

#895

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 DEVELOPMENTAL CENTER

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,  
LOCAL 11, AFSCME

GRIEVANT: CLARINDA HODGE  
GRIEVANCE NO.: 24-14-20030609-2637-01-04

ARBITRATOR'S OPINION AND AWARD  
ARBITRATOR: DAVID M. PINCUS  
DATE: APRIL 18, 2005

APPEARANCES

For the Employer

Shari G. Zuckerman  
Cornell Hale  
Laura Frazier  
Karen Reich  
Kim Thorp Ward  
Christine Breslin  
Krista Weida

Health & Safety Administrator  
Labor Relations Officer 3  
Labor Relations Officer 3  
Human Resource Specialist 2  
QMRP  
LPN  
Advocate

For the Union

Clarinda Hodge  
Antonio May  
Deborah Hudson-Tucker  
Curtis Bishop  
Robert Ellis

Grievant  
TPW  
TPW  
President  
Custodial

### INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Department of Mental Retardation and Developmental Disabilities, hereinafter referred to as the Employer, and the Ohio Civil Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union, for the period March 1, 2003 through February 28, 2006 (Joint Exhibit 1).

An arbitration hearing was held on January 4, 2005 at Warrensville Developmental Center, Cleveland, Ohio. 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 guidelines established at the hearing.

### JOINT ISSUE

Did the Grievant, abuse a resident at the Warrensville Developmental Center? If not, what shall the remedy be?

### JOINT STIPULATIONS

- Grievant began her employment with the Department on November 19, 2001.
- The Grievant's past disciplinary history includes: Oral Reprimand for Inefficiency/Incompetency in May 2002, a Written Reprimand for Poor Judgment (client related) in July 2002, a 2-day working suspension for insubordination (refusal of mandatory overtime) in September 2002, and a 5-day working suspension for Insubordination (refusal of mandatory overtime) in November 2002.
- The Grievant was removed from her position as a Therapeutic Program Worker in June of 2003.

## 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 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. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the 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(1).

#### **24.02 – Progressive Discipline**

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. one or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. working suspension;
- D. one or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB.
- E. one or more day(s) suspension(s);
- F. termination

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages or fines, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine or;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks

under such terms as may be mutually agreed to between the Employer, employee, and the Union.

(Joint Exhibit 1, Pg. 72)

#### 24.05 – Imposition of Discipline

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Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

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(Joint Exhibit 1, Pg. 74)

#### CASE HISTORY

At the time of the disputed incident, Clarinda Hodge, the Grievant, was employed as a Therapeutic Program Worker (TPN). She held this position since November 19, 2001. At the time of her removal, the Grievant had worked for approximately a year and a half at the facility.

Warrensville Developmental Center (WDC) provides services and support for disabled residents. These residents have certain disabilities which prevent them from being housed in community-based facilities. Its purported primary mission is to assist each resident in reaching his or her fullest psychological, social, physical, and spiritual potential.

On February 5, 2003, at approximately 3:10 p.m., June Boynton, a police secretary took a phone call from Bob Case, MUI Coordinator, at the Cuyahoga County MRDD. Case reported that his office had received an anonymous call which involved allegations of resident abuse at WDC. A temporary staff nurse reported that on February 14, 2003, regular staff in House 4200, acted very aggressively toward the residents.

Christine Breslin, the temporary staff nurse, maintained she passed medication two times between 6:00 p.m. and 8:00 p.m. On both occasions she observed four naked residents wandering throughout House 4200. They were covered with urine, food and feces.

Lamont was one of the naked residents. At the time of the disputed incident Lamont was a twenty-nine year old African-American male admitted to WDC at the age of ten. He is profoundly mentally retarded with a seizure disorder and is non-verbal, but can understand English.

At approximately 8:30 p.m., Breslin observed the Grievant smack Lamont on his naked buttocks while standing in the office area behind the counter. All of the staff in House 4200 allegedly witnessed this abusive event. The Grievant, moreover, threatened Lamont with a raised fist and called him a Mother F\_\_\_\_\_r.

At some subsequent time toward the end of the shift, Breslin spoke to Douglas McKenzie, a Registered Nurse, and advised him what she had seen in House 4200. When asked what she should do, he told her to place her observations in writing and submit them to the Director of Nursing. Breslin remarked she preferred to tell someone directly what she saw rather than put her findings on a formal written document (Employer Exhibit 2).

