

RECEIVED / REVIEWED

FEB 26 2009

OCSEA-OFFICE OF
GENERAL COUNSEL

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – OHIO DEPARTMENT OF YOUTH SERVICES
OHIO RIVER VALLEY JUVENILE CORRECTIONAL FACILITY

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME, AFL-CIO LOCAL 11

Arbitration Date: February 12, 2009
Benjamin Burton: 35-20-20080707-0018-01-03

BEFORE: Arbitrator Craig A. Allen

Advocate for the State:
Melinda M. Hepper
Labor Relations Officer
Ohio Department of Youth Services
51 N. High Street
Columbus, OH 43215

Advocate for the Union:
David Justice
OCSEA, AFSCME Local 11,
AFL-CIO
390 Worthington Rd.
Westerville, OH 43082

#1020

I. HEARING

The hearing was held at the Ohio River Juvenile Correctional Facility on February 12, 2009. The hearing commenced at 9:10 A.M. The joint issue before the arbitrator is "Was the Grievant, Benjamin Burton removed for just cause? If not, what shall the remedy be?"

Testifying for the Ohio River Juvenile Correctional Facility "The Employer" were David Haynes, Senior Investigator, Kevin Hamilton, Operations Manager, JCO Daryl Russell and Joan Oliveri, Bureau Chief, Labor Relations.

Testifying for the Ohio Civil Service Employees Association, AFSCME Local 11 "The Union" were JCO Bill Imes, JCO James Dubois, Mike Wells, Electronic Technician, and the Grievant, Benjamin Burton

II. STATEMENT OF THE CASE

The Grievant was removed from his position as a Juvenile Corrections Officer (JCO) on June 13, 2008, for an incident with Youth Fears.

The Grievant was removed for violations of the Ohio Department of Youth Services General Work Rules Policy 103.17, specifically rules 4.11 - Physical Assault, 4.12 - Inappropriate or Unwarranted use of Force, 5.1 - Failure to Follow Policy and Procedure, specifically Policy 301.05.05, Response to Resistant Youth Behavior. The Union timely filed a grievance and the case is properly before the Arbitrator.

III. THE EMPLOYER'S CASE

The Employer's first witness was David Haynes, Senior Investigator. Mr. Haynes testified he has had over three hundred (300) use of force investigations. Mr. Haynes testified he started his investigation June 18, 2007 and concluded it September 13, 2007. Mr. Haynes interviewed Youth Jabriel Fears. Youth Fears testified from Investigation Exhibit, at pages 18 - 19, that his group were coming back from the Café where Grievant stopped the line and asked Youth Fears if he had cleared his room. Youth Fears said "No, cause you were pushing me and we had to go to Café". Youth Fears then claimed that Grievant tackled him and started punching, kicking, and kneeling him. Youth Fears then testified that other staff came and he placed his arms under his body to avoid them being broken and he resisted being handcuffed until Kevin Hamilton, the Operations Manger, arrived.

Mr. Haynes testified he interviewed a total of eleven (11) youths. Mr. Haynes reviewed the written and recorded testimony of the youths, all contained in the Investigation Exhibit.

The testimony was supportive of Youth Fears statement, except for Youth Jerimiah Smith. Youth Smith in his testimony in the Investigation Exhibit, pages 55-58 had an entirely different version of the facts. After, being cautioned by Mr. Haynes, Youth Smith said he was told what to say. He then recanted that.

Mr. Haynes then said he interviewed staff. Mr. Haynes reviewed Investigation Exhibit, pages 22-27, the Youth Intervention Report and Investigation Exhibit, pages 105-117 and interview with the Grievant.

According to the youth Intervention Report and the Interview the Grievant said the Youths were returning to the Unit from the Café. Youth Fears was in the front of the line. The Youth was failing to follow directions and Youth Fears turned and swung at the Grievant. Grievant said other staff were responding and he hit his man down alarm. He also said he hit his head on the ground.

Mr. Haynes then reviewed Investigation Exhibit, pages 30 and 31 and Investigation Exhibit, pages 129-131, which are the Youth Investigation Report filed by JCO Tina Langford and her recorded interview. JCO Langford said she only saw Youth Fears flinch, but not swing. Other staff responded and JCO Langford took part in the restraint by holding Youth Fears legs. She saw Operations Manager Kevin Hamilton coming and said "Hold on. Help's on the way".

Mr. Haynes then reviewed JCO Bill Imes Youth Intervention Report, Investigation Exhibit, pages 34 and 35 and Investigation Exhibit, pages 118-120, the recorded interview with JCO Imes.

JCO Imes and he came out of the building in front of the fight. He saw Youth Fears and the Grievant struggling and denies there was any inappropriate force or abuse.

