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IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO
DEPARTMENT OF YOUTH SERVICES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME, LOCAL 11

Before: Robert G. Stein
CASE# 35-04-041122-143-03-01

Grievant: Charles J. Wilson
Termination

Advocate for the EMPLOYER:

Victor Dandridge, LRO 3
DEPARTMENT OF YOUTH SERVICES
Ray Mussio, 2nd Chair
OFFICE OF COLLECTIVE BARGAINING

Advocate for the UNION:

Steve Wiles, Staff Representative
Bruce Thompson, Chapter President
OCSEA/AFSCME LOCAL 11, AFL-CIO

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GENERAL COUNSEL

INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (herein "Agreement") between the State of Ohio, Department of Youth Services (herein "Employer" or "DYS") and the Ohio Civil Service Employees Association, AFSCME, Local 11 (herein "Union"). That Agreement was effective from March 1, 2003 to February 28, 2006 and includes the conduct that is the subject of this grievance. Robert G. Stein was selected by the parties to arbitrate this matter pursuant to Article 25.03 of the Agreement as Case No. 35-04-041122-143-03-01.

A hearing on this matter was held on September 14, 2005 in Massillon, Ohio. The parties mutually agreed to that hearing date and location, and they were given a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a full written transcript, was subsequently closed upon the parties' submission of written closing statements.

The parties have both agreed to the arbitration of this matter. No issues of either procedural or jurisdictional authority have been raised, and the matter is properly before the arbitrator for a determination on the merits.

ISSUE

> Did the Department of Youth Services discharge the grievant, Charles J. Wilson, for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

Article 5—Management Rights
Article 24—Discipline
Article 25—Grievance Procedure

BACKGROUND

Grievant Charles J. Wilson (herein "Wilson" or "Grievant") has worked for DYS since December 12, 1994 as a juvenile correctional officer at the Indian River Juvenile Correctional Facility in Massillon, Ohio. He was working the day shift on September 19, 2004 and was involved at 6:35 a.m. with organizing a group of youth inmates at the facility to move in a quiet manner through a line in the dietary area to receive their respective medications and then breakfasts. In response to some inappropriate language and/or conduct from youth inmate Smith (3207585) (herein "Smith"), Wilson first responded unsuccessfully in providing Smith with an oral warning that Smith's conduct was unacceptable. Next, Wilson used

his left hand in an attempt to separate Smith from the line due to Smith's inappropriate conduct, and Smith responded by slapping Wilson's left hand from Smith's chest. The next series of events is in dispute in this matter. The ultimate result was that the back of Smith's head hit a window outside of the operations managers' office. The window glass shattered and Smith was taken immediately to the nurse's station for examination for potential injuries. There is a definite disparity in the evidence indicating whether or not Smith actually incurred any new injury resulting from this incident.

Following an investigation of the matter (Joint Exh. C), the Employer determined that Wilson had used excessive force in dealing with Smith in that incident on September 19, 2004, and a pre-disciplinary hearing was held on October 18, 2004. A determination (Joint Exh. C, p.1) was made that the Grievant had violated the following DYS work rules from policy 103.17, which resulted in his termination as of November 22, 2004:

> 4.13—Physical Assault
> Fighting with, striking or physically assaulting another employee, youth, or member of the general public while on duty or on state property.
>
> 4.14—Excessive Force
> Use of excessive force toward any individual under the supervision of the department or a member of the general public.
>
> 5.1—Failure to Follow Policies and Procedures

A grievance was filed by the Union on behalf of the Grievant on November 28, 2004. Because the matter remained unresolved through the initial steps of the grievance procedure, as provided in Article 25 of the Agreement, the matter has proceeded to arbitration.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer insists that the Grievant's termination was the appropriate discipline imposed in response to Wilson's improper conduct, which DYS claims did involve Wilson having "assaulted a youth by forcefully shoving him into a pane glass window." (Employer's opening statement, p. 1). Witness Freeman testified that Wilson struck Smith in the neck/chest area with Wilson's open hand and then "slammed" Smith's head against the window of the operations managers' office "with enough force to cause the window to shatter." (Employer's closing statement p. 1).

The Employer also contends that the amount of force used by Wilson "was inappropriate and excessive based on the criteria outlined in the Management of Resistant Youth Behavior Policy. (Joint Exh. D) (Employer's closing statement p. 2). The Employer also claims that Smith's purported "oral misconduct" did not warrant Wilson's physical interaction

and his allegedly "egregious violation of the policies and mission" of DYS (Employer's closing statement p. 4).

A full delineation of the Employer's arguments is contained in its closing statement. An electronic version of the closing statement was not made available to the arbitrator; therefore, a restatement of the arguments will not be included in this decision.

Based upon the above arguments, the City requests that the instant grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union's basic contention is that DYS has violated Article 24, Section 24.01 of the Agreement by failing to prove that there was, in fact, just cause to justify the Grievant's termination. The Union specifically challenges the sufficiency and sources of evidence gathered during the DYS investigation and ultimately used as a basis for Wilson's discharge. The Union also challenges the consistency and credibility of the testimony of witnesses Chris Freeman and Charles Ford, based on the purported discrepancies in their testimony during the investigation, and then under cross-examination at the actual arbitration hearing. The Union also challenges the involvement of both Freeman and Ford in conducting portions of the investigation of the disputed incident because those same

individuals also claim to have been witnesses to the actual events being investigated, while also serving as Wilson's supervisors and operations managers at Indian River. The Union insists that Freeman and Ford's active participation in the investigation resulted in a violation of DYS policy 301.05, regarding the work or function of a fact-finding panel. For this and other reasons, the Union contends that the investigation of the incident involving the Grievant's allegedly abusive conduct was neither fair nor thorough.

The Union claims that Wilson's response to Smith's misbehavior did not involve any abusive or excessive conduct by the correctional officer, especially in view of Smith's own original statement after the event, reporting that he had not been assaulted but had lost his balance before ultimately falling backward into the window, which then shattered.

The Union's arguments, as taken directly from its post-hearing brief, were transmitted to the arbitrator electronically as well as in writing and are as follows:

The union showed today, the management has not met its burden of proof as called for under article 24 sections 24.01 to establish just cause in the case that is before you today. The union also showed that management investigation was flawed and bias toward officer Wilson.

At this time I would like to direct your attention to each of the management witness testimonies and their inconsistency of what record shows.

First witness is Mr. Freeman O.M. Incident statement (J-C Page 22 and Q-A, J-C Pages 62-63) Mr. Freeman stated that officer Wilson with his left hand grabbed/struck Youth Smith around the neck. Mr. Freeman also stated that he grabbed Officer Wilson's hand and removed it removed it from the neck/throat area of the youth.

Cross examination of Mr. Freeman: He testified that Officer Wilson's hand was on the youth's chest area and not his throat. Mr. Freeman also testified that he removed Wilson's hand from the chest area and not the

throat. When asked "Did you see Wilson's hand on the youth's shirt?" Mr. Freeman's answer was "I don't recall I could have" when asked "What did you do after the incident?" Mr. Freeman stated after taking the youth to the clinic he placed the youth in seclusion.

Inconsistency and credibility of Mr. Freeman

The union argues that Inconsistency and credibility of Mr. Freeman's testimony comes into questions in the following are as. The investigation itself and Mr. Freeman's part in interviewing the youth Smith, Mr. Freeman statement's (J-C Page 22 and Q-A, J-C Pages 62-63) and to what he testified on cross examination shows some clear Inconsistency. Although Mr. Freeman's was consistent in one area of the investigation. (See incident reports J-C Page 22-23) that he and Mr. Ford did on 9-24-04

These reports almost mirror each other, if you were to cover their names, it would be hard to tell them apart. Mr. Ford's incident report and Mr. Freeman's are almost exactly the same. Mr. Freeman also testified that he took the youth from the clinic to seclusion. In looking at the youth intervention report (J-C Page 19) The seclusion box was never checked nor were there any door log reports or documentation as called for under policy (301.05 See J-D page 5 par B).

Second Witness O.M. Ford

Incident statement (J-C page 23 and Q-A J-C pages 60-61)

Mr. Ford's statements were that Officer Wilson was backing the youth up against the window and was grabbing him around the neck. Mr. Ford also stated that Mr. Freeman then grabbed Officer Wilson's hand and removed it from the neck of the youth. In Mr. Ford's Q-A he was questioned where Wilson had put his hands on the youth and he replied "Wilson put his hand around Smith's neck and pushed him up against the glass."

Cross examination of Mr. Ford O.M.

Mr. Ford testified that officer Wilson's hand was on the youth's upper chest and lower neck area. Also Mr. Ford testifies that he did not actually see Mr. Freeman take off Wilson's hand from the youth's neck but just that it appeared that way. He also testified that the youth was moving toward back toward the wall.

Inconsistency and credibility of Mr. Ford

I believe the union showed Mr. Ford's cross examination against his incident (J-C page 23 and Q-A J-C) this raises the same questions of credibility as Mr. Freeman's case. First of all it would be the investigation itself that Mr. Ford testified that he took it upon himself that he would do the investigation and also was told by his supervisor to do said investigations. Mr. Ford also testified that Mr. Freeman assisted in questioning witnesses. When asked what kind of Officer Wilson was Mr. Ford stated that he was a great officer, And we did not have to micro manage him.

Mr. Arbitrator - At this point the union will show that management did violate due process in what they presented today in that the two management witnesses, Mr. Freeman and Mr. Ford were shown to have an active role in the investigation from the start. This was done in violation in there own policy (301.5 C J-D page 12) fact finding panel. This panel should've done the investigation before manager's should be authorized to

investigate what they have witnessed themselves. Also the initial investigation only took 39 minutes. Management's delay in the union request for information such as youth Smith's address and records requested on December 6, 2004 were not given until September 12, 2005. Also requested that day was the highway trooper's report which we were denied by management.

Union Witnesses

Union Witness JCO Austin, testified consistent with her statement incident report (J-C page 35 and Q-A page 67) that Officer Wilson had his hand on the youth's shoulder talking to him, the youth knocked his hand away and J-CO Wilson pushed the youth away and the youth fell backwards towards the window, Officer Wilson tried to grab the youth to keep him from falling.

Second witness- JCO Johnson

Her initial statements see incident report (j-c page 39 Q-A page J-D 18-19) She testified she saw nothing. Also she testified she was called to Superintendent Tate's office and was told by him to make another statement and that she was on probation. This shows the act of intimidation toward witnesses and the lengths management will go to get the story the way *they* want it. She was also asked if youth Smith was put into seclusion and she answered no. She also testified that if the youth invades your personal space you can push them away and she said yes.

Third witness- Nurse McCue

See (Q-A, C-J Page 73 -74 and incident statement C-J 33)
She also testified consistent to what her statement said. She testified when youth Smith when examined said that it was no big deal that he just fell into the window.

Fourth witness- Nurse Moore

She testified that she initially examined youth Smith in the clinic and did an assessment report on youth Smith She also testified to superintendent Tate brought the youth back to be looked at again after the first assessment. When asked about youth Smiths injuries she stated there were no cuts or scrapes just an old scar. When asked if the youth was secluded she said no that he was in day hall. She also stated the assessment (See J-C Page 20) in the record it was not hers and that she had a conversation with her supervisor Mr. Walker and he was typing out another assessment. She also said that the nursing notes (J-C page 21) were incomplete or lost. She also stated that this has never happened before where her supervisor redid an assessment report.

Fifth witness- R.N. Flood

Flood's statement, (See J-C 34 Q/A 64) to which she's testified consistent that youth Smith was brought into the clinic three times to be looked at. When asked if it was normal to have the youth looked at three times she said no it was very abnormal. When asked about any injuries on youth Smith she stated Old Injuries, she also stated she had missing nurse notes see (J-C 21)

Union exhibit one

Transcript from the Massilion Municipal Court, Stark County Ohio, signed by Judge Kettler signed 5-20-05.
This document was entered into the record along with the tape of youth Smith talking to Officer Wilson's Legal department. I would ask that the arbitrator give some credibility to the document and the tape. The union argued that management delayed in giving the union requested information on the whereabouts of youth Smith. Two (2) day's before this arbitration, management responded to the unions request for youth Smith's address and phone number. Although the union does not believe this document or the tape should carry the day in it's over all argument in this case. Management should be penalized for its delay in receiving requested information. Youth Ryan Smiths taped testimony stated that he slipped and fell into the window and was not hurt. Ryan Smith's first statement (C-J page 27) bears this out. Also in progress notes (J-C page 21 2cnd par youths statement toward clinic) Although Smith made many statement contradicting that. (J-C 68-69) The statement by Jefferies (J-D 20) JCO Jefferies states that the youth told him on October 5 2004 that if he didn't change his story that he would be facing a felony or more time. He also brought this information out in his taped testimony.

Sixth witness- Chuck Wilson

Officer Wilson testified that he had been in a marine core for 5 years and helped DYS enhancement team and also helped to train new employees, and was also assigned to coordinate the school area. At this point the union presented exhibit 2 (Chuck Wilson's evaluations) from 1995 till 2003. Officer Wilson received 43 above's in his evaluation, some which deal with demanding situations. Mr. Wilson testified that he put his hand on the left shoulder of the youth, and the youth slapped it away. At that point Officer Wilson put his right hand on the youth and pushed him back to respond to the youth knocking his arm away. At some point the youth lost his balance and fell into the window. Mr. Wilson stated that he tried to grab the youth to keep him from falling into the glass. Officer Wilson's incident statements (J-C 24-25-26 And Q-A J-C 56-59 78-81) all point to the fact that Officer Wilson was following policy 301.05 J-D page 1-17. Page 2 of the policy shows the continuum under youth resistance the youth was verbally and actively resisting. The union feels that Mr. Wilson did not use excessive force (see J-E page 5 rules 414), which does not give a definition of excessive force.

In Closing

The Union feels that Management has not met its burden of proof and that thier own fact finding panel should have been the tool that they used from the start in this investigation. Also the Union would argue that there own fact finding panel is somewhat bias In thier investigation in that Robert Walker the R.N. Supervisor who changed R.N. Moore's assessment report about youth Smith Is on that fact finding committee see J-C Page 16 said panels see page J-C page 14 based there summery on the preponderance of the evidence instead of clear convincing evidence. In this case management picked and chose what evidence to use and not to use. For the above stated reasons we ask that the arbitrator make the grievant whole and to reinstate the grievant to his former position (first shift, same day's off, any and all back pay included but not limited to role call, holiday and overtime pay from the removal day to present, all benefits, reimburse all sick vacation, and personal time accrued from the removal date, all PERS time and money reimburse from the removal date, the remove will be expunged from his record E-Hawk file, and no break in seniority.

Based on the above, the Grievant and the Union urge the arbitrator to sustain the grievance and to both reinstate the Grievant to his former position and to ensure that he is made whole for his lost wages and benefits. The Union also requests that the Grievant's seniority be restored and that all data regarding the Grievant's discharge be expunged from his personnel records maintained by DYS.

DISCUSSION

The U.S. Supreme Court has cautioned that an arbitrator is confined to an interpretation and application of a collective bargaining agreement, and he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from a collective bargaining agreement. *Ohio Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n, Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 180, 572 N.E.2d 71 (1991), citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

> The arbitrator is a creature of the contract between the parties and has only that authority and jurisdiction granted to him. Where the language of a contract is clear and unambiguous, it is his obligation to enforce it and not to apply his own concepts of fairness and justice. When the parties have agreed to include [specific provisions] within the contract and agree to their terms and conditions, the arbitrator must regard it as a contractual

undertaking subject to the same treatment as any other provisions of the contract.

NES Equip. Rental, LP and Operating Eng'rs, Local 324, 05-1 Lab. Arb. Awards (CCH) P 3124 (Daniel 2004). Article 25.03 of the Agreement, which details the steps of the parties' negotiated grievance procedure, provides the following language specifically limiting the arbitrator's authority:

> Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

Generally, in an employee termination case, an arbitrator must determine whether an employer has proved clearly and convincingly that a discharged employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 102 LA 555 (Bergist 1994). If an employer does not meet this burden, then an arbitrator must decide whether the amount of discipline is reasonable. In making this determination, the arbitrator may consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work record, and whether the employer has acted consistently with respect to similar previous offenses. *Presource Distrib. Servs., Inc. and Teamsters Local 284*, FMCS No. 96-01624 (1997). The right of an arbitrator to change or

modify penalties found to be improper or too severe is inherent in the arbitrator's power to determine "just cause." This right is also inherent in the arbitrator's authority to finally resolve a dispute. Generally, an arbitrator will not substitute his own judgment for that of an employer unless the challenged penalty imposed is deemed to be excessive, given any mitigating circumstances. *Verizon Wireless and DWQ, Local 2236*, 117 LA 589 (Dichler 2002).

> Discharge from one's employment is management's most extreme penalty against an employee. Given its seriousness and finality, the burden of proof generally is held to be on the employer to prove guilt of a wrongdoing in a disciplinary discharge or to justify or show "good cause" for terminating an employee. This is especially true in cases, like this one, where the parties have agreed that the collective bargaining agreement requires "just cause" for disciplinary action, including discharge.

Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for "just cause," but does not define what does constitute "just cause," it is proper for an arbitrator to look at employer policies, rules, statutes, and regulations to determine whether or not a discharge was actually warranted. *E. Associated Coal Corp. and United Mine Workers of Am., Dist. 17*, 139 Lab. Arb. Awards (CCH) P 10,604 (1998).

> "Just cause" is the contractual principle that regulates an employer's disciplinary authority. It is an amorphous standard, ordinarily open to arbitral interpretation on a case-by-case basis. Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances of the misconduct, mitigating factors, and whether the aggrieved employee received his/her contractual and legal due process protections.

State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County and Mun. Employees, AFSCME State Council 61, 01-2 Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001). The existence of "just cause" is generally recognized as encompassing two basic elements. First, the Employer bears the burden of proof to show that the Grievant committed an offense or engaged in misconduct that warranted some form of disciplinary action. The second prong of "just cause" is to determine whether the severity of the responsive action taken by the employer was commensurate with the degree of seriousness of the established offense. *City of Oklahoma City, Okla. and Am. Fed'n of State, County and Mun. Employees, Local 2406*, 02-1 Lab. Arb. Awards (CCH) P 3104 (Eisenmenger 2001). The proof must satisfy both the question of any actual wrongdoing charged against an employee and the appropriateness of the punishment imposed. "Just cause" requires that employer policies and rules be fair and reasonable and that they be equally, even-handedly, and consistently applied to all employees. *Int'l Assoc. of Machinists and Aerospace Workers Union. Dist. 160 and Intalco Aluminum Corp.*, 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

In this discharge matter, a determination of "just cause" hinges on the credibility of witness testimony. It is the role of an arbitrator to observe the witnesses and determine who is telling the truth. *Givaudin Corp.*, 80 LA 835, 839 (Deckerman 1983).

> The arbitrator must look beyond actual testimony and search to expose any bias or motivation for the testimony given. Where there is a conflict in testimony, this does not necessarily mean that any party may be deliberately misrepresenting or falsely testifying. Hearings may be replete with good faith conflicting testimony as to what the witnesses thought they heard or saw.

Am. Baking Co., Merita Div. and Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., Local No. 28, Dist. 65, 87-1 Lab. Arb. Awards (CCH) P 8176 (Statham 1986). In addition to determining the credibility of witnesses, the arbitrator also determines the weight to be accorded the evidence submitted by the parties. *Minn. Teamsters Pub. and Law Enforcement Employees Union, Local No. 320 and City of Champlin, State of Minn.*, 00-2 Lab. Arb. Awards (CCH) P 3499 (Berquist 2000). Because reliability resolution is often the most difficult fact for any fact-finder to resolve, it is proper to take into account the appearance, manner, and demeanor of each witness while testifying, his apparent frankness and intelligence, his capacity for consecutive narration of acts and events, the probability of the story related by him, the advantages he appears to have had for gaining accurate information on the subject, the accuracy or retentiveness of his memory as well as the lapse of time affecting it, and even the intonation of his voice and his positiveness or

uncertainty in testifying. *Racing Corp. of West Virginia d/b/a Tri-State Race and Gaming and United Steelworkers of Am., ALF-CIO*, 00-2 Lab. Arb. Awards (CCH) P 3625 (Frockt 2000).

> In resolving the issues presented in any case, an arbitrator must determine the weight, relevancy, and authenticity of evidence. He must weigh and consider the exhibits received into evidence, any stipulations of the parties, and the testimony—both on direct and cross-examination—presented during the hearing. With regard to the testimony presented, an arbitrator must determine whether and to what extent the testimony of each witness is to be believed, as well as the significance of the facts educed . . . To assist in making the necessary credibility determinations, although the best weapon is probably common sense, arbitrators utilize various guidelines. They consider, *inter alia*, the conduct, appearance, and demeanor of each witness who appears and gives testimony, weighing, of course, his or her frankness or lack of frankness, any inconsistencies between his testimony and any previous statements he may have made, any inconsistencies between his testimony and that of other witnesses, his character as indicated by his past history and conduct, any relationship with or feeling for or against the grievant or either of the parties which the witness may have, the factual probability or improbability of the testimony offered, the witness's opportunity for observation or acquisition of information with respect to the matters about which he testified, and any possible motive or lack of motive he may have had for testifying the way he did or any interest or lack of interest he may have in the outcome of the dispute.

Startran, Inc. and Amalgamated Transit Union, Local 1091, 00-2 Lab. Arb. Awards (CCH) P 3490 (Richard 2000).

In this particular case, facts are in dispute regarding the Grievant's actual conduct involving his use of physical force in dealing with Smith. The issue centers on the "force" actually employed by Wilson and the nature of his response to having his hand thrown from Smith's upper torso when Wilson responded to Smith's profanity by placing his hand on Smith's

shoulder or chest. In resolving the conflicts in witnesses' testimony, an arbitrator normally utilizes the same factors that a judge or jury would use is assessing witness credibility. Not all of the witnesses presented could have been telling the truth and, therefore, the arbitrator must carefully analyze all of the testimony in order to resolve the conflict. In doing so, arbitrators and other triers of fact always keep in consideration the fact that a witness may be motivated to testify falsely due to some self-interest. Certainly, a grievant accused of misconduct and facing a severe disciplinary penalty has such an interest, but other witnesses may also. In addition to considering questions of self-interest or motivation, it is also of value to consider whether parties acted in a way that reasonably prudent persons would under the circumstances and as events unfolded, thus by their actions confirming what is alleged to have taken place. *Racing Corp. of W.Va. d/b/a Tri-State Race and Gaming and United Steelworkers of Am., AFL-CIO, Local 14614*, 00-2 Lab. Arb. Awards (CCH) P 3625 (Frockt 2000).

Arbitrators generally agree that, once proof of an offense has been established, the determination as to the appropriate penalty generally lies within the discretion of management. *Greene County Dept. of Human Res. and Teamsters Local 957*, FMCS Case No. 97/08895 (Sergent 1997). The "Management Rights" section of the Agreement, included in Article

reserves to DYS the right to make disciplinary decisions as provided for under O.R.C. 4117.08 C.

Arbitrators do not lightly interfere with management's decisions in discipline and discharge matters, but that does not mean to suggest that they will sustain an action found to be unjust or unreasonable under all circumstances. The role of an arbitrator is extremely limited in a disciplinary discharge matter. "An arbitrator must review, not redetermine, the disciplinary action imposed by an employer. Arbitrators are not authorized to make a disciplinary decision on their own, and they should hesitate to substitute their judgment for that of management. The determination of employee misconduct is properly a function of management." *Operating Eng'rs Local Union No. 3 and Grace Pac. Corp.*, 01-2 Lab. Arb. Awards (CCH) P 3971 (Najita 2001).

When a grievance involves a challenge to a managerial decision or action, the standard of review is whether a challenged action is arbitrary, capricious, or taken in bad faith. *Kankakee (Ill.) School Dist. No. 111 and Serv. Employees Int'l Union, Local 73,* 117 LA 1209 (2002).

> Arbitrary conduct is not rooted in reason or judgment but is irrational under the circumstances. It is whimsical in character and not governed by any objective rule or standard. An action is described as arbitrary when it is without consideration and in disregard of facts and circumstances of a case and without a rational basis, justification, or excuse. The term "capricious" also defines a course of action that is whimsical, changeable, or inconstant.

City of Solon and Ohio Patrolman's Benevolent Ass'n, 114 LA 221 (Oberdank 2000).

The "just cause" standard also requires an employer to conduct a fair, impartial, and thorough investigation before determining an employee's guilt and initiating disciplinary action. It requires the employer to impartially examine all of the evidence, including the totality of the circumstances surrounding the conduct in question and possible mitigating factors that might reasonably explain an employee's behavior. Further, this "just cause" standard requires that the employer's investigation produce substantive proof of the employee's guilt. *Yolo County Corr. Officers Ass'n and Yolo County Sheriff-Coroner's Dept., Woodland, Cal.,* 04-1 Lab. Arb. Awards (CCH) P 3697 (Nelson 2003). A thoroughly settled principle of industrial due process is that a decision to discharge must be based on a fair and thorough investigation of the facts. *Kohl's Food Stores, Inc. and Commercial Workers Union, Local 73A,* 02-2 Lab. Arb. Awards (CCH) (Wolff 2001). "Elemental fairness" requires that unbiased persons conduct a full and fair investigation of employee misconduct. *Communication Workers of Am., AFL-CIO and Quest Communications Int'l, Inc.,* 01-2 Lab. Arb. Awards (CCH) P 3903 (Landau 2000). The "Institutional and Administrative Review" of the disputed incident in which the Grievant allegedly assaulted Smith and used excessive force was based at least in part on the initial investigation conducted by the Grievant's supervisors, Ford and Freeman, and

depended in large measure on the written statements solicited from other employees, who allegedly witnessed part of the disputed incident. Problematic to the arbitrator is the questionable objectivity of investigation reports gathered and witness testimony offered by these same two individuals.

` DYS contends that the Grievant's actions were tantamount to abuse of Smith, but the arbitrator here finds that there was an absence of sufficient evidence that the Grievant actually engaged in the specific conduct for which he was disciplined, which is a primary requirement among the substantive elements of "just cause." *King Soopers, Inc. and United Food and Commercial Workers, Local No. 7*, 03-1 Lab. Arb. Awards (CCH) P 3387 (Blackard 2002). The level of evidence required to summarily sever the employment relationship is clear and convincing evidence that the offense happened as alleged. *Bismarck Food Servs., Inc. and Hotel Employees and Rest. Employees Union, Local 24*, 8801 Lab. Arb. Awards (CCH) P 8104 (Dorby 1987). The absence of sufficient substantive evidence is indicated in the memorandum accompanying the prosecution's motion to dismiss a criminal action against the Grievant in the Massillon Municipal Court (Union Exh. 1). That document indicates the prosecution's conclusion that it "[could not] successfully meet its burden of proof" in attempting to prove that the Grievant had committed

criminal assault. The significant language in the prosecution's memorandum includes the following:

> [B]ased upon further review of the Department of Youth Services Management of Resistant Youth Behavior Policy, the State of Ohio believes that . . . Charles J. Wilson was privileged to response physically in a reasonable and consistent degree to the amount of resistance being invoked by a resistant youth, in order to preserve institution security and order . . . [T]he State of Ohio has concluded that . . . Smith initially exhibited passive resistance followed by active resistance in response to . . . Wilson's attempt to maintain institution security and order . . . Passive resistance is defined in part as the failure of a youth to follow a verbal directive. Active resistance is defined in part as physically evasive movements to avoid a staff member's attempt to gain control of a youth or the pulling away from staff . . . In JCO Charles Wilson's attempt to "escort" youth Smith from the med line, it is uncontroverted that youth Smith exhibited active resistance by slapping or shrugging JCO Charles White's arm away from him. A JCO may respond to a youth's active resistance with a Level III physical response consisting of Escort Techniques or Control Techniques . . . [T]he State of Ohio does not believe it could successfully meet its burden of proving beyond a reasonable doubt that on or about the 29th day of September, 2004, [that] Charles Wilson did "knowingly cause or attempt to cause physical harm" to youth Smith.

Although certainly not dispositive in the instant matter, the arbitrator does find this determination by the State of Ohio to be indicative of the absence of the requisite evidence to support DYS's finding that the Grievant's response to Smith's misconduct was, in fact, unreasonable under the circumstances. After considering all of the evidence included in the record, the arbitrator here recognizes that, in light of conflicting witness testimony, it has not been clearly and convincingly proven that the Grievant did, in fact, push Smith into the wall and window, as DYS claims, or that Smith did not, in fact, lose his balance, as the Grievant and

Union contend, and then fell backward into the wall and window. Moreover, the videotape did not capture the incident (see hearing officer's statement) and it does not validate either version of the events.

The Union contends that, if the Grievant's handling of Smith's misconduct merited the imposition of employee discipline against the Grievant, that progressive discipline should have been applied in view of his long-term, favorable work history. "Progressive discipline" is defined in Ohio Administrative Code § 124-1-02(8) as follows:

> Progressive discipline generally means the act of discharging an employee in graduated increments and progressing through a logical sequence, such as a written reprimand for a first offense, a short suspension for the second offense, and a longer suspension or removal for the third offense. The severity of the offense may negate the use of progressive discipline.

The application of progressive discipline by the Board is based on its application of the following Agreement language, included in Article 24.01:

> 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 . . .

The "just cause" principle applies to the level of discipline, as well as to the reason for the discipline in dispute. That means that there must be some proportionality between the offense and the punishment imposed, that the Employer must use progressive discipline, except in the most extreme cases, and that the Employer must weigh all mitigating factors, such as the employee's seniority, the magnitude of the offense, and the

employee's prior work record. *Lorillard Tobacco Co., Greensboro, N.C. and Bakery, Confectionary and Tobacco Workers Int'l Union, Local 317T,* 00-1 Lab. Arb. Awards (CCH) P3433 (Nolan 2000). The intent of progressive discipline is correction, and most offenses call for warnings to be used before termination is imposed. *City of Bell Gardens (Cal.),* 00-2 Lab. Arb. Awards (CCH) P 3489 (Pool 2000). It is the Employer's burden in a discipline and/or discharge case to prove guilt of wrongdoing and to also show "good cause" for the discipline and/or discharge action.

Arbitrators almost universally agree that there are factors that, if present, may mitigate against the imposition of discharge. *Int'l Union of Operating Eng'rs, Local 18 and Stein, Inc.,* 00-2 Lab. Arb. Awards (CCH) P 3582 (Shanker 2000). It is a serious violation of arbitral standards not to consider an employee's past work or performance record. *City of Houston (Tex.),* 07-2 Lab. Arb. Awards (CCH) P 8575 (Williams 1986). An important factor in the instant matter is that progressive discipline was not utilized or apparently even considered. Most arbitrators emphasize that the purpose of progressive discipline is not to punish, but rather to correct. Thus, except for the most egregious situations, arbitrators generally insist on progressive discipline in an attempt to correct before the imposition of the ultimate penalty of discharge. This is particularly true in situations such as the instant matter, when the previous work record of the Grievant is "clean" and contains no prior infractions that required discipline. *Int'l*

Union of Operating Eng'rs. There is nothing in the Grievant's employment history to suggest that he could not be remediated through progressive discipline and an opportunity to receive additional training regarding the use of appropriate disciplinary responses. At the arbitration hearing, testimony of at least two witnesses (Charles Ford and Linda Austin) indicated that the Grievant was a good officer, who typically demonstrated a firm, fair, and caring attitude in dealing with the Indian River population. Performance Summaries of the Grievant's work during the past several years (Union Exh. 2) indicate that the Grievant's work was found to be generally "satisfactory" and in many cases was noted as "exceeding expectations."

> In evaluating whether the penalty of termination was warranted, a wide range of factors may be considered. These include the grievant's entire work history; prior discipline; compliance with procedural or contractual requirements regarding progressive discipline; and any aggravating or mitigating circumstances.

Communication Workers of Am., AFL-CIO and Quest Communications Int'l, Inc., 01-2 Lab. Arb. Awards (CCH) P 3903 (Landau 2000). Such circumstances in the area of discipline include the nature of the offense and the degree of fault. *Hamilton County Sheriff's Dept. and Frat. Order of Police, Ohio Labor Council, Inc.*, 91-1 Lab. Arb. Awards (CCH) P8158 (Klein 1990). The arbitrator here believes that the Grievant's knowledge that Smith had been transferred to the Indian River location from another DYS facility after he had assaulted a correctional officer there may have

affected the Grievant's response to Smith's conduct, which changed from passive resistance to active resistance and was then subject to a response by Wilson of a different nature and magnitude.

Arbitrators have recognized that managers must have some latitude in disciplinary situations and should exercise discretion to treat employee misconduct on a case-by-case basis. "Disciplinary actions must reflect the circumstances of each incident and the employment record of the individual employee." *Paper, Allied Indus., Chem., and Energy Workers Int'l Union, AFL-CIO, CLC, Local 8-0784 and Chinet Co.*, 01-1 Lab. Arb. Awards (CCH) P 3819 (Nelson 2000). Employee offenses are generally divided into the "extremely serious" and "less serious" categories. Less serious offenses call for a less severe penalty, providing the employee with an opportunity to correct the improper conduct. *Whiteway Mfg. Co.*, 85 LA 144 (Cloke 1946). Moreover, in the less serious cases, arbitrators generally apply progressive discipline, exercise lenience, and modify disciplinary penalties imposed by management when there mitigating facts that indicate that the penalty is too severe.

In the instant matter, the Grievant's conduct justified discipline being imposed. The arbitrator recognizes that the Grievant, as a veteran employee, failed to take the most appropriate course of action in responding to Smith's misconduct and was unable to display a greater sense of reasonable anticipation for seeking the assistance of fellow

officers. In the "Disciplinary Action—Removal" termination letter (Joint Exh. C, p. 13) from Indian River Superintendent Arthur Tate, Jr. to the Director of the Ohio Department of Youth Services, Mr. Tate recommended that termination be imposed, while noting in his letter or memo that "DYS Policy 103.17 prescribes a 6 day suspension to termination for a level four infraction absent intervening discipline." The penalty of termination prescribed was the most severe from the range of all options available under DYS General Work Rules, Standards of Employee Conduct, Rule Violations and Penalties (Joint Exh. E). In light of the mitigating factors recognized by the arbitrator, including the Grievant's long and unblemished employment record with DYS, the likelihood of his remediation, and the absence of clear and convincing evidence that his conduct his use of force was excessive, his summary discharge in response to this one offense is excessive, does not fit the "crime," and does not fundamentally comport with either progressive discipline of "just cause." The penalty imposed should be based on evaluating the actual harm resulting from an employee's conduct, rather than on speculation, to be congruent with progressive discipline and "just cause." *Yolo County Corr. Officers Ass'n.*

> In disciplinary cases generally, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under the circumstances of the situation. If they could not to do, arbitration would be a sham, and of little importance, since the judgment of management would always amount to a final verdict, without appeal. The arbitrator's authority stems from

> the "just cause" concept, and if indeed the penalty is not fair and reasonable, under the circumstances, then arbitrators do have a duty to reverse, or modify, the penalty.

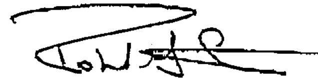
Escalade Sports, Inc. and Int'l Union of Electronic, Salaried, Machine and Furniture Workers, AFL-CIO, Local 848.

In this matter it appears the youth was not seriously hurt, yet the potential for such harm was present. I find the Grievant's conduct in this matter invites corrective action short of discharge. While the Grievant's conduct did not rise to the level of abuse, the evidence indicates that on September 29, 2004 the Grievant had viable options that if employed may have avoided the confrontation that took place. For example, present in the immediate vicinity were other officers as well as managerial staff who could have been called by the Grievant for assistance. Ten (10) years of experience and the expected wisdom gained over that period of time could have been put to better use in this matter. In fashioning an award the inclusion of appropriate corrective action is to correct the Grievant's action in the future, and also to underscore the fact that discretion is often the better part of valor when it comes to handling dangerous and difficult juvenile inmates.

AWARD

The grievance is granted in part and denied in part. The Grievant's termination shall be removed from his record and replaced with a fifteen (15) day suspension effective the same date as was the termination. In addition, the Grievant's record shall reflect the singe charge of 5.1 Failure to Follow Policies and Procedures. All other charges shall be removed from the Grievant's personal record. The Grievant shall be returned to employment (same position and shift) with back pay (less any W-2 income earned subsequent to termination and unemployment paid), less fifteen (15) work days, full restoration of his seniority, and any benefits he would have accumulated from the time of his termination, less suspension time, to the date of his return. The Grievant shall be returned to work in accordance with the Collective Bargaining Agreement, with the Employer having the discretion to place the Grievant through any retraining it reasonably deems needed following the Grievant's long absence from his position.

Respectfully submitted this 13th day of November 2005.



Robert G. Stein, Arbitrator

FROM : CHAPHARTMANSTEIN/RGSTEIN PHONE NO. : 330 676 1199 Nov. 16 2005 08:47AM P3