On May 23, 2003, the Grievant was removed from her position. Theresa A. Lynn, the Appointing Authority/Designee, notified the Grievant of the disputed Administrative Action. She provided the following rationale:

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This will notify you that you are being removed from the position of TPW effective:

The reason for this action is that you have been guilty of Client Abuse, to wit: On 2/4/03, you were observed hitting a consumer on the buttocks, threatening a consumer with your raised fist, and swearing at consumers. On other occasions you were observed threatening to physically harm a consumer, using profanity towards consumers and using threatening gestures towards consumers. These actions are violations of the Center's Policies and Procedures.

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**(Joint Exhibit 10)**

On June 9, 2003, the Grievant formally protested the above mentioned disciplinary action. She maintained the removal was not for just cause (Joint Exhibit 3).

Neither party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

**THE MERITS OF THE CASE**

**The Employer's Position**

The Employer posited that the Grievant engaged in physical abuse of Lamont. Removal was, therefore, warranted for an initial offense as specified in the Standards of Employee Conduct (Joint Exhibit 2).

The removal decision was based primarily on the testimony provided by Breslin. During the shift, Breslin observed several residents in House 4200 walking around covered in urine, feces, and food. At bedtime, Breslin entered Lamont's room and noticed he was covered in urine. She asked whether anyone was going to change him, and the Grievant eventually did, but appeared to be aggravated. As Lamont was being changed, the Grievant directed foul language towards him, grabbed him and "cracked" him on his butt. Breslin viewed the smack as severe enough to be deemed abusive.

Breslin's testimony should be given a great deal of weight. She held no animus toward the Grievant. She never knew, worked nor met the Grievant prior to the evening in question.

Breslin's testimony should not be minimized as a consequence of a collateral criminal proceeding involving the Grievant's misconduct. The Union was unable to provide any evidence that the criminal proceedings were dropped because Breslin failed to testify. Breslin admitted she attended several scheduled hearing dates, but on other occasions the subpoenas had been sent to the wrong address.

This collateral outcome, moreover, does not bind the Arbitrator's present analysis. As such, the criminal outcome cannot be used to prove the matter asserted.

The Grievant was unable to provide any convincing evidence or testimony which rebutted the abuse allegation. She admitted nothing out of the ordinary occurred on the day in question. The Grievant, moreover, did not identify any prior relationship or negative incidents with Breslin.

Union witnesses and fellow TPW's, Antonio May and Debbie Hodson-Tucker, did not provide testimony which aided the Grievant's case. They did not see any abuse on the shift in question. Opportunity to observe the Grievant throughout the shift, however, precluded an absolute defense in the Grievant's favor.

Obviously the primary focus of any analysis rests with the conflicting testimony provided by the Grievant and Breslin. Breslin's version should be believed since she has no presumed incentive for not telling the truth.

### The Union's Position

The Union opined the evidence and testimony do not support removal. The Grievant never engaged in abusive conduct toward Lamont and should, therefore, be reinstated to her former position. She neither spanked, swore, nor raised her fist in a threatening manner.

The record exposes serious credibility problems with Breslin's version of events. If Breslin truly believed this abusive conduct had taken place, she could have eagerly provided testimony at the Grievant's criminal proceeding. Yet Breslin failed to appear for approximately forty combined pre-trials and hearing dates. Her absences are not viewed as justified. Inaccurate subpoena addresses and work schedule issues were viewed as totally unpersuasive justifications. The collateral matter was eventually disposed of without any significant input from Breslin. There were two indictments and two dismissals (Union Exhibit 4 and 5) as a consequence of Breslin's non-attendance.

Nothing out of the ordinary took place on the night in question. The Grievant and other Union witnesses provided credible consistent testimony regarding the events raised in support of removal. Their testimony, moreover, was bolstered by statements which reflected their testimony at the hearing.

Breslin's testimony, moreover, did not comport with other statements submitted into the record. Waller's statement (Employer Exhibit 3) raised questions regarding the time of the incident. Lack of episodic specificity was discussed by McKenzie (Employer Exhibit 2), while Olivia Kemp, the house supervisor, had never confronted similar situations.



Breslin's motivation should be questioned rather than attitudes held by the Grievant and her co-workers. The house in question is not an easy assignment for anyone based on behaviors attended to on a daily basis, and the general needs of the population. The Grievant and her co-workers "speak" for these residents. On a daily basis, they empower these residents by expanding their skills and social abilities. The Grievant enjoyed providing these individuals with extensive care. On more than one occasion, the Grievant and her co-workers spent their own funds in an attempt to make the residents' lives a bit more bearable. Within this context, any abuse would not be condoned, but rectified if it ever arose in the Grievant's presence.

#### **THE ARBITRATOR'S OPINION AND AWARD**

From the evidence and testimony adduced at the hearing, a complete review of the record including pertinent contract provisions and the parties' briefs, it is this Arbitrator's opinion that the Employer failed to support the Grievant's removal for abuse. Nothing in the record provides significant proof that the Grievant was guilty as charged. Improperly supported allegations, regardless of the Employer's well-intentioned purpose, require a ruling in the Grievant's favor. Mere innuendo, without proper support in the form of consistent and valid evidence and testimony, will lead to similar findings in the future. Abuse allegations are serious matters for the Employer, the Union, bargaining unit members and the resident population. They require continuous diligence which can only be fulfilled by timely and thorough investigations.

This finding was fashioned primarily by the overwhelmingly consistent testimony provided by the Grievant and her co-workers. The Grievant, May and Hudson-Tucker testified the events reviewed by Breslin never took place. They never observed the

Grievant strike, curse or threaten Lamont. This testimony, moreover, reflected consistent responses provided during the course of the investigation (Union Exhibits 2, 3, and 7).

The Union posited an inability to observe argument. Yet Breslin, herself, noted the staff was present at the time of the incident. The Employer, therefore, raised certain questions regarding Breslin's own testimony. Either May and the other co-workers were in the staff area or they were not. This direct discrepancy is not for the Arbitrator to resolve, and the Employer cannot have it both ways. Conflicting arguments of this sort merely weaken the Employer's case in chief. As always in removal cases, the Employer has the burden of proof.

The Employer was unable to resolve another inconsistency. All witnesses, including Breslin, acknowledged that Lamont had a contagious form of hepatitis. As such, the unprotected "smack" discussed by Breslin would have exposed her to this disease. Her observations never included any statement regarding measures taken by the Grievant prior to or after the clothing change. A highly unlikely circumstance since the staff knew protective procedures had to be taken any time Lamont's urine became exposed. Equally troubling was Breslin's less than unequivocal testimony dealing with Lamont's hepatitis status. She seemed unsure, yet eventually remarked in the affirmative.

The entire episode, per Breslin's recollection, is less than persuasive for several other reasons. Breslin maintained that staff engaged in excessive behavior throughout her tour on February 4, 2003. No one, including other staff or supervision, reported the purported misconduct engaged in by the Grievant and other staff members. Breslin


specifically recalled Police Officer Demko's presence on February 4, 2003. She said Demko observed the four residents walking around naked (Employer 4, Pg. 4). Breslin would have this Arbitrator believe that Demko would observe these chaotic conditions and do absolutely nothing. She never confronted Demko nor pursued an incident report. Officer Demko never testified at the arbitration hearing. Kim Thorp Ward, a QMRP, maintained she had never observed a situation as chaotically depicted by Breslin.

Equally troubling are other unsupported allegations contained in the removal order. Reference is made to "...other occasions you were observed threatening to physically harm a consumer, using profanity towards consumers and using threatening gestures toward consumers." The record as developed by the Employer failed to properly identify, elaborate or support these "other incidents." The removal order was never formally amended to limit the scope of the removal. As such, these "other" episodes are equally unconvincing and fail to support the removal.

#### AWARD

The grievance is sustained. The Grievant did not engage in abuse. She is to be reinstated to her former position and shall be made whole for all pay and benefits lost as a consequence of the Employer's action. Overtime pay shall not be included as an element of this Award. Back pay, moreover, shall be reduced by any interim earnings realized by the Grievant.

April 18, 2005  
Moreland Hills, Ohio

  
David M. Pincus  
Arbitrator