

Thomas J. Nowel, NAA
Arbitrator, Mediator, Fact Finder
Lakewood, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

Arbitration Proceedings Between:)	DMR-2023-
)	00626-04
Ohio Department of Developmental)	
Disabilities, Northwest Ohio Developmental)	ARBITRATION
Center)	OPINION AND AWARD
)	
and)	DATE:
)	January 9, 2024
Ohio Civil Service Employees Association,)	
AFSCME Local 11)	

Re: Courtney Jones Termination

APPEARANCES:

Venita S. White, Labor Relations Officer III, for the Ohio Department of Developmental Disabilities and Jeff Freeman, Staff Representative, for the Ohio Civil Service Employees Association.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, AFSCME Local 11. The Union represents a bargaining unit comprised of various classifications in a number of departments administered by the State of Ohio. The Grievant, Courtney Jones, is a Licensed Practical Nurse who had been employed by the Ohio Department of Developmental Disabilities at the Northwest Ohio Developmental Center. The Grievant was terminated on February 22, 2023 for an alleged violation of Department Standards of Conduct and Rules, A1 - Abuse of a Client. The Union grieved the termination on March 4, 2023. Following a Step 2 grievance meeting, the grievance was denied on June 9, 2023. The Union appealed the matter to arbitration on September 9, 2023.

The arbitrator was selected to hear the grievance at arbitration and to render a binding award pursuant to Section 25.05 of the collective bargaining agreement. The parties agreed to a virtual hearing (Zoom) which was administered by the Ohio Office of Collective Bargaining on November 14, 2023. The parties agreed to file post hearing briefs no later than December 19, 2023. The record of hearing was closed on that date. The arbitrator indicated that the award would be rendered no later than January 19, 2024. Each party had full opportunity to present their cases including witnesses, exhibits and video.

WITNESSES

Testifying for the Employer:

Lajeune Gover, Investigator

John Rutherford, Human Resources Manager

Trina Kincaid, NODC Superintendent

Testifying for the Union:

Courtney Jones, Grievant

Carrie Coffee, Union Steward

RELEVANT PROVISIONS OF THE AGREEMENT

Article 24, Discipline

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from a 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 bank 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.

Article 25, Grievance Procedure

25.05 – Arbitration/Mediation Panels

The parties agree that a panel of no less than eight (8) Arbitrators shall be selected to hear arbitration cases covered under this Agreement, except that all disciplinary in which the discipline is the result of alleged abuse of a patient or another in the care or custody of the State of Ohio shall be submitted to a separate panel of four (4) Arbitrators selected from the main arbitration panel. *This section contains additional provisions . . .*

JOINT STIPULATIONS OF THE PARTIES

JOINT ISSUE

1. Was the Grievant, Courtney Jones, removed for just cause?
2. If the Grievant was not removed for just cause, what shall the remedy be?

JOINT STIPULATIONS

1. The Grievance is properly before the Arbitrator.
2. The Grievant was hired by the Employer on or about 2/12/2018 as a Licensed Practical Nurse (LPN) at the Northwest Developmental Center.
3. The Grievant was removed from her position as an LPN on 2/22/2023.

4. The Grievant was removed for a violation of the Ohio Department of Developmental Disabilities Standard of Conduct Policy, specifically rules:
 - Abuse of a Client, A-1 - Abuse of any type or nature to an individual under the supervision or care of the Department or State, including, but not limited to, physical, sexual, or verbal as defined by Ohio Administrative Code 5123:2-7-02 addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvement.
5. The Grievant had no active discipline on her record at the time of her removal.

GRIEVANCE

Statement of Grievance: Grievant was terminated for abuse of an individual. The Union does not agree that the situation rose to the level of abuse.

Resolution Requested: Position restored.

BACKGROUND

The Northwest Ohio Developmental Center (NODC) serves approximately 70 adults who reside at the facility in the Toledo, Ohio area. The Center provides a variety of services to those who are developmentally disabled. The resident, who was involved in the incident, will be referred to as M for purposes of this arbitration case and award.

The Grievant, Courtney Jones, is a Licensed Practical Nurse (LPN) who was employed by the NODC since February 12, 2018. The Grievant's employment was terminated on February 22, 2023. The notice of termination accused the Grievant of violating the Department Standards of Conduct, specifically "Abuse of a Client A1."

Abuse of a Client A1 – 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 5123:2-17-02, addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvement.

The Grievant was accused of physical abuse of client/resident M. Physical abuse is defined by the Ohio Revised Code as follows:

Physical abuse means the use of physical force that can reasonably be expected to result in physical harm or serious physical harm as those terms are defined in Section 2901.01 of the Ohio Revised Code. Such force may include, but is not limited to hitting, slapping, pushing, or throwing objects at an individual. O.A.C. 5123:2-17-02(C)(15)(a)(vii).¹ As such, a violation of Abuse of a Client does not require actual physical harm so long as the action could reasonably result in physical harm.

On October 11, 2022, the Grievant entered Home 608 to conduct rounds. She entered the dining area at approximately 11:54 pm and observed M sitting at a table with sheets of paper and coloring markers. M is permitted to engage in coloring, but evidence suggests that, by court order, he must be observed by Department staff when doing so. There were no staff members in the dining room to observe M. The Grievant was aware of the court order, treatment plans and his behavior. She, therefore, removed the coloring markers from M and took them to the office. M walked in and out of the dining area and expressed his anger. The Grievant re-entered the dining room and attempted to direct M to leave the area and return to his room. The Grievant has stated that most residents were sleeping, and she did not want M to awaken them. It was nearly midnight at the time. M resisted leaving the dining room. It appears that M struck the Grievant once and attempted to do so a second time (video evidence). The Grievant held on to his right arm and attempted to walk him toward a wall. The coloring papers fell on the floor; M walked backwards and tripped on a chair; he fell to the floor in what appeared to be in a sitting position. M stood and gathered the coloring papers from

¹ Ohio Administrative Code.

the floor. He then walked to B-wing which was the location of his room. The Grievant followed M to his room. He turned toward the Grievant who used her hands to direct M into his room. Evidence suggests he was angry and very verbally confrontational. The coloring papers again dropped to the floor. Both individuals entered the room, out of site of the video. The Grievant extended her leg as if to kick but no contact with M occurred. The Grievant exited the room and kicked the coloring papers into the room. The door to the room closed, and the Grievant kicked the remaining coloring papers under the door. The Grievant exited B-wing. M exited his room and was speaking in the direction of the Grievant. He walked to the foyer and threw an empty laundry basket in the direction of the Grievant. The basket did not hit the Grievant, and she picked up the basket and chased M down the hallway. Evidence suggests that the Grievant was laughing when she chased M back toward B-wing. The Grievant did not make contact with M, and she left the area. Facility video captured most of this interaction with the exception of the brief time both individuals were in M's room.

The Grievant did not file a report with the administration following the interaction with M. The following day, October 12, 2022, M reported to an LPN that the Grievant struck him in the face which caused a bump on his cheek. Following a medical examination the following day, staff made the following assessment. "NODC medical personnel visually assessed no injuries noted (M has acne on his facial area).²

The Grievant was placed on administrative leave on October 12, 2022. Lajeune Gover, Investigative Agent Supervisor at the time, conducted a comprehensive investigation of the interaction between the Grievant and M. She interviewed a number of employees who were

² Joint Exhibit 3, pg. 9.

working in the area when the incidents occurred. Ms. Gover interviewed the Grievant on October 21, 2022. The Grievant refused to answer a number of questions which were posed during the investigative interview. A second interview was conducted on October 24, 2022. The Grievant was asked a limited number of questions, but no new or substantial information was obtained by Investigator Gover.

The Employer conducted a pre-disciplinary hearing on February 12, 2023. Both management and Union positions were presented and reviewed by the hearing officer. The Employer's position at the hearing was termination of the Grievant's employment. The hearing officer recommended that just cause existed for disciplinary action.

The Employer terminated the Grievant's employment on February 22, 2023. The notice of termination included the following charge:

A1 – 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 the Ohio Administrative Code 5123-17-02. Addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvements – defined by Developmental Center or Central Office Policy. On October 12, 2022, individual served M.W. of Home 608 made allegations that Courtney Jones (LPN) hit him on the left side of his face and left a big bump on his cheek. After video surveillance review it appears LPN Courtney Jones took his coloring items, and an unsafe interaction was noted involving M.W. on the night of October 11, 2022.

The notice of termination noted no prior discipline based on the Attendance Track and no discipline on the Performance Track.

The Union grieved the termination of employment and appealed to arbitration following the denial of the grievance by the Employer.

The court found that M was found to be incompetent and unrestorable. He may not have Internet access, no cell phone accessibility, and no writing materials in his room. He may not possess pictures, photographs or videos of children. He may stomp his feet, scream, tip over chairs or kick walls. "Staff should use hands-on hands-off redirection if M attempts to hit staff while upset. Often times giving M personal space while upset and letting him know you are there to talk when he is ready is helpful." "M has attempted to hit staff since moving to NODC and these incidents have typically occurred when they have located an item or witnessed M doing something, he should not be doing due to court ordered restrictions."³

POSITION OF THE EMPLOYER

The Employer states that the Grievant was properly removed from her position as a Licensed Practical Nurse for violations of Standards of Conduct and Rules violations, specifically Abuse of a Client. The day following the incident, M reported to LPN Olsen that the Grievant had struck him in the cheek and caused an injury. LPN Olsen completed a "Major Incident Report" (MUI) following discussion with M. The Grievant was obligated to complete an MUI but failed to do so. The Department initiated an investigation which included a review of video recordings which were obtained in most of the rooms and hallways in which the incidents occurred. A number of employees were interviewed including the Grievant. The Grievant refused to answer a number of specific questions which were posed by the Investigator. A second interview was conducted during which the Grievant again refused to respond to posed questions. The Employer states that, compared to the video, the responses from the Grievant

³ Joint exhibit 3, pg. 3.

were inconsistent and possibly dishonest. The Employer notes that employees are required to cooperate during an official investigation and must provide information in reference to work performed during their shift.

The Employer states that the pre-disciplinary hearing officer found just cause as he determined that the Grievant had physically abused M by her actions. He also determined that the Grievant had been untruthful during the investigation. Management learned of the incident, not from the Grievant, who would have been required to complete a report, but from LPN Olsen after his interaction with M.

The Employer states that the Grievant failed to utilize any training techniques to gain compliance with M. Rather than utilize physical techniques, the Grievant should have verbally instructed M to give the coloring items to her as opposed to removing them from his possession. The Grievant has been trained and is aware of M's plan and court order. His plan outlines how to address issues regarding behavior especially when he is agitated. The Employer notes that the Ohio Highway Patrol completed a report on the incident, and Trooper Derthick verbally stated that charges would be brought against the Grievant for patient abuse.

Physical harm to the resident could have resulted from the actions of the Grievant. The Grievant pulled, grabbed and attempted to kick M. Actual physical harm is not required for violation of the Standards of Conduct and the Ohio Revised Code. The use of physical force, which may reasonably be expected to result in physical harm, is a violation of policy and statute. The Employer states that video evidence confirms that none of the Grievant's actions are approved behavior or reasonable action. Staff are required to deescalate rather than instigate negative conduct.

Section 24.01 of the collective bargaining agreement provides that, in cases of patient/resident abuse, if the arbitrator finds that there has been abuse, he/she may not modify the termination or mitigate the penalty. Further, Medicaid regulations (Tags) prohibit the return to employment in a direct care capacity of employees who have been found to have abused a client/resident. The Employer argues that the arbitrator, in the instant matter, must not mitigate the penalty, but, if that is the determination of the matter, the Grievant may not be returned to direct care.

The preponderance of evidence is based on witness statements, video surveillance and other reports. The Grievant did not properly intervene to ensure that M's court order and PCP were followed. The Grievant was not authorized to intimidate, harass, grab, kick, push or violate M's rights. Video evidence shows that M was calmly coloring in the dining area. The Grievant aggressively removed his coloring markers; grabbed him by the arm; pushed him into a chair which caused him to fall; dragged him out of the dining room; and attempted to kick M at the door of his room. The Employer states that this behavior cannot be condoned and the Department cannot risk entrusting the health and safety of clients and residents in the hands of an employee with such blatant disregard for the rules and basic human rights. The Employer requests the arbitrator to sustain the discipline and deny the grievance in its entirety.

POSITION OF THE UNION

The Union states that there was no just cause to terminate the Grievant. The Grievant entered Building 806 to conduct rounds and observed the Grievant with coloring markers and paper without staff supervision. This was not in compliance with M's Person-Centered Plan or

court order. The Grievant was fully aware of the Plan and court order and was obligated to ensure compliance. Staff interviews confirm that M is permitted to engage in coloring but supervision by staff is required. The Union states that, when the Grievant removed the coloring markers, M began acting out in a loud, derogatory and threatening manner directed at her. TPW Jones, who was in the bathroom at the time, heard M yelling. When the Grievant returned to the dining room, M attempted to hit her. Investigator Gover testified during the arbitration hearing that M did swing at the Grievant.

It was late in the evening, near midnight. Several residents were in their rooms and in bed. M continued to shout loudly while making derogatory remarks toward the Grievant. The Grievant took the coloring papers to his room in hopes that M would calm down and not continuing disrupting others who may have been asleep. While approaching his room, M continued with loud and derogatory remarks. The Grievant extended her leg to keep distance from M who has a history of physically attacking staff. She did not attempt to kick M as suggested by the Employer.

The Union states that M has a history of “acting out” when he is corrected concerning activity in which he is not to engage. M raised his right hand at which time the Grievant directed him into his room using hands-on hands-off technique. M has had five Unusual Reports during the past year, three for aggression and two for behavior.

The Grievant attempted to turn the incident into a joking interaction. When M threw the laundry basket at her, she playfully chased him down the hall. A witness to this incident stated that she thought M and the Grievant were playing. The Union notes that M’s Personal Centered Plan indicates that use of humor is a technique which may calm him.

The Union argues that the Employer violated certain provisions of Article 24 of the collective bargaining agreement. In disciplining the Grievant, the Employer failed to follow principles of progressive discipline. Section 24.06 requires that imposed discipline must be commensurate with the offense and must not be used solely for punishment.

While the Employer has cited Medicaid requirements and has argued that the level of discipline is consistent with said provisions, this regulation does not require the termination of as the only corrective action. On cross-examination, NODC Superintendent Kincaid confirmed this to be the case. The Employer improperly decided on “career capital punishment” in violation of the CBA. Additionally, the Employer failed to consider the Grievant’s record of performance.

The Union cites an award issued by Arbitrator Anna Duval Smith in which she states that the Employer faces a heavy burden of proof in abuse cases. The evidence and proofs must be “clear and convincing.” The Employer must prove clearly and convincingly that this or other grievants abused a patient/resident. The Union states that the Grievant was simply doing her job. She did not abuse M on October 11, 2022. The Union requests that the arbitrator sustain the grievance and reinstate Courtney Jones to her position of Licensed Practical Nurse at NODC with all lost wages including step increases and longevity less interim earnings and deductions for Union dues. The Union requests that the Grievant be made whole including PERS contributions, holiday pay, payment for missed overtime opportunities, restored leave balances, medical expenses and other lost benefits. The Union requests that the arbitrator retain jurisdiction for sixty days.

ANALYSIS AND OPINION

Disciplinary cases of this nature are unfortunate and complicated. In this matter, we are dealing with a client/resident with developmental issues and a difficult and volatile background. The Grievant has provided service to the NODC, as an LPN, with no record of discipline. It is an understatement to say that employees, who serve an institution dedicated to the developmentally disadvantaged, have a difficult assignment even in light of the most up to date and thorough training.

The Union has argued that the Employer did not consider the principle of progressive discipline as outlined in Section 24.02 of the collective bargaining agreement and the DODD Standards of Conduct. Nevertheless, if there is a finding that abuse occurred, based upon a termination case, the arbitrator may not reinstate a grievant with a lessor disciplinary penalty. Mitigation of the penalty is barred by agreement of the Union and Employer. "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."⁴ This is what the parties have bargained. And it makes sense as proven abuse impacts Medicaid standards and requirements.

The Employer has stated that the Ohio Highway Patrol was summoned to review the actions of the Grievant and that the involved Trooper stated to management that criminal charges would be brought against the Grievant. It is unknown what involvement, if any, the Ohio Highway Patrol played following the Trooper's review of the video and discussions with management of the NODC. There is no evidence that charges were brought against the

⁴ Article 24, Section 24.01.

Grievant. The involved Trooper was not a witness during the arbitration hearing. There is no evidence to suggest that the incident resulted in criminal charges or that the Highway Patrol continued involvement.

The Employer states that the Grievant was dishonest during the investigation, that her version of the incident was inconsistent. The Grievant's responses during the investigative interviews were less than forthcoming. She refused to respond to a number of questions posed by Investigator Gover. The pre-disciplinary hearing officer felt that the Grievant was not truthful. The failure on the part of the Grievant to be completely forthcoming during the investigation is problematic. Nevertheless, neither the notice of pre-disciplinary hearing or termination notice, as issued on February 22, 2023, included a charge of dishonesty. An allegation that the Grievant was untruthful during the investigation will, therefore, not be considered as part of the decision.

Evidence indicates that M engaged, at times, in difficult and violent behavior, and he acted angrily from time to time. He would stomp his feet and scream. Documentation indicates that M would tip over chairs and kick walls. He was known to attempt to hit staff when upset or when given direction. "M has attempted to hit staff since moving to NODC and these incidents have typically occurred when they have located an item or witnessed M doing something he should not be doing due to court ordered restrictions."⁵ A number of incident reports involved M's confrontational behavior. It is noted that the Grievant was familiar with the court order and M's documented background.

⁵ Joint exhibit 3, pg. 3.

The video of the events, which occurred on October 11, 2022, is the primary evidence in this case. It was reviewed by the pre-discipline hearing officer, the Grievant, potential witnesses and other members of management. The video was viewed during the arbitration hearing, and one portion was viewed a second time. The arbitrator had an opportunity to view the video again at a later time. M was seen coloring in the dining room just prior to the midnight hour. He was doing so quietly by himself and not disturbing anyone. It is noted that no staff were in the dining room. When the Grievant entered the building and viewed the dining room, she realized that the court order prohibited M from using coloring materials unsupervised. She removed the coloring markers and took them to the office. M is seen walking in the dining room in an agitated manner. The Grievant testified that M was cursing and became aggressive. The Grievant re-entered the dining room and walked up to M. It appears, based on video evidence, that M attempted to hit or actually struck the Grievant at which point she used hands-on hands-off technique to walk him toward the wall. Again, it is not completely clear on the video, but it appears that, as M was struggling, he tripped and fell when he bumped into a chair. The Grievant did not push him over a chair. The Grievant testified during the arbitration hearing that M continued to be verbally aggressive. She testified, under oath, that M stated that he would attack her. He cursed and called her the “N” word and “bitch” and stated he wanted to hurt her. It is alleged that the Grievant attempted to kick M when she moved him into his room. Her leg did not make contact with M, and it is not clear, from the video, if she attempted to kick him or simply took a long stride. She was observed kicking the coloring papers, which were dropped by M, under the door of his room. The Grievant’s testimony regarding her interaction with M was not challenged or contradicted

as no witnesses, who were present in the area, testified during the hearing. There are two critical points to be considered. The video does not contain audio. It does not confirm that the Grievant abused M. And there was no testimony from a witness or witnesses who may have observed, first hand, the interactions between the Grievant and M although there were employees in the area.

The Investigator interviewed a number of employees who were in the area during the interaction between the Grievant and M. Their statements were summarized by the Investigator and were included as joint exhibits at the arbitration hearing. TPW Timothy Jordan was in the restroom during the interaction between the Grievant and M. He could hear M's loud retorts. TPW Murphi Banks was interviewed by the Investigator. She viewed the video with the Investigator and felt that the actions of the Grievant were not respectful. Nevertheless, Murphi Banks was not present at the time of the interaction of the Grievant and M. The Investigator, in her report, noted that "Murphi Banks has a known motive to make a false report." TPW Nikeiva Winters was interviewed by the Investigator. She did not believe the Grievant's actions were intimidating or threatening. She believed the Grievant was being playful when she chased M down the hall when he threw the laundry basket at her. The Investigator's report indicated that the statement of Nikeiva Winters was not credible and that her personnel record contained active discipline. Other individuals, who were interviewed by the Investigator, including members of management, were not present during the interaction between the Grievant and M on October 11, 2022.

It is problematic that there were no witnesses, who were present during the interaction between the Grievant and M, to provide testimony and to confirm the Employer's

interpretation of the video. In arbitration case No. DYS-2019-04388-03, Ohio Department of Youth Services and Ohio Civil Service Employees Association, Daniel Lee Removal, dated April 12, 2021, this arbitrator heard and decided a case involving abuse of a client/resident at a DYS facility. The Employer presented video evidence of an incident of resident abuse during a virtual hearing as is the case in the instant matter. While the video was easily seen and interpreted, the Employer also provided witness testimony from an individual who observed the interaction between the Grievant and involved youth. The witness was in the room and close to the incident. She viewed the video during her testimony and provided clear interpretation of the video footage based on personal observation which supported the Employer's case. In the instant matter, there was no testimony from witnesses who were working in the facility during the interaction between the Grievant and M, therefore leaving the video as the primary focal point of the Employer's case. The video does not provide the "clear and convincing" evidence necessary for a conclusion that the Grievant abused the client/resident. M accused the Grievant of hitting him on the cheek which left a red bump on his face. A medical examination of M indicated that M did not sustain a facial injury. There is no evidence that the Grievant struck him in the face. Nevertheless, the notice of termination makes reference to M's accusation.

The post hearing brief of the Union cites an OCSEA and State of Ohio arbitration award issued by Arbitrator Anna DuVal Smith involving patient abuse. The conclusion of her award is unknown, but she made the following statement: "Management has a heavy burden in abuse cases. Not only must it have clear and convincing evidence, but in order to meet the Article 24.01 standard, it must establish that the Grievant's actions rise at least to the level of

recklessness . . .”⁶ This arbitrator agrees with this assessment. The termination of employment of a Licensed Practical Nurse for client/resident abuse is a serious matter which will follow the Grievant during her career and possibly make the obtaining of future employment difficult. Patient abuse is not to be tolerated, but the burden of proof, based on the collective bargaining agreement, rests with the Employer. There must be clear and convincing evidence to support the Employer’s case against the Grievant. There was no testimony from anyone who may have observed the interaction between the Grievant and M. The Ohio Highway Patrol Trooper, who suggested that charges would be filed against the Grievant, was not called as an Employer witness.

It is determined that the video did not provide conclusive evidence that the Grievant violated the Ohio Department of Developmental Disabilities Standards of Conduct, A-1 Abuse of a Client. The Grievant was attempting to control an angry and aggressive resident using hands-on hands-off technique, an individual with a confrontational and sometimes violent history. It is noted that the Grievant’s initial actions and response to M’s use of coloring materials, which was barred by the court, were less than professional. The video indicates that she simply walked up to M and immediately removed his coloring markers with little interaction or explanation. This was not an act of abuse, but it initiated an angry and profane response which then required the Grievant to gain control of M and move him to his room. Perhaps some re-training in this area would be appropriate. The Grievant was charged solely for abuse of a client.

⁶ Union post hearing brief, pages 5 – 6, unnumbered.

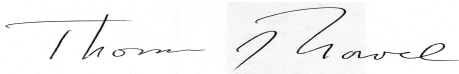
The Employer argues that the Grievant failed to file an Unusual Incident Report following the interaction with M. Although there is no finding of abuse, the Grievant may have been obligated to file a UIR based on the behavior of M and her interactions with him. But it is unclear if the notice of termination specified violation of Department Standards regarding the requirement to complete and file a UIR. The sole charge brought by the Employer, A1 – Abuse of a Client, contains language regarding the addressing of major unusual incidents and unusual incidents. The notice of termination does not include a specific charge regarding failure to file a UIR. This may be an area for re-training.

The termination of the Grievant, for alleged violation of Department Standard A1 – Abuse of a Client and related state statutes, was not for just cause, as there is no finding of abuse, and is, therefore, a violation of Article 24, Section 24.01, of the collective bargaining agreement. The grievance of the Union, DMR-2023-00626-04, is hereby sustained and granted. The Grievant is to be reinstated as a Licensed Practical Nurse at NODC. Notice of termination is to be removed from any personnel records. Lost wages, including step increases and longevity, less interim earnings, are to be paid to the Grievant. This includes lost holiday pay if appropriate. Leave balances, which would have accrued, are to be reinstated. Payment for incurred medical expenses, if covered by the Employer's health care plan, are to be reimbursed. The Grievant is to be made whole.

AWARD

Grievance No. DMR-2023-00626-04 is hereby sustained and granted. The arbitrator will retain jurisdiction for purposes of remedy only for sixty days from the date of the award.

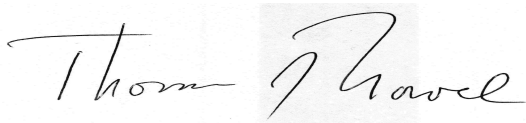
Signed and dated this 9th day of January 2024 at Lakewood, Ohio.

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

Thomas J. Nowel, NAA
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of January 2024, a copy of the foregoing award was served, by way of electronic mail, upon Venita S. White, Labor Relations Officer III, for the Ohio Department of Developmental Disabilities; Kate Nicholson for the Ohio Office of Collective Bargaining; Jeff Freeman, Staff Representative, for the Ohio Civil Service Employees Association, AFSCME Local 11; and Jessica Chester for the Ohio Civil Service Employees Association, AFSCME Local 11.

A handwritten signature in black ink that reads "Thomas J. Nowel". The signature is written in a cursive style with a large, stylized 'T' and 'N'.

Thomas J. Nowel, NAA
Arbitrator

