IN THE MATTER OF
GRIEVANCE ARBITRATION
BETWEEN

1199 NEW ENGLAND HEALTH CARE EMPLOYEES UNION DISTRICT 1199, AFL-CIO **-AND-** **STATE OF CONNECTICUT (DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES)**	**OLR #10-8508** **GRIEVANT: MICHAEL COOMBS**

AWARD

The dismissal of Michael Coombs was not for just cause. Mr. Coombs shall be forthwith reinstated to his position. Mr. Coombs shall be forthwith made whole as regards all contract and statutory rights and benefits, including lost wages to the date of his reinstatement, less interim earnings. Mr. Coombs' termination notice and related documents shall be expunged from his personnel file. The arbitrator retains jurisdiction of the case for a period of thirty (30) calendar days for remedial implementation purposes.

Dated: 4/6/12

/s/ Richard G. Boulanger, Esq.
Arbitrator

12-17

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The grievance was heard by Arbitrator Richard G. Boulanger, Esq. on December 15, 2011 and on February 2, 2012 at Connecticut Valley Hospital, Middletown, Connecticut.

Ms. Cathleen Simpson, Esq. represented the State of Connecticut (State). The following individuals testified for the State: Mr. Patrick Fox, M.D., Mr. Michael McGarthy, Ms. Helene Vartelas, Mr. Thomas Tokarz, and Ms. Sharon Ciarlo. Mr. John Brown participated in the State's case. Ms. Paula Rivers was in attendance for the State.

New England Health Care Employees Union, District 1199 (Union) was represented by Ms. Shirley Watson, Union Delegate, and Mr. William Myerson, Union Vice President. Mr. John Ertl, Organizer, was on brief with Mr. Myerson. Mr. Michael Coombs and Mr. Robert Larned testified for the Union.

The parties were given full opportunity to present evidence and make arguments.

Witnesses were sworn

The stipulated issue is as follows:

> Was the dismissal of Michael Coombs for just cause? If not, what shall be the remedy that is consistent with the contract?

I. CONTRACT DOCUMENTS

A. COLLECTIVE BARGAINING AGREEMENT

1. ARTICLE 5: MANAGEMENT RIGHTS

2. ARTICLE 32: GRIEVANCE AND ARBITRATION

3. ARTICLE 33: DISMISSAL, SUSPENSION, DEMOTION OR OTHER DISCIPLINE

4. ARTICLE 34: WORKERS' RIGHTS AND SAFETY

5. ARTICLE 44: SUPERSEDENCE

6. MEMORANDUM OF AGREEMENT #18: WHITING FORENSIC INSTITUTE STIPULATED AGREEMENT

II. SUMMARY OF THE CASE

Mr. Michael Coombs (grievant), a Forensic Treatment Specialist (FTS) at the Whiting Forensic Division (Whiting) of Connecticut Valley Hospital (CVH), was terminated in April, 2010 as the result of allegations that he physically abused a patient in March, 2010.

The State argues that the grievant's termination was justified as he violated the Consumer Non-Abuse Policy and Work Rules for which the State has zero tolerance.

The Union contends that the grievant's March, 2010 conduct was not abusive, and that there was no just cause for his termination.

The arbitrator ruled that the grievant was terminated without just cause.

III. FACTUAL BACKGROUND

At the time of his termination in April, 2010, the grievant had been employed at Whiting, a unit of the Department of Mental Health and Addiction Services (DMHAS), Division of Forensic Services, as an FTS for approximately ten (10) years. (See Joint Exhibit #4.) As an FTS, the grievant's duties and responsibilities include interacting with and monitoring patients with severe behavioral deficiencies. The grievant received training in such interactions. (See Joint Exhibit #3 and State Exhibit #3.) During his Whiting career, the grievant received positive service ratings.

On March 7, 2010, the grievant interacted with WS, a civilly committed patient housed in Unit 6. WS taunted the grievant and others in a belligerent fashion and made abusive comments to KW, a female patient with an assaultive history. The grievant verbally encouraged WS to cease such behavior, but WS would not do so. The grievant testified that he approached WS to verbally de-escalate him, after his co-worker, Mr. Robert Larned, was unable to do so. The grievant stated that he sought to avoid a physical confrontation between WS and patient KW. The grievant testified that during his verbal discussion with WS, WS snorted. The grievant, fearing a spitting incident by WS, put his arms out to create space between himself and WS. As a result, WS fell into a TV room chair. WS then approached the grievant in an aggressive fashion, putting his arms around the grievant's legs. The grievant testified that while he was so restrained, he attempted to walk WS back towards the chair. While his skirmish with WS ensued, other Unit 6 staff responded and assisted him in restraining WS in the chair. A video recorded the interaction among the grievant, WS, and other Unit 6 staff. (See State Exhibit #1.)

Ms. Sharon Ciarlo, Director of Safety Education and Training, testified that the grievant

received proper training in appropriately intervening with patient WS. She also testified that after reviewing the March 7, 2010 video of the grievant and WS, she concluded that the grievant did not properly interact with patient WS because he utilized offensive physical force, but not a defensive "parry technique." Mr. Michael McGarthy, Labor Relations Investigator, testified that he was assigned to investigate the incident regarding the grievant and WS. After interviewing various witnesses to the event, and considering statements by non-interviewed employees, Mr. McGarthy determined that WS verbally abused the grievant and others on the unit. (See State Exhibits #5 - #7.) However, in comparing various witness statements to the video taken of the interaction between the grievant and WS, Mr. McGarthy concluded that WS did not physically confront the grievant, but that the grievant was physically aggressive toward WS. Ms. Helene Vartelas, CVH Chief Executive Officer, considered the investigation findings and discussed the matter with other CVH officials. She concluded that the grievant's March 7, 2010 behavior warranted termination. On April 21, 2010, she approved a termination letter to the grievant. (See Joint Exhibit #9.)

The Union grieved Mr. Coombs' termination. The grievance was not resolved during the course of the parties' grievance procedure, and it was appealed to arbitration. (See Joint Exhibit #2.)

IV. SUMMARIES OF THE PARTIES' ARGUMENTS

A. STATE:

The State contends that it had just cause to terminate the grievant's employment as a result of his March 7, 2010 physical abuse of WS. The State's evidence satisfies the "seven (7) tests of just cause" enunciated by arbitrator Carroll Daugherty in *Enterprise Wire Co.*, 46 LA 359, 364-65 (Daugherty, 1966). The grievant was notified of State rules and regulations proscribing physical abuse of patients in his care. The rule prohibiting physical abuse of a patient is a reasonable one, necessary to protect the well-being of State patients. Moreover, those rules identified discipline up to and including termination for a violation.

The State's investigation was thorough, fair, and reasonable, and included the grievant's version of the incident. The investigation revealed that the grievant violated important State rules and regulations barring patient physical abuse. Therefore, the State substantiated its burden of proof that in physically abusing WS on March 7, 2010, the grievant violated State policies justifying his termination. The grievant's defense that he was attempting to protect another patient, KW, and/or himself is not credible. The grievant's arbitration testimony is inconsistent with his prior statements explaining his March 7, 2010 conduct. Therefore, the grievant's testimony should be given little, if any, weight.

The Union failed to support its claim that the State disparately disciplined the grievant vis á vis other employees similarly situated. There was no evidence of a fact pattern comparable to that of the instant case which resulted in less than termination of the offending employee. Consequently, the Union's disparate discipline defense must fail, as the evidence supports a conclusion that the State has consistently terminated employees for their physical abuse of patients in their care. Similarly,

termination of the grievant is the penalty commensurate with his March 7, 2010 offense. The grievant engaged in conduct without good reason which led to his physical altercation with WS. The evidence discloses that the grievant was adequately trained in interactions with volatile patients. On March 7, 2010, the grievant failed to implement that training. There is no credible evidence that the grievant was attempting to defend himself or patient KW when he struck WS on March 7, 2010. As the State has and must continue to enforce a zero tolerance policy for employee physical abuse of patients, the grievant's termination must be upheld. The State cites authority in support of its arguments.

B. UNION:

The Union argues that the State did not have just cause to terminate the grievant for his March 7, 2010 conduct in connection with WS. Whiting patients are behaviorally very difficult and challenging to staff who must interact with them. As a result, Whiting employees are classified as "hazardous duty" personnel. WS is one such difficult and challenging patient in general, and in particular on March 7, 2010.

The testimony of the grievant and Mr. Larned disclosed that on March 7, 2010, WS was verbally abusive in general and specifically to KW, a patient with an assaultive history. On March 7, 2010, the grievant, in keeping with his training and experience, attempted to verbally de-escalate WS in order to avoid his potential confrontation with KW. The grievant's normally positive rapport with WS did not result in WS's de-escalation on March 7, 2010. As the grievant attempted to calm WS, he formed a good faith belief that WS was preparing to spit at him. WS has been diagnosed with the Hepatitis C virus. The grievant was concerned with WS's actions due to the probability that he (the grievant) might contract WS's Hepatitis C virus. Therefore, the grievant placed his hands outwardly toward WS to create a buffer against his spitting. The grievant's decision to create a space between

himself and WS was a split second one. As a result of the grievant's hand motion, WS accidentally fell backward into a chair in the TV room. He was not thereby injured. WS's behavior then became more aggressive and he was restrained in the TV room chair.

The ensuing investigation into the March 7, 2010 incident was inadequate. Mr. McGarthy, the agency's lead investigator, failed to follow-up on critical witness statements. Moreover, Mr. McGarthy did not request or examine video footage prior to the grievant's approach toward WS, showing KW's passage in the hall, a key component of the grievant's motivation for attempting to de-escalate WS. The State was not able to demonstrate that, in his more than ten (10) year State career, the grievant had a propensity for aggressive behavior towards patients. Furthermore, the evidence also reveals that the grievant had been disparately disciplined for the March 7, 2010 incident relative to other employees similarly situated. If the arbitrator determines that the grievant is deserving of discipline for his March 7, 2010 conduct, he must reduce the termination to either a warning or a suspension because that is the level of discipline typically issued by the State to staff who have physically interacted with patients in an inappropriate fashion.

