

**ARBITRATION DECISION NO.:**

409

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Mental Retardation  
and Developmental Disabilities  
Gallipolis Developmental Center

**DATE OF ARBITRATION:**

August 21, 1991  
September 30, 1991

**DATE OF DECISION:**

December 23, 1991

**GRIEVANT:**

Tamara M. Jones

**OCB GRIEVANCE NO.:**

24-07-(91-02-14)-0396-01-04

**ARBITRATOR:**

David Pincus

**FOR THE UNION:**

Richard Sycks

**FOR THE EMPLOYER:**

Mike Fuscardo, Advocate  
Paul Kirschner, 2nd Chair

**KEY WORDS:**

Removal  
Client Abuse  
Failure to Act Within Client's  
Behavioral Program  
Failure to Use Proper  
Restraint Techniques

**ARTICLES:**

Article 24-Discipline  
§24.01-Standard  
§24.02-Progressive Discipline

**FACTS:**

The grievant had been a Therapeutic Program Worker at the Gallipolis Developmental Center for four years. The grievant was involved in an incident with a client who was acting out. A specific restraint program

designated the proper method to restrain, or redirect the client if he engaged in unwanted behaviors. While eating dinner, the client began to yell and appeared ready to tip a table over. Another employee settled the client down pursuant to his restraint program. The grievant then entered the room and began to restrain the client, allegedly not utilizing techniques within his restraint program, by either using a choke hold or placing him in a bear hug. The grievant was removed for abuse of the client.

**EMPLOYER'S POSITION:**

There was just cause for the grievant's removal. The grievant abused a client of the agency by failing to use proper restraint techniques as contained in the client's program or general agency rules. Three bargaining unit members testified that the grievant used a choke hold on the client. The witnesses were present when the incident occurred and were not part of a conspiracy to implicate the grievant. Nor were they coerced by the employer to implicate the grievant. Alternatively, if the grievant's story is true, placing a client in a bear hug also constitutes abuse as it is not consistent with general restraint guidelines or the client's specific program. Thus, as the grievant abused the client, the penalty of removal cannot be reduced at arbitration.

**UNION'S POSITION:**

There was no just cause for the grievant's removal. A client had become agitated while in the dining room. He had not been settled down prior to the grievant's restraining him. The grievant restrained the client properly and only used a bear hug to place the client in his chair. She released the client when he relaxed and stayed in his chair. The grievant is more credible than the other witnesses because they have made prior statements which are not consistent with their testimony, and the grievant was the only one who reported the incident when it occurred. Additionally, the employer coerced the witnesses to testify against the grievant. There was also no medical evidence that the grievant abused the client.

Procedural errors committed by the employer were: (1) the investigation was biased against the grievant; 2) witnesses for the grievant were not allowed to testify at the pre-disciplinary hearing; 3) the union was denied access to necessary documents; and 4) the Step 3 meeting requirements were not met.

**ARBITRATOR'S OPINION:**

The arbitrator's authority in this case is limited by the employer's charge of abuse. If abuse is found, the arbitrator is without authority to reduce the penalty imposed under a just cause standard. Procedural errors alleged, even if proven, cannot reduce the penalty as the parties negotiated that abuse constitutes just cause.

The employer proved that the grievant abused the client. The agency definition includes acts "inconsistent with human rights which result or could result in physical or emotional injury to a client. The grievant was proven to have acted inconsistently with the client's human rights whether she choked him or used a bear hug as she claims. Neither act is within the client's behavior program as proper intervention, or the agency's restraint techniques. The three employer's witnesses were more credible than the grievant. Their testimony was consistent with their prior written statements. There was no evidence of collusion among the three to implicate the grievant, nor was there any evidence of employer coercion. The witnesses' reasons for not immediately reporting the incident were reasonable. The grievant's explanation was self serving, and her written statement was sketchy and inaccurate. Additionally, the grievant's testimony was evasive and inconsistent.

**AWARD:**

The grievance was denied.

