

In the Matter of Arbitration Between the	:	Grievance Number: DMR- 2018 – 01742 - 04
	:	
<b>STATE OF OHIO, DEPARTMENT OF</b>	:	
<b>DEVELOPMENTAL DISABILITIES,</b>	:	
<b>COLUMBUS DEVELOPMENTAL CENTER,</b>	:	Grievant: Robert Louis Hampton
Employer	:	
	:	
and the	:	
	:	Arbitration Hearing Date:
<b>OHIO CIVIL SERVICE EMPLOYEES</b>	:	January 29, 2019
<b>ASSOCIATION, AMERICAN FEDERATION</b>	:	
<b>OF STATE, COUNTY AND MUNICIPAL</b>	:	
<b>EMPLOYEES, LOCAL 11, AFL-CIO,</b>	:	
Union	:	Howard D. Silver, Esquire
	:	Arbitrator

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

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Columbus Developmental Center, Employer

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## PROCEDURAL BACKGROUND

This matter came on for an arbitration hearing on January 29, 2019 at 9:00 a. m. in a conference room at the Columbus Developmental Center, 1601 West Broad Street, Columbus, Ohio 43222. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The arbitration hearing concluded on January 29, 2019 at 12:40 p. m. and the evidentiary portion of the hearing record was closed at that time.

The arbitrator received post-hearing written arguments from both parties by March 3, 2019 and the arbitrator exchanged the post-hearing briefs between the parties on March 3, 2019.

This matter proceeds under a collective bargaining agreement between the parties in effect from July 1, 2015 through February 28, 2018, Joint Exhibit 1.

No challenge to the arbitrability of the grievance before the arbitrator in this proceeding has been raised.

Based on the language of the parties' collective bargaining agreement, the arbitrator finds the grievance at issue herein to be arbitrable and properly before the arbitrator for review and resolution.

## JOINT ISSUE STATEMENT

1. Did the Grievant, Robert Hampton, abuse an individual of the Columbus Developmental Center?
2. If the Grievant did not abuse an individual, was the Grievant removed for just cause?
3. If the Grievant was not removed for just cause, what shall the remedy be?

## JOINT STIPULATIONS OF FACT

1. The Grievance is properly before the Arbitrator.
2. The Grievant was hired by the Employer on May 22, 1995, as a Therapeutic Program Worker (TPW).

3. The Grievant was removed from his position as a TPW on May 19, 2018.
4. The Grievant was removed for a violation of the Ohio Department of Developmental Disabilities Standards of Conduct, specifically rules:
  - Abuse of a Client, A-1 – Abuse of any type or nature to an individual under the supervision or care of the Department or State, including, but not limited to, physical, sexual, or verbal as defined by Ohio Administrative Code 5123:2-7-02 addressing major unusual incidents and unusual incidents to insure health, welfare, and continuous quality improvement.
  - Failure to Report, F-1 – Failing to report in any manner which results in potential or actual harm to an individual. Failing to report, lying about, or covering up abuse, neglect or mistreatment.
5. The Grievant had no active discipline on his record at the time of his removal.

#### JOINT EXHIBITS

Joint Exhibit 1 – 2015-2018 OCSEA Contract

Joint Exhibit 2 – Grievance Trail

Joint Exhibit 3 – Discipline Trail

Joint Exhibit 4 – DODD Standards of Conduct, Rule Violations and Penalties

Joint Exhibit 5 – Ohio Administrative Code 5123:2-17-02

Joint Exhibit 6 – Medicaid Regulations

Joint Exhibit 7 – Information Sharing Agreement and DVD

Joint Exhibit 8 – Behavior Support Plan

#### STATEMENT OF THE CASE

The parties to this arbitration proceeding, the State of Ohio, Department of Developmental Disabilities, Columbus Developmental Center, the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, the

Union, are parties to a collective bargaining agreement that was in effect from July 1, 2015 through February 28, 2018, Joint Exhibit 1. Within this collective bargaining agreement is an Article on Discipline, Article 24, which begins with the following language in section 24.01:

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary actions. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

The grievant in this proceeding, Robert Louis Hampton, has worked at the Columbus Developmental Center as a Therapeutic Program Worker (TPW) for twenty-three (23) years, having been originally hired at the Center in 1995. For the past fifteen (15) years Mr. Hampton had been assigned to a living unit designated Broadview 2.

During all times relevant to this proceeding Mr. Hampton had no active discipline on his employment record.

On January 28, 2018 Mr. Hampton completed his assigned shift at the Center and was asked to stay over and provide coverage on the next shift, to which Mr. Hampton agreed.

Around 5:00 p. m. on January 28, 2018 a co-worker who had been employed at the Center for one month called out for help due to the behavior of a client who was acting aggressively. This CDC client had initially been throwing objects at another CDC resident who was engaged in eating. When the new co-worker attempted to redirect the client from throwing things at another client, the aggressive client redirected his wrath to the staff member.

The aggression of the client directed toward the staff worker included spitting, cursing, and threatening to get the staff member fired.

As this aggressive behavior was being directed at the staff member this TPW called out to TPW Hampton for assistance, Mr. Hampton having been known to have worked with the aggressive client

for many years and known to have been able to handle this client. Mr. Hampton responded to the shouted request for help. Mr. Hampton approached the aggressive client and verbally directed the client to calm down. Mr. Hampton asked the misbehaving client to return to the client's bedroom to aid the client in regaining his composure. The client acceded to the request from Mr. Hampton and entered the client's room. Almost immediately, however, the client exited the room while spraying an aerosol body wash into the air and then throwing the aerosol container forcefully to the floor.

Mr. Hampton approached the client and managed to move the client to the client's room.

The interaction between Mr. Hampton and the client on January 28, 2018 at about 5:13 p. m. was recorded through a camera on the living unit. The recording of the events in question is found in the hearing record upon a DVD-R, Joint Exhibit 7. This video recording was reviewed at the arbitration hearing.

On April 19, 2018 the Union and the grievant were notified by the Employer that a pre-disciplinary meeting would be convened on April 23, 2018 to consider allegations of misconduct on the part of Mr. Hampton in his interaction with a client on January 28, 2018 at approximately 5:13 p. m. This notice referred to the abuse of a client and a failure to report that included the following language:

On January 28, 2018, at approximately 5:13 p. m., video evidence was captured whereby you were witnessed dragging an Individual [(client)] into his room by his shirt collar and shutting his door behind you. You were alone with [(client)] for approximately three (3) minutes. You failed to report physical contact or intervention when notifying the supervisor about the incident. You also failed to report that [(client)] alleged that you had choked him.

The pre-disciplinary meeting was convened and completed on April 23, 2018. The conclusion reached by the pre-disciplinary meeting hearing officer was that there was just cause for discipline.

The Union and Mr. Hampton were notified that effective May 18, 2018 Mr. Hampton's employment by the State of Ohio, Department of Developmental Disabilities as a Therapeutic Program

Worker at the Columbus Developmental Center was being terminated. The reasons listed on the notice letter as to Mr. Hampton's discharge were a violation agency work rule A-1, Abuse of a Client, and a violation of agency work rule F-1, Failure to Report.

A grievance was thereafter filed as to the discharge of Mr. Hampton, citing violations of the parties' collective bargaining agreement in Article 24, sections 24.01, 24.02, and 24.06.

## SUMMARY OF TESTIMONY

### Thomas Dean Hopkins

Thomas Dean Hopkins is a Resident Care Supervisor employed at the Columbus Developmental Center. Mr. Hopkins was originally hired as a Therapeutic Program Worker by the Center on June 18, 2001.

Mr. Hopkins identified his written statement concerning a client that resides on Broadview #2 at the Columbus Developmental Center. The second paragraph of Mr. Hopkins's written statement at Joint Exhibit 3, page 46 reads as follows:

On January 28<sup>th</sup> at 6:00 pm I received a call from TPW Robert Hampton stating that [client] attacked staff and was redirected and went into his bedroom & cut his thumb on his left hand, scratched his left arm and bit his right arm around the wrist area.

Mr. Hopkins testified that the report from Mr. Hampton to Supervisor Hopkins on January 28, 2018 at 6:00 p. m. did not include any mention of a physical intervention and there was no reference to an allegation that the client had accused Mr. Hampton of choking the client. Mr. Hopkins testified that Mr. Hampton should have reported a physical interaction if Mr. Hampton had for any reason placed his hands on the client. Mr. Hopkins testified that the policies of the Center indicate that a TPW should not be putting his hands on a client, should not be dragging a client by the client's shirt collar, and in this case TPW Hampton should have put distance between himself and the misbehaving client during the

aggressive phase of the client's behavior.

Under questioning by the Union representative, Mr. Hopkins testified that the events of January 28, 2018 between Mr. Hampton and the Broadview #2 client were assigned an unusual incident number, 47376. Mr. Hopkins testified that at no time did Mr. Hampton report imposing any form of restraint upon the client.

Mr. Hopkins identified Joint Exhibit 3, page 43 as the cover sheet of the Columbus Developmental Center's Unusual Incident Report Review for UIR #47376. This CDC UIR Review was initiated by Mr. Hopkins and was entered into the Center's database. On this cover sheet, under "Brief Incident description," the following appears: "[Client] was attacking and spitting on staff he was redirected him to his bedroom where he cut his thumb on his left hand, scratched himself on left arm and bit himself on the right wrist area. Nurse Sue aware ISU left mess. At 6:04 p. m."

Mr. Hopkins has known the client on Broadview #2 who was involved in the events of January 28, 2018 with Mr. Hampton for about five years. This client was described by Mr. Hopkins in his testimony at the arbitration hearing as being in his upper twenties, at times very affable, even affectionate, and at other times becoming physically and/or verbally aggressive. Mr. Hopkins testified that he has known this client on different occasions to strike others, to bite others, and to threaten others with physical harm or discharge from their employment.