The State did not uphold its burden of demonstrating just cause to discipline the grievant for his March 7, 2010 conduct. The grievance should be upheld, the grievant reinstated and made whole. The Union cites authority in support of its arguments.

V. FINDINGS AND OPINION

A. CONTRACTUAL AND POLICY STANDARD

The parties' stipulated issue requires that I determine whether or not the State had just cause to terminate the grievant. The just cause standard is included in Article 33 (**Dismissal, Suspension, Demotion Or Other Discipline**), which provides, in pertinent part, as follows:

> **SECTION ONE.** No permanent Employee or Employee as provided in Article One Section Four, who has completed the Working Test Period shall be disciplined except for just cause. Discipline shall be defined as dismissal, demotion, suspension, reprimand or warning.
>
> All reprimands or warnings shall be in writing and placed in the Employee's personnel file in accordance with Article 37 (Personnel Records). Unless an employee has been given a written reprimand or warning, which is placed in the employee's personnel file, the employee shall not be considered to have been reprimanded or warned.

On April 21, 2010, the State issued the following termination notice to the grievant:

> This is to notify you that you are being dismissed from State service effective close of business on Saturday, April 24, 2010 for just cause in accordance with the New England Health Care Employees Union - District 1199 contract Article 33 Section 1, and Section 5-240-IA (c) of the State Personnel Regulations.
>
> This action is the result of an investigation into allegations made against you which were reported via an MHAS-20 on March 8, 2010. During the investigation, credible evidence was obtained which determined that on March 7, 2010 you physically abused a male patient while working on Unit 6 in the Whiting Forensics Building. Your actions violated DMHAS Work Rule #19 which states, "Physical violence, verbal abuse, inappropriate or indecent conduct and behavior that endangers the safety and welfare of persons or property is prohibited", and Commissioner's Policy Statement No. 29 regarding "Client Abuse ".
>
> You have the right to appeal this action to Step 2 of the grievance procedure within fourteen (14) days of your receipt of this letter. A copy of this letter is being furnished to your Union representative and sent to District 1199 via certified mail.
>
> Please note that you will remain on Administrative Leave status through the effective date of your dismissal. You are required to return all of Connecticut Valley Hospital's

property. This includes all keys, picture identifications, beepers, cell phones, swipe cards, and any additional State property you may have in your possession.

If you have any questions regarding your health insurance or other state benefits, please contact the DMHAS Benefits Unit at ..... If you have any questions regarding your state pension plan(s), you may contact the DMHAS Retirement Unit .....

The parties stipulated that the grievant was aware of Work Rule #19, satisfying the State's notice obligation.

Commissioner's Policy Statement No. 29, Client Abuse, provides in pertinent part as follows:

It is the policy of the Department of Mental Health and Addiction Services that client abuse is prohibited. This policy applies to verbal abuse, physical abuse, or any other abusive conduct towards clients. As Commissioner of the Department of Mental Health and Addiction Services, it is my expectation that all clients shall be treated with dignity and respect; these are basic client rights which are guaranteed to all clients. All reported incidents of client abuse must receive a thorough investigation, regardless of the nature of the complaint.. All complaints of abuse made by clients must be reported. All employees must report incidents of client Abuse whether they have knowledge of such an act or whether they are a participant or witness. Without exception, this must be adhered to and applies to all employees of the Department of Mental Health and Addiction Services.

It is mandatory that allegations of abuse to persons over age sixty also be reported to the Regional Ombudsman of the Department of Aging. It is also mandatory that allegations of abuse to clients with a diagnosis of mental retardation be reported to the Office of Protection and Advocacy.

The purpose of this policy is to promote the best client care environment possible and to reaffirm that client abuse will not. be tolerated. Any employee found to have violated this policy shall be subject to termination.

The rule is a reasonable, one necessary to protect patients in DMHAS care. There is no evidence of a Union challenge to it.

The State's General Work Rules specify the following just cause definition, including misconduct relevant to the instant case:

Note: Reference State Personnel Regulations: Sec. 5-240-1a Definitions

c) "Just Cause" means any conduct for which an employee may be suspended, demoted or dismissed and includes, but is not limited to, the following:

4. Offensive or abusive conduct toward the public, co-workers, or inmates, patients or clients of State Institutions or facilities.

The just cause standard requires the State to prove by a preponderance of the evidence its abuse allegations against the grievant. If the State's factual claims against the grievant are borne out by the evidence, then the State must establish that termination of the grievant was the penalty commensurate with his offense.

The March 7, 2010 incident was video taped. (See State Exhibit #1.) However, there was no audio taping of the incident. My findings are based on the testimonial and documentary evidence, including multiple, painstaking, frame by frame reviews of all video camera angles. In making findings of fact, I also compared witness testimony and statements to the video.