**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 DEVELOPMENTAL**  
**DISABILITIES, GALLIPOLIS DEVELOPMENTAL CENTER**

**-and-**

**OHIO CIVIL SERVICE EMPLOYEES**  
**ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO**

**GRIEVANT:**  
**Tamara M. Jones**

**OCB Case No.:**  
24-07-(91-02-14)-0396-01-04

**ARBITRATOR'S OPINION AND AWARD**

Arbitrator: David M. Pincus  
Date: December 23, 1991

**APPEARANCES**

For the Employer

Michael Dey, Superintendent  
Donald Walker, Labor Relations Officer  
Richard C. Houck, Director of Operations  
Joseph B. Fenderbosch, Training Officer  
Malcolm Nichols, Recreational Coordinator  
Susan Moore, Licensed Practical Nurse  
Michael Bush, Vice President of Local  
Rhonda Bush, Therapeutic Prog. Worker  
Verna Easter, Therapeutic Prog. Worker  
Elizabeth Putney, Therapeutic Prog. Worker  
Jessica Jarrell, Therapeutic Prog. Worker  
Paul Kirschner, Second Chair  
Mike Fuscardo, Advocate

For the Union

Tamara Jones, Grievant  
Sharon Brown, Steward  
John W. Blankenship, Therapeutic Prog. Worker  
Esther DeMoss, Therapeutic Prog. Worker  
Monty Blanton, Custodian  
Richard Sycks, Advocate  
A. Mildred Hamilton, Observer

**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

Developmental Disabilities, Gallipolis Developmental Center, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period July 1, 1989 through December 31, 1991 (Joint Exhibit 1).

The arbitration hearings were held on August 21, 1991 and September 30, 1991 at the office of the Ohio Civil Service Employees Association, 1680 Watermark Drive, Columbus, Ohio. The Parties had selected 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**

Did the Employer violate Section 24.01 when it removed  
Tamara Jones, the Grievant?

If not, what shall the remedy be?

### **PERTINENT CONTRACT PROVISIONS**

#### 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.

##### 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. One or more verbal reprimand(s) (with appropriate notation in employees's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- 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, Pgs. 37 - 38)

### **CASE HISTORY**

In Gallipolis Developmental Center, the Employer, is a resident treatment center which houses three hundred individuals. The facility has, as its primary goal, the treatment and education of individuals with a wide range of mental retardation maladies. As a resident treatment center, it hopes to return some segment

of its resident population back to the general community. Some residents, however, are inflicted with such severely profound behavioral problems that long term care is the only possible treatment outcome.

Tamara Jones, the Grievant, was employed as a Therapeutic Program Worker for approximately four years prior to her removal for patient abuse.

The incident in question took place on January 2, 1991, during the second shift, on Living Area 6049-4.

Before the circumstances surrounding the incident are reviewed, one needs to understand the behavioral tendencies of Robert E., the allegedly abused resident. Malcolm Nichols, a Recreational Coordinator and formerly an Administrative Assistant II, provided some background concerning Robert E.'s condition. Robert E. functions at a profound level of mental retardation and he cannot communicate except for gestures. He tends to possess an anxious demeanor and cries and makes sounds when he wants something. At times, Robert E. expresses his frustration by crying, becoming very demonstrative, and exhibiting extreme agitation to the point of violence.

Robert E.'s behavioral program at the time of the incident consisted of two components. The preventive component required the use of two reinforcers on a per shift or per day basis. He liked to take walks and engage in responsible behavior such as taking care of the laundry and bringing the meals up the hallway in a cart. Robert E. was also reinforced by being provided with a soda once per shift each day. Direct interventions normally took place as a result of specific behavioral patterns. He normally became agitated and on occasion could become violent. Problems sometimes arose in the lunchroom because he wanted to leave the area. On other occasions Robert E. wanted to wander off and look through windows which provided him with an opportunity to view the surrounding area.

Nichols and other witnesses attested to a specific behavioral paradigm designated to extinguish or control these unwarranted behaviors. Since restraint attempts often engendered an agitated state sometimes leading to violent acts, attendants were advised to redirect his behavior and then sitting him down until he became calm. If his emotional state continued to escalate, the staff was then authorized to separate him from the rest of the group and restrain him on the floor in a safe manner.

The incident in question took place on January 2, 1991 during the second shift. The circumstances surrounding the incident are in dispute with varying versions offered by three bargaining unit members as opposed to the version offered by the Grievant. On the evening in question, four bargaining unit members, holding Therapeutic Program Worker positions, were assigned to the fourth floor: the Grievant, Verna Easter, Jessica Jarrell, and Elizabeth Putney. At approximately 6:00 p.m., during the dinner hour, Verna Easter was attending to Robert E. and several other patients in the small dining room, while the other previously mentioned bargaining unit members were supervising the dinner meal for a number of patients in an adjacent large dining room.

At approximately 6:00 p.m., Robert E. started to yell. All three protagonists testified the staff from the large dining room responded by coming to their co-workers's aid. Jessica Jarrell purportedly was the first individual to reach the small dining room. She observed Robert E. acting up and allegedly yelled "sit down". As she approached Robert E., he was grabbing the table top as if he was preparing to tip the table over. Jarrell then proceeded to hold Robert E.'s right arm while Easter held his left arm per the behavioral protocol. Robert E. allegedly calmed down and eventually sat down in the chair.

While these events were taking place, Putney and the Grievant entered the small dining room. Although the facts are in dispute, all three protagonists testified the Grievant knocked Jarrell out of the way against the wall. The Grievant then purportedly positioned herself behind Robert E. and placed him in an illegal choke hold. Easter stepped to the side letting go of Robert E.'s hand. She allegedly begged the Grievant to ease up once she observed Robert E. turning blue and his tongue hanging out of his mouth. Rather than terminating the hold, the Grievant responded by stating "I'm going to kill this fucker."

Easter continued to admonish the Grievant and asked her to stop. She eventually released the patient but he slumped over in a virtual unconscious state. The bargaining unit members maintained the Grievant struck the patient in the back and his face which eventually aroused him to a normal state.

For a variety of reasons to be discussed below, none of the protagonists documented the incident per the normally required procedure ( Union Exhibit 2). They wanted to handle the matter without notifying the proper authorities. The Grievant, however, did document the incident by noting in the Daily Living Area

## Report:

“ ... Robert E. aggressive during supper, placed in manual restraints, calm in 5 min. ...”

(Joint Exhibit 5, Pg. 2)

She also made a similar notation in the Program Data Correction Summary (Union Exhibit 6).

Nichols testified he became aware of the incident after being contacted by a Union representative. Although he was not provided with any specifics, he was informed of a potential incident involving the Grievant and Robert E. Additional interviews of the participants led to the issuance of an Order of Removal on February 4, 1991. It contained the following particulars:

... “

The reason for this action is that you have been guilty of client abuse in the following particulars, to wit: On or about January 2, 1991, you choked a male client residing in Living Area 6049-4.

... ”

(Joint Exhibit 2)

On February 4, 1991, the Grievant contested the disciplinary action by filing a grievance. The Statement of Facts specified the following allegations:

... ”

On February 04, 1991, the grievant was removed from employment for Client Abuse. Management refused to provide pertinent information requested by the Union. Management also refused to answer pertinent questions. The hearing was prejudiced and the grievant's representative was not permitted to question witnesses to get the truth. Three employee that are guilty of neglect by G.O.C. Policy were not disciplined.

... ”

(Joint Exhibit 22)

A Step 3 Grievance Hearing was held by the Parties. The hearing was held on March 1, 1991. In support of the removal, the Employer noted the bargaining unit members' testimony was credible. As such, it was determined the Grievant acted in a fashion for which she was accused (Joint Exhibit 22).

The Parties were unable to resolve the disputed matter. Since neither Party raised any procedural nor substantive arbitrability claims, the grievance is properly before the Arbitrator.

## **THE MERITS OF THE CASE**

### **The Position of the Employer**

The Employer asserted that it removed the Grievant in accordance with Section 24.01 requirements. That is, patient abuse was established which precluded the Arbitrator from modifying the termination of the Grievant.

