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**OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN
OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES
-AND-
Ohio Civil Service Employees Association AFSCME Local 11**

Appearing for the Ohio Department of MRDD

Robin Bledsoe, Human Resource Specialist
Barbara Caldwell, Nurse Director
Laura Frazier, Labor Relations MRDD
Julia M. Hadsell, Former TPW
Ruth A. Renak, Labor Relations Coordinator
Matthew Richards, Police Officer II
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Krista Weida, Labor Relations Specialist (OCB)
D. Eric Young, Program Director

Appearing for OCSEA

Sharon L. Brown, OCSEA Steward
Brenda Halfhill, Speech TPW
Debra Lynn Gooderham, LPN
Emily Miller, TPW
Paula Rainey, Grievant
Michael Scheffer, OCSEA Staff Representative

CASE-SPECIFIC DATA

Grievance No.

Grievance No. 24-07- (09-02-03)-0969-01-04

Hearing Held

June 30, 2004

Post-Hearing Briefs Submitted

7/15/04

Case Decided

8/14/04

Subject

Removal-Client Abuse

The Award

Grievance Denied

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Facts

The parties to this dispute are the Ohio Department of Mental Retardation and Developmental Disabilities ("the Agency") and the Ohio Civil Service Employees Association ("the Union"),¹ which represents Ms. Paula Rainey ("the Grievant"). This dispute involves the removal of the Grievant. At the outset of the arbitral hearing, the Union objected to not having received a video tape it had repeatedly requested from the Agency, but that objection was subsequently withdrawn.² There were no other procedural objections in this dispute, and the Parties agreed that it was properly before the Arbitrator.

On or about August 26, 2003, the Agency removed the Grievant from her position as Therapeutic Program Worker ("TPW") at the Gallipolis Developmental Center ("GDC") based on allegations of client abuse. When she was removed, the Grievant had approximately 2½ years of service with the Agency and had active discipline in the form of an oral reprimand for failure to follow policy.

The Agency modified its charges against the Grievant during the arbitral hearing. The Agency originally charged the Grievant with two separate episodes of client abuse: (1) using her fist to forcefully strike or punch "B" ("the Client") on her upper arm approximately three times; and (2) injuring the Client's lip. During the arbitral hearing, however, the Parties agreed to drop the charge associated with the Client's alleged lip injury. The Parties further agreed that the decision to drop this charge against the Grievant does not indicate her innocence thereof. Accordingly, the Parties stipulated that the sole issue before the Arbitrator in this dispute is whether a preponderance of evidence in the record as a whole establishes that the Grievant physically abused the Client by striking her on the upper arm. Furthermore, the Parties stipulated that the Arbitrator should consider only evidence pertaining to the allegation that the Grievant physically abused the Client and "make all determinations based on the evidence presented at the hearing

¹ Hereinafter collectively referred to as "the Parties."

² Joint Exhibit 3b.

regarding the alleged arm injury.”¹³

Several peculiarities about the Client warrant mentioning at the outset. The Client is mute and usually utters only her own peculiar, inarticulate sounds. Also, the Client frequently suffers from self-inflicted injuries.¹⁴ Indeed, she is forced to wear a helmet—which she often tries to remove—to keep her from smashing her head against objects. Also, the Client pinches various areas of her body and throws herself onto the floor. “[The Client] . . . is completely deaf and utilizes sign language for communication. [The Client] . . . will have spontaneous self injurious behavior (“SIB”); i.e., go to the floor to strike her head and this can be several times. She will become aggressive to staff if they intervene. . . .”¹⁵

Ms. Julia Hadsell encountered problems her first day on the job until she resigned a few days later. The Agency hired Ms. Hadsell as a TPW on or about July 7, 2003. Although she was delighted to get the position, Ms. Hadsell’s negative, on-the-job experiences began during her first day at work and persisted in some form until her premature resignation. During Ms. Hadsell’s first day on the job, co-workers advised her to remain silent about any untoward situations between staff and clients. Indeed, one coworker flatly told Ms. Hadsell that if she blew the whistle on a coworker for mistreating a client, other coworkers would retaliate by bribing clients to say that Ms. Hadsell abused them. Finally, during her first day at work, Ms. Hadsell observed several other episodes of client abuse, which are not before the Undersigned in this hearing.

