

ARBITRATION DECISION NO.:

547

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health

Oakwood Forensic Center

DATE OF ARBITRATION:

May 11, 1994

DATE OF DECISION:

June 19, 1994

GRIEVANT:

Steve L. Barrington

Carl L. Wireman

OCB GRIEVANCE NO.:

23-12-(93-11-24)-0507-01-04

23-12-(93-11-24)-0510-01-03

ARBITRATOR:

Mollie Bowers

FOR THE UNION:

Bob J. Rowland

FOR THE EMPLOYER:

Maller Johnson Myrickes

KEY WORDS:

Removal

Just Cause

Patient Abuse

Credibility

ARTICLES:

Article 24 - Discipline

§ 24.01 - Standard

§ 24.02 - Progressive Discipline

§ 24.04 - Pre-Discipline

FACTS:

The grievants worked at the Oakwood Forensic Center (OFC). Both grievants have over twenty years of service and no prior discipline on their records. The first grievant was a Psychiatric Attendant and the other grievant was an Activities Therapist II. These grievances were the direct result of an incident which occurred on March 31, 1993.

A patient at OFC created a disturbance in the Day Hall and refused to obey directions given to him. Subsequently he was ordered to return to his cell and he did. Due to hallucinations, the patient did not want anyone to see into his cell. He, therefore, barricaded his cell. While in his cell, the patient's behavior became increasingly severe. A decision was made to enter the cell and calm the patient. There were five employees, including the grievants, involved in the patient's take down on March 31. Due to this take down, the patient received an eye injury, scratches, and management alleged that the patient received a broken nose. The grievants denied hitting or kicking the patient. Furthermore, the other employees testified that they did not see the grievants hitting or kicking the patient.

Two doctors testified to the nature of the patient's injuries. The first doctor testified that "Obviously, he (the patient) was struck by something." However, he did not believe the patient needed immediate treatment. Additionally, the second doctor testified that the patient's injuries were similar to the injuries of other patients who had been through take down/restraint situations and that there was no evidence that one of the grievants hit the patient in the face.

EMPLOYER'S POSITION:

The State asserted that there was just cause for the grievants' removal due to the alleged excessive force used to restrain the patient. The State claimed that the patient's injuries were a result of the patient being hit and kicked by the grievants. According to the State, the grievants had committed abuse and therefore under Article 24.01 of the Contract "the arbitrator does not have the authority to modify the termination of an employee committing patient abuse". The State maintained that the first doctor's opinion, in conjunction with emergency room reports, sufficiently proved that the patient had been abused by the grievants. The State, therefore, requested that this grievance be denied.

UNION'S POSITION:

The Union contended that the State failed to prove that the grievants' termination was for just cause. One of the Union's defenses was the testimony of the grievants regarding the patient's combative behavior. The Union asserted that the grievants used proper techniques in the take down of the patient. Furthermore, the Highway Patrol's investigation was unfair and procedurally flawed due to Officer Parker's badgering of the grievants and his refusal to let the Steward speak during these proceedings. The Highway Patrol also failed in their attempt to obtain a criminal indictment of the grievants from the County prosecutor, due to the lack of evidence.

Contrary to the position of the State, the Union believes that the testimony of the patient was not credible for several reasons. First, the patient was heavily medicated at the time of the incident and when he testified at the Hearing. Second, he admitted to hallucinating at the time of the incident. Finally, the patient's testimony concerning the identity of the persons who abused him was inconsistent.

The Union relied more on the testimony of the second doctor in determining whether or not the patient was abused. The second doctor testified that the patient's injuries were consistent with a take down situation, required no immediate medical treatment, and provided no evidence that the patient had been hit or kicked. As further evidence that the grievants, discipline was too extreme, was the fact that both the grievants had over twenty years service at OFC and that neither of them had been disciplined before.

ARBITRATOR'S OPINION:

The Arbitrator concluded that the State failed to meet its burden of presenting sufficient credible evidence and testimony to prove that the grievants abused the patient and thus their termination was not for just cause. The Arbitrator considered the patient's hostile behavior when he was admitted to OFC and she gave weight to the testimony on the patient's acting out in the Day Hall.

When examining the patient's injuries, the Arbitrator found the second doctor's testimony to be more credible than the first doctor's testimony, because the second doctor had more experience at OFC and he did not have contempt for this proceeding.

The other decisive issue for the Arbitrator was the question of the grievants, motive to commit abuse. Both of the grievants had more than twenty years service at OFC, had been involved in numerous take down

situations before and had received no prior discipline.

The patient's testimony was also considered. The Arbitrator concluded that the patient's testimony was not sufficient to prove that the grievants were guilty of abuse. Therefore, the patient's testimony did not warrant the removal of the grievants.

AWARD:

The grievance was sustained. The grievants are to receive full back pay and benefits, minus interim earnings, and shall be made whole in every other respect.

TEXT OF THE OPINION:

IN THE MATTER OF THE ARBITRATION BETWEEN:

**Ohio Department of Mental Health,
Oakwood Forensic Center**

-and-

OCSEA/AFSCME, Local 11, AFL-CIO

Grievance case No.:

23-12-931124=0507-01-04

23-12-931124-0510-01-03

Grievants:

Steve L. Barrington

Carl L. Wireman

Arbitrator:

Mollie H. Bowers

Appearances:

For the State:

Maller Johnson Myrickes

For the Union:

Bob J. Rowland

This case was advanced to arbitration by the Ohio Civil Service Employees Association/American Federation of State, County and Municipal Employees, Local 11, AFL-CIO (hereinafter, "the Union") to protest, as without just cause, the discharge of Messrs. Steve L. Barrington and Carl "Bud" L. Wireman (hereinafter, "the Grievants") by the State of Ohio Department of Mental Health Oakwood Forensic Center (hereinafter, "the State" or "the OFC"). The Hearing was held on May 11, 1994, at 10:30 a.m. in Lima, Ohio. Both parties were present and represented. They stipulated that this case is properly before the Arbitrator. The parties had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the parties presented oral argument in support of their respective positions. The entire record has been carefully considered by the Arbitrator in reaching her decision.

STIPULATED ISSUES

Were the Grievants removed for just cause?
If not, what shall the remedy be?

EXHIBITS

- JX-1 Collective Bargaining Agreement, effective January 1, 1992 through January 31, 1994.
- JX-2 Notice of Pre-disciplinary conference, dated September 9, 1993, and copy of Order of Removal addressed to the Grievants, dated November 17, 1993.
- JX-3 Grievance Reports, dated November 23, 1993, and indicated as received on November 29, 1993, and copy of the letter to Grievants of the Step III Response, dated January 6, 1994, and Notice of Intent to Arbitrate, dated January 18, 1994.
- JX-4 Oakwood Forensic Center Hospital Policy: Corrective Action, dated July 7, 1992
- JX-5 Oakwood Forensic Center Hospital Policy: Client Abuse/Neglect, dated July 7, 1992.
- JX-6 Transcribed interviews conducted by Officer Parker (some by or with the presence of the Highway Patrol) with persons involved in the incident at bar, undated.
- JX-7 Highway Patrol Reports of Investigation.
- JX-8 Statement of Dr. Saunders, dated April 7, 1993.
- JX-9 Statement of Irene Hellman, RN, dated April 12, 1993
- JX-10 Statement of Bob Wegesin, dated April 12, 1993.
- JX-11 Statement of Marie Miller, dated April 2, 1993.
- JX-12 Statement of Carl Wireman, dated March 31, 1993.
- JX-13 Statement of Steve Barrington, dated March 31, 1993.
- JX-14 Statement of Tom Baxter, dated April 1, 1993.
- JX-15 Statement of Bill Caudill, dated April 2, 1993.
- JX-16 Statement of Dan Casey, dated March 31, 1993.
- JX-17 Statement of Dick Alger, dated April 6, 1993.
- JX-18 Statement of Janet Aller, dated May 10, 1994.
- JX-19 Statement of Kenny Hollar, dated May 10, 1994.
- JX-20 O.R.C 2903 Homicide and Assault, dated November 1989.
- JX-21 Training sign-off form, dated July 17, 1992.

MX-1 Photographs of Patient's injuries, dated March 31, 1993.

MX-2 St. Rita's Medical Center Reports, dated March 31, 1993.

MX-3 St. Rita's Medical Center Emergency Department Report, dated March 31, 1993.

UX-1 Copy of Memo to Rick Mawhorr from Niki Musto and Dima Snyder, Union Stewards, for extension of time for scheduled hearing, dated September 30, 1993.

UX-2 Inter-office Memo to Ms. Musto and Ms. Snyder from Rick Mawhorr denying requested extension, dated September 30, 1993.

UX-3 Statements of Turner, Miller and Alger at the pre-disciplinary meeting, undated.

CONTRACT CLAUSES AND PERTINENT POLICY/REGULATION

Collective Bargaining Agreement

ARTICLE 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 process. 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

....

ARTICLE 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:

. . . .

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.

ARTICLE 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. . . . An employee who is charged, or his/her representative, may make a written request for a continuance of up to 48 hours. Such continuance shall not be unreasonably denied. A continuance may be longer than 48 hours if mutually agreed to by the parties. . . . The Union and/or the employee shall be given the opportunity to ask questions, 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.

Oakwood Forensic Center Policy

Number 101: Client Abuse/Neglect

. . . .

Oakwood Forensic Center shall provide a safe environment for patients. Abuse and/or neglect will not be tolerated and disciplinary action shall be the most stringent available for offenses of this nature.

. . .
 Number 507: Corrective Action
 . . .

It shall be the policy of Oakwood Forensic Center to administer fair and consistent progressive corrective action when necessary . . . for just cause.
 . . .

Ohio Mental Health Laws

Chapter 2903 - Homicide and Assault

2903.33(B)(2) "Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the person. 2903.34(A) No person who owns, operates, or administers, or who is an agent or employee of a care facility shall do any of the following:

- (1) Commit gross abuse against a resident or patient of the facility;
 - (2) Commit abuse against a resident or patient of the facility;
- . . .

BACKGROUND

The Oakwood Forensic Center (OFC) is a psychiatric facility operated by the Ohio Department of Mental Health. It provides care for severely mentally ill male inmates who are transferred there from the Department of Rehabilitation and Corrections to receive intensive psychiatric treatment when such treatment is unavailable at the correctional institution in which they are incarcerated. Once a patient is "stabilized," he is returned to the correctional facility he came from.

The parties stipulated certain facts about the Grievants at the time of the incident which occurred on March 31, 1993. Carl Wireman was a Psychiatric Attendant with approximately twenty-three years' service and no prior discipline on his record. Steve Barrington was an Activities Therapist II with approximately twenty-one years' service and no prior discipline on his record.

The parties also stipulated the following about the Patient's conduct and demeanor when he was admitted to OFC on March 23, 1993:

“. . . the patient was listed as refusing medication, exhibiting bizarre negative and hostile behavior; had flooded his cell and set a fire. Admissions records indicate he was assaultive, escape prone, suicidal, self abusive, uncooperative and unpredictable. Records indicate he was kicking in the admissions office as he was being processed.”

The dispute in this case arose as a result of an incident which occurred on March 31, 1993, at approximately 11:15 a.m. when the Grievants and three other OFC employees participated in a take down and four-way restraint of the Patient. There is no disagreement between the parties that the events which led up to the take down began in the Day Hall where the Patient kicked and/or threw a tobacco can, created a disturbance and refused to obey directions given him. He was then ordered to return to his cell and he did. The Patient testified that he was hallucinating a lot at that time and he did not want anyone to see into his cell. He proceeded to barricade his cell by placing his clothes and a mattress in front of the door. Testimony by Grievants Wireman and Barrington, and by Psychiatric Attendant, Daniel Casey, indicated that the Patient's behavior escalated while he was in seclusion whereby he was shouting, screaming and daring the Attendants to come in and get him. [\[1\]](#)

At some point shortly thereafter, backup assistance was called by Grievant Wireman from West 1 North, and a decision was made to enter the cell to subdue the Patient. Attendant Casey testified that he went in first, however, Attendant Caudill stated that Attendant Baxter went in first. All five employees who entered

the Patient's cell testified, in essence, that he was shouting, screaming profanities, threatening to kill them, brandishing weapons (probably a toothbrush and a plastic spoon) and "stabbing at their eyes." Attendant Casey said that he tried to throw a blanket over the Patient's head and then he fell because the floor was wet. [2] The blanket did not stay on the Patient and, Attendant Casey testified, that the Patient became even more angry when another attempt was made. This witness recalled that Grievant Barrington entered the cell "later," but did not recall if he made contact with the Patient. He subsequently remembered the Patient "swinging" at the Grievant and stated that the Grievant and the Patient "were struggling" as the Patient tried to hit the Grievant. Attendant Casey acknowledged that, because he fell on the floor, he could not keep eye contact with everyone during the entire incident. He denied seeing anyone kick or hit the Patient. Attendant Casey received a two-day suspension for failure to properly dispose of a blanket and another charge he could not remember as a result of this incident.

Psychiatric Attendant Bill Caudill has worked at OFC for nineteen years and was assigned to West 1 North at the time of the incident. He believed that Attendant Baxter [3] was the first to enter the Patient's cell. He testified that the Patient came after everyone with a spoon and a toothbrush. At some point in the melee, this witness stated that he attempted to throw a blanket at/over the Patient. Attendant Caudill testified that, when Grievant Barrington rushed into the room to help, he accidentally knocked Caudill down in the tight quarters. He could not maintain eye contact at all times, but he recalled "hearing" the Patient and Grievant Barrington hit the wall or floor "really hard" and seeing the Patient on top of Grievant Barrington. Attendant Caudill further stated that he saw Grievant Wireman standing over them (in the area of the Patient's chest) "trying to subdue" the Patient. He stated that Grievant Barrington tried to get the objects (i.e., spoon and toothbrush) away from the Patient and that Grievant Wireman was trying to put cuffs on him. According to Attendant Caudill, Grievant Barrington left the cell before the Patient was four-wayed to the bed. He also testified that a blanket was placed over the Patient as/after he was four-wayed because he was spitting at the Attendants. He denied seeing anyone hit or kick the Patient, but acknowledged that the "left side of his head was red and his nose was bleeding a bit when we left. This witness received a two-day suspension for removing the blanket from the Patient's cell and for not writing an accurate report. [4]

Grievant Wireman testified that, after Attendants Caudill, Baxter and Casey were present, he opened the door of the Patient's cell, asked him to sit on the bed and to show them what he had behind his back. According to Grievant Wireman, the Patient refused to cooperate and "Definitely, he was wanting to hurt someone." He stated that "he did not go in right away. I went in to help put the cuffs on him [the Patient]." The reason Grievant Wireman gave was that he has a bad heart. He denied kicking or striking the Patient and stated that "I [he] saw no one else do this either." Grievant Wireman stated that he helped get the Patient on the bed, but did not participate in the four-way restraint.

According to Grievant Barrington, he was in the Day Hall on the date and at the time in question because he was running a music cart for patients and asking if anyone wanted to go to the gym. He observed the incident created by the Patient and heard the instruction to return to his cell, the noise the Patient, himself, created, sounds as if he was flooding his cell, and the call for backup assistance. Grievant Barrington testified that "I [he] could have stayed out of it. [The Patient] was completely out of control. I dove in." He further stated that the Patient "was trying to do stuff to us. I ran him into a wall. We went down. I wasn't going to let go of his arm (he had a weapon in his hand). He got to spitting at us. That's why they put a blanket on him." Grievant Barrington denied hitting the Patient and said he left the cell before the Patient was four-wayed because he was tired from the struggle. He stated that he had been involved in other take downs and that the Patient "didn't look that bad when I left."

Officer Daniel Parker, Police Officer II, since April 25, 1983, became an Investigator of patient incidents, among other things, at OFC three years ago. He testified that Nurse Irene Hellman [5] told him about the incident at approximately 11:45 a.m. on March 31, 1993. Officer Parker said that he went to investigate and found blood on the Patient's hands and face, and on the wall, floor and bed. He stated that he also observed marks on the Patient's shoulders. He then took the pictures which appear in State Exhibit 1. Officer Parker testified that Grievant Wireman was uncooperative and refused to give a statement. According to Officer Parker, Grievant Wireman "totally exploded" and told him that he had no right to take pictures until the

patient was cleaned up. The Officer stated that he informed Grievant Wireman that the Patient had been examined by Dr. Saunders and Nurse Hellman.

All other employees involved in the incident gave statements, but Grievant Wireman refused until he was ordered directly to do so by Robert Wegesin, Director of Nursing. Mr. Wegesin testified that he told Grievant Wireman that completion of the statement was part of his job requirements and that, ultimately, Grievant Wireman completed a statement.

At the Hearing, Grievant Wireman maintained his position, stated at the time of the incident, that "It's illegal to force a person to give a statement." He also explained that his heart rate had gone up and he wanted to relax a moment before being pressed to write a statement.

Grievant Wireman also admitted that he became upset with Officer Parker in the Day Hall subsequent to the incident with the Patient. The Grievant explained that a Kay McCue (apparently a Nurse) [6] came into the Day Hall and complained that Officer Parker had "run her out" of the Patient's room while she was attempting to clean him up after the take down. Grievant Wireman testified that he asked Officer Parker if he could speak to him, to which the reply was "No." According to the Grievant, he then said to Officer Parker that "this is supposed to be team work for the welfare of the patients," to which the reply was "His [Officer Parker's] pictures come first."

According to Officer Parker's testimony, in his first interview with the Patient, he was told only that the Patient was kicked. At the second interview (contained in Joint Exhibit 5), the Patient could not identify the names of any of his alleged assailants. The Patient testified that, sometime after an interview with Officer Parker, another patient named Neumeister, [7] with whom he had become friends and who allegedly witnessed the take down from the hall, told him "the names of the people who had hit him."

Dimale Snyder was a part-time Union Steward at the time of the incident on March 31, 1993. She testified that she was present when Officer Parker interviewed each of the Grievants, on April 1, 1993, but that he told her that she could not speak or act on their behalf. She stated that Officer Parker was "abusive [to the Grievants] during the interviews" and that she reported his conduct to a Mr. Mahar in labor relations and to Mr. Wegesin. Officer Parker responded that he did not tell Ms. Snyder that she could not speak until she had interrupted his interview. He acknowledged telling her not to say anything and stated "He had always done it that way."

There is no dispute between the parties that the five employees involved in the Patient's take down on March 31, were put on administrative leave with pay beginning on April 1, 1993. It is also a fact that another employee, Kenny Hollar, was put on administrative leave at the same time for his alleged involvement in the incident in question. Ms. Snyder gave un rebutted testimony that, on **April 3, 1993**, she went to the Chief Executive Officer (CEO), John Allen, to inquire why this action had been taken since Mr. Hollar was not present at the facility on the date of the incident and why Officer Parker did not know this. Ms. Snyder admitted that she got into a shouting match with Officer Parker about this matter and that Mr. Allen had to calm them down.

Officer Parker acknowledged testifying at the pre-disciplinary hearing, in October of 1993, that the Patient had told him Attendant Hollar hit him. He also stated that he was not aware of the Patient's history of self-abuse until he started the investigation. Based upon evidence contained in Joint Exhibit 5, Officer Parker admitted that, during his second interview with the Patient, he told the Patient that "Bud" was the "old man." On cross-examination, Officer Parker was asked how Grievant Barrington was charged with abuse since the Patient had identified Attendant Hollar and Grievant Wireman. The Officer's response was that the Patient "later" identified Grievant Barrington. [8]

According to Officer Parker's testimony, he did not tell Nurse Marie Miller to exclude anything from her statement which appears in Joint Exhibit 10. On cross-examination, Nurse Miller stated that Officer Parker told her not to include that the Patient had said that Attendant Casey was not involved in the incident in question.

Mr. John Allen, CEO, was responsible for the overall management of OFC on March 31, 1993, and has been in state service since February, 1969. He stated that he was made aware by Officer Parker, late in the afternoon of March 31, that a patient had been injured in a take down and restraint situation. Mr. Allen

testified that he told Officer Parker to begin an investigation and that the Patient's injuries were reported to him. He stated that, sometime between 7:30 and 8:00 p.m., he observed the Patient's injuries, which he described as a black eye, swollen nose and abrasions on the face and upper body, and ordered the Patient transported to the emergency room at St. Rita's Hospital as soon as possible.

State Exhibits 2 and 3 are the reports from St. Rita's Hospital. State Exhibit 1 contains the following information, in pertinent part:

"CLINICAL INFORMATION: Injury

Multiple views [x-rays] of the facial bones including the left orbit demonstrate fracture of the lower third of both nasal bones with minimal displacement between the fracture fragments. There are no other gross bony abnormalities.

CONCLUSION:

FRACTURE OF THE LOWER THIRD OF BOTH NASAL BONES.

State Exhibit 2 contains the following information, in pertinent part:

NO ACUTE FRACTURE, DISLOCATION OR BONY ABNORMALITY. SIGN OR RACCOON EYES. EXTREMITIES. HE MOVES ALL 4 EXTREMITIES WELL. GOOD MUSCLE STRENGTH AND TONE. UPPER AND LOWER EXTREMITIES BILATERALLY.

NEUROLOGICAL: CRANIAL NERVES 2-12 FUNCTION INTACT. NO FOCAL SIGNS.

WE GAVE A TETANUS DIPHTHERIA IMMUNIZATION AS WELL AS LODINE FOR HIS DISCOMFORT.

- I:**
- 1. MULTIPLE CONTUSIONS.**
 - 2. NASAL FX SECONDARY TO ALLEGED ASSAULT.**

PLAN: HE IS TO PUT ICE ON THE SORE AREAS FOR 24-48 HRS. USE IBUPROFEN AS NECESSARY FOR PAIN. FOLLOW UP W/ DR. MARTINEZ AFTER THE SWELLING GOES DOWN OR IF THE NASAL DEFORMITY PERSISTS OR IF THERE IS ANY DIFFICULTY BREATHING THROUGH NOSE. CLEAN THE ABRASIONS W/WARM SOAPY WATER. RETURN FOR ANY COMPLICATIONS.

Dr. Benjamin Saunders had been employed for three years, 2 hours per day at OFC when the incident in question occurred. He testified that he examined the Patient twice on March 31, once at about 9:30 a.m. when he observed no injuries, and once at about 11:30 a.m. when he observed that the Patient had a "bloody nose and abrasions." Based upon his post-incident examination, Dr. Saunders testified that "Obviously, he [the Patient] was struck by something." and opined that he doubted the injuries could have been self-inflicted. He further stated that he had not "seen as severe an eye since I [Dr. Saunders] came to work here." On cross-examination, Dr. Saunders stated that he had treated no one else claiming patient abuse he began work at OFC. He further testified that he did not believe the Patient needed immediate treatment and that he would not have sent a patient with a broken nose to the emergency room at St. Rita's Hospital.

Dr. Jeko Nedelkoff has been a Staff Psychiatrist at OFC for nineteen years, is Dr. Saunder's Supervisor, and has extensive credentials and experience in a wide variety of medical specialties as well as a general practitioner. He did not see the Patient on March 31, 1993, but discussed the incident with the Nurse and Mr. Allen the following day after he had seen the Patient. ^[9] Dr. Nedelkoff described the Patient's injuries as "superficial." He testified that he had seen a lot of patients who had been through taken down/restraint situations, that the Patient's injuries were similar to those others received and that "There is nothing wrong with this [referring to his observation of the Patient and to the pictures in State Exhibit 1]."

Dr. Nedelkoff provided specific, detailed explanations of the reasons for his conclusions. He stated that there was nothing in the photographs of the Patient which indicated that he had been struck in the eye by a fist. He explained that the dark discoloration above the Patient's eye was "in a superficial layer of skin," consistent with upward pressure on the eye lid and with the scratches above and below the Patient's eye which were incurred the course of trying to restrain him. The doctor provided a detailed explanation of how these presentations differed markedly from the presentation that would have been made if the Patient had been struck and, thus, been given a black eye. He concluded by stating that there was "Absolutely no evidence that Steve [Grievant Barrington] hit the Patient in the face four or five times."

According to this witness, he had seen the report from St. Rita's Hospital (but not the x-rays),^[10] but he doubted that the Patient had a broken nose. In support of his opinion, Dr. Nedelkoff noted that the emergency room report gave no indication that the Patient had a nose bleed and that the Nurse had reported to him that she had found only a little dried blood under his nose when she cared for him on the day of the incident. Additionally, Dr. Nedelkoff testified that, in order for the proof to be conclusive that the Patient's nose was broken, he would have had to have a nose bleed and his nose would have been swollen and deformed. He opined that the damage to the Patient's nose depicted in the photographs does not conform to these conditions.

According to Dr. Nedelkoff, when he examined the Patient on April 1, "He [the Patient] said he couldn't remember what had happened." He acknowledged being "perturbed such a fuss was made about it [the way the incident was being handled]." and that he told Mr. Allen so. He explained that "We've had patients who have come from prison with more severe injuries" and that, for example, another OFC patient's arm was broken in a take down situation and no complaint was forthcoming from that incident.

The record is uncontroverted that the five employees who participated in the take down and/or restraint of the Patient, and Attendant Hollar, were placed on paid administrative leave on April 1, 1993. Attendant Hollar was subsequently restored to full duty, however, a pre-disciplinary hearing was not held for the five employees involved in the incident until October 4-5, 1993. Mr. Allen was asked to explain why it took so long to hold the pre-disciplinary hearing. One reason he gave was the requirement to conduct two investigations, administratively by Officer Parker, and one criminally by the Highway Patrol. He stated that these investigations proceeded concurrently and that Officer Parker's investigation was completed on April 9, and the Highway Patrol's in early July, 1993.^[11] Mr. Allen testified that, when the Highway Patrol report was received, the results were submitted to the County prosecutor, but there was insufficient evidence for charges to be pressed.

The matter did not end here, however. According to Mr. Allen, he went with Doug Wells, Chief Investigator for Mental Health, to see the prosecutor to obtain an order for a specialized blood test on the blanket from the Patient's cell to determine if any of Grievant Barrington's blood,^[12] or that of any of the other four employees, was present there. The test was performed, no proof was provided and no indictments were issued. This additional analysis was completed sometime during July of 1993.

The other reason Mr. Allen gave for the delay in holding the pre-disciplinary hearing was his vacation schedule and that of two of his staff members. Specifically, Mr. Allen testified that he went on vacation in early August, then his Labor Relations officer went on vacation, followed by the Personnel Director. According to Mr. Allen, "Given the number of people involved . . . the earliest we could do it was October.

It is a fact that shortly before the scheduled date of the pre-disciplinary hearing, Union Steward Niki Musto had a death in her family and that a forty-eight hour extension was requested under Article 24.04 of the collective bargaining agreement. Ms. Snyder and Ms. Musto both testified that the latter had been responsible throughout the disciplinary process for preparation and handling of the Union's case at the hearing. The record is uncontroverted that the extension was denied and that no reason for the denial was provided by management at that the or at this Hearing. Ms. Snyder and Ms. Musto testified that this placed undue hardship on the Union because Ms. Snyder was part-time and had to take over this critical aspect of the case on short notice.

The outcome of the pre-disciplinary hearing was that Grievants Wireman and Barrington were terminated, Attendants Casey and Caudill were given two-day suspensions, and no information was provided

on what, if any, disciplined was meted out to Attendant Baxter. These are the circumstances which are before this Arbitrator to decide whether just cause existed for the termination of Grievants Wireman and Barrington.

STATE POSITION

The State maintains that it has proven just cause for the Grievants' discharge. As part of the support for this claim, the State asserts that the force used to restrain the Patient was excessive. It points to the facts that he received a black eye, fractured nose and multiple abrasions on his body. According to the State, these injuries are consistent with the Patient's being hit and kicked by the Grievants; not with self-abuse.

To support this argument, the State refers to its administrative investigation which revealed that the Grievants were identified by the Patient as the persons responsible for his injuries. The Patient's incrimination of the Grievants is augmented, the State maintains, by the information contained in Ms. Aller's statement about what she was told by him about the incident, by Nurse Miller's statement that the Patient identified "Steve" and "Bud," by Dr. Saunder's assessment of the manner in which the Patient's injuries were sustained and by the conclusions reached by Officer Parker after a thorough investigation of the incident. The State argues that the overwhelming weight of this evidence and its credibility vis-à-vis the vague and self-serving testimony presented by the Union witnesses and the Grievants must be controlling in determining that the State met its burden of proving just cause for their termination.

According to the State, it is also evident that the Grievants violated established, well publicized policy (Hospital Policy on Corrective Action No. 507 and on Client Abuse/Neglect No. 101), rule (DMH Rule 5122-3-14 Patient Abuse/Neglect, law (Ohio Mental Health Laws 2903.33 Patient Abuse/Neglect) and the collective bargaining agreement (Article 24.01) with respect to the force used to restrain the Patient and by physically assaulting him. In so asserting, the State reminds the Arbitrator that if abuse is found, then she has no alternative but to uphold the Grievants' termination in accordance with Article 24.01 of the Agreement. The State maintains that Dr. Saunders' testimony, coupled with the reports from the emergency room at St. Rita's Hospital, was sufficient to medically prove that the Patient had been abused by the Grievants and, thus, that termination is the appropriate penalty in this case.

The State also decries the Union's attempt, in this course of this Hearing, to deflect attention from the serious issues at hand by challenging the timeliness of the pre-disciplinary hearing and management's decision to deny Ms. Musto a forty-eight hour extension of this time. According to the State, these alleged procedural defects were not grieved at the time and, thus, no longer have standing in this proceeding. The State also emphasizes that two, thorough investigations were being conducted simultaneously and that the Grievants were not prejudiced by the delay "because they were placed on paid administrative leave on April 1, 1993."

Based upon the foregoing considerations, the State contends that it has proven the Grievants are guilty of patient abuse and asks that their grievance be denied as the outcome of this case.

UNION POSITION

The Union contends that the Grievants did not abuse the Patient on March 31, 1993, and that the State has failed to prove that their termination was for just cause. One of the keys to its defense is the Grievants' testimony that the Patient was combative and a threat to himself and to others when he was subdued and restrained. The Union asserts that the Grievants did nothing wrong and that they used proper techniques in the take down and in four waying him to the bed. In support of its position, the Union stresses that the cell is small, the floor was wet from the Patient's attempt to flood the cell and that five people were in this small space attempting to deal with the Patient who was out of control and attempting to assault the staff with a plastic spoon and a toothbrush.

According to the Union, the investigation conducted by Officer Parker was procedurally flawed and was neither full nor fair. It points to the manner in which Officer Parker bullied the Grievants during the investigative interview and to his refusal to let the Steward speak during these proceedings. The Union also emphasizes the fact that Officer Parker, in effect, incriminated Grievant Wireman when it is obvious from the

transcript of the interview that the Patient did not know who he was until prompted by Officer Parker.

Juxtaposed to these circumstances, the Union offers the investigation by the Highway Patrol as evidence that the Grievants should be exonerated of all charges. Despite its best and most extraordinary investigative efforts/techniques, the Union asks the Arbitrator to take judicious note that on two occasions the Highway Patrol was unable to obtain sufficient evidence to obtain an indictment of the Grievants from the County prosecutor. According to the Union, this result, standing alone, should weigh heavily in showing that the Grievants are not guilty of abusing the Patient in question.

The Union challenges every effort made by the State in the course of this entire case to put forward the Patient as a credible witness regarding the incident of March 31, 1993. To support this position, the Union offers the following reasons that the Grievant: was heavily medicated at the time of the incident and when he testified at this Hearing; he admitted to hallucinating "a lot" at that time; he initially told Dr. Nedelkoff that he did not remember what happened; he subsequently identified Attendant Hollar as the person who hit him; and he then identified two Highway Patrol Officers as the persons who abused him; and he only identified the Grievants after prompting from at least two persons, Patient Neumeister and Officer Parker. Because of these gross inconsistencies, the Union asks that the Patient's testimony be given no weight in determining the outcome of this proceeding. According to the Union, the testimony that is dispositive of the question of whether the Patient was abused was provided by Dr. Nedelkoff who, among other things, has nineteen years' experience as Staff Psychiatrist at OFC. The Union asserts that this testimony showed that the Patient's injuries were "superficial," consistent with a take down situation, required no immediate medical treatment, and provided no evidence that the Patient had been hit or kicked. It also stresses that testimony provided by both Drs. Nedelkoff and Saunders clearly indicated that the Patient's injuries were not serious enough to warrant "immediate treatment." This testimony, the Union maintains, is sufficient for a reasonable person to draw the conclusion that the Grievants did not hit, kick or otherwise abuse the Patient during the take down on March 31, 1993.

As further evidence that the discipline is unwarranted, the Union emphasizes that both Grievants have over twenty years' service at OFC and that neither of them has been disciplined before. Under such circumstances, the Union claims that the egregious behavior that should be investigated is management's handling of this case. As further support for this position, the Union points to the long delay in time it took to convene a pre-disciplinary hearing and to the denial of Ms. Musto request for a forty-eight hour extension due to a death in her family.

For the aforesaid reasons, the Union maintains that the State has failed to prove that the Grievants abused the Patient or engaged in any conduct that would have justified their termination for the events which occurred on March 31, 1993. It asks as remedy that they be reinstated to their former positions with full backpay and be made whole in every respect for the period of their discharge.

ANALYSIS

The Arbitrator carefully reviewed all the evidence and testimony of record in deciding what the outcome of this case shall be. She understands that patient abuse is a very serious charge, the probity of which must be thoroughly examined for the well being of all parties concerned. Based upon such an examination, the Arbitrator's conclusion is that the State has failed to meet its burden of presenting sufficient credible evidence and testimony to establish that the Grievants' abused the Patient on March 31, 1993, and, thus, that their termination was for just cause.

In reaching this conclusion, the Arbitrator considered the parties' stipulation regarding the Patient's behavior when he was admitted to OFC on March 23. She also gave weight to the uncontroverted testimony of record that, on March 31, he was acting out in the Day Hall and was told to return to his cell where he attempted to barricade and flood it while yelling and generally making a lot of noise. Specific note was made that the record contains no indication whatsoever that anyone has questioned the need for Attendants to enter the Patient's cell and to subdue him by placing him in a four-way restraint.

The critical issue on which this case hinges is, therefore, whether the injuries the Patient received were consistent with his actively physical resistance (including the brandishing of "weapons") to the efforts made

to restrain him or with abuse. It should be emphasized that there is no evidence or testimony in the record that the Patient was passive or that he was beaten for making an excessive amount of noise. Where assessment of the Patient's injuries is concerned, the Arbitrator found Dr. Nedelkoff's testimony more credible, based on substantially more experience both at OFC and otherwise, and more detailed than that of Dr. Saunders. Dr. Nedelkoff's testimony was also devoid of the obvious contempt which Dr. Saunders had for this proceeding and for the Grievants as exhibited by his demeanor and conduct at the Hearing. The inconsistency in Dr. Saunders' testimony was another reason his presentation was given little or no weight. That is, he stated on direct examination that he had not seen "as severe an eye since he came here [OFC]," but on cross-examination he testified that the Patient did not need immediate treatment, "It wasn't an emergency. I wouldn't have sent a patient with a suspected broken nose to emergency."

In contrast, Dr. Nedelkoff has seen many patients at OFC after take down situations and gave credible testimony as to how the eye injury could have legitimately occurred in the course of the struggle to restrain the Patient. He was also able to provide specific reasons why the Patient's eye injury was not a black eye and, thus, why there was no evidence that he had been hit 4 or more times. Dr. Nedelkoff also gave a detailed analysis of the scratches on the Patient's face and shoulder, and described these as unmistakably characteristic of what occurs in take down situations. He also testified that the Patient had a bump on his head that was not serious and was, again, consistent with the normal course of a take down. Finally, consideration was given to the Patient's allegedly broken nose. Dr. Nedelkoff gave detailed testimony about why, based upon his examination of the Patient on April 1, and of the photographs submitted at the Hearing, he did not believe that the Patient had sustained such an injury. Even if the Patient's nose was broken, Dr. Nedelkoff testified persuasively that this would not necessarily be evidence of abuse since another patient's arm was broken in a take down situation and no complaint was made nor did any investigation ensue. On this basis, the Arbitrator concluded that there is no compelling evidence of abuse and, thus, that the Grievant's are not guilty as charged."[\[13\]](#)

This conclusion is buttressed by other evidence and testimony of record. As one example, there is the question of motive for abuse. Both of the Grievants had more than twenty years' service at OFC, had been involved in numerous take down situations before and had received no prior discipline. It is possible that what transpired on March 31, was the incident which crossed both Grievants' threshold for coping with a take down in a professional manner. However, to presume so would be to elevate both speculation and coincidence to the level of evidence which is simply out of the question in this or any other case. Additionally, Grievant Barrington's testimony is un rebutted that the Patient never went to the gym so he would have had little or not opportunity to develop personal animosity for the Patient.

The Patient's testimony was also considered. Since both parties acknowledge the Patient's diminished mental capacity (due to medication and/or otherwise), it is appropriate for the Arbitrator to consider whether he has the ability to be an effective witness. The numerous inconsistencies in his testimony as to who allegedly abused him, coupled with the fact that he admitted he was hallucinating "a lot" at the time of the incident and with Officer Parker's prompting during the investigation, mean that his testimony is not of sufficient probative value as to prove abuse and to warrant the termination of Grievants Wireman and Barrington.

In making this ruling, the Arbitrator did note that Nurse Miller stated in her report of April 5, that the Patient had told her that "Steve" and "Bud" were the persons who "hit" him. The Arbitrator does not challenge the credibility of Nurse Miller's statement, however, it is a fact that the Patient did not know these names himself, but rather was told them by Patient Neumeister. It is also a fact that the Patient identified Attendant Hollar (who was not present at OFC on the day of the incident) and two Highway Patrol Officers as his assailants so no weight could be given to this information.

The Arbitrator also considered the statement made by Patient Advocate, Janet Aller, on May 10, 1994. Again, the Arbitrator does not question the accuracy of the report Ms. Aller made. The fact is that Officer Parker and Patient Neumeister had both had an opportunity to influence the Patient's report by the time he made a statement to Ms. Aller and, thus, the information cannot be given any substantial weight in this decision.

Weight was given to the fact that two investigations were conducted of this incident, including the use of a special blood test of the Patient's blanket, and the Highway Patrol could not find sufficient evidence to obtain the Grievants' indictment by the County prosecutor.

Finally, the Arbitrator did note that the OFC was able to postpone the pre-disciplinary hearing to accommodate the vacation schedules of three managers, including the CEO, but acted arbitrarily and capriciously in denying a forty-eight hour extension to Ms. Musto when a death occurred in her family. These findings are not dispositive of the central issue in this case, but they are indicative of management's conduct in handling the matter.

AWARD

The State has failed to prove that Grievants Wireman and Barrington and guilty of abusing the Patient on March 31, 1993, and, thus, that just cause existed for their termination. This discipline shall be rescinded and the record of both Grievants expunged regarding the action taken against them. Both shall be reinstated to their former positions with full backpay, minus any interim earnings, and shall be made whole in every other respect.

DATE: June 19, 1994

MOLLIE H. BOWERS, Arbitrator

[1] All five people who entered the Patient's cell at the time of the take down indicated that the floor was wet. Some speculated that the Patient had blocked up the toilet and was attempting to flood the cell.

[2] The State stipulated that it is proper to use a blanket or sheet to distract a patient in a take down situation.

[3] Attendant Baxter was not presented as a witness at this proceeding. It is a fact that he was one of the backup Attendants called from West 1 North.

[4] It is a fact that the blanket from the Patient's cell was found at the bottom of a gurney in the laundry room.

[5] Nurse Hellman was not called as a witness in this proceeding.

[6] This person was not presented as a witness at the Hearing.

[7] Mr. Neumeister was not presented as a witness at the Hearing.

[8] Nurse Marie Miller's statement in Joint Exhibit 10, dated April 5, 1993, indicates that the Patient told her on that date that Steve and Bud were the assailants and that she had reported this information to Officer Parker.

[9] Apparently, Mr. Allen telephoned Dr. Nedelkoff the evening of the incident. He testified that he did not advise Mr. Allen to send the Patient to St. Rita's Hospital and that he "reluctantly consented" because Mr. Allen was "concerned about possible abuse and wanted it documented."

[10] Dr. Nedelkoff indicated that x-rays were also taken at OFC on the evening of the incident. It was acknowledged that the equipment at OFC may not produce high quality images.

[11] It is a fact that, in a picture line-up conducted by the Highway Patrol, the Patient identified two of its officers as those who assaulted him on March 31, 1993. Grievant Barrington gave un rebutted testimony that, by the time of the pre-disciplinary hearing, the Patient "knew all about him."

[12] Grievant Barrington admitted that he had small scratches on his arms at the time of the incident. He explained to Officer Parker during the investigation and at the Hearing that these marks were made by a puppy he had recently acquired.

[13] In reaching this conclusion, the Arbitrator also considered that neither Dr. Nedelkoff nor Dr. Saunders provided any testimony that the Patient's injuries showed evidence that he had been kicked or that anyone had stood on his chest.