

#1790

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO - DEPARTMENT OF YOUTH SERVICES
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: James Holt

Case No. 35-18 (040329) 0025-01-03

Date of Hearing: October 1, 2004

Place of Hearing: Circleville, Ohio

APPEARANCES:

For the Union:

Advocate: James McElvain

2nd Chair: Patricia Howell

Witnesses:

James Holt, Grievant

For the Employer:

Advocate: Mark D. Tackett

2nd Chair: Shelly Ward

Witnesses:

Dartanion Prevost - Youth

Ronnie Jervis - Youth

Michael Durrah - Youth

Kinyate Williams - Youth

Danny Argo - Youth

Rick L. Henderson - Manager

Mark Adams - Manager

Clarence Daniels - Officer

Gary C. Mohr - Superintendent

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: October 28, 2004

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2003, through February 28, 2006, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, James Holt ("Holt"), for violating Employer's General Work Rules Policy 103.17; specifically 4.14 (Excessive Use of Force). The removal involved the alleged use of excessive force against a youth in the custody of The Department of Youth Services ("DYS").

The removal of the Grievant occurred on March 24, 2004 and was appealed in accord with Article 24 of the CBA. This matter was heard on October 1, 2004, and is properly before the Arbitrator for resolution. Both parties had the opportunity to present evidence through witnesses and exhibits. Both parties presented oral argument, with the record being closed as of October 1, 2004.

BACKGROUND

The Grievant worked for the Department of Youth Services ("DYS") as a Juvenile Correctional Officer ("JCO"). DYS operates eight correctional and rehabilitation facilities for youth felony offenders from ages 10-21. Holt was assigned to the Circleville Juvenile Correctional Facility ("Circleville") at all times relevant herein. Circleville's population consists of youth sex offenders.

At the time of his removal by the Employer, Holt was employed for twenty-six years, with no active discipline of record

The incident- giving rise to removal occurred on January 23, 2004, involving the youth, Dartanion Prevost ("Prevost") and the Grievant. The Grievant was assigned the hall post near the education center and was responsible for monitoring youth movement in and around the

school area between classes. Part of the Grievant's responsibility was to ensure the youths were lined-up properly prior to being escorted back to their housing unit.

At the end of the 7th period, the Grievant observed that several youths were making a lot of noise with Prevost being the loudest. Prevost told the Grievant that he had to obtain a pen from the classroom and proceeded to walk away from the Grievant, despite being ordered to stop and line up. Holt again directed Prevost to line up and when Prevost did not comply, an exchange of words occurred, resulting in Holt grabbing Prevost in a c-grip and/or by the shirt. While holding Prevost by the shirt, the Grievant smacked him with an open hand in front of other youths', JCO Clarence Daniels ("Daniels") and recreation administrator, Mark Abrams ("Abrams"). When Prevost became more agitated, JCO Daniels intervened and took hold of Prevost and asked him to calm down. According to the investigatory statements of several youths, Abrams, and JCO Daniels, Holt then punched Prevost in the face area. The Grievant denies that he struck Prevost at any time with an open hand or fist on January 23, 2004.

According to the Grievant, when Prevost refused to comply with his verbal directions, Prevost was placed (attempted) in a c-grip at which time the youth put his hands on the Grievant's arms in an attempt to break his (Grievant's) hold. The Grievant told Prevost that he would count to three and his (Prevost) hands better **be** off his arms. Prevost was upset and called the Grievant several unpleasant names. The Grievant, with his radio in his right hand, attempted to break Prevost's grip by using a downward sweeping motion with his right hand/forearm to break Prevost's grip on his arm. The Grievant indicated that maybe the radio brushed Prevost's face area at this time.

Throughout the discipline hearings, the Grievant's version of the events contradicts all of the other witnesses and contends that his co-worker's and the youth's statements are inconsistent or simply lies. The Grievant contends that he was required to use reasonable force

¹ Written statements were obtained from the following: Daniel Argo, James Thomas, Alan Wallace, Kiryatae Williams, Ronnie Jarvis, Michael Duty and Michael Durrah. The statements, although not identical, state that they observed the Grievant slap or punch Prevost either one or two times. (JX Discipline Trial, pp. 20-40).

to prevent Prevost from assaulting him. No excessive force was used and the Grievant, consistent with his training, acted in a manner required to subdue an out-of-control youth.

