**OCB AWARD NUMBER: 2730**

SUBJECT: Arb Summary # 2730

TO: All Advocates

FROM: Kate Nicholson

OCB GRIEVANCE NUMBER: [DMR-2023-00626-04](https://ohgrievance.my.salesforce.com/a008y000003NALX)

DEPARTMENT: Department of Developmental Disabilities

UNION: OCSEA

ARBITRATOR: Tom Nowel

GRIEVANT NAME: Courtney Jones

MANAGEMENT ADVOCATE: Venita White

UNION ADVOCATE: Jeff Freeman

OCB REPRESENTATIVE: Marisah Ali

ARBITRATION DATE: November 14, 2023

DECISION DATE: January 9, 2024

DECISION: Grievance Granted

CONTRACT SECTIONS 24

OCB/BNA RESEARCH CODES: 116.6462 Abuse of a Client

KEYWORD SEARCH TERMS: Discipline, Termination, Resignation

**HOLDING: Grievance GRANTED**. The Arbitrator found that in this 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.

**Facts:** The Grievant was Licensed Practical Nurse who had been employed by the Ohio Department of Developmental Disabilities at the Northwest Ohio Developmental Center since February 2018. The Grievant was terminated on February 22, 2023, for violation of rule 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, sexual, or verbal as defined by Ohio Administrative Code 5123:2-17-02. Video showed the grievant removing coloring markers from a client as required by court order when unsupervised and the client becoming frustrated. This was followed by the client hitting the grievant and the grievant guiding the client to his room, most interaction was seen except for a brief time in the client’s room. The following day the client reported that the grievant struck him. Medical personnel did not visually assess any injuries. There was no prior discipline at the time of the removal.

**The Union argued:** The Union argued that the Grievant was only doing her job. The Grievant saw the client with coloring markers and paper without staff supervision which is not in compliance with the client’s Person-Centered Plan or court order. The Grievant was obligated to ensure compliance. The Grievant took the coloring papers to the client’s room in hopes that the client would calm down and not continuing disrupting others who may have been asleep. While approaching his room, the client continued with loud and derogatory remarks. The Grievant extended her leg to keep distance from the client who has a history of physically attacking staff. The client 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. A witness to this incident stated that she thought M and the Grievant were playing. The Union notes that the client’s Plan indicates that use of humor is a technique which my calm him. In disciplining the Grievant, the Employer failed to follow principles of progressive discipline. 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 as the only corrective action. 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 argued:** The Employer states that the Grievant was properly removed. The day following the incident, a another 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, interviewed numerous employees, including the Grievant, and the Grievant refused to answer a number of specific questions. A second interview was conducted during which the Grievant again refused to respond to posed questions. Rather than utilize physical techniques, the Grievant should have verbally instructed the as opposed to removing items from the client’s possession in accordance with the client’s plan and court order. The client’s plan outlines how to address issues regarding behavior especially when agitated. 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. 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 Arbitrator found:** There are two critical points to be considered. The video does not contain audio. It does not confirm that the Grievant abused the client. And there was no testimony from a witness or witnesses who may have observed, first hand, the interactions between the Grievant and the client although there were employees in the area. 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 the client. 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. 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 the client’s use of coloring materials, which was barred by the court, were less than professional. The notice of termination does not include a specific charge regarding failure to file an Unusual Incident Report or Dishonesty. 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 is hereby sustained and granted.