

IN THE MATTER OF ARBITRATION

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BETWEEN

AUG 10 2007

STATE OF OHIO – DEPARTMENT OF YOUTH SERVICES

OCSEA-OFFICE OF
GENERAL COUNSEL

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Richard B. Penn

Case No. 35-07-20061025-0117-01-03

Date of Hearing: June 7, 2007

Place of Hearing: DYS Scioto – Delaware, Ohio

APPEARANCES:

For the Union:

Advocate: Mike Hill, OCSEA Staff Representative

2nd Chair: Patti Howell

Witnesses:

Richard B. Penn - Grievant

John W. Richardson, III – Registered Nurse

Frank Wilborn – Youth

Carl Watson – JCO

For the Employer:

Advocate: Mark Tackett, Labor Relations Officer

2nd Chair: Victor Dandridge, Office of Collective Bargaining

Witnesses:

Mary K. Bourke – Investigator

Chris Lackey – Youth

Charles D. Bird – Training Manager

Amy L. Ast – Former Superintendent

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: August 9, 2007

#975

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2006 through February 28, 2009, between the State of Ohio Department of Youth Services ("DYS") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Richard B. Penn ("Penn") for violating the Ohio Department of Youth Services Policy 103.17, General Work Rules, Sections 4.12 – inappropriate or unwarranted use of force, 5.1 – failure to follow policies and procedures and 5.12 – actions that could harm or potentially harm an employee, youth or a member of the general public.

The removal of the Grievant occurred on October 28, 2006 and was appealed in accordance with Article 24 of the CBA. This matter was heard on June 7, 2007 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were agreed to be submitted by both parties on or about June 22, 2007 but due to email issues the briefs submission date occurred on June 28, 2007.

BACKGROUND

The Grievant was removed because on July 3, 2006 he utilized a technique that is neither taught nor condoned by ODYS in the second restraint of a youth, by placing his arm across the neck and exerting force that caused the youth to move backwards until he fell to the floor. (Joint Exhibit (JX) 1, p. 1).

Penn was employed as a Juvenile Corrections Officer ("JCO") at the Scioto facility. Scioto is one of eight institutions under ODYS governance and is a high-security juvenile correctional facility. JCOs perform security duties related to the juveniles placed in the custody

of ODYS. The Grievant had been employed for over sixteen years, and had no active discipline at the time of his removal.

On July 3, 2006, Youth Chris Lackey ("Lackey"), began inappropriate behavior by standing up, looking out a window and yelling at other juveniles who were walking outside of his living quarters on their way to the cafeteria. Penn verbally instructed the youth to sit down to no avail. The Grievant pressed (signaled) Code 3 to alert other staff of the problem. The Grievant ordered the youth to his room. The Grievant was near the youth to escort him to his room. The youth grabbed a trash can and threw it at or in the vicinity of the Grievant.

The Grievant pushed the youth against a wall and again pressed (signaled) Code 3, while holding the youth with his forearm on his chest.

The youth began to struggle to get free from the Grievant and they eventually went to the floor. After struggling with each other, the youth was able to pull away from Grievant's grasp and got back on his feet. Lackey was taunting the Grievant. The Grievant got up and slammed the youth to the floor by using his arm to "clothesline" the youth back to the floor.

JCO Carl Watson ("Watson") arrived while the Grievant was taking the youth to the floor. JCO Watson ensured other juveniles in the housing unit were secured, then escorted Lackey to the isolation cell. The youth continued to taunt and curse at the Grievant on his way to isolation and after being placed therein.

A video of the incident by security cameras captured some of the interaction including the takedown. The Employer, after reviewing the video and talking with the Grievant and other witnesses, initiated an investigation. The investigation focused on whether the Grievant's conduct escalated the situation and whether the Grievant used inappropriate force when he slammed Lackey to the floor. Mary K. Bourke ("Bourke"), Investigator, concluded that the

Grievant's level of response to Lackey's behavior was inappropriate by employing a restraint technique not authorized by DYS. (JX, pp. 39-40).

As a result, the Grievant was removed by then Superintendent Amy L. Ast ("Ast") for violating the policies listed above.

ISSUE

Was the Grievant disciplined for just cause? If not, what shall the remedy be?

RELEVANT PROVISIONS OF THE CBA AND DYS WORK RULES

ARTICLE 24 – DISCIPLINE

24.01 – STANDARD

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

DYS WORK RULES

POLICY NUMBER 103.17 (IN PART)

I. Policy Provisions (in part)

The policy of the Ohio Department of Youth Services is to establish uniform, written work rules regarding subjects that have general applicability for all employees. This policy shall provide employees the rules of conduct that specify prohibited behavior and penalties that may be imposed. [2-CO-1C-04]. The unauthorized activities contained herein are not considered as all-inclusive, but are intended to be representative examples of activities that warrant immediate corrective action. Violation of this policy and other Ohio Department of Youth Services policies and procedures shall constitute cause for corrective action, up to and including removal.

