

**CONTRACTUAL
LABOR ARBITRATION PROCEEDINGS**

IN THE MATTER OF)	
ARBITRATION BETWEEN)	
)	
)	
OHIO DEPARTMENT OF)	
DEVELOPMENTAL DISABILITIES)	
WARRENSVILLE DEVELOPMENTAL CENTER)	
)	
)	
-AND-)	DECISION IN
)	
)	
OHIO CIVIL SERVICE EMPLOYEES)	REMOVAL GRIEVANCE
ASSOCIATION, AFSCME, LOCAL 11)	DMR-2018-02150-04
)	<u>(JOHN CRAWFORD)</u>

<u>GRIEVANCE NO.:</u>	DMR-2018-02150-04; TPW John Crawford
<u>GRIEVANCE:</u>	The Grievance protests the Removal of Therapeutic Program Worker, John Crawford, as lacking Just Cause.
<u>AWARD:</u>	The Grievance is Sustained in part; and, Denied in part.
<u>HEARING:</u>	March 20, 2019 Warrensville Developmental Center Highland Hills, Ohio
<u>ARBITRATOR:</u>	David W. Stanton

APPEARANCES

FOR THE EMPLOYER

Venita S. White, Labor Relations Officer III
Andy Bower, Labor Relations Administrator,
Division of Human Resources
Victor Dandridge, Labor Relations Administrator
Nicole Baxter, Investigative Service Manager
Chris Vanscoy, Residential Care Supervisor
Deontra Owens, HR Coordinator

FOR THE UNION

Buffy Andrews, Operations Director
Doug Sollitto, Staff Representative
Deborah Weaver, Chapter President
John Crawford, Grievant

ADMINISTRATION

By email correspondence dated February 14, 2019, from the State of Ohio, Department of Administrative Services, Office of Collective Bargaining, the Undersigned was notified of his mutual selection from the Parties permanent, rotating panel to serve as impartial Arbitrator to hear and decide Grievance No. DMR-2018-02150-04, concerning the Removal of Therapeutic Program Worker, John Crawford, then in dispute between these Parties. On March 20, 2019, at the Warrensville Developmental Center, 4325 South Green Road, Highland Hills, Ohio, an Arbitration Hearing was conducted wherein each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence supportive of positions advanced; and, where, the Grievant appeared and testified. The evidentiary record of this Proceeding was subsequently closed upon the Arbitrator's receipt of each Party's Post-Hearing Brief filed in accordance with the arrangements agreed to at the conclusion of the presentation of evidence and subsequently modified per agreement between the Parties. Accordingly, this matter is now ready for final disposition herein.

GRIEVANCE AND QUESTION TO BE RESOLVED

The following Grievance, Joint Exhibit 2, challenges the Removal of the Grievant, John Crawford as lacking "Just Cause" as required in Article 24 of the Collective Bargaining Agreement; and, is set forth as follows:

Grievance: DMR-2018-02150-04
Grievant: John Crawford

Grievant's Agency: DMR

Grievant's Union: Ohio Civil Service Employee Association (OCSEA)

Worksite: WADC

Grievant's Classification Title:

Therapeutic Program Worker

Date of Hire: 8/2/2010

Years of Service: 7

Date Grievance Arose: 6/22/2018

Grievance Type: Discipline

Grievance Sub-type: Termination

Date of Termination: 6/21/2018

Contract Articles: 24

Resolution Requested: The Union, OCSEA, is requesting that our member, John Crawford, be made whole.

The Employer frames the issues for disposition by the Arbitrator as:

- 1) Did the Grievant, John Crawford, abuse an individual of the Warrensville Developmental Center?
- 2) If the Grievant did not abuse an individual of WDC, was the Grievant removed for Just Cause?
- 3) If the Grievant was not removed for Just Cause, what shall the remedy be?

The Union frames the issue for disposition by the Arbitrator as follows:

Was the Grievant, Therapeutic Program Worker, John Crawford, removed from his position at the Warrensville Developmental Center without Just Cause; and, if so, what shall be the appropriate remedy?

**CITED PROVISIONS OF THE
COLLECTIVE BARGAINING AGREEMENT**

The following provisions of the Collective Bargaining Agreement, Joint Exhibit-1, were cited and/or are deemed relevant herein as follows:

**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 work force, which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provisions 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.

**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. Abuse cases which are processed through the Arbitration Step of Article 25 shall be heard by an Arbitrator selected from the separate panel of abuse case Arbitrators established pursuant to Section 25.05. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

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 written reprimand(s);
- B. 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.

If a working suspension is Grieved, and the Grievance is denied, or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balance in lieu of a fine leveled against him/her.

C. 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) suspension. No suspension greater than five (5) days shall be issued by the Employer;

D. termination.

ARTICLE 25 GRIEVANCE PROCEDURE

25.03 Arbitration Procedures

The Parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the Arbitrator.

The Union and/or Employer may make requests for specific documents, books, papers, or witnesses reasonably available from the other Party and relevant to the Grievance under consideration. Such requests will not be unreasonably denied.

The Employer or Union shall have the right to request the Arbitrator to require the presence of witnesses and/or documents. Such requests shall be made no later than three (3) work days prior to the start of the Arbitration Hearing, except under unusual circumstances where the Union or the Employer has been unaware of the need for subpoena of such witnesses or documents, in which case the request shall be made as soon as practicable. Each Party shall bear the expense of its own witnesses who are not Employees of the Employer.