Mr. Hopkins confirmed that there have been times in the past when the client on Broadview #2 who had become aggressive on January 28, 2018 had had to be restrained but this was not a frequent occurrence. On one occasion this client had used a butter knife to threaten another client.

Under redirect questioning by the Employer's representative, Mr. Hopkins noted that the client on Broadview #2 had an interdisciplinary care plan in place and this care plan included, under appropriate circumstances, the use of physical restraints upon the client. Mr. Hopkins noted however that dragging the client by his shirt collar was not part of the care plan.



Under recross-examination by the Union's representative, Mr. Hopkins explained that restraints may be mechanical or may be applied directly by residential care staff to protect an individual against harm. In the event a restraint of any type is used, it must be promptly reported.

Scott Flynn

Scott Flynn is the Director of Investigations at the Columbus Developmental Center and has twenty-two years of prior experience as a police officer. Mr. Flynn began his employment at the Columbus Developmental Center as a Center Police Officer in 2001 and subsequently served as the Chief of the CDC Police Department beginning in 2009. In 2012 Mr. Flynn assumed the position of Director of Investigations, responsible for leading the Investigations Unit within the CDC Police Department.

Mr. Flynn explained that there were 361 unusual incidents investigated at the Columbus Developmental Center in 2018. These investigations ranged from abuse and neglect of a client to medical emergencies to hospital visits, and usually involved something of a physical nature.

Mr. Flynn recalled that on January 31, 2018 he was contacted by a supervisor in the Broadview building and informed that a guardian of the client on Broadview #2 had contacted the Center. In this regard Mr. Flynn identified Joint Exhibit 3, pages 30 and 31 as the email sent on behalf of the Broadview #2 client from a Protective Service Representative that reads as follows:

[Client] left me a voice mail at 3:17 pm on 01/30/18. In this voice mail he stated that CDC staff Robert Hampton put him on his bed in his bedroom after shutting the door and began to choke him with his hand and arm, he stated both separately, once that he was choked with Robert's arm around him and once by Robert's hand. He said that this incident took place on 01/28/18 this past Sunday. He said this happened because [client] had hit another staff person. He also described two different vehicles that he associated with the staff in question as an orange dodge ram and a chrysler 300 and asked for the police to find him.

I had another voice mail from 01/29/18 send at 2:58pm in which [client] stated that Robert Hampton put him in a headlock and he couldn't breathe.

The email presented above was sent on January 31, 2018 at 1:45 p. m. by the client's guardian to CDC.

Mr. Flynn stated that an internal investigation was initiated and the review of a video recording occurred.

Mr. Flynn identified Joint Exhibit 3, pages 9 – 26 as the Center's investigative report completed on March 7, 2018.

Mr. Flynn identified Management Exhibit 1 as the CDC UIR Review for UIR #47376 that includes "Nurse Comments." These comments, from Susan F. Parkman, dated January 29, 2018 at 5:40 p. m., read as follows:

Cut left thumb – bit right forearm without breaking skin – 6 cm. long scratch with several small scratches right forearm – all areas cleansed with soap and water – TAB and band aid applied to thumb – all other areas left open to air.

Mr. Flynn identified Joint Exhibit 3, pages 32 and 33 as the written statement from Mr. Hampton dated February 2, 2018. The written statement from Mr. Hampton dated February 2, 2018 is presented in the form of a question from Mr. Flynn and an answer from Mr. Hampton. Mr. Hampton's February 2, 2018 statement reads as follows:

Q: Describe the events that occurred on 1/28 with you & [client].

A: While on 3<sup>rd</sup> shift staff from #2 said he needed to see me, [client] was in hallway punching and hitting staff.

Q: What action did you take?

A: I got [client] off of staff and was talking to him in hallway of BV in front of BV 2 door and put my arm around his shoulder to get him to focus on me to calm him and get him to go to his room.

Q: What occurred next as you entered the area?

A: We enter area with [client] headed toward his room. He started to pull off shirt to target staff again calling racial slurs & cursing that he was gonna get staff so I pull [client] into his room. He stated I choked him. He was going to get me fired.

Q: How did you get [client] into his room?

A: I pulled him into his room cause he drop to the floor by his arms & shirt because he was targeting staff and that's the only thing I could do.

Q: Did you re-enter [client's] room after he was inside?

A: Yes I did to check on him cause he was tearing up his room.

Q: At any point did you have to restrain [client] while he was in his room?

A: No.

Q: Was [client] injured while in his room?

A: Yes he cut his tumb (sic) holiday on holiday canister and he scratched his arm and bite his arm on right arm.

Q: Did you do a UIR?

A: Yes I did. I gave the UIR to Nurse Sue. I called Tom the grounds supervisor first and he stated he will give UIR # number to Sue the nurse.

Q: At anytime while you were in [client's] room did you place your hands on his neck?

A: No.

Q: Did any physical redirection occur that [client] could've misconstrued as being choked?

A: No cause [client] stated I choke him and he was gonna get me fired. He stated that before we even got in his room.

Mr. Flynn identified Joint Exhibit 3, pages 36 – 37 as the written statement of Formum Fozao, provided on February 2, 2018. Mr. Fozoa was the (then) newly hired Therapeutic Program Worker who was assigned to Broadview #2 on January 28, 2018, the staff member who had called out for help because of an aggressive client. Mr. Fozoa's written statement reads as follows:

Last Sunday during dinner time, when the other three residents have completed their dinner and [client #2] was still on the dining table eating out of a sudden [client] started through (sic) stuff on [client #2] and the staff. (Formum Fozao) redirected [client] and he could not stop; he instead turns at the staff (Formum Fozao) and started spitting on me cursing, hitting saying his aim is to get me fired but I continue to redirect him until Robert came from the next and took him to his room and later on [client] came out again started spraying his body spray and Robert again took him to his room.

Q: Did you see how Robert took [client] into his room?

A: No because the chair in front block me from seeing.

Q: Did [client] ever make the statement that Robert had choked him?

A: No.

Q: Did Robert tell you that he had to restrain [client]?

A: No.

Q: Could you see both [client] and Robert walk into [client's] room the 2<sup>nd</sup> time?

A: No.

Q: At what point did [client] stop targeting (spitting and yelling) at you?

A: [Client] stopped spitting at me just immediately Robert step in.

Q: In the photo shown to you – is this the approximate view you had of the incident?

A: Yes sir is the same chair I saw that day.

Q: Why did you not assist Robert & [client]?

A: When it happened Robert told me to wait, that he would handle it by himself that is why I stop.

Q: What was Robert saying to [client] – as they went in his room? (explain)

A: Robert did not say anything to [client].

Q: Did Robert make any threats towards [client]?

A: No he did not.

Mr. Flynn identified Joint Exhibit 3, pages 38 – 39 as a follow-up interview of Mr. Hampton that occurred on February 9, 2018 at 2:05 p. m. at the Columbus Developmental Center. This second written statement from Mr. Hampton reads:

Q: What were you saying to [client] during the time you took him into his room?

A: Just calm down and focus on relaxing – verbally redirecting him.

Q: What was [client] saying to you as you took him into his room?

A: Still cussing calling co worker racial slurs and that he was going to get him.

Q: Did you ask TPW Fazio (sic) for assistance with [client]? (explain)

A: I couldn't ask for no assist from him because he was [client's] target so I tried to get [client's] focus off co worker.

Q: Why were you insistent on going to [client's] room with him?

A: To let him focus on his room and to keep him from targeting co worker or other residents.

Q: With pulling [client] into his room – did you report the physical redirection - as you stated?

A: I don't restraint record but I told Tom Grounds Supervisor UIR numbers.

Q: Did you tell Tom that you went physical with [client]?

A: Yes.

Q: When [client] went to the floor, why didn't you disengage from him?

A: Because he was saying he was going to get my co worker and was trying to get him.

Mr. Flynn identified Joint Exhibit 3, pages 2 – 4 as the report and recommendation of the hearing officer who presided over the pre-disciplinary conference that considered Mr. Hampton's conduct, a pre-hearing conference held on April 23, 2018. The pre-disciplinary report and recommendation was issued on May 1, 2018.

Mr. Flynn identified Joint Exhibit 8, pages 1 – 7 as the Columbus Developmental Center's Behavior Support Strategy for the client on Broadview #2 who was involved in the events on January 28, 2018 with Mr. Hampton. Within a summary on page one of this interdisciplinary plan of care the client is described as having a very short attention span, presenting issues of impulsiveness, boredom, and frustration that contribute to his behaviors. This plan states that the client can engage in incidents of severe aggression that can cause harm to himself, to others, and to the environment. This plan states that the client is very strong and during behavioral crises had injured a number of people.

Under “target behavior” in the Behavior Support Strategy for the client in question there is described aggression by this client in the form of hitting, kicking, biting, and/or scratching others or using a weapon to physically harm others. This client is also described as having a particular problem with taking the property of other clients without permission to do so.

Mr. Flynn identified Joint Exhibit 3, pages 44 – 45 as staff notes, including a second shift

summary with F. Fozao indicated as serving in module one and Mr. Hampton indicated as serving on module two. At Joint Exhibit 3, page 44 the following was recorded by Mr. Hampton under second shift summary:

[Client] upset attacked staff hitting them and making threats and racial slurs cut finger and scratch his arm up and say he was gonna get staff fired an that staff choke him also he bite himself on arm.

Mr. Flynn identified Joint Exhibit 3, page 45 as the third shift summary for modules one and two on Broadview #2 dated January 28, 2018. This summary indicated: "No problems or UIR's - quiet night."