On March 2, 2004, the pre-disciplinary hearing occurred and the Employer presented various documents regarding the investigation, including, but not limited to the following:

1. Investigation report dated February 2, 2004 from Rick Miller.
2. Investigatory interviews with the Grievant, Adams, Rick Henderson, JCO Daniels, Prevost, and youths (Alan Wallace, Jervis, Darrah, Michael Duty, Argo, Williams), and
3. Additional documents relating to the investigation (Joint Exhibit ("JX") 5).

The hearing officer concluded that the Grievant slapped and punched Prevost while under his supervision and just cause existed to find a violation of DYS Policy No. 103.17. On March 24, 2004, Gary C. Mohr ("Mohr"), Superintendent, concurred that just cause existed and issued a notice of removal to the Grievant effective March 24, 2004.

The Union contends that under Article 24 of the CBA, just cause for removal is absent and seeks reinstatement with appropriate economic benefits to the Grievant. The Union further contends that the Grievant's long tenure of service, good performance evaluations, no active discipline and a poor investigation by the Employer should mitigate against the Grievant's removal.

ISSUE

Was the Grievant, James Holt, disciplined for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA AND DYS WORK RULES ARTICLE 24 - DISCIPLINE

24.01 Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

DYS Directive 103.17 - General Work Rules

Rule 4.14 - Excessive Use of Force:

Use of excessive force toward any individual under the supervision of the department or a member of the general public.

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

DYS serves as the corrections system in the State of Ohio for youth from age ten (10) to twenty-one (21). Juvenile offenders reside in eight (8) different facilities in the state after being convicted of a felony I, II, III, or IV charge(s). JCO's are primarily assigned to carry out safety and security procedures to ensure that the youths, co-workers and the facility are secure at all times.

A JCO's duties generally require supervision of the youths within their custody for twenty-four (24) hours, seven (7) days a week. The youths assigned to Circleville are sex offenders. DYS has promulgated general work rules, which includes progressive discipline for violations. All DYS employees are required to review the work rules and certify that they are aware of the rules and the consequences for violations. The steps in the progressive discipline have a range from verbal to removal determined by the seriousness of the infraction.

Witness Mohr, Superintendent, testified that after reviewing the investigatory report, he was convinced that the Grievant had struck Prevost twice and this behavior was beyond the use

of excessive force. Mohr indicated that this type of action was as far from the mission of the institution as one could imagine and, the Grievant's conduct amounted to physical abuse. Mohr, with over thirty years in corrections and a former Warden at three other institutions, underscored the difference of this case in that co-workers provided written statements against "one of their own". Mohr further added that the youth statements (although not factually identical), were "...very consistent with the staff statements and the theme was comparable to make the overall picture very credible". Mohr decided that removal was the only option and length of service or good performance evaluations should not mitigate a physical abuse case. In fact, Mohr believes an employee with twenty-six years of service should set an example of how to diffuse situations such as this without resorting to violence.

Three co-workers either witnessed the slap/punch or heard the conflict. They were JCO Daniels, Therapist Administrator Abrams and Operations Manager, Rick Henderson ("Henderson"). Each provided written investigatory statements and testified at the hearing.

JCO Daniels, a three (3) month employee at the time of the incident, testified that he heard a lot of noise being made by Prevost. The Grievant told Prevost to settle down several times, to no avail. Prevost was walking away from the Grievant when the Grievant grabbed Prevost around the collar/neck area of his sweat suit. The Grievant then took Prevost to the wall when he saw the Grievant slap Prevost with an open hand. Prevost continued to talk and disrespect the Grievant when he saw the Grievant hit Prevost with a closed fist (short punch) in or around the mouth area. At this time, JCO Daniels intervened and put himself between the Grievant and Prevost to prevent Prevost from retaliating or the Grievant from hitting him again.

Therapist administrator, Abrams, a fourteen-year employee with DYS, testified that he heard Prevost state to the Grievant to "...get off me you fat bitch and keep your hands off me". Abrams indicated that he walked over to the Grievant and Prevost and told the other youths to put a hand on the wall and he pushed the 'man down' button to obtain additional help. Prevost attempted to go after the Grievant when Abrams and JCO Daniels put Prevost in a c-grip.

Abrams told Prevost to calm down. Prevost replied, "...That fat bitch needs to keep his hands off of me". According to Abrams, while Prevost was in Daniels' and his custody the Grievant punched Prevost in the lower jaw area. Prevost became further upset and continued to call the Grievant a bunch of names.

Henderson heard the commotion and testified that although he did not see the Grievant strike the youth, he heard what was a slap-like noise. Henderson testified that he was approximately 10-15 feet away in another hallway when he heard the slap-like noise. Upon his arrival, he saw JCO Daniels and Abrams escorting Prevost away from the Grievant. Henderson obtained custody of Prevost and escorted Prevost back to his housing unit and ultimately to the medical clinic.