Questions of Arbitrability shall be decided by the Arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the Arbitrator shall then proceed to determine the merits of the dispute. Upon the Union's request, a Grievance that is automatically closed shall be reopened to allow arbitrability questions to be decided by the Arbitrator. The reopening of the Grievance does not constitute a waiver of a claim of a procedural defect.

The expenses and fees of the Arbitrator shall be equally be shared by the Parties.

The decision and award of the Arbitrator shall be final and binding on the Parties. The Arbitrator shall render his/her decision in writing as soon as possible, but no later than 45 days after

1. The conclusion of the hearing; or
2. The date written closings are due to the Arbitrator, unless the Parties' agree otherwise.

Only disputes involving the interpretation, application, or alleged violation of a provision of the Agreement shall be subject to Arbitration. The Arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either Party a limitation or obligation not specifically required by the expressed language of this Agreement.

If either Party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other Party desires a copy, the cost shall be shared.

FACTUAL BACKGROUND

The operative facts which gave rise to the filing of this Grievance, challenging the Removal of Therapeutic Program Worker, John Crawford, as lacking “Just Cause”, are, except where otherwise indicated, essentially undisputed. The evidence of record demonstrates an Investigation ensued concerning the allegations of abuse of Resident "BC" (the names of the Residents at this Facility will be referred to based on the initials of their first and last name, where available, to protect the confidentiality and privacy of these individuals, as well as, maintaining the confidentiality and privacy of the Facility). The Ohio Department of Developmental Disabilities, hereinafter referred to as the “Employer”, operates a ninety (90) Resident Facility at Warrensville Developmental Center in Highland Hills, Ohio for developmentally disabled individuals. These Residents are provided housing and extensive support in the areas of daily living, healthcare, social skills development and pre-vocational training. Resident BC has been at this Facility for a number of years and, according to the

testimony of record, Therapeutic Program Worker, John Crawford, hereinafter referred to as the “Grievant”, had an ongoing relationship/involvement with BC for approximately seven (7) years. The Employer is party to a Collective Bargaining Agreement, Joint Exhibit-1 with the Ohio Civil Service Employee's Association, Local 11, hereinafter referred to as the “Union”. Article 24, titled “Discipline”, affords the Employer the contractual authority to effectuate and impose disciplinary action upon an Employee for "Just Cause".

The evidence of record demonstrates the Grievant worked the night shift that began at approximately 10:00 P.M. on November 13 and carried through into the next day at approximately 6:30 A.M. November 14. The Employer has various video cameras strategically placed throughout this Facility for various reasons. The video depiction was provided and reviewed by the Parties during the course of the Arbitration proceedings and, subsequently provided to the Arbitrator for further review and consideration. The video depicts Resident BC exhibiting certain aggressive behavior which, as described, was consistent with his tendencies. Resident BC was described as an individual who suffers from Cerebral Palsy and other developmental disabilities including, according to the Nurses Notes and his Resident File “Book” containing his “Plan”, aggressive behavior at times; false statements made against other Residents and Staff; and, manipulation of Staff in order to obtain additional cigarettes which he has privileges to smoke. The Record demonstrates however, that he does not have the unfettered right to request these cigarettes at any time and only during First Shift is he provided additional cigarettes as the need arises.

According to the characterization on the Shift in question, Resident BC, who was apparently “up the entire Shift”, became agitated and aggressive, when, according to the Grievant who was assigned to his care during that Shift, he attempted to manipulate to receive

additional cigarettes. According to the Grievant, he explained to him these cigarettes were to be distributed on First Shift and he would not receive any during his Shift. The video depiction indicates the Resident, in an aggressive manner, chased the Grievant around the dining room area at the Facility; cursing (as described); throwing things at him; ripping and tearing “his Book” and creating havoc because of his inability to receive additional cigarettes as requested. The Grievant indicated additionally, at times, Resident BC would request from him macaroni salad, which would be provided. The evidence of record indicates, BC later apologized for his actions.

The evidence of record demonstrates at approximately 4:45 a.m., the Grievant had an additional encounter with Resident BC concerning cigarettes. The Grievant is depicted going into the Resident's Bedroom, where as he described, he assisted BC in locating his cigarettes. He is in that room approximately twelve (12) minutes. Obviously for privacy concerns, video cameras are not placed in the Resident's rooms, so what occurred therein is obviously subject to differing accounts. The Grievant contends this incident arose based on Resident BC's attempts to manipulate Staff to receive additional cigarettes when in fact he had 1 ½ packs cigarettes in his possession and he had left a cigarette outside during a time when he is depicted going outside to smoke that cigarette which he was permitted to do.

After being in the Resident's Bedroom for twelve (12) minutes, as depicted in the video, the Grievant is further observed exiting the Resident's Bedroom and his outer shirt, gray in color, was ripped down the front. The video depiction does not, in the opinion of the Arbitrator after numerous reviews, suggest the Grievant, in any way, was disheveled other than the torn shirt, or that he was in any way exhibiting signs of exertion, etc., that would be consistent with someone who had, as the Resident subsequently alleged, been involved in some physical incident. Another Resident “J_” (the Resident’s last name is not available or relevant) allegedly observed the

Grievant “restraining” BC as he walked past BC’s open door – such contact is denied by the Grievant.

