

In the Matter of the
Arbitration between

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION AFSCME, LOCAL 11

and

STATE OF OHIO DEPARTMENT OF
YOUTH SERVICES

Case No. DYS-2023-01942-03

Grievant: Mark Garner

Arbitrator: Tobie Braverman

OPINION AND AWARD

APPEARANCES:

For the Employer:

Bradley A. Nielsen, Management Advocate
Cullen Jackson - OCB Representative
Richard Duncan, Training Manager

For the Union:

Russell Burkepile, Advocate/Staff
Representative
Mark Garner, Grievant

The Ohio Department of Youth Services (hereinafter referred to as "Employer") and Ohio Civil Service Employees Association, AFSCME, Local 11 (hereinafter referred to as "Union") have submitted the grievance of Mark Garner (hereinafter referred to as "Grievant") to the Arbitrator for decision pursuant to the Collective Bargaining Agreement of the parties. Hearing was held at Westerville, Ohio on March 26, 2024.¹ The parties submitted post hearing briefs which were received and exchanged by the Arbitrator on April 12, 2024. The parties stipulated that the grievance is properly before the Arbitrator for decision, and further stipulated that the issue for decision is as follows:

Did the Ohio Department of Youth Services-Indian River Juvenile Correctional Facility have just cause to remove the Grievant from employment? If not, what is the remedy?

FACTS

The Employer is a division of the Ohio Department of Youth Services ("DYS") which operates the Indian River Juvenile Correctional Facility ("IRJCF") located in Massillon, Ohio. The IRJCF houses juvenile felony offenders, commonly referred to in the facility as "youths" in eight housing facilities which can accommodate up to twenty-three youths each. Each youth has an individual room as well as access to a common day room. Each unit is routinely staffed by two Juvenile Corrections Officers ("JCO") on each of the three daily eight hour shifts. The Grievant was, at the time of his removal, employed in the classification of JCO. The duties of a JCO include supervision and control of the youth in custody. The Grievant began his employment with DYS on July 8, 2019. The Grievant worked first shift on Unit "A", with duties which primarily involved supervision of meals, youth movement to and from school, escort to and from other necessary destinations and assisting with daily programming.

¹ The Grievant was in attendance via video call.

The incident which gave rise to the Grievant's removal occurred on March 25, 2023. At approximately 9:08 a.m., staff on Unit "N" made a Signal 88 call, which is a call for emergency assistance by all available staff. The incident which prompted the Signal 88 call was captured on the facility's day room camera, and was presented as evidence at hearing. The video does not include audio.

A review of the video initially depicts a number of the youth who are sitting in chairs or milling around the day room. When one particular youth walks into the room, six other youth rush to him, pin him against a wall and begin hitting and kicking him. The JCO's present intervene, and after a Signal 5 call which brings in additional JCO's, manage to break up the fight by pulling some of the youth off and placing one of them in a bear hug over a chair. Others stop and retreat after apparent verbal commands. At that point, however, two of the youth begin to tear up the room by throwing papers and turning over chairs, with a third joining in. It is at this juncture that other staff, including the Grievant arrive in response to a Signal 88 call.

When the Grievant arrived on the scene, he observed Youth T, a fourteen year old boy, walking across the room. The Grievant testified that the rule, of which all youth are aware, is that in the event of a signal call, youth are to stand against the wall. Those who are not against the wall, are deemed to be part of the problem. It is apparent from the video that the Grievant immediately moved toward Youth T, who, after glancing over his shoulder at the Grievant, attempted to walk away from the Grievant. The Grievant approached Youth T as Youth T was walking away, and directed him to stand at the wall. It is unclear if Youth T intended to comply. The Grievant immediately closed the distance between them and reached out, tapping Youth T on the shoulder.

At that point, Youth T turned toward the Grievant in response to the touch on his shoulder. Youth T then pushed the Grievant in the chest with both of his open hands. In immediate response to the shove, the Grievant balled his fist, cocked his arm and punched Youth T in the side of his face. According to the Grievant, the punch did not land. A repeated view of the video appears to indicate that the punch did not land solidly, but must have grazed the side of Youth T's face. A

struggle between the two then ensued. Other staff members immediately got involved, and Youth T was ultimately wrestled to the floor, handcuffed and escorted back to his room. It is undisputed that neither the Grievant nor Youth T sustained any injuries in the incident.

The Grievant was placed on paid administrative leave on March 26, 2023 while the incident was investigated. The matter was investigated by Trainer Instructor, Darrin Kreis who, after conducting interviews with all participants as well as reviewing the video, concluded that “the level of force used ... was unauthorized and inappropriate”. Richard Duncan, Training Manager, testified at hearing that the Grievant had been trained on the use of force policies upon hire, and had additionally attended a refresher training in 2021. He testified that the initial training consists of four days, which include policy review as well as practical hands on training. The policy includes a “Use of Force Continuum” which provides appropriate responses to varying levels of threat.

Duncan additionally testified that he reviewed the Investigation Report as well as the video of the incident. Based on that review, on the Use of Force Continuum, which is part of the Policy, Youth T’s actions constituted “Threatening Movement” to which the appropriate response would have been staff presence, time and distance, verbal strategies and a call for assistance. In his opinion, the use of force was unjustified because Youth T had not gained physical superiority and presented no imminent threat of bodily harm to the Grievant or others at the time the Grievant hit Youth T. The Grievant acknowledged that he should not have punched Youth T, but noted that Youth T had shoved him and ignored his commands. His reaction was a spontaneous one in the heat of the moment, and he believed that it would not recur with additional training.

Subsequently, a pre-disciplinary meeting was held before Chris White on May 24, 2023, who determined that the Grievant had violated the Use of Force Continuum and that the Grievant’s actions had violated Work Rules 5.01P, 5.30P and 6.05P. Upon review, Director, Amy L. Ast, determined that the Grievant had violated the use of force policy, and affirmed the conclusion that the Grievant had used excessive force and used unauthorized techniques. She determined that the incident, together with the Grievant’s active disciplinary record, which included three written

reprimands, a one day working suspension and a two day working suspension warranted his removal from employment. A timely grievance was filed, and the matter proceeded through the grievance procedure without resolution to arbitration.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees for just cause; ...

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 the authority to modify the termination of an employee committing such abuse. ...

24.02 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

- a. One (1) or more written reprimand(s)
- b. One (1) or more working suspension(s). ... a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued. ...
- c. One (1) or more day(s) suspension(s) ...
- d. Termination. ...

24.06 - Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-discipline meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day time frame; however,

the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation. ...

DYS GENERAL WORK RULES RULE VIOLATIONS ...

LEVEL FIVE: ...

Rule 5.01P Failure to follow policies and procedures

131-SEM-05 General Work Rules

163 UOF-02 Managing Youth Resistance - Use of Force

Rule 5.30P Use of excessive force

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

Rule 6.05 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 which could result in death or severe bodily injury to oneself or to others.

The intentional, knowing or reckless use of the following techniques: ... slapping, punching, kicking or hitting; ...

Managing Youth Resistance - Use of Force ...

IV. Definitions ...

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

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

- Carries a substantial risk of death;
- Involves partial or total substantial incapacity;
- Involves any mental illness or condition of such gravity as 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.

POSITIONS OF THE PARTIES

Employer Position: The Employer contends that it has met its burden of proof to demonstrate that the Grievant is guilty of the offenses with which he is charged and that the penalty of removal is the appropriate penalty for those offenses. The video evidence provides clear proof that the Grievant exercised poor judgment when he failed to exercise time/distance and verbal strategies with a non-compliant youth. He clearly violated applicable policies when he struck a youth in circumstances where the youth had not gained physical superiority and there was no imminent risk of serious physical harm. The Grievant unnecessarily pursued the youth, closed the physical space between them and then punched him within ten seconds of entering the day room. Even if the punch did not land, as argued by the Union, the Grievant's actions in throwing the punch clearly violated the applicable use of force rules. The Grievant had other options under the circumstances, and admitted that he used poor judgment in punching Youth T instead of using verbal strategies to gain compliance. The Grievant was a short term four year employee with five active disciplinary actions, including one for utilizing a prohibited restraint technique in July, 2020. His removal was clearly warranted under all the circumstances of this case. The grievance should therefore be denied.

Union Position: The Union argues that the Employer has failed to meet its burden of proof to demonstrate just cause for the Grievant's termination in this case. The video evidence demonstrates that the Grievant only did what he felt was necessary to protect himself against the risk of serious physical harm. The youth had failed to follow instructions and assaulted the Grievant. When Youth T shoved the Grievant, he created a situation in which there was a real risk of serious physical harm, and the Grievant's actions were therefore necessary and justified. The Grievant's reaction was instinctual in the heat of the moment. Further, the evidence demonstrates that the punch did not actually connect and there was no injury to either the youth or the Grievant. The punch was not prohibited. The Grievant's actions should be viewed in light

of all the prevailing circumstances and judged from the perspective of a reasonable officer. By that standard, his actions were both reasonable and appropriate. The Grievant was called to a serious situation requiring immediate response and was assaulted by a youth who had just been involved in an altercation with other youths. The discipline here did not take into account all of the circumstances and is being used solely as punishment. The Employer has failed to meet its burden of proof that the Grievant did anything that was prohibited under the circumstances presented. Further, the Grievant should be considered to be a long term employee based on his four years of service. This should additionally serve to mitigate against the penalty imposed. The grievance should be sustained the Grievant should be reinstated with full back pay and benefits.

DISCUSSION AND ANALYSIS

This being a case of termination, the burden of proof rests with the Employer to demonstrate both that the Grievant is guilty of the offense with which he is charged, and that the commission of that offense warrants the penalty of discharge. Generally, this Arbitrator has subscribed to the requirement that the two elements of the Employer's burden of proof be demonstrated by the intermediate evidentiary standard of clear and convincing evidence. This standard of proof recognizes the severe and potentially lasting impacts that a discharge has on the Grievant and his ability to obtain future employment by requiring greater proof than a mere preponderance of the evidence. That is the burden of proof which will be applied in the instant case.

In evaluating whether the Employer has met its burden of proof to demonstrate that the Grievant has committed the offenses with which he is charged in this case, the primary available evidence is the video of the incident. That evidence captures the incident with clarity in this case. After viewing the video repeatedly at various speeds, the Arbitrator is left with one

overriding conclusion. It was the Grievant's actions which precipitated his throwing a punch and the ensuing struggle with Youth T.

The video evidence demonstrates that the day room erupted when several youths, including Youth T, descended on another youth, punching and kicking him. After that assault was broken up, some of the involved youths started throwing papers and overturning chairs. Youth T was not involved in that activity. He was, however, walking across the room when the Grievant and other staff arrived in response to the Signal 88 call. The Grievant, immediately upon entering, approaches Youth T, pointing at him and saying something which cannot be heard on the video, but which the Grievant has indicated was an instruction to report to the wall. Youth T glances backward several times and continues to move away, while the Grievant quickly closes the distance between them and touches Youth T on the shoulder. It is at that juncture that Youth T turns fully around and shoves the Grievant. The shove is with two open hands, and does not appear to be forceful enough to move the Grievant backward. In response, the Grievant immediately balls his fist, cocks his arm and throws a punch at the side of Youth T's face. As noted above, the punch does not appear to land cleanly, but rather grazes Youth T's face. Other staff then intervenes, and Youth T is ultimately subdued after a struggle.

Two things are important to note. First, the Grievant made no attempt to use time and distance to gain compliance from Youth T. At the time of initial contact there was no ongoing altercation in the dayroom and Youth T was moving across the room with his hands at his waist. It is not even clear that the Grievant gave Youth T time to comply with his direction to report to the wall. Instead of following the use of force continuum by first allowing for distance and verbal direction, the Grievant did the opposite. He quickly closed the distance on Youth T and put his hand on his shoulder. Even after the shove, there does not appear to be any threat of imminent harm to the Grievant or others. The shove was not sufficiently forceful to push the Grievant back, indicating that it did not pose any serious threat of harm. The Grievant's immediate response, however, was to throw a punch. The rules clearly prohibit this action under

the prevailing circumstances here.

Second, the contention that because the punch did not actually land on Youth T's face it was effectively harmless and not in violation of the use of force rules is specious and must be rejected. There is no question but that the Grievant fully intended that the punch he threw would make contact with Youth T's face. He was physically very close, balled his fist, pulled back his arm, and forcefully directed the movement at Youth T's head. The fact that Youth T managed to evade all or most of the impact was lucky. It does not mitigate the Grievant's intent or conduct. The Grievant chose to use a prohibited use of force in a situation in which he was clearly not in imminent danger of serious bodily harm. That his prohibited use of force was not as efficacious as it could have been can not serve to justify its use after the fact.

The Grievant further testified that his actions were an unfortunate reaction in the heat of the moment, and should therefore be forgiven. However, the testimony at hearing from both the Grievant and Training Manager Duncan was that these sort of youth fighting incidents occur on a daily basis. That being the case, it is difficult to understand how or why the Grievant would not react similarly in another similar situation. If the Grievant is unable to control his impulse to react with force in response to youth misconduct, it seems likely that he will again use prohibited force when faced with a situation that is likely to recur.

In fact, when the Grievant was asked what would prevent similar misconduct in the future, he did not indicate that he had any insight into his own actions or ability to control his future reactions. He stated only that he should be re-trained regarding the use of force. The Grievant has, however, been trained and re-trained. He did not testify that he was unsure of the appropriate procedures, was in any way unfamiliar with them or somehow had forgotten the appropriate techniques and procedures. It is simply unclear that re-training would prevent a

recurrence. The Grievant acted from impulse in a situation that required patience and maturity.

Ultimately, the Arbitrator must conclude that under all of the circumstances, the Grievant is guilty of the offenses with which he is charged. Having determined that the Grievant is guilty of those offenses, it is necessary to determine if removal is the appropriate penalty under the circumstances presented by this case. As the Union notes, there were no injuries to either the Youth or the Grievant, which serves as a mitigating factor. There are, however, other significant aggravating factors. First, the Grievant is a short term employee with only four years on the job. While the Union argues that this should be considered long term employment, presumably based on turn over rates in the position, the Union did not present any evidence in support of that contention. By typical standards, this is a short term of employment.

More important than the Grievant's tenure, however, is his disciplinary record. In his four years of employment the Grievant has amassed three written reprimands, a one day suspension and a two day suspension. One of the written reprimands was for using a prohibited restraint technique, indicting that the event here is not an entirely isolated incident. He is charged with three offenses, two of which are Level 5 offenses, and one of which is Level 6 offense. Both of these offense categories call for a suspension of up to five days or termination in the event that the prior disciplinary record includes a suspension. Further, the Grievant's testimony indicates that that he has neither recognized or made any effort to address the impulse which caused him to overreact on March 25, 2023. As a result, there is no reason to have confidence that the Grievant will not react in a similar manner in the future. In light of this, the Arbitrator cannot conclude that the discipline was either punitive or too severe as urged by the Union, and the removal must be upheld..

AWARD

The grievance is denied.

Dated: May 10, 2024



Tobie Braverman, Arbitrator