

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

THE BROWN COUNTY EMPLOYEES' UNION,
LOCAL 1901, AFSCME, AFL-CIO

and

BROWN COUNTY

Grievance #45-89
dated 10-30-89
involving Bernard Corbielle

Case 412
No. 43062
MA-5885

Appearances:

Mr. John C. Jacques, Assistant Corporation Counsel, PO Box 1600, Green Bay, WI 54305-5600, appearing on behalf of the County.

Mr. Bruce F. Ehlke, Lawton & Cates, SC, 214 West Mifflin Street, Madison, WI 53207-2594, appearing on behalf of the Union.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievance arising pursuant to the grievance arbitration provisions of the parties' 1989-90 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the Brown County Mental Health Center in Green Bay, Wisconsin, on February 19-20, March 21-22 and April 11, 1990. The hearing was transcribed, with the transcript consisting of 893 pages, which was exceeded by the page volume of the documentary evidence submitted in addition to the one videotape recording and numerous photographs. Prior to briefing, by correspondence including a letter dated May 29, 1990, the Arbitrator authorized receipt of certain additional documents into evidence including Exhibits 46-48 which consist of earlier-dated and signed versions of client evaluation exhibits previously received into evidence during the hearing. The parties' submission of 93 pages of briefs and reply briefs was completed on July 20, 1990, marking the close of the record.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide following issues:

1. Was there just cause for the termination of Bernard Corbielle's employment?
2. If not, what shall the appropriate remedy be?

RELEVANT PORTIONS OF THE AGREEMENT

ARTICLE 24. GRIEVANCE PROCEDURE - DISCIPLINARY PROCEDURE

. . .

DISMISSAL: No employee shall be discharged except for just cause.

. . .

FACTUAL BACKGROUND

The Grievant has been employed as a Nursing Assistant [herein NA] at the County's Mental Health Center since being hired on an on-call basis in June of 1986, changing to at least four-fifths time in August 10, 1986, and to full-time on July 10, 1988.

On October 3, 1989, Grievant was placed on investigation with pay status and removed from direct client care duties pending an investigation of injuries sustained by a client residing at the Center. On October 30, 1989, he was dismissed for the following reasons stated in the Center Executive Director's October 30, 1989, letter:

. . . due to your unsatisfactory work performance in the role of a Nursing Assistant, inappropriate judgment in client care, and neglect of a client. According to our records and available information you were directly responsible for the care of client [Jimmy M.] on the shift of 10:00 PM to 6:20 [AM] commencing on the evening of Saturday, September 30, 1989.

A client incident has been thoroughly investigated, and we have concluded that you were directly involved in the client incident during your shift that resulted in abrasions with bruising to the client.

. . .

The incident was a serious, major infraction of ICF/MR State Code

HSS 124.31(2)(e) and HSS 134.46(1)(2); Federal regulation 483.420(Tags W 127 and W 150) as well as facility policies . . . which individually or in whole constituted grounds for dismissal.

. . .

The Grievant timely grieved the discharge and the matter was ultimately submitted to arbitration as noted above.

It is undisputed that Grievant had been employed in a portion of the Center in which the County is required to follow various governmental requirements including ch. HSS 134.44((2)(b), Wis. Adm. Code, which provides as one of the "conditions of licensure of facilities that primarily serve developmentally disabled persons who require active treatment that "No person with a documented history of.....resident abuse, neglect or exploitation may be hired or continue to be employed by the facility."

It is also undisputed that the facial injuries in question were first noted client Jimmy M's chart at 7:20 AM on the morning of October 1. LPN Mary Fameree testified that she saw Jimmy M. at about 11:15 PM on September 30, 1989 and that he did not have such injuries at that time. Center Management undertook an investigation of the causes of those injuries. Management's investigation included interviews of all employees known to have been working on Unit 4 at and before the time the injuries were noted in the record, of all clients on Unit 4 who could comprehend or communicate, and of certain other persons with possible knowledge bearing on the matter. Ultimately, five Unit 4 Nursing Assistants were put on investigation with pay status pending the results of the investigation. The investigation included the production of a videotape record interviews of three clients by a County Social Worker. The investigation was interrupted and placed on hold for several days to permit the Green Bay Police Department to conduct its own investigation of the matter, which it did. The State Department of Justice also made inquiries in the matter. Management's investigation was then resumed, completed and the individual results were announced to the affected employees and their Union representatives. Neither the police nor the Wisconsin Department of Justice have brought any charges to date and at least the DOJ has closed its file in the matter. The Center Management's investigation resulted in the discharge of Grievant, and the return of the other investigated employees to their employment.

Throughout the investigation and to the present, Grievant has denied any wrongdoing and any knowledge of how Jimmy M. sustained the injuries. When interviewed during Management's investigation on October 12, 1989, Grievant offered only the possibility that because client Norman S. is sexually aggressive, he might have precipitated an incident with Jimmy M. that led to Jimmy sustaining the injuries.

The case turns on the factual dispute between Management's abovenoted conclusion and Grievant's denials of any knowledge of the cause of Jimmy M.'s injuries and of any wrongdoing

associated with those injuries.

The parties have engaged one another in heated procedural and evidentiary disputes before, during and after the hearing. Each has seriously questioned the good faith and credibility of the other and various of its witnesses, leaving the range of truly undisputed facts quite limited. For those reasons, the Arbitrator sets forth below detailed summaries of the parties' respective written closing arguments in order to provide the balance of the background of the dispute.

POSITION OF THE COUNTY

The County asserts that the proper standard of proof in this case is not the criminal standard of "beyond a reasonable doubt." Citing Elkouri and Elkouri, How Arbitration Works 663 (BNA 4.ed, 1985) [herein Elkouri] and cases cited therein at Note 74. Rather, the County asserts that the Arbitrator should adopt the same viewpoint as was expressed in Senn Park Nursing Center, 86-2 Arb. Par. 8838 at p.4450 (Dunham, 1985) to the effect that the arbitral standard should be the same as would be applied in a civil proceeding.

In its brief, the County argues as follows.

The evidence consisting of photographs, incident report, nursing notes, body check and the descriptions of the injuries in the testimony of witnesses Langer, Ahearn and Carriveau shows that Jimmy M.'s injuries could only have been caused by an altercation with another person. Those injuries could only have been caused by another person hitting, striking or bruising Jimmy M. There is no prior instance of record in which Jimmy M. exhibited facial abrasions/bruises such as in this instance.

Grievant is the only person who has been specifically associated with "hitting" or "fighting" with Jimmy M. in the clients' statements. The Union has altogether failed to explain how Jimmy sustained these injuries. It would be unwarranted speculation for the Arbitrator to conclude from the evidence in this case that another client caused Jimmy M.'s injuries.

Discharge is unquestionably required for striking a client under the applicable state and federal regulations, citing, Ch. HSS 134, Wis. Adm Code. The imposition of discharge for such an offense would also unquestionably constitute just cause as that term is used in the Agreement. Grievant's denials of wrongdoing in this case are self-serving and not worthy of weight. Citing, Senn Park Nursing Center, above.

It is not disputed that Grievant knew the rules against client abuse and requiring reporting client incidents. Grievant also knew from a prior experience involving a complaint against him by now-deceased client Alvin R. that the County does not condone client abuse and investigates client complaints and makes determinations as to their validity. It is also not disputed that Grievant had been trained in the procedures for working with aggressive clients including gentle self defense

and of calling for assistance in the event that a client's actions are endangering the employe.

Grievant cannot be permitted merely to deny knowledge of how Jimmy M. was injured and get away with it. Grievant had direct client care responsibilities for Jimmy M. and others on Unit 4 on the night and morning at issue. He was therefore responsible for the well-being of each of those clients. Grievant failed to properly care for Jimmy M., failed to report an incident, neglected to obtain immediate care for the injuries, and left work on October 1, 1989 without checking on the clients in Jimmy M.'s room.

Grievant's version of events is not only self-serving but also undercut by other evidence. LPN Mary Fameree testified that she overheard Grievant talking to two other staff members about "taking down" and "working over" a client" on the night of September 30. That Grievant would make and then deny making such statements undercuts his credibility. That Grievant would make such statements undercuts the Union's contentions that he is a gentle person and concerned about clients' well-being. According to Nancy Tess, Grievant had previously denied being on duty at the time a deceased client Alvin R. claimed to have been abused by Grievant. The statements taken from clients Jimmy M., Mark P., and Mike R. indicate that Grievant was involved in an incident with Jimmy M. Since none of those clients held any animus toward Grievant or had anything to gain from falsely accusing Grievant, their statements should be credited over the Grievant's self-interested denials. Citing, Hillhaven Corp., 94 LA 451 (McCurdy, 1988). The three clients' statements are credible and worthy of weight in this proceeding. The testimony of the parties' respective expert witnesses supports that conclusion. So does LPN James Ward's testimony that Mark P. and Jimmy M. have never made accusatory remarks against staff members in the past.

The Union's theories that Jimmy M. sustained his injuries in some way other than in an altercation with Grievant are speculative and without merit.

Unlike the situation with Grievant, there are no first-hand client witness statements connecting Norman S. to an incident with Grievant. Norman S. has not been shown to have ever attacked another client in ways that would cause facial injuries of the sort Jimmy M. sustained. Moreover, the record contains a form bearing Grievant's and NA Judith King's initialled verifications of his whereabouts and status every 15 minutes which makes no mention at all that he was acting out on the AM of October 1. It can also be noted that the idea that Norman S. could have caused the injuries did not surface until Grievant speculated on it during his investigation interview on October 12.

The nature of the injuries themselves rule out the possibility that they were self-inflicted. The abrasions with bruising on various parts of both sides of Grievant's face could only come from an altercation with another person. Clients Jimmy M. and Mark P. identified Grievant by name and photograph as having caused the injuries. Client Mark R.'s statement corroborates the fact that there was an altercation. Although Client Bernie R. was present when Jimmy M.

responded to LPN Carriveau that "Bernie" who he meant when he said "somebody hurt me," by all accounts Bernie R. would not be capable of causing such injuries. NA John Ahearn's testimony clearly distinguished the injuries to Jimmy M.'s neck sustained in an incident with Frankie R. on the night of September 30 from those Ahearn saw on Jimmy M. on the evening of October 1. The record also clearly establishes that both the injuries Jimmy sustained from the incident with Frankie R. and the injuries Jimmy M. inflicted on himself by habitual neck rubbing were different in kind and distinguishable from the facial injuries at issue herein. Although NA Victor Johnson claims that Jimmy M. first explained his injuries as the result of a fall, it is unnecessary to determine whether Johnson was telling the truth in that regard because a fall is clearly inconsistent with the physical evidence and with Mike R's statement that he heard an altercation taking place in Jimmy M's room. NA Ronald McIntosh's testimony about an incident involving Jimmy M. and roommate client Gary L. in November of 1989 is not probative as to what happened the previous month to cause Jimmy M's facial injuries because it is undisputed that a staff member was to check Norman S. every 15 minutes in the same room that Jimmy M. and Gary L. were in and there is no testimony or indication on Norman S.' location sheet that Gary L. was agitated at any time on the AM of October 1, 1989, thereby virtually eliminating the plausibility that Gary L. could have caused Jimmy M.'s injuries.

The Union claims and the employes' testimony that none of the various NAs on duty on Unit 4 knew how Jimmy M. sustained his injuries are incredible. Grievant and King were the only employes with overnight direct care responsibility for Unit 4 clients, Grievant for the males, King for the females. Each of them left work without reporting Jimmy M.'s injuries or any incident involving Jimmy M. King left work at 7:20 AM, whereas Grievant had left earlier. Grievant initialled a 5:00 AM location check regarding Jimmy M.'s roommate Norman S, and claims to have been giving baths to clients in other rooms. King had responsibility for waking the female clients that morning, and yet she initialled 15-minute location checks on Norman S.' form indicating that he was in the room he shared with Jimmy M. and others at each quarter hour interval from 5:15 through 6:30 AM. Since she could not have been waking female patients and checking Norman S.' location at the various times noted on the form, perhaps she was waking female clients and post-timed the 15 minute checks. King's testimony as to when she saw Jimmy M. and what she was able to see of him differed from her original versions of the events as related to Unit Coordinator Carol Hartford and Nursing Services Administrator Nancy Tess. At the hearing King claimed she checked Jimmy M's bed and spoke with him at 6:30 or 6:45 AM and saw that he did not have facial injuries, whereas when originally interviewed by Carol Hartford King said that at approximately 6:00 a.m. she checked Jimmy M. and was unable to see his face. When later interviewed by Tess, King said she checked Jimmy's bed sometime between 6:00 and 6:30 AM. King's tentative and uncertain testimony as to whether and when she saw Jimmy M. free of facial injuries on the morning of October 1 should therefore not be credited. Jerry Husting was working on the unit from at least 5:30 that morning but claims he was with other male patients than Jimmy M. NA Victor Johnson arrived at 6:00 AM but also claims he was involved with other clients prior to the time he reported the injuries at around 7:20 AM. Johnson reported the injuries to LPN Rose Carmody who arrived at work at 7:00 AM, after Grievant had left.

"The only reasonable inference from the testimony of the four Nursing Assistants present was that one was involved in an incident with Jimmy M." County brief at 10. The testimony of all four of the Nursing Assistants should be discounted because as members of the same labor organization they "were inhibited from 'ratting' on grievant and colored their testimony by inconsistencies in an attempt to confuse the investigation." Id. There frequently is a strong personal reluctance on the part of members of an organization to testify against other members of that organization, and that has been recognized as a factor which might be considered by an Arbitrator in weighing testimony in discharge cases. Citing, Elkouri, above, at 323. It is not credible that King did not know of the injuries before she left work at about the same time they were being reported by Johnson to LPN Carmody. King's credibility is also questionable because she may have altered testimony to protect herself from discipline for leaving work without reporting an incident or to protect her child who is a client at the Center. The fact that on the shifts that followed King was admittedly and visibly "upset" about the injuries to Jimmy M. logically implies that she knew about the incident with Jimmy M. but did not report it.

The statements of all three clients are worthy of consideration and weight in this proceeding. Under Sec. 51.61, Stats., developmentally disabled persons have the right to grieve about their treatment, such that their statements cannot be disregarded. The Union's expert witness, Dr. John Marshall, identified factors such as diagnostic history of prior accusations, medications taken, diagnostic history of delusions and degree of suggestibility as factors to be considered in determining the weight to be given. Dr. Marshall admitted that the statements of Jimmy M., Mark P. and Mike R. would not have resulted from a shared delusion or from intentional deception. Rather, Dr. Marshall was primarily concerned that the three clients were susceptible to repeating what they had heard from others.

The three clients might be susceptible to repeating suggested facts, but the statements taken from the clients as to Bernie bruising, hitting or fighting with Jimmy M. have not been shown to have been a part of any rumors specifically involving the terms bruising, hitting or fighting. Mary Carriveau testified that Jimmy M. told her, "Bernie hit me" a short time after he appeared with the injuries. OTR Geraldine Sherwood testified that Mark P. told her within 48 hours after the incident had occurred that Bernie Corbielle was "fighting" with Jimmy. Nancy Tess testified that on October 3 Jimmy M. named "Bernie" and "the night man" as his assailant and Jimmy's mother Margaret M. testified that Jimmy named "Bernie and Jerry" as involved. Those statements are admissible as exceptions to the hearsay rule because they come within the excited utterance exception to the hearsay rule. Citing, State V. Padilla, 110 W.2d 414 (1982). Those statements are worthy of weight because the clients supplied the names they stated, "Bernie" and "Bernie Corbielle", respectively, without those names having been suggested to them, and because those statements occurred too soon after the injuries were incurred for the clients to have picked up rumors. Similarly, Gail Gagnon testified that she signed a statement on October 2, 1989 quoting Jimmy M. as having named "Bernie" as one of two named assailants. Mike R. corroborated the fact that an fighting incident occurred on the morning in question. On October 18, videotaped

statements were taken from the clients which confirmed the earlier statements that Bernie hit, bruised and fought Jimmy M. Significantly, there is no evidence that before any of those statements were made, rumors had been heard by the clients to the effects that they related in their statements.

Dr. James Peterson, one of the County's expert witnesses testified that because Jimmy M. and Mark P. were developmentally disabled, they were unlikely to convert auditory rumor stimuli to a visual image such as a photograph. Since both those clients identified photographs of Grievant during their videotaped interviews, Dr. Peterson concluded that their statements were reliable. Dr. Peterson's conclusion that the three clients' statements are reliable is also supported by the expert opinion testimony of Dr. Koti Mannem and Psychologist James Heider who work at the Center and who have direct familiarity with and responsibility for the clients involved. County witness Daniel Zimmerman is also quite familiar with the developmentally disabled, and his testimony provides further support for those of the County's other experts. While the Union's experts, Dr. Marshall has unquestioned competence as a psychiatrist, he has little experience in directly treating a pervasive developmentally disabled population. For that reason, and because there is no evidence that there were rumors consisting of the specific facts related in the clients' statements, Dr. Marshall's opinion concerning the reliability of the clients' statements should not be controlling.

Jimmy M. told RN Carriveau "Bernie hit me" around 8:00 AM on October 1, before there could have been any rumors for him to have heard. He thereafter made various corroborative statements when interviewed by Tess, after several attempts, October 3 and on video tape on October 18. While Jimmy M.'s pervasive developmental "disorder makes him unavailable as a witness, his statements are nonetheless admissible while under the influence of a traumatic event regardless of whether he can testify or not." County brief at 17. His statements were of visual memories about what happened to him, not auditory memories of rumors he had heard. Jimmy M. identified Grievant by photograph. Jimmy M. has no diagnostic history of past accusations against staff or of fabricating stories.

Mark P. told Geraldine Sherwood on the morning of October 3, 1989 that Bernie Corbielle was fighting with Jimmy as the way Jimmy got hurt. Sherwood testified that Mark P. identified Grievant by first and last name without Sherwood's first providing the name to him. Union witness Debra Engobos' testimony that she overheard Sherwood's conversation with Mark P. and that Sherwood was the first to mention Grievant's name should be disregarded as an illogical fabrication by a disgruntled exiting employe with a grudge against professionals. Mark P. also told Carol Hartford and Nancy Tess that Bernie was "fighting" with Jimmy and that Bernie "bruised" Jimmy. These statements are consistent with the later videotaped statement, and they explain what caused the injuries and the reason why Grievant struck Jimmy, i.e., Grievant "'hit" 'bruised' or 'struck' Jimmy M while subduing an agitated client." County brief at 21. Mark P. was describing what he heard and saw, making it less likely that his statements were the result of a rumor he may have heard about what supposedly happened to Jimmy. Mark P. also has no

diagnostic history of past accusations against staff. Mark P. trusted and confided in Sherwood and would not have reported to her what he did if it were not true.