B. CHRONOLOGY OF EVENTS

1. APPROACH

The evidence supports a finding that the grievant received all of the training necessary to fulfill the duties and responsibilities of the FTS classification. (T_1 – p. 176.) (See **Article 34, Workers' Rights and Safety**) Collaborative Safety Strategies require non-invasive, verbal De-Escalation and Distraction before Restraint and Seclusion is applied. (T_1 – p.179.) (See Joint Exhibit #3 and State Exhibit #3.) In keeping with that training, the grievant testified without contradiction that on March 7, 2010 he approached WS, with whom he had a good rapport, to calm him down by means of verbal de-escalation after his co-worker, Mr. Larned, attempted to do so with limited success.(T_2 – pp. 36, 116, and 126-127.)[1] The grievant and Mr. Larned credibly testified that from

[1] T_{1-2} signifies the transcripts of December 15, 2011 and February 2, 2012 respectively, followed by the page number(s).

the beginning of their shift, WS was shouting out profanities and vulgarities while standing in the doorway of a Unit 6 TV room, proximate to the nurses' station. (T_2 – pp. 35, 112-113.) The grievant and Mr. Larned testified without contradiction that WS yelled sexual profanities and other derogatory statements to KW, the only Unit 6 female, as she walked by WS on March 7, 2010. While the video commenced after KW walked past WS, and did not capture KW's travel, nevertheless, based on the evidence submitted, including the testimony of the grievant and Mr. Larned, I find that WS was verbally abusive to KW beginning shortly before Mr. Larned and the grievant attempted to verbally de-escalate WS. Mr. Larned testified that he was concerned for KW's safety. (T_2 – p. 118.) Although profanity-shouting by patients is not unusual on Unit 6, the grievant's and Mr. Larned's specific concern was that WS's comments would provoke a physical confrontation between KW and WS based on their respective combative histories. (T_2 – pp. 35-36, 118-119, 125-126.) The Unit 6 staff, including the grievant, knew that WS had violent tendencies when he was transferred to Unit 6 because he had stabbed a patient and engaged in a fist fight with yet another patient. (T_2 – p35, 55, 207.) The Unit 6 staff, including the grievant, also knew that KW had a history of assaults. (T_2 – pp. 35-39.)

Even though KW had walked by WS at the time of the grievant's approach to WS, she was in the map room, proximate to WS's location. The grievant testified without contradiction that KW was visible in the map room doorway, approximately ten (10) feet from WS's location. (T_2 – pp. 60-61.) The grievant testified that he continued a de-escalation discourse with WS when WS continued his verbal attack on KW, following Mr. Larned's failed attempt to prevent such conduct. (T_2 – pp. 36-37.) Not only was KW proximate to WS's location while he continued taunting her, but as Ms. Ciarlo and Mr. Larned both testified, Unit 6 patients, including KW and WS, are capable of

unpredictable behavior. (T_1 – p. 194 and T_2 – p. 118.) The grievant testified without contradiction that on March 7, 2010, KW and WS started arguing. (T_2 – p. 36.) Therefore, based on KW's proximity to WS while he continued his offensive verbal assault on her, combined with their spontaneous and unforeseeable conduct, the grievant was rightfully concerned about the potential for a physical altercation between them. (T_2 – p. 37.) Consequently, the grievant and Mr. Larned rightfully interceded with WS and attempted to calm him before a physical confrontation with KW erupted. The grievant accurately testified that it is an FTS' responsibility to prevent verbal and physical outbursts by patients on the Unit.

The FTS job description includes the following pertinent duties and responsibilities:

PURPOSE OF CLASS:

In the Department of Mental Health at Whiting Forensic Institute, under established security conditions, this class is accountable for developing and maintaining an effective therapeutic environment for patients.

SUPERVISION RECEIVED:

Works under the general supervision of a Lead Forensic Treatment Specialist, a Head Nurse or other nursing supervisor.

EXAMPLES OF DUTIES

Develops and maintains therapeutic relationships with patients; may informally counsel patients as need arises; actively participates in team patient care conferences; performs patient care duties such as feeding, bathing, dressing patients; takes vital signs; observes, reports and records patient behaviors and appearance; effectively implements security regulations; prevents unauthorized movement of patients, visitors and personnel; performs housekeeping tasks, escorts patients and secures supplies and materials; assists in transfer of patients from and to security treatment facility; monitors and participates in patient management on units; after proper training, may prepare and administer medication other than controlled substances and perform first aid procedures; may participate in group counseling sessions; may participate in patient activities; performs related duties as required.

MINIMUM QUALIFICATIONS REQUIRED KNOWLEDGE, SKILL AND ABILITY:

Knowledge of psychiatric procedures and principles involved in care and treatment of the mentally ill; knowledge of modern medical, therapeutic and psychiatric routines, methods and procedures; knowledge of safe patient custody in a security treatment area; knowledge of human behavior, behavioral manifestations of mental illness and principles involved in care and treatment of the mentally ill; considerable interpersonal skills; ability to perform basic first aid procedures.

WORKING CONDITIONS:

Incumbents in this class may be required to lift and restrain patients; may have significant exposure to communicable/infectious diseases and to risk of injury from patients; may be exposed to significant mental stress and other extremely disagreeable conditions. (See Joint Exhibit #4.)

It is clear from the FTS job description that the grievant "monitors and participates in patient management on units." The grievant satisfied that job duty when he attempted to verbally de-escalate WS on March 7, 2010.