The witness then reviewed Investigation Exhibit, page 27, the Youth Intervention Report of JCO James Dubois and Investigation Exhibit, pages 100-104, the recorded interview with JCO Dubois.

JCO Dubois said he was a Relief Officer and was leaving the Café with another Group. He said he left his group and went to the fight. JCO Dubois said he saw Youth Fears tackle Grievant. He said he was asked to help get Youth Fears arms out from under his body and couldn't see what Grievant was doing.

Mr. Haynes then reviewed Investigation Exhibit, pages 36-39, JCO Daryl Russell's Youth Intervention Report and Investigation Exhibit, pages 91-95, JCO Russell's recorded interview. JCO Russell said he was outside with a different Unit. He saw JCO Dubois running across the yard and had to calm his Youths. JCO Russell said he saw Grievant hitting and punching Youth Fears.

Next Mr. Haynes reviewed Investigation Exhibit, pages 32 and 33, Kevin Hamilton's Youth Intervention Report and Investigation Exhibit, pages 96-99, Kevin Hamilton's recorded interview. Mr. Hamilton said there was no video of the event as the video was broken.

Mr. Haynes then reviewed the Investigation Exhibit which showed Youth Fears taken to medical and the medical photographs of Youth Fears. The medical reports of the injured staff, the Grievant, JCO Dubois and JCO Langford.

Mr. Haynes then discussed Discipline Trail Exhibit, page 36, the Pre-Disciplinary Notice setting the meeting for October 12, 2007. The Discipline Trail Exhibit, page 36, an email from the Union continuing the meeting until October 22, 2007. Mr. Haynes also referred to the Union Contract Article 24.05. This Article says a Pre-Disciplinary meeting may be delayed until after a criminal investigation is completed. The witness said the Ohio Highway Patrol filed reports with both City and County Prosecutors.

Further that there were meetings with the Ohio State Patrol, the Chief Counsel for DYS and the Prosecutor, which caused delay. No charges were filed.

Mr. Haynes then read Discipline Trail Exhibit, Page 4, which is the Pre-Discipline Notice for May 2, 2008. Discipline Trail, pages 31-35 are Medical Reports from the Union for the Pre-Disciplinary meeting.

The witness then read the Disciplinary Trail Exhibit, pages 22-30, which is the Ohio State Patrol Report. Mr. Haynes said the Grievant told the Ohio State Patrol one thing and him another.

Mr. Haynes then reviewed the Policy and Procedure Exhibits, Tabs 4 and 5. These Exhibits concern physical response and there is a Standard Operating Policy "SOP". He then read Policy and Procedure Exhibit Tab 6 which is the "SOP" for Response to Resistance which defines levels of resistance. Policy and Procedures Exhibit Tab 7 in the Response to Resistance Continuum concerning the "Hands Underneath" says to only use control techniques.

Mr. Haynes then read from his recorded interview with the Grievant Investigation Exhibit, page 113, and said the Grievant said there was no training at ORV to handcuff a kid on the ground.

On Cross-Examination said the AMS Incident Report Summary Investigation Exhibit, page 14 said Youth Fears hit Grievant. Mr. Haynes said Grievant, JCO's Dubois, Imes, Lanford and Russell were involved along with Operations Manager Hamilton.

Mr. Haynes said he took a written statement from Youth Fears, but no recorded statement. He did take recorded statements from the other witnesses. Mr. Haynes said he was trying to determine how far away the witnesses were from the fight.

Mr. Haynes then read Youth Fears first statement and said Youth Fears was refusing an order which was resistant. He also read Investigation Exhibit , pages 19, 20, 21 where Youth Fears accuses JCO's Imes and Dubois of hitting him.

Mr. Haynes was then referred to Investigation Exhibit, pages 129-131 the recorded interview with JCO Langford. The interview indicates Youth Fears and the Grievant were having words. JCO Langford said she thought Youth Fears lunged at Grievant, but she said she doesn't remember Youth Fears throwing a punch at Grievant. Mr. Haynes was then referred to Investigation Exhibit, pages 55-57, which was the recorded interview with Youth Jerimiah Smith. The exhibit indicates Youth Smith was offered a transfer to another institution if he would testify. Mr. Haynes said no one else was offered this.

Mr. Haynes looked at the Investigation Exhibit, page 230 and said the medical report did not indicate any "kicking injuries".

He also said Investigation Exhibit, page 217, the Shift Log shows Youth Fears was moved to the Edison Unit on the same day.

Mr. Haynes also testified Youth Fears was on top of the Grievant at one point.

The Union then gave Mr. Haynes Exhibit Union 1, which indicated the Grievant had set of his "man down" alarm at 5:17 and again at 5:26. He was then referred to Investigation Exhibit, page 221 and said it was an aerial photograph of the grounds prepared based upon his interviews. He was then referred to Investigation Exhibit, page 13, which is his conclusion. He concluded JCO's Dubois, Imes and Langford were dishonest.

Mr. Haynes then was referred to Policy and Procedure Tab 6, which is "SOP" Response to Resistance"Control Technique" and said moving the hands to handcuff Youth is Ok. He also reviewed in the same Exhibit Tab 6, page 3 "Talk Back" and Tab 6, page 4 "Combative Resistance".

On re-direct Mr. Haynes said a refusal to "give up arms" is common here. He was referred to Investigation Exhibit 21 and said there was no real information that JCO's Imes and Dubois hit Youth Fears. He said witnesses statements corroborate the testimony of JCO Russell and Operations Manager Hamilton. He was also referred to Policy and Procedure Exhibit Tab 7, the Response to Resistance Continuum.

On Re-Cross Examination Mr. Haynes said offering a transfer to a Youth may affect his testimony.

The next witness was Kevin Hamilton, Operations Manager. Mr. Hamilton was referred to Investigation Exhibit, page 32, his written statement and Investigation Exhibit, pages 96-99 his recorded statement. Mr. Hamilton testified he was in the Café when he observed Youths looking out into the yard. He turned and saw Grievant throwing punches at Youth Fears. He said he left the Café and went toward the fight. He said he saw twenty (20) to thirty (30) youths there. Mr. Hamilton saw Grievant kicking into the pile. He said Grievant was wearing blue jeans and was the only JCO out of uniform. He said he made eye contact with the Grievant and the Grievant kicked Youth Fears one more time.

Mr. Hamilton helped Youth Fears up and Youth Fears was bleeding in the face. He told the JCO's "I have it" and took Youth fears to the Taft Building.

On Cross-examination, Mr. Hamilton said he saw a pile from the Café. He heard a call "signal 88" over the intercom. "Signal 88" means there is an incident. He said the "man down" alarm can be activated by a push button or a tilt switch.

Mr. Hamilton was shown Investigation Exhibit, page 26, his statement to Mr. Haynes and said he had no discussion with Mr. Haynes prior to recording. He said he saw officers on the ground, but could not tell who was whom until he got there. He said he made eye contact with the Grievant, but the Grievant did not acknowledge him. He also said the JCO's did not acknowledge his yell, but they may not have heard him. He got Youth Fears up when the got there, but doesn't recall which JCO helped him escort Youth Fears to Taft.

On Re-Direct Mr. Hamilton said you can't hit or kick a Youth on the ground who has his hands underneath his body.

The next witness was JCO Daryl Russell. JCO Russell testified he was working the Edison Unit on over-time. He was referred to Investigation Exhibit, page 36, his written statement and Investigation Exhibit, pages 91-95, his recorded statement and said both were accurate.

JCO Russell said he was out in the yard on recreation. The Youths started talking and going toward the incident. He said there was a Youth on the ground and that Grievant hit, kicked, and kneed the Youth. JCO Russell then said Grievant saw Operations Manager Hamilton and kicked the Youth again.

On Cross-Examination JCO Russell said he was by the walk-way in front of Edison. He saw JCO's run across the yard and there were JCO's around the "pile". He saw Grievant hitting the Youth.

Joan Olivieri was the next witness. She is the Bureau Chief for Labor Relations. She reviewed the evidence and this discipline. She said she meets with the Deputy Director and then Director.

Ms. Olivieri reviewed Policy and Procedure Exhibit Tab 1, General Work Rule, Tab 2, Rule Violations 4.11, 4.12, 5.1, Tab 3 Discipline Grid. She said the Discipline Grid allows for five (5) days to termination. She said there was no reason to kick or punch the Youth as the Youth's hands were under his body.

IV. THE UNION'S CASE

The first witness in the Union's Case was JCO Bill Imes. JCo Imes said he vaguely remembered the Youth Fears incident. He said he was at Unit Taft and came out the Liberation Door. He said that Youth Fears had his arm around Grievant and tackled Grievant. JCO Imes said other Youths were upset and he went to redirect them. He then went to assist Grievant and said Youth Fears was on top of Grievant. He later went with Youth Fears to the Taft Building and put the Youth in isolation.

On Cross-Examination he was referred to Investigation Exhibit, pages 122-123 and said he was "facing away from Grievant" and couldn't see any kick or punch.

On Re-Direct JCO Imes said he heard no cry out in pain from Youth Fears.

JCO James Dubois was the next witness. He was escorting the Rickenbacker Unit from chow. JCO Dubois saw a Youth tackle a JCO. The Youth got on top of Grievant and he pulled him off. JCO Dubois was reviewing Investigation Report Exhibit, page 100. He said he yelled at the Youth to calm down. Grievant asked him to help get the Youth's arms and JCO Langford relieved JCO Dubois on the Youth's legs. He said he never heard Operations Manager Hamilton yell.

On Cross-Examination JCO Dubois was referred to Investigation Exhibit, page 100 and 102. He said he had Youth Fears head between his legs and did not see Grievant hit or punch the Youth.

The next witness was Mike Wells, an Electronic Technician. Mr. Wells maintains the Personal Protection Device.

He said the system tests itself by computer and all individual alarms are tested . Mr.

Wells said there was no doubt Grievant hit his alarm twice.

The Union then called the Grievant Benjamin Burton. The Grievant said he had been off for two days. When he returned to work he read the log book which indicated Youth Fears was acting up. The Grievant reviewed the Investigation Exhibit, page 211, which is the McKinley Log Book. The log book entry concerning Youth Fears.

The McKinley Unit went to dinner in the Café and there were problems with Youth. The Grievant said the problems got worse after the Youth left the Café.

The Grievant was then given Union 3, Minutes of the Direct Services Meeting May 9, 2007. He was directed to page 9. The exhibit indicates Youths are not to talk while in line and it is proper to stop the line and re-direct the Units.

The Grievant said he stopped the line Unit and started to re-direct it. Youth Fears was in the front of the line and Grievant was in the back. Youth fears was talking in line in violation of the rules. There was no problem with the other Youths in the line. Youth fears started quarreling with Grievant and was very argumentative. Grievant said he had only worked with Youth Fears twice and that McKinley is a Mental Health Unit. Grievant said he could see the pressure build up and he told Youth Fears to go into the Unit and cool off.

Grievant said he turned. Youth Fears stayed and threw a haymaker at him. Grievant said he attempted an outside wrist turn and Youth Fears tackled him. Grievant said he followed DYS Policy and did not try anything new, but lost control of the situation.

Grievant said he went to the ground and Youth Fears was over his left leg on top of him.

Grievant said he hit his head and doesn't remember what he did. He said he pushed the Youth off with one leg and the Youth's head was down range. Other JCO's were there. JCO Dubois was down on the legs; Youth Fears continued to struggle. Grievant said he told Youth Fears many times to give up his arms and no JCO referred to breaking the Youth's arms.

Grievant said he suffered a concussion as a result of the fight. He was also bitten on the left hand and had knots on his head.

He was referred to Discipline Trail Exhibit, pages 31-35 and said he was placed on Administrative Leave, before he went to medical. He denies kicking Youth Fears and says he never hit him on the ground except when Youth Fears was on top of him.

On Cross-Examination Grievant said he doesn't recall eye contact with Operations Manager Hamilton.

On Re-Direct Grievant said he only knew two reasons why Operations Manager Hamilton testified the way he did. He said it was either to keep his job or because of Grievant's association with Mike Wells. He doesn't recall seeing JCO Russell and has no idea why he said what he did.

V. OPINION OF THE ARBITRATOR

The Union raises a serious timeliness question. The Union contends that Article 24.05 of the Contract is dispositive as the continuance of the Pre-Disciplinary meeting was longer than the sixty (60) days set forth in the Article.

Article 24.02 states: "Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article".

However, it appears to the arbitrator that Article 24.06 of the Contract is Controlling. Presumably the purpose of a Pre-Disciplinary Meeting is to make a determination as to whether to proceed with discipline. Article 24.06 gives the Employer the option to delay the process and halt the running of the forty-five days until after the criminal investigation. The Arbitrator therefore overrules the timeliness objection.

The Arbitrator denies the grievance. The Arbitrator has considered the evidence carefully. The statements of the Youths are not dispositive. The majority of the Youth's statements are supportive of the Employer's position.

However, the environment in a detention facility does not lead the Arbitrator to accept them all at face value. The statement of Youth Jerimiah Smith is a prime example. Investigator Haynes is not necessarily correct that some of the JCO's were dishonest. It appears from the evidence that they saw what they saw.

The evidence is clear that there was a fight and Grievant and several other JCO's were injured. However, the evidence is clear from Operations Manager Hamilton and JCO Russell that Grievant hit and kicked Youth Fears once he was on the ground. The Grievant's own testimony is that other JCO's were present. Operations Manager Hamilton testified he could tell it was the Grievant hitting and kicking the Youth as he was the only JCO not in uniform. Considering the severity of the assault, I find the discipline to be correct.

Decision rendered the 26th day of February, 2009 at Ironton, Ohio.

Craig A. Allen, Arbitrator

-13-