Union witness Stephanae Ward's claim that on October 19 Mark P. named Carol Hartford as having caused Jimmy's injuries is inherently incredible. The further testimony concerning Ms. Ward's causing Mark P. to say in front of other staff that "Nancy Tess hit Jimmy M." amounted to ridicule and a violation of Mark P.'s right to humane treatment, and should be disregarded. The fact that Mark P. may be manipulated to repeat things is different from his claimed susceptibility to picking up rumors.

In his October 18 videotaped statement, Mike R. talked about someone who had "worked over" Jimmy. Those were the same words as had been used by Mary Fameree in quoting Grievant's comments to co-workers the day before the injuries were sustained. Mike R.'s statement corroborates those of the other two clients that an altercation took place. Mike R. did not see the incident but he heard noises from Jimmy's room and saw Bernie slam the door to that room.

The videotaping was done by John Durkee, a social worker not employed at the Center. Videotaped testimony is permitted in Wisconsin, citing, Sec. 885.40, Stats. It can be a constitutionally permissible means of protecting vulnerable victims from being further traumatized, under a U.S. Supreme Court decision issued June 27, 1990. The tape affords the Arbitrator the opportunity to observe the demeanor of the clients when they made their statements. In Wisconsin, persons under a mental disability can testify even if they do not understand abstract concepts and the meaning of the oath, citing State v. Hansen, 149 Wis.2d 474 (1989), with the fact finder determining independently what weight to give to their statements.

Clients have a legal and moral right to be protected from exploitation, abuse and degrading treatment. Jimmy M.'s injuries make it obvious that his rights in that regard were seriously violated. Clients also have a right to grieve their treatment, to speak out if abused, and to be listened to. The County had a duty under the applicable government regulations to investigate injuries such as those Jimmy sustained. The statements of the three clients indicate that an altercation occurred. This was confirmed by the physical evidence of the injuries. The Union cannot deny that a serious risk to all clients existed after Jimmy M.'s otherwise unexplained injuries were discovered. That risk to clients required the employer to investigate the incident and obtain information from the staff members present on Unit 4 at and before the time the injuries were reported. All those employees denied any first-hand knowledge of how the injuries occurred. The County therefore found it necessary to ask clients about the injury, and the statements of the clients on videotape remain the best available evidence as to the cause of the injuries.

Speculation about Norman S. and Gary L. is negated by the absence of any notation of a problem in the room on any of the 15 minute checks of Norman S.' location. The clinical records and other evidence do not warrant the conclusion that the clients were suggestible or prone to

falsely accuse or fabricate. Grievant's denials are suspect because he has so much at stake in this proceeding and because his presence throughout the hearing gave him an opportunity to take account of the County's other evidence before he testified about his own. Grievant's "explanation for his actions and alibis for not properly caring for Jimmy M. do not comport with his job duties and responsibilities for the well-being of his clients." County brief at 29. He was present at the time and place the injuries occurred with the job responsibilities to protect Jimmy and report any incidents and he obviously failed in those responsibilities.

"The rights of the clients to be free of risks to their bodily security outweigh an employee's right to claim no duty or responsibility for client safety. The fate of the clients hinges upon their ability to cry out against mistreatment. To ignore those cries for help would subject them to a climate of fear and an inhumane psychological environment. The trauma of the incident affected Jimmy for days after the event. The magnitude of the harm and risks in the future required the discharge of the grievant." Id. Arbitrators have recognized that the most severe discipline is justified in cases of physical patient abuse. Citing numerous arbitration awards.

The evidence concerning Grievant's work record is too short and too questionable to either mitigate the instant offense or to make it any less likely that he caused Jimmy M.'s injuries. Citing, Elkouri at 670-688. He has only worked for the County a relatively short time. Prior to the instant situation, now deceased client Alvin R. had previously complained that Grievant had mistreated him. Moreover, the statement Mary Famaree overheard Grievant make to co-workers on the night of September 30, 1989, should be construed as an admission made by grievant that he had "worked over" and/or "taken down" a client. Because a perpetrator would obviously not commit an offense while he knew he was being observed, the testimony of various Union witnesses as to Grievant's past work conduct is worthy of little weight.

There can be no question generally but especially given the requirements of HSS 134, Wis. Adm. Code that discharge is the only appropriate disciplinary action for the physical abuse of a client.

In its reply brief, the County made the following additional arguments.

Since no one had the same opportunity to cause Jimmy's injuries and since Jimmy consistently mentioned "Bernie," Grievant was required to give a logical explanation of his job activities on the morning in question, but failed to do so. The evidence confirms that he had an opportunity to inflict the injuries, since he initialled the 5:00 AM location check showing Norman S. in the room also occupied by Jimmy M. Grievant's job duties included caring for and safeguarding Jimmy M. from harm and reporting any injuries.

The County need not prove that Grievant had a motive to harm Jimmy M. Nevertheless, the evidence does show that Jimmy is unpredictable and that he can and has struck staff members in the past. Such an incident could have caused the fighting to which Mark P.'s statements

referred. It would clearly violate established policies and procedures for Grievant to respond by hitting or fighting with Jimmy. A gentle self-defense response has been taught and is required. The fact that the idea of working over a client had at least occurred to Grievant was shown by Grievant's comments of earlier in the same shift as related by Mary Fameree. Alvin R. had previously complained that Grievant and another staff member handled him roughly and put him in a cold bath when he resisted being bathed, further suggesting that Grievant may be prone to be physically rough in response to difficulties with a client.

The clients' statements must be given weight. The Union has not satisfactorily explained why the three clients would have all implicated Grievant. The clients' treating psychiatrist, Dr. Mannem found their statements to be worthy of weight, and his should be given great deference. In addition to their videotaped statements, Jimmy M. and Mark P. were interviewed by Nancy Tess on October 3, and hence within 2 days of the incident. Jimmy M. identified Grievant from a set of photographs as the "night man" who struck him. The expert testimony indicates that it is unlikely that the clients would convert an auditory rumor into a visual image. Again, Dr. Marshall's suggestibility theory can only have significance if it were proven that the two clients heard someone else say that "Bernie hit Jimmy" or that "Bernie was fighting with Jimmy" and there is no evidence to that effect. Assumptions that clients participate in or eavesdrop on staff conversations are not warranted on this record. The nature of the injuries themselves rules out the possibility that they were self-inflicted.

The Union's contention that the Grievant's self-serving denials constitute compelling evidence of his innocence must be rejected. Grievant claims to have been busy dressing and bathing other residents so as to have been too busy to have injured Jimmy M. However, the injuries could have occurred within the span of just a couple of minutes, so that none of the staff on duty can reasonably claim to have been too busy to have been involved. "From 6:00 AM to 6:20 AM, Grievant could have injured a client several times over." County reply brief at 8.

It seems strange that King initialled Norman S' client checks from 5:15 AM until 6:30 AM, given her testimony that she was helping wake female clients at those times. "King could have initialed the document at a later time at grievant's request [or she] might have initialled the document properly and be hesitant to implicate the grievant. In any event, she lied when she testified she was with female clients at the same time she was in Jimmy's room with male clients initialing the document because it was physically impossible. (Tr. p. 492-3) King also stated in the initial interview with Carol Hartford she didn't even look at Jimmy's face. (Tr. p. 101). If there is any compelling evidence of a coverup, King's testimony is such an attempt, but she made the crucial mistake of discounting the document she admittedly initialed." County reply brief at 8.

Another reason to ignore Engobos' attempt to discredit Sherwood's testimony is that Engobos did not come to supervision with her story before the arbitration hearing.

If Grievant caused Jimmy M's injuries, then the discharge was for "just cause as a matter

of the state law applicable to the facility in which Grievant was employed. Citing, Sec. 134.44(2)(b), Wis. Adm. Code, above.

The investigation was fairly conducted. The Union's claims that it was tainted by an anti-staff bias or tainted by a coverup of James Heider's preliminary drafts of evaluations of the client witnesses are without merit. Management gave Grievant a full opportunity to explain how Jimmy M. sustained the injuries. The other three staff members involved were also interviewed, but all four gave "know nothing" answers. Grievant's name was the only one given by all three clients as present when the hitting, fighting and door slamming occurred. The County came to its conclusion as to Grievant's guilt based on the evidence, not due to any bias. Nor has there been a coverup of evidence unfavorable to the County's case. The County provided the Union with Psychologist Heider's official evaluation reports regarding each of the three clients on whose statements the County has relied in this proceeding. The Union chose to put them into evidence as part of (Exhibits 37-39) and to rest its case without asking for or about the earlier drafts of those documents to which date references are made at the end of each of the final evaluations. The Union had ample time and opportunity during the hearing to question Heider about his professional judgments regarding the clients involved. It was not until after the hearing that the Union then offered into evidence the earlier drafts and an associated document, which documents had been illegally obtained from County files after the close of the arbitration hearing had been concluded. Those documents ought not be considered. The only attempted coverup in this case is the Union's attempt to twist the facts and testimony to fit its illogical hypothesis.

For all of the foregoing reasons, the Arbitrator should find that the County had just cause for the discharge and deny the grievance. Citing, Park Geriatric Village, 81 LA 306 (Lewis, 1983). The proof of injuries and their cause was established by the evidence. The Union's speculative theories of causation are neither supported by the credible evidence nor within the realm of reasonable inference given the nature of the injuries.

