

Thomas J. Nowel
Arbitrator and Mediator
Lakewood, Ohio

#1195
Rec'd
5/12/2021

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

Arbitration Proceedings Between:)	
)	Case No. DMR-
State of Ohio, Department of Developmental)	2020-02226-04
Disabilities, Warrensville Developmental Center)	
)	ARBITRATION
and)	OPINION AND
)	AWARD
Ohio Civil Service Employees Association,)	
AFSCME Local 11)	DATE:
)	May 12, 2021
Re: Yolanda Avery Removal)	

APPEARANCES:

Jill M. Harlan, Labor Relations Officer 3, for the Ohio Department of
Developmental Disabilities and Russell Burkepile, Staff Representative, for the
Ohio Civil Service Employees Association, AFSCME Local 11.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, AFSCME Local 11. The Grievant, Yolanda Avery, had served as a Therapeutic Program Worker (TPW) at the Warrensville Developmental Center. Following an investigation, the Grievant's employment was terminated based on charges that she violated Department policies involving abuse of a client and failure of good behavior. The termination was effective on June 10, 2020. The Union appealed the termination through the Grievance Procedure on June 10, 2020, and the grievance was denied by the Employer at Step 2 of the Grievance Procedure on July 30, 2020. The Union appealed the matter to arbitration.

The arbitrator was selected to hear the matter pursuant to Section 25.05 of the collective bargaining agreement. The arbitration hearing was held on March 24, 2021 via video platform (Zoom). The parties agreed that the matter was properly before the arbitrator, and, at the conclusion of the hearing, agreed to submit post hearing briefs no later than April 30, 2021. The record of hearing was closed on that date. The parties had full opportunity to present their cases, facts and argument.

WITNESSES

TESTIFYING FOR THE EMPLOYER:

Nicole Baxter, Investigative Services Manager

Kelita Swanson, Therapeutic Program Worker

Patricia Nixon, Superintendent at Warrensville Developmental Center

TESTIFYING FOR THE UNION:

Quinten Curtis, Therapeutic Program Worker

Diane Evans, Therapeutic Program Worker

Yolanda Avery, Grievant

JOINT STIPULATIONS

1. Issue: Was the Grievant, Yolanda Avery, removed for just cause?
2. If the Grievant was not removed for just cause, what shall the remedy be?
1. The Grievance is properly before the Arbitrator.
2. The Grievant was hired by the Employer as a Therapeutic Program Worker (TPW) on November 22, 2004.
3. The Grievant was removed from her position as a TPW on June 10, 2020.
4. The Grievant had no active discipline on her record at the time of her removal.

RELEVANT PROVISIONS OF THE AGREEMENT

Article 24 – Discipline 24.01 – Standard Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Article 25.05. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

24.02 – Progressive Discipline. The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include: a. One (1) or more written reprimand(s); b. One (1) or more days(s) working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer. If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are

exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her. c. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer. d. Termination.

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

The remainder of this section is not relevant to this case.

24.03 – Supervisory Intimidation. An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this Section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this Section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline Employer representatives who violate this Section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

24.06 – Imposition of Discipline The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-disciplinary meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-disciplinary meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the

Union shall satisfy the Employer's procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or Union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose any discipline, including oral and written reprimands, the employee, if available, and Union shall be notified in writing. The OCSEA Chapter President shall notify the Agency Head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave, without loss of pay (except in cases that fall within ORC Section 124.388(B)) or reassigned while an investigation is being conducted except that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment or if the reassignment is to a position on the same shift and days off, without loss of pay and does not exceed 30 days. For cases that fall within ORC Section 124.388(B) as referenced above, any payment due the employee under subsection (B) shall be based upon the employee's total rate plus any applicable roll call pay. For purposes of this paragraph, "without loss of pay" shall mean the employee's total rate plus any applicable roll call pay.

GRIEVANCE

Statement of Grievance: Wrongful Termination.

Resolution Requested: To be made whole, have this termination removed from both her records.

