

**ARBITRATION DECISION NO.:**

165

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Mental Retardation  
and Developmental Disabilities,  
Youngstown Developmental Center

**DATE OF ARBITRATION:**

December 16, 1988

**DATE OF DECISION:**

January 9, 1989

**GRIEVANT:**

Rena Rozenblad

**OCB GRIEVANCE NO.:**

G-87-2260

**ARBITRATOR:**

Harry Graham

**FOR THE UNION:**

Daniel Smith

**FOR THE EMPLOYER:**

Robin Thomas

**KEY WORDS:**

Just Cause  
Termination  
Patient Abuse

**ARTICLES:**

Article 24 - Discipline  
§24.01-Standard

**FACTS:**

The Grievant in this case is an employee of the Department of Mental Retardation and Developmental Disabilities in Youngstown, Ohio. The facility cares for mentally disabled individuals. Among these individuals is a Ms. M.B. and Ms. E.P. (The full names of M.B. and E.P. are omitted from this award by agreement of the parties in order to preserve their privacy). On the

morning of August 8, 1987, M.B. was discovered to have experienced an injury to her left ear. Subsequently, the State determined that the Grievant had struck M.B. causing the injury. As a result of this incident the Grievant was Discharged.

#### **EMPLOYER'S POSITION:**

The State argued that it had just cause for the discharge of the Grievant. The State presented the facts as follows which are sharply different from the Union's position. According to the employer, M.B. and E.P. were outside on the evening of August 7, 1987, following their dinner. During their time together, M.B. tried to take a cigarette from E.P.. M.B. is on a ration of cigarettes and fixes upon them. She desires to have more cigarettes than she is permitted. In the course of the struggle between M.B. and E.P. the Grievant came out of House 2. In her zeal to halt the situation she hit M.B. a strong blow to the ear. The blow literally caused substantial swelling and hematoma, requiring surgical attention the following morning. As a result of the actions taken by the Grievant the employer felt it had just cause to remove the Grievant.

#### **UNION'S POSITION:**

The Union's position was that the Grievant has nothing to do with the injury of M.B.. The Union's view of the facts are as follows. August 7, 1987, was a normal day for the Grievant, M.B., and E.P.. Dinner was served as usual at 5:00 pm. After dinner M.B. went outside and had her 6:00 pm cigarette as prescribed by the staff. Later in the evening M.B. engaged in minor horseplay with another resident and the Grievant called M.B. over and they sat together for a time. Subsequently the Grievant bathed all the women in House 2 and put them to bed. At this time M.B. had not suffered any injury. The next morning the injury to M.B. was discovered but was in no way inflicted by the Grievant. At the hearing M.B. testified that the Grievant had struck her in the ear causing her injury. However, she retracted her statements at a later time and has been inconsistent with this story since the discovery of her injury. The Union points out that the Grievant has been involved in the care of mentally handicapped person for some fifteen years and has an excellent work record with no discipline problems. It also points out that it is impossible to cross-examine M.B. because of his mental state. In accordance with these facts the Union feels that the discharge of the Grievant is unwarranted and the testimony of M.B. and E.P. should have received much greater scrutiny.

#### **ARBITRATOR'S OPINION:**

The arbitrator felt that the testimony of M.B. and E.P. was credible even though they were mentally retarded. The arbitrator felt that E.P. was the most credible party because he felt that E.P. was not capable of having the mental ability to fabricate a lie, let alone retell it consistently more than a year later. He felt the testimony of the Grievant was not credible because she had an obvious interest in testifying in the manner she did. In conclusion, the arbitrator felt that the testimony of M.B. and E.P. should be viewed in a better light than that of the Grievant and since there was abuse of a patient then the termination should stand.

#### **AWARD:**

The grievance is denied.

#### **TEXT OF THE OPINION:**

In the Matter of Arbitration

Between

**OCSEA/AFSCME Local 11**

and

**The State of Ohio**

**Case No:**

G-87-2260

**Appearances:**

**For OCSEA/AFSCME Local 11:**

Daniel Smith  
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**For The State of Ohio:**

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**Introduction:**

Pursuant to the procedures of the parties a hearing was held in this matter on December 16, 1988 before Harry Graham of South Russell, OH. At that hearing both parties were provided complete opportunity to present testimony and evidence. Post-hearing statements were filed in this dispute. They were exchanged by the Arbitrator on December 27, 1988 and the record was declared closed as of that date.

**Issue:**

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

Did the State have just cause to discharge Renae Rozenblad? If not, what shall the remedy be?

**Background:**

A great deal of the facts that lead to this dispute are in contention. Certain background facts though are not contested. The State of Ohio, Department of Mental Retardation and Developmental Disabilities, operates a facility in the Youngstown, OH. area known as the

Youngstown Developmental Center. That facility is residential and has among its clients M.B. and E.P. (The full names of M.B. and E.P. are omitted from this award by agreement of the parties in order to preserve their privacy). Both are moderately retarded. (Joint Ex. 3 and 4). On the morning of August 8, 1987 M.B. was discovered to have experienced an injury to her left ear. That injury involved swelling. M.B. was taken to Youngstown Hospital where a quantity of blood was drained from her ear. Subsequently, the State determined that the grievant in this case, Renae Rozenblad, had struck M.B., causing the injury. As the State believed this to be the case Ms. Rozenblad was discharged. A grievance protesting the discharge was processed through the grievance procedure of the parties without resolution. Both parties agree that it is properly before the Arbitrator for determination on its merits.

### **Position of the Union:**

August 7, 1987 was a normal day for the Grievant, M.B. and E.P. according to the Union. Dinner was held at the usual time, about 5:00 - 5:30 PM. After dinner M.B. went outside and had her 6:00 PM cigarette according to the schedule prescribed by the staff of Youngstown Developmental Center. Later in the evening M.B. engaged in minor horseplay with another resident and the Grievant called M.B. over and they sat together for a time. The Grievant went to lunch from 7:00 PM - 7:30 PM. No unusual problems were noted. Later that night she gave baths to the women residents of House 2 and assisted them to bed. Nothing out of the ordinary occurred on August 7, 1987. No injury was noted to M.B. on that date. While it was subsequently discovered that M.B. had sustained an injury to her ear, the Grievant had nothing to do with that event.

At the hearing M.B. and E.P. gave inconsistent and contradictory testimony. This occurred in the investigation of the alleged incident as well. Thus, M.B. testified that she fell and hurt her ear. She also testified that S. (another resident) hit her. The Union points out that M.B. was asked leading questions at the hearing. It was impossible to conduct a proper cross-examination of her due to her mental state. E.P. testified that the Grievant was trying to break up a fight between her and M.B. She demonstrated the blow allegedly delivered by the Grievant to M.B. That blow was more like a tap than a forceful rap to M.B.'s ear. If a blow occurred, a fact not conceded by the Union, the blow demonstrated by E.P. was not of sufficient force to produce the injury discovered on the morning of August 8, 1987.

The Union points out that staff at the Center did not notice any sign of injury to M.B. on the evening of August 7, 1987. Staff assisted M.B. in combing her hair and would be very likely to see any injury to her ear. Nothing was seen.

The Grievant has been dealing with mentally handicapped people for approximately ten years. Prior to accepting employment with the State she had five years of service in the private sector. Her record there is unblemished. In the five years of service at Youngstown Developmental Center prior to this event she had a clean record with no discipline. Given her steadfast denial of any unusual occurrence on August 7, 1987 and the fact that the witnesses against her are both mentally handicapped, the Union urges the grievance be sustained.

### **Position of the State:**

The State presents a very different picture of the events leading to this proceeding than does the Union. According to it, M.B. and E.P. were outside on the evening of August 7, 1987 following their dinner. During their time together, M.B. tried to take a cigarette from E.P. M.B. is on a ration of cigarettes and fixes upon them. She desires to have more cigarettes than she is permitted. In

the course of the struggle between M.B. and E.P. the Grievant came out of House 2. In her zeal to halt the situation she hit M.B. a strong blow to the ear. That blow ultimately caused substantial swelling and a hematoma, requiring surgical attention the following morning.

The State acknowledges that M.B. has been inconsistent in her story. She initially told staff that the Grievant had hit her. She then recanted and said that she had fallen to the sidewalk. A fall to the sidewalk is inconsistent with the injury sustained by M.B. In addition, she has since testified consistently that she was struck by the Grievant.

M.B. has a history of self-abuse. On occasion she strikes her head with sufficient force to cause a laceration and bleeding. She has never hit herself in the ear.

The State points out that in the pre-disciplinary meeting the Grievant acknowledged that an incident occurred on the evening of August 7, 1987. She confirmed that M.B. and E.P. had some sort of altercation concerning cigarettes. Her denial centered on any role she may have had in causing the injury to M.B. At the hearing the Grievant denied that any unusual incident occurred on August 7, 1987. This inconsistent testimony should be discredited, given its self-serving nature.

### **Discussion:**

This dispute presents an extraordinary credibility dispute to the Arbitrator. It is not infrequent that one party issues a forthright denial and another just as forthright testimony that a particular event occurred. To that common situation is added the fact that the witnesses against the Grievant in this situation are mentally retarded. M.B. cannot function in society at all. E.P. interacts with the world outside of the Youngstown Developmental Center in very limited fashion.

The fact that M.B. and E.P. are retarded does not automatically require that their testimony be discarded. It is questionable whether M.B. and E.P. possess the mental facilities to fabricate a lie, let alone retell it consistently more than a year after the event, in a strange setting. Furthermore, with one exception, the account told by M.B. and E.P. has been consistent throughout the period from August, 1987 to the date of the hearing. Given the mental condition of M.B. and E.P., their consistent version of the events of August 7, 1987 must be given credence. M.B. and E.P. both told the same story. They indicated that M.B. had been struck by the Grievant as they argued about cigarettes. It is impossible for this Arbitrator to believe that they could concoct that story and remain steadfast in it for over a year unless it were true. Furthermore, no history of animosity was shown between the Grievant and M.B. and E.P. Even if they could fabricate such a story, no reason why they would desire to do so was advanced by the Union.

That staff may not have noticed an injury to M.B. on the evening of August 7, 1987 does not, standing alone, prompt a finding on behalf of the Grievant. Swelling and hematomas may take some time to develop. The fact is incontrovertible that on the morning of August 8, 1987 M.B. had a swollen ear that required medical attention. No reason for that to have occurred other than the version of events set forth by the State, is before the Arbitrator. The self-abusive behavior engaged in by M.B. from time to time is not of the type to produce an injury to her ear.

The Grievant's testimony that the altercation between M.B. and E.P. never occurred rings hollow. She has an obvious interest in testifying to that effect. Set against the consistent and forthright testimony of M.B. and E.P. her version of events is implausible. It is obvious that this Arbitrator credits M.B. and E.P.

At Article 24, Section 24.01 the parties have agreed that if an arbitrator determines that abuse of a patient in the custody of the State has occurred no authority exists to modify the penalty of termination. It is clear from the discussion above that the Arbitrator has determined that M.B. did experience abuse on the evening of August 7, 1987. Having found that to be the case, no consideration may be given to any reduction of the penalty imposed by the State.

**Award:**

Based upon the preceding discussion the grievance is DENIED.

Signed and dated this 9th day of January, 1989 at South Russell, OH.

Harry Graham  
Arbitrator