

In the Matter of the
Arbitration between

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION AFSCME, LOCAL 11

and

STATE OF OHIO DEPARTMENT OF
YOUTH SERVICES

Case No. DYS-2022-06894-03

Grievant: Brian Watson

Arbitrator: Tobie Braverman

OPINION AND AWARD

APPEARANCES:

For the Employer:

Bradley A. Nielsen, DYS Labor Relations
Official
Eric Eilerman, DAS - OCB
Daniel See - DYS Labor Relations
Amy Jo Hansen - Investigator
Darrin Kreis, Academy Unit Supervisor

For the Union:

Russell Burkepile, Advocate/Staff
Representative
Brian Watson, Grievant
JaQuanda Clarly, OCSEA Second Chair
Derik Knox, Youth Specialist
Christopher Head, Program Administrator

The Ohio Department of Youth Services (hereinafter referred to as "Employer") and Ohio Civil Service Employees Association, AFSCME, Local 11 (hereinafter referred to as "Union") have submitted the grievance of Brian Watson (hereinafter referred to as "Grievant") to the Arbitrator for decision pursuant to the Collective Bargaining Agreement of the parties. Hearing was held at Circleville, Ohio on August 2, 2023. The parties submitted post hearing briefs which were received and exchanged by the Arbitrator on August 18, 2023. The parties stipulated that the grievance is properly before the Arbitrator for decision, and further stipulated that the issue for decision is as follows:

Did the Ohio Department of Youth Services-Circleville Juvenile Correctional Facility have just cause to remove the Grievant from employment? If not, what is the remedy?

FACTS

The Employer is a division of the Ohio Department of Youth Services ("DYS") which operates the Circleville Juvenile Correctional Facility ("CJCF") located in Circleville, Ohio. The CJCF consists of twelve housing units which each house twelve juvenile offenders, commonly referred to in the facility as "youths". Each youth has an individual room on the perimeter of a day room. Each unit is routinely staffed by two Juvenile Corrections Officers "(JCO) on each of the three daily eight hour shifts. The Grievant was, at the time of his removal, employed in the classification of JCO". The duties of a JCO include supervision and control of the youth in custody. The Grievant began his employment with DYS on July 6, 2020. The incident which gave rise to the Grievant's removal occurred on August 1, 2022 at 8:23 p.m. On that date, the Grievant was assigned to work first shift, but worked overtime on second shift as well.

At approximately 8:20 p.m., staff on the second shift in Unit C1 made a signal five call, which is a call for emergency assistance. The incident which ensued was recorded on the facility's cameras from three separate vantage points. The videos do not include audio. In viewing the

videos it is unclear why the signal five was called on the unit. There is no visible disturbance or disruption in the day room, but the testimony was that the unit was very loud, and at least two youth can be seen banging on the windows and doors from inside of their rooms. When the Grievant arrived on the scene, he sat down at one of the day room tables. After sitting at the table for just under a minute, the youth in question approached the table while putting a sweat shirt over his head. As he passed by the Grievant, he reached out and poked or punched the Grievant in the side while the Grievant was looking in the opposite direction. In the video, the Youth then backs up and strikes a fighting stance and does a short boxer type shuffle. He stops the shuffle and begins to put his arms through the sleeves of the shirt. The Grievant was not facing the Youth to observe this at the time.

Shortly thereafter, the Grievant rose from the table, turned around, and for first time observed who had poked or punched his side. The Grievant's immediate reaction was to walk swiftly toward the Youth, who turned his back toward the Grievant and walked to the wall while still putting his arms through the sleeves of the shirt. The Grievant pursued him, quickly closing the space between the two. While there is no completely clear video of the rest of the incident, what is clear, is that the Grievant placed himself in front of the Youth, and the two were face to face with no distance between them. There appears to be some conversation between the two while the Grievant stands directly in front of the Youth who is pressed against the wall for approximately twenty seconds.

At that juncture, the Grievant took several steps back away from the Youth, who stepped forward and punched or pushed the Grievant in the stomach. The Grievant responded by again closing the gap, punching the Youth two times and pushing him up onto a counter which was located to the Youth's left. Other JCO's in the room provided statements during the investigation of the incident that they heard the Grievant state something to the effect of "stop playing like that" in a loud voice. A signal five was called at that time, and the Youth was restrained and returned to his room. There were no injuries as a result of the incident.

The Grievant was placed in a no youth contact status effective August 8, 2022 while the matter was investigated, which is standard procedure. The investigation was conducted by Investigator, Amy Jo Hansen. After interviewing the Grievant, the Youth, several other witnesses as well as the video, Hansen concluded that the force used was excessive and in violation of the applicable use of force policies. Hansen testified that under the Use of Force Policy, striking the Youth was prohibited since the situation was not such that there was any risk of serious physical harm as defined in the policy. She further testified that under the Use of Force Continuum, which is part of the Policy, the Youth's actions constituted "Threatening Movement" to which the appropriate response would have been staff presence, time and distance and verbal strategies and a call for assistance.¹ Hansen requested that the video of the incident be reviewed by Darrin Kreis, Use of Force Instructor at the Training Academy. He concluded that, in his review of the video, the Grievant had violated the Use of Force Continuum. In her report dated September 16 2022, based on her investigation and Kreis' review, Hansen concluded that the Grievant had used excessive restraint techniques in violation of policy 163-UOF-01. That Report was reviewed and approved by Chief Inspector, David Haynes on October 11, 2022.

The Grievant testified that upon seeing who had punched him in the side he rose to deal with the situation, knowing that the Youth had a history of assaults on staff and other youths. Because it was loud, he got close to the Youth to be heard and to insure that he understood the gravity of the situation. At that point, the Youth twice attempted to grab his groin. He stepped back to protect himself, and the Youth stepped forward and punched him in the chest. The Grievant testified that in order to protect himself, it was necessary to the Grievant throw two punches, to which he has always admitted. He testified further, that although he admitted to throwing the punches, he has never admitted that he landed the punches. According to the Grievant, the youth jumped on the counter of his own accord in order to avoid being handcuffed. It was at that point the Grievant was

¹ There is no dispute that the Grievant was appropriately trained in all of these strategies and de-escalation techniques.

tapped out of the episode.

Subsequently, a pre-disciplinary meeting was held before Christopher Head on November 14, 2022, who determined that the Grievant had not violated the use of force policy and the discipline was not warranted. His determination was based on his conclusions from the video that there was no clear view which indicated that the Grievant's punches had actually landed on the Youth. He additionally credited the Grievant's account that he was in imminent danger of harm because the Youth attempted to grab him in the groin. He noted that while this cannot be seen on the video, the Grievant's hands appear to be attempting to protect his groin in a still photo pulled from the video. Upon review, Site Manager, Superintendent, Andrea K. Jones, determined that Head had reached an incorrect conclusion and that the Grievant was guilty of failing to maintain appropriate time and distance and of punching the Youth without sufficient cause under the use of force policy. She therefore overruled Head's finding and found just cause for discipline.

The Grievant was issued a Notice of Disciplinary Action on December 12, 2022 terminating his employment effective on that date. The stated grounds included Rule 5.01P, Failure to follow policies and procedures, Rule 5.12P, Action that could harm or potentially harm an employee, youth or a member of the general public and Rule 5.28P, Failure to follow work assignment or the exercise in poor judgment in carrying out an assignment. A timely grievance was filed, and the matter proceeded through the grievance procedure without resolution to arbitration.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees for just cause; ...

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 the authority to modify the termination of an employee committing such abuse. ...

24.02 Progressive Discipline

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

- a. One (1) or more written reprimand(s)
- b. One (1) or more working suspension(s). ... a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued. ...
- c. One (1) or more day(s) suspension(s) ...
- d. Termination. ...

24.06 - Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-discipline meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation. ...

DYS GENERAL WORK RULES RULE VIOLATIONS ...

LEVEL FIVE: ...

Rule 5.01P Failure to follow policies and procedures

131-SEM-05 General Work Rules

163 UOF-02 Managing Youth Resistance - Use of Force

Rule 5.12P Actions that could harm or potentially harm an employee, youth, or member of the general public.

Rule 5.28P Failure to follow work assignment or the exercise in poor judgment in carrying out an assignment

Failure to perform assigned duties in a specified amount of time or failure to adequately perform the duties of the position or the exercise in poor judgment in carrying out an assignment.

Rule 6.05 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: ... slapping, punching, kicking or hitting; ...

Managing Youth Resistance - Use of Force ...

IV. Definitions ...

Emergency Defense Techniques – Actions by a staff member to protect himself/herself or a third party when a youth has gained or is gaining a superiority or there is a risk of serious physical harm. ...

Serious Physical Harm – Any of the following as defined by ORC 2901.01:

- Carries a substantial risk of death;
- Involves partial or total substantial incapacity;
- Involves any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment which is caused by a physical injury;
- Involves some serious disfigurement;
- Involves acute pain of such duration as to result in substantial suffering or which involves any degree of prolonged or intractable pain.

POSITIONS OF THE PARTIES

Employer Position: The Employer contends that it has met its burden of proof to demonstrate that the Grievant is guilty of the offenses with which he is charged and that the penalty of discharge is the appropriate penalty for those offenses. The video evidence provides clear proof that the Grievant exercised poor judgment when he failed to exercise time/distance and verbal strategies with a non-compliant youth. He clearly violated applicable policies when he struck a youth in circumstances where the youth had not gained physical superiority and there was no risk of serious physical harm. The Grievant unnecessarily pursued the youth and closed the physical space. The Grievant clearly had other options under the circumstances, including issuing a Youth Behavior Incident Report and using verbal strategies to gain compliance. Instead, he exercised poor judgment and escalated the situation. The findings of Christopher Head, who conducted the pre-disciplinary hearing were properly overruled by the Site Manager.

and should not be considered as controlling here. Further, Head is not a subject matter expert on the use of force, and his conclusions are therefore invalid to contradict those of experts in that area who concluded that in fact the Grievant's actions were excessive and in poor judgment. It is important to note that the Grievant was subject to a five day working suspension on June 30, 2022 for a similar incident in which he inappropriately struck a youth. The Grievant was placed in no youth contact status as a result of that incident from February 13 through May 6, 2022. He attended a pre-disciplinary meeting on May 18, 2022, and the resulting suspension was served on the Union, which filed a grievance on his behalf. There is no doubt that the Grievant was aware of the charges against him and the potential resulting discipline when he left for maternity leave in May, 2022. The Grievant's commission of a similar offense only two months later demonstrates that the removal here is for just cause. The grievance should therefore be denied.

Union Position: The Union argues that the Employer has failed to meet its burden of proof to demonstrate just cause for the Grievant's termination in this case. The video evidence demonstrates that the Greivant was at risk of serious physical harm. The youth in question was known to be violent, having assaulted both staff and other youths, and is currently in the adult system. The youth began the incident by punching him in the back and later punched him in the chest. The Grievant testified that the youth additionally twice attempted to grab his groin, and he threw punches at the youth to protect himself. Although he admitted to throwing punches to back the youth up, he denies that they actually hit the youth. It is noted that the youth did not seek medical treatment. His actions should be judged from the perspective of a reasonable officer coping with a fast evolving situation. By that standard, his actions were both reasonable and appropriate. Additionally, the Grievant was unaware of the prior five day suspension until two days prior to his pre-disciplinary meeting in this case when he examined his personnel file. Because he left on maternity leave shortly after the pre-disciplinary meeting in the prior case, he was never actually provided with a copy of the discipline. He was without notice of the discipline and therefore did not get the benefit of an opportunity to correct or adjust his behavior.

It should therefore not be considered here. The discipline here is solely punishment and does not comport with the parties' commitment to progressive discipline intended to allow employees to correct their future conduct. The grievance should be sustained the Grievant should be reinstated with full back pay and benefits.

DISCUSSION AND ANALYSIS

This being a case of termination, the burden of proof rests with the Employer to demonstrate both that the Grievant is guilty of the offense with which he is charged, and that the commission of that offense warrants the penalty of discharge. Generally, this Arbitrator has subscribed to the requirement that the two elements of the Employer's burden of proof be demonstrated by the intermediate evidentiary standard of clear and convincing evidence. This standard of proof recognizes the severe and potentially lasting impacts that a discharge has on the Grievant and his ability to obtain future employment by requiring greater proof than a mere preponderance of the evidence. That is the burden of proof which will be applied in the instant case.

In evaluating whether the Employer has met its burden of proof to demonstrate that the Grievant has committed the offenses with which he is charged in this case, the primary available evidence is the video of the incident. While the videos do not capture every movement with clarity, they do provide a view of all or portions of the incident from three separate vantage points. After repeated reviews of all three videos, the Arbitrator is left with one overriding conclusion. It was the Grievant who initiated the escalation of the encounter to the point that punches were thrown.

The video evidence demonstrates that the initial contact between the Grievant and the Youth was made by the Youth who poked or punched the Grievant from behind. This clearly appears to be a playful act intended to be horseplay. As noted by Investigator Hansen, the

Grievant's body does not move during the poke indicating that it was not very forceful. In reviewing the video, it appears that the Youth's contact with the Grievant was prohibited as horseplay, but was not intended as an assault. This conclusion is further supported by the Youth's actions. He approaches the Grievant while in the process of putting his sweatshirt over his head and then turns, stops and does a brief fighting shuffle and then proceeds to put his arms in the sleeves of his shirt when the Grievant does not immediately look at him. It is at this juncture that the Grievant jumps up and rushes toward the Youth. The Youth, rather than moving aggressively toward the Grievant, turns his back and moves toward the wall in an apparent attempt to get away from the Grievant. The video is not able to capture everything that happened from that point on, but it is clear that the Youth becomes more aggressive after being cornered, and hits the Grievant in the stomach. The Grievant in response throws two punches.

The Grievant has attempted to justify his actions on two basis. First, while the Grievant admitted that he threw the punches, he testified at hearing that he never admitted that the blows made contact with the Youth. The Arbitrator must reject the suggestion that the punches may not have struck the Youth. While the Youth's upper body cannot be seen at the time the punches are thrown, the two are in very close proximity, and the Youth is in the process of bending backwards over a counter. He appears to be pinned by the Grievant. Because of the very close proximity of the two, It is simply impossible to believe that both of the Grievant's punches missed actual contact.

The Grievant additionally justified his punching the Youth on the basis that the Youth was attempting to grab his groin, thus placing him at risk of serious prolonged pain. The video does not demonstrate this, and the still picture relied upon is insufficient evidence that such action was imminent. The still photo relied upon by Head and the Union, depicts a moment in

the event during which the Grievant's right hand is in front of him slightly below the waist. The Youth is close by with both hands balled into fists close to his own body. When the video is advanced at a slower speed, it does not appear that this location of the Grievant's hand is anything more than coincidental to the ongoing action. In fact there does not appear to be any imminent threat that the Youth was able to inflict serious pain on the Grievant by grabbing or punching his groin.

Ultimately, the Arbitrator must conclude that under all of the circumstances, the Grievant is guilty of the offenses with which he is charged. The Grievant chose to chase the Youth to the wall in response to conduct which amounted to nothing more than prohibited horseplay. According to the use of force continuum, the situation should have been dealt with by using time/distance and verbal strategies. The Grievant chose instead to move into the Youth's personal space and escalate the incident. While the Youth appears to have punched him at one point, there does not appear to be any point in the confrontation when the Grievant was at imminent risk of serious bodily harm or prolonged pain. His choice to punch back was in poor judgment and in violation of the applicable rules for the use of force.

Having determined that the Grievant is guilty of the offense with which he is charged, it is necessary to determine if removal is the appropriate penalty under the circumstances presented by this case. As the Union notes, there were no injuries to either the Youth or the Grievant, which serves as a mitigating factor. There are, however, other significant aggravating factors. First, the Grievant is a short term employee with only two years on the job. While the Union argues that this should be considered long term employment, presumably based on turn over rates in the position, it did not present any evidence in support of that contention. By typical standards, this is a short term of employment.

More important than the Grievant's tenure, however is his disciplinary record. The Grievant received a five day working suspension arising out of an incident which occurred on February 13, 2022. In that incident, the Grievant was charged with using excessive force and for failing to utilize proper de-escalation techniques. The Grievant attended a pre-disciplinary meeting regarding that incident and was in no-youth contact status from February 13 until May 6, 2022. The Grievant did not, however, sign for receipt of the discipline since he was off work on maternity leave at the time it was issued on June 30, 2022. The Grievant testified that he was unaware that the discipline had been issued until shortly before the pre-disciplinary meeting in this matter, when his personnel file was reviewed. He was, however, undoubtedly aware that the Employer was considering disciplinary action at the time.

Despite the Grievant's lack of actual knowledge of the suspension, it must be noted that the Union did receive notice of the suspension, and in fact, filed a grievance on his behalf. Section 24.06 of the Collective Bargaining Agreement clearly provides for delivery of discipline to either the Union or the employee. It specifically provides that "the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation." Thus, there can be no doubt that the five day suspension was properly served on the Union, was appropriately part of the Grievant's disciplinary record and is appropriately considered here.

Ultimately, in the course of six months the Grievant was involved in two separate incidents in which he exercised poor judgment and failed to follow applicable policies regarding the use of force. In his two years of employment, he has spent almost seven months in no-youth contact status as a result of his violations of the use of force policies. His actions, which were in violation of those policies, were the escalating factor in the August 1, 2022 incident. As a result of his repeated misconduct regarding the use of force as well as his brief tenure with the Employer, the aggravating factors outweigh the mitigating ones here. Under the circumstances of this case, removal is the appropriate penalty.

AWARD

The grievance is denied.

Dated: September 25, 2023



Tobie Braverman, Arbitrator