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In the Matter of Arbitration Between the	:	Grievance Number: DMR-2016-04397-4
	:	
STATE OF OHIO, DEPARTMENT OF	:	
DEVELOPMENTAL DISABILITIES,	:	
COLUMBUS DEVELOPMENTAL	:	Grievant: Akintunde Durosinmi-Etti
CENTER,	:	
	:	
Employer	:	
and the	:	
	:	Date of Arbitration Hearing:
OHIO CIVIL SERVICE EMPLOYEES	:	September 5, 2017
ASSOCIATION, AMERICAN	:	
FEDERATION OF STATE, COUNTY	:	
AND MUNICIPAL EMPLOYEES,	:	
LOCAL 11, AFL-CIO,	:	Howard D. Silver, Esquire
Union	:	Arbitrator

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: State of Ohio, Department of Developmental Disabilities,
Columbus Developmental Center, Employer

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PROCEDURAL BACKGROUND

This matter came for an arbitration hearing on September 5, 2017 at 9:00 a.m. in the board room at the Columbus Developmental Center, 1601 West Broad Street, Columbus, Ohio 43222. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded on September 5, 2017 at 12:10 p.m. and the evidentiary record was closed at that time. Post-hearing briefs from both parties were received by the arbitrator by October 5, 2017 and exchanged between the parties by the arbitrator on October 6, 2017.

This matter proceeds under a collective bargaining agreement between the parties, Joint Exhibit 1, in effect from July 1, 2015 through February 28, 2018.

No challenge to the arbitrability of the grievance that has given rise to this proceeding has been raised. The arbitrator finds the grievance underlying this proceeding to be arbitrable under the language of the parties' collective bargaining agreement and properly before the arbitrator for review and resolution.

JOINT ISSUE

1. Did the Grievant, Akintunde Durosinmi-Etti, abuse an individual of the Columbus Developmental Center?
2. If the Grievant did not abuse an individual, was the Grievant removed for just cause?
3. If the grievant was not removed for just cause, what shall the remedy be?

JOINT STIPULATIONS

1. The Grievance is properly before the Arbitrator.
2. The Grievant was hired by the Employer on June 30, 2013, as an Intermittent Therapeutic Program Worker (TPW), and became a permanent TPW on September 22, 2013.
3. The Grievant was removed from his position as a TPW on October 26, 2016.
4. The Grievant was removed for a violation of the Ohio Department of Developmental Disabilities Standards of Conduct Policy, specifically rules:
 - 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, sexual, or verbal as defined by Ohio Administrative Code 5123:2-7-02 addressing major unusual incidents and unusual incidents to insure health, welfare, and continuous quality of improvement.
 - 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, or covering up abuse, neglect or mistreatment.
5. The Grievant had no active discipline on his record at the time of his removal.

JOINT EXHIBITS

1. Contract between the State of Ohio and OCSEA/AFSCME
2. Grievance Trail
3. Discipline Trail
4. Color Pictures
5. Policies and Training Records
6. DODD Standards of Conduct, Rule Violations and Penalties
7. Ohio Administrative Code 5123: 2-17-02

8. Medicaid Regulations

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the State of Ohio, Department of Developmental Disabilities, Columbus Developmental Center, hereinafter the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter the Union, are parties to a collective bargaining agreement, Joint Exhibit 1, in effect from July 1, 2015 through February 28, 2018.

Within the collective bargaining agreement between the parties, Joint Exhibit 1, in Article 5, Management Rights, the parties agreed to the following language:

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

Article 5, Management Rights also reserves to the Employer the right to suspend, discharge, and discipline employees.

Article 24, Discipline within the parties' collective bargaining agreement, in section 24.01 – Standard presents an express and specific written provision that reads as follows:

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...

On June 5, 2016 an incident occurred at the Columbus Developmental Center (CDC) that

involved a CDC resident who is referred to herein as DR.

At 1:55 p.m. on June 5, 2016 DR acted aggressively toward Therapeutic Program Worker (TPW) Akintunde Durosinmi-Etti, the grievant in this proceeding. The actions of CDC resident DR included throwing punches at Mr. Durosinmi-Etti, with some punches connecting. This violence prompted Mr. Dursoninmi-Etti to call out to other staff for assistance. This shouted plea for help brought TPWs Frank Mitchell and Matthew Ostrowski running to help Mr. Durosinmi-Etti by restraining DR until he stopped assaulting Mr. Durosinmi-Etti. TPWs Mitchell, Durosinmi-Etti, and Ostrowski were joined a short time later by TPW Mesan Daboni at a time when DR had already been taken to the floor.

Because of the violence of DR's attack upon Mr. Durosinmi-Etti, and because DR had initially refused to break off his attack upon Mr. Durosinmi-Etti, the TPWs who had responded immediately to assist Mr. Durosinmi-Etti placed DR in a three-person restraint and took him to the floor. TPW Mitchell held DR's left arm; TPW Ostrowski held DR's right shoulder; TPW Daboni upon arrival held DR's left leg. Mr. Durosinmi-Etti recalls kneeling by DR's right leg.

The four-person, four-point restraint of DR on June 5, 2016 by the four TPWs in response to the attack upon TPW Durosinmi-Etti by DR lasted about one and one-half minutes. When DR had calmed sufficiently to release him from the four-point restraint, the beginning of bruising, discoloration, redness, and swelling was observed on the left side of DR's face. After ceasing his attack upon TPW Durosinmi-Etti, and after being released from the four-point restraint, DR accused TPW Durosinmi-Etti of repeatedly punching the left side of DR's face and declared that he would have Mr. Dorosinmi-Etti fired.

The Employer conducted an investigation into the events surrounding the physical restraint of DR on June 5, 2016. The Employer's investigation included interviews of and written, signed

statements from each of the TPWs who had been involved in restraining DR on June 5, 2016 - TPWs Mitchell, Ostrowski, Daboni, and Durosinmi-Etti.

TPW Frank Mitchell shortly after 1:55 p.m. on June 5, 2016 provided to CDC administrators a first written, signed statement, found at Joint Exhibit 3, page 39 that reads as follows:

DR punched at Akin etti, at which point myself and 3 other staff placed DR into a four point restraint, DR fought resulting in a ground restraint for 1.5 min, he calmed down and said he was punched in the face by staff, however I did not see this occur. During the restraint, I secured DR's left arm.

TPW Matthew Ostrowski prepared and signed a written statement on June 5, 2016 that is found at Joint Exhibit 3, page 40 that reads as follows:

I came into the hallway to see DR attacking Akin E. swinging violently. We struggled with him. On the takedown he hit his head against the wall/railing. We put him in a "four point restraint" for one minute and a half. I held the right shoulder. Eventually calmed down, he claimed "you punched me, your (sic) getting fired" at staff Akin.

TPW Mesan Daboni signed a written statement on June 5, 2016 that is found at Joint Exhibit 3, page 41 that reads as follows:

I (Daboni, Messan) was in living area with individuals when I heard staff (Akin) yelling for help. I went to the hallway where [DR] was aggressively attacking Akin by punching him while Akin was blocking him. For both safety, I was involved with restraint of [DR] who won't stop his aggressivity. While [DR] was in four points firm restraint (firm extremity restraint), I was holding [DR's] left leg. During the process of [DR's] restraint, he was so agitated that he hit his face to the wall. [DR] was restrained for about 1.5 minutes before calming down.

On June 5, 2016 TPW Frank Mitchell prepared and signed a second written statement found at Joint Exhibit 3, page 42. This latter written and signed statement by Mr. Mitchell reads

as follows:

[DR] threw punches at staff Akin etti connecting twice, I and Matt from (1720B) immediately placed [DR] in a restraint and were joined by 2 other staff. We went to a ground restraint at which point Akin etti punched [DR] several times on his left side of his face. Before leaving the scene [DR] calmed down and went on a walk with other staff.

On the second statement provided by TPW Mitchell on June 5, 2016, Joint Exhibit 3, page 42, Mr. Mitchell is asked why he had changed his statement from what he had earlier reported.

Mr. Mitchell's answer reads as follows:

I was under extreme pressure to avoid telling the entire truth to protect staff and my report was going to members with their own interest. I knew my report would not reach the correct people if it identified staff considering the massive cover up at play. I knew I had to go separately to administrators.

