

Voluntary Labor Arbitration Proceeding

In the matter of the Arbitration between:

The State of Ohio, Ohio Civil Department of Developmental Disabilities, Tiffin Developmental Center

-And-

Ohio Civil Service Employees Association, Local 11, AFSCME

#1099

Grievant: Melissa Perin

Grievance No.: 24-13-(10-11-08)-0037-01-04

Arbitrator's Opinion and Award

Arbitrator: David M. Pincus

Date:

Appearances

For the Employer

Laura Frazier	Director of Human Resources
Karen Ringle	Human Resources Manager
Heather Geary	Case Management Specialist
Harold Lucius	Carpenter (Retired)
Kathy S. Conley	TPW (Retired)
Jessica Vallejo	TPW
Antoinette Wallace	LRO 3
Jessie Keyes	Second Chair
Cornell Hale	Advocate

For the Union

Melissa J. Perin	Grievant
Timothy A. Vassalle	Vice President
Donna King	TPW
Doug Graham	TPW
Chad Mathews	PCS
Kyle R. Daugherty	Police Officer II
James J. Hauenstein	Advocate

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GENERAL COUNSEL

Introduction

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panels between the State of Ohio, Ohio Department of Developmental Disabilities, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period of April 15, 2009 to February 29, 2012. (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to present witnesses, and to cross-examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit post hearing written closings. The parties submitted written closings in accordance with the guidelines established at the hearing.

#### Stipulated Issue

Did the Grievant commit an act of abuse? If not what shall the remedy be? Was the Grievant, Melissa Perin, removed for just cause? If not, what shall the remedy be?

#### Joint Stipulations

1. The Grievant is properly before the Arbitrator.
2. The Grievant was hired by the Employer on May 8, 2000.
3. The Grievant was hired from her position as a Therapeutic Program Worker on November 5, 2010
4. The Grievant was removed for violation of the Ohio Department of Developmental Disabilities Standards of Conduct Policy, specifically Abuse of a Client and Failure of Good Behavior, specifically Violence in the Workplace Policy.
5. The Grievant did not have any active prior discipline at the time of her removal.
6. The Grievant was trained on the Standards of Conduct Policy on December 24, 2009 and she was trained on the Violence in the Workplace Policy on May 1, 2008.
7. Contract between the State of Ohio and OCSEA/ AFSCME Local 11
8. The nurses who assessed Randel A. observed no new injuries on his person. The medical department after reviewing Randel's condition determined there were no new injuries.=

#### Case History

Melissa Perin, the Grievant, was employed as a Therapeutic Program Worker (TPW) at the Tiffin Developmental Center (TDC) since May 8, 2000.

On November 5, 2010, she was removed for two violations of Standards of Conduct, Rule Violations, and Penalties for Classified Employees policy: abuse of client and failure of good behavior reference #2- Threatening, fighting, intimidating, striking another, or any other act or threat that is in violation of the Violence Prevention in the Workplace Policy.

Article 24.01 states in pertinent part:

XXX

In cases involving termination, if an arbitrator finds that there was been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse.

Therefore, the parties limit abuse cases to a threshold determination regarding the facts surrounding an abuse allegation. A just cause standard cannot be applied. For this primary reason the Arbitrator shall bifurcate this Opinion and Award. If the abuse allegation is supported by the record, then the failure of good behavior charge becomes irrelevant and an analysis becomes unnecessary. The following portions of this Opinion and Award will focus solely the abuse charge. This finding will determine if additional analysis is required.

On August 18, 2010, the Grievant and Kathy Conley, another TPW, were working on the Nevada East Module. The Grievant was assigned to Alex W. who needs to be supervised by "eyesight" at all times. Conley was assigned Randel A. who has similar supervision requirements.

At some point during the morning of August 18, 2010, Conley had to go to her car. The Grievant devised a plan where she would leave the living room but observe Alex W. in the Nevada East living room watching TV. At the same time, the Grievant stood in the hallway in front of the living room with Randel A. Thus, the Grievant was able to have both patients in her "eyesight."

Conley returned from her car and noticed that the living room door was severely damaged. It was hanging by the top hinge only, and slanted at an angle with debris and screws on the floor. Conley confronted her coworkers and asked "What happened to this door?" They failed to provide a response. The Grievant advised Conley that possibly the damage took place the previous evening.

A discussion of the incident took place at the Brubaker Workshop later in the morning. TPW Mary Snyder spoke to Jennifer Keller, an Account Clerk 2, about the incident. Snyder maintained that Jessica Vallejo, a TPW, had told her that she saw the Grievant throw Randel A. against the living room door at Nevada East.

Supervisory staff was notified and an investigation ensued which resulted in the Grievant's removal. A removal order was issued on October 15, 2010. It contained the following pertinent particulars:

XXX

This will notify you that you are being removed from your position as a Therapeutic Program Worker effective November 5, 2010. The reason for this action is that you have been found guilty of Abuse and Failure of Good Behavior #2- threatening and intimidating behavior in the following particulars:

Abuse- On August 18, 2010 you were seen pushing individual Randel A into the living room door on the Nevada East home. The witness who saw the push also heard a noise- minutes later the door to the living room was found to be damaged. Per witness testimony, there was nothing wrong with the door prior to you pushing Randel into the door.

Failure of Good Behavior #2- on August 18, 2010 you were upset that a co-worker was not working in your production unit at Brubaker. You were heard calling this employee a "two faced bitch" and said you would "throw here under the bus next time something happened." The witness who saw you push Randel was so afraid of what you might do to her that she did not report the incident timely. Both staff and individuals made comments during the course of the investigation regarding you being a bully and having a bad temper.

XXX

(Joint Exhibit 2, Pg 6)

On November 5, 2010, the Grievant and the Union contested the removal by filing a grievance (Joint Exhibit 2, Pg 1). They alleged there was no just cause for the discipline.

The parties were unable to resolve the disputed matter during subsequent stages of the grievance procedure. Neither party raised neither procedural nor substantive arbitrability issues. As such, the grievance is properly before the Arbitrator.

### The Merits of the Abuse Charge

#### The Employer's Position

The Employer maintains the Grievant did engage in abusive conduct on August 18, 2010. Thus, removal was the appropriate penalty and outcome. The record supported the view that the Grievant pushed Randel A. hard enough so that the living room door was damaged. Vallejo saw Randel A. shoved

by the Grievant. She did not immediately report the incident because she was afraid of the Grievant's retaliatory tendencies.

The Grievant's version of events was inconsistent and evasive. She evaded questions regarding the damaged door and was unclear about her location when the alleged incident took place. The Grievant failed to remember whether she was in the living room with Randel A. or in the hallway.

Several witnesses described the condition of the door prior and after the incident. Kathy Conley, a retired TPW, was assigned to Randel A. on August 18, 2010. Conley had to go to her car which caused the Grievant to supervise Randel A. for a brief period of time. She testified she walked down the Nevada East hallway prior to exiting the area. She checked the living room and noted all residents were in the living room watching TV. She maintained the door was hinged and not damaged at this stage of the incident.

Upon Conley's return, she noticed the living room door hanging by the top hinge. Debris and broken screws were on the ground. Harold Lucius, a retired Carpenter, supported Conley's recollections about the living room door's condition after the disputed episode.

### The Union's Position

The Employer failed to support the abuse misconduct claim. The claim appears to be improbable considering Randel A.'s physical condition. The Employer stipulated there were no new injuries identified by the medical department after the disputed episode. If the Grievant had pushed Randel A. with the force witnessed by Vallejo, and the assault resulted in the damaged living room door, Randel A. should have suffered severe injuries and bruising. Without any visible medical complications, an abuse charge is difficult to support.

The Employer's case is riddled with inconsistent testimony. Vallejo's testimony at the hearing did not comply with her previous actions and pronouncements. If the incident unfolded as depicted, she

should have reported the incident. Vallejo, moreover, never took the time to determine whether Randel A. was truly injured.

Her inactions and subsequent testimony can be easily explained. Earlier in the day, Vallejo and the Grievant engaged in a minor altercation over some non-clinical information written in the first shift chart. This dispute served as the impetus for Vallejo's subsequent testimony.

Conley's testimony is equally flawed. She lost constant visual contact with Randel A. when she left to visit her vehicle without seeking relief. This lapse by Conley caused the Grievant to be thrust into a difficult situation. She had to supervise two individuals with red cards requiring continuous visual care.

The living room door's condition provides little evidence in support of the Employer's allegation. Lucius's decision to replace the door is not in dispute. The door's condition upon arrival is somewhat in dispute because no pictures were taken. It was eventually taken to a dumpster with a tow motor but retrieved once its importance was determined. As such, the door could have been easily damaged during the retrieval process. Several other witnesses, moreover, testified the door had been damaged on some prior occasions; mitigating the Employer's version of the episode.

#### The Arbitrator's Opinion and Award Regarding the Abuse Charge

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record including pertinent contract provisions and the parties' written statements, it is the Arbitrator's opinion that the Grievant abused Randel A. In accordance with Article 24.01, the Arbitrator "does not have the authority to modify the termination of an employee committing such abuse." Any attempt to mitigate the charge of abuse is outside the scope of the Arbitrator's authority.

Support for an abuse charge does not require proof of physical injury. Obviously, an employer's ability to produce reports and conditions documenting abuse make an abuse determination much

easier. Here, evaluations took place without the requisite finding. Still, abusive behavior is properly supported by the record.

The living room door was significantly damaged as a consequence of the Grievant pushing Randel A. into the living room door from the hallway. Conley's pre and post incident observations appear credible. Upon exiting to her car she viewed the living room area and did not observe any damage to the door. Upon her return, the door was hanging from one hinge, debris was on the ground the door itself was severely damaged. The door screws on the ground also resulted in a safety hazard to some of the residents who have pica disorders. They would be inclined to pick up the screw heads and eat them if the debris was left unattended.

Lucius corroborated Conley's observations regarding the door's condition. Without a door stop, the door hit the wall which acted as a fulcrum creating stress on the hinges. This outcome could not have materialized on its own but required some extreme action initiated by the Grievant. Nothing in the record provides an alternative explanation.

Even if a prior incident had cracked the door, the disputed incident can be readily distinguished. Here, a unique set of circumstances resulted in a demolished door requiring removal and eventual destruction.

Vallejo's testimony is viewed as credible and highly critical to the abuse finding. Vallejo's location during the dispute allowed her to observe the incident, listen to discussions and other altercations. Vallejo saw the Grievant verbally prompt Randel A. to go from the hallway to the Nevada East living room. Randel A. did not comply with the Grievant's request. The Grievant then pushed or shoved Randel A. into the living room. Almost immediately thereafter she heard a loud sharp noise.

Granted, Vallejo did not come forward and report the incident which caused her to receive a five day working suspension. The Arbitrator is convinced she feared the Grievant which caused her initial delay. Under cross examination she never veered from this conviction and appeared credible.

The Grievant's version of events, however, was not consistent but evasive. She modified her testimony regarding whether she was with Randal A. in the living room or out in the hallway. Her recollections about how the door was damaged and who did it strongly discredited her testimony.

Award

The grievance is denied. The Arbitrator finds the Grievant abused a patient or another in the care or custody of the State of Ohio.

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Chagrin Falls, Ohio

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Dr. David M. Pincus  
Arbitrator