

IN THE MATTER OF ARBITRATION BETWEEN

Ohio Department of Youth Services

Grievance No DYS-2022-06282-03

Employer

And

Ohio Civil Service Employees Association
/AFSCME Local 11

Union

Marcus Jones,

Grievant

Arbitrator: Arbitrator Meeta Bass

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PROCEDURAL HISTORY

Ohio Department of Youth Services is hereinafter referred to as "DYS" or "Employer." Ohio Civil Service Employees Association is hereinafter referred to as "Union." Marcus Jones is hereinafter referred to as the "Grievant."

The Union submitted Grievance Number DYS-2022-06282-03 to the Employer on October 2, 2022, pursuant to Article 25 of the parties' Collective Bargaining Agreement, effective April 21, 2021 - February 28, 2024. The grievance alleged the Grievant was removed from service on April 12, 2022 in violation of Article 24. The Statement of Grievance reads,

Grievant, Mr. Marcus Jones, was removed without Just Cause. Employer claims Mr. Jones used unnecessary force when it was the youth who struck him first. Mr. Jones was talking and walking with you in a calm manner before the youth assaulted him without provocation. Mr. Jones threw punches to protect himself as he viewed the youth as to have possible superiority over him. SME for UOF gave opinion before Mr. Jones was questioned so he didn't take in consideration Mr. Jones side nor mindset during the incident.

Pursuant to the CBA between the Employer and the Union, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on Wednesday April 4, 2023 at the Indian River Juvenile Correction Facility at 2775 Indian River Road, Massillon, Ohio 44646.

The parties' stipulated to the issue as:

Did the Ohio Department of Youth Services have just cause to remove the Grievant from employment? If not, what shall the remedy be?

The parties' stipulated to the following facts:

- 1) Grievance #DYS-2022-06282-03 is properly before the Arbitrator.
- 2) Grievant commenced employment with the Ohio Department of Youth Services-Indian River Juvenile Correctional Facility on May 1, 2017, in the Juvenile Correctional Officer (JCO) classification.
- 3) Grievant worked continuously in the JCO classification until removed from employment.
- 4) Ohio Department of Youth Services removed Grievant from his JCO position on September 30, 2022.
- 5) At the time of his removal, the Grievant worked 2nd shift (2PM-10PM) on Unit D.
- 6) On June 15, 2022, Grievant arrived to work at 5:47AM, working overtime on 1st shift.
- 7) The incident that led to the removal of the Grievant happened on June 15, 2022, at approximately 5:37 PM on Unit D, in the Day Area.
- 8) On June 15, 2022, the Grievant clocked out at 6:29 PM.
- 9) On June 16, 2022, the Grievant clocked in/arrived to work at 1:47 PM
- 10) At the time of his removal, the Grievant possessed the following active discipline:
 - a. July 8, 2022 One Day working Suspension (Reduced to no discipline NTA)¹
 - b. August 2, 2021 (Written Reprimand)
- 11) Prior to June 15, 2022, Youth JV engaged in two (2) Acts of Violence (AOV). Since June 15, 2022, Youth JV engaged in eleven (11) AOV.

- 12) As of June 15, 2022, Youth JV maintained an affiliation with the Heartless Felons gang.

During the hearing, both parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument.

WITNESSES

EMPLOYER WITNESSES

Andrew Blank

Darrin Kreis, Training Program Manager

UNION WITNESS

Marcus Jones

JOINT EXHIBITS

- 1) Collective Bargaining Agreement Between State of Ohio and Ohio Civil Service Employees Association
- 2) Discipline Trail
 - a. Removal letter dated September 30, 2022
 - b. Pre-Disiplinary conference hearing officer report dated September 15, 2022
 - c. Investigation Report (redacted) dated August 22, 2022
 - d. Video of June 15, 2022
- 3) Grievance Trail-OHGRIEV Grievance Snapshot #DYS-2022-06282-03
- 4) DYS2003 Grievant Notification of No youth Contact
DYS Policy 109-INV-04 Placing an Employee on No Youth Contact Status
- 5) DYS Policy 131-SEM-05 General Work Rules/Rules Violations/Grid
- 6) DYS Policy 163-UOF-02 Managing Use of Force-Use of Force
- 7) DYS Form 2112 Use of Force Continuum
- 8) Grievant Position Description
- 9) Grievant DYS Training Records

