****

The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

****

ZARELLA, J., dissenting in part. The majority concludes that the arbitrator's reinstatement of the grievant, James Howell, who was found by the arbitrator to have abused a client, did not violate the public policy of protecting clients in the care and custody of the department of mental retardation (department) from harm and providing such clients with humane and dignified treatment. I respectfully disagree with this conclusion and therefore dissent.

In undertaking the two step analysis required when considering public policy challenges to arbitration awards, the majority begins by noting that there is an ''explicit, well-defined and dominant public policy'' against the mistreatment of persons in the department's custody. The majority then determines that, ''because Howell had not intended to harm the client and had never been disciplined for abusing a client prior to this incident, the record did not support a finding that continuing Howell's employment would place department clients at risk of abuse.'' The majority thus agrees with the trial court's conclusion that reinstating Howell to his position in the department as a mental retardation worker with direct responsibilities for the care and custody of department clients will not result in a violation of public policy.

I depart from the reasoning of the majority because it conflicts with the arbitrator's express conclusion that Howell abused the client. The majority initially concedes that the arbitrator concluded that Howell abused the client. It nevertheless determines that the arbitrator could not have meant that the client was abused within the meaning of General Statutes § 17a-247a (1), which defines ''abuse'' in relevant part as ''the wilful infliction by an employee of physical pain or injury,'' because the arbitrator (1) did not refer specifically to § 17a-247a (1) when he concluded that Howell had abused the client, and (2) did not make a separate finding ''that Howell wilfully had inflicted pain or injury on the client'' during the incident in question. The majority thus concludes that the arbitrator used the term ''abuse'' only ''loose[ly]'' in referring to the deliberate conduct by Howell that resulted in the client's ''inadvertent injury . . . .''[1] I believe that, not only is there no basis in the record to support the majority's reasoning, but the majority, in effect, is improperly substituting its own factual findings for the findings of the arbitrator. See *Board of Education* v. *Local 566, Council 4, AFSCME*, 43 Conn. App. 499, 506–507, 683 A.2d 1036 (1996) (courts lack authority to substitute factual findings for those of arbitrator), cert. denied, 239 Conn. 957, 688 A.2d 327 (1997), citing *United Paperworkers Interna-*

tional Union v. *Misco, Inc.*, 484 U.S. 29, 44–45, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).

I agree that the arbitrator did not make a specific finding that Howell intended to harm the client, nor did he refer directly to § 17a-247a (1), but the arbitrator plainly stated that Howell ''was culpable of patient or client abuse . . . .'' The majority cites no department rule or other governing authority that requires the arbitrator to refer to § 17a-247a (1) when making a finding of client abuse. Consequently, I submit that the arbitrator's finding that Howell abused the client means exactly what it says.

Moreover, in explaining his conclusion that Howell was culpable of client abuse, the arbitrator specifically referred to the fact that (1) Howell, who had knowledge of the client's behavioral problems and how to respond to them properly, attempted to bring the agitated client into the dining room following a supervisor's advice to leave the client alone and to give him time to calm down, (2) Howell laughed at the client, a blind and retarded man who could have believed that he was being mocked, (3) Howell's actions were deliberate and not spontaneous, (4) Howell's verbal behavior demonstrated his own anger and agitation, and (5) Howell shoved the blind and emotionally disturbed client four feet backward into a nearby chair. In short, the arbitrator found that Howell was culpable of client abuse because Howell, in a state of anger and agitation, deliberately rejected his supervisor's advice to give the blind and emotionally disturbed client time to calm down, deliberately laughed at the client in a manner that the client could have construed as mocking and deliberately shoved the client backward into a chair that was four feet away, thereby causing him injury. In my view, these factual findings fully support the arbitrator's conclusion that Howell abused the client.

Furthermore, the arbitrator used the term ''abuse'' more than one dozen times throughout the opinion to describe the type of misconduct at issue, such as when he referred to ''the department's rules against client abuse and neglect,'' ''an in-service course covering the subject[s] of abuse and neglect,'' the department's ''abuse and neglect policy,'' ''the abuse of vulnerable retarded clients,'' employee ''discipline . . . for patient abuse,'' the reduction by arbitrators of penalties imposed for ''client abuse,'' and the employee's ''obligation to report instances of patient abuse.'' There is no indication that the arbitrator's references to abuse were to anything other than conduct in violation of the stated public policy of protecting department clients from mistreatment or harm.

That the arbitrator was referring to client ''abuse'' as defined by § 17a-247a (1), and not to conduct of some lesser magnitude, is supported by the fact that the arbitrator referred in his opinion to the department's deter-

mination, following an investigation and hearing on the matter, that Howell ''forcibly and intentionally pushed the patient into a chair in violation of [the department's] abuse and neglect policy.'' Because the arbitrator had knowledge of the department's abuse and neglect policy, it would seem only reasonable to assume that he also knew that the department was required to follow the procedures set forth in § 17a-247e-2 (f) (3) (A) of the Regulations of Connecticut State Agencies, which provides in relevant part that allegations of abuse or neglect by an authorized agency must be ''*substantiated in accordance with the definitions set forth in Section 17a-247a of the Connecticut General Statutes . . . .*'' (Emphasis added.) Accordingly, it strains credulity to conclude that the arbitrator's use of the term ''abuse,'' in relation to Howell, differed from the arbitrator's use of that term in other portions of the opinion. Indeed, if the arbitrator had intended to distinguish his own finding of client abuse from the finding of the department, he presumably would have done so expressly.

In the closing lines of his opinion, the arbitrator states that Howell ''could have and should have exercised better judgment. It was because the [client] was swinging his arms about in an agitated state that Howell reacted improperly by holding onto his arms and [shoving] him into a chair.'' We recently observed that poor judgment should not render an employee's misconduct excusable. See *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, 252 Conn. 467, 477, 747 A.2d 480 (2000).

In *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 469, a correctional officer employed by the state department of correction was terminated because he had made an anonymous telephone call to a state legislator from a correctional facility telephone during working hours and had left a profane and racist message on the legislator's voice mail. As a result of this incident, the employee also was charged with harassment in the second degree in violation of General Statutes § 53a-183 (a). Id. Following his termination, the employee filed a grievance, claiming that he had been ''discharged without cause and that the discipline was too severe.'' Id., 470. The arbitrator vacated the termination and ordered reinstatement following a sixty working day suspension. Id., 471. The arbitrator's award was predicated on the employee's apology and a finding of mitigating circumstances arising from the employee's personal and family situation. Id., 479 (*Peters, J.*, concurring). The state filed an application to vacate the arbitration award and the trial court granted the state's application. Id., 471–72. On appeal, this court cited with approval the trial court's conclusion that, although the arbitrator had attempted to excuse the employee's conduct ''as the outgrowth of various personal stressors''; (internal quotation marks omitted) id., 477; the reinstatement of the employee, despite his conduct, would minimize ''society's overriding interest in preventing

conduct such as that at issue in th[e] case from occurring. Thus, the award—with its inherent rationalization of [such] conduct . . . which was violative of statute and regulations—is in itself violative of clear public policy. . . . A lesser sanction . . . would, very simply, send the message that stress, or poor judgment, or other factors, somehow [render] the conduct permissible or excusable.'' (Internal quotation marks omitted.) Id.

In the present case, the misconduct at issue was equally or even more disturbing than the misconduct in *AFSCME, Council 4, Local 387, AFL-CIO* because it involved the physical pushing or shoving of a completely defenseless client. Additionally, Howell not only refused to admit to the misconduct at issue, but emphatically denied that he pushed or shoved the client toward the chair, asserting, instead, that he had been trying to protect himself from the *client's* blows when the client ''bounced off'' him and fell into the chair. The arbitrator did not find this testimony credible and concluded that Howell had abused the client. Accordingly, the only remaining question for this court to consider in light of the arbitrator's conclusion is whether the arbitrator's award is in violation of public policy. See, e.g., *New Haven* v. *AFSCME, Council 15, Local 530, AFL-CIO*, 208 Conn. 411, 416, 544 A.2d 186 (1988). I submit that it is.

The public policy at issue in this case is the protection of mentally retarded persons in the care of public or private facilities from harm and the provision of humane and dignified treatment to such persons. See generally General Statutes § 17a-238. The arbitrator made an explicit finding that Howell, who was angry and agitated at the time of the incident, had abused the client by disobeying the supervisor's instruction to give the client time to calm down and by deliberately shoving him into a chair, which resulted in the client's injury. The arbitrator's finding that Howell was angry when the incident occurred makes the arbitrator's ultimate finding of abuse particularly compelling. To reinstate Howell following such an incident would be in clear violation of the ''explicit, well-defined and dominant public policy'' against the mistreatment of retarded persons in the department's custody because such reinstatement would allow a known abuser to return to a position involving direct responsibility for the care and custody of persons who are almost totally dependent on their caretakers. Consequently, the reinstatement of Howell would place future department clients at risk of abuse.[2]

The majority nonetheless concludes that the arbitrator's award does not violate public policy because to conclude otherwise would mean that, ''if a single instance of deliberate conduct results in any injury to a client, no matter how inadvertent or minor, the conduct is grounds for termination, per se.'' According to

the majority, such a rule would vest the state with ''authority . . . to discharge an employee for such conduct without review, thereby undermining both the collective bargaining process and the arbitration process voluntarily agreed to by the parties.'' I disagree that vacating the arbitrator's award in this case will mean that, in the future, any single instance of deliberate misconduct by an employee that results in injury or harm to a client will become automatic grounds for termination.

In my view, whether the disputed conduct is deliberate and whether it results in physical pain or injury to the client are issues that the arbitrator must decide when making his initial determination as to whether the client was abused. See General Statutes § 17a-247a (1). If the arbitrator finds that the employee's conduct, although deliberate, did not result in physical pain or injury to the client, he presumably will not conclude that the employee abused the client. If, on the other hand, the arbitrator finds that the misconduct was sufficiently callous or severe, under the circumstances, to support a finding that the employee abused the client, the only duty of the court is to examine whether the arbitrator's award is in violation of public policy.

The majority, by contrast, states that the arbitrator may consider factors such as the circumstances and severity of the employee's misconduct *following* his finding of abuse when determining an appropriate *award*. I disagree because the public policy at issue in this case requires that persons in the custody of the department be protected from harm and receive humane and dignified treatment. I therefore concede that a finding of client abuse almost certainly will result in the termination of the employee. That is why findings of client abuse must be made carefully and supported by substantial evidence. If the evidence establishes that the employee's misconduct does not rise to the level of abuse, it should not be characterized as such. In the present case, the arbitrator's conclusion that Howell abused the client was supported by numerous factual findings and, therefore, does not permit further examination of whether just cause existed for Howell's dismissal. Accordingly, I respectfully dissent.

[1] The majority dismisses as a "harmless misstatement" the trial court's assertion that the arbitrator made a finding that Howell had abused the client within the meaning of § 17a-247a (1).

[2] The trial court's statement that the clear and dominant public policy at issue is to provide mentally retarded persons "with an environment *reasonably free* from abuse" is a misstatement of the law that borders on the outrageous and should be emphatically disavowed by the majority. (Emphasis added.)