#1151

Thomas J. Nowel, NAA
Arbitrator and Mediator
Cleveland, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO AGREEMENT OF THE PARTIES

In The Matter of a Controversy Between	)	Grievance No.
	)	DMH-2015-
Ohio Civil Service Employees Association	)	04500-4
Local 11 AFSCME, AFL-CIO	)	
	)	ARBITRATION
and	)	OPINION AND
	)	AWARD
Ohio Department of Mental Health	)	
Heartland Behavioral Healthcare Hospital	)	DATE:
	)	August 29,
Re: Ryan Shaner Removal	)	2016

APPEARANCES:
George L. Yerkes, OCSEA Staff Representative, for the Union; Edward A. Flynn, Labor Relations Officer, for the Department of Mental Health; and Victor Dandridge for the Ohio Office of Collective Bargaining.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, Local 11 AFSCME. The parties are in disagreement regarding the termination of employment of Ryan Shaner. At the time of his termination, Mr. Shaner, the Grievant, was a Therapeutic Program Worker (TPW) at Heartland Behavioral Healthcare located in Massillon, Ohio. The Employer conducted a pre-disciplinary hearing on November 4, 2015 at Heartland Behavioral and determined on the same day that the Grievant had violated Rule 5.4 which is the policy regarding abuse of a patient under the supervision of the Department. The Grievant's employment was terminated on November 30, 2015. Mr. Shaner grieved the removal on December 1, 2015, and the Union appealed the grievance to arbitration following its denial at the various steps of the Grievance Procedure.

The arbitrator was selected to hear this case pursuant to Article 25 of the collective bargaining agreement. Hearing was held on July 28, 2016 at Heartland Behavioral Healthcare Hospital located in Massillon, Ohio. At hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits. Witnesses were properly sworn or affirmed by the Arbitrator. The parties stipulated that the grievance was properly before the Arbitrator. The parties submitted a series of joint exhibits. At the closing of the hearing, the parties agreed to submit post hearing briefs no later than August 12, 2016

ISSUE

The parties stipulated to the following issue to be decided by the Arbitrator.

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

JOINT STIPULATIONS

1. Ryan Shaner's appointment date was December 7, 2009.

2. Ryan Shaner was classified as a Therapeutic Program Worker (TPW) for Heartland Behavioral Healthcare.

3. Ryan Shaner was removed from his position, effective November 30, 2015.

4. The above referenced grievance is properly before the arbitrator.

WITNESSES

TESTIFYING FOR THE EMPLOYER:
Barbara C. Lohn, MD, Former Staff MD
Theresa Wilson, Social Worker (testified via telephone)
Kenneth Johns, Training Officer
John Stocker, Client Rights Advocate
David Colletti, Chief Executive Officer

TESTIFYING FOR THE UNION:
Sheri Black, Lab Technician and Union Steward
Jaymes Wells, TPW
Robert Rose, TPW
Ryan Shaner, Grievant

RELEVANT PROVISIONS OF THE AGREEMENT

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 the 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 25.04. 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) days suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than (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 balances in lieu to a fine levied 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) day suspension. No suspension greater than five (5) days shall be issued by the Employer.

d. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the

other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

24.06 – Imposition of Discipline

The agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-discipline meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or Union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose any discipline, including oral and written reprimands, the employee, if available, and the Union shall be notified in writing. The OCSEA Chapter President shall notify the Agency Head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave, without loss of pay (except in cases that fall within ORC Section 124.388(B)), or reassigned while an investigation is being conducted except that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment or if the reassignment is to a position on the same shift and days off, without loss of pay and does not exceed 30 days. For cases that fall within ORC Section 124.388(B) as referenced above, any payment due the employee under subsection (B) shall be based upon the employee's total rate plus any applicable roll call pay. For purposes of this paragraph, "without loss of pay" shall mean the employee's total rate plus any applicable roll call pay.

GRIEVANCE

The grievance of Ryan Shaner was filed with the Employer on December 1, 2015 and makes the following statement.

"Grievant was removed as TPW without just cause. Grievant to be reinstated to his position. Grievant to be made whole."