BACKGROUND

The Grievant, Yolanda Avery, had been employed as a Therapeutic Program Worker at the Warrensville Developmental Center for approximately 16 years at the time of her termination. Two client residents were involved in the incident. For purposes of this decision to protect privacy, the involved male will be referred to as Dar, and the female will be referred to as Cry. On February 26, 2020, Dar and Cry were returning together in a facility bus from a day program. During the ride to the residential facility, Dar spit at Cry's face. Cry notified staff of the incident upon returning to the facility and expressed her anger. Dar returned to his room on the men's side of the facility. The Grievant went into the hallway of the men's area to discuss and counsel Dar regarding his behavior. Dar exited a room and came into the hallway as the Grievant entered the area. Dar was a frail individual. Within a few moments, Cry quickly entered the hallway and approached Dar aggressively with possible intent to injure him. The Grievant positioned herself between the two resident clients in order to protect Dar from a physical attack. The Grievant pushed Cry a number of times in order to maintain space between the clients and pointed at her face a number of times in an attempt to warn her to back away from Dar. Cry's aggressiveness re-focused toward the Grievant and she pushed

back. Cry is physically larger than the Grievant, and she aggressively pushed the Grievant into a corner. Video footage did not capture what occurred in the corner area. Other staff interceded and assisted in removing the Grievant from the corner area and separating her from the resident. Cry shouted out that the Grievant punched her in the face a number of times. Video footage suggests that Cry may have swung at the Grievant as they moved into the corner area, but it is difficult to observe the interaction. As the Grievant and other staff members moved toward the door to leave the hallway, Cry aggressively charged at the Grievant and they exited the area. Video footage shows Cry entering the hallway again, aggressively knocking over a mobile partition, and going into the men's area, probably looking for Dar. The Grievant left the hallway and entered a large dining area. Cry came through the door almost running in an aggressive manner toward the Grievant with staff attempting to control her and diverting her away. The Grievant responded by pointing at Cry. The Grievant left the area.

Cry met with the facility psychologist, following the incident, and stated that the Grievant punched her in the face. When an allegation of abuse is made, the Department is required to conduct an investigation which commenced on February 26, 2020. Approximately 15 potential witnesses were interviewed along with a viewing of the video which captured most of the incident between the Grievant and Cry. The Ohio Highway Patrol was notified of the incident but declined involvement. The Employer concluded that the Grievant had committed physical and verbal abuse of the resident client. The Grievant was charged with violation of the DODD Standards of Conduct rules, specifically A-1, Abuse of a Client; K-6, Failure of Good Behavior; L-9, Disregard of Duty; and L-11, Disregard of Duty. A pre-disciplinary hearing was conducted on June 1, 2020. The hearing officer determined that just cause existed for

discipline for violations of Rules A-1 and K-6. The Grievant's employment was terminated on June 8, 2020 for violation of Rules A-1 and K-6. The Union grieved and appealed the discipline to arbitration.

POSITION OF THE EMPLOYER

The Employer states that the Grievant failed to uphold the obligations of her position when she engaged in physical and verbal abuse of a resident client. The Grievant initially stepped between Cry and Dar in order to prevent a physical attack, but she ultimately abused the resident. While there is no video evidence, Cry claimed that the Grievant punched her in the face while backed into a corner. Numerous staff witnessed Cry yelling that she had been punched by the Grievant. The punch was witnessed by a member of the staff and a resident client. Numerous staff reported that Cry repeatedly stated that the Grievant had punched her in the face. She reported the punch to the facility psychologist. Following the incident, the facility nursing staff met with Cry and determined that there was a red mark on her face. Although the Grievant denied punching the resident, Cry's statement was consistent and never changed. Physical abuse occurs when physical force occurs which might reasonably be expected to result in physical harm although a physical injury may not actually occur.

The Employer states that the Grievant pointed her finger in the Cry's face when she entered the hallway and continued to do so after they had been separated by other staff, and the finger pointing continued in the dining area. Verbal abuse, as defined in DODD policy,

includes the use of words and gestures which threaten, humiliate or intimidate. The prohibition of physical and verbal abuse is contained in policy and state law as well as Medicaid regulations. The Employer states that the Grievant, through her training, clearly understands that finger pointing is not permitted. She had been warned by supervision in the past to refrain from using her hands while speaking. The Employer concludes that the finger pointing and gestures satisfied the definition of verbal abuse.

The Employer states that all members of the staff have been trained in the “Bill of Rights” of clients. They must be treated with respect and courtesy, and they have the right to be free from any form of abuse. The Grievant had been trained to deal with aggressive behavior. Staff must remain in control of their emotions at all times. It is true that Cry exhibited aggressive behavior from time to time, and that she had been in jail at one time, but the Grievant had a working relationship with her and had been trained to handle her aggression. The Grievant failed to de-escalate the incident and provoked the resident with her finger pointing. She should have allowed other staff to intervene and should have walked away from the confrontation.

Although the Union argued that the Employer’s investigation was not impartial, the Employer states that the investigators interviewed or received statements from 15 witnesses to the incident. Video footage was reviewed. The 25 page investigative report was completed over a period of one month. The Employer states that the Union offered no evidence to support its contention of unfairness and lack of impartiality.

The Employer states that it is clear that the Grievant engaged in abusive behavior.

Section 24.01 of the collective bargaining agreement prohibits an arbitrator from mitigating a discharge if it has been determined that abuse occurred. The Employer references a case of abuse heard by this arbitrator which affirmed this limitation of the arbitrator's authority. The Employer argues that the imposition of the discipline must be upheld and the grievance denied in its entirety.

POSITION OF THE UNION

The Union states that the Employer did not have just cause to terminate the employment of the Grievant. Essentially, she protected client Dar and herself from possible bodily injury. The Grievant acted to protect Dar from physical harm as Cry was intent on fighting with him due to the spitting incident on the bus. Cry was physically aggressive during the entire incident, and the Grievant chose a level of response necessary to immobilize the aggression. The Grievant did not advance towards Cry, but the client aggressively advanced toward her during the entire incident in both the men's area hallway and dining room.

The Union states that a core argument of the Employer is that the Grievant punched Cry when they were out of view of the video camera. Cry repeatedly stated that the Grievant had punched her in the face. Although a number of employees were interviewed during the investigation, the Employer did not present witness testimony during the arbitration hearing of anyone who witnessed the alleged abuse. The location of an alleged red mark on the face of Cry, which was allegedly caused by the Grievant, was unclear during testimony at the hearing.

The Employer's witness stated that client Cry claimed to have been punched, but the testimony was confusing as the wrong side of her face was referenced. The Union states that the investigation was not fair and objective.

The Union argues that the standard of proof, regarding an allegation of abuse, must rise to a higher level based on the consequences an employee would experience from losing her position based on a charge of abuse. The Union cites Arbitrator Anna DuVal Smith who opined, in a matter between the State of Ohio and OCSEA, that the level of proof in an abuse case must be clear and convincing, and, to meet the Section 24.01 standard, as contained in the collective bargaining agreement, it must be established that a Grievant acted recklessly. The Union argues that the Employer did not have clear and convincing evidence that the Grievant abused the resident client. The Employer failed to present witnesses during the arbitration hearing who were present during the incident. Its case relied on a video, which did not capture important aspects of the incident, and uncorroborated statements. Additionally, the Union argues that the investigation was not objective as there was a lack of substantial proof regarding charges of abuse.

The Union states that an arbitrator is not barred from modifying discipline if there is no finding of just cause for abuse. The Union references a recent arbitration case in which witness statements failed to corroborate the allegations of abuse and the disciplinary penalty was mitigated due to other policy violations. The Union states further that Section 24.02 of the collective bargaining agreement provides for the principle of progressive discipline and that the penalty must be commensurate with the offense. Further, the Department Standards of

Conduct provide that progressive discipline is intended in order to impose a penalty which is commensurate with the offense. The Union asserts that the Grievant's actions did not rise to the level of termination, and the Employer could have imposed a lesser penalty rather than imposing a penalty based solely on punishment.

The Union states that the Grievant did not abuse the client. There is a lack of corroborative evidence. The Union poses the question, "should someone lose their job because of speculation...." The Employer failed to provide clear and convincing evidence of abuse or even a preponderance of evidence. Client Cry was aggressive and threatening during the entire incident. She attempted to attack Dar and then turned her aggression toward the Grievant. The Grievant's career at the Warrensville Developmental Center spans 16 years and her record indicates no active discipline. A review of the entire incident demands that the Grievant be reinstated to her position and that she be made whole including lost wages, roll call pay, step increases, PERS contributions, seniority, holiday pay, leave balances, payment for medical expenses which would have been provided through insurance, and missed overtime. The Grievant should be assigned to her former post and shift, and the termination be stricken from her personnel record.

ANALYSIS AND OPINION

The Grievant was charged with Abuse of a Client, A-1. A second charge of Failure of Good Behavior, K-6, was predicated on the abuse charge. The charge of abuse involved both

physical and verbal abuse as determined by the Employer's Investigator. The Department's Standards of Conduct defines abuse as does Section 5123-17-02 of the Ohio Administrative Code as follows.

Physical Abuse. "Physical abuse" means the use of physical force that can reasonably be expected to result in physical harm to an individual. Such physical force may include, but is not limited to, hitting, slapping, pushing, or throwing objects at an individual.

Verbal abuse. "Verbal abuse" means the use of words, gestures, or other communicative means to purposely threaten, coerce, intimidate, harass, or humiliate an individual.

The arbitrator is tasked with determining if the Grievant abused Cry as outlined in policy and state administrative code and as considered in Section 24.01 of the collective bargaining agreement. Additionally, the parties have jointly submitted the issue before the arbitrator asking if the Grievant was "removed for just cause."

Exhibits prepared by the Employer and entered into evidence as joint exhibits describe the resident client, Cry. The description includes physical aggression, hitting, kicking, scratching, verbal aggression and threatening others. She was placed in the facility by the court after being incarcerated. Cry deserves to be treated with respect and provided all the rights afforded to an individual who is in the custody of the state. She is a physically large individual and, based on video evidence, moves quickly with determination and strength. She appears to be in her 20s or 30s. The Grievant had worked with Cry over time and was aware of her behaviors and potential for physical aggression. The Grievant was aware of the spitting incident earlier in the day and knew that Cry was angry with feelings of aggression. The Grievant went to the men's side of the building to discuss with Dar his poor behavior. From

video evidence, Dar appeared to be of small stature and possibly feeble. A physical attack on the part of Cry could cause substantial injury. Cry aggressively entered the hallway and was moving quickly to confront Dar who had entered the area. An important factor is the quickness with which Cry moved toward a vulnerable Dar. The Grievant placed herself between Cry and Dar and pushed her back, using hands on hands off technique to separate her from Dar. The Employer states that the Grievant engaged in verbal abuse as she was observed pointing at Cry close to her face. But it must be remembered that the Grievant was forced to act quickly as Cry was attempting to attack Dar. The Employer has stated that the Grievant could have stepped away from Cry and disassociate herself from the confrontation as other staff arrived on the scene. Logically, this is the best course of action, but in the heat of the moment, it may have been difficult for the Grievant to disconnect. Things were moving quickly. Cry pushed back as the Grievant attempted to separate her from Dar. Cry re-focused on the Grievant and began attacking her, and their momentum carried them into the corner and out of view of the video camera. Investigative reports indicate that Cry was swinging at the Grievant as they went into the corner and the video appears to confirm this. Cry is physically superior to the Grievant, and evidence indicates that she was responsible for the movement into the corner. Investigative reports indicate that the Grievant continued to speak loudly to Cry and point toward her. The Employer argues that the Grievant failed to de-escalate the confrontation, but hindsight is 20/20. The confrontation, initiated by the resident, was forceful and fast moving.

Much of the focus of the Employer's charge of abuse involves the allegation that the Grievant punched Cry in the face when the confrontation moved to the corner of the hallway and out of view of the video camera. The Grievant denied punching Cry during the

investigation and did so again during her testimony at the arbitration hearing. Cry was screaming that she had been punched and continually maintained that the Grievant had taken this action. There is no video evidence to support this claim. In the absence of video evidence, it is incumbent that the Employer provide substantial proof that this occurred, clear and convincing evidence, in order to justify the termination of the Grievant's employment. During the investigation of the allegations, the Employer interviewed fifteen individuals who were in or near the confrontation as it moved into the hallway corner. Many of these individuals were actively attempting to separate Cry and the Grievant or observed the incident. Sheila White stated she saw the Grievant punch Cry. Ms. White was, at the time, a new employee, an intern, who was shadowing other TPWs. A resident, Ofustus, claimed to have seen a punch as he was in the area. Ms. Coleman-Stover stated that she did not see the Grievant punch Cry and neither did TPWs Dyous, Tracey, Brown, Jordan and Sims.

