

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

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

Arbitration Proceedings Between:)	
)	Case No. DMR-
State of Ohio, Department of Developmental)	2020-00152-04
Disabilities, Northwest Developmental Center)	
)	ARBITRATION
and)	OPINION AND
)	AWARD
Ohio Civil Service Employees Association,)	
AFSCME Local 11)	DATE:
)	March 9, 2021
Re: Nemire Removal)	

APPEARANCES:

Venita S. White, Labor Relations Officer III, for the Ohio Department of Developmental Disabilities and Ryan Ochmanek, Staff Representative, for the Ohio Civil Service Employees Association.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, AFSCME Local 11. The Grievant, Jessica Nemire, had served as a Therapeutic Program Worker (TPW) at the Northwest Developmental Center. Following an investigation, the Grievant's employment was terminated based on charges of violations of DODD Standards of Conduct, specifically Abuse of a Client and Failure to Report. Termination was effective January 11, 2020. The Union appealed the termination through the Grievance Procedure on January 16, 2020. The Employer denied the grievance during the various steps of the Grievance Procedure, and the Union carried the matter forward to arbitration.

The arbitrator was selected to hear the matter pursuant to Section 25.05 of the collective bargaining agreement. The arbitration hearing was held on January 25, 2021 via video platform (Zoom). The parties agreed that the matter was properly before the arbitrator and, at the conclusion of the hearing, agreed to submit post hearing briefs no later than February 26, 2021. The record of hearing was closed on that date.

WITNESSES

TESTIFYING FOR THE EMPLOYER:

Chad Burman, Investigative Agent (at the time of the incident)
Tanya Meyers, Investigative Agent (at the time of the incident)
Chris Skarratt, Hearing Officer, Pre-discipline Hearing
Jason Bunting, Mental Health Administrator

TESTIFYING FOR THE UNION:

Jessica Nemire, Grievant
Carrie Coffee, Union Representative

ISSUE

The parties stipulated to the following issue which is before the arbitrator.

1. Was the Grievant, Jessica Nemire, removed for just cause?
2. 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 October 24, 2010, as an intermittent Therapeutic Program Worker (TPW) and became permanent on June 21, 2010. [*Grievant became a full-time bargaining unit employee on October 24, 2010.*]
3. The Grievant was removed from her position as a TPW on January 11, 2020.
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 ensure health, welfare, and continuous quality 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 her record at the time of her removal.

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 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 Article 25.05. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

24.02 – Progressive Discipline. The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include: a. One (1) or more written reprimand(s); b. One (1) or more days(s) working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer. If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of 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 remainder of this section is not relevant to this case.

24.03 – Supervisory Intimidation. An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this Section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this Section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline Employer representatives who violate this Section.

Knowingly making a false statement alleging patient abuse when the statement is made with

the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

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-disciplinary 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-disciplinary 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 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

Statement of Grievance: The Grievant was removed for alleged abuse. The client fell to her knees in the process of redirection. The Union does not agree there were grounds for a removal.

Resolution Requested: The Grievant requests to be restored to her position in its entirety.

BACKGROUND

The Grievant, Jessica Nemire, had been a full time Therapeutic Program Worker (TPW) at the Northwest Developmental Center since October 2010. The Center serves approximately 70 developmentally disabled adults who reside at the facility. On September 16, 2019, the Grievant was working in the facility kitchen around the noon hour with other employees including a supervisor. A resident entered the kitchen who, for purposes of this document, is known as G.O. G.O. has a history of agitation and violent responses from time to time. G.O. had been assigned to the workshop prior to entering the kitchen but was asked to leave due to conflict. She may have soiled herself. As she entered the kitchen, G.O. attempted to take a micro-meal from the cupboard which was assigned to another resident. There may have been silverware in the area which could have created a danger to G.O. and others in the room. G.O. had cut herself in the past. The Grievant and a supervisor stood in the front of the kitchen counter and cabinet in order that the resident not come into contact with various items. G.O. pushed the Grievant. As G.O. continued to be disruptive, the Grievant began to move her toward the kitchen door. The Grievant claims to have used a procedure known as hands

on/hands off to move the resident to the kitchen door and out into the hallway. The Grievant claims that G.O. purposely fell to the floor as she was moving through the doorway and into the hallway.

Due to the fact that G.O. fell to the floor, the Grievant was required to complete an "Unusual Incident Report" on the same day. The Report read as follows.

G.O. was in kitchen & became agitated. Staff asked her to leave out of the kitchen until she calmed down. G.O. refused & started pushing staff. Staff redirected G.O. out of the kitchen & G.O. fell on knee.

