

Thomas J. Nowel
Arbitrator and Mediator
Cleveland, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In The Matter of a Controversy Between:)	Grievance No.
)	24-04-20111208-
Ohio Civil Service Employees Association,)	0018-01-04
Local 11 AFSCME, AFL-CIO)	
)	ARBITRATION
and)	OPINION AND
)	AWARD
Ohio Department of Developmental)	
Disabilities, Cambridge Developmental Center)	DATE:
)	September 19,
Re: Grievance of Ralph McMillen)	2012

APPEARANCES:

Tim Watson, Advocate for OCSEA, Local 11 AFSCME; Melinda M. Armstrong, Advocate for the Ohio Department of Developmental Disabilities; and Jessie Keyes for the Ohio Office of Collective Bargaining.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, Local 11 AFSCME. The parties are in disagreement whether the Grievant violated his Last Chance Disciplinary Agreement.

Union member, Ralph McMillen, was terminated by the Employer on December 7, 2011 following an incident with a resident of the facility. The Employer based the termination on policy violation and a Last Chance Disciplinary Agreement. The Union states that the Grievant did not violate Department policy and therefore is not in violation of the Last Chance Disciplinary Agreement. Mr. McMillen grieved his termination of employment on December 7, 2011, and the grievance was denied by the Employer. The Union appealed the termination to arbitration.

The Arbitrator was selected by the parties, pursuant to Article 25 of the collective bargaining agreement, to conduct a hearing and render a binding arbitration award. Hearing was held on August 20, 2012 at the Cambridge Developmental Center in Cambridge, Ohio. At the hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits. Witnesses were sworn by the Arbitrator.

ISSUE

The parties stipulated to the following issue to be decided by the Arbitrator.
“Did the Grievant, Ralph McMillen, violate his Last Chance Agreement? If not, what shall the remedy be?”

JOINT STIPULATIONS

1. The Grievant was hired by the Employer on September 2, 1986 as an intermittent employee and hired permanently on September 11, 1988.
2. The Grievant was removed from his position as a Therapeutic Program Worker (TPW) on December 7, 2011.
3. The Grievance is properly before the Arbitrator.

WITNESSES

TESTIFYING FOR THE EMPLOYER:

Cindy Campbell, Therapeutic Program Worker
Susan Watson, Therapeutic Program Worker

TESTIFYING FOR THE UNION:

Gary Finch, Therapeutic Program Worker (Trainer)
Melinda Johnston, Therapeutic Program Worker
Trina Harmon, Therapeutic Program Worker
Ralph McMillen, Grievant

LAST CHANCE AGREEMENT

The Grievant, Union and Employer signed a “Last Chance Disciplinary Agreement” on August 5, 2011. The Agreement is as follows.

This Agreement made by and between the Ohio Department of DD, the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO (OCSEA/AFSCME), and **Ralph McMillen** (Employee), parties hereto.

Whereas, just cause exists to warrant discharge of the employee;
Whereas, the parties wish to reach full and final resolution to the discipline pending and establish terms and conditions of the employee's future employment;
Now therefore, all parties hereto, in consideration of the mutual covenants and agreements to be performed, as herein set forth, agree as follows:

1. Removal from position of TPW will be held in abeyance and the charge will be reduced to rule Neglect of a Client E3 – An act, failure to act, behavior or judgment towards an individual that is insensitive and/or inattentive to the needs and/or rights of an individual entrusted to the custody of the Department or State.
2. The parties agree that, if within twenty-four (24) months from the date of this agreement, the employee commits any performance-related violation of the Department of Developmental Disabilities disciplinary grid, or the Cambridge Developmental Center's policies and procedures; that violation will result in the imposition of the removal being held in abeyance under the agreement.
3. Any grievance arising out of this disciplinary action shall have the scope of the arbitration of the grievance limited to the question of whether or not the grievant did indeed commit the subsequent act, which gave rise to the imposition of the removal. The arbitrator shall have no authority to modify any disciplinary action received unless the arbitrator finds that the grievant did not commit the acts leading to the discipline.