The Shift concluded and on November 15, 2017, Occupational Therapist, Joe Piunno, met with Resident BC regarding three (3) falls he had sustained earlier in October 2017. It was during this assessment Resident BC reported to him he was “kicked three (3) times in the back of his left knee” and was “taken down” in his Bedroom. This prompted OT Piunno to contact Dan Singer, the Qualified Intellectual Disabilities Professional to report these allegations based on the bruising and swelling in BC's leg. This prompted the completion of an Unusual Incident Report (UIR) and ultimately Resident BC was taken to the Hospital for evaluation for possible DVT due to the observed swelling in his left leg. Following the completion of the UIR, BC's Guardian/Family was notified.

The evidence of record demonstrates photographs were taken concerning status of the Resident's leg and such depict discoloration on the affected area consistent with trauma and bruising. Nursing was notified which assessed him further. The Director of Nursing, Pam Lee, advised Dr. Gary Greenspan, BC had been placed in a hold and taken down to the ground for prior behavior issues, and such could have been a possible source of the bruising (*see*, page 125 of Joint Exhibit 3). According to the Grievant, following his exit from Resident BC's Bedroom, he reported back to the "common area" wherein TPW Cassandra Roney was standing. The Grievant alleges he mentioned to her what had occurred in Resident BC's Bedroom which she later indicated she could not recall such being stated to her by the Grievant.

Residential Care Supervisor (“RCS”) Chris Vanscoy, the Third Shift Supervisor, testified he was asked to complete a statement after the Facility became aware of the abuse allegations. He testified regarding two (2) phone calls he received from TPW Roney and the Grievant during

that Shift wherein the Grievant advised him BC was upset regarding cigarettes. Vanscoy testified the Grievant did not report there was any physical contact with BC or that he ripped the Grievant's shirt while he was in his Bedroom helping him locate his cigarettes. He also indicated TWP Roney did not indicate to him the Grievant had told her BC had ripped his shirt. The Grievant alleges BC, being angry at him for his refusal to provide him additional cigarettes, indicated he would "tell on him and get him in trouble and get him fired". Neither Roney nor Vanscoy could recall this statement being made. Vanscoy advised Roney to note in BC's "Book" and Shift Notes he was upset about the cigarettes and was throwing things about the common area. Vanscoy testified that if indeed the Grievant had reported this incident, his next course of action would be to remove the Grievant from Client contact and have Medical Staff evaluate Resident BC. Vanscoy did confirm Resident BC can be aggressive and has been physically abusive toward others and his "Plan" outlines ways to intervene.

Following the Grievant's time in Resident BC's Bedroom, he is depicted in the video exiting the Bedroom, shirt torn and proceeding down the Hallway to the area where the Staff Office is located. He places the torn, dark shirt on a counter and obtains a hooded jacket and puts that on. The Parties differ with respect to reporting requirements and whether the Grievant was required to report this incident since, as he and the Union assert, no one was physically harmed other than the torn shirt of the Grievant.

The record demonstrates that following this incident based on the medical evaluations provided and a review of the Nursing Notes, files, etc., the Employer initiated an Investigation wherein ISU Agents Baxter and Harris met with Resident BC, *et.al.*, to inquire about what he alleged and reported. According to the evidence of record, Resident BC advised he was kicked in the back of his leg during the middle of the night in his Bedroom and the Staff's name is

"John". Upon further investigation, they determined the individual reference by Resident BC was indeed the Grievant, John Crawford. Ms. Baxter also spoke with Resident "J_" who, as Baxter relayed, allegedly observed the Grievant having Resident BC in a "basket hold" while in his Bedroom that morning as he walked by. According to House Manager, Dan Singer, who writes Resident BC's Plans, BC did not exhibit any self-injuring behavior, but he had a history of making false allegations, dropping to the ground, or losing his balance. Such is depicted in Joint Exhibit-3. The evidence of record further demonstrates the afore-referenced Residents, who were questioned during the Employer's Investigation, neither was made available to the Union for questioning, or testified at the Arbitration Hearing. The Union's request to interview each Resident was denied by either the Family and/or Guardian. The Employer's Investigation began after these allegations of abuse were raised by resident BC; however, given the delay from the date of incident (10:00 P.M. – 6:30 A.M. Shift November 13-November 14) until such time the Resident was medically evaluated, no other Staff assigned to this Resident was interviewed.

Following the completion of the Employer's Investigation, it was ultimately concluded the Grievant violated Ohio Department of Developmental Disability, Standards of Conduct, Rule Violations and Penalties for Classified Employees, specifically:

Performance:

1. **Abuse of a Client - A-1** (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, or verbal as defined by Ohio Administrative Code 5123:2-17-02 addressing major unusual incidents and unusual incidents to ensure health, welfare and continuous quality improvements;
2. **Failure to Report - F-1** (Failing to report in any manner which results in potential or actual harm to an individual. Failing to report, lying about it, or covering up, abuse, neglect, or mistreatment.

The Pre-Disciplinary Hearing was concluded on Tuesday, June 5, 2018 wherein the Grievant was accompanied/represented by OCSEA Operations Director, Buffy Andrews. The Grievant was subsequently provided Notice of his Removal signed by Appointing Authority, Superintendent Patricia Nixon; and, Agency Head and Director, John L. Martin, and deemed effective, June 21, 2018. Such action prompted the filing of Grievance DMR-2018-02150-04 challenging the Removal of the Grievant and was processed through the negotiated Grievance Procedure without resolution culminating in Arbitration before the Undersigned. When the Parties' efforts to resolve this matter through the course thereof proved unsuccessful, the Removal Grievance of Therapeutic Program Worker, John Crawford was appealed to Arbitration hereunder.

