

#9916

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: Marcus Peacock

Case No. 35-07-20071012-0060-01-03

Date of Hearing: February 22, 2008

Place of Hearing: DYS Scioto – Delaware, Ohio

APPEARANCES:

For the Union:

Advocate: Jenny Lewis, OCSEA Staff Representative

2nd Chair: Karl Wilkins, Chief Steward

Witnesses:

Marcus Peacock – Grievant

Christopher Head – Operations Manager

Latisha Almon – JCO

For the Employer:

Advocate: Mark Tackett, Labor Relations Officer

2nd Chair: Victor Dandridge, Office of Collective Bargaining

Witnesses:

Brian Conrad – Administrative Assistant

Charles Bird – Training Manager

Joan Olivieri – Labor Relations Officer

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: April 9, 2008

INTRODUCTION

This grievance is before the Arbitrator 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, Marcus Peacock ("Peacock"), for violating the Ohio Department of Youth Services Policy 103.17, General Work Rules, Sections 4.12 – Inappropriate or unwarranted force and 5.1 – Failure to follow policies and procedures.

The Grievant was disciplined on October 12, 2007, and he appealed the discipline in accordance with Article 24 of the CBA. This Arbitrator heard the grievance on February 22, 2008, and both parties had the opportunity to present evidence through witnesses and exhibits at the hearing. Post-hearing briefs were agreed to be submitted by both parties on or about March 7, 2008. The matter is properly before the Arbitrator for determination.

BACKGROUND

Peacock was employed as a Juvenile Correction Officer ("JCO") with DHS and worked at the Scioto Juvenile Correctional Facility ("Scioto"). Peacock was hired in 1993 and had no discipline of record at the time of his removal.

Scioto is one of eight institutions under the direction of DHS and serves as the intake/assessment center for all males and females under DHS supervision. Additionally, Scioto houses all of the females under DHS supervision.

On June 9, 2007, Peacock was directing the youths as they were cleaning their area. Youth M was ordered to assist in the cleaning but refused. Peacock went into her room to retrieve a broom, whereupon Youth M shut the door, locking the Grievant in the room. JCO Latisha Almon ("Almon") was present at the podium and pushed a button on the control panel releasing Peacock from Youth M's room.

Youth M was standing in front of the podium at this time, whereupon the Grievant approached the youth in an attempt to direct her towards her room. The Grievant and the youth became involved in a physical struggle resulting in the youth being taken to the floor and dragged into her room.

The Employer contends that when the Grievant initially approached the youth by the podium, he "placed his hands on the youth, [and] the youth tried to jerk away." (Employer's Closing Statement, p. 3). The Employer asserts that the use of force was inappropriate because the youth was posing no threat to staff or herself. The Employer further asserts that the Grievant was trained on how to interact with youths who refuse to obey JCOs' verbal commands but failed to deploy the "planned use of force" process. The Employer considered the Grievant's actions egregious, warranting the Grievant's removal.

The Union contends that the youth became combative by the podium, striking the Grievant, and that her actions required the use of force necessary to restrain the youth. The Union asserts that the Employer's investigation was faulty because it did not interview the youth's roommate, who was present during the incident. The Employer also failed to interview other youths who were in the area as well.

The Union contends that the incident resulted in use of a slight physical response that was justified due to the youth's reaction. The Union further contends that the technique utilized by the Grievant was part of the training that JCOs were instructed to use and was reasonable under the circumstances.

The Employer contends that the incident, which was captured on video, provides it just cause to terminate the Grievant, whereas the Union requests reinstatement and the restitution of any and all economic losses suffered by the Grievant.

ISSUE

Was the Grievant removed for just cause, and if not, what should 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 377.02(1).

POLICY NUMBER 103.17

LEVEL FOUR:

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.

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 Grievant was verbally directing the youths on June 9, 2007 regarding the general cleaning of their housing unit. Youth M did not comply after being verbally instructed to clean her room. The Grievant entered her room to retrieve the broom and

dust pan. Once the Grievant was inside the room, Youth M closed the door on the Grievant, locking him in the room.

JCO Almon, who was at the podium, released the Grievant from the room. In the interim, Youth M had walked to the podium area. The Grievant immediately approached the youth and used inappropriate force toward her in an effort to return Youth M to her room.

The video indicates that the Grievant placed his hands on the youth and, when she attempted to jerk away, the confrontation escalated with the Grievant taking the youth to the floor and dragging her to her room.

The Grievant's conduct violated DYS policy for the following reasons: (1) if a youth refuses verbal directions, a JCO should contact a supervisor to determine if the situation requires a planned use of force; (2) the continuum training requires other steps before utilizing force on a youth; (3) the Grievant had an opportunity to call for assistance once he was released from the room. Employer witnesses Don Bird ("Bird"), Training Manager, and Brian Conrad ("Conrad"), Investigator, testified that when a JCO's verbal commands are ignored, a JCO should contact a supervisor to implement planned use of force procedures which include proper supervision and videotape. Bird also indicated the concept of "slight use of force" espoused by the Union and Grievant is nonexistent and was not taught during the Grievant's April 2007 training.

The Grievant, apparently upset by being locked in the room, initiated unwarranted force without proper approval. These acts were egregious and warranted the Grievant's removal.

UNION'S POSITION

The Grievant, a fourteen (14) year employee with a good work record, was removed without just cause. The incident escalated when Youth M kicked the Grievant and locked him in her room.

Upon his release from the youth's room, the Grievant attempted to redirect the youth to her room for timeout, but she became combative with the Grievant. Youth M knocked off the Grievant's hat and glasses, and other staff were required to ultimately subdue the youth.

Neither Youth M's roommate, who was present at all times, nor other youths who were in the area were interviewed by Conrad. The Employer failed to conduct an adequate investigation to ascertain the Grievant, as well as Youth M's, mood and demeanor. Conrad did interview JCO Almon and Christopher Head ("Head"), Operations Manager, and both indicated that Youth M was loud, out of control, and combative.

The Grievant testified that he utilized the "slight physical response" technique. Although Conrad and Bird testified this technique was no longer taught as part of the Management of Resistant Youth (i.e., R2R) training, both indicated that this technique is used daily and does not always require the involvement of a supervisor. JCO Almon indicated that she employs the slight use of force technique on a daily basis similarly to what the Grievant was employing prior to the youth becoming combative.

The Union further directs the Arbitrator's attention to the Employer's conduct following the June 9, 2007 incident. After the incident, the Grievant remained on post in the same area until his removal almost ninety (90) days later. The Grievant was also

noted throughout the facility as a JCO who could de-escalate troublesome situations with the youths, and he continued in that role after the incident. Superintendent Chris Money ("Money") initially recommended a five-day suspension for Grievant which was denied by higher authority. Money then recommended a ten-day suspension, which was also rejected. (Union (UX) 2). Finally, if discipline was required, a wide range existed with removal being clearly excessive and punitive based upon his past work record.

The Union requests reinstatement and to be made whole for any economic benefit lost and/or incurred as a result of his removal.

DISCUSSION AND CONCLUSIONS

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

The best evidence offered in this case was the video. The video captured the Grievant as he exited the youth's room and the resulting confrontation which began in front of the podium and concluded in Youth M's room. In the video, the following sequence occurs:

1. The Grievant approaches the youth in front of the podium and initiates physical contact by placing his hands on her upper body area.
2. Youth M begins to resist, whereupon the Grievant's hat and glasses are knocked off.
3. Youth and Grievant go to the floor.
4. The Grievant pulls the youth back to her room after attempting to pick her up.

It appears that the Grievant put his hands on her shoulders as the initial contact. The video detail is not high definition but clear enough that it was the Grievant who initiated the contact by the podium. Although the Employer contends that the Grievant dragged the youth in the room, no evidence including the video, indicates if he dragged her by her hair, arms or feet.

The total time involved in the above sequence was about fifteen (15) seconds. Once in her room, the youth continued to act out requiring her to be restrained in handcuffs for about fifteen minutes until she calmed down.

Testimony was offered by several witnesses regarding the general temperament of the youth. Youth M has a reputation of being defiant, disrespectful and combative when she is upset. An inference might arise that, due to the youth's reputation, the Grievant was justified in how he initially approached the youth or the type of force he used. That inference, however, does not exist under these facts. The behavior of the youth is relevant only if her conduct placed herself or others at immediate risk. It did not.

The video indicates that the youth was not engaged in any conduct that required imminent intervention by the Grievant. I concur with DYS that ample opportunity existed for the Grievant to contact his supervisor to determine if this situation warranted a "planned use of force." Both parties offered considerable testimony on the slight use of force technique. Slight use of force is a technique employed for routine situations JCOs are constantly confronted with that does not require supervisor intervention. In this case, after being locked in a room by a youth whose temperament

is feisty, the Grievant was clearly put on notice that the slight use of force technique was probably inappropriate.

Despite the Grievant's length of service and training, the Grievant failed to follow DYS policy when he used inappropriate and unwarranted force against Youth M in violation of Rules 4.12 and 5.1. Considering that the Grievant had no prior discipline, DYS' disciplinary options for Grievant's violation of Rule 5.1 range from verbal reprimand to termination and the available penalty for a first offense under Rule 4.12 ranges from five days' suspension to termination.

The Union contends that DYS did not display any administrative urgency in dealing with this "serious" matter. Rather, the Grievant was allowed to remain in that area for almost three (3) months without an assignment change. The Union asks: If DYS believed that the Grievant's behavior was serious as it related to that particular youth, why not reassign him? I find DYS' investigation, although lacking by not interviewing all material witnesses, was sufficient due primarily to the video. The same conduct called egregious by DYS was initially recommended as a five (5) day suspension by the Superintendent. DYS was privy to the video, the investigator's report and the JCO witness statements when Superintendent Money made a second recommendation of only a ten (10) day suspension, which was also rejected by the Director. Considering that the Grievant was well regarded by co-workers and management, Superintendent Money's recommendations apparently took into consideration Grievant's fourteen years of good service.

Given the seriousness of the use of unwarranted force by the Grievant and his failure to follow proper protocols when judgment indicated that a planned use of force

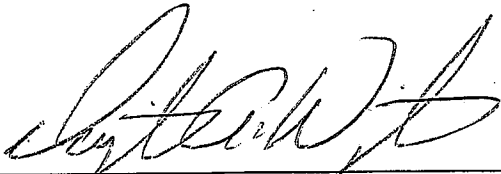
was required, just cause for discipline exists in this matter. However, removal of the Grievant is inappropriate.

Mitigation includes the Grievant's fourteen (14) years of good service as well as his reputation of being a valued employee in helping to diffuse potential problem situations within the facility. The incident of June 9, 2007 was an isolated, and hopefully, a one time event in the Grievant's career. In other words, his past record mitigates against his removal but does not exonerate his June 9, 2007 behavior. The disciplinary grid is a guideline with discretion contained therein for greater or lesser discipline based upon each situation.

Based upon the record as a whole, the Grievant shall be reinstated with the following conditions:

1. Reinstatement to occur within thirty days of the parties' receipt of this decision;
2. Discipline of record shall be a ten (10) day suspension;
3. Grievant shall not receive any back pay, roll call pay, holiday pay or shift differential;
4. Restoration of all seniority;
5. Reimbursement for any medical, hospital or related expenses incurred from removal to reinstatement.

Respectfully submitted this 9th day of April, 2008.



Dwight A. Washington, Esq., Arbitrator