Much of the Employer's case was based on the consistent and unequivocal testimony provided by the three bargaining unit members. Their testimony and written statements (Joint Exhibits 3(A), (B), and (C)) substantiated the abuse determination because their versions never varied. Statements taken shortly after the incident were highly similar in terms of content and identical to the testimony provided at the hearing.

A number of arguments were raised in support of the bargaining unit members' testimony. First, there was no grand conspiracy because the Union failed to show any real animus toward the Grievant. Past alleged historical difficulties played no role in the allegations raised by these individuals.

Second, it was asserted by those involved in the incident that Jarrell was indeed in the small dining room. She was directly involved in the intervention which calmed Robert E. Her detailed recollection of the events clearly supported her attendance during the altercation. It confirmed, moreover, the client abusive activity engaged in by the Grievant.

Third, the lack of forthrightness initially evidenced by these individuals was clearly justified under the circumstances. They initially attempted to deal with it as an internal matter without any outside intervention. This strategy was engaged in an attempt to protect the Grievant against any possible disciplinary action. They were also justifiably fearful as a consequence of the Grievant's notoriety for harassment of fellow employees and prior history of gang involvement. Three employees discussed harassment tactics engaged in by the Grievant and her boyfriend. Putney and Jarrell discussed several incidents which occurred after they gave their statements to security. To corroborate this tendency, the Employer introduced evidence and testimony by Susan Moore, a LPN employed by the facility. She reviewed a harassment incident which took place in January of 1990. The Grievant's comments and actions engendered such fear that Moore was forced to file a statement (Employer Exhibit 5) with security.

Fourth, coercion allegations raised by the Union were unsupported by the Union. The Employer never coerced the bargaining unit members into lying to support its contentions. If anything, the discussions held by Union representatives with their members could be viewed as coercive tactics. These witnesses had nothing to gain by fabricating the incident.

The Employer emphasized that the Grievant failed to follow the requirements contained in Robert E.'s behavior program. Based on Nichols' review, the Grievant bypassed the program by disregarding critical aspects of the behavioral program. She choked Robert E. into an unconscious state and never placed him in a "bear hug" hold.

Even if one credits the Grievant's version as accurate, her actions still should be characterized as abusive. She acted improperly by placing him in a "bear hug" hold; a procedure never taught during the orientation or any in-service training programs. This hold, moreover, jeopardized the Patient's health by placing him in a perilous situation. Her "bear hug" was also outside of Robert E. Is behavioral program.

Various procedural arguments raised by the Union were also rebutted. The Grievant was provided with orientation and training dealing with client rights and the definition of client abuse (Joint Exhibits 11 and 13). Administrative Rules dealing with the Restraint of Clients (Joint Exhibit 9) were also reviewed with the Grievant. Joseph B. Fenderbosch, a Training Officer, provided testimony which supported the document-related portion of the argument. He stated client abuse was discussed during orientation. Furthermore, in terms of intervention techniques, choke holds and "bear hugs" were never taught.

Monty Blanton, a Custodian and Union Representative, alleged the Employer's investigation was biased which prejudiced the disciplinary action. Richard C. Houck, the Director of Operations, contested Blanton's assertion. He maintained the Grievant was to be placed on administrative leave if the investigation established just cause for removal. Houck asserted he never had any preconceived perception involving the Grievant's termination.

### **The Position of the Union**

In the Union's opinion, the Grievant was not removed for just cause. This conclusion was based on credible testimony provided by the Grievant and a number of procedural defect claims raised by the Union.

The Grievant's version of events conflicts with the circumstances discussed by the bargaining unit members; yet, she should be believed. The Grievant asserted Jarrell never entered the small dining room during the course of the altercation. As she entered the small dining room, she observed Easter cornered by Robert E.; both individuals were screaming at each other. Robert E. was reaching for Easter as his arms were flailing about and she, in turn, was blocking his blows.