The Report was witnessed and signed by Supervisor Martin.

Medical staff was contacted to evaluate G.O. for injuries following the fall to the floor. There were superficial abrasions to the knee. G.O. had also fallen at the workshop just prior to the incident in the kitchen. During the medical assessment, G.O. stated that the Grievant had pushed her which caused her to fall in the hallway outside the kitchen door. An investigation by the "Major Unusual Incident" division was therefore initiated.

Chad Burman, the Investigative agent at the time, initiated the investigation. During questioning, the Grievant stated that she used hands on/hands off techniques to re-direct G.O. out of the kitchen and that she fell to her knees. At the direction of Mr. Burman, the Grievant inserted the word "push" in her statement. Mr. Burman later stated that he directed the Grievant to insert the word because she had verbally used the word "push" in her discussion with him.

Chad Burman moved to another position with the Department, and Tanya Meyers continued the investigation. The Grievant was interviewed a number of times along with other employees who were in or near the kitchen at the time of the incident. During an investigative

interview conducted on September 19, 2019, the Grievant stated that she used hands on/hands off techniques to move G.O. out of the kitchen. She stated that G.O. opened the door leading from the kitchen to the hallway, spun around and fell. The Grievant then walked down the hall and came back to where G.O. was on the floor. The Grievant states that she cursed at her and stated that she had been pushed. The Grievant stated during the interview that she had not pushed G.O.

A video of the incident was obtained and viewed by the investigator and the Grievant. Following interviews of the Grievant, Supervisor Martin and others employees who were in the vicinity of the kitchen, Investigative Agent Meyers filed her report which stated, in part:

TPW Nemire's statements do not appear to be credible. TPW Nemire was not forthcoming with reporting the verbal allegation made by (G.O.) The UIR that was written by TPW Nemire regarding the incident, does not match details she provided in her written nor verbal statements. TPW Nemire's statements were inconsistent with what was viewed from video surveillance. TPW Jessica Nemire has a known motive to make a false report as she is the primary person of interest.

On December 16, 2019, a pre-disciplinary hearing was conducted. The Grievant had been charged with two policy violations as follows.

1. Abuse of a Client (Reference A #1): Abuse of any type or nature to an individual under the supervision or care of the Department or State including but not limited to, physical, or verbal as defined by the Ohio Administrative Code 5123-17-02. Addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvement.
2. Failure to report (Reference F #1): Failure to report in any manner which results in potential or actual harm to an individual. Failing to report, lying about, or covering up abuse, neglect, or mistreatment.

The hearing officer determined that just cause existed for discipline on December 17, 2019 and affirmed the two policy violations. The employment of the Grievant was then terminated effective January 11, 2020. The Union appealed the matter to the Grievance Procedure and ultimately to arbitration.

POSITION OF THE EMPLOYER

The Employer states that the Grievant pushed G.O. which caused her to fall. G.O. reported to medical staff that the Grievant pushed her which caused her to fall to the floor. Investigator Burman testified, during the arbitration hearing, that the Grievant indicated that she used hands on/hands off and pushed the resident. The Grievant included the word “push” in her verbal statement given to the investigator. She was therefore asked to insert the word in her written statement. Tanya Meyers completed the investigation and pointed out that the Grievant’s statement, that the kitchen door was closed when she attempted to re-direct G.O. out of the kitchen, was not truthful as the video clearly shows an open door. The Grievant failed to report the incident as it actually occurred. The Employer states further that the pre-disciplinary hearing officer also viewed the video and determined that the actions of the Grievant did not reflect the hands on/hands off technique but rather a push. The Employer emphasizes that the Grievant’s claim that she did not push G.O. is untruthful. The video does not lie. All unusual incidents are required to be reported and documented. She completed the UIR but failed to report truthfully what had occurred. With G.O. laying on the floor, the Grievant walked away down the hall. The Employer states that the record in this matter clearly

indicates that the Grievant had been properly trained to manage and control an incident of this nature.

Medicaid requires county boards and state administered developmental centers to establish rules for addressing major unusual incidents. The Employer emphasizes that it is not necessary for an injury to occur for abuse to be substantiated. Actual physical harm is not required. The Ohio Administrative Code Section 5123-17-02 addresses major incident reports to ensure the health and safety of those under the care of the Department (and other agencies in the state). The Grievant has been properly trained regarding the requirements outlined in the OAC.