All parties to this agreement hereby acknowledge and agree that this Agreement is in no way precedent setting. This agreement shall not be introduced, referred to, or in any way utilized in any subsequent arbitration, litigation, or administrative hearing, except as may be necessary to enforce its terms. **Ralph McMillen** has been fully informed and advised of the terms and conditions herein, he fully and completely understands said conditions, and voluntarily enters into the agreement without duress. The agreement shall be extended by any periods of leave in excess of 13 days including but not limited to, vacation, personal, sick leave, disability, and workers compensation.

GRIEVANCE

Ralph McMillen filed a grievance on December 7, 2011 appealing the termination of employment as follows:

Contract Article: 24.01, Any other pertinent article.

Statement of facts: On 12-7-2011, the Grievant was removed for Violation of a Last Chance Agreement – Due to Work Rule Violation – (E-2). The use of any behavior support method, including restraint or time-out, that is implemented in a manner prohibited by the Department or by federal regulations or rules. The Grievant feels that management failed to show Just Cause for the E-2 Violation.

Remedy: Reinstate the grievant's employment. Remove the E-2 violation from any/all files pertaining/related to the grievant. Full back pay – to include holiday/premium pay. Full reimbursement to the OPERS for time removed. Any other expenses incurred due to removal. Make grievance whole.

The grievance was denied by the Employer, and it was appealed to arbitration pursuant to the Agreement.

BACKGROUND

The Grievant was employed as an intermittent employee of the Department of Developmental Disabilities on September 2, 1986 and was hired permanently on September 11, 1988. He served as a Therapeutic Program Worker (TPW). The Union had grieved the previous termination of employment of the Grievant, and the parties resolved the matter by agreeing to a Last Chance Disciplinary Agreement on August 5, 2011. The parties agreed that the Last Chance Disciplinary Agreement would remain in place for twenty-four consecutive months. The agreement provided for termination of employment for any new infraction which would occur during the twenty-four month period, and the authority of an arbitrator, who heard an appeal of the discharge, was limited to determine if the violation actually took

place. If it is determined in arbitration that violation occurred, an arbitrator has no authority to modify the disciplinary action imposed by the Employer. All parties, including the Grievant, signed the Last Chance Disciplinary Agreement. Following the signing of the Agreement, the Grievant received four weeks of training prior to being returned to supervise residents of the institution. Training included issues of resident abuse and neglect.

On November 9, 2011, Resident W became disruptive during a break in the workshop. Resident W has a history of disruptive behavior. He had come over to Rudolph, an area which was not his assigned work station, to receive a snack. He was asked to return to his own work area, and he refused to comply. The Grievant was responsible for Resident W, and he was called to bring him back to his work area. TPW Melissa Johnston asked Resident W to return to his area. He became disruptive and hit Ms. Johnston in the stomach. He then threw various items which had been on a table onto the floor including a tape dispenser and couplers. During this time, the Grievant had come into the area. Resident W was then observed lying on the floor. Other employees (TPWs) who witnessed all or part of the incident included Trina Harmon, Jessica Hupp, Tisha Wine, Cindy Campbell and Susan Watson.

At the end of the work day, Ms. Campbell asked her supervisor if the Grievant had been put on notice. She then left to begin her vacation. The following day, Ms. Campbell returned to the facility to report to the Union Steward, Cory Phillips, that she felt that the Grievant had not handled the Resident W incident appropriately,

the prior day, and asked him to report the matter to management. Mr. Phillips indicated that he could not report another Union member.

The Grievant was President of the Union approximately five years ago. Susan Watson served as Vice President during his tenure.

Following the incident, the Employer charged the Grievant on November 28, 2011 with violation of Policy E-2: "The use of any behavior support method, including restraint or time-out, that is implemented in a manner prohibited by rules promulgated by the Department or by federal regulations or rules and Violation of a Last Chance Disciplinary Agreement signed on 8/5/2011. In particulars to wit: That on November 9th you utilized an unauthorized behavioral method for an individual that lives at this facility."

A pre-disciplinary hearing was convened on December 2, 2011. The hearing officer found that the Grievant had violated Department policy and the Last Chance Disciplinary Agreement and recommended removal. The Grievant's employment was terminated on December 7, 2011.

POSITION OF THE EMPLOYER

The Employer states that the Grievant approached Resident W and forced him to the floor by wrapping his arm around his neck and shoulder. The Employer states that this was clearly witnessed by Cindy Campbell who was only two or three feet away from the incident. Ms. Campbell is a TPW and co-worker of the Grievant. The Employer states that the Grievant confronted Resident W and then forced him to the floor. The Employer goes on to state that the incident was also witnessed by

Susan Watson, another TPW and co-worker of the Grievant. The Employer states that Ms. Campbell has twenty-four years of service with the Department and Ms. Watson has sixteen years of service. The Employer states that both testified at hearing that the Grievant's actions were not approved technique. They both demonstrated the actions of the Grievant at hearing.

The Employer states that Ms. Campbell was fearful of the Grievant because he possessed "lots of guns" and has anger management issues.

The Employer argues that the Grievant used his physical size and gender to intimidate Resident W. Although the Grievant claims he attempted to verbally re-direct the Resident, the Employer argues that he approached him and took him to the floor. The Employer argues that the Grievant wanted the resident to know "who was in charge of the workshop that day." (Employer post hearing brief, pg. 7)

The Employer argues that Union witness, Gary Finch, who is a Department trainer, supports its case. He testified that staff should not engage in a physical intervention and should not attempt to control or restrain from the head or neck area.

The Employer states that the Union inferred that Ms. Campbell and Ms. Watson had conflicts with the Grievant in the past. The Employer argues that their coming forward to report the actions of the Grievant had nothing to do with any perceived conflict.

The Employer states that the Grievant has a record of discipline. He is on a Last Chance Disciplinary Agreement at this time. He has received significant training following the agreement which included issues of resident abuse and

neglect. He has minimized the occurrence with Resident W. The Grievant did not speak to him but instead immediately took him to the ground. The Grievant has violated Department policy and is therefore in violation of the Last Chance Disciplinary Agreement. The Employer requests the Arbitrator to sustain the discipline and deny the grievance.

POSITION OF THE UNION

The Union states that the Grievant did not violate Departmental policy, in particular Rule E-2. He therefore was not in violation of the Last Chance Disciplinary Agreement and should not have been removed by the Employer. The Grievant went to the aid of Melissa Johnston when she called for assistance after being struck by Resident W. Other employees in the work area made no attempt to assist Ms. Johnston.

The Union states that Ms. Campbell did not report the incident until eight days following the incident. She also made conflicting statements. Her version of the incident and testimony should not be considered credible. Ms. Campbell initially told investigators that she was fearful of the Grievant, that she might be shot by him, but testified at hearing that she was not fearful and that he had never threatened her.

The Union argues that Employer witness, Susan Watson, is likewise not credible. Her statements were inconsistent and contradictory. The Union states that Ms. Watson did not witness the incident at all as she was behind a cupboard door which blocked her view. Ms. Watson had disagreements with the Grievant

when he was Union President, and she is attempting to discredit him now. Other witnesses admitted that they did not see how Resident W came to be on the floor of the workshop.

The Union states that Ms. Campbell and Ms. Watson, the Employer's witnesses in this case, were disciplined for not reporting the incident in a timely manner. But they received only written reprimands when policy indicates that the penalty is a five day suspension to removal. The Union argues that the reduced penalties were based on the witnesses providing statements and testifying for the Employer in this matter. Additionally, a supervisor completed the "Unusual Incident Report" when it should have been drafted by the employee who allegedly witnessed the incident, Ms. Campbell. This report was not accurate in listing who was in the area at the time of the incident, and it appeared that the date of the incident was not accurate.

The Union states that the Grievant has provided consistent reports and statements throughout the investigation. The Highway Patrol investigated the incident and found no abuse or wrong doing on the part of the Grievant. The Union states that the Grievant did not force Resident W to the floor, but instead the Resident sat down on the floor of his own accord. This is typical behavior on the part of Resident W who, in the past, has sat on the floor when he could not have his way. In this case, the resident was upset and sat on the floor because he was unable to obtain a snack.

Contrary to the manner in which the Grievant has been depicted by the Employer, he is not "hot headed" and does not have anger management issues.

Although the Grievant has been disciplined in the past for a number of issues, the Arbitrator is charged with considering only the immediate cause for removal based on the Last Chance Disciplinary Agreement. The Union states that the Arbitrator must only answer one question. "...Did he commit the act he is currently being charged with." The Grievant had just participated in training, and he was aware of the appropriate techniques for controlling a resident who was engaged in a behavioral problem. He did not violate Department policy.

The Grievant did not utilize a technique that violated policy. In fact, the resident sat down on the floor of his own accord. The Grievant did not violate the Last Chance Disciplinary Agreement. The Union requests that the Arbitrator grant the grievance by making the Grievant whole and by reinstating him with full back pay, holiday and premium pay and OPERS contributions.

DISCUSSION

The question before the Arbitrator in this case is whether the Grievant violated the Last Chance Disciplinary Agreement which was signed by the Department, Union and Grievant on August 5, 2011. The Employer terminated the employment of the Grievant for violation of the Last Chance Disciplinary Agreement based on a violation of Policy E-2 which states the following. "The use of any behavior support method, including restraint or time-out, that is implemented in a manner prohibited by rules promulgated by the Department or by federal regulations or rules."

Based on testimony and argument of both sides of this dispute, it is obvious that forcing a resident to the floor by wrapping an arm around the neck and shoulder area is in violation of Department policy, and, when questioned by the investigator, the Grievant stated that proper procedure is to re-direct a resident when confronted with difficult behavior. So the evidence must show, at least by a preponderance, that the Grievant took Resident W to the floor, in a manner which violates policy, in order for the Employer's case to be sustained.

Cindy Campbell, a twenty-four year employee of the facility and co-worker of the Grievant, testified that she witnessed the Grievant force the resident to the floor by placing his arm around the neck and shoulder area. Although she did not immediately report the incident in a timely manner, her testimony is credible as she was just a few feet away from the Grievant and resident. Although the Union suggests that her discipline, for failure to report the incident, was modified in order to obtain testimony adverse to the Grievant, there was no basis to this allegation. She initially reported the incident to a Union officer rather than to a management representative. It was also suggested that she was fearful of losing her position to the Grievant through a bumping procedure and therefore was untruthful about the incident. There was no evidence to suggest that the Department was considering the bumping or transfer of employees as suggested by the Union and Grievant. Ms. Campbell stated to the investigator that "Ralph then wrapped his arm around (Resident W's) neck, dragged him backwards, then forcing him down on the floor on his back." Ms. Campbell testified that she was three feet away from the incident.

Susan Watson, a sixteen year employee of the facility and co-worker of the Grievant, testified that she observed the Grievant grab Resident W and take him to the floor. She testified that she was five or six feet away from the incident. She testified that the Grievant did not utilize an approved method, that one person must not take a resident down to the floor. Ms. Watson testified further that Resident W was “shook up laying on his back” and that the Grievant was standing over him. Ms. Watson did not report the incident immediately to management but reported it to the Union steward. In her statement to the investigator, Ms. Watson stated that “Ralph McMillen came up behind (Resident W) put his arm around (Resident W’s) upper shoulder neck area and put him on the ground.” The Union argued that Ms. Watson’s statements are questionable because, when the Grievant was President of the Union and she was Vice President, she had various disagreements with him. Ms. Watson testified that her statements regarding the incident had nothing to do with any past disagreements, and there was no evidence to support the Union’s contention. It had been five or more years since the two had been Union officers together. The Union also argued that Ms. Watson could not have observed the incident because she was standing behind a cupboard door, but, in her statement to the investigator, she stated that she did not observe the blow to Ms. Johnston because she was behind the cupboard door. She stated that she closed the door and then observed the take down of the resident.

The testimony and statements of Ms. Campbell and Ms. Watson are convincing. At hearing, they physically demonstrated the take down based on their observations of the Grievant’s actions. Union witness, Melissa Johnston, testified

that she left the work area after being hit in the stomach and did not observe Resident W going to the floor. Union witness, Trina Harmon, observed Resident W throwing couplers but also testified that she did not observe how he got to the floor. Although Jessica Hupp and Tisha Wine, TPWs who were in the work area at the time of the incident, did not testify for the Union, their written statements were entered into the record of the hearing. Their statements indicated that they had not observed the manner in which Resident W came be on the floor of the workshop.

The Grievant claims that Resident W sat down on the floor on his own accord. He testified that he merely placed his hand between Ms. Johnston and Resident W in an effort to protect her. He stated that he encouraged Resident W to return to his work area, and he then sat on the floor on his own accord. The Grievant testified that he never touched the resident during the incident. None of the employees in the work area have corroborated the Grievant's version of the incident. Two witnesses very clearly contradict his statement. The Grievant had very recently participated in extensive training, and he knew proper procedure and protocol. The Grievant is a long term employee of the facility, and he testified that he has supervised Resident W "for years." He therefore must have been aware of the assessment prepared by Psychologist Melissa Buhrow (Joint Exhibit). She states that in dealing with Resident W, "A non-directive interaction style appears to work best for (Resident W). It is important for staff members to be low-keyed and avoid 'power struggle' with him." The Grievant was anything but low keyed when he forced Resident W to the floor.

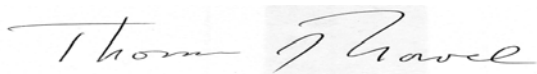
Union witness, Gary Finch, is a 32 year employee of the facility and has been providing positive intervention training for approximately two years. He testified that after all the training has been provided, a real life incident usually cannot be replicated in a training scenario. He testified further that, if physical contact is required, it requires a two person escort. Under cross examination, Mr. Finch stated that a resident must never be grabbed around the neck and shoulder area.

The Grievant violated Policy E-2, Neglect of a Client, which states the following. "The use of any behavior support method, including restraint or time-out, that is implemented in a manner prohibited by rules promulgated by the Department or by federal regulations or rules." He had been disciplined on three occasions prior to the matter which resulted in the Last Chance Disciplinary Agreement. The Grievant's record of discipline does not work in favor of his credibility in the face of two senior TPWs who clearly witnessed and reported the take down of Resident W. Paragraph 2 of the Last Chance Disciplinary Agreement states that "The parties agree that, if within twenty-four months from the date of this agreement, the employee commits any performance-related violation of the Department of Developmental Disabilities disciplinary grid, or the Cambridge Developmental Center's policies and procedures; that violation will result in the imposition of the removal being held in abeyance under this agreement." The Grievant has violated the Last Chance Disciplinary Agreement. The removal of the Grievant is sustained, and grievance of the Union is denied.

AWARD

The Grievant has violated the Last Chance Disciplinary Agreement. The removal of the Grievant is sustained, and grievance of the Union is denied.

Signed and dated this 19th Day of September, 2012 at Cleveland, Ohio.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in dark ink on a light-colored background.

Thomas J. Nowel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that on this 19th Day of September, 2012 a copy of the foregoing Award was served upon Tim Watson, representing OCSEA, Local 11 AFSCME; Melinda M. Armstrong, representing the Ohio Department of Developmental Disabilities; and Jessie Keyes and Alicyn Carrel, representing the Ohio Office of Collective Bargaining, by way of electronic mail.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a white background.

Thomas J. Nowel
Arbitrator