The Grievant initiated her intervention attempt by grabbing Robert E.'s chair and inching toward him. She hollered toward the patient in an attempt to redirect his behavior; he failed to respond. The Grievant reached for him but failed on her initial pass. Her second attempt proved to be more successful. She grabbed the patient and brought him to the chair and had him in a "bear hug" type hold. As she lowered him into the chair, it slipped on the vinyl floor causing it to rotate. The Grievant emphasized that Robert E. tried to get out

of the chair by slamming it against the wall a number of times. Moreover, Robert E., struck her arms and attempted to bite her in his effort to break free from her hold.

The Grievant asked Easter and Putney to help her by holding his hands. They finally complied with this request. The Grievant emphasized she did not state: "I'm going to kill him", but rather stated: "Fuck, grab the fucking hand." After a brief period of time, Robert E. appeared to calm down because his muscles seemed to relax. Easter and Putney released his hands while the Grievant left her hands on his shoulders.

The Union maintained the Employer's witness were not credible. Not one of the three individuals properly filed an Unusual Incident Report per policy guidelines (Joint Exhibit 12). The Grievant, on the other hand, documented the altercation (Joint Exhibit 5) shortly after the incident. Nichols' statement was thought to be irrelevant because he lacked first-hand knowledge of the situation and significant time had elapsed since the incident. Proper medical documentation was also missing which further tarnished the Employer's case. The Employer failed to present any physical evidence which documented the alleged severity of the choke hold. If the witnesses for the Employer are to be believed, some objective physical manifestation of the choke hold should have readily been apparent.

Other circumstances raised certain suspicion concerning the credibility of the Employer's witnesses. Union witnesses testified Jarrell told them she was not in the small dining room when the incident took place. Jarrell, moreover, confirmed this testimony. And yet, at a later date, Jarrell maintained she initially lied because she was afraid of the Grievant. At the hearing, Easter stated Robert E. never became aggressive during the incident. Her written statement (Joint Exhibit 3 (C)), however, stated Robert E. was aggressive. She told several individuals Robert E. had physically attacked her. Putney's testimony also lacked veracity. One has to wonder why she failed to intervene if the Grievant's attack on Robert E. was so extensive and brutal. Any reasonable person would have intervened if the altercation had, indeed, taken place.

Throughout the hearing, the Employer attempted to cloth the bargaining unit member's actions with a layer of fear based upon the Grievant's reputation. These fears were merely based on unsubstantiated rumors partially perpetuated by the Employer's own actions. All the innuendo concerning the Grievant's previous gang activity, carrying a knife, and wearing a glove with an attached block of wood, were never established. These items were not introduced, nor was testimony provided concerning the Grievant harming clients and/or fellow employees. If the bargaining unit members were fearful of the Grievant, the majority of the blame had to be placed on the Employer.

The Union strongly asserted the witness' statements (Joint Exhibit 3) relied upon by the Employer and related testimony were coerced, and thus, should not be considered in support of the removal decision. The employees were intimidated and told they would be implicated if they did not cooperate fully in the Employer's investigation. Within this context, it became apparent why the bargaining unit members' observations and perceptions are unequivocally consistent. They were all intimidated and threatened.

The Union raised a number of procedural defect claims. First, the employer's investigation was biased because it intended to remove the Grievant without due process. This strategy is a direct violation of Section 24.01. Blanton testified Houck expressed this view during a conversation prior to the removal action. Blanton warned him a prejudgment of this sort would violate the Grievant's due process.

Second, Sections 24.04 and 25.08 were also violated. It was alleged witnesses were not allowed to testify at the pre-disciplinary hearing.

Third, Section 25.08 requirements were also violated. This provision allows the Union to request specific documents reasonably available and relevant to the grievance under consideration. The Union alleged throughout the various stages of the grievance procedure the Employer denied the Union certain pertinent documents.

Last, Section 25.02, Step 3 particulars were not adhered to by the Employer. The hearing was, itself, held on March 6, 1991 and the record was to be held open for additional Union testimony until March 11, 1991. The Employer never held the record open because the Step 3 answer was dated March 7, 1991 and was never reviewed by the Office of Collective Bargaining.

