

SUSAN GRODY RUBEN, Esq.
Labor Arbitrator and Mediator
30799 Pinetree Road, No. 226
Cleveland, OH 44124

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

#1066

In the Matter of

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

and

OHIO DEPARTMENT OF
YOUTH SERVICES
Indian River Juvenile Correction Facility

Case No. 35-04-20091224-0064-01-03
Grievant: Brian Chaney

ARBITRATOR'S
OPINION AND AWARD

RECEIVED / REVIEWED

AUG 23 2010

DCSEA-OFFICE OF
GENERAL COUNSEL

This Arbitration arises pursuant to collective bargaining agreement ("the Agreement") between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ("the Union") and the STATE OF OHIO ("the State" or "DYS"), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator, whose decision shall be final and binding pursuant to the Agreement.

Hearing was held June 4, 2010 at the Indian River Juvenile Correction Facility. Both Parties agreed there are no procedural impediments to a final and binding Award by the Arbitrator. The Parties had the opportunity to present

evidence and make arguments. Both Parties submitted written post-hearing briefs.

APPEARANCES:

On behalf of the Union:

GEORGE L. YERKES, OCSEA Staff Representative,
390 Worthington Road, Suite A, Westerville, Ohio
43082.

On behalf of the State:

ROCHELLE JONES, Labor Relations Officer, Ohio
Department of Youth Services, 51 North High Street,
Columbus, Ohio 43215.

ISSUE

Was the Grievant removed for just cause? If not, what is the appropriate remedy?

RELEVANT PORTION OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

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Article 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....

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FACTS

The Grievant has been employed by DYS since 1992. On December 21, 2009, he was removed from his position as a Juvenile Correction Officer at the Indian River Juvenile Correction Facility for alleged use of excessive force in an incident with Youth "T" on September 11, 2009.

The incident occurred when Youth T went into a classroom that was not his and attempted to shut himself in that classroom's bathroom. The Grievant, along with two other CO's, was on the scene to remove Youth T from the bathroom. Youth T physically resisted; he and the Grievant engaged in a physical struggle. The Grievant's supervisor told him to "take down" Youth T. Within a very brief period of time, all the following occurred: Youth T wrapped himself around the Grievant; the Grievant told him to "get the fuck off"; Youth T reached for the Grievant's genitals; the Grievant elbowed Youth T's head three times, resulting in Youth T's head hitting the wall; Youth T was handcuffed; Youth T kicked the Grievant in the genitals; the Grievant either hit Youth T in the forehead or grabbed his shirt.

The Grievant was charged with having violated Ohio Department of Youth Services General Work Rules Policy 103.17, specifically:

- . Rule 4.09P – Use of Excessive Force – without injury
Physical response beyond what was necessary to control/stabilize the situation
- . Rule 5.01P – Failure to Follow Policies and Procedures
 - . Policy 301.05 – Management of Resistant Youth Behavior (Institution)
 - . Standard Operating Procedure 301.05.05 – Response to Resistant Youth Behavior
 - . Policy 301.04 – Verbal Abuse
- . Rule 5.12P – Actions that could harm or potentially harm an employee, youth, or a member of the general public
- . Rule 6.05P – Use of prohibited physical response
Techniques or practices that unduly risk serious harm or needless pain to the youth. May not be used unless in an emergency defense situation to prevent an act which could result in death or severe bodily injury to oneself or to others.

The intentional, knowing or reckless use of the following techniques: restricting respiration in any way, such as applying a chokehold or pressure to a youth's back or chest or placing a youth in a position that is capable of causing positional asphyxia; using any method that is capable of causing loss of consciousness or harm to the neck; pinning down with

knees to torso, head or neck; slapping, punching, kicking or hitting; using pressure point pain compliance and joint manipulation techniques other than those approved and trained by ODYS; modifying mechanical restraint equipment or applying any cuffing technique that connects handcuffs behind the back to leg shackles; dragging or lifting of the youth by the hair or ear or by any type of mechanical restraints; applying any type of physical response to a youth's wrist, once the youth is placed in handcuffs; using other youth or untrained staff to assist with the restraints; securing a youth to another youth or to a fixed object, other than an agency-approved restraint bed.

PARTIES' POSITIONS

State Position

The Grievant used excessive force while restraining Youth T, despite knowing the situation did not meet the criteria for emergency defense. The Grievant compounded the infraction by using a prohibited physical response, when he elbowed Youth T three times in the head.

On September 11, 2009, Youth T refused to leave the school hallway after he had been removed from class. He went down the school hallway, entered a classroom, and went into the bathroom. He tried to shut the bathroom door, but was stopped by Operations Manager Beddell.

The Grievant and JCO Brian Mathews went into the bathroom to restrain Youth T. During the restraint, JCO Mathews had Youth T's right hand and arm up toward the youth's upper body, while the Grievant had Youth T's left arm pinned around the Grievant's body. The Grievant then used a prohibited physical response; he elbowed Youth T three times in the head. After Youth T was restrained and handcuffed, he kicked the Grievant. In response, the Grievant hit Youth T on his forehead.

Emergency defense is permitted only when:

1. All other attempts to control the youth and defend oneself have failed; and

2. The resistant youth has superiority over the staff; and
3. There is a risk of serious physical harm to staff.

None of these three criteria were met:

1. The Grievant tried to C-grip Youth T (i.e., grab the youth's lower and upper arm) and failed. The Grievant made only this one attempt to control the youth.
2. Youth T did not have superiority over the Grievant. There was a 9" and 100 lbs. difference between the two, plus there were two other staff present in the bathroom.
3. There was no risk of serious harm to staff.

DYS agrees the OM did not handle the situation as well as he could have. The OM's actions or inactions in handling the situation have been addressed. At no time, however, did the OM tell the Grievant to elbow Youth T. The Grievant's actions were his own.

The State's expert witness on Response to Resistance ("R2R") testified when the Grievant struck Youth T with his elbow, there was no need for emergency defense. There are clearly prohibited physical responses that cannot be used; elbowing a youth in the head is one of them.

The State's Investigator, Timothy Gillis, testified that during his investigatory interview with the Grievant, the Grievant had stated Youth T did not hit him in the genitals during the restraint prior to the Grievant striking Youth T three times in the head with his elbow; the Grievant had stated Youth T merely grabbed the Grievant's pants. The Grievant had admitted he struck Youth T two or three times in the head. The Grievant had claimed he panicked and retaliated with emergency defense responses.

Youth T testified he did not hit or try to hit the Grievant before the Grievant elbowed him in the head. He admitted to kicking the Grievant after being elbowed

in the head. Youth T further testified after he was handcuffed, the Grievant hit him in the head with his hand.

Joan Olivieri, Bureau Chief of Employee Relations for DYS, testified the Director of DYS takes a strong stance on excessive or prohibited use of force cases. She further testified the Grievant had two active disciplines for not following policies and procedures:

1. 10-17-08 -- Written Reprimand – Policy 301.04 – Verbal Abuse
The Grievant was overheard using profanity while talking to a youth.
2. 12-30-08 – Written Reprimand – Policy 301.05 – Management of Resistant Youth Behavior (Institution)
Standard Operating Procedure 301.05.05 – Response to Resistant Youth Behavior
The Grievant pulled a youth over the back of a couch onto the floor.

Bureau Chief Olivieri further testified the disciplinary grid calls for 5 days or removal when an employee has an active written reprimand and has then committed a Level 6 Major Infraction. She explained the incident rose to the level of removal because the Grievant used an excessive, prohibited physical response on the youth.

JCO Burns testified Youth T had the Grievant by the neck with both hands/arms; the video, however, does not show Youth T had a choke hold on the Grievant. JCO Mathews stated the Grievant entered the bathroom first, he entered second and he immediately grabbed Youth T's right arm.

It is improbable Youth T attempted to grab the Grievant's genitals if both his arms were restricted. The video shows Youth T's right arm was controlled by JCO Mathews and Youth T's left arm was behind the Grievant's back. Youth T testified he did not grab the Grievant's genitals.

The Grievant himself testified he struck Youth T three times. He testified Youth T did not choke him, nor did he grab or touch his genitals, but in fact, grabbed at the Grievant's pants only. The Grievant also stated he told Youth T,

“Get the fuck off me,” and he told Youth “J” to “shut up” several times. He further testified he went after Youth T after he was in handcuffs. Finally, he admitted he elbowed Youth T in the head prior to Youth T kicking him.

DYS has a zero tolerance of prohibited physical responses and excessive use of force. JCO’s are to provide safety, security, and custodial care to the juvenile offenders. The Grievant’s actions were contrary to this role.

The Grievant admitted he did not use an approved R2R technique when he restrained Youth T. The Grievant testified Youth T’s left arm, draped around the Grievant’s shoulder/neck area, posed no threat to him. No justification existed for using any elbowing or striking techniques on Youth T. The Grievant was removed for just cause pursuant to Article 24 of the Agreement. The discipline was commensurate with the offense and consistent with DYS work rules and past practice.

Union Position

The Grievant did what he had to do to protect himself. The State did not offer in the record what the Grievant should have done. He would not have even been in the situation he was put in if the OM had initiated a planned intervention. From the position the Grievant found himself in, there was no approved technique with which he could have extricated himself.

The Grievant believed Youth T was reaching for his genitals with intent to do injury. JCO Burns testified he saw Youth T reaching for that area. The State attempted to argue JCO Matthews had hold of Youth T’s right arm throughout the struggle, inferring Youth T could have never been close to the Grievant’s genital area. But the photographs in the record tell a different story. JCO Matthews does not have control of Youth T’s right arm the whole time.

The record shows the Grievant used just enough force to gain compliance from Youth T. The Grievant's elbow motions in the video are tempered by the confined space and Youth T's close proximity. The Grievant's actions may not have been pretty, but they got the job done.

In a case such as this, field discretion becomes the deciding factor. There is a presumption that must be given that the actions taken by the Grievant were done in good faith. The presumption draws its essence from the policy itself, which states an officer "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 capabilities/characteristics."

"Assessment of the situation" implies independent judgment. The State would have the Arbitrator believe that departmental policy determines what is reasonable. That is not the case, nor is it practical. As the U.S. Supreme Court held in Graham v. Conner, 490 U.S. 386, 396 (1989), "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Questions involving use of force should be judged from the perspective of a reasonable officer coping with a tense, fast-evolving situation, and not from the armchair of DYS Central Office.

OPINION

The State has the burden of proving just cause for the Grievant's removal. In its attempt to do so, it analyzed the video of the incident virtually frame by frame, pointing out when the Grievant took physical actions inconsistent with written procedures. The most egregious of the Grievant's physical actions was

when he elbowed Youth T in the head three times, resulting in Youth T's head hitting the bathroom wall.

The Grievant's actions, however, must be viewed in context. The incident took place in a very small, one-toilet bathroom. At some points during the incident, there were as many as four officers plus Youth T in this small bathroom attempting to gain control over him. Floor space was at a minimum and the walls were close in. Youth T had wrapped himself around the Grievant and was grabbing at his crotch. The Grievant told Youth T to "get the fuck off" him, but Youth T stayed wrapped around the Grievant. To get Youth T off him and keep him away from his genitals, the Grievant elbowed Youth T three times. Being in such a confined space, Youth T's head hit the nearby wall each time the Grievant elbowed him. After Youth T was cuffed, he kicked the Grievant in the genitals. In a visceral, instantaneous reaction, the Grievant either grabbed Youth T's shirt or hit him in the forehead.¹

The Grievant found himself in a difficult situation due to the inaction of the Operations Manager, who, the record shows, should have implemented a planned intervention rather than a knee-jerk "take him down." The record shows Youth T was in no immediate danger in the small bathroom; there was time to orchestrate what should have been done. Once Youth T was physically wrapped around the Grievant in a confined space, didn't respond when the Grievant told him to get off, and reached for the Grievant's genitals, it is hardly surprising the Grievant reacted physically. While elbowing Youth T in the head three times was certainly not an ideal reaction, it did not physically harm Youth T. Nor is it surprising the Grievant reacted physically after Youth T kicked him in his genitals. Again, Youth T was not harmed by the Grievant's physical reaction.

¹ It should be noted the record shows Youth T suffered no significant injury and needed no medical attention, while the Grievant ended up at the hospital with a bruised scrotum.

It is unclear from the video at what points during the scuffle JCO Mathews had control of Youth T's right hand and arm. Certainly, the Grievant cannot be expected to have known during the incident when this was the case. Similarly, the Grievant cannot be expected to have known during the incident whether Youth T was reaching for the Grievant's pants or reaching for his genitals. In a difficult to navigate space, with limited information and minimal direction, the Grievant did the best he could under challenging circumstances.

AWARD

For the reasons set out above, the grievance is granted. DYS did not have just cause to remove the Grievant from employment.

Accordingly, by September 17, 2010, the State shall make the Grievant whole, which shall include:

1. reinstatement of the Grievant to his former position with no loss in seniority, and the post, shift and good days the Grievant had when he was removed;
2. lost wages, including roll call pay, holiday pay, premium pay, step increases and longevity pay, lost overtime opportunities, less any interim earnings and payroll deductions including Union dues;
3. employer and employee shares of PERS contributions;
4. all leave balances that would have accrued; and
5. reimbursement for any medical, dental, or vision expense that would have been covered under the Grievant's health insurance, less any applicable deductible expense and co-payments.

The State will give the Grievant a detailed, written accounting of items 2 through 5 above.

The removal will be purged from employment records concerning the Grievant, including electronic records.

The Arbitrator shall maintain jurisdiction for 60 calendar days from the date of this Award with regard to remedy only.

Dated: August 20, 2010

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator