

#1202

Rec'd 10/21/2021

IN THE MATTER OF ARBITRATION)

BETWEEN)

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11)

AND)

OHIO DEPARTMENT OF
DEVELOPMENTAL DISABILITIES,)
GALLIPOLIS DEVELOPMENTAL
CENTER)

GRIEVANCE ID: Holly White

Grievance No. Discharge

Grievance #DMR-2020-00078-04

BEFORE: ROBERT G. STEIN, NAA

ARBITRATOR

FOR THE UNION:

Monty Blanton
Staff Representative
Ohio Civil Service Association
390 Worthington Road, Suite A
Westerville, OH 43082

FOR THE EMPLOYER:

Andy Bower
Labor Relations Administrator
Ohio Department of Developmental Disabilities
30 East Broad Street, 18th Floor
Columbus, OH 43215

INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (“Agreement” or “CBA”) between The State of Ohio (“Employer”) and The Ohio Civil Service Employees Association (“Union”). That Agreement was effective from May 12, 2018, through February 28, 2021, and included the conduct which is the subject of this grievance. The department involved in this matter was the Department of Developmental Disabilities (“DODD”), and its facility the Gallipolis Developmental Center (“GDC”).

Robert G. Stein was mutually selected by the parties to impartially arbitrate this matter, pursuant to Article 25.05 of the Agreement. A hearing on this matter was conducted on August 23, 2021, was held virtually. The parties mutually agreed to that hearing date and that virtual format, and they were each provided with a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a written transcript, was subsequently declared closed upon the parties’ individual submissions of post-hearing briefs.

No issues of either procedural or jurisdictional arbitrability have been raised, and the parties have stipulated that the instant matter is properly before the arbitrator for a

determination on the merits. The parties have also agreed to the submission of five (5) joint exhibits.

ISSUE

Did the Grievant, Holly White, abuse an individual of the Gallipolis Developmental Center (GDC)? If the Grievant did not abuse an individual of GDC, was the Grievant removed for just cause? If the Grievant was not removed for just cause, what shall the remedy be?

(Tr. 5)

BACKGROUND

The Grievant in this matter is Holly White ("White" or "Grievant"). Her position with GDC was a Therapeutic Program Worker ("TPW") She was removed from her position as a TPW at GDC on January 10, 2020, for the following violations of the Department of Developmental Disabilities' (DODD or the Department) Standards of Conduct, Rule Violations, and Penalties for Classified Employees:

- Abuse of a Client A1- 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,¹ sexual, 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.

The Grievant had been employed with DODD since July 17, 2017. Subsequently the Union filed a grievance on behalf of White and it was processed pursuant to Article 25 of the CBA. The

grievance remained unresolved, and it was submitted to final and binding arbitration by the Union. The parties have stipulated that the matter is properly before the Arbitrator.

SUMMARY OF THE EMPLOYER POSITION

The Employer avers that on December 1, 2019, White physically abused individual or client Dillion a resident of GDC. Video evidence of the incident shows Dillion, a strong young male resident, repeatedly attempt to enter the kitchen area where the Grievant was cooking on a stove top. He initially was stopped by other TPWs in the immediate area, briefly left, but quickly returned and again attempted to enter the kitchen using the physical force of this body and considerable size to push other employees back as he tried to reach White. As Dillion continued to enter the kitchen, White, instead of leaving the area, left her cooking activity and physically engaged the Dillion along with other TPWs. She placed her had on his throat and proceeded to place him in a choke hold for more than 30 seconds. Dillon eventually succumbed to the force of the other TPWs blocking him, his face became mottled, his tongue was protruding from his mouth, his face become red, and his body became limp. (Employer brief, p. 3)

Becoming aware of this incident the Employer investigated, led by Jack Kemper ("Kemper"), Director of Investigations. He gathered video evidence, statements of employees and conducted investigatory interviews. He also determined that White had received training in the Employer's abuse and neglect policy (Jx. 3, page 34) The Employer emphasized through the testimony of Kemper that there does not have to be a resulting injury in this type of matter and

for abuse to be substantiated if the evidence substantiates that an employee's actions could reasonably lead to physical harm and that in the instant matter the Grievant choked Dillon, which reasonably could have caused physical harm to Dillon.

Kemper's investigation contained employee statements by TPW DeBoard ("Deboard") who told the Grievant to get off of Dillon, "...let him go, back away, go away" and admitting to seeing Dillon become weak, his face turning red losing consciousness. (Jx. 3, p. 13) And by LPN French ("French") who heard the Grievant's coworkers tell White to get back, go away and to the breakroom. French, referring to White, also heard Dillon say, "she is choking me." (Jx. 3, p. 15) The Grievant also interviewed by Kemper also admitted to performing an illegal restraint on Dillon and that she was familiar with Dillon and his propensity to be aggressive. (Jx. 3, p. 19)

Kemper completing his investigation concluded that on December 1, 2019, White had physically abused Dillon. Susan Smith, ("Smith") GDC Superintendent Smith testified that the Major Unusual Incident (MUI) Rule (JX 5, pages 1-34), which covers all county boards of developmental disabilities, the DODD Developmental Centers, and all providers. (Employer brief, p. 4) Smith, after reviewing Kemper's findings concluded that the evidence substantiates White abused Dillon when she grabbed him by the throat and choked him, and offense on the disciplinary grid that calls for an automatic removal. (Jx 4, p. 5)

The Employer emphasizes the following:

"DODD has policies and procedures in place to protect the clients in its care as well as its staff. The policies central to the case at hand are the DODD Standards of Conduct (JX 4, pages 1-15), and the Gallipolis Developmental Center Individual Abuse and/or Neglect Policy, #4 (JX 3, pages 53-58). The Developmental Disability System in Ohio, which includes DODD, is governed

by Ohio Administrative Code 5123-17-02 (JX 5, pages 1-34). The Grievant has had training in all the above.

The applicable standard for this administrative hearing is found in Ohio Administrative Code 5123-17-02 "Addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvement" (JX 5, pages 1-34)). This is the Developmental Disability System Rule which addresses physical and verbal abuse and failure to report such. This rule applies to all DODD employees (JX 5, pages 1-34).

In Ohio Administrative Code 5123-17-02 (C)(16)(a)(vi) Physical abuse means the use of physical force that can **reasonably be expected** [emphasis added] to result in physical harm or serious physical harm as those terms are defined in Section 2901.01 of the Ohio Revised Code. The reference to Ohio Revised Code 2901.01 is for the definition of physical harm and serious physical harm, not the definition of abuse. Ohio Administrative Code 5123-17-02 does not require that physical harm occur to find abuse. It only requires that the use of force may result in physical or serious physical harm. Such force may include but is not limited to hitting, slapping, pushing..." (JX 5, page 5 of 34). Grabbing Dillon by the throat and choking him certainly may result in physical harm." (Employer brief, p. 5)

"For proof of the Grievant's egregious behavior one need look no further than the video evidence. Dillon might have been advancing towards the Grievant, but the Grievant was clearly the aggressor. The Grievant clearly grabbed Dillon by the throat and choked him. At one point the Grievant even switched hands and grabbed Dillon by the throat with her other hand. In today's day and age, it is never acceptable to grab someone by the throat and choke them, especially someone with developmental disabilities who you are responsible for their care.

TPWs must deal with challenging behaviors from those who live at the Developmental Centers. These behaviors are wide ranging. Our clients need staff to model healthy behavior. Staff need to deescalate and not instigate negative conduct. DODD cannot condone this behavior and cannot risk entrusting the health and safety of the clients it cares for in the hands of an employee with such blatant disregard for rules and policies.

Article 24.01 of the CBA between the State of Ohio and OCSEA provides, "In cases involving termination, if the arbitrator finds that there has been 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.” Therefore, if abuse has occurred the discipline cannot be modified. Because the evidence and testimony presented at the hearing demonstrate that the Grievant grabbed Dillon by the throat and choked him, the only inquiry that must be determined is whether this action could have caused harm to Dillon. If so, the Grievant is responsible for abuse of a client and the termination must be upheld.” (Employer brief, p. 6)

SUMMARY OF THE UNION’S POSITION

The Union asserts that White was removed from her position at GDC without just cause. It argues that Dillon threatened to hit Dillon in the head with a hot skillet (Section 3, p. 10, Tara Mays interview) and although on the morning of December 1, 2019 White told Dillon he could not come into the kitchen and that he needed to calm down, he did not follow this directive and attempted to force his way into the kitchen where White was cooking on the stove using a skillet. The Union points out that the video reveals up to four (4) direct care staff, which included White’s immediate supervisor, Derek Taylor attempted to push a persistent Dillon ...out of the kitchen on December 1, 2019. According to the video, as pointed out by the Union, this group of TPWs failed to redirect Dillon out of the kitchen and Dillon became violent, swinging his arms, grabbing her hooded sweatshirt which had the effect of choking her, and she was struck and injured by Dillon during the confrontation. Dillon was not injured and showed no signs of distress (Union brief, p. 2)

The Union in its own words states.

“It's also important to point out, that staff, including Ms. White, attempted to do everything right in this incident In Union Attachment 1are the identified holds that are allowable for physical restraint

including a standing bear hug and firm extremity hold. Both of these techniques were attempted to be used here or were used but were not successful at stopping Dillon's behavior. According to Dillon's PCP plan as identified in the investigators report (Section 3, Page 6), staff are also directed to block any physical aggression, which staff also did here. But the plan also indicates that staff should realize once they do that "that he is likely to escalate more quickly at this point so alert others for assistance." This also was the case here. Dillon's history of aggression and violence was widely known. He's also a looming figure at approximately 6 foot 4 inches tall and 260 pounds. His identifying behaviors are as stated in Section 3, page 6 and include but are not limited to:

1. Verbal aggression-yelling, cursing, threatening others in an angry manner.
2. Disruption/ destruction-throwing things in anger, breaking objects, slamming doors or other disruptive acts.
3. Physical aggression-hitting, choking, pushing, kicking or other aggressive acts.

Union Attachment 2 lists the number of violent incidences Dillon had in 2018 and 2019. In 2019 alone, there were 96 physical aggressions that took place with this individual, showing an extreme pattern of aggression that has only grown worse over time."

(Union brief, p. 2, 3)

Based upon the evidence, testimony, and arguments, the Union asserts its grievance should be sustained and that White in terms of a remedy should have the following actions taken:

1. That all discipline be removed from TPW Holly White record including any electronic record.
2. Reinstate TPW Holly White;
3. Payment for all lost wages.
4. All leave balances that would have accrued from the date of removal.
5. The ability to buy back any leave balances that were

cashed out after her termination.

6. All seniority that would have accrued from the date of removal to the date of reinstatement.
7. Payment for all documented medical, dental, and vision expenses that TPW Holly White and her family have incurred since her removal, and until she is covered by insurance.
8. The shift, assignment and days off that she held when she was removed.
9. Payment of all retirement contributions and union dues

The Union respectfully requests that the Arbitrator retain jurisdiction for sixty (60) days.

DISCUSSION

In an employee termination matter, an arbitrator must determine whether the Employer has proved with substantial evidence that a discharged employee has committed an act or acts warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 102 LA 555 (Bergist 1994). In making this determination, the arbitrator may consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work record, and whether the Employer has acted consistently with respect to similar previous offenses. *Presource Distrib. Servs., Inc. and Teamsters Local 284*, FMCS No. 96-10624 (1997). Generally, an arbitrator will not substitute his own judgment for that of an employer unless the challenged penalty imposed is deemed to be excessive, given any mitigating circumstances. *Verizon Wireless and DWQ, Local 2236*, 117 LA 589 (Dichler 2002).

Discharge from one's employment is management's most extreme penalty against an employee. Given its seriousness and finality, the burden of proof generally is held to be on the employer to prove guilt of a wrongdoing in a disciplinary discharge or to justify or show "good cause" for terminating an employee. This is especially true in cases, like

this one, where the parties have agreed that the collective bargaining agreement requires “just cause” for disciplinary action, including discharge.

Int’l Ass’n. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

In the instant matter, the parties have collectively bargained for the inclusion of a “just cause” provision in Article 24 of the Agreement. Even though the parties did not include a definition of the “just cause” standard in the language therein, commonly accepted principles routinely used by arbitrators in disciplinary matters “are intended to ensure a higher level of fairness and due process for employees accused of wrongdoing, they are also intended to increase the probability of workplace justice.” *Paper, Allied Indus., Chem., and Energy Workers Int’l Union, AFL-CIO, Oren Parker Local 8-171, Vancouver, Wash. and Petra Pak, Inc.,* 05-1 Lab. Arb. Awards (CCH) P3078 (Nelson 2004).

“Just cause” imposes on management the burden of establishing: (a) that the standard of conduct being imposed is reasonable and is a generally accepted employment standard which has been properly communicated to the employee; (b) that the evidence proves that the employee engaged in the misconduct which did cause a violation of the standard; and (c) that the discipline assessed is appropriate for the offense after considering any mitigating or extenuating circumstances.

Phillips Chem. Co. and Pace, Local No, 4-227, AFL-CIO, 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor 2000).

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for “just cause,” but does not define what does constitute “just cause,” it is proper for an arbitrator to look at employer-generated procedures and policies to determine whether or not a discharge was actually warranted.

E. Associated Coal Corp. and United Mine Workers of Am., Dist. 17, 139 Lab. Arb. Awards (CCH) P 6040 (1998). Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances

of the misconduct, any mitigating factors, and whether the aggrieved employee received his/her contractual and legal due process protections. *State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County, and Mun. Employees, AFSCME State Council 61*, Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001). Awards (CCH) P 10,604 (1998). The purpose of “just cause” is to protect employees from unexpected, unforeseen, or unwarranted disciplinary actions, while at the same time protecting management’s rights to adopt and to enforce generally accepted employment standards. *Phillips Chem. Co. and Pace, Local No. 4-227, AFL-CIO, 00-2* Lab. Arb. Awards (CCH) P 3553 (Taylor 2000). The Employer here has retained specific management rights in the Agreement so long as its exercise of discretion in utilizing those specific rights is not unreasonable, arbitrary, capricious, or motivated by improper means. *Municipality of Anchorage (Alaska) and Int’l Ass’n of Fire Fighters, Local 1264*, 115 LA 190 (Landau 2001).

After a thorough review of the evidence submitted and the respective arguments made by both parties, the arbitrator finds that the Employer did not abuse its discretion and did not act arbitrarily in imposing the challenged termination of White under the specifically identified circumstances.

The duty of an arbitrator is simply to determine the truth regarding the material matters of a controversy, as he believes them to be, based upon a full and fair consideration of all of the evidence and the weight to which he honestly believes it is entitled. An arbitrator must, therefore, consider whether the conflicting statements do ring true, weigh each witness’s demeanor while testifying, and use certain guidelines to determine witness credibility—the self-interest or bias of a witness, the presence or absence of corroboration, and the inherent probability of the testimony.

CLEO, Inc. (Memphis, Tenn.) and Paper, Allied-Indus. Chem. And Energy Workers Int’l Union, Local 5-1766, 177 LA 1479 (Curry 2002).

The arbitrator finds that White's termination did have a legitimate "just cause" basis given the nature and intentional conduct of the Grievant in placing an extended choke hold on individual Dillon for a prolonged period. The investigation by the Employer appeared to be thorough and professional and did not leave the arbitrator with many unanswered questions. And although the testimony of eyewitnesses, some of whom were direct participants in attempting to redirect Dillon is subject to the emotional trauma of being engaged in a physical struggle and the inevitable memory distortion which may occur over an extended period of time, the Video of the incident represents the most accurate and least bias account of what occurred on December 1, 2019 and in general serves to support eyewitness testimony. It is also important to note that the incident in question was not sudden or unexpected, but one that developed more slowly, which should have given White time to leave the area. However, White, rather than leaving the area and securing items of potential harm (e.g., hot skillet and a knife) from the kitchen, instead made the choice of leaving those potentially lethal items out in the open and proceeded to physically engage Dillon along with other employees as he tried to force his way into the kitchen. Although the Grievant knew Dillon was targeting her on the day of the incident and was aware of his size and behavioral propensities, she escalated the situation and chose to engage him and applied an unapproved choke hold on him for over 30 seconds. The video clearly shows White knowing employed an unauthorized and admittedly "not a legal" choke hold even as other TPWs were attempting to employ acceptable methods of redirection. During the struggle other TPWs specifically told White to get off Dillon, let him go, back away, go away, to back off and leave the area. Had the Grievant attempted to deescalate this impending

confrontation by leaving the area this matter would not have resulted in discipline for just cause.

(Jx. 3)

White's testimony was inconsistent and lacked credibility. One example is when White was questioned about her concern regarding the presence of a knife in the kitchen (where another individual was located), the location of which she could not pinpoint under cross examination even though under direct examination she made a point of the danger of its presence as Dillon attempted to enter the kitchen. In addition, the evidence indicates she was familiar with and trained in the Abuse and Neglect Policy and admitted during her hearing that grabbing an individual by the throat was not part of said training. (Jx. 3)

There is little question that the job duties placed upon TPWs and others who work in direct care at facilities like GDC are at times difficult and accompanied by physical and psychological risks. It is also apparent that attempting to appropriately manage the scope of behavior that occurs daily is challenging and not always perfectly executed, especially when an employee must place herself or himself in harm's way in a moment's notice. Yet, there is an important distinction between unintended action and deliberate action, which was the case in the instant matter. Individuals served by DODD are susceptible to harm to themselves and from others and rules to protect them that are reasonable, clearly communicated, regularly reinforced, and applied fairly are essential to provide necessary protection to the most vulnerable of those among us. Based upon the record presented to the arbitrator there is sufficiently clear and convincing evidence that the Grievant acted in an intentional manner that violated Rule A-1 of DODD Standards of Conduct, Rule Violations, and Penalties for Classified Employees when she physically abused individual Dillon on December 1, 2019.

AWARD

Grievance denied.

Respectfully submitted to the parties this _____ day of October 2021,

Robert G. Stein, Arbitrator