On June 5, 2016 at 8:30 p.m. TPW Akintunde Durosinmi-Etti signed a written statement, Joint Exhibit 3, page 43 that reads as follows:

I came in saw DR agitated and asked him what was going on, he starting cursing at me and started throwing punches at me, I was blocking him and at the same time, calling for help, other staffs showed up and we put him a four man restrain per his program, during which he hit his face on the wall railing because we were struggling, this was for about 1½ minutes he later calmed down, grounds and nurse were notified.

On the written statement provided by Mr. Durosinmi-Eti on June 5, 2016 the question was put to him: "Did you punch [DR] in the face at any time?" to which Mr. Durosinmi-Etti answered: "No." Mr. Duronsinmi-Etti confirmed that DR had said he was going to get Mr. Durosinmi-Etti fired and stated that the other staff involved in the restraint of DR had been Mesan Daboni, Matt Ostrowski, and Frank Mitchell. See Joint Exhibit 3, pages 43-44.

On September 30, 2016 notice of a pre-disciplinary meeting scheduled for October 3, 2016 at 12:30 p.m. in the Human Resources Administrator's Area was provided to Mr. Durosinmi-Etti. Within this pre-disciplinary meeting notice, Joint Exhibit 3, page 5, three rules of the Ohio Department of Developmental Disabilities' Standards of Conduct are cited: Performance Track – rule (A)(1) – Abuse of any type or nature to an individual under the supervision or care of the Department or State including but limited to, physical, or verbal as defined by Ohio Administrative Code 5123:2-7-02 addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality of improvement; Performance Track – rule (F)(1) – Failing to report in any manner which results in potential or actual harm to an individual. Failing to report, lying about, or covering up, abuse, neglect or mistreatment; Performance Track – rule (J)(1) – Interfering, failing to comply, withholding information or failing to cooperate with an investigation related to abuse, death or other significant event of an individual.

The September 30, 2016 notice of the pre-disciplinary meeting scheduled for October 3, 2016 also included the following:

In the particulars to wit: On June 5, 2016, at approximately 1:55 p.m., you were involved in implementing a manual four point restraint of DR. You reported that, in the process of taking DR to the floor, DR struck the left side of his face on a wooden railing along the wall. Later, at approximately 7:30 p.m., it was reported that, during this incident, you were observed striking DR on the left side of his face several times. DR was observed to have bruising and swelling around the area of his left eye. Further, after the incident, it was reported that you pressured other staff to provide false information on their initial reports. You gave varying accounts of what happened during this incident each time you were interviewed. You were not truthful during the investigation.

The pre-disciplinary meeting that addressed Mr. Durosinmi-Etti occurred on October 3, 2016. On October 18, 2016 the pre-disciplinary meeting hearing officer, Joseph J. Fanell, issued a Report and Recommendation, Joint Exhibit 3, pages 2 – 3, stating that three rules of the Ohio

Department of Developmental Disabilities' Standards of Conduct, rule A1, Abuse of a Client; rule F1, Failure to Report; and rule J1, Interference in an Investigation, were considered. The pre-disciplinary meeting hearing officer found just cause for the discharge of Mr. Durosinmi-Etti for having violated rules A1 and F1 of the Standards of Conduct.

On October 26, 2016 the Employer served upon Mr. Durosinmi-Etti a written notice of removal, Joint Exhibit 3, page 1 that charged Mr. Durosinmi-Etti with having abused a client, a violation of rule A1 of the Ohio Department of Developmental Disabilities' Standards of Conduct, and with failure to report, a violation of rule F1 of the Ohio Department of Developmental Disabilities' Standards of Conduct. The notice of removal charged Mr. Durosinmi-Etti with abusing a client on June 5, 2016 by striking the client on the left side of the client's face, subsequently giving varying accounts of what occurred, and not being truthful about what happened when asked about the incident during an investigation of the incident and at the pre-disciplinary meeting. The order of removal noted that both for the Attendance Track and the Performance Track, the grievant, Mr. Durosinmi-Etti, had no active discipline.

A timely grievance was filed by the Union on behalf of Mr. Durosinmi-Etti charging that the Employer had unjustly removed Mr. Durosinmi-Etti because Mr. Durosinmi-Etti was not guilty of abusing anyone and had not failed to report the abuse of anyone. The grievance filed on behalf of Mr. Durosinmi-Etti seeks the return of Mr. Durosinmi-Etti to his employment at CDC and asks that the grievant be made whole by placing the grievant in the position he would have been in had the discharge of the grievant not occurred.

The grievance filed on behalf of Mr. Durosinmi-Etti moved through the parties' contractual grievance procedure but remained unresolved. The grievance was moved to final and binding arbitration at the direction of the Union. This matter came on for an arbitration hearing before the

undersigned arbitrator on September 5, 2017.

SUMMARY OF TESTIMONY

Frank Mitchell

At the time of his testimony in this proceeding on September 5, 2017, Frank Mitchell was not an employee of the Columbus Developmental Center (CDC) having resigned his position there in early September, 2016. In this regard Mr. Mitchell identified Management Exhibit 1 as a copy of Mr. Mitchell's written and signed resignation letter that he had directed to CDC's administration that reads as follows:

I regret that I must place this 2 weeks notice to end my employment with CDC, it was a joy and honor to work along side such great people.
effective this 18th day of August, 2016.
Thank you for allowing me a chance at being your employee.

Mr. Mitchell testified that he left the employ of the CDC in early September, 2016. Mr. Mitchell recalled that had worked at CDC from May, 2016 through early September, 2016 as an intermittent employee.

Mr. Mitchell testified that while the investigation into the incident that occurred on June 5, 2016 that involved the restraint of DR was ongoing, Mr. Mitchell had been placed on administrative leave. Because Mr. Mitchell had not been a full-time employee the administrative leave had been unpaid. Mr. Mitchell explained that he could not continue indefinitely on administrative leave and so ended his employment relationship with CDC in early September, 2016.

Mr. Mitchell identified Joint Exhibit 3, page 39 as the first written statement he submitted to CDC administrators about what had occurred on June 5, 2016 in the restraint of DR. Mr.

Mitchell explained in his testimony that this written statement is the second version of an earlier first draft of a statement that had mentioned that Mr. Durosinmi-Etti had been acting in self-defense. The second version of Mr. Mitchell's initial draft does not contain the language about self-defense as Mr. Durosinmi-Etti, according to Mr. Mitchell, had insisted that the language about self-defense be excluded. Mr. Mitchell testified that his first written statement submitted to CDC administrators, appearing at Joint Exhibit 3, page 39, does not present an accurate description of the events of June 5, 2016 relating to the restraint of DR.

Mr. Mitchell identified Joint Exhibit 3, page 42 as his second written statement provided to CDC administrators about the restraint of DR on June 5, 2016, and testified that this second written statement presents an accurate description of what occurred. The second statement describes Mr. Durosinmi-Etti punching DR several times on the left side of DR's face while DR was being restrained on the floor. Mr. Mitchell testified that at no time did he observe DR's face strike the railing on the hallway's wall. Mr. Mitchell testified that he had seen what happened and DR's face had not come into contact with the wall or railing in the hallway.

Mr. Mitchell recalled that on the day in question, June 5, 2016, he had clocked in at the beginning of his scheduled shift at 1:30 p.m. and he had been aware that DR was to receive his medications at that time. Mr. Mitchell recalled that DR had appeared agitated with Mr. Durosinmi-Etti, had appeared standoffish, and DR then took two swings at Mr. Durosinmi-Etti, connecting once.

Mr. Mitchell testified that DR was then restrained by TPWs Ostrowsky and Mitchell, and shortly thereafter by Mr. Daboni, who had also come to Mr. Durosinmi-Etti's aid. Mr. Mitchell testified that it had been during DR's active restraint by these TPWs that DR was punched in the face by Mr. Durosinmi-Etti.

Mr. Mitchell was asked why he had not reported this abuse immediately. Mr. Mitchell responded that he had believed his job was on the line and had thought that if he told the truth he would be treated as a pariah on the unit by other staff. Mr. Mitchell testified that he had been a new employee in June, 2016 and had found himself in a very difficult situation.

Mr. Mitchell identified Joint Exhibit 3, pages 54-55 as presenting his interview that occurred on June 8, 2016. During this interview Mr. Mitchell recalled Mr. Durosinmi-Etti and DR becoming tangled up with one another and Mr. Mitchell and Mr. Ostrowski rushing in to restrain DR, first with DR face down on the floor and then, while still restraining him, turning DR onto his back. Mr. Mitchell was asked who had asked him to write a statement to the effect that DR had fallen on the hallway railing causing the injuries to DR's face, to which Mr. Mitchell had responded: "Akin Etti made the statement and everyone followed suit." When asked why he had not reported the incident earlier, Mr. Mitchell responded: "I did not believe that my report would get to those it needed to if left in the hands of the perpetrators. So I took the first chance I could to go to command and relate what actually occurred to the best of my knowledge."

Mr. Mitchell was asked at his interview on June 8, 2016 whether anyone had threatened him and he answered: "No," but recalled that he had been asked to change his initial report. Mr. Mitchell recalled that the punches thrown by Mr. Durosinmi-Etti had been short punches.

Mr. Mitchell identified Joint Exhibit 3, page 85 as a written statement he provided on August 23, 2016 in which he was again asked about why he had delayed reporting an accurate description of the restraint of DR on June 5, 2016. Mr. Mitchell recalled that he had been directed by Mr. Dorosinmi-Etti to revise Mr. Mitchell's initial statement.

Under questioning by the Union's representative, Mr. Mitchell confirmed that his first written statement, found at Joint Exhibit 3, page 39 had not been accurate and was a second version

of his first written statement after having been directed to rewrite his initial written statement by Mr. Durosinmi-Etti.

Mr. Mitchell recalled that on the day in question he had observed DR and Mr. Durosinmi-Etti talking and then observed DR throw punches at Mr. Durosinmi-Etti, with one punch connecting. Mr. Mitchell recalled that he and Mr. Ostrowski took DR to the ground and as they were restraining DR Mr. Durosinmi-Etti, who had been standing by the head of DR, got on top of DR and punched DR several times. Mr. Mitchell testified that DR had been punched by Mr. Durosinmi-Etti at a time when DR had been restrained on the ground. Mr. Mitchell testified that Mr. Durosinmi-Etti punched DR several times in the face while DR had been restrained.

Mr. Mitchell recalled that Mr. Durosinmi-Etti punched DR in the face three to five times. Mr. Mitchell stated that he had not pushed Mr. Durosinmi-Etti away from DR in response to the punches he observed being delivered by Mr. Durosinmi-Etti to DR.

Mr. Mitchell pointed out that at the time of the punches delivered by Mr. Durosinmi-Etti to DR, Mr. Mitchell had been engaged in restraining DR to protect Mr. Durosinmi-Etti, and it was at this time that DR was struck in the face by Mr. Durosinmi-Etti.

Under redirect examination by the Employer's representative, Mr. Mitchell recalled that when the restraint of DR was over and DR was taken for a walk elsewhere by other staff, Mr. Durosinmi-Etti called everyone into a room and had said that DR had hit his face on the hallway's railing.

Scott Flynn

Scott Flynn began his employment with the Department of Developmental Disabilities as a part-time Police Officer in May, 2001 and then moved to a full-time Police Officer position with the Department. Mr. Flynn then served as the Chief of Police at the Columbus Developmental

Center (CDC) and in 2012 became the Director of Investigations at CDC. Mr. Flynn testified that at CDC there are 200 to 250 major unusual incidents investigated each year and estimated that he conducted about 200 investigations per year. Mr. Flynn testified that investigations of abuse or neglect of a resident at CDC account for about fifty investigations per year.

Mr. Flynn testified that during the evening hours of June 5, 2016 he received a telephone call at his home that informed him that a resident's restraint had occurred and the resident had suffered an injury. Mr. Flynn was informed that the incident had to be investigated and Mr. Flynn testified that the following day an investigation was initiated and the Ohio State Highway Patrol (OSHP) was notified.

Mr. Flynn testified that Joint Exhibit 3, pages 34 – 36 present the Resident Unusual Incident Report at the Columbus Developmental Center for an incident that occurred on June 5, 2016 in a hallway near living area 1720A.

Mr. Flynn testified that the unusual incident report at Joint Exhibit 3, page 34 was based on the facts of the incident in question as provided by Mr. Durosinmi-Etti, a description that included the assertion that DR had hit his eye on the railing in the hallway. Mr. Flynn noted that in a separate Resident Unusual Incident report at Joint Exhibit 3, page 32 Frank Mitchell had reported that DR was taken to the ground during a restraint and during this restraint TPW Akin Durosinmi-Etti punched DR in the face. Mr. Flynn testified that the statements received from DR were consistent with being punched in the face by Mr. Durosinmi-Etti.

Mr. Flynn noted that DR had made false allegations of abuse against staff in the past and testified that DR was known to lie when suspected of some misconduct. Mr. Flynn testified, however, that when DR observes another person's actions he tells the truth about what he observed. Mr. Flynn testified that DR had remained consistent in his statements about the June 5, 2016

incident and those statements were in accordance with what Mr. Mitchell had reported.

Mr. Flynn identified Joint Exhibit 5, pages 85 – 90 as the Columbus Developmental Center Behavior Support Strategy for DR, dated April 5, 2016. Joint Exhibit 5, page 84 indicates that on April 12, 2016 Akin Durosinmi-Etti attached his signature to a sign in sheet indicating that he had reviewed DR's Behavior Support Strategy and Special Team Meeting minutes.

At Joint Exhibit 5, page 87 of the Behavior Support Strategy for DR at CDC, within the paragraph numbered six, it is suggested that staff avoid a confrontational approach in speaking to DR and not power struggle with him. It is suggested that when DR becomes upset he be provided with some additional personal space. Joint Exhibit 5, page 88 in the paragraph numbered seven suggests that DR be offered a chance to go to a quieter place to relax. Mr. Flynn testified that Mr. Durosinmi-Etti had been confrontational with DR and had not provided additional personal space to DR in which to calm down.

Mr. Flynn identified Joint Exhibit 4, pages 1 – 4 as photographs of DR's face. Joint Exhibit 4, page 5 presents a photograph of the railing in the hallway where the events of June 5, 2016 involving the restraint of DR occurred. Mr. Flynn expressed his opinion that the injuries observed and photographed on DR's face in Joint Exhibit 4, pages 1 – 4 are not consistent with an injury caused by striking a linear rail in the hallway. Mr. Flynn testified that the trauma that can be seen in the photographs of DR's face in Joint Exhibit 4, pages 1 – 4 shows a circular pattern to the bruising in the area of the left eye. Mr. Flynn testified that the shape of the discoloration and swelling are not explained by a straight railing in the hallway.

Mr. Flynn identified Joint Exhibit 5, pages 1 – 8 as the incident reporting policy at CDC. Mr. Flynn testified that Mr. Durosinmi-Etti had been trained in this and other Center policies. Pages 20 – 24 of Joint Exhibit 5 were identified by Mr. Flynn as written policies at CDC on

reporting resident abuse or neglect. Mr. Flynn referred to Joint Exhibit 5, page 46 that indicates that training was provided by Mr. Flynn to Mr. Durosinmi-Etti on this policy on July 1, 2013.

Under questioning by the Union's representative, Mr. Flynn was referred to Joint Exhibit 3, page 10, the beginning of a transcription of a taped interview that at page 11 indicates DR stating: "He wasn't even on me. He was down on his knees" and "... punching me with his closed fist."

Mr. Flynn testified that when he looks at Joint Exhibit 4, pages 1 – 4, the photographs of DR's face, it appears to Mr. Flynn that DR had been punched in his left eye by a fist.

Mr. Flynn confirmed that the other two eyewitnesses to the restraint of DR on June 5, 2016, Mr. Ostowski and Mr. Daboni, did not report observing Mr. Durosinmi-Etti punching DR.

Robert Capaldi, Ph.D.

Robert Capaldi, Ph.D. has been employed by the Ohio Department of Developmental Disabilities for ten years. In May, 2009 Dr. Capaldi moved to the Columbus Developmental Center to serve as the Center's Program Director. In May, 2014 Dr. Capaldi was appointed to the position of Superintendent of CDC.

Dr. Capaldi testified that he was called at his home and notified that an allegation of abuse against a resident had arisen with DR claiming he had been struck. Dr. Capaldi identified Joint Exhibit 3, pages 2 – 117 as pre-disciplinary and investigatory records arising from the incident in question. Dr. Capaldi explained that as Superintendent of CDC he is the institution's appointing authority, the final decision-maker who examines the information gathered and decides what, if any, discipline to impose.

Dr. Capaldi testified that based on the information gathered in the investigation into the June 5, 2016 restraint of DR, Superintendent Capaldi determined there was sufficient evidence

upon which to conclude that abuse had occurred.

Dr. Capaldi identified Joint Exhibit 3, page 1 as the order of removal issued to Mr. Durosinmi-Etti that was effective October 26, 2016. Dr. Capaldi explained that the order of removal was premised on substantiated abuse of a resident and a failure to report this abuse.

Dr. Capaldi was referred to Joint Exhibit 6, pages 1 – 14, the Ohio Department of Developmental Disabilities' Standards of Conduct, Rule Violations, and Penalties for Classified Employees (Department-Wide), a policy that was effective May 1, 2016. At page 6 of this policy are Standard Guidelines for Progressive Discipline Performance Track. For a first offense of abusing a client the discipline indicated is removal.

Dr. Capaldi stated that Joint Exhibit 6, page 7 presents failing to report an allegation of abuse or neglect, or lying about it, or covering up abuse, neglect, or mistreatment. This rule presents a range of discipline for a first offense that extends from a written reprimand to removal.

Dr. Capaldi was referred to Joint Exhibit 7, Ohio Administrative Code section 5123: 2-17-02 – Addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvement. Within this rule, in section (C) – Definitions, in subparagraph (15)(a)(vii) at page 4 of this policy, “Physical abuse” is defined as meaning “... 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 2901.01 of the Ohio Revised Code. Such force may include, but is not limited to, hitting, slapping, pushing, or throwing objects at an individual.”

Dr. Capaldi was referred to Joint Exhibit 8, Interpretative Guidelines under the Medicaid Program for Intermediate Care Facilities for Persons with Mental Retardation. Dr. Capaldi explained that because CDC participates in the Medicaid Program it is required to follow these Medicaid guidelines. Tag number W122 in section 483.420, Compliance Principles, provides that

the Condition of Participation of Client Protections is met when individuals are free from abuse and neglect.

At page three of these Medicaid guidelines, Joint Exhibit 8, at tag W127 the following appears:

The facility must take whatever action is necessary to protect the clients residing there. For example, if a facility is forced by court order or arbitration rulings to retain or reinstate an employee found to be abusive, the facility must take measures to protect the clients of the facility (such as assigning the employee to an area where there is no contact with clients).

Within Joint Exhibit 8 at page 5 of the Medicaid guidelines, under tab W152 the following appears:

Where the facility has terminated an employee based upon confirmation that abuse, neglect, or mistreatment occurred during the employee's performance, and the termination decision was overturned by either arbitration finding or a court finding, the employee must be returned to a position which does not involve direct contact between that employee and clients of the facility.

The same sentiments set out above are found under tag W157 at page 8 of the Medicaid guidelines in Joint Exhibit 8, that is, forced to reinstate a person who has been determined to have been abusive, that person may not be allowed to work directly with clients.

Dr. Capaldi explained that every allegation of resident abuse at CDC results in a major unusual incident (MUI) report being prepared. Dr. Capaldi explained that four initial written statements were taken from the TPWs involved in the restraint of DR on the second shift on June 5, 2016. Dr. Capaldi emphasized that TPWs do not take statements from other TPWs.

Mesan Daboni

Mesan Daboni testified that on June 5, 2016 he had been working at CDC on living unit

1720A and when he had not been working on that living unit he had been working on living unit 1720B. On the day in question Mr. Daboni was working an assigned second shift.

Mr. Daboni recalled that on June 5, 2016, after he had begun his scheduled shift he saw Frank Mitchell on 1720A and asked him why he was there because Akin (Durosinmi-Etti) was expected to be working on the unit. Mr. Daboni recalled that Mr. Mitchell had said that he, Mr. Mitchell, had been told to report to this living unit because something had gone on with DR during the first shift. Mr. Mitchell had said that if there were to be an escalation he was there to help.

Mr. Daboni recalled that as they awaited the arrival of Mr. Durosinmi-Etti on the unit they heard DR speaking to himself. Mr. Daboni recalled DR saying that he was going to punch someone in the face but did not know who. Mr. Durosinmi-Etti then came onto the unit and Mr. Daboni observed DR exit the living unit and walk into a hallway. Mr. Daboni then recalled hearing Mr. Durosinmi-Etti calling for help and other TPWs responding to the call for assistance from Mr. Durosinmi-Etti.

Mr. Daboni testified that when he saw DR in the hallway DR had been assaulting Mr. Durosinmi-Etti. Mr. Daboni stated that when he heard Mr. Durosinmi-Etti's call for help Mr. Daboni had taken residents for whom Mr. Daboni had been responsible into the living unit and stayed with them there. Mr. Daboni recalled seeing DR fighting Mr. Durosinmi-Etti but Mr. Daboni could not at that time hear what was being said. Mr. Daboni recalled that more than one person had responded to Mr. Durosinmi-Etti's call for help.

Mr. Daboni stated that when he looked in the hallway he observed that DR was still struggling with the TPWs whereupon Mr. Daboni checked on his residents and then ran to the hallway to lend his assistance. Mr. Daboni found upon arrival in the hallway DR on the floor and Mr. Daboni's colleagues still struggling to control DR.

Mr. Daboni recalled that when DR was on the ground he continued to fight and there were three people attempting to restrain him. When Mr. Daboni arrived in the hallway he helped restrain DR with the concerted efforts of three other TPWs. DR eventually was restrained on the ground face up and Mr. Daboni recalled seeing DR's face swollen, whereupon Mr. Daboni recalled that someone had said that DR had hit his face on the hallway rail. Mr. Daboni testified that he is unable to say who that person was. Mr. Daboni testified that at no time did he see DR being abused. Mr. Daboni testified that he prepared his written statement in a room while he was by himself and gave his written statement to a nurse.

Mr. Daboni testified that at no time did Mr. Durosinmi-Etti tell Mr. Daboni what to write and testified that Mr. Durosinmi-Etti had not been with Mr. Daboni when Mr. Daboni prepared his written statement.

Under questioning by the Employer's representative, Mr. Daboni was referred to Joint Exhibit 3, page 41, his CDC Statement Form that he signed on June 5, 2016. The second to last sentence in this written statement from Mr. Daboni reads: "During the process of [DR's] restraint, he was so agitated that he hit his face to the wall."

Mr. Daboni was then referred to Joint Exhibit 3, page 56, the first page of an interview of Mr. Daboni that occurred on June 8, 2016 by investigator Ed Goodwin. At the bottom of page 56 within Joint Exhibit 3 Mr. Daboni is asked how DR got a black eye, to which Mr. Daboni responds: "The black eye can be related to the fact that [DR] hit his face against the wall."

Mr. Daboni was referred to Joint Exhibit 3, page 86, the interview of Mr. Daboni on August 30, 2016 by investigator Scott Flynn. At page 86 within Joint Exhibit 3 Mr. Daboni is asked if he actually saw DR's head strike the rail, to which Mr. Daboni responded: "[DR] was bleeding before the restraint happened, but I did not see his head hit the rail because I was in the living area when

they started in the hallway.”

Mr. Daboni testified that he received a five-day suspension based on the restraint of DR that occurred on June 5, 2016.

Mr. Daboni testified that no one had asked him to write a statement.

Matthew Ostrowski

Matthew Ostrowski worked the second shift at CDC on June 5, 2016, a shift that began at 1:30 p.m. Mr. Ostrowski testified that there had been chaos on the first shift that day and staff had been informed that Akin (Durosinmi-Etti) might need help because of threatening behavior that had occurred on the first shift.

Mr. Ostrowski recalled that when Mr. Durosinmi-Etti called out for assistance Mr. Ostrowski ran to the hallway and saw DR attacking Mr. Durosinmi-Etti. Mr. Ostrowski recalled that Frank Mitchell had been there and Mr. Ostrowski described DR as standing six feet, three inches tall and weighing 240 pounds. Mr. Ostrowski recalled that the three of them, TPWs Mitchell, Ostrowski, and Durosinmi-Etti were able to take DR to the ground and then Mr. Daboni appeared and with his assistance they turned DR over onto his back. Mr. Ostrowski recalled that DR began making allegations against staff but testified that DR always did that. DR eventually calmed down.

Mr. Ostrowski recalled that he saw DR hitting Mr. Durosinmi-Etti and observed Mr. Durosinmi-Etti blocking DR’s punches by using Mr. Durosinmi-Etti’s forearms. Mr. Ostrowski recalled that DR had cornered Mr. Durosinmi-Etti. Mr. Ostrowski recalled DR eventually calming down and taking a walk away from the unit accompanied by other staff.

Under questioning by the Employer’s representative, Mr. Ostrowski noted that no one told Mr. Ostrowski what he was to write in his written statement about the incident. Mr. Ostrowski

testified that he had written his statement in a room and that other staff members were present when he did so. Mr. Ostrowsky recalled that all of the participants in the restraint of DR on the second shift on June 5, 2016 were together when they wrote their respective statements about the incident. Mr. Ostrowsky said that all the participants in the restraint of DR had seen the same thing.

Mr. Ostrowsky recalled that there had been three TPWs involved in the take down and restraint of DR, with Mr. Ostrowsky holding DR's shoulder, the other shoulder being held by Mr. Mitchell, and eventually Mr. Daboni and Mr. Durosinmi-Etti holding DR's legs.

Mr. Ostrowsky testified that he is no longer employed at CDC and had received a five-day suspension for failing to adequately report the June 5, 2016 incident.

Mr. Ostrowsky testified that when DR was taken to the ground by three TPWs in the hallway near living unit 1720A, DR had hit the wall in the hallway.

Akintunde Durosinmi-Etti

Akintunde-Durosinmi-Etti arrived at CDC on June 5, 2016 in his Church clothes. Mr. Durosinmi-Etti first changed his clothes and then clocked in for the start of the second shift. Mr. Durosinmi-Etti testified that he had known DR for two years and explained that it is important to keep DR active.

Mr. Durosinmi-Etti testified that staff notes from the first shift on June 5, 2016 had related that DR had had to be restrained twice during that shift.

When Mr. Durosinmi-Etti entered living unit 1720A, DR pointed at Mr. Durosinmi-Etti and exclaimed: "And that motherfucker too!" Mr. Durosinmi-Etti approached DR and asked: "What's going on?" Mr. Durosinmi-Etti recalled DR exclaiming: "Don't talk to me!" and then commenced calling Mr. Durosinmi-Etti names.

Mr. Durosinmi-Etti recalled that DR began throwing punches at Mr. Durosinmi-Etti and

that Mr. Durosinmi-Etti was doing his best to block them with his forearms while he yelled for help. As the struggle with DR continued, Mr. Durosinmi-Etti recalled DR saying: "I'm going to get you fired!"

Mr. Durosinmi-Etti testified that he was often a target of DR's anger because DR had wanted extra cigarettes and his requests in this regard had been refused by Mr. Durosinmi-Etti.

Mr. Durosinmi-Etti recalled that Mr. Daboni had arrived after DR had been restrained and taken to the ground.

Under questioning by the Employer's representative, Mr. Durosinmi-Etti recalled that the three TPWs who had restrained DR initially and taken him to the ground had been Mr. Mitchell, Mr. Ostrowsky, and Mr. Durosinmi-Etti.

Mr. Durosinmi-Etti recalled that when he arrived for his scheduled shift on June 5, 2016 he had seen Mr. Ostrowsky and had told him that he, Mr. Durosinmi-Etti, might need assistance and if he did he would call for help. Mr. Durosinmi-Etti testified that he did not confront DR and had done nothing but attempt to deescalate the situation. Mr. Durosinmi-Etti denied that he had entered the personal space of DR but testified that DR had come over to Mr. Durosinmi-Etti, closing the distance between them.

Mr. Durosinmi-Etti testified that DR had claimed that he had been hit. When the TPWs talked about it the only logical explanation that could be conceived was that DR had hit his face on the rail in the hallway on his way to the ground. Mr. Durosinmi-Etti testified that this was the only possibility that the TPWs could think of to explain DR's injuries. Mr. Durosinmi-Etti testified that he had been restraining the lower part of DR and denied that he had been frustrated with DR at the time of these events. Mr. Durosinmi-Etti testified that it was not unusual for DR to have extreme mood swings.

Mr. Durosinmi-Etti testified that he had had no issues with Mr. Mitchell and no one had told Mr. Durosinmi-Etti what to write in his written statement.

Mr. Durosinmi-Etti testified that no one saw DR's head hitting the railing in the hallway.

Mr. Durosinmi-Etti testified that based upon the events of June 5, 2016 he had pled guilty to a criminal charge of disorderly conduct and had been convicted of this misdemeanor.

Mr. Durosinmi-Etti testified that DR had hated Mr. Durosinmi-Etti.

POSITIONS OF THE PARTIES

Position of the State of Ohio, Department of Developmental Disabilities, Columbus Developmental Center, Employer

It is the position of the Employer, the State of Ohio, Department of Developmental Disabilities, Columbus Developmental Center, that the grievant, Akintunde Dorosinmi-Etti, abused CDC resident DR on June 5, 2016. The Employer points out that this physical abuse of DR by Mr. Durosinmi-Etti prompted a complaint by DR and had been observed by TPW Frank Mitchell.

The Employer recalls the testimony from Mr. Mitchell at the arbitration hearing wherein he referred to his second written statement, Joint Exhibit 3, page 39. The Employer recalls Mr. Mitchell's testimony to the effect that he had been pressured by Mr. Durosinmi-Etti to change his initial written statement to bring it more in line with Mr. Durosinmi-Etti's written statement. Mr. Mitchell testified that he did change his statement to one that was more acceptable to Mr. Durosinmi-Etti but the Employer points out that Mr. Mitchell at no time reported that DR had suffered his injuries by hitting his face on the railing in the hallway.

While the grievant pointed out in his testimony at the arbitration hearing that it is his belief that Mr. Mitchell reported an abuse of DR because Mr. Mitchell was ambitious and wished to

secure an administrative position, Mr. Mitchell pointed out in his testimony at the arbitration hearing that he had had no prior interaction with Mr. Durosinmi-Etti. Mr. Durosinmi-Etti testified that Mr. Mitchell and DR were together for some time after the incident and claims that this is when DR and Mr. Mitchell concocted the allegation of abuse against Mr. Durosinmi-Etti. The Employer points out however that Mr. Mitchell and other witnesses had said that DR and Mr. Mitchell had not been together after the incident in the hallway on June 5, 2016 had concluded as DR was taken by other staff members on a walk away from his living unit. During DR's walk elsewhere after the incident the TPWs involved in the restraint of DR on June 5, 2016 gathered in a room to write their written statements.

The Employer claims there was a thorough investigation of the June 5, 2016 incident by Director of Investigations Scott Flynn. This investigation produced a report that appears within Joint Exhibit 3, pages 3 – 106.

Mr. Flynn's testimony at the arbitration hearing is recalled wherein Mr. Flynn had said that the original report of the restraint of DR on June 5, 2016 had been through the use of an Unusual Incident Report (UIR) because the restraint described in the Unusual Incident Report was in accordance with DR's behavior plan. This is the reason an Unusual Incident Report was used initially rather than a Major Unusual Incident (MUI) report.

Mr. Flynn stated in his testimony at the arbitration hearing that when Mr. Mitchell reported that DR had been abused by being punched in the face by Mr. Durosinmi-Etti, the matter was treated as a Major Unusual Incident and triggered a thorough investigation of the incident. Mr. Flynn expressed the opinion that Mr. Durosinmi-Etti had been attempting to avoid the more in-depth MUI investigation by pressuring others to conform their written statements to Mr. Durosinmi-Etti's written statement.

The Employer acknowledges that DR has made false allegations against staff members in the past and it is conceded that DR confirmed he had initiated the punching between himself and Mr. Durosinmi-Etti. The Employer points out nonetheless that DR has been consistent in his recollection of what occurred, consistently describing himself as being punched in the face by Mr. Durosinmi-Etti, the abuse observed by Mr. Mitchell and reported by Mr. Mitchell, and confirmed in Mr. Mitchell's testimony in this proceeding.

The Employer points out that the grievant had had ample training on the Center's abuse and neglect policy and had been fully aware on June 5, 2016 what was prohibited in that regard. The Employer notes that the grievant had been fully cognizant of the consequences to his employment at the Center from an abuse of a resident.

The Employer recalls the testimony of Dr. Capaldi in explaining the investigatory materials he received about the June 5, 2016 incident, the pre-disciplinary procedures carried out in reference to the grievant, and the decision by Superintendent Capaldi to terminate the employment of the grievant effective October 26, 2016 based upon an abuse of a resident and a failure to report this abuse.

The Employer claims that the recollections from Mr. Daboni, Mr. Ostrowski, and Mr. Durosinmi-Etti have not remained consistent over time, and in the case of Mr. Daboni, who reported that DR had hit his face on the railing in the hallway, admitted subsequent to the issuance of his written statement that he had entered the hallway to assist in the restraint of DR after DR had been restrained and taken to the ground. The Employer points out that Mr. Ostrowski's testimony included overhearing DR during the incident claim that he had been punched in the face by Mr. Durosinmi-Etti.

As to the grievant's testimony provided at the arbitration hearing, it was noted that Mr.

Durosinmi-Etti had reported DR hitting his face on the hallway railing during the take down of DR and Mr. Durosinmi-Etti had stuck by this story at the pre-disciplinary meeting and in previous statements. However, in his testimony at the arbitration hearing, Mr. Durosinmi-Etti confirmed that he had not seen DR's face hit the railing in the hallway. The Employer claims that the grievant has provided inconsistent testimony as to his location in relation to DR during the restraint of DR on June 5, 2016.

The Employer reminds the arbitrator that the Department of Developmental Disabilities has policies and procedures in place to protect CDC residents, residents who are under the care and custody of the Department. These policies are found among Standards of Conduct rules and in Ohio Administrative Code rules, including Ohio Administrative Code section 5123: 2-17-02.

It is the position of the Employer that the grievant engaged in the physical abuse of a CDC resident as the term "physical abuse" is defined by Ohio Administrative Code section 5123: 2-17-02(C)(15)(a)(vii) on June 5, 2016 by punching DR in the face. The Employer points out that this egregious misconduct was the subject of an immediate verbal complaint from DR while still being restrained and is corroborated by the eyewitness testimony from former CDC TPW Frank Mitchell. The Employer argues that Frank Mitchell has no motive to make up a story of abuse and has no reason to conspire with DR to construct and support a false allegation of abuse against the grievant.

The Employer points out that based on the punching of DR by Mr. Durosinmi-Etti on June 5, 2016 Mr. Durosinmi-Etti was charged with criminal assault by the Ohio State Highway Patrol. This led to an amended charge of disorderly conduct to which Mr. Durosinmi-Etti pled guilty and was convicted.

The Employer acknowledges that challenging behaviors among residents do arise and must be addressed by direct care staff. The Employer argues that TPWs are charged with the grave

responsibility of responding appropriately to such behaviors, not instigating such behaviors.

The Employer points to the language of Article 24, section 24.01 within the parties' collective bargaining agreement that provides: "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."

The Employer argues, in the alternative, that in the event the arbitrator does not find that an abuse of a resident occurred, the grievant should not be returned to a direct care position based on the Medicaid guidelines cited by Superintendent Capaldi in his testimony at the arbitration hearing. The Employer acknowledges that this does not prevent the grievant from being placed in a negotiated, non-direct care position in a similar pay range.

The Employer contends, however, that the hearing record clearly illustrates that the grievant abused DR, lied about it, and tried to cover it up. The Employer claims the Department's rules have been reasonably and fairly applied to the grievant, and based on the proven misconduct engaged in by the grievant, the Employer asks the arbitrator to find the grievant did physically abuse DR on June 5, 2016, and deny the grievance in its entirety.

Position of the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union

It is the position of the Union in this proceeding, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, that Akintunde Durosinmi-Etti, the grievant herein, was removed from his Therapeutic Program Worker position at the Columbus Developmental Center without just cause.

The Union notes that on June 5, 2016 Mr. Durosinmi-Etti arrived at CDC for his scheduled

shift after leaving Church services that day. Upon arrival at CDC Mr. Durosinmi-Etti changed from his Church clothes to his work clothes and then clocked in for his assigned shift.

The Union notes that on June 5, 2016 prior to Mr. Durosinmi-Etti's arrival at CDC, during the prior shift that day, CDC resident DR had had two documented incidents wherein DR had had to be restrained and given his medications. When Mr. Durosinmi-Etti entered the break area near living unit 1720A he observed that DR had appeared to be upset. Mr. Durosinmi-Etti asked DR what was wrong and when Mr. Durosinmi-Etti and DR were in a hallway near the 1720A living unit DR began attacking Mr. Durosinmi-Etti by directing punches at Mr. Durosinmi-Etti.

The Union points out that Mr. Durosinmi-Etti attempted to block the punches from DR and attempted to calm DR while retreating and calling for assistance. TPWs Matthew Ostrowski and Frank Mitchell responded to Mr. Durosinmi-Etti's call for help by rushing to the hallway to assist Mr. Durosinmi-Etti. The Union notes that DR is a large man, standing about six feet, two inches tall, weighing 250 pounds, and therefore restraining DR while he struggled against such restraint was difficult and included taking DR to the ground. The Union notes that the struggle to restrain DR in the hallway on June 5, 2016 during the second shift lasted about 1½ minutes.

The Union recalls the testimony of TPW Matthew Ostrowski who observed DR swinging his fists violently at Mr. Durosinmi-Etti and recalled attempting to restrain DR in conjunction with TPW Frank Mitchell and TPW Durosinmi-Etti. The Union notes that Mr. Ostrowski testified at the arbitration hearing that he did not know how DR received the mark on his face, saying that DR could have hit his head anywhere. The Union emphasizes however that Mr. Ostrowski had stated in his testimony that DR was not punched.

As to TPW Frank Mitchell, the Union notes that Mr. Mitchell's first written statement communicated that DR had punched Mr. Durosinmi-Etti which prompted Mr. Durosinmi-Etti, Mr.

Mitchell, and Mr. Ostrowski to place DR in a four-point restraint. Mr. Mitchell wrote in his initial written statement submitted to CDC administrators that DR had fought, resulting in a ground restraint that lasted for 1.5 minutes. Mr. Mitchell wrote in his initial written statement that DR had calmed down and was saying that he, DR, had been punched in the face by staff. Mr. Mitchell wrote in in his first written statement: "... however I did not see this occur."

The Union notes that several hours after submitting his first written statement, TPW Mitchell changed his written statement to say that he had observed Mr. Durosinmi-Etti punch DR. The Union notes that TPW Mitchell stated that Mr. Durosinmi-Etti had punched DR a couple of times but changed this statement during additional testimony wherein he recalled DR being punched by Mr. Durosinmi-Etti four to five times. The Union notes that if this was the case, TPW Mitchell has been shown to have done nothing to stop this abuse and would be equally liable for the assault upon DR. The Union questions why, if Mr. Mitchell did see a resident being assaulted, he did not intervene. The Union asserts that the answer is the punches claimed by Mr. Mitchell to have been thrown by Mr. Durosinmi-Eti against DR never happened. The Union points out that the event itself lasted only 1½ minutes, and the Union emphasizes that memory is at its best at the time of the event, not several hours later.

As to TPW Mesan Daboni, the Union points out that Mr. Daboni testified in this proceeding that he had been in and out of the hallway due to the fact that he had been working with a group of residents. Mr. Daboni testified that he observed DR punching the grievant, observed Mr. Durosinmi-Etti backing away from DR, and saw Mr. Durosinmi-Etti blocking punches from DR. Mr. Daboni testified that there had been no forward aggression from Mr. Durosinmi-Etti toward DR and Mr. Daboni testified that he observed TPWs Ostrowski, Mitchell, and Durosinmi-Etti struggling to control DR.

The Union notes that Mr. Daboni testified at the arbitration hearing that once he got his group of residents settled he went into the hallway to assist. Upon arrival in the hallway Mr. Daboni found DR being restrained. Mr. Daboni held DR's left leg. Mr. Daboni stated that during the 1½ minutes of the struggle with DR, DR hit his eye, but no one is sure where DR hit his eye due to the violence of the struggle in restraining DR.

The Union points out that documented past behaviors by DR include hitting and kicking, biting and/or scratching, using weapons to physically harm others, and exhibiting mood changes that occur quickly and become extreme. The Union notes that DR has been known to throw items, break glass, and knock over tables and chairs. The Union notes that DR has damaged walls and doors and has been away without leave by running away.

The Union emphasizes that DR is a resident whose moods change quickly and may become extreme in a brief period of time. The Union claims that this is what happened on June 5, 2016 in the hallway on the second shift. DR, during the events in question, was not a resident who was going to take reasonable directions, not while in the mood DR was in. The Union points out that two earlier incidents that day involving DR and violence had occurred on a prior shift, and although the grievant in the past had worked well with DR, June 5, 2016 was destined to be a day upon which DR was just not going to cooperate and do the right thing.

The Union argues that the grievant did nothing wrong during the events in question and points out that the Employer does not dispute the behaviors ascribed to DR by the Union. The Union claims that the Employer is using the grievant as a scapegoat because of the necessity of identifying a reason for the mark on the resident's face under the Medicaid Program's guidelines. Therefore, argues the Union, instead of the Employer acknowledging that there was a scuffle and the variety of ways the resident could have sustained the marks to his face, the Employer has

chosen to believe a resident who is known to lie about staff, and a witness who has changed his story more than once, in the face of two other witnesses and the grievant who have stated that no punches were thrown by Mr. Durosinmi-Etti at DR. The Union claims that the Employer jumped to conclusions and discharged an innocent employee with no prior discipline who had served as an excellent TPW.

The Union claims that the grievant did not abuse DR and the violence that erupted originated with DR without fault on the part of the grievant. The Union claims that Mr. Durosinmi-Etti in interacting with DR on June 5, 2016 did everything in accordance with the policies and procedures of the Center, and the Union claims the Employer has relied on a statement from TPW Mitchell that had been revised after Mr. Mitchell had submitted an earlier written statement. The Union argues that the Employer has chosen to take the word of a resident who is known to lie about abuse by staff and a witness who has changed his story to overcome the eyewitness recollections of three other witnesses – Mr. Ostrowski, Mr. Daboni, and Mr. Durosinmi-Etti. The Union wonders how the Employer could have concluded upon these circumstances that the abuse of DR by the grievant had been substantiated.

The Union refers to an arbitration decision by arbitrator Anna DuVal Smith, Ph.D. issued January 8, 2007, *In the Matter of Arbitration Between OCSEA, Local 11, AFSCME, AFL-CIO and the Ohio Department of Mental Health*, case number 23-07-20060221-0001-01-04. The Union points out that within this arbitration decision, at page 7, arbitrator DuVal Smith found that:

Management has a heavy burden in abuse cases. Not only must it have clear and convincing evidence, but in order to meet the Article 24.01 standard, it must establish that the Grievant's actions rise at least to the level of recklessness, which is the standard of Ohio Revised Code Section 2903.33(B)(2) held to be applicable in Article 24.01 cases for both the mental health and mental retardation/developmental disabilities departments...

In support of the above assertion arbitrator DuVal Smith cites an October 31, 1987 arbitration decision issued by arbitrator D. Pincus, case number G87-0001.

The Union notes that the Ohio Administrative Code definition for “abuse” for the Ohio Department of Mental Health has been revised since arbitrator Pincus’s 1987 decision and award, but the Union claims that the definition still must be read in accordance with Ohio Revised Code section 2903.33(B)(2) which requires intent or “at least, indifference.” The Union points out that arbitrator DuVal Smith held: “... Management must prove clearly and convincingly that the Grievant acted (or failed to act) recklessly or knowingly.”

It is the position of the Union that the evidence in the hearing record clearly shows that the Employer did not meet the burden of proof required of the Employer for the Employer to prevail in this case because the Employer failed to prove just cause for the discharge of the grievant.

In support of its claim that the Employer has failed to substantiate just cause for the discipline imposed upon the grievant, the Union questions whether the investigation conducted by the Employer was fair and objective. The Union notes that the Employer relied on two statements to find just cause, including a statement from a witness who had changed his story over time. The other statement relied on by the Employer came from a resident who is known to have a history of lying about staff and abuse. The Union claims that the Employer failed to give any weight to the statements from the grievant or the other two witnesses.

The Union points out that the only proof put forward by the Employer to support the removal of the grievant came from the witness who had changed his statement and the resident who is known to fabricate accusations of abuse by staff. The Union claims that the only evidence put forward by the Employer comes from two very questionable sources and the Employer has not shown proof of the grievant’s guilt.

The Union claims the penalty imposed upon the grievant in this case is not reasonably related to the seriousness of the offense and the past work record of the grievant. The Union claims that the Employer failed to consider other disciplinary responses and instead chose a rule that calls for a removal upon a first offense. The Union reminds the arbitrator that the grievant in this case had had no prior discipline.

The Union notes that the grievant is charged with a failure to report. The Union questions how, when the events at issue only spanned ninety seconds, and with the challenges presented by a violent DR, anyone could be expected to observe everything that was going on around him during the incident.

The Union argues that after a thorough review of the entire hearing record, only one conclusion remains – the hearing record is devoid of any evidence that Akintunde Durosinmi-Etti violated any work rule and there is no evidence in the hearing record substantiating just cause for the discipline imposed upon the grievant in this case.

Based on the above-cited reasons, the Union urges the arbitrator to sustain the grievance and order all references to the October 26, 2016 removal of the grievant expunged from the grievant's personnel file, including electronic records; reinstate the grievant to a TPW position at CDC; pay the grievant for all lost wages caused by his October 26, 2016 discharge; restore all leave balances, authority to buy back leave balances that were cashed out after the termination of the grievant's employment, and all seniority; pay all documented medical, dental, and vision expenses that have been incurred by the grievant and his family since the grievant's removal until he is covered by insurance; restore the shift, assignment, and good days held by the grievant at the time of his removal; and pay all of the grievant's retirement contributions.

The Union asks that the arbitrator retain jurisdiction over this matter for sixty days from

the issuance of the arbitrator's decision and award.

DISCUSSION

Under the language of the parties' collective bargaining agreement, there are three separate disciplinary considerations when an allegation of resident abuse is raised. First, has abuse been proven? If abuse is not proven, are other grounds proven to substantiate just cause for the discipline? If neither abuse nor just cause is substantiated, how is the reinstatement and compensation of the grievant to occur?

The first issue presented by this case is whether the grievant has been proven to have physically abused a Columbus Developmental Center resident during the second shift on June 5, 2016. During the events in question Mr. Durosinmi-Etti was on duty, on the premises of CDC, and fulfilling the responsibilities of a Therapeutic Program Worker.

The question as to whether the grievant inflicted physical abuse upon a CDC resident on June 5, 2016 is disputed among the five eyewitnesses to the restraint of resident DR in the hallway near living unit 1720A shortly before 2:00 p.m. that day. Two eyewitnesses, TPW Frank Mitchell and CDC resident DR, have claimed since June 5, 2016 that during the course of the restraint of DR, and at a time when DR was being physically restrained by TPWs Frank Mitchell and Matthew Ostrowsky, TPW Durosinmi-Etti punched DR in the face with a closed fist, using several short punches delivered to the left side of DR's face.

The Union emphasizes that TPW Mitchell in his initial written statement provided to CDC administrators made no mention of any type of abuse by TPW Durosinmi-Etti against DR. The Union points out that it was hours after TPW Mitchell prepared and signed his initial written statement that TPW Mitchell communicated, for the first time, the allegation of abuse against Mr. Durosinmi-Etti. The Union questions assigning substantial evidentiary weight to Mr. Mitchell's

assertions in this regard considering he had changed his story over time.

As to the assertions of the resident who claims to have been physically abused by Mr. Durosinmi-Etti, the Union points out that this resident is known to have lied in the past about staff inflicting abuse upon DR. The Union reminds the arbitrator that DR is known to be a violent, manipulative, and untrustworthy individual whose credibility is insufficient to justify substantial evidentiary weight.

In opposition to what has been asserted by Mr. Mitchell and DR about the events in question, the written statements, interviews, and testimony from TPWs Matthew Ostrowsky, Mesan Daboni, and Akintunde Durosinmi-Etti are offered in the hearing record. The Union urges that the weight of evidence in the hearing record is on the side of the Union, with three eyewitnesses tipping the evidentiary balance against the testimony from a single TPW whose story has changed over time and the claims of a resident who is known to fabricate stories alleging abuse.

The arbitrator acknowledges the arguments made by the Union as to which witnesses should be credited and which witnesses should be viewed with greater skepticism. The arbitrator also includes in his deliberations the changes to the assertions made by Mr. Daboni and Mr. Durosinmi-Etti since their first written statements were provided on June 5, 2016.

Mr. Daboni in his written statement provided on June 5, 2016, Joint Exhibit 3, page 41 reported: "... he was so agitated that he hit his face on the wall." Mr. Daboni explained in his testimony at the arbitration hearing herein that he never observed DR's face hitting the wall, and the evidence in the hearing record indicates that Mr. Daboni entered the hallway area where the restraint of DR was occurring at a time when DR had already been taken to the ground under the restraint of TPWs Mitchell and Ostrowsky. Why Mr. Daboni had given the impression in his June 5, 2016 written statement that he had seen DR hit his face on the hallway wall when Mr. Daboni

had not been in a position to observe whether that had occurred or not, is unexplained except for the verbal statement heard by Mr. Daboni from an unidentified declarant that DR had hit his face on the hallway wall/railing.

Even TPW Matthew Ostrowsky, who asserted in his original written statement on June 5, 2016 that DR had: "... hit his head against the wall/railing" and reiterated this assertion at the arbitration hearing herein, explained that other TPWs were in the room in which Mr. Ostrowsky prepared and signed his initial written statement about the events in question. Considering that Mr. Daboni had not been in the hallway to observe whether DR had hit his face on the wall and therefore must have been told this, it is just as likely that when Mr. Daboni was told of this reason for DR's injuries while in the hallway (although Mr. Daboni could not identify the speaker) other TPWs heard this as well. It is just as likely that in the room where the TPWs had gathered to write their statements they heard this assertion as well.

There is also the matter of the amount of time estimated to have elapsed during the struggle to restrain DR, with each and every witness recalling that the incident took 1½ minutes to transpire – not one minute, not two minutes, not some range of minutes, but in each case precisely 1½ minutes. Such unanimity is surprising considering the intensity of the struggle to restrain DR and each participant's focus on that activity rather than the clock. Such a precise, unanimous agreement on the time involved would not be expected except in the case of a discussion of what had occurred and the time that had elapsed during those events.

There are also the photographs of the injuries to DR's face found in Joint Exhibit 4, pages 1 – 4, and the photograph of the hallway railing found at Joint Exhibit 4, page 5.

The injuries that can be observed to DR's face reflect a purplish discoloration below and immediately above DR's left eye. Swelling can be seen above DR's left eyebrow. The photographs

of DR's face give the appearance of someone suffering from a "black eye," an injury that is commonly observed following a forceful punch to an eye by a closed fist.

There is in the hearing record testimony from Chief of Investigations Scott Flynn who expressed the opinion that the marks appearing on DR's face in the photographs in Joint Exhibit 4 do not show an injury that appears linear in its shape but rather shows discoloration and swelling that curves around DR's left eye. Investigator Flynn expressed the opinion that the linear hallway railing would not have produced the injuries observed on DR's face in Joint Exhibit 4, pages 1 – 4.

The arbitrator is not prepared to say that falling face first on the hallway railing could not have produced the injuries observed on DR's face. The arbitrator finds only one eyewitness, Mr. Ostrowsky, claiming to have observed DR hitting the wall/railing. Mr. Mitchell testified that he, Mr. Mitchell, was able to see that DR's face did not hit the wall or the railing, and Mr. Daboni and Mr. Durosinmi-Etti testified that they did not observe DR's face hit the wall or the railing but discussed it as a reason that could explain the injuries seen on DR's face after DR's restraint.

The arbitrator found the testimony from Mr. Mitchell to be entirely credible, in accordance with that which had been claimed by DR, and supported by the injuries observed to DR's face. The fact that Mr. Mitchell did not immediately declare that he had observed the physical abuse of DR when surrounded by co-workers is not difficult to accept or understand. Mr. Mitchell at the time of the incident had been an intermittent employee and wondered, not unreasonably, how his response to what he had just observed would affect his employment at the Center and his relations with co-workers there. The fact that Mr. Mitchell on June 5, 2016 issued a second written statement about what had occurred that day, saying that he had observed Mr. Durosinmi-Etti punch DR in the face while DR was being restrained, not only appeared credible as Mr. Mitchell spoke of it in

his testimony at the arbitration hearing, but there has been presented no evidence suggesting any credible reason for Mr. Mitchell to have concocted a false allegation of abuse against Mr. Durosinmi-Etti or to have conspired with DR to fabricate such a lie. There is nothing in the hearing record to suggest an anticipated gain by Mr. Mitchell from making such a claim, nor is there any indication of animus on the part of Mr. Mitchell toward Mr. Durosinmi-Etti. Prior to June 5, 2016 Mr. Mitchell and Mr. Durosinmi-Etti had had no interaction. Mr. Mitchell in his testimony appeared to be an employee who, after taking some hours to consider what action to take, decided to tell the truth about what he observed and did so.

The arbitrator finds it curious that after restraining DR and observing the injuries to DR's face that Mr. Durosinmi-Etti decided that the participants in the restraint of DR should come to a common agreement as to not only what had occurred but what could have occurred. This desire to ensure conformity based on a consensus rather than each participant writing down what each observed remains unexplained in the hearing record as anything other than an attempt to anticipate questions about how the injuries to DR's face had occurred.

The arbitrator is persuaded that a preponderance of evidence in the hearing record, evidence that the arbitrator finds to be clear and convincing, proves that the grievant on June 5, 2016 punched a CDC resident in the face repeatedly when the resident was being physically restrained by two other TPWs. The punching of the resident in the face by the grievant constitutes physical abuse of an individual under the care and custody of the State of Ohio. Proof of such abuse removes from the arbitrator the discretion to modify the discipline imposed.

Based upon the evidence presented to the hearing record, the arbitrator finds that a preponderance of clear and convincing evidence has been presented substantiating that the grievant, Akintunde Durosinmi-Etti, abused an individual under the care and custody of the State

of Ohio at the Columbus Developmental Center on June 5, 2016. The arbitrator finds that this abuse supports the termination of the employment of the grievant effective October 26, 2016.

Accordingly, the grievance is denied.

AWARD

1. The grievance that has given rise to this arbitration proceeding is arbitrable and properly before the arbitrator for review and resolution.
2. A preponderance of clear and convincing evidence in the hearing record proves that the grievant, Akintunde Durosinmi-Etti, physically abused an individual in the care and custody of the State of Ohio, Department of Developmental Disabilities, Columbus Developmental Center on June 5, 2016.
3. The physical abuse of a Columbus Developmental Center resident by the grievant on June 5, 2016 supports the termination of the employment of the grievant effective October 26, 2016.
4. The grievance is denied.

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
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Columbus, Ohio
November 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the State of Ohio, Department of Developmental Disabilities, Columbus Developmental Center, the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, the Union, Grievant: Akintunde Dorosinmi-Etti, Grievance Number: DMR-2016-04397-4, was served electronically upon the following this 6th day of November, 2017:

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November 6, 2017