POSITION OF THE UNION

In its brief, the Union reviews the factual background of the case in detail. It notes that Grievant has been involved in providing direct care for the mentally or physically disabled since he spent time with his stroke victim grandmother at ages 11-12. As a teenager, he volunteered and was later employed at San Luis Nursing Home where he worked with geriatric and mentally retarded populations. In June of 1986 he began working at the Center but has also worked, while a Center employe, at Parkview and Roseville Nursing Homes, and his employment at the latter continues at present. In the course of these experiences in direct client care, Grievant has been thoroughly trained in patient care techniques, including use of the Heimlich maneuver by which he saved a choking Center patient.

Except for the present instance, no employer has ever accused Grievant of causing injury to or otherwise improperly treating patients, and Grievant has never experienced a disciplinary

suspension of any kind. Numerous witnesses stated that he has an excellent rapport with clients and that they, have never known him to mistreat or be accused of mistreating clients. The only exception was client Alvin R., now deceased, who was a chronic complainer and a source of false accusations against staff members in the past. Alvin R. resisted the efforts of Grievant and another employe to bring Alvin R. to the bath they had drawn for him, resulting in bruises on Alvin R.'s wrists and a colder than usual bath. Upon investigating Alvin R's complaint in that regard, Management properly concluded that the employes had acted appropriately in the circumstances.

The only people implicating Grievant in Jimmy M's injuries at issue here were clients Jimmy M., Mark P. and Mike R. The evidence shows that Jimmy M.'s mental condition includes both a psychotic process being managed with anti-psychotic drugs, and mental retardation. With these conditions and given his residing in a closed treatment unit, he is highly susceptible to being influenced by conflict situations arising among staff, with a high potential for mistaking rumors for reality. In addition, several Center employe witnesses described Jimmy M.'s history of making unreliable statements. Jimmy M. also has a history before and since October 1 of self-inflicted abrasions from rubbing raw the back of his neck. Some witnesses described his October 1 facial abrasions as practically identical to his self-inflicted neck rubbings. Jimmy M. also has a history of a volatile personality and has been known to get into physical altercations with staff and other residents. Finally, witnesses testified that Jimmy M. has a habit of avoiding answering questions by answering "I don't know" and by giving answers which he thinks will satisfy his interrogator to bring an end to the questioning.

Mark P. has a similar diagnosis and hence there is great cause for concern about his ability to report an incident accurately, for the same reasons. Witnesses confirmed that Mark P. has been known to repeat what others say, sometimes embellishing the story and trying to please his caretakers by telling them what they want to hear.

Mike R. is mentally retarded and hence highly suggestible and susceptible to problems of grasping the importance of what he hears. Residing in a closed treatment setting, he too has a heightened potential for misunderstanding rumors and treating them as reality. He also has a history of socializing with the staff, increasing the potential for picking up rumors.

On the evening of Saturday, September 30, 1989, Grievant worked his usual 10 PM-6:20 AM shift on Unit 4, punching in at 9:55 PM. NA Judith King, is the other NA on duty on Unit 4 that night, beginning her shift at 11:00 PM.

LPN Mary Fameree worked from 3:00 PM to 11:20 PM that night and saw Jimmy M. without abrasions on his face at about 11:15 PM.

Between 11:20 PM and 5:15 AM, Grievant and King were the only staff members on Unit 4. Among their responsibilities were to check Norman S.' location on approximately each quarter hour and to record and initial that location on a form. In practice such checks are often made a

few minutes before or after the quarter hour times at which they are recorded and initialled on the form. Grievant testified that he and King shared the responsibility for all the residents, male and female, on Unit 4. King testified that she tended to do the necessary checks on the female residents and Grievant on the male residents, but that when one of them was on break the other did all the checks. On the night in question, King performed the fifteen minute checks on Norman S at the quarter hour intervals from 1:00-1:45 and 5:15-7:00 AM. Grievant testified that the last time he saw Jimmy M. was during his 5:00 AM check on Norman S. who was one of the four clients in Jimmy M's room. Grievant testified that between 5:00 and 5:30 AM, he did some charting, got the shower ready for the residents he was to help bathe, and generally straightened up on the unit. Grievant further testified that between 5:30 and 6:20, as usual, he woke and dressed specific clients in room 247, woke and dressed a client in room 251 and woke and bathed another client from room 251 in the shower room. He stated that it took him approximately 20 minutes to bathe one resident and a total of 30 minutes to wake and dress the other two.

At 5:30 AM, Unit 5 NA Gerald Husting reported to Unit 4 where he normally helps wake clients, primarily the males, for an hour or hour and one-half. October 1 Husting spent from 5:30 AM to 7:00 AM on Unit 4. At 6:00 AM, NA Victor Johnson started his shift on Unit 4. Grievant punched out and left work at 6:20 AM.

King testified that between 6:30 and 6:45 AM she entered Jimmy M's room, noted that Norman S. was awake and dressing, and took clothes from a locked closet for another of the roommates, client Gary L., to get dressed. King further testified that because she smelled urine on entering the room, she went to Jimmy M.'s bed to see if he had wet it, finding Jimmy awake, fully dressed, and lying on his right side. King states that she bent over Jimmy and felt to see if the bed under him was wet with urine, looking at Jimmy M. and talking to him as he checked the bed. King testified that she did not see any abrasions or bruises on his face at that time and that she would have seen them if they had been there at that time. Carol Hartford testified that King told her on October 2 that she had checked Jimmy's bed at 6:00 AM, and Nancy Tess testified that King had told her she had checked Jimmy's bed between 6:00 and 6:30 AM. (NA Ronald McIntosh testified that in late November of 1989, Gary L. struck roommate Jimmy M. twice with a closed fist while Jimmy M. was laying in bed, and that Jimmy M. did not cry out or otherwise react when he was hit. McIntosh further testified that had he not intervened, it appeared that the hitting would have continued.)

Husting testified that he opened the door and looked into Jimmy M.'s room at 6:45 AM, seeing Jimmy laying in bed with his body covered with a sheet and with no one else in the room with him. Husting further testified that the door was supposed to have been kept open, but that Norman S. often habitually closes it, preventing staff from monitoring what is going on in the room from the hallway.

Victor Johnson testified that he saw Jimmy M. walking near the Nursing Desk with the abrasions on his face at roughly 7:00 AM and before 7:20 AM. Johnson asked Jimmy how the

injuries occurred, to which Jimmy responded, "I don't know." He asked again, to which Jimmy responded, "I fell." Johnson testified that he reported the injuries immediately to LPN Rose Carmody who then made a note of the report at 7:20 AM and reported them to RN Mary Carriveau shortly after 8:00 AM. Johnson then brought Jimmy M. out to the desk and Carriveau asked him what had happened. According to Carriveau and Carmody, after responding "I don't know," Jimmy M walked a short distance away and then returned to the desk. Carriveau said it looked like the injury hurt, to which Jimmy responded, "Somebody hurt me." Carriveau asked who had hurt him, and Jimmy did not respond for a few moments. Then he put his fingertips up to the sides of his head and looked around several times. When he stopped looking, he said, "Bernie," when he was standing next to and looking at a client named Bernie R. Carriveau and Carmody discussed the possibility that Bernie R. had injured Jimmy, but neither felt that Jimmy M's statement was accurate, since Bernie R. was not known to be violent or aggressive. At 8:40, Carriveau charted her observations, noting initially "client unreliable historian - unable to state how injury occurred", but then adding a continued charting note with the same time reference to the effect of Jimmy M.'s responses that "somebody hurt me" and Jimmy responded "Bernie" when questioned who had hurt him.

Carriveau and LPN Fameree testified that, that afternoon, LPN Fameree commented to Carriveau that she did not think it was possible that Bernie R. had caused Jimmy M's injuries but that perhaps Jimmy was referring to Bernie Corbielle, the Grievant. At 5:00 PM, Carriveau called Carol Hartford, the RN coordinator at home to report the incident. Hartford told Carriveau to take pictures which was done at 6:00 PM, and Carriveau had a body check done by NAs Lance Langer and John Ahern.

At 11: 00 PM on October 1, King came on duty. King testified that upon her arrival, Fameree and other staff members asked her what had happened to Jimmy M. and that King went into Jimmy M.'s room to look at him. King asked him what happened, and that Jimmy M. replied, "I don't know." King testified that the incident including the fact that Jimmy M. had named "Bernie" and that that was Grievant's first name, was a topic being discussed among all of the staff. According to NA Douglas Reetz, by the next morning, October 2, staff members outside Unit 4 had heard about the incident and it was a general topic of conversation including references to Grievant and to Victor Johnson. Reetz testified that the clients could not help but hear the rumors.

When Hartford came in to work on October 2, she told Nancy Tess of the incident and visually checked Jimmy M. for bruises. Tess obtained permission from Center top Management to launch an investigation.

Hartford spoke to King about the incident at the end of King's shift on October 2. Hartford made rough notes of the interview which are not in evidence, but she did not write them up until October 6 and did not review the write-up with King for accuracy. On October 3, Tess interviewed Jimmy M., Mark P., and Mike R. Tess testified that Jimmy M. at first responded "I

don't know," when asked how he got the bruises, but when asked again said "Bernie hit me" and when asked "Bernie who" responded "The night man". Tess further stated that Jimmy M. pointed to a picture of Grievant, saying "Bernie hit me." When Tess asked if anyone else had hurt him, Jimmy M. replied "Bernie and Jerry hit me."

Tess testified that Mark P. told him he hid in the door and saw Jimmy M fighting with Bernie and that Bernie hit Jimmy.

Tess testified that Mike R. told her he saw Bernie go into Jimmy's room and shut the door and that he heard Bernie, Victor and Jerry in the shower room laughing about what they had done.

On October 3, Grievant, Johnson, King and Husting were issued notices of investigation and placed on leave of absence with pay.

On October 4, Tess contacted the Green Bay Police. At the Police' suggestion, Management put its investigation on hold while police officers spoke with all concerned. The police detective involved then told Tess that there was no one who would give him any information that would substantiate the allegation that Grievant had hit Jimmy M.

On October 12, Tess interviewed Grievant regarding the injuries. Tess testified that Grievant told her he had no idea what happened and that Jimmy had been quiet all night. According to Union President Ray Schmitt's notes of the interview questions and answers, Grievant brought up the fact that one of Jimmy's roommates, Norman S. was sexually aggressive to which Personnel Coordinator Nancy Tomchek-May replied, "What does that have to do with this investigation." Tess write-up also indicates that before that, Tess had stated, "We must find out who the staff are that are abusing clients."

Tess also interviewed Husting, Johnson and King. Tess testified that none of them had any idea how Jimmy M. had sustained his injuries. On October 18, Jimmy M., Mark P. and Mike R. were interviewed on videotape by social worker Jack Durkee.

The testimony of various witnesses shows that in the days and weeks following the injuries, each of the three clients has implicated several people as having caused Jimmy's injuries. In their interviews with Tess and the videotape, Jimmy M. named Jerry and Bernie; Mark P. named Bernie; and Mike R. named Bernie, Jerry and Victor. In addition, Carriveau testified that Jimmy M. told her on October 1 that "Bernie and Jerry did it" and then later in the day that it was Frankie who had hurt him. Client Frankie R. had choked Jimmy M. from behind during the evening meal on September 30, 1989, causing some swelling to appear on his neck later. OTR Jane Chartier testified that she asked Jimmy M. what happened to him on October 2 and he said replied Frankie did it. NA James Ward testified that he heard Mark P. say that "[Nursing Home Administrator] Dorothy Riley did it." OTR Geraldine Sherwood testified that on October 3, Jimmy M. told her that Bernie Corbielle had hit him, but Occupational Therapist Debra Engobos,

testified that she overheard the conversation and that Sherwood had mentioned Grievant's name before Jimmy M. did. NA Stephanae Ward testified that after the videotaped interviews had inadvertently been played on a television in the facility on October 19, Park P. had volunteered to her that Carol Hartford had beat up Jimmy M. Ward then took Mark P. to the nursing station desk and asked in the presence of NAs Wayne Schwantes and Gail Gagnon "Who beat up Jimmy M?" to which Mark P. answered, "Carol Hartford." Ward then suggested Nancy Tess' name and Mark P. answered with it in response to "who really bet up Jimmy M."

Grievant was discharged effective October 30, 1989. In February of 1990, shortly before the hearing in this case began, Center Psychologist James Heider prepared psychological evaluations of the three clients. After having them typed and signing them, Heider made major changes on all three, striking out any reference to "competency" as a referral question and replacing it with a statement concerning "treatment recommendations." Also struck were Heider's statements regarding the the clients' "questionable reliability," "limited ability," and "inability to demonstrate competence" as witnesses.

The Union then presents the following arguments in its brief.

Many arbitrators require proof "beyond a reasonable doubt" where, as here, the conduct alleged would be a crime. Citing, Hill and Sinicropi, Evidence in Arbitration 16 (BNA, 1981) and Elkouri at 662-63. In civil cases involving intentional torts of battery the Wisconsin courts apply a "middle burden" requiring proof by "a clear and satisfactory preponderance of the evidence, citing, Johnson v. Ray, 99 Wis. 2d 777, 783. That is the same as the proof "to a reasonable certainty by evidence that is clear, satisfactory and convincing" standard applicable in Wisconsin civil cases involving criminal acts. Citing, Wangen v. Ford Motor Co., 97 Wis.2d 260, 299 (1980). The ordinary civil case burden of proof requires proof "to a reasonable certainty but the greater weight of the credible evidence." Id. Whether the Arbitrator applies beyond reasonable doubt or a middle burden standard of proof, the County has not proven its charge that Grievant was directly involved in the client incident during his shift that resulted in abrasions with bruising to Jimmy M.

The clients' statements cited by the County are not reliable. Each of the clients is mentally disabled; each lives in a closed, specialized treatment environment; each has been known to make unreliable statements in the past; and none can fairly be viewed as capable of understanding the abstract concept of truth.

The videotape interview statements of the clients are not reliable. They were not subject to cross-examination. Because they occurred some three weeks after the incidents in question, the clients experienced and were influenced by interim discussions among staff and residents about Jimmy M's injuries and his statement on October 1 that "Bernie" caused them. The expert testimony establishes that the mentally retarded are prone to pick up rumors circulating among staff or clients and prone to fail to distinguish such information from reality, due to difficulties

making sense of differing information and due to their dependent relationships with staff members and the possible additional effects of peer influence. The videotape interview procedure was flawed in that: the questions were often leading in nature or unreliably framed as "isn't that right?" which UW-Medical School psychiatry professor John Marshall noted will often lead to unreliable affirmative responses from clients like these. In addition, the interviewer repeated questions until an apparently acceptable answer was received and then reinforced that answer by including references to it in subsequent questions.

The clients' statements give no plausible explanation for why Grievant would have injured Jimmy M. as the County claims he did. The evidence concerning Grievant's work history shows, instead, that if an incident had occurred in which a client struck Grievant, Grievant would not have started fighting with him. The evidence from numerous witnesses establishes that Grievant has never been known to have lost his temper with a client; has never yelled at a client; and has never been disciplined for mistreating a client in any way.

Even if the clients' statements implicating Grievant were reliable, the County has not shown those statements to be any more credible than the clients' various other statements that are wholly inconsistent with the idea that Grievant caused Jimmy M.'s injuries. At various points in their statements, the clients each named others as the person(s) who caused the injuries. Jimmy M. named a total of four including Grievant. Mark P. named a total of three. Mark R. named Grievant and two others. At various points in each of their statements, each client stated that he did not know how Jimmy M. got hurt. The statements of Jimmy M. and Mark P. also include denials that Jimmy M. had been hurt at all.

Dr. James Peterson, admittedly a friend of James Heider's, claimed incorrectly that Mark P. picked out Grievant's picture as the person responsible for Jimmy's injuries. The fact is that the interviewer asked, "is there a picture of Bernie on the table, the one that hurt Jimmy," to which Mark P. responded by pointing to a picture allegedly of Grievant though the videotape does not show that a picture of Grievant was in fact on the table. All that showed was that Mark P. could recognize which of several pictures was Grievant; it does not reliably show that the picture chosen was someone P. saw hurt Jimmy M.

There is compelling evidence that Grievant did not injure Jimmy M. Grievant, King and Husting all testified that things had been quiet on the Unit; Grievant did not have a problem with Jimmy M. to which to react. The evidence shows Grievant has no history of reacting improperly to patients acting out. On the contrary, Grievant has worked for many years with disabled persons, dating back to his caring for a disabled grandmother when he was young, through volunteering as a teenager and later working and volunteering as an aide at a nursing home, and then in his work for the County since 1986. Numerous witnesses described him as an employee in dealing with clients, including among others, RN Carriveau--"very gentle, very caring, kind" (tr.59); LPN Fameree--never known him to act aggressively or abusively towards any of the residents (tr.73); LPN Carmody--"I think he related very well (to the clients)]. Whenever I was on

if anything unusual happened he would have reported it immediately and he was an ambitious person" (tr.178); NA Lance Langer--"I think Bernie enjoys our clients on Unit 4. There are several clients that look forward to seeing him come on at night. That's my opinion." Appears to relate well with the clients. (tr.188-89); and LPN Judy Tillman--surprised he was being accused of having caused the abrasions "because I had worked with Bernie and I had never seen him -- you know, he doesn't -- I've never seen him abuse patients. I always thought Bernie was really good with the older people. I worked on Unit 2 where the elderly people are and he seemed to have a nice way of taking care of them I thought." (tr.208).

The evidence shows the abrasions appeared on Jimmy M. only after Grievant left work at 6:20 AM. Judith King testified that she checked Jimmy M.'s bed for urine wetness between 6:30 and 6:45 AM, saw his face, and saw that he did not have abrasions on it. Even if that occurred at 6:00 AM, as on Hartford's October 6 write-up of her October 2 interview of King (which was not verified by King), Grievant would still have had no opportunity to injure Jimmy M. because, as Grievant testified, he was busy waking, bathing and dressing other male patients whom he named. As Grievant testified, it took him a half hour to bathe and dress two residents, 20 minutes to bathe the third, and a few minutes to get from the unit to the time clock to punch out at 6:20 AM.

Many statements by the County's client "witnesses" exculpate Grievant. Jimmy M. made statements to the following effects: nobody struck him; he didn't know who did it; they didn't hurt him; they didn't hit him; they didn't kick him; they didn't hit him with their fists; they weren't trying to hold him so he wouldn't hit them; they weren't upset with him; he didn't know how he got bruised; and he likes Bernie and Jerry. Citing, tr. 273-281 and videotape. Similarly, Mark P. made statements to the following effects: that he did not know what happened to Jimmy; that Jimmy did not get into a fight; that Jimmy did not get hurt; that Jimmy did not get any bruises; and that he did not see Jimmy get hit. Citing, tr.284, 289 and videotape. Mike R. made similar exculpatory statements to the following effects: that he hears noise in Jimmy's room all the time; that he did not know what happened; that he did not know who was in Jimmy's room with Jimmy; that he does not know who did it; that he does not know what "to work him over" means; that he did not know who hit Jimmy; that he did not know what happened in Jimmy's room; everybody in the room was laughing including Jimmy; that he did not know whether it was Bernie; it happens every day [that] . . . Somebody always get hurt every morning"; that he did not know if anybody besides Jimmy was in Jimmy's room; and that he did not know if Bernie was in the room with Jimmy. Citing, tr. 294-306.

