OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio Department of Mental Retardation and Developmental Disabilities
Warrensville Developmental Center
-AND-
Ohio Civil Service Employees Association AFSCME Local 11

Appearing for Warrensville Developmental Center
Dr. Katherine A. Brown, Director of Bureau of Vocational Rehabilitation (Prior Superintendent)
Francine Farmer, Human Resources Administrator
Laura Frazier, Labor Relations Officer 3
Stacey Geyer, Program Director
Cornell Hale, Labor Relations Officer 3
Sheri L. Henley
David Montgomery, AA2
Vedia Satchel, RCS
Laurie Worcester, Labor Relations Specialist, 2nd Chair

Appearing for OCSEA
Curtis Bishop, Acting President 1860
Robert Ellis, OCSEA Chief Steward
Karen Graham, TPW
Daniel Gurish, Maintenance Repair II
Celestine Harper, TPW
Dorothy Horton, OCSEA #1860
Robert Robinson, OCSEA Advocate
Laquanna Trimble, TPW

CASE-SPECIFIC DATA
Grievance No.
Grievance No. 24-14-(8/10/04)-2900-01-04

Hearing(s) Held
April 5, 2005

Closing Arguments Received
April 19, 2005

Case Decided
May 22, 2005

Subject
Patient Abuse

The Award
Grievance Sustained

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Facts

This is a disciplinary dispute involving the Warrensville Developmental Center ("WDC" or "Agency") and OCSEA, AFSCME Local 11 ("Union"), which represents Ms. LaQuanna Trimble ("Grievant"). The Agency removed the Grievant on August 9, 2004 for patient abuse. At that time, the Grievant was a Therapeutic Program Worker ("TPW") with approximately seventeen months of seniority and satisfactory job performance. She also had an active two-day working suspension for insubordination–mandatory overtime refusal–in July 2004.

WDC houses patients ("Customers" or "Consumers") with mental disabilities, ranging from mild to severe. The Agency's mission is to afford its patients a residential setting, treat their disabilities, and generally encourage them to realize their full functional capacities. Also, WDC seeks to preserve and enhance the dignity and respect of its customers.

The undisputed facts in this case are set forth below. On or about June 25, 2004, shortly before 2:00 P.M., the Grievant was escorting a male customer ("Customer") to the dining room. Her hands were wet and she was wearing latex gloves because she had just performed hygienic functions for another customer. As the Grievant and the Customer reached the dining room, the Customer suddenly grabbed the front of the Grievant's shirt collar and neck and fell to the floor, causing the Grievant to fall on top of him.

In that position, a rather desperate struggle ensued. The Customer assumed a tightly coiled fetal position with his head down and his chin locked tightly against his chest. From that position, he choked the Grievant, using her shirt collar as a crude tourniquet around her throat. Even though the Grievant is heavier than the slightly built Customer and was on top of him, his grip on the Grievant's shirt collar and throat began to shut off her air supply. Quickly losing her supply of oxygen, the Grievant repeated the Customer's name to get his attention, while applying "knuckle pressure" (a P.A.C.E.S. training maneuver) to loosen his grip. Neither tactic worked as the Customer's grip tightened, shutting off the Grievant's air supply. Because the Customer was choking her, she could not call for assistance, and, at that time, no one was in the area to

observe the struggle. Unable to breathe, the Grievant began to panic and tap,[1] slap,[2] hit,[3] or swat[4] the Customer on the left side of his face with her right hand to get his attention and to persuade him to release his choke hold on her. Tapping his cheek began to work and the Customer began to look up into the Grievant's face. As the Grievant delivered the last slap or tap to the Customer's left cheek, however, Ms. Sheri L. Henley, a Qualified Mental Retardation Professional, walked out of a staff office adjacent to the dining room and saw the Grievant strike the Customer's left cheek. Ms. Henley yelled, "Hey, what are you doing? You can't hit a client. Get in the office."[5] Finally freeing herself from the Customer's choke hold (the tapping worked), the Grievant stood up and said, "He was all over me, scratching me, choking me."[6] Ms. Henley said, "You don't hit a client. Get into the office."[7]

Ms. Henley then assisted the Customer to his feet, asked him if he was all right, and escorted him directly into an office where Ms. Arlene Bowen, TPW, was located. As she followed Ms. Henley and the Customer into the office, the Grievant again said the Customer had attacked her, though the Parties dispute the exact content of that statement.

Shortly after the incident, several Unusual Incident Reports ("UIR") and written statements were submitted, and the Agency launched an administrative investigation. On June 25, 2004, Ms. Henley submitted a written statement[8] and a UIR, [9] describing her alleged observation. Ms. Vedia Satchel, Residential Care Supervisor, also filed a written statement on June 25, 2004, stating, among other things, that the Grievant said, "Well he was choking me and I could not get his hands off my neck."[10] On June 25, the

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[1] Joint Exhibit 10c.
[2] Joint Exhibit 10b.
[3] Joint Exhibit 11b.
[4] Joint Exhibit 11c.
[5] Joint Exhibit 8a.
[6] *Id.*
[7] *Id.*
[8] Joint Exhibit 8a-b.
[9] Joint Exhibit 15a.
[10] Joint Exhibit 9.

Grievant also offered a written statement of the incident.[11] Also, on June 25, as part of an administrative investigation, Officer Kathy English interviewed the Grievant[12] and submitted a written summary of that interview.[13] Ms. Arlene Bowen, TPW, offered a written statement on June 25, 2004, saying that as the Grievant, the Customer, and Ms. Henley entered the office, the Grievant say that the Customer "had grabbed her and she was tapping his face to try to have him let her go."[14] Finally, on June 25, Ms. Valery Day, TPW, gave a written statement.[15]

Ms. Satchel's and Ms. Henley's statements together with the Grievant's admission triggered disciplinary proceedings against the Grievant. On July 20, 2004, the Agency scheduled a Pre-disciplinary hearing to be held on July 23, 2004,[16] and the hearing was held on that date.[17] The Pre-disciplinary Hearing Officer found "just cause to impose the appropriate level of discipline for the charge of client abuse."[18] In light of that decision, the Agency removed the Grievant for client abuse effective August 9, 2004.[19]

The formal grievance negotiation process began on August 9, 2004 when the Union challenged the Grievant's removal in Grievance No. 24-14-(8/10/04)-2900-01-04 ("Grievance").[20] On August 24, 2004, the Parties negotiated the Grievance to impasse and subsequently appointed the Undersigned to hear the dispute and scheduled an arbitral hearing for April 5, 2005.

The Undersigned heard the matter on the date scheduled. At the beginning of the hearing, the Parties offered several factual stipulations, joint exhibits, and a submission agreement. There were no procedural challenges or objections to the Undersigned's jurisdiction. The Agency and the Union were represented by their respective advocates, each of whom had a full and fair opportunity to produce testimonial and

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[11] 10a.
[12] Joint Exhibit 11a-d.
[13] Joint Exhibit 12a-c.
[14] Joint Exhibit 13.
[15] Joint Exhibit 14.
[16] Joint Exhibit 2.
[17] Joint Exhibit 3a-b.
[18] *Id.*
[19] Joint Exhibit 1-a (Customarily, the Collective-Bargaining Agreement is designated Joint Exhibit 1.)
[20] Joint Exhibit 6a. (The Collective-Bargaining Agreement is customarily labeled Joint Exhibit 1)

documentary evidence in support of their cases. All witnesses were duly sworn and fully available for direct and cross-examination. All documents introduced into the arbitral record were available for relevant objections. At the end of the hearing, the Parties opted to submit post-hearing briefs in lieu of closing arguments and agreed to e-mail the briefs to the Undersigned on or before April 19, 2005. Both Post-hearing Briefs were e-mailed on April 19, 2005, on which date the Undersigned officially closed the record.

II. Relevant Contractual and Regulatory Language

Collective-Bargaining Agreement

Article 24 - Discipline

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for *just cause*. . . . 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. . . .[21]

Article 44 - Miscellaneous

44.03 - Work Rules

> After the effective date of this agreement, agency work rules or institutional rules and directives *must not* be in violation of this Agreement. Such work rules shall be *reasonable*. . . .[22]

Warrensville Developmental Center Training Materials in Lecture

* * * *

6. "Employees cannot *'tap'* or *'hit'* individuals with an object of any kind."[23]

OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

PROCEDURE

Abuse - The *ill treatment*, *violation*, revilement, malignant, exploitation, and/or disregard of an individual, whether *purposeful or due to carelessness*, inattentiveness, or omission of the perpetrator.[24]

Physical Abuse - Any *physical motion or action (e.g. hitting, slapping,* punching, kicking, pinching) by which *bodily harm or trauma* may occur. It includes use of corporal punishment as well as the use of any restrictive, intrusive procedure to control inappropriate behavior for purposes of punishment. . . .[25]

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[21] Joint Exhibit 1, at 72 (emphasis added).

[22] *Id.* at 112 (emphasis added).

[23] Joint Exhibit 22 (emphasis added).

[24] Joint Exhibit 24d (emphasis added).

[25] *Id.* Management Exhibit 1, at 2 (emphasis added).

III. The Issue

The Parties offered the following submission agreement: did the Grievant commit an act of abuse against a resident at Warrensville Developmental Center? If not, what shall the remedy be?

IV. Summaries of Agency's and Union's Arguments

Argument No. 1

Agency

The Grievant physically abused the Customer when she slapped him because MR/DD rules explicitly prohibit slapping customers. Assuming the Customer threatened the Grievant's life or limb, she still abused him because she failed to exhaust all P.A.C.E.S. techniques. For example, she did not request assistance.

Union

The Grievant was fighting for her life when she tapped the Customer on the face and, therefore, did not abuse him. Staff need not forfeit their lives to avoid striking customers. In this case, the Grievant had a right to tap the Customer on the face in self-defense.

The medicaid guidelines are based on commonsense. Therefore, staff need not die to avoid tapping customers on the face after P.A.C.E.S. techniques have failed. The first law of life is self preservation, of which no one can be deprived.

Article 44. 03 of the Contract requires reasonable work rules. A work rule that requires staff to forfeit their lives rather than to tap a customer on the face, after unsuccessfully applying P.A.C.E.S. techniques, are inherently unreasonable if not insane. Ms. Stacey Geyer gave self-serving testimony when she said she would forfeit her life rather than slap a customer and free herself.

The testimony of Mr. David Montgomery, Administrative Assistant II, a self-defense professional, did not help the Agency. Mr. Montgomery was never in a life-threatening situation and was not certain how he would respond. He expects from the Grievant what he perhaps could not deliver. Nor did he disagree that Mr. Curtis Bishop, for example, last received P.A.C.E.S. training approximately five years ago.

That a trained professional's response would have been different does not necessarily implicate the Grievant's response, since her training falls far short of a trained professional's.

Argument No. 2

Agency

Ms. Henley is a credible witness. Her testimony and written statements are internally and externally consistent. Her testimony was credible, specific, forthright, consistent, and unbiased. She testified that she stood behind the Grievant who was facing the Customer and that the Grievant and Customer were standing approximately two feet apart when the Grievant struck him; Ms. Henley saw no choking of the Grievant. The Grievant's blouse or shirt was wrinkled. Ms. Henley did not waiver under cross-examination. Upon seeing the Grievant strike the Customer, Ms. Henley spontaneously exclaimed: "Hey, what are you doing? You cannot hit a client. Get into the office."

The Union failed to challenge Ms. Henley's description of her observation of the incident. Ms. Henley stated that she entered the room from behind the Grievant. If so, then the Grievant could not have seen Ms. Henley, while the Customer was allegedly choking the Grievant and depriving her of air. Ms. Henley observed the Grievant and the Customer from less than ten feet away.

Union

Ms. Henley is not a credible witness because her written statements and testimony do not jibe. Ms. Henley's testimony conflicts with her written statements. For example, her statement referenced a red mark and fingerprints on the Customer's face, and that the Grievant and the Customer were standing up from a struggle, the Grievant seemed visibly shaken up and her shirt was wrinkled. However, her testimony describes the Grievant taking a full swing and striking the Customer as hard as she could. Also, her testimony placed the Grievant and the Customer apart, but her written statement does not reflect this important point. Ms. Henley's allegation against the Grievant is thoughtless and exaggerated. After entering

the dining room at the end of the struggle, she summarily concluded that the Grievant abused the Customer. Ms. Henley's statement does not jibe with Ms. Satchel's. Ms. Satchel said she was with Ms. Henley when the incident occurred, but Ms. Henley said Ms. Satchel was in the office. Finally, Ms. Vidia Satchel's testimony is incredible because it contradicts Ms. Henley's.

Argument No. 3

Agency

For several reasons, the Grievant is not a credible witness. First, her failure to challenge Ms. Henley's testimony during the site visit suggests that the Grievant agrees with Ms. Henley's description. Second, the Grievant's written statement and interview are internally inconsistent and conflict with her testimony, which was illogical. For example, the Grievant could not have seen Ms. Henley initially enter the dining room, since she claims that she was then on top of the customer looking down at him. During the site visit, the Grievant failed to offer her version of the incident between her and the Customer and where they were located relative to each other when Ms. Henley entered the dinning room. During her investigative interview, the Grievant admitted that she hit the Customer but never claimed that the Customer threatened her life. The Grievant offered the following disparate descriptions of her blows to the Customer's face: "smack," "swat," "tap," "hit," and "slap." And there were other fundamental inconsistencies. For example, the Grievant first admitted that Ms. Henley saw her and the Customer. Then the Grievant said Ms. Henley was not present and saw nothing. Finally, compared to the Grievant, Ms. Henley has less reason to misrepresent the truth.

Union

When she gave her first statement, the Grievant did not understand the gravity of the situation. Thereafter, she offered a more detailed statement.

Argument 4

Agency

Immediately after his struggle with the Grievant, the Customer's face had red marks, proof that the Grievant did not merely "tap" him. Ms. Henley observed the hand print on the Customer's face immediately after the Grievant slapped him. Ms. Satchel also observed the red marks.

Union

Only Ms. Henley and Ms. Satchel claimed to have seen red marks. Even if the Grievant tapped the Customer a bit harder than she either stated or intended, the tap did not thereby become intentional. Because the Customer is Caucasian, the slightest tap may very well leave a red mark. Ms. Arlene Bowen and Ms. Valerie Day observed the Customer shortly after the incident, but never mentioned red marks or handprints in their written statements.

Argument No. 5

Agency

The Union failed to prove its affirmative defense that the Grievant's life or limb was threatened at the moment she struck the Customer. Assuming arguendo that the Customer did in fact choke the Grievant, she struck him after they had separated; At that time, he was not threatening her with death or serious bodily injury.

Union

The Grievant offered unrebutted testimony that the Customer choked her to the point of depriving her of oxygen. Furthermore, circumstantial evidence corroborates the argument that the Grievant was choked. For example, her shirt was wrinkled.

Argument No. 6

Agency

Under MR/DD's policy, intent and negligence are irrelevant to a charge of abuse. Because Ohio Administrative Code, Section 5123-3-14 (C)(1) has been repealed, the relevant and proper regulation is the MR/DD disciplinary policy. Also, Federal Medicaid regulations and policies prohibit the Grievant's conduct.

Union

The MR/DD policy on abuse is not the only relevant definition thereof. Ohio Administrative Code, Section 5123-3-14(C)(1) defines abuse as "[A]ny action or absence of action inconsistent with rights which results or could result in physical injury to a client. EXCEPT if the act was done in self defense or occurs by accident." The Ohio Revised Code 2903.33(B)(2) provides, "Abuse means knowingly causing physical harm or recklessly causing physical harm to a person by physical restraint, medication or isolation in the person." The Agency's medicaid-based definition ignores relevant provisions in the Collective-Bargaining Agreement. Yet, Medicaid definitions do not supersede either Collective-Bargaining Agreement or applicable law.

Argument No. 7

Agency

The Agency trained the Grievant on all relevant policies, especially on the types of conduct that constitute abuse. The Agency clearly informed the Grievant that she would be removed for patient abuse.

Union

Because the Grievant, and other staff, were inadequately trained in the P.A.C.E.S. techniques, the Agency cannot reasonably expect them to respond like professionals in life-or-death situations like that in the instant dispute.

Argument No. 8

Agency

If the Agency fails to follow medicaid guidelines, it will lose its federal funding.

Union

Several arbitrators have reinstated grievants who were fired for alleged patient abuse, and the Agency did not lose funding. Furthermore, Arbitrator Anthony Greene and Arbitrator Smith held that blind adhesion to medicaid policies will not shield the Agency's decisions from being overruled.

Argument No. 9

Agency

After insisting that the Customer threatened her life by choking her, the Grievant testified that she did not believe the Customer intended to hurt her.

Union

The Union offered no specific response to this argument.

V. Analysis and Discussion

A. Evidentiary Preliminaries

Because this dispute involves discipline, the Agency has the burden of proof or persuasion regarding its charge of patient abuse against the Grievant. To establish that charge, the Agency must adduce *preponderant* evidence in the arbitral record as a whole, showing *more likely than not* that: (1) The Grievant abused the Client on June 25, 2004. Doubts regarding the existence of the alleged misconduct shall be resolved against the Agency. If the Agency fails adequately to establish purported misconduct in the first instance, it cannot prevail, *irrespective* of the strength or weakness of the Union's defenses.

Similarly, the Union has the burden of persuasion (preponderant evidence) as to its allegations and

affirmative defenses, doubts about which shall be resolved against the Union.

B. Nature of Agency's and Union's Cases

Both the Agency's and the Union's cases rest on eyewitness testimony. The Agency has produced no relevant circumstantial evidence to support its claim of patient abuse. Ms. Henley and the Grievant are the only eyewitnesses to that claim. More important, their testimonies conflict on a pivotal issue: Whether the Grievant and the Customer were in contact when the Grievant struck him. Consequently, the vitality of the Agency's case and of the Union's affirmative defenses rests on the credibility of Ms. Henley and the Grievant respectively.

C. Core Issues

Although the ultimate issue is whether the Grievant was fired for just cause, there are several threshold issues for which the burden of proof is split between the Parties. First, as discussed below, preponderant evidence in the record–Ms. Henley's testimony and the Grievant's admission–establishes that the Grievant "tapped" the Customer on the left side of his face. Absent a clear and convincing justification, this conduct constitutes patient abuse under the Agency's legitimate rules and policies, and the Agency prevails.[\26]

For the Union to prevail in this case, it must establish three criteria: (1) The Grievant has a right to self-preservation where P.A.C.E.S. techniques fail; (2) The Grievant was in a life-threatening situation when she struck the Customer. Here, Ms. Henley's testimony and credibility become vital to the Agency's case; (3) The Grievant was entitled to use techniques/force other than that prescribed in P.A.C.E.S. Training, i.e., "Unauthorized Techniques or Force," even though she did not first exhaust all P.A.C.E.S. maneuvers; and (4) The Grievant used reasonable rather than excessive force against the Customer.

D. Agency's Rules on Patient Abuse

Clearly, law and the Agency's work rules explicitly prohibit staff members from physically abusing patients. Specifically, the Agency's policy defines physical abuse to include "any *physical motion or action*

[\26] *See* Joint Exhibits 22 and 24d.

(e.g. hitting, slapping, punching, kicking, pinching) by which *bodily harm or trauma may* occur. It includes use of corporal punishment as well as the use of any restrictive, intrusive procedure to control inappropriate behavior for purposes of punishment. . . ."[27]

Similarly, the Agency defines "abuse" as, "The *ill treatment*, *violation*, revilement, malignant, exploitation, and/or disregard of an individual, whether *purposeful or due to carelessness*, inattentiveness, or omission of the perpetrator.[28] Finally, the Agency's regulations state that, "Employees cannot *'tap'* or *'hit'* individuals *with an object of any kind*."[29]

The Arbitrator holds that, in its quest to protect patients, the Agency may enforce these rules and regulations to the absolute limit of reasonableness, which, of course, is the key. Indeed, Article 44.03 of the Collective-Bargaining Agreement and commonsense mandate that "work rules shall be *reasonable*."[30]

E. Scope of Grievant's Right to Use Unauthorized Force for Self Preservation

During the arbitral hearing, witnesses for the Union and the Agency addressed the general proposition of whether the Grievant or any staff member has the right to use unauthorized force to save their lives, where P.A.C.E.S. techniques have failed. During the arbitral hearing and in its Post-hearing Brief, the Union stoutly contends that unauthorized force is implicitly permitted in life or death situations, such as alleged in this case. The Agency's Post-hearing Brief does not directly or explicitly address this issue. Instead, the Agency argues that the Customer and the Grievant *were not in physical contact* when Ms. Henley observed the Grievant strike the Customer. Alternatively, the Agency seems to argue that the Grievant failed to exhaust available P.A.C.E.S. techniques before resorting to unauthorized force. Specifically, the Agency contends that the Grievant could have yelled for help. In other words, the Agency seems to suggest, that the Grievant was obliged to utilize all available authorized techniques. However, Ms. Stacey Geyer, Program Director,

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[27] *Id.* Management Exhibit 1, at 2 (emphasis added).
[28] Joint Exhibit 24d (emphasis added).
[29] Joint Exhibit 22 (emphasis added).
[30] Joint Exhibit 1, at 72 (emphasis added).

substantially extended and clarified the Agency's position. Ms. Geyer flatly and explicitly testified that she expected staff to *forfeit their lives* (to die) rather than to use unauthorized force against customers, should P.A.C.E.S. techniques fail to repel customers' life-threatening attacks on staff.

For the following reasons, the Arbitrator holds that nothing in the record requires that the Grievant forfeit her life to avoid using reasonable unauthorized force against the Customer where P.A.C.E.S. maneuvers did not repel him. First, neither regulation, work rule, nor contractual provision requires the Grievant to suffer death or serious bodily injury rather than to use unauthorized force, as a last resort, to repel the Customer's life threatening attack.

Notwithstanding Ms. Geyer's, and, apparently, the Agency's position, it is manifestly unreasonable for the Agency either to require or to expect employees to forfeit their lives if authorized force fails to repel patients' life-threatening attacks. If, indeed, the Agency expects that ultimate sacrifice from staff, then as with any other work rule or policy, the Agency must explicitly notify staff of that extreme expectation. Yet, merely articulating such a proposition reveals its absurdity. Few if any rational TPWs would willingly sacrifice themselves to avoid being fired or to preserve the integrity of authorized techniques or force. Yet, as the Agency's witness, Ms. Geyer explicitly embraced that proposition and other members of management deftly, if not adamantly, refused to reject it.[31]

To be sure, the Arbitrator does not intend for this analysis and holding to either effectively or literally license patient abuse. One understands the dire need and rationale underlying the development and implementation of well-defined, rigorous rules and regulations, prohibiting the use of unauthorized or excessive physical force against patients. Absent enforcement of such rigorous prohibitions, loopholes would unduly and unnecessarily compromise or undermine patients' rights and well-being.

The goal is (or should be) to strike a reasonable balance between patients' undisputed rights to be free from

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[31] Ms. Stacey Geyer, Program Director, specifically testified that staff members are expected to die rather than to use unauthorized techniques to stem or avert customers' attacks. And although Dr. Brown, Mr. Montgomery, and Ms. Henley stopped short of explicitly embracing that extraordinary position, they repeatedly and evasively declined to specifically state whether the Grievant was entitled to use unauthorized techniques to save her life, where authorized techniques have failed.

physical abuse and the undisputed right of staff to self-preservation, where authorized force fails.

Even where their lives are at stake, however, staff must scrupulously avoid using any ***excessive*** force, authorized or unauthorized. Equally important, staff members who use unauthorized force should bear the burden of establishing through clear and *convincing* (rather than merely preponderant) evidence that: (1) A customer's conduct actually and imminently threatened their lives, (2) They applied P.A.C.E.S. techniques to the best of their abilities, albeit unsuccessfully, and (3) They used ***reasonable*** (rather than ***excessive***) force to repel patients' life-threatening attacks. *Excessive* force equals abuse, irrespective of the circumstances. The maximum permissible amount of unauthorized force should be what is required to repel the attacker. Failure to demonstrate any one of the three conditions should result in full and strict application of the Agency's anti-abuse policies, including removal for first offenses of patient abuse. The foregoing discussion and holdings merely begin rather than end the analysis in this case.

F. Whether Grievant Struck Customer Only in Life-threatening Situation

The Arbitrator holds, in summary, that the Grievant was in a life-threatening situation when she struck the Customer. The bases for this holding are: (1) The Customer launched a life-threatening attack against the Grievant; (2) The Grievant sought in vain to free herself by using "knuckle pressure," an authorized technique; (3) The Grievant lacked time, opportunity, and/or training to use other P.A.C.E.S. techniques; (4) When the Grievant struck the Customer, he was still choking her in a life-threatening manner; and (5) Under the circumstance of this case, the Grievant did not use excessive force to repel the Customer. Discussion of these four criteria is set forth below.

G. Customer's Life-Threatening Attack

The Grievant offered undisputed testimony that the Customer grabbed her shirt and throat and effectively converted her shirt collar into a tourniquet, which shut off her air supply. During the site visit, the Arbitrator witnessed, firsthand, the Customer's powerful attack on what appeared to be a fellow patient. En route to a site visit in this case, the Arbitrator saw the Customer suddenly clutch another person's collar and neck in

the same manner described by the Grievant in this case. The Customer then pressed his chin against his collar bone and began converting the person's shirt collar into a tourniquet by twisting it tightly around the person's neck. Two heavyset females appeared and each grabbed one of the Customer's arms. They seemingly pulled with all of their strength to detach the Customer's hands from the person's shirt and neck. Then each woman held one of the Customer's arms, lifted him off the floor, and carried him away. Ms. Henley and several other witnesses later corroborated my observation by testifying that the Customer is exceptionally strong for his size. In light of the Grievant's unrebutted and unchallenged testimony and the above-mentioned, first-hand observation, the Arbitrator holds that more likely than not, the Grievant was in a life-threatening situation, on June 25, 2004, when the Customer grabbed her collar and neck, fell to the floor, and took her down with him, with no one present to assist her and with her being unable to yell for assistance.

H. Grievant's Use of Authorized and Unauthorized Force

The Grievant also offered unrebutted testimony that when the Customer first seized her throat, she vainly applied "knuckle pressure" (a P.A.C.E.S. technique) to loosen his grip. Still, Ms. Henley and the Union, in its Post-hearing Brief, insist that the Grievant should have yelled for assistance. However, the Grievant credibly testified that she could not call for help because the Customer had virtually shut off her air supply. This makes sense. One is hardly able to scream while being strangled.

Finally, unable to breathe, the Grievant, by her own admission, panicked and began hitting the Customer on the left cheek to gain his attention and to effect her release. Moreover, unrebutted testimony in the record establishes that, even though she received some P.A.C.E.S. training,[32] it is decidedly unclear whether the Agency afforded the Grievant regular and sufficient hands-on, physical training in P.A.C.E.S. techniques. The record reveals that even when the Agency provides P.A.C.E.S. training, it is infrequent and lasts for only

[32] Joint Exhibits 21, 23, 24, and 25.

a few hours.[33] One cannot ***reasonably*** expect staff, with so little training, to remember and effectively apply P.A.C.E.S. techniques in actual life-threatening situations.

I. Whether Grievant Struck Customer Only During Physical Attack

At this point, Ms. Henley's testimony factors prominently into the analysis. She claims that the Customer was neither attacking nor even touching the Grievant when she struck him. On the other hand, the Grievant insists that the Customer was still choking her and her life was still very much in danger when she struck the Customer in Ms. Henley's presence.

As mentioned above, this is a critical, outcome-determinative juncture in this dispute. If the Customer had released the Grievant when she struck him, that poses a substantial problem for her. For, at that point, her life was no longer threatened and any right she had to use unauthorized force had vanished. If, on the other hand, the Grievant is more credible, then the justification for the removal is undermined.

Based on the following discussion, the Arbitrator finds the Grievant more credible than Ms. Henley and that the Grievant's life was still being threatened when she struck the Customer. As usual, assessing credibility in this or any other dispute involves evaluating internal and external inconsistencies in witnesses' testimonies. Here the Arbitrator examines the internal consistencies and inconsistencies of the Grievant's and Ms. Henley's testimonies and compares their testimonies to their written statements.[34]

J. Ms. Henley's Credibility

The Agency insists that Ms. Hanley's testimony was forthright, consistent, specific, and credible. However, the Union claims that Ms. Henley's testimony is distinctly inconsistent, exaggerated, and wholly incredible. Ms. Henley's written statements reflect her experience and competence to testify in this dispute because she made them when her observations were freshest, on the day she observed the Grievant strike the Customer. Logically, then, those statements should be no less specific than her testimony months later. Yet,

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[33] *Id.*

[34] .

as set forth below, Ms. Henley's testimony is sometimes exaggerated and often substantially at odds with her written statements. Consequently, her credibility is undermined or compromised in this dispute.

In her written statement, Ms. Henley declared: "I looked and saw TPW Trimble slap . . . [the Customer] on the left side of his face–They both looked like they were *coming up from a struggle*. . . ." [35] In her UIR, Ms. Henley stated: "TPW Trimble slap . . . [the Customer] on the left side of his face. [The Customer] was on the floor, it was apparent *there was a struggle*. . . .[36] and apparently in a struggle."[37] Based on these two statements, the Grievant and the Customer "looked like they were coming up from a struggle" and a struggle was "apparent."[38]

However, Ms. Henley testified that when she saw the Grievant and the Customer, there was *no struggle* at all, a statement that plainly contradicts her written statements. Also, Ms. Henley testified that on a one-to-ten scale (one being the lightest blow and ten, the hardest) the Grievant's slap was a ten. She demonstrated the range and force of the alleged stroke by drawing her right hand back as far as possible. Later, during direct examination, Ms. Henley was asked to demonstrate the sound of the alleged slap, and she smacked her hands together about as hard as she could, producing an ear-piercing clap.

Two significant problems plague this part of Ms. Henley's testimony. First, her original statement makes no mention of the force with which the Grievant allegedly slapped the Customer. Certainly such an event should figure prominently in Ms. Henley's written statement. The force of a blow to a customer's face is no less relevant or aggravating as is the blow itself. Furthermore, during the site visit, Ms. Henley testified that the Grievant took the aforementioned full, forceful swing when she was sharply off balance, leaning or falling backward. Nevertheless, neither of Ms. Henley's written statements mentions the position or angle of the Grievant's body when she allegedly struck the Customer. In contrast, Ms. Henley's UIR states that

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[35] Joint Exhibit 8a (emphasis added).
[36] Joint Exhibit 15a (emphasis added).
[37] *Id,* 15b.
[38] Joint Exhibits 8a and 15b.

the Customer was "on the floor."[39] Taken together, Ms. Henley's testimony and UIR have the Grievant falling backward, striking the Customer with a full swing *while he was on the floor*! To further confuse matters, Ms. Henley also testified that when the Grievant struck the Customer, "he fell to the floor," despite the fact that her UIR says he was already on the floor! In sum, Ms. Henley's testimony is far more specific and exaggerated than her prior written statements taken together or separately.

Having offered, under direct examination, the foregoing detailed descriptions, of the Grievant's position when she allegedly slapped the Customer, Ms. Henley stated, under cross-examination, that she could not describe the Grievant's position when she struck the Customer. In a sense, this is hardly surprising, given the conflicts between her written statements and testimony. If Ms. Henley could not describe the Grievant's and the Customer's positions under cross-examination, then what is left of her specific, detailed description of those positions under direct examination in the hearing room or at the site of the incident? Either she can describe what she saw or she cannot.[40]

Second, Ms. Henley testified that as the Grievant left the scene of the incident and walked into the office, she said, "He was choking me. He had me by my shirt. . . . I did it. I lost it. I hit him." Furthermore, Ms. Henley testified, under direct examination, that this was the only statement she heard the Grievant make. In contrast, her written statement claims the Grievant said, "[H]e was all over me, scratching me & choking me. . . . "Yea, I did it, I hit him, but he was all over me."[41] In further contrast, Ms. Henley's UIR is inexplicably silent about the Grievant's alleged statements. Surely omitting such a potentially damning admission in an official UIR report is both significant and curious.[42]

Ms. Henley's testimony and written statements also conflict with those of other witnesses in this dispute. For example, Ms. Henley testified that the Grievant only used the word "*hit*." But Ms. Arlene Bowen's

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[39] Joint Exhibit 15a.

[40] Prior written statements are akin to depositions. Employees who substantially deviate from those statements risk erosion of their credibility, especially where the deviation pertains to crucial evidence. For example, deviations about how the disputed incident occurred or played out are likely to undermine credibility.

[41] Joint Exhibit 8a.

[42] Joint Exhibit 15a.

written statement claims the Grievant said, "[The Customer] . . . had grabbed onto her and she was *tapping* his face lightly to have him let her go."[43]

Third, Ms. Henley's written statement and testimony, but not her UIR, declare that there was a red handprint on the left side of the Customer's face when Ms. Henley helped him to his feet and escorted him into the office. On the surface, this assertion seems consistent with Ms. Henley's claim that the Grievant struck the Customer as hard as she could. The difficulty is that a blow of that magnitude would most likely leave a more enduring handprint. Yet, Ms. Arlene Bowen was in the office when the Customer walked into the office at approximately 2:00 P.M., very shortly after the Grievant had allegedly slapped him as hard as she could. But Ms. Bowen's written statement nowhere mentions a handprint ostensibly because she observed no handprint or red mark on the Customer's face,[44] and, for that matter, apparently neither did Ms. Valerie Day.[45]

Although Ms. Day does not state how soon she saw the Customer after the Grievant allegedly slapped him, Ms. Day's written statement makes no mention of either redness or handprints on the Customer's face.[46] Finally, approximately forty minutes after the incident, a nurse examined the Customer but found no evidence of recent trauma anywhere on his body.[47]

The foregoing discussion is not intended to suggest that proof of physical abuse somehow requires signs of physical trauma. Clearly such is not the case. Nevertheless, one might reasonably expect some evidence of physical trauma where, as here, the Grievant–a woman of substantial size and build took a full, exaggerated back swing and slapped a Caucasian patient as hard as she possibly could, ten on a scale of one-to-ten.

In addition to the foregoing problems, Ms. Henley was rather evasive during cross-examination. During

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[43] Joint Exhibit 13.
[44] Joint Exhibit 13.
[45] Joint Exhibit 14.
[46] Joint Exhibit 14.
[47] Joint Exhibits 16-19.

direct and cross-examination, she testified that "absolutely nothing" (under any circumstances) justifies staff hitting a customer. But when asked, during cross-examination, whether staff may strike consumers if the P.A.C.E.S. training fails and the staff member's life is in imminent danger, Ms. Henley said, "That's a whole other situation; I don't understand your question." When the question was repeated, Ms. Henley said, "[S]taff cannot hit a client and that's all I can say." Nor could she comprehend and directly answer the simple (yes/no) question: "Haven't you known eyewitness testimony to be incorrect."

In her written statement, Ms. Henley said, "They [Grievant and Customer] both looked like they were *coming out of a struggle*."[48] Her UIR states, "[T]he Grievant slapped the Customer on the left side of his face. David was on the floor it was *apparent there was a struggle*.[49] Ms. Henley also stated that, "[The Grievant's] shirt was all distorted as if she had been in a *struggle*."[50] Thus, Ms. Henley several times concluded that the Grievant and the Customer either had been (or likely had been) in a struggle. Despite these conclusions, under cross-examination, Ms. Henley could not give a straight answer to the simple, direct question whether a struggle had likely occurred before Ms. Henley witnessed the alleged slap. Ms. Henley said, "I don't know, I did not see it." In fact, Ms. Henley was not asked whether she saw the struggle but whether a struggle had likely occurred. Ms. Henley's written statements strongly indicate that she had concluded that a struggle had occurred between the Grievant and the Customer, even though Ms. Henley did not see the actual struggle. These answers are simply evasive, if not self-serving.

In light of the foregoing discussion, the Arbitrator holds that although some of Ms. Henley's assertions are credible, overall she is hardly a credible witness.

K. Grievant's Credibility

As pointed out above, the Union needs to prove that the Grievant was in a life-threatening situation when she struck the Customer. The Union's defense will either succeed or fail based on the Grievant's credibility.

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[48] Joint Exhibit 8a (emphasis added).
[49] Joint Exhibit 15a (emphasis added).
[50] Joint Exhibit 8b (emphasis added).