The relevant facts leading to the charge against and removal of the Grievant are set forth below. The alleged abuse occurred on or about July 9, 2003 between 3:30 and 4:30 PM.¹⁶ Ms. Hadsell was returning to her assigned dorm or living area after escorting another client, Athena, to cash her check. When Ms. Hadsell

¹³ Parties’ stipulation. The full language of the stipulation is as follows: “Management agrees to stipulate that the charges relating to the alleged client abuse resulting in an injury to Barb K.’s lip be removed from the removal order. This does not constitute a statement of the Grievant’s innocence with regard to the lip injury. This stipulation is only an agreement to leave this evidence out of the hearing and make all determinations based on the evidence presented at the hearing regarding the alleged on injury.”]

¹⁴ Union Exhibit 1, Joint exhibit 25 a-b, and testimony from management and union witnesses.

¹⁵ Joint Exhibit 32b.

¹⁶ Joint Exhibit 12m.

entered the dorm and began walking down the main hall, she heard the Client making her usual sounds, which were coming from the female day room of the Living Area 6040 ("Living room").¹⁷ That room is approximately 13 X 30 feet, walled on three sides, and is accessible from the main hall through an entryway approximately the length of the longest wall. Every section of the living room is plainly visible from the main hall.¹⁸ As Ms. Hadsell walked past the living room, she observed the Grievant sitting beside the Client on a sofa that faced the main hall. The Grievant was sitting on the very edge of the sofa to the right of the Client, positioned so that her body was more or less perpendicular to the Client, who was sitting straight back in the sofa. The Grievant's position on the sofa placed her back to Ms. Hadsell, thereby preventing the Grievant from seeing Ms. Hadsell walk past the living room. During the 10-15 seconds that Ms. Hadsell walked past the entryway to the living room, she saw the Grievant punch ("drill") the Client on the upper right arm three or four times, causing her to squeal, whine, or sob in a manner different from her usual sounds. As she passed the entryway, Ms. Hadsell also saw three other clients but no staff in the living room. Ms. Hadsell recognized one of the clients as "Linda" but did not recognize the other two until she examined their photographs during the subsequent administrative investigation. As Ms. Hadsell walked passed the room, one of the clients made eye contact with her with an expression that Ms. Hadsell interpreted as "please do something." Instead of intervening, Ms. Hadsell, upset and confused, walked past the entry, and proceeded down the hall where she placed Athena's check receipt under her supervisor's door. Then she returned to the living room, sat on an ottoman approximately perpendicular to the sofa where the Grievant and the Client were sitting, and began paging through a magazine, while considering the incident she had just witnessed. Between the time Ms. Hadsell observed the incident and returned to the living room, a co-worker, Ms. Emily Miller, had entered the living room. Shortly thereafter, the Grievant began communicating with the Client in sign language ("Signing") and stating aloud, "No, I'm mad at you; no, I'm mad at you." The

¹⁷ Joint Exhibit 7a.

¹⁸ Joint Exhibit 8

Grievant then showed Ms. Hadsell a spot on the back of her hand that the Client had allegedly bit.

A site visit to the living room helped to solidify the descriptions of that area, even though Ms. Hadsell could not recall all of the facts and circumstances that occurred on July 9, 2003. For example, she could not recall whether the lights were on in the living room when she allegedly observed the abusive incident, but she noticed that since that date someone had rearranged the furniture, e.g., a love seat replaced the original sofa. Also, Ms. Hadsell recalled that the curtains behind the sofa (now the love seat) were open when she observed the Grievant punching the Client.

The Agency sought to recreate the setting of the incident by positioning certain individuals in the positions of key parties when the Grievant punched the Client. Thus, Ms. Robin Bledsoe stood in the hallway where Ms. Hadsell had stood when she observed the incident. Ms. Ruth Rehak took the Client's position on the sofa, and Ms. Hadsell assumed the Grievant's position on the sofa next to Ms. Rehak. With those individuals in place, it was clear that Ms. Hadsell was no more than fifteen feet away when she observed the Grievant strike the Client. In this recreated scene, Ms. Hadsell demonstrated how and where she saw the Grievant punch the Client and flatly rejected the proposition that the Grievant was merely reaching toward the Client to keep her from throwing herself to the floor.

Ms. Hadsell did not immediately report the incident to management. She hesitated primarily because a coworker had warned her that she would lose her job if she blew the whistle on fellow employees. Consequently, Ms. Hadsell went home at the end of her shift and agonized about her observation and what she should do. In route to work the next day, Ms. Hadsell was still confused and upset and twice turned her vehicle around to return home. Ultimately, she decided to go to work, arriving there at approximately 12:30 PM when she was scheduled to begin at approximately 8:30 AM.

Upon arriving at work, she reported the incident to Ms. Sandra McCreedy¹⁹ and shortly thereafter resigned from her position. Disillusionment with how staff treated clients, some harassment from the

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Joint Exhibit 15a.

staff-refusal to work with her and making obscene gestures at her—and fear of further coworker retaliation prompted Ms. Hadsell to resign.

The Agency launched an administrative investigation, on or about July 10, 2003. Apparently as part of that investigation an agency nurse examined the Client on that same day but found no bruise on her right upper arm.¹⁰ On July 11, 2003, however, Nursing Director Barbara Caldwell again physically examined the Client and found faint, bluish bruise on her upper right arm.¹¹ Nurse Caldwell offered several possible reasons that no bruise were found during the July 10 physical examination. First, the bruise may have been too fresh to be visible during that examination. According to Nurse Caldwell, bruises tend to change color or hue over time, acquiring a bluish hue or color approximately seventy-two hours after the causal impact. Skin color and firmness as well as location of the injury can affect bleeding and clotting time. Second, the examination room could have been poorly lit. Third, the examiner's visual skills may have been a factor. Finally, the Client's position during the exam may have obscured the bruise. In any event, Nurse Caldwell concluded that the size and shape of the bruise on the Client's upper right arm were consistent with the type of mark that punches might produce. Based primarily on the testimony of Ms. Hadsell and the photographs, the Agency removed the Grievant on or about August 26, 2003.¹²

II. Relevant Contractual and Regulatory Provisions

Article 24.01

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* . . . 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 and Neglect of Individuals in Residence

* * * *

DEFINITION

* * * *

Abuse – the ill treatment, violation, revilement, malignant, exploitation, and/or disregard of an individual, whether purposeful or due to carelessness, inattentiveness, or omission of the perpetrator.

¹⁰ Joint Exhibit 25.

¹¹ Joint Exhibits 9a-c, 26b.

¹² Joint Exhibit 4a.

Physical abuse – any physical motion or action (e.g. hitting, slapping, punching, kicking, pinching) by which bodily harm or trauma may occur.

III. The Issue

Although the Parties did not offer a submission agreement, the Agency articulated the issue as follows: “Did the Employer have just cause to remove the Grievant? If not, what shall the remedy be?” The Arbitrator adopts the Agency’s statement as a fair articulation of the issue in this case.

IV. Summaries of the Parties’ Arguments

A. Summary of the Agency’s Arguments

1. Ms. Hadsell saw the Grievant punch the Client three times on her upper right arm.
2. Ms. Hadsell is more credible than either Ms. Miller or the Grievant.
3. A bruise on the Client’s upper right arm was consistent with her being punched there.
4. Ms. Miller was not in the living room when the Grievant punched the Client.
5. Striking a client constitutes physical abuse in direct violation of the Agency’s explicit policy.
6. The Agency’s policy provides for removal for the first instance of client abuse.
7. Although the Union afforded alternative explanations for the bruise on the Client’s arm, those explanations fail to rebut the charge of abuse against the Grievant.

B. Summary of the Union’s Arguments

1. The Agency failed to conduct a thorough investigation, which precludes removal as a penalty.
2. The Agency failed to follow its own policy of issuing an Unusual Incident Report.
3. Ms. Miller’s testimony that the Grievant never struck the Client is more credible than Ms. Hadsell’s, which is fraught with inconsistencies.
4. Given her prior training in MRDD, Ms. Hadsell should have quickly recognized the impropriety of punching a client and immediately reported the incident.
5. Something other than a punch very well could have bruised the Client’s right arm.

V. Analysis and Discussion

As is customary in disciplinary disputes, the Agency has the burden of proof (burden of persuasion) and can prevail in this case only by establishing its charges against the Grievant by preponderant evidence in the record as a whole. Similarly, the Union has the burden of persuasion with respect to its affirmative defenses. With these basic evidentiary considerations in mind, the Arbitrator now turns to a discussion and analysis of the case.

Success of the Agency’s case hinges primarily if not entirely on the credibility of Ms. Hadsell as an eyewitness to alleged client abuse and perhaps secondarily on the photographs of the Client’s upper right arm. Ms. Miller is the Union’s eyewitness and her testimony in rebuttal of Ms. Hadsell’s is the major obstacle for the Agency in proving its case. It is, therefore, small wonder that both Parties’ Post-hearing

Briefs largely focus on the credibility of Ms. Hadsell and Ms. Miller. Accordingly, the ensuing analysis and discussion scrutinizes both the testimonies and investigative statements of these witnesses.

A. Credibility of Ms. Hadsell and Ms. Miller

For reasons set forth below, the Arbitrator finds that Ms. Hadsell's testimony is more credible than Ms. Miller's. Based upon this assessment of credibility, the Arbitrator finds that on or about July 9, 2003 the Grievant forcefully punched the Client on the right upper arm several times. Finally, the Arbitrator holds that the Grievant's conduct constituted client abuse, which the Agency's rules expressly forbid.

1. Major Undisputed Facts

Before assessing the credibility of Ms. Miller and Ms. Hadsell as to the undisputed facts in this case, a recitation of the following *undisputed* facts is indicated:

1. Between 3:30 and 4:30 PM on July 9, 2003, Ms. Miller asked Ms. Hadsell to accompany Athena to the business office to cash her check.
2. After cashing Athena's check, Ms. Hadsell and Athena returned to the dormitory.
3. Athena then went to her room and Ms. Hadsell walked down the hall past the living room and slipped Athena's check receipt under the door of a supervisor's office.
4. Ms. Hadsell then returned to the living room, sat on an Ottoman near the couch where the Grievant and the Client were sitting, and began to leaf through a magazine.
5. While Ms. Hadsell was sitting in the living room with the Grievant and the Client, the Grievant signed and verbally told the Client: "No, I'm mad. . . ."
6. Between 3:30 and 4:30 PM, the Client was squealing or sobbing in an unusual manner.¹³

Nothing in the arbitral record either rebuts or attempts seriously to rebut the foregoing facts.

2. Major Disputed Facts

a. Location of Ms. Miller

Although this case has numerous disputed facts, some are more relevant and probative than others. The bottom-line issue is whether the Grievant punched the Client on July 9, 2003 as Ms. Hadsell alleges. To resolve that issue, one must first determine whether Ms. Miller was in the living room when the alleged abuse occurred. Since Ms. Miller is the Union's eyewitness whose testimony directly challenges Ms. Hadsell's

¹³ Both Ms. Hadsell and Ms. Miller agreed that the Client was crying or squealing during the period in question, but Ms. Miller declared that those unusual sounds resulted from the Client's SIB and not the Grievant's punches.

allegation that the Grievant struck the Client, a pivotal *undisputed* fact is Ms. Miller's location when the Grievant allegedly struck the Client.

Ms. Miller claims that she was in the living room during the alleged abuse; Ms. Hadsell insists that Ms. Miller was elsewhere. Ms. Hadsell alleges that as she walked past the living room to slide the check receipt under the supervisor's door, she observed the Grievant repeatedly strike the Client. Therefore, the issue reduces to whether Ms. Miller was in the living room *when Ms. Hadsell walked past*, since that was when the alleged abuse occurred.

A careful reading of the Grievant's, Ms. Hadsell's, and Ms. Miller's investigative interviews as well as their arbitral testimonies establish that more likely than not Ms. Miller was not in the living room when Ms. Hadsell walked past and allegedly saw the Grievant punching the Client. The arbitral record establishes that, between 3:00 and 4:30 PM, Ms. Miller was out of the living room on at least four separate occasions. First, she left the living room to assist clients with their laundry. Thus, Ms. Miller stated: "I had the ladies [clients] putting their clothes away."¹⁴ Similarly, the Grievant stated: "[Ms. Miller] . . . had been putting away laundry. . . . [Ms. Miller] . . . was putting away laundry. . . ."¹⁵ The testimonies of Ms. Miller and the Grievant corroborate their investigative statements on this point. Second, Ms. Miller left the living room to help pack clients' lunches in the kitchen. During her investigative interview, Ms. Miller stated: "[S]o I took all the close clients to kitchen so I could pack lunches. . . ."¹⁶ Likewise, in her investigative interview, the Grievant asserted: "[Ms. Miller] . . . took a couple of the clients in there [the kitchen] I believe to pack lunches."¹⁷ Third, Ms. Miller left the living room to prepare for the clients' showers. Thus, under direct examination, the Grievant testified that Ms. Miller was "getting stuff ready for the clients' showers." Also, Ms. Hadsell's investigative statement asserts: "[Ms. Miller] . . . was in the restroom, she was moving, I mean

¹⁴ Joint Exhibit 20a.

¹⁵ Joint Exhibit 16c.

¹⁶ Joint Exhibit 20b.

¹⁷ Joint Exhibit 16c.

I'm not positive but she was either in the girls rooms or the restroom because what she was doing was getting there [sic] stuff ready for showers. She was getting ready to give showers."¹⁸ Ms. Hadsell's arbitral testimony essentially corroborated this statement.

Finally, and most important in this case, Ms. Miller left the living room to get "kit boxes" for conducting activities with clients. She got the "kit boxes" from the clients' bedrooms and then returned to the living room to conduct activities with the clients. In this respect, Ms. Miller offered the following investigative statement: "So I then took my close clients back in ladies living room to do some activities. . . ."¹⁹ Under direct examination during the arbitral hearing, Ms. Miller further explained that she left the living room to get "kit boxes" from the clients' bedroom. But, under cross-examination, she claimed that when she left the living room to get the "kit boxes," Ms. Hadsell had not returned from cashing Athena's check. What is pivotal here is that Ms. Miller's investigative statement also states: "I then took my close clients back in ladies living room to do some activities. I was doing activities with clients for *just a couple of minutes* when the new girl came back with Athena. [Ms. Hadsell] . . . came in and sat in the living room in chair beside . . . [the Client] [on?] couch."²⁰

Although the foregoing passages clearly place Ms. Miller outside of the living room on several occasions between 3:00 and 4:30 PM on July 9, 2003, the last statement is critical in determining whether Ms. Miller was in the living room when Ms. Hadsell walked past and allegedly saw the Grievant striking the Client. First, Ms. Miller never stated that she saw Ms. Hadsell walk past the living room.²¹ Yet, this was the precise time that Ms. Hadsell claimed to have observed the Grievant punching the Client. By her own testimony and investigative statement, Ms. Miller only saw Ms. Hadsell *enter the living room* and sit on an ottoman beside the couch occupied by the Grievant and the Client. And, as set forth in the statement above, Ms. Hadsell

¹⁸ Joint Exhibit 121.

¹⁹ Joint Exhibit 20b.

²⁰ *Id.* (emphasis added).

²¹ The Grievant admitted that she did not see Ms. Hadsell pass by the living room entryway.

entered the living room and sat down *within minutes* after Ms. Miller returned with the “kit boxes” and began activities with the clients. The timing of these events supports a factual finding, and the Arbitrator so finds, that when Ms. Hadsell walked past the living room and allegedly observed the client abuse, Ms. Miller had more likely than not left the living room to get the “kit boxes.” In short, Ms. Miller was not in the living room at that time.

3. Other Problems with Ms. Miller’s Credibility

a. Overstatement of Facts

Other evidence in the record suggests that Ms. Miller may be given to overstating her position. A prime example of this occurred when she categorically and emphatically testified that her investigative statement about the Grievant’s interaction with the Client between 4:00 and 4:30 PM was *absolutely complete*. In addition, Ms. Miller stoutly testified that she had observed *all* interactions between the Grievant and the Client during that thirty-minute period. Under cross-examination, however, Ms. Miller could not explain why her investigative statement was silent with respect to the Grievant’s signing and verbalizing to the Client: “No, I’m mad with you. . . .” Clearly, Ms. Miller either did not *observe* all of the Grievant’s and Client’s interactions between 4:00 and 4:30 PM, as she asserted, or, notwithstanding her strong assertion to the contrary, she neglected to *report* all interactions between the Grievant and the Client that she in fact observed. Either way she overstated her position. Such glaring overstatements tend to weaken a witness’ credibility not only in the specific area of the overstatement, but also the witness’ credibility as a whole.

b. When Did the Grievant Shower the Client

Another fundamental factual conflict exists between Ms. Miller on the one hand and the Grievant and Ms. Hadsell on the other. The conflict pertains to when the Grievant showered the Client on July 9, 2003. The Grievant’s investigative statement suggests that she showered the Client between 4:00 and 4:30 PM. And during the shower, the Client tried to strike her head against the unpadded shower wall. When the Grievant placed her hand between the Client’s head and the wall, the Client’s teeth struck the back of the Grievant’s hand, thereby injuring the Grievant’s hand and the Client’s lip. After the shower, the Grievant

and the Client returned to the couch in the living room, where the Grievant began signing and verbalizing to the Client that she was mad. Clearly, Ms. Hadsell was present at that time because she observed the Grievant's signing and uttering that statement to Client. Thus, the Grievant's version suggests that she showered the Client and returned her to the couch *before* Ms. Hadsell entered the living room and sat on the ottoman.

In contrast, Ms. Miller's investigative statement suggests that Ms. Hadsell was sitting in the living room paging through a magazine when the Client signed to the Grievant that she wanted to take a shower. According to Ms. Miller, the Grievant then took the Client into the shower (where the Client tried to bang her head against the wall) and returned to the living room and resumed activities.¹²² Then Ms. Miller stated that Ms. Hadsell left at 4:30. The problem is that neither the Grievant nor Ms. Miller indicated that Ms. Hadsell was *present* when the Grievant left the living room to shower the Client. In fact, the Grievant's version of this event is essentially consistent with Ms. Hadsell's because the Grievant's hand was already injured (presumably from the incident in the shower) when Ms. Hadsell entered the living room and sat down. Moreover, Ms. Hadsell's investigative statement and testimony clearly indicate that she was in the living room when the Grievant was signing the Client, an event that occurred after the Grievant was injured in the shower. This leaves Ms. Miller's version of this episode in direct conflict with Ms. Hadsell's and the Grievant's versions, raising more suspicion about Ms. Miller's credibility.

4. Ms. Hadsell's Credibility

The Arbitrator hardly intended for the foregoing discussion to suggest that somehow Ms. Hadsell was the *perfect* witness. She was not. Still, *overall*, she was an entirely *credible* witness because, as a witness, her pluses substantially offset her minuses, which is not true with respect to Ms. Miller. First, Ms. Hadsell's

¹²²

Joint Exhibit 20c-d.

account of the alleged abuse is detailed and suffered no significant internal inconsistencies.²³ For example, she consistently described the position of furniture in the living room when and where the alleged abuse occurred. She offered a detailed and consistent description of the Grievant's and the Client's positions on the couch during and after the alleged abuse. And, she described how, upon being punched, the mute Client emitted a cry noticeably different from her usual sounds. When testifying during the arbitral hearing, she did not become defensive or evasive when confronted with conflicting or potentially impeaching evidence. For example, although some passages in her investigative statement are garbled, she freely admitted being at a loss to explain the existence of the garble, which seemed nonsensical to her. Instead, she pointed out that despite the garble the facts were correct. Nor was she able (and she did not even try) either to explain (not to mention justify) why she failed immediately to report the alleged patient abuse. More important, however, not once did she waiver or contradict herself with respect to the facts and circumstances surrounding her observation of the alleged abuse.

Second, the Arbitrator concludes that Ms. Hadsell was indeed quite enthusiastic about her new employment with the Agency and that some relatively traumatic event(s) forced her to prematurely resign after a few days on the job. That Ms. Hadsell enjoys working with the mentally challenged is reflected not only by her employment history, but also by her seeking employment with the Agency in this case and her obtaining similar employment after resigning from the Agency.²⁴ Given Ms. Hadsell's demonstrated attraction for working with mentally challenged individuals, the Arbitrator is persuaded that only a relatively traumatic event could have forced her to resign after only a few days, despite management's efforts to retain

²³ On the other hand, Ms. Hadsell's account of when Ms. Miller entered the room differs from that of Ms. Miller and the Grievant, both of whom claim that Ms. Miller was in the room when Ms. Hadsell entered and sat down. In contrast, Ms. Hadsell testified that she entered the living room first, and had communicated with the Grievant before Ms. Miller entered the living room carrying a laundry basket. But as set forth above, this *external inconsistency* and similar ones do not erode Ms. Hadsell's credibility as a witness, especially with respect to her account of the specific client abuse in this case. A second external inconsistency occurred where Ms. Hadsell denied discussing anything with Ms. Miller when they were in the living room together, but Ms. Miller and the Grievant claimed that Ms. Miller began to explain client activities to the Grievant.

²⁴ In fact, Ms. Hadsell has a relative that suffers from some form of mental malady.

her. Because her resignation occurred almost immediately after she reported the Client's abuse (along with several other episodes of abuse of other clients), one can reasonably conclude that client abuse was a major if not the pivotal factor in Ms. Hadsell's decision to tender her resignation.

Third, nothing in the record even begins to suggest that Ms. Hadsell had some "ax to grind" with the Grievant or with any other coworker. Nor is there evidence that any coworker, including the Grievant, harbored malice or animus toward Ms. Hadsell, at least not before she blew the whistle in this case. It simply makes no sense for Ms. Hadsell to flirt with the wrath of and potential retaliation from her coworkers just to falsely accuse the Grievant. Finally, the Grievant's statement that she was "mad" with the Client is consistent with and tends to explain why she might have punched the Client.

B. Impact of the Photographs

Standing alone, in the particular facts of this case, the photographs of the faintly discolored area on the Client's upper right arm, without more, are hardly conclusive evidence that she was punched at all, let alone punched by the Grievant. This is not to say that absolutely no nexus exists between the photographs and the claim that the Client was punched. Commonsense and Nurse Caldwell's testimony suggest that blows could have caused the discoloration.

On balance, however, there are too many other potential causes for the bruise and too little clear explanation linking the bruise to the Grievant. Other potential causes include the Client's strong tendency for SIB, her proclivity to bruise easily, and the accidental bruises or scratches that staff accidentally inflict upon the Client when trying to prevent her from engaging in SIB. Also, the faintness of the bruise is inconsistent with two other facts in the case: The Client bruises easily, and the Grievant forcefully punched her three or four times. These two facts suggest that, other matters equal, the bruise perhaps should have been darker or more prominent. Perhaps it was and the photographs did not capture that fact. Indeed, during her testimony, Nurse Caldwell earnestly sought to assess the general age of the bruise by its color and testified that its general shape was consistent with a blow from a fist. Ultimately, though she admitted, under cross-

examination, that the photographs were neither dispositive nor probative of whether the Grievant punched the Client or when she was punched. In short, the photographs were inconclusive (the bruise could have been merely coincidental) and did not lend themselves to an accurate assessment of the bruise.

In light of these facts and observations, the Arbitrator holds that the photographs of the Client's upper right arm do not advance the Agency's case against the Grievant. At best they suggest that the Client did in fact suffer some perhaps relatively mild trauma to her upper right arm.

VI. The Penalty Decision

The testimony and investigative statements together with other corroborative evidence set forth above constitute preponderant evidence that the Grievant physically abused the Client on or about July 9, 2003. Therefore, some measure of discipline is indicated. And Article 24.01 as well as the Agency's policies explicitly prohibit the Arbitrator from modifying or otherwise disturbing the Agency's penalties once client abuse is established as it has been in this case.

VII. The Award

Accordingly, the Arbitrator holds that the *Grievance is denied* in its entirety and the Grievant's removal was for just cause.



Robert Brookins, Labor Arbitrator. J.D. Ph.D.