

OCB AWARD NUMBER: 2509

SUBJECT: Arb Summary #2509
TO: All Advocates
FROM: Megan Schenk
OCB GRIEVANCE NUMBER: DMR-2015-02450-4
DEPARTMENT: OOD
UNION: OCSEA
ARBITRATOR: Thomas Nowel
GRIEVANT NAME: Diana Starcher (Wittenbrook)
MANAGEMENT ADVOCATE: Andy Bower
UNION ADVOCATE: Tim Watson
ARBITRATION DATE: January 11, 2016
DECISION DATE: February 26, 2016
DECISION: Denied
CONTRACT SECTIONS: 24, 24.01, 24.02, 24.06
OCB RESEARCH CODES: 118.01 – Discipline in General; 118.9462 – Client Abuse;

HOLDING: Grievance **DENIED**. Grievant’s actions in kicking, pulling, and yelling at a client constituted abuse and the Employer’s discipline policy and the CBA require termination for any incident of abuse. Therefore, there was just cause to remove Grievant.

Facts: Grievant was a Therapeutic Program Worker with approximately 3 years of service at the time of her termination. Grievant had an active written reprimand at the time. The incident leading to the termination involved alleged abuse of a client with “intellectual functioning is in the severe range with profound adaptive behavior deficits”. Two witnesses reported that Grievant engaged in abusive behavior. They said the client fell out of a wheel chair and that Grievant kicked her in the buttocks and pulled on her arm. They state that they could not hear the words being used but indicated that the Grievant was screaming at the client in a loud voice. An administrative investigation was conducted and concluded that Grievant had abused the client. Grievant was placed on administrative leave and terminated approximately a month later for violating the Employer’s Abuse of a Client work rule which prohibits, “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.” The discipline grid and the collective bargaining agreement require removal for the first violation.

The Employer argued: Grievant was terminated for just cause. Grievant was called away from her regular group assignment and was required to work with the client who was slow to lift herself from the ground. Grievant became impatient with the client’s actions and did not want to take the time necessary to follow protocol. It was near the end of the Grievant’s shift, and she was anxious to complete her tasks and leave the facility. Witnesses clearly observed the Grievant kick, pull and scream at the client. Also, the client’s statement closely parallels the witness statements. The incident greatly traumatized her. The investigation conducted by the Employer was done so in a professional manner by a very experienced investigator. The Employer must be in compliance with Federal Medicaid Regulations which demand that clients must be free from abuse and neglect and require that the facility take steps to prevent recurrence. Further, Grievant’s actions violated sections of the ORC and OAC related to physical harm and abuse of a client. Grievant’s termination was necessary in order to comply with these regulations. Article 24.01 states that an arbitrator may not modify the termination of an employee who has committed abuse. The grievance should be denied in its entirety.

The Union argued: Grievant was wrongfully terminated. The client sat on the ground near the entrance to the cottage. Grievant and another employee assisted the client to a standing position and into a wheel chair. The allegations suggesting that the Grievant kicked or pulled on the client are inaccurate. The Union argues that no injuries to the client as a result of the Grievant's actions. The Superintendent failed to document her knowledge of the incident in a timely and proper manner the following day. The Employer failed to conduct a complete investigation. The statements and testimony of the witnesses are contradictory and inconclusive and therefore cannot be the basis of a just cause termination of employment. Further, the client has a known inability to remember recent incidents. She is unable, at times, to remember her age, and she often points at various individuals as having done something to her or engaged in an act which is troubling to her, the Union was unable to question her, and she did not testify at hearing. The grievance must be sustained, and the Grievant be made whole in every respect including reinstatement, back pay, and restoration of seniority and all benefits.

The Arbitrator found: The Arbitrator found that the Employer proved that the Grievant abused the client by kicking, pulling, and yelling at the client. The witness statements were credible and the investigation was completed in a professional and thorough manner. Department policy states that abuse of any type or nature to an individual under the supervision or care of the Department or State is subject to removal for first offense. Grievant violated the policy. Evidence also indicates that Grievant had acknowledged her understanding of the policy and consequence of first time violation. In addition, the actions of the Grievant violated Ohio Administrative Code Section 5123:2-17-02 as argued by the Employer. The collective bargaining agreement states in Section 24.01 "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 the authority to modify the termination of an employee committing such abuse." The termination of the Grievant's employment was for just cause, and the Employer therefore did not violate Article 24 of the Agreement.