In the Matter of the
Arbitration between

FRATERNAL ORDER OF POLICE OHIO LABOR COUNCIL, INC., UNIT 2

and

THE STATE OF OHIO (DEPARTMENT OF MENTAL HEALTH)

Grievance #DMH-2017-04323-02

Grievant: Brian Michaels

Arbitrator: Tobie Braverman

OPINION AND AWARD

APPEARANCES:

For the Employer:

Edward A. Flynn, Labor Relations Advocate
Victor Danridge, Labor Relations Advocate
Josph Dina - Labor Relations Officer
Randy Yoder, Police Chief - Heartland
James H. Wuliger, Police Chief - Northcoast
Kenneth Johns - Training Officer
Dan Dawkins - Observer

For the Union:

Douglas J. Behringer, General Counsel
Brian Michaels, Grievant
Scott Cooper, FOP Representative
Renee Engelbach, Paralegal

The State of Ohio Division of Mental Health (hereinafter referred to as "Employer") and Fraternal Order of Police Ohio Labor Council, Inc., Unit 2 (hereinafter referred to as "Union") have submitted the grievance of Brian Michaels (hereinafter referred to as "Grievant") to the Arbitrator for decision. Hearing was held at Columbus, Ohio on November 29, 2018. The parties submitted post hearing briefs which were received by the Arbitrator on December 21, 2018. The parties stipulated that the grievance is properly before the Arbitrator for decision, and further stipulated that the issue for decision, is as follows:

Was the Grievant issued a five day working suspension for just cause, and if not, what is the appropriate remedy?

FACTS

The Grievant has been employed by the Employer as a police officer since June, 2014. Prior to the incident which resulted in the discipline in this case, the Grievant did not have any live disciplinary actions. On the night of January 12, 2017 he was employed at Heartland Behavioral Healthcare in Massillon, Ohio. That facility is an in-patient mental health facility which houses and treats mental health patients. He was working the overnight shift along with a second officer, Dennis Mathieu, who is now retired. Their duties included patrolling the facility and its grounds as well as being available to staff and patients as needed for protection and safety. While there are variations in the accounts by a number of witnesses to the incident which occurred at approximately 1:50 a.m., there are a great many details which are consistent and from which a fairly clear picture of the events can be gleaned.

At approximately 1:45 a.m. that night, there was a call for the H-Team in Unit B2. The H-Team is called for assistance when there is a problem with a patient which has the potential to become violent. A "Code Violet", according to the Employer's Police Policy and Procedure Manual, is called when staff "have an emergency that exists or a violation of law has or is highly

probable of occurring." In both situations, the officers are to respond and provide assistance as required. The policy provides that if the officers participate in the incident either "verbally or physically (manual hold or seclusion per CIT Principles)" they are required to complete a report detailing their involvement. The physician or charge nurse present is the individual in charge of the situation during an H-Team or Code Violet event.

On this occasion, the H-Team was called to the Unit B2 day hall concerning a patient who was agitated and was refusing to take medication. The Grievant and Officer Mathieu responded, but removed themselves from the day hall to the corridor when the presence of police officers seemed to further agitate the patient. There were four other staff members also present in the corridor. The Grievant continued to observe the situation in the day hall from his location in the corridor in case he was needed.

Shortly thereafter, Patient U came into the hallway. By all accounts, including his own statement, he was angry and in pain. Patient U had several days previously broken his hand when he punched a fellow patient. He had requested additional pain medication earlier in the day, and no doctor had come to examine him and prescribe the medication as promised. While there is some variation in the accounts of what he said upon emerging from his room, it is clear that he demanded medication or to go to the hospital, and commented that one of the individuals standing around in the hall should take him. There is a dispute between the accounts as to whether Patient U or the Grievant used profanity, but according to the Grievant he advised Patient U that he would have to wait. At that juncture, Patient U threw a wet washcloth which contained ice remnants at the Grievant. The Grievant testified that it hit him in the chest. Other witness statements varied, stating that they were unsure if it hit him, that it hit him in the face, or that it hit the wall next to the Grievant. At that point someone called a Code Violet indicating the presence of an emergent situation. It was unclear who called the Code Violet.

All witnesses, including Patient U in his initial statement, agreed that Patient U then advanced on the Grievant. Some described his stance as "charging", while others described it as

"lunging" and "squared as if ready to fight". While he later stated that his fists were not clenched, in an interview with the Ohio State Highway Patrol on January 12, 2017, Patient U stated that "at least his right hand was balled up". The Grievant testified that Patient U's hands were raised in a fighting stance and he believed at the time that Patient U was about to physically attack him. He therefore advanced on Patient U, placed him in a bear hug, and used Patient U's backwards momentum to take him to the floor. Once he was on the floor, other staff became involved. Patient U was then taken to a seclusion room, and shortly thereafter was transported to the hospital. Before leaving for the hospital, all agree that he remarked that he had been successful in his achieving his goal of going to the hospital. Patient U suffered a broken clavicle as a result of the fall.

Immediately after the incident, the Grievant collected statements from the staff witnesses.[1] He then sent Police Chief, Randy Yoder a text message at approximately 3:30 a.m., advising him concerning the incident. Upon his arrival at work approximately 7:30 a.m., Yoder met with the Grievant and advised him that the matter would be investigated. After a meeting with relevant staff, it was determined that the Grievant would be placed on administrative leave. After an investigation by the State Highway Patrol, it was determined that there would be no criminal charges brought against the Grievant. After completion of an investigation for purposes of disciplinary action by Northcoast Police Chief James H. Wuliger, the Employer determined that the Grievant's actions were in violation of policies regarding the use of force and the use of therapeutic interventions. It ultimately charged the Grievant with a violation of Rule 4.4 of the Employer's work rules. The Employer determined that a five day working suspension was the appropriate discipline after the conclusion of the mandated pre-disciplinary procedures.

The testimony at hearing established that the Employer has implemented procedures referred

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[1] Police Chief Randy Yoder testified that the Grievant's actions in commencing that investigation were in direct violation of a Policy and Procedure in place which prohibits an officer involved in an incident from investigating the incident. The Grievant, however, was not charged with any violation of that Policy.

to as Crisis Intervention Training ("CIT") which are to be used in dealing with uncooperative, aggressive or violent patients. That training includes training and procedures for first attempting to verbally de-escalate the situation through the use of open ended questions to engage the patient. Hands on interaction is to be avoided if at all possible. If verbal interaction is unsuccessful, CIT provides that staff may then intervene to control a patient physically if necessary by using a group of staff to converge on the patient and gain physical control by using techniques which are considered therapeutic and which are intended to avoid inflicting harm. The Grievant has received training in these techniques, and was re-trained after this incident.

The instant grievance was timely filed and proceeded through the grievance procedure without resolution to arbitration.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 19 -DISCIPLINARY PROCEDURE

19.01 Standard
No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause. ...

19.05 Progressive Discipline
The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:

1. One or more written reprimand(s);
2. One or more fines in an amount of one (1) to five (5) days pay for any form of discipline ...
3. Suspension;
4. Leave reduction of one or more day(s);
5. Working suspension ...

However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.
The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant. ...

Ohio Department of Mental Health Policy HR-22
H. Progressive Discipline
The purpose of "MHAS Work Rules Infractions" (Attachment A) is to provide consistency regarding the application and progression of disciplinary action.

However, this does not preclude the employer's use of discretion when considering the facts and circumstances of each incident. The following are steps in progressive discipline:

1. Written Reprimand
2. One Day Suspension/Fine
3. Three Day Suspension/Fine
4. Five Day Suspension/Fine
5. Demotion or Reduction in pay step
6. Removal

Attachment A ... LEVEL FOUR (Discretionary Infractions) ...
Rule 4.4 **Non-Therapeutic Intervention**
Non-therapeutic intervention inconsistent with department or hospital training.

POSITIONS OF THE PARTIES

Employer Position: The Employer contends that it has demonstrated that it had just cause to discipline the Grievant with a five day working suspension for his use of force on a patient which resulted in the patient suffering a fractured clavicle on January 12, 2017. The Grievant was trained in the use of approved therapeutic interventions, but made no effort to use those interventions. The techniques used by the Grievant were not approved, and he over reacted in the circumstances presented. Applicable Ohio law provides that police officers in mental health facilities are to serve to protect patients, staff and property, but are to do so with patient care and well being in mind. They are not to manage patient behavior except when there is an evident violation of law. There was no such violation here, and the Grievant's actions were uncalled for in the circumstances. Further, the Grievant's account of the events should not be credited. It is contradicted by the statements of Patient U and other witnesses present. Finally, while he was not charged for improperly initiating his own investigation and being out of uniform, these activities clearly contributed in exacerbating the situation. The five day working suspension was appropriate and the grievance should be denied in its entirety.

Union Position: The Union argues that the Employer has not demonstrated just cause for the discipline in this case. While the Employer has argued that the Grievant was out of uniform and should not have collected statements regarding the incident on January 12, 2017, he was not charged with either of those alleged violations, and they should therefore not be considered here. The Grievant was the only witness at hearing who was actually present on January 12. He testified credibly that Patient U, who he knew to have a recent violent history of assault, threw a wet wash cloth and then advanced on him. He reacted by placing Patient U in a bear hug and using Patient U's off balance momentum while struggling in the bear hug to take him to the floor. This is an OPOTA approved technique, and it was called for in the circumstances to protect both the Grievant and staff. While the Employer would have preferred the use of CIT techniques, none of the other staff in the area moved to initiate those techniques, perhaps due to their fear of Patient U. Further, the Grievant was never advised by the Employer that this maneuver was prohibited. The Grievant exercised judgement as an officer to take control of a volatile situation for the safety of all. The discipline was not for just cause and should be expunged.

DISCUSSION AND ANALYSIS

This being a case of disciplinary action, it is well established that the burden of proof to demonstrate just cause for the discipline is on the Employer by a preponderance of the evidence. In order to meet that burden of proof it must be demonstrated initially that the Grievant committed the offense with which he is charged. Once that element is proven, the Employer must demonstrate that the commission of that offense warranted the penalty imposed in the all of the circumstances prevailing at the time of the incident.

In this case there can be little doubt that the Grievant did in fact utilize a non-therapeutic intervention to take control of Patient U who, by all accounts, was angry and aggressive. The

evidence at hearing demonstrated that Patient U threw a wet wash cloth with ice in it at the Grievant and advanced toward him. By most written witness accounts, and the testimony of the Grievant who was the only individual present at the time who testified at hearing, Patient U was angry and appeared to be ready to attack. It is also clear that the Grievant did not ask for assistance from the staff present, but instead reacted by advancing toward Patient U, placing him in a bear hug, and taking him to the floor. It is clear based on these facts that the Grievant did in fact utilize a non-therapeutic intervention, and therefore committed the offense with which he is charged.

That conclusion does not, however, end the inquiry in this case. While the Employer's rules give notice to employees that it is a violation of Rule 4.4 to use non-therapeutic interventions, those rules do not clearly state that a police officer may not utilize non-therapeutic interventions in any situation. In fact, OAC §5122-7-04(E)(2)(j) provides that an officer in a mental health facility may "as an emergency intervention at the request of a clinical supervisor, assist in the control of a patient's behavior when such behavior presents a danger of physical harm to himself/herself and/or others". This provision clearly anticipates that there may be circumstances in which an officer in a mental health facility will be required to act to control a patient who presents a danger. This conclusion is also supported by the fact that all police officers in mental health facilities are required to be OPOTA trained and certified. The result is that while the rules and policies clearly express a strong preference for the use of CIT tactics to diffuse or control disruptive or aggressive behavior, and further provide that police intervention should be avoided except in cases of emergency or imminent danger, the use of non-therapeutic interventions is not strictly and entirely prohibited.

In this case, the Grievant was confronted with a patient who was angry and unruly. The concern for safety was exacerbated by the fact that the patient was known to be violent, having broken his own hand punching another patient only a few days previously. When Patient U threw the wash cloth and began to approach, the Grievant was required to make an

instantaneous decision concerning how to react. While he could have called out to fellow staff members for assistance, his judgment, made in the heat of the moment, was that there was an imminent risk of harm and he was required to act to protect himself and other staff members who were present.[2] His conclusion is supported by the fact that someone called a Code Violet, indicating the presence of an emergency. Since, however, no clinical supervisor requested that intervention, and there exists a clear and strong preference for CIT approaches before resort to more extreme use of force, there appears to have been a violation of the policies and OAC language quoted above.

The violation, however, is mitigated by the known violent nature of the patient. Under the circumstances prevailing at the time, the Grievant's actions, while not employing approved CIT interventions, were not entirely unjustified. Further, it appears that the Employer determined that the five day suspension was appropriate based upon factors which the Arbitrator cannot accept as supporting the degree of discipline imposed.

First, the Employer argues that the Grievant's use of a non-uniform sweat shirt over his uniform on January 12 caused the situation to escalate. This contention is based largely on Patient U's statement that he would not have acted as he did had he known that the Grievant was a police officer. It must be stressed, however, that Patient U did not testify at hearing, making it impossible to test the credibility of his statements. Further, the Employer's apparent assumption that Patient U would have been polite and calm had he realized that the Grievant was an officer is refuted by the fact that Patient U was aware, at a minimum, that there was at least one officer present. Further, Patient U came into the hallway admittedly angry, in pain, and making demands. This was not an individual who was going to calmly retreat due to the mere presence of a police officer. The conclusion that Patient U made that statement well after

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[2] It is a bit concerning that none of the clinical staff present saw fit to intervene with therapeutic interventions immediately when Patient U first appeared on the scene demanding pain medication in the middle of the night. It does not appear that this aspect of the event was ever considered or investigated.

the fact for fear of being charged with an assault on a police officer is every bit as legitimate as the conclusion reached by the Employer. Further, it is simply not possible to conclude that a patient with a recent violent past would have had sufficient self control to alter his conduct simply because the Grievant was more clearly identified as an officer. There was insufficient evidence to demonstrate the Grievant's non-uniform apparel had any role in Patient U's conduct.

The second factor on which the Employer relies to justify the level of discipline is the fact that the Grievant began an investigation of the incident by collecting statements from witnesses. Again, the Grievant was not charged with any disciplinary violation for initiating an investigation, but the Employer urges that this conduct, which was a violation of the policy regarding investigations, tainted the investigation to such an extent that those statements cannot be credited. The problem with this contention is twofold. First, none of the individuals giving statements testified at hearing concerning either the content of their statements or the circumstances under which they were prepared. Secondly, although there was no evidence that the statements were influenced in any way by the Grievant, the Employer has assumed that they were, and has therefore discounted them. Without any evidence of undue influence or taint however, it simply cannot be assumed that the statements are not legitimate and truthful. The Employer's conclusion is not supported by sufficient evidence.

The Employer finally relies heavily on the fact that Patient U was injured to support the degree of discipline imposed on the Grievant. It was also suggested at hearing, however, that Patient U suffered from brittle bone disease, a fact about which the Grievant was entirely unaware. This fact indicates that Patient U is more easily injured than most people, and does not support the conclusion that the Grievant applied extreme force. Further, if clinical staff were aware of Patient U's condition, it was incumbent on them to intervene immediately to calm him. They made no apparent effort to do so, instead remaining focused on other matters and relying on the police officers present to control the situation.

Finally, it must be stressed that while CIT is always the first approach with an aggressive patient, there is nothing in writing which states that all other approaches to quell a disturbance are banned for police officers. Ultimately, the issue is whether the Grievant's actions here were appropriate or too severe under all of the prevailing circumstances at the time. Based upon all of the evidence in this case, the Arbitrator must conclude that the Grievant and other staff present did not make a sufficient effort to use CIT in the first instance, but his actions were not entirely unjustified.

It must be finally noted that the Employer has committed to the principles of progressive discipline, both in the Collective Bargaining Agreement and its policy manual. The purpose of progressive discipline is to acknowledge that an employee has made a mistake, while allowing for an opportunity to correct the conduct in the future. Progressive discipline should be issued in such a way that an employee is made aware of his offense so that he may choose to improve his conduct in the future in order to avoid more severe discipline. There is no indication in this case that greater punishment beyond a written warning and the re-training in CIT which has already been completed was necessary to correct the Grievant's judgment on the use of force should he be confronted with a similar situation in the future.

The Grievant is a four year employee with no prior discipline. His actions were not entirely unjustified in the circumstances presented, and the responsibility of other staff present was not taken into account. As a result, while disciplinary action was warranted in this case, the discipline was too severe. Under all of the circumstances presented in this case, the discipline should be reduced to a written warning.

AWARD

The grievance is sustained in part. The discipline will be reduced to a written warning.

Dated: January 22, 2019

Tobie Braverman, Arbitrator