MANAGEMENT EXHIBITS

- 11) Grievance Written Reprimand, August 2021 and Written Reprimand Investigation
- 13) Lorain County Children Services Statement
- 14) State of Ohio vs Marcus Jones Massillon Court Docket Entry #2022CRB02161
- 15) Pictures of Grievance's arms taken by IRJCF medical on June 16, 2022
- 16) Former IRJCF Jamaal Ballard Disciplinary Records
 - a) Written Reprimand dated March 17, 2022
 - b) Removal letter dated February 28, 2023
 - c) Redacted removal investigation
 - d) EHOC-Employee History on Computer

UNION EXHIBITS

- 1)** Discipline Comparable of Other Coworkers
- 2) Jones Coaching/Information Training dated June 30, 2022
- 3) Grievance's Attorney letter dated November 22, 2022
- 4) Union Discovery Request
- 5) Children Services email dated April 3, 2023

The parties agreed to post-hearing submissions on April 21, 2023 at which time the record was closed.

APPLICABLE PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND POLICY 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 25.05. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

24.02 - Progressive Discipline The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- a. One (1) or more written reprimand(s);
- b. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer. If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.
- c. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;
- d. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process. The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines. If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

Rule 5.01P: Failure to follow policies and procedures:

DYS Policy 131-SEM-05 General Work Rules

DYS Policy 163-UOF-02 Managing Youth Resistance-Use of Force, effective August 26, 2021, incorporated as if fully rewritten herein.

Authority

This policy is issued in compliance with Ohio Revised Code 5139.01, which delegates to the Director of the Department of Youth Services the authority to adopt rules for the governance of the department, the conduct of its officers and employees, the performance of its business, and the custody, use, and preservation of the department's records, papers, books, documents, and property.

Purpose

The purpose of this policy is to provide guidance to staff who utilize physical force when responding to youth assistance...

Emergency Defense Technique - Actions by a staff member to protect himself/herself or a third party when a youth has gained or is gaining superiority or where there is a risk of serious physical harm.

Serious Physical Harm - Any of the following as defined by ORC 2901.01

- Carries substantial risk of death;
- Involves partial or total substantial incapacity;
- Involves any mental illness or condition of such gravitas would normally require hospitalization or prolonged psychiatric treatment which is caused by a physical injury;
- Involves some serious disfigurement;
- Involves acute pain of such duration as to result in substantial suffering or which involves any degree of prolonged or intractable pain.

Application of Force

1. Force may be used in self-defense or for the protection of others from physical attacks, prevention of self-injury, prevention of escapes, enforcement of facility rules to prevent a serious disruption or threat to security, and to prevent the destruction of state property.

10. The Managing Youth Resistance Use of Force Continuum (DYS2112), shall be a resource to assist staff in recognizing the various levels of youth resistance so that the appropriate staff response, which may include physical force, is employed. Staff responses may include any combination of those outlined in section VI.B, of this policy and shall not be required to be implemented sequentially.

11. Agency Approved Physical Response Techniques shall be:

- a. Personal Safety Techniques,
- b. Team Approach Techniques,
- c. Emergency Defense Techniques,

B. MYR-UOF Continuum

1. No Physical Threat

a. Youth Behavior

- i. Resistance No Threat
- ii. Verbal Threat
- iii. Threatening Movement

b. Staff Response

- i. Verbal Strategies
- ii. Time and Distance
 - a. Allow time for the youth in crisis to reasonably express their emotions and regain some level of self-control
 - b. staff shall use this time to assess the situation, plan, and consider options for resolution.
- iii. Staff positioning
 - a. staff shall move and position themselves to have a full view of the youth, while continuing to use verbal strategies in an effort to de-escalate the youth's behavior.

2. Immediate Physical Threat

a. Youth Behavior

- i. Physical Engagement/Physical Assault
- ii. Physical Superiority

b. Staff Authorized Response

- i. Authorized responses previously covered in this policy as outlined in section VI.B
- ii. Trained Techniques
- iii. Emergency Defense Techniques, in situations where there is a risk of serious physical harm

D. Prohibited Use of Physical Response

Except for items 1-7 of this section, which shall be permissive only as Emergency Defense Techniques, the following techniques shall be prohibited:

1. Striking, kicking, or punching a youth
2. Chokeholds placed on youth or restricting respiration in any way
3. Using any method that is capable of causing loss of consciousness or harm to the neck
4. Pinning down with knees Totoro, head and/or neck
5. Using control and/or reactive defense techniques other than those approved and trained by DYS
6. Dragging or lifting of the youth by the hair or ear
7. Using other youth or untrained staff to assist with the restraint.

Rule 5.30P Use of Excessive Force

Physical response beyond what was necessary to control/stabilize the situation

Rule 6.05P Use of Prohibited Physical Response

Techniques or practices that unduly risk serious harm or needless pain to the youth, may not be used unless in an emergency defense situation to prevent an act that could result in death or severe bodily injury to oneself or others.

The intentional, knowing, or reckless use of the following techniques: Restricting respiration in any way, such as applying a chokehold or pressure to a youth's back or chest or placing a youth in a position that is capable of causing positional asphyxia; using any method that is capable of causing loss of consciousness or harm to the neck; pinning down with knees to torso, head or neck; slapping, punching, kicking or hitting; using pressure point pain compliance and joint manipulation techniques other than those approved and trained by ODYS; modifying mechanical restraint equipment or applying any cuffing technique that connects handcuffs behind the back to leg shackles; dragging or lifting of the youth by the hair or ear or by type of mechanical restraint; applying any type of physical response to a youth's wrist, once the youth is placed in handcuffs; using other youth or untrained staff to assist with the restraint; securing a youth to another youth or a fixed object, other than an agency-approved restraint bed.

STATEMENT OF FACTS

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either are necessary to understand the Arbitrator's decision.

DYS hired the Grievant on May 1, 2017, in the Juvenile Correctional Officer (JCO) classification. The Grievant worked at the Indian River Juvenile Correctional Facility. As a JCO, the Grievant was responsible to provide safety, security, custodial care, and to surveillance youth assigned a juvenile residential facility; escort transport, oversee and maintain security of youth to and from various destinations, oversee youth movement on facility grounds, as outlined in his job description.

On June 15, 2022 Grievant reported to work for first shift overtime, and then started his regular second shift scheduled from 2PM-10PM on Unit D. The incident that led to the removal of the Grievant happened during his regular second shift at approximately 5:37 PM on Unit D, in the Day Area. The incident is captured on video. The video does not provide any audio.

The Grievant was supervising six youths in the Dayroom including the Youth involved in the incident. The Youth involved in the incident was on restriction for assaulting another youth and was not allowed to be around other youths at the time of this incident. The Grievant allowed the Youth to make a phone call as a courtesy to him and instructed him to return to his assigned area, seated outside of his room in the hallway, when he finished the call. After the completion of his phone call, the Youth walked to the water fountain for a drink. The Grievant walked away from the area. The Youth moved toward the opposite side of the room and made some comments. A youth wearing a purple shirt looked at the Youth and then back toward the Grievant. The Grievant returned to the Dayroom. Upon entering the room, the Grievant instructed the Youth to return to his assigned area.

The Grievant testified the Youth in a joking manner says, "I'm going down; no, I'm not going down." The Youth in his written statement also stated he was playing around. The Grievant called a Signal 5 for staff assistance to help manage the situation and secure the area. Once the Signal 5 was called, four youths moved to the wall in the opposite direction of the Youth and one youth continued gaming in his chair in the front of the room unaware of the events unfolding.

According to the Grievant, he still continued to request the Youth to return to his assigned area. The Grievant testified he told the Youth that he permitted the phone call but the Youth needed to return to the assigned area. The Youth positioned himself in the front corner of the room and then started moving across the room. In the video, the Grievant can be observed eyeing the seated youth as he approaches the Youth walking between the chairs. The Youth then moves back to corner of the room. The Grievant moves in the aisle between the chair and the door. Grievant starts to approach the Youth with his hands in his pockets. There is conversation between the Grievant and the Youth but its content is disputed.

It appears from the video the Grievant stopped his approach to the Youth several feet from the Youth. At this time, the video depicts the seated youth observing the encounter. The seated youth jumped out of his seat and moved to the opposite end of the room. The Youth took two to three steps adjusted his pants, lunged at the Grievant and punched him in his face. Grievant's cap fell off.

The video next depicts the Youth punching Grievant in the face. Grievant attempted to throw some punches and the Youth was still attempting to punch as well. The Grievant then took the Youth down in some type of guillotine maneuver as the Youth attempted to grab his legs. The Grievant stumbled but quickly recovers. The Youth lowered his stance to take the Grievant down. Grievant took the Youth down in some type of

modified guillotine maneuver. The Grievant held the Youth in position and continued to talk to the Youth. The Youth tapped out and the Grievant began to relax his hold, looked down, and punched the Youth. Grievant testified at this moment the Youth started biting him. Staff then entered the room while Grievant was hitting Youth. Staff separated the Grievant and Youth.

Grievant wrote and submitted his report which included very little detail of the events. His supervisor returned the report to him and told him he needed to provide more detail. The Grievant then rewrote the report and included the Youth bit him. Grievant reported to the nurse station and reported no injury. The Grievant clocked out at 6:29 PM.

When he returned the next day, management placed the Grievant on "No Youth Contact Status" pending the outcome of an investigation based on this incident on June 15, 2022. "No Youth Contact Status" is a temporary modification of Grievant's duties to limit the conditions and circumstances under which the Grievant may come into contact with youth. The Grievant reported to the nurse's station and reported injury to his forearm where the Youth bit him. On June 30th, the Employer conducted a coaching session with the Grievant and the Grievant returned to his job as a juvenile correctional officer that day.

On September 30, 2022, Employer terminated the Grievant for violation of Rule 5.01P: Failure to follow policies and procedures. The removal letter specifically identifies DYS Policy 131-SEM-05 General Work Rules, DYS Policy 163-UOF-02 Managing Youth Resistance-Use of Force, Rule 5.30P Use of excessive force, Rule 6.05P Use of prohibited physical response. According to the grievance procedure in the CBA, the Union filed a timely grievance challenging the Grievant's discharge. The Employer denied that grievance, which led to the Union initiating the instant arbitration proceedings.

POSITION STATEMENTS

POSITION OF EMPLOYER

Employer contends DYS trained Grievant on the Use of Force Continuum. Employer argues the Training Program Manager and Managing Youth Resistance (MYR)-UOF Subject Matter Expert (SME) outlined the extensive training the Grievant and all JCO's receive at pre-service and then annually from the DYS Training Academy. The Employer also asserts the evidence established that at pre-service, the Grievant received over three (3) and a half-days for MYR-UOF training in addition to his annual training. The Employer also points out the evidence established the DYS Training Academy recognized the Grievant as a "scenario-based" training instructor. The Employer concludes the Grievant knew of the Department's policy and procedures.

Employer also contends the evidence established that the Grievant did not conform to his training and the UOF Continuum. Employer argues the Grievant should have maintained his distance, and the unnecessary UOF would not have happened. The Employer also argues the Youth posed no threat to staff or other youth and wanted to comply. The Employer denies the Youth's gang affiliation and former/since assaultive behavior are of any consequence in this situation. The Employer further argues the Youth never demonstrated a physical superiority over the Grievant. According to the Employer, staff responded in seconds to the scene and would have successfully de-escalated the entire situation, following their training and the UOF Continuum. The Employer concludes that the Grievant violated DYS policy.

Employer further contends the Grievant established his "youth bite theory" the next day when he returned to work, and realized management placed him on no youth contact pending an administrative investigation. According to the Employer, all DYS staff know if you are placed on "no youth contact," it is because you are accused of engaging in inappropriate/excessive force against a youth. Employer argues the last two (2) punches depicted in the video are prohibited, unnecessary, excessive, and simply administered out of anger and designed to inflict pain/harm upon the Youth. The Employer asserts the video of the incident does not demonstrate the youth biting the

Grievant. The Employer suggests the Grievant concocted this story in a last-ditch attempt to justify his actions and escape the impending discipline.

Employer contends neither the Grievant nor the Union made any official request for documents pursuant to Article 25.09. Employer states management provided the Union with all requested information/ documents before the April 4, 2023 arbitration. Employer argues the Union did not claim the requested documentation adversely impacted its case presentation. The Employer explains that the Legal Division handles Public Records Request for DYS. The Employer maintains the parties have negotiated a provision for document requests related to this removal grievance in Article 25.09 of the State of Ohio/OCSEA collective bargaining agreement.

In addition, Employer contends the Union's disparate treatment arguments are without merit. The Employer argues Children Services did not issue a substantiated finding of child abuse against any of the five (5) individuals. However, the Lorain County Children Services substantiated a finding of child abuse against the Grievant. The Employer also argues the Grievant maintains two (2) active disciplines for excessive force. The Employer asserts DYS will remove from employment any of the five (5) employees identified by the Union if they engaged in a second instance of excessive force against a youth.

Lastly, the Employer requests this Arbitrator to deny the grievance. The Employer maintains the Grievant's removal from employment with DYS is appropriate based on his egregious and dangerous conduct. The Employer points out from the Grievant's testimony if confronted with the same situation again, he would behave in the same inappropriate manner. The Employer argues the Grievant does not differentiate between a bar fight at BW3's and striking an upset youth he is employed to oversee and protect as part of his employment. The Employer reminds this Arbitrator if she finds the Grievant committed abuse, this Arbitrator has no authority to modify the penalty pursuant to Article 24.01.

POSITION OF UNION

Union contends that the Employer discipline without just cause. Union argues there was no fair investigation of the incident. The Union complains the investigators did not question the Youth or any of the witnesses about the bite allegations. The Union complains the investigator did not consider the photos, indicating redness in the area of the alleged bite to the Grievant's right wrist. The Union complains the SME for UOF gave his opinion before the Grievant was questioned; thus, the SME could not consider the Grievant's position. The Union opines the Employer did not conduct a fair investigation of the incident. The Union asserts the evidence established the Youth was the aggressor and the Grievant used permissible techniques in an emergency. The Union argues the Employer returned the Grievant to his position as a juvenile correctional officer following a coaching session on June 30. The Union concludes the Grievant was no just cause to discipline the Grievant.

Union contends the Employer failed to meet its burden of proof. The Union points out the Employer failed to produce any witnesses to the actual event. Union argues the Grievant did not use "prohibited physical response" for unnecessary and excessive use of force. Union asserts the Grievant used emergency defense techniques per policy. Union claims the Grievant's use of force and de-escalation techniques should not be evaluated with 20/20 hindsight. Union cites [*Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443, 57 USLW 4513 \(1989\)](#) in support of its position. The Union points out the Youth continued to show physical engagement/physical assault throughout the entire incident. Union argues the video depicts the Youth can be seen continuing to throw punches at the Grievant, and as testified by the Grievant, the Youth also bit Grievant. According to the Union, the evidence demonstrated that Grievant responded to the physically aggressive youth, acted to protect himself from harm, and did what he felt appropriate at the time. Union opines the Grievant's actions complied with DYS policies and procedures.

Union contends there was no abuse. Union argues Lorain County Human Services substantiated abuse without talking to the Grievant. Union also argues the case progressed through the legal process and was dismissed.

Union also argues there is no evidence of record of injury to the Youth. Union believes the Grievant acted in a manner to protect himself and consistent with departmental policy. The Union maintains the actions of the Grievant were appropriate and did not constitute abuse.

Union contends the Employer did not apply the discipline evenhandedly. Union claims other juvenile correctional officers with previous discipline, including removal from their job, were given a second chance with a last chance agreement or other disciplines. One of these officers had similar charges and a similar discipline record and was given a five-day working suspension. Another officer, who used a prohibited physical response and had two previous working suspensions for excessive or unwarranted force, was given a five-day working suspension. If misconduct is found, the Union suggests the discipline should be similar to other employees disciplined for similar offenses.

Union contends the Legal Department failed to provide the Grievant with the information requested on October 4, 2022. Union explains the Grievant submitted a public information request to DYS Legal Department on October 4, 2022, and DYS Legal acknowledged receipt on October 5, 2022. The Grievant submitted a second request on October 28, 2022. Union asserts DYS failed to respond to his requests as of the arbitration date.

Lastly, Union request the grievance be granted. The Grievant be reinstated to his position as Juvenile Corrections Officer with no loss in seniority, and the termination be stricken from his record, including any employee electronic record. The Grievant be paid all lost wages less any interim earnings and appropriate deductions, including union dues and PERS. The Grievant also request all leave balances would have accrued from the date of removal and payment for any medical, dental, or vision expense that would have been covered under his insurance, less appropriate deductible and co-payments, and so forth. The Grievant requests a make-whole remedy, and the Arbitrator retains jurisdiction for sixty (60) days.

Discussion

This grievance arises from a termination of employment. The Employer terminated the Grievant for violating Rule 5.01P: Failure to follow policies and procedures. The removal letter specifically identifies DYS Policy 131-SEM-05 General Work Rules, DYS Policy 163-UOF-02 Managing Youth Resistance-Use of Force, Rule 5.30P Use of excessive force, Rule 6.05P Use of prohibited physical response. The Employer must prove just cause for its disciplinary and discharge actions. Determining the quantum of proof is a procedural matter within the Arbitrator's powers. To remove a claim of excessive force, the Employer must support the charges with a relatively high degree of proof by clear and convincing evidence. Where the preponderance of evidence only requires the plaintiff to 'tip the scales' towards demonstrating fault, the clear and convincing standard needs to demonstrate that fault is 'highly' and 'substantially' more probable to be true than not true.

The parties' Agreement states discipline may not be issued without just cause. Arbitrators and advocates employ the test of whether an employer had sufficient cause for disciplining an employee derived from the landmark decision by Arbitrator Carroll R. Daugherty. Those seven tests are reasonable rule or work order, notice, fair investigation, sufficient investigation, proof, equal treatment, and appropriate discipline. Daugherty's seven steps include both procedural and substantive components. The procedural requirements constitute the due process component of just cause, reasonably related work rule, a notice of said rule, training, and a fair investigation. If the procedural requirements are met, then the focus shifts to the substantive component of just cause. Under this component, the Employer has the burden to establish by clear and convincing evidence that Grievant violated the work rule and, if he did, that termination is a penalty consistent with just cause.

In this case however, the parties have negotiated the penalty in a case of abuse. DYS argues the Arbitrator does not have the authority to modify this termination. DYS relies upon Article 24.01, which states the following:

"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 the employee committing such abuse."

In this case, the alleged victim is an incarcerated youth under the care and custody of the State of Ohio. Thus, the Arbitrator agrees, consistent with the language of the negotiated article, if she finds the actions of the Grievant constitute abuse, she cannot modify the penalty, and the remedy should be to uphold the question.

The Employer contends DYS has established just cause and asks this Arbitrator to rely upon the findings of Children Services to substantiate the abuse. This Arbitrator will not rely upon the findings of a third-party tribunal; the collective bargaining agreement is between the Employer and the Union. The Arbitrator discredited these findings when the Grievant did not get notice of hearing and/or an opportunity to be heard, which are the minimum standards established for due process of law. Curiously, the record is devoid of any evidence that the Employer contacted Children Services to provide Grievant's personal address when they received such notice with due process rights addressed to him. The evidence further establishes the Grievant did receive notice of the criminal charges and was provided an opportunity to present his defense stemming from the incident. This charge was thereafter dismissed.

The Union disagrees just cause exists in this matter and takes exception to the fairness of the investigation. A fair investigation is conducted just and impartially, ensuring that all parties involved are treated equitably and the truth is sought after without bias or prejudice. The

investigator did not investigate the Grievant's allegation that the Youth bit him. The Employer argues the Grievant concocted this story in a last-ditch attempt to justify his actions. The Employer also argues the Grievant submitted the report the next day. However, the evidence at the arbitration established otherwise. This Arbitrator finds the evidence established that Grievant submitted both incident reports on the incident date.

More troubling is the investigator's testimony that even while knowing the existence of the second report and the allegation of biting, he completely disregarded the allegation and failed to investigate further. Yet, he admits under cross-examination that biting constitutes serious physical harm that would justify emergency defense per policy. The investigator acknowledged Exhibit 15, the photo of Grievant's forearm taken by the DYS medical staff, shows pinkness in the dark-skinned Grievant's forearm. The investigator downplays the significance of the pinkness on Grievant's forearm and asserts what he believes the bite indicators should be. There is no testimony of his skill, knowledge, experience, education, or training to justify his opinion. The Arbitrator notes the record lacks any testimony or AI statement from the nurse who did the examination and took the photos.

The Grievant stated in his administrative investigation the Youth bit him. Yet, the investigator does not question any responding JCOs or youths in the room about the alleged biting. He testified he believed the Grievant self-inflicted the injury. The expert on the use of force (UOF) rendered his opinion before the investigator interviewed the Grievant. Thus, the expert did not consider the Grievant's recollection of the incident or his mindset during the incident.

The Grievant called a Signal 5, and staff responded. The investigator interviewed eight employees, two operational managers, and six youth specialists. A review of these statements indicates inconsistencies between their observations and the video of the incident. For example, Youth

Specialist McMeans stated, "he observed Youth punch YS M. Jones and then YS M. Jones put the youth in a headlock and begin to punch the youth as they fell to the floor." The video does not corroborate any punching of the youth as they fell. Operations Manager Butler states "that as OM Lane was attempting to remove YS Jones from the situation, YS Jones was punching the youth as he was getting up off the ground and starting to move away." OM Sheppard stepped in and physically ensured YS Jones left the use of force and ordered YS Jones to leave the unit." The video depicts the operational manager grabbing Grievant's arm but the responding officers obstruct the view of the interaction between Grievant and the Youth. Before the staff intervention, the video shows the Grievant releasing the hold on the Youth, but then he looks down and starts punching Youth. OM Good also states, "when YS Jones was being replaced in the intervention, he saw YS Jones striking the Youth." The investigator did not ask any clarifying questions in the AI and should have pursued more clarification of these responses to obtain a complete picture of the facts unfolding.

The surveillance video does not contain audio. The investigator readily accepted the Youth's version of the conversation, discredited the Grievant, and failed to interview the other youths in the room. The video depicted the Youth talking while he walked from the water fountain toward the opposite end of the room; his remarks caught the attention of the youth in the purple shirt. The video depicted the JCO calling the Signal 5 and four youths moving to the opposite wall, indicating the youths were listening to this conversation. The video also shows the presence and/or conversation of the JCO and Youth, drawing the attention of the youth seated several feet away from them. The purpose of the youth interviews would have been to corroborate either the position of the Grievant or the position of the Youth regarding what was said.

The Youth writes in the Statement Form:

"I got off the phone and was playing and said "I'm not going down" then YS Jones radioed "Signal 5" I told him to get away from me and I'd go to my room. He then stepped closer to me and I said get away before I punch you he then said "do it so I can beat your ass" so I punched him, He also pushed back. I was already upset because Jones always talks shit to everyone, And has an attitude all the time and its gets annoying"

The Investigator Question and Answer (Q & A) Interview Form asked the following questions:

1. Have you been advised that you are a victim of this investigation?
2. On 06-11-22, you were involved in a signal five where you assaulted YS Jones. Please tell me what happened.
3. Did he only hit you in the head?
4. How many times did YS M. Jacobs hit you in the head?
5. Did you have any injuries?
6. Do you have anything else you wish to add?

The Youth responds to the question regarding what happened with one sentence stating, "I hit Jones but after I was restrained, operations cuffed me up and Jones hit me the in the head." Questions 3-6 are the investigator's follow-up questions. The video contradicts all of the above. The events started to unfold at approximately 17:33:03 on the video when the Youth hung up the phone. The responding JCO cuffs the Youth at approximately 17:34:19 on the video. At approximately 17:34:19, the video depicts the Grievant walking with another JCO towards the exit and close to the youths standing on the opposite wall. The investigator did not question the Youth regarding these contradictions.

The investigator also failed to explore the Youth's statement that he was "playing" around. Knowing this information would indicate a reasonable response for the JCO to obtain compliance. Grievant testified, and the Union argued that Grievant's believed the Youth was also joking around, which led

him to think he could utilize verbal strategy to obtain cooperation. Regardless of the joking attitude, the Grievant stated the Youth was not complying with his request to return to his assigned area, so he called a Signal 5.

While the video raises the question of whether the Grievant used excessive force, it is not conclusive. An investigator is still responsible for conducting a full and fair investigation wherever it may lead. An employer's failure to fully and fairly investigate before imposing discipline is an element of the just cause standard lacking in this case. In light of the foregoing, this Arbitrator must determine if the failure to conduct a more thorough investigation has had a detrimental impact on the substantive component of just cause, i.e., proof of misconduct and the reasonableness of the discipline imposed. As previously explained, the Employer bears the burden of proof by clear and convincing evidence.

The Employer maintains the Grievant failed to exercise time/distance and situational awareness by approaching and confronting the Youth, leading to an unnecessary and excessive UOF and violating policy. The Arbitrator considers these to be two separate questions discussed more fully below. Did Grievant properly maintain time and distance? If not, was the result an unnecessary and excessive UOF?

The policy defines situational awareness as "knowledge and understanding of the current situation which promotes timely relevant and accurate assessment to facilitate decision making; fostering an ability to determine quickly the context and relevance of events unfolding." The Arbitrator finds that the Grievant exercised situational awareness in these circumstances. The Grievant responded to the Youth's "playful" resistance to his order directing the Youth to return to his seating assignment. Grievant appears to position himself between this Youth and the seated youth. The Youth seems to be pacing in an agitated manner. As the Youth turns away

from the seated Youth, he moves in the other direction. The Grievant places his hands in his pocket, and according to the Grievant, he employs a verbal strategy to try to de-escalate the situation as he moves into the aisle. The policy notes distance will reduce the risk of youth perception of staff as a threat and reduce the opportunity to strike staff. Grievant stops his approach, and he and the Youth are talking. The Youth closed what appeared to be an appropriate distance by taking three steps to land a punch to the face of the Grievant in less than two seconds.

In less than two seconds, the events moved from "resistance no threat" to "immediate threat." Employer argues the events would not have reached "immediate threat" if Grievant had maintained his position. This Arbitrator disagrees. As noted above, Grievant moved to place himself in a position to protect the seated youth, which is part of his responsibilities. This Youth already acted violently toward other incarcerated youth(s). The Arbitrator agrees while holding the Youth on the ground in this chokehold, Grievant had physical superiority over the Youth. However, as the other JCOs approached and Grievant began to release his hold, the unrefuted testimony was the Youth began biting the Grievant. The photo of the pinkness of Grievant's forearm corroborates this unrefuted testimony. The investigator acknowledged on cross-examination biting constitutes serious harm. The SME testified that the allegation of biting was possible but highly improbable appears to be negated by the photo evidence. The lack of testimony from the responding youth specialists and operation managers is conspicuous. Absent evidence to the contrary, the Arbitrator finds that the Grievant acted within the parameters of acceptable emergency defenses as outlined in DYS Policies- DYS Policy 131-SEM-05 General Work Rules, DYS Policy 163-UOF-02 Managing Youth Resistance-Use of Force, Rule 5.30P Use of excessive force, and Rule 6.05P Use of prohibited physical response.

There are no laws or regulations on force proportionality. The Department has provided a resource for its juvenile correction officers in its UOF policy and continuum grid regarding applying all levels of force. The United States Supreme Court, in Graham v. Connor, talks about the application of objectively reasonable force, not proportionality. Objectively reasonable is based on a totality of circumstances. But at the same time, when we talk about reasonable force, what is objectively reasonable is the least amount of force to accomplish a stated objective. On the record presented at the arbitration, this Arbitrator concludes the action of the Youth forced the confrontation and an application of force. The Youth closed the appropriate distance in less than two second by taking three steps and lunging at the Grievant. The emergency defense techniques by the Grievant were objectively reasonable absent evidence that the Youth was not biting the Grievant when Grievant relaxed the hold. Thus, this Arbitrator finds the Employer has not met its burden of proof to sustain the charges herein based on the evidence presented at the arbitration. This Arbitrator reminds the advocates that unless there is a stipulation to the AI witness statements, the examination and admission of an AI prove whether or not the Employer conducted a fair investigation with limited exceptions, and not the misconduct. The Arbitrator sustains this grievance.

AWARD

The Employer did not have just cause to discharge the Grievant, and therefore it violated Article 24 of the parties' Collective Bargaining Agreement. Accordingly, the Employer shall reinstate the Grievant to his former position as a Youth Specialist with seniority unimpaired and make him whole for wages, and benefits lost, less any earnings from the Grievant's post-discharge employment. The Grievant's personnel records

shall be amended to reflect this, and he shall otherwise be made whole for any loss he sustained due to his unjust discharge.

Dated: June 5, 2023

Meeta A. Bass

Arbitrator Meeta A. Bass

CERTIFICATE OF SERVICE

I certify a true and accurate copy of the foregoing Award was served on the following individuals this 5th day of June 2023:

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