The Employer states that Medicaid prevents an employee from returning to direct patient or resident care if facility management, following an investigation, determines that abuse, neglect or mistreatment has occurred. Medicaid is clear that this is the case even if an employee is reinstated by order of a court or arbitrator. Further, Section 24.01 of the collective bargaining agreement states that an arbitrator may not modify or mitigate the penalty of termination if it is determined that an employee abused a patient or client of the Department. The Employer references the vacating of an arbitration award by the court when an arbitrator determined that the abuse of a client occurred but reduced a termination to a 30 day suspension.

The Employer references the "Standard Guidelines for Progressive Discipline" in its Standard of Conduct Rules. The discipline grid states termination of employment for any first offense involving the abuse of a client. The discipline grid also states termination of employment for first violation of failing to accurately report an incident. The Grievant was not

truthful when she reported the incident. Section 24.01 prohibits the arbitrator from mitigating the disciplinary penalty. The Employer argues that the grievance must be denied in its entirety.

POSITION OF THE UNION

The Union states first that the Grievant is a nine year employee with no prior discipline. She did not push, harm or abuse G.O. The Grievant, over her years of employment at the Northwest Developmental Center, has never been accused of the behavior the Employer argues in this case. The arbitrator must consider her excellent record of employment. The Union states that the video indisputably shows the Grievant with her hands appropriately placed on G.O. The Union emphasizes that the video does not show the Grievant pushing or using physical force to push the client to the floor.

The Union states that an incident occurred prior to G.O. entering the kitchen from the workshop. There is evidence that a potential abusive incident occurred in the workshop involving G.O. Management failed to investigate that incident appropriately and is placing the blame for G.O.'s claim of being pushed on the Grievant.

Although the Grievant's statement, produced during the investigation, includes the word "push," the Union states that Investigator Burman directed her to insert this word in the document. The Union argues that the Grievant never stated that she pushed the client. During the arbitration hearing, the Grievant testified that she was directed to insert the word "push" by the investigator. The Union states that this coercion was intimidating and led to an unfair investigation. The Union emphasizes that the Employer failed to provide the Grievant with a

Union steward during the investigative interview. The Grievant had never been the subject of an investigative interview and was not familiar with her right to representation.

The Union states that the Employer coerced the Grievant into writing a false statement but then charged her with a failure to report. The Grievant wrote the details of the incident as they occurred. The Employer claims that the Grievant failed to report abuse, but there is no evidence that any abuse occurred at the hands of Ms. Nemire. Supervisor Martin stated that G.O. remarked that she slipped and fell. Ms. Martin also stated that G.O. was upset when she entered the kitchen from an earlier incident of alleged abuse which caused her to have a superficial bruise on her knee. The Employer failed to properly investigate the prior incident which occurred before G.O. entered the kitchen.

The Union states that the Grievant was doing her job to the best of her ability. A claim of abuse has a long term effect on an employee's ability to continue in her career. The Union argues, therefore, that the Employer must prove beyond a reasonable doubt that the Grievant abused the client. The Employer did not provide a preponderance of evidence that the Grievant abused G.O. The Union argues for the granting of the grievance in its entirety and that the Grievant be made whole in every way including back pay, all benefits, pension benefits and medical expenses.

ANALYSIS AND OPINION

The work of a Therapeutic Program Worker is difficult and complex in dealing with clients and residents many who may exhibit difficult and occasional violent behaviors. At the same time, employees are trained to handle and cope with said behaviors and must react in a

professional and restrained manner when confronted with difficult behavior. State law requires a professional response, and the collective bargaining agreement alludes specifically to this approach (Section 24.01).

Testimony and exhibits presented during the arbitration hearing indicate that resident, G.O., was exhibiting difficult behavior when she came into the kitchen. She was somewhat aggressive and was acting inappropriately. Evidence suggests that she left the workshop following an incident with staff and may have fallen there. She was directed to leave the workshop and entered the kitchen in an agitated state. She attempted to obtain a lunch which was assigned to another resident and, at one point, pushed the Grievant. The Grievant and her supervisor determined that it was necessary to re-direct G.O. out of the kitchen. In addition to disrupting kitchen activities, there was a concern that the resident could injure herself. She had utilized sharp objects in the past to inflict injury on herself, and there may have been forks and knives near the kitchen counter.

The Grievant, deciding it was necessary for G.O. to leave the kitchen, maneuvered her out of the kitchen door and into the hallway. In the process, G.O. fell to the floor and was sprawled there for a period of time. The Grievant has stated that she used the hands on/hands off technique to move G.O. through the doorway and into the hall. Following its investigation, the Employer determined that the Grievant pushed G.O. through the doorway which caused her to fall. If the Grievant pushed G.O. through the door, she violated Department policy which prohibits the abuse of a client/resident. Pushing is listed specifically as a prohibited approach or act. It is important to understand the hands on/hands off technique in determining if the

actions of the Grievant were appropriate or a violation of the abuse policy. The training manual defines the technique as follows.

Hands On/Hands Off Prompting

1. For individuals that may require a hand on/hands off approach it may be used as a very brief physical contact, no more than ten seconds.
2. Hands on/hands off is used to interrupt an action.
3. The contact is brief and open handed, on the forearm just above the wrist, long enough to serve as a prompt. This is meant to be a guide rather than a restraint.
4. If self-calming is unsuccessful, then separate the individual from the activity or the object the individual finds frustrating.

It is important to note that the Grievant was trained in a number of approaches to working with difficult clients including the hands on/hands off prompt.

There are few if any witnesses who clearly viewed the incident, but video from three distinct angles is available and was utilized as a major factor in the Employer's decision to terminate the employment of the Grievant. During the arbitration hearing, the video was played three or more times during testimony, and it was made available as an exhibit in order that the arbitrator might view it again at a later time. It is critical that the video be observed a number of times and also run slowly in order to determine if the Grievant pushed G.O. through the door causing her to fall.

The Grievant stated in her report that, as G.O. was being re-directed toward the door, she herself opened it. This is an inaccurate account as the door was open. The hands on/hands off approach involves very brief contact to serve as a prompt on the forearm. This did not occur when the Grievant moved G.O. through the doorway. Instead she placed both hands on the client's back. The video shows both hands on G.O.'s back as she moved through the doorway. The video shows the Grievant's hands and arms moving in a downward motion as

G.O. goes through the doorway, an indication that she was being pushed. Due to being pushed, G.O. attempted to hold onto the doorway as she was moving through the door. There would have been no need for the client to grab onto the doorway if a hands on/hands off technique had been involved. There was momentum caused by the pushing motion which caused G.O. to fall to the floor and the Grievant herself to move quickly through the doorway and into the hallway. The Grievant reported that G.O. spun around when moving through the door. The video does not support that statement. A preponderance of evidence supports the Employer's contention that the Grievant pushed G.O. through the doorway and into the hall. Further, the Grievant did not immediately come to the client's aid as she lay sprawled on the floor but instead walked down the hallway as she attempted to collect herself (Grievant's statement). This is problematic.

The Union argues emphatically that the Employer failed to properly investigate the previous incident in the workshop which caused the minor injuries to G.O.'s knee and is now scapegoating the Grievant in this case. There is insufficient evidence that a fall in the workshop was not properly investigated. Nevertheless, the previous incident is irrelevant in the determination of the actions of the Grievant as she pushed G.O. through the kitchen door. Additionally, the Union argues that Department investigators coerced the Grievant into inserting the word "push" in her investigatory statement. The Grievant may have used the word "push" during informal conversation with the investigator. Investigator Burman should not have suggested that she modify her statement. Nevertheless, the Grievant is a nine year veteran of the facility and has significant experience in handling difficult scenarios and interactions. She had the option of refusing to insert the word which essentially was self-

incriminating. She also had the option of requesting Union representation but failed to do so. The Department's investigator, knowing the potential for severe discipline, should have reminded the Grievant of her right to representation. An important lesson to be learned.

It is unclear if the minor injuries suffered by G.O. were a result of the fall outside of the kitchen. The Employer argues that it is not necessary for a physical injury to occur for a charge of abuse to be substantiated. In a recent arbitration award involving the termination of an OCSEA bargaining unit member for abuse of a client, Arbitrator Howard Silver commented whether evidence of injury is a prerequisite for a finding of abuse.

The arbitrator is persuaded that evidence of an injury is not a prerequisite for a finding of abuse. Ohio Administrative Code section 5123:2-17-02, the Ohio Administrative Code rule referenced in rule A-1 on the disciplinary grid, defines "physical abuse" as ..." the use of physical force that can reasonably be expected to result in physical harm or serious physical harm as those terms are defined in section 2901.01 of the Ohio Revised Code..." This definition refers to what "can reasonably be expected..."¹

This arbitrator concurs with Arbitrator Silver.

In addition to the charge of Abuse of a Client (A-1), the Grievant was charged with Failure to Report (F-1). Following the incident on September 16, 2019, the Grievant completed an "Unusual Incident Report." Her statement reads as follows.

G.O. was in kitchen & become agitated. Staff asked her to leave out of the kitchen until she calmed down. G.O. refused & started pushing staff. Staff redirected G.O. out of the kitchen & G.O. fell on knee.

¹ State of Ohio, Department of Developmental Disabilities, Columbus Developmental Center and the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO. Grievance No. DMR-2018-01742-04. January 29, 2019. Howard Silver, Esq., Arbitrator.

Evidence indicates that the author of this statement, the Grievant, pushed G.O. through the doorway causing her to fall. It is critical that an "Unusual Incident Report" contain accurate details of the incident involved as required by policy and Ohio Administrative Code Section 5123-17-02. Additionally, Medicaid requires that county boards and the State of Ohio comply. The Code requires an accurate description of the incident and immediate actions taken to ensure the safety of the involved client. The Grievant, although trained regarding this section of the Code, failed to accurately report the incident involving G.O.

The Employer states that Medicaid demands that an employee, who has been determined to have abused a resident or client, may not continue employment involving direct care even if reinstated through arbitration or court order. While this is an important issue for the Employer, the authority of the arbitrator is found exclusively within the "four corners of the contract." In this case, Section 24.01 is controlling.

Evidence in this case indicates that Grievant Nemire violated policy A-1, Abuse of a Client. The Employer's discipline grid indicates "Removal" for first offense. Additionally, the Grievant violated policy F-1, Failing to Report. The Employer's grid indicates "Removal" for first offense. In response, the Union argues that the Grievant is a nine year employee with no prior discipline and that this history must be considered. The parties agreed that the issue before the arbitrator is whether or not just cause existed for termination of employment. In a standard case of discipline, the just cause principle, as found in the collective bargaining agreement, would require that the arbitrator consider issues such as length of service, record of discipline or disparate treatment. This is not the case in matters involving abuse of a patient, client or resident under the care of the State of Ohio. In such matters, Section 24.01 of the Agreement is

controlling and limits the authority of the arbitrator to mitigate a penalty of termination if evidence indicates that such abuse occurred regardless of the involved employee's length of service and, perhaps, exemplary record. Section 24.01 states the following.

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.

This limitation in cases of alleged patient or client abuse has been agreed to by the parties.

Words mean something. To mitigate such penalty would also violate Section 25.03 of the Agreement. "The arbitrator shall have no power to add to, subtract from or modify any term of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of the Agreement." In deciding a similar case of client abuse which involved an employee with 23 years of service and a record of no discipline, Arbitrator Silver, in the case previously cited in this award, upheld the Employer's decision to terminate when evidence indicated that abuse had actually occurred. He arrived at the following conclusion.

It also bears mentioning that the arbitrator's opinion about whether termination of employment is the best decision on the facts of this case is not an issue in this proceeding. The question to be determined is not whether the arbitrator agrees or disagrees with the discipline imposed but whether the Employer acted within the authority granted to the Employer by the parties' collective bargaining agreement in imposing the discipline upon the grievant... If the Employer has acted upon facts fairly and objectively gathered, acted without a discriminatory intent, and can present evidence substantiating by a preponderance of the evidence that abuse of a client occurred, the Employer, in the absence of an abuse of discretion, is empowered to impose a termination of employment and have that discipline upheld.

A preponderance of the evidence illustrates that Grievant Nemire did, in fact, push G.O. through the kitchen door causing her to fall to the hallway floor. The act of pushing is a prohibited act based on Department policy. The Grievant was not forthcoming when completing the "Unusual Incident Report" following the incident, a critically important Departmental document. She violated Departmental Policy A-1, Abuse of a Client and Policy F-1, Failure to Report. The Employer's discipline grid dictates "removal" for both offenses. Although the Grievant is a fairly long term employee with a record of no discipline, Section 24.01 of the agreement prohibits the arbitrator from considering mitigation. The grievance of the Union is therefore denied.

AWARD

The termination of the Grievant's employment was not in violation of Article 24 of the collective bargaining agreement. The grievance is denied.

Signed and dated this 9th day of March 2021 at Lakewood, Ohio.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

Thomas J. Nowel, NAA
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th Day of March 2021, a copy of the foregoing Award was served by electronic mail upon Venita S. White, Labor Relations Officer for the Ohio Department of Developmental Disabilities; Ryan Ochmanek, Staff Representative, for the Ohio Civil Service Employees Association; Jessica Chester for the Ohio Civil Service Employees Association; and Kate Nicholson and Robert Patchen for the Ohio Office of Collective Bargaining.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

Thomas J. Nowel, NAA
Arbitrator