The penalties reflected on Attachment 103.17.B, DYS General Work Rules and Rule Penalties, shall provide a framework for equitable discipline. The actual discipline imposed by the Agency Director may vary depending on the circumstances and the appropriate Collective Bargaining Agreement (CBA), if applicable. For overtime exempt employees, the discipline issued may differ from the grid as required under the Fair Labor Standards Act.

Rule 4.12 Inappropriate or unwarranted use of force

Use of inappropriate or unwarranted force toward any individual under the supervision of the Department or a member of the general public.

Rule 5.1 Failure to follow policies and procedures

Included but not limited to the Response to Resistance policy, post orders, timekeeping policies, verbal strategies, etc.

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

POLICY NUMBER 301.05 (IN PART)

I. Policy Provisions

The purpose of this policy is to provide guidelines and establish uniform procedures to manage resistant youth behavior. Management interventions include staff use of verbal responses, seclusion, physical responses and mechanical restraining devices in order to control and de-escalate a youth's resistant behavior. These interventions are never to be used as punishment or for the convenience of staff and are applied only with the approval of the Superintendent or designee. [3-JTS-3A-16, 31] Staff response must be reasonable and consistent with the degree of resistance being demonstrated by the youth. When responding to a youth's level of resistance, staff shall utilize the least restrictive response likely to be effective under the circumstances to gain control of the youth. Staff may use force to control situations involving the following:

- To prevent imminent and physical harm to self or other persons.
- To prevent damage to property.
- To prevent or terminate escapes.
- To preserve institution security and order.

II. Applicability

The provisions of this policy apply to all personnel, state operated Department of Youth Services facilities, whose duties may require the use of verbal response, seclusion, physical response and/or mechanical restraints while managing youth.

III. Definitions

Reasonable Response to Resistance – that degree of intervention or level of response which is consistent with the level of resistance displayed by the youth, when staff is in the process of protecting self, others, property, or to preserve institution safety and security. Staff shall use the least restrictive level of response that is reasonably expected to be effective under the circumstances. Staff will choose a reasonable level of response to gain control of the situation based on departmental policy, their physical capabilities/characteristics, training, experience, assessment of the situation, and youth's physical capabilities/characteristics.

Response to Resistance Continuum – provides guidance as to the reasonable level of response by staff to manage resistant youth behavior. Youth Resistance and Staff Response are defined in the continuum as follows:

Verbal Resistance – youth verbally refuses to comply with staff requests or attempts to control a situation. Youth may threaten staff with further resistance or may not respond to staff

Passive Resistance – is the lowest form of physical resistance where the youth refuses to comply or respond to staff instructions through passive actions

Active Resistance - youth make physically evasive movements to defeat staff's attempt to gain control, i.e.: bracing, tensing, attempting to push or pull away from staff, but never attempt to strike staff. This type of resistance also includes non-injurious actions such as throwing feces, urine, water, and spitting and minor destruction of property such as scratching or marking room walls, floors and fixtures.

Destructive Resistance – youth engages in behavior that could result in physical harm to self or could result in serious property damage.

Combative Resistance- youth assaults or attempts to assault other persons, or uses a maneuver in a manner that may result in physical harm to others (i.e: punching, kicking, biting, elbowing, or throwing objects), or serious physical harm to others (i.e.: actions that create a substantial risk of death)

Staff Response:

Verbal Response – use of a two-way, emotionally controlled communication between staff and youth aimed at problem identification and/or resolution

Seclusion- the involuntary confinement of a youth alone in their own room or in a safe-room. Youth can be confined to Immediate Seclusion (up to one hour) or Extended Seclusion (up to three hours).

Physical Response- physical actions by staff, either immediate or calculated, to the body of the youth in such a way to limit the youth's physical activity. Staff's physical actions shall be nonpunitive. This level of response encompasses Escort, Control, Self-Defense Techniques, and Emergency Defense Responses.

POSITION OF THE PARTIES

EMPLOYER'S POSITION

JCOs are trained continuously on the appropriate use of force directed toward any youth incarcerated under the supervision of DYS. A key component of the training is the Response to Resistance Continuum, which sets out the appropriate response expected of JCOs based upon the level of resistance by the youth.

Don Bird ("Bird"), training manager, indicated that the Grievant's actions did not comply with the continuum and the take down technique used by the Grievant was not a maneuver taught by DYS. Ast, also testified that as a Response to Resistance (R2R) instructor and concurred with Bird's position on the inappropriateness of the Grievant's action and viewed the Grievant's response as egregious and excessive.

DYS contends that the youth failed to follow the verbal commands and when the youth threw the trash can the Grievant used appropriate force in pushing the youth against a door and attempting to hold the youth with his forearm against his chest. However, when the youth was able to free himself and return to his feet is when the Grievant's reactions failed to follow the continuum and/or policy.

The video demonstrates that the youth's arms were at his side and he was walking away from the Grievant when the Grievant slammed the youth to the floor. The video demonstrates that the youth was not pounding his fist into his hand nor threatening the Grievant immediately preceding the Grievant's conduct.

The Employer further argues that since the Grievant had called for back up, all he had to do was to wait for assistance as opposed to escalating the situation. Investigator Bourke testified that the Grievant's behavior escalated the situation and she viewed the "clothesline" as inappropriate. Burke also indicated that the "clothesline" was the second restraint and concurred with the other witnesses that the initial restraint was appropriate given that the youth failed to follow the Grievant's verbal directives.

Finally, the Employer argues that the Grievant's sixteen years of service does not mitigate but aggravates the situation. The regular training and long tenure required the Grievant to act responsibly and appropriately. (Employer Post Hearing Statement, p. 5). The Grievant's behavior escalated a tense situation and the use of excessive force under the circumstances justified the discipline.

UNION'S POSITION

The Grievant was an exemplary employee who had no active discipline on record at the time of removal. As a sixteen year employee, the Grievant was promoted several times to managerial positions, and voluntarily demoted back to JCO in 2005.

The youth involved in this situation testified that in the past, he had assaulted other youths and was verbally and physically assaultive towards the Grievant on July 3, 2006.

The Grievant attempted to verbally direct youth Lackey to return to his room, when Lackey was yelling out of the window and refused to sit down after being directed to do so by

the Grievant. When Lackey started to walk in the direction of his room he picked up a trash can and threw it at the Grievant. The Grievant engaged the youth with a forearm in the chest area to hold him against the door until help arrived.

The youth struggled resulting in their falling to the floor. While on the floor, the Grievant testified that Lackey punched him at least two times. When the youth got back to his feet, he continued to be non-compliant and displayed physically aggressive behavior towards the Grievant. (Union's Post Hearing Statement, p. 2). The Grievant added that Lackey had his fists clenched and was bracing, before the Grievant took Lackey back to the floor.

The Union contends that the incident was continuous in that Lackey was never compliant and contained. Therefore, there was no second incident since all of the events took place in a continuous loop. The youth was never under control and the continuum mandates that a JCO is required to respond to the level of resistance until the youth is under control. Regarding the technique employed, the Grievant testified that he attempted to use the arm/shoulder control technique that would have prevented Lackey from getting up off the ground again. The Union points out that the Response to Resistance Policy (JX 5) suggests that Lackey's conduct allowed for a physical response under several categories of the policy, including the "arm shoulder lock to the ground" technique that was taught by DYS. The Union further contends that Lackey was not in retreat and his aggressive/disruptive behavior was not under control, justifying the force employed by the Grievant.

Moreover, the Grievant has a right, like any other employee, to use self defense if substantial risk of physical harm is imminent, under the Emergency Defense Response of the continuum.

The Union seeks reemployment with appropriate financial remuneration, asserting no just cause existed to impose discipline.

DISCUSSION AND CONCLUSIONS

Based upon the sworn testimony at the arbitration hearing, exhibits and the post hearing statements, the grievance is denied. My reasons are as follows:

The majority of the relevant facts are not in dispute, namely: Youth Lackey refused to follow the initial verbal directives from the Grievant resulting in Lackey being ordered to return to his room; while being escorted by the Grievant to his room, Lackey picked up a trash can and threw it at the Grievant; the Grievant placed Lackey on the wall by using his forearm to the chest; the Grievant had called for back-up; the youth resisted being placed on the wall and began to tussle with the Grievant resulting in both of them falling to the floor; Lackey was able to free himself and returned to his feet while the Grievant was still on the floor; and when the Grievant returned to his feet, he used his left arm on the upper part of Lackey's body to retake the youth to the floor.

The primary factual divide centers on whether or not the Grievant was required to retake Lackey to the floor and did the Grievant employ a technique that was inappropriate. If answered affirmatively, did the Grievant use unwarranted force that could harm Lackey?

In support of its actions to discipline the Grievant, the investigation by Bourke concluded that the restraint technique used by the Grievant "is not taught or condoned by DYS". (Bourke report, p. 40). Bird and Ast, both R2R instructors, agreed that the technique used by the Grievant in a clothesline fashion is not the arm shoulder control technique that the Grievant contends he employed.

Bird testified the arm shoulder control technique, aka #7, is used when the youth is the aggressor and the JCO would have been under attack. However, DYS in 1999 ceased to teach #7. Bird testified credibly, and the evidence indicates, that the Grievant did not use technique #7 or any other recognizable trained technique on July 3, 2006. The employment of an unauthorized technique may be acceptable under the appropriate circumstances. To that end, the continuum specifically allows in the event of serious physical risk of harm staff may utilize the emergency defense response, which allows for the use of force directed to the head, throat or neck area with an instrument or by applying force.

The situation of July 3, 2006, although very serious, in my opinion did not rise to the level that the youth was engaged in combative resistance. In fact critical portions of the Grievant's testimony at the hearing is at odds with prior statements regarding what happened on the floor. At the investigative interview with Bourke on July 12, 2006, the Grievant states he believes Lackey "might have" punched him in the head at least one time. (JX 1, p. 24). At the hearing on June 7, 2007, the Grievant testified that Lackey in fact hit him two times. It seems reasonable that if the Grievant was hit on July 3, 2006 his best recollection would have been contained in the investigatory report recorded only nine days after the incident. There is insufficient credible evidence to conclude that Lackey assaulted the Grievant while on the floor. The issue remains whether the Grievant was required to gain physical control of Lackey by retaking him to the floor? The answer is no.

The video indicates that when Lackey and the Grievant returned to their feet, sufficient space existed between them to place them beyond each other's reach. Lackey started to move away from the Grievant,¹ at which time the Grievant closed the space by moving towards

¹ It is immaterial that Lackey was going to his room, the bathroom or any other room in the unit. The video image is irrefutable that Lackey was not walking towards the Grievant, but away from the Grievant.

Lackey. The Grievant was within arm's length of Lackey when the "clothesline" maneuver was used by the Grievant. The Union argues that Lackey had fists pounding into hands and remained combative. The video shows clenched fists but not overt acts of aggression towards the Grievant occurred by Lackey while on his feet. I find that no credible evidence exists to conclude that youth Lackey's behavior while on his feet required the response displayed by the Grievant.

The Grievant testified that once on his feet, Lackey continued to talk in an aggressive manner. Lackey stated words to the effect that "I am a beast . . . that was Round 1 . . . do you wanna go to Round 2?" The Grievant, without checking to see if JCO Watson or any other back up had arrived, apparently accepted the taunts of an incarcerated youth who had a reputation of being a bully. The Grievant's response was required to be "reasonable and consistent with the degree of resistance being demonstrated by the youth." (DYS Policy 301.05). Under these facts, the Grievant's response was unreasonable and borderline punitive.

A review of all of the guidelines regarding restraint by JCOs fails to support the Union's central argument that the restraint used was reasonable under these circumstances. If the facts indicated that the Grievant had to employ self-defense and/or emergency defense, the "clothesline" or another technique might have been appropriate. No such level of resistance was employed by youth Lackey and the evidence through witness testimony and the video indicates otherwise.

Therefore, the remaining issue is whether the Grievant's longevity and good service act as mitigation to lessen the discipline. Normally, a long-term employee with a good work record is entitled to receive "credit" for positive behavior exhibited over an extended period of time. See, In re International Extrusion Corp., 106 LA 371 (Selvo 1996).

However, as pointed out by DYS, in some cases long tenure will serve to aggravate this concept, particularly if the Grievant received periodic training and understood the consequences of his actions. On one hand it can be argued that the Grievant simply lost control and this was a one time mishap. On the other hand, it seems more plausible that the Grievant overreacted because the youth escaped and started to taunt him.

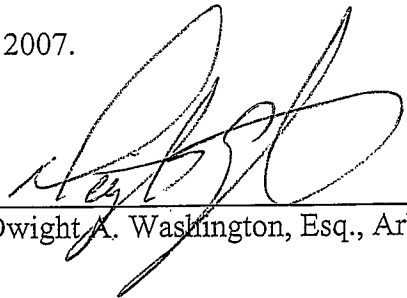
The Grievant as a long-term employee is generally entitled to deference under the proper circumstances when termination is an issue. The Grievant was properly trained and well aware of the employer's desire to provide a safe and efficient rehabilitation system for youths under its supervision. JCOs are responsible for direct supervision and care, requiring the highest level of public trust in the performance of their duties. The Grievant's behavior in carrying out a physical takedown when he was not in peril was not in compliance with the continuum and was sufficiently egregious to waive the longevity/good service arguments. The Grievant's behavior could have seriously injured the youth, and under these facts no mitigation is warranted. Finally, based on the above I cannot find that the discipline was excessive, arbitrary or unreasonable regarding the Grievant.

I find that just cause existed to discipline the Grievant, and for all the reasons cited above the grievance is denied.

AWARD

The grievance is denied.

Respectfully submitted this 9th day of August, 2007.



Dwight A. Washington, Esq., Arbitrator