

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

**THE STATE OF OHIO, DEPARTMENT OF
YOUTH SERVICES**

-and-

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

**ARBITRATOR'S
OPINION**

Grievant: Eugene
Locker

FOR THE STATE:

DONALD E. ELDER
Deputy Director
Ohio Department of Youth Services
Division of Administrative
Services
51 North High Street, 8th Floor
Columbus, Ohio 43266-0582

FOR THE UNION:

MAXINE S. HICKS
Staff Representative
Ohio Civil Service Employees
Association, Local 11, AFSCME
AFL-CIO
1680 Watermark Drive
Columbus, Ohio 43215

DATE OF THE HEARING:

April 19, 1990

PLACE OF THE HEARING:

Ohio Department of Administrative
Services
Office of Collective Bargaining
65 East State Street
Columbus, Ohio 43215

ARBITRATOR:

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295

* * * * *

The hearing was held on April 19, 1990 at the Office of Collective Bargaining, State of Ohio, Columbus, Ohio, before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:20 a.m. and was concluded at 4:55 p.m.

* * * * *

On or about September 28, 1989 **EUGENE LOCKER** filed a grievance with the **STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES, BUCKEYE/TRAINING CENTER FOR YOUTH (TCY) COMPLEX** located in Columbus, Ohio, the "State" in which he protested his dismissal from his job. He claimed that the State did so for "unjust cause" and "there was no proof" that he "had abused anyone".

The State denied the grievance and the denial of the grievance was appealed to Step 3 under the Agreement with **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO**, the "Union". After the grievance was denied at a Step 3 hearing it was carried to arbitration.

FACTUAL DISCUSSION

The Grievant was employed by the State as a full time Youth Leader II at the Training Center for Youth from October 9, 1984 through August 31, 1989, when he was removed from employment.

The Training Center for Youth which is operated by the Department of Youth Services is a facility for felony offenders who are thirteen (13) to twenty-one (21) years old. The Training Center has 140 (one hundred forty) beds and is located near a residential area. The general purpose of the Training Center is "to protect the public and

provide rehabilitation services, in a safe, secure humane and industrious community". At the hearing the youth were said to suffer from "mental health problems"; in addition, some of the youth, for example are arson offenders and sex offenders. The Training Center attempts to develop programs to treat the various problems facing the youth offenders who are confined to the facility.

As a Youth Leader II, the Grievant's duties included the custody and security of the youth under his supervision, informal counseling, supervision over the transportation of the youth and seeing to it that the youth maintain clean living quarters. Prior to his removal from employment by the State, the Grievant was Youth Leader II of Group H on the first shift [7:00 a.m. to 3:00 p.m.]

Turning to the events giving rise to the grievance, Deputy Superintendent Paul Hemphill indicated that on or before August 1, 1989 a note was sent to Superintendent Granville Potter, Jr. by T. D. a youth at the facility. The note indicated that "a staff member is putting hands on me and he is not my father".

The youth, T. D., was brought to Hemphill's office where he (Hemphill) talked to him in the presence of "Mr. Burton", a supervisor. When Hemphill questioned T. D. about the note that he sent to Superintendent Potter, T. D. told Hemphill that he was hit by a staff member on the buttocks. Hemphill asked T. D. to show him where he

was hit. T. D. did so and according to Hemphill, he observed red, bluish bruises on his buttocks. According to Hemphill T. D. said that he was "served" by the Grievant. T. D. told him that the term "served" meant that he was swatted on his rear "after bending over". According to Hemphill, before T. D. explained the meaning of "served" he had never heard of the word.

Hemphill called the clinic at the facility to have T. D. examined. Furthermore, Hemphill also took photos of T. D.'s buttocks one of which was submitted at the hearing. The photo showed that the buttocks of T. D. were discolored; they were "red-bluish" and bruised.

Virginia Kuhns is a staff nurse at the Training Center for Youth. She described that she saw T. D on August 1, 1989. Kuhns went on to state that his buttocks were black. There was a solid bruise on his buttocks. Due to the discoloration and the swelling of the buttocks it was Kuhns' judgment that the bruises had been caused within a short period of time prior to her examination. In her "charting" [taking notes on information provided by youth who require her assistance] she stated that T. D. "claims he was hit in right buttocks [with] a stick per a staff member repeatedly on the following days: 7/26/89 (Thursday), 7/27/89 (Friday), 7/28/89 (Saturday), 7/29/89 (Sunday). Extensive bruised areas [on right and left] buttocks."

Both T. D. and A.L., another youth at the facility indicated that they were "served" by the Grievant. At the time that he said that he was "served" by the Grievant, T. D. was assigned to Group "H". Furthermore, A. L. testified that he had seen T. D. and other youth "served" by the Grievant in the T.V. area. It should be noted that a few days after August 1, 1989, T. D. attended an "early release hearing" after which he was released from the facility. At the time of the arbitration hearing he was incarcerated at a facility operated by the State, located in Masillon, Ohio. He was incarcerated because he had committed the felony of "stealing".

The Grievant said that on July 26, 1989 he arrived at the Training Center at approximately 6:55 a.m. He indicated that he saw T. D. "on the breakfast line" in the cafeteria when he arrived at work. On July 31 the Grievant said that Assistant Principal Percy Wright approached him and said that T. D. told him that he had bruises on his body. Wright also told the Grievant that T. D. accused him (the Grievant) of causing the bruises. Among other things Wright also told the Grievant that "the kid did not want to go back to Group "H". The Grievant went on to state that Wright told him that T. D. said "they were hitting on him" and he told Wright that he would check on T. D. "to see if he wanted to go to a nurse or go to the doctor". According to the Grievant he walked to the cafeteria with Wright and asked T. D. who was then in Group "K" if he wanted to see the nurse. He also

asked him if he had bruises or whether anything was "wrong with him". By the Grievant's account, T. D. said "no". The Grievant indicated that he never saw T. D. again and that T.D. remained in Youth Leader Steven Wade's group which was Group "K".

Beginning August 1 the Grievant was off for five (5) consecutive days and on August 6, 1989 he reported for work. Upon reporting for work he was notified that he was being placed on administrative leave of absence pending the completion of an investigation concerning the allegations contained in a Notice of Investigation, which was given to him. The Notice of Investigation which was signed by Hemphill on August 3, 1989 contained the "alleged incident" which is set forth, as follows:

"It is alleged that on or about July 26, 1989 and for several days after, you did strike a youth under your supervision on the buttocks with a stick. This resulted in extensive bruised areas on the left and right buttocks. This is a violation of DYS Directives, Chapter B-19, Section IV-A, Work Rule #1... Abusing or mistreating youth entrusted to the Department's care; failing to immediately report the use of physical force on a youth as prescribed by local directive or rule and DYS Directives, Chapter B-38, Section IV, #1... Using brutality,

physical violence, or intimidation towards a youth, employee or member of the general public".

The Grievant's statement which was attached to the Notice of Investigation and signed on August 7 indicated the following:

"I did not strike any youth on the buttock or anywhere else. The youth in question could had [sic] possibly gotten the bruise from sitting on a milk crate. Or I heard that the youths in his dorm said that they were going to get him for coming back into an inside grp."

On August 8 the Grievant received notice that a pre-disciplinary hearing would take place on August 11, 1989 concerning the allegations that "you did strike a youth under your supervision on the buttock with a stick resulting in the youth having extensive bruised areas on the left and right buttocks". As a result of the pre-disciplinary hearing on August 31, 1989 Geno Natalucci-Persichetti, Director of the Department of Youth Services removed the Grievant from his position of Youth Leader II effective August 31, 1989.

In light of this outline of events, the instant grievance was filed with the State.

DISCUSSION

The issue to be resolved by this arbitration is whether the State removed the Grievant from his position as Youth Leader II for just cause; if not, what is the remedy to be awarded?

After carefully examining the evidence in the record I have concluded that the Grievant struck the Grievant on the buttocks with a wooden instrument on or about July 26, 1989 and for several days thereafter. As a Youth Leader II, the Grievant was a supervisor of Group "H" to which T. D. was assigned. T. D. indicated that he was "served" by the Grievant by placing himself on the floor "on [his] knees and he was struck on [his] behind". T. D. went on to state that "he told me to get on my knees". He testified that the stick was "square" and "about two (2) feet long". T.D. added that "when he [the Grievant] comes in you have to be ready". T. D. said that a "serving" occurs "for something you have done".

A.L. also testified that he was "served" by the Grievant. He defined the term, "served" by stating that it is "where you get swatted"--you get hit with a stick, like a crutch in the rear end". A.L. added that he got served by the Grievant, by getting "down on [his] hands and knees". In this position, he said that "your butt sticks out even more".

T. D. was described by the staff members at the hearing as being a "loner", "quiet" and "passive". He left the Training Center a

few days after August 1, 1989. A.L. was at the facility during the events in question and on the date of the hearing, he was still confined at the facility. A. L. had not seen T. D. since late July or early August, 1989. He described his relationship with T. D. as "okay".

In light of these considerations I find it more than coincidental that both T. D. and A. L. described the manner in which they were served by the Grievant. Moreover, A. L. observed the Grievant "serving" T. D. in the "T.V. area" as well as K.R. and K.E., which were the initials of the names of the other youth that he "could remember".

I find the testimony of T. D. and A. L. highly credible and persuasive. I cannot believe that T. D. and A.L. fabricated their testimony about the manner in which they were served by the Grievant. They had not seen each other for roughly one (1) year and there was no evidence in the record to indicate that they were friends when they were both in Group "H" before or when the events in question took place.

Their testimony was also convincing with respect to the wooden instrument that the Grievant used to physically abuse them. T.D. described the instrument as square and "about two (2) feet long". A.L. indicated that the instrument the Grievant used for "serving" was a "stick * * like the end of a crutch" with the screws removed". He added that "the stick has holes where the screws were removed and

has tape around it--there were also layers of wood in it". After A. L. described the instrument the State produced part of a crutch which was shown to A.L. He indicated that he was "pretty sure it was used for the serving". A.L. testified that the last time that he "saw it" [the wooden instrument] was when the Grievant "swatted" T. D. A. L. said that "the crutch" is "kept in the supply closet where we keep chairs and cleaning" supplies. He added that "the crutch" is locked most of the time.

The testimony of both T. D. and A. L. in describing "the crutch" had the ring of truth. Both witnesses were accurate in describing the instrument used for "serving". A.L.'s demeanor while observing the instrument after he had described its physical characteristics, was compelling. Based upon their testimony I have concluded that the part of the crutch shown to A. L. was the instrument which the Grievant used to serve T. D.

The Grievant denied that he struck or physically abused T. D. However, I found his direct testimony, to say the least, unusual. He indicated that on July 26, 1989, he saw the Grievant in the cafeteria during breakfast and lunch. He said that he "tries to see how they are doing" and "when the kids come back from lunch they run around".

The Grievant then indicated that when Wright approached him on July 31 and accused him of causing bruises to T.D., he replied

"when"? The Grievant did not deny the accusation but he wanted to know "when" he caused the bruises, to which Wright "said he did not know". The Grievant then stated that he "would check out the kid to see if he has to go to the med line", or go to the nurse or go to the doctor". Thus, the Grievant was concerned about whether T. D. wanted to go to the clinic. However, at no time did the Grievant indicate to Wright that he denied physically abusing T. D.

The State attempted to introduce a written statement by Wright in which he set forth his discussions with T. D. and the Grievant on July 31. I sustained the Union's objection to the introduction of Wright's statement because Wright was not at the hearing to present testimony. During the Union's case, it sought to introduce two (2) sentences of Wright's statement in which he related what T. D. had told him. The sentences that were read by the Grievant are as follows: I asked him what the problem was and he said that he was afraid to go back to group because every [sic] since he had been moved back inside to Group "H" from the outside, whenever he goes back to group they were picking on him. I asked what he mean [sic] by they and how they were picking on him." [Emphasis added]. By having these sentences of Wright's written account read by the Grievant at the hearing, the Union sought to emphasize the word "they". However, since the Union sought to utilize Wright's statement to bolster its case, which it previously objected to on the grounds that it constituted

hearsay when the State attempted to introduce it into the evidentiary record, leads me to permit Wright's entire statement to be part of the evidentiary record. It would be unfair to merely lift a few sentences from Wright's report of the events in question without placing it into the context of his full report. Thus, Wright's statement, dated August 2, 1989 is as follows:

"On Monday 7-31-89 a youth (T. D.) came to my office during class change saying that he did not want to go back to group because he was having problems and wanted to go up front. I asked him what the problem was and he said that he was afraid to go back to group because every since he had been moved back inside to Group H from the outside, whenever he goes back to group they were picking on him. I asked what he mean by they and how were they picking on him. He said that he didn't want to talk about it. He said ok. he then told me that the [sic] they that he referred to was the staff. I asked him what staff and he said Mr. Locker. I asked what he meant by picking on him. He then showed me a small bruise about 2 to 3 inches in diameter on his buttocks an [sic] said that it came for what they called serving. I told him that I would take him to group K and leave him with Mr. Wade. He agreed. I

then explained to Mr. Wade what the situation was. Mr. Locker was not on his group at this time. I asked Mr. Wade to have Mr. Locker to call me as soon as he returned to group. Mr. Locker stopped by my office about 20 minutes later and told him about the small bruise that D had shown me and accused him of putting it there. Mr. Locker said thanks, assured me that the mark was an isolated incident, and that he had talked to D on frequent occasions and they had a good relationship. I told him that he couldn't use any physical abuse on the kids regardless of what type of relationship he think he may have. On Wednesday 8-2-89 when I saw pictures of D's buttocks it seems that additional marks, reddened areas, and bruises had been made possibly from additional punishment or late surfacing".

Thus, Wright's report indicates that by the word "they", T. D. "referred to * * the staff". When Wright asked T. D. "what staff", T. D. said "Mr. Locker" or, in other words, the Grievant. I am persuaded that the Grievant told Wright "that the mark [on T. D.'s buttocks] was an isolated incident * *." Taking Wright's report as a whole, I find it highly detrimental to the Grievant's case and constitutes an admission that he physically abused T. D.

Moreover, at no time during his testimony did the Grievant deny that he "served" A. L. or the other youth, referred to by A. L. His failure to deny A. L.'s testimony concerning the "servings" leads me to infer that he "served" A. L. and the other youth mentioned by A. L. Indeed, his statement in reply to Hemphill's Notice of Investigation that T. D. could have received his bruise "from sitting on a milk crate" is hard to believe. Kuhns stated that in her opinion, the bruises suffered by T. D. could not have resulted from sitting on a milk crate. The photo taken by Hemphill of the Grievant's buttocks shows bluish red bruises, which could hardly be caused from sitting on a milk crate. The bruises appear to result from the exertion of severe physical force with a hard instrument so as to cause the discoloration of the buttocks. The photo supports T. D.'s statement to Kuhns on August 1, 1989 that his "right buttocks" were "repeatedly" hit with a stick and that both his right and left buttocks showed "extensive" bruises.

T. D. did not initially report the "servings" by the Grievant because he "was going to talk to him", and he "thought it would stop". He reported the "servings" to the Grievant's supervisors because he "could not take it any longer". A. L. did not report the "serving" administered by the Grievant because it did not affect [him] that much". The reasons that T. D. initially failed to report the "servings"

by the Grievant and A. L.'s failure to report the Grievant's serving are convincing.

ABSENCE OF GRIEVANT ON JULY 28 AND 29, 1989

It is undisputed that the Grievant was absent on July 28 and 29, 1989. Based upon Kuhns' "charting" on August 1, 1989, T. D. claimed that he was hit on the buttocks by the Grievant, each day, beginning July 26 through July 29, 1989. The Grievant could not have "served" T. D. inasmuch as he was absent on July 28 and 29, 1990. Despite this fact, based upon the evidentiary record with emphasis on the testimony of T. D., A.L. and the Grievant himself, I have concluded that T. D. was served by the Grievant on or about July 26, 1989 and some days thereafter. However, T. D. is mistaken that he was served by the Grievant on July 28 and 29, 1989. T. D.'s reference to being served on those dates, is not fatal to the State's case given the entire evidence in the record. Moreover, as T. D. stated, he was never "served" by "anyone else", but the Grievant.

T. D. and GROUP "H"

As I have already indicated, T. D. has been in and out of state operated facilities since the age of fourteen (14). He was "committed" to the Training Center facility "the first time", because he failed to attend school. As a result his parole was revoked. At the time of the

arbitration hearing T. D. was confined to a state operated facility located in Masillon, Ohio for stealing.

Group H was described by Kuhns as consisting of "aggressive youth. Ricardo Volley, who has been a Youth Leader II of Group "H" for six (6) to seven (7) months prior to the hearing characterized the youth in Group "H" as "the most aggressive" at the institution. Anthony Mosely who was employed as a Youth Leader II of Group "H" during the second shift said that when the events in question occurred, Group "H" was comprised of "older and aggressive kids".

T. D. acknowledged that he did not get along with some youth. He "did [get along] with some other" youth. However, he said that he was not involved in fighting with the youth in Group "H". This was confirmed by A. L. as well as the Youth Leaders. Although A. L. said that he was involved four (4) times in fights, he was not aware of anyone who beat up T. D. He characterized T. D. as "quiet" and a person who "stays to himself". A. L. had never seen T. D. in a fight. Steven Wade, a Youth Leader, called T. D. "quiet and lazy" and that he "had hygiene problems". Wade added that he "had to keep the kids off him" but he [T. D.] "would not do anything to anyone". He indicated that T. D. did not participate in sports" and "the kids would chase him". Wade said that T. D. was "manipulative". Volley characterized T. D. as a "very frail type of kid" who "is not aggressive"--he is "passive

and low key". The testimony of other Union witnesses who were Youth Leaders at the Training Center is consistent with the testimony already set forth.

T. D. admitted to having a "habit" of smoking cigarettes. He acknowledged that he would give up his tray of food for cigarettes; he denied giving "sexual favors" or his clothes for cigarettes. The various Youth Leaders testified that they knew T. D. smoked. Although smoking by the youth is prohibited cigarettes would be given to the youth, for example, by visitors. The youth "pop sockets in order to light the cigarettes".

Thomas Hurt, a Youth Supervisor said that the "kids used" the Grievant--the kids would give him contraband, so that they would not be found to be in possession of the contraband. Hurt said that he "would get blamed for it and he was too scared to tell anyone".

The evidence concerning T. D. and his "manipulative" personality in order to obtain cigarettes is not entitled to much, if any, weight. A. L. indicated that it is common "to trade things for cigarettes". In any event, there is no question but that T. D. is not a model youth. However, evidence concerning his record, assignment to Group "H" and his "passive" manner does not lead me to conclude that the bruises on his buttocks were caused by the other youth. The testimony of T. D. and A. L. as well as the Grievant himself is

compelling to warrant the conclusion that the Grievant physically abused T. D. on or about July 26, 1989 and for a short period thereafter.

"INITIATION"

A. L. referred to the term "initiation" which he said occurred at night in the dormitories. The "term" is used to indicate a situation where "youths serve each other", for example by striking a youth with a soap contained "in a pillow * * ." Wade referred to "pillow partys" where "kids are beat up". Clearly, the evidence does not lead to the conclusion that T. D. suffered the bruises on his buttocks from an "initiation" or "serving" by other youth. As A. L. stated, "initiation" was not performed with a "crutch" or part of a crutch.

"A. L."

The Union submitted a report on A. L. involving an incident that occurred on March 3, 1990. A. L. was refused permission to go to his room because he was slow in previously coming out of his room. As a result, A. L. cursed at Ms. Hemphill, a Youth Leader, and threatened to "report her and hit her". As already established, the youth confined to the Training Center facility are extremely troubled. That their anti-social behavior may very well continue when they are confined is not

surprising. However, such evidence involving A. L. does not detract from the evidence supporting the State's case against the Grievant.

SECTION 124.34 OF THE OHIO REVISED CODE

In the removal order dated August 31, 1989, Director Natalucci-Persichetti indicated that the Grievant's actions constitute failure of good behavior in violation of Section 124.34 of the Ohio Revised Code". The Union claims that Section 124.34 does not require just cause and progressive discipline. Consequently, the Union contends that the removal of the Grievant under Section 124.34 of the Ohio Statute violates the agreed upon standard and requirements contained in the Agreement providing for just cause and progressive discipline. In a decision rendered on January 7, 1990, between the State of Ohio, Department of Youth Services, Cuyahoga Hills Boys School and the Union, [Case No. G87-2810], the Arbitrator considered the removal order "defective for a number of reasons" including its reference to Section 124.34 of the Ohio Revised Code. The Arbitrator indicated that Section 124.34 "conflicts with a recent Ohio Supreme Court decision which found that the Code cannot be used to supplement and indirectly usurp provisions negotiated by the parties".

The issue of whether the Grievant was removed or discharged for "just cause" is the issue to be resolved by this arbitration. Thus, the removal of the Grievant by the State under Section 124.34 is not

relevant to the instant arbitration. The Grievant's discharge in this arbitration is assessed against the standard of "just cause" which was agreed upon by the parties in Article 24, Section 24.01 of the Agreement. The basis for the decision in this case is the Agreement between the parties and not the Ohio Revised Code.

Furthermore, since I have not taken into account the Ohio Statute in this case, I have concluded that the State's reference to Section 124.34 is not prejudicial to the Grievant.

PENALTY

The Grievant was employed as a full-time Youth Leader for almost five (5) years before his removal, effective August 31, 1989. Furthermore, Volley described the Grievant as "making the kids work". He indicated that he was "like a drill sergeant", and that "everything had to shine". Volley said that he was strict but fair as a Youth Leader and the "kids respect him for it". Anthony Mosley, another Youth Leader, said that the Grievant is "strict" and that he keeps the group clean". He added that nothing is left laying around and that "the lazy kids resented [the Grievant's] assignment of work". In trying to guess as to the motives behind T. D.'s accusation of physical abuse, the Grievant said that he is a "detail man" and that he assigns them "cleaning" chores. He added that he was singled out

because he is "harder on manners, hygiene and keeping the group clean".

Although a motive for physically abusing T. D. was not disclosed at the hearing, I cannot believe that T. D. fabricated his testimony because the Grievant is a "detail" man and that he is strict concerning "hygiene" and "manners". Nor can I conclude that A. L. lied about the Grievant serving him and observing other youth who were served by the Grievant.

Furthermore, Volley described the Grievant as "caring", stating that occasionally, on his off days he would spend time with the youth in his group. The Grievant said that he "likes the kids and can reach some of them". He said that "at times" he takes them "to the gym or on an outing".

Turning to the Grievant's record, on June 3, 1987, the Grievant received a verbal warning for being away from his work area and for the offense of neglect of duty; on February 12, 1988 he was suspended for two hundred thirty-eight (238) days. Wade said that he worked with the Grievant for more than three and one-half (3 1/2) years and he "never heard of problems" involving the Grievant. He then testified that the Grievant has been suspended and "brought back" to the institution for abusing kids".

Moreover, in this case, the State proved by clear and convincing evidence that the Grievant violated Department of Youth Services General Work Rules, Chapter B-19, Section IV A. 1. which provides:

"Abusing or mistreating youth entrusted to the Department's care; failing to report the use of physical force on a youth as prescribed by local directive or rules."

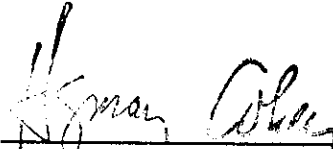
The violation of Section IV, A. 1. in light of the Grievant's past record outweighs the evidence in the record concerning his "drill sergeant" tactics concerning cleanliness, manners, hygiene and his "caring" attitude.

Pursuant to Article 24, Section 24.01 the State proved by clear and convincing evidence that the Grievant was discharged for "just cause", by physically abusing T. D. on or about July 26, 1989 and for a short period thereafter.

AWARD

In light of the aforementioned considerations, the grievance is denied.

Dated: May 15, 1990
Cuyahoga County
Cleveland, Ohio



HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295