

#968

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

Department of Youth Services/Scioto Correctional Facility

-AND-

OCSEA/AFSCME Local 11

Appearing for DYS

Bruce Brock, LRO
Steve Elliott, Personnel Officer 3
Tina Krueger, Deputy Director HR
Tim Mason, Operations Administrator
Paul Scarsella, Assistant Prosecutor
Mark Tackett, LRO, Management Advocate
Steve Wolfe, LRS/OCB

Appearing for OCSEA

Thomas Cochrane, Union Attorney
Calvin Collins, President-2130
Stanley Gates, Grievant
Colby Glaze, JCO
Mike Hill, 2nd Union
Cinda Thacker-Newlin, JCO
Karl Wilkins, Jr., Chief Steward-2130

CASE-SPECIFIC DATA

Grievance Nos.

Grievance No. 35-07-20040513-0255-01-03

Hearing Held

January 23, 2007

Case Decided

May 31, 2007

Subject

Excessive Force Against Youth, Failure to Report Physical Force, Interference with Investigation, Failure to Follow Policies and Procedures

Award

Grievance Denied

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

Table of Contents

| | |
|--|----|
| I. The Facts | 3 |
| II. The Issue | 7 |
| III. Relevant Contractual Language, Policies, and Work Rules | 8 |
| IV. Summaries of Parties' Arguments | 8 |
| A. Summary of Agency's Arguments | 8 |
| B. Summary of Union's Arguments | 9 |
| V. Analysis and Discussion | 9 |
| A. Evidentiary Preliminaries—measure of Persuasion | 9 |
| B. Excessive Force | 10 |
| 1. Agency's Position | 10 |
| 2. Union's Position | 11 |
| C. Proof of Excessive Force | 12 |
| D. Impact of Criminal Process and Alford Plea | 13 |
| E. Duty to Report Force | 15 |
| F. Interference in Administrative Investigation | 15 |
| VI. Penalty Decision | 18 |
| A. Mitigative Circumstances | 18 |
| B. Aggravative Circumstances | 18 |
| C. Proper Measure of Discipline | 19 |
| VII. The Award | 19 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

I. The Facts

The parties to this disciplinary dispute are the Department of Youth Services, Scioto Juvenile Correctional Facility ("Scioto" or "Agency") and Ohio Civil Service Employees Association AFSCME Local 11 AFL-CIO ("Union"), representing Stanley Gates ("Grievant"). Scioto is a high-security juvenile correctional facility that houses all female youths assigned to DYS. Also, Scioto is the intake center for all DYS male and female juveniles. DYS hired the Grievant as a Juvenile Corrections Officer ("JCO") on June 15, 1992¹ and removed him on May 6, 2004 when he was a second-shift Correctional Officer at Scioto. DYS fired the Grievant for violating several rules under its General Work Rule Policy 103.17. The specific allegations against the Grievant include violating: Rule 3.7, "Failure to Report Physical Force," Rule 3.8, "Interference in an Investigation," Rule 4.14, "Excessive Use of Force," and Rule 5.1, "Failure to Follow Policies and Procedures."² When he was removed, the Grievant had an active written reprimand for violating Rule 5.1, "Failure to Follow Policies and Procedures."³ At the arbitral hearing, the Parties agreed that the instant dispute was properly before the Undersigned.

During the arbitral hearing before the Undersigned, the Agency relied on the written statements of seven female youths, the Grievant's inconsistent statements, and his *Alford* plea in a criminal prosecution to establish the charge of "Excessive Use of Force." The following scenario gave rise to the instant dispute. At the of the beginning of the second shift on December 28, 2003 when the Grievant notified the youths that misconduct during dinner would result in their being restrained and crying. During dinner that evening, the youths were prohibited from talking, but Youth Jackson talked anyway. Accordingly, after dinner, the Grievant and Juvenile Correctional Officer James escorted Youth Jackson to her room. En route there, Youth Jackson and JCO James began to argue and curse at each other. When Youth Jackson reached her room, the Grievant stopped her from placing her activities box in the room. Youth Jackson then became agitated,

¹ Joint Issues and Stipulations.

² *Id.*

³ *Id.*

1 entered her room, and threw a cup filled with water back out the door at the Grievant. The cup did not hit him.
2 According to the Grievant, he and JCO James then left the area, and subsequently the Grievant allowed Youth
3 Jackson to leave her room when she had calmed down. Neither the Grievant nor JCO James officially
4 reported this incident. Subsequently, JCO James submitted a written statement of the event that essentially
5 tracked the Grievant's.¹⁴

6 The alternative account is that the Grievant pushed Youth Jackson in her room where he slapped her
7 about the head and face and ultimately ruptured her eardrum. Youth Jackson did not immediately report the
8 alleged beating, and in fact initially denied it, because the Grievant allegedly threatened that her time in
9 Scioto would be increased if she reported his misconduct. According to Youth Jackson, that threat was
10 especially intimidating because she wanted to be with her son as soon as possible. However, Social Worker
11 Igwi heard snippets of the alleged incident through the grapevine and on December 30, 2003 approached
12 Youth Jackson about it. After Mr. Igwi assured Youth Jackson that he was only concerned with the incident
13 and not the consequences to her, Youth Jackson told him about the alleged beating. Specifically, she claimed
14 that the Grievant pushed her into her room where he continually struck her in the face while JCO James
15 observed from the doorway of her room. Furthermore, she told Mr. Igwi that she had lost some hearing in
16 her left ear.

17 On December 30, 2004, Mr. Igwi reported the alleged abuse and sent Youth Jackson for medical
18 examination. Upon examining Youth Jackson on December 30, 2004, the medical staff reported none of the
19 signs of physical abuse set forth above¹⁵ but they did find blood in Youth Jackson's left ear and determined
20 that she had a ruptured eardrum.¹⁶ Based on Youth Jackson's allegations and her ruptured eardrum, on or
21 about December 31, 2004, the Agency assigned Mr. Steve Elliott to initiate an administrative investigation

¹⁴ DT, at 93.

¹⁵ DT, at 53-54.

¹⁶ *Id.*

1 of Youth Jackson's allegations against the Grievant and JCO James.¹² Mr. Elliott initiated his investigation
2 that same day.¹³

3 During that investigation, Mr. Elliott interviewed approximately twelve youths,¹⁴ most of whom made
4 written statements and/or statements during interviews. At least seven youths essentially offered written
5 statements and/or statements in interviews with Mr. Elliott that the Grievant **pushed** Youth Jackson into her
6 room, entered immediately after her, and battered her.¹⁵ Many of the youths said they heard the sound of
7 slapping and banging; some allegedly heard Youth Jackson screaming. Also, most youths placed JCO James
8 standing at the door of Youth Jackson's room ordering the youths into their rooms.¹⁶

9 Finally, most of the youths claimed that Youth Jackson had signs of physical abuse when they saw her
10 on the evening of December 28 and the next day, December 29, 2004.¹⁷ Specifically, (1) She was badly
11 bruised;¹⁸ (2) Her face had "warts"¹⁹ or welts²⁰ or bumps;²¹ (3) Her lip was busted;²² (4) Her lip was
12 swollen;²³ and (5) The left side of her face was swollen.²⁴ In addition, Youth Jackson said her left ear and
13 hand were swollen and her lip was cut.²⁵ Mr. Elliott completed his investigation on or about February 23,
14 2004²⁶ and found evidence that the Grievant "acted improperly" on December 28, 2004²⁷.

¹² DT, at 48.

¹³ DT, at 35.

¹⁴ DT, at 50A.

¹⁵ Written statements and interviews of the following youths: Youth Greenlee, DT 58 & 75; Youth Jackson, DT 56 & 71; Youth Morrow, DT 57 & 64; Youth Russell, DT 77; Youth Tobias, DT 73; Youth Washington, DT 59 & 66; and Youth Yeager, DT 69.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ DT, at 57.

¹⁹ *Id.*, at 65.

²⁰ *Id.*, at 87.

²¹ *Id.*, at 67, 89.

²² *Id.*, at 65.

²³ *Id.*, at 70, 76, 77, 79.

²⁴ *Id.*, at 77, 89.

²⁵ *Id.*, at 56.

²⁶ *Id.*, at 39.

²⁷ *Id.*, at 37.

1 Based on Mr. Elliott's investigative report, the Agency charged the Grievant with violation of Rule No.
2 3.6, "Failure to Follow Work Assignment," Rule No. 3.7, "Failure to Report Physical Force," Rule No. 3.8,
3 "Interference in an Investigation," Rule No. 4.13, "Physical Assault," Rule No. 4.14, "Excessive Use of
4 Force," and Rule No. 5.1, "Failure to Follow Policies and Procedures."¹²³ On March 11, 2004, the Agency
5 scheduled a pre-disciplinary hearing for March 15, 2004 at 10:00 P.M.¹²⁴ but held the Hearing on March 16,
6 2004 at 10:00 P.M. before Hearing Officer Shari Wolf.¹²⁵ On March 24, 2004, Hearing Officer Wolf
7 submitted her opinion, finding "just cause for further administrative action against . . . [the Grievant]."¹²⁶ On
8 March 25, the Agency removed the Grievant effective May 4, 2004 based on his alleged violation of: DYS
9 Policy 103.17, Rule No. 3.7, "Failure to Report Physical Force," Rule No. 3.8, "Interference in an
10 Investigation, Rule No. 4.14, "Excessive Use of Force," and Rule No. 5.1, "Failure to Follow Policies and
11 Procedures."¹²⁷

12 The Union challenged the Grievant's removal in Grievance No. 35-07-20040513-0255-01-03
13 ("Grievance"), asserting that the Grievant was removed for other than just cause pursuant to Articles 24.01,
14 24.02, and 24.05 of the Collective-bargaining Agreement.¹²⁸ The Parties stipulated that when he was
15 terminated, the Grievant had one written reprimand on his disciplinary record.¹²⁹

16 In addition, the event between the Grievant and Youth Jackson on December 28, 2003 led to the
17 Grievant's being indicted on criminal charges. Allegedly, to exit the criminal justice system and to attend
18 personal matters, the Grievant subsequently entered an *Alford* plea to the lesser included charges of criminal
19 "Assault" and "Falsification."¹³⁰ However, by entering an *Alford* plea, the Grievant also avoided: having a
20 trial by his peers, entering a guilty plea, and facing the prospect of a stiffer penalty. Nevertheless, the court

¹²³ *Id.*, at 32.

¹²⁴ *Id.*

¹²⁵ *Id.*, at 25.

¹²⁶ DT, at 30.

¹²⁷ *Id.*

¹²⁸ Grievance Trail, at 1.

¹²⁹ Joint issue and Stipulations.

¹³⁰ Agency Exhibit 2.

1 plainly noted that despite the *Alford* plea, it retained the right to sentence the Grievant to the maximum based
2 on the criminal charges of "Assault" and "Falsification."¹¹ Finally, as part of the *Alford* plea, the Grievant
3 agreed not to work in an environment with juveniles including Scioto, which, of course, precluded his being
4 reinstated at Scioto. The Union subsequently modified the Grievance to exclude the demand for the
5 Grievant's reinstatement. The Parties were unable to resolve this dispute, and agreed to present it to the
6 Undersigned in an arbitral hearing on January 23, 2007.

7 At the arbitral hearing before the Undersigned, the Parties agreed that the Grievant's reinstatement was
8 not a remedial option and that he only sought monetary relief and a clean record. Also, at the outset of that
9 hearing, the Parties agreed that the dispute was free of procedural errors and properly before the
10 Undersigned.¹² All parties relevant to the resolution of the dispute attended the arbitral hearing. Throughout
11 the hearing, the Undersigned afforded the Parties a full and fair opportunity to present admissible evidence
12 and arguments supporting their positions. Specifically, the parties made opening statements and submitted
13 admissible documentary and testimonial evidence. The latter were fully available for relevant objections and
14 cross-examination. At the close of the hearing, the Parties agreed to e-mail their Post-hearing Briefs to the
15 Undersigned by February 12, 2007, when the arbitral record would be officially closed.

16 II. The Issue

17 The Parties agreed upon the following issue: Was the Grievant removed from his position as a Juvenile
18 Correction Officer with the Scioto Juvenile Correctional Facility for just cause? If not, what shall the remedy
19 be?

¹¹ *Id.*

¹² In its Post-hearing Brief, the Union alleges what appears to be several procedural errors involving the charges. For example, it alleges that the Agency may not rely on the Grievant's alleged refusal to submit two youth statements to Mr. Elliott, since that specific allegation did not appear in the charges. The Arbitrator notes in passing that

1 **III. Relevant Contractual Language, Policies, and Work Rules**

2 **ARTICLE 24-DISCIPLINE**

3 24.01 -Standard

4 Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the
5 burden of proof to establish just cause for any disciplinary action.

6 24.02- Progressive Discipline

7 The Employer will follow the principals of progressive discipline. Disciplinary action will be commensurate
8 with the offense.

9 24.06 -Imposition of Discipline

10 Disciplinary measures shall be reasonable and commensurate with the offense and shall not be used solely
11 for punishment.

12 **General Work Rules Policy 103.17**

13 **IV. Procedures**

- 14 C. Disciplinary action for violations of work rules falls under the relevant provisions of the civil code,
15 not the criminal code. Therefore, employees do not have the right to withhold information regarding
16 a possible infraction of the work rules, even if it may be self-incriminating.

17 **Offenses Infraction Levels**

18 **LEVEL ONE**

19 **Rule 3.7 Failure to Report Physical Force**

20 Failing to report the use of physical force on a youth

21 **Rule 3.8 Interference in an Investigation**

22 Interfering in an investigation, including, but not limited to, coaching, threatening, or
23 attempting to intimidate or alter the statements of a witness (employees, youth or the general
24 public) and/or *withholding information or knowledge concerning a possible rule infraction*
25 *or law violation.*¹³

26 **Rule 4.14 Excessive Use of Force**

27 Use of excessive force toward any individual under the supervision of the department or a
28 member of the general public.

29 **Rule 5.1 Failure to Follow Policies and Procedures**

30 **IV. Summaries of Parties' Arguments**

31 **A. Summary of Agency's Arguments**

- 32 1. The Grievant interfered in an investigation by refusing to submit the statements of two youths regarding
33 the incident between the Grievant and Youth Jackson on December 28, 2004.
- 34 2. The Grievant used excessive force against Youth Jackson. Seven youths said they either observed the
35 Grievant hitting Youth Jackson or heard slapping or banging or both emanating from Youth Jackson's

¹³ Emphasis added.

1 room.

- 2 3. The Grievant failed to report his use of force against Youth Jackson. Tim Mason, then Deputy
3 Superintendent testified that the Grievant should have logged the December 28 incident in the unit log
4 book.
- 5 4. Any of the foregoing violations constitutes a failure to follow policies and procedures.

6 **B. Summary of Union's Arguments**

- 7 1. The Grievant did not interfere with Mr. Elliott's investigation. JCO Thacker collected the youths'
8 statements in the course of a Union's investigation. The Grievant was willing to submit copies of the
9 youths' statements, to which the Agency was not entitled in the first instance. Furthermore, he intended
10 to produce them during the investigation and the Grievance processing.
- 11 2. The Grievant's refusal to submit the youths' statements may not be used to support the "interference."
- 12 3. Since Director Natalucci-Persichetti's *Removal* notice does not explicitly mention the Grievant's alleged
13 refusal to cooperate with Mr. Elliott by submitting the two youths' statements as a basis for the charge
14 of interfering in an administrative investigation, the Agency may not premise its disciplinary decision
15 on that alleged misconduct or refusal.
- 16 4. The Removal Order fails to explain why Natalucci-Persichetti, Director of Scioto, relied on three rule
17 violations to remove the Grievant when the pre-Disciplinary Hearing Officer set forth seven infractions.
- 18 5. The Agency failed to prove that the Grievant used excessive force against Youth Jackson.
19 a. First, the Agency must establish its case by clear and convincing evidence, and it failed to do so.
20 b. Second, the Agency wholly relied on hearsay to establish the use of force charge, thereby denying
21 the Grievant his due process right to cross-examine his accusers. Such hearsay lacks probative value.
22 c. Third, the hearsay statements are externally inconsistent or contradictory.
23 d. Fourth, convicted felons produced the hearsay.
24 e. Fifth, the medical evidence contradicts the statements.
25 5. The Grievant violated no DYS Policy by failing to log the incident.
- 26 6. The Grievant did not interfere in Mr. Elliott's investigation, since he offered to submit copies of the
27 youths' statements.

28 **V. Analysis and Discussion**

29 **A. Evidentiary Preliminaries—Measure of Persuasion**

30 Because this is a disciplinary dispute, the Agency has the burden of proof or persuasion regarding its
31 charges against the Grievant. To establish those charges, the Agency normally must adduce *preponderant*
32 evidence in the arbitral record as a whole, showing that *more likely than not* the Grievant engaged in the
33 alleged misconduct. In the instant case, however, it is fair to impose two measures of persuasion on the
34 Agency. First, as the Union strenuously contends, the moral turpitude associated with the "excessive force"

1 charge very well *could* undermine the Grievant's future efforts to obtain gainful employment and *could*
2 besmirch his reputation in the community.¹³⁴ Nevertheless, the Arbitrator will afford the Grievant the benefit
3 of the doubt with respect to the excessive force charge and will apply the clear and convincing standard to
4 that specific charge in this dispute.

5 On the other hand, there is nothing to recommend the clear and convincing standard for the other three
6 charges that lack perceptible elements of moral turpitude. Therefore, the Agency needs only to establish the
7 other three charges by preponderant evidence in the arbitral record as a whole. Because the Agency has the
8 burden of persuasion regarding its charges against the Grievant, doubts about the existence of any alleged
9 misconduct underlying the charges shall be resolved against the Agency. If the Agency fails adequately to
10 establish the alleged misconduct in the first instance, it cannot prevail on the related charge, *irrespective* of
11 the strength or weakness of the Union's defenses. Similarly, the Union has the burden of persuasion
12 (preponderant evidence) regarding its allegations and affirmative defenses, doubts about which shall be
13 resolved against the Union.

14 **B. Excessive Force**

15 Rule 4.14 prohibits the "use of excessive force toward any individual under the supervision of the
16 department or a member of the general public."¹³⁵ The issue here is whether the Grievant ruptured Youth
17 Jackson's left eardrum on December 28, 2003 when he allegedly slapped her about the face and head.¹³⁶

18 **1. Agency's Position**

19 In support of its "excessive force" charge, the Agency offers three pieces of evidence. First, it offers and
20 heavily relies on the written statements and interviews of seven youths claiming to have witnessed (observed
21 and/or heard) the Grievant hitting Youth Jackson on December 28, 2004. Three youths said they saw JCO

¹³⁴ Although they are not fully devoid of persuasive force, these arguments suffer from some degree of persuasive anemia. In this dispute, the damage is done. The Grievant has gainful employment, which the court has mandated that he retain for some time (Joint Exhibit 6, Sentence Hearing). Given the *Alford* plea and incarceration, the Grievant's reputation in the community is likely undermined, and he is unlikely to suffer further substantial harm from being found guilty of excessive use of force in an arbitral hearing.

¹³⁵ DYS Work Policy No. 103.17 General Work Rules, at 7.

¹³⁶ (There are allegations that the Grievant inflicted other injuries upon Youth Jackson, but the Notice of Removal mentions only ruptured eardrum.)

1 Gates push Youth Jackson into her room and follow her inside. All seven reported hearing sounds of slapping
2 and/or banging emanating from Youth Jackson's room. Two youths said they actually observed the Grievant
3 striking Youth Jackson. Second, the Agency establishes that, on December 30, 2004, two days after the
4 Grievant allegedly beat Youth Jackson in her room, the Agency's medical staff diagnosed Youth Jackson as
5 having a ruptured left eardrum. Youth Jackson claimed the Grievant ruptured her eardrum while hitting her
6 on December 28, 2004. Third, the Agency stresses that the Grievant was indicted for criminal assault and
7 falsification and then copped a plea under North Carolina v. Henry C. Alford³⁷ ("Alford plea"). Furthermore,
8 the Agency argues that "[A]n Alford plea is a form of a guilty plea [and that the Grievant] was definitely
9 found guilty with a preponderance of the evidence."³⁸ Beyond the forgoing affirmative evidence, the Agency
10 argues that the Grievant is unworthy of belief because he offered contradictory accounts of an event on
11 December 28, 2004. Specifically, the Grievant's written statement claims that *he* and Youth Jackson were
12 arguing as he escorted her to her room after she talked during dinner. However, at the arbitral hearing, the
13 Grievant testified that *JCO James* and Youth Jackson were arguing en route to the Youth's room.

14 2. Union's Position

15 The Union argues that the Agency failed to establish the "excessive force" charge for want of probative
16 evidence. Essentially, the Union contends that four flaws fatally taint the Agency's evidence. First, the
17 Union points out that all statements of the Agency's eyewitness are hearsay and that the failure of these
18 witnesses to present themselves for cross-examination at the arbitral hearing denied the Grievant the right to
19 confront his accusers, thereby denying his right to due process. Second, the Union stresses that all statements
20 on which the Agency relies came from convicted felons whose statements are inherently unreliable. Indeed
21 the Union asserts that "the parties have long agreed" that testimony from felons may not be used to establish
22 just cause absent "substantial guarantees of . . . [testimonial] reliability," which the Agency failed to produce

³⁷ 400 U.S. 25 (1970).

³⁸ Agency Post-hearing Brief, at 4.

1 in the instant hearing.¹³⁹ In the Union's view, "One felon cannot vouch for another."¹⁴⁰ Third, the Union
2 argues that the statements lack persuasive force because the witnesses contradict one another as well as the
3 testimonies of Union witnesses who did testify at the arbitral hearing. Fourth, the Union contends that the
4 witnesses' statements gainsay the medical evidence.¹⁴¹ With respect to the *Alford* plea, the Union
5 characterizes the criminal proceedings as irrelevant to the instant dispute because the assault and falsification
6 charges were neither established nor admitted.

7 C. Proof of "Excessive Force"

8 Clearly, the youths' statements are hearsay, a fact that the Agency never contested either during the
9 arbitral hearing or in its Post-hearing Brief. Furthermore, because the Agency's witnesses did not appear to
10 testify at the arbitral hearing, the Grievant was deprived of his due-process right to confront and cross-
11 examine his accusers. Nor is this procedural deprivation remedied because this dispute is three years old and
12 Scioto had released the witnesses before (perhaps long before) the arbitral hearing. The hearsay nature of the
13 statements essentially strips them of virtually all probative value, absent independent, corroborative evidence.
14 Also, the Union correctly notes that the youths' statements are inconsistent on several points. For example,
15 Youth Greene said she heard sounds of slapping and Youth Jackson crying and screaming.¹⁴² Conversely,
16 Youth Yeager said she heard Youth Jackson tell the Grievant, "I ain't gonna cry no matter what. . . ."¹⁴³
17 Similarly, Youth Russell said she heard Youth Jackson say, "I ain't gonna cry over no hoe ass nigger. . . ."¹⁴⁴
18 In stark contrast, Youth Crump said none of the other youths actually saw the Grievant hit Youth Jackson.¹⁴⁵
19 Youth Cornett said she heard banging but no slapping.¹⁴⁶

20 On the other hand, the Youths' statements are substantially consistent on several points. For example,

¹³⁹ Union's Post-hearing Brief, at 20. (citations omitted).

¹⁴⁰ *Id.*

¹⁴¹ Union's Post-hearing Brief, at 21.

¹⁴² DT, at 58.

¹⁴³ DT, at 69.

¹⁴⁴ DT, at 77. *See also* the statements of youths Cornett (DT, at 82) and Crump (DT, at 84) saying they heard Youth Jackson declare that she would not cry.

¹⁴⁵ DT, at 87-88.

¹⁴⁶ DT, at 82.

1 virtually every youth reported that the Grievant pushed Youth Jackson into her room and followed her inside.
2 Similarly, all or almost all of the youth witnesses said that JCO James stood outside Youth Jackson's door
3 and ordered them to go inside their rooms. At bottom, however, the inconsistencies outweigh the
4 consistencies and further undermine the already crippled credibility of the hearsay statement. The lack of
5 credibility together with the hearsay status of the statements strip them of virtually all probative value.

6 In addition, the youths' claims that Youth Jackson had welts, bumps, and a swollen lip the next day
7 (December 29, 2004) is inconsistent with the medical report, which did not mention these injuries. Reason
8 suggests that these injuries would not have entirely disappeared when the medical staff examined Youth
9 Jackson on December 30, 2004. This discrepancy further discredits the youths' statements.

10 Nor was the Union's evidence regarding the "excessive force" charge wholly credible. Indeed, the
11 Grievant's credibility was substantially undermined after he contradicted himself on the basic issue of
12 whether he or JCO James was arguing with Youth Jackson. Also noteworthy is that the Grievant's revised
13 account emerged *after* JCO James had agreed to testify against the Grievant in the criminal trial. Thus, the
14 Grievant's credibility is not entirely intact. Ultimately, however, the burden of persuasion rests on the
15 Agency to demonstrate that the Grievant used excessive force against Youth Jackson on December 28, 2003
16 and not on the Union to establish the reverse. Doubts about that charge are thus resolved against the Agency.
17 The Arbitrator, therefore, does not and logically cannot hold that the Grievant is factually innocent of the
18 "excessive force" charge. Based on evidence in the record as a whole, the Arbitrator is persuaded that the
19 youths' statements failed to prove by *clear and convincing* evidence that the Grievant used excessive force
20 against Youth Jackson on December 28, 2004.⁴²

21 **D. Impact of Criminal Process and *Alford* Plea**

22 The issue now becomes whether the *Alford* plea together with the youths' statements, establish the
23 "excessive force" charge. Because the Arbitrator has held that the statements lack any probative value, the

⁴² Although the Union offered several other arguments regarding the "excessive force" charge, the foregoing arguments and discussion fully resolve the "excessive force" issue.

1 bottom-line issue is whether the *Alford* plea alone establishes the "excessive force" charge. The Agency
2 contends that the *Alford* plea is effectively a guilty plea and establishes guilt by preponderant evidence. On
3 the other hand, the Union views the plea and the entire criminal process as irrelevant because the assault and
4 falsification charges were neither established nor admitted.

5 The *Alford* plea does not establish the Grievant's guilt in this dispute. This issue resuscitates the
6 timeworn debate about the probative value that arbitrators must or should accord decisions in other forums.
7 Grievance arbitration involves a direct examination *novo* assessment of the facts and circumstances that
8 trigger a given dispute, especially where, as here the entire dispute arises from an interpretation or application
9 of the Parties' Collective-bargaining Agreement rather than under external law. Where the dispute is wholly
10 contractual, the decisions or precedent of other forums are merely persuasive rather than mandatory, which
11 means the Arbitrator may partially or wholly adopt or discount them, even where, as here, the same facts
12 triggered the criminal proceedings and the instant dispute. Although the *Alford* plea is a direct examination
13 *facto* guilty plea, it arises from bargaining rather than from adjudication of the facts underlying the charges
14 of assault and falsification. And the Grievant's admission of guilt was strategic rather than factual. He
15 copped the *Alford* plea to avoid the greater risk of being found guilty at trial and of receiving harsher
16 punishment. In contrast, the Parties presumably retained the Undersigned to render a decision on the facts
17 of this dispute rather than to piggyback off another forum's decision, which likely entails policies and
18 rationales different from those in the arbitral arena. Therefore, the Arbitrator holds that even though the
19 *Alford* plea is a *functional* guilty plea, it cannot substitute for an affirmative, explicit adjudication of the
20 underlying rules, facts, and circumstances that precipitated the Grievant's removal, and therefore, cannot
21 address proof of the Grievant's guilt.⁴⁸

22 Moreover, the Court, in *Alford*, could perceive no difference between a plea that refuses to admit a
23 criminal act (*nolo contendere*) and a plea that contains a protestation of innocence when, as in the instant case,

⁴⁸ An *Alford* plea is valid where; (1) A defendant is competently represented by counsel; (2) The plea is intelligently chosen; and (3) There is strong evidence of actual guilt. As far as the constitution was concerned, the Court found no distinction between a *nolo contendere* (guilty plea).

1 a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the
2 judge contains strong evidence of actual guilt. Thus for constitutional purposes, an *Alford* plea is equivalent
3 to a guilty plea, but not necessarily in arbitration, which esteems actual factual adjudication. Based on the
4 foregoing analysis and discussion, the Arbitrator holds that the Grievant's *Alford* plea does not establish that
5 the Grievant used excessive force against Youth Jackson on December 28, 2004.

6 **E. Duty to Report Force**

7 At this juncture, the issue here is whether the Grievant had a duty to report the use of force applied
8 against Youth Jackson on December 28, 2004. The Arbitrator cannot assess this issue absent proof that force
9 was indeed used in the first instance. However, as discussed above, the arbitral record fails to establish
10 clearly and convincingly that the Grievant used excessive (or, for that matter, any) force against Youth
11 Jackson on the date in question. Absent such proof, the Agency cannot establish that the Grievant violated
12 any duty to report the use of force. Accordingly, the Arbitrator holds that the Grievant did not violate any
13 duty to report the use of force.

14 **F. Interference in Administrative Investigation**

15 Here the issue is whether the Grievant interfered with Mr. Elliott's efforts to obtain statements that JCO
16 Thacker obtained from two youths and gave to the Grievant. The Agency claims that the Grievant interfered
17 in the administrative investigation by refusing Mr. Elliott's requests to submit the statements. In response,
18 the Union offers two arguments in support of its position that the Grievant did not interfere in Mr. Elliott's
19 investigation. First, the Union maintains that the Grievant had no duty to submit the statements because JCO
20 Thacker secured them in the course of conducting a Union investigation. Second, the Union urges that the
21 Grievant in fact agreed to submit *copies* (as oppose to the originals) of the statements. However, someone
22 stole them before he could follow through. In addition, the Union states that the Agency was not entitled to
23 the original copies. Third, the Union asserts that the Agency could have independently interviewed the two
24 youths; or the Agency could have obtained copies of the statements from either OCB or OCSEA. Finally,
25 the Union argues that the Grievant never received an official request to submit the documents.

1 Section IV-A of Policy No. 103.17 states: "Disciplinary action for violations of work rules falls under
2 the relevant provisions of the civil code, not the criminal code. Therefore, employees do not have the right
3 to withhold information regarding a possible infraction of the work rules, even if it may be self-
4 incriminating."⁴² On its face, Section IV-A obliges employees to submit information pertaining to possible
5 violations of work rules. In the instant case, the Grievant possessed two statements about conduct that could
6 have violated legitimate work rules. Furthermore, Section IV-A does not provide that the duty to submit
7 possibly inculpatory evidence arises only upon management's formal requests for such evidence. In other
8 words, a formal request from management is not a precondition to the duty to submit such evidence under
9 Section IV-A. During his first and second interview with the Grievant, Mr. Elliott explicitly and repeatedly
10 asked for the two statements and the Grievant adamantly refused to submit them. Under Section IV-A, the
11 Grievant had a duty to submit the statements the *first* time Mr. Elliott asked for them. Nothing in Section IV-
12 A required Mr. Elliott to *formally* request the statements or to *order* the Grievant to submit them. This is not
13 an issue of insubordination or failing to follow a direct order. It is an issue of wrongfully withholding or
14 refusing to submit evidence of possible misconduct pursuant to an administrative investigation. That the
15 Grievant finally agreed to submit copies of the statements neither excuses nor justifies his initial refusal to
16 do so. Furthermore, contrary to the Union's position, nothing in the arbitral record, including JCO Thacker's
17 testimony and written statements, suggests that JCO Thacker was conducting either a formal or an informal
18 investigation for the Union. Instead, the evidence establishes that the two youths affirmatively and
19 voluntarily approached JCO Thacker and submitted the statements. Nor does Section IV-A require the
20 Agency to pursue other venues to obtain the statements, even though the Agency has discretion to do so when
21 conducting an administrative investigation. That discretion hardly relieves the Grievant of his duties under
22 Section IV-A. Consequently, the Arbitrator holds that the Grievant had a clear and present duty to submit
23 the two youths' statements to Mr. Elliott the first time he requested them and that the Grievant violated that

⁴² DYS Work Policy 103.17.

1 duty by refusing to do so. Finally, the Arbitrator perceives no bases for the Grievant's continual refusal to
2 directly answer Mr. Elliott's questions during the second interview on February 12, 2004.⁵⁰ Instead of
3 directly answering Mr. Elliott's questions, the Grievant continually referenced answers he gave in the first
4 interview on January 20, 2004.⁵¹ Had the Grievant affirmatively requested a union representative during the
5 second interview, he would have been fully entitled to one who could have counseled and otherwise assisted
6 him in the interview. With or without the assistance of a union representative, the Grievant could not flatly
7 and repeatedly refuse to answer perfectly legitimate questions, irrespective of whether he had answered them
8 in an earlier interview. Subsequent interviews on the same or similar subject matter are not inconsistent with
9 due process or thorough investigations.

10 Finally, the Union attacks Director Natalucci-Persichetti's Removal Notice, specifically contending that
11 it does not explain why he relied on four rule violations to terminate the Grievant when Pre-disciplinary
12 Hearing Officer Wolf listed seven. The Union also notes that the Removal Notice does not state which of
13 Hearing Officer Wolf's factual findings were rejected and why. The Union then maintains that Director
14 Natalucci-Persichetti's failure specifically to list the Grievant's alleged refusal to submit the two statements
15 to Mr. Elliott effectively bars that alleged conduct from arbitral consideration.

16 Neither of these arguments is persuasive. First, it is not fatal error for the Removal Notice not to list *all*
17 of the Agency's initial charges against the Grievant or to specifically explain why it dropped some charges.
18 What matters is that the Grievant has adequate notice of the charges on which the Agency ultimately relied
19 to terminate him. The second argument seems to suggest that Director Natalucci-Persichetti somehow waived
20 the right to submit the Grievant's refusal to submit the two youths' statements at the arbitral hearing.
21 However, because the Removal Notice does not state a specific episode of misconduct related to a particular
22 charge does not bar that the Agency from trying to demonstrate the existence of that conduct at a subsequent
23 arbitral hearing. However, this proposition only holds where, as here, a Pre-disciplinary Report or similar

⁵⁰ DT, at 43-47.

⁵¹ DT, at 40-42.

1 notification *fully apprises* the Grievant and the Union of the specific misconduct that will be used to support
2 the charges against him.

3 Based on the foregoing discussion, the Arbitrator holds that the Grievant had a duty to submit the two
4 youths' statements and violated that duty by not submitting them when Mr. Elliott asked him to do so during
5 the first and second interviews.

6 **VI. Penalty Decision**

7 Because preponderant evidence in the arbitral record as a whole establishes that the Grievant interfered
8 in an administrative investigation by failing to submit evidence covered by Section IV-A, some measure of
9 discipline is indicated. Also, because of the Grievant's interference in the investigation, he violated Rule 5.1,
10 "Failure to Follow Policies and Procedures." Assessment of the proper quantum of discipline for these
11 infractions involves a balancing of the relevant mitigative and aggravative factors and ultimately a
12 determination of whether removal was unreasonable, arbitrary, capricious, discriminatory, or an abuse of
13 discretion under the circumstances of this case.

14 **A. Mitigative Circumstances**

15 The strongest mitigative factors for the Grievant are his approximate fifteen years of tenure and
16 presumably his satisfactory record of performance, both of which are not to be lightly regarded.

17 **B. Aggravative Circumstances**

18 In opposition to these mitigative factors are the Grievant's active disciplinary record involving a written
19 reprimand and, of course the nature of misconduct established in the instant dispute. As discussed above, the
20 Grievant twice deliberately and repeatedly declined to submit two statements from youths when Mr. Elliott
21 asked him to do so and thereby also violated Rule 5.1. None of the reasons or rationales offered for this
22 misconduct either justify or excuse it. The Agency cannot be expected to conduct thorough administrations
23 without full cooperation from its employees.¹²² Section IV-A makes that much clear.

¹²² In making this ruling, the Arbitrator makes no ruling implicit or otherwise about the Union's right to retain the work product of its official investigations.

1 **C. Proper Measure of Discipline**

2 The foregoing balance of aggravating and mitigating factors indicates that termination of the Grievant
3 was unreasonable in this case. Under ordinary circumstances, the Arbitrator would reinstate the Grievant
4 *without* backpay or any other monetary or non-monetary employment benefit, given the number of his
5 violations and the defiant nature of his misconduct. However, circumstances are not "ordinary" in this case
6 because at the outset of the arbitral hearing, the Union and the Grievant made clear that the Grievant no
7 longer requested and could not accept reinstatement in this dispute. Instead, the Grievant seeks to have his
8 name cleared and to recover for all economic and financial losses, including backpay that he suffered as a
9 result of being terminated. But as stated above, the arbitral record does not indicate that the Grievant is
10 entitled to any monetary or economic relief.

11 **VII. The Award**

12 For all of the foregoing reasons, the Grievance is hereby **DENIED** on its entirety.

13 Respectfully,

14 Robert Brookins

Robert Brookins, Professor of Law, Labor Arbitrator, J.D., Ph.D.