BACKGROUND

The Grievant, Ryan Shaner, was employed as a Therapeutic Program Worker (TPW) at Heartland Behavioral Healthcare, a mental health facility operated by the Mental Health and Addiction Services Department of the State of Ohio. His employment commenced on December 7, 2009, and he served as a TPW during his entire employment at the facility. Heartland Behavioral is located in Massillon, Ohio.

At approximately 1:30 pm on October 23, 2015, a treatment/assessment session was being conducted in the Unit B-2 treatment team room with Patient M. The treatment team included Dr. Barbara Lohn, MD, a psychiatrist employed by Heartland, Theresa Wilson, a social worker employed by the facility, and Salman

Khan, a medical student who was observing the session. At the conclusion of the treatment session, the patient was asked to leave the room. Patient M refused to respond or leave the room. She refused to move from her chair. Additional sessions were scheduled for the room. Dr. Lohn opened the treatment room door and motioned for a TPW to enter the room to provide assistance. The Grievant, TPW Ryan Shaner, responded and entered the room. He was accompanied by TPW Jaymes Wells and TPW Robert Rose. There are a number of versions regarding the manner in which the Grievant removed Patient M. Generally, the Grievant maneuvered the chair, in which the patient was seated, away from the table. Patient M was seated in the first chair closest to the door. The treatment room is small. During the effort to remove Patient M from the chair, she fell toward an adjoining chair and then went to the floor. Patient M has a history of dropping to the floor when frustrated or being given directions. Patient M also has a history of violent reaction. The Grievant moved the patient along the floor, out the door and into the hallway near a nurse's station. He placed Patient M in a sitting position against the wall in the hallway just outside the treatment room. The patient may have been crying softly. A few minutes later, Patient M stood and walked to an activity room. The Grievant provided the patient with coloring materials.

Following the incident, Social Worker Wilson approached the Grievant to inquire if he was upset in any way. She then criticized his approach with the patient, and the Grievant stated that she should not ask for his assistance if she disapproved of his approach. Ms. Wilson was angered and walked away.

At a later time in the afternoon, Dr. Lohn approached the Client Rights Advocate, John Stocker, and completed a report which indicated that the Grievant abused Patient M. At 3:30 pm, Dr. Lohn was interviewed by Officer Stephen Stockhaus, a Department Police Officer assigned to Heartland Behavioral. Her statement accused the Grievant of abusive behavior in that he was angry when asked to assist; his actions caused the patient to fall to the ground; and he improperly dragged the patient on the floor and into the hallway and left her on the hallway floor. Officer Stockhaus interviewed Social Worker Wilson who generally confirmed the statement made by Dr. Lohn although she indicated that the Grievant pushed Patient M to the floor. She also stated that the patient was crying. Medical student Kahn provided a statement which confirmed those provided by Dr. Lohn and Ms. Wilson. Officer Stockhaus interviewed the Grievant who stated that he responded to the request to assist in the removal of Patient M from the treatment room. His statement indicated that he gently lifted the chair in an attempt to move the patient to her feet. She stood for a moment but then sat on the floor. The Grievant stated that he was able to move the patient to a standing position, but she dropped her weight on him. The Grievant stated that he then guided her to the wall in the hallway. He stated that his actions did not cause any physical or mental harm. Officer Stockhaus attempted to interview Patient M who was not responsive to his inquiries. Finally Officer Stockhaus interviewed TPW Wells who stated that the Grievant moved Patient M into the hallway by pulling her arms. A determination was made that the patient suffered no physical injuries.

Following Officer Stockhaus' investigation, the Heartland Behavioral Police Department made a determination that the complaint of patient abuse regarding the Grievant's approach to the incident, was unfounded.

The Grievant was reassigned to duties which allowed for no patient contact while the Employer initiated an investigation separate from that conducted by the Department Police Department. Pre-disciplinary hearing was held on November 4, 2015. The scheduled hearing officer, Ben Burney, was replaced by David Colletti, the CEO of Heartland Behavioral who then issued a report indicating that the Grievant violated Rule 5.4. "Abuse, exploitation, or intimidation of any patient under the supervision of the department." The Grievant's employment was terminated effective November 30, 2015.