During the investigative interview of TPW Quinton Curtis, he stated that he did not witness a punch thrown by the Grievant. He had positioned himself between Cry and the Grievant in the corner in an attempt to keep them separated and would have been aware of a thrown punch. He stated that he did not believe the Grievant acted in an unprofessional manner. Mr. Curtis was probably as close to the incident as anyone in the area. On March 3, 2020, Mr. Curtis was interviewed a second time by the Investigator on the pretense that an additional charge of "Failure to Report" was being investigated. The interview did not involve this charge specifically but instead was a repeat of the initial interview involving the alleged punch. Mr. Curtis' original report was read aloud, and he was reminded that he had originally stated that the Grievant did not throw a punch. He was told by the Investigator that three

other individuals had stated that they observed the Grievant punch Cry. Video footage was shown. Under what appeared to be intense pressure, Mr. Curtis stated again that he did not observe the Grievant throw a punch. Evidence indicates that a resident and new employee had stated to the Investigator that they had observed the Grievant punch the resident. Not three as was suggested by the Investigator to Mr. Curtis. During the arbitration hearing, Mr. Curtis testified that the Investigator pressured him to change his original statements, and this appears to be the case. This is very problematic.

Similarly, TPW Diane Evans initially stated to the Investigator that she did not observe the Grievant punch the resident, and she was interviewed a second time. The Investigative report indicates that she did not change her original statement. Again, she was told that the second interview involved a charge of "Failure to Report." The Grievant was never charged with this violation either at the pre-disciplinary hearing or in the notice of removal. The Investigator stated to Ms. Evans that "we have 3 people who told us that's when Yolanda hit (Cry)." TPW Robinson was interviewed by the Investigator and stated that she did not observe the Grievant strike the resident. After a fairly long interrogation, Ms. Robinson stated again that she did not observe a thrown punch. TPW Evans testified at the arbitration hearing that she did not see the Grievant punch the resident client.

The Union has argued that the Employer's investigation was not fair and objective. This argument has merit in light of the second interviews as outlined above. The Investigator attempted to change the statements of TPWs Curtis, Evans and Robinson by suggesting that three other individuals had reported that the Grievant punched Cry. In doing so, the

Investigator essentially violated the goal of obtaining a fair and objective investigation without persuasion or pressure. It is not clear who the three individuals were as only two stated that they had observed a punch. The investigation was tainted by attempting to persuade the three interviewees to change their stories by way of dubious information. While not all arbitrators consider all seven tests of just cause, as defined by Arbitrator Carroll Daugherty in *Grief Brothers Cooperage*, 42 LA 555, and *Enterprise Wire Co.*, 46 LA 359, most or all would espouse the critical necessity of a fair and objective investigation. Arbitrator Daugherty stated that all seven tests must be met for a finding of just cause. Test 4 states that the Employer's investigation must be conducted fairly and objectively. The attempt by the Investigator to change the statements of the three TPWs by providing dubious information is a violation of this precept. Test 5 asks the question if the Investigator obtained substantial evidence or proof that the employee was guilty as charged. Of the fourteen individuals who were interviewed by the Investigator, not including the Grievant, twelve stated that they did not witness or observe the Grievant punch resident client Cry. Of the two who stated that they observed the Grievant punch the resident, one was a new employee who was interning at the facility and the other was a resident who may have been going to his room at the time.

Furthermore, none of the three alleged individuals who the Employer claimed witnessed the Grievant punch the resident testified during the arbitration hearing. The Employer did not call Sheila White to testify at arbitration or the resident, Ofustus. None of the Employer's witnesses at the arbitration hearing observed any part of the incident of February 26, 2020 as the Union has noted in its case. The Employer did not obtain substantial proof that the Grievant punched or hit resident client Cry.

The Employer argues that the finger pointing on the part of the Grievant in the face of Cry was a form of verbal abuse. Nevertheless, evidence indicates that Cry was moving quickly through the doorway and into the hall in an attempt to physically attack resident Dar. These quick movements forced the Grievant to move in front of Cry and they were face to face. In an attempt to warn Cry to back away, the Grievant verbally and with her finger pointing attempted to persuade Cry to move away and end her attempt to attack Dar. The Grievant testified that she uses her hands when verbalizing, and video evidence suggests that there was little time to reason with Cry as she was moving quickly in her attempt to attack Dar. Witnesses suggest that, when backed into the hallway corner and out of view of the video, the Grievant continued to point at Cry who was now attacking her and swinging at her. Evidence indicates that the Grievant continued to finger point as Cry attacked her again as she was being led out of the hallway and did so again as Cry charged at her in the dining room. It must be noted again that Cry has exhibited violent and aggressive behavior since being housed at the Warrensville facility, and she clearly exhibited this behavior during the incident involving the Grievant. The Grievant knew what Cry was capable of and was concerned for the safety of Dar and herself.

The Employer charged the Grievant with verbal abuse based on the finger pointing and responses of the Grievant when engaged with the resident. Nevertheless, following the arbitration hearing, it is determined that the Grievant did not verbally abuse resident client Cry. Her use of words and finger pointing gestures did not “purposely threaten, coerce, intimidate, harass, or humiliate an individual” (definition of verbal abuse). Cry was the aggressor, and the Grievant attempted to prevent a physical attack on Dar who could have sustained a serious injury.

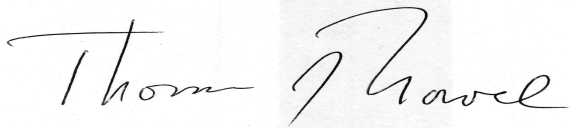
There is no substantial evidence that the Grievant punched the resident. There were two witnesses at the arbitration hearing who were present during the February 26, 2020 incident in the corner of the men's hallway. TPW Evans did not see the Grievant punch the client. Union witness Quinten Curtis who, from the investigative report, was standing between the Grievant and resident client in the corner and out of view of the video camera. He testified that, although he stood between the Grievant and client, he did not observe the Grievant throw a punch, and he testified that the Employer pressured him to change his statement. The Employer's case did not include any witnesses who were present during any part of the incident in the hallway or corner. There is, therefore, no finding that the Grievant violated the policy prohibiting Abuse of a Client (A-1), neither physical or verbal. There is no finding that the Grievant violated the policy involving Failure of Good Behavior (K-6). Additionally, the termination of the Grievant's employment on June 10, 2020 was not for just cause and was therefore in violation of Article 24 of the collective bargaining agreement.

The Grievant, Yolanda Avery, is to be reinstated to her position as Therapeutic Program Worker at the Warrensville Developmental Center to the post and shift to which she was assigned at the time of the termination no later than two pay periods from the date of this Award. The Grievant is to be made whole including lost wages, less interim earnings, including step increases and longevity and other regularly scheduled earnings to the date of the termination. The remedy includes leave balances which would have accrued, payment for medical expenses which would have been provided through medical insurance, and pension payments (PERS). Termination documents are to be removed from the personnel record of the Grievant.

AWARD

The grievance is granted. The Grievant did not violate the Abuse of a Client (A-1) policy or Failure of Good Behavior (K-6). The termination of employment was not for just cause and in violation of Article 24 of the collective bargaining agreement. Remedy is as noted in the above paragraph. Arbitrator retains jurisdiction for 60 days for purpose of remedy only.

Signed and dated this 12th day of May 2021 at Lakewood, Ohio.

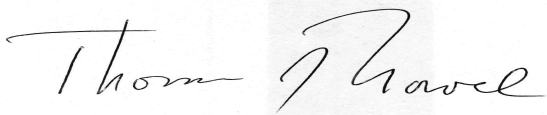
A handwritten signature in black ink that reads "Thomas J. Nowel". The signature is written in a cursive style with a large, stylized "T" and "N".

Thomas J. Nowel, NAA

Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of May 2021, a copy of the foregoing Award was served by electronic mail upon Jill M. Harlan, Labor Relations Officer, for the Ohio of Department of Developmental Disabilities and Russell Burkepile, Staff Representative, for the Ohio Civil Service Employees Association, AFSCME Local 11. In addition, copies of the Award are served upon Thomas Dunn and Kate Nicholson for the Ohio Office of Collective Bargaining and Jessica Chester for OCSEA.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

Thomas J. Nowel, NAA

Arbitrator

