

IN THE MATTER OF

Ohio Civil Service Employees
Association, AFSCME Local 11, AFL-CIO
Union

Case No. DMR-2020-03994-04

Latasha Perryman
Grievant

and

Ohio Department of Developmental
Disabilities - Northwest Developmental
Center (NODC)

Employer

Arbitrator Meeta A. Bass

OPINION AND AWARD

Employer Advocate:

Venita S. White
Labor Relations Officer III
Ohio Department of Developmental Disabilities
30 East Broad Street, 18th Floor
Columbus, Ohio 43215

Union Advocate:

Ryan Ochmanek
Staff Representative
Ohio Civil Services Association
390 Worthington Road, Suite A
Westerville, Ohio 43082

PROCEDURAL HISTORY

This arbitration proceeding arises under the Collective Bargaining Agreement effective May 12, 2018, through February 28, 2021, between the Ohio Departmental of Developmental Disabilities Northwest Developmental Center is hereinafter referred to as "Employer" or " Agency" or "NODC" and the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO is hereinafter referred to as "Union" and grieves the termination of Latasha Perryman, hereinafter referred to as "Grievant," for her alleged patient abuse. The Union submitted this grievance to the Employer in writing pursuant to Article 25 of the parties' Agreement. Following unsuccessful attempts at resolving the grievance, the Union requested to advance the grievance to arbitration. The parties have designated this Arbitrator to hear and decide this discipline action. The parties presented and argued their positions on May 21, 2021, at the virtual hearing hosted by the Union.

The parties stipulated to the following issues for resolution by the Arbitrator:

Was the Grievant, Latasha Perryman, removed for just cause? If the Grievant was not removed for just cause, what shall the remedy be?

During the hearing, both parties were afforded a full opportunity to present evidence, exam and cross-exam the witnesses, and oral argument. Witnesses other than the representatives were sequestered in the waiting room and/or contacted when needed.

The following individuals testified at the hearing:

1. La Jeune Gover, Investigative Supervisor
2. Jason Bunting, Superintendent of NODC
3. Leyendra Wilson, TPW
4. Latasha Perryman, Grievant

The Parties stipulated to the following facts:

1. The Grievance is properly before the Arbitrator.
2. The Grievant was hired by the Employer on June 1, 2004, as a Therapeutic Program Worker (TPW).
3. The Grievant was removed from her position as a TPW on October 24, 2020.
4. The Grievant was removed for a violation of the Ohio Departmental Disabilities Standards of Conduct Policy, specifically rules:

Abuse of 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 ensure health, welfare, and continuous quality improvement.

5. The Grievant had no active discipline on her record at the time of her removal.

The Parties jointly stipulated to the following exhibits:

1. Joint Exhibit 1 - 2018 -2021 OCSEA Contract
2. Joint Exhibit 2 - Grievance Trail
3. Joint Exhibit 3 - Discipline Trail/Investigation Packet
4. Joint Exhibit 4 - DODD Standards of Conduct, Rule Violations and Penalties
5. Joint Exhibit 5 - Ohio Administrative Code 5123:2-17-02
6. Medicaid Regulations

The parties submitted their written closing statements at the conclusion of the hearing on June 21, 2021, at which time the record was closed.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND POLICY PROVISIONS

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 Section 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 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 deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

Standards of Conduct, Rule Violations, and Penalties for Classified Employees (Department-wide) (HR-013) effective March 18, 2019, is incorporated herein as if fully rewritten.

I. Purpose

To ensure that employees of the Ohio Department of Developmental Disabilities (DODD) are aware of the expectations of the Department and the consequences of inappropriate behavior, that discipline is imposed in a fair and consistent manner, and when appropriate, that employees are afforded the opportunity to correct inappropriate behavior of performance.

Scope.

III. Definitions Related to Abuse

Physical Abuse. The use of physical force that can be reasonably 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. The use of words, gestures or other communicative means to purposefully threaten, coerce, intimidate, harass or humiliate an individual.

Standard Guidelines for Progressive Discipline Performance Track

A.1 Abuse of a Client

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, or verbal as defined by Ohio Administrative Code 5123-17-02. Addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvement.
1st Offense Removal

OAC 5123-17-02 Addressing major unusual incidents and unusual incident to ensure health, welfare, and continuous quality improvement is incorporated herein as if fully rewritten.

(A) Purpose

This rule establishes the requirements for addressing major unusual and unusual incident to ensure health, welfare, and continuous quality improvement process to prevent or reduce the risk of harm to individuals.

(B) Scope

This rule applies to county boards, developmental centers, and providers of services to individuals with developmental disabilities.

(C) Definitions

(16)(a)(vi) Physical Abuse

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

ARTICLE 11 – HEALTH AND SAFETY

11.03 - Unsafe Conditions All employees shall report promptly unsafe conditions related to physical plant, tools and equipment to their supervisor. Additionally, matters related to patients, residents, clients, youths and inmates which are abnormal to the employees' workplace shall be reported to their supervisor. If the supervisor does not abate the problem, the matter should then be reported to an Agency/Facility safety designee. In such event, the employee shall not be disciplined for reporting these matters to these persons. An Agency/Facility safety designee shall abate the problem or will report to the employee or his/her representative in five (5) days or less reasons why the problem cannot be abated in an expeditious manner. The appropriate Health and Safety Committee(s) 24 will be provided the name(s) of the Agency/Facility safety designee(s).

No employee shall be required to operate equipment that any reasonable operator in the exercise of ordinary care would know might cause injury to the employee or anyone else. An employee shall not be subject to disciplinary action by reason of his/her failure or refusal to operate or handle any such unsafe piece of equipment. In the event that a disagreement arises between the employee and his/her supervisor concerning the question of whether or not a particular piece of equipment is unsafe, the Agency/Facility safety designee shall be notified and the employee shall not be required to operate the equipment until the Agency/Facility safety designee has inspected said equipment and deemed it safe for operation.

An employee shall not be disciplined for a good faith refusal to engage in an alleged unsafe or dangerous act or practice which is abnormal to the place of employment and/or position description of the employee. Such a refusal shall be immediately reported to an Agency/Facility safety designee for evaluation. An employee confronted with an alleged unsafe situation must assure the health and safety of a person entrusted to his/her care or for whom he/she is responsible and the general public by performing his/her duties according to Agency policies and procedures before refusing to perform an alleged unsafe or dangerous act or practice pursuant to this Section.

Nothing in this Section shall be construed as preventing an employee from grieving the safety designee's decision.

STATEMENT OF FACTS

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The Northwest Developmental Center (NODC) provides housing and extensive supports in the areas of daily living, health care, social skills development, and pre-vocational training for individuals with disabilities. Employer hired Grievant on June 1, 2004, as a Therapeutic Program Worker (TPW). As a TPW, Grievant was responsible for the direct care of clients residing at NODC. KE is an individual with disabilities who resides at NODC. At the time of the incident, KE was a 2-on-1. When KE initially arrived at the NODC, he was a 5-on-1, and was placed in restricted housing due to his aggressive behaviors.

On June 25, 2020, Employer assigned KE to two (2) TPWs. One of KE's assigned TPWs testified at the arbitration hearing, and the other TPW did not. The assigned TPW who testified described her interaction with KE as a "pretty good relationship," and she would switch assignments with many of her coworkers because of his behaviors. She testified that she did not have "run-ins" with KE for the three (3) months that she worked with him. She stated that she enjoyed bike rides, gym work outs, and walks around with grounds with KE.

At the time of the incident, KE and his assigned TPWs were at a different cottage. At the cottage, his assigned TPW reminded KE of personal space awareness. KE then became upset and started walking away. His assigned KE asked where he was going. KE then turned around and started approaching the two TPWs. KE started "cussing her out" and walking with his fists up as he approached her. The assigned TPW then asked him "are willing

going to hit me.” The assigned TPW testified that KE “pretty much started attacking her and very forcibly punching her,¹” The assigned worker testified that KE was fighting her as if they “were out in the street.” The assigned TPW testified that she was in shock and was unable to reach for her radio to call a STAT. The assigned TPW heard Grievant “yell, somebody, help her!” There was a retirement party going on simultaneously, and other individuals watched as the events unfolded.

Grievant and two (2) other colleagues were at the Gazebo when KE’s started punching his assigned worker. Grievant testified that she told her colleagues to call for a Stat when she saw no one responding. Grievant ran to assist the assigned worker. Grievant asked, “KE, are you okay? What’s the problem?” The assigned TPW also confirmed that Grievant tried to talk to KE but he then directed his aggression toward Grievant. KE replied, “Do you want some of this bitch?” The assigned TPW described the interaction between KE and Grievant as KE “pretty much attacking” her. The assigned TPW attempted hands-on hands-off techniques in an effort to get KE off Grievant. She explained that due to KE size, strength, and combative punching, she could not use other positive support techniques. The video established that the other assigned TPW did not assist in this incident.

After KE was hit in his mouth during the incident, KE walked away and headed toward Building 610. The assigned TPWs and Grievant followed him. Other staff intervened near Building 610 and secured KE. KE reported that Grievant hit him in the face. The nurse examined KE and documented a cut on his inner lip and gum as well as multiple scratches on his chest².

¹ The assigned worker suffered sprains in her upper body due to the attack. She was on leave for approximately two (2) months following the incident.

² There was no evidence of causation for the scratches.

The manager of Grievant advised her to file criminal charges, which she did. Grievant testified that the prosecutor did not prosecute the incident because of Grievant's age and his residential status at DODD.

Grievant was off for six (6) weeks due to the injuries she sustained.

The assigned TPW completed the Agency's Unusual Incident Report. An investigation occurred which included a review of video surveillance, statements of eighteen (18) witnesses, and photographs of injuries sustained by Grievant. The Major Unusual Incident Final Report dated September 9, 2020, cites the following causes and contributing factors to the incident as:

1. Assigned TPW did not intervene or utilize Positive Supports & Principles when KE began displaying aggression.
2. Assigned TPW did not follow KE's PCP, immediately call a STAT for assistance.
3. Assigned TPW (who was attacked) did not utilize Positive Supports & Principles when K began displaying signs of aggression.
4. Assigned TPW (who was attacked) did not follow K's PCP, immediately call a STAT for assistance.
5. Approved Positive Supports & Principles were not utilized to assist with KE's aggression by Grievant.

The Prevention Plan recommended that the Employer placed Grievant on administrative leave, and the assigned TPWs retrained on KE's PCP and the Positive Supports & Principles manual prior to returning to client care.

The Employer conducted a Pre-Disciplinary Meeting on September 25, 2020. On October 23, 2020, Grievant received the Order of Removal from her position as a Therapeutic Program Worker (TPW) effective October 24, 2020, for violations of the Department of Developmental Disabilities (DODD) Standards of Conduct A-1. The Union submitted this grievance on October 28, 2020, alleging a violation of Articles 11.03 and 24 of the parties' Agreement. The Union requested that Grievant be reinstated to her position, and otherwise made whole. The Step 2 Response denied the grievance, and

stated that upon video review Grievant was observed abusing an individual on June 25, 2020 in violation of DODD Standards of Conduct. The parties were unable to resolve this matter and advanced the grievance to arbitration.

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

Employer contends that Grievant violated Rue A-1, Abuse of A Client. The Employer argues that the evidence, video surveillance, photos, and physical injury to client established that Grievant physically abused KE. Employer also argues that Grievant did not utilize any Positive Supports and Principles techniques to intervene and is observed on video holding Keith by his shirt. Employer maintains that the intervention used by Grievant is not an improved technique resulting in injury to the client. Employer concludes that it has met its burden of proof and there was just cause to terminate Grievant.

Employer also contends that DODD has policies and procedures in place to protect the clients in its care and their staff. Employer asserts that Grievant had training on all relevant policies relevant to this grievance, the DODD Standards of Conduct and Medicaid Tags. Employer explains that the Developmental Disability System in Ohio, which includes DODD, is governed by Ohio Administrative Code 5123:2-17-02. Employer maintains that DODD cannot condone Grievant's behavior and cannot risk entrusting the health and safety of the individuals it cares for in the hands of an employee with such blatant disregard for rules, policies, and basic human rights. Employer concludes that the Grievant's return to work would be wholly inappropriate and unfair to the individuals, their family members, and guardians.

Further, Employer contends that the appropriate standard of proof is "less than beyond a reasonable doubt but is no less than a preponderance of the evidence and maybe as high as clear and convincing standard" citing Arbitrator Silver in DMR-2018-01742-04 wherein Arbitrator Silver concluded that the beyond the reasonable doubt standard is applied in criminal cases.

Moreover, Employer contends that the Standards of Conduct provide notice to employees of what is unacceptable behavior. Employer acknowledges that the parties' Agreement does not define patient abuse, and relies on the rationale provided by Arbitrator Silver in DMR-2018-01742-04 as controlling. Here, Arbitrator Silver favored utilizing the definition of abuse found in the

Standards of Conduct, Rule A1 as opposed to the criminal definition of abuse.

Lastly, Employer contends that the grievance should be denied in its entirety. Employer asserts that the DODD discipline grid indicates that a 1st offense for violation of A1- Abuse of a Client is removal. The Employer also asserts that the Arbitrator has no authority to modify the discipline if abuse is found. Article 24 of the parties' Agreement reads "...the arbitrator does not have authority to modify the termination of an employee committing such abuse..." If the grievance is sustained, the Employer asserts that Grievant cannot be returned to direct care according to Medicaid regulations.

POSITION OF THE UNION

Union contends that the appropriate standard of proof is beyond a reasonable doubt. The Union asserts that the allegation of patient abuse is a serious offense. The Union explains that a claim of patient abuse has long-term ramifications for her career, and just the reported accusation to Medicaid prevents an employee from working with clients. Therefore, Union maintains that standard of proof should be elevated to beyond a reasonable doubt.

Union also contends that there was no patient abuse. The Union argues that the client was very aggressive and out of control, assaulting other employees when Grievant reacted in defense of others. Union suggests that her assistance prevented more severe injury when no one else came to their aid. Union asserts that Grievant followed the training manual for blocking a client when they are punching. According to the Union, the video evidence only depicts the proper execution of positive support techniques. Further, Grievant followed the client's plan on when to interact or not. The Union points out that no witness to the incident witnessed Grievant punching the client. The Union concludes that Employer failed to meet its burden of proof.

Further, Union contends that Employer trained Grievant to use positive support techniques to manage behaviors of aggressive clients. Union points out that the training manual demonstrates the same positive support

techniques with closed fists utilized by Grievant during the incident, and Grievant acted consistent with her employer-sponsored training. Union maintains that the client received an injury during the use of positive support techniques during the incident.

Moreover, Union contends that the Employer failed to provide Grievant with adequate training on Grievant's personal care plan prior to the incident. Union argues that Employer knew that K.E. was a physically abusive towards others, based on his previous history at Tiffin Developmental Center and provided special training on K.E. guidelines. Union points out that Grievant did not work in the building KE was housed and she was not given in-depth training on KE's Support plan. It is the position of the Union that Employer failed to provide the staff with a safe working environment when they received K.E. from Tiffin Developmental Center.

Lastly, Union contends that the Grievant was a long-term, sixteen (16) year dedicated employee with the State of Ohio, with no prior discipline. The Union believes, based on its contentions, there was no just cause to discipline, that the penalty of termination is unwarranted, and that the Employer failed to carry its burden of proof. Union claims that the grievance should be sustained in its entirety, and that Grievant be made whole. Union requests all backpay be granted, all lost leave benefits granted (sick, vacation, and personal), medical, dental and vision restored, union dues paid, all taxes, insurance, payment for medical, vision, or dental expense that the Grievant and her dependents have incurred since the date of removal that would have been covered under her insurance plan less appropriate deductibles and co-and retirement benefits paid.

DISCUSSION

Employer charged Grievant with the sole charge of A1- Abuse of a Client which carries a penalty of removal for the first offense. The parties stipulated to the issue as:

Was the Grievant, Latasha Perryman, removed for just cause?
If the Grievant was not removed for just cause, what shall the remedy be?

A just cause analysis includes consideration of the reasonableness and appropriateness of the penalty. However, by the terms of the parties' Agreement, this Arbitrator cannot modify the penalty. Article 24.01 reads:

"...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..."

This Arbitrator therefore modifies the issue to conform with the language of the parties' Agreement as follows:

Did the Grievant abuse a patient in the care or custody of the State of Ohio?

If there is a finding of abuse, the grievance is denied since the penalty has been negotiated by the Employer and Union. If there is no finding of abuse, the Grievant is reinstated and otherwise made whole.

In cases involving employee discipline, the burden of proof lies with an employer to sustain its allegation of cause. The preponderance of the evidence is the standard of proof traditionally imposed in arbitration proceedings. An employer then needs to show that it was more probable than not that the alleged actions occurred to prove the misconduct. Generally, this standard is applied to less serious offenses, and progressive discipline offenses.

The standard of proof can change depending on the seriousness of the charges. Here, Grievant is charge with Abuse of a Client. Grievant expressed her devotion for caring for individuals with disability. Grievant has been a caregiver for individuals with disabilities for over eighteen (18) years; sixteen (16) years with this Employer and two (2) years prior with another employer. Pursuant to Medicaid regulations she cannot be returned to direct patient care. Thus, a charge of patient abuse affects her career and employment as a direct caregiver. The Union therefore argues that this Arbitrator should apply the highest standard of proof, beyond a reasonable doubt. On the other hand, the Employer cites Arbitrator Silver, and suggests that the quantum of proof should be "less than beyond a reasonable doubt but not less than a preponderance of the evidence and may be as high as clear and convincing standard."

"Beyond a reasonable doubt" is a criminal standard and this is not a criminal matter. Some arbitrators have applied this standard in recognition that discharge is an extreme industrial penalty since the employee's job, seniority, other contractual benefits and reputation are at stake. This Arbitrator disagrees. This grievance is arising from a contractual relationship between Union and the State of Ohio, and is a dispute between an employer and an employee. It is a civil matter and the civil standards of proof, preponderance of the evidence and clear and convincing evidence should apply. In consideration of the facts and circumstances of this case, this Arbitrator finds that the interests at stake are more substantial in that this decision affects the career and livelihood of Grievant. This Arbitrator will weigh the sufficiency of the evidence offered in this case by clear and convincing evidence standard. Clear and convincing proof means that the evidence presented by a party is more highly probable to be true than not.

While the parties' Agreement indicates there should be no modification of penalty when there is a finding of patient abuse, it does not define the

term patient abuse. It would have been preferable for the parties to have settled this matter through negotiations but they declined to do so, and have left the gap-filling via interpretation by Arbitrators. Arbitrator Silver points out that this issue was initially addressed by Arbitrator Pincus in 1987 when he found this gap of no contractual definition for patient abuse. Arbitrator Pincus then apparently adopted the criminal definition for patient abuse as a source of authority. This Arbitrator is not familiar with the Pincus decision but generally an application of a criminal statute infers a mens rea element inferring intent. Arbitrator Silver has since adopted Standards of Conduct A-1 as a source of authority which defines abuse according to OAC 5123-17-02. OAC 5123-17-02(16)(a)(vi) defines physical abuse as "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." This Arbitrator agrees that the appropriate authority is the OAC 5123-17-02. The scope of this regulation applies to county boards, developmental centers, and providers of services to individuals with developmental disabilities. It is the opinion of this Arbitrator this source authority represents and governs the industry standard.

KE was injured in the altercation. He suffered multiple scratches to both shoulders to chest, open area to top lip (inner), open area around tooth (rt) side of gum. There were several witness statements stating that Grievant did not hit KE. It is noted that only two eye witnesses, one of which was Grievant, testified. The video recording was played at the hearing in conjunction with witness testimony to establish the violation by the Employer and a defense by the Union. This Arbitrator has independently reviewed the recording several times and the recording is inconclusive as to whether Grievant deliberately hit Grievant in the face to stop his attack or whether she made contact with his face in her blocking of his punches.

Grievant acknowledges that the video captures her grabbing his tee shirt during the altercations.

The recording here does not convince this Arbitrator that Grievant physically abused KE. Rather, it is apparent that an emergency situation existed and Grievant unsuccessfully attempted to use positive support techniques in an effort to defend the assigned TPW and herself as the behavior of KE escalates and are then directed toward Grievant. More disturbing is the failure to call the Stat by the observant assigned TPW, and the lack of timely response by other staff once the Stat is called. The video depicts the other staff responded after the incident was over.

The assigned TPW testified that she could not apply any techniques other than hands-on and hands-off because of his size, strength, combative nature. The other TPW assigned to KE simply stood back and kept away from KE. The investigative supervisor initially testified that this TPW backed away from the incident and did not appear to be afraid but on cross examination admitted that she was expressing her opinion. Contrary to her opinion, the Major Unusual Incident Final Report indicates that this TPW was fearful for her safety. The Report reads:

"... When asked if she had anything else, she would like to add, TPW stated "Yea that I already stated that I fear of this individual when he really he already tried to chase me down before and tried to harm me and I've already stated I was fear for my safety and I just don't feel comfortable working with him (sic)..."

The video depicts the assigned TPW backing away as the client continued to advance forward punching her. The testimony establishes that Grievant tried to verbally de-escalate the situation. The client, however, responded, "Do you want some of this bitch?" and started punching her. Both witnesses agreed that it was difficult use other positive support techniques due to the size, strength and combative nature of client when compared to their stature.

Grievant explained that although she was provided information on the client's personal care plan. Due to the pandemic, TPWs were assigned cottages and not permitted to float. She was not familiar with his plan on the date of the incident. Grievant stated that she was responding to the attack on her coworker when no one else did.

It appears from the Employer's arguments and testimony to support the charge that the Employer would like to impose a strict liability which is not the standard under OAC 5123:2-17-02 that speaks to the use of force that can be reasonably be expected to cause physical harm. Reasonableness should be determined by an objective standard whether or not Grievant's actions are objectively reasonable in light of the facts and circumstances confronting her. The Employer in these circumstances must convince this Arbitrator that Grievant used physical force that can reasonably be expected to result in physical harm to an individual.

The action to which the Employer objects is her closed-hand and stance, however, the training manual illustrates this position with closed-hands and stance. The next action to which the Employer objects is the contact to face which resulted in injury. There is insufficient evidence to establish that Grievant intentionally hit the Grievant in his mouth. Grievant testified and the video confirms that she was attempting blocking techniques throughout this attack. The testimony from the assigned TPW and the Superintendent establish that no one observed Grievant hit the KE in the face. The fact that she was not proficient in her execution signifies a need for additional training, and not abuse. The next action to which the Employer complains is the grabbing of his shirt. This technique does not fall within the Positive Supports & Principles Manual. The duration time of the tee shirt is de minis. Grievant testified that she did not remember grabbing his shirt until the she saw the video. Her action most likely represent a momentary lapse of judgment when Grievant is trying to protect herself from the client's

continuous aggression without any other assistance except for the hands-on and hands-off technique. The Superintendent acknowledged that a client may still be injured when using these techniques which serve to minimize the injury to staff and residents. There is not sufficient evidence to conclude that these actions against this client would likely result in physical harm as contemplated by the OAC.

The Arbitrator therefore finds that the Employer has failed to establish abuse of a patient or another in the care or custody of the State of Ohio.³ Generally when a grievance involving termination is sustained, the grievant is returned to their regular position and otherwise made whole. However, Medicaid regulations prevent such a remedy in this case and Grievant cannot be returned to direct care.

This is troublesome with these facts and circumstances. The Agency conducted its own investigation into the incident and concluded there was abuse based solely on the video surveillance. This Arbitrator recognizes that in this industry where clients suffer from diminished capacity to err on the side of caution maybe prudent. However, where exigent circumstances existed and Grievant was the only staff member who timely came to the assistance of her coworker. Then, to become the subject of the client's aggression without help is troubling. It is the opinion of this Arbitrator that the Agency should take further action to at least attempt to remove the Grievant's name from the Registry.

³ The Union alleged a violation of Article 11.03 Unsafe Conditions. This section reads "... matters related to patients, residents, clients...which are abnormal to the employee's workplace shall be reported to their supervisor...In such event, the employee shall not be disciplined for reporting...Agency shall abate the problem ...within 5 days.... There is no evidence of violation of this section

AWARD

Having heard, read and carefully reviewed the evidence and the arbitral precedent and caselaw submitted in this case and in light of the above Discussion, the grievance is sustained. The Grievant is to be reinstated and awarded full backpay less any interim earnings received by Grievant together with seniority and benefit rights.

Employer shall make a good faith effort to remove and/or assist with the removal of her name from the Medicaid Registry within sixty (60) days of this Award. If her name is successfully removed from the Registry, Grievant shall be reinstated to her former position, if she chooses.

By agreement of the parties, jurisdiction shall be retained for sixty (60) days as to this remedy.

Dated: August 9, 2021

/s/ Meeta A. Bass, Arbitrator
Reynoldsburg, Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Opinion and Award was served upon the following individuals via electronic service to this 9th day of August 2021:

Venita S. White
Labor Relations Officer III
Ohio Department of Developmental Disabilities
30 East Broad Street, 18th Floor
Columbus, Ohio 43215

Ryan Ochmanek
Staff Representative
Ohio Civil Services Association
390 Worthington Road, Suite A
Westerville, Ohio 43082

/s/ Meeta A. Bass, Arbitrator
Reynoldsburg, Ohio