**OCB AWARD NUMBER: []**

SUBJECT: Arb Summary #

TO: All Advocates

FROM: Tom Dunn

OCB GRIEVANCE NUMBER: DMR-2020-02226-04

DEPARTMENT: Ohio Department of Developmental Disabilities

UNION: OCSEA

ARBITRATOR: Thomas J. Nowel

GRIEVANT NAME: Yolanda Avery

MANAGEMENT ADVOCATE: Jill Harlan

UNION ADVOCATE: Russell Burkepile

OCB REPRESENTATIVE: Tom Dunn

ARBITRATION DATE: March 241, 2021

DECISION DATE: May 12, 2021

DECISION: Sustained

CONTRACT SECTIONS 24.01, 24.02, 24.03, 24.06,

OCB/BNA RESEARCH CODES: Abuse

 Discipline

 Termination

**HOLDING:** The Arbitrator found that the Employer violated the Collective Bargaining Agreement when they terminated the Grievant’s employment. The Arbitrator found that the Grievant did not violate the Abuse of a Client (A-1) policy or Failure of Good Behavior (K-6), and as such, the termination of employment was not for just cause and was in violation of Article 24 of the collective bargaining agreement. Therefore, the grievances are **SUSTAINED.**

**Facts:**

**The Union argued:** The Union contends that the Employer did not have just cause to terminate the

employment of the Grievant. Essentially, the union argued grievant protected another client and herself from possible bodily injury as the alleged victim was acting physically aggressive throughout the entire incident. The union alleged the Grievant did not advance toward or engage the client, but the client was aggressively interacting with the Grievant. The Union states that a core argument of the Employer is that the Grievant punched the client when they were out of view of the video camera. The client repeatedly stated that the Grievant had punched her in the face. Although a number of employees were interviewed during the investigation, the Employer failed to present witness testimony during the arbitration hearing of anyone who witnessed the alleged abuse. The Union argued 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. The Employer’s case relied on a video, which did not capture important aspects of the incident, and uncorroborated statements.

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 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.

**The Employer argued:** 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 tried to prevent a physical attack, but she ultimately abused the resident. While there is no video evidence, the client claimed that the Grievant punched her in the face while backed into a corner. Numerous staff witnessed the client yelling that she had been punched by the Grievant. The punch was witnessed by a member of the staff and another client. The client also reported the punch to the facility psychologist. Following the incident, the facility nursing staff met with the client and determined that there was a red mark on her face. Although the Grievant denied punching the resident, client’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, and the Employer contends a punch to the face constitutes physical abuse.

The Employer states that the Grievant pointed her finger in the clients face when she

entered the hallway and continued to do so after they had been separated by other staff, which escalated the situation. 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. 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 Arbitrator found:** The arbitrator is tasked with determining if the Grievant abused a client as outlined in policy and state administrative code and as considered in Section 24.01 of the collective bargaining agreement. The Arbitrator is mindful that even though client was placed in the facility by the court after being incarcerated, she deserves to be treated with respect and provided all the rights afforded to an individual who is in the custody of the state. The Arbitrator understands Employer’s argument that the best course of action would be for the Grievant to have stepped away from the situation. However, in the heat of the moment, it may have been difficult for the Grievant to disconnect as things were moving quickly. The Arbitrator also was persuaded that there was no video evidence to support an abuse 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. Further, the Arbitrator found that the investigation was tainted by attempting to persuade the three interviewees to change their stories by way of dubious information, which fails to satisfy one of the seven tests of just cause.

The Arbitrator found the Grievant did not violate 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 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.

Therefore, the Arbitrator **SUSTAINED** the Grievances.