

**American Arbitration Association**

AAA # 01-17-0004-0268

In the Matter of the Arbitration between

( [REDACTED] Suspension  
and Termination)

Between

CITIZENS' LEAGUE FOR ADULT  
SPECIAL SERVICES (CLASS, INC.)

And

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 509

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I, the UNDERSIGNED ARBTIRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn and having heard the proofs and allegations of the parties, AWARD the following:

**AWARD**

The Employer violated Article 7 of the collective bargaining agreement by suspending and terminating the grievant, [REDACTED] without just cause.

The Employer must offer the grievant reinstatement to his former position.

The Employer must purge the grievant's personnel record of any reference to the suspension and termination that gave rise to this case.

The Employer must make the grievant whole for lost wages and benefits brought about by his suspension and termination, from the date on which he was placed on unpaid suspension status to the date of compliance with this Award.

The Arbitrator retains jurisdiction for ninety days from the date of this Award for the sole purpose of resolving any dispute between the parties concerning the remedy ordered herein.



Sarah Kerr Garraty,  
Arbitrator  
March 8, 2019

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Before: Sarah Kerr Garraty, Esq.

Appearances: For the Employer:  
Geoffrey P. Wermuth, Esq.  
Paul G. King, Esq.

For the Union:  
James Hykel, Esq.

Hearing Dates: October 22 and November 13, 2018

Briefs Received: January 28, 2019

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**STATEMENT OF THE ISSUES:**

The parties stipulated to the following issues:

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Did the Employer violate Article 7 of the collective bargaining agreement by suspending or terminating the grievant, [REDACTED] without just cause?

If not, what shall be the remedy?

## **RELEVANT CONTRACT PROVISIONS**

The 2015-2017 Collective Bargaining Agreement between the parties contains the following relevant provisions:

### Article 1 – Dignity and Respect

The parties agree that all employees shall be treated with dignity and respect ... Additionally, bargaining unit employees shall treat the individuals the Employer services, and their families and guests, with dignity and respect.

### Article IV – Management Rights

Section 1: Except as specifically limited by an express provision of this Agreement, the Employer reserves and retains, solely and exclusively, its right to manage and operate the Employer, and to direct its operation and workforce ... These management rights shall include, but are not limited to:

... The right to ... suspend, discharge or discipline employees for just cause; to set standards of productivity and services to be rendered; to establish and maintain reasonable work rules governing the conduct of employees ...

### Article VIII – Discipline and Discharge

Section 1: Just Cause: No employee who has completed his or her probationary period shall be disciplined or discharged except for just cause.

### Article XXXIII – Investigations

All employees of CLASS, Inc. are considered “mandated reporters” and as such are required to report any inappropriate conduct toward individuals receiving services immediately. Mandated Reporters are required, by law to report cases of suspected abuse to the DPPC when they have a suspicion that a person with a disability is suffering from a reportable condition of abuse and neglect.

Employees or any other individual who are alleged to have mistreated or abused an individual will be reported to DPPC. Any employee in this situation will be placed on unpaid leave of absence, or reassigned at management discretion. An internal investigation into the situation will be conducted, after which the Employer will determine whether or not disciplinary action is warranted. Nothing in this article shall limit the

Agency's right to discipline employees for just cause at any time regardless of the status of any governmental investigation.

### **BACKGROUND**

The grievant, [REDACTED] was employed by the Employer, Class, Inc., from mid 2015 until his suspension without pay effective May 5, 2017. He was subsequently terminated from employment on September 15, 2017. The grievant was initially hired as a Driver, but soon applied for and was awarded a transfer to the position of "Day Hab Specialist." His 90-day evaluation in the Day Hab role rated him as having exceeded or met expectations in all categories. In particular, the evaluation noted that he, "... provides personal care and assistance to individuals consistent with their physical needs and defined support plans, as necessary based on their job functions," that he "communicates effectively with individuals in his room as well as with his co-workers," and that he "has learned to understand the verbal and non-verbal needs of each individual in her (sic) room." The grievant had no history of discipline.

On early May 5, 2017 the grievant was suspended without pay pending investigation for two incidents of alleged patient abuse. The first took place on May 3, 2017 and involved alleged patient abuse in the form of a slap to the face of [REDACTED] an individual who is blind, non verbal, and subject to aggressive and sometimes self-injurious behavior. The second took place the following day and involved an allegation that the grievant had left or locked a wheelchair bound individual named [REDACTED]" alone in a bathroom for an extended period of time. The two incidents were reported only after the second one occurred, and so they were investigated in tandem. Ultimately, the grievant was terminated only in

connection with the [REDACTED] incident; the allegations concerning the [REDACTED] incident were not sustained.

Because the Union and the Employer both point to extensive inconsistencies among percipient witnesses and/or employer investigators, the testimony and written statements must be individually summarized in some detail in an effort to arrive at any conclusions about what occurred.

A. The Employer's Witnesses

[REDACTED] is a quality compliance Specialist for the employer. Her role is to insure compliance with the rules and regulations of state governing bodies. She is also the Human Rights Coordinator who is tasked with running all internal investigations and interacting with the Disabled Persons Protective Commission (DPPC).

[REDACTED] explained that the Day Hab program is funded by Mass Health and provides nursing and behavioral support to the employer's more medically compromised clients. She testified that at the time of the investigation concerning the [REDACTED] incident, she had only general knowledge that he was non-verbal and needed Day Hab support. She did not know [REDACTED] either.

On May 5, 2017 an employee named [REDACTED] reported that she thought she should report an incident that she had witnessed to the DPPC. As a result, [REDACTED] sat down with [REDACTED] and HR Director [REDACTED] to summarize what she had witnessed. Both [REDACTED] and [REDACTED] took contemporaneous handwritten notes, which they then transcribed in typed form. [REDACTED] handwritten notes were not preserved. They interviewed [REDACTED] co-worker [REDACTED] (who had also

reportedly witnessed the [REDACTED] incident), the grievant, and [REDACTED] Case Coordinator, [REDACTED]

[REDACTED] documented that [REDACTED] had said that,

... She was sitting in the "Discovery" room by the windows and [REDACTED] (ALV) was sitting across the room with his back to her. [REDACTED] reports that another staff member, [REDACTED] (ALAB), walked up to [REDACTED] left side and slapped his left cheek with his right hand.<sup>1</sup> [REDACTED] reports that she was eating her lunch at the time and was shocked and unsure what to do since staff in question is a Union Steward and "well respected" in the agency. She reported the incident to DPPC on Friday 5/5 after speaking with her supervisor.

With regard to this interview, [REDACTED] testified that she did not recall having a nurse examine [REDACTED] cheek but assumed she had not done so because she did not include that in her notes. She also testified that there was a discrepancy between her own notes and those taken by [REDACTED] he had written that [REDACTED] did not say that she actually saw the slap while [REDACTED] had written that [REDACTED] had reported that she did see it. Based on that discrepancy [REDACTED] met with both [REDACTED] and [REDACTED] a second time to ask them the single question: "Did you see the grievant slap [REDACTED]" [REDACTED] testified that both women confirmed that they had seen the alleged slap and that she had, in turn, reported that fact to [REDACTED] [REDACTED] took no notes concerning the second interview, since she had only asked one question.

With regard to the May 5, 2017 interview of [REDACTED] [REDACTED] noted,

[REDACTED] reports that on Wednesday at lunchtime, at about 12:20, she had come to eat her lunch in the "Discovery" room with [REDACTED] [REDACTED] (ALV) had his back to [REDACTED] and was noticing that [REDACTED] seemed bored and was trying to tip his chair. [REDACTED] reports that she asked staff [REDACTED] (ALAB) if there was something [REDACTED] could be doing. She reports that [REDACTED] walked up to [REDACTED] and

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<sup>1</sup> [REDACTED] is variously referred to as [REDACTED] or [REDACTED] ALV apparently stands for "Alleged Victim" and ALAB apparently stands for "Alleged Abuser."

said, “who? This guy? And slapped him in the right side of ALV’s face. [REDACTED] reports that [REDACTED] right cheek was red. She was surprised, looked at [REDACTED] and went back into the room she was assigned to work in. She spoke with [REDACTED] about the incident the next day.

With regard to the grievant’s interview [REDACTED] noted,

... [REDACTED] let him know that there was a DPPC investigation regarding [REDACTED] and that the allegation was that [REDACTED] had slapped him across the face. [REDACTED] reports that [REDACTED] slaps himself with other people’s hands. That he will grab a staff member’s hand and slap his own face with it. [REDACTED] reports that on 5/3, [REDACTED] was displaying usual behavior of throwing things and pushing his chair out from under him. [REDACTED] reports that [REDACTED] grabbed [REDACTED] wrist and slapped his own face with it. [REDACTED] reports that [REDACTED] does this to all staff members.

With regard to the interview of [REDACTED], [REDACTED] noted,

... [REDACTED] reports that she has never witnessed him grabbing other people’s hands to slap himself, but has witnessed him slapping his own face. The [REDACTED] provided me with “helpful hints” that all staff have access to for [REDACTED]

[REDACTED] testified that no one from the Union suggested that she interview anyone else. She also explained that she usually asks if there are any other witnesses but she did not recall whether she did so in this case. She acknowledged that staff members have regular room assignments and that she did not consult the schedules to ascertain if anyone else might have been present during the [REDACTED] incident. She also acknowledged that the grievant was not offered the assistance of a Union representative during this interview, nor was there an interpreter present.<sup>2</sup>

[REDACTED] testified that she was not familiar with the standard of proof that DPPC utilizes in substantiating incidents of alleged abuse. She eventually became

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<sup>2</sup> There was considerable dispute concerning the grievant’s level of English language proficiency. On his employment application he claimed that his ability to speak and write in English was “Good” and that his ability to read it was “Good to Poor.” It is not in dispute that English is the grievant’s second language and that he is fluent in Spanish. Two Spanish language interpreters attended the arbitration hearing and translated all of the hearing testimony.

aware that the allegations concerning ██████ were not sustained but that DPPC did substantiate the allegations concerning ██████. As a result, the Employer terminated the grievant upon receipt of DPPC's written report but did not consider the ██████ incident at all in determining that he should be terminated. ██████ insisted, however, that in any case, she was not a decision maker.

██████ also typed up his notes taken during the same interviews.<sup>3</sup>

With regard to ██████<sup>4</sup> ██████ interview, he noted that ██████ had said,

"I was eating lunch in the Discovery room on Wednesday, May 3 with another employee. It was around 12:00 or so in the afternoon. I looked down to eat my lunch and heard a loud "slap or smack" sound. When I looked up ██████ was standing next to ██████ and it looked he had slapped the individual. I was shocked at what I saw and left the room."<sup>5</sup>

With regard to the ██████ interview ██████ wrote,

"I entered the Discovery room to eat my lunch and noticed ██████ was sitting in a chair, by himself, facing the wall. ██████ looked like he was being ignored and I thought that seemed strange. I asked ██████ if there was anything we could do to help ██████ be more engaged and he laughed at me. I looked down to start grabbing my lunch and that is when I heard the loud "slap/smack" sound. ██████ was standing next to ██████ with a smile on his face and it looked like he had slapped ██████ of the side of the face. When I

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<sup>3</sup> In contrast to ██████, ██████ testified that he did keep his original handwritten notes but had not produced them to the Union in response to its information request.

<sup>4</sup> ██████ notes spelled this witness's first name "██████" and ██████ spelled it "██████" The witness herself signed the Arbitration Sign in sheet and spelled her name "██████" In the same vein, the grievant's name was variously spelled "██████" and "██████" The grievant omitted the "u" in ██████ on the sign in sheet and on some documents in evidence, and that is therefore presumed to be the correct spelling.

<sup>5</sup> ██████ testified that when he used quotation marks in his notes, that depicted a quote from the witness, as opposed to his own summary of what the witness had said.

<sup>6</sup> ██████ must have initially asked that her name be withheld; ██████ referred to her as "anonymous employee."

approached [REDACTED], the side of his face was red. I was so mad and distraught with what I witnessed that I walked out. After talking things over with [REDACTED] we knew we had to report this to our supervisor and make a call to DPPC.”

With regard to the grievant’s interview, [REDACTED] wrote,

“I did not slap or hit [REDACTED]. Maybe the staff was confused or misunderstood what they saw, but I did not slap him. [REDACTED] will often grab your hand and use it to pet or touch his face and head. For him, I think it is a comfort measure, or a sign that he is trying to “feel that someone is there,” since he does not see well. It was not a slap and his face was not red.”

[REDACTED] then noted,

After we met with [REDACTED] we informed him that he was being suspended from employment while we conducted our internal investigation. He was also informed that DPPC was contacted and that they too may also do an investigation. As of today and until further notice, [REDACTED] is suspended here at CLASS, INC. After checking the individual’s file, there are no references or behaviors that include ([REDACTED]) grabbing employees’ hands and petting, hitting or rubbing his face.

[REDACTED] testified that he asked each of the three witnesses whether there were any other witnesses to the incident and they mentioned no other names.

[REDACTED] confirmed that when he and [REDACTED] compared notes they realized that only she had noted that either complaining witness said she had seen the alleged slap occur. He recalled that [REDACTED] had interviewed them a second time to clarify that issue and she subsequently told him they had each confirmed that they did see the slap. [REDACTED] took responsibility for the fact that he never changed his own interview notes to reflect that clarification.

The grievant, [REDACTED] testified that on May 3, 2017 [REDACTED] was at his usual table (affixed to the floor) when he stood up and threw his chair. The grievant testified that he left the area where he had been working and placed the chair behind [REDACTED], then touched his shoulders to guide him back into the chair.

He recalled that [REDACTED] hit himself, as is typical for him. He denied that he slapped the [REDACTED] and he also denied that he ever told [REDACTED] and [REDACTED] that [REDACTED] had used his own hand to slap himself.