CONTENTIONS OF THE PARTIES

EMPLOYER CONTENTIONS

The Employer contends the Grievant clearly violated the “Department of Developmental Disabilities Standards of Conduct, Rule Violations, and Penalties for Classified Employees”, specifically Rule A-1, titled “Abuse of a Client”; and, Rule F-1, titled “Failure to Report” based on the events that occurred during the 10:00 P.M. to 6:30 A.M. Shift commencing on November 13 and concluding on November 14, 2017, when, as alleged, the Grievant physically abused Resident BC while in his Bedroom for twelve (12) minutes off camera. It emphasizes that on November 15, 2017, Occupational Therapist, Joe Piunno, reported when he met with resident BC to evaluate three (3) falls he had earlier in October, BC told him he was kicked behind his left knee. The evidence of record demonstrates Piunno then contacted Dan Singer to report this concern and an Unusual Incident Report “UIR” was completed. This information was reported to Warrensville Developmental Center Investigative Services Unit and an Investigation was

initiated into these allegations wherein video footage gleaned from the cameras strategically placed on this Unit were reviewed. The Employer emphasizes that based on the interview of BC, he indicated he was kicked, pulled to the ground and stepped on by a staff named "John".

The video depiction clearly indicates the Grievant did indeed enter BC's room for approximately twelve (12) minutes and is seen exiting his room with his grey outer shirt ripped down the front. Despite the Grievant's assertions his shirt was ripped because BC tried to retrieve cigarettes from him, it is clear based on the statements from resident BC and another Resident "J_", the Grievant engaged in abuse of this Resident. Despite the Grievant's testimony and statements given during the Investigation, that he exited the room and told his coworker TWP Cassandra Roney what happened and inquired as to whether he should complete an UIR since his clothes were torn, the Investigation established the abuse as asserted by BC.

TPW Roney did contact Residential Care Supervisor, RCS Chris Vanscoy to inquire whether a report needed to be filed. The Employer asserts the Grievant failed to report any physical contact or intervention when notifying Supervisor Vanscoy of this incident. Nor did the Grievant mention or report BC alleged he was going to "get him fired" as the Grievant now asserts. The record emphasizes Roney did not report this allegation when she contacted Supervisor Vanscoy. Despite the Grievant's assertions BC attacked him and then apologized afterwards resulting in no need to report this incident or any possible injury, the video evidence demonstrates there was some altercation that occurred in BC's Bedroom since, as seen on the video, the Grievant exited his room with his shirt visibly torn. Inasmuch as some force occurred, the Grievant failed to report that anything happened. The Grievant's account of this incident is suspect and self-serving and the Grievant never had any need to enter BC's Bedroom.

Investigator Nicole Baxter explained the Steps she took to ensure a fair and thorough investigations and address the target behaviors of BC. She indicated Staff are trained to interact with Residents during such occurrences in accordance with the behavior support strategy, how it was implemented and how the Staff are trained to interact with individuals during such behavior. During her investigation, she learned the "John" referenced by the Resident(s) was in fact John Crawford and that he worked with BC on the evening of November 13 beginning at approximately 10:00 p.m. and carrying over into November 14, 2017.

The evidence of record demonstrates the Grievant failed to report BC allegedly attacked him while he was in his Bedroom helping him find his misplaced cigarettes. The video depiction shows the Grievant was in the Bedroom for an extended period of time -12 minutes - whereupon he exits and walks by his co-worker alleging he told her BC had ripped his shirt. However, she denied this ever occurring. The Grievant never reported to Supervision that something took place in BC's Bedroom to explain why his shirt is visibly ripped on the video. Indeed, the files and documents of record indicate BC has a history of making allegations, but no self-destructive behavior.

Residential Care Supervisor, Chris Vanscoy was the Supervisor on duty that Shift and provided details of phone calls he received from the Grievant and Ms. Roney regarding this incident. He testified that at no time did the Grievant, nor Ms. Roney, report any physical contact or physical intervention involving resident BC. He indicated the Grievant failed to report BC was alleging he would report that he kicked him or was going to get him fired or in trouble. He described the procedure he would follow if indeed these assertions were made by the Grievant and Ms. Roney.

The Employer emphasizes Ohio Administrative Code 5123: 2-17-02(C)(15)(a)(vii) wherein physical abuse is defined as the use of physical force that can reasonably be expected to result in physical harm or serious physical harm as those terms are defined in Section 29.01.01 of the Ohio Revised Code. The Ohio Administrative Code does not require that physical harm occurred to constitute a finding of abuse. It only requires that the use of force may result in physical or serious physical harm. Such force may include, but is not limited to hitting, slapping, pushing, etc. Indeed, the kicking of BC could result in physical harm and did in this matter. The Standards of Conduct, Rule Violations and Penalties for Classified Employees are consistent with the above referenced DODD with specific Ohio Administrative Code Sections.

Additionally, Article 24.01 of the CBA between the Parties indicates, "in cases involving termination, if the Arbitrator finds that there has been abuse of a patient, or another in the care of or custody of in the State of Ohio, the Arbitrator does not have authority to modify the termination of an employee committing such abuse". Clearly, in this matter, abuse has been established and the Arbitrator is contractually precluded from modifying the discipline as imposed. It submits the primary goal of the DODD is to ensure the safety, health and happiness of the Residents and the TPW's play the most important role in attaining this goal since they provide the care to these individuals 24/7. They are in constant contact with individuals who have many different behaviors and personalities and must conduct themselves truthfully, with integrity and character.

The Grievant was not truthful over the course of this Investigation and his acts were unacceptable, contrary to policy, individual programs planned and the training he received. The Employer simply cannot condone such behavior nor afford to have the Grievant in its employ. The guardians and family members of all individuals involved, especially those of Resident BC,

will not condone this type of behavior. The Grievant physically abused Resident BC and failed to report this incident as he is required and has been trained to do. In this regard, Removal was indeed appropriate, commensurate with the proven misconduct and in accordance with the Parties' CBA. The Employer has established "Just Cause" to effectuate the discipline as imposed and given the fact the Grievant did indeed engage in abuse of a Resident, the Arbitrator is precluded from modifying the discipline imposed.

For these reasons, the Employer requests the Grievance be denied.

UNION CONTENTIONS

The Union contends the Grievant, Therapeutic Program Worker, John Crawford, was improperly removed from his position at the Warrensville Developmental Center without Just Cause. It asserts the Employer failed to provide any evidence to support its decision for removal based on the allegations the Grievant abused resident "BC" and his alleged failure to report, since there was really nothing unusual in accordance with policy to report. The evidence of record demonstrates BC was being aggressive, throwing items at the Staff, including the Grievant, throughout the night in question. The Grievant's demeanor is depicted on the video gleaned from the cameras strategically placed throughout this section of the Facility. Indeed, according to the video taken, the Grievant was in BC's Bedroom for approximately twelve (12) minutes whereupon he is viewed exiting said room with his shirt ripped. Indeed, something did occur, however, there is no evidence to suggest, other than statements taken from two (2) Residents without the ability of the Union to question these individuals or have them testify at the Arbitration proceedings, that would support the removal of the Grievant.

The Union emphasizes the video depiction of the Grievant as he was exiting BC's Bedroom wherein while his shirt was ripped, he was not out of breath or panicked, nor was the

Resident viewed as disarrayed, hurt, or that his clothes were out of sorts. The Grievant testified he had a good relationship with BC and while they were in his Bedroom, they were looking for cigarettes based on BC's tendencies to hide and hoard them in order to request additional ones from Staff. The Grievant testified he found these cigarettes under BC's fake female companion made from different trash bags lying on his bed. Upon finding these, according to the Grievant, BC leaned forward, grabbed the Grievant's shirt by the neck in an effort to obtain these cigarettes discovered by the Grievant. The Grievant testified BC's history indicates he can become aggressive as depicted in earlier portions of the video submitted into evidence. Moreover, his behavior is noted throughout the documentary evidence provided.

With respect to the Employer's assertion the Grievant failed to report this unusual incident in accordance with policy, Supervisor Vanscoy testified the Grievant did not need to file a UIR since the resident was not injured. The Union notes the Grievant, upon leaving BC's Bedroom, was not sweating, out of breath, or in a panicked state. Nor was BC, who was depicted leaving the Bedroom shortly thereafter. According to the video, and corroborated by the testimony of the Grievant, BC apologized to the Grievant wherein the Grievant consoles him. The Union asserts that during the course of what Investigation the Employer did endeavor, it was performed through intimidation with three (3) Investigators who simply assumed something occurred regarding the alleged mistreatment of a Resident. In this particular matter, the Resident was not injured, the Grievant's shirt was ripped and the Supervisor on staff at the time was called regarding this behavior wherein a URI was not required. The Grievant testified it was not uncommon to have one's clothes ripped or stained and in training he was advised to bring a spare change of clothes to work.

The Union emphasizes there were several other instances that were documented that may have contributed to BC hurting his leg. Investigator, Nicole Baxter, testified there were other instances earlier in the day with BC that could have resulted in his injuries. The Resident saw Joe Piunno for a wellness check due to several falls he sustained earlier in the month of October. BC saw Piunno on November 15 at 7:00 p.m. where BC first complained about hurting his leg. Indeed, bruises were found on BC and he was “checked out” at the Hospital. Despite the timeframe and the time lapse from the time of the incident and until such time of his well-check visit, no other Staff Member was interviewed during those timeframes. The Investigator further testified she had no knowledge of what happened in BC's Bedroom since no one else was present other than the Grievant and another Resident who alleged he observed the Grievant having BC in a “hold”. She acknowledged she likely did not conduct a fair and objective investigation into this matter.

It is clear in the documentation regarding BC, Management was aware of his behaviors wherein he becomes physically aggressive and has hurt Staff numerous times prior to this alleged incident. He has a history of becoming physically aggressive regarding cigarettes and coffee. He was characterized as manipulative, aggressive, explosive at times, and can inflict harm by hitting, scratching and biting. Cigarettes and coffee are a source of frustration and preservation if either runs out. He exhibits physical aggression and has a history of dropping to the ground or losing his balance when acting aggressively, or when Staff is attempting to place him in manual restraints. Moreover, the Union notes BC has a history of making false allegations against Staff Members in order to "get them in trouble or get them fired." The statements of BC and another Resident wherein the Union was not permitted to interview these individuals or have them testify

at the Arbitration proceeding, constitute procedural due process flaws running counter to a Just Cause analysis.

The Union requests the definition of abuse as defined by the Ohio Revised Code be adopted herein wherein it states: "knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person." The documentation of record indicates there are a number of instances wherein BC could have received this injury, including being in a bathroom by himself for approximately 20 minutes and the fact he suffers from Cerebral Palsy, loses his balance and falls. The reliance by Investigator Baxter on the video of the "dark spot" on the back of BC's leg approximately the size of a dime simply does not equate to the bruising.

It is clear the Grievant explained what had occurred based on the documented history of this individual and his propensity to become aggressive concerning cigarettes which prompted his outburst on the Shift in question. There is no evidence of any type of abuse by the Grievant and any assertions relative thereto occurred some two (2) days later from this Resident who has a history of lying about Staff and threatening to get them in trouble or fired. The Employer relied on the testimony of two (2) Residents who were not allowed to testify or be interviewed by the Union. It is clear this resident could have fallen resulting in the bruising while in the bathroom, or from earlier documented uses of force wherein he had to be restrained, that could have easily been explored if a fair and objective Investigation was undertaken. There simply exists no evidence the Grievant abused this Resident; he could have received whatever injuries from his own health issues and/or falls or being restrained. The physician evaluated BC regarding falls he had sustained on October 3, 8 and 16, respectively and concluded such were consistent with someone with BC's medical condition. The "notes" of record indicate he was asked when he was

kicked and he responded yes to a month ago, or last week. His condition was deemed to be baseline as articulated.

For these reasons, the Union requests the Grievance be sustained and the following remedial redress be awarded:

1. That all discipline be removed from TPW John Crawford's record, including any electronic record;
2. Reinstate TPW John Crawford to his position as Therapeutic Program Worker at Warrensville Developmental Center;
3. Payment for all lost wages;
4. All leave balances that would have accrued from the date of removal;
5. The ability to buy back any leave balances that were cashed out after his termination;
6. All seniority to the date of removal;
7. Payment for all documented medical, dental and vision expenses that TPW Crawford and his family has incurred since his removal and until he is covered by insurance;
8. The shift, assignment and good days that he held when he was removed; and,
9. Payment of all retirement contributions.

Additionally, the Union requests that the Arbitrator retain jurisdiction over this matter for a period of sixty (60) days from the date of the issuance of this Award.

DISCUSSION & FINDINGS

The disposition of this matter hinges upon the determination of whether the Employer has established "Just Cause", as required in Article 24 of the Collective Bargaining Agreement, to effectuate the Removal of Therapeutic Program Worker, John Crawford, for the charges levied against him concerning "abuse of a client" and "failure to report" following an alleged incident that occurred on or about November 13-14, 2017, involving resident BC.

The Employer emphasizes that indeed the evidence of record demonstrates Just Cause has been established based on the thorough investigation conducted by the Employer resulting in the determination based on the verbal accounts of Resident BC and Resident J_, concerning the Grievant's actions on the Shift in question. It asserts the video depiction clearly indicates the Grievant entered BC's Bedroom and remained there for approximately twelve (12) minutes.

While it acknowledges no one knows precisely what occurred in that Bedroom, other than Resident BC and the Grievant, it is clear, based on that attained through its Investigation, the Grievant engaged in physical abuse of Resident BC resulting in injuries to his leg which, as characterized by Resident BC, occurred based on the Grievant kicking him three (3) times and taking him down. Moreover, the Employer emphasizes that despite the Grievant's assertion to the contrary, this incident, as described by him, did indeed require proper reporting consistent with mandates required of a Facility of this nature. It is clear the Grievant failed to provide any type of Report as required and his failure to do so clearly violates his known obligations concerning such.

The Union contends the Grievant simply cannot be found to have engaged in such conduct since it is documented and well known this Resident has a propensity for making false allegations against Staff when he does not receive that which he seeks; namely cigarettes and coffee. This alleged incident arose following an aggressive and emotional outburst of Resident BC during the Shift in question following the Grievant's denial of his request to receive more cigarettes. The Grievant testified he has a long, prior history dealing with this individual and the documentation relative to this Resident clearly indicates his manipulative, aggressive behavior and certain false allegations against other members of Staff. Moreover, the Union asserts the Grievant was denied fundamental procedural due process when it was denied the opportunity to interview two (2) Residents who claim the allegation of abuse. Inasmuch as it was not afforded the opportunity to question and/or interview these individuals and the critical fact that neither were called to testify during the Arbitration Proceeding to afford them the opportunity to cross examine them, such is problematic and runs counter to basic due process mandates. It emphasizes that during the course of the Arbitration Hearing , the Investigator was questioned

about whether or not she believed the Investigation was fair to which she replied "no" and as such the Union implores the Arbitrator to recognize the denial of fundamental due process in the manner in which this incident was investigated.