In attacking the Grievant's credibility, the Agency first argues that in her written statements, she stated that she "tapped," "hit," "slapped," "swatted," or "smacked" the Customer. The Agency ignores "tap" and concentrates on the other descriptions of how the Grievant struck the Customer. Although the Agency's argument carries some persuasive force, it ultimately fails.

One problem here is semantics. For example, "hit" comprehends all of the foregoing terms. Moreover, except for "tap," the American Heritage Dictionary defines all of those terms to involve a quick sharp blow of the hand. Apparently, the Agency views "hit," "slap," "swat," and "smack" as admissions about how hard the Grievant struck the Customer and to discredit her claim that she only "tapped" him. However, the Grievant freely admitted that she *might have hit* him a little harder than she either thought or intended. On the other hand, she flatly denied hitting the Customer with a full back swing and as hard as she could. The rationale here is that she was panicking and running out of air. Commonsense suggests that the more desperate she became for air the more forceful her blows likely would be. In all likelihood, the Grievant did "tap" the Customer with sufficient force to get his attention and persuade him to release her throat and shirt collar. Having exhausted her P.A.C.E.S. maneuvers and unable to yell, the Grievant was in the desparate position of either getting the Customer's attention or suffering serious injury if not death. Under these conditions she is entitled to use sufficient force to *break the Customer's grip* on her shirt and throat. Ultimately, then, the Arbitrator finds nothing in the Grievant's use of the above-mentioned terms to discredit her as a witness.

Also, the Agency focuses on how the Grievant could have been in a life-or-death struggle with the Customer and yet see Ms. Henley and know her whereabouts as she walked into the room. However, upon reviewing the audio tape recording of the Grievant's testimony, it is clear that she testified that she first heard Ms. Henley yell out not to hit a client. At that point the Grievant testified that she knew Ms. Henley's location and saw her for the first time, but that was at the *end* of the Grievant's struggle with the Customer. Although the Grievant had to restate this scenario three different times during cross-examination, the

common thread was that she first heard Ms. Henley yell and then saw her *toward the end* of her struggle with the Customer.

However, the Grievant made it clear that she and the Customer were still entangled on the floor when Ms. Henley arrived on the scene. In other words, they were struggling, as Ms. Henley suggested in her written statement but denied in her testimony. The Grievant explained that when she said Ms. Henley did not see anything, she meant Ms. Henley saw only the end of the struggle, which is an established fact in this case.

The Agency also seized upon the Grievant's statement that the Customer was not trying to hurt her. The Agency thought it nonsensical or fatally contradictory for the Grievant to assert that the Customer was not trying to hurt her when he was in fact choking the breath out of her.

The Agency's interpretation misses the point. "Trying to hurt" is synonymous with "intending to hurt," which presents two difficulties for the Agency's argument. First, during direct examination, the Grievant testified that sometimes the Customer grabs her when he wants attention or wants juice. Therefore, on June 25, 2004, the Customer very well could have been trying to get her attention. Second, intent is a state of mind that is not always easily discerned even in healthy minds. It is even riskier to try to rely a mentally disabled person's conduct as a "window" through which to discern that person's mental state or intention.

Finally, Ms. Henley and the Grievant testified that the Customer customarily grabs individuals by the shirt and throat and falls to the floor with them in tow. This is his modus operandi. If in fact he was intentionally trying either to injure or to kill patients and staff, one wonders whether the Agency would permit him to circulate freely among patients and staff. Ultimately, the Arbitrator does not find inconsistent the Grievant's statement–the Customer was not *trying* to hurt her–necessarily inconsistent with the fact that he was choking her.

The Agency also seeks to draw adverse inferences against the Grievant because she did not testify and deny Ms. Henley's testimony during the site visit. First, the Arbitrator is slow to draw adverse inferences

from any grievant's decision not to testify. That is a grievant's right. To be sure, certain costs may accompany the exercise of that right.[51] In this case, however, the Grievant did testify, though not during the site visit. Nevertheless, when she subsequently took the stand in the hearing room, she flatly denied Ms. Henley's representation of her (the Grievant's) and the Customer's positions on the floor. Thus, the Agency's concern lacks substance in this instance, since the Grievant took the opportunity to challenge Ms. Henley's on-site testimony.

VI. The Award

For all the foregoing reasons the grievance is **sustained** in its entirety. Accordingly, the Agency shall reinstate the Grievant with full backpay less any wages she either earned or could have earned with due diligence. Furthermore, the Grievant shall be made whole with respect to all of the following benefits and rights just as if the wrongful removal *never* occurred: PERS contributions, leave balances, overtime, medical benefits, dental benefits, optical benefits, pick-a-post rights, and pick-a-vacation rights. With respect to overtime, the Grievant has the burden of proving *clearly and convincingly* that she was *entitled to* and *would have actually worked* any overtime for which she seeks compensation during her wrongful removal.

[51] For example, if the Union has the burden of persuasion, the Grievant's decision not to testify could leave an evidentiary gap in the Union's case.

Notary Certificate

State of Indiana)

)SS:

County of _____

Before me the undersigned, Notary Public for _____ County, State of Indiana, personally appeared _____, and acknowledged the execution of this instrument this ____ day of _____, 2005

Signature of Notary Public: _____

Printed Name of Notary Public: _____

My commission expires: _____

County of Residency: _____

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Robert Brookins