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ARBITRATION DECISION

July 15, 2009

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GENERAL COUNSEL

In the Matter of:

State of Ohio, Department of Youth Services,)
Scioto Juvenile Correction Facility)

and)

Ohio Civil Service Employees Association,)
AFSCME Local 11)

Case No. 35-07-20081020-0019-01-03
Corey Dorsey, Grievant

APPEARANCES

For the State:

Melinda Hepper, Labor Relations Officer
Victor Dandridge, Labor Relations Specialist, OCB
Larry L. Blake, Labor Relations Officer
Joan Olivieri, Bureau Chief, Labor Relations
David Haynes, Senior Investigator
Don Bird, Training Manager
Tiffany Jamison, Social Worker

For the Union:

Jennie Lewis, Staff Representative
Ricardo Volley, Chapter President
Corey Dorsey Grievant
Karl Wilkins Jr., Chief Steward
Cassell Causey, Juvenile Correctional Officer
Victoria Jackson, Unit Manager

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant is Corey Dorsey. He was hired by the Department of Youth Services on January 23, 2006. He worked as a Juvenile Correctional Officer at the Scioto Juvenile Correctional Facility. SJCF is the reception center for the males and females entering any of the correctional facilities. It also houses the entire female population.

The events giving rise to the grievant's removal occurred on April 2, 2008. On that day, the grievant was working in Carver Cottage along with David Evans, another JCO, and Victoria Jackson, the Unit Manager. At some point in time, the grievant ordered DL, who was talking in the television area in violation of the rules, to go to his room. When the youth refused to comply and became verbally abusive, the grievant called William Samuels, a JCO at Jefferson Cottage, for assistance and informed Victoria Jackson, the unit manager, that a planned use of force might be necessary. She went to the television area with a video camera to record the possible use of force.

When the grievant returned to the television area, he again directed DL to return to his room. DL refused to comply and a physical confrontation ensued. The grievant, Evans, and Samuels fell into a chair and then on to the floor. In the process, DL spit on the grievant and hit him in the head. The state claims that while DL was lying on the floor in a face down position with Evans attempting to control his legs and Samuels his upper body, the grievant punched him in the head twice. The union asserts that the grievant did not punch DL; rather, the arm motions seen on the video recordings from the surveillance cameras in the area show him trying to get DL's hands out from under him so he could be handcuffed.

While DL was being restrained on the floor by Evans and Samuels, the grievant stepped away. He took off his fleece jacket and duty belt and threw them on the floor. The testimony of several witnesses indicates that the grievant challenged DL to fight. At that point, Cassell Causey, a JCO from another cottage, came into Carver to use the restroom. He observed the grievant was very angry and was trying to get to DL who

remained on the floor where he was restrained by Evans and Samuels. Causey prevented the grievant from reaching DL and eventually escorted him from the cottage. DL was subsequently handcuffed and placed in seclusion.

David Haynes, a Senior Investigator in the Chief Investigator's Office, was assigned to investigate the grievant's alleged use of inappropriate or unwarranted force. He interviewed and took statements from the participants in the incident and witnesses, including several youths and reviewed the video recordings from the surveillance cameras in the television area. On April 7, 2008, Haynes issued his report upholding the allegations against the grievant.

On June 17, 2008, a pre-disciplinary meeting was held. The grievant was charged with violating Policy 103.17 as follows:

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,

Rule 5.1 - Failure to follow policy and procedure, included but not limited to the response to resistance policy, post orders, timekeeping policies, verbal strategies, etc., and

Rule 5.12 - Action that could harm or potentially harm an employee, youth, or a member of the general public.

On September 19, 2008, Keith Williams, the hearing officer, found just cause to discipline the grievant. As a result, the grievant was removed on October 8, 2008.

On October 17, 2008, the union filed a grievance on behalf of the grievant. It charged that he was removed without just cause and that the state's action violated Article 24, Sections 24.01, 24.03, and 24.05 of the collective bargaining agreement. The union asked that the grievant be reinstated and made whole.

When the grievance was denied at step three of the grievance procedure on November 26, 2008, it was appealed to arbitration. The hearing was held on June 11, 2009. Written closing statements were received on June 26, 2009.

ISSUE

The issue as agreed to by the parties is:

Was the Grievant, Corey Dorsey, removed for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 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.

Disciplinary action shall include:

- A. One or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. working suspension;
- D. one or more fines in an amount of one (1) to five (5) days, the first time an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB;
- E. one or more day(s) suspension(s);
- F. termination.

* * *

24.05 - Imposition of Discipline

* * *

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

* * *

STATE POSITION

The state argues that General Work Rules Policy 103.17, Management of Resistant Youth Behavior Policy 301.05, and the Standard Operating Procedures are central to its case. It points out that they provide a guide to procedures to manage resistant youth behavior, indicate what constitutes an infraction, and provide a schedule of disciplinary penalties. The state notes that the grievant acknowledged receiving these policies and has 2½ years of experience working under them.

The state contends that there was a thorough investigation of the incident leading to the grievant's removal. It states that Haynes interviewed four youths on the unit who witnessed the incident. The state observes that Haynes indicated that they said that the grievant hit and/or punched DL and that the grievant had to be held back from attacking DL. It reports that Haynes stated that one of the youths reported that the grievant directed inflammatory comments at DL.

The state maintains that the testimony of staff who were present at the time of the incident supports its case. It points out that Causey testified that the grievant was "very upset" and that he had to keep the grievant from going after DL. The state notes that he indicated that once he had the grievant off the unit, the grievant told him that could not be expected to take DL's spitting and punching.

The state claims that the testimony of Tiffany Jamison, a Social Worker, also supports its position. It states that she reported that she saw the grievant remove his coat and utility belt and throw them on the floor. The state adds that she testified that he made comments to DL like, "you know, we can bang these things, you just let him go, we'll handle this like men." (State Written Closing Statement, page 4)

The state argues that the grievant violated the response to youth resistance continuum contained in Policy 301.05. It observes that Don Bird, the Training Manager, testified that the video showed the grievant at DL's head even though there is no

technique to control a youth from the head area. The state adds that Bird also indicated that he saw nothing that would have justified punching DL.

The state contends that the testimony of Joan Olivieri, the Chief of Labor Relations, explains the department's decision to terminate the grievant. It points out that she revealed that the grievant's actions "were viewed as a blatant disregard for youth and staff safety and security and wholly outside the scope of permitted responses." (State Written Closing Statement, page 5) The state notes that she stressed that the Director and the department take a "firm stance" in all use of force cases.

The state also relies on Jackson's testimony. It acknowledges that she testified at the arbitration hearing that she did not see the grievant punch DL but stresses that during her April 10, 2008, investigatory interview she reported that she saw the grievant "swing at, swing in the direction" of DL. (State Written Closing Statement, page 5) The state observes that Jackson was removed for failing to report the grievant's inappropriate and unwarranted use of force.

The state questions the union's claim that DL locked his hands under his body to thwart the staff's attempt to restrain him. It states that Samuels made no notation of this claim in his intervention report or during his investigatory interview and, in fact, indicated that he had DL's left arm. The state notes that Evans also made no mention of DL locking his arms under his body and indicated that once DL was on the floor, the grievant was not involved in the restraint. It emphasizes that the grievant did not make this claim in his Intervention Report, investigatory interview, or pre-disciplinary meeting. The state claims that "even if the youth was resisting and locking his hands, it would make more sense for the Grievant to stay on the ground and assist, rather than stand up, strip his gear and go after the youth." (State Written Closing Statement, page 6)

The state charges that the grievant remembered more at the arbitration hearing than at his investigatory interview just 12 days after the incident. It reports that at his interview, he could not tell what part of DL's body he was trying to control, what part he

played in the restraint, or explain his arm motion toward DL's head. The state notes, however, that "the Grievant was sure to report that the youth spit on him and punched him." (State Written Closing Statement, page 7)

The state claims that the grievant created a dangerous situation for DL and staff. It states that the grievant threw his gear to the floor and tried to go after DL. The state indicates that a video recording of the incident reveals that Samuels had to reposition himself to protect DL and that Causey had to physically remove the grievant from the unit. It asserts that the grievant "was not having a bad day -- he was getting ready to fight the youth." (Ibid.)

The state maintains the department cannot afford to have the grievant on its staff. It observes that JCOs must deal with juvenile offenders who are not "the kids next door." The state worries, "if the Grievant feels the instinct to punch a youth in this situation who knows what his instinct will be in the next situation?" (Ibid.)

The state contends that it takes very seriously punitive and egregious actions of staff in dealing with youths in its custody. It points out that in Department of Youth Services/Ohio River Valley Correction Facility and OCSEA/AFSCME, Local 11; Case No. 25-20-20060720-0024-01-03; February 10, 2007, Arbitrator Robert Brookins upheld its decision to remove a staff member who kicked a youth after the youth bit him, spit on him, and kicked him. The state notes that in 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; Case No. 35-20-20080707; February 26, 2009, Arbitrator Craig Allen agreed with its decision to remove a staff member who kicked a youth who had tackled him.

The state concludes that the grievant is not fit to work in the field of corrections. It asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that there is not just cause for the grievant's removal. It claims that it demonstrated through video recordings and witness testimony that the state acted without evidence to support its decision to terminate the grievant. The union states that "at no time did [the grievant] use excessive or unwarranted force" and that "the actions used to diffuse the situation were entirely reasonable." (Union Written Closing Statement, page 1)

The union contends that the grievant responded properly when DL ignored his order to go to his room. It points out that the grievant notified Jackson that a planned use of force was necessary. The union notes that DL pushed the grievant and they fell into a chair with DL on top of the grievant. It stresses that at that point, DL spit on the grievant and struck him on the left side of his head.

The union maintains that when DL was taken to the floor by the grievant and two other JCOs, DL locked his hands under his body to avoid the restraint. It states that the grievant attempted several times to retrieve DL's hands. The union observes that DL was eventually handcuffed and was then taken to seclusion.

The union reports that the grievant was injured in the incident. It indicates that he sought medical attention at the institution and completed an accident report. The union notes that the grievant was also seen by the staff at an urgent care center.

The union disputes the state's claim that DL was injured. It suggests that the alleged injury to DL's face reflects "several issues with his facial features prior to the incident including a scar and a defect in one eye." (Union Written Closing Statement, page 2) The union adds that DL was not seen by medical personnel until April 3, 2008.

The union maintains that the grievant is a calm and even-tempered person. It acknowledges that he was upset when DL spit on him and struck him but claims that his response was "not unreasonable given the circumstances." (Ibid.) The union emphasizes that several witnesses testified that the grievant's behavior on the date at issue was "atypical for him." (Ibid.)

The union reports that several staff members did not see the grievant hit DL. It points out that Jackson, who videotaped the incident with a hand-held camera, testified that she never saw the grievant hit DL. The union observes that in contrast to this, "all witnesses ... stated that [DL] was very combative, both physically and verbally." (Ibid.) The union claims that "it is not reasonable to expect an individual who is physically assaulted to remain emotionless in a situation like that one which occurred on April 2, 2008." (Union Written Closing Statement, page 3)

The union disputes the charge that the grievant violated Rule 5.1 by not documenting the incident. It reports that the grievant completed and logged a report on the event of the same day they occurred. The union notes that Jackson did the same thing.

The union acknowledges that criminal charges were brought against the grievant. It indicates that the video recording of the incident and the testimony of those present was provided to the court. The union stresses that the grievant was acquitted of the charges against him.

The union argues that the grievant responded appropriately to the situation. It states the techniques and procedures used to diffuse the situation were reasonable. The

union notes that the grievant followed the policy and procedures by calling for assistance and by implementing a planned use of force with other staff.

The union suggests that the grievant's record should be considered. It points out that he is aware that it is his duty to provide security for the youths in the institution. The union observes that the grievant has 2½ years of service at the institution with no previous discipline and good performance evaluations.

The union concludes that the grievance should be sustained. It asks the Arbitrator to reinstate the grievant to his former position and to make him whole in every way, including any medical or hospital expenses from the date of his removal until his reinstatement.

ANALYSIS

The Arbitrator believes that the state had just cause to remove the grievant. First, the grievant punched DL in the head while he was being restrained on the floor by Evans and Samuels. This conclusion is based on the testimony and statements of a number of witnesses, including staff and youths. More importantly, the grievant's actions are clearly shown on the video recordings from the surveillance cameras in the television room.

There is no doubt that the grievant's action was inappropriate. At the time the grievant punched DL, the youth was no threat to staff or himself. Furthermore, Bird testified that punching a youth in the head is not a technique used to control a youth and that nothing in the video recordings justified the grievant's action.

The Arbitrator rejects the union's claim that the grievant did not punch DL but was trying to get DL's hands, which he had locked under his body. It is not supported by

what is shown on the video recordings. The claim is also inconsistent with the fact that the grievant did offer this explanation in the statement he gave after the incident or at any prior to the arbitration hearing.

Second, after the grievant punched DL, he stood up and threw his coat and duty belt on the floor and challenged DL to fight. This conclusion is based on the statements of a number of witnesses and Jamison's testimony that the grievant urged Evans and Samuels to let DL go so they could "handle this like men." The grievant's behavior was contrary to his responsibility to de-escalate a situation and could have led to a situation which would have been hazardous for staff and the youths in television area.

The Arbitrator appreciates how the grievant felt. He had been punched in the head and spit on. However, while this constitutes provocation, a JCO is apt to be subject to provocation from time to time and cannot respond to it by punching a youth in the head and challenging him to fight.

Finally, the grievant persisted in his attempt to retaliate against DL. Causey testified that when he entered Carver Cottage to use the restroom, he had to keep the grievant from getting at DL. In fact, the video recordings show that Causey struggled to keep the grievant away from DL. It is not clear what might have happened had Causey not stopped by to use the restroom.

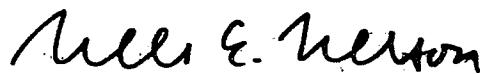
The remaining issue is the proper penalty. The record establishes that the grievant used inappropriate or unwarranted force, a level four offense, and failed to follow the response to restraint policy, a level five offense. The disciplinary grid provides for a five-day suspension to termination for a level four offense and a verbal reprimand to termination for a level five offense.

The Arbitrator believes that the state did not violate the collective bargaining agreement's requirement that discipline be progressive and commensurate with the offense when it terminated the grievant. First, the grievant committed serious misconduct where it is not necessary to employ progressively harsher penalties. Second, while provocation sometimes serves to mitigate the penalty in a case involving a fight between two employees, it does not justify the grievant's response in the instant case. As indicated above, JCOs are likely to be subject to provocation by youths and must react in an appropriate manner to minimize the threat to staff and youths. Finally, the grievant had only 2½ years of service. If he had a longer record of service demonstrating his ability to handle provocation in a proper manner, it would have been easier to conclude that the grievant simply had a bad day and acted out of character.

Based upon the above analysis, the Arbitrator must deny the grievance.

AWARD

The grievance is denied.



Nels E. Nelson
Nels E. Nelson
Arbitrator

July 15, 2009
Russell Township
Geauga County, Ohio