

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

**STATE OF OHIO, DEPARTMENT OF
YOUTH SERVICES, BUCKEYE YOUTH
CENTER**

-and-

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

ARBITRATOR'S

OPINION

Grievant:

Gregory Dyer

35-02-900702-0013-01-06

FOR THE STATE:

**BARRY BRAVERMAN
Labor Relations Officer
State of Ohio
Department of Youth Services
2280 West Broad Street
Columbus, Ohio 43223**

FOR THE UNION:

**BRENDA GOHEEN
Advocate
Ohio Civil Service
Employees Association
Local 11, AFSCME, AFL-CIO
1680 Watermark Drive
Columbus, Ohio 45246**

DATE OF THE HEARING:

January 16, 1991

PLACE OF THE HEARING:

**OCSEA
1680 Watermark Drive
Columbus, Ohio**

ARBITRATOR:

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

#570

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The hearing was held on January 16, 1991 at OCSEA, 1680 Watermark Drive, Columbus, Ohio, before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:00 a.m. and was concluded at 3:00 p.m.

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secure, humane and industrious environment, providing various services which will prepare the youths to re-enter the community as productive citizens. It is also the Youth Center's responsibility to protect the people of the State of Ohio.

The Youth Leader position at the Center is to provide direct care of the youth while working an eight (8) hour shift. It is the responsibility of the Youth Leader to provide security so that the youths do not hurt each other and destroy property. The Youth Leader is also responsible for the daily supervision of the youths at the institution.

The State relied upon the testimony of a Youth Leader and two (2) of the youths at the Buckeye Youth Center in support of the discharge of the Grievant. The Grievant did not provide testimony as to the events which led to this discharge. I believe it would be useful to set forth the stories of the State's witnesses concerning the events in question.

Ronny Johnston was a Youth Leader at Buckeye Youth Center during the evening of May 21, 1990 when the events giving rise to the grievance occurred. He had worked with the Grievant for a couple of weeks on the third shift. Before May 21 he worked at the Center for three (3) months and "was in an interim position at the time".

Johnston said that he came on shift and he found two (2) youths "on the wall". The phrase "on the wall", was explained at the hearing as a short term disciplinary method. The method is used to discipline for offenses, such as sleeping on quiet time or sleeping when for example the youth should not be sleeping. The discipline requires the youth to stand against the wall. According to Johnston, the youth "should not stand more than 15 minutes against the wall". According to Johnston on May 21, 1990, the youths who were facing the wall were Dorrior Harden, and Carlos Woods. When Johnston came on the shift, he indicated that the youths had already been "on the wall" from the second shift. Johnston said that the Grievant had reported to duty before he did, during the evening of May 21.

When Johnston observed the youths on the wall he testified that the Grievant said "something" to Harden. He then heard the Grievant tell Harden "to be quiet and to do his time on the wall". Harden kept on talking to the Grievant and the Grievant said to Harden again, that he was to "do time on the wall". While Johnston was filling out a log sheet, he said that there was a "verbal confrontation" between the Grievant and Johnston. Johnston then went on to state that "somewhere in the process, someone started chasing someone around the orange suit area". A youth is required to wear an "orange suit" when he is placed in a "negative status". An offense for example which warrants the requirement of wearing an

Before turning to Harden's account of the episode, it should be noted that Harden was seventeen (17) years old at the time that the incident took place on May 21, 1990. Harden indicated that he was confined to Buckeye Youth Center for driving without a license and for violating his parole for drug abuse. He left the institution approximately one (1) weeks after the incident and has lived with his mother on "after care". He indicated that since his departure from the institution he has been in drug rehabilitation but has not been incarcerated.

During the "shift change" on the evening of May 21, 1990, Harden said that the Grievant asked him and Woods to leave their dormitory room to be "on the wall". That evening, the Grievant said that "we were on the wall for approximately one hour". While they were "on the wall", the Grievant was watching television. At the same time, Harden said that he and Woods could see the television screen while standing "on the wall". A pizza commercial appeared on the screen and the Grievant "said something". Harden said that he and Woods started to laugh and the Grievant said, "what's so funny?" Harden did not answer the Grievant, but the Grievant placed Woods in the dormitory room. According to Harden, the Grievant stood beside him and he was "talking and stuff--he said "if I hit you, would you hit me back", to which Harden said, "no". I leave next week." Harden then continued with his testimony by indicating that

the Grievant made a gesture to hit him in the side and then he "hit me in the right kidney and then in the chest". After being hit in the kidney, Harden said that he went down to his knees trying to catch his breath." While on his knees, Woods sought permission to leave the dormitory room to go to the rest room. The Grievant permitted him to leave the room and after returning from the rest room, Harden said that he was still on his knees. When Woods returned to the room, Harden said that he "was back on the wall".

Harden continued with his testimony by stating that the Grievant was "still out there" and the Grievant then made him "jump". Harden ran to the "orange suit area" and hid behind a laundry cart trying to dodge out of the Grievant's way. He said that the Grievant "pushed the cart out of the way" after which he proceeded to the furniture area. He then ran past Mrs. Robinson's office when the Grievant said, "come back up here before I write you up for being AWOL". Harden said that he began walking towards the Grievant and when he approached him, the Grievant hit him again in his chest and told him to stand on the wall. Harden indicated that he told the Grievant that he would tell Miss Robinson the following day about the incident. According to Harden, the Grievant said, "no one is going to believe you since you do not have any bruises to show for it". While Harden was still on the wall, the Grievant was sitting in a chair talking to him. Harden added that he "smelled alcohol" on the Grievant's

breath. After the Grievant "talked some more to him", the Grievant put him [Harden] to bed. Harden said that the Grievant hit him approximately five (5) or six (6) times.

Harden said that Johnston "came in at the time--he was there". However, he "was not there" when the Grievant hit him. After Harden disclosed to some members of the staff the following morning what had happened, they asked him if he wanted to see a doctor so he could be examined. Harden indicated that he was not hurt. Harden added that a person examined him but nothing was found. Harden testified that the Grievant hit him because he kept on talking back to him.

Turning to Woods testimony, he said that the events of May 21 began when the Grievant came into the dormitory room and awakened both Harden and himself so that they could be put "on the wall". While they were on the wall, Woods said that they "were laughing before the commercial went on". He also indicated that he and Harden were whispering to each other. As he watched television, the Grievant said that he liked the commercial. The Grievant then approached them and said, "quit laughing". Woods said that he stopped laughing but Harden made a "noise holding back a laugh". Woods indicated that he "did not know" whether the Grievant "was playing or not". Woods went on to state that the Grievant then hit

Harden in the back, after which Harden went to the "orange suit" area where he heard chairs moving. Woods went on to indicate that a punch was thrown by the Grievant at Harden. According to Woods, Harden then ran past Ms. Robinson's office. The Grievant then told Harden to get back "on the wall". Woods said that the Grievant told him that he could go to bed when Harden returned to the wall and Woods was locked up in dormitory "No. 1". He did not go to sleep but a couple of minutes later he knocked on the door and asked if the Grievant could leave the dormitory room in order to go to the bathroom. The Grievant unlocked the door. While going towards the bathroom, Woods said that he saw Harden was on his knees. He was crying and his eyes were red. Harden said to him that the Grievant hit him in the stomach. Woods said he "hurried up" and went to the bathroom after which he returned to his room. He said that he "was too scared to go to sleep".

According to Woods, Johnston was at work and was present when the incident occurred.

DISCUSSION

At the hearing the parties agreed that the issue to be resolved by this arbitration is: "Was the Grievant discharged for just cause? If not, what shall the remedy be?"

EVENTS OF MAY 21, 1990

After carefully examining the evidence in the record, I have concluded that on May 21, 1990 the Grievant hit Harden in the chest and stomach area with such force that the Grievant fell to his knees. In arriving at this conclusion, Johnston's testimony has been given great weight. His testimony was highly detailed in observing both the Grievant and Harden run to the "orange suit area". As Johnston indicated he did not know "who was chasing whom". According to Johnston it appeared to him that both the Grievant and Harden were engaged in "horseplay". Such testimony of the events which occurred before he observed Harden return to be "on the wall" carries with it a high sense of credibility. Furthermore, the chase to the "orange suit area" corresponds to the testimony of Harden and Woods. Harden indicated that after the Grievant made him "jump", he went to the orange suit area with the Grievant in pursuit of him. Corroborating the testimony of Johnston, Woods said that he did not know whether the Grievant "was playing or not"; however, he stopped laughing when the Grievant told him and Harden to "quit" doing so.

After Johnston locked the kitchen door, and returned from the kitchen to the Youth Leader desk, he observed the Grievant hit Harden with his right fist "somewhere in the abdomen and chest". As a result, Harden went to his knees. Harden confirmed that the Grievant hit

"came in at the time" but "was not there" when the Grievant hit him. Johnston said that he observed the incident in question take place approximately fifteen (15) feet away from him; furthermore, the Grievant had his back towards him and Harden was facing him.

The variance in the testimony of Johnston and Harden is difficult to explain. However, it must be underscored that Johnston indicated that he was not in a fixed position when he observed the Grievant hitting Harden. He was returning from the kitchen to the Youth Leader desk when he observed the Grievant hit Harden with his right fist. In any event, the testimony by Johnston that the Grievant hit Harden in the abdomen and chest area corroborated Harden's testimony. Moreover, the testimony by the three (3) witnesses concerning the chase to the orange area and the position of Harden on his knees is more than coincidence. I believe that it is a fact and resulted from the Grievant hitting Harden.

Furthermore, the implication from the testimony of Harden which was supported by Woods is that Harden was on his knees for a longer period than the period observed by Johnston. Johnston indicated that "the youth went to his knees and got back up". Harden said that after he was hit, Woods went to the rest room and he [Harden] was still on [his] knees trying to catch [his] breath". Woods indicated that on his way to the bathroom and while Harden was on

his knees he told him [Woods] that "he [the Grievant] hit me in the stomach". Woods added that Harden was crying and his eyes were red". The point to emphasize is that Johnston's observation that Harden went down to his knees after being hit was substantiated by both Harden and Woods. Moreover, it is significant that in Johnston's written statement of May 24, 1990 he observed that "* * a minute or so" after being hit by the Grievant, Harden "got up * *." Thus, Johnston's written statement is consistent with the testimony of Harden and Woods.

TESTIMONY OF W.M. BAUMGARDNER

W. M. Baumgardner is the Deputy Director for Youth Services at Buckeye Youth Center. He indicated that he became aware of the incident involving the Grievant and Harden on May 23, 1990. Upon requesting a physical force report form from the Grievant, Baumgardner said that the Grievant replied that there was "no incident". Since there was no incident in the view of the Grievant, no physical force report was submitted by him.

According to Baumgardner, the Grievant told him that he was having a difference of opinion with another Youth Leader who utilized Harden to "control the smaller boys" at the Center. The Youth Leader was revealed during the course of the hearing to be a "Ms. Saunders". Baumgardner investigated the Grievant's allegation. Although the

results of the investigation were not disclosed at the hearing, I find that it is of no weight with regard to the events of May 21.

It is nothing less than astonishing that Baumgardner could not recall if he or another administrator proceeded with the investigation of the incident. Furthermore, he indicated that he did "not recall if the incident took place outside the dormitory". He did "not know if anyone except the two (2) principals were questioned about the incident". Baumgardner further testified that a medical examination was "done on the youth" but he did not know "what it showed". Moreover, Baumgardner indicated that there has been no full time Superintendent at the Youth Center. The Center has been operating under an Acting Superintendent. Baumgardner said that the Acting Superintendent did not perform the investigation of the May 21 episode.

Baumgardner said that he "talked to [Johnston] about this case". Johnston testified that Studebaker requested and obtained his written statement dated May 24, 1990. I do not see any discrepancy between the testimony of Johnston and Baumgardner. There is a difference between "talking" to Johnston "about this case", and Studebaker requesting and obtaining Johnston's written statement. In sum, apart from Baumgardner's testimony about the general duties and responsibilities of the Department of Youth Services and the position

of Youth Leader, and his brief discussion with the Grievant about the incident, his testimony is not entitled to any weight.

**WRITTEN STATEMENTS OF JOHNSTON,
HARDEN AND WOODS**

As I have previously established Johnston was requested by Studebaker to submit a written statement of the events of May 21. Elaborating on Studebaker's request, Johnston said that Studebaker asked him "what happened?" and Johnston "told him" what he observed. Johnston added that Studebaker then asked him to write the statement which is dated May 24, 1990. Johnston's testimony essentially contains the important details of the events of May 21 which are contained in his written statement. Johnston's written account of the events merely reinforces his undisputed testimony.

Harden indicated that his written statement of the events of May 23 were submitted to the State at the request of Ms. Saunders and Ms. Gonzalez, both of whom are Youth Leaders. Harden's written account in most of its essential aspects supports his testimony on the events of May 21. Nevertheless, I cannot give much, if any weight to Harden's written statement. He indicated that he wrote the statement "together" with Woods. Moreover, Harden said that he "never talked to [Woods] about the statement. However, Woods indicated that it was

Harden who asked him to write the statement dated May 23, 1990. Moreover, contrary to Woods' testimony, in which he stated that his written statement did not refer to seeing the Grievant and Harden in the orange suit area, Woods' written account clearly set forth that "Harden ran to the orange suit area and, i heard some punches been thrown * *." Based on the evidentiary record, and in light of the vague and contradictory testimony of Harden and Woods concerning their written statements of the incident on May 21, I cannot give any weight to their written statements.

A question was raised by the Union as to whether its representative received the written statements by Johnston, Harden and Woods in accordance with Article 24, Section 24.04 of the Agreement. Section 24.04 in relevant part, provides: " * * When the pre-disciplinary notice is sent, the employer will provide a list of witnesses tot he event or act known of at the time and documents known of at the time used to support the possible disciplinary action".

Union President Dannie Fairly admitted that the "pre-disciplinary package" from the State contained the written statements of Johnston, Harden and Woods. Accordingly, I have concluded that the State provided the Union with "the documents known of at the time used to support the possible disciplinary action". Although the written statements of Harden and Woods are not entitled to probative

weight, their written statements along with Johnston's written statement were relied upon by the State "to support the possible disciplinary action" prior to the pre-disciplinary meeting. In my judgment, the evidence in the record warrants the conclusion that the State complied with Article 24, Section 24.04 of the Agreement.

SECTION 124.34 of the OHIO REVISED CODE

The State removed the Grievant from employment, based in part, upon Section 124.34 of the Ohio Revised Code. As the parties stipulated at the hearing, the issue to be resolved by this arbitration is whether the Grievant has been discharged for just cause; if not, what should the remedy be? The removal of the Grievant by the State under Section 124.34 is not relevant to the instant arbitration. The basis for the decision in this case is the Agreement between the parties and not the Ohio Revised Code. I have not considered any provision of the Ohio Revised Code in arriving at the decision in this case. Accordingly, I have concluded that the State's reference to Section 124.34 is not prejudicial to the Grievant.

CONCLUSION

It is disturbing that except for Baumgardner's testimony on the duties and responsibilities of the Department of Youth Services and the position of Youth Leader, and his discussion with the Grievant

concerning the incident in question, his testimony is not entitled to any weight. It is also a matter of some concern that the written statements of Harden and Woods are not credible and trustworthy.

As a matter of fundamental fairness, the State is required to carry out a "reasonable inquiry or investigation before assessing punishment * *." See, e.g., Elkouri and Elkouri, *How Arbitration Works* Fourth Edition, (BNA, 1985) at page 673. There was an investigation carried out by the State. Baumgardner indicated that he talked to the Grievant on May 23, 1990 about filling out a physical force report form. Since the Grievant said that nothing occurred, a physical force report form was not prepared by the Grievant. As part of the investigation Mr. Studebaker requested and received from Johnston a written account of the events of May 21. Furthermore, Saunders and Gonzalez requested and received a written statement from Harden. There was also a written statement by Woods of the events of May 21. Although the written statements of Harden and Woods are not entitled to any probative weight, the statements were nevertheless, part of an investigation conducted by the State on the events in question.

I have attributed great weight to the testimony of Johnston. His written statement of May 24 reinforces his testimony. Furthermore, the testimony of Harden and Woods supports critical aspects of Johnston's testimony. Harden indicated that the Grievant hit him in

the chest, and in the right kidney. Woods saw Harden on his knees. These aspects of the testimony support Johnston's testimony that the Grievant hit Harden on May 21.

As I have previously established, no reason has been shown why Johnston would fabricate his testimony concerning the Grievant hitting Harden. Moreover, there is nothing in the evidence to warrant the conclusion that Johnston, a Youth Leader, would conspire with Harden and Woods to fabricate a story that the Grievant hit Harden. Johnston's testimony on the events of May 21 has the ring of truth. The testimony of Harden and Woods supports Johnston's testimony.

The State's case is to be contrasted with the Union's case. In this connection, the Grievant was not a witness. As a result, Johnston's testimony supported by Harden and Woods, is undisputed. Accordingly, I have concluded that the State proved by clear and convincing evidence that on May 21, 1990 the Grievant violated the General Work Rules, Chapter B-19, Section IV. A., Rule 1 which provides:

"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 rules."

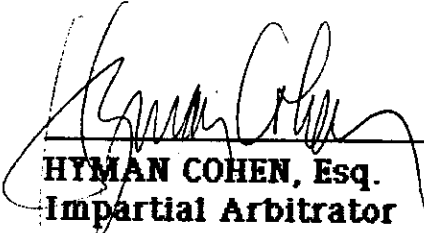
The Grievant has been employed by the State since March 31, 1980. It should be noted that since November 1985 and before the events giving rise to the termination of the Grievant, he has received discipline on eight (8) different occasions, including disciplinary suspensions ranging from one (1) day to fifteen (15) days.

Pursuant to Article 24, Section 24.01 of the Agreement, I do "not have the authority to modify the termination of an employee" abusing a person" in the care and custody of the State of Ohio." Based upon the entire record, I have concluded that the State proved by clear and convincing evidence that the Grievant was discharged for just cause.

AWARD

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

Dated: March 7, 1991
Cuyahoga County
Cleveland, Ohio



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