

IN THE MATTER OF THE ARBITRATION BETWEEN

#1182

Ohio Department of Youth Services Grievance No:DYS-2019-01944-03
Cuyahoga Hills Juvenile Correctional Facility

AND

Ohio Civil Services Employees Association
Local 11 AFCME, AFL-CIO

John Derrico, Grievant

ARBITRATOR: Meeta A. Bass
AWARD DATE: February 11, 2020

APPEARANCES FOR THE PARTIES

Advocate for the State:

Larry L. Blake
Ohio Department of Youth Services
4545 Fisher Road – 2nd Floor
Columbus, Ohio 43228

Victor Dandridge
Office of Collective Bargaining
1602 West Broad Street
Columbus, Ohio 43223

Advocate for the Union:

Mike Duco
SEIU/District 1199
1395 Dublin Road
Columbus, Ohio 43215

John Derrico, Grievant

PROCEDURAL HISTORY

The Cuyahoga Hills Juvenile Correctional Facility (CHJCF) is hereinafter referred to as "Employer" or "Facility." The SEIU/District 1199 is hereinafter referred to as "Union." John Derrico is hereinafter referred to as "Grievant."

The Union submitted the grievance to the Employer by electronic submission on May 23, 2019, pursuant to Article 25 of the parties' 2018-2021 Collective Bargaining Agreement. Following unsuccessful attempts at resolving the grievance, the Union requested that the grievance be advanced to arbitration. Pursuant to the CBA between the Employer and the Union, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on Monday, December 9, 2019, at the Cuyahoga Hills Juvenile Correctional Facility located at 4321 Green Road, Highland Hills, Ohio 44128.

The parties stipulated to the issue as follows:

Was the Grievant, John Derrico, removed for Just Cause? If not, what shall the remedy be?

During the hearing, both parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The following individuals testified at the hearing:

Employer:

Terry Woodworth
William Stout
Donald Redwood

Union:

John Derrico

Witnesses other than the representatives were sequestered.

Joint Stipulation of Facts

1. The Grievant was hired on October 15, 2012.
2. The Grievant was removed from his position as a Youth Specialist on May 22, 2019.
3. The Grievant had the following active discipline at the time of his removal:
5-day Working Suspension
5-day Working Suspension.
4. The date of the incident was January 2, 2019. The Grievant was at work on the stated date.
5. The grievance is properly before the Arbitrator.

Joint Exhibits

1. 2018-2021 - Contract between the State of Ohio and OCSEA/AFSCME Local 11
2. Videos
3. Grievance Trail
 - a. Grievance
 - b. Step 2 Response
4. Discipline Trail
 - a. Order of Removal
 - b. Pre-Disciplinary Packet
 - c. Pre-Disciplinary Hearing Officers Report
5. Investigation
6. Training Record of the Grievant
7. Ohio Department of Youth Services Policy 131-SEM-05-General Work Rules with attached Rules Infractions and Disciplinary Grid
8. Ohio Department of Youth Services Policy 163-UOF-01-Managing Youth Resistance-Use of Force

The parties agreed to post-hearing submissions on Friday, December 27, 2019, at which time the record was closed.

APPLICABLE PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND POLICY RULES.

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:...

(c) One (10 or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five(5) day shall be issued by the Employer;

(d) Termination.

Policy Number 131-SEM-05 and 163-UOF-01

As if fully rewritten and incorporated herein.

ODYS General Work Rules Rule Violations: Offense Infraction Levels

Rule 5.01P Failure to follow policies and procedures

(Specifically: DYS Policy 131-SEM-05 - General Work Rules and DYS Policy 163-UOF-01-Managing Youth Resistance-Use of Force)

Rule 5:12P Actions that could harm or potentially harm an employee, youth, or a member of the general public

Rule 5:30P Use of excessive force

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 mechanics 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 agency-approved restraint bed.

STATEMENT OF FACTS

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 are necessary to understand the Arbitrator's decision.

The Ohio Department of Youth Services (DYS) is the juvenile corrections system for the State of Ohio. DYS is statutorily mandated to confine and rehabilitate felony offenders, ages 10 to 21, who have been adjudicated and committed by one of Ohio's eighty-eight (88) county juvenile courts. DYS generally has an average of 100 youth offenders, and at the time of the incident, there were approximately 160-170 youth offenders. It is the responsibility of DYS to maintain the safety of these youth offenders at the facility.

The Employer hired the Grievant on October 15, 2012; the Grievant had approximately six and half years of service at the time of his removal. The Grievant held the position of a youth specialist, a juvenile correctional officer. On September 26, 2016, the Grievant acknowledged that he received, reviewed, understood, and recognized his responsibilities to stay up-to-date on the General Work Rules. A review of his training records indicates that the Grievant last attended the DYS Facility Use of Force Training on December 5, 2018.

On January 2, 2019, the Grievant was involved in an altercation with two (2) youth offenders, hereinafter referred to as Youth A and Youth B. Youth A was admitted to DYS for felonious assault and receiving stolen property on April 19, 2017, and was classified as a medium that level, heartless felon-passive, a gang member but not actively participating in gang activity. Youth B was admitted to DYS for burglary on April 21, 2016, and was classified as a heartless felon-passive with a high threat level. The Grievant and the youth offenders described the start of the incident as

“playful.” However, as the events quickly unfolded, the incident turned into a physical altercation amongst the three individuals.

Both youth offenders pushed the Grievant in his chest area to prevent his entrance into the social worker’s office. The Grievant secured Youth A by the shirt and pushed him into the room while Youth B continued to engage him. Youth A is knocked into some office equipment that is knocked to the floor. The Grievant pushes Youth A to the couch. The supervisor then secures Youth B. Youth A grabs the Grievant by his shirt with his right arm and charges toward the Grievant. Youth A pushes the Grievant into another staff member as she attempts to block another youth offender from entry into the office. The two struggle for a few seconds. The Grievant’s shoe slides off. The Grievant continues to push Youth A towards the couch. Youth A continues to charge the Grievant. Youth A steps forward and pushed his head in such a manner to lodge his head under the Grievant’s forearm. Youth A then begins to take another step toward the Grievant using his right leg, pushing the Grievant backward. The Grievant grabbed Youth A around his shoulders. Youth A continued to lunge toward the Grievant and he got pushed and backed into the same office equipment. Grievant straightens up his back resulting in a headlock. The supervisor calls for assistance. The Grievant shoves the Youth A onto the couch. After a cooling-off period, the Grievant and the Youth A apologized to each other. Youth A was not injured.

The Employer assigned the incident to the investigator on January 16, 2019. As a part of the administrative process, the incident was also referred to the State Highway Patrol. The investigator inquired of the State Highway Patrol whether or not the agency would be pursuing criminal charges, and the Agency informed the investigator that it would not be pursuing criminal charges. The investigator reviewed the videotape, interviewed and secured witness statements from all persons who witnessed the incident. The investigator also forwarded a request to the use of force expert who is the

subject matter expert in the management of youth resistance. Based on her findings, the investigator concluded that the Grievant used inappropriate force on Youth A in violation of Policy Number 163-UOF-01. The investigator found that the first inappropriate use of force occurred when the Grievant placed Youth A in the headlock and then straightened his back and raised his forearm which could have caused pressure on the neck area. The investigator testified that she further believed that the Grievant used inappropriate force when he allegedly put his hands on Youth A's neck while the youth was seated on the sofa. The investigator stated that Youth B stated that the Grievant choked Youth A.

The Grievant remained in his position until January 29, 2019, at which time he went on injury leave. The Employer removed the Grievant on May 22, 2019, for the following charges: Failure to follow policies and procedures, Actions that could harm or potentially harm an employee, youth, or a member of the General public, Use of excessive Physical Force, Use of prohibited physical response. At the time of his removal, the Grievant had two (2) five-day suspensions, one of which involved a Use of Force incident, on his record. On May 23, 2019, the Grievant filed his grievance alleging a violation of Article 24 of the 2018-2021 Collective Bargaining Agreement and requesting reinstatement to his position as a youth specialist and to be made otherwise whole upon his return to work. The grievance was not resolved within the procedure established by the CBA and was properly advanced to arbitration.

POSITION OF THE PARTIES
POSITION OF THE EMPLOYER

The Employer contends that there was just cause to discipline the Grievant for his conduct. The Employer asserts that DYS has a contractual right to manage its workforce through the establishment of policies and work rules. The Grievant was properly trained thereon. The Employer also asserts that it conducted a fair investigation resulting in a determination that the Grievant violated departmental policy as it directly relates to the inappropriate force used on the youth and general work rules. The Employer further asserts that the removal was reasonably related to the seriousness of the offense and the Grievant's active disciplinary record. There was no evidence of disparate treatment and no mitigation was warranted. The Employer maintains there was just cause for discipline due to the use of excessive force.

The Employer also contends that the record consisting of the videos, witness testimony, and documents, establishes by a preponderance of the evidence that the Grievant violated the cited rules. The Employer argues that the actions of the Grievant in placing the youth offender in a chokehold is a restricted technique to manage a youth's behavior and a violation of the applicable policy. The Employer argues that the video review and subsequent testimony establish that the Grievant used the inappropriate placement of the youth in a headlock and how the straightening of his back and raising of his forearm put further pressure on the youth's neck. The Grievant failed to use an appropriate Managing Youth Assistance (MYR) technique in accordance with Departmental training, policy, and procedure. The Employer maintains that the Grievant violated the cited general work rules and use of force policy.

Further, the Employer contends that there was just cause for removal, and the penalty imposed was commensurate with the offense. The Employer argues that DYS has a zero-tolerance for prohibited physical responses, and any continued employment at the facility would be a liability for the Ohio Department of Youth Services. The Employer argues that Youth Specialists are charged with the duty and responsibility of providing a safe and secure

environment and custodial care for the youth under their direct care and supervision. The actions of the Grievant were contrary to this role.

Moreover, the Employer argues that the penalty imposed is reasonable due to the seriousness of the offense and the Grievant's employment record. The Grievant had only six (6) years of service. The Employer argues that the removal was consistent with the Employer's disciplinary grid; the Grievant had two five (5) working suspensions on his record, and the seriousness of his actions in this instance warrant removal. The Employer maintains there was no violation of the CBA.

Lastly, the Employer contends the Grievant was removed for Just Cause pursuant to Article 24 of the parties' respective collective bargaining agreement, the discipline imposed was commensurate with the offense and progressive within the DYS' work rules and practice, and the grievance should be denied in its entirety.

POSITION OF THE UNION

The Union contends that the Employer failed to conduct a fair and impartial investigation. The Union argues that the Employer in its evaluation and assessment failed to consider exculpatory evidence which in the opinion of the Union exonerates the Grievant. The Union argues that during the struggle, the Grievant lost his shoe, and while he momentarily struggled to regain his footing, he straightened his back which resulted in the complained move. The Union asserts that the Employer failed to give proper weight to the evidence contra, and only considered those facts that supported its view. The Union maintains that confirmation bias, the selection and distortion of facts that confirm one's position, negates principles of fair and impartial investigation.

The Union also contends that the Employer stacked the charges to make the incident seem more egregious. The Union argues that the Employer charged the Grievant with four separate offenses. Yet, the use of force reviewer testified that the actions of the Grievant complied with policies and

procedures thought the encounter with the youth except for the instance where he arched his back. The Union maintains that the actions of the Grievant were not intentional but a reaction to maintain his footing resulting from the attempt to tackle by the Youth A and the loss of his shoe.

Further, the Union contends that the Employer failed to meet its burden of proof. The Union argues that the Agency failed to provide any direct evidence of the events beyond the video, and the Grievant offered the only direct evidence. The Union argues that the alleged headlock for fourteen (14) seconds is not at issue in the opinion of the use of force expert who testified that until the one move, where the Grievant arched up, his actions followed policies and procedures. The Union asserts that the Grievant's explanation, struggling to maintain his footing, and the video depicting his shoe supports his position. The Union opines that there was no violation of the cited rules.

Moreover, the Union contends that the Employer has rushed to judgment in terminating the Grievant, not based on the facts of the underlying incident, but the prior discipline record of the Grievant. The Union does not dispute that the Grievant had two active disciplines on his record but asserts that the Grievant is in the position within the facility to be most requested for use of force incidents which increases the likelihood that his actions are reviewed by the Employer. The Union also argues that the Employer has been under significant scrutiny by the federal court system, and the Employer due to these pressures has failed to consider all relevant facts, and simply chose to terminate his employment. The Union further argues that the Grievant continued with his duties and responsibilities until January 29, 2019, twenty-seven (27) days after the incident. The Union maintains that there was no just cause to discipline.

Lastly, it is the position the Union that the grievance should be sustained, the Grievant awarded all lost wages and benefits. Further that the Employer be admonished that details, nuances, and the totality of the circumstances must be considered in its decision to impose discipline.

DISCUSSION

It is well established that a just cause determination must be made based on the facts and circumstances as proven. The initial inquiry is whether the evidence establishes that the Grievant committed the misconduct for which he was disciplined. If so, it is necessary to consider whether the employee had adequate notice of the work rules or policies, whether the employer applied the discipline in a fair and even-handed manner and whether the penalty imposed was commensurate to the misconduct committed. Here, the Employer charged the Grievant with violation of the Ohio Department of Youth Services' (ODYS) General Work Rules Policy 131-SEM-05, specifically DYS Policy 163-UOF-01 – Managing Youth Resistance – Use of Force. For each of the charges, the Employer must establish by a preponderance of the evidence that the Grievant committed the violation(s) and the violation(s) support the removal.

The Employer has promulgated Policy 163-UOF-01, Managing Youth Resistance-Use of Force to “provide guidance to facility staff who must utilize force when responding to youth resistance and provide guidance for those who investigate incidents of force.” While the policy provides for the use of control techniques, such as armbar controls and bear hugs, as a means of physical response to gain control of a youth who is combative and resisting restraint, the policy specifically prohibits other techniques, such as chokeholds placed on youth, restricting respiration in any way or using any method that is capable of causing loss of consciousness or harm to the neck. Further, the policy contemplates that emergency situations may arise where other techniques must be utilized to gain control of the youth offender. According to the policy, the Grievant can use other non-prohibited reasonable response techniques as long as it falls within those three criteria: (1) youth has gained or is gaining superiority, (2) there is a risk of serious physical harm or (3) all other authorized force responses have failed.

The Union acknowledges that the Employer has established an effective review process to regulate the use of force policy but challenges the reliability of its conclusions when the Employer failed to consider evidence related to the Grievant losing his shoe during the altercation and continued to struggle in his stocking/sock. The Union argues that if the Employer had considered these facts, lost of his shoe during the midst of a struggle, then the conclusion must be that no just cause for discipline exists due to the level of threat posed by the juvenile offender in these emergent circumstances.

The Employer presented the testimony of its investigator, use of force expert and the Superintendent as well as the video. The other witnesses from the incident including the supervisor did not testify. The Employer has relied on the video to demonstrate a violation of its policy and work rules at the arbitration hearing. Post-incident reviews of excessive force claims are complexed when videos are involved. The Employer has, in the installation of cameras in the workplace, attempted to ensure the safety of youth, and manage youth resistance responses by its staff. The video enables a 20/20 vision of hindsight review to judge whether an employee's action complies with policy and procedures. But, unfortunately, hindsight review, is not always reliable. The camera, as here, may not always capture every angle, and witness testimony becomes even more critical and relevant to gap fill. Observations whether first-hand or on video review are often skewed and filtered by the observers' own experiences.

It is not disputed that the Grievant was struggling with the youth offenders. The videotape captures the Grievant and both youth offenders struggling in the Huron SW office, placing the incident at physical engagement, striking, grabbing, pushing, punching, etc., an immediate threat level under the policy. The investigator questioned two moves of the Grievant at the hearing. Regarding the alleged choking, the video does not

depict the Grievant choking Youth A as suggested by the investigator. Youth A reported that he was not choked. Except for Youth B, no other witnesses including the supervisor did not report that the Grievant choked Youth A. More importantly, the use of force expert stated that the only exception that he took to the Grievant's actions is when he straightened his back with the youth when the youth's head was under his forearm. The Arbitrator finds that the Grievant did not choke Youth A.

In his examination of the video, the use of force expert took exception only to period of time when the Grievant straightened or arched his back; this action occurred less than a couple of seconds, and not the fourteen (14) seconds originally complained of in the other testimony or his written summary. Nonetheless, the use of force expert opined that any use of prohibited technique violates the policy regardless of duration. Upon cross-examination, the use of force expert testified that his written findings did not depict all of the actions or behaviors of the Grievant and Youth. When reviewing the video at the hearing, the use of force expert made some additional observations. When he wrote that Youth A pushed the Grievant backward, he acknowledged that Youth A was charging the Grievant waist-high. Although the use of force expert wrote that the Grievant appeared to be placing Youth A in a "headlock" in his conclusion, he explained at the hearing that the Youth A placed his head into that position. The use of force expert stated that although he observed the Grievant's shoe in the video; he did not observe any imbalance in the video. The use of force expert acknowledged that the video captures the Grievant's upper body, and his legs are not always visible. The visual of his legs is blocked by the desk.

The Superintendent testified that he had the opportunity to review the video several times and to slow down the video frame by frame to review the Grievant's actions, and concluded the Grievant's actions were deliberate. By straightening his back, the Grievant did momentarily "cross the line" into

the application of an inappropriate technique. However, there was no evidence that the Grievant displayed any malice or ill will toward Youth A. The Grievant's shoe did slide off during the struggle while he was attempting to restrain the aggressive youth offender with one shoe off and a sock/stocking. According to the use of force expert, the Grievant had followed protocol throughout the incident except for when he straightened his back. The Grievant also asked the supervisor, who was present in the office to call for assistance, in further compliance with the policy since the supervisor or staff present had not. Youth A and the Grievant apologized after the incident. The supervisor who was present at the scene did not intervene. The Arbitrator is not persuaded that the complained move, straightening his back while Youth A's head was under his forearm, was deliberate and intentional.

Although the Employer may hope that the initial training of approximately four (4) hours on policy, and twenty-four (24) hours on technique, and subsequent annual training creates a muscle memory of dos and don'ts such that the employee's response to youth's aggression would exhibit all of his trained physical skills in a crisis situation, this does not always happen. The Grievant does not have the opportunity to study responses and techniques as a situation quickly unfolds in emergent situations to protect the safety of himself and others. Consequently arbitral precedent judges the actions of the Grievant against a reasonable officer standard considering the totality of the circumstances in a just cause determination.

The Grievant explained that he arched his back to adjust his balance rather than to use the straightening of his back as a physical response technique. The Grievant testified that Youth A charged him to attempt to knock him down, and he did not place Youth A in the headlock but instead, Youth A placed his head in his side. The video captures the Grievant attempting to grab Youth A initially in a bear hug while Youth A continued to

lunge at him. The Grievant explained that he arched his back to maintain his footing; he was fearful of falling and giving Youth A an advantage which would have escalated the level of threat. The Grievant also explained that he had bad knees. However, no medical documentation was provided. The mere assertion of a medical condition does not establish an affirmative defense. Notwithstanding there are a couple of shoes sliding off in the video, the Grievant's and Youth A's. In absence of the testimony of the supervisor and staff who were present at the scene, it is reasonable to factor a self-adjustment in the course of the attempted tackle to maintain his balance in consideration of the totality of the circumstances.

The policy does allow for use of non-prohibited techniques when other approved techniques fail. The use of force expert testified that alternative techniques could have been used in this instance but a headlock is a prohibited technique, the use of which is a violation of the policy. The expert opines that when the Grievant straightened his back he used a prohibited technique. The Grievant states that his response is merely self-correction in the course of the attempted tackle. The desk hides the view of the Grievant at the moment he straightens his back. The testimony of the supervisor and another staff member would have shed light on his actions during the struggle, and without said testimony subject to cross-examination, the Arbitrator cannot find that the Grievant, intentionally, knowingly or recklessly applied a prohibited technique.

After carefully reviewing the video footage, evaluating the testimony, and considering the arguments of the parties, the Arbitrator finds that the Employer failed to meet its burden of proof. The Arbitrator finds no violation of General Work Rules Policy 131-SEM-05, specifically: Rule 5.01P Failure to follow policies and procedures (Specifically: 131-SEM-05 – General Work Rules and DYS Policy 163-UOF-01 – Managing Youth Resistance – Use of Force) Rule 5.12P Actions that could harm or potentially harm an employee,

youth, or a member of the general public Rule 5.30P Use of excessive force
Rule 6.05P Use of prohibited physical response.

AWARD

Having heard, read and carefully reviewed the evidence and the submissions in this case and in light of the above Discussion, the grievance is sustained. The Grievant shall be made whole, awarded backpay less interim earnings, and his benefits and rights unimpaired. It is within the Employer's discretion to provide any remedial training it deems appropriate due to the length of absence of the Grievant and his role as a Youth Specialist.

Dated: February 11, 2020

/s/ Meeta A. Bass, Arbitrator
Dublin, Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Opinion and Award was served upon the following persons via electronic service this 11th day of February 2020:

Wayne Mogan
Ohio Department of Youth Services
4545 Fisher Road – 2nd Floor
Columbus, Ohio 43228
Wayne.Mogan@dys.ohio.gov.

Mike Duco
SEIU/District 1199
1395 Dublin Road
Columbus, Ohio 43215
mduco@ocsea.org