The grievant did recall that [REDACTED] and [REDACTED] were in the room at the time this incident occurred. He testified that in May of 2017 there was a large table in the middle of the Discovery Room, and [REDACTED] was sitting there with the individual for whom she was acting as a “one-on-one” while [REDACTED], who had no individual assigned to her in the Discovery Room, was there eating lunch. According to the grievant, neither of them was positioned so that she could see [REDACTED] both were facing the other side of the room. He testified that while [REDACTED] had worked with [REDACTED] for a couple of days, [REDACTED] had no experience working with him. The grievant recalled that after he got [REDACTED] settled down there was no conversation between staff concerning the incident and he heard nothing about it at all until two days later, when he was called to an interview with [REDACTED] and [REDACTED]

The grievant admitted that he did not ask for a Union representative or an interpreter during this initial interview. He recalled that [REDACTED] and [REDACTED] asked him questions about both [REDACTED] and [REDACTED]. With regard to [REDACTED] the grievant said that he helped her get her wheelchair down the hall and then left her in the bathroom for about ten minutes. With regard to [REDACTED], when asked what had happened during that incident, he responded, “nothing.” According to the grievant, the two administrators just asked him about [REDACTED] and [REDACTED] behaviors. He recalled mentioning that [REDACTED] sometimes hit himself but denied having claimed

that [REDACTED] his used the grievant's hand to slap himself. He testified that [REDACTED] never engages in that particular behavior.

At the end of this meeting, the grievant was allowed to return to work, but later in the day he was summoned back to the Human Resources department and told that he was being suspended. His supervisor helped him collect his things and escorted him out of the building. He testified that he was interviewed by DPPC in June or July and about both the [REDACTED] incident and the [REDACTED] incident. He testified that he asked for an interpreter during his DPPC interview but none was provided. He did receive help form a bilingual co-worker.

The grievant testified that his English is not good. He explained that someone helped him fill out his application for employment at CLASS, Inc. and when they asked him about his ability to speak and understand English he said, not good. He assumed that the person assisting him wanted him to get the job and indicated that his English was "good." He estimated that he frequently asks for help understanding various aspects of his job from co-workers.

[REDACTED] testified that she had saw the grievant slap [REDACTED] and that she had then seen that he had a red mark on his cheek. She recalled that she and [REDACTED] continued to finish their lunch for about fifteen minutes after the incident but said nothing about it to the grievant or to each other. Neither did they report it to management until the following day and after they had discussed it among themselves following the [REDACTED] incident.

[REDACTED] confirmed that [REDACTED] is self-injurious. She said that, "He will slam his head on his table, which is padded." She said that she has heard of [REDACTED] hitting

himself in the past but has not seen it herself. When asked during cross-examination who else was in the room when the alleged slapping occurred, [REDACTED] named [REDACTED] and another staff member named [REDACTED]”

[REDACTED] testified that when she first came into the Discovery Room to eat her lunch she asked the grievant what he does with [REDACTED] all day because he was just sitting there. She recalled that the grievant responded, in Spanish, “this idiot does nothing all day,” and then slapped him. He then put his hand on his forehead as if he had been joking. [REDACTED] left right after that incident. She recalled that [REDACTED] “ [REDACTED]” and “ [REDACTED]” were all in the room at the time of the incident and further stated that she had told [REDACTED] and [REDACTED] that these staff members were in the room during her initial interview with them. [REDACTED] also insisted that she had not seen [REDACTED] red cheek and had not told [REDACTED] and [REDACTED] that she had seen that.

[REDACTED] testified that she is very familiar with [REDACTED] behaviors and has worked with him for about nineteen years. His issues include blindness and a tendency to be self-injurious. He hits himself and bangs his head against the table. In the past he had also thrown himself to the ground and hit his own head onto the floor to an extent that he was outfitted with a protective helmet. This protection was eliminated when he stopped throwing himself onto the floor. The table where he sits is bolted to the floor and padded.

[REDACTED] testified that on May 3, 2017, she was in the Discovery Room. She was on the opposite side of a half wall that separates two sides of the room and she and the grievant were working with several individuals, cutting decorations for

“Culture Day.” According to ██████████ ██████████ was sitting at his table on the other side of the room and the grievant was keeping an eye on him while helping with the decorations. When ██████████ stood up and threw his chair backwards the grievant immediately went over to where ██████████ was standing, picked up the chair, and placed it behind ██████████. He used his hands to direct ██████████ physically back onto the chair, which is the usual protocol.

██████████ acknowledged that both ██████████ and ██████████ were present at the time but disagreed with their testimony about where they were sitting. According to ██████████ at the time of the incident there was a large round table in the middle of the room. She recalled that ██████████ was facing ██████████ and ██████████ was sitting next to ██████████ facing away from ██████████. The individual for whom ██████████ was acting as a one-on-one caretaker that day was also eating lunch at that table.

██████████ insisted that she did not see or hear the grievant slap ██████████. She testified that because she is so familiar with ██████████ behaviors she watched the grievant’s interactions with him carefully. She recalled that ██████████ was trying to hit his head as he usually does but that he calmed down and the grievant returned her side of the room to help with the decorations.

██████████ testified that she was not questioned about the incident initially but that sometime toward the end of May 2017 she told ██████████ what she had witnessed and expected that he would have written it down. ██████████ was not interviewed by

the DPPC concerning the [REDACTED] incident, although she did receive a call from that agency concerning the [REDACTED] incident.<sup>7</sup>

Unlike [REDACTED], [REDACTED] attended the May 25, 2017 Step 2 grievance hearing at which the grievant made a second statement. This time a Spanish interpreter participated and [REDACTED] attended as a Union representative.<sup>8</sup> According to [REDACTED] the grievant's account of the [REDACTED] incident at the Step 2 hearing was quite different from what he had said during the initial interview. At the Step 2 meeting the grievant reported that [REDACTED] had been having a difficult time with the chair sliding out from under him and that the grievant "touched his shoulders to motion to him to sit." [REDACTED] acknowledged that [REDACTED] had stated that she had also been present and had witnessed both the [REDACTED] incident and the [REDACTED] incident and that she corroborated the grievant's account of both.

In his June 9, 2017 summary to the Step 2 grievance meeting, which was addressed to [REDACTED] [REDACTED] concluded that,

Due to our internal investigation and the anticipated results from DPPC, the Step 2 grievance is denied. [REDACTED] will remain on an unpaid leave until the DPPC investigation has been concluded. At that time, CLASS Inc. will review [REDACTED] employment with the company.

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<sup>7</sup> [REDACTED] testified that she was present for both the [REDACTED] incident and the [REDACTED] incidents and that she was working with individuals on the same decoration cutting activity on both May 3 and May 4, 2017.

<sup>8</sup> [REDACTED] testified that the grievant had seemed to speak and understand English during his first interview and that he had also discussed a pay issue with him on another occasion and not perceived the grievant as having difficulty speaking or understanding English.

█████ testified that he left the Company soon after the grievant's termination, but that during his employment there as HR Manager he had never seen a substantiated claim of abuse that did not result in termination.<sup>9</sup>

On September 13, 2017 the DPPC issued its conclusions following an investigation in which it interviewed the grievant, █████ and █████

Based on interviews conducted and documents reviewed, there is sufficient evidence that the ALAB committed an act when he slapped the ALV across the face. Although the ALAB denied this act occurred, 11 and 12 both stated they witnessed the ALAB slap the ALV across the left side of his face, causing a red mark. Both 11 and 12 deny any interpersonal problems with the ALAB. The ALAB also denied any interpersonal problems with 11 and 12. The ALAB could not present any reasonable explanation as to why 11 and 12 stated they witnessed the ALAB physically assault the ALV. Both 11 and 12 deny the ALAB's version of events and deny that the ALV slapped himself on the face. Both 11 and 12 stated they were both in the room at the time of the incident and had a good line of sight when the incident occurred. 12 and 14 confirmed that there were no interpersonal problems between ALAB and 11 and 12. Therefore, mistreatment is substantiated.

On September 15, 2017 the Employer changed the grievant's status from a suspension to a termination. The letter of termination stated, in pertinent part:

... We recently received a finding that was found to be substantiated by DPPC, that you physically abused one of our individuals.

During our own internal investigations, you gave two separate statements as to what happened with the individual. This led us to not believe your statement and brought your credibility into question.

After concluding our own internal investigation and after receiving the results from the DPPC, the decision has been made to terminate your employment effective immediately...

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<sup>9</sup> He also acknowledged that he did not recall any other substantiated claims of abuse at all.

## POSITIONS OF THE PARTIES <sup>10</sup>

### The Employer

The employer insists that it had just cause to terminate the grievant's employment for physically abusing ██████ an act that impaired the employer's ability to fulfill its most basic functions, as outlined in its Employment & Benefits Guidelines.

All staff members are required to "relate to individuals served in a manner which maximizes human dignity, community integration and opportunities for self-direction." They are further obligated to ensure that, "the value and dignity of all individuals are respected," and that "their work helps to maintain a climate of loyalty, trust and mutual respect." The credible evidence in this case, the employer argues, demonstrates that the grievant violated all of these principals in his dealings with ██████ on May 3, 2017.

The two witnesses to the grievant's physical abuse were more credible than were the grievant's evolving defenses. This conclusion was substantiated by the DPPC, the state agency charged with investigating incidents of alleged physical abuse of disabled persons. Indeed, the objectivity of this agency was demonstrated in this case; it substantiated the allegations in the ██████ incident but determined that the allegations in the ██████ incident were unsubstantiated. It is for this reason that the employer's Employment Guidelines specifically provide that, "if a

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<sup>10</sup> The Employer and the Union each argued in detail that the witnesses for the opposing party presented inconsistent information or were unreliable for other reasons. In an effort at brevity, I have opted to summarize these arguments in the context of my analysis rather than separately in this section of the Decision and Award.

(DPPC) finding indicates or concludes that abuse did occur, the employee will be terminated.”<sup>11</sup>

For this reason, the DPPC’s conclusions are entitled to a *res judicata* effect with regard to the underlying factual allegations. Yet CLASS also fulfilled its obligation to complete an independent investigation which revealed that consistent recollections on the part of ██████ and ██████ were credible, in contrast to the grievant’s ever-evolving explanations and later assertions that they were the result of a fabricated lack of English language proficiency. The grievant’s single collaborating witness emerged late in the game and was not positioned to view the ██████ incident clearly. For all of these reasons, the employer asks the arbitrator to deny the grievance.

### **The Union**

Not surprisingly, the Union asserts that it was ██████ and ██████ who were the consistent and credible witnesses, while ██████ and ██████ told inconsistent stories. The Union also insists that there was no just cause to terminate the grievant because the employer’s investigation was fatally flawed in a number of respects.

First, the Union asserts that the employer was not entitled to leave the grievant on suspension status in limbo for the duration of the DPPC’s investigation. Article XXXIII of the Agreement requires specifically that when an employee’s alleged misconduct is under investigation by the DPPC the employer may opt to suspend that employee but that, “An internal investigation will be conducted, after which the Employer will determine whether of not disciplinary action is warranted.”

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<sup>11</sup> The grievant’s appeal of that conclusion was filed outside the statutory timeframe.

Here, the employer suspended the grievant without pay for four months following completion of its own investigation and then essentially rubber-stamped the DPPC's conclusions. In essence, the process the employer used in this case was backwards. First it allowed the grievant to continue to work following allegations of abuse, then it investigated, then it suspended. It clearly relied entirely on the DPPC to validate the allegations. Thus, the suspension was not for just cause.

The Union contends that the grievant's termination was also not for just cause because the employer has failed to prove with sufficient certainty that the grievant slapped [REDACTED]. Physical abuse of a severely handicapped individual is a serious offense requiring proof beyond a reasonable doubt or, at the very least proof by clear and convincing evidence. The contradictory evidence relating to whether the grievant did what he is charged with having done did not meet that standard. The compromised investigation worsened that state of affairs. For example, [REDACTED] documented a conversation with [REDACTED] case manager in which she verified [REDACTED] tendency toward self-injurious behavior, then [REDACTED] reported that there was no such corroboration of the grievant's claim. And whereas [REDACTED] and [REDACTED] had virtually no knowledge of [REDACTED] behavior patterns, the grievant and [REDACTED] shared years of experience with them. Their testimony was consistent in portraying these behaviors, while [REDACTED] and [REDACTED] misinterpreted a typical self-injurious behavior as abuse.

It was fundamentally unfair that the employer refused to even interview [REDACTED] based on the false assumption that she was not in the room. She testified that by the end of May 2017, she specifically informed [REDACTED] that she had witnessed

both of the alleged incidents of abuse. At that time, the DPPC investigation was underway and would not be concluded for over three months. Yet because the employer did not interview [REDACTED] or identify her as a witness, neither did the DPPC. Indeed, there is no evidence that [REDACTED] or [REDACTED] even consulted available work schedule in order to ascertain who had been present during these highly contested interactions. Had it done so, it would have discovered that [REDACTED] was present as were staff members [REDACTED] and [REDACTED]

After having conducted a substandard investigation, the employer then rubber-stamped the DPPC conclusions that were based on the same scant evidence. For all of these reasons the Union asks the arbitrator to sustain the grievance and offer the grievant reinstatement with full back pay and benefits.

### **DISCUSSION**

The Union has raised both procedural and substantive arguments in support of its assertion that the employer neither suspended nor terminated the grievant for just cause. These may be broken down as follows: First, did the grievant's unpaid suspension violate Article XXXIII of the Agreement because the employer imposed it without completing an internal investigation of his alleged transgression followed by a conclusion that they amounted to just cause for his suspension? Second did the employer lack just cause for the grievant's suspension and termination because its investigators conducted a shoddy investigation? Third, did the employer prove that the grievant slapped [REDACTED] on May 3, 2017? I will address these issues in turn.

## **1. Article XXXIII – The Grievant’s Suspension**

While Article XXXIII requires the Employer, and its mandated reporters, to report any allegations of abuse to the DPPC, it clearly was not designed to supplant the mandate also requiring that, “An internal investigation into the situation will be conducted, after which the Employer will determine whether or not disciplinary action is warranted.” The intention is not to utilize the DPPC investigation as a stand in for the employer’s obligation to make its own determination under the just cause standard of the collective bargaining agreement. That separate obligation is also emphasized in the next sentence of Article XXIII stating that, “Nothing in this article shall limit the Agency’s right to discipline employees for just cause at any time regardless of the status of any governmental investigation.”

Although the employer expected that the DPPC investigation would be concluded by the end of June 2017, for reasons not explained that investigation was not completed until mid-September. Thus, the Union correctly asserts that the grievant was essentially suspended without pay for over four months during which the employer had made no determination under the just cause provision of the Agreement.

Two days after the DPPC sustained only the [REDACTED] allegations, the employer terminated the grievant based only on the [REDACTED] allegations. These facts support the Union’s claim that the employer bypassed its own obligation to conduct a thorough investigation, and reach its own conclusion, irrespective of the outcome of a parallel investigation undertaken by an agency with its own set statutory standards not governed by the Agreement’s just cause provision. For that reason

alone, the suspension without pay was not for just cause because no just cause analysis was done during its approximately four-month duration.

## **2. The Investigation Process**

The employer's administrators initially took the right steps in investigating the dual allegations of abuse that the grievant's co-workers brought to their attention. They interviewed the two complainants and they interviewed the grievant. After comparing what the grievant's accusers alleged with the grievant's denials, the investigator credited the co-workers because there was no reason that they bore any ill will toward the grievant and because the grievant's explanation, allegedly that ██████ had used the grievant's hand to hit himself, did not seem credible.

██████ looked into the issue of whether there was any documentation that ██████ had a propensity for hitting himself using someone else's hands and found none, although there was documentation of ██████ general tendency toward self-injurious behavior that included hitting himself.

The grievant's interview was a clearly an investigatory interview that could lead to discipline. Thus, the grievant had *Weingarten* rights under which he was entitled to a Union Representative to assist him during the interview. However, he has acknowledged that he did not request a Union Representative. The grievant also did not request the assistance of a Spanish language interpreter and so none was provided. Again, the grievant clearly speaks English to some extent and did not request an interpreter.

Thus, the problems with this investigation were initially more substantive than procedural. The two investigators both took notes and their notes differed in a

very significant way. [REDACTED] who testified that the portions of his notes that were in quotations were direct quotes, indicated that the witnesses had said that they had heard, but not seen the alleged slap. In contrast [REDACTED] whose notes were structured as a summary, did indicate that [REDACTED] and [REDACTED] had both said that they saw and heard the grievant slap [REDACTED] and that they noted a red mark. It is mystifying that two people could have documented such a meaningful distinction so differently in the course of such short interviews. In any case, [REDACTED] followed up with a wholly undocumented meeting with [REDACTED] and [REDACTED] during which she asked the leading question, “Did you see [REDACTED] slap [REDACTED]?” She then told [REDACTED] that they had both agreed that they had seen this, although [REDACTED] never changed his own written conclusion to the contrary.

[REDACTED] and [REDACTED] recounted other issues differently. [REDACTED] stated that just before the “slap” she had confronted the grievant about not attending to [REDACTED] [REDACTED] did not mention any conversation between either herself or [REDACTED] during the entire incident. [REDACTED] also noted seeing a red mark on [REDACTED] cheek but [REDACTED] did not corroborate that. And because neither [REDACTED] nor [REDACTED] reported the alleged abuse until the following day, there was no opportunity to determine whether there was a red mark on [REDACTED] cheek.

The investigators’ notes concerning what the grievant said were also quite different. [REDACTED] quoted the grievant as having said, “[REDACTED] will often grab your hand and use it to pet or touch his face and head. For him, I think it is a comfort measure, or a sign that he is trying to ‘feel that someone is there,’ since he does not see well.” In contrast, [REDACTED] notes about that the grievant said read,

██████ reports that █████ slaps himself with other people's hands. That he will grab a staff member's hand and slap his own face with it. █████ reports that on 5/3, █████ was displaying usual behavior of throwing things and pushing his chair out from under him. █████ reports that █████ grabbed █████ wrist and slapped his own face with it. █████ reports that █████ does this to all staff members.

Given the contradictions among the accusers and between both accusers and the grievant, which were compounded by the meaningful differences in the investigators' notes, a fair and thorough investigation would have required further scrutiny. █████ said that she usually asks known witnesses to an alleged incident of abuse whether there was anyone else present. But she acknowledged that she did not remember whether she did so in this case. █████ testified, however, that she told █████ and █████ that █████, "██████ and █████ were all present and █████ corroborated the presence of █████ and "██████." None of these witnesses, who might have resolved the murky testimony about whether the grievant actually slapped █████, were interviewed.

This lax follow up then tainted the entire process going forward. When the employer reported the incident to DPPC, it provided only the names of the witnesses that its investigators had interviewed. The DPPC, in turn, interviewed only those witnesses, relying on the belief that these witnesses had a clear vantage point, had no history of conflict with the grievant, and therefore had no reason to lie about what they saw.

As it turned out, █████ had a completely different story to tell – one that matched the grievant's version of the events and not that of █████ and █████<sup>12</sup>

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<sup>12</sup> There remains no way of knowing what █████ would have said.

And [REDACTED] testimony placed in doubt certain facts that the DPPC relied on. For example, the grievant and [REDACTED] recalled that the complaining witnesses were seated at a different table than they had claimed and that they were positioned with their backs to [REDACTED]. She agreed that [REDACTED] had stood up, knocked over a chair, and was hitting himself before the grievant managed to help him back into the chair, where he soon calmed down. It must be noted that the witnesses with the most familiarity with [REDACTED] behaviors were the [REDACTED] and to a lesser extent the grievant – [REDACTED] [REDACTED]

If the employer's administrators missed the fact that there were other witnesses during the initial interviews (despite the fact that [REDACTED] testified that she had had named [REDACTED] and "[REDACTED]" as having also been present) it could not have continued to miss that fact in the wake of the May 25 step 2 grievance hearing.

At that point [REDACTED] (then acting as the grievant's union representative) corroborated the grievant's story in virtually every detail. The employer not only failed to subsequently interview [REDACTED] or include her version of the facts as part of their own investigation, but it also neglected to let the DPPC investigators know that there was another witness that they might want to interview. It must be noted that in late May, the DPPC investigation was still ongoing and its report was not even due till June.

The administrators seem to have thought it was very important that the grievant appeared to have changed his story between May 5 and May 25, 2007, but did not think it was important that there was now a percipient witness, who had known and worked with [REDACTED] for 19 years, and who had insisted that [REDACTED] and

█████ could have heard but not seen the interaction between the grievant and █████. Indeed, the █████ version of what occurred is more consistent with the █████ reaction at the time. Neither of █████ or █████ said a word to each other or to the grievant about the fact that they had allegedly just witnessed a shocking incident of patient abuse. Neither did they report it to management or to the DPPC until the following day, despite the fact that they knew they were mandated reporters.<sup>13</sup>

As is discussed in more detail in Section 3, below, the harm done to the grievant's chances based on the employer's failure to update the information it provided to the DPPC was exacerbated when the employer then over-relied on the DPPC's findings.

### **3. Just Cause**

The Employer bears the burden of proving that the grievant abused █████ on May 3, 2017, by at least "clear and convincing" evidence adduced at the arbitration hearing. Based on the stigma that a charge of patient abuse carries to the career of an employee whose work involves care of disabled and highly vulnerable individuals, that standard is appropriate. Yet I find myself unconvinced that, despite the efforts of highly effective counsel, the evidence demonstrates just

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<sup>13</sup> It is true that there is no evidence of ill will between █████ and the grievant. Thus, there is no reason to think they would have had any motivation fabricate charges against him. Another possible explanation is that, as █████ originally noted, █████ and █████ heard a slap sound but did not actually see the grievant slap █████. That would be consistent with █████ recollection that they were faced away from █████ at the time. Then, in retrospect and following what █████ viewed abuse in connection with the █████ incident, she and █████ may have revisited the incident the following day and concluded that the grievant had abused █████ too.

cause for the grievant's termination even under the more common "preponderance of the evidence" standard.

The investigators ignored inconsistencies between witnesses that they interviewed, as well as conflicting recollections among themselves, failed to interview witnesses that they should have known were positioned to provide relevant information, ignored later-provided corroborating evidence that would have seemed to vindicate the grievant, and failed to report the existence of this additional information to the DPPC investigators.

As noted above, the employer then treated the DPPC's conclusions as essentially binding. The Union appended to its brief a series of arbitration awards issued by Boston-area arbitrators considering closely analogous situations. In each case, the employer was found to have over-relied the result of an administrative agency investigation report issued under regulatory, rather than contractual standards. In each case, the arbitrator considered, *de novo*, the evidence that was presented at arbitration and assessed that evidence against the just cause standard contained in the operative collective bargaining agreement. In each case, the arbitrator determined that this over-reliance on agency conclusions was not justified and that there was therefore insufficient evidence of abuse to meet the just cause standard (or that the evidence supported only discipline short of termination). See, *Human Services Options and SEIU, Local 509*, AAA # 01-16-0003-6805 (Boulanger, 2017); *Elliot Community Health Center and SEIU, Local 509*, AAA # 11 300 1370 08 (Golick, 2012); *Data Projects and SEIU, Local 509 11 300 00453 11* (Cooper, 2011); *Better Community Living and SEIU, Local 509* (Cooper, 2007).

The four-month delay between the time at which the investigation was no longer active and the employers decision to terminate the grievant, coupled with the mere two-day lapse between the DPPC report and the grievant's discharge, speak volumes in persuading this arbitrator that the employer treated the DPPC findings as determinative. Yet, as noted above, the DPPC does not operate under a contractual just cause standard, of have expertise in the arbitral conventions and precedents that accompany that standard.

For all of these reasons, I conclude that the employer violated Article 7 of the collective bargaining agreement by suspending and terminating the grievant, [REDACTED] without just cause. The grievance is therefore sustained.

#### **AWARD**

The Employer violated Article 7 of the collective bargaining agreement by suspending and terminating the grievant, [REDACTED] without just cause.

The Employer must offer the grievant reinstatement to his former position.

The Employer must purge the grievant's personnel record of any reference to the suspension and termination that gave rise to this case.

The Employer must make the grievant whole for lost wages and benefits brought about by his suspension and termination, from the date on which he was placed on unpaid suspension status to the date of compliance with this Award.

The Arbitrator retains jurisdiction for ninety days from the date of this Award for the sole purpose of resolving and dispute between the parties concerning the remedy ordered herein.



Sarah Kerr Garry, Arbitrator  
March 8, 2019

