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**ARBITRATION PROCEEDING PURSUANT TO
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE
PARTIES**

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|------------------------------------|---|---------------------|
| In the Matter of | ◆ | |
| | ◆ | |
| OHIO CIVIL SERVICE EMPLOYEES | ◆ | |
| ASSOCIATION, AFSCME, Local 11 | ◆ | |
| | ◆ | ARBITRATOR’S |
| and | ◆ | OPINION |
| | ◆ | and AWARD |
| OHIO DEPARTMENT OF | ◆ | |
| DEVELOPMENTAL DISABILITIES | ◆ | |
| | ◆ | |
| Grievant: Danielle Lazaro | ◆ | |
| Case No. 24-15-20140102-0001-01-04 | ◆ | |

This Arbitration arises pursuant to the collective bargaining agreement (“the Agreement”) between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION (“the Union”) and the STATE OF OHIO (“the State” or “DODD”) under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be

finding and binding pursuant to the Agreement. The Parties stipulated there are no procedural impediments to a final and binding Award.

Hearing was held March 20, 2015. Both Parties were represented by advocates who had full opportunity to examine and cross-examine witnesses and introduce documentary evidence. Both Parties filed post-hearing briefs on or before April 13, 2015.

APPEARANCES:

On behalf of the Union:

BUFFY ANDREWS, Operations Director, OCSEA, Columbus, Ohio.

On behalf of the State:

ANDY BOWER, Labor Relations Officer, Ohio Department of Developmental Disabilities, Columbus, Ohio.

ISSUE

**Was the Grievant removed for just cause?
If not, what shall the remedy be?**

RELEVANT PORTIONS OF THE AGREEMENT

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ARTICLE 5 – MANAGEMENT RIGHTS

The Union agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees....

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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....

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 oral reprimand(s) (with appropriate notation in employee's file);**
- b. One (1) or more written reprimand(s);**
- c. 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.

...

- d. 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;**

- e. Termination.**

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FACTS

The Grievant was employed by the State since September 13, 1999 as a Therapeutic Program Worker ("TPW"). She was removed on December 31, 2013 from her employment at the Youngstown Developmental Center ("YDC") for violation of DODD Standards of Conduct Policy relating to a July 30, 2013 incident with a client and a co-worker:

- A-1 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; and**
- F-1 Failure to Report - Failing to report in any manner which results in potential or actual harm to an**

individual. Failing to report, lying about, or covering up, abuse, neglect or mistreatment.

At the time of her removal, the Grievant did not have any active prior discipline and had positive performance evaluations.

The July 30, 2013 incident involved the Grievant and her co-worker physically and verbally reacting to a client who was looking through the residence's kitchen refrigerator. Unbeknownst to the Grievant and her co-worker, there was a camera in the kitchen.¹ The video shows the Grievant engaged in various ways of reacting to the client going through the refrigerator. The client was known to take items, including food, which she would sometimes eat too quickly, putting her at risk of choking.

When the Grievant entered the kitchen and saw the client there, the Grievant slapped her own thigh to get the client's attention; slapped the client's hand, or knocked something out of the client's hand²; did not do anything after the co-worker hit the client in the client's side, although it is possible the Grievant did not see the hit; waved her arms at the client; pointed at the client; did not stop the client from pulling down

¹ The State had placed the camera in the kitchen to determine who was taking food from the refrigerator, as large amounts of food had been disappearing.

² The Grievant denies she slapped the client; the Union describes the Grievant's action during this segment of the video as pointing at the food in the client's hand.

the client's pants; used her foot to determine if there were any food items in the client's pants on the floor; and did not do anything after the co-worker kicked the client, although it is possible the Grievant did not see the kick.³

After reviewing the video and conducting an investigation, the State removed the Grievant and her co-worker from their TPW positions.⁴ The Union filed the instant grievance on behalf of the Grievant, contending the State did not have just cause to remove the Grievant.

POSITIONS OF THE PARTIES

State Position

DODD had just cause to remove the Grievant. The Union contends the July 30, 2013 incident in the kitchen was the client's fault and the

³ The video has no audio. It appears from the video, however, that the Grievant likely raised her voice to the client.

⁴ From the video, it is apparent that the co-worker's treatment of the client during the incident was worse than the Grievant's; the co-worker kicked the client and grabbed the back of the client's neck. The co-worker was criminally charged; she pled guilty to a charge of Patient Neglect in violation of ORC 2903.34(A)(2)(D), a first-degree misdemeanor. She was sentenced to one year of probation. While the Grievant may not have seen the co-worker kick the client, it is apparent from the video that the Grievant did not see the co-worker grab the back of the client's neck.

The record also indicates that while the Grievant also was criminally charged, the State filed a Motion to Dismiss that was granted.

Grievant's co-worker's fault. But both the Grievant and the Grievant's co-worker grossly mistreated the client. They thought no one was watching; they punished the client for taking food. They disregarded the client's basic human rights.

The Grievant had over fifteen years' experience in an institutional setting. She was familiar with the rules associated with working with individuals and the requirements to report abuse and neglect. The Grievant did not report the July 30, 2013 incident; State witnesses testified the video showed the July 30, 2013 incident was a reportable incident.

During the first internal investigatory interview on September 18, 2013, the Grievant said she was never physically abusive to this client, never hit her, and never saw anyone be physically abusive to this client. During the second investigatory interview on November 8, 2013, the Grievant, when asked how an employee is supposed to respond to this client when the client steals (a known behavior of this client's), responded, "You should redirect [her]." The Grievant further said it is not appropriate to slap, hit, kick, or grab a client when the client is caught stealing. The Grievant denied she ever saw anyone slap, hit, kick, or grab

a client. When asked what to do if she ever saw someone do this, she responded, "Report it." When the State eventually showed the video to the Grievant and asked her to identify herself in the video, the Grievant said, "I can't tell. Looks like me." And when the Grievant was asked if she had reported the July 30, 2013 incident, she answered, "Don't recall. Don't recall this day. I don't know if I did or not."

YDC Program Director Michael Irwin testified this client is an "eyes on" client, meaning that the Grievant should have remained within eyesight of her. The video shows the client alone in the kitchen for 40 seconds.

Irwin also testified that the DODD Consumer Abuse and Neglect Policy includes gestures in the definition of abuse, and that the Grievant was trained on this Policy. He also testified the Grievant had violated the Individual Bill of Rights, which is posted in the residences and on which the Grievant also was trained. Specifically, the Grievant did not treat the client with courtesy and respect when the Grievant slapped the client on the hand and intimidated her with gestures. Irwin further testified the Grievant did not respect the client's dignity when she made, or let, the client disrobe in the kitchen. The Individual Bill of Rights also states

clients have the right to be free from physical, verbal, sexual, or psychological abuse or punishment. The Grievant violated this right when she abused the client and allowed the co-worker to abuse the client.

Irwin additionally testified the Grievant tapping her leg to get the client's attention was not taught as a diversionary technique, and was intimidating and controlling. He also stated that crowding, invading personal space, and the gestures the Grievant made toward the client were intimidating and controlling. The Grievant's search of the client's garments using the Grievant's feet was humiliating and demeaning. Irwin further testified slapping, hitting, kicking, grabbing or shaking are never appropriate techniques.

The Grievant's actions were contrary to what is outlined in the client's Individual Program Plan ("IPP"). The Grievant intervened, but in a negative, not a positive, manner. This client is known to be aggressive. It is confusing why experienced staff would engage in activity that would escalate, rather than prevent, aggressive behavior.

OAC 5123:2-17-02(C)(15)(a)(vii), the applicable standard for physical abuse, defines it as "the use of physical force that can reasonably be expected to result in physical harm or serious physical harm...."

(Emphasis added.) Thus, physical harm is not required to find abuse.

Slapping certainly may result in physical harm.

OAC 5123:2-17-02(C)(15)(a)(xi), the applicable standard for verbal abuse, defines it as “the use of words, gestures, or other communicative means to purposefully threaten, coerce, intimidate, harass, or humiliate an individual.” The State does not need to prove how the victim felt or reacted to the act, but that the Grievant committed the act.

OAC 5123:2-17-02(C)(15)(a)(iii) defines failure to report. DODD Standards of Conduct, Rule Violations, and Penalties for Classified Employees are consistent with these DODD-specific Ohio Administrative Code sections.

Ginnie Whisman, Deputy Director of DODD Residential Resources, testified she considered the Grievant’s actions to have been a blatant disregard for individual safety and security. Whisman further testified the Grievant’s actions violated Rule A-1 – Abuse of a Client, which calls for automatic removal; and Rule F-1 – Failure to Report, which calls for a 5-day suspension to removal.

The video demonstrates the Grievant abused the client when the Grievant forcefully slapped the client’s hand, and then participated in

humiliating and demeaning tactics to punish the client for taking food.

These tactics included gesturing, crowding, and intimidation.

Additionally, the Grievant saw her co-worker hit, kick, and pull on the client's arm. It is not plausible that the Grievant did not see this.

The Union has referred to Arbitrator Smith's 2007 Award that states that for the State to be able to prove abuse, it must show an employee's actions rise at least to the level of recklessness. *OCSEA v. ODMHA, (Drake)*, Grievance No. 23-07-20060221-0001-01-04. FreeDictionary.com defines recklessness as "careless to the point of being heedless of the consequences...." It is obvious from the video that the State has met its burden of proving the Grievant was at least reckless.

The Union considers the Grievant's years of service to be a mitigating factor. But as Arbitrator Dworkin held, "...tenure is not a pass to commit misconduct. It does not allow an individual to break rules with impunity; it does not insulate people from removal for conduct totally inimicable to an employer's fundamental interests." *OCSEA v. OBES, (Pall)*, Grievance No. 11-09-970603-0047-01-14 (1999).

Additionally, as Arbitrator Brookins held, "The major aggravative factor is the nature of the Grievant's misconduct and the inherent need

for trustworthiness in his position as a TPW in charge of clients who may be vulnerable and virtually helpless. TPWs must be held to high standards of integrity and honesty, since, during their day-to-day activities, they will likely encounter numerous opportunities to exploit clients who are incapable of protecting themselves. Trustworthiness is, therefore, a non-negotiable trait for TPWs.” *OCSEA v. ODMRDD, (Pope)*, Grievance No. 24-07-20040122-1001-01-04 (2004).

The record demonstrates the Grievant’s actions went beyond a single display of poor judgment. DODD cannot condone the Grievant’s behavior. It cannot risk entrusting the health and safety of clients in the hands of an employee with such blatant disregard for rules, policies, and human rights. Reinstating the Grievant would be wholly inappropriate and unfair to clients, family members, and guardians. The State requests the Arbitrator to uphold the removal and deny the grievance.

Union Position

The State failed to meet its burden of proving the removal was for just cause. The Grievant entered the kitchen on July 30, 2013 to find the client taking food out of the refrigerator. The Grievant redirected the

client to put the food back in the refrigerator. Within 2 minutes and 14 seconds, the incident was resolved. The client was sent out of the kitchen with no food in her possession. There was no aggressive incident to report.

No State witness was able to define abuse as defined by law.

Deputy Director of Residential Resources Whisman, when asked to define abuse, answered, "ORC 2901 in the training materials." The Union asked her why the definition of abuse was incorrect in the training materials; she answered, "I don't know." Whisman should have known the ORC definition of abuse. It has been law for years; elements of the crime, including intent, have remained unchanged.

Program Director Irwin was asked by Union counsel, "Why would all the TPWs that I interviewed, which is approximately 12, say the same thing – that it was not abuse?" Irwin answered, "They are all wrong." When asked if TPWs needed to be retrained, Irwin responded, "It's not the training."

Operations Director and Acting Superintendent of YDC Kim Toohey testified, "I saw [the Grievant] hit an item out of [the client's] hand." The video is not clear enough so that a reasonable person could conclude this

to be fact. What makes more sense is that the Grievant was sternly directing the client to put the food back in the refrigerator, and the client pulled the item toward her chest to try and keep it; this is one of the client's documented behaviors.

Toohey further testified she saw in the video the Grievant kick at the client's feet. But the client's feet are not visible in the video. The Grievant was making sure the client did not have any other food. There were no gloves available, so while the Grievant did use her foot, it was only to make sure the client did not take food back to her room and possibly choke on it during the night.

The client's IPP states that when the client steals, you should "intervene immediately and then as quickly as possible, attempt to re-integrate her back into a functional task or activity, as she will persevere on the situation." In the 2 minutes and 14 seconds of the video during which the Grievant is involved, she handled the situation with no aggression from the client.

In the *Drake* case (supra), Arbitrator Smith held, "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, which is the standard of Ohio Revised Code Section 2903.33(B)(2) held to be applicable in Article 24.01 cases for both the mental health and mental retardation/developmental disabilities departments (*Ohio Department of Mental Retardation and Developmental Disabilities and Ohio Civil Service Employees Association* (Juliette Dunning, Grievant), Case No. G87-0001. D. Pincus, Arbitrator, October 31, 1987). The Administrative Code definition for the Department of Mental Health has been revised since the *Dunning* decision, but it must still be read with ORC 2903.33(B)(2), which requires intent or, at least, indifference....Management must prove clearly and convincingly that the Grievant acted (or failed to act) recklessly or knowingly."

DODD policy defines abuse as:

The ill treatment, violation, revilement, malignant, exploitation, and/or disregard of an individual, whether purposeful or due to carelessness, inattentiveness, or omission of the perpetrator.

However, ORC 2903.33(B) defines abuse as:

...knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with

the person or by the inappropriate use of a physical or chemical restraint, medication, or isolation of the person.

ORC 2903.33(A)(3) states this definition of abuse applies to:

Any institution or facility operated or provided by the department of mental health and addiction services or by the department of developmental disabilities pursuant to sections 5119.14 and 5123.03 of the Revised Code.

DODD's definition of abuse is inconsistent with the definition of abuse in the Ohio Revised Code. DODD charged the Grievant with abuse, even though her actions did not fit the standard dictated by the Ohio Revised Code. The Grievant did not cause any physical harm to the client. This is indisputable.

Further, DODD policy states:

...it is the responsibility of the Appointing Authority to ensure that a fair and consistent investigation is conducted and that all employees are afforded due process prior to the recommendation or imposition of discipline....

This did not happen with the Grievant. The State considered her guilty before the investigation started. DODD used the wrong standard for abuse. Moreover, the Grievant was never asked if she had anything to add.

DODD policy also states:

In all cases, mitigating and aggravating circumstances along with the relationship of multiple offenses must be considered.

The Grievant was never asked if there was any mitigation. Moreover, DODD did not take into consideration the client's behaviors. Nor did DODD take into consideration that the client's IPP calls for immediate intervention.

DODD policy further states:

Each instance of a violation turns on its own facts and distinguishing variables such as prior disciplinary history, length of time since the last discipline, and mitigating or aggravating circumstances....In instances where there is a choice or a range of penalties, issues of mitigation or aggravation shall determine the penalty.

The mitigation not considered by the State is the Grievant's explanation that she was simply doing an intervention with the client by pointing at the food in the client's hand, and redirecting the client to return the food.

Program Director Irwin testified the Grievant did not follow the client's IPP. If so, the Grievant should have been charged not with abuse, but with a violation of Rule E-6 – "Neglect of a Client – Failing to follow a policy, procedure, or program implemented specifically to ensure the

safety and well-being of individuals.” DODD did not charge the Grievant with violation of Rule E-6 because the penalty for a first offense of that rule is only a written reprimand.

DODD’s investigation of this matter took place one month and 17 days after the incident took place. The client has behavior issues almost every day. DODD expected the Grievant to recall interaction with a client – something she experiences every day. DODD did not show the Grievant the video before asking her questions. They did this because they were concerned she had valid reasons for doing what she did. The Grievant did not lie during the investigation. She recalled as much as she could.

The video is not clear and convincing. The Grievant could not have seen everything DODD alleges she saw, especially given the client’s documented behaviors in progress notes. One day before the incident, the client became aggressive and tried to hit another client. By the standard testified to by DODD witnesses, the Grievant should have let the client assault her before she redirected her. The Grievant could not have handled the situation any differently than she did.

In the Grievant’s most recent evaluation, she was rated “above” in “Dealing with Demanding Situation,” “Directing/Coordinating Behavior of

Clients,” and “Quality.” Her supervisor wrote in the evaluation that “[The Grievant] has made a nice transition to 2nd shift over the past year. She works well with the consumers....She continually works to build rapport and positive relationships even with the most demanding consumers by remaining consistent with implementing behavior plans and programs.”

In addition to abuse, the Grievant was charged with Failure to Report. Violation of this rule calls for a 5-day suspension to removal. What is the standard by which an employee receives a 5-day suspension for failing to report? The Grievant is an 18-year employee with no active discipline and outstanding evaluations. One has to wonder why the State wants the Arbitrator to uphold a removal on a rule that calls for a 5-day suspension up to removal on a first offense for an employee with an exemplary record such as the Grievant’s.

The State went straight to removal based on the perceived egregiousness of the video. Admittedly, the video is disturbing – based on the actions of the Grievant’s co-worker. DODD should have closely examined the Grievant’s actions documented in the video. DODD should have conducted an investigation in which all required questions were

asked. DODD should have examined all the evidence, including the client's documented history of aggressiveness.

If DODD perceived abuse on the Grievant's part, DODD had the responsibility to know the legal definition of abuse as dictated by the State of Ohio. The State has the burden of proving clearly and convincingly that the Grievant abused the client and/or failed to report abuse. There was no physical harm to the client. There is no evidence the Grievant violated any work rule.

The Union asks the Arbitrator to sustain the grievance, and order the removal of discipline from the Grievant's record, reinstatement of the Grievant to her position as TPW at YDC, all lost wages, all leave balances that would have accrued, the ability to buy back any leave balances the Grievant cashed out after her termination, seniority to the date of removal, payment for all documented medical, dental, and vision expenses the Grievant and her family have incurred since her removal until she is covered by insurance, the shift and assignment and good days the Grievant held when she was terminated, and payment of all lost retirement contributions. The Union also asks the Arbitrator to retain jurisdiction for 60 days.

OPINION

DODD has the burden of proving it had just cause to terminate the Grievant's employment. Just cause in this context consists of proving: A) the Grievant did what she is accused of doing; and B) termination is appropriate under the circumstances.

A. The Charges Against the Grievant

The Grievant was charged with two violations: 1) abuse of a client; and 2) failure to report a co-worker's abuse of a client.

1. Abuse

DODD Standards of Conduct policy regarding abuse of clients provides in pertinent part:

I. Purpose

To ensure that employees of the Ohio Department of Developmental Disabilities (DODD) are aware of the expectations of the Department and the consequences of inappropriate behavior, that discipline is imposed in a fair and consistent manner, and when appropriate, that employees are afforded the opportunity to correct inappropriate behavior or performance.

...

III. Definitions Related to Abuse

Abuse: The ill treatment, violation, revilement, malignant, exploitation, and/or disregard of an individual, whether purposeful or due to carelessness, inattentiveness, or omission of the perpetrator.

Physical Abuse: Any physical motion or action (e.g., hitting, slapping, punching, kicking, or pinching) by which potential or actual bodily harm or trauma may occur. The use of physical force that can be reasonably expected to result or potentially result in physical harm or serious harm, including psychological harm or trauma and sexual abuse. Such force includes, but is not limited to, hitting, slapping, pushing, or throwing objects at an individual with developmental disabilities.

Psychological Abuse: Includes, but is not limited to, humiliation, harassment, and threats of punishment or deprivation, sexual coercion, or intimidation.

Verbal Abuse: Any use of oral, written, or gestured language. This includes pejorative and derogatory terms to describe persons with disabilities. Using spoken or written words or gestures to threaten, coerce, intimidate, harass, or humiliate an individual with developmental disabilities.

...

The Union contends the definition of abuse that should be applied to the Grievant's conduct is found in ORC 2903.33(B) which provides:

"Abuse" means knowingly causing physical harm or recklessly causing serious harm to a person by physical contact with the

person or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the person.

ORC 2903.33 is the criminal definition of abuse.⁵ Ordinarily, a criminal standard would not be used as the standard for a labor arbitration. In 1987, however, Arbitrator Pincus held this is the standard to be used for these Parties. The collective bargaining agreements between the Parties in the years since 1987 have not negotiated a change to Arbitrator Pincus' decision.

So the question for the Arbitrator is whether the Grievant's conduct falls within the ORC 2903.33 definition of abuse. In the opinion of the Arbitrator, the Grievant's worst behavior is found on the video at 21:35:41-42, where the video shows the Grievant slapping the client's hand. It is possible the Grievant was only knocking food items out of the client's hand, rather than directly slapping the client's hand. Even if that were the case, however, the video shows the Grievant doing so in a very aggressive manner. Such slapping or "knocking" does not fall within the ORC 2903.33 definition of physical abuse, as set out above, however,

⁵ See ORC 2903.34(C):

Whoever violates division (A)(1) of this section [no employee of a care facility shall commit abuse against a resident] is guilty of patient abuse, a felony of the fourth degree....

because it did not “knowingly caus[e] physical harm or recklessly caus[e] serious harm to [the client] by physical contact with the [client] or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the [client].” Rather, the Grievant’s act can be considered a violation of DODD Rule E-3.⁶

The Arbitrator finds Grievant’s other actions toward the client, as seen on the video, also did not constitute abuse. While DODD witnesses characterize the Grievant’s tapping her thigh, pointing, and waving her arms as abusive, the Arbitrator finds these movements were not made in a sufficiently aggressive manner as to constitute abuse. These movements seem, to the Arbitrator, to not be best practices as expected by DODD with regard to employees’ conduct toward clients. Rather than being abusive, this conduct by the Grievant can also be considered a violation of DODD Rule E-3.

⁶ Rule E-3 addresses:

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.

The Standard Guidelines for Progressive Discipline provide a 2-Day Working Suspension/Fine/Suspension to Removal for violation of Rule E-3.

It is more difficult to characterize the Grievant's inactivity when the client pulled down the client's pants, and the Grievant using her foot to determine if there were food items in the client's pants on the floor.⁷ This act and non-act can be characterized as questionable judgment calls by the Grievant. As such, they fall within the purview of DODD Rule E-5.⁸

2. Failure to Report

The video shows the Grievant's co-worker hit the client in the client's side, kicked the client, and grabbed the client by the back of the client's neck. The Grievant is charged with failing to report these acts of abuse. The Union contends the Grievant did not see these physical acts by the co-worker.

The Arbitrator finds it difficult, if not impossible, to say with a degree of significant certainty that the Grievant definitely saw her co-

⁷ The Union is correct that the video does not show the Grievant's feet. Nevertheless, it is clear from the Grievant's legs in the video that the Grievant used her feet to search the client's pants.

⁸ Rule E-5 addresses:

Engaging in/or making poor decisions or using poor judgment in a situation that could jeopardize the safety or well being of an individual entrusted to the custody of the Department or State.

The Standard Guidelines for Progressive Discipline provide for a Written Reprimand for violation of Rule E-5.

worker's acts of physical aggression toward the client. Accordingly, the Arbitrator finds the Grievant did not fail to report.

B. Whether Termination is Appropriate under the Circumstances

As set out above, the Arbitrator finds the Grievant violated Rule E-3 and Rule E-5, Neglect of a Client, rather than Rule A-1, Abuse of a Client.

The Grievant's worst act occurred when she slapped the client's hand while the client was holding food she had taken from the refrigerator. The Arbitrator finds this momentary lapse in judgment by the Grievant to be serious, but not fatal to her employment. From the record, the Grievant appears quite capable of better judgment in the future.

As the Parties know, progressive discipline is a hallmark of just cause. That does not mean there are no justifiable terminations for first offenses. But it does mean that progressive discipline is intended to be corrective, not punitive.

From the video, it is apparent that the Grievant's co-worker engaged in serious, multiple acts of abuse toward the client – hitting, kicking, and grabbing. In contrast, the Grievant's only act of gross misconduct was slapping the client's hand once, at the beginning of the

kitchen incident when the Grievant first discovered the client had taken food from the refrigerator. After that slap, the Grievant conducted herself in a more measured manner, though she did not consistently use best practices.

Based on the entire record, as well as the Parties' contentions, the Arbitrator finds the Grievant's single act of gross misconduct and multiple acts of lesser misconduct merit a serious suspension, but not termination.

AWARD

For the reasons stated above, the State did not have just cause to terminate the Grievant's employment, but did have just cause to discipline the Grievant.

The Grievant is to be reinstated to her former position and made whole with full back pay, seniority, and benefits, less 30 working days pay, seniority, and benefits. Her discipline record will reflect a 30-day suspension for a first offense of Rules E-3 and E-5.

The Arbitrator retains jurisdiction through July 31, 2015 to resolve any dispute in the implementation of this Award.

May 31, 2015

Susan Grody Ruben
Arbitrator