Mr. Flynn testified that the Ohio State Highway Patrol was contacted and apprised of the Center's investigation. Mr. Flynn confirmed that the client in question could become very aggressive. Mr. Flynn referred to Joint Exhibit 8, page 7 of the Behavior Support Strategy for the client in question wherein the client is described as five feet four inches tall, weighing 163 pounds.

Mr. Flynn referred to Joint Exhibit 8, page 4 within the client's Behavior Support Strategy, in particular the seventh full paragraph which reads:

[Client] has a history of injuring others by hitting, kicking and using items as weapons to harm others. In the event that [client's] behavior escalates to the point of severe physical aggression and blocking and redirection is not effective, and there is imminent risk of injury, staff may utilize programmatic physical restraint including a One-Person Basket Hold, Two-Person Basket Hold, One to Two Person Seated Stabilization Hold. If necessary to protect [client] and others, a Firm Extremity Hold, holding both [client's] arms and legs, can be used. The hold must be maintained for as short a time period as possible and must not be maintained for more than 29 minutes. If [client] is still engaging in dangerous behavior when released, reestablish the manual hold again. Calm behavior is defined as total relaxation of the body, able to respond to staff in a calm voice. Once [client] is calm he appears more relaxed without pressured speech, breathing is slower and his able to follow simply (sic) requests.

Mr. Flynn noted that nowhere within the restraints described in the client's Behavior Support

Strategy is there mention of dragging the client by the shirt collar. Mr. Flynn testified that such activity is prohibited at the Center. Mr. Flynn testified that dragging a client by his shirt collar to his room was not in accordance with the client's Behavior Support Strategy.

Mr. Flynn referred to Joint Exhibit 3, pages 48 – 55 which comprise the Columbus Developmental Center's policy on Incident Reporting and Review. This policy provides on its first page under III, Procedure, B. Reporting of Unusual Incidents, a UIR report will be made out following all major unusual incidents including allegations of abuse/neglect, even if the person receiving the report feels the allegation is unreasonable and without merit. Mr. Flynn noted that at Joint Exhibit 3, page 76 there is a policy review verification signed by Robert Hampton dated August 10, 2017 that includes training on policy 1.09, Incident Report and Review.

Mr. Flynn testified that Mr. Hampton should have reported an accusation of choking made by the client.

Mr. Flynn identified Joint Exhibit 3, pages 56 – 63 as the Columbus Developmental Center's policy and procedure involving Behavior Support Strategies.

Mr. Flynn identified Joint Exhibit 3, page 64 as the first page of the Columbus Developmental Center's policy on individual abuse and/or neglect. Under this policy the definition of “abuse” is presented under III, Definitions, (A). This definition refers to: “The ill treatment, violation, revilement, malignment, exploitation and/or disregard of an individual, whether purposeful, or due to carelessness, inattentiveness, or omission of the perpetrator.” This definition provides that: “Abuse of any type or nature to an individual under the supervision or care of the Department or State,” may include but is not limited to physical, sexual, psychological, or verbal abuse. “Physical abuse” is defined as “... the use of physical force that can reasonably be expected to result in physical harm or serious physical harm as those terms are defined in section 2901.01 of the Revised Code. Such force may include but is not limited, to hitting, slapping, pushing, or throwing objects at an individual. “Verbal abuse” is defined

as "... purposefully using words or gestures to threaten, coerce, intimidate, harass, or humiliate an individual."

Mr. Flynn identified Joint Exhibit 8, page 9 as the Columbus Development Center's policy on protection from harm. Mr. Flynn noted that direct care staff at the Center received training on this policy.

Mr. Flynn testified that the video recording and the statements from Mr. Hampton and other eyewitnesses to the events in question have persuaded Mr. Flynn that Mr. Hampton grabbed the collar of the shirt worn by a client, dragged the client to the client's room using the shirt collar, and failed to report this physical interaction as required by Center policies. Mr. Flynn pointed out that an incident of abuse does not require an injury but balances on the risk of harm arising from the conduct engaged in by the employee. Mr. Flynn pointed out that dragging a client by grabbing the shirt collar of the client could cause injury to the client and such conduct is prohibited.

Under questioning by the Union's representative, Mr. Flynn was referred to Joint Exhibit 3, page 25 under "Cause and Contributing Factors" in the Center's investigative report, language that provides: "Any action of Hampton dragging [client] into his room by his shirt collar from the floor was a total lapse in judgment and against not only policy and training here at CDC."

Mr. Flynn was referred to Joint Exhibit 3, page 45, the third shift summary for January 28, 2018 that reported no problems and no UIRs. This third shift summary reported a "Quiet night."

Mr. Flynn confirmed that the events investigated occurred on the second shift on January 28, 2018.

Mr. Flynn testified that the original complaint received by the Center about these events came from a guardian of the client.

Mr. Flynn testified that the original Unusual Incident Report concerning the events in question had not been located. The original UIR was supposed to have been passed to the charge nurse.



Mr. Flynn testified that at first Mr. Hampton denied an intervention had occurred but at no time has Mr. Hampton denied that these events occurred on January 28, 2018 during the second shift.

Mr. Flynn testified that he has found no indication in the work history of Mr. Hampton of Mr. Hampton having lied to supervisors or administrators at the Center. Mr. Flynn testified that the client in question, however, has amassed a substantial history of making false allegations against staff members. Mr. Flynn confirmed that no charges were brought against Mr. Hampton by the Ohio State Highway Patrol.

Mr. Flynn was referred to Joint Exhibit 3, page 54 - page 7 of policy section 1.09, the Columbus Developmental Center's policy on incident reporting and review. Under paragraph (J) on page seven it is stated that all CDC investigative service unit investigations must be received by the Superintendent or the Superintendent's designee within five working days of the incident. The Superintendent is also to receive reports of incidents of unknown origin within five working days of the incident. Mr. Flynn testified that the investigation of Mr. Hampton's conduct on January 28, 2018 lasted a little over one month.

Robert Capaldi, Ph. D.

Robert Capaldi, Ph. D. has worked for the Ohio Department of Developmental Disabilities for eleven years and has been serving in the field of direct care since 1996. Dr. Capaldi formerly worked for a county board for eight years as a case manager and came to the Department of Developmental Disabilities in 2007 as a license reviewer. Dr. Capaldi came to the Columbus Developmental Center in 2009 and became Superintendent of CDC in 2014.

Dr. Capaldi identified Joint Exhibit 3, pages 1 – 77 as the investigative report prepared at the Columbus Developmental Center based on the events of January 28, 2018 between Mr. Hampton and a client on Broadview #2. Superintendent Capaldi indicated that this is the investigative report he

considered in determining the discipline to impose in this case. As the appointing authority at the Columbus Developmental Center, Superintendent Capaldi is empowered to determine the disciplinary action to be imposed at the Center. Superintendent Capaldi referred to the investigative report, a video recording, emails, and interviews that he considered, finding based on these investigative materials, that the allegation of abuse had been substantiated.

Superintendent Capaldi identified Joint Exhibit 3, page 1 as the order of removal he issued to Mr. Hampton, a Therapeutic Program Worker, ordering that Mr. Hampton's employment by the Columbus Developmental Center be terminated effective May 18, 2018.

Dr. Capaldi identified Joint Exhibit 4, pages 1 – 14 as Standards of Conduct, Rule Violations, and Penalties for Classified Employees (Department-Wide) that include a disciplinary grid at pages 6 – 14. Superintendent Capaldi stated that Mr. Hampton had abused a client by dragging the client by the client's shirt collar, an activity that comprises abuse under the definition of “abuse of a client,” section A-1, and Superintendent Capaldi also found Mr. Hampton had failed to report the incident, a violation of section F-1. Dr. Capaldi pointed out that Mr. Hampton had made no report of a physical intervention nor did Mr. Hampton report that the the client had alleged that Mr. Hampton had choked the client.

Superintendent Capaldi was referred to Joint Exhibit 5, Ohio Administrative Code section 5123:2-17-02 as a rule that addresses major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvement. Ohio Administrative Code section 5123:2-17-02(C)(15) (a)(vii) defines “physical abuse” as meaning:

... the use of physical force that can reasonably be expected to result in physical harm or serious physical harm as those terms are defined in section 2901.01 of the Revised Code. Such force may include, but is not limited to, hitting, slapping, pushing, or throwing objects at an individual.

Superintendent Capaldi testified that dragging a client by the client's shirt collar can be reasonably expected to cause physical harm to the client.

Superintendent Capaldi identified Joint Exhibit 6, pages 1 – 8 as interpretive guidelines issued by the Medicaid program for intermediate care facilities responsible for overseeing persons with developmental disabilities. At page 2 of these guidelines “physical abuse” is defined as:

... any action intended to cause physical harm or pain, trauma or bodily harm (e.g., hitting, slapping, punching, kicking, pinching, etc.). It includes the use of corporal punishment as well as the use of any restrictive, intrusive procedure to control inappropriate behavior for purposes of punishment.

At Joint Exhibit 6, page 3 the following Medicaid interpretative guideline is presented:

The facility must take whatever action is necessary to protect the clients residing there. For example, if a facility is forced by court order or arbitration ruling to retain or reinstate an employee found to be abusive, the facility must take measures to protect the clients of the facility (such as assigning the employee to an area where there is no contact with clients.)

At Joint Exhibit 6, page 5 the following Medicaid interpretative guideline is presented:

Where the facility has terminated an employee based upon confirmation that abuse, neglect or mistreatment occurred during the employee's performance, and the termination decision was overturned by either an arbitration finding or a court finding, the employee must be returned to a position which does not involve direct contact between employee and clients of the facility.

Dr. Capaldi identified Joint Exhibit 8, pages 9 – 22 as the Columbus Developmental Center's policy on protection from harm. This policy provides when restraints may be used.

Superintendent Capaldi testified that in his viewing of the video recording of the events in question there did not appear to be a risk of harm threatened against TPW Hampton.

