

IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING
DEPARTMENT OF YOUTH SERVICES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME

ARBITRATION AWARD

HEARING DATES: December 4, 1991
GRIEVANCE; 35-02(01-25-91)28-01-03
ARBITRATOR: John E. Drotning

#706

I. HEARING

The undersigned Arbitrator conducted a Hearing on December 4, 1991 at the Office of Collective Bargaining, 65 East State St., Columbus, Ohio. Appearing for the Union were: Penny Lewis, Dannie Fairley, Glenita Nutter, and the grievant, Todd Penn. Appearing for the Employer were: Donald E. Elder, Robert Thornton, Brad Rahr, Lee Enckler, Mal Baumgardner, and DeJuan Davis.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed. The discussion and award are based solely on the record described above.

II. ISSUE

The parties jointly asked:

Was the grievant removed for just cause? If not, what shall be the remedy?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1 through #6.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. EMPLOYER

1. TESTIMONY AND EVIDENCE

William Malcolm Baumgardner, Administrator of the Freedom Center, said that he had been with the Department of Youth Services for about 24 years. He stated that Youth Services focuses on teenagers between the ages of 13 and 21 who have felonies. Youth leaders, said Baumgardner, must care for those teenagers.

Baumgardner said he was involved in the investigation of Todd Penn.

Baumgardner testified that he observed red eyes or hemorrhaging by DeJuan Davis. He went on to say that Davis went to MedLine the day in question. Baumgardner said that he took a picture of Davis's eyes on 1/7/91.

Baumgardner testified that he had seen Davis prior to January 4th and that his eyes did not appear red.

Baumgardner testified that a youth leader should get back-up help if he needs it.

He said the reports indicated some sort of physical encounter and there were marks on Davis's neck, ear, and lip.

Baumgardner said that he talked to Penn and the latter said he was involved in an altercation with Davis. Baumgardner said he wrote the statement given by Penn and he noted that at one point, Penn said that he was "losing it" during a physical encounter with Davis.

Baumgardner said Todd Penn wrote up Employer Exhibit #2.

On redirect, Baumgardner said the just cause form is used to make sure that the supervisor really asks the appropriate questions.

The Employer called DeJuan Davis who testified that he lived in Detroit and he was at the Bucyrus Youth Center for drug abuse and was in group 55.

Davis said that Penn choked him after he asked to go to the bathroom. Davis reiterated that Penn pushed him and choked him.

Davis said he was in a room with two others and that Penn opened the door and Davis said he wanted to go to the bathroom but he kept having to wait for the door to be opened.

Davis reiterated that Penn pushed him and choked him and as a result, his eyes got red. Davis testified that Penn might have sworn at him and that Penn pushed him twice.

Davis said that someone else called for assistance and the situation was broken up.

Davis said the only injury to himself was red eyes and nothing else.

On redirect, Davis said that he stayed at 53 and later moved to 55 and that is where he went to bed.

At the time of incident, Davis said he was 17 and weighed about 135 pounds.

Management also cross examined Union witnesses. Dannie Fairley testified that he was involved in the custody of group 22 and he said he has had altercations with youths and there were injuries. He said he was not present at the DeJuan-Davis incident.

Glenita Nutter on cross testified that she worked the day of the incident, 1/4/91, and she said the request to go to the bathroom by prisoners is a game.

Nutter also testified that she had been threatened on many occasions.

Todd Penn on cross testified that Davis was in the room on floor zero and Penn said he weighed 180 pounds.

Penn said that he asked others in the room to leave so he could talk to Davis. He was asked why he did not just get Davis out of the room and he said he did not think of that.

Penn said that he worked in a detention home before this and the individuals could be run-aways or they could be murderers. He testified that he received a good deal of verbal abuse and he got it at Buckeye Youth Center as well. He testified that even if he receives verbal abuse, he attempts to talk to the prisoner.

Penn said that Davis was banging on the door in order to request to go to the bathroom.

Penn said it is not normal for him to empty the room and then talk to a specific prisoner.

He said he did file a verbal abuse report and there were options such as he could have Glenita Nutter take care of the situation.

2. ARGUMENT

The Employer asserts that Todd Penn was aware of work rules regarding abuse and the use of physical force with clients. The Employer asserts that Todd Penn provoked an

altercation with DeJuan Davis which resulted in the latter's injury.

The Employer points out that youth leaders have to control prisoners and sometimes that may involve physical intervention but they should not misuse that ability and they should not use excessive force.

The Employer notes that Penn worked the 3:00 to 11:00 shift on January 4, 1991 on group 55 along with Glenita Nutter, another youth leader.

The testimony indicates that Davis yelled at Mr. Penn that he needed to go to the bathroom and he did not respond immediately because he was on the telephone and the youth continued yelling saying that the staff was not doing their job.

Eventually, Penn responded by unlocking the door and told all the youths to leave the room and apparently Davis said to Penn that he would kick "Mr. Penn's ass". The Employer asserts that Penn encouraged the youth to "come on" and there was a physical altercation with youth Davis.

The Employer asserts that the grievant could have asked for assistance and that his decision to take on Davis violated the Contract and other appropriate language. In short, the Employer asserts that Penn's behavior was excessive.

Management argues that no degree of physical abuse can be imposed by the staff at any time and that such a violation is the basis for removal for a single offense. Moreover, Penn was aware of the work rule and the policy violations.

The Employer asserts that while youths may be confined to the Department of Youth Services, their rights cannot be violated and they cannot be abused.

The infraction between Davis and Penn occurred and the Employer goes on to say that the Union's presentation of exhibits are not precedent setting and this case should be determined on the merits.

For all these reasons, the Employer asks that the grievant be terminated.

B. UNION

1. TESTIMONY AND EVIDENCE

Mr. Dannie Fairley testified he was a unit manager at BYC as well as a chief steward of OCSEA and local president. He said he was aware of the January 4th incident and he wrote up the grievance trail.

Fairley testified that he thought black workers were discriminated against more than white employees and they are dealt with more severely than white employees.

Fairley testified about a Mr. Chin who hit a boy in the mouth got a verbal reprimand for not filling out a form in a timely manner. Moreover, he said that Mr. Chin is still employed at BYC as a youth leader.

Ms. Glenita Nutter testified that she was on unit 3 on January 4th working with co-worker Todd Penn.

Nutter testified that she had altercations with Davis and that he was out of control at times and he would spit on her and slap her in the face.

On the day in question, Nutter said she was allowing youths to make phone calls to their parents and that takes two or three hours.

At one point, Nutter said a youth was banging on the window and he said he needed her help.

Nutter said that she saw Davis out of control and Penn was trying to hold him down. Nutter said that Davis was at level "0" and she also noted that she wrote a statement to the above testimony (see Union Exhibit #6).

Nutter said that she took an unarmed self defense course six months after being hired.

Nutter said that she heard Davis say, "We're going get some money off this and we'll sue the State".

Nutter said that she observed Davis on either January 7th or 8th.

On occasion, Nutter said she has seen Penn take Davis aside and talk to him on a one on one basis.

Mr. Todd Penn, youth leader #2, testified he had a two week training course before he started but he did not have an unarmed self defense course.

He said that on January 4th, on the 3:00 to 11:00 shift, the group was loud and it stayed that way. He said there is a time out after dinner and he let two or three of the felons play ping pong or watch TV and Davis had to go to level "0". He said the

group in level "O" was loud and he said he was watching the TV area and the game room as well as Davis.

Penn testified to the following statements:

Davis: Let me out to use the mother fucking bathroom.

Penn: Just wait.

Davis: Let me out of the mother fucking room.

Penn: I'll clean the room and let's talk.

Davis: I'll kick your mother fucking ass.

(he pushed me and pushed me again)

Penn: I can take you to the lock up.

Davis: I don't care.

Penn said that then they had a tussle and he testified that he put his hand in Davis's crutch and his arm around Davis's neck and said he would not let him out until he stopped yelling.

Penn said he had a decent relationship with Davis and he also testified that Davis came back and apologized to him and went to his room.

Penn said he had not seen Joint Exhibit #6.

Penn also testified that he observed Davis's red eyes three or four days later.

On redirect, Penn was asked whether he pushed Davis and he said No. He was asked whether he thought Davis was going to strike him and he said sure he thought the latter would strike him.

The Union cross examined Management witnesses. Mr. Mal Baumgardner on cross testified that the just cause forum involves a series of questions and the Superintendent may use such a form in making his decision.

Baumgardner said he noticed Davis's red eyes at least two days after the incident.

Baumgardner said that he talked to Penn on January 8th as noted on Employer Exhibit #2. He said that it is unusual for the youth leaders to talk to youths on a one on one basis.

Baumgardner said he did not know whether Penn was given an unarmed training course although usually they should be trained right before beginning work.

DeJuan Davis, on cross, testified that before the incident he and Penn were in "cool". He also said that Penn talked to him on a one on one basis before the incident.

Davis said that Penn had his arm around his neck and that he tried to get away.

Davis said that when Penn came in to the room, he did move his arm against Penn.

Davis said that when he was taken to the nurse's room, he was not hurt but he was mad and he said when he returned from the nurse's room, he did not talk to Penn.

That night, he said when he came back from room 55, he noticed his red eyes; that is, after he saw the nurse.

Davis said he went to the nurse's room two days later and that Baumgardner took the pictures of him on January 7, 1991.

Davis said he wrote three or four statements to Mrs. Willis and the State Highway Patrol.

Davis was asked whether he was sick to his stomach as a result of the incident and he said no that he felt fine but he was mad.

On recross, David said he was on level "O" at Buckeye which was the lowest level and had to wear an orange suit. He said he was in level "O" because he had pushed someone who made him mad.

2. ARGUMENT

The Union points out that the incident occurred on January 4th at about 8:45 p.m. and Penn was on the phone when prisoner Davis asked to use the restroom and when Penn told him to wait a minute, the youth became belligerent and began cursing at Penn. The Union points out that because of Davis's loud behavior and cursing, Penn instructed the other youths to leave the room so he could have a one on one talk with Davis and try to calm him down, but Davis became more irate and pushed the grievant a number of times. Penn tried to restrain the youth by placing him in a bearhug but somehow, he lost control and eventually he put one of his arms around the youth's neck and one underneath the youth's legs to hold him.

The Union argues that Penn did not violate general work rule #23 which involves physical abuse/fighting. Penn did not fight with the youth but he was attempting to restrain him because of the youth's unruly behavior.

The Union argues that Management cannot prove that Penn knowingly, intentionally, or deliberately injured the youth. Moreover, the Union argues that the Employer must make a fair and objective investigation before imposing discipline. In this case, the Union claims that Management did not question or obtain statements from two youth leaders who were present before and

after the incident; namely, Mr. Roosevelt Osborne and Ms. Glenita Nutter.

The Union points out that the pre-disciplinary report indicates that there was no evidence to show that Penn struck the youth or twisted his limbs or intended to cause pain to youth Davis. Thus, there was no abuse by Penn toward the grievant.

The Union asserts that Penn did not use good judgement in that he did not secure additional help to control youth Davis.

The Union also argues that its request for documents were not granted by the Employer and, therefore, the discipline should be dismissed on that count alone.

Moreover, the Union testified about the just cause form and that form was utilized to impose discipline against the grievant.

The Union notes that the Employer terminated Penn because of his physical condition of the youth's eyes which hemorrhaged as a result of Penn's application of excessive force. However, the Union points out that the medical texts taken from the public library show that the eye condition suffered by Davis did not necessarily relate to the incident.

For these reasons, the Union asks that Todd Penn be reinstated.

V. DISCUSSION AND AWARD

The question is whether Youth Leader Todd Penn abused prisoner DeJuan Davis and if so, should Penn be terminated?

The testimony indicates that DeJuan Davis was raising a ruckus and was yelling about his need to use the toilet. At this time, Todd Penn was on the phone and Davis continued his outbursts, yelling at Penn saying he wanted to use the toilet. Penn told him to wait and Davis responded by saying to Penn that he was not "doing his mother fucking business". As a result, Penn removed the other prisoners from the room and Penn then met with Davis alone and apparently tried to calm Davis down without any success.

Penn testified that Davis brushed him or pushed him a couple of times and the third time Davis shoved him, Penn grabbed Davis and eventually had him around the neck and also held him under his legs. Davis said that Penn choked him to the point where his eyes got red. Davis also testified that his only injury was red eyes and that there were no other injuries.

Davis wore an orange suit on level "O" and was in that situation because he had been in another altercation with someone who had made him mad. Obviously, Davis gets "mad" easily, but that is not the issue; rather it is whether Penn used excessive physical force in dealing with Davis's out of control state and therefore should be discharged.

First, it is necessary to consider the damage to Davis, specifically the red eye condition which is the major reason for the Employer's decision to terminate Penn. The documents of the American Medical Association indicate that a subconjunctival

hemorrhage occurs after injuries and operations and also occurs in persons with brittle blood vessels as a result of sneezing, whooping cough, etc. The hemorrhage, itself, as noted in these documents, is of no importance and the blood becomes absorbed within a week or two. Could the red eye condition have been caused by Penn's alleged "choke hold" of Davis as claimed by Mal Baumgardner or could Davis's red eye condition have occurred two (2) days after Penn's physical interaction with Davis and not have been the result of the alleged "choke hold"?

The best evidence is that Penn over-reacted and used excessive strength (he is much larger and stronger than Davis). Penn, if overly annoyed by Davis's continued yelling, could have asked Glenita Nutter to handle Davis but he did not do so. Penn should have handled Davis carefully. Even Union representative Penny Lewis notes in her closing argument that Penn was guilty of using poor judgement in not securing additional help to control prisoner Davis.


It is also true that Penn had a decent relationship with Davis and had engaged on one on one conversations with Davis in the past. Penn's reaction to Davis's continued outbursts was excessive but there is no persuasive argument that Penn "encouraged" Davis to start a fight in order to "beat up Davis". The best evidence is that Penn overreacted but he did not intentionally do excessive physical harm to prisoner Davis.

Penn did not provoke Davis; rather, it was prisoner Davis who started the interaction. Penn unsuccessfully tried to talk out a problem with an irate and threatening prisoner. That was a

mistake; that was not the time to interact on a one-on-one basis. In addition, Penn also should have obtained additional help. And finally, Penn may have used "excessive force" in his effort to control prisoner Davis.

Thus, the testimony is such that the termination of Penn is inappropriate and excessive; rather Penn shall be disciplined for using more force than necessary and for not utilizing appropriate help in a difficult situation. Todd Penn shall be given a one month suspension without pay. He shall be reinstated with back pay minus any earnings and unemployment compensation, etc. between the date ending his thirty day suspension and his return to work as of three days after the date this award is received by either party.

Cuyahoga County, Ohio
December 16, 1991


John E. Drotning
Arbitrator