

In the Matter of Arbitration Between the : Grievance Number: DMR- 2020 – 01080-4
: :
STATE OF OHIO, DEPARTMENT OF : :
DEVELOPMENTAL DISABILITIES, : :
COLUMBUS DEVELOPMENTAL CENTER, : Grievant: Dieudonne Tabot
Employer : :
: :
and the : :
: Arbitration Hearing Date:
OHIO CIVIL SERVICE EMPLOYEES : May 6, 2021
ASSOCIATION, AMERICAN FEDERATION : :
OF STATE, COUNTY AND MUNICIPAL : :
EMPLOYEES, LOCAL 11, AFL-CIO, : :
Union : Howard D. Silver, Esquire
: Arbitrator

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

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

Jill M. Harlan
Labor Relations Officer 3
Ohio Department of Developmental Disabilities
30 East Broad Street, 18th Floor
Columbus, Ohio 43215
Jill.Harlan@dodd.ohio.gov

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

Michael Tenney
Staff Representative
Ohio Civil Service Employees Association,
AFSCME, Local 11
390 Worthington Road, Suite A
Westerville, Ohio 43082
mtenney@ocsea.org

TABLE OF CONTENTS

	Page
Case Caption	1
Appearances	1
Procedural Background	3
Joint Issue	3
Joint Stipulations	3
Joint Exhibits	4
Statement of the Case	4
Summary of Testimony	7
Myia Powell	7
Shila Griffith	8
Kimberly Bradford	9
Scott Flynn	10
Robert Capaldi	15
Tamara McGee	16
Cheryle Mason	18
Dieudonne Tabot	18
Positions of the Parties	19
Position of the Employer	19
Position of the Union	23
Discussion	27
Award	34
Certificate of Service	35

PROCEDURAL BACKGROUND

This matter came on for a remote arbitration hearing on May 6, 2021 at 9:00 a. m. via the teleconferencing platform Zoom. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The arbitration hearing concluded on May 6, 2021 at 2:30 p. m. and the evidentiary portion of the hearing record was closed at that time.

The arbitrator received post-hearing written arguments from both parties by June 9, 2021 and the arbitrator exchanged the post-hearing briefs between the parties on June 9, 2021.

This matter proceeds under a collective bargaining agreement between the parties in effect from May 12, 2018 through February 28, 2021, Joint Exhibit 1.

No challenge to the arbitrability of the grievance has been raised.

Based on the language of the parties' collective bargaining agreement, the arbitrator finds the grievance at issue herein to be arbitrable and properly before the arbitrator for review and resolution.

JOINT ISSUE

Was the Grievant, Dieudonne Tabot, removed for just cause?

If not, what shall the remedy be?

JOINT STIPULATIONS

1. The Grievance is properly before the Arbitrator.
2. The Grievant was hired by the Employer as an Intermittent Therapeutic Program Worker (TPW) on November 2, 2015, became a Permanent Part-Time TPW on September 18, 2016 and became a Permanent Full-time TPW on April 14, 2019.
3. The Grievant was removed from his position as a TPW on March 10, 2020.

4. The Grievant was removed for a violation of the Ohio Department of Developmental Disabilities Standards of Conduct, Policy:
 - o Rule A-1 (Abuse of a Client) Abuse of any type or nature to an individual under the supervision or care of the Department or State, including but not limited to, physical, or verbal as defined by Ohio Administrative Code 5123-17-02, Addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvement.
5. The Grievant had no active discipline on his record at the time of his removal.

JOINT EXHIBITS

1. 2018-2021 OCSEA Contract
2. Grievance Trail/Information Sharing Agreement and Zip Drive
3. Discipline Trail/Investigation
4. DODD Standards of Conduct, Rule Violations and Penalties
5. Ohio Administrative Code 5123-17-02
6. Medicaid Regulations

STATEMENT OF THE CASE

The parties to this arbitration proceeding, 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, are parties to a collective bargaining agreement that was in effect from May 12, 2018 through February 28, 2021, Joint Exhibit 1. Within this collective bargaining agreement is Article 24, an Article which that begins, in section 24.01, with the following language:

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 actions.

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 grievant in this proceeding, Dieudonne Tabot, has worked at the Columbus Developmental Center as a Therapeutic Program Worker (TPW) since November 2, 2015 when he was originally hired as an intermittent TPW. Mr. Tabot became a permanent, part-time TPW at the Center on September 18, 2016, and became a permanent, full-time TPW at the CDC on April 14, 2019. See Joint Stipulation 2.

On January 7, 2020 Mr. Tabot reported for his scheduled shift, the second shift, from 2:00 p. m. to 10:30 p. m. During this shift Mr. Tabot was offered an opportunity to stay over and work the next shift, the third shift, beginning at 10:30 p. m. on January 7, 2020 and concluding at 7:00 a. m. on January 8, 2020. Mr. Tabot accepted the overtime opportunity and was on duty on the third shift beginning at 10:30 a. m. on January 7, 2020 and concluding at 7:00 a. m. on January 8, 2020.

Between 6:12 a. m. and 6:13 a. m. on January 8, 2020, Myia Powell, a licensed phlebotomist employed by a private health care services company, entered the Parkside Building at the CDC for the purpose of drawing blood from certain clients residing there. Ms. Powell entered the building through the side one entrance and, upon walking in the hallway by the door to Resident 1's room, claims to have heard what Ms. Powell interpreted to be a hard, loud slap, with the sound appearing to come from Resident 1's room.¹ Ms. Powell stopped upon hearing the noise and then peeked into Resident 1's room through the space between the door's frame and the slightly ajar door to Resident 1's room. When peering into Resident 1's room Ms. Powell claims to have seen TPW Tabot slap the face of Resident 1

¹ To protect the privacy rights of CDC residents, the arbitrator has assigned numbers to the residents involved in the narrative of this case - Resident 1, Resident 2, Resident 3 - rather than using the residents' names. The resident who is alleged to have been abused by the grievant is Resident 1. Resident 2 and Resident 3 are clients whose rooms are on the same hallway as Resident 1's room. Resident 2 and Resident 3 were two of the residents at CDC who were to have blood drawn by Ms. Powell during the early morning hours of January 8, 2020. All parties to this proceeding are aware of the identities of Resident 1, Resident 2, and Resident 3.

hard.

Ms. Powell states that upon observing the striking of Resident 1 by the grievant, she entered Resident 1's room, giving as her reason her need to locate Resident 2 to conduct a blood draw. TPW Tabot pointed in the direction of Resident 2's room and directed that Ms. Powell leave Resident 1's room.

Ms. Powell left Resident 1's room and proceeded to perform blood draws on Resident 2 and Resident 3. Ms. Powell then left the building while in a highly emotional state, reporting what she had heard and seen at Resident 1's room concerning the actions of TPW Tabot toward Resident 1.

