

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF YOUTH SERVICES

AND

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

Grievant: Marc Camboni

Case No. 35-07-20060110-0008-01-03

Date of Hearing: August 30, 2007

Place of Hearing: DYS Scioto – Delaware, Ohio

APPEARANCES:

For the Union:

Advocate: Mike Hill, OCSEA Staff Representative
2nd Chair: Karl Wilkins, Chief Steward

Witnesses:

Marc Camboni – Grievant
Trevor Black – JCO

For the Employer:

Advocate: Melinda M. Hepper, Labor Relations Officer
2nd Chair: Victor Dandridge, Office of Collective Bargaining

Witnesses:

Deandre Sanders – Youth
Devon Porter – Youth
James Coulter – Youth
Stephen Hughes – JCO
Maureen Jordan – JCO
Mary K Bourke – Investigator
Amy L. Ast – Former Superintendent

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: November 2, 2007

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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 fifteen (15) day suspension of the Grievant, Marc Camboni ("Camboni") for violating the Ohio Department of Youth Services Policy 103.17, General Work Rules, Sections 4.11 – physical assault, 5.1 – failure to follow policies and procedures and Policy 301.05 – management of resistant youth behavior (R2R).

The discipline of the Grievant occurred on December 22, 2006 and was appealed in accordance with Article 24 of the CBA. This matter was heard on August 30, 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 September 21, 2007, the matter is ready for resolution.

BACKGROUND

Camboni was employed as a Juvenile Correction Officer ("JCO") with DYS and worked at the Scioto Juvenile Correction Facility ("SJCF"). Camboni was originally hired September 26, 1994. At the time of the incident, Camboni had no active discipline of record.

SJCF is the reception center for all youths entering the DYS system and is the facility that houses the entire female population. JCO's primary duties are to perform safety and security related functions to ensure the youths, co-workers and the public are safe and secure.

On October 7, 2006, at shift change JCOs Camboni, Maureen Jordan ("Jordan") and Stephen Hughes ("Hughes") were working in Boone Cottage at SJCF. As Camboni and Jordan were preparing to leave the unit a fight occurred between youths Beatty and Reynolds. Jordan and Hughes initially responded and attempted to separate the participants. Camboni called for back-up and then joined Jordan and Hughes' efforts to separate the youths.

JCOs Jordan and Hughes and the youths fell to the floor whereupon JCO Jordan was on the bottom of the pile screaming for help. Camboni grabbed Beatty to separate him from Reynolds. JCO Hughes was retraining Reynolds, while Camboni continued to restrain Beatty. According to DYS, Camboni while restraining Beatty, choked and hit him with his radio. Other youths on the unit witnessed Camboni's behavior and provided written statements. JCOs Jordan and Hughes on the other hand, did not see Camboni choke or strike Beatty. Youth Beatty had injuries to his face and was provided medical assistance. Additionally, after seeing the doctor, Camboni continued to demonstrate his animus against Beatty by hitting him with a cell door causing the youth to fall on the bed hitting his head. Camboni only admits to grabbing youth Beatty by his clothes to get the youth off JCO Jordan, but denies all other alleged acts.

DYS conducted an investigation which included interviews of various parties. Additionally, DYS reviewed a video of the incident which was captured by security camera. DYS concluded that Camboni did not follow DYS policy and procedure and his response to youth Beatty's resistance was inappropriate. Consequently, a fifteen (15) day suspension was given to Camboni.

In accord with the CBA, the Union appealed this discipline and contends that DYS failed to establish any wrongdoing by Camboni, seeks the removal of the discipline from his record and the recovery of any economic loss. Finally, DYS also contends that the Union failed to follow

the timelines in advancing this Grievance to Step 3, therefore, the procedural defect requires the denial of this grievance.

ISSUE

Was the discipline for just cause? If not, what is the remedy?

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 377.02(1).

DYS GENERAL WORK RULES POLICY NUMBER 103.17

LEVEL FOUR:

Rule 4.11 Physical assault
Fighting with, striking, or physically assaulting another employee, youth, or member of the general public while on duty or on state property.

LEVEL FIVE:

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.

**POLICY NUMBER 301.05
MANAGEMENT OF RESISTANT YOUTH BEHAVIOR
(INSTITUTIONS) (IN PART)**

I. Policy Provisions

It shall be the policy of the Ohio Department of Youth Services (ODYS) to establish uniform procedures to manage resistant youth behavior. It shall be the requirement of ODYS that physical response shall only be used in instances of justifiable self defense, protection of others, prevention of self-injury, protection of property, prevention of escapes, and to maintain or regain control [3-JTS-3A-31].

IV. Procedures

The Ohio Department of Youth Services recognizes five levels of youth resistance and authorizes four levels of staff response. Staff shall use the least restrictive level of response that is reasonably expected to be effective under the circumstances. Staff shall choose a reasonable level of response to gain control of the situation based on departmental policy, their physical capabilities/characteristics, training, experience, assessments of the situation, and youth's physical capabilities/characteristics.

POSITION OF THE PARTIES

EMPLOYER'S POSITION

The Employer raised a procedural objection and contends that the Grievance is untimely by at least three (3) days requiring dismissal. The Employer's evidence indicates that on December 22, 2006, Camboni received and signed for the discipline in accord with Article 25.02. The Grievant had fourteen (14) days or until January 5, 2007, to advance the discipline to Step 3 of the Grievance process. The Grievance is dated January 8th and was received on January 10, 2007, by the Employer with no verified proof of the mailing date. Without an

agreement to extend the timelines for filing, the Union violated the fourteen (14) day requirement; requiring dismissal of the Grievance. Also, the alleged different emails received by the Union regarding the Employer's Step 3 answer, were transmitted as a Word document and could have been altered by anyone. This alleged defect does not establish a deficiency by the Employer to cure the Union's failure to timely file this Grievance.

Regarding the altercation between the youths, Camboni's behavior violated various work rules and was contrary to his training. The Employer trained Camboni in areas of physical response to youth behavior, the objective being for JCOs to utilize the proper response based upon the level of resistance by the youth. The Employer submitted several exhibits containing the policies governing the JCOs' response to a youth resistance. (Joint Exhibits (JX) Policy and Procedures, A, B, C & D). Of note, is the Response to Resistance (R2R) procedures detailing the appropriate resistance required to properly respond to a youth's physical aggression. (JX Policy and Procedures, D).

The altercation between the youths is not in dispute. What is in dispute is whether Camboni used unnecessary tactics and/or assaulted the youth.

Various youth witness statements indicates that Camboni choked Beatty and hit him with his radio. Youths Beatty, Overton, Booker, Coulter, Thompson and Stephens provided incident statements and were interviewed by the Institution's investigator. Coulter, Sanders and Beatty testified credibly about the choking and hitting with the radio.

Prior to this incident none of the youths had any problems with Camboni; so no incentive existed to falsify their testimony. Youth Beatty was injured requiring off-site medical attention.

The injuries were located primarily on his face. Beatty testified that while being choked by Camboni he became lightheaded, and he was struck with the radio close to his right eye. The

photographs taken by the medical staff are clear evidence that the facial injuries are consistent with the transmission keys of the radio used by Camboni. (JX 3, pp. 81-100). No other plausible explanation exists for Beatty's injuries.

Youth Beatty did not fall on the radio and JCO Jordan had thrown her radio away from the area of the fight. Furthermore, JCO Hughes was restraining youth Reynolds, so the only radio which could have caused the imprint on Beatty's face, was in Camboni's hand.

This incident was thoroughly investigated by Kathleen Bourke ("Bourke") who testified that the facial injuries were consistent with JCOs' radio transmission keys and the probability of Beatty accidentally falling on the radio to cause this injury was unlikely.

Finally, Amy L. Ast ("Ast"), former superintendent, who is a response to resistance trainer, imposed the discipline. Ast considered all the facts and weighed the range of discipline for a Level 4, i.e., 4.11, and a Level 5, i.e., 5.1, violations and assessed that fifteen days were warranted due to the punitive nature of Camboni's action.

UNION'S POSITION

The Union is required to receive a copy of the discipline issued to any employee pursuant to Article 24.06. On the date the discipline was issued, i.e., December 22, 2006, no Union steward was present nor was the Union informed in writing.

The Union received notice of the discipline via a telephone conversation with the Grievant sometime after December 22, 2006. Another technical defect occurred when the Employer submitted two different Step 3 answers regarding this matter. (Union Exhibit "UEX" 1). Although the Employer alleged that the same Step 3 answer was emailed to Karl Wilkins ("Wilkins"), chief steward, and Mike Hill ("Hill") on the same date, the Wilkins email is different from the Hill email although both emails were allegedly sent at the same time by the

Employer. Clearly, the Employer's hands are unclean and the minimal time defect, if any, should not be fatal in this matter.

The Employer's investigation fails to point out that the entire incident was captured on video from several angles. A review of the video fails to show Camboni slamming Beatty to the ground; choking or striking him with his radio. The youth witnesses when confronted with the video at the hearing, recanted their testimony on cross examination and admitted their written statements did not align with the video.

As example, Coulter's statement claimed that Camboni and JCO Jordan slammed kids to the floor, and Camboni started beating a kid (Beatty) with a radio. However, Coulter admitted on cross examination that the video fails to show Camboni slamming, choking or hitting anyone. Testimony comparable to Coulter was also solicited from the other youths who testified at the hearing.

No evidence exists to state with specificity how Beatty's injuries occurred and which radio, if any, made the imprint on Beatty's face.

Beatty's injuries are consistent with him being in a fist fight with Reynolds – not because a radio was used to hit him. The Employer's proof is speculation, not credible evidence.

Therefore, the Union seeks that the Grievance be sustained and Camboni made whole.

DISCUSSION AND CONCLUSIONS

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

As a threshold finding the Employer's procedural objection as to timeliness is denied; because the record fails to indicate that on December 22, 2006, the Union also received notification **in writing** to comply with Article 24.06 of the CBA. (JX 4, Discipline Trail, p. 1).

The Employer argues that Article 24.06 does not require that the Union also sign for the discipline and since Camboni received notice on December 22, 2006, Article 24.06 was satisfied.

I concur that Article 24.06 does not require the Union's signature on the discipline notification document, but the Union must be notified in writing of the discipline. The CBA is silent as to whether the Union notification must occur in concert with the Employees? It seems reasonable for the employee and the Union to be notified of the discipline at the same time to avoid disputes over which notification controls the procedural time clock. A review of Article 24.05 language offers some guidance in this area.

As example, on November 6, 2006, the Employer provided the predisciplinary packet which in accord with Article 24.05 requires that, “. . . prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons . . .” (Emphasis added). Although not required by the CBA, the predisciplinary packet required the Union representative to sign in a designated space confirming receipt. The CBA is silent in both Article 24.05 and 24.06, but the parties have reached a mutual accord that eliminates any dispute regarding the receipt of the predisciplinary notice by the Union. Therefore, a technical interpretation of Article 24.06 not intended by the course of conduct of the parties will not occur herein.

The Union contends that no Union steward was present on December 22, 2006 and the Union did not receive the first day suspension document until after the 22nd of December. The evidence fails to indicate if and when the Union was notified by the Employer as required pursuant to Article 24.06. Absent evidence to the contrary, I concur with Arbitrator Graham's findings attached as UX 2 that the minimal time defect must be balanced when both parties have failed to comply with the procedural grid.

The analysis of the Beatty/Reynolds' altercation is separated into two areas: (1) what actually occurred; and (2) what could have occurred.

A. What Actually Occurred

Beatty and Reynolds were involved in a fight where they used their fists and hit each other numerous times in the head area. "Youth Beatty admitted that he and Reynolds continued to fight once on the ground and had each other in mutual head locks while punching each other in the face." (JX 4, Herriott investigation, p. 12).

JCOs Hughes and Jordan initially attempted to stop the fight without success. JCO Jordan tossed her radio away from the altercation, and she and JCO Hughes continued to try and break up the fight. Hughes and Jordan became physically engaged with the youths and all went to the floor with Jordan on the bottom of the pile. Jordan stated that ". . . I believe that I attempted to get out of the bottom of the pile. I was hollering for help as we fell . . ." (JX 4, Herriott investigation, p. 74).

Camboni arrives at the pile and pulls Beatty away, while JCO Hughes restrains Reynolds. During the altercation as many as sixty youths were on the unit.

Video cameras were operable and the incident was recorded with the various images captured by the Employer.

B. What Could Have Occurred

The record contains twelve youth statements and JCOs Hughes', Jordan's and Camboni's statements. Additionally, the investigatory report prepared by Herriott with various interviews forms the body of evidence for this area.

Camboni while restraining Beatty was choking him until he could not breathe (JX 4, Beatty statement, p. 18) or until Beatty passed out (JX 4, Overton statement, p. 40). Camboni

hit Beatty with the radio and then slammed him to the ground (JX 4, Booker statement, p. 26) or after Beatty fell to the floor Camboni hit him with the radio (JX 4, Beatty statement, p. 18; Thompson statement, p. 52). Also, Camboni hit Beatty in the eye two or three times (JX 4, Sanders statement, p. 49; Howard statement, p. 36) or Beatty was hit one time (JX 4, Thompson statement, p. 52; Beatty statement, p. 24; Booker statement, p. 26).

A review of the video of the incident was sufficient to make the following conclusions:

(1) Beatty and Reynolds punched each other in the upper body and the face area; (2) JCOs Jordan, Hughes and Camboni did not slam any youths to the floor; and (3) no video image confirms that Camboni either choked or used a swinging motion while his radio was in his hand.

Regarding the injuries to youth Beatty, the record establishes something happened. The Employer attributed all of Beatty's injuries to the conduct of Camboni. I disagree. The evidence indicates more probable than not that the altercation with Reynolds was the source of the majority, if not all of the injuries. None of the Employer's evidence attributes any of Beatty's facial injuries to the fight. In fact, a review of the Predisciplinary Hearing Officer's Report (JX4, pp. 101-104) and the summary of Herriott's investigative report fails to reconcile or even mention the video, it's as if the video did not exist. Similarly, discerning is the failure of the Employer to address the injuries Beatty received during the fight with Reynolds. If Reynolds, who had swelling to his eye, was injured due to the fight, why not Beatty? (JX 4, Herriott investigation, p. 4). Similarly, all of the youth statements attempt to demonstrate consistency regarding the choking and radio allegation but a cursory reading of their statements lack the consistency necessary to support this discipline. Finally, having the opportunity to assess the demeanor and hear their testimony the youths, in my opinion, were not credible

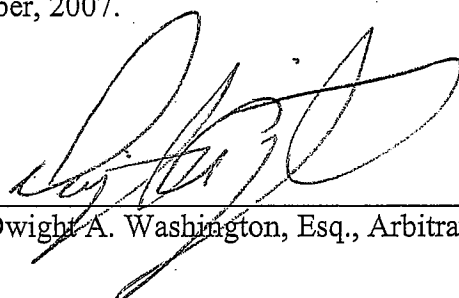
singularly or collectively. The youths were not able to recall with sufficient clarity the material facts of an incident that was not complicated.

More discerning was their hearing testimony when each youth admitted that their written statement was at odds with the video.

The Grievant was alleged to have violated a Level 4 and Level 5 rule, which are serious infractions. If in fact the Grievant committed those violations, the finding that this evidence failed to demonstrate "just cause" should not be viewed as a victory only that, in my opinion the evidence fails to support that the discipline was for just cause.

For the reasons cited above, the grievance is granted and Camboni is entitled to back pay and any other economic benefit he suffered.

Respectfully submitted this 2nd day of November, 2007.



Dwight A. Washington, Esq., Arbitrator