Henderson did not observe any physical injuries on Prevost immediately after the incident. Henderson did not escort Prevost immediately to medical, because he was concerned about Prevost's safety, in that Prevost would have to go past the security office and the Grievant was in that area. The delay in taking Prevost to the medical clinic did not abrogate what happened.

JCO Daniels, Abrams and Henderson testified that if a youth is out of control or has assaulted staff, all staff is trained to implement the following intervention strategies: (1) use of verbal skills, (2) direct order(s), and (3) document the behavior by preparing a Youth Incident Report ("YIR"). According to each witness, there is no evidence that the Grievant employed the strategies to diffuse this situation.

JCO Daniels, Abrams and Henderson further testified that the DYS policy 301.05 lists the situations where use of force is permissive.² Although Prevost did not follow the verbal

² DYS policy number 301.05 provides in part: Staff may use force to control situations involving the following:

- To prevent imminent and physical harm to self or other persons
- To prevent damage to property
- To prevent or terminate escapes
- To preserve institution security and order

orders, all witnesses agreed that they did not see or hear any conduct by Prevost that required the use of force by the Grievant.

Prevost testified that at the end of the seventh period class, several of the youths were making a lot of noise in the hallway. The Grievant told everyone to get quiet at which time, Prevost walked past the Grievant and told him that he was going back in to the class to get his hat. After an exchange of words, Prevost called the Grievant a "fat ass bitch" whereupon the Grievant grabbed Prevost by his shirt. Prevost tried to get the Grievant's hands off of him by grabbing the Grievant's wrist/forearm area. The Grievant told Prevost, "you have three seconds to get your hands off my watch". Prevost continued to try to break the Grievant's grip when the Grievant hit Prevost's hands and slapped his face. Prevost tried to hit the Grievant in the chest when JCO Daniels and Abrams intervened and took physical control of him. While being restrained, the Grievant then punched Prevost in the face whereupon he shouted, "...why did he hit me'? That was wrong..."

Prevost admits being verbally abusive to the Grievant, but denies being out of control. Prevost was escorted to his housing unit by Henderson and did not go to the health clinic for about forty-five minutes to an hour after the incident. Finally, Prevost added that he had no prior verbal or physical altercation with the Grievant, and if he was out of control, "...JCO's would write me up, not physically punch me".

Jervis testified that he was approximately 5 to 10 feet away from the incident when he saw the Grievant smack Prevost with his backhand. Prevost was upset and cursing at the Grievant. Jervis further testified that JCO Daniels intervened and was restraining Prevost when the Grievant punched him.

Darrah testified that he wasn't certain of all the particulars, but he did see the Grievant slap Prevost with his left hand. Darrah further believed that both JCO Daniels and Abrams had a hold of Prevost when the Grievant punched him with a closed hand.

Williams testified that he heard a lot of noise and saw the Grievant with a hold on Prevost's shirt. Prevost was trying to get away when he heard the Grievant state, "I'll count to three and your (Prevost's) hands better be away from me." Prevost was attempting to break free when Williams saw the Grievant hit at Prevost's hands and slap Prevost in the face. About this time, JCO Daniels and Abrams arrived and obtained control of Prevost from the Grievant. Williams stated that while Prevost, was being restrained by JCO Daniels and Abrams, the Grievant struck Prevost in the face with his fist.

Argo testified that he did not see a slap, but heard a scream, and it was Prevost. He observed the Grievant hit Prevost in the upper chest area several times. Argo's written statement was prepared approximately two (2) hours after the incident when he returned to his housing unit.

An accurate accounting of what happened must be balanced against the three (3) administrators and seven (7) youths who provided credible evidence in sharp comparison to the Grievant's version of what happened. If the Grievant wanted to properly discipline Prevost, he was required to write an incident report and seek a youth disciplinary hearing. As a long-term employee, the Grievant was trained to de-escalate situations, not aggravate the matter by use of unwarranted excessive force.

In response to the Union's position that the medical exam conducted found only redness on Prevost's neck and a superficial cut on Prevost's lip, such does not supplant what occurred and the level of the injury is not determinative of the seriousness of the Grievant's behavior.

In reply to the Union's contention that certain youths (Argo, Williams, and Jervis) were not in school since they are high school graduates, Mohr testified that it's common to have youth workers in all areas of the facility.

The level of discipline was appropriate and Mohr testified that there's no room at any facility, particularly a juvenile facility for this type of behavior. The Grievant's length of employment should not mitigate the recommendation for removal and in fact, his tenure acts as

an aggravating condition. Namely, the Grievant's training and prior work experience provided him the necessary skills to employ other intervention options.

Finally, even if all of the youth's statements and/or testimony is afforded little weight due to inconsistencies or a finding of a conspiracy to get the Grievant, no evidence exists to infer that the staff lied or had animosity toward the Grievant. Aside from the Grievant's self-serving testimony, the Union offered no evidence to contradict the sequence of events relied upon by the Employer to support the Grievant's removal.

POSITION OF THE UNION

The Grievant, an employee with over twenty-six (26) years seniority and no active discipline of record was removed without 'just cause' in violation of the parties' CBA.

On January 23, 2004, the Grievant was working a familiar post and understood the process to follow with the youths before returning them to their housing units. The Grievant is a large man standing 62" and weighs approximately 370 pounds. Due to the increase in his waist size, the Grievant indicated that he carries his radio in his right hand while on post since he was unable to secure the radio properly on his person.

The Grievant testified on his most recent performance evaluations, (Union Exhibit ("UN EX") 1(A), 1(B) and 1(C)), he received favorable ratings from his supervisors in dealing with crisis situations. To wit, "The Grievant remains calm and in control of himself and the situation". UN EX:1(B), p. 2. The Grievant also served as the JCO whom instructors would contact to remove a youth from the classroom, if required.

On January 23, 2004, the Grievant's recollection of what took place is the following. The Grievant observed Prevost coming towards him to go back in the classroom and allegedly to get an ink pen. The Grievant told Prevost several times to line-up. Prevost tried to get around the Grievant, and the Grievant attempted to use a c-grip on Prevost who got away. The Grievant then grabbed Prevost's shirt and Prevost put his hands on the Grievant's arm in an effort to

break free. The Grievant told Prevost, "I'm going to count to three (3) and you better have your hands off me". Prevost refused to let go and the Grievant then slapped Prevost's hands away by bringing his right hand in a downward motion.

The Grievant testified that he had his radio in his right hand and when he swung down to break Prevost's grip he could have brushed Prevost's face or lip accidentally. The Grievant denies that he intentionally slapped Prevost at any time on January 23, 2004.

The Grievant further indicated that he recalls JCO Daniels' and Abrams' presence sometime during the incident, but denies punching or hitting Prevost with his fist while in their custody.

Regarding the youths' statements, the Union contends that some if not all of the statements were prepared together. The youths conspired and their statements were manufactured. Despite the alleged conspiracy, the statements themselves do not support the truth demonstrated by the various inconsistencies. Examples include, but not limited to the following: The Slap: Jervis indicated the Grievant used a backhand to slap Prevost; Prevost stated the Grievant slapped him with his right hand; and Darrah stated the Grievant slapped him with his left hand. The Punch: Prevost alleged he was restrained by JCO Daniels and Abrams when the punch occurred; Jervis testified that JCO Daniels was not restraining Prevost when the Grievant punched him; Williams testified JCO Daniels and Abrams had Prevost restrained when the punch happened; and Argo testified that he saw the Grievant punch Prevost in the chest area as well as the face. Simply, the youth statements are all across the board regarding what they observed. The Union contends that all of the youth statements were prepared together and under the direction of the Employer and points to Argo's statement as an example. Argo's investigatory statement provides that the Grievant hit Prevost in the chest area and in the face three times. Upon cross-examination, Argo admitted that "somebody" told him to write that the Grievant had hit Prevost three times. Upon further questioning, Argo could not recall what staff

member told him what to write. The statements and testimony of the other youths are similarly untrue, unreliable and inconsistent.

The Union also contends that youths' Jervis, Williams and Argo are all high school graduates and would not have been in that education area. The Grievant testified that a review of the attendance register, UN EX's 2(A)(B) & (C), supports this proposition. Therefore, any reliance upon the youth statements undermines the reliability of the evidence recited upon by the Employer to support the discipline.

Prevost failed to comply with the verbal directives of the Grievant and by attempting to push pass the Grievant, Prevost initiated the contact and became increasingly verbally and physically abusive towards the Grievant by attempting to hit at the Grievant to break free. The Grievant used only the necessary force to control Prevost.

Regarding the staff, the Union points out that Henderson did not see any of the confrontation and that JCO Daniels and Abrams statements differ over a key factor. JCO Daniels, as opposed to Abrams, testified he was not restraining Prevost when the punch occurred. Once again, where's the consistency?

Therefore, the Grievant, a long-term employee with good performance evaluations, especially in dealing with crisis situations, must receive some consideration relative to mitigation. The youth was out of control and the Grievant acted reasonably under the circumstances. The Employer has failed to meet its burden in showing that excessive force was used on January 23, 2004.

The Union seeks back pay; roll call pay; applicable leave accrual; lost overtime opportunities and medical expenses paid by the Grievant since removal.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. See, Elkouri & Elkouri - "How Arbitration Works" (6th Ed., 2003).

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the DYS burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After a review of the testimony, exhibits and post hearing arguments of both parties, the grievance is denied. My reasons are as follows:

The operative facts of this case are in dispute. The Grievant contends that he did not slap or punch Prevost at any time on January 23, 2004. Although the Grievant admits that co-workers and youths were present, he contends for a myriad of reasons all of the Employer's witnesses' are unbelievable or compromised. The only testimony presented by the Union was that of the Grievant and the evidence does not comport in any way the Grievant's theory of the case. In short, the Grievant did not present himself well at the hearing, displayed no contrition and his version of what occurred was not credible nor believable in the opinion of this Arbitrator.

The Grievant denies that he slapped or punched Prevost, contradicting all DYS witnesses, i.e., Abrams, JCO Daniels, Prevost, Jervis, Durrah, Williams and Argo, who provided direct/first-hand testimony of what they saw on January 23, 2004. The Grievant only admits that to remove Prevost's hands from his arms, he used his right hand in a downward movement and as a result, his radio may have brushed Prevost's face.

On January 23, 2004, the relevant facts adopted by this Arbitrator indicate that the Grievant initiated the physical confrontation by grabbing Prevost by his shirt. Prevost directed obscenities at the Grievant and attempted to get away from the Grievant by either hitting or trying to pry the Grievant's hands away from his shirt. The Grievant struck Prevost on his hands and slapped the youth, which was witnessed by two co-workers (JCO Daniels and Abrams) and four youths (Prevost, Jervis, Durrah and Williams) who testified at the hearing. After the intervention of JCO Daniels and Abrams, the Grievant punched Prevost in the face area, which was also observed by each of the witnesses listed above.

To sustain this grievance the evidence must establish the Employer's proof lacks reliability and sufficient credibility to support the removal. For the reasons contained herein, I find that the evidence supports the disciplinary action taken by the Employer.

The Union attacked the credibility of the Employer's witnesses, particularly the youths. On cross-examination, the Union pointed out the apparent inconsistencies. Examples were, did the Grievant slap Prevost with his right hand or left hand? Did the Grievant use a backhand as opposed to a slap (Jervis)? Regarding witness Argo, the Union contends that he and others were directed by "someone" to write untrue versions of the incident to "get" the Grievant.

The Arbitrator had an opportunity to assess the demeanor of each witness and found Prevost, Jervis and Williams' versions very credible. The youths were able to recall with sufficient clarity the facts, and their overall perception and description of the incident was credible. On the other hand, I found Argo's testimony to be of little value and no weight and Durrah's of marginal value due to his uncertainty in answering questions, i.e., "I think.... I don't remember..." However, Prevost, Jervis and Williams all testified that the Grievant slapped and punched Prevost. Whether a right hand or left hand delivered the slap does not alter the fact that 'force' was used by the Grievant. No evidence was offered that any of the youths did not see the exchange or were motivated to fabricate what occurred. In fact, Prevost testified that he had no previous problems either verbally or physically with the Grievant. Moreover, even if all of

the youths' statements and testimony were given no evidentiary weight, the testimony and direct evidence offered by co-workers must also be abrogated by the Union.

The Union submits that JCO Daniels' testimony should be discredited and his memory unreliable because he could not recall the name of his female partner who was working with him on January 23, 2004. The Union further contends that Abrams and JCO Daniels' versions are inconsistent in that Abrams states that JCO Daniels was restraining Prevost when the Grievant punched him. On the other hand, JCO Daniels' investigatory statement and testimony indicates that he took hold of Prevost after being punched with a fist by the Grievant. I find the Union's argument somewhat disingenuous in that whether Prevost was restrained by one or both does not offer any contra evidence to find Prevost was not punched with a fist in the presence of JCO Daniels or Abrams. They both indicated a punch occurred in their presence and no credible evidence was presented by the Union to conclude otherwise.

Abrams and JCO Daniels testified that they were within ten (10) to twenty (20) feet of the incident. Whether Prevost was being restrained or not fails to minimize what they saw the Grievant do. I do not find the minor variations in the co-workers' recollection dissipate the evidentiary reliability of their recollection. In fact, it's not typical that co-workers voