ARBITRATION DECISION NO.:
616

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Mental Retardation and Developmental Disabilities
Warrensville Developmental Center

DATE OF ARBITRATION:
July 17, 1996

DATE OF DECISION:
October 18, 1996

GRIEVANT:
Carolyn Christian
Joyce Brown

OCB GRIEVANCE NO.:
24-14-(95-09-01)-1336-01-04
24-14-(95-09-01)-1338-01-04

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Robert Robinson, Advocate
Jerry Buty, Second Chair

FOR THE EMPLOYER:
Carolyn Borden-Collins, Advocate
Pat Mogan, Second Chair

KEY WORDS:
Abuse
Credibility of Witnesses
Failure to Cooperate in an Investigation
Grievant's Testimony
Removal

ARTICLES:
Article 24 - Discipline
§ 24.01 - Standard

FACTS:

The Grievants (hereinafter "Grievant #1 and Grievant #2") were employed as Therapeutic Program Workers. The Grievants were charged with engaging in client abuse by a new employee. The facts that follow were presented by management. Management alleged that both grievants pinched a resident which

caused her to jump. Another resident was grabbed by the shirt, pinched under the arm as she was being led away and told to “shut up" by Grievant #2. It was also alleged that Grievant #2 put her middle finger up to the left eye of a resident who was blind in the right eye. Both grievants were accused of calling a resident "crow legs". Finally, Grievant #2 was accused of physically assaulting a resident by slapping her in the face.

EMPLOYER’S POSITION:

Management argued that the witness, a new employee who observed the alleged events, was highly credible. Management contended that the witness' prior experience, thirty-three (33) years working as a mental retardation practitioner, enabled her to identify patient abuse. Management also argued that the witness' involvement in the dispute was not a result of animus towards the grievants and that the Union's theory that she was "planted" in the unit to get the grievants was unfounded and unsupported by the record.

UNION’S POSITION:

The Union argued that the grievants did not verbally and physically abuse the residents. The Union's contention was that the witness' credibility was reduced by her testimony and that she was a "plant" for Management. The Union attempted to rebut the witness' recollection of the events. The Union argued that one resident called everyone, including herself, "crow legs", neither grievant pinched the residents, and grievant #2 never slapped the resident and that incident was fabricated by the witness. The Union attempted to discredit the witness by relying on the grievants' version of the facts, the witness' failure to report the alleged incidents when they occurred and the lack of physical evidence supporting the abuse allegations.

ARBITRATOR’S OPINION:

The Arbitrator found that both the grievants verbally and physically abused the residents. This finding was based upon a number of credibility concerns and affirmative defenses raised by the Union which the record failed to support. The most damaging evidence and testimony to the Union's position dealt with the inconsistent explanations provided by the grievants at the hearing versus prior statements they made. The Arbitrator found that the grievants were uncooperative during the investigation of the alleged incidents and denied any personal knowledge of and/or direct involvement in the alleged incidents at the hearing. The Arbitrator held that the Union's attempt to justify these inconsistencies based on a self-incrimination theory was misplaced. The Arbitrator found the witness' testimony to be very credible, explicit, forthright and that it was corroborated by her prior written statements. Furthermore, the witness' recollections were credible considering the amount of detail given and the fact that she was a new employee unaware of the resident behavioral profiles. In disciplinary cases a majority of arbitrators resolve conflicts between the testimony of the grievants and management witnesses by applying the presumption that the accused is presumed to have an incentive for not telling the truth and that when the testimony of the accused is contradicted by one who has nothing to lose, the latter is to be believed. Thus, the Arbitrator concluded that the witness had nothing to lose as a consequence of her testimony and that the grievants had the incentive to distort the truth because their jobs were in jeopardy. Finally, the Arbitrator concluded that the Union's plant theory was misplaced because rumors and innuendo cannot establish such a theory. As an affirmative defense this theory must be supported by specific expressions of intent and motivation.

AWARD:

Grievances were denied.

TEXT OF THE OPINION:

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

In The Matter of the Arbitration Between:

The State of Ohio, Department of Mental Retardation and Developmental Disabilities, Warrensville Development Center

-and-

Ohio Civil Service Employees Association, Local 11, AFSCME

Grievants:
Carolyn Christian and Joyce Brown
Case Nos:
24-14-(95-09-01)-1336-01-04
24-14-(95-09-01)-1338-01-04

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: October 18,1996

Appearances

For the Employer
Charmaine Watkins, Witness
Jacqueline D. Taylor, QMRP
Janet A. Davis, TPW
Ruby Holman, LRO
Pat Mogan, Second Chair
Carolyn Borden-Collins, Advocate

For the Union
Carolyn Christian, Grievant
Joyce Brown, Grievant
Paul D. Caldwell, Chapter President
Laurietta Wright, TPW
Deborah Robinson, TPW
Sheryl Averiett, TPW
Jerry Buty, Second Chair
Robert Robinson, Advocate

Introduction

This is a proceeding under Article 25, entitled Grievance Procedure, Section 25.03 - Arbitration Procedures, Section 25.04 - Arbitration/Mediation Panels of the Agreement between The State of Ohio, Department of Mental Retardation and Developmental Disabilities, Warrensville Developmental Center, hereinafter referred to as the 'Employer,' and Ohio Civil Service Employees Association, AFSCME, Local 11, hereinafter referred to as the "Union," for the period March 1, 1994-February 28, 1997. The arbitration hearing was held on July 17, 1996. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the

grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

Stipulated Issue

Did the Grievants verbally and physically abuse residents of the Warrensville Developmental Center? If not, what shall the remedy be?

Pertinent Contract Provisions

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 disciplinary action. In casesinvolving 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. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from a separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02

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(Joint Exhibit, Pgs. 68-69)

Stipulated Facts

1. The issue is properly before the Arbitrator.

2. The Grievants' years of service: Ms. Brown, 16 years; Ms. Christian, 19 years.

3. Ms. Brown had no active disciplines.

4. Ms. Christian had an oral reprimand for insubordination and a written reprimand of (sic) for inappropriate behavior/inappropriate interaction.

Case History

Warrensville Developmental Center, the Employer, provides a number of support systems for residents which provide an environment of choice and increasing opportunities for achievement. This facility serves a wide range of residents with mental retardation and/or developmental disabilities. Its purported primary mission is to assist each resident in reaching his or her fullest psychological, social, physical and spiritual potential.

The disputed series of incidents took place on April 17, 1995, during second shift on House 4/100. A number of protagonists were involved in the dispute.Charmaine Watkins was originally hired on April 10, 1995 as a full-time external Therapeutic Program Worker (TPW). She was hired as a fill-in for Laurletta Wright who was on disability leave. Watkins became the Employer's eyewitness to the disputed incidents; and worked her first and only day on House 4/100 on April 17, 1995.

Three (3) other TPWs working House 4/100 on second shift were implicated by Watkins for engaging in client abuse and/or client neglect charges. Sheryl Averiett was removed for client neglect for leaving client Laura P. sifting nude in the bathroom for thirty (30) to forty (40) minutes while allegedly talking on the phone.

This removal was eventually reduced to a written reprimand contingent upon certain stipulations which included a “last chance agreement” (Employer Exhibit 7).

The two other TPWs are the major focus of the present action. As stipulated, Joyce Brown realized sixteen (16) years of service at the time of her removal. Carolyn Christian, moreover, had also accrued a significant amount of service. At the time of her removal, she had accumulated nineteen (19) years of State service.

The facts for the most part are highly disputed. As previously mentioned, Watkins worked one shift on April 17, 1995, and then decided to resign based on what she allegedly observed during the second shift. She did not, however, report the purported acts of abuse the night of the various incidents. She waited until the following morning to notify administrative personnel. The various Orders of Removal, however, provide some beneficial background. Each position will be explored in greater detail in a subsequent portion of this Opinion and Award. Brown was removedfrom her position effective August 24, 1995. The Order of Removal specifies the following rationale for this action:

***

The reason for this action is that you have been guilty of client abuse in the following particulars to wit:

On April 17, 1995, you did physically and verbally abuse clients residing in House 4/100. Witness statements indicate you taunted and pinched resident Wanda C. and that you called resident Laura P. "crow legs.” These actions are direct violations of Warrensville Development Center's policies and procedures.

***

(Joint Exhibit 3)

Watkins' observations, moreover, led to Carolyn Christian's removal effective August 24, 1995. Her Order of Removal contained the following pertinent particulars:

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The reason for this action is that you have been guilty of client abuse in the following particulars to wit:

On April 17, 1995, you did verbally and physically abuse several clients that reside in House 4/100. Witness statements indicate that you taunted and pinched resident Wanda C.; that you slapped Julia S. in the face; that you pinched resident Elaine P.'s arm; that you stuck your middle finger in resident Brandy E.'s face and made inappropriate comments; and that you called resident Laura P. “crow legs.” These actions are direct violations of Warrensville Developmental Center's policies and procedures.

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(Joint Exhibit 3)

On August 31, 1995, both Grievants formally challenged the Employer's removal decisions. Even though the Grievants' filed independent protests, their Grievance Forms contained the following identical Statement of Facts:

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Employee grieves that management is in violation of the above named articles and sections of the OCSEA contract. She makes such claim when on 8/24/95 a removal order became effective for alleged client abuse.

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(Joint Exhibit 2)

Neither party raised substantive nor procedural arbitrability issues. As such, the grievances are properly before the Arbitrator.

The Merits of the Case

The Employer's Position

The Employer opined it had established that the Grievants engaged in verbal and physical abuse. Watkins, moreover, provided testimony which established that certain actions took place which one could clearly classify as abusive. Her testimony was credible, consistent and submitted without prejudice. The entrapment or "plant" theory proposed by the Union was not proven nor supported by the record. The Grievants were provided with equal treatment and were not similarly situated to Averiett. Due process considerations, if the abuse allegations are not proven, do not mitigate the removal decision.

Watkins described a series of incidents she observed involving the Grievants which one could easily characterize as abusive, and in violation of specified policy andprocedure. Each of these incidents will be reviewed below with specific attention placed on proposed actions engaged in and the resident(s) involved.

Watkins alleged Wanda C., a blind resident, was physically abused by the Grievants. The incident took place in one of the living areas on House 4/100. Initially, Brown and Wanda C. were at this location. Brown was sitting on a chair near Wanda C. who was sitting in close proximity on a couch. Brown pinched Wanda C. which caused her to jump. Brown purportedly laughed and called out to Christian saying she pinched "her girl." Christian arrived on the scene and stood on the other side of Wanda C. They, then, proceeded to pinch her on each side of her body. Wanda C. responded by jumping up and down, waving and thrashing her arms. Brown and Christian continued to laugh as a consequence of Wanda C.'s behavior.

Another incident involved Elaine P. and Christian. During the course of the shift, the resident made several attempts to get water. Upon inquiring about her behavior, staff advised Watkins that Elaine P. would urinate shortly after consuming water. Christian, however, provided a more descriptive perspective regarding this patterned behavior. She exclaimed Elaine P. "liked to feel the warm piss going down her leg." After these observations were communicated, Elaine P., again, went to the water fountain to get some water. Christian followed the resident, grabbed her by the shirt, walked her toward the staff area and pinched her underarm as she pulled her away from the fountain. The resident screamed but was told to "shut up." She was also told to stand in the room so that she could be observed. Watkins testified she saw Elaine P. crying, although she made no verbal utterance. Watkins approached Elaine P., and Christian responded that the resident was totally independent and could relieve herselfwithout assistance. These protestations did not dissuade Watkins. She escorted Elaine P. to the restroom.

Watkins implicated Christian in an incident involving Brandy E. who is blind in one eye. While the resident was in the dining area, Christian approached her and stuck her middle finger up to her left eye. She allegedly said "I know you know what this sign is. You can see it with your one good eye."

Both Grievants were described as abusing resident Laura P. She was sitting in a room which had a VCR playing an exercise tape. Brown and Christian were in another room. Both Grievants called for her by yelling "crow legs" rather than using her name. Laura P. responded by arriving at their location.

Christian committed another act of abuse by physically assaulting resident Julia S. The resident was sitting between Christian's legs having her hair combed. As this was taking place, Julia S. had her head down with her hands around her mouth area. Suddenly, Christian slapped the resident in the face. Watkins asked her what had been done to deserve such a response. Christian then claimed that Julia S. was going to "sling spit on her."

The Employer posited Watkins' testimony should be given considerable weight since it was highly credible. A number of arguments were proposed in support of this assertion.

Watkins was able to clearly identify the actions as abusive based on her prior experience. Even though April 17, 1995 was her first working day at the facility, she was an experienced mental retardation practitioner with thirty-three (33) years of expertise. At the time of the incident, she held another position at a private residentialcare facility. She, moreover, provided personal and professional care for a sister who has Down's syndrome. As such, the actions engaged in by the Grievants caused tremendous shock and surprise.

Watkins' demeanor on the stand was soft-spoken, strong and assured. The Grievant was never evasive in her responses even when confronted by an unrelenting cross-examination motivated with a desire to discredit her observations.

Unlike Watkins, the Grievants' demeanors were highly suspect. They were hesitant, evasive and confused in their responses. Oftentimes, they demonstrated selective memory in their efforts to maintain their total innocence.

Consistency of testimony was argued in an attempt to challenge the veracity of the Grievants' versions. Brown admitted she lied in an effort to protect herself during the investigation; which caused a great deal of suspicion regarding her testimony at the hearing. Disciplinary history, moreover, failed to support her allegations dealing with disciplinary threats initiated by Jacqueline D. Taylor, the QMRP.

Christian's testimony was also viewed with suspicion. At the hearing, she was clear and insightful regarding her activities during the night in question. She, moreover, provided detailed information pertaining to the residents' histories and behavioral tendencies. Christian, however, was less than forthright in responses offered during cross-examination, and during the investigatory phase of the grievance process.

Watkins' testimony, unlike the Grievants' versions, was extremely consistent throughout the entire process. Her recollections were coherent and detailed. She never wavered from her initial version contained in her statements (Joint Exhibit 3).

Watkins' involvement was not motivated by an animus toward the Grievants. The Grievant never knew the Grievants prior to the night in question. As such, she had no reason to fabricate these allegations. In fact, her participation, and related observations, caused her to leave her place of employment because she feared potential repercussions. She lost her job and other potential personal and professional opportunities because she willingly stepped forward and documented abuse related misconduct.

The Grievants' testimonies, however, should be questioned because they had every reason to lie. They were charged with a very serious offense and possible job loss. These circumstances clearly provided them with a motive to deny patient abuse took place; they have a great deal vested in the outcome of this proceeding.

The Union's entrapment or "plant" theory is unfounded and unsupported by the record. The Union has the burden of proof when raising this affirmative defense. Vague inferences are not enough to support this defense. The Union provided no direct testimony or evidence in support of this fabrication. None of the Union's witnesses had any personal knowledge or direct evidence that Watkins was placed by the facility to “get” the Grievants.

The manner in which the Grievant was compensated further discounts the Union's entrapment theory. Watkins and Holman testified that she was only compensated for the time she worked at the facility. She was never paid as a “plant” which was supported by internal payment documents (Employer Exhibit 7). A mere bookkeeping error fostered the misperception that Watkins remained on the payroll after her departure on April 18, 1995.

Taylor's supervisory style was consistently imposed. She did not discriminate against the Grievants, nor set out to get them fired. Wright's testimony failed to support these accusations. She could not substantiate prior Employer backlashing strategies and her claim that she never had problems with any supervisory staff other than Taylor. In fact, her testimony seemed suspicious since she had no direct knowledge of the disputed incidents. She was on disability leave prior to and after the disputed incident..

Averiett's testimony should be similarly discounted because of certain biasing motivational interests. She admitted that she considered herself to be a friend of the Grievants. Her testimony, moreover, underscored her continued hostility and resentment surrounding her removal and subsequent reinstatement. She also had a negative opinion regarding Taylor's supervisory skills.

Testimony provided by Janet A. Davis, a TPW, countered the Union's contention regarding Taylor's animus toward the Grievants. She claimed Taylor instructed all her staff regarding appropriate behavior toward residents. These discussions dealt with general concerns, but on occasion involved individual counseling sessions. This approach was not limited to prior actions engaged in by the Grievants.

The Union's procedural due process arguments were totally unsupported by the record. Even if this Arbitrator found these representations to be accurate, Article/Section 24.01 precludes a review of the matter

on this basis because just cause is not the standard relied on in an abuse case.

The Union's Position

The Union argued the Grievants did not verbally and physically abuse residents of Warrensville Developmental Center. Watkins' version of the events was challengedas it relates to specific allegations and the Grievants' involvements. Other aspects of Watkins' testimony further reduced her credibility which led the Union to believe she was a “plant.”

Each of the various incidents were challenged which clearly supported the view that the Grievants did not engage in abusive conduct. Brown and Christian never called Laura P. “crow legs." The record clearly indicates the resident rather than the Grievants tended to use this nickname. Averiett, Brown and Christian testified Laura P. frequently called staff, other clients as well as herself "crow legs.” Brown, moreover, denied having heard this phrase during the investigation process. Any failure to confirm ever hearing this phrase during the investigation stage is easily explainable. The Grievants and other staff members have had their statements intentionally twisted during the investigation stage, and then used to support the imposed discipline. The Grievants' failure to fully acknowledge the use of the term “crow legs" is another example of this procedure.

Wanda C. was never taunted or pinched by Brown and Christian. They denied this incident ever took place. Brown testified Wanda C. tends to fight if anyone touches her; she is very aggressive. Watkins never stated Wanda C. exhibited aggressive tendencies once she was pinched. This omission lessened the probability of the incident; especially when one considers the lack of rebuttal surrounding this behavioral tendency. Also, the incident allegedly took place in an open area. A highly unlikely allegation considering the risks involved and the likely presence of a potential "plant".

Christian never slapped Julia S. in the face. The entire episode was fabricated by Watkins. An altercation did take place which was precipitated by the resident. Sheapproached Christian and attempted to head butt her. Fortunately, Christian was able to block the blow by throwing her hand up. Several witnesses testified Julia S. has head butted and injured other staff and residents.

Some of the activities attributed to the resident seem implausible. The resident is profoundly retarded, nonverbal and hearing impaired. As such, staff would never ask a resident with these impairments to get hair curlers.

Christian admitted some altercation involving Elaine P.'s water intake took place. She, more specifically, did lead her away from the water fountain by the arm since she had violated her program. Other portions of Watkins' version were totally denied. Elaine P. never eats chocolate let alone chocolate cake.

Watkins' version regarding the Brandy E. incident was also rejected as unpersuasive. Christian never engaged in the actions alluded to by Watkins. She did intervene but not in the manner suggested. Christian testified Brandy E. wanted some water; and that she prompted the resident to follow her by placing her hand up in the resident's face. Christian employed this approach because Brandy E. responds to verbal and physical prompts. Christian, moreover, noted that supervisors had advised the staff to use these approaches to increase the residents' fluid intake. Watkins admitted she never asked the Grievant what she was doing.

Other credibility arguments regarding Watkins' testimony were raised to discredit her testimony. The reasons underlying Averiett's settlement (Employee Exhibit 7) present a credibility challenge. Clearly, one of the reasons supporting the decision to settle dealt with Watkins' inaccurate depiction of Averiett's telephone activity. Another reason justifying settlement dealt with the residents' behavioral tendencies, andWatkins' lack of understanding regarding other residents' behavioral programs. If these matters caused the Employer to question Watkins' testimony causing a settlement of the dispute, similar inconsistencies dealing with the presently disputed matter should lead to reinstatement.

A critical credibility issue concerned Watkins' failure to report abuse when it happened rather than the following day. She provided various reasons for this failure: she assumed the proper contact personnel were not at work; the charge office did not handle these matters; and she failed to call the police department because she was in shock. Her justifications appeared unpersuasive considering her recent attendance in the new employee orientation program. Topics covered dealt with the facility's abuse policy (Employer

Exhibit 3) and discipline grid (Employer Exhibit 2).

Holman's attempt to support Watkins' charge that she was uncertain of the appropriate reporting procedure is equally unpersuasive. Holman stated she taught Watkins' orientation class which dealt with abuse. She maintained she never advised the group about the reporting process. This testimony was thought to fly in the face of the facility's own abuse policy (Employer Exhibit 3). It states an alleged incident is to be reported immediately to the Charge Supervisor and to the Campus Police. An omission of this sort seems impossible when one realizes that discipline may be imposed for failure to report known incidents of abuse.

Lack of physical evidence supporting the abuse, allegations further discredited Watkins' version of the events. Third shift accepted the cottage without noting any injuries or bruising. Residents were eventually examined by the medical staff who failed to identify any physical evidence of physical abuse.

Watkins remained on the payroll for a considerable period of time after her departure. This status did not reflect sloppy bookkeeping. Rather, an inference can be drawn that some special arrangement had been made involving Watkins and the facility. Watkins was eventually removed from the roster only after the Union 's advocate disclosed that this situation would be probed at the arbitration hearing. As such, Watkins' observations and testimony could have been biased by agreed to future favors.

Watkins' testimony was further tarnished by her responses dealing with criminal proceedings regarding this disputed matter. The Grievants testified that out of ten (10) court appearances, Watkins only attended one (1) and had to be escorted by the Sheriff's Department. Watkins claimed that she was notified of postponements ahead of prearranged court appearance dates. The Grievants, however, were under the impression that the postponements were a consequence of Watkins' failure to appear.

The Union emphasized that the record clearly evidenced reasonable doubt concerning the proofs offered in support of the removal actions. As such, the Employer should be required, for the want of proof, to withhold or rescind the disciplinary actions.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, an impartial review of the record including pertinent contract provisions, it is this Arbitrator's opinion that both Grievants verbally and physically abused residents of the Warrensville Developmental Center. This finding is based on a number of credibility concerns and affirmative defenses raised by the Union which the record failed to support.

Probably the most damaging evidence and testimony dealt with the polar opposite inconsistent explanations provided by the Grievants at the hearing versus evidence provided by their statements (Joint Exhibits 3 and 4). They were basically quite uncooperative during the investigation stage of the process. Ample multiple opportunities were provided to allow a clarification of the record. And yet, they basically denied any personal knowledge of and/or direct involvement in the incidents alluded to by Watkins at the hearing. They were very forthcoming in terms of partially validating some of the incidents which took place while discounting any alleged abusive conduct. They also clearly acknowledged certain resident specific behavioral tendencies in an attempt to discredit Watkins.

The Union's attempt to justify these inconsistencies based on a quasi self-incrimination theory is totally misplaced. The Union has other means at its disposal if the Employer “takes things" out of context and "twists" them to support an imposed discipline. In fact, the Union has won other cases in front of this Arbitrator when such a theory is supported. The Union, however, can jeopardize a case, raise considerable credibility concerns, and thus, make Grievants vulnerable to discipline when it advocates a strategy which minimizes disclosure.

My view of this particular issue is held by a majority of Arbitrators. It is axiomatic that an employee has a duty to cooperate with an employer's investigative efforts. Arbitrator Jones in Thrifty Drug[1] quite adequately articulated this position when he said:

It is manifest that an employee has an obligation, arising from operational necessity, to make reasonable disclosures to his employer of facts which are relevant to the employers operations. If an employer is

honestly seeking facts rather then really just probing for a confession, he is entitled to the cooperation of his employee in achieving reasonable disclosure of his activities or observations while on the job, and this as an incident of the employment relationship.

Here, we do not have any insubordination or a duty to cooperate charge. And yet, the Grievants became vulnerable, and were properly removed, because their disclosures were widely divergent.

The testimony of the new employee, Watkins, was very credible and explicit as to the incidents of April 17, 1995. She was forthright and unshakable in her recollections which made her quite credible. During rigorous cross-examination she never waivered nor engaged in selective perception. All her testimony was corroborated by her prior written statements. Her recollections were viewed quite credibly since they reflected a certain detail even though she was newly hired and unfamiliar with the residents' behavioral profiles. She had no historical perspective to taint her observations, and merely reviewed what she observed on second shift.

The Grievants, themselves, helped to certify the validity of her observations. They alluded to Wanda C.'s aggressive tendencies if touched. Watkins confirmed this view by recalling that Wanda C., screamed and thrashed her arms; clearly aggressive acts. Brown and Christian affirmed that Laura P., used the term "crow legs" when speaking of herself or referring to staff members. Even though the Grievants and Watkins differed on whether Laura P. or the Grievants uttered this phrase, Watkins could never have fabricated hearing such a unique figure of speech. Christian eventually admitted to the water fountain incident involving Elaine P. and explained her water fixation. As such, Watkin's knowledge of this fixation could only have occurred if she observed the incident in question and had it explained by Christian. Finally, Christian's attempt to justify her prompting of Brandy E. by placing her hands in proximity of her face is not viewed by this Arbitrator as a prompting gesture. As a consequence, Watkins' version is more readily believed, Christian admitted to some form of action, an inappropriate one at best, which tends to make Watkins' account more believable.

In disciplinary cases, most arbitrators resolve conflicts between testimony of the Grievant and others representing management's interests by applying certain presumptions. This point was properly articulated by Arbitrator William F. Dolson in United Parcel Service:[2]

[A]n accused is presumed to have an incentive for not telling the truth and that when his testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed.

Here, Watkins had nothing to gain or lose as a consequence of her testimony. The Grievants, however, had a great deal of incentive for distorting the truth because their jobs were in jeopardy; an incredible self-interest to protect. Similarly, Averiett and Wright, the Grievants admitted friends had their friends' job interests to protect. Averiett had an additional motivation based on her previous removal experience.

Neither Taylor's purported animus toward the. Grievants nor the proposed planttheory were supported by the record. Taylor never disciplined the Grievants for their work performance. Her supervisory style and method of communicating do not establish a predisposed desire to remove the Grievants. In fact, her involvement in the present dispute seems highly misplaced; it did not exist. Watkins' observations, not Taylor's, caused the investigation and subsequent removal.

Rumors and innuendo do not establish an entrapment or “plant" theory. A theory of this sort serves as an affirmative defense requiring specific expressions of intent and motivation. Just because Watkins remained on the roster after her departure does not provide sufficient proof of this allegation. The record clearly indicated she was never paid for services after her departure. One can reasonably conclude her presence on the roster was a mere bookkeeping error.

AWARD

The grievances are denied.

October 18, 1996
Dr. David M. Pincus
Arbitrator

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[1] Thrifty Drug, 50 LA 1253 (Jones, 1968).
[2] United Parcel Service, 66-2 ARB P 8703 (Dolson, 1966).