Ms. Powell's initial reports of what she had observed in Resident 1's room were made to nursing staff and to the CDC Grounds unit. Ms. Powell provided written statements about what she says she observed on January 8, 2020, with a detailed description provided in letter form on January 8, 2020 prepared by Ms. Powell and addressed to CDC's Director of Nursing, Karey Peters. See Joint Exhibit 3, page 29.

A physical examination was performed on Resident 1 on January 8, 2020 prior to 1:00 p. m. by an LPN at the Center. This examination found no visible indication of an injury to Resident 1, with no marks, redness, or bruising observed on Resident 1's person.

Mr. Tabot has always denied inflicting abuse on Resident 1.

An investigation was conducted by the Employer that included videotape recordings from January 8, 2020, written statements, interviews, and a records review. The Employer decided to terminate the employment of Mr. Tabot and did so through a written order of removal signed on March 9, 2020 that ordered the discharge of Mr. Tabot effective March 11, 2020.

A grievance was filed on March 23, 2020 challenging the March 11, 2020 discharge of Mr. Tabot as discipline imposed without just cause and therefore a violation of Article 24, Discipline, in the

parties' collective bargaining agreement. At the time of Mr. Tabot's removal on March 11, 2020, Mr. Tabot had on his employment record no active discipline.

The grievance was reviewed under the parties' agreed grievance procedure, Article 25, with a Step Two meeting convened on July 24, 2020. The Employer denied the grievance at Step Two and the grievance underwent a mediation process. The grievance remained unresolved between the parties and a Step Three meeting occurred on April 8, 2021. The Employer at Step Three again denied the grievance. The unresolved grievance was directed on to final and binding arbitration by the Union pursuant to Article 25, section 25.02, Arbitration.

This matter came on for an arbitration hearing on May 6, 2021.

No challenge to the arbitrability of the grievance has been raised.

This matter is properly before the arbitrator for review and resolution under the parties' collective bargaining agreement.

SUMMARY OF TESTIMONY

Myia Powell

Myia Powell, a licensed phlebotomist, was employed in that capacity by a private health care company, American Health Associates, in 2019. By January 2020 Ms. Powell had been coming to the Columbus Developmental Center as assigned by her employer for about one year to perform blood draws on identified residents.

On January 8, 2020 during the early morning hours Ms. Powell walked into the Parkside Building on the campus of the Columbus Developmental Center. As she entered a hallway she heard a loud smack as she was passing the door to Resident 1's room. Ms. Powell immediately froze and heard a resident, Resident 1, say: "No smack. No smack." Ms. Powell looked into Resident 1's room through

a narrow space between the slightly ajar door to the room and the door frame.

Ms. Powell testified at the arbitration hearing that she observed the resident, Resident 1, seated on his bed saying to a staff member, TPW Tabot, that Resident 1 wanted to go home. Ms. Powell testified at the arbitration hearing that she observed TPW Tabot smack Resident 1's right facial cheek and order Resident 1 to get dressed.

Ms. Powell then entered the room of Resident 1 saying: "Where's Resident 2?" Upon exiting Resident 1's room, Ms. Powell saw another TPW exiting the bathroom and asked the TPW for the name of the staff member who Ms. Powell had observed with Resident 1. Ms. Powell was informed that the name of the TPW with Resident 1 was Tabot.

Ms. Powell testified that when she left the Parkside building for another building she had been crying, not knowing to whom to report the striking of Resident 1 by TPW Tabot. Ms. Powell was advised by another TPW to make her report to Grounds at the Center. Ms. Powell contacted Grounds via a telephone and made her report to a nurse there, LPN Shila Griffith. Ms. Powell testified that she had not known Mr. Tabot prior to January 8, 2020.

Under questioning by the Union's representative, Ms. Powell confirmed that she had been employed as a phlebotomist by American Health Associates, and in that role was to draw blood at the Columbus Developmental Center on a consistent, daily basis for about one year. Ms. Powell confirmed that she stopped going to CDC in mid-January 2020.

Shila Griffith

Shila Griffith is a licensed practical nurse (LPN) who has worked for the Department of Developmental Disabilities at the Columbus Developmental Center since September 2004.

Ms. Griffith recalled that on January 8, 2020 Ms. Powell reported to Ms. Griffith at the nurses'

station that Ms. Powell had observed a staff member hit a resident. Ms. Griffith advised Ms. Powell that a report should be made to CDC's Grounds department. Ms. Griffith dialed the Grounds department using a telephone that was present at the nurses' station and handed the receiver to Ms. Powell to make her report. Nurse Griffith also prepared an unusual incident report (UIR).

Nurse Griffith testified that she examined Resident 1 after 7:30 a. m. on January 8, 2020, at least one hour after the incident had been reported to have occurred, and found no visible marks on the resident's person.

Under questioning by the Union representative, Ms Griffith testified that after two hard smacks she would expect to see some mark indicating as such. LPN Griffith recalled that Resident 1 had said nothing out of the ordinary to her at the time of her examination of her on January 8, 2020.

Kimberly Bradford

Kimberly Bradford is a licensed practical nurse who has worked for the Ohio Department of Developmental Disabilities for three and one-half (3½) years.

On January 8, 2020, while on duty at the Columbus Developmental Center, working the night shift from 10:00 p. m. on January 7, 2020 to 8:00 a. m. on January 8, 2020, Nurse Bradford received a report of abuse perpetrated against a resident, Resident 1. Ms. Bradford recalled that on January 8, 2020 she traveled to the Parkside Building to pass medications and discovered Ms. Powell in the parking lot outside Parkside crying. Ms. Powell told Nurse Bradford that Ms. Powell had entered Parkside that morning to perform a blood draw and upon entering the building had heard a slap. Peering into the room from which the sound of the slap had been heard, Ms. Powell explained that she had observed a TPW slap resident Resident 1 . Nurse Bradford recalled in her testimony that she advised Ms. Powell that Nurse Bradford would report to Grounds what Ms. Powell had said.

On January 31, 2020, Nurse Bradford directed an email to a CDC investigator describing what she had been told by Ms. Powell on January 8, 2020. The January 31, 2020 email from Ms. Bradford is found within the hearing record at Joint Exhibit 3, page 31 and tracks Ms. Bradford's testimony at the arbitration hearing.

Under questioning by the Union's representative, Ms. Bradford confirmed that at the end of her January 31, 2020 email, Joint Exhibit 3, page 31, Ms. Bradford had written: "... I then proceeded inside the Building to assess [Resident 1] in the PS 1 living room on the couch." In her testimony at the arbitration hearing, Ms. Bradford recalled that Allison Jumper, a CDC quality assurance manager had asked Nurse Bradford to assess Resident 1. Nurse Bradford recalls assessing Resident 1 but cannot recall at what time the assessment was conducted. Ms. Bradford was able to recall that she observed nothing abnormal about Resident 1 during her assessment of him.

Scott Flynn

Scott Flynn is the Chief of Investigations at the Columbus Developmental Center. Mr. Flynn served as a commissioned law enforcement officer for twenty-eight (28) years prior to his employment at CDC in May 2000 as a police officer. Mr. Flynn subsequently was appointed Chief of Police at CDC and now serves as the Chief of Investigations at the Center.

Mr. Flynn explained that investigations are conducted at CDC on all major unusual incidents and on all allegations of abuse of a client. Mr. Flynn estimated that about 350 investigations at CDC are conducted yearly.

Mr. Flynn recalled that during the morning hours of January 8, 2020 he received a telephone call from CDC's Grounds office that notified him an allegation of client abuse had been made against TPW Dieudonne Tabot.

Mr. Flynn began the investigation of the charge of client abuse against Mr. Tabot by examining any unusual incident reports connected to the alleged incident, in this case beginning with the unusual incident report (UIR) filed by LPN Shila Griffith on January 8, 2020, Joint Exhibit 3, page 27. This unusual incident report is dated January 8, 2020, reports a time of 6:30 a. m. as the time of the UIR, and reports the following: “Lab tech came to me in 1740 nurse station and reported that she seen staff hitting client in his room. I then had Lab tech report the incident to grounds. Assessment was completed on chart. No visible injuries seen no marks on pt.”

Mr. Flynn identified Joint Exhibit 3, page 29 as the January 8, 2020 written correspondence from Ms. Powell addressed to the Director of Nursing at CDC, Karey Peters. This letter states that Ms. Powell arrived at CDC/Parkside at 6:00 a. m., entering the building through the first entrance at the far right of the building, entering through the hallway of Side One. Upon entering Ms. Powell heard a loud noise that sounded like a smack and heard Resident 1 saying: “No smack, no smack!” Ms. Powell walked to the room from which the loud noise had been heard, discovered that the door to the room was slightly ajar, and peeked into the room. Ms. Powell states in her January 8, 2020 letter to CDC's Director of Nursing that she observed in the room Resident 1 sitting Indian-style on the end of his bed, holding his left (face) cheek with his left hand. Ms. Powell then wrote:

... A male TPW (Aide) was standing, facing [Resident 1] trying to help him get dressed. In an unpleasant tone, the male TPW told [Resident 1] “to get up and get dressed” but [Resident 1] replied “I want to go home” over and over. I saw the male TPW smack [Resident 1] hard on his right (face) cheek. I quickly entered Resident 1's room and said “hey, I'm here to draw [Resident 2] and [Resident 3]” to the TPW, who now seemed to be caught off guard by my presence in [Resident 1's] room. The male TPW walked out of [Resident 1's] room without saying a word. I followed him into the hallway; the TPW pointed and said “there's [Resident 2's] room” before heading toward the bathroom. I proceeded to [Resident 2's] room and collected his lab draw orders. When I was finished, I returned to [Resident 1's] room to ask about [Resident 3]. I stuck my head in [Resident 1's] room; there was another male TPW working (shift change), so I asked him, “where's [Resident 3] ?” The TPW replied “right behind you.”

I turned around and saw [Resident 3]. I walked with [Resident 3] back to his room and collected his lab draw orders. I returned to [Resident 1's] room and asked the TPW his name, he replied "Alfino." I asked Alfino if he knew the name of the other male TPW in [Resident 1's] room the shift before his; Alfino replied "Taybit."

As I was leaving Side One, a Nurse (Kim) was entering the building. I reported the incident in [Resident 1's] room to Nurse Kim, who confirmed that she would report it to the correct people. I left Side One and proceeded to Unit 1740. When I arrived in Unit 1740, a female TPW (Tamera) noticed that I was upset and asked me what was wrong. I told Tamera "that I saw someone get smacked in the face really hard." Tamera told me to report it to Grounds. Before I had a chance to report the incident to Grounds, I saw Nurse Shayla and asked her for help reporting the incident in [Resident 1's] room. Nurse Shayla immediately called Grounds (6:35AM). I verbally shared all the details of what I witnessed earlier that morning in [Resident 1's] room with Tasheea/Grounds. DESCRIPTION OF MALE TPW (Taybit): African American male, wearing a green hoodie/sweatshirt and blue jeans (1/08/2020).

Sincerely,

Myia Powell
Phlebotomy Supervisor, AHA

Mr. Flynn identified Joint Exhibit 5 as Ohio Administrative Code section 5123-17-02, a section titled "Addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvement." Ohio Administrative Code section 5123-17-02(C)(16)(a)(vi) defines "physical abuse" as meaning:

... the use of physical force that can reasonably be expected to result in physical harm to an individual. Such physical force may include, but is not limited to, hitting, slapping, pushing, or throwing objects at an individual.

Chief Investigator Flynn identified Joint Exhibit 3, pages 19 – 26 as the Report of Investigation of the incident involving Resident 1 that is alleged to have occurred at 6:30 a. m. on January 8, 2020 at the Parkside Building, Side 1. Mr. Flynn explained that he directed the investigation and prepared the investigative report.

Mr. Flynn identified a video recording of the interior of the Parkside Building, in particular the hallway on Side One of the building, the hallway that includes Resident 1's room. The video begins at 6:10 a. m. on January 8, 2020. Resident 1 can be seen to walk from his room to a bathroom on the hallway while in a state of undress. Resident 1 is then seen returning to his room from the bathroom.

At 6:12 a. m. TPW Tabot can be seen leaving a common living area and walking to the bathroom and then on to Resident 1's room. A door at the end of the hallway can then be seen to open and Ms. Powell is observed to enter the hallway. Ms. Powell can be seen to walk into the hallway until she reaches Resident 1's room when she is observed to stop abruptly outside Resident 1's room's door. Ms. Powell is then observed to enter Resident 1's room. TPW Adibao Adeola, the TPW assigned to Resident 1 that morning, is observed to enter Resident 1's room at 6:13 a. m.

A second resident, Resident 2, is observed in the hallway. Resident 2 was one of the residents to have blood drawn by Ms. Powell. TPW Tabot is then observed to leave Resident 1's room and travel to the bathroom. Resident 2 is seen to be standing outside Resident 1's room and then walking to his own room.

At 6:14 a. m. Resident 2 is seen to exit his room and stand outside Resident 1's room. Ms. Powell is then seen, at 6:14:44 a. m., to exit Resident 1's room and enter Resident 2's room.

At 6:15 a. m. TPW Tabot can be seen to exit the bathroom and travel to the common living area on the hallway. Mr. Tabot is then observed to walk away. Ms. Powell is seen to walk across the hallway to another room. Resident 1 is seen to exit his room, clothed, accompanied by TPW Adebayo Adeola.

Ms. Powell is seen to leave Parkside, Side One at 6:19 a. m.

Mr. Flynn identified written statements in the investigative report from LPN Kimberly Bradford, Joint Exhibit 3, page 31; LPN Tamara McGee, Joint Exhibit 3, page 36; and LPN Shila Griffith, Joint Exhibit 3, page 30. Mr. Flynn explained that Resident 1 was not interviewed due to

Resident 1's limited cognitive abilities.

Mr. Flynn identified Joint Exhibit 3, page 32-33 as the statement from Mr. Tabot provided on January 21, 2020. In this statement Mr. Tabor confirmed that he had worked the third shift, a shift that began on the night of January 7, 2020 and ended during the morning hours on January 8, 2020. Mr. Tabot recalled assisting Resident 1 during this shift. Mr. Tabot recalled that another staff member on the shift had been Adebayo Adeola. Mr. Tabot states in his statement that his shift was completed without incident.

Mr. Tabot noted in his January 20, 2020 statement that when first shift staff arrived during the morning of January 8, 2020, Mr. Tabot had been in Resident 1's room. TPW Adeola had said to TPW Tabot that rather than have Resident 1 parade around naked in the hallway, he, TPW Adeola, was going to dress Resident 1, whereupon TPW Adeola exited Resident 1's room to gather clean clothes for Resident 1. When TPW Adeola returned to Resident 1's room with the clothing for Resident 1, TPW Tabot left the room and the unit.

Mr. Tabot says in his written statement that he had been in Resident 1's room when a woman had stood in the hallway and said she was there to perform a blood draw on Resident 3. Mr. Tabot stated that he pointed to Resident 3's room and advised the woman that Resident 3 was still sleeping.

Mr. Tabot in his written statement states that while in Resident 1's room, TPW Tabot had been prompting Resident 1 to undress so Resident 1 could change his clothes, and Resident 1 did so while declaring his desire to go home and be with his family, a frequent request verbalized by Resident 1.

Mr. Tabot had no explanation for the loud smack claimed to have been heard by Ms. Powell. Mr. Tabot has no recollection of Resident 1 saying "no smack, no smack" during the morning hours of January 8, 2020, although Mr. Tabot confirmed that Resident 1 has a tendency to attempt to bully other clients or staff members, and as he does so Resident 1 is redirected by being reminded not to bully and

not to smack. Mr. Tabot states in his written statement that Resident 1 has adapted the redirection received from staff about bullying and smacking to preempt the subject by announcing “no bullying” or “no smack.” Mr. Tabot had no recollection, however, of Resident 1 using these terms during the morning of January 8, 2020.

Mr. Tabot has no explanation for the claim by Ms. Powell that she observed TPW Tabot smack the face of Resident 1.

On February 7, 2020 CDC's Chief of Investigations issued the Center's investigative report . At Joint Exhibit 3, page 25 the report found that physical abuse had been substantiated. Chief Investigator Flynn stated in his report that Ms. Powell had had no reason to make a false claim against Mr. Tabot.

Under questioning by the Union's representative, Mr. Flynn acknowledged that at Joint Exhibit 3, page 20 is the second page of the investigative report upon which is reported an interview of TPW Adebayo. TPW Adebayo is reported to have said that he saw no slap of Resident 1 by TPW Tabot and Resident 1 had made no complaint about being struck.

Robert Capaldi

Robert Capaldi is a Medical Health Systems Manager for the Department of Developmental Disabilities. From 2014 through March 2021 Mr. Capaldi served as Superintendent of the Columbus Developmental Center. Mr. Capaldi has been employed by the Department of Developmental Disabilities for thirteen and one-half (13½) years.

Mr. Capaldi explained that the Columbus Developmental Center has a resident census of 115. It has operated as a residential facility for over 160 years. The Center employs over 300 staff members. Mr. Capaldi explained that a Therapeutic Program Worker (TPW) provides direct care support to those clients at the Center who require it.

Mr. Capaldi recalled receiving notice of the January 8, 2020 incident in his capacity as Superintendent of the Center and recalled that the notice referred to an allegation of client abuse that had been reported. As Superintendent of the CDC Mr. Capaldi served as the Center's appointing authority and therefore possessed the authority to impose discipline for violations of work rules, subject to the express limitations presented in the parties' collective bargaining agreement. Mr. Capaldi testified that he decided to discharge TPW Tabot for a violation of Standard of Conduct A 1 as presented in Department of Developmental Disabilities Policy HR-013. This policy provides that abuse of any type or nature to anyone under the supervision or care of the Department or State, including but not limited to physical or verbal abuse as defined by Ohio Administrative Code section 5123-17-02. A violation of this work rule, for a first offense, is to result in the removal of the employee who perpetrated the abuse.

Mr. Capaldi identified Joint Exhibit 3, page 11 as the order of removal dated March 9, 2020 directing the removal of Mr. Tabot from his employment at the Columbus Developmental Center, effective March 11, 2020. The order of removal states that Mr. Tabot had violated agency work rule A1 – Abuse of a Client. The order of removal stated: “On or about January 8, 2020 you were witnessed to smack individual [Resident 1] on his face while in his bedroom.” Mr. Capaldi noted in his testimony that the Department's Standard Guidelines for Progressive Discipline Performance Track provides that for a first offense of violating rule A1, abuse of a client, the discipline to be imposed is removal.

Under questioning by the Union's representative, Mr. Capaldi stated that at the time he decided to terminate the employment of Mr. Tabot, Superintendent Capaldi had been aware of inconsistencies in Ms. Powell's statements about the incident.

Tamara McGee

Tamara McGee is a licensed practical nurse employed at the Franklin Medical Center, a

correctional institution. Ms. McGee had been employed at the CDC as a TPW in 2007. In February 2020, when Ms. McGee had secured her LPN license, she accepted a position at the Franklin Medical Center.

Ms. McGee testified that she was very familiar with Resident 1 at the CDC, having worked with Resident 1 at the Center for eleven years. Ms. McGee recalled that Resident 1 had a habit of taking other people's belongings. Beyond stealing, Resident 1 sometimes slapped himself.

Ms. McGee identified Joint Exhibit 3, page 36 as a copy of her signed statement provided on January 22, 2020 at CDC at 10:30 a. m. In her January 22, 2020 written statement Ms. McGee says that when Ms. Powell arrived at Ms. McGee's location, Ms. Powell had been talking on the telephone. When Ms. Powell ended her telephone conversation, Ms. McGee observed Ms. Powell to be crying. When Nurse McGee asked Ms. Powell about what was wrong, Ms. Powell responded that she just had to report a staff member because it sounded like the staff member slapped Resident 1. Ms. McGee states in her written statement that she asked Ms. Powell to whom Ms. Powell had reported the incident, and asked about the identity of the staff member alleged to have engaged in the abuse of a client. Ms. McGee says in her written statement that Ms. Powell had said that she reported it to Kim and to her supervisor, and was about to call Grounds. Ms. McGee says in her statement that Ms. Powell asked if Ms. McGee knew the staff in Parkside and showed Ms. McGee a name that Ms. McGee did not recognize. There is nothing in Ms. McGee's written statement about Ms. Powell claiming to have seen TPW Tabot slap Resident 1.

Under questioning by the Employer's representative, Ms. McGee confirmed that on January 8, 2020 she had been assigned to a building different from the building housing Resident 1. Ms. McGee recalled that in her interaction with Ms. Powell on January 8, 2020, Ms. Powell had been crying and had appeared to be very upset.

Cheryle Mason

Cheryle Mason is employed at the Columbus Developmental Center as a Therapeutic Program Worker. Ms. Mason has worked at CDC for eighteen (18) years, all as a TPW. Ms. Mason also serves as the Union Chapter President at CDC.

Ms. Mason testified that she had worked directly with Resident 1 and found him to be pleasant, easy-going, and intelligent. Ms. Mason said that Resident 1 can communicate verbally but only to a listener who is familiar with how Resident 1 talks.

Ms. Mason recalled encouraging Resident 1 not to strike anyone, and Resident 1 under such prompting would sometimes respond with “[Resident 1's first name] no smack, no smack.”

Ms. Mason explained that Resident 1 deeply loves his mother and sister and stepfather, and was often heard to say: “I want to go home.” Ms. Mason said that this sentiment was frequently and regularly expressed by Resident 1.

Dieudonne Tabot

Dieudonne Tabot, the grievant in this proceeding, worked at the Columbus Developmental Center as a Therapeutic Program Worker for over four (4) years.

Mr. Tabot explained that in 2020 he had been assigned to the second shift, a tour of duty from 2:00 p. m. to 10:30 p. m., an assigned shift on January 7, 2020. On January 8, 2020 Mr. Tabot was on duty because he had been asked to stay over for the third shift, that began the night of January 7, 2020 and concluded in the morning hours of January 8, 2020. Mr. Tabot noted that the invitation to remain for a second shift on January 7, 2020 was accepted by Mr. Tabot and comprised a voluntary overtime opportunity.

Mr. Tabot recalled that Resident 1 had had a good night January 7-8, 2020, and had presented

no issues. Mr. Tabot recalled that Resident 1 had arisen and walked to the bathroom on the hallway while naked. Resident 1 returned to his room where TPW Tabot encouraged Resident 1 to get dressed in clean clothes in anticipation of that day's programming. TPW Adebayo Adeola oversaw Resident 1 putting on clothes and Resident 1 then seated himself on his bed. Mr. Tabot recalled in his testimony that Resident 1 acted normally, saying he wanted to go home and asking when he could go home.

Mr. Tabot recalled seeing Ms. Powell in the building while Mr. Tabot had been in Resident 1's room. He recalled Ms. Powell being near the door to Resident 1's room, explaining that she was there for blood draws. Mr. Tabot recalled directing Ms. Powell to Resident 3's room and a discussion about Resident 2's location also occurred.

Mr. Tabot recalled that Ms. Powell had left the building and at no time had Mr. Tabot encountered any problem in Resident 1's behavior that morning.

Mr. Tabot emphatically denied slapping Resident 1, declaring that he would never do such a thing and had never done such a thing in the past. Mr. Tabot stated that he had had no reason to strike a client, and did not.

Although Mr. Tabot has heard Resident 1 say "No smack,no smack" in the past, Mr. Tabot does not recall Resident 1 saying that on January 8, 2020. Mr. Tabot explained that when Resident is verbally redirected from misbehavior, it was common for Resident 1 to mimic back the verbal prompts.

Mr. Tabot has no explanation for the report made by Ms. Powell on January 8, 2020 about the abuse of Resident 1 and cannot imagine why such a report was filed.

POSITIONS OF THE PARTIES

Position of the Employer

The Employer understands the purpose of this proceeding to be a determination of whether the

Employer possessed the just cause needed to terminate the employment of the grievant for the physical abuse of an individual under the care or supervision of the Ohio Department of Developmental Disabilities and the Columbus Developmental Center. The Employer asserts that it did possess in March 2020 the just cause required by the parties' collective bargaining agreement to order the removal of the grievant from his employment by the Department.

The Employer points to the testimony and other evidence in the hearing record in recounting the events at the Parkside Building on January 8, 2020 in the building's bedroom hallway from 6:12 a. m. when phlebotomist Myia Powell entered the building to 6:19 a. m. when Ms. Powell exited the building. The Employer refers to the sound of a smack heard by Ms. Powell when she was located outside the door to Resident 1's bedroom, and recalls Ms. Powell's testimony at the arbitration hearing to the effect that she clearly observed the grievant while in Resident 1's bedroom with Resident 1 forcefully slap the facial cheek of Resident 1. Ms. Powell testified that she immediately entered the bedroom of Resident 1 to interrupt any further abuse.

With the arrival of TPW Adebayo Adeola and his attending to Resident 1, TPW Tabot left the room as did Ms. Powell to attend to those residents in the building who were to have blood drawn. When Ms. Powell left the Parkside Building she was crying and upset. Ms. Powell then encountered a series of staff members at the Center, each of whom asked Ms Powell why she appeared to be upset. Ms. Powell explained to each staff member that she had just observed a resident be physically abused by a TPW at the Center. Ms. Powell made this report to LPN Kimberly Bradford, to (then) TPW Tamara McGee, and to LPN Shila Griffith. Ms. Powell also filed a report with CDC's Grounds office. Ms. Powell provided written statements about what she had observed and experienced at the Parkside Building during the early morning hours of January 8, 2020.

The Employer refers to the investigation conducted by the CDC into the allegations of client

abuse made against the grievant, an investigation that included written statements, interviews, pertinent documents collected and reviewed, and a video recording from the morning in question.

The Employer points out that the Department's Standards of Conduct in rule A-1 prohibits, under a threat of discharge for a first offense, the abuse of a person under the supervision and care of the Department. The Employer points to Ohio Administrative Code section 5123:2-17-02 as providing a definition for physical abuse as meaning the use of physical force that can reasonably be expected to result in physical harm to an individual.

The Employer contends that a preponderance of the evidence in the hearing record substantiates the charge made by Ms. Powell that the grievant on January 8, 2020, at or near 6:13 a. m., physically abused Resident 1 by slapping Resident 1's facial cheek with sufficient force to reasonably expect physical harm to result from the striking.

The Employer emphasizes that there is no reason for Ms. Powell to have fabricated the events she reported, and she has never wavered in what she heard, observed, and did. She reported the events immediately and has been consistent in what she says she observed. Ms. Powell had not known Mr. Tabot prior to January 8, 2020 and does not work for the Department. The Employer argues that Ms. Powell had no reason to lie, having no motive related to any advantage in making these reports, and having no reason to malign the grievant. All of Ms. Powell's actions were voluntary and motivated by nothing more than the determination to do the right thing.

The Employer reminds the arbitrator that neither the administrative rule as to Major Unusual Incidents nor the Employer's Standards of Conduct require that a physical injury be present to prove client abuse. While a physical manifestation of the slap of the resident was not found, the Employer contends that it is the slap itself which constitutes the physical abuse, and that physical abuse does not require a noticeable injury to be determined abuse.

The Employer rejects the Union's claim that Ms. Powell's recitation of the events in question suffers from inconsistencies that undermine the credibility of Ms. Powell's testimony. The Employer finds trivial the difference in the color of the grievant's hoodie, that Ms. Powell was only in Resident 1's bedroom on one occasion and not the two additional occasions mentioned by Ms. Powell, and that she did not immediately follow TPW Tabot out of Resident 1's bedroom. The Employer points to the brevity of the incident and the high emotion provoked in Ms. Powell as an explanation of any minor discrepancies in Ms. Powell's recounting of events. The Employer argues that none of the discrepancies cited by the Union alter in any way what Ms. Powell saw, and what she saw was the grievant physically abuse Resident 1.

The Employer contends that there is more than a preponderance of clear and convincing evidence in the hearing record proving that the grievant abused a CDC resident on January 8, 2020 by slapping the resident in the face. What occurred immediately before the slap and what occurred immediately after the slap has been amply substantiated by the testimony of Ms. Powell and others who were present at the Center that morning. The Employer argues that having proven that abuse of a client occurred, removal of the employee perpetrating the abuse comprises appropriate disciplinary action, and the rules of the Employer and the parties' collective bargaining agreement demand it.

The Employer emphasizes that the clients who reside at the Columbus Developmental Center have a human and legal right to be cared for in a way that is healthy, safe, and humane. The Employer claims that clients have a right to feel physically and emotionally secure while in the care of CDC staff, including direct care staff. The Employer argues that when the grievant crossed the line separating acceptable care from unacceptable care by physically abusing a resident, the grievant forfeited his claim to continuing employment by the Department. The Employer argues that the abuse perpetrated by the grievant upon Resident 1 on January 8, 2020 supports the removal of the grievant, provides the just

cause needed to discharge the grievant, and is why the grievance should be denied and dismissed in its entirety by the arbitrator.

Position of the Union

The Union points out that at the time of the removal of the grievant, Dieuonne Tabot, from his employment by the Department of Developmental Disabilities at the Columbus Developmental Center in March 2020, Mr. Tabot had over four years of service as a TPW at the Center and had no active discipline.

The Union claims that the Employer has failed to provide clear and convincing evidence in support of the charge against the grievant, namely a violation of rule A-1, Abuse. The Union claims that the investigation conducted by the Employer into the charge made against the grievant revealed inconsistency after inconsistency in the events described by Ms. Powell, and the Union characterizes the Employer's investigation as neither full nor fair nor objective and therefore the Employer is unable to prove it possessed the just cause demanded by Article 24 in imposing discipline.

Because the alleged abuse purportedly occurred in Resident 1's bedroom, space in which no video recording had been made, the Union contends that to prevail in this case the Employer must present substantial proof that the alleged abuse occurred, clear and convincing evidence in support of the charge, if the discharge is to be determined justified.

The Union notes that the victim of the purported abuse, Resident 1, was not interviewed as part of the Employer's investigation. This omission was explained by Chief Investigator Flynn as having been caused by Resident 1's inability to recount past events due to limited cognitive abilities. The Union points to Joint Exhibit 3, page 20 in the investigative report wherein TPW Adebayo Adeola in his interview refers to IA Hoffman speaking with Resident 1, but was not able to get any details about

the incident from Resident 1.

The Union argues that the grievant, TPW McGee, and TPW Mason each testified at the hearing that Resident 1 is capable of comprehending and reporting an incident of abuse perpetrated against him. As noted by Ms. McGee in her testimony, Resident 1 was capable of one word utterances or short phrases.

Without an interview of the purported victim of the alleged abuse, the investigative report, argues the Union, must be viewed as incomplete, and cannot be relied upon for a conclusion about the veracity of the charge made against the grievant.

The Union claims that there is nothing in the hearing record that would indicate in any way that the grievant had been anything less than truthful and cooperative in his interview and in his recounting of what had occurred during the morning in question. The Union points out that Mr. Tabot cannot be determined to be untruthful simply because he disagrees with what Ms. Powell had reported and knows of no reason why Ms. Powell would make this charge against him. The Union emphasizes that just because there is a disagreement between these two witnesses, this lack of consensus does not make Mr. Tabot a liar. The Union points out the Employer has not been able to point to any statement made by the grievant during the investigation that has been shown to be untrue.

The Union contends that the reports made by Ms. Powell concerning the purported abuse of Resident 1 by the grievant included a number of inconsistencies when Ms. Powell's recollections are compared to the video recording of the hallway in the Parkside Building during the morning hours of January 8, 2020. The inconsistencies in Ms. Powell's recounting of events, as claimed by the Union, include the sequence of Ms. Powell's movements in the hallway that January 8, 2020 morning. The Union states that Ms. Powell had claimed to go into Resident 1's room on three occasions, while the video recording shows Ms. Powell in Resident 1's room on one occasion, from 6:12:43 a. m. to 6:14:41

a. m., one minute and fifty-eight seconds. The Union notes that Ms. Powell reported that the color of the hoodie worn by the perpetrator of the abuse against Resident 1 had been green when the color of Mr. Tabot's hoodie had been red/burgundy.

The Union also points to certain discrepancies between what Ms. Powell claims to have reported to staff and what those staff who received these reports recall about what they were told by Ms. Powell. For example, LPN Griffith does not recall Ms. Powell saying she, Ms. Powell, had heard a loud smack outside Resident 1's room.

The Union claims that LPN Bradford was told by Ms. Powell that Ms. Powell had said that she, Ms. Powell, had performed a blood draw in another room off the hallway before traveling to and entering Resident 1's room. The Union points out that this sequence of events does not match what can be observed on the video recording.

The Union notes that Ms. McGee recalls being told by Ms. Powell that Ms. Powell heard a slap but did not mention seeing the grievant slap Resident 1.

The Union notes that at the hearing Ms. Powell had said that she had been in Resident 1's room while both TPW Tabot and TPW Adeola had been there. The Union states that this was not the case as the video shows Mr. Adeola entering the room only after Ms. Powell had exited the room.

The Union argues that the fact that Ms. Powell stopped coming to CDC two weeks after she had made her report of abuse on January 8, 2020 is a factor to be considered in adjudging Ms. Powell's credibility. The Union claims that the fact that Ms. Powell, a private contractor's employee while at the CDC, had not been subject to disciplinary action by the Center, is a factor to be considered in determining Ms. Powell's credibility.

The Union contends that it has presented sufficient evidence to the hearing record to prove the credibility of Ms. Powell to be suspect and unreliable. The Union alludes to what it finds to be

inconsistencies in Ms. Powell's narrative and argues that the number of inconsistencies leave Ms. Powell's credibility on the allegation of abuse wanting.

The Union points out that Ms. Powell was not interviewed as part of the investigation conducted by the Employer, the very person who alone accused the grievant of abusing a resident. The Union finds this omission to be critical to the completeness, objectivity, and fairness of the Employer's investigation. The Union contends that in the absence of a complete, objective, and fair investigation the Employer is unable to show that it acted while in possession of the just cause required by Article 24, section 24.01.

The Union also points out that more than one physical examination of Resident 1 on January 8, 2020 found no marks, bruising, or other signs of injury. The Union points out that Ms. Powell described in her testimony hearing a loud smack and then observing a hard smack of Resident 1's facial cheek. The Union reasons that two strikes to the face of Resident 1 using the level of force described by Ms. Powell would be expected to leave some indication of these strikes on the skin of Resident 1, yet neither LPN Griffith nor LPN Bradford observed any sign of an injury on Resident 1 in their examinations of Resident 1 on January 8, 2020. LPN Griffith examined Resident 1 within ninety minutes of the alleged incident; LPN Bradford examined Resident 1 later that day when Resident 1 was seated on a couch in the Parkside 1 living room.

The Union claims that the Employer's investigation failed to substantiate the abuse of Resident 1. The Union understands the seriousness of the charge that was made by Ms. Powell but also keeps in mind that it is the Employer's burden to prove that the charged violation occurred, such proof must be clear and convincing, and meeting this burden is demanded by the just cause requirement expressed in Article 24, section 24.01.

The Union notes that while the Employer found Ms. Powell to have been credible, the grievant

has fully cooperated to the best of his ability in answering questions about the events in question. The only reason given by the Employer for not finding the grievant credible is the grievant's inability to explain why Ms. Powell would fabricate such a charge against Mr. Tabot. The Union contends that the Employer has failed to provide the evidence necessary to support the charge of abuse leveled against the grievant.

The Union argues that the Employer has failed to present clear and convincing evidence to support the claim that abuse of a client occurred. No other work rule has been cited as having been violated, so without proof of abuse, the disciplinary action taken by the Employer against the grievant is without just cause and must be reversed.

The Union urges the arbitrator to sustain the grievance, order the reinstatement of the grievant to employment at the Columbus Developmental Center to a position equal to pay range 5 retroactive to the date of removal, expunge all references to the grievant's removal from the grievant's work record, compensate the grievant for all lost wages less interim earnings, restore all leave balances and seniority credits, pay medical expenses since the date of removal, and make the grievant whole by placing him in the position he would have been in had the discharge not occurred.

The arbitrator is requested by the Union to retain jurisdiction over his award for sixty days after its issuance.

DISCUSSION

This case balances on a factual issue, that is, whether there is sufficient proof in the hearing record to find the grievant abused a client under the care and supervision of the Ohio Department of Developmental Disabilities at the Columbus Developmental Center on January 8, 2020 at about 6:13 a. m. The burden of proving the charge of abuse must be carried by the Employer if the discipline

imposed on the grievant is to be upheld. The Union argues that the severity of the discipline imposed in this case, removal from employment, requires clear and convincing evidence if the Employer's burden of proof is to be met.

There is no question that the Employer carries the burden of proof in this matter. Express language in Article 24, section 24.01 of the parties' collective bargaining agreement, the Article on discipline, assigns the burden of proof to the Employer when discipline is imposed and grieved. As stated in Article 24, section 24.01, the Employer has the burden of establishing just cause for any disciplinary action. Article 24, section 24.01 also provides that in a case involving the termination of employment, if the arbitrator finds that abuse of a patient under the care or custody of the State of Ohio has occurred, the arbitrator is prohibited from modifying the discharge of an employee found to have committed such abuse.

There is no language, however, in Article 24 which specifies the standard of proof to be met by the Employer, that is, nothing about requiring clear and convincing evidence to meet this burden of proof rather than a preponderance of the evidence, a lesser standard of proof. The arbitrator understands that in cases of the highest severity, including cases of discharge from employment, an argument can be made that the seriousness of the disciplinary response calls for a proportionately higher standard of proof, requiring a more stringent standard. The arbitrator understands the logic in such an argument but also understands the language of Article 25, section 25.03 in the parties' collective bargaining agreement to expressly prohibit the arbitrator from adding to, subtracting from, or modifying any of the terms of the the parties' Agreement, nor is the arbitrator authorized to impose on either party a limitation or obligation not specifically required by the expressed language in the parties' Agreement.

The arbitrator confirms that the burden of proof in this case as to just cause must be carried by the Employer if the Employer is prevail. To meet that burden, at a minimum, the Employer must

present a preponderance of evidence proving that the grievant abused a resident at the Columbus Developmental Center on January 8, 2020.

The most direct, eyewitness evidence as to the events in question comes from two sources, both of whom were in a position to see and be aware of the events as they transpired in Resident 1's room on the day in question. Ms. Powell and Mr. Tabot were both in a position to observe what occurred in Resident 1's room at the time the abuse of Resident 1 is alleged to have occurred, at or near 6:13 a. m.

While no video recording of what occurred in Resident 1's room at 6:13 a. m. on January 8, 2020 exists, the hearing record does contain a video recording of the hallway that Resident 1's room abuts. The video recording of the hallway in the Parkside Building on side one shows the entry of Ms. Powell and her first movement into the hallway at 6:12 a. m. on January 8, 2020. We see on the video recording Ms. Powell walking down the hallway (toward the viewer) and stopping abruptly outside the door of Resident 1's room. We see Ms. Powell look into Resident 1's room and then enter Resident 1's room. We can observe that Ms. Powell remained in Resident 1's room for just under two minutes and then exited Resident 1's room and entered other resident rooms abutting the hallway, presumably to perform blood draws on residents therein.

It should be remembered that Ms. Powell had not traveled to the Parkside Building on January 8, 2020 to attend to Resident 1. Resident 1 was not, that morning, one of the residents slated to sit for a blood draw performed by Ms. Powell. Ms. Powell had no reason to stop by or enter Resident 1's room but something experienced by Ms. Powell caused her to stop abruptly outside the door to a resident's room in which, at that time, housed a resident unknown to Ms. Powell. Ms. Powell testified that what brought her up short in front of Resident 1's room was a loud noise that sounded to Ms. Powell like a loud smack. Ms. Powell also heard someone from inside the room at which she had halted say: "No smack. No smack."

When Ms. Powell looked into the room from which the loud noise had emanated she observed Resident 1 seated on a bed, with his left hand on his left cheek, saying that he wanted to go home. Ms. Powell tells us that at this point the staff member with Resident 1, the only staff member in the room, slapped Resident 1 on the right cheek, hard, and ordered the resident to get dressed.

The grievant, Mr. Tabot, unequivocally denies striking Resident 1 at this time or at any other time. The grievant tells us that nothing out of the ordinary occurred between himself and Resident 1 on the day in question, that he has never abused anyone under his care, and would never do so, and can think of no reason why Ms. Powell would accuse him of this misconduct when he did not engage in any form of abuse.

The two eyewitnesses to the events in question, Ms. Powell and Mr. Tabot, directly disagree on what occurred between the grievant and Resident 1 in a time span of less than one minute. Ms. Powell can be seen stopping outside Resident 1's room and then looking into the room all within a matter of a few seconds. It should be remembered that TPW Tabot is seen on the video recording entering Resident 1's room at 6:12 a. m., followed by Ms. Powell's entry into the hallway at 6:12 a. m., shortly after TPW Tabot had entered the room of Resident 1. Ms. Powell can be seen to stop abruptly outside the door of Resident 1's room, look into the room, and enter the room, all at 6:12 a. m. TPW Adebayo Adeola is observed to enter Resident 1's room at 6:13 a. m.

The video recording shows the entry of TPW Tabot into Resident 1's room, Ms. Powell's entry into the hallway and her abrupt halt outside Resident 1's room, Ms. Powell looking into Resident 1's room, and Ms. Powell's entry into the room, all occurred in less than sixty seconds, at 6:12 a. m. The alleged abuse reported to have occurred during these sixty seconds, the striking of the client, is the only significant event that is disputed.

What is surprising to the arbitrator are how many of the aspects of that morning are not

disputed. The video recording confirms the movements of TPW Tabor, Ms. Powell, Residents 1, 2, and 3, and TPW Adebayo Adeola. Ms. Powell was not familiar with Resident 1 yet reported idiosyncratic behavior specific to Resident 1. One statement by Resident 1 overheard by Ms. Powell was Resident 1 saying: “No smack, no smack.” Considering that Ms. Powell says she heard this statement from the room in which she had heard a loud smack, it could be interpreted as an adaption by Resident 1 of promptings made to him about hitting others or it could be interpreted to be Resident 1's reaction to being slapped in the face and his knowledge of what usually occurred after such a striking – a prompt not to smack again.

Ms. Powell also says she heard Resident 1 express a desire to go home, a request commonly heard from Resident 1. Considering Ms. Powell's limited experience with Resident 1, her recollections about what she heard from Resident 1 appear to be born out, credible, and worthy of belief because these particular tendencies of Resident 1 appear to have been learned by Ms. Powell during the events in question.

The very tight timeline about the sequence of events described by Ms. Powell and Mr. Tabot also supports the credibility of Ms. Powell. The events as they evolved over that one minute time span were not the kind of events that lend themselves to fabrication or subterfuge. It may have been a coincidence that Ms. Powell was in a position to hear a loud smack outside Resident 1's door but she was obviously there and just as obviously came to know things about Resident 1 that she could have only have come by in listening to what Resident 1 had said that morning.

What is most compelling about the credibility of Ms. Powell's testimony and written statements about occurred is that Ms. Powell did not know Mr. Tabot and had no reason to concoct a story accusing Mr. Tabot of abuse of a client. The report made by Ms. Powell beginning at 6:20 a. m. in the parking lot of the Parkside Building on January 8, 2020 offered no advantage or gain to Ms. Powell.

The strong emotion evoked in Ms. Powell immediately after the alleged abuse of Resident 1 was noticed by a number of staff members, all of whom observed Ms. Powell to be crying and clearly shaken.

The arbitrator is unable to accept that the chronology of events as shown by the video recording and the emotion and actions of Ms. Powell were part of a subterfuge created and perpetuated by a person who had not known the accused, TPW Tabor, and who had had no reason to misrepresent what she heard, what she saw, and what she did. It has not been within the experience of this arbitrator that strangers go to great lengths to hurt one another. Ms. Powell was clearly in a position on January 8, 2020 to hear what she says she heard outside Resident 1's room and to have seen what she says she saw in that room. Beyond the grievant's denial of having perpetrated any form of abuse against Resident 1 there is no basis upon which to discount the claims made by Ms. Powell about that abuse. The inconsistencies cited by the Union do not persuade the arbitrator that the sworn testimony about hearing and observing hard slaps to the face of Resident 1 by the grievant is not worthy of belief and not worthy of substantial evidentiary weight.

The lack of an indication of a physical injury to Resident 1 on January 8, 2020; the inconsistencies in some of the recollections by Ms. Powell concerning the color of the hoodie worn by TPW Tabor or the number of times she entered Resident 1's room; and the satisfactory work record of the grievant are factors that support the Union's position on Ms. Powell's credibility as a witness in this case. The arbitrator however finds much of what Ms. Powell claimed to have heard, seen, and done confirmed by the video recording and supported by the testimony of staff members who interacted with Ms. Powell during the events in question. The arbitrator is convinced that Ms. Powell is a credible witness, a truthful witness, a witness worthy of belief.

The arbitrator finds the Employer has presented a preponderance of clear and convincing

evidence to the hearing record proving that on January 8, 2020 the grievant abused a person who was under the care and supervision of the Ohio Department of Developmental Disabilities and the Columbus Developmental Center. The abuse proven by the evidence in the hearing record to have been perpetrated by the grievant against Resident 1 at the CDC on January 8, 2020 provides the just cause required for the Employer to terminate the employment of the grievant.

The Employer has carried its burden of proof in this case. The grievance is denied.

[The remainder of this page is blank.]

AWARD

1. The grievance giving rise to this proceeding is determined arbitrable and properly before the arbitrator for review and resolution under the language of the parties' collective bargaining agreement.
2. The hearing record contains a preponderance of clear and convincing evidence proving that on January 8, 2020 the grievant physically abused a resident at the Columbus Developmental Center by slapping the face of the resident while the resident was in the care and custody of the Ohio Department of Developmental Disabilities.
3. The physical abuse of the resident by the the grievant constitutes a violation of the Employer's Standards of Conduct, rule A 1, and comprises the just cause required of the Employer to discharge the grievant.
4. The just cause needed to discharge the grievant having been proven by a preponderance of clear and convincing evidence in the hearing record, the grievance is denied.

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
P. O. Box 14092
Columbus, Ohio 43214
hsilver@columbus.rr.com

Columbus, Ohio
July 7, 2021

CERTIFICATE OF SERVICE

I hereby certify that duplicate signed originals, in electronic form, of the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the Ohio Department of Developmental Disabilities, Columbus Developmental Center, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Grievance Number DMR-2020-01080-4, Grievant Dieudonne Tabot, were directed to the following this 7th day of July, 2020:

Jill M. Hardin
Labor Relations Officer 3
Ohio Department of Developmental Disabilities
30 East Broad Street, 18th Floor
Columbus, Ohio 43215
Jill.Harlan@dodd.ohio.gov

and

Michael Tenney
Staff Representative
Ohio Civil Service Employees Association,
AFSCME, Local 11
390 Worthington Road, Suite A
Westerville, Ohio 43082
mtenney@ocsea.org

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
P. O. Box 14092
Columbus, Ohio 43214
hsilver@columbus.rr.com

Columbus, Ohio
July 7, 2021