## **THE ARBITRATOR'S OPINION**

## AND AWARD

In Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO (1991), \_\_\_ Ohio St. 3d \_\_\_; the Ohio Supreme Court interpreted Section 24.01 as it relates to the interplay between the just cause proviso and its impact on patient abuse matter. The Court chastised a panel arbitrator for grafting a just cause requirement onto the provision dealing with termination for abuse. By doing so, the arbitrator's interpretation of the provision failed to draw its essence from the terms of the agreement. Specifically, the majority concluded that once an arbitrator finds "abuse," any award involving reinstatement is prohibited. If an arbitrator determines something less than "abuse," then a traditional just cause analysis would be necessary under the agreement. The Parties have, therefore, negotiated language in Section 24.01 which establishes abuse as per se just cause. This provision limits an arbitrator's authority to modify a penalty imposed under 24.01 which governs termination for patient abuse. This Arbitrator is bound by the interpretation rendered by the Ohio Supreme Court. These standards were considered and applied in the analysis which follows in the sections below.

From the evidence and testimony introduced at the hearing and a complete review of relevant contract provisions, it is my opinion the Grievant did commit an abuse of a patient or another in the care or custody of the State of Ohio. As such, the various procedural defects raised by the Union are inconsequential in this particular case. A determination that abuse has been committed establishes per se just cause for removal. This provision is contained in Section 24.01 and was mutually agreed to by the Parties. I would be fashioning my own brand of industrial jurisprudence if I modified the penalty after an abuse charge has been established.

As an aside, I must briefly discuss the procedural defects raised by the Union although they were not factored into the forthcoming analysis. Much of what was discussed in the Union's brief, dealing with procedural defects, was presented in the form of argument, but was not supported by sufficient evidence or testimony. As such, the arguments never attained the status of facts. Even if a charge other than abuse had been established, it would have been extremely difficult for the Union to establish the propriety of these various procedural defects.

In my opinion, the Employer established abuse had been perpetuated by the Grievant against Robert E. The abuse definition employed at the facility is contained in G.D.C. Administrative Policy No. 4-77. The definition in effect at the time of the incident included the following guidelines:

“ . . .

### DEFINITION

A. "Abuse/Neglect" means any act or absence of action inconsistent with human rights which results or could result in physical or emotional injury to a client; or any insulting or coarse language or gestures directed toward a client which subjects the client to humiliation or degradation; or any act depriving a client or real or personal property by fraudulent or illegal means; or any purposeful disregard of a duty or duties imposed or expected of an employee by a statute, rule or professional standard and owed to a client by that employee.

“ . . . ”

(Joint Exhibit 6, Pg. 1)

I am convinced the Grievant acted in a manner inconsistent with human rights which resulted or could have resulted in physical injury to Robert E. Whether she choked the client or placed him in a "bear hug", she still engaged in action inconsistent with human rights. Either action, moreover, directly violated Robert E.'s Behavior Program (Joint Exhibit 4). A program understood by the Grievant as evidenced by her testimony and admission that she might have skipped some initial steps. The Behavior Program contains the following Intervention steps:

“ . . .

Intervention:

1. If Robert starts to run away, staff will tell him in a calm, firm voice to stop.
2. If he stops, redirect him to the group or an alternative activity and provide positive reinforcement for listening to your request.
3. If he refuses to stop, staff should attempt to stop him by taking his hand and physically redirecting him.
4. If Robert continues to refuse redirection and becomes physically aggressive, attempt to direct him (with physical assistance) away from other peers.
5. If his aggression continues, he may begin to cause injury to himself or others. Staff (usually takes two) should immediately direct him to the safest area (in the grass, on the pad, to a chair, on the bed, etc.) and manually restrain Robert (per Restraint Policy #7-76) to prevent injury to himself and/or others until five minutes of calm behavior is established. The period of restraint is not to extend 30 minutes at a time.
6. After establishing a calm behavior for at least five minutes, release Robert and explain to him that running off is wrong. Robert should then be prompted to participate with the on-going scenarios at the present time.

PROGRAM DOCUMENTATION: If manual restraint is necessary, staff are to use any of the facility-approved techniques and are to use the least intrusive hold possible. Please document the reason a particular technique was used in the interdisciplinary progress notes and should also be documented on Robert's Behavior Program Data Sheet.

... ”

(Joint Exhibit 4, Pgs. 1-2)

The Grievant deviated significantly from the intervention protocol in an unnecessary manner. If one believes her version of the circumstances, she did not attempt to redirect Robert E.'s behavior to the group or an alternative activity. Once this step proved to be ineffective, she should have taken his hand and physically redirected him. Manual restraint was advised as a possible last resort with facility-approved techniques mandated by the Employer; the least intrusive techniques were to be used when necessary.

The use of a "bear hug" hold would have rendered her actions as abusive even if she never choked Robert E. Fenderbosch stated the "bear hug" was not a facility-approved technique; it is not taught to employees.

Also, the "bear hug" appears to be a highly intrusive technique in light of the circumstances discussed by the Grievant. She had to reach and grab Robert E., and place him in the chair as she inched up behind him, and manually restrained him in the chair. The Grievant admitted she had some difficulty because the chair slipped on the vinyl floor; a highly intrusive technique.

For a variety of reasons, I view the version proffered by the three individuals as more credible than the Grievant's version. The Grievant did, indeed, abuse Robert E. by choking him and rendering him unconscious. The three individuals provided consistent testimony not only at the hearing but via their written statements (Joint Exhibit 3 (A) , (B) , and (C)). This Arbitrator was extremely impressed with the comparably detailed testimony provided by these individuals. There was no evidence of any collusion between these individuals, nor were their statements coerced by the Employer. Nothing in the record supports these allegations. The Union never properly supported this assertion. Blanton's testimony was not sufficiently corroborated to establish this argument.

The three individuals admitted they were not as honest as they could have been in terms of reporting the incident. This admission does not reduce their credibility since their tardy responses were supported by reasonable justifications. Whether the rumors surrounding the Grievant's history were accurate or not, they

were widely discussed throughout the facility. Also, two of these individuals were either harassed by the Grievant or her boyfriend shortly after the incident. Such activity will not be condoned by this Arbitrator; to do so would undercut and discourage future employees from stepping forward. Also, they were not motivated by any animus toward the Grievant. The Grievant's reliance on events which took place in the distant past and other thinly veiled justifications failed to establish an adverse attitudinal orientation. These individuals had no reason to lie and none was established.

This Arbitrator does not view the Grievant's version as credible because she embellished her version of the events. Her written statement (Employer Exhibit 9) was quite sketchy and inaccurate. She did not implement Robert E.'s Behavior Program and never mentioned the problems she had in manually restraining Robert E. Under direct examination, however, she mentioned Robert E. had Easter trapped in a corner and both were yelling at each other. The story improved under cross examination. Robert E. and Easter were not only yelling at each other but they made physical contact before the Grievant manually restrained Robert E. Once the Grievant established the "bear hug" hold, Robert E. attempted to bite her and hit her before he was restrained. A consistent, unaltered version would have enhanced the Grievant's credibility.

Her credibility was further tarnished by her evasive responses to questions. The Employer's advocate attempted to determine the relative location of the Grievant when the chair slipped on the floor with Robert E. in a manual restraint. The Grievant was never clear on the distance from her position to the wall and the adjacent table. An understanding of these distances would have allowed one to determine if she was truly able to pivot the chair and whether Robert E. had enough room to bump the Grievant against wall. Her evasive testimony regarding this matter exposed a flaw in the arguments for her defense. It raised sufficient doubt concerning her version of the events when compared to the consistent testimony of the Employer's witnesses.

### **AWARD**

The grievance is denied. The Employer's removal decision was proper because the Grievant abused Robert E. by placing him in a choke hold. Even if one believes the Grievant's "bear hug" procedure, which I do not, this restraint practice would also be characterized as abusive under the circumstances. As such, the various procedural defects raised by the Union could not be properly reviewed. An analysis factoring these other considerations would be in direct violation of Section 24.01.

Date: December 23, 1991  
DR. DAVID M. PINCUS, Arbitrator