The evidence supports a finding that WS failed to comply with Mr. Larned's or the grievant's verbal directives that he halt his inflammatory comments. The grievant testified that when WS would not stop his sexually charged comments to KW, he tried, on numerous occasions, without success, to verbally de-escalate WS from his chair near the nurses' station. (T_2 – pp. 37, 74-75.) When that technique failed, the grievant decided to approach WS to verbally de-escalate the potential confrontation between WS and KW. Mr. Larned testified that the grievant had a very good rapport with WS, and he supported the grievant's attempt to de-escalate the situation by approaching WS and engaging in a discussion with him. (T_2 – pp. 116, 126, 127.)

Other employees provided statements which corroborated the testimony of the grievant and Mr. Larned. On March 12, 2010, Mr. Mark Cusson, Unit 6 Head Nurse on March 7, 2010, authored a

report of the incident which corroborates the grievant's testimony and statements. In his March 12, 2010 report, Mr. Cusson indicated that WS "swore at a female patient *(KW)* and made a taunting comment." (See State Exhibit #7.) In his report, Mr. Cusson also indicated that the grievant "had gotten up *(from his chair)* and walked toward Room 625 *(WS's location)*. (See State Exhibit #7.) In his report, Mr. Cusson indicates that the grievant instructed WS to leave her *(KW)* alone and move away from the doorway." (See State Exhibit #7.) Mr. Cusson reported that WS "moved away from the doorway but made a final taunt toward Ms. ___*(KW)*." (See State Exhibit #7.)

On March 19, 2010, FTS Owen Hughes authored a statement of the March 7, 2010 matter, indicating that WS was "cursing, swearing, threatening, and disrespecting staff FTS Coombs as well as another patient." (See State Exhibit #7.) FTS Hughes also indicated that WS was "becoming out of control." (See State Exhibit #7.) As he was leaving the unit, Mr. Hughes reported "hearing PT (WS) raising his voice and threatening and disrespecting staff and patients. (See State Exhibit #7.) Consequently, the grievant rightfully attempted to diffuse WS's taunts and threats directed at other patients, specifically KW. Unit 6 FTS David Johnson reported that on March 7, 2010, the grievant "tried to speak to the patient *(WS)* and redirect him to the TV room," after WS failed to respond to earlier staff directions that he "stop disrupting the unit, and go sit quietly in the TV room." (See State Exhibit #7.)

The grievant credibly testified that he was calm and not angry when approaching WS. Mr. Larned testified that the grievant was very calm in general, and maintained that disposition while approaching WS on March 7, 2010. (T_2 – p. 116.) Mr. Larned's testimony corroborates the grievant's testimony. The grievant's videotaped demeanor in walking towards WS supports his testimony. (See State Exhibit #1.) The video shows the grievant's slow and deliberate approach toward WS from his

chair in the nurses' station. It is not as if the grievant jumped up from his chair and charged towards WS. Although not audible, the video also shows the grievant talking to WS as he walked toward him. The video also shows that WS continued talking to and gesturing toward the grievant as the grievant approached him, while continuously talking to him. Consequently, I credit the grievant's testimony that he approached WS in a calm fashion while attempting to de-escalate a potentially dangerous situation between WS and KW in the Unit 6 hallway.

The grievant testified without contradiction that when he reached WS's location, he attempted to calm him and redirect his focus away from KW and move him out of the hallway area and into the TV room. (T_2 – pp. 37, 41.) A review of the video supports the grievant's testimony. In explaining why he attempted to calm and redirect WS, the grievant testified that it was his responsibility to prevent one patient from targeting or victimizing another patient. (T_2 – pp. 43-44.) FTSs are responsible for protecting patients from one another's assaultive tendencies. (See Joint Exhibit #4.) Consequently, there was no misconduct on the grievant's part in approaching WS on March 7, 2010, trying to verbally calm him, and redirecting his focus from KW.

2. <u>CLIENT/STAFF INTERACTION</u>

The video reveals that when the grievant arrived at WS's location in the doorway, he continued his discussion with him, while guiding him into the TV room's interior. WS and the grievant were very close to one another, approximately six (6) inches apart. Throughout his encounter with WS, the grievant continued to hold the newspaper in his right hand, revealing no intent to engage WS in a physical confrontation. The evidence supports a finding that the grievant did not intend to physically intervene with WS when he first encountered him in the hallway. It is not as if the grievant started to push WS as soon as he encountered him in the hallway. The grievant did not

extend his arms until he was inside the TV room.

The matter escalated when during the discussion between the grievant and WS in the TV room, WS's demeanor quickly changed and he snorted, in preparation for spitting on the grievant. (T_2 – pp. 38-39.) The grievant reasonably believing that WS snorted in preparation of spitting at him, he put his hands out to create space between them. The grievant testified that WS's snorting gave him every reason to believe that he would be spit upon, and that he exercised instantaneous judgment by pushing WS away from him. (T_2 – pp. 51, 81-83.) By preparing to launch Hepatitis C-laden spit on the grievant, WS became the aggressor, requiring quick defensive maneuvering by the grievant.

The grievant testified that WS had a history of spitting on people. (T_2 – p. 38.) On March 7, 2010, shortly after the WS incident with the grievant, Mr. Cusson reported to Dr. Rebecca Wahl that WS was "currently spitting at staff and threatening them and required that the seclusion door be locked." (See State Exhibit #5 and Joint Exhibit #10.) Again, shortly after he attempted to spit on the grievant, Dr. Santhappa reported to Dr. Wahl that WS "was spitting blood and saliva at staff." (See State Exhibit #5.) In her March 10, 2010 report of the March 7, 2010 incident, Dr. Wahl also indicated that on March 7, 2010, Mr. Cusson "had been spit upon in the face and possibly the eye by Mr. __ *(WS) who is Hepatitis C+.*" (See State Exhibit #5.) While an FTS is often required to ignore patient verbal abuse, such as that spouted by WS on March 7, 2010, unless it has the potential, as on March 7, 2010, of causing a physical altercation between two (2) patients, it is quite another matter to passively become a target of unacceptable patient behavior, such as Hepatitis C-infected spit, which has serious health consequences. (T_2 – p. 126.) The grievant was particularly concerned about being the victim of WS's spitting because he knew that WS was afflicted with the Hepatitis C virus. (T_2 – p.38.) The grievant testified that when WS has spit on employees, they were required to seek

medical attention, including blood-drawing and testing. (T_2 – p. 44.) Possessing such knowledge, the grievant acted reasonably to create space between him and WS. Significantly, WS put in motion a series of events that led to the grievant defensively pushing him. It is not as if the grievant set out from his chair with the intent of physically interacting with or abusing WS. Notably, the grievant was involved in a verbal discussion with WS for a period of time prior to pushing him back as a buffer against his spitting.

The video reveals a spontaneous extension of the grievant's hands on WS's chest. Multiple, careful reviews of the video disclose that the grievant's left hand appears to be located on WS's right upper arm/chest area while the grievant's newspaper-holding right hand was positioned on the grievant's left-side, upper chest area. The video also reveals that at the time that the grievant extended his arms, his feet were nearly parallel, indicating that he did not utilize any significant force against WS. The grievant did not undertake any other defensive mechanism taught in FTS training. While based on the evidence submitted, I find that the grievant was trained for various, predictable patient behavior, he could not foresee the immediacy of WS's attempt to spit on him. Moreover, based on his proximity to WS at the time of his "snort," there was insufficient time to engage in an evasive maneuver. Therefore, the grievant did not act unreasonably when he extended his arm moving WS away from himself in order to avoid WS's spit.

When the grievant pushed WS away from him to avoid or minimize a spitting situation, he did not use any more force than was necessary to create the physical space between himself and WS, again indicating his lack of intent to physically assault WS. It is not as if the grievant planted a foot and/or dropped his newspaper to provide more force against WS's chest. Furthermore, he did not batter WS by means of punching, kicking, striking, or by any other physical means. The difficult job

of an FTS and working with patients such as WS who are prone to unpredictably abusive and dangerous behavior must not be overlooked when evaluating an FTS' exercise of split second judgment, as here, defensively pushing the patient to avoid the possibility of contacting Hepatitis C. Based on his relationship with WS, and his intent to de-escalate him verbally, which was often successful, the grievant could not foresee an immediate, physical turn of events begun by WS. The split second decision making by the grievant supports a finding that it was impossible for him to engage in a parry maneuver because there was insufficient time to plan to implement such a move. Ms. Ciarlo testified that a verbal de-escalation is not always successful and can evolve into a physical restraint. (T_1 – p. 192.) She testified that while physical skill training has remained consistent, interventions do not always proceed as planned. (T_1 – p. 193.) Therefore, a defensive maneuver, such as that employed by the grievant with WS on March 7, 2010 was not inappropriate under the circumstances. Ms. Ciarlo testified that in approaching a patient exhibiting dangerous behavior, an employee must assess the risk factors of the patient and the situation, and "determine what makes sense." (T_1 – p. 181.) On March 7, 2010, the grievant performed a risk management analysis, albeit on an instantaneous basis, when confronted by WS's spit threat. He reasonably concluded that creating space between himself and WS made sense.

Following the grievant's space-creating defensive push of WS, WS moved in a backward position and landed in a TV room chair. Significantly, after moving WS away to avoid his spit, the grievant remained motionless until WS left his seat and charged him. It is not as if the grievant charged and physically attacked WS after he landed in the chair. (T_2 – p. 53.) The grievant's conduct in remaining still supports a finding that he only intended to create space between himself and WS in order to avoid his spit. It also supports a finding that the grievant's use of force was measured to only

avoid the risk and danger of being infected by the Hepatitis C virus.

The grievant credibly testified that he instructed WS to remain in the chair. (T_2 – p. 39.) Rather than remain in the chair, WS aggressively moved from the chair toward the grievant setting in motion a physical confrontation with the grievant, and other staff. The video buttresses the grievant's testimony. The video also reveals that, per his training, the grievant attempted a parry maneuver by putting his hands up as WS charged him and twisting his body counterclockwise, trying to deflect WS to the side with his hands while continuing to hold the newspaper in his right hand. (T_1 – pp. 183-184.) (See also State Exhibit #7 (grievant's statement)) After just a moment of separation, WS wrapped his arms around the grievant's legs as if to tackle him. (See State Exhibit #1.) The grievant credibly testified that he attempted to walk back to the chair while WS was attached to his legs. Although the grievant was successful in moving WS back toward the chair, it was not physically possible for the grievant to continue the parry maneuver while WS had his arms wrapped around the grievant's legs. (See State Exhibit #1.)

The grievant complied with Unit 6 protocol when he called for help in restraining WS in the TV room chair. In his March 10, 2010 report of the March 7, 2010 incident, Mr. Richard Pietruszka, Lead FTS, indicated that "At approximately 7:10 am, Mike Coombs yelled for help." "I ran into the TV room, *(WS)* was being held down in the second chair on the left." (See State Exhibit #5.) Pursuant to Departmental protocol, the grievant called for help while WS was attached to him and a number of staff assisted him in restraining WS in the chair.

The grievant's testimony, although given nearly two (2) years after the incident, was consistent in material respects with the statements that he provided to CVH Police (see Joint Exhibit #10) and to Mr. McGarthy. (See State Exhibit #7.) Significantly, both statements given shortly after

the March 7, 2010 incident, when the events were fresh in the grievant's mind, specify the grievant's concern for protecting KW, identified in the police report and referenced in his statement to Mr. McGarthy. Moreover, the grievant references WS's "snort" in preparation for spitting at him on March 7, 2010. Therefore, the grievant's testimony and his statements are corroborative of one another and are reliable. Although the grievant's Commission on Human Rights and Opportunities (CHRO) statement is more general, it was sworn to in October, 2010 and includes a reference to WS's verbal abuse of staff and patients, and WS's aggressive behavior towards the grievant. (See State Exhibit #16.) It is not unusual that more detail would be provided during an employee's testimony as compared to his written statement. Cross-examination questions typically result in responses that may not have been included in an employee's written statement. The key inquiry is whether or not the employee's testimony is consistent in material respects with written statements given shortly after an incident. Here, the grievant's testimony is consistent with his statements.

B. PHYSICAL ABUSE

While DMHAS Work Rule #19 prohibits physical violence toward patients and Commissioner's Policy Statement No. 29 proscribes "client abuse," neither term is defined in the collective bargaining agreement or in the policy statements themselves. However, as to their meaning and application, arbitration awards cited by the State provide some guidance. In *The State of Connecticut Department of Mental Health and New England Healthcare Employees Union, District 1199 SEIU, AFL-CIO*, OLR No. 10-4685 decided by Arbitrator Michael C. Ryan, Esq. on December 19, 1994, the grievant's termination for physical abuse was upheld. **Id.** @ 19. In defining physical abuse, Arbitrator Ryan cited two (2) incidents. **Id.** @ 6. As to the first incident, the grievant's co-worker testified that he "observed the grievant with a hold on Eddie's *(client)* clothes, shaking him

up and down, and back and forth while arguing with him about Eddie's chronic reluctance to have a blood sample taken as required each week." **Id.** @ 7. That co-worker indicated that "grievant was really mad, his eyes were bulging out and that Eddie looked scared and nervous." **Id.** @ 7. As to the second episode, Arbitrator Ryan found credible testimony that indicated that the "grievant had hold of Eddie on the floor and was shaking him, threw his body on top of Eddie such that ___*(co-worker)* had to let go of Eddie's other hand and, critically that grievant was 'out of control.' **Id.** @ 11. Arbitrator Ryan also accepted the testimony of another co-worker that "grievant was twisting Eddie's right arm (the weak one) and hand up to Eddie's face and hitting him in the face with his own hand, three or four times." **Id.** @ 11. Arbitrator Ryan indicated that "she *(co-worker)* also testified that the grievant was swearing and threatening Eddie saying in an angry tone, 'You can't do that to me' and 'I'll kill you old man'." **Id.** @ 11. It is worthy of note that the grievant pled "nolo contendere" to a reduced charge of disturbing the peace which criminal complaint arose out of the incident with Eddie. **Id.** @ 12. The grievant was not charged with a crime as a result of his interaction with WS on March 7, 2010.

Arbitrator Ryan summarized his reasoning as follows:

> As convincingly testified to by ____ *(co-worker)* and ____ *(co-worker)*, I conclude that ___*(grievant)* was literally out of control in his physical, angry altercation with Eddie. He turned mean and nasty in his physical and verbal response to the situation and went significantly beyond any possible justifiable physical restraint technique. He took the patient to the floor out of control, he shook him, angrily yelled at him, hit him with his own hand, and threatened him as charged. In sum, a convincing case of physical and verbal abuse has been established here which exceeds the threshold necessary to justify termination. **Id.** @ 17.

Clearly, physical abuse occurs when an employee shakes a patient up and down, and back and forth and throws his body on top of a patient. It is also twisting a patient's arm and using the patient's

hand to hit the patient's face. The facts of the instant case are clearly distinguishable from Arbitrator Ryan's fact pattern. In the instant case, there was a defensive push to avoid WS's Hepatitis C-infected spit. There was no physical shaking, twisting, hitting or other offensive physical contact with WS. Based on a fair evaluation of the evidence, the grievant in the instant case was clearly not "out of control," maintained his composure, and appropriately responded to WS's aggressive, potentially harmful conduct.

In *The State of Connecticut Department of Mental Health and Addition Services and New England Healthcare Employees Union, District 1199 SEIU, AFL-CIO*, OLR No. 10-6598 decided by Arbitrator Margery E. Williams on February19, 2004, the grievant's termination was upheld when Arbitrator Williams determined that the grievant "physically confronted X *(patient)* with sufficient force to cause a serious injury..." **Id.** @ 34. Arbitrator Williams concluded that "the grievant lost her temper and exerted some sort of force that caused X's (client) head to hit the wall." **Id.** @ 33. She also found that the grievant had "long disliked working with X." **Id.** @ 33. The case decided by Arbitrator Williams is also distinguishable from the instant case in that there is no evidence that the grievant offensively exerted force on WS causing substantial injury to him. Mr. McGarthy testified that the grievant was not charged with inflicting injury on WS. (T_1 – p. 96.) Moreover, in the instant case, the evidence was that WS and the grievant had a good rapport and that the grievant was often successful in verbally de-escalating WS. Therefore, the grievant did not engage in physical abuse as defined by Arbitrator Williams.

In the case of *The State of Connecticut and New England Healthcare Employees Union, District 1199*, OLR No. 10-8449 decided by Arbitrator Eileen A. Cenci on April 8, 2011, the grievant was terminated by the State when he dragged a client along the floor, away from a

bathroom. Id. @ 11. Although Arbitrator Cenci reduced the grievant's termination to a suspension based on disparate treatment, nevertheless, she concluded that the grievant engaged in physical abuse of the patient by dragging him along the floor. Id. @ 11. Clearly, that fact pattern differs considerably from that of the instant case. As indicated above, there is no evidence that the grievant sought or engaged in an offensive physical confrontation with WS. Rather, while properly trying to verbally de-escalate him on March 7, 2010, WS became the aggressor by preparing to spit on the grievant with potential serious medical consequences. Therefore, Arbitrator Cenci's definition of physical abuse does not support a finding that in the instant case the grievant engaged in physical abuse of WS.

In *State of Connecticut Department of Mental Health and Addition Services and New England Healthcare Employees Union, District 1199*, OLR No. 10-6903, Arbitrator Susan R. Meredith (March 17, 2005) upheld the grievant's termination for patient physical abuse. Id. @ 6. Arbitrator Meredith concluded that the grievant physically abused a client when he "rushed the client down the hall, holding him tightly, and not cooperating with other staff members who tried to help him." Id. @ 5. Arbitrator Meredith also concluded that "He *(grievant)* was unable to control the client and escort him to his room without harming the client. Id. @ 5. Clearly, the grievant in the instant case did not engage in patient physical abuse as defined by Arbitrator Meredith.

In the case of *Park Geriatric Village and Service Employees International Union, Local 79* AAA Case No. 54 30 0253 83, Arbitrator Dawson J. Lewis (June 29, 1983), the grievant's termination was upheld as a result of her wrestling with an old, frail patient while trying to remove her cane from her which was necessary for her mobility. Id. @ 8. Arbitrator Lewis described the grievant's conduct as physical abuse of a client meriting termination. Id. @ 8. Although in the instant

case, the grievant pushed WS away to avoid his *(WS)*spit and attempted to walk WS back to his chair after WS grabbed the grievant by the legs, there was no evidence that the grievant wrestled WS to the floor in an aggressive, offensive maneuver to remove a personal possession, unlike the grievant in Arbitrator Lewis' case. Consequently, the grievant did not engage in physical abuse as defined by Arbitrator Lewis. **Supra.**

There was no evidence that when the State promulgated its patient physical abuse policy, it meant that all physical contact between bargaining unit employees and patients was prohibited. In the instant case, the FTS training modules indicate that there will be such contact, but only when necessary. The training materials indicate that physical restraint and seclusion should only be undertaken when necessary, recognizing their inevitability in an environment such as Whiting. Abuse is often described as "physical or mental maltreatment." **Black's Law Dictionary,** Fifth Edition, West Publishing Co., 1979. The common denominator in the above cited cases is the physical mistreatment of patients by employees. Unlike the terminated employees in the above cited cases, a careful review of the evidence reveals that the grievant did not physically abuse WS on March 7, 2010 when he pushed him away to avoid being spit on by a Hepatitis C positive patient, after attempting to appropriately verbally de-escalate him.

The dismissal of Michael Coombs was not for just cause. Mr. Coombs shall be forthwith reinstated to his position. Mr. Coombs shall be forthwith made whole as regards all contract and statutory rights and benefits, including lost wages to the date of his reinstatement, less interim earnings. Mr. Coombs' termination notice and related documents shall be expunged from his personnel file. The arbitrator retains jurisdiction of the case for a period of thirty (30) calendar days for remedial implementation purposes.