

#1479

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In The Matter of the Arbitration

OPINION AND AWARD  
The Marcus Peacock Matter

-between-

The State of Ohio,  
Department of Youth Services,  
Scioto Juvenile Correctional Facility

-and-

Civil Service Employees, Association,  
AFSCME, Local 11

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ARBITRATOR: John J. Murphy  
Cincinnati, Ohio

APPEARANCES:

FOR THE UNION: Victor H. Dandridge, Sr.  
Staff Representative  
OCSEA/AFSCME Local 11  
390 East Worthington Road, Suite A  
Westerville, Ohio 43082-8331

Herman Whitter  
Director of Dispute Resolution/Attorney  
2nd Chair

Also present: Brett Rucker  
Former Bargaining Unit Member

Carl Wilkins  
Juvenile Correctional Officer  
Local Chapter Officer

Marcus Peacock  
Juvenile Correctional Officer  
Grievant

FOR THE STATE: Bradley E. Rahr, Sr.  
Labor Relations Officer  
Ohio Department of Youth Services  
51 N. High Street  
Columbus, Ohio 43215

Kate Stires  
Office of Collective Bargaining  
2nd Chair

Also present: Melinda Posey-Jones  
Superintendent, Scioto Juvenile  
Correctional Facility  
(During the period of the transaction  
involved in this case)

Larry Alessio  
Operations Manager

Don Bird  
Trainer, Unarmed Self-Defense

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Youth

FACTUAL BACKGROUND

The Scioto Juvenile Correctional Facility, otherwise known as Scioto Village, houses male juveniles, adjudicated for felony sex offenses. The youths range in age from twelve to twenty-one, and have been adjudicated for felonies ranging from Class 1 to Class 5--from rape to sexual assault. The Village houses an average of 270 youths with a staff of 323, 113 of whom are juvenile correctional officers.

The Grievant began his employment with the Village in July 1993 as a Juvenile Correctional Officer, and remained in this position until his removal effective July 12, 2000. The removal, challenged in this arbitration, centered on events that occurred on May 5, 2000 while the Grievant was performing his duties as a Juvenile Correctional Officer (JCO) at the Scioto Village.

The Grievant was supervising a number of youths and ordered them to stand by the doors to their rooms while he passed out snacks and organized a restroom call. Youth \_\_\_\_\_ decided to "jump his turn" and go to the restroom without permission. The Grievant told Youth \_\_\_\_\_ to go back to his door. By the Youth's testimony, he went back to his door and while doing so, "got smart" with the Grievant.

The Youth then removed his glasses "because I knew I was going out of my area" and because "I knew there was going to be an altercation." For the second time the Youth went to a restroom without permission.

At that point the Grievant took steps to have the Youth leave the bathroom--steps that are more fully delineated in the opinion

below. A physical struggle did occur between the Grievant and the Youth by the doorway to the restroom. The Youth punched the Grievant in the chin, and grabbed his hair that had been braided into locks, pulling the Grievant's head down by his hair. Five locks of several inches in length were removed by the Youth.

JCO Rucker observed the incident from the point at which the Youth twice left his door in defiance of the Grievant's order. When the struggle occurred, Rucker came around his desk to assist the Grievant in restraining the Youth and all three fell to the floor by the restroom. The Grievant and Rucker were able to restrain the Youth sufficiently to carry him to an isolation room where he was strapped down for approximately two hours.

The Youth's right eye was swollen nearly shut with some bleeding, and he needed attention at a nearby hospital for this injury. How this occurred was gradually revealed. The Grievant filed several forms required by the Village in the event of a behavioral problem and an injury to a youth, as well as the use of physical intervention with a youth. The forms report a physical struggle between the Grievant and the Youth, but did not explicitly state that the Grievant punched the Youth.

The superintendent caused an investigation to begin on May 9, 2000. In a question and answer session that was transcribed by an investigator with the transcription initialed by the investigator and the Grievant, the Grievant denied that he had punched Youth

\_\_\_\_\_ in the face while they were struggling on the floor or prior to falling to the floor by the restroom. When asked how the Youth received the injured eye, the Grievant responded "my head was down, I don't know."

On June 22, 2000, the Ohio State Highway Patrol conducted an interview of the Grievant. The Grievant gave a written statement that acknowledged that he had punched the Youth in the face or eye in order to force the Youth to release his grasp on the Grievant's hair as the Youth pulled the Grievant's head down.

[The Youth] hit me in my chin and pulled my head down by my hair. I, Mr. Peacock, hit the Youth \_\_\_\_\_ in the face or eye so that [the Youth] would let go of my hair. In the process, [the Youth] pulled my hair out (of my head).

On July 6, 2000 a pre-disciplinary meeting was held, and it was acknowledged that the Grievant had, indeed, punched the Youth during the events that occurred on May 5, 2000 at the Village.

The Grievant was removed from his position effective July 12, 2000 in a notice that stated:

On or about 05/05/00 you used excessive and inappropriate physical force on youth \_\_\_\_\_.

Your actions constitute violation of DYS Directive B-19, Rule No. 21a, Physical Force--Using unwarranted and/or excessive physical force on a youth.

You are hereby removed from your position of Juvenile Correctional Officer effective 7/12/00.

STIPULATED ISSUE:

Was the Grievant removed from his position for just cause, and if not, what shall the remedy be?

RELEVANT DEPARTMENT DIRECTIVES:

Directive K-1

Rules of Youth Conduct

A. POLICY PROVISIONS:

The Department of Youth Services has adopted rules of youth conduct that shall be standard throughout the Department referred to as Category I Rules. . . .

Rule #1: Defying Institutional Authority

a. Disobedience of a direct order  
. . . .

Rule #2: Disruptive Institutional Order

. . . .  
e. Being out of assigned area

Directive K-2

Youth Disciplinary Sanctions

A. POLICY:

Each institution shall adhere to the guidelines contained in this Directive to develop written procedures to address major and minor rule violations. . . .

C. PROCEDURE GUIDELINES

. . . .

4. Permissible forms of graduated behavior sanctions include:

4.1 Verbal Intervention . . .

4.2 Written Intervention . . .

4.3 Time-Out . . .

4.4 Cooling-Off Period . . .

4.5 Room Confinement . . .

Directive I-15

Use of Force

A. POLICY PROVISIONS:

1. Use of Force is restricted to wholly justifiable instances which include: self-protection; protection of the youth or other persons; prevention of property damage; and prevention of escape. The physical power, strength, device, or technique employed to restrain or control a youth is the minimum necessary. It is a temporary measure used only until control has been gained or to prevent escalation of the incident.

Directive B-19

General Work Rules

DYS GENERAL WORK RULES  
STANDARDS OF EMPLOYEE CONDUCT  
RULE VIOLATIONS AND PENALTIES

Steps in Progressive Discipline:

|            |                              |
|------------|------------------------------|
| (V)        | Verbal                       |
| (V to 5)   | Verbal to 5-day Suspension   |
| (W)        | Written                      |
| (W to 5)   | Written to 5-day Suspension  |
| (W to 10)  | Written to 10-day Suspension |
| (W to R)   | Written to Removal           |
| (1 to 5)   | 1 to 5-day Suspension        |
| (1 to R)   | 1 day Suspension to Removal  |
| (5 to 10)  | 5 to 10-day Suspension       |
| (5 to 15)  | 5 to 15-day Suspension       |
| (5 to R)   | 5 days to Removal            |
| (10 or 15) | 10 or 15-day Suspension      |
| (15 or R)  | 15-day Suspension or Removal |
| (xxx)      | 1 to 5-day Fine              |

OFFENSES

|  | 1st | 2nd | 3rd | 4th | 5th |
|--|-----|-----|-----|-----|-----|
|--|-----|-----|-----|-----|-----|

RULE 21. PHYSICAL FORCE

- |  |         |         |   |
|--|---------|---------|---|
| a. Using unwarranted and/or excessive physical force on a youth. | 5 to 15 | 15 or R | R |
|--|---------|---------|---|

POSITIONS OF THE PARTIES

A.) Union Position

The State failed its burden of proof that the Grievant violated Rule 21 a. of the General Work Rules. The Youth was spoiling for a fight with the Grievant, and the Superintendent agreed that the Grievant was justified in using force once the Youth attacked the Grievant. The Grievant punched the Youth during the struggle not prior to the attack nor when the Youth was restrained.

It is true that the Grievant received instruction on the first five techniques of unarmed self-defense, but this training occurred more than two years prior to the attack. This attack was by a youth who had a history of violent behavior against the staff at the Village and other institutions. The Grievant, in fact, used force in the form of punching the Youth as a method of self-defense.

The State sought to go beyond the Grievant's punch, and find a violation of Rule 21 a. by the Grievant in other aspects of what happened on May 5. The State attempted to claim that the Grievant's following the Youth into the restroom was not proper procedure. Even assuming such to be the case, the Grievant was not charged with a failure to follow procedure which is the subject of a separate rule in the General Work Rules. In addition, the State claimed that the Grievant violated Rule 21 a. by touching the Youth in placing his hand on the Youth's shoulder or back in a nonviolent manner. The State claims this is unnecessary force. "This is a preposterous, impractical and unreasonable definition of force."

B.) State Position

The case does not turn on when the punch by the Grievant of the Youth occurred. The Grievant did punch the Youth and the Grievant finally and "miraculously" admitted this fact to the police in June 2000 and the Employer at the pre-disciplinary hearing in July 2000. The Grievant hit the Youth while the Youth was on the ground and restrained. This was retaliatory for the Youth pulling the Grievant's hair during the course of the preceding struggle. Five techniques of unarmed self-defense are authorized and approved to be used by Juvenile Correctional Officers. Punching is not within that list of five techniques; therefore, punching the Youth constitutes excessive force in violation of Rule 21.

In addition to punching the Youth, the Grievant touched the Youth while the Youth was in the restroom. The Grievant should have used verbal strategies, or called the Operations Manager. This touching constitutes a violation of Directive I-15--Use of Force.

Finally, the Grievant failed to file a report on his touching the Youth which should be separate grounds for discharge. The Grievant touched the Youth as he began his attempt to escort the Youth from the restroom. The Grievant did not admit to placing his hands on the Youth at any time prior to the Youth's attacking the Grievant. This denial lacks credibility and is self-serving.



OPINION

A) The Punch

There were three witnesses to the struggle on May 5, 2000--the Grievant, the Youth, and JCO Rucker who came to the Grievant's assistance. Each was subject to a transcribed and initialed question and answer session with an investigator shortly after the events and was subject to questions under oath at the arbitration hearing. Much of the interrogation and investigation at the arbitration constituted an attempt to sequence the events of the struggle of May 5. In what order did these events occur: the Youth's pulling and removing the Grievant's hair; the Youth's punch to the chin of the Grievant; the Grievant's punch to the Youth's face or eye; the fall by the Youth, the Grievant and Rucker to the floor; and the struggle on the floor? The pressure in the investigation as exhibited by the transcribed questions and answers, and the pressure in the examination at the arbitration was to place these events in a lock-step sequence. The center, of course, of this pressure was when did the punch by the Grievant occur relative to the other events within the struggle.

The testimony of the Youth and Rucker--two of the three participants in the struggle--illuminates the futility of sequencing the events in the struggle. The Youth during the transcribed Q. & A. conducted by the investigator from Scioto Village stated that the Grievant punched him on the face "while I was on the ground." At the arbitration hearing, the Youth stated on direct- and cross-examination that he was lying on his stomach on the floor while he was still struggling with the Grievant and

Rucker. When asked how could the Grievant hit him on the eye if he were lying on his stomach on the ground, the Youth responded, "Maybe he hit me while I was going to the ground. This happened very quickly. It's possible I was hit before I hit the ground."

Rucker appeared as a pathetic witness--one who invoked pity and who seemed liable to external influence when groping for his recollection of the events of May 5. In his initial statement on May 5, Rucker never said that the Grievant punched the Youth. When questioned by the investigator for the Village, in the transcribed Q. & A. session, Rucker stated that the Grievant did punch the Youth, and supplied an unrequested statement to that effect the day after the investigator completed the interrogation. Finally, Rucker appeared at the arbitration hearing and under oath recanted his testimony about the punch by the Grievant and stated that, "At no time did I see the Grievant punch the Youth while we were in the process of restraining the Youth."

The Employer appears to have become exasperated (with good reason) with the shifting testimony of Rucker. In its post-hearing brief it was conceded that Rucker did not see the punch thrown by the Grievant.

The Union brought forth Mr. Rucker to deny that he saw when the Grievant punched the Youth. Fine. The Employer concedes that the witness did not see the punch. (Employer Post-hearing Brief at 4).

One piece of Rucker's testimony rings true. It appears that his shifting views on seeing a punch by the Grievant may be explainable based upon pressure exerted by the interrogators. But it also may be explainable based upon the fact that the events

sought to be sequenced in a neat fashion by the interrogators occurred so fast that the events could not be sequenced, and that the only clear fact that he recalled was being on the ground assisting the Grievant in the restraint of the Youth. Rucker testified:

I came around my desk. Everything was happening so fast that we were all on the ground as I assisted in restraining the Youth.

In combining the statements, the Q. & A.'s and the testimony of the three participants in the struggle, the arbitrator concludes as follows. The struggle happened so fast that it is impossible to put the events of hair pulling and removal, punch to the Grievant's chin, Grievant's punch to the Youth's eye, dropping to the floor into lock-step sequence. This is not a case of hair pulling by the Youth. It is a case of the wrenching of much hair of the Grievant, the Grievant's head pulled down, and the hair pulled out of the head of the Grievant. The probability based on the evidence is that the Grievant's punch occurred as his head was pulled down by the Youth's gripping his hair with such force that a large clump of hair was pulled from the Grievant's head.

The Department's Directive I-15 permits the use of force but it is restricted to particular instances such as self-protection and other reasons stated in the directive. On two occasions during the testimony of the superintendent, she stated that force is common in dealing with youths in the institution when verbal strategies may not work. She said that force is common to gain control. The question becomes under Directive I-15 whether the force used by the Grievant--the punch to the face of the Youth

while the Youth had the Grievant's head bowed with a grasp on his hair--was excessive? Was this force the minimum necessary to restrain the Youth? As the superintendent noted, nothing defines excessive force in any document of the department or in Rule 21 a. itself--the rule with which the Grievant was charged.

The arbitrator concludes the answer to these questions is no. The force used by the Grievant was instinctive, spontaneous, fueled with fear of more and continued pain and injury, and what appeared to be the only option available to the Grievant. Several factors support this ultimate conclusion.

1. This Youth, according to the superintendent, had exhibited assaultive behavior to the staff before and had caused physical violence with the staff. These instances had led to disciplinary hearings concerning the Youth. The Youth had been adjudicated for gross sexual imposition and incarcerated for six months with an exit day of April 26, 2000. When the Youth appeared at the arbitration hearing, he was now seventeen years of age, of moderate height, but strapping build. He had been incarcerated for three years because of several periods of Disciplinary Time--institutional time added to his presumptive release date for violations of the Rules of Conduct for Youth.

The Youth testified that he took his glasses off before he proceeded in a second occasion of disobedience of the Grievant "because I knew I was out of my area and I knew there was going to be an altercation." The evidence supports the conclusion that the struggle with the Grievant was premeditated on the part of the Youth. Rucker testified in another moment of truth that the "Youth

was violently out of control" (during the struggle). Lastly, after the Youth was placed in the isolation room, he was kept under restraints for two hours--evidence that further supports not only his history of violence known to the institution, but the boiling nature of the violence he exhibited in the struggle with the Grievant.

All of this was known by the Grievant. Immediately following the struggle, the Grievant completed a required form entitled Youth Behavioral Incident Report. The report asked whether the same behavior had been exhibited previously, and the Grievant noted that it had. Furthermore, the Grievant testified that he knew that the Youth had attacked three other Juvenile Correctional Officers; that his violence was common knowledge; and this knowledge heightened his fear when the Youth attacked him.

2. The State claims that the punch by the Grievant is ipso facto--a violation of Rule 21 a. regardless of when the Grievant threw the punch in the struggle with the Youth. This is so because punching a youth is not within the five techniques of unarmed self-defense authorized to be used by Juvenile Correctional Officers. There are two problems with this claim. The first is that the Grievant's training in these five techniques took place two years ago. As the State's expert testified, the techniques may be second nature to him but certainly would not if training sessions in the techniques were years apart.

The second difficulty with the State's claim centers on the two demonstrations of the first and second techniques that could be used against an assailant "close by" and upright, unarmed, Juvenile

Correctional Officer who is observing the assailant. These demonstrations simply did not fit the facts of this case. In this case, the Youth had the Grievant's head bowed with the Youth grasping and pulling at five locks of the Grievant's hair.

3. The grasp of the Youth on the Grievant's head was secure given the style of the Grievant's hair. The Grievant had elected to style his hair into locks by twisting individual hair strands until the strands are interwoven into locks. The locks were obviously much stronger than individual strands of hair; thus permitting the Youth to have a strong grasp of the Grievant's head as he bowed the Grievant's head.

Five locks of the Grievant's hair were introduced into evidence, and the ends of each of the five locks show a messy separation of a broad clump of many strands of hair indicating the force that had been exerted by the Youth not only to pull the locks but to wrench them from the head of the Grievant.

The punch by the Grievant was not excessive use of force. It was a spontaneous action by the Grievant who reasonably feared for more and continued pain, and whose training (even if recalled by the Grievant) did not provide any option than striking the Youth. The Grievant was the victim of a premeditated attack by a Youth who had long exhibited violent tendencies towards Juvenile Correctional Officers, all of which was known by the institution and the Grievant.

B.) The Touching and Turning of the Grievant

The Grievant finally cast away his dissembling and denials of punching the Youth. He admitted punching the Youth in the

statement to the police in June and early in July at the pre-disciplinary hearing. The above is the analysis of this punch by the Grievant under Rule 21 a. and the circumstances of the Grievant's struggle. But there is more. The Grievant steadfastly denied touching the Youth in the restroom prior to the commencement of the struggle just outside the door of the restroom. The Grievant dissembling and denials of the punching obviously creates doubts about this steadfast denial. With all of Rucker's shifting statements, he did not recant his statement that the Grievant entered the restroom, put his arm on the shoulder or back of the Youth, and turned the Youth to exit the bathroom. This was a very fateful move on the part of the Grievant because it obviously precipitated the struggle that the Youth had indeed planned to visit upon the Grievant.

The Union views this as a mere touching which could in no stretch of the imagination constitute force at all--quite apart from excessive or unwarranted force under Rule 21 a. By contrast, the State claimed that the action of the Grievant prior to the struggle did constitute a violation of Rule 21 a. and that action, in and of itself, warranted the discharge apart from the punching.

The arbitrator finds that this is not a case of mere innocent touching. The Grievant did more; his touch was with sufficient force to turn the Youth and move him along toward the exit to the restroom. While a close case, this action does constitute unwarranted force because the evidence shows that the Grievant had an alternative in dealing with the recalcitrant youth who refused to follow his instructions. He could have communicated by

available communication devices with the Duty Office or Operations Manager--a call which would have brought additional assistance. While judgments in hindsight are always suspect, it is painfully obvious that, had the Grievant followed this procedure, the struggle would not have occurred. The expenditure of time, energies, anxieties and money by all concerned in this transaction would have been avoided.

As noted above, the facts do show a bare use of unwarranted force by the Grievant in placing his hand on the back or shoulder of the Youth and turning the Youth and moving the Youth to the exit of the bathroom. However, this violation of Rule 21 a. does not warrant discharge.

The Grievant already had been suspended for a violation for a first violation of Rule 21 a. Under Directive B-19, the second violation calls for a sanction from a 15-day suspension or removal; the third violation calls for automatic removal.

The superintendent testified on direct examination that one of the two factors that led to her recommendation of removal was the severity of the injury to the eye of the Youth. This injury to the Youth is totally unrelated to the touching and turning of the Youth by the Grievant; rather, it is the direct result of the punching of the Youth during the struggle which has been found not to be violative of Rule 21 a. Consequently, one of the factors that led the State to seek removal of the Grievant is not present when the removal of the Grievant is considered simply on the basis of the Grievant's touching and turning the Youth.

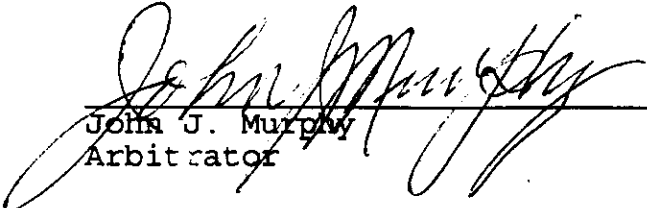


In addition, it is clear to the arbitrator that the core of this case was the injury to the Youth and the punching of the Youth by the Grievant who only belatedly admitted punching the Youth. By far the substantial amount of evidence and argument in this case centered on the punching of the Youth, rather than the touching and turning of the Youth. The Grievant deserves discipline for this unwarranted force used on the Youth. The discipline should reflect the risk of an altercation that the Grievant should have foreseen given his knowledge of the violent tendencies of the Youth. Consequently, a substantial suspension without pay is warranted.

AWARD:

The grievance is granted in part in that it is found that the Grievant did not violate Rule 21 a. in punching the Youth out of self-defense during the violent attack on the Grievant by the Youth. The punching was the only option available to the Grievant to avoid further fear and injury. The grievance is denied in part in that the Grievant did use unwarranted force on the Youth by touching and turning the Youth to move the Youth to the exit of the restroom. The sanction of discharge, however, is converted to that of a suspension without pay or restoration of seniority or contract rights until the end of the suspension. The suspension shall end at the reinstatement of the Grievant which shall occur within ten (10) working days from the date of this Opinion and Award.

Date: March 19, 2001

  
John J. Murphy  
Arbitrator