

1026

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO – DEPARTMENT OF YOUTH SERVICES
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME. LOCAL 11

Arbitration Date: April 1, 2009

Grievant Donald Richards: #35-20-20080924-0040-01-03

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Melinda Hepper
Ohio Department of Youth Services
51 N. High Street, Suite 101
Columbus, Ohio 43215

Advocate for the Union:

Jennie Lewis
OCSEA, AFSCME Local 11
390 Worthington Rd., Suite A
Westerville, OH 43082

RECEIVED / REVIEWED
APR 22 2009
OCSEA-OFFICE OF
GENERAL COUNSEL

I. HEARING

The hearing was held at the Ohio River Valley Juvenile Correctional Facility on April 1, 2009. The hearing commenced at 9:04 A.M. The joint issue before the arbitrator is "Was the discipline for Just Cause? If not, what shall the remedy be?"

Testifying for the Ohio River Valley Juvenile Correctional Facility "The Employer" were Amy Ast, Bureau Chief of Facilities ; Eric Avery, JCO; Scott Moore, Coordinator; and Brent Barber, Youth inmate.

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME ("The Union") was Donald Richards, the Grievant.

II. STATEMENT OF THE CASE

The Grievant was removed by the "Employer" on September 19, 2008. The Grievant was removed for violations of the Ohio Department of Youth Services General Work Rules Policy 103.17, specifically rules 3.1 Dishonesty and 4.12 Inappropriate or unwarranted use of force. The removal involved two separate incidents. One occurred on November 6, 2007 and the other occurred on December 2, 2007.

The Union timely filed a grievance and the issue is properly before the Arbitrator.

III. THE EMPLOYER'S CASE

The Employer's first witness was Amy Ast, Bureau Chief of Facilities.

Ms. Ast is a Response to Resistance "R2R" Instructor. Ms. Ast says she trains new hires and conducts Quarterly training sessions for staff. Ms. Ast testified that the Discipline packet concerning the November 6, 2007 incident was sent to her and that she also knows of the information on the December 2, 2007 incident.

Ms. Ast testified that she reviews the packet including the Pre-Disciplinary hearing, Policies and Procedures, any prior discipline and the credibility of the witnesses. She then makes a recommendation to the Director. She was referred to Investigation Exhibit Pages 1 - 35 and said she had reviewed these as part of her recommendation. Ms. Ast also read Investigation Exhibit Page 2 which is the Investigator's conclusion on the incident with Youth Alexander. This conclusion is that Grievant used unwarranted force on Youth Alexander. Ms. Ast testified that the Grievant should have left the room and used the least level of response.

Ms Ast also testified concerning the incident of December 2, 2007. Ms. Ast read Investigation Exhibit Pages 101 - 102 which is Youth Barber's grievance against the Grievant. She testified that Youth can access a grievance form at will. The form is then placed in a locked box. Ms. Ast then read Investigation Exhibit Pages 99 - 100. This is a question and answer session with Youth Barber. Youth Barber said the Grievant used force on him.

Ms. Ast then read Investigation Exhibit Pages 104 - 106 which is a grievance filed by Youth Calhoun. Youth Calhoun said several staff, including the Grievant hit and punched Youth Barber. She then read Investigation Exhibit Page 103 which is a question and answer session with Youth Calhoun. Youth Calhoun said he saw staff punch and kick Youth Barber and Grievant

banged Youth Barber's head against the wall. Ms. Ast then read Investigation Exhibit Page 115 which is a statement from Youth Jackson. Youth Jackson said the Grievant kicked and punched Youth Barber while other staff were holding him and this happened in front of his room. She then read Investigation Exhibit Page 109 which is a question and answer session with Youth Johnson. Youth Johnson said it looked like Youth Barber was getting punched but he did not identify any staff. Ms. Ast then read Investigation Exhibit Page 110, an interview with Youth Ross. Youth Ross said staff were punching and kicking Youth Barber but did not identify anyone. She then read Investigation Exhibit Pages 118 - 120, which is a grievance filed by Youth Ceasar. Youth Ceasar said Grievant assaulted Youth Barber.

Ms. Ast then read Investigation Exhibit Pages 91 & 92 which is a question and answer interview with Grievant. Grievant denied punching or kicking Youth Barber. She said she used this interview as part of her recommendation. She then read Investigation Exhibit Pages 36 & 37 which is Grievant's Youth Intervention Report "YIR". Grievant said Youth Barber was combative.

Ms. Ast then read Investigative Exhibit Pages 195 - 204 which is a question and answer interview with Grievant conducted by Investigator Don Whipple. In this interview Grievant said he did not assault Youth Barber and could not explain his injuries. She then read Investigation Exhibit Pages 205 - 209 which is the second interview of Grievant by Investigator Don Whipple. Grievant admitted not being honest in the first interview. Grievant now says he saw other staff hit Youth Barber but denies bouncing Youth Barber's head off the wall.

Ms. Ast then reviewed Investigation Exhibit Pages 220 - 234 which is a question and

answer interview with JCO Avery. She said she used this in her recommendation. Ms Ast then read Investigation Exhibit Page 265 which is Youth Barber's Youth Injury and Assessment Form. The report shows left eye swollen and pain to the mandible and chin. She then looked at Investigation Exhibit Page 266, the Photo of Youth Barber and said no approved technique would cause this injury. Ms. Ast said the Director has a strong stance on use of force. She said there is a federal lawsuit pending and the Department has to protect the Youth. She also said it was clear that the injuries were caused by staff.

Ms Ast then read Policy and Procedure Exhibit Tab 4 which is the Use of Force Policy. This policy provides Staff Guidelines. She also read Tab 6 which is the Standard Operating Procedure "SOP" on "R2R". She then read the definitions of Active and Combative Resistance and she also read Control Techniques. None of these techniques permit the use of pressure points. She then read Tab 7 which is a continuum of visual guidelines.

Ms Ast said if Youth Barber's hands were underneath him it is Passive Resistance. If the Youth is struggling it is Active Resistance. The Youth can not be hit or punched or have his head banged on the wall. If the Youth is engaged in Combative Resistance the Youth can only be hit in self-defense.

Ms. Ast then turned to Policies and Procedures Exhibit Tab 1, the General Work Rules. Tab 2 is the list of infractions. Ms. Ast turns to Tab 2 Page 3 of 9 and reads Rule 3.1 Dishonesty and Rule 4.12 Inappropriate or Unwarranted Force. She then read Tab 3 the Discipline grid. She was asked to read the penalties under Rule 3.1 and 4.12 if the Grievant had no prior discipline. Her response was 1 - 3 days under Rule 3.1 and 5 days to termination under Rule 4.12.

Ms. Ast said the Grievant was removed because of inappropriate force in both the November 6, 2007 and the December 2, 2007 incidents.

On Cross-Examination Ms Ast was asked if there were videos. Her answer was Yes and that the videos were consistent with the rest of the investigation. Ms. Ast was then asked if she were aware of gangs at the facility and she said Yes. She was then asked if she had knowledge of participants and she replied that she did not recall Youth Barber being a member. She said she is not aware of other Youth as members.

Ms Ast was then referred to Investigation Exhibit 265 which is Youth Barber's injury report. This report says the injuries came from a fight with another Youth and makes no reference to Staff. Ms Ast says Youth Barber complained to Mr. Alessio ten days after the incident. Youth Barber and Other Youth filed grievances that Grievant assaulted Youth Barber.

On Re-Direct Ms. Ast said she did not rely solely on the video.

The Employer's next witness was Eric Avery, JCO. JCO Avery was referred to Investigation Exhibit Pages 220 - 234, his question and answer interview with Investigator Don Whipple and said it was accurate. He was then referred to Investigation Exhibit Page 221 where he said he doesn't know if Youth Barber threw a punch at the other kid. JCO Avery was referred to Investigation Exhibit Page 226 which says they "all fell on him". He was then referred to Investigation Exhibit Page 228 which says Grievant had his elbow on the back of Youth Barber's head. Youth Barber's arms were underneath him. The Grievant put weight on Youth Barber's head and asked JCO Avery about pressure points. JCO Avery replied "we do not do that".

JCO Avery said the injury to Youth Barber came from Grievant's elbow. The Grievant was trying to pin the Youth's head to the floor.

JCO Avery then read Investigation Exhibit Page 226 where he was asked if Grievant bounced Youth Barber's head off the wall. He said he didn't know what happened to him as he had left the room. JCO Avery then read Investigation Exhibit Page 227 where Grievant said "he wasn't going to put up with shit". He then read Investigation Exhibit Page 230 and said Grievant had his forearms on Youth Barber's shoulders and the back of his head. The Youth was handcuffed and against the wall.

On Cross-Examination JCO Avery was asked if Youth Barber was resisting in the room and his answer was "Nope". He then was asked if Youth Barber was bloody when he came off the floor and he said he couldn't recall. He was then asked if he could recall any other conversation when he left the room and he said "No". He was then asked if youth Barber was very resistant when he was on the floor and he replied "Very resistant". JCO Avery was asked if others were involved and he said "Yes".

JCO Avery was then asked about Youth Barber's size. He said he was about 5' 11" tall and weighed 200 pounds. JCO Avery was referred to Investigation Exhibit Pages 56 - 58 which is his "YIR" where he did not say he saw Grievant and Youth Barber on the wall. He was then asked if his opinion was the restraint used necessary when the Youth was on the floor. He replied "Yes".

On Re-Direct JCO Avery said if the Youth is handcuffed against the wall all you can do is hold him there. He was then referred to Investigation Exhibit Page 229 where he had said force

was not necessary as they had the Youth's arms.

The next witness was Scott Moore a Coordinator. He investigated the complaint of Youth Alexander about improper restraint.

Mr. Moore then was referred to Investigation Exhibit Page 1 which is his Investigation Report. He said on November 6, 2007 Youth Alexander Complained of improper restraint by the Grievant.

Mr. Moore then turned to Investigation Exhibit Page 12. This is Youth Alexander's Youth Behavior Incident Report "YBIR". Youth Alexander said he tore up a "YBIR" but did not throw it in the Grievant's face. He then turned to Investigation Exhibit Page 15 which is JCO DuBois' statement . JCO DuBois said Youth Alexander was resisting but he was not there at the beginning of the incident.

Mr. Moore then read the statement of Youth Ferguson. Youth Ferguson said Grievant hit Youth Alexander and threatened Youth Ferguson if he made a report. He then read Investigation Exhibit Page 21 which is JCO Patterson's report but JCO Patterson was not there at the beginning of the incident. He was then referred to Investigation Exhibit Page 24 which is a Photo of Youth Alexander's foot. He then read Investigation Exhibit Pages 25 and 26 which is a question and answer interview with Youth Alexander. Youth Alexander did not report any allegations. Investigation Exhibit Page 27 Youth Alexander said he tore up his YBIR and Grievant hit his man down and restrained him.

Mr. Moore then read Investigation Exhibit pages 28 and 29. This is a Question and Answer interview with Youth Ferguson who is Youth Alexander's roommate. Youth Ferguson

said Youth Alexander tore up his YBIR and put it on the floor. He said Grievant threatened him if he made a statement.

Mr. Moore then read Investigation Exhibit Page 31. This is Grievant's statement. Grievant said Youth Alexander was sitting on the bed. Youth Alexander tore up the YBIR and threw it at him. He said Youth Alexander stepped toward him with his hands up. He then read Investigation Exhibit Pages 32 and 33 Grievant's YIR. Grievant said the Youth threw the YBIR. Mr. Moore then read Investigation Exhibit Page 11 which is Youth Alexander's Youth Injury form. This shows pain to left ankle. He was then referred to Investigation Report Page which is his conclusion. His conclusion is the Grievant had time to leave the Youth's room.

On Cross-Examination he was asked if the staff who were present said Youth Alexander was resistant. He said "Yes". He was then asked if he had experience with gangs. He said "Yes, seven to eight years". He was then referred to Investigation Exhibit Page 17 Youth Ferguson's statement. He was asked how long the November 6, 2007 incident took, Mr. Moore replied "I don't know". He was then asked if Grievant told him the Youth got up off the bed. He replied "No". He was asked if the block used was a proper technique. He said "Yes". He was then asked if the man down use was proper. He said "Yes".

The last witness was Youth Brent Barber. Youth Barber was involved in an incident on December 2, 2007. He was referred to Investigation Exhibit Pages 101 and 102 which is his grievance report. Youth Barber says it is true that Grievant banged his head against the wall. He was then referred to Investigation Exhibit Page 99. This says he ran up on a Youth and staff stopped him and he got restrained. Youth Barber said he doesn't know who punched and kinked

him. He said he was handcuffed and taken to his room. He said staff tore up his room and Grievant put his head into the wall. Every time he looked around Grievant pushed his head into the wall. He is not sure who put his finger in his eye nor who punched and kicked him. He is certain Grievant put his head into the wall.

On Cross-Examination he said he was told to stay on the wall. He said he kept turning around as staff were tearing up his pictures. He said when he turned his head "Boom" Grievant hit his head on the wall. Youth Barber said he ran up on Youth Jackson and was stopped. He said he was angry at Youth Jackson and got put down. Youth Barber said he was bleeding when he went to his room. He said his mouth was busted and his nose bled when his head hit the wall. He was asked about the friends he hangs with and said he is not in a gang and the incident is not gang related.

On Re-Direct he said only staff touched him. He said he was in handcuffs when his head hit the wall and his nose was not bleeding on the floor.

IV. THE UNION'S CASE

The Grievant, Donald Richards, testified for the Union. The Grievant said he had been a JCO for thirty-seven months. Prior to that he was an EMT.

The Grievant testified first about the incident on November 6, 2007. He said he went into Youth Alexander's room and asked him to sign a YBIR. He said the Youth tore it up and threw it in his face. The Grievant said he used a basic block and hit his man down alarm.

He said the youth was on the bed and when the Youth got up he was restrained. The

Grievant testified he doesn't recall for how long.

The Grievant then testified concerning the incident on December 2, 2007. The Grievant said he was at the JCO podium in Unit Armstrong recording the incident in the mini-gym. The mini-gym Youth were chaotic. Youth Barber ran toward another Youth. Staff told Youth Barber to stop and the Grievant was still behind the podium. He then said all staff and Youth Barber went to the floor.

The Grievant said he then responded and assisted in holding Youth Barber on the floor. Grievant denies punching or kicking him. When Youth Barber was handcuffed Grievant helped him up and took him to his room.

Grievant said Unit Manager Doss was searching the Youth's room and he told the Youth to stand in the corner. He said Youth Barber was threatening to "get even" with staff. The Grievant said Youth Barber was spitting blood and he turned around and rested his head against the wall. Grievant said Unit Manager Doss was in the room. He said the Youth finally complied and he remained on the Unit with the Youth.

The Grievant was then asked if he was threatened by gang members. He replied that he has to check statements but that Youth Barber was in a gang. The Grievant said Youth Barber was spitting blood when he went in the room. He said the Youth spit blood when his face was to the wall. Grievant again denied hitting or kicking the Youth.

On Cross-Examination the Grievant said that on December 2, 2007 he was on temporary bid status, and had been so for about three weeks. He said he didn't know if Youth Barber's nose

was bleeding when he went into the room.

The hearing was concluded at 11:37 A.M.

V. OPINION OF THE ARBITRATOR

This case concerns two different incidents involving this Grievant.

The first incident occurred on November 6, 2007. The evidence is that this incident happened in Youth Alexander's room. The Grievant had gone to Youth Alexander's room to deliver a YBIR. The Grievant contends that Youth Alexander tore up the YBIR and threw it in his face. The Grievant also contends that the Youth got off his bed and approached the Grievant. The Grievant said he gave a basic block and hit his man down alarm.

The Employer contends the Grievant's response was inappropriate and that Grievant should have left the room. The Union contends in its closing argument that the incident took about one minute and that Grievant did not have time to leave the room.

Youth Ferguson, Youth Alexander's room mate said Youth Ferguson tore up the YBIR and put it on the floor. Youth Ferguson also said Grievant threatened him if he gave a statement.

Both Ms Ast and Scott Moore said Grievant had time to have left the room and should have done so.

The Arbitrator finds the Grievant used inappropriate force on Youth Alexander. The testimony of Youth Ferguson supports the testimony of Youth Alexander, Ms. Ast, and Scott Moore. In addition the Arbitrator is persuaded by the statement of Youth Ferguson that he was

threatened by the Grievant if he made a statement. There was no reason for the Grievant to have threatened Youth Ferguson if he had nothing to hide.

The second incident, concerning Youth Barber occurred on December 2, 2007. The majority of the evidence in the hearing concerned this incident.

The evidence is that Youth Barber attempted to attack another Youth who was being escorted by a JCO. Youth Barber was intercepted by staff and taken to the floor. The evidence from both testimony and photographs is that Youth Barber sustained severe facial injuries.

JCO Avery was involved in the restraint of Youth Barber. JCO Avery told the investigator that he thought Grievant's use of force was Unwarranted as Youth Barber's arms were underneath him.

JCO Avery also testified that Youth Barber was not resisting when he was in the room.

Youth Jackson testified that the Grievant kicked and punched Youth Barber while the staff were holding him down. Youth Jackson said the restraint was right in front of his room.

Ms. Ast testified that at least seven Youth, including Youth Barber testified that Youth Barber was beaten by staff. At least four of the Youth identified the Grievant. Ms Ast further testified that based upon Youth Barber's level of resistance, staff could not hit, punch or kick him. In addition, she said no approved technique could have caused Youth Barber's injuries and the SOP forbids the use of pressure points.

Youth Barber testified that he was handcuffed in his room and that Grievant banged his head against the wall every time he looked around.

JCO Avery testified that Grievant asserted it was "his house" and that he left the room to avoid seeing what was going to happen.

The Grievant was interviewed twice. The second time he changed his story. He blamed peer pressure and said his second statement was correct. Grievant also failed to file correct reports of the incident.

The Union contends that the video was not shown at the hearing and may not have been supportive of the Employer's contention. Ms. Ast testified that the video confirmed her findings. As the Union did not offer the video, the Arbitrator can only rely on the sworn testimony of Ms. Ast.

The Union also contends in its closing that Youth Barber "was angry and ready for a fight". Even if this was true, Youth Barber was severely out numbered by staff and handcuffed when he was in his room. He was therefor defenseless in his room. The Union in its closing also raises the specter of gang violence against the Grievant. However, the Union tried to prove this at the hearing. There was no evidence of this, even from the Grievant.

The Union also claims inconsistent discipline. The Union cites a book throwing incident in its closing. However this was not raised at the hearing so the Employer has no opportunity to respond. The Arbitrator can therefor, only treat this as argument and not evidence.

The Union also cites Herron vs DYS in support of its argument and has attached this decision to its closing argument. The Arbitrator has read this fairly complex decision and does not find it persuasive.

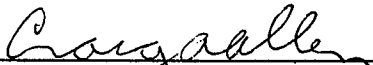
The Herron case had several issues. The issue of the thirteen day absence is not relevant. The other issues concerning entry of a Youth's room, horseplay, and medical attention are arguably relevant.

The issue on the entry into the Youth's room concerned notification of supervision and development of a planned use of Force. While one of the issues here is the Grievant's entry into a Youth's room the charges and evidence in this case are much different from Herron.

The other issues of horseplay and medical attention in Herron are also not in point. What is in point in the Union's argument is the finding in Herron that the Grievant did not intend to injure the Youth and was therefor reinstated. The Union contends that Grievant had no intention of harming Youth Barber. The evidence, however, is over whelming that Grievant used inappropriate and unwarranted force.

The grievance is denied. The discipline was commensurate with the offense and consistent with ODYS's work rules and past practice.

Decision rendered this 20th day of April, 2009 at Ironton, Ohio.



Craig A. Allen
Arbitrator