Superintendent Capaldi testified that Robert Hampton has accumulated an employment record that reflects punctuality and reliability in reporting for duty as scheduled, a direct care worker who has involved himself with clients, treating each client as an individual, and assisting in interventions when

necessary. Superintendent Capaldi described CDC as promoting a positive culture that looks to bridge gaps, work through issues, and lessen the use of restraints.

Superintendent Capaldi testified that Mr. Hampton saw himself in the role of a parent in relation to clients at the Center, and saw himself as a Therapeutic Program Worker responsible for enforcing the rules of the Center. Superintendent Capaldi emphasized that the role of a Therapeutic Program Worker is not to cover for other staff members but to assist clients and maintain the safety of clients.

Under questioning by the Union's representative, Superintendent Capaldi was referred to Joint Exhibit 3, page 26, the conclusion of the CDC investigative report that provides as follows:

The TPW has an obligation to each individual to show them respect and dignity at all times.

[Client] will be encouraged to relay details in an accurate manner at the time of the incident and at any time that he feels unsafe.

Staff will continue to build a positive rapport with [client] and remind him that they are here at CDC to help him.

The TPW's are trained through each individual's BSS to deal with each of their behaviors and what strategies they can use to deescalate situations.

Superintendent Capaldi was referred to Joint Exhibit 6, page 2 wherein the Medicaid interpretative guidelines provide the definitions for "abuse" and "physical abuse." Superintendent Capaldi testified that these Medicaid guidelines are followed at the Columbus Developmental Center.

Superintendent Capaldi testified that if a Therapeutic Program Worker is in danger of physical harm, that worker is to be assisted by co-workers, but the staff member or staff members who provide such assistance are not to assume the duties of the staff member being assisted.

Osman Bah

Osman Bah is a Therapeutic Program Worker who has worked at the Columbus Developmental Center for eleven years. During all times relevant to this proceeding and over the past four years Mr. Bah has been assigned to work on Broadview #2 during the second shift.

Mr. Bah testified that living unit Broadview #2 has five residents and is assigned two Therapeutic Program Workers per shift.

Mr. Bah testified that it was important to resolve the misbehaviors that arise on the living unit among clients through verbal redirection and through attempts to move an aggressive or misbehaving client to a safe place.

Mr. Bah testified that all of the clients residing on Broadview #2 bring their own individual issues to the living unit and many of these clients do not get along. Mr. Bah stated that clients that live on Broadview #2 are high functioning clients who present a high risk of misbehavior. Sometimes the misbehavior involves physical aggression, sometimes it takes the form of inappropriate sexual conduct, and the staff members assigned to the living unit are expected to manage these misbehaving clients so as to return the unit to a living environment that is safe and orderly.

Mr. Bah stated that the clients on Broadview #2 exhibit more aggression than is the case with clients on other living units. Broadview #2, according to Mr. Bah, presents behavioral issues every other day. Such issues when they arise produce higher levels of stress among residents and staff members.

The client in question herein, the resident of Broadview #2 who was involved with Mr. Hampton in the events of January 28, 2018, was known by Mr. Bah to destroy property. According to Mr. Bah, this client had vandalized Mr. Bah's car.

Mr. Bah testified that the best safe place for a misbehaving client is the client's bedroom.

Mr. Bah testified that the client in question had a very short attention span and a very explosive

temper. Mr. Bah testified that this client had lived on Broadview #2 assigned to the same bedroom for the past seven years. Mr. Bah testified that this client is known to spit on staff members, call the staff insulting names, hurl objects at staff and clients, and in these cases a staff member must redirect the client. Mr. Bah testified that when this client drops to the floor it is a signal that this client intends to bite either a staff member or a resident on the leg.

Mr. Bah testified that the client in question is also known to self-inflict injuries to his person, including hitting his head on the floor. Mr. Bah testified that this client often directs threats to staff members, claiming that the client is going to have the staff member fired. Mr. Bah recalled that this client had stabbed another client with a pen and Broadview #2 now uses only plastic utensils.

Mr. Bah testified that he often worked with Mr. Hampton and had never observed Mr. Hampton become upset with a client. Mr. Bah emphasized that Mr. Hampton sincerely cares about each of the clients he serves and is known on weekends to expend his own funds to bring food to the living unit as a treat for the residents.

Mr. Bah testified that restraints are to be used as a last resort. Initially, verbal redirection is to be employed and choices are to be presented to a client in helping to redirect the client. Mr. Bah pointed out that if a client becomes aggressive and restraint is needed, staff members have received training as to restraints.

Mr. Bah testified that if a restraint were to be applied to a client an usual incident report is required to be filled out and submitted. A separate restraint form must also be completed and filed. Mr. Bah pointed out, however, that completed unusual incident reports are often misplaced and it is frequently the case that after submitting an unusual incident report another unusual incident report is requested because the initial report could not be located. Mr. Bah testified that in this circumstance a supervisor would say that another unusual incident report was needed.

Under questioning by the Employer's representative, Mr. Bah confirmed that he was not on duty

on January 28, 2018 and therefore had not been in a position to observe the events as they occurred on Broadview #2 that day. In this regard Mr. Bah confirmed that Management Exhibit 2 presents a work schedule showing that Mr. Bah was not scheduled for duty on January 28, 2018.

Mr. Bah confirmed that if the client in question drops to the floor, and if a staff member's hand were to get caught up in the client's shirt and used to guide the client to the client's safe place, an unusual incident report would be required to be completed and submitted, the intervention would require to be documented in a staff note, and if an allegation of choking were to be made, the allegation must be reported.

Under redirect questioning by the Union's representative Mr. Bah testified that it is permissible to hold the shirt collar of a client to protect others from harm, and Mr. Bah testified that he has no reason to believe that Mr. Hampton intended to drag the client by the client's shirt collar. Mr. Bah testified that he believes that Mr. Hampton was attempting to restrain the client to the best of his ability in the midst of an aggressive incident that threatened serious physical harm to Mr. Hampton. Mr. Bah pointed out that in past incidents, two to three people had been required to hold the client to restrain him, a client known to bite and scratch others.

#### Formum Fozao

Formum Fozao is employed as a Therapeutic Program Worker at the Columbus Developmental Center and has served in this position for one year. At the time the events at issue in this proceeding had occurred Mr. Fozao had been employed at the Columbus Development Center for one month.

Mr. Fozao recalled that upon his hire at CDC he was assigned to Broadview #2, and had worked with TPW Robert Hampton.

Mr. Fozao described the client in question as a client who frequently became very upset for no good reason.

Mr. Fozao recalled that on the day in question the client had been throwing objects at another client who had been engaged in eating a meal. Mr. Fozao attempted to redirect the client but the client refused to stop and then turned on Mr. Fozao, cursing, spitting at Mr. Fozao, and threatening to get Mr. Fozao fired.

Mr. Fozao recalled Mr. Hampton entering the area in response to a call for help from Mr. Fozao. Mr. Fozao testified that at no time did the client hit Mr. Fozao.

Mr. Fozao recalled Mr. Hampton entering the area containing Mr. Fozao and the client. Mr. Fozao noted that at that time he had been aware that Mr. Hampton was able to handle this client. Mr. Fozao heard Mr. Hampton verbally redirecting the client and attempting to calm the client. Mr. Hampton asked the client to go to his room and to calm himself.

Mr. Fozao testified that the client did as Mr. Hampton had directed and walked to and entered the client's room. However, after entering his room the client almost immediately exited his room spraying an aerosol and then throwing the spray bottle forcefully to the floor.

Mr. Fozao testified that at that time Mr. Hampton ordered the client back to the client's room but Mr. Fozao testified that he did not see, only heard, this action. Mr. Fozao testified that he heard no threat from Mr. Hampton and at no time did Mr. Hampton appear angry but rather gave the appearance of remaining calm and presenting a composed demeanor. Mr. Fozao confirmed that he allowed TPW Hampton to take over the situation.

Under questioning by the Employer's representative, Mr. Fozao confirmed that TPW Hampton had verbally redirected the client but in his written statement on February 2, 2018, at Joint Exhibit 3, page 37, Mr. Fozao in his written statement had indicated that Mr. Hampton had not said anything to the client as they entered the client's room.

Mr. Fozao confirmed that if a staff member places his hands on an individual there must be a report of this occurrence.



Robert Louis Hampton

Robert Louis Hampton, the grievant in this proceeding, had been employed by the Columbus Development Center for twenty-three years as a Therapeutic Program Worker. Mr. Hampton spent the last fifteen years working on Broadview #2, described by Mr. Hampton as a regular living unit.

Mr. Hampton has no active discipline in his employment record with the Center.

Mr. Hampton recalled that on the day in question he had finished working his assigned first shift, had been asked to stay over and work the next shift, and Mr. Hampton had agreed to do so. Mr. Hampton testified that it was not unusual for Mr. Hampton to put in eighty to 100 hours of work in a work week at CDC and testified that building a positive relationship with each client made the work at the Center much easier.

Mr. Hampton recalled Mr. Fozao calling out for help and observed the client to be spitting on Mr. Fozao. Mr. Fozao had only been employed at the Center at that time for one month and Mr. Hampton believed he, Mr. Hampton, could handle the situation and that it was appropriate for him to do so under these circumstances. Mr. Hampton commenced verbally redirecting the client who then focused on Mr. Hampton rather than Mr. Fozao.

Mr. Hampton recalled the client cursing, hurling racial slurs, and threatening to get Mr. Hampton fired. Mr. Hampton recalled that his intention at that time was to get the client to go to client's room to assist the client in regaining his composure.

Mr. Hampton testified that he was able to escort the client to the client's room with little difficulty but the client emerged almost immediately from his room with an Axe aerosol can that the client was spraying into the air as he was exiting his room. Mr. Hampton again began verbally redirecting the client to get the client to go to the client's room whereupon the client began cursing and spoke of killing staff members.

Mr. Hampton recalled that after the client had exited his room while spraying the aerosol can of

Axe, and after cursing and threatening staff, the client dropped to the floor whereupon Mr. Hampton grabbed the shirt worn by the client and put the client in the client's room. Mr. Hampton testified: "There was nothing else I could do to keep him from hurting himself." Mr. Hampton testified that at no time had he been trying to harm the client.

Mr. Hampton testified that no restraint had been placed on the client but noted that while the client was in his room the client purposefully cut his hand on a popcorn can, bit himself, and scratched himself. The client then became destructive in his room and was subsequently taken to a nurse.

Mr. Hampton testified that he notified Mr. Hopkins of the events in question and in this regard referred to Joint Exhibit 3, page 44, the second shift summary for modules one and two on Broadview #2 on January 28, 2018.

Mr. Hampton testified that he completed an unusual incident report and gave it to the nurse. Mr. Hampton testified that no restraint report was submitted because no restraint had been placed on the client.

Mr. Hampton identified Union Exhibit 1 as the State of Ohio, Department of Developmental Disabilities Restrictive Measure Usage Form, the restraint form that is to be filed under the categories of restraint presented on this form, none of which, claims Mr. Hampton, occurred in the events in question.

Mr. Hampton emphasized that he had utilized verbal redirection of the client at every opportunity, physically redirecting the client only as an option of last resort. Mr. Hampton testified that he has never tried to hide anything and he had been aware at all times that video cameras had been installed in the living units and were recording the events therein.

Mr. Hampton identified Union Exhibit 2 as work performance evaluations of Mr. Hampton from 2005, 2006, and 2007, none which mention any concern about Mr. Hampton's provision of direct care to clients.

Under questioning by the Employer's representative, Mr. Hampton was referred to Joint Exhibit 3, page 43, the CDC UIR Review in UIR #47376, presenting the signature of Mr. Hampton dated February 9, 2018. Mr. Hampton confirmed that nowhere on this CDC UIR Review form is there a reference to any physical contact with a client. Mr. Hampton testified that he had reported to Mr. Hopkins that the client had been physically redirected.

Mr. Hampton testified that there was no report of the client being choked and agreed that a client should not be moved by pulling on the client's shirt collar. Mr. Hampton was referred to Joint Exhibit 3, page 32, the first page of his February 2, 2018 interview that includes the following:

Q: What occurred next as you entered the area?

A: We enter area with [client] headed toward his room. He started to pull off shirt to target staff again calling racial slurs & cursing that he was gonna get staff so I pulled [client] into his room he's stated that I choked him he was going to get me fired.

Mr. Hampton also recalled the client attacking Mr. Fozao and hitting him.

Mr. Hampton testified that the client in question "goes off" every other day and has been physically violent toward a number of individuals.

As to Joint Exhibit 3, page 43, the CDC UIR Review presenting the signature of Mr. Hampton dated February 9, 2018, Mr. Hampton testified that this was not the UIR form he had filled out and submitted.

## POSITIONS OF THE PARTIES

### Position of the State of Ohio, Department of Developmental Disabilities, Columbus Developmental Center, Employer

The Employer in this proceeding, the State of Ohio, Department of Developmental Disabilities, Columbus Developmental Center, points out that the grievant was discharged from his employment on

May 19, 2018 for violating two Standards of Conduct Rules - A-1, Abuse of a Client, and F-1, Failure to Report.

Standard of Conduct Rule A-1, Abuse of a Client, refers to all types of abuse, including physical abuse as defined by Ohio Administrative Code section 5123:2-17-02 that describes “physical abuse” as meaning the use of physical force that can reasonably be expected to result in physical harm or serious physical harm as those terms are defined in section 2901.01 of the Ohio Revised Code. Ohio Administrative Code section 5123:2-17-02(C)(15)(a)(vii) refers to force that may include, but is not limited to, hitting, slapping, pushing, or throwing objects at an individual. The Employer emphasizes that under these definitions of abuse and physical abuse, a client is not required to have suffered an injury to meet the definition of abuse if the action taken could reasonably be expected to result in physical harm.

Standard of Conduct Rule F-1, Failure to Report, prohibits failing to report any matter that results in potential or actual harm to an individual. Failure to report includes lying, covering up, or failing to report neglect or mistreatment.

It is the position of the Employer that on January 28, 2018 the grievant physically abused the client on Broadview #2. This abuse was reported by the client to his advocate, an employee of Advocacy and Protective Services, Inc. This advocate directed an email to the Columbus Developmental Center summarizing two voicemail messages the advocate had received from the client about physical abuse suffered by the client.

The first voicemail received by the advocate from the client had been received on January 29, 2018 and claimed that the grievant had placed the client in a headlock and the client had been unable to breathe. A second voicemail directed to the advocate by the client was received on January 30, 2018 in which the client had stated that on January 28, 2018 the grievant had put the client on the client's bed in the client's bedroom after shutting the bedroom door and choked the client using the grievant's hand

and arm. The report received from the client by the client's advocate was directed to the Columbus Developmental Center's Investigations Unit on January 31, 2018 and an investigation of the allegations made by the client to the advocate was initiated.

The Employer refers to the testimony of Mr. Hopkins, a Residential Care Supervisor who had received reports from Mr. Hampton about what had occurred on January 28, 2018. Nowhere in the reports directed made by Mr. Hampton to Mr. Hopkins did Mr. Hampton report physical contact with a client nor did Mr. Hampton indicate that a physical intervention had occurred with a client. The Employer also points out that at no time did Mr. Hampton report the client had accused Mr. Hampton of choking the client.

The Employer notes that all physical contact with individuals at the Center is required to be reported, as are any and all statements from clients accusing staff members of abuse. The Employer points to the testimony from Mr. Hopkins to the effect that had the grievant accurately reported what can be observed on the video recording of the events in question, Mr. Hopkins would have been required to separate the grievant from direct client care immediately. The Employer points to the testimony of Mr. Hopkins to the effect that at no time should the grievant have placed his hands on the client under the circumstances presented. According to Mr. Hopkins, the grievant should have backed away when the client dropped to the floor.

The Employer points out that the client's mercurial nature and the client's capacity for aggression were well-known to staff members and the client's plan of care specifically addressed these issues, including when physical intervention becomes necessary. The Employer points out that the grievant had been well aware through training, Center policies, and rules at the Center that dragging a client by the shirt collar across the floor to the client's room is not contemplated by the care plan for this client or any rule or policy. The Employer claims the grievant had also been well aware during the events in question that any physical contact with a client had to be promptly and accurately reported to

a supervisor.

The Employer argues that a complete and thorough investigation of the events in question was conducted at the Center by an experienced and skilled investigator, CDC Director of Investigations Scott Flynn. The Employer points out that Mr. Flynn found, through interviewing the grievant on February 2, 2018 and on February 9, 2018, that Mr. Hampton confirmed that Mr. Hampton had pulled the client into the client's room, and the client had alleged to Mr. Hampton that Mr. Hampton had choked the client.

The Employer claims the grievant had been well aware of when and what types of interventions were permissible under the client's care plan but failed to implement the care plan, creating a dangerous situation that placed the client and staff at risk.

The Employer emphasizes the ample training provided to the grievant on abuse and neglect policies enforced at the Center. This training included notice that no injury is required for abuse to be substantiated so long as the actions taken could reasonably be expected to lead to physical harm. The Employer contends that dragging the client across the floor by the client's shirt collar could reasonably be expected to cause physical harm to the client.

The Employer claims that the actions of the grievant in dragging the client across the floor by the client's shirt collar was found by Investigator Flynn to be an action that could reasonably be expected to result in harm to the client's airway and prevent the client from being able to breathe. The fact that there was no noticeable bruising at the time of the encounter does not prevent a finding of abuse as actual harm is not required to substantiate abuse.

The Employer points out that the failure to report as charged in this case includes a failure to report a physical intervention with a client and a failure to report that a client had accused a staff member of choking the client.

The Employer points to the testimony of the Superintendent of the Columbus Developmental

Center, Dr. Robert Capaldi, who was apprised of the events of January 28, 2018 on January 31, 2018. Dr. Capaldi recalled during his testimony at the hearing reviewing the Center's investigative report about the events in question and basing his decision to impose disciplinary action based upon the investigative report and the supporting documents and video recording attached to that report.

Dr. Capaldi noted that the disciplinary grid used by the Department of Developmental Disabilities calls for removal for violation of rule A-1, Abuse of a Client, for a first offense. Dr. Capaldi also noted that the grievant had failed to report abuse, had lied about the abuse, and had attempted to cover it up. Dr. Capaldi concluded that the grievant had never reported the true nature of the encounter with the client on January 28, 2018 to Supervisor Hopkins, failed to report physical contact between himself and the client, failed to report a physical intervention of any kind between himself and the client, and failed to report that a client had accused the grievant of choking the client.

The Employer notes that while the disciplinary grid calls for a range of discipline for failure to report, from a five-day working suspension to removal, a violation of rule A-1, Abuse of a Client, under the Department's disciplinary grid, requires termination of employment, a sentiment mirrored in the language of Article 24, section 24.01 of the parties' collective bargaining agreement.

The Employer refers to the testimony from Mr. Bah, a Therapeutic Program Worker who had frequently worked with Mr. Hampton. Mr. Bah testified that he could imagine a situation wherein a staff member's hand could drop and become stuck in a client's shirt, in which case the staff member could be viewed as "guiding" the client rather than dragging the client by the client's shirt. The Employer claims that the video evidence clearly demonstrates that the grievant's hand was not stuck in the client's shirt and Mr. Hampton had not been "guiding" the client but dragging the client to the client's room. Mr. Bah confirmed that anytime a staff member touches an individual, a report of such contact must be made. Mr. Bah also confirmed that any allegation by a client of having been choked must be reported.

The Employer points to the testimony from Therapeutic Program Worker Fozao who had been employed for one month at the time the events in question had occurred, January 28, 2018. Mr. Fozao testified of what he had observed in the actions of the client and Mr. Hampton, and also testified that at no time did the client hit Mr. Fozao. This conflicts with Mr. Hampton's claim that when he entered the area the client was "punching and hitting staff."

The Employer points out that the client was well known to Mr. Hampton by January 28, 2018 and the Employer claims that Mr. Hampton had had ample opportunity to let go of the client and step away from the client to give the client room to stand up. The Employer claims that Mr. Hampton's behavior placed the client and co-workers in harm's way, and the Employer claims that while the grievant sees himself as a stern parent and the enforcer of rules, the Department sees a Therapeutic Program Worker as a teacher and facilitator.

The Employer refers to the video recording admitted to the hearing record and argues that it can clearly be seen that the client was dragged to the client's room by his shirt collar by Mr. Hampton.

The Employer claims that Therapeutic Program Workers at the Columbus Developmental Center are required to deal with challenging behaviors from residents at the Center and these behaviors are wide-ranging. It is contended that the clients at the Center need staff to model healthy behavior and the staff is to deescalate, not instigate or initiate negative conduct.

The Employer refers to Article 24, section 24.01 in the parties' collective bargaining agreement that provides: "In cases involving termination, if the arbitrator finds that there has been abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee admitting such abuse." The Employer argues that because the evidence and the testimony presented at the hearing demonstrate that the grievant dragged the client across the floor by the client's shirt collar, the only issue remaining is a determination as to whether this action could reasonably have caused harm to the client. If so, abuse has been perpetrated against a



client and the termination of the employment of the perpetrator of such abuse is required by the parties' collective bargaining agreement.

The Employer notes that if the arbitrator in this case were to find that dragging a client across the floor by the client's shirt collar could not reasonably be expected to cause harm to the client, and the failure to report such activity does not justify discharge, the arbitrator is requested by the Employer not to direct the grievant back to a position responsible for direct resident care. The Employer points to the interpretative guidelines issued by the Medicaid program that prohibit an employee who has committed abuse, neglect, or mistreatment from being returned to a position from which direct resident care is to be provided.

The Employer points to arbitration decisions from arbitrators Jonathon Dworkin and Robert Brookins. Arbitrator Dworkin found that: "... Tenure is not a pass to commit misconduct. It does not allow an individual to break rules with impunity; it does not insulate people from removal for conduct totally inimical to an employer's fundamental interests."

Arbitrator Brookins found an inherent need for trustworthiness in the position of Therapeutic Program Worker, a position responsible for clients who may be vulnerable. Arbitrator Brookins found: "... TPWs must be held to high standards of integrity and honesty, since, during their day-to-day activities, they will likely encounter numerous opportunities to exploit clients who are incapable of protecting themselves. Trustworthiness is, therefore, a non-negotiable trait for TPWs."

The Employer claims that the hearing record demonstrates by a preponderance of the evidence therein that the grievant's actions went beyond a display of poor judgment. It is contended that the Employer cannot and will not condone the behavior that has been proven in this case to have been engaged in by the grievant toward a client on January 28, 2018 on Broadview #2 during the second shift. The Employer claims that the grievant's disregard of the Center's rules and policies and basic human rights support the termination of employment that has been ordered and makes returning the

grievant to work at the Center inappropriate, unfair, and not supported by the evidence or the laws and rules applicable to this proceeding.

Based on the arguments set out above, the arbitrator is urged by the Employer to uphold the discipline and deny the grievance at issue herein in its entirety.

Position of the Ohio Civil Service Employees Association, American Federation of  
State, County and Municipal Employees, Local 11, AFL-CIO, Union

The Union understands the issue raised by this arbitration proceeding to be whether the Employer violated Article 24 of the parties' collective bargaining agreement by removing the grievant without just cause. In the absence of just cause, the question becomes what form the remedy is to take in healing the breach of the parties' Agreement.

The Union points out that the facts underlying this case are in large part undisputed. The grievant, Robert Hampton, has served as a Therapeutic Program Worker at the Columbus Developmental Center for over twenty-three years and has shown himself over those many years to be an exemplary employee, with no active prior discipline and highly respected at the Columbus Developmental Center by co-workers and residents. The Union points out that due to Mr. Hampton's lengthy experience at the Columbus Developmental Center he was regularly called upon throughout the facility to deescalate negative behaviors. The Union points out that all of the performance evaluations of Mr. Hampton that could be located show Mr. Hampton to have met the expectations of the Employer. There is no reference in these performance evaluations to any concern about client abuse or neglect or exploitation by Mr. Hampton. The Union does not dispute that the last performance evaluation that could be located for Mr. Hampton dates to 2007.

The Union notes that the grievant was removed effective May 18, 2018 for violation of Standards of Conduct Rule A-1, Abuse of a Client, and for violation of Standards of Conduct Rule F-1, Failure to Report.

As to the events of January 28, 2018 the Union notes that Mr. Hampton had completed his scheduled work shift, the first shift on January 28, 2018, and had been asked by the Employer to stay over and work the second shift as well. Mr. Hampton agreed to this request and worked the second shift.

At about 5:03 p. m. on January 28, 2018, during the second shift on Broadview #2, a Therapeutic Program Worker assigned to Broadview #2, Formum Fozao, called out for help. Mr. Hampton heard the shout by Mr. Fozao and responded to this request for assistance.

Upon approaching the location of Mr. Fozao, Mr. Hampton found a client of Broadview #2 engaged in a behavioral episode in a hallway outside the living unit acting aggressively toward TPW Fozao.

The Union notes that because Mr. Hampton found Mr. Fozao to be the object of the client's aggression, Mr. Hampton directed Mr. Fozao to move away from the client so as to remove Mr. Fozao as a target of the client's wrath. TPW Hampton then spent several minutes verbally redirecting the attention of the client to calm the client. The Union points out that when they entered the living unit the client can be observed on the video recording spinning away from Mr. Hampton, moving aggressively toward TPW Fozao, and spitting at TPW Fozao. TPW Hampton positioned himself between the client and TPW Fozao and walked the client to the client's room.

The Union points out that shortly after entering his bedroom the client exited his room while holding a container of body spray, spraying the body spray into the air. TPW Hampton again attempted to verbally redirect the client and shepherd the client back to the client's room. The client then throws the container to the floor with sufficient force to break the container.

Mr. Hampton began walking the client to his room and the client can be seen spinning toward TPW Fozao, throwing a fist in the air and shouting. The Union points out that the client can be seen leaning around TPW Hampton and looking in the direction of TPW Fozao while shouting and

attempting to get around Mr. Hampton. The client then throws himself to the floor whereupon TPW Hampton took hold of the client's shirt and pulled the client to the client's room.

The Union points out that at 5:33 p. m. on January 28, 2018 TPW Hampton escorted the client to the nurse's station where the client underwent a physical examination by the nurse. No indication of abuse was observed during this examination.

The Union points out that the grievant contacted the Grounds Supervisor, Mr. Hopkins, reported the incident, recorded the incident in the shift log, and directed a completed, written unusual incident report (UIR) to the nurse. The Union points out that during the Center's investigation of the events in question, Mr. Hampton's written statements about these events have proven to be accurate accounts of what occurred as supported by what can be observed in the video recording.

The Union points out that each and every TPW at the Columbus Developmental Center is trained on each client's Behavior Support Strategy (BSS), a plan of care that describes the behaviors an individual displays and how to deescalate these behaviors. The Union argues that TPW Hampton on January 28, 2018 was following the BSS plan for the client when TPW Hampton responded to a call for assistance from a co-worker, TPW Fozao.

The Union reminds the arbitrator that TPW Hampton was very familiar with the client in question, and knew full well the client's propensity to display severe aggression, causing harm to himself and others. The Union points out that the BSS plan in effect for this client states: "... when [client] is upset redirect him to his room. He usually calms down when suggested things to do in his room." See Joint Exhibit 8, page 4. The Union claims that this is precisely what TPW Hampton was attempting to accomplish, understanding that this would be the safest and best way to calm the client. The Union points out that Mr. Hampton had had no intention to harm the client and there is nothing in the hearing record to indicate Mr. Hampton caused any injury to the client.

The Union notes that Mr. Hampton did not complete a Restrictive Measure Usage Form

(Restraint Form) because, as he testified at the arbitration hearing, he did not impose a physical restraint upon the client. The Union points out that CDC staff are trained on the restraints listed on the Restrictive Measure Usage Form and these enumerated restraints were not employed by TPW Hampton on January 28, 2018.

The Union questions whether the Columbus Developmental Center's investigation was fair and objective. The Union notes that while some people were interviewed, Mr. Hopkins was not interviewed, the client's advocate who made the initial report to the Center alleging abuse was not interviewed, and the nurse on duty, Susan Parkman, who performed the examination of the client on January 28, 2018, was not interviewed. The Union points out that this is especially curious given the fact that Nurse Parkman had been in a position to receive a written unusual incident report from TPW Hampton, the UIR that today cannot be located.

The Union also points out that Columbus Developmental Center policy for Incident Reporting and Review provides that investigations must be received by the Superintendent within five working days of the incident. The Union points out that the investigation in this case was initiated on January 31, 2018 and was submitted to the Superintendent of the CDC on March 7, 2018.

As to whether the investigation produced substantial evidence or proof of guilt, the Union points out that termination for abuse of a client is such a serious charge that it can, if supported by sufficient evidence, cause criminal charges to be brought. The charge of an abuse of a client also causes an impairment to the grievant's opportunities for future employment in the field of direct client care and therefore such a serious charge, with such serious potential consequences, should be required to be substantiated by substantial proof of guilt in support of the claim that just cause exists for this most severe of all disciplinary action.

The Union claims that the term "abuse" should be defined in this case by the language of Ohio Revised Code section 2903.33 which states: " 'Abuse' means knowingly causing physical harm or

recklessly causing physical harm to a person by physical contact with the person or by inappropriate use of physical or chemical restraint, medication, or isolation in the person.” The Union points to an arbitration decision in *OCSEA v. DODD, Northwest Ohio Developmental Center*, grievance number G87-0001(A), a decision from arbitrator David M. Pincus who expressed the opinion that the parties in that case were subject to Ohio Revised Code section 2903.33(B)(2) and Ohio Administrative Code sections 5123-314(C)(1) and 5122-314(C)(1). The Union argues that the video recording, coupled with the medical evidence presented, clearly shows the grievant did not abuse the client as he did not knowingly cause physical harm or recklessly cause physical harm to the client.

The Union points out that Article 24, section 24.01 in the parties' collective bargaining agreement provides: “Discipline shall not be imposed upon an employee except for just cause.” The Union claims proof through witness testimony, the video recording, and the documentary evidence presented to the hearing record establish that the Employer's investigation was not fair and objective, showing the Employer does not possess substantial evidence that the grievant abused a client, and therefore the discharge of the grievant herein is without just cause. The Union contends that because of the seriousness of the charge and the severity of the discipline imposed, the charge must be supported by clear and convincing evidence to be upheld.

The Union argues that the grievant during the events in question was trying to protect other clients and a co-worker from harm and was attempting to deescalate the client's behavior. The Union claims that at no time did TPW Hampton abuse or physically restrain the client nor did he fail to report the incident to the Residential Care Supervisor, Mr. Hopkins. The Union claims that, at most, the technique used by Mr. Hampton resulted from a lapse in judgment, but the physical force brought to bear upon the client did not rise to the level of abuse.

Because the Employer has failed to present sufficient evidence in support of just cause for the discharge of the grievant, the Union urges that the arbitrator grant the grievance in its entirety and find

that the grievant did not abuse a client on January 28, 2018 as charged by the Employer. The Union asks that the termination of the employment of the grievant be vacated, the grievant be reinstated to his former TPW position with full back pay, including holiday premium pay and all lost overtime opportunities. The Union asks that the Employer be ordered to reimburse the grievant for all health care expenses for the grievant and his family from the date of the removal to the date of reinstatement. The Union asks that all seniority, including PERS seniority credit and contributions, leave balances, and other accrued benefits be restored to the grievant so as to place the grievant in the position he would have been in had the discipline not been imposed.

The Union also asks that the arbitrator issue an order directing the Employer to cease and desist in violating the parties' collective bargaining agreement, and order the Employer to honor the terms and conditions of employment expressed in the parties' Agreement.

## DISCUSSION

The language presented by Article 24, section 24.01 in the parties' collective bargaining agreement prohibits the imposition of disciplinary action upon an employee except for just cause. The language of this Article places the burden of proving just cause for disciplinary action upon the Employer.

The language in Article 24, section 24.01, in a case involving the termination of the employment of a bargaining unit member, limits through express language the arbitrator's authority to act if the arbitrator finds an abuse of a patient or another under the care or custody of the State of Ohio. In a case of termination, when a finding of abuse is found, the language of Article 24, section 24.01 specifies: "... the arbitrator does not have authority to modify the termination of an employee committing such abuse."

The Joint Issue Statement agreed by the parties in this proceeding mirrors the importance of a

finding about whether abuse occurred based upon the facts proven in this case by presenting as the first question in a three-part Joint Issue Statement: “Did the Grievant, Robert Hampton, abuse an individual of the Columbus Developmental Center?” If the arbitrator were to find in the affirmative, the language of Article 24, section 24.01 is explicit as to the result, an express limitation upon the arbitrator's authority as to the outcome of a case in which abuse is found to be proven and termination of employment has been imposed.

Because of the importance of the finding as to whether an instance of abuse has occurred, how the term “abuse” is to be defined and understood in reaching this finding becomes a primary question.

The Employer references the Medicaid program's interpretive guidelines that define “abuse” and “physical abuse” for purposes of participation in the Medicaid program. These interpretive guidelines provide a definition for “abuse” and “physical abuse” and, as specified by Superintendent Capaldi in his testimony at the arbitration hearing, these guidelines are followed at the Columbus Developmental Center as a requisite to maintaining eligibility for participation in the Medicaid program.

The Union does not deny the validity of the Medicaid interpretive guidelines nor their enforcement as a requisite for the Columbus Developmental Center to continue to participate in the Medicaid program. The Union, however, points out that the grievance at issue herein is to be determined by the express language in the parties' collective bargaining agreement, an Agreement containing language agreed by both parties. The Union notes that the Union has never been a party to the interpretive guidelines issued by the Medicaid program and the Union believes that the arbitrator in this proceeding is limited to the parties' collective bargaining agreement in deciding the grievance at issue rather than deciding the grievance based upon a source external to the parties' collective bargaining agreement, that is, outside the language that had been agreed by both parties.

The Union argues that if the Medicaid interpretive guidelines are not to be used herein to



determine the grievance at issue because they are not part of the parties' collective bargaining agreement and have not been agreed by the Union, the arbitrator should apply a different definition for "abuse," the definition presented at Ohio Revised Code section 2903.33.

The arbitrator understands and accepts the Union's argument as to the necessity of the arbitrator in resolving the grievance before him to remain within the four corners of the parties' Agreement and not include in the foundation underlying the arbitrator's decision and award authorities that are external to the parties' Agreement. The Union is correct that the parties are entitled to have the grievance at issue herein determined on mutually agreed language rather than language over which the Union exercised no authority, that is, no opportunity to accept, reject, or bargain.

The arbitrator understands Ohio Revised Code section 2903.33 to be part of Title 29 of the Ohio Revised Code, Ohio's Criminal Code. Ohio Revised Code section 2903.33(B) defines "abuse" as meaning: "... knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with a person or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the person." Ohio Revised Code section 2903.33 is the section recommended by Arbitrator Pincus in 1987 to be used for the definition of "abuse" based on what Arbitrator Pincus found to be a gap in the parties' Agreement about what is to constitute client abuse.

Ohio Revised Code section 2903.33, however, is a criminal statute. The standard of proof in all criminal cases is proof beyond a reasonable doubt. The standard of proof in the case herein is not the standard of proof applied in a criminal proceeding. The standard of proof in this proceeding is less than beyond a reasonable doubt but is no less than a preponderance of the evidence and may be as high as clear and convincing evidence. While Arbitrator Pincus found a gap in the parties' Agreement, that finding was issued in 1987. The arbitrator herein questions whether the oversight found by Arbitrator Pincus in 1987 has remained unattended for thirty-two years. The arbitrator herein is not persuaded that a criminal statute's definition of abuse is to determine what constitutes abuse under the parties'

collective bargaining agreement.

While the Employer highlighted the Medicaid program's interpretive guidelines and the Union references Ohio's Criminal Code for definitions of "abuse" and "physical abuse," there is a third source of authority for the definition of "abuse" in the hearing record, namely rule A-1 in the Standards of Conduct promulgated and enforced by the Ohio Department of Developmental Disabilities. Rule A-1, Abuse of a Client, references the definition of "physical abuse" presented in Ohio Administrative Code section 5123:2-17-02, defining "physical abuse" as: "... the use of physical force that can reasonably be expected to result in physical harm or serious physical harm as those terms are defined in section 2901.01 of the Revised Code." Ohio Revised Code section 2901.01(A)(3) defines "physical harm to persons" as meaning "... any injury, illness, or other physiological impairment regardless of its gravity or duration."

The arbitrator understands that the Standards of Conduct rules are promulgated unilaterally by the Employer but finds nothing to diminish or invalidate their application to employees under the parties' Agreement. These Standards of Conduct rules provide notice to employees and to administrators alike what is unacceptable behavior in an employee's official capacity with the Department. The arbitrator finds the Standards of Conduct rules applied in this case, rules A-1 and F-1, Abuse of a Client and Failure to Report, respectively, to be enforceable and applicable.

The grievant has been accused of misconduct under two rules but the allegations of misconduct ascribed to the grievant are more than two. The allegations of a failure to report reference an alleged failure by the grievant to report that a physical intervention with a client had occurred, that a physical restraint upon a client had occurred, and that a client had accused a staff member of choking the client.

The alleged abuse of the client on January 28, 2018 refers to an allegation by the client of being choked by TPW Hampton and refers to the physical pulling of the client to the client's room by means of the client's shirt collar.

As to the allegation made by the client about having been choked by TPW Hampton on January 28, 2018, there is insufficient evidence, that is, less than a preponderance of the evidence in the hearing record, to substantiate that the client had been choked by the grievant. The physical examination of the client by a nurse on January 28, 2018 around 5:33 p. m. revealed no bruising, redness, or other form of injury to the client's neck or throat area; the client was in an agitated state and has a history of threatening the continuing employment of staff members at the Center when agitated by alleging physical abuse; the grievant has no history of being abusive to clients; the grievant, without equivocation, denies choking the client.

There is also the fact that the report by the client to his advocate first occurred on January 29, 2018 and a second call was made to the advocate by the client on January 30, 2018. The client alleged that he was choked by TPW Hampton on two occasions on January 28, 2018, once through a headlock applied to the client by TPW Hampton, and a subsequent instance in which TPW Hampton purportedly used his arm and hand to cut off the client's air passage. What is curious is that while both alleged choking incidents were claimed to have occurred on January 28, 2018, only the initial incident was reported to the client's advocate on January 29, 2018, while the second alleged instance of choking was reported to the advocate on January 30, 2018.

Whatever the reasons for the client to have made such a charge, there is insufficient evidence under even the most minimal standard of proof to substantiate a choking of the client by TPW Hampton on January 28, 2018.

A separate question is whether TPW Hampton had a duty to report the allegation made by the client about being choked by TPW Hampton. The answer to this question is clearly yes. TPW Hampton had a duty to report the allegation no matter how outrageous such a claim was believed to be. No matter how ridiculous or offensive the client's allegation may have been viewed, the work rules at the Columbus Developmental Center, promulgated by the Ohio Department of Developmental Disabilities,

require prompt reporting of such a charge. No report of the allegation was provided in this case to Supervisor Hopkins but the hearing record does reflect a mention of the choking allegation in a second shift summary made by Mr. Hampton on January 28, 2018. See Joint Exhibit 3, page 44.

The hearing record indicates that on at least one occasion on January 28, 2018 during the second shift on Broadview #2 a client verbally accused TPW Hampton of choking the client. Even though the arbitrator has found the allegation of choking unproven, the responsibility of reporting the allegation to an appropriate supervisor remained and was unfulfilled by the grievant, opening the grievant to some form of disciplinary action under the Department of Developmental Disabilities' disciplinary grid under rule F-1.

The failure to report ascribed to the grievant also relates to the failure to submit a physical restraint form. The lack of such a form and the absence of a verbal report to Supervisor Hopkins of a physical intervention between TPW Hampton and the client on January 28, 2018 form the grounds for the claim that rule F-1, Failure to Report, had been violated, a violation proven by a preponderance of the evidence that supports the discipline imposed upon the grievant.

A violation of rule F-1, however, under the disciplinary grid enforced by the Ohio Department of Developmental Disabilities, does not require termination of employment for a first offense. The disciplinary grid provides a range of disciplinary action for violation of rule F-1, a range of discipline clearly missing from a proven violation of rule A-1, Abuse of a Client, and a resulting termination of employment.

The arbitrator is persuaded that evidence of an injury is not a prerequisite for a finding of abuse. Ohio Administrative Code section 5123:2-17-02, the Ohio Administrative Code rule referenced in rule A-1 on the disciplinary grid, defines "physical abuse" as: "... the use of physical force that can reasonably be expected to result in physical harm or serious physical harm as those terms are defined in section 2901.01 of the Ohio Revised Code." This definition refers to what "can reasonably be

expected” from the actions of an employee upon a client, that is, whether physical harm can reasonably be expected to result from the employee's actions.

It bears reiterating that the grievant in this case, Mr. Hampton, had been an employee of the Columbus Developmental Center for twenty-three years, has no active prior discipline, has never before presented any indication of having been abusive to clients, and had agreed to work substantial hours beyond his assigned work schedule at the request of the Employer. Mr. Hampton over the many years of his employment at the Columbus Developmental Center showed himself to be an experienced, skilled, and seasoned direct care provider. Mr. Hampton was known throughout the facility to be particularly adept at deescalating client behaviors.

It also bears mentioning that the arbitrator's opinion about whether termination of employment is the best decision on the facts of this case is not an issue in this proceeding. The question to be determined is not whether the arbitrator agrees or disagrees with the discipline imposed but whether the Employer acted within the authority granted to the Employer by the parties' collective bargaining agreement in imposing the discipline upon the grievant, and whether the severity of the discipline imposed, termination of employment, can be proven to be supported by just cause. If the Employer has acted upon facts fairly and objectively gathered, acted without a discriminatory intent, and can present evidence substantiating by a preponderance of the evidence that abuse of a client occurred, the Employer, in the absence of an abuse of discretion, is empowered to impose a termination of employment and have that discipline upheld.

In considering the grievant's circumstance during the second shift on Broadview #2 on January 28, 2018 shortly after 5:00 p. m. TPW Hampton can only be viewed with sympathy for being confronted with the challenges arising from the tantrum thrown by the client. It is important to remember that the grievant did not insert himself uninvited into this situation but had responded to a shouted request for assistance from a co-worker, TPW Fozao, who at that time had been the object of

the client's wrath.

The arbitrator is persuaded that the Employer is empowered to determine what comprises physical abuse at a developmental center operated by the Ohio Department of Developmental Disabilities. The arbitrator herein is not persuaded that unless and until a grievant is shown to have violated the elements of a criminal statute a dismissal may not be imposed by the Employer. The criminal statute has a higher, more stringent standard of proof and presents a higher threshold for what comprises abuse, requiring actual injury to the victim.

As noted above, the arbitrator herein finds no basis upon which to invalidate or diminish the effect of work rules promulgated by the Employer for enforcement at its developmental centers, including the Columbus Developmental Center. Those work rules include a definition for “abuse” through rule A-1, Abuse of a Client, that refers to Ohio Administrative Code section 5123:2-17-02. Ohio Administrative Code section 5123:2-17-02 defines “physical abuse” as the use of physical force that can reasonably be expected to result in physical harm or serious physical harm as those terms are defined in Ohio Revised Code section 2901.01.” While Ohio Revised Code section 2901.01(A)(3) refers to “physical harm to persons” as meaning “... any injury, illness, or other physiological impairment regardless of its gravity or duration,” the definition of “physical abuse” in the work rules enforced at the Columbus Developmental Center means “... the use of physical force that can reasonably be expected to result in physical harm or serious physical harm...” The arbitrator in this case is persuaded that the work rules applicable to the bargaining unit provide a definition for “abuse” and “physical abuse” that do not require an injury. What is required is action that can reasonably be expected to cause physical harm or serious physical harm.

Except for the physical movement by TPW Hampton of the client to the client's room, it is difficult to find any questionable action by TPW Hampton toward the client as presented by the video recording and the eyewitness testimony and written statements presented to the hearing record. The

harm to the client, and the reports made by the grievant about his actions in this regard failed to satisfy the reporting requirements in the work rules imposed at the Columbus Developmental Center.

The arbitrator finds that the Employer had just cause to find that the grievant had engaged in an instance of abuse of a client on January 28, 2018, a violation of CDC work rule A-1, and therefore the Employer had just cause to order the termination of the grievant's employment effective May 18, 2018. Accordingly, the grievance is denied.

#### AWARD

1. The arbitrator finds the grievance at issue herein to be arbitrable and properly before the arbitrator for review and resolution.
2. The grievant, Robert Hampton, abused an individual of the Columbus Developmental Center.
3. The abuse of a resident provides the just cause needed for the Employer to terminate the employment of the grievant.
4. The grievance is denied.

Howard D. Silver

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Columbus, Ohio  
April 2, 2019

exhibition of anger and frustration by the client is clearly visible, as are TPW Hampton's efforts to redirect the client back to the client's room to encourage the client to regain his composure in a safe place.

There is, however, in the chronology of events that make up this case, a point when the client, after exhibiting continuing aggressive actions toward TPW Hampton and TPW Fozao, throws himself to the floor, a well-known signal that the client was readying himself to sink his teeth into another person's leg, having done so on prior occasions in biting the legs of residents and staff members. A preponderance of evidence in the hearing record indicates that this circumstance presented a real and substantial threat to the physical well-being of TPW Hampton.

Because of the charged atmosphere surrounding the client's drop to the floor in front of TPW Hampton it is understandable that Mr. Hampton determined he was out of non-physical options, grabbed the shirt worn by the client, and proceeded to forcibly drag the client to the client's bedroom.

As stated above, the Employer Standards of Conduct Rules define abuse in terms of what can reasonably be expected from the actions of a staff member upon a client. The Employer argues in this case that the actions of TPW Hampton upon the client, albeit in a difficult situation, are actions that could reasonably be expected to result in physical harm to the client and therefore are actions which are prohibited at the Columbus Developmental Center because they constitute physical abuse.

The arbitrator is persuaded that the Employer could reasonably expect that the action taken by TPW Hampton toward the client on January 28, 2018, grabbing the client's shirt and dragging the client to the client's bedroom by means of the client's shirt, could result in physical harm to the client and therefore constitutes an action that is prohibited as an abuse of a client. The arbitrator finds that the Employer has provided sufficient proof, proof beyond a preponderance of the evidence, that the grievant physically dragged a client across the floor by means of the shirt worn by the client to the client's bedroom on January 28, 2018, such action can reasonably be expected to result in physical



CERTIFICATE OF SERVICE

I hereby certify that duplicate originals of the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the State of Ohio, Department of Developmental Disabilities, Columbus Developmental Center, the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, the Union, grievance number DMR-2018-01742-04, Grievant: Robert L. Hampton, were served electronically this 2<sup>nd</sup> day of April, 2019 upon the following:

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Columbus, Ohio  
April 2, 2019

## Grievance Closed - DMR-2018-01742-04

4-319

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OHGrievance Auto &lt;ohgrievance@das.ohio.gov&gt;

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Tue 4/2/2019 10:24 AM

To: Chapter 2509; rwillou1805@gmail.com; robert.willoughby@dodd.ohio.gov; Chris Minney; joseph.fanell@dodd.ohio.gov;  
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## \*\*\*NOTIFICATION OF GRIEVANCE CLOSURE\*\*\*

Grievance: DMR-2018-01742-04

Grievance Type : Discipline

Grievance Sub-Type: Termination

Step: Arbitration

Closure Reason: Denied

Status: Closed

Date Filed: 5/21/2018

Withdraw Request by:

Grievant: ROBERT HAMPTON

Union: Ohio Civil Service Employee Association (OCSEA)

Chapter (if applicable): 2509

Management Users: <https://oh-grievances.force.com/Management/a00t0000005s8NU>DAS Link: <https://ohgrievance.my.salesforce.com/a00t0000005s8NU>Union/Grievant Link: <https://oh-grievances.force.com/Union/a00t0000005s8NU>