

ARBITRATION DECISION NO.:

573

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation and
Developmental Disabilities,
Columbus Developmental Center

DATE OF ARBITRATION:

September 9, 1994,
October 4, 1994,
November 30, 1994,
December 5, 1994,
January 1, 1995 and
January 19, 1995

DATE OF DECISION:

April 24, 1995

GRIEVANT:

Clifford Hill, Jr. and
James Wright

OCB GRIEVANCE NO.:

24-06-(93-03-26)-0421-01-04 and
24-06-(93-03-26)-0422-01-04

ARBITRATOR:

Mollie H. Bowers

FOR THE UNION:

Robert W. Steele, Staff Representative
Adam Hubble, Second Chair

FOR THE EMPLOYER:

Brenda L. Gerhardstein, Human Resource Director
Edie Berger, Office of Collective Bargaining, Second Chair

KEY WORDS:

Removal
Just Cause
Credibility
Credibility of Witnesses
Patient Abuse
Burden of Proof
Contract Interpretation
Disparate Treatment

ARTICLES:

Article 24 - Discipline
§24.01 - Standard

FACTS:

The grievants were employed as Therapeutic Program Workers (TPW) in the Ohio Department of Mental Retardation, at the Columbus Developmental Center. The grievants were removed for alleged abuse of a patient.

At 3:00am on February 1, 1993 "TW", a resident at the Columbus Developmental Center, had an outburst which created a "Code Yellow" situation in which "TW" had to be restrained by several TPW'S. The resident sustained several minor injuries as a result of the outburst. An incident report was filed in which the injuries were described.

One of the grievants made an entry on the incident log that at 6:30am "TW" had been running into the door and striking his elbows on the walls. At the request of one of the grievants, "TW" was examined at 8:30am by a nurse who observed numerous bruises on his torso that, in her opinion, had been caused within the preceding twenty-four hour period. One of the grievants stated that he first noticed the bruises when he was asked to bring the resident a towel.

There was conflicting testimony as to whether the grievants had restrained "TW" before 8:30am. It was resolved that it had been necessary for the grievants and another TPW to restrain the resident two or three times that morning. Another resident, "JM" stated that he saw the grievants assaulting "TW". "TW", in an interview, originally stated that he had been injured in a fight with another resident, "Travis", several days prior. Later, the resident stated that he had been struck by the grievant and another TPW.

As a result of an investigation, the grievants were placed on administrative leave, and were subsequently removed for Resident Abuse.

EMPLOYER'S POSITION:

The State claimed that it had demonstrated just cause for the removal of the grievants. They maintained that the bruises which "TW" sustained on February 1, 1993 could only have been incurred during his restraint at or about 6:30am by the two grievants.

According to the State, the resident did not have the bruises following the 3:30am incident. The bruises were first documented at 8:30am by a nurse. During this period, the state argued that only the grievants and another TPW had physical contact with the resident.

The evidence and testimony, the State argued, proved that the injuries only could have occurred as a result of patient abuse. Further, the State had conducted an in-depth investigation of the incident, the grievants had the opportunity to respond to the charges, and they gave conflicting and inconsistent accounts of the events which transpired on the morning in question.

UNION'S POSITION:

The Union argued that the contract requires just cause be shown for disciplinary action to be taken. According to the Union, just cause was not met in this situation.

First, the investigation undertaken by the State was one that sought to reach the predetermined conclusion that the grievants were guilty. No attempt was made to determine if the grievants were actually guilty, or to investigate whether the earlier incident of fighting with another resident could have caused the bruises. Also, no weight could be placed on the testimony of the other resident, "JM". His condition made him a less than reliable witness.

Second, the State also failed to meet the standard of proof required by just cause principles to sustain a discharge. The standard of proof required is that of "clear and convincing", not a preponderance of the evidence. The State had not proven its case by this clear and convincing standard because its entire case rested on the credibility of two witnesses who are residents of the Columbus Developmental Center. The credibility of the witnesses was questionable because of inconsistencies in testimony and possible improper

motive.

According to the Union's expert witness, the bruises occurred in earlier altercations, and not the one in which the grievants were involved. This was shown by the age of the bruises.

Finally, the grievants should not have been required to prove they did not commit the acts, but rather the State must show that they did commit acts of patient abuse.

ARBITRATOR'S OPINION:

There were two separate incidents in which resident "TW" was involved. After the first, the resident was examined and no injuries were found, nor did he complain of any. The second incident in which the grievants were involved was not as well documented as the first.

The first grievant was involved in all three of the restraints of the resident. The second grievant was involved only once in assisting the first grievant in restraining the resident. From the record of the case, it was shown that the second grievant gave conflicting statements concerning his involvement in or knowledge of the physical restraint of the resident. Based on all the facts the arbitrator had reason to question the grievant's credibility.

The resident had repeatedly and consistently named the grievants as the employees who had caused the bruises which were the subject of the case. This was corroborated by the credible testimony of two other residents who stated that the grievants had physical contact with the resident in question.

The Arbitrator found that the bruises in question occurred after the 3:30am incident. They were not discovered during the examination of the resident at 3:30am. Further, the Arbitrator found the testimony of the State's expert witness to be more credible.

Finally, the Arbitrator held that since there was no standard included in the contract between the parties for removal, she would not impose one. The Arbitrator held that the standard of "clear and convincing" evidence was not to be imposed upon the State, but rather, what is required is "a heavy burden to present sufficient evidence that discharge is warranted".

The Arbitrator determined that the record supported a finding that the Grievants were guilty of patient abuse and that action warranted the penalty of discharge.

AWARD:

The grievances were denied.

TEXT OF THE OPINION:

IN THE MATTER OF THE ARBITRATION BETWEEN

State of Ohio, Department of Mental
Retardation and Developmental
Disabilities, Columbus Developmental
Center

- and -

Ohio Civil Service Employees
Association, AFSCME, Local 11, AFL-CIO

Grievants:

Clifford Hill, Jr.
24-06-03-26-93-421-01-04
James Wright
24-06-03-26-93-422-01-04

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the State:

Brenda L. Gerhardstein, Human Resource Director
Edie Berger, Office of Collective Bargaining, Second Chair
Debra Buccillo, Program Director, CDC
Dr. Kitano, Psychologist
Kim Brown, Former employee
Pat Eiselt, Registered Nurse
Craig Copley, Therapeutic Program Worker
Sharon Cannord, Former employee
Virginia Geyra, Qualified Mental Retardation Professional
Jim Carpenter, Uniworks Case Management Coordinator
Denise O'Connor, Uniworks Manager of Program
Dr. Ruth Ann Holzhauser, then Medical Director, CDC
Dr. Naeem Khan, Psychologist Supervisor
Leon Verdine, Residential Care Supervisor
Julia Rutherford, Police Officer
Joe Anderson, Police Chief
Beverly Chapman, Client Rights Advocate
JM, Resident
TW, Resident
Juanita Bryan, then Licensed Practical Nurse, CDC
Dr. Robert Falcone, Expert Witness
Donna Haynes, Labor Relations Officer

For the Union:

Robert W. Steele, Staff Representative OCSEA/AFSCME
Adam Hubble, Second Chair
John Gersper, Staff Representative
James Wright, Grievant
Clifford Hill, Jr., Grievant
Dr. Edward Friedlander, Expert Witness
Robert Abbott, Therapeutic Program Worker, Third Shift
Bobby Hooper, Therapeutic Program Worker
Classon Martini, Therapeutic Program Worker
Coulette Grant, Therapeutic Program Worker

The Hearings were held on September 9, October 4, November 30 and December 5, 1994, and January 1 and 19, 1995. The location was the State of Ohio, Department of Mental Retardation and Developmental Disabilities, Columbus Developmental Center (hereinafter, "the State" or "the CDC") located at 1601 West Broad Street, Columbus, Ohio. Both the State and the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO (hereinafter, "the Union") were represented. They had a full and fair opportunity to present all testimony and evidence in support of their case and to cross-examine that presented by the other party. At the conclusion of the Hearings, the parties requested the opportunity to submit post-Hearing briefs. These were timely received by the Arbitrator.

ISSUES

The parties stipulated that the issues to be decided are as follows:

- A) Was the removal of James Wright for just cause? If not, what should the remedy be?
- B) Was the removal of Clifford Hill, Jr. for just cause? If not, what should the remedy be?

JOINT STIPULATIONS

The parties also stipulated to the following facts:

- 1. There are no procedural objections to the Grievance procedure;
- 2. There are no procedural objections to the discipline procedure;
- 3. Clifford Hill, Jr. was employed on May 18, 1992, and was removed on March 23, 1993;
- 4. James Wright was employed on September 26, 1977, and was removed on March 23, 1992;
- 5. James Wright had prior disciplinary action on January 6, 1993, and on November 20, 1992;
- 6. Clifford Hill, Jr. had prior disciplinary action on October 15, 1992, and on September 24, 1992; and
- 7. Clifford Hill, Jr. is referred to as "Petey".

CONTRACT CLAUSE AND DISCIPLINARY GRID

Article 24 - Discipline

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...

STANDARD GUIDELINES FOR PROGRESSIVE CORRECTIVE ACTION

Offense	Penalties	
	First Offense	Second Offense
Physical Abuse	20 days suspension to Removal	Removal

EXHIBITS

- JX - 1 OCSEA Collective Bargaining Agreement, January 1, 1992 to January 31, 1994.
- JX - 2 Discipline Record of Grievant Hill.
- JX - 3 Discipline Record of Grievant Wright.
- JX - 4 Grievance Package for Grievant Hill.

- JX - 5 Grievance Package for Grievant Wright.
- JX - 6 Resident Abuse/Neglect Policies.
- JX - 7 Discipline Grid.
- JX - 8 CDC Work Rules signed by Grievant Wright.
- JX - 9 CDC Work Rules signed by Grievant Hill.
- JX -10 Corrective Action Policy.
- JX -11 Employee Agreement signed by Grievant Wright, September 27, 1977.
- JX -12 Module Sheets, read & signed by Grievant Hill, October 10, 1992 and by Wright, January 5, 1993. Grievant
- JX -13 Letter from Superintendent Williams to Grievant Hill, June 30, 1992.
- JX -14 COPE Training, Grievant Hill.
- JX- 15 Abuse and Neglect/Incident Report, Grievant Hill.
- JX -16 Training Records of Grievant Wright.
- JX -17 Incident Details from J. Rutherford, CDC Police, February 2, 1993.
- SX - 1 Statement of Ruth A. Holzhauser, MD, February 2, 1993.
- SX - 2 Series of photos, one of room and ten of resident TW, May 12, 1992, and February 1, 1992.
- SX - 3 Employment Application of Ruth A. Holzhauser, January 22, 1990.
- SX - 4 Position Description for Therapeutic Program Worker, June 12, 1990.
- SX - 5 Employment Application of Naeem U. Khan, March 20, 1992.
- SX - 6 Physical Examination Form for "TW", date unreadable.
- SX - 7 Behavior Modification Program for resident "TW".
- SX - 8 Physical Examination Form for JM", October 20, 1992.
- SX - 9 Curriculum Vitae for Robert W. Falcone, M.D.
- SX -10 Original Photographs referred to in SX-2.
- SX -11 Nursing Notes, January 21, 1993 to February 1, 1993.
- SX -12 Common Incident Log, January 31-February 1, 1993.
- SX -13 Statement of Patricia A. Eiselt, February 1, 1993, 5:49am.
- SX -14 Statement of Patricia A. Eiselt, February 1, 1993, 3:15am.
- SX -15 Statement of James Carpenter, February 3, 1993, 9:00am.
- SX -16 Uniworks, Disruptive Episode Report, January 29,1993.
- SX -17 Statement of "TW", February 3, 1993.
- SX -18 Statement of Neil Allison, February 13, 1993.
- SX -19 Follow-up Report by facility police, September 22, 1993.
- SX -20 Criminal Record of Grievant Wright, September 12, 1994.
- SX -21 Observation Notes January 30 to February 1, 1993.
- SX -22 Incident Details, February 2, 1993.
- SX -23 Investigative Results Report by Officer Rutherford, undated.
- SX -24 Report titled "Inconsistencies" August 31, 1993.
- SX -25 Written Reprimand to Grievant Wright, January 7, 1993.
- SX -26 Pay information for Grievant Hill, February 12,1993.
- SX -27 Hearing Recommendation, February 16, 1993.
- SX -28 Hearing Recommendation, dated February 26, 1993.
- SX -29 Handwritten notes, name at top, Grievant Hill, February 25, 1993.
- SX -30 Statement of Virginia Geyer, February 12, 1993.
- UX - 1 Curriculum Vitae of Edward R. Friedlander, M.D.
- UX - 2 N.E.I. Langlois and G. A. Gresham, "The Ageing of Bruises: A Review and Study of
The Color Changes With Time," Forensic Science International, Vol. 50 (1991), pp. 227-238.
- UX - 3 Hand drawn chart, titled, The Dynamic Bruise.

UX - 4	Medication Administration Record of "TW".	
UX - 5	Statement of Naeem Khan to Ohio Civil Rights Commission, January 10,	1994.
UX - 6	Incident Supplement, February 6, 1993.	
UX - 7	Statement of Patricia A. Eiselt, May 14, 1993.	
UX - 8	Statement of Craig Copley, February 1, 1993.	
UX - 9	Statement of Juanita D. Bryan, February 1, 1993.	
UX -10	State of Ohio Employee Performance Review for Grievant Wright, November 1992.	25,
UX -11	Statement of Grievant Hill, February 2, 1993.	
UX -12	State of Ohio Employee Performance Review for Grievant Hill, November 22,	1992.
UX -13	Statement of Robert Abbott, February 1, 1993.	
UX -14	Statement of Robert Abbott, May 14, 1993.	
UX -15	Handwritten statement of Craig Copley, June 24, 1993.	

BACKGROUND

The Columbus Developmental Center is a facility that provides care for mentally handicapped patients in a normalized, secure environment. This facility promulgated precise policy statements and rules regarding the interaction between staff and clients/residents (JX-6,7). These documents set forth the types of physical contact that are permitted between staff and residents, the range of circumstances under which such contact can occur, the training outlines for such contact, and the reporting procedures to be followed for incidents and injuries to staff or residents. It is undisputed that employees are given copies of these rules and receive training on the procedures to be used (JX-14). It is also unrefuted that the Grievants were aware of these policies and procedures (JX-8,9,11,12).

At the time of their removal, Clifford Hill, Jr. (hereinafter, "Grievant Hill") and James Wright (hereinafter, "Grievant Wright") were employed at the CDC as Therapeutic Program Workers (TPWs). These employees provide a wide range of care giving services to clients, including: chart entries on physical and behavioral problems; assistance with hygiene and grooming; intervention for aggression management; accompaniment to training; and provision of input on client progress (SX-4). Grievant Hill had been employed at the facility for almost one year, while Grievant Wright had sixteen years' service (Joint Stipulations by the parties).

"TW" is a long term client of CDC. As such, he is the subject of a Behavioral Modification Program (SX-7). This program sets forth expected behaviors on the part of "TW" that include physical aggression and destruction of property tendencies. It also advises employees of eight (8) preventative activities and eleven (11) intervention techniques, listing permissible levels of physical restraint, including the "baskethold" and the use of soft tie restraints for up to twenty (20) minutes.

The events which led to the Grievants' termination were set in motion on February 1, 1993. Shortly before 10:45am., Jim Carpenter, an employee of Uniworks (located at CDC), stated that he observed some large bruises on the upper body of resident, "TW". When he asked "TW" how he received these bruises, "TW" told him he had been fighting with the two Grievants, Art Thompson and a person named "Neal" (SX-15). Mr. Carpenter notified his superior, Denise O'Connor, of his observation. Ms. O'Connor reported that she also inquired how "TW" got the bruises, and he told her, initially, from fighting with "Travis" several days before. When "TW" was specifically asked about the previous night, he said that he had been fighting with the two Grievants, "Art Thomas" (sic), and "Neil" (SX-17).

Ms. O'Connor notified the CDC police, the Client Rights Advocate, and the Residential Care Specialist, Leon Verdine. (JX17). She also testified that while these individuals were meeting, the door opened and Grievant Wright "put his head in the door" and asked to speak to Mr. Verdine. The CDC Police Officer Julia Rutherford began an investigation into the injuries "TW" had sustained. What follows are the facts adduced from this investigation and from the record of this case.

Shortly after 3:00am. on February 1, 1993, "TW" had an aggressive outburst which necessitated his restraint in a baskethold by TPW Craig Copely (SX-21). This resulted in both individuals falling to the ground. Another client, "DB", then come out of his room and began throwing charts and chairs at TPW

Copely and "TW" who were still on the floor. TPW Copely subsequently released "TW", activated a "Code Yellow", and proceeded to restrain "DB". While this was occurring, "TW" tipped over a stand holding a television set and a VCR, damaging both these items. "TW" was again restrained by TPWs Copely and Abbott; the latter of whom had responded to the Code Yellow. When calm was restored, Nurse Pat Eiselt was called, examined "TW", and found a cut on his right cheek, other abrasions on his cheek and right eye area, and abrasions on his foot. She treated these injuries and described them in her notes (SX-11) and in the Common Incident Report (SX-12).

Grievant Wright made an entry on the Common Incident Log (SX-12) and on the observation Notes (SX-21) that, at 6:30am., "TW" had been upset and began running into the door and striking his elbows on the walls. At the Hearings, Grievant Wright admitted that he did not make these entries until approximately 8:15am. that morning. A variety of stories were offered during the investigation and during these Hearings about the interaction among the Grievants, TPW Thompson, and resident "TW" at approximately 6:00am. on February 1.

Nurse Bryan stated that she examined "TW" at 8:30am., at the request of Grievant Hill, who noticed the bruises. She claimed that she observed numerous bruises on his torso that, in her professional opinion, had been caused within the preceding twenty-four hour period. It was also Nurse Bryan's testimony that Grievant Hill did not report to her any restraint of "TW", and she assumed that the bruises were a result of the physical interaction that occurred at 3:00am.

Grievant Hill gave a statement wherein he wrote that "TW" was disruptive when he came on duty, but that he (Hill) went to perform his usual rounds. Later, after being asked to bring a towel for "TW", Grievant Hill stated that he noticed the bruises and summonsed Nurse Bryan. He also wrote that "TW" was "stop manuely (sic) a few time to keep from destroying furniture" (UX11).

In her report, Officer Rutherford described that, at first, Grievant Hill denied seeing anyone restrain "TW" on February 1, but later admitted that "TW" had been restrained two or three times, once by him, and other times by Grievant Wright and TWP Thompson. According to Officer Rutherford's report, TPW Thompson stated that because of "TW's" disruptive actions, he was restrained by both the two Grievants and by himself.

When Grievant Wright was interviewed, he acknowledged making the entries on the Common Log and Observation Notes at 8:30am. claiming he did this as a courtesy to TPW Thompson. He claimed that he could not recall or did not know of any restraint of "TW".

As a part of her investigation, residents in the area of "TW's" room were interviewed. One resident, "CF" stated he observed the Grievants in a physical restraint of "TW" in his room on the bed. Another resident, "JM", stated that he saw the incident and that Grievant Hill jumped on "TW's" stomach, while Grievant Wright was hitting "TW" in the side. This resident also stated that he had been asked to lie about the incident by TPW Neil Anderson but refused.

Dr. Naeem Kahn was interviewed by Officer Rutherford. He informed her that "TW" had told him that he had been struck by TPW Thompson and Grievant Wright. He also said that he interviewed resident "JM" about any possible involvement he had in "TW's" injuries and was told about TPW Anderson's attempt to have him lie about the incident.

It is a undisputed fact that the records cited reflect that "TW" was involved in physical contact with the two Grievants and TPW Thompson at 6:30am. on February 1, 1993. It is also a fact that Grievant Wright was involved in all three restraints. Grievant Hill testified that he held "TW's" arms on one occasion. TPW Art Thompson was also involved in at least one restraint of "TW" on the morning in question. According to Grievant Wright's entrees, "TW" had bruises on his "side, arm, stomach" (SX21) which were described as "old looking bruises" (SX-12). The Nursing Notes indicate that "TW" was checked by J. Bryan at 8:15am. Nurse Bryan found "numerous deep dark and red bruises covering client upper trunk of the body, Lg bruises that appear to be fresh in appearance. Covering both sides, back and chest. No tx rendered @ tht (sic) time" (SX-11). Photos of these bruises were taken at 11:00am. and at 8:00pm. that day and were provided as evidence at these Hearings (SX-2, 10).

As a result of her investigation, Officer Rutherford concluded that the Grievants and TPW Thompson were less than truthful in their account of what transpired on the morning of February 1, 1993. As a result, all three were placed on administrative leave pending the outcome of the investigation (JX-2,3).

A Fact-Finder's report, involving both Grievants, was issued on February 12, 1993. The Fact-Finder concluded that on February 1, 1993, between 6:15am. and 8:00am., client "TW" sustained multiple bruises to his torso and upper arms. The Grievants failed to document these injuries on the proper forms. It was also found that abuse was suspected. Pre-Disciplinary Hearings were then conducted, for Grievant Wright on February 16, 1993, and for Grievant Hill on February 26, 1993. The Hearing Officer, Donna D. Haynes, concluded that, for both Grievants, just cause existed for termination since neither Grievant presented any testimony to disprove the allegation of physical abuse of "TW" (see JXs 2 & 3).

On March 4, 1993, Superintendent Thomas L. Armstrong recommended that the Grievants be removed for Resident Abuse. The removal was effective March 23, 1993 (JX 2 & 3).

Both Grievants, with the assistance of the Union, timely filed grievances protesting their dismissal. These grievances were not resolved and the matter is now before this Arbitrator for final decision.

STATE POSITION

The State claims it has demonstrated just cause for the Grievants' discharge. It maintains that the bruises resident "TW" sustained on February 1, 1993, could only have been incurred during his restraints at or about 6:30am. by the two Grievants and by TPW Art Thompson. In support of this position, the State introduced the testimony of TPW Copely, who had restrained the Grievant at 3:30am., and of Nurse Patricia Eislet, who examined and treated "TW" immediately following that incident. The State emphasizes that Nurse Eislet testified that she found no bruises on "TW"'s body, other than on his face and feet. This testimony, the State points out, is consistent with her contemporaneous entries on the Nursing Notes (SX-11).

The notes prepared by Grievant Wright at 8:15am. indicating a need for physical restraint of "TW" earlier that morning were cited next by the State. It then points to the testimony of Nurse Juanita Bryan that she was asked by Grievant Hill to check "TW" at about 8:15-8:30am. on February 1, and noticed what appeared to be old bruises on his arms but new reddish, deep purple bruises on his torso. This testimony was reflected in the Nursing notes Nurse Bryan prepared contemporaneously (SX-11). The State therefore asserts that the injuries to resident "TW" could only have occurred during the period following the 3:30am. incident and the time Nurse Bryan was asked to examine "TW" at or about 8:30am.

According to the State, only the Grievants and TPW Thompson had any physical interaction with "TW" during that time period. The State stresses that, after the discovery of the subject bruises while "TW" was at Uniworks, he has consistently told the same story that he was fighting with the two Grievants and with TPW Thompson. This is corroborated, the State points out, by the credible testimony of at least five witnesses: Dr. Holzhauser; Dr. Kahn; Mr. Carpenter; Ms. O'Conner; and Police Officer Rutherford; all of whom made reports and gave testimony to this effect.

The State also relies upon resident "JM", who told staff members and physicians, and testified at the Hearings, that "TW" was beaten by the Grievants. This information, along with the report and testimony of Dr. Holzhauser regarding the freshness of the injuries when she examined "TW", was used by the State to maintain that the subject bruises resulted from restraints of "TW" by Grievants Hill and Wright, and by TPW Thompson, at or about 6:30am. on February 1, 1993.

The accuracy of Dr. Holzhauser's observations was confirmed, the State contends, by its expert witness, Dr. Robert Falcone (SX-9). The State emphasizes that Dr. Falcone opined that not only were the bruises of recent origin, but also that they all could not have occurred accidentally, since it would be extremely difficult for "TW", or anyone, to inflict bruises on unreachable parts of the back and to make the knuckle marks indicated in the photographs.

This evidence and testimony, the State argues, proves that the injuries only could have occurred as a result of patient abuse by the Grievants. While acknowledging that resident "TW" has limitations as a result of his handicap, the State maintains that this handicap makes it very unlikely that he would lie. It acknowledges that both sides to this dispute experienced difficulty taking testimony from "TW" because of his condition, but contends that this does not mean that his testimony was not credible, especially since he has consistently told the same story for the two years it has taken for this case to reach the arbitration stage.

The State maintains that it conducted an in-depth investigation of the incident, that the Grievants had the

opportunity to respond to the charges, and that they gave conflicting and inconsistent accounts of the events which transpired on the morning of February 1, 1993. In support of the latter assertion, the State offers its Exhibit 24, wherein Officer Rutherford delineated a number of inconsistencies in the statements made by the two Grievants and by TPW Thompson. It emphasizes Officer Rutherford's notes that Grievant Wright wrote a report regarding "TW's" restraint then, several days later, stated that he could not recall or did not know the number of times and type of interaction that occurred. TPW Thompson first stated that he helped restrain "TW" and then denied any such involvement with him. Grievant Hill first stated that he never saw anyone restrain "TW", but later admitted that "TW" had been restrained several times and that he participated in at least one such restraint.

Accordingly, the State asserts that it has met its burden of proving that the Grievants engaged in patient abuse which, under Article 24, Section .01 of the Collective Bargaining Agreement, means that discharge is the appropriate penalty. The State therefore asks that these be grievances by denied.

UNION POSITION

The Union offers a multifaceted defense of the Grievants and also attacks what the State has offered as alleged proof of their guilt. First, the Union points out that the Agreement requires that just cause be shown for disciplinary action to be taken. With its post-Hearing brief, the Union provided an article written by Adolph Koven and Susan L. Smith on the seven tests of just cause. It claims that the State has failed to meet four of these tests, (i.e. the conducting of an investigation, the fairness of the investigation, the required proof of the act, and the requirement for equal treatment).

The Union contends that the only investigation done was one that sought to reach a predetermined conclusion that the Grievants were guilty. It argues that no attempt was made to determine if the Grievants were actually guilty, or to investigate whether the earlier incident involving TPWs Copely and Abbott, and "TW", or "fighting" with other residents could have caused the subject bruises. The Union also challenges the significance of Nurse Eiselt's statement and testimony since it is obvious that during her 3:30am. examination, she only checked and certain areas on "TW's" body where bruising was later found (UPHB p. 15). According to the Union, the Arbitrator should also consider that the State's own witness, Leon Verdine, testified that a Unusual Incident Report (UIR) should have been prepared regarding the 3:30am. Incident, but was not, and no one was disciplined for this discrepancy. On the other hand, the Union emphasizes that the State adopted a different standard when it considered it significant that the Grievants did not report their restraint of "TW" to Nurse Bryan.

It also argues that no weight can be placed on the testimony provided by resident "JM" about his activities at the time of the 3:30am. incident and his later claimed observations of the two Grievants beating "TW". This position is the correct one, the Union maintains, because of the inconsistencies between TPW Copely's and "JM's" testimony about the latter's whereabouts at the time of the incident at 3:30am. incident and because "JM'S" condition made him a less than reliable witness. All the aforesaid oversights and failures, the Union argues, reflect the lack of a proper and even handed investigation in the instant case.

According to the Union, the State also failed to meet the standard of proof required by just cause principles to sustain a discharge. It cites the Pre-Disciplinary Hearing Officer, Donna Haynes' recommendation as evidence to support this assertion. In particular, the Union points to her comment that the Grievants did nothing to disprove the charges and claims that this constitutes a guilty until proven innocent test which is contrary to any notion of fairness and to any conception of due process (JX-3). This also reinforces, the Union contends, the accuracy of its allegation that the State predetermined the outcome it sought in the instant case.

While acknowledging that it did not raise the issue of disparate treatment in these grievances or during these Hearings, the Union argues that such treatment did, in fact, occur. As support of this assertion, it stresses that although implicated equally, TWP Art Thompson was not discharged, but rather received only a thirty day suspension for resident neglect and for failure to act. The Union therefore claims that the Grievants were singled out to take the blame for patient abuse which was neither properly investigated nor attributable to them.

Next, the Union contends that the standard of proof required in this case is that of "clear and convincing evidence"; not a preponderance of the evidence. Three arbitration awards by Rhonda Rivera, Lawrence Loeb, and Mitchell Goldberg each were offered to support this point.^[1] The Union maintains that the State has not proven its case by this clear and convincing standard because its entire case rests on the credibility of two witnesses, "TW" and "JM", who are both residents of CDC with records of severe mental handicaps and personality disorders. As an example, the Union cites the different versions "TW" gave about how he became severely bruised (fighting for five days versus his claim of fighting with Grievants Hill and Wright, and with TPW Thompson) to Dr. Kahn and others. It also addresses possible motives, on "JM"s part, to place the blame on the Grievants, claiming that "JM" has shown animosity toward Grievant Hill through the use of racial epithets (UPHB p.24). The Union also contends that "JM" would benefit from the Grievants' punishment because he could have lost his weekend privileges if it had been shown he was fighting with "TW". The Union then cites an award of Arbitrator Gregg McCurdy wherein he set forth conditions to be met in accepting a witness's statements regarding improper behavior. These conditions are: lack of animus toward the accused; no interest to benefit from the prosecution of the allegations; and absence of known characteristics that should cause a reasonably prudent person to question the motivations of the accuser.^[2] Applying these criteria to the testimony of "JM", the union claims, makes his testimony of no value in determining the Grievants' guilt or innocence in the instant case.

The Union cites the testimony of their expert witness regarding the bruises on "TW" as evidence that they were not caused by the Grievants, but rather resulted from earlier altercations in which "TW" was involved. According to the Union, there was a very narrow time frame during which the State alleges the abuse occurred. This means that the age of the bruises is critical importance. The Union acknowledged that both its expert and that of the State agree on key points, but emphasizes the difference that Dr. Friedlander is of the opinion that the bruises were at least twenty four hours old. He explained convincingly, the Union asserts, that an expert should look at the outer edge color of the bruises to determine and compare this coloration to the patient's nipple color as a baseline.

Finally, the Union asserts that the Grievants are not required to prove they did not commit the acts alleged, but rather that the State must prove they did. It points to another decision by this Arbitrator wherein it was found that the seriousness of a charge of patient abuse and the consideration of the patient's diminished mental capacity were key factors that led to the conclusion that just cause for discharge did not exist.^[3]

For these reasons the Union requested that the grievances be upheld and that the Grievants be reinstated to their former position with full back pay and benefits for the period of their discharge. Additionally, the Union asks that such award "include the penalties incurred by the Grievants as a result of having to withdraw their retirement (PERS) funds during the period in which they were improperly denied their employment" (UPHB p. 32).

DECISION

The testimony and evidence produced at these Hearings, and the information contained in the parties' post-Hearing briefs, were carefully reviewed and evaluated in arriving at a decision in this case. It was established as fact that resident "TW" was involved in two, separate, incidents during which he was physically restrained and injured on February 1, 1993. The first incident occurred at or about 3:30am., at which time "TW" became aggressive and was placed in a baskethold by TPW Craig Copely. Both men fell to the floor and both were injured. While this restraint was taking place, another resident, "DB", began breaking furniture and throwing pieces of it and of charts at the other two men. As a result, TPW Copely released "TW", initiated a "Code Yellow" alert, and restrained "DB". During this time, "TW" turned over a stand holding a television set and a VCR, breaking both and sustaining glass cuts on his toes. Another TPW, Robert Abbott, responded and TPW Copely and he again restrained "TW" until he calmed down.

Medical assistance was summonsed. Nurse Patricia Eiselt responded and treated both TPW Copely and "TW". Her Nursing Notes, subsequent statements, and testimony reflect that she treated "TW" for a cut near

his eye, abrasions on his cheeks, and cuts on his toes. She testified that she had checked "TW"s torso and found no injuries nor did he complain of any other injuries when asked. This entire episode was recorded in the Incident Log and in the Nursing Notes. A required report about the initiation of the "Code Yellow" was not prepared.

In evaluating this incident, the Arbitrator took judicious note that most of the damage that occurred was a result of "DB's" behavior. It was also found that the injuries to "TW" noted and treated were consistent with the physical activities and restraints alleged in the reports and testified to by TPWs Copley and Abbott.

The second incident on February 1, 1993, took place at or about 6:30am. This incident was not nearly as well documented contemporaneously. A wide variety of accounts of what took place and who was involved were obtained and resulted in the discharge of the Grievants and the instant proceedings. Facts adduced are that at about 6:30am., resident "TW" became aggressive and had to be restrained on at least three occasions. Grievant Wright was involved in all three of these restraints, while it appears that Grievant Hill and TPW Thompson were each involved once in assisting Grievant Wright with restraint of "TW".

At or about 8:30am., Nurse Juanita Bryan was summonsed by Grievant Hill and shown a number of bruises on "TW's" torso. Grievant Hill did not report any restraint of "TW" at 6:30am. and Nurse Bryan assumed the bruises were a result of the 3:30am. incident that had been documented. At 8:30am., Grievant Wright made an entry on the Incident Log, back timing it to 6:30am., claiming that "TW" had become upset and had begun running into doors and banging his arms. Grievant Wright reported that he made this entry as a courtesy to TPW Thompson.

From the record of this case, it has been shown that Grievant Hill gave conflicting written and verbal statements about his involvement in or knowledge of any physical restraint of "TW". Grievant Wright initially expressed no knowledge or memory of any restraint of "TW" and later reported restraining him either by the use of a baskethold or just by holding his arms. The statement taken from TPW Thompson said that he never restrained "TW", but later acknowledged that he and the two Grievants had restrained "TW" by holding his arms (SX-24). Based upon the award of Arbitrator McCurdy, offered by the Union, the Arbitrator concluded that sound reasons exist for questioning the credibility of the Grievants. While there was no demonstration of animus toward "TW", an interest in benefiting from the outcome of the case was certainly shared by both Grievants. Where Grievant Wright's credibility is concerned, moreover, the Arbitrator had cause to question based upon "other characteristics" of his testimony in this case. That is, his explanation to her of why he spent forty five (45) days in jail for a fire at his house which he claims started because a barbecue got out of hand. It is a known fact that an individual does not get arrested for, convicted of, and sentenced to jail for an arson-type crime unless the evidence has shown that he is guilty of the charge. What is also fatal to Grievant Wright in this case is that he apparently chose to be less than truthful about this conviction in the instant proceeding even though it has nothing to do with whether or not he retains his job at CDC.

With respect to the events giving rise to the Grievants' termination, "TW" has repeatedly and consistently named three persons (the two Grievants and Art Thompson) as the employees who punched and kicked him, causing the bruises which are the subject of this case. He made this identification to Mr. Carpenter, Ms. O'Connor, Officer Rutherford, Dr. Holzhauser, Dr. Kahn, and at these Hearings. It is true that "TW", on one occasion, named another resident, "T". The record is unrebutted, however, that the investigation proved that "TW's" altercation with "T" occurred several nights prior to February 1 (SX-17). It is also a fact that both Mr. Carpenter and Ms. O'Connor reported to Officer Rutherford that "TW" named a person named "Neil" as being involved along with the Grievants and Art Thompson (SX-15). While there is evidence in the record that TPW Neil Anderson was involved in making a false statement about the incident, there is nothing presented or claimed by either party that this TPW was even on duty at any time proximate to when "TW" incurred his injuries.

In contrast, identification of the two Grievants by "TW" is corroborated by the statements and testimony of residents "JM" and "CF" (UX-6). Further, the Union's attempt to implicate resident "JM" as kicking "TW" during the 3:30am. incident are positively refuted by the evidence that the person making this allegation, TPW Anderson, later admitted to fabricating this information to help the two Grievants (SX-18, 19 and UX-5). Therefore, the credible evidence is that the Grievants had physical contact with "TW" and that such

contact involved more than just holding his arms and/or placing him in a baskethold on the morning of February 1, 1993.

A question critical to the outcome of this case is when the injuries occurred which produced the bruises which are the subject of this case. Massive bruises (SX-2 and 10) on "TW's" torso, back, side, and front, which "appeared to be fresh" (SX11), were treated by Nurse Bryan at 8:00am. on the date in question; approximately one and a half hours after "TW's" latest behavioral outburst. Such bruises were not observed by Nurse Eiselt in her 3:30am. examination of "TW" (SX-11,12,21). According to Nurse Bryan, she believed the bruises were from the 3:30am. incident because neither of the Grievants told her that "TW" had been running into doors and windows, and had to be restrained three times at 6:30am. (JX-17). If the Grievants had nothing to hide, then why did they not tell the Nurse that "TW" had been restrained that morning?

Nevertheless, more information is necessary to confirm that the bruising occurred after the 3:30am. incident. Dr. Holzhauser's statement and testimony are uncontroverted that, in her opinion, the bruises she saw could not have been the result of a 'baskethold', but rather were of a type usually caused by blunt trauma. The TPWs on duty at both 3:30 and 6:30am. all claim that basketholds (and in the latter case, holding of arms) were used to restrain "TW". The difference is that client "CF" stated that he saw the Grievants holding "TW" on the bed in the course of the episode at 6:30.

Due to the size and the location of the bruises, Dr. Holzhauswer opined that all the bruises could not have been self-inflicted (JX-17). This opinion was corroborated by Dr. Falcone. He further stated that, in his opinion, the bruises he saw in the photos were not more than a day old and were not a result of an accident, but rather were more likely the result of an altercation. The Union's expert witness, Dr. Friedlander, while agreeing with Dr. Falcone on a number of key points, gave the opinion that "TW's" bruises were "at least" twenty four hours old. The reason given for this opinion was a comparison of the colorization at the outer edges of the bruises to the client's nipple color. He also cited the contents of the article The Ageing of Bruises; A Review and Study of the Colour Changes with Time, by N.E.I. Langlois and G.A. Gresham (UX-2) as support for this opinion. The Arbitrator took notice that both experts based their opinions on images of the injuries in Polaroid photographs; not personal examination of "TW". She found that Dr. Falcone's testimony was more convincing. If, as asserted by Dr. Friedlander, the bruises were at least twenty four hours old, it would be reasonable to assume that whatever caused the bruises would have to have occurred prior to 11:00am. on January 31, 1993. If this was the case, then TPW Copely and Nurse Eiselt (and probably another shift of TPWS) would have noticed these bruises at or before the time of the 3:30am. incident. No such observations were made. In fact, Nurse Eiselt specifically testified that she saw no bruises on "TW's" torso. The Union protested that this testimony was contrived because the torso was mentioned specifically. The Arbitrator disagrees based upon the Union's own offered tests of credibility. Nurse Eiselt had nothing to gain from this proceeding and also had no knowledge of what either expert witness testified to when she provided this information.

Grievant Wright admitted to making entries, containing incorrect time identification, in the Common Log and the Observation Notes, but stated that he did this as a courtesy to Art Thompson. The Union did not produce TPW Thompson to corroborate this testimony nor did it give any reason why he was unable to appear. Given the critical role of timing in the instant case, the Arbitrator holds that Grievant Wright's statements and testimony are both self-serving and less than credible.

Similarly, Grievant Wright's explanation for going to Uniworks (to be a "behind the scenes safeguard") on the morning of February 1, was not corroborated by any other witness. His testimony that he opened the door on the meeting being held by Ms. O'Connor also fails to be convincing since, as a "behind the scenes safeguard", he should have known where "TW" was rather than have had to go looking for him.

The Grievants asserted that the absence of a UIR for the 6:30 incident was attributable to Nurse Bryan because she said she would check to see if a report regarding the incident was needed and would get back to them. Again, this was refuted by Nurse Bryan whose testimony has proved credible. Furthermore, based upon the unrefuted fact that the Grievants were familiar with the policies and procedures of the institution (including the circumstances under which an UIR had to be prepared), the Arbitrator found that they knew or should have known that a UIR had to be prepared for the incident. The Arbitrator also concluded that this was but another example of the Grievants' attempt to use co-workers as scapegoats for conduct which they

have failed to explain with sufficient credibility and consistency to warrant exoneration from the charges made. Also, while not condoning the absence of a UIR for the 3:30 incident, the Arbitrator considered that the Common Log and Nurses Notes accurately reflect the credible testimony about that incident whereas this is not the case where the 6:30 incident is concerned.

The testimony of two Union witnesses, TPW Martin and TPW Grant was also considered. These witnesses testified that, based on their experience with "JM", they believed he was capable of fabricating the story about witnessing the Grievants abusing "TW". No weight was given to this testimony. These witnesses had not disclosed their identity or information to anyone at the time of the February 1, incident, during the subsequent investigation, or at any time between then and the closing stages of these Hearings. Since no reason was offered for this lack of disclosure, the Arbitrator concluded that these witnesses were brought forward in a last ditch effort to salvage the Grievants, case.

The Arbitrator further finds that the Union failed to prove that resident "JM"s testimony was based on a desire to benefit from it. To the contrary, the Union's own witnesses, TPWs Grant and Hooper testified that "JM" did not like "TW" and would "sucker punch" him if the opportunity presented itself. They also testified (as did Dr. Kahn) that "JM" was defensive of the staff, particularly in cases involving "TW". The alleged racial epithet which "JM" directed at Grievant Hill when he was first employed at CDC was not sufficient explanation, under the circumstances of this case, of why "JM" would deviate from his normal proclivity to defend the staff. This conclusion is buttressed by the fact that TPW Anderson thought such extraordinary measures were necessary to discredit "JM"s testimony, that he initially lied about "JM" kicking "TW" during the incident at 3:30.

In evaluating the Union's assertion of disparate treatment, the Arbitrator took notice that no evidence was offered that Art Thompson was charged similarly to the Grievants with patient abuse. Since he was not presented by either party as a witness, and sufficient evidence was not offered upon which a reasonable conclusion could be based that there was disparate treatment, the Arbitrator gave no weight to this claim. Furthermore, the Union admits that disparate treatment was not raised in the grievances nor at these Hearings. It is therefore ruled that the Union cannot raise the issue in its post-Hearing brief as it has lost its standing to complain.

The Union's attempt to show a lack of proper proof, by using Pre-Disciplinary Hearing Officer Haynes' written comments that the Grievants failed to disprove the allegations against them, was considered. However, neither Ms. Haynes' opinion, her lack of competency, nor her poor choice of words, invalidates the entire investigation, the inescapable facts and circumstances of record, and the conclusion that the Grievants did abuse resident "TW" during the 6:30am. incident on February 1, 1993, and thus, that just cause exists for their discharge.

Finally, the Union expended effort to try to convince the Arbitrator that the quantum of proof required in this case should be "clear and convincing" and not a "preponderance of the evidence." While the reasoning of other arbitrators is interesting, it is also a reality that there is no hard and fast rule about the quantum of proof arbitrators should expect in discharge cases. The Agreement between the parties places the burden of proof in discharge cases on the State, but is silent as to what quantum of proof is needed. This Arbitrator is mindful of the prohibition against adding to, subtracting from, or modifying the Agreement. She finds, therefore, that if the parties wanted a standard other than that which is indicated in the Agreement, then they could have negotiated it at the bargaining table. That is not to say, however, that this Arbitrator is not mindful that discharge is the most serious disciplinary action that can be taken against an employee and that the entity proposing such action bears a heavy burden to present sufficient evidence that discharge is warranted.

The Union also quoted another award of this Arbitrator wherein she held that cases involving patient abuse are serious matters that must be thoroughly evaluated in fairness to all parties.^[4] In the instant case, the credible testimony was clear, as the great bulk of circumstantial evidence was convincing, that the Grievants were guilty, as charged, of patient abuse. To rule otherwise would be nonsensical regardless of the standard of proof selected. The record is clear that the Grievants wove a web of inconsistent testimony and statements, and of attempts to use co-workers as scapegoats for their offense. If this was not an elaborate attempt to obfuscate the record, then what purpose would innocent men have in expending such

effort? Finally, it is well recognized in courts of law, as well as in arbitration, that entire cases must be tried knowing that circumstantial evidence is the best, and sometimes the only, evidence. This is not a bar to due process or to reaching a clear, inescapable conclusion that a party is either innocent or guilty as charged. In the instant case, the Arbitrator has determined that the record supports a finding that the Grievants are guilty of patient abuse and warrant the penalty of discharge as a result.

AWARD

The Grievances are denied.

Mollie H. Bowers, Arbitrator

DATE: April 24, 1995

[1] 35-07-(90-05-30)-0011-01-03; 33-00-(92-12-07)-0450-01-05; and 23-10-(92)-10-26-(0167-01-04).

[2] Hillhaven Corp. 91 LA 451-454, 1988

[3] Ohio Department of Mental Health and OCSEA/AFSCME 23-12-(93-11-24)-0567-01-04

[4] 23-12-931124-0587-0104 and 23-12-931124-0510-01-03.