POSITION OF EMPLOYER

The Employer states that, of all the witnesses who testified at hearing, only two were credible and consistent regarding their statements, Dr. Lohn and Social Worker Wilson. The Employer argues that each witness, produced by the Union, told conflicting stories regarding the Grievant's actions in removing the patient from the treatment room. The Employer states that the Grievant was angry when he was summoned to assist the treatment team, that he slammed his clipboard on the table upon entering the room. The Employer states that the Grievant shouted at the patient to "get up" and had no further verbal communication with her. The Employer states that the Grievant "ejected" the patient from the chair with force and then dragged her out of the room after she slid to the floor. He left her sitting in a

fetal position on the floor. The Employer states that the Grievant did not gently remove the patient from the chair as he stated during the investigative interview. The Employer states that the incident occurred so quickly that Dr. Lohn and Ms. Wilson had no time to respond. They were shocked by the manner in which the Grievant responded. The Employer states that Patient M incurred no physical injuries but this is irrelevant as the actions of the Grievant were clearly abusive, and leaving the patient sitting on the floor in a fetal position was degrading and humiliating. The Employer states that Patient M had been traumatized, and trauma victims often repress their feelings. The Employer argues that the Grievant clearly did not treat the patient in a humane manner.

The Employer cites a number of policies on which the Grievant was trained. Employees are to avoid the use of negative words such as "get up" as stated by the Grievant. Employees must provide patients the opportunity to make choices based on verbal suggestion. These strategies take time, and the Grievant did not comply with the policy and his extensive training. The Employer states that Policy MED-19 emphasizes the avoidance of physical contact. Exceptions to the policy were not present during the Grievant's encounter with Patient M. The Grievant also had the option of calling for a pre-crisis team (H-TEAM). The Employer states that the Grievant failed to act as trained when he hastily moved the patient from the treatment room in a physically abusive manner. His actions are consistent with the definition of abuse as outlined in Policy 3.04.

The Employer argues that, in reviewing the actions of the Grievant in their totality, he clearly violated the Ohio Administrative Code Section 5122-3-14,

"Abuse/neglect of patients receiving services in regional psychiatric hospitals" and is therefore in violation of Rule 5.4 as stated in the notice of termination of employment. The Employer states that the Grievant's record may indicate a lack of previous discipline, but he has been investigated for patient abuse in at least one case in the past. The Arbitrator is urged to deny the grievance of Ryan Shaner in its entirety.

POSITION OF THE UNION

The Union argues, both at hearing and in its post hearing brief, that in this case the standard of proof must rise to the level of "clear and convincing" due to potential loss of employment at Heartland Behavioral which may also be career ending.

The Union states that all evidence and testimony show that there was no physical abuse of Patient M. Further, the Employer refused to consider the police report which determined that the charge of abuse was "unfounded." The Union argues that the Employer engaged in a conflict of interest when CEO Colletti appointed himself as the pre-disciplinary hearing officer and then recommended to himself that the employment of the Grievant be terminated. The Union states that the CEO has never in the past acted in the capacity of a pre-d hearing officer. The Union suggests that the CEO was predisposed to end the Grievant's employment before any due process occurred. The Union argues further that the Employer failed to complete a thorough investigation as Robert Rose, who accompanied the Grievant

to the treatment room, was never interviewed as a part of the investigation. Additionally, medical student Kahn was not produced at hearing to testify.

The Union argues that Dr. Lohn ordered the Grievant to remove Patient M from the treatment room. Having done so, the Grievant had no options such as verbal exchange and H-TEAM intervention. He was to follow the direct instructions given by the physician. The Union states that Dr. Lohn's written statement does not mention patient abuse. The Union emphasizes that Dr. Lohn did nothing to intervene in an action which she later referred to as patient abuse. The Union states that Dr. Lohn's testimony differed from her written statement. There was no mention of the alleged slamming of a clip board in her statement, and she described the patient as having slid to the floor as opposed to being ejected.

The Union states that Social Worker Wilson is a newer employee who has difficulty working with other staff members. The Union argues that she fabricated abuse charges due to the fact that the Grievant did not agree with her assessment of the incident. And, if she believed abuse had occurred, Ms. Wilson did nothing to intervene during the incident.

The Union states that witness Wells testified that there was no abuse and that the Grievant was not angry but acted in a professional and assertive manner. TPW Wells stated that Patient M had a history of going limp and falling to the floor. The Union states that TPW Rose testified clearly that the Grievant did not eject or throw the patient to the floor.

The Union states that the Grievant has been an exemplary employee and is known for his skill at deescalating patients whose behavior is difficult. The Union

cites a number of employee awards achieved by the Grievant. The Union argues that there is no evidence or proof to support the Employer's charge of violation of the abuse rule. The Union argues that there was no just cause and asks the Arbitrator to sustain the grievance; reinstate the Grievant to his former position; award all lost wages including any holiday pay and premium pay to which the Grievant would have been entitled; make appropriate PERS payments; make payment for lost overtime opportunities; reinstate all leave balances which would have accrued; and make payment for medical, dental or vision care expenses. The Union requests the Arbitrator to retain jurisdiction for sixty days.

DISCUSSION AND ANALYSIS

Evidence in this matter indicates that Patient M was known to have a history of difficult behavior including biting, hitting and other violent acts. When confronted with an authority figure, she was known to drop her weight often falling to the floor. The Grievant was well aware of the patient's background and behavior when he was asked to provide assistance in moving her from the treatment room. Dr. Lohn testified that Patient M refused to leave the room and remove herself from a chair in the treatment room following the treatment and assessment session. Dr. Lohn opened the door and motioned for the Grievant to come into the room and assist with the removal of the patient. She testified that the Grievant came into the room, slammed his clipboard on the table and yelled at the patient to stand. In contrast to her testimony at hearing, Dr. Lohn's written statement, which was taken by hospital police, does not mention that the Grievant slammed a clipboard on the

table. Likewise, Social Worker Wilson testified at hearing, on cross-examination, that the Grievant slammed the clipboard on the table, but her written statement, given the day of the incident, does not include this detail. The Union's argument, that testimony and evidence are not consistent regarding this facet of the incident, is noted. Union witness, TPW Jaymes Wells, who followed the Grievant into the room, testified that the Grievant did not slam a clipboard on the table. While Dr. Lohn and Ms. Wilson stated that the Grievant was "gruff and angry," Union witness Wells testified that he was not angry, and witness Rose stated that the Grievant was not angry at all but was instead firm and professional. The Employer agrees that there are many variations of the description of the incident. Dr. Lohn testified that the Grievant lifted the chair, on which the patient was seated, and she fell to the floor, falling first onto the arm of another nearby chair. Her statement given to police the day of the incident states that the patient "slid to the floor." Social Worker Wilson testified by telephone by agreement of the parties. She testified that the Grievant shoved Patient M out of her chair and wrote in her statement to Police Officer Stockhaus that he ejected her from the chair. Union witness Wells testified that the Grievant did not throw or eject the patient from the chair. Union witness Rose testified that the Grievant stood Patient M up from the chair. He stated that the Grievant moved the chair and the patient purposely dropped to the floor. The inconsistency in testimony from witnesses who were sworn or affirmed and who were sequestered during the hearing is critical. In addition to Dr. Lohn and Social Worker Wilson, the Grievant and both Union witnesses, Wells and Rose, were either in the room or in the doorway. The treatment room is small and any activity is

easily observed from within or at the doorway as pointed out to the Arbitrator who was taken to the treatment room on the unit. Dr. Lohn testified that the Grievant dragged the patient out of the room by her wrists, but her written statement to the Police Officer stated that he dragged her out by holding her arms. A significant difference. Witness Wells testified at hearing that the Grievant did not drag the patient but instead held her under the arms as she was moved out of the room.

The Employer argues that the Grievant "left her crying in a fetal position." In her written investigative statement, Dr. Lohn made no such reference to Patient M being in a fetal position, and her testimony at hearing made no such claim. Likewise, Ms. Wilson's written statement and testimony do not mention that the patient was left in a fetal position. Witnesses Wells and Rose made no reference to the patient being in a fetal position.

It must be noted that there are a number of versions of the incident including that of the Grievant which differs from all others. The Union argued, during its opening statement and in its post hearing brief, that the level of proof in disciplinary cases of this nature must be the "clear and convincing standard." The Union's argument is compelling.

> Concerning the quantum of required proof, most arbitrators apply the "preponderance of the evidence" standard to ordinary discipline and discharge cases. However, in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a "clear and convincing evidence standard. . . ."
> *How Arbitration Works, Elkouri and Elkouri, Sixth Edition, pgs. 950 – 951.*

Arbitrator McDonald considers the level of proof required in a discharge case which impacts the public reputation of an employee.

> In deciding the amount of proof to be produced, I do not believe that labor arbitration should be bound by criminal law doctrines such as "beyond a reasonable doubt." At the same time, I do believe that in cases as serious as this involving discharge, and certainly involving a person's reputation, a degree of proof above and beyond that normally used should be required. As such, I am convinced that the best standard is requiring that the Employer carry the burden of demonstrating by "clear and convincing evidence" reasons that would justify the serious penalty of discharge.
> *Michigan Milk Producers Assn. and United Dairy Workers, Retail, Wholesale and Department Store (RWDSU) Local 86. Arbitrator Thomas A. McDonald, 114 LA 1024 1029.*

The Union's "clear and convincing" argument is persuasive based on inconsistent statements and testimony. A discharge based on the abuse of a patient in a mental health facility is damaging to reputation and any future employment. The Grievant testified to his inability to find regular employment since his removal from Heartland.

The Employer argues that the only consistent testimony was from Employer witnesses, but all witnesses were sworn or affirmed and sequestered during the hearing, and there were a number of inconsistent versions from all who testified. Further, as noted above, inconsistencies exist between written statements produced the day of the incident and testimony at hearing. There is, nevertheless, sufficient evidence to indicate that the Grievant did not proceed consistent with policy and training.

The Employer states that the Grievant violated training in the appropriate methods to diffuse a potential crisis, and all involved were aware that Patient M was potentially violent and difficult to direct. The Grievant was trained to avoid the use of negative words such as "get up." His immediate approach was not consistent with

that training. The Grievant was fully aware of Policy MED-19 which states that "This policy focuses on reducing injuries by avoiding or limiting staff-to-patient physical contact. Significant emphasis of this policy is placed on prevention and consistency . . . ." The policy emphasizes that an employee should "avoid 'hands on' physical contact." The Grievant failed to consider the policy and training. The Employer argues that the Grievant had the option of calling for a pre-crisis assist team or H-Team (Emp. Exb. 2). The assist team policy indicates that assistance from an H-Team may be required when a patient fails to respond to initial interventions. This was the case with Patient M when she was requested to leave by Dr. Lohn and Ms. Wilson. The Grievant's better approach may have been to call for the assistance of an H-Team as opposed to taking matters into his hands and physically removing the patient. It is interesting that the initial elements for an H-Team were already available in the treatment room based on Heartland Behavioral H-Team policy. Dr. Lohn, Social Worker Wilson, the Grievant and TPWs Wells and Rose could easily have been the core of an H-Team. One wonders why Dr. Lohn or Ms. Wilson did not proceed in this manner before looking into the hallway and motioning for the Grievant to enter the treatment room to assist in removing the patient on his own volition. There is no evidence that Dr. Lohn and Ms. Wilson considered utilizing an H-Team. And when the Grievant initiated the removal of Patient M from the chair, either Dr. Lohn or Ms. Wilson could have insisted that the Grievant stop and consider, as a group, a different approach. Dr. Lohn and Social Worker Wilson testified that everything happened so quickly that they stood in the room stunned. But Dr. Lohn had been employed by Heartland for two and one half years, and, as

the facility psychiatrist, she certainly had been involved in fast moving pre-crisis situations on a number of occasions. As the Union argues, her inaction is problematic as was her comment following the removal of Patient M from the treatment room that the Grievant's approach was one way to handle it. The Union's suggestion, that blame must be shared by those who conducted the treatment/assessment of Patient M, is compelling.

The Union makes an emphatic argument of conflict of interest in that the CEO of the hospital acted as hearing officer at the pre-disciplinary hearing and then made the recommendation to terminate the employment of the Grievant to himself. While there may be a perception of conflict of interest, there was no violation of the collective bargaining agreement and the action of the Employer in this respect may yet pass the "Loudermill" test. There is no procedural defect, but, based on perception of a conflict of interest, the Employer may in the future want to consider a different management employee as hearing officer.

The actions of the Grievant were not consistent with aspects of Heartland Behavioral policy and his training as noted above. But the termination of his employment was specifically and solely for violation of Rule 5.4, Abuse, exploitation, or intimidation of any patient under the supervision of the department. Policy 3.04 (Jt. Exb. 9) defines abuse.

> 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.

Evidence in this matter does not lead to a conclusion that the Grievant knowingly caused physical harm to Patient M. Nor did he recklessly cause serious physical

harm. There is no evidence that Patient M sustained an injury due to being removed from the treatment room. The lack of physical abuse is not necessarily an indication that no abuse occurred. As Arbitrator Nels Nelson stated in Case No. 23-13-941104-0850-01-04, Department of Mental Health and OCSEA, "It is well-established that a patient does not have to have an apparent injury for an employee to be guilty of patient abuse." But evidence in this matter does not point to patient abuse. A critical piece of evidence in this matter is Joint Exhibit 3, the report from the Police Department. Following a thorough investigation, the charge of abuse was "unfounded." The investigation was not conducted by the Massillon Police Department, County Sheriff Department or the Ohio Highway Patrol. It was conducted by the Department's internal police department whose members' training is specific and specialized on rules and polices of the hospital. CEO David Colletti suggested during testimony that there is a difference between the police department finding regarding abuse based on a criminal interpretation and an administrative interpretation. But there was no evidence at hearing to explain what the difference might be. The Employer utilized the same investigatory interview statements which were assembled by hospital police to make the decision to terminate the employment of the Grievant.

The Grievant was charged with violation of the abuse rule 5.04. This Arbitrator would suggest that violation of a level four violation in this matter may have been appropriate based on the physical moving of the patient and her placement on the hallway floor although the inaction of Dr. Lohn and Social Worker

Wilson is troubling. The collective bargaining agreement in Section 24.01 states that "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 the authority to modify the termination of an employee committing such abuse." The arbitrator in this matter finds that the Grievant, Ryan Shaner, did not violate Rule 5.4 consistent with the definition of abuse as found in Policy 3.04. There was, therefore, no just cause to terminate the Grievant's employment, and the Employer, therefore, violated Section 24.01 of the collective bargaining agreement in doing so. Grievance is granted.

AWARD

Grievance is granted. The Employer did not have just cause to terminate the employment of the Grievant pursuant to Section 24.01 of the collective bargaining agreement. Grievant is to be reinstated, at the earliest possible time, to the unit and shift to which he had been assigned at the time of his removal with no loss of seniority and with all leave balances which would have accrued. The Grievant will be made whole which includes lost wages, minus interim earnings, step increases and longevity, any holiday pay or premium pay to which he may have been entitled and any regularly scheduled overtime if any. The Employer and employee share of PERS retirement credits will be reinstated. The Grievant will be reimbursed for any medical, dental and vision expense which would have been provided through the

health care plan. The Grievant's personnel record will not reflect the termination of employment in any respect.

The Arbitrator will retain jurisdiction for thirty days from the date of the Award for purposes of remedy only.

Signed and dated this 29th Day of August 2016 at Cleveland, Ohio.

Thomas J. Nowel, NAA

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th Day of August 2016, a copy of the foregoing Award was served, by electronic mail, upon George L. Yerkes, Advocate for the Union and Jessica Doogan; Edward A. Flynn, Advocate for the Employer; and Victor Dandridge and Alicyn Carrel from the Office of Collective Bargaining.

Thomas J. Nowel, NAA
Arbitrator