The Collective Bargaining Agreement, Joint Exhibit-1, under which the Arbitrator's authority is recognized and conferred, sets forth in Article 24, titled "Discipline", the contractually recognized authority of Management to effectuate disciplinary action; however, such must be for "Just Cause". Under a Just Cause Analysis, the Employer is charged with the obligation to establish the Grievant is guilty of the wrong-doing which served as the basis for disciplinary action imposed; and, whether the discipline imposed is commensurate with the nature of the infraction(s) allegedly committed. Here, you have very serious allegations stemming from a Resident with developmental disabilities, cerebral palsy and other emotional considerations. This is not to diminish, in any way, that which was alleged to have occurred, simply the medical condition/history of the aggrieved individual, alleged victim of abuse, must be taken into consideration, weighed and measured with respect to whether that individual should be, and/or can be, called to testify in a procedure such as this. The Guardian(s) of the Resident(s) would not provide permission for the Union to interview/and or question them nor, were they permitted to attend and provide testimony at the Arbitration Hearing.

While the Arbitrator is indeed mindful and sympathetic as to the sensitive nature of these individuals with developmental and physical issues, unfortunately, the failure of the Union on behalf of the aggrieved, removed Employee to have the opportunity to question and/or interview those making these very serious allegations is problematic based on fundamental due process considerations. It is indeed a basic tenant of due process to be afforded the opportunity to confront the individual raising allegations that serve as the basis for disciplinary action for

allegations of egregious misconduct. In any healthcare setting, the allegation of patient abuse is of tantamount concern to any Facility providing such services and simply cannot go unaddressed. If the person against whom the allegations are raised is indeed found to have engaged in such conduct, then the standards/penalties cited by both Parties with respect to the definition of “abuse of a client” would provide the necessary basis to substantiate the removal of that individual. However, proof thereof is simply not established herein.

The definition relied upon gains its genesis from that gleaned in the Ohio Revised Code under various criminal statutes relative to “abuse”. Indeed, there are criminal sanctions that could be brought in a particular set of circumstances that, as this Record demonstrates, did not rise to that level. While the Arbitrator is indeed mindful of the evolution of the concept of abuse, the definitions relied upon are gleaned from criminal statutes, and consistent with the Silver Decision, this matter is not criminal in nature. The standards of proof are indeed different - proof beyond a reasonable doubt in a criminal setting as distinguished with that within a civil setting under which Arbitration is weighed and measured. The usual and customary standard for civil matters such as Arbitration is a preponderance of the evidence - it was more likely than not the misconduct occurred which served as the basis for the imposition and disciplinary action. Here, the problematic aspect with respect to that which was alleged to have occurred was not observed by anyone other than a resident named "J_" who was only questioned/interviewed by the Employer and the Union was not afforded that opportunity. Clearly, fundamental due process requires more and absent corroboration, such denial thereof proves fatal to the Employer’s case-in-chief.

After reviewing the video footage provided, on numerous occasions, it is clear from the various angles of the strategically placed cameras throughout this part of the Facility and

consistent with the characterization of Resident BC's tendencies, if you will, it is clear that during the morning hours of November 14, 2017 during the 10:00 p.m. to 6:30 a.m. Shift worked by the Grievant wherein he was assigned to the care of Resident BC, this Resident is observed in a very agitated, emotional state. He is seen throwing items and tearing up other items based on his dissatisfaction with the Grievant's refusal to provide him additional cigarettes when it was determined Resident BC had nearly 1 1/2 packs at his disposal. The question arises as to what proof exists that would substantiate/corroborate the conclusion that indeed the Grievant engaged in some form of physical conduct that resulted in the injuries sustained by Resident BC, or was this injury sustained through the course of the various falls noted in his records that occurred earlier in that month; or, as relayed to Dr. Greenspan by Nursing Director Pam Lee, "he was put in a hold and that he was taken down to the ground because of behaviors, and that is a possible source of the bruising". Dr. Greenspan indicated in his transcribed, November 21, 2017 Interview, "[h]owever, the bruise was fairly extensive on the upper thigh and lower leg. And it looks like there was an interaction between [BC] and the Staff, which would have caused that".

For obvious privacy concerns, cameras are not placed in Resident's rooms. However, the video footage provided indicates the Grievant did indeed enter Resident BC's Bedroom and remained in there for twelve (12) minutes. Upon his exit, it is clear his shirt was ripped and torn. What the footage does not indicate is someone in a state of disarray exhibiting signs of exertion that would be consistent with an altercation of some kind that was alleged to have occurred while he was in the Resident's Bedroom. The Grievant is depicted walking down the Hallway in a calm and collected manner not indicating any signs of someone that had exerted himself to physically restrain BC in some type of "hold" as alleged by, in the uncorroborated statement relayed to the Investigators, Resident J_. Other than the allegations of an individual who has a history of

making false allegations against Staff, exhibits manipulative or aggressive behavior and has a propensity of "brow beating" Staff to obtain that which he seeks, i.e. cigarettes and coffee, no definitive, corroborating evidence was presented substantiating these very serious allegations of abuse of a client.

It is clear based on the evidence of record this Resident can be, and has become, physically aggressive and hurt Staff Members prior to this incident. He can be manipulative and explosive at times. He has hit, scratched, bit others and cigarettes and coffee are very important items to him. Of particular importance is the depiction indicating "BC has a history of dropping to the ground or losing his balance when he is acting aggressively or when Staff is attempting to place him in manual restraint." Based on the evidence of record, it is clear this Resident has sustained previous "fall(s)" prior to this incident in question. Moreover, that relayed to Dr. Greenspan by Nursing Director, Pam Lee, indicates BC was "put in a hold and taken down to the ground because of behaviors, and that is a possible source of the bruising". While it must be reiterated that any Patient allegation of abusive conduct by his/her caretaker must be acknowledged and acted upon, uncorroborated assertions alone, not subject to exploration by an opposing Party or the alleged "abuser" in an evidentiary forum, simply do not provide the requisite evidentiary basis to support Removal. This evidence, that relayed by the Director of Nursing to Dr. Greenspan, and that gleaned from BC's "Book" and "Plan", simply cannot be ignored as it provides another possible and plausible explanation for the injuries sustained by BC.

Based on this evidentiary record, the Arbitrator concludes the Employer has not met its burden of proof to establish the allegation of abuse as raised by Resident BC. The Removal of Therapeutic Program Worker, John Crawford, was inconsistent with a finding of Just Cause as

required in Article 24 of the CBA. Moreover, the images of Resident depicted in the video during this Shift, do not suggest a significant incident of trauma as alleged by the Resident. Had the Resident been “kicked three (3) times” as alleged, such trauma would have been more readily discernable and apparent. When the Resident is seen making his way to the shower, the “spot” seen is hardly consistent with usual trauma depicted where someone has been kicked three (3) times.

Additionally, while the record demonstrates the Grievant was assigned to work on the November 13, the 10:00 P.M. to 6:30 A.M. Shift, the allegations of abuse, as raised by Resident BC were not reported by him until 7:00 p.m. on November 15, 2017 when he met with OT Piunno. Such were based on what can only be deemed as unreliable and uncorroborated statements from this Resident given his propensity for falsification of events, etc. and the prior incidents where he would allege to get Staff into trouble. It can reasonably be concluded that perhaps, given the physical limitations of this individual, as well as, those developmentally, he could have fallen on his own accord and that bruising could have resulted by some other event (that relayed by Nursing Director Lee to Dr. Greenspan) or inflicted by someone else. There simply is no definitive proof corroborated by any reliable witness that would lead to the conclusion the Grievant engaged in any form of patient abuse. That violation has not been met.

With respect to the allegation of the Grievant's “Failure to Report”, and while each Party has differing views on what event requires the filing of an Unusual Incident Report, the evidence of record demonstrates clearly, in the opinion of the Arbitrator, the Grievant should have initiated some form of “paper trail” to substantiate that which now has become problematic to him and possibly to the Facility. The requirement that a Report be completed not only documents an “event”, it also satisfies any inquiries that may be undertaken with respect to any

oversight Board of Facilities of this nature, as well as, serves to provide certain protections for Staff Members who are later accused to have engaged in the very type of conduct alleged to have occurred herein. Reporting of this nature is indeed tantamount to Facilities that provide these types of services and cannot be under-emphasized. Had the Grievant completed the necessary Report(s), despite reasons asserted for why they were not, this matter likely may not have risen to the level it did. Based on this evidentiary record, that violation is indeed established, and Just Cause has been substantiated to warrant disciplinary action.

Based on this evidentiary record, the charge of “Abuse of a Client” has not been substantiated and therefore the Grievant's Removal shall be overturned; the charge of “Failure to Report” has been established and carries, for a “First Offense”, as set forth in Joint Exhibit 4, titled “Standards of Conduct, Rule Violations and Penalties for Classified of Employees (Department-wide) with an effective date of May 1, 2016, a five (5) day time/working suspension/fine/to removal. Based thereon, and in recognition of the Grievant’s otherwise “clean” disciplinary record, such is deemed a “1st Offense” for which the Grievant shall receive a five (5) day suspension for his “failure 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”. Despite the Union's assertions to the contrary, the better course of action is to report such incidents for the protections not only for the Facility, based on reporting requirements placed upon them by certain Oversight Boards or entities, as well as, preserving the incident in a contemporaneous manner for the protection of the Staff involved.

Based on a totality of the circumstances in the evidence as presented, the Employer did not establish Just Cause to effectuate/support the Removal of Therapeutic Program Worker, John Crawford; the Employer established Just Cause for the second charge concerning “Failure to

Report” which a five (5) day suspension is appropriate and consistent with that contained in DODD “Standard Guidelines for Progressive Discipline Performance Track”, Abuse of a Client, 1st Offense.

With respect to remedial considerations, the Grievant shall have any and all documentation reflecting this matter modified to support/reflect only the charge of Failure to Report. Within seven (7) days from the date of this Opinion and Award, the Grievant shall be reinstated to his position as Therapeutic Program Worker at Warrensville Developmental Center without loss Seniority; Classification; Pay Grade; and Shift. Except for the five (5) day unpaid Suspension for the substantiated finding for his Failure to Report, he shall receive payment for all lost wages and benefits and be made whole in every other manner consistent with contractual mandates of the Collective Bargaining Agreement. Such backpay shall be set off by any and all interim earnings and/or Unemployment benefits/compensation. The Grievant shall provide the necessary Documentation to substantiate his claim for backpay and any other contractual entitlements; his failure to do so will result in a forfeiture of whatever period of time he fails to validate said claim(s). Summarily stated, except for the 5-Day Suspension, he shall be “made whole” as if he had not been Removed. The Arbitrator shall retain jurisdiction for sixty (60) calendar days from the date of this Opinion and Award to assist the Parties with any implementation issues that may arise.

AWARD

The Grievance is Sustained in part; and, Denied in part.

David W. Stanton

David W. Stanton, Esq.
NAA Arbitrator

June 24, 2019
Cincinnati, Ohio