The Union agrees that abuse of clients cannot be condoned, especially by those directly responsible for their direct care. The record however, shows that bargaining unit employes have shown concern about and have reported instances of client abuse by co-workers and supervisors but Management has become concerned only when the impetus for an inquiry comes from management and only when they think they can prove that staff are abusing clients. Thus, when Grievant was being interviewed for the first time by management about the incident on October 12, 1989, he was told "We must find out who on the staff are abusing our clients," and

Management showed little interest in Grievant's suggestion that Jimmy's roommate was sexually aggressive and gets aggressive when he does not get what he wants.

"A young man's good name, and with that his future are at stake. They should not be permitted to be destroyed because of a management bias that refused to consider any alternative explanation other than that 'staff' must have injured Jimmy M., a bias that led management to try to cover up the real opinion of its own Psychologist concerning the actual unreliability of its so-called witnesses." Union brief at 33.

For those reasons, the Union requests that the Arbitrator find the County lacked just cause for the discharge and order Grievant reinstated in the day shift position on Unit 2 that he bid for at the time of the investigation, with the option to return to his original night shift posting on Unit 4 should he so choose. In addition, the Arbitrator should order the County to grant Grievant full back pay and full restoration of seniority and of all the other attributes of employment.

In its reply brief, the Union argues as follows.

The County's brief fails to come to grips with the record evidence and instead has resorted to unwarranted personal slurs and attacks on employe witnesses and the nonsupervisory staff as a whole. The County's analysis seems to be Jimmy M. got his abrasions somehow, so it must have been caused by the staff because they are the staff.

The County unfairly asserts one of the four employes on duty must have been involved in the incident causing the injuries without acknowledging the possibilities that Jimmy M.'s injuries were self-inflicted or inflicted by another client. The County unfairly asserts there was purposeful delay in reporting the injuries without acknowledging the likelihood that the injuries occurred shortly before they were observed and reported. The County claims Union members were inhibited from ratting on Grievant and colored their testimony by inconsistencies in an attempt to confuse the investigation, without offering any evidence to support either claim and in the face of evidence that employes have in fact reported instances of abuse by co-workers and supervisors to higher management.

The County unfairly asserts King testified falsely that Jimmy M. was free of the abrasions at 6:30 or 6:45 AM. Carol Hartford's report of her October 2 interview of King which identifies the time as "approximately" 6:00 AM was not written until October 6, was never verified for accuracy with King, and Hartford's rough notes taken during the interview are not in evidence. Thus, it is by no means clear that King told Hartford anything different from her consistent testimony at the hearing. Notably, it was the County's attorney who focused King's attention on 6:30 AM. Also notably, King testified that Norman S. was up and dressing when she checked Jimmy's bed, corresponding to the 6:30 AM location check which noted Norman S. dressing rather than the 6:00 AM check which noted his location as in bed. It must be remembered that by all accounts the quarter hour location checks are often five to seven minutes before or after the

quarter hour interval for which they are recorded on the form.

The County chooses to attack Stephanae Ward for what it calls mistreating Mark P., rather than addressing the fact that the incident she related confirms Mark P's propensity to implicate individuals based on what he hears from others and to embellish the story by adding names, as well. Notably, James Heider's signed evaluations concluded that none of the three clients were reliable witnesses, but his revised drafts eliminated those comments altogether and the earlier drafts were not provided to the Union or brought to light until the Union submitted them and the Arbitrator received them after the close of the hearing. The Arbitrator however declined to reopen the hearing to allow the Union to prove, as it offered to do, that that Heider had made those changes at Tess' behest.

The County has misstated or ignored the record in various respects making little effort to cite the record in support of the factual assertions contained in its brief.

Thus, it is not true that the evidence clearly establishes that an altercation caused Jimmy M.'s injuries. RN Carriveau said the abrasions looked like rug burns (tr.45); LPN James Ward said they looked the same as those Jimmy inflicts on himself on the back of his neck (tr.805, 814); NA Wayne Schwantes said the abrasions looked like they were caused by contact with a carpet (tr. 351); and NA Ronald McIntosh said the abrasions were different from the bruises Jimmy suffered when he was known to have been fist hit by roommate Gary L. in November of 1989. (tr.856).

It is also not true that Grievant was the only person named as "hitting" or "fighting" by the two alleged eyewitnesses. At one time or another, Jimmy M. has also named NA Jerry Husting, client Frankie R., and NA Victor Johnson. Mark P. has at one time or another also named Dorothy Riley, Carol Hartford and Nancy Tess.

It is not true that the the evidence clearly establishes that Grievant had an opportunity to "work over" Jimmy M. Grievant explained where he was and what he was doing, leaving no time during which he had any such opportunity.

It is also not true that the evidence shows Grievant "admitted" taking down or working over a client. Fameree testified that she believed she overheard a conversation (which is denied in the testimony of all three of the alleged participants) in which Grievant spoke only hypothetically about what Grievant felt angry enough that he "could have" done. Famaree also said she thought Grievant was merely letting off steam by saying something he did not mean, and she stated further that the remark was followed by laughter.

It is not true that the nature of the evidence rules out a fall. Schwantes said forced contact with a carpet could cause the injuries he saw, and Johnson said Jimmy's first explanation of his injuries was that he fell.

It is not true that the 15 minute checks rule out the possibility that one of Grievant's roommates caused the injuries. That County contention ignores the speed with which a battery can occur in an institutional setting, as was the case in November of 1989 when Gary L. attacked Jimmy M in his bed and punched and bruised him with his fists before NA McIntosh who was observing the event from the doorway on instructions from the staff nurse was able to intercede. It also ignores the fact that Jimmy M.'s response was to stay in a fetal position during the attack and not to call out at all. Finally, the County contention ignores the evidence that Norman S. habitually closes the door when he is awake in the room.

In stressing that "Bernie" was the first person implicated by Jimmy M. as regards his injuries, just minutes after they were first reported, the County overlooks the critical fact that Jimmy M.'s initial response to the question of what had caused his injuries was "I don't know," then "I fell," and only 40 minutes or so later at the nurses' station did he say "Bernie" after being pressed for a further explanation, fidgeting until his eyes fell on client Bernie R. who was next to him. Only then did he say "Bernie" as the name of the somebody who hurt him. Thus, the identification of "Bernie" was not spontaneous and it was severely suggestively tainted by the immediate presence of client Bernie R.

The County asserts without record evidence support that Jimmy M. was still under the influence/trauma of whatever produced the injuries when he was interviewed by Tess on October 3.

The County is also incorrect when it asserts that there is no evidence that the client population heard suggestive speculation that Bernie had hit Jimmy after Jimmy's injuries were reported and noted. For example, Unit 2 NA Doug Reetz testified (tr.502-506 and 509-511) that Grievant's name and those of other Unit 4 staff members were rumored as having been suspected or accused of having caused injuries to a client as of late Monday morning, October 2. In that regard Reetz testified that "when it involves staff, word gets around . . . by word of mouth" and "The way the clients move around and walking around the units and stuff, I'm sure that they could not help but overhearing at different times. Whether it's walking through the rec hall or anywhere, they hear names, they know the staff that attend them, they recognize those names. Some of them know those people for years. You could consider it a family member to them because that's the person they see every day and so they recognize the name and the know when it's you know, involving a person on their unit or wherever, and majority of the clients know the names of every staff in the building because of having worked with them at one time or another."

The County's excited utterance theory is without merit. The fact that an alleged incident may have been exciting to a mentally incompetent person does not render them competent or reliable. In any events none of the client statements implicating "Bernie" or the Grievant were either spontaneous or uttered at or immediately after the moment the injuries were sustained.

It seems highly likely that all of the clients statements were tainted by Jimmy M's first

stating "Bernie" while looking at and standing next to Bernie R. at the Nurses' station in an effort to say something that would get his interrogators to stop asking him questions.

If the clients were in fact capable of giving reliable statements then they should have been put on the witness stand and subjected to cross-examination before any of their statements were relied upon by the County. The Union promptly and repeatedly objected before and at the hearing to what has constituted a denial of Grievant's constitutional right to confront those whose statements are being taken as accusations against him. Citing, State v. Roth, 152 Minn 73, 77 (1922). The videotape evidence does not cure the denial of Grievant's rights to confront and the absence of vigorous cross-examination as a test of the reliability of the clients' statements.

The County began its investigation with the biased view (unsupported by any record evidence of an extant problem) that staff were abusing clients and that Management needed to find out which staff member(s) it was. The County then contrived an inept videotape interview, tried unsuccessfully to present altered psychological evaluations and to coverup the fact that James Heider had signed an earlier set appraising each of the three clients as unreliable witnesses. The County then substituted personal and group vilification for reasoned analysis of the evidence. In the end, the County failed to meet even a minimum burden of proof of its charges and has failed therefore to justify the discharge.

For those reasons, the Union requests that the discharge be overturned and the Union's relief request be granted.

DISCUSSION

This has been a difficult case for the everyone concerned, the Arbitrator included. Jimmy M. sustained prominent, multiple facial injuries. In the circumstances, there is a great need on all sides for a satisfactory explanation of how those injuries were sustained, and it would be the Arbitrator's strong preference that he could state with reasonable certainty how those injuries occurred. On the evidence presented, however, the Arbitrator is unable to do so.

There can be no serious dispute that if Grievant were proven guilty of the offense charged the discharge would be justified. The case turns, however, on the dispute about whether Grievant is guilty.

Applicable Standard of Proof

It is well settled and not disputed here that the County bears the burden of proving Grievant's guilt.

The standard (or quantum) of proof required to establish just cause is not well settled among arbitrators. After reviewing the authorities including those cited by both parties, the

Arbitrator agrees with the County that proof beyond a reasonable doubt need not be shown. Although some arbitrators in some discharge cases apply a "beyond reasonable doubt" standard, most do not. See, Kansas City Area Transport Authority, 82 LA 409 (Maniscalco, 1984). Nevertheless, "the majority of arbitrators do require a higher burden of proof than preponderance of the evidence standard in cases of a kind recognized and penalized by the criminal law." Indiana Bell Telephone, 93 LA 980, 987 (Goldstein, 1989), citing, Caterpillar Tractor Co., 78-2 ARB Par. 317 (Petrie, 1978), Dockside Machine & Boilerworkers Inc., 55 LA 1221 (H. Block, 1970) and Kroger Co., 25 LA 906 (1955).

The misconduct at issue here would constitute the crime of battery. Indeed, the County reported the situation to the Green Bay Police Department, and that department conducted a detailed investigation which delayed the County's own investigation for several days. The Arbitrator is therefore persuaded that it is appropriate to require the County to prove Grievant's guilt by clear and convincing evidence. E.g., Indiana Bell Telephone, above.

In the Arbitrator's opinion, the County has failed to meet that burden.

Client Statement Evidence

The Arbitrator finds that the County's client statement evidence is not sufficiently reliable to be given weight in this proceeding.

The County relies heavily on the videotaped statements and testimony concerning other statements made by the three clients, Jimmy M., Mark P. and Mike. R. The County's resort to such means is understandable given the absence of a reasonable explanation from the staff on duty as regards the cause of the prominent facial injuries Jimmy M. sustained. The County has responsibility for the safety and well being of its clients, such that aggressive pursuit of the truth regarding the cause of Jimmy M.'s injuries was consistent with those County responsibilities.

Nevertheless, the Arbitrator must determine whether the statements of the clients are sufficiently reliable to be given weight in determining the dispute of fact present in this arbitration.

Upon careful consideration of this question, the Arbitrator agrees with the Union that they are not.

In their statements on the videotape and elsewhere, the clients' descriptions of what happened lack a coherent picture of what supposedly occurred between Grievant and Jimmy M. The reliability of the clients' statements is also undercut by the multiple individuals as to whom responsibility has been attributed at one time or another by the clients. These shortcomings, taken together with the evidence concerning the clients' mental disabilities and the effects of residing in a closed treatment setting, make the potential very high that what County asserts the clients have reported as facts are something the clients did not in fact see, hear or experience. In these regards#, the Arbitrator has found particularly persuasive the opinions and concerns expressed by

the Union's expert, Dr. John Marshall, Professor of Psychiatry at the UW-Medical School, to the effect that the clients' are highly susceptible to being influenced and to reaching mistaken understandings of reality.

The prime example of the potential for the clients's statements to be influenced by other than actual experiences/observations is Jimmy M.'s initial reference to "Bernie" in response to questioning about his injuries. After first stating that he did not know how he sustained the injuries and then that he fell, Grievant's response to persistent questioning was that "somebody hurt me" and that it was "Bernie." However, when he first referred to "Bernie" as responsible for his injuries, he was standing next to and turning his head to look at the client Bernie R. The likelihood that Jimmy M.'s reference to "Bernie" was suggested by client Bernie R.'s presence seems extremely high.

Record evidence also confirms what common sense and scholarly studies referred to by Dr. Marshall (tr. 560) suggest regarding the likely spread of rumors about how Jimmy M. sustained his prominent facial injuries: the injuries Jimmy M. experienced were a matter of concern to the staff; speculation arose among staff members that Jimmy M. may have meant Bernie Corbielle, the Grievant; there were further rumors implicating other staff members, as well; and both the client population and the staff members were exposed to those rumors. NA Reetz described just such interactions as they took place on Unit 2, and witnesses described various discussions that took place among Unit 4 staff on the subject of who might have been responsible for Jimmy M's injuries, and who the "Bernie" referred to by Jimmy M. might have been.

Notwithstanding the various factors cited by the County in support of of the reliability of the clients' statements, the Arbitrator finds that the nature of communication and relationships in the instant closed treatment setting and the proneness to suggestion and misunderstanding of individuals with Jimmy M's, Mark P's and Mike R's mental disabilities and residential circumstances, render unreliable the recorded and attributed statements of clients Jimmy M., Mark P., and Mark R. cited by the County.

While the videotapes allowed the Arbitrator to view the clients' demeanor, those recordings were flawed by numerous methodological deficiencies undercutting their reliability. The clients did not appear to firmly grasp the concept of truth-telling, and their "oath" did not appear to have significance to them. Many questions were leading in nature and/or provided cues drawn from previous answers. None of the clients' statements provided a coherent story as to what in fact occurred between Jimmy M. and Grievant or others. The statements also included numerous material inconsistencies within and among them. While Dr. Peterson was prepared to treat these as background noise from which meaningful details can reliably be ferreted, the Arbitrator is not similarly persuaded.

The Arbitrator cannot with confidence find that the photograph identifications indicate

more than that the clients can pick out the picture of Bernie Corbielle when asked by an interviewer to do so. Dr. Marshall expressed concern that he was not sure the the clients understood exactly what they were being asked. (tr.575) In the case of Mark P's identification, the question and identification of Grievant's photo clearly amounted merely to showing the client could pick out Bernie Corbielle's picture. (tr.286). While Jimmy M's identification of what the Arbitrator believes was in fact Grievant's photograph was more straightforward, it was not, of course, under a meaningful oath or subject to cross-examination.

Jimmy M.'s reported identification of Grievant's picture in his October 3 interview by Tess with the statements "Bernie hit me", "Bernie hit me" was not even on tape, and the Arbitrator is not persuaded that such a statement is rendered reliable on the County's excited utterance theory. Tess' interview of Jimmy M. occurred some 48 or more hours after the injuries were first observed, such that he was exposed to the influences of interactions on the subject during that interim period. Moreover, Dr. Marshall pointed out that the traumatic nature of an incident could have increased the potential that clients such as these would more severely distort reality rather than relate it more accurately. (tr.588).

In view of the foregoing, coupled with the fact that the clients have not generally been made available for cross-examination, the Arbitrator does not find that their statements on videotape or as described in the testimony of others can be given weight in this proceeding.

The Arbitrator would emphasize that in so concluding he does not discount the importance of protecting clients' health and safety and sense of well-being by preventing client abuse. The County's concerns in that regard and its responsibilities to prevent, investigate and rid itself of client abusing employes are supported both by both legal and moral standards. The Arbitrator would also emphasize that in reaching the above conclusion regarding the reliability of the clients' statements, he does not discredit the genuineness of the beliefs of witnesses such as Margaret M. (Jimmy's mother) who are familiar with the clients involved and who feel confident they can believe and rely on what the clients have said to them. The Arbitrator has attempted to make as informed a judgment as possible concerning the reliability of what the clients have related. Despite the Union's strong objections before and during the hearing to the Arbitrator's even considering videotape and testimony about the clients' statements, the Arbitrator ruled that he would consider that evidence in recognition of the vulnerability of the clients and the importance of their right to be heard regarding claims that they have been mistreated. Rather than assuming the clients' statements could not possibly be worthy of weight in this matter, the Arbitrator has heard their statements on video, listened to the testimony about what the clients said to their caretakers and relatives, and listened to various witnesses' opinions regarding the reliability of the clients' statements, including the opinions of the parties' respective experts. Having done so, however, and having considered all of that evidence, the Arbitrator has reached the conclusion that the clients' statements are not sufficiently reliable to be given weight in this proceeding.

Evidence Besides Client Statements

The remaining evidence shows, at most, that Grievant may have caused Jimmy M.'s injuries, but it does not clearly or convincingly prove that he did.

The physical nature of the injuries does make it likely that there was an altercation with another person, though it does not rule out the possibility of self-infliction altogether. The minor markings found on Grievant's spine in the October 1 body check seem most likely to be due to Frankie R. choking Jimmy M. from behind while he was seated eating dinner on September 30. John Ahearn did not notice any marks when he checked and showered Jimmy a short time after that incident, whereas the neck swelling where Frankie R. had choked Jimmy M. was noted on the body check Ahearn and Langer did the next night on account of the facial injuries. Jimmy M. has caused himself injuries in the past, including both ripping off a toenail and habitually rubbing the skin on his neck until it is dark red and irritated. Jimmy M. has also been charted as putting articles of clothing around his neck. (tr.858) These facts make it conceivable though unlikely that Jimmy M. violently rubbed his face with a rough enough fabric and with enough force to cause the facial injuries in question. The bed spread was described as a rough, but the force that would have likely been necessary to cause the underlying bruising seems so great that self-infliction is unlikely.

The nature of the injuries by no means clearly indicates that Grievant was hit or struck, however. Rather, the injuries appear to the Arbitrator more likely to have been the result of a firm gripping and rubbing of Jimmy's face in contact with a rough fabric or other rough surface. A firm and violent headlock, for example, would seem more likely than a series of blows to produce the sort of abrasions and then bruising that Jimmy M. exhibited. Some of the witnesses who saw the injuries thought they looked like carpet burns. However, the record indicates that there is no carpet in Jimmy's room and there is no evidence that he was in the day room (where there apparently is carpet) before he appeared with the injuries. Jimmy also has had no problem with falls in his recent history, and injuries appeared on both sides of his face making the likelihood that they were caused by an accidental fall on a carpet or other rough fabric surface quite remote.

It is clear the facial injuries were not late-appearing results of injuries suffered the night before in the dining room when Jimmy M. was choked by Frankie R. Rather, the evidence seems to indicate that the injuries were incurred a short time before they were first reported by Victor Johnson to Rose Carmody sometime between 7:00 and 7:20 AM. Carmody said the injuries looked to her like they were quite recently sustained, and she agreed that could have been sustained within the preceding half hour or hour. Carriveau, who first saw them at about 8:40 AM (tr.36), said that the wounds were quite recent but since there was no open bleeding she believed they could have occurred minutes or hours before she saw them.

The County has shown that it is possible that the injuries occurred before Grievant left work at 6:20 AM. Judith King's testimony that she checked Jimmy M.'s bed between 6:30 and 6:45 AM and saw no injuries is inconsistent with what the Arbitrator finds were her earlier statements on the subject to Hartford and Tess fixing the time of that event at about 6:00 AM in

the first statement given to Hartford and at between 6:00 and 6:30 in the later statements given to Tess. It also appears that King was surer in her testimony than in her investigation statements that the injuries could not have been there when she checked Jimmy's bed for wetness. At a minimum, that moves the time King checked Jimmy's bed to as early as about 6:00 AM, and it also raises the possibility that King may not have seen the injuries even though they were sustained earlier. For those reasons, it is possible that the injuries occurred sometime before 6:00 AM, as well, limited only by the rather nonspecific implications of the abovenoted observations that the injuries had occurred "quite recently."

It is possible that Grievant became engaged with Jimmy M. in an altercation that resulted in Jimmy M's injuries, even if those injuries occurred after 6:00 AM. The problem for the County is that it has simply not proven by clear and convincing evidence that Grievant had caused or knew of Jimmy M's injuries when he left work at 6:20. The evidence shows that Grievant and King shared direct responsibility for Jimmy M's care and for the perhaps 25 or 26 other clients on Unit 4, more males than females, that were living on Unit 4 on the shift in question. Given the fact that the residents were divided into various rooms in groups of approximately four, the night NAs' responsibility did not and could not involve keeping watch over Jimmy M. at every moment.

Grievant asserts that he looked into Jimmy M's room and checked on the four clients there at 5:00 AM and had no occasion to reenter the room thereafter. His testimony as to the nature and location of the duties he performed on the shift has not been shown in any respect to be inconsistent with existing norms on the unit or to be inconsistent with Grievant's statements during the investigation about what he had seen and done that morning. Grievant also described in some detail the duties that took him, variously to the shower room (some 35-40 feet away from the door to Jimmy M.'s room) and to rooms 247 (some 75 feet away), and 251 (also some 75 feet away from the door to Jimmy M's room) from 5:30 AM until he left Unit 4 a few minutes before leaving the Center at 6:20 AM. The evidence does not establish that what Grievant said he was doing during those times or earlier was in any way out of the ordinary or that he did not in fact accomplish the work he claims to have been doing, or that such work would not take the sort of time he claims it took him, or that such work would not be performed in the locations he claims to have performed it. There is no evidence, for example, that Grievant was expected to or customarily looked in on each of the male clients on the unit before leaving work at the end of his shift. Nor is there any contention that Grievant's hearing testimony in those regards has deviated in any way from information gathered from him previously during the investigation. Similarly, the evidence does not establish that it was unusual for King's and Grievant's initials to appear in the order and numbers of respective checks as they appeared on the 15-minute location check form for October 1 kept as regards client Norman S.

Thus, while Grievant admits being in Jimmy M's room at 5:00 AM and could have been in that room at various other times before and after up until 6:20, the County has simply not proven by clear and convincing evidence that Grievant has done anything wrong. While it is possible that Grievant was not doing what he says he was doing during those times or that he could have interrupted what he says he was doing to come into Jimmy M.'s room sometime after 5:00 AM, it

is equally possible that he did just what he says he did without such an interruption, and without any improper conduct with respect to Jimmy M.

It is also possible to conclude that Jimmy M. sustained his injuries in an altercation with another client. Jimmy has been injured by other clients before. Indeed, on the evening of September 30, Jimmy M. had been choked from behind in the dining room by client Frankie R. The undisputed evidence of the late November, 1989 incident further reveals that Jimmy M's roommate Gary L. was capable of violently attacking Jimmy M. in their room and of inflicting repeated blows with his fists on Jimmy M even with a staff member present in the room. It also shows that Jimmy M's response to the attack was to remain in a fetal position and not to cry out or respond in any other way physically to his attacker. While it is true the November attack occurred at a time when Gary L. was visibly agitated, the absence of any observation of such agitation by King in making her 15 minute checks on Norman S.' location from 5:00 AM on on October 1 does not entirely rule out the possibility that such an attack could have occurred between such checks without being observed or heard by staff, especially given Norman S' propensity to close the room door during his waking hours.

It is also possible to conclude that Jimmy M. sustained the injuries in an altercation with another staff member on duty on the unit that morning. That possibility does not, however, constitute a basis on which to premise Grievant's guilt.

As the Union has noted, several witnesses described Grievant's gentle and effective mode of interaction with clients. The County sought to raise doubts about Grievant's good nature with the clients by reference to his September 30 remark as overheard by LPN Mary Famaree, his history with Alvin R., and his comment at his investigation interview to the effect that the clients are not afraid of him but they do respect him. The remark related by Famaree was not an admission of prior client abuse, but rather, at most, evidence that Grievant thought the idea of taking down or working over a patient he was angry with was an idea to be laughed about. Famaree properly viewed the comment as letting off steam, even if in a questionable way. Alvin R's complaint against Grievant and another employe for putting him in a cold bath was found to be without merit, although Tess stated that before he ultimately acknowledged what had happened, Grievant had denied any involvement in the incident. Tess also said Alvin R. had complained almost daily that Grievant was mean to the clients at night but that she never found any basis for the complaint and concluded that Alvin R. was improperly focusing on Grievant. Finally, Grievant's remark that the clients respected him does not, in the Arbitrator's opinion, connote an improper attitude toward clients in any way. More importantly, however, the evidence about Grievant's allegedly good and bad habits and attitudes does not persuasively disprove or prove the County's allegations of wrongdoing in this particular instance.

Conclusions

When all of the evidence in this case is considered, the Arbitrator is not persuaded that the

County has met its burden of proving by clear and convincing evidence that Grievant was "directly involved in a client incident with Jimmy M. that resulted in abrasions with bruising to the client." While the Arbitrator can understand the County's concern about avoiding risks to the well-being of its clients, and its consternation at not having a satisfactory explanation for injuries of this kind, the Arbitrator nonetheless cannot conclude on the evidence in this record that the Grievant's guilt has been proven by the requisite clear and convincing evidence.

Because the County has not sustained its burden of proving that Grievant was guilty of the misconduct charged in the County's October 30, 1989 termination letter, it follows that the County did not have just cause to discharge Grievant and that the discharge violated the Agreement.

Remedy

The Arbitrator has accordingly ordered conventional relief in the forms of reinstatement, back-pay and records expungement.

Grievant's testimony is undisputed that he caused a bid to be submitted on his behalf for a full-time Unit 2 day shift vacancy and that he had sufficient seniority to have been awarded the position but for his investigation with pay status and subsequent discharge. Accordingly, the Arbitrator has ordered that Grievant be reinstated to that shift and unit, with the same rights he would have had had he been awarded that position by reason of an Agreement Art. 23 selection as of the date of his reinstatement.

The Arbitrator has also included a requirement that the County remove from its records any reference to the discharge and any other records-based impediment to Grievant's reinstatement. Records expungement is a conventional element in arbitral remedies in discharge cases, and particularly important where, as here, government regulations forbid employment of an individual with a documented history of patient abuse.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. There was not just cause for the termination of Bernard Corbielle's employment.
2. The appropriate remedy is that the County shall immediately:
 - a. offer Bernard Corbielle reinstatement to a Unit 2 day shift nursing assistant position with full restoration of

seniority and of other rights and privileges, and with whatever right he would have to return to the position he held prior to the discharge if the reinstatement were deemed to be an award of a Unit 2 vacancy pursuant to the Agreement seniority provisions.

b. make Bernard Corbielle whole, without interest, for the loss of wages and benefits he experienced by reason of the County's October 30, 1989 termination of his employment in violation of the Agreement (with a set-off for interim earnings that Grievant would not have received had he not been terminated).

c. remove from Bernard Corbielle's employment record all references to the subject termination and take whatever other steps are necessary to adjust its records so that they do not contain a documented history of resident abuse, neglect or exploitation by Bernard Corbielle as regards Jimmy M. on September 30-October 11 1989.

Dated at Shorewood, Wisconsin this 30th day of October, 1990.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator