Thomas J. Nowel
Arbitrator and Mediator
Cleveland, Ohio 44113

#1108

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In The Matter of a Controversy Between:	)	Grievance No.
	)	35-04-20120416-
Ohio Civil Service Employees Association,	)	0011-01-03
Local 11 AFSCME, AFL-CIO	)	
	)	ARBITRATION
and	)	OPINION AND
	)	AWARD
Ohio Department of Youth Services	)	
Indian River Juvenile Correctional Facility	)	DATE:
	)	November 12,
Re: Brian Chaney Termination	)	2012

APPEARANCES:
Rusty Burkepile, Advocate for OCSEA, Local 11 AFSCME; Larry L. Blake, Advocate for the Ohio Department of Youth Services; and Victor Dandridge for the Ohio Office of Collective Bargaining.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, Local 11 AFSCME. The parties are in disagreement regarding the termination of Brian Chaney, a Youth Specialist at the Indian River Juvenile Correctional Facility. The Grievant, Mr. Chaney, was terminated effective April 9, 2012 by the Employer following an incident with a juvenile. The Union states that the termination is not for just cause. Mr. Chaney grieved the termination on April 17, 2012, and the Employer denied the grievance at Step 3 of the Grievance Procedure on June 10, 2012. The Employer waived mediation of the grievance on June 6, 2012, and the matter was then moved to arbitration.

The Arbitrator was selected by the parties, pursuant to Article 25 of the collective bargaining agreement, to conduct a hearing and render a binding arbitration award. Hearing was held on September 20, 2012 at the Indian River Juvenile Correctional Facility in Massillon, Ohio. At hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits including videos. Witnesses were sworn by the Arbitrator. The parties stipulated that the grievance was properly before the Arbitrator.

ISSUE

The parties stipulated to the following issue to be decided by the Arbitrator. "Was the Grievant, Brian Chaney, removed for Just Cause? If not, what shall the remedy be?"

JOINT STIPULATIONS

1. The Grievant was hired June 5, 1992.

2. The Grievant was removed from his position as a Youth Specialist on April 9, 2012.

3. The Grievant had the following active discipline at the time of his removal: One-day suspension on 8/8/2011 for Rule 2.04P, 5.01P and 5.25P.

4. The date of the incident was January 30, 2012. The Grievant was at work on stated date.

5. The grievance is properly before the Arbitrator.

WITNESSES

TESTIFYING FOR THE EMPLOYER:
David Haynes, Chief Inspector's Office
Youth R
Don Bird, Instructor/Instructor Trainer
Rochelle Jones, Bureau Chief, HR and Employee Relations

TESTIFYING FOR THE UNION:
Edward M Pruitt, Youth Specialist
Rosa L. Sanchez, Youth Specialist
Jake Steuer, Teacher
Brian Chaney, Grievant

RELEVANT PROVISIONS OF AGREEMENT

Article 2 – Non-Discrimination

2.01 – Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status. Except for rules governing nepotism, neither party shall discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer may also undertake reasonable accommodation to fulfill or ensure compliance with the Americans with Disabilities Act of 1990 (ADA) and corresponding provisions of Chapter 4112 of the Ohio Revised Code. Prior to establishing reasonable accommodation which adversely affects rights established under this Agreement, the Employer will discuss the matter with a Union representative designated by the President.

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

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 (1) or more oral reprimand(s) (with the appropriate notation in employee's file);

b. One (1) or more written reprimand(s).

c. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

If a working suspension is grieved, and the grievance is denied or partially granted and all appeals exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.

d. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a

major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;

e. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay;

2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

24.03 - Supervisory Intimidation

An employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this Section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the

Employer representative allegedly violating this Section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline Employer representatives who violate this Section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

GRIEVANCE

The grievance of Brian Chaney reads as follows.

Articles 2.01, 24.01, 24.02, 24.03, all other.....

"On 4/9/12, I was fired from IRJCF without just cause. The deck has been stacked against me in as much disparity in treatment. Officers have broke arms, choked inmates on camera and nothing was done, especially not termination. I did not hurt the inmate that I got involved with. I was just protecting myself."

Remedy: "My record to be made whole & any loss of overtime pay be paid back to me in full during my missed time from work."

The grievance was denied by the Employer and was then appealed to arbitration.

BACKGROUND

The Indian River Juvenile Correctional Facility is a maximum security correctional facility located in Massillon, Ohio which houses approximately 148 juvenile offenders between the ages of 10 to 21. Juveniles held at the facility are felony offenders.

The Grievant, Brian Chaney, was a Youth Specialist (Juvenile Correctional Officer) at the facility. His employment commenced on June 5, 1992. The Grievant has one active discipline in his personnel record, a one day suspension.

On January 30, 2012, Youth R was disruptive in his classroom and was sent to the ABC Classroom which is reserved for disruptive youth. Youth R has a history of violent behavior and gang related activity (Jt. Exb. 13). It had been necessary to restrain Youth R at Indian River for violent and disruptive behavior on numerous occasions.

Upon arriving at the ABC Classroom, Youth R became disruptive. He was angry to have been sent there. The Grievant entered the classroom in possession of a number of documents which were work assignments for Youth R. The Grievant attempted to hand the assignments to Youth R who refused to accept the documents and cursed. The Grievant then tossed the documents toward Youth R, and they fell to the floor. Youth R then walked away from the Grievant. Youth R continued in a verbally disruptive manner, and the Grievant called for assistance to remove him from the ABC Classroom. Youth R then walked toward the door and threw a folder at the Grievant which missed his head. He then threw a wadded piece of paper at the Grievant, hitting him in the forehead. The Grievant struck Youth R to the left

side of his head and then took him to the floor. Youth R regained his feet and made a move toward the Grievant who pushed him in the chest. Youth R threw and landed a punch as the Grievant pushed his head. As Youth R continued to swing at the Grievant, Manager Warmath, who had been called to assist with the removal of the youth, restrained and secured him. The Grievant then made a move toward the youth, and Youth Specialist, Mike Pruitt, re-directed him in an attempt to de-escalate the incident. Youth R was removed from the ABC Classroom. The incident between Youth R and the Grievant last approximately six or ten seconds.

The Grievant was placed on administrative leave, the following day, January 31, 2012 pending an administrative investigation (Jt. Exb. 6-26). Following the investigation, a pre-disciplinary hearing was convened on March 20, 2012. The Highway Patrol also reviewed the incident. The Grievant was terminated on April 9, 2012 based on the following rule violations.

Rule 5.01P Failure to follow policies and procedures. Specifically 301.05 – Managing Youth Resistance and 301.05.01 – Use of Force, including attachment (G) Youth Resistance Grid.

Rule 4.09P Physical response beyond what was necessary to control/stabilize the situation.

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 restraint; 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 restraint; securing a youth to another youth or to a fixed object, other than an agency-approved restraint bed.

The termination was grieved and is now before the Arbitrator.

POSITION OF THE EMPLOYER

The Employer argues that the termination of the Grievant was for just cause. He was in violation of the policies which are outlined in the notice of termination of employment. The Grievant struck Youth R with his right hand to the left side of his head and then struck him a second time knocking him to the floor and possibly against a desk. After the youth regained his feet, the Grievant pushed his head as the youth threw a punch. The Grievant attempted to re-engage Youth R after he was restrained by Manager Warmath. The Employer states that the Grievant was responsible for escalating the incident when he threw papers at the youth which fell to the floor.

The Employer argues that the Grievant failed to follow Departmental policies and procedures including Policy 301.05 which provides that "Advanced verbal strategies shall be the preferred response to resistance and shall be utilized, whenever practical, to assist a youth in maintaining or regaining self-control." The Grievant failed to utilize proper verbal strategies when he threw documents at Youth R when he entered the classroom.

The Employer states that evidence shows that the youth was not physically aggressive and was not a threat to others in the classroom. Furthermore, the Grievant should have removed himself from the room if he knew that there was friction between he and the youth. The Grievant also could have requested assistance from other staff in the room but failed to do so.

The Employer notes that the Grievant is six foot four inches and weighs 245 pounds compared to the youth who, at the time, was five foot five and 146 pounds. Clearly the Grievant had no reason to physically confront the youth. The use of physical force is restricted by policy to instances of "justifiable self-defense, protection of others, protection of property, prevention of self-injury, and prevention of escapes and then only as a last resort...." The Grievant's actions were not consistent with Department policy.

The Employer states that the Union's argument, that U. S. Supreme Court Case, *Graham v. Conner*, regarding the reasonable use of force, is relevant in the instant case, lacks merit. This case is governed by the collective bargaining agreement and departmental policies.

The Grievant received significant training during his twenty years of employment in the Department, and Youth Specialists are continually trained on Managing Youth Resistance. The Grievant was a trainer for a period of time. The Employer argues that he clearly understood Department policies regarding disruptive youth, and Don Bird, Department Trainer and Trainer Instructor, testified that the actions of the Grievant were not based on appropriate or approved technique. Appropriate techniques were available to the Grievant in the event

Youth R became a threat to others in the classroom. Furthermore, the throwing of a folder and wadded piece of paper was not a threat to anyone in the room.

The Employer argues further that there was just cause for termination in the instant matter because the Grievant had recently been suspended for one day in August, 2011 for violation of a number of policies relating to the management of youth resistance, use of force and verbal abuse. The Employer argues that it is in compliance with the principle of progressive discipline because, in the instant case, the Grievant used a prohibited physical response that was excessive just months following the previous disciplinary action.

The Employer argues further that the Union's attempt to suggest disparate treatment lacks merit. The Franklin case was settled with an agreement by the parties that it not be brought forward in subsequent arbitrations or litigation. Other cases are decided based on individual circumstances and merit.

The Employer argues that it had just cause to terminate the employment of the Grievant. He over-reacted to the throwing of the file and paper; he could have injured Youth R; he refused to accept responsibility for his actions; and he exhibited no contrition for his acts. The Ohio Department of Youth Services has a zero tolerance policy regarding prohibited physical responses. The Arbitrator is requested to deny the grievance of the Union in its entirety.

POSITION OF THE UNION

The Union argues that the termination of the Grievant was not for just cause. Brian Chaney's actions were reasonable in that he protected himself and other

youth and employees from bodily injury. And Youth R was not injured as a result of the incident. In addition, the termination lacks just cause as the Employer had other options short of termination.

The Union states that the Grievant is a twenty year veteran of the Department and was a former Response to Resistance Instructor. He is well trained in appropriate technique and reacted to a physical assault as he had been previously instructed. He utilized the least restrictive level of response considering the actions of Youth R. The Grievant used a permissible technique which was necessary to control aggression. The Grievant was successful in preventing injury to himself and the involved youth.

The Union argues that the United States Supreme Court, in the case of *Graham v. Conner*, stated that the appropriateness of use of force must be judged from the perspective of police officers on the scene as opposed to "the 20/20 vision of hindsight." In reviewing an incident, actions should be "judged from the perspective of a reasonable officer coping with a tense, fast-evolving situation." In the instant case, the incident evolved quickly, and the Grievant's response was justified in light of the *Graham/Conner* standard.

The Union argues further that the disciplinary grid, which is contained in the General Work Rules, does not mandate termination of employment for an employee with a previous one-day suspension, and Section 24.02 of the collective bargaining agreement states that the Employer will comply with the principle of progressive discipline. Department General Work Rules state that disciplinary penalties are to be "determined by considering all relevant circumstances, mitigating or

aggravating." The Union states that the discipline was used for punishment and was not applied evenhandedly as other employees received disciplinary suspensions for the same or similar policy violations (Union Exb. 2).

The Union states that evidence indicates that the Grievant was a good employee who was "well liked and respected by his co-workers." He could be counted on in critical situations. The record is clear that Youth R was engaging in behavior which could cause harm or destruction to others, and this justified the actions of the Grievant. The Grievant did not intentionally hit or slap Youth R, and the Employer failed to prove that this occurred. If the Grievant was in violation of Department policy, the disciplinary grid suggests a suspension. The Employer did not have just cause to terminate the Grievant, and the Union requests that the Arbitrator sustain the grievance; reinstate the Grievant as a Juvenile Corrections Officer; and make him whole for lost wages and benefits.

DISCUSSION

Evidence indicates that Youth R entered the ABC Classroom and was followed by the Grievant who possessed documents which were to be given to him. Youth R refused to accept the documents, and the Grievant tossed them at him. They fell to the floor. The Employer's argument, that the Grievant's actions exasperated an already agitated youth, has merit. The Grievant could have placed the documents on a table and employed verbal de-escalation strategies. It was obvious, at this point, that it would be necessary to remove Youth R from the ABC Classroom due to his anger and disruptive behavior. The youth's refusal to accept

the documents was not surprising based on his general demeanor and behavior. The Grievant acted in an unprofessional manner when he tossed the documents at the youth. He passed on an opportunity to de-escalate and gain control, but instead his actions were the proverbial "tossing gasoline on the fire."

Jake Steuer, the teacher assigned to the ABC Classroom, testified that Youth R stated that he wanted to "fuck staff up" and then stated that he wanted to hit somebody. This obviously created a tense situation in the classroom, one which was being observed by the Grievant. Evidence is clear that Youth R had a history of violence in and out of the detention facility. His statements had to be taken seriously.

Evidence indicates that the Grievant had backed away and was standing near the door to the classroom. Youth R walked toward the door and threw a folder at the Grievant which missed his head and then threw a wadded piece of paper which hit him in the forehead. Youth R was walking toward the Grievant and was within a few feet of him. The Grievant reacted by hitting the youth on the side of his head. The Employer suggests that the Grievant punched the youth, but the Union argues that he pushed the youth away from his space as a defensive matter with an open hand. It is difficult to determine from the video (Jt. Exb. 2) if the Grievant's hand was clenched or in an open position. Jake Steuer testified that the Grievant pushed the youth's head with an open hand. Youth Specialist Sanchez, who was in the classroom, stated during the investigation that she saw the Grievant "shoving R in head at the time and again on floor with an open hand." Youth Specialist Pruitt also testified that the Grievant did not strike or hit Youth R. In the absence of clarity in

the video, the Union's assertion, that the Grievant did not strike the youth with a clenched fist, has merit. Evidence then indicates that the Grievant followed through and took the youth to the floor. There is no evidence that Youth R hit a desk when pushed to the floor by the Grievant. The Employer argues that this maneuver is in violation of policy, and states that the Grievant is significantly taller and weighs significantly more than the youth, and therefore there was no need to take him to the floor in the physical manner in which it occurred. The Union argues that all of this took place in a few seconds, and the Grievant reacted defensively. The Grievant testified at hearing that he "just reacted." He stated that it was a reaction and not technique, and that he "didn't plan it." The Employer's argument, that the Grievant did not follow procedure is meritorious. It is true that the incident happened very quickly which would cause one to act defensively and without thinking about technique and procedure, but the Grievant had been in the position of Youth Specialist for twenty years and was a trainer in techniques used to control situations of this nature, and it was obvious from the moment Youth R entered the room that he would be a problem. The Grievant should have been well prepared to employee strategies to control the youth, but he lost control of the situation by his own actions. He violated policy when he hit Youth R in the head with his open hand and was in violation when he took the youth to the floor using an unapproved physical technique.

Evidence indicates that Youth R swung at the Grievant and hit him in the chest. The Grievant then extended his arms in a defensive move to avoid further physical contact with the youth. The youth was then restrained by Manager

Warmath who had arrived at the classroom following the Grievant's request for assistance. Youth Specialist Pruitt assisted in restraining the youth. Although the youth appeared to be restrained, evidence indicates that the Grievant began to make a move toward him. Specialist Pruitt intervened by re-directing the Grievant away from the youth. The Grievant stated that he was prepared to intervene again to assist in the restraint because he possessed handcuffs. But Manager Warmath had quickly gained control of Youth R. There was no reason for the Grievant to have further physical contact with the youth, and his actions were unprofessional, confrontational and, therefore, a violation of policy. If it was true that the Grievant was lending assistance by handcuffing the youth, evidence would have shown him accessing the cuffs. There is no evidence to suggest that this was the case. Evidence indicates that the Grievant was out of control. He was a senior Youth Specialist who should have had the capacity to engage the youth appropriately based on his experience and training. The Grievant had been a trainer regarding incidents of this very nature, but he failed in this instance to utilize any verbal, non-physical strategies.

The Union argues that, in analyzing this case, the Arbitrator should be guided by U. S. Supreme Court case, *Graham v. Conner* in which a physical response by police officers is essentially measured by the perception of level of violence. The Employer argues that *Graham v. Hudson* has little to do with this case. The collective bargaining agreement is controlling. The Employer's argument has merit. It is difficult to compare this decision of the court regarding police officers who face unpredictability on the street to an incident involving a youth who is detained in a

secure facility and whose behavior has been well documented. The Grievant was very familiar with the behavior of Youth R.

The Union argues further that the Grievant, in the heat of the moment, used an old technique, but Employer witness, Don Bird, a facility trainer, stated that "Technique 7" had not been an approved maneuver since 1999. The Grievant received significant training in restraint and had been trained as a trainer. This argument lacks merit.

The Union cites a number of disciplinary cases involving penalties less than termination of employment in cases which involved Youth Specialists physically engaging disruptive youth in a manner which violated Department policies. The Arbitrator takes note that the Employer has demonstrated flexibility regarding the discipline grid which allows for the highest level of disciplinary suspension as opposed to termination. Chief of Human Resources, Rochelle Jones, testified that the Department Director is very strict regarding the use of inappropriate force, but she also stated that each case is decided based on its own merit. The fact that the Grievant is a senior Youth Specialist must be considered when determining the merits of the instant case. It is also noted that the Grievant had been suspended just six months prior to this incident for a similar infraction involving a disruptive youth. This is compelling and lends justification for the Employer's decision to terminate.

The Employer charged the Grievant with violation of Rule 5.01P. Youth R was highly agitated when he entered the ABC Classroom. He made threatening statements to those in the room. It was common knowledge that he had a history of violence. The Grievant escalated the tension when he threw the documents at the

youth. He then overacted and failed to follow policy when Youth walked toward him and threw the file folder and wadded piece of paper. The Grievant violated Rule 5.01P.

The Employer charged the Grievant with violation of Rule 4.09P. The Grievant overreacted to the actions of the youth and admitted that he just reacted, that he didn't think about it. The manner in which the Grievant pushed or hit the head of the youth and then took him to the ground violates Rule 4.09P. His attempt to re-engage Youth R when Manager Warmath applied a restraining technique is also in violation of Rule 4.09P, "physical response beyond what was necessary to control/stabilize the situation." This act illustrates that the Grievant had lost control of the situation and himself. He failed to follow policy which states that physical force is a last resort.

The Employer has charged the Grievant with violation of Rule 6.05P. The fact that Youth R was not injured by the hit to the head and take down is inconsequential. He easily could have suffered "serious harm or needless pain" as outlined in the policy. The Grievant was in violation of Rule 6.05P.

The Grievant's twenty years of service must be weighed against the policy violations. The Grievant knew that Youth R was a problem, and he had been trained to de-escalate. It was his responsibility to de-escalate Youth R, and evidence is clear that he made no attempt to do so at any time. Instead he further agitated the youth by throwing papers; he used an improper technique when he hit the youth and took him to the floor; and he attempted to re-engage the youth who was then being restrained by Manager Warmath. The Grievant had just been disciplined for a

similar occurrence. Youth Specialists at the Indian River facility must be held to a high standard based on their charge to appropriately supervise youth offenders. The Grievant had a second chance, and he failed. His continued employment at the facility would be a liability for the State of Ohio. The Employer had just cause to terminate the employment of the Grievant and did not violate the collective bargaining agreement when it did so. The grievance of Brian Chaney and the Union is denied.

AWARD

The Employer had just cause to terminate the employment of the Grievant and did not violate the collective bargaining agreement when it did so. The grievance of Brian Chaney and the Union is denied.

Signed and dated this 12th Day of November, 2012 at Cleveland, Ohio

Thomas J. Nowel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th Day of November, 2012, a copy of the foregoing Award was served upon Rusty Burkepile, Advocate for OCSEA Local 11 AFSCME; Larry L. Blake, Advocate for the Ohio Department of Youth Services; Victor Dandridge, Office of Collective Bargaining; and Alicyn Carrel, Office of Collective Bargaining, by way of electronic mail.

Thomas J. Nowel
Arbitrator