoing. Emphasis was placed on the disciplinary policy (Joint Exhibit 12) in effect at the time of the incident. This policy contained lesser penalties for allegations of verbal and physical abuse than those imposed by the Employer. Thus, in the Union's opinion, the Employer acted outside of the expectations generated by those policies for similar types of offenses.

Second, disparate treatment was also asserted by the Union because the Employer failed to apply its rules consistently. The Union claimed that Zalewski was merely suspended for twenty (20)

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days for engaging in incidents similar to those engaged in by the Grievant. The penalty, moreover, was promulgated under a policy (Union Exhibit 3) more stringent than the one in effect at the time of the present incident; and Zalewski had been previously disciplined. The Union maintained that one could also characterize the Grievant's physical abuse allegation in a manner similar to the particulars contained in Zalewski's suspension order (Union Exhibit 2). In other words, the Union claimed that the Grievant should have been charged with handling a resident in a rough or inappropriate manner, rather than physical abuse.

Third, the Union claimed that the procedures utilized by the Employer were not fairly administered with respect to the incident in question. Numerous defects dealing with the Reporting Suspected Abuse procedure (Union Exhibit 13) were identified by the Union. Various sections of the Employee Incident Report were not completed as provided for by the procedure (Union Exhibit 13). In addition, follow-up medical or psychological examinations were not performed by the facility;

Resident A's guardian was not timely notified; and the Client Rights Advocate did not talk to the resident after the incident was brought to her attention.

Last, the Employer failed to provide the Grievant with sufficient notice because the Employer never issued a formal predisciplinary notice. This procedural defect violated a specific contractual requirement (See Pg. 4 of this Award for Article 24 - Discipline, Section 24.04 - Pre-Discipline). The Union alleged that the Abuse Committee meeting did not substitute for the above
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requirement and thus, the Grievant's due process rights were violated. This meeting, more specifically, did not engender expectations concerning the possible disciplinary outcome, the nature of the specific resulting charges, or the possible penalty attached to the violation.

For the above specified reasons, the Union maintained that the Employer did not have just cause to remove the Grievant. As a consequence, the Union argued that the Agreement (See Pg. 3 of this Award for Article 24 - Discipline, Section 24.01 – Standard) allows the Arbitrator to review potential mitigating factors such as the Grievant's work record (Union Brief, Pg. 7) (Union Exhibits 9, 10, 11, and 12). In the alternative, if the Arbitrator ruled in the Employer's favor, the Union claimed that the standard to be used in determining whether the Arbitrator's authority is limited is found in Ohio Revised Code, Section 29.03.33 et seq. (Union Exhibit 14). Thus, modification of a penalty would be precluded if the Arbitrator concluded that the Grievant engaged in an intentional act which resulted in significant harm.

THE ARBITRATOR'S OPINION AND AWARD

In a recent award this Arbitrator discussed the inherent linkage between the definition of the term "abuse", and the language contained in Section 24.01 (See Pg. 3 of this Award for Article 24 - Discipline, Section 24.01 - Standard) dealing with the scope of an arbitrator's authority. (Ohio Department of Mental Retardation and Developmental Disabilities v. OCSEA/AFSCME, Juliette Dunning (A), Grievance No. G87-0001(A)).
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This Arbitrator concluded that the standard specified in the previously mentioned section contains an explicit just cause requirement for any (emphasis added) disciplinary action. The sentence that follows does not modify but supplements the previous section. Thus, a determination that an abuse has been committed does not automatically guarantee that termination is the appropriate penalty. In other words, the Employer must establish that it had just cause to undertake the termination before it can allege that an arbitrator does not have authority to modify a penalty. The purpose of this provision is to prevent an arbitrator from holding that an employee was terminated for proper cause on the basis of certain misconduct, but that termination for such misconduct should be reduced (Jones and Laughlin Steel Corp., 46 LA 187, Sherman, 1966).

The present grievance is a clear example of the above discussion. From the evidence and testimony introduced at the hearing, it is the opinion of this Arbitrator that the Grievant did engage

in the activities for which she was charged, but that the Employer failed to establish just cause for the removal because critical principles were violated. It should be noted that this conclusion was based on an analysis of the particulars contained in the Removal Order and related documents (Joint Exhibit 2).

Consideration of other alleged violations discussed at the hearing, but excluded from the Removal Order (Joint Exhibit 2), would violate the Grievant's due process rights., At the hearing and in the Employer's Brief, several allegations dealing with

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forcible removal from the kitchen by applying an arm lock were discussed as partial justification for the removal. In addition, use of an illegal manual restraint, that is headlock, prior to the manual restraint engaged in by the Grievant and other staff members was also discussed to support the physical abuse allegation. These items were not included in the particulars justifying the Grievant's removal, and thus, were not considered by this Arbitrator in the rendering of the Opinion and Award.

The major contention in the present grievant deals with varying versions of the events which took place on September 7, 1986. The evidence and testimony presented by the Parties represent widely differing versions of the facts surrounding the incident. In situations involving the credibility of testimony it is this Arbitrator's responsibility to scrutinize and evaluate the testimony and to reach the best conclusion regarding the actual fact situation.

In evaluating the testimony presented by the Parties, this Arbitrator considered several critical factors. Arbitrators often focus upon the existence or nonexistence of bias, interest, or other motive in resolving issues of credibility. Arbitrators, more specifically, have recognized in arbitrations involving disciplinary action, when an employer's witness and the grievant give testimony which is in conflict, weight may be given to the fact that the accused employee has a personal interest in the outcome. This recognition is especially true when the accusers have nothing to gain by their adverse testimony (South Penn Oil Co., 29 LA 718, Duff, 1957; Herrud and Co., 77-2 ARB P 8410,

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Daniel, 1977; Lake Orion Community Schools, 73 LA 707, Roumell, 1979).

This Arbitrator accords significantly more weight to the testimony provided by the two (2) food service employees than the opposing testimony. Both Felton and Blynt were recent hires at the time of the altercation. They had minimal contact or interaction with the staff and residents on the second shift, and thus, their depiction of the events were not tainted by any personal bias. At the time of the hearing, moreover, neither of these individuals were employed by the food service; their decision to explore alternative job opportunities was unrelated to the altercation. In addition, their credibility was not successfully attacked by the Union, and no reason was shown why they would testify untruthfully or have any animus against the Grievant.

Typically, interest, by itself, should not be considered as the decisive factor for discrediting a

witness' testimony. This Arbitrator also considered the consistency or inconsistency of testimony in evaluating the credibility of the witnesses. (Ready Mix Concrete Co., 731 ARB P 8082, Mulhall, 1973; American Air Filter Co., 1975 ARB P 8024, Hilpert, 1975). In this Arbitrator's opinion the testimony provided by the Employer's witnesses was far more consistent than the testimony provided by the Union's witnesses.

Special emphasis was placed on the statements made by witnesses at this arbitration hearing, as opposed to statements made earlier in the investigation of the case. A
glaring **28**

omission deals with Resident B's involvement in the altercation. Both of Lee's statements (Employer Exhibits 8 and 9) omit Resident B's involvement in the kitchen. Yet, a critical feature of the Union's argument dealt with the problems Lee had controlling Resident B's activities, while Resident A was engaging in her rebellious behavior. Similarly, the Grievant's statement to the security officer (Employer Exhibit 11), her grievance statement (Joint Exhibit 2), and her testimony during the course of the investigation, failed to include any reference dealing with Resident B's activities during the altercation.

Inconsistencies also exist concerning statements made by the Grievant to the cooks and the cooks' fears during the altercation. The Grievant testified that she informed these individuals to be wary of Resident A because of her aggressive tendencies. She, moreover, stated that this warning took place in Lee's presence and that she had to intervene to prevent an attack by Resident A on the cooks. Documents introduced at the hearing also indicate that one (1) of the cooks became so fearful that she departed from the kitchen (Joint Exhibit 2).

Although Lee testified that she was in the kitchen with Resident B prior to the manual restraint, she did not corroborate the Grievant's version of the events. Lee, more specifically, did not provide any testimony or statements during the course of the investigation (Employer Exhibits 9 and 10) concerning these events. In other words, she never discussed the food service employee's exit from the kitchen, the cooks' fear of Resident A's activities, and the Grievant's warnings and intervention.

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Unlike the inconsistencies and contradictions discussed above, the testimony provided by the two (2) food service employees was highly consistent, and thus, credible. Despite the frequent repetition of their testimony in the course of direct and cross-examination, their testimony remained remarkably consistent and coherent. Their testimony, moreover, closely approximated critical features of the statements gathered during the course of the investigation (Employer Exhibits 1 and 2).

This Arbitrator was also troubled by the Grievant's disregard for Resident A's Behavioral Program (Joint Exhibit 11). Even if the Grievant's version of the events was deemed an accurate depiction, she did not comply with the procedure developed for dealing with Resident A's

inappropriate behavior. This procedure states in part:

“ ...

- b. If Resident A becomes agitated, (sic) screaming, moving rapidly, being non-compliant;
 - 1. One attempt should be made to verbally redirect her into this activity.
 - 2. If this is unsuccessful one attempt should be made to physically redirect her into an activity.
 - 3. If she continues she should sit in a chair away from other residents until calm for up to 15 minutes.

...”

(Joint Exhibit 2, Pg. 2)

Obviously, Grievant's continuance attempts to redirect Resident A's behavior exceeded the steps outlined above. She, more specifically, engaged in more than one (1) attempt to verbally redirect Resident A into the dishwashing activity. Step 3 was also violated because Resident A was never placed in a chair away from other residents to afford her an opportunity to calm down.

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The Arbitrator surveyed Cottage 604 subsequent to the arbitration hearing. This viewing further reinforced the credibility determinations discussed above. The kitchen, dining room, and dayroom are in close proximity. The cooks' testimony dealing with their ability to observe the altercation by peeking outside the kitchen toward the dayroom hallway was confirmed by the Arbitrator. In addition, the kitchen area is extremely small. Thus, testimony concerning the activities of various individuals and their remarks during the altercation seem quite probable.

A determination that the Employer obtained a substantial level of proof that the Grievant committed the particulars for which she was removed, does not necessarily satisfy the just cause requirement contained in the Agreement (See Pg. 3 of this Award for Article 24 - Discipline, Section 24.01 - Standard). In this Arbitrator's opinion, the notice and equal treatment standards were violated by the Employer.

Arbitrators have taken various positions in discipline and discharge cases where the employer has engaged in procedural defects. These approaches were summarized by Arbitrator Fleming in the following manner:

“ ... (1) that unless there is strict compliance with the procedural requirements the whole action will be nullified; (2) that the requirements are of significance only where the employee can show that he has been prejudiced by failure to comply therewith; or (3) that the requirements are important, and that any failure to comply will be penalized, but that the action taken is not thereby rendered null and void.”

(Fleming, R.W. The Labor Arbitration Process Urbana: University of Press,

The third approach is the most prevalent. This Arbitrator concurs with this approach because it has the virtue of penalizing failure to comply with contractual requirements, but does not necessarily obviate all that has been done.

The Parties have negotiated language dealing with specific procedural requirements dealing with notice. This provision requires that an employee and his/her representative shall (emphasis added) be informed in writing of the reasons for the contemplated discipline and the possible form of discipline (See Pg. 4 of this Award for Article 24 - Discipline, Section 24.04 -Pre-Discipline). The Employer failed to comply with these mutually negotiated requirements.

The various documents referred to by the Employer did not provide the Grievant with adequate notice for the reasons for contemplated discipline. The employer, moreover, expected the Grievant to integrate a variety of documents and conclude, with sufficient specificity, the reasons for her removal. Such an expectation is totally unwarranted and underscores the importance of the "writing" requirement. Specificity is extremely important when dealing with abuse and neglect cases because without such a requirement case preparation becomes quite difficult. Testimony provided at the hearing adequately evidences the problems that may be engendered when this condition is not met. Several incidents involving physical abuse allegations were proposed including improper escort procedures and illegal manual restraints. All of the allegations, however, were not specified as particulars in the Removal order (Joint Exhibit 2). **32**

Rittichier's testimony concerning the physical abuse charge provides additional support for this conclusion. She stated that the last takedown was considered an indirect rather than a direct justification for the charge. Without a specific delineation of reasons, one could have easily inferred that the last takedown constituted the primary charge for physical abuse, rather than the final outcome engendered by a series of prior provocations.

In a like fashion, the possible form of discipline was not properly delineated. Granted, the Grievant signed an Employee Agreement (Joint Exhibit 9) indicating that abuse and neglect of any client may be cause for dismissal. The Guidelines (Joint Exhibit 12), however, in effect at the time of the incident contain such a broad range of possible penalties that some notice concerning specificity is essential. Such a requirement is especially important when the Employer feels that mitigating or aggravating circumstances support the issuance of a major penalty rather than progressive penalties.

In the opinion of the Arbitrator, the Employer did not apply its rules and penalties even-handedly. Both the Grievant and Zalewski engaged in similar types of unapproved behavior (Employer Exhibits 9 and 10). Review of the relevant incident reports indicate that one could equate Zalewski's unapproved behavior modification technique (Union Exhibit 5) with the Grievant's threat of a potential takedown (Union Exhibit 7). The Grievant's verbal abuse or harassment charge is also closely akin to Zalewski's particulars dealing with the use of profanity in

his interaction with residents (Union Exhibit 2), and his

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ordering of residents in an authoritarian manner (Employer Exhibit 10).

The Employer was given ample opportunity to provide plausible distinctions regarding these two disciplinary orders (joint Exhibit 2, Union Exhibit 2). Rittichier testified that Zalewski's activities were not viewed as premeditated or intentional but rather a function of carelessness. This rationale does not provide sufficient justification for the tremendous disparity in the penalties imposed by the Employer for like offenses. She also noted that the Grievant's work record was reviewed which further muddies the distinctions alleged by the Employer. At the time of Zalewski's twenty (20) day suspension, his work record contained a three (3) day suspension (Union Exhibit 2). The Grievant, however, possessed a clean work record and a series of exceptional performance evaluations (Union Exhibits 9, 10, 11, and 12).

The Arbitrator is mindful that the penalties and charges cited were not for identical events and comparisons are often difficult without a complete record. This Arbitrator, however, cannot condone the activities of the Grievant. Employees of the Northwest Ohio Developmental Center have responsibilities which exceed those of employees in industrial establishments. Those charged with the care, custody, and protection of residents must possess extraordinary self-discipline and dedication. Careless behavior, in violation of a behavioral program developed for a nonverbal profoundly retarded patient, will not be tolerated by this Arbitrator. Verbal harassment and behavioral modification

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threats to a nonverbal resident are viewed as egregious activities which justify a penalty much more severe than the one issued to Zalewski. At the same time, procedural defects, violating an employee's due process rights, can also adversely impact the labor-management relationship.

The Parties mutually agreed to language in the Agreement dealing with notice requirements (See Pg. 3 of this Award for Article 24 - Discipline, Section 24.01 - Standard). To minimize the importance of this language would in effect subtract from or modify the terms of this Agreement (Joint Exhibit 1, Pg. 40).

AWARD

The grievance is sustained in part and denied in part. The Grievant is to be reinstated without back pay but without loss of seniority. No back pay is given to evidence the seriousness of the totality of the Grievant's conduct.

March 11, 1988

Dr. David M. Pincus
Arbitrator

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