

#1032

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 35-04-20082208-046-01-03

The Ohio Civil Service Employees
Association, AFSCME Local 11

GRIEVANT: Franklin Kulp

AND

Ohio Department of Youth Services
Indian River Juvenile Correction Facility

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: June 8, 2009

APPEARANCES FOR THE PARTIES

Management: Rochelle Jones, Labor Relations Officer
Management Advocate
Victor Dandridge, Office of Collective Bargaining

UNION: George Yerkes, Ohio Civil Services Employees
Association, AFSCME Local 11,
Union Advocate
Bruce Thompson, Chapter President

PROCEDURAL HISTORY

Indian River Juvenile Correction Facility is hereinafter referred to as "Management". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Franklin Kulp is the "Grievant".

Grievance No. 35-04-20082208-046-01-03 was submitted by the Union to Management in writing on August 26, 2008 pursuant to Article 25 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2006-2009 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Management, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on April 23, 2009 at the Indian River Juvenile Correction Facility. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing. The hearing was concluded on April 23, 2009. The parties elected to file post-hearing briefs. The Arbitrator electronically received timely briefs from both parties on May 7, 2009.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator.

The parties did stipulate to the issue as follows: Was the Grievant, Franklin Kulp, removed for Just Cause? If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE 2006-2009 AGREEMENT

¹ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. ...

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

24.06 - Imposition of Discipline

...Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment...

Work Rule 4.12 Inappropriate or unwarranted use of force

Use of inappropriate or unwarranted force toward any individual under the supervision of the Department or a member of the general public.

Work Rule 5.1 Failure to follow policies and procedures

Included but not limited to the Response to Resistance policy, post orders, timekeeping policies, verbal strategies, etc.

¹ Grievant alleged violation of Article 2: Non-Discrimination and Article 11: Health and Safety on the grievance form. Union did not argue these violations at the arbitration hearing.

BACKGROUND

Set forth in this background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

Grievant was a Juvenile Correctional Officer at the Indian River Juvenile Correction Facility, a facility of the Ohio Department of Youth Services, until August 15, 2008. Grievant had approximately seven years and 5 months of service at the time of his removal.

Grievant was removed from his position regarding an incident that occurred on April 26, 2008 with Youth Thompson, a mental health youth with a history of violent and aggressive behavior. Grievant was playing basketball with a group of twelve (12) youth in the gymnasium. During the course of the activity, Grievant observed Youth Thompson chasing Youth Mangum. When Youth Thompson caught Youth Mangum, Youth Thompson ripped his shirt. Both youths then started pushing each other. Grievant then pushed the man-down signal on his radio. All the youth went to the wall; Youth Thompson and Youth Mangum went to opposite walls. The other youths were still encouraging Youth Thompson to assault Youth Mangum. Youth Thompson left the wall and moved toward the direction of Youth Mangum. Grievant stepped in the middle of his path, and Youth Thompson tried to dodge him. Grievant began shadowing the movement of Youth Thompson to prevent him from reaching Youth Mangum. During this series of events, Grievant also utilized verbal strategies to direct Grievant to discontinue his behavior. Youth Thompson refused to comply with the verbal directives.

Operational Manager Velinda Braithwaite entered the gymnasium in response to the man-down signal with a handheld video recorder. Braithwaite observed Youth Thompson charging toward Grievant. She denied seeing the actual take down due to other commotion in the gymnasium. The videotape captured Braithwaite yelling "Kulp!" Braithwaite later explained that she yelled Grievant's name to stop him from the intervention until appropriate staff arrived to the gymnasium.

Youth Thompson stepped backward. Figure 1 of the handheld video series depicts the body of the youth angled with his hand clinched in fists at his sides. Grievant embraced Youth Thompson by wrapping his arms around his back in an effort to restrain him. Youth Thompson then engaged in some wrestling techniques where he maneuvered his arms and hands to the front, and proceeded to move his arms and hands up the front of the Grievant's body until he had Grievant in a head lock and asserted pressure. Once in a headlock, Grievant told Youth Thompson to release his grip; Youth Thompson refused. Grievant then lifted Youth Thompson off the ground and took him down to the floor. Grievant fell on top of Youth Thompson. Youth Thompson still did not release his grip. Braithwaite and other staff assisted in removing Youth Thompson's grasp on Grievant's head. Grievant then stood and watched the other staff restrain Youth Thompson.

Grievant was terminated from his position due to charges of inappropriate or unwarranted use of force and failure to follow policies and procedures. The Agency has a zero tolerance for the charge of inappropriate or unwarranted use of force. Grievant had no prior active discipline at the time of the removal. With the exception of 2001 evaluation, his performance evaluations indicate that Grievant met the expectations of Management throughout his tenure.

The Union filed its grievance on August 26, 2008 alleging a violation of Article 24. The grievance was not resolved within the procedure established

by the collective bargaining agreement, and was properly advanced to arbitration.

POSITIONS OF THE PARTIES

MANAGEMENT

Management contends that Grievant used excessive force in his efforts to restrain the youth inmate, and said actions constitute a violation of General Work Rules Policy 103.17, specifically Work Rules 4.12 - Inappropriate or unwarranted use of force and 5.1- Failure to Follow Policies and Procedures, and therefore the removal was for just cause.

Management contends that Grievant was aware of ODYS's policies and procedures, trained on response to resistant techniques, yet failed to use minimum amount of force necessary to gain compliance from the youth, and the criteria necessary for the utilization of Emergency Defense Response was not present.

Management contends that the removal was just, and was neither arbitrary nor capricious. The discipline was commensurate with the offense and was in accordance with the Department work rules and collective bargaining agreement.

Management requests that Grievance No. 35-04-20082208-046-01-03 be denied.

UNION

Union contends that Grievant was removed from his position as a Juvenile Correction Officer without Just Cause, and in violation of the principles of progressive discipline.

Union contends that Grievant responded appropriately to the resistant youth, acted to protect another youth and himself from harm, and properly exercised "emergency defense". Management failed to consider all the relevant facts and circumstances, and there was no just cause for discipline.

Union contends that given the Grievant's seven-year tenure and no active discipline record, the termination was made solely for punishment.

Union requests that Grievance No. 35-04-20082208-046-01-03 be sustained, and that Grievant be reinstated to his position as Juvenile Corrections Officer, the termination be stricken from his record including any employee electronic record, all lost wages, less any interim earnings and appropriate deductions including union dues, all leave balances that would have accrued from the date of removal, no loss in seniority, the post, shift and good days that Grievant held when he was removed and payment for any medical, dental or vision expense that would have covered under his insurance less appropriate deductible and co-payments.

DISCUSSION

The Union opines that the standard of review should be based upon the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, citing Graham vs. Connor, 490 U.S. 386, 396 (1989). In Graham, plaintiff sued for damages arising from law enforcement use of physical force at an investigatory stop under a 1983 action. The United States Supreme Court established the standard of review for civil rights violations claiming excessive use of force. The Court held that the question to be resolved is whether the amount of force used by the officer was reasonable under the circumstances to control the behavior of Plaintiff. Id.

This Arbitrator disagrees with the application of the Graham standard of review. The matter in the instant case arises from a labor relations dispute. The review is thus based on the reasonableness of the policies and work rules of the Agency, whether the policies were communicated to the employees, whether the employees received applicable training to comply with policies or work rules, and were these policies or work rules consistently applied in the Agency.

The policy in the instant case is set forth at Policy No. 301.05 revised, effective September 27, 2006. Provision IV Procedures (A) provides in pertinent part...

"The Ohio Department of Youth Services recognizes five levels of youth resistance and authorizes four levels of staff response. ... Staff shall choose a reasonable level of response to gain control of the situation based on departmental policy, their physical capabilities/characteristics, training, experience, assessment of the situation, and youth's physical capabilities/characteristics."

The Agency policy therefore sets forth the standard of review.

The Response to Resistance Continuum identifies the five levels of youth resistance. Those levels are verbal resistance, passive resistance, active resistance, destructive resistance and combative resistance. Management argues that Youth Thompson's behavior should be characterized as active resistance. Active resistance is defined by policy as physically evasive movements by youth to defeat staff's attempts to gain control, ie. bracing, tensing, attempting to push or pull away from staff, but never attempt to strike staff. This position ignores several salient facts. The man-down signal was given due to the ensuing tension between Youth Thompson and Youth Mangum. What started out as horseplay during basketball ended with Youth Thompson ripping Youth Mangum's shirt. Grievant, the only staff in the gymnasium signaled for further staff assistance. Grievant then separated the youths on opposite ends of gymnasium. Youth Thompson repeatedly attempted to charge Youth Mangum. The videotape, the investigation report, witness statements and testimony introduced, evidence that Youth Thompson attempted to assault Youth Mangum. Specifically Youth Thompson stated in the investigation:

" the incident began when he and Mangum got into an altercation. He said JCO Kulp pressed the code and he walked to the wall. Once on the wall, other youths were encouraging him to go after Mangum again. Thompson walked off of the wall and approached Mangum. He said that Mangum ran away and more staffed arrived. He stated that

staff attempted to stop him from going after Mangum by giving him direct orders to stop. JCO Kulp walked back and forth attempting to stop him from going after Mangum. Velinda Braithwaite also told him to stop."

Thus, it is uncontroverted that Youth Thompson was attempting at all times prior to the intervention by Grievant to assault Youth Mangum. Combative resistance, the highest level of youth resistance in which the youth assaults or *attempts to assault other persons* (Emphasis added.), or uses a maneuver in a manner that may result in physical harm to others, more accurately defines Youth Thompson's level of resistance.

Once the level of resistance, combative resistance, has been identified, the policy sets forth the appropriate responses. Level III responses include escort techniques, control techniques, self-defense techniques and emergency defense. Level III responses also include all lower level responses. In accordance with policy, "staff shall use the least restrictive level of response that is reasonably expected to be effective under the circumstances". As the incident unfolds, Grievant utilizes a variety of responses, ranging from verbal strategies, call for staff assistance, shadowing youth and ultimately emergency defense, to gain control of the youth. Further it is clear from the sequence of events that the mere presence of correction officers and verbal commands were ineffective in controlling the youth's behavior. Notwithstanding, it is the use of the last response, emergency defense, which becomes the basis of the removal.

The policy authorizes staff to use emergency defense when all other attempts to control the youth and defend oneself have failed, the resistant youth has superiority over the staff, and there is a risk of serious physical harm to staff. It is undisputed that Grievant shadowed Youth Thompson in an attempt to prevent him from assaulting Youth Mangum. Grievant then engages Youth Thompson by embracing him around his waist. Grievant perceived that Youth Thompson was coming toward him when the youth

stepped backward. JCO Moore, another responding officer, perceived the Youth Thompson was darting toward Youth Mangum when the youth stepped backward, and described the contact between Grievant and Youth Thompson as "a meet and greet". Operations Manager Braithwaite testified that she saw Thompson charge and attempt to go after Youth Mangum when he stepped backward. The video depicts Youth Thompson stepping back with his hands clinched in a fist with his right leg and his left knee bent giving the impression that he is postured to run. Youth Thompson explained that he had taken a step backward to brace himself because Grievant was approaching him. The conflicting testimony does not affect the credibility of the witnesses but depicts the individual perception of the witness at the time of the incident.

Youth Thompson responds by moving his arms to the front, and bringing his arms upwards around Grievant's neck and then his head. Grievant, who suffers from aneurysms, felt threatened by the pressure being asserted against his head with his medical condition. Grievant told the Youth Thompson to release his grip; Youth Thompson did not. Grievant then lifted the Youth Thompson off the floor, and took him down to the ground. Youth Thompson still did not release his grip until his hands were physically removed with the assistance of the other officers. It is not disputed that there was no self-defense tactic taught for this situation.

Grievant employed an emergency defense technique, a take down, to free his head from Youth Thompson's grip. Grievant testified that once Youth Thompson started resisting he became off balance. Once he was in the headlock, he felt that Youth Thompson was gaining superiority and that he was at risk of harm due to the untreated aneurysm in his brain. When the following question, if a youth had his arms around JCO Kulp's head and was pressing tightly, and in his judgment the officer felt that the youth had

gained superiority over him, could he use emergency defense, was posed to Don Burke, training manager, Mr. Burke responded affirmatively.

Management asserts that but for Grievant embracing Youth Thompson, the struggle between the two, Grievant and Youth Thompson, would not have occurred. Management argued that this technique of embracing, Grievant wrapping his arms around the youth to hold him, is not a technique taught or approved by the Agency. However, Grievant testified that one (1) week prior to the incident he was engaged in another incident with Youth Thompson and another youth, and utilized the same technique with compliance by Youth Thompson and without disciplinary action by Management. Grievant stated that the technique worked at that time, and he thought it would work again in this instance. A fundamental element of just cause is notice. An employee must know or reasonably be expected to know ahead of time that engaging in the improper conduct will likely result in discipline or discharge. Management cannot discharge for a technique where no discipline was issued one week earlier.

The chief element of the just cause standard is the existence of sufficient proof that the employee engaged in the conduct for which he was discharged or disciplined. It is well established in labor arbitration that where, as in the present case, an employer's right to discharge an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proving that the discharge of an employee was for just cause. The Arbitrator is persuaded and finds that the Management has not satisfied its burden of proving that the Grievant acted outside the Response to Resistance Continuum and engaged in the conduct for which he was removed.

The Arbitrator finds that Grievant was removed without just cause and therefore Grievance no. 35-04-20082208-046-01-03, is sustained.

AWARD

Having heard, read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance no. 35-04-20082208-046-01-03 is sustained. The Grievant was removed without just cause, and the grievance is granted.

Grievant is to be reinstated forthwith to his former position of Juvenile Correction Officer with his post assignment at C-Unit restored with good days and is to be made whole including being given back pay and commensurate benefits for the period from the date of his termination from employment with the Company to the date of his reinstatement. The termination is to be stricken from his record including any employee electronic records.

Grievant is granted full back pay, less any interim earnings and appropriate deductions including union dues, and benefits including but not necessarily limited to healthcare benefits and reimbursements, PERS contributions all leave balances that would have accrued from the date of removal, and no loss in seniority. Because the record does not establish that the Grievant regularly worked both mandated and voluntary overtime, no overtime is granted.

The Arbitrator retains jurisdiction over this matter for the sole purpose of resolving any issue any dispute in the interpretation and application of the remedy. Such retention of jurisdiction shall be for a period of sixty (60) days from the date of this Award. A request to the Arbitrator to exercise jurisdiction shall be made in writing as to the exact issue and shall be served on the other party at the same time that it is filed with the Arbitrator. If neither party advises the Arbitrator of the existence of a dispute regarding

the remedy directed herein by that date, the Arbitrator's jurisdiction over this grievance shall then cease.

Dated: June 8, 2009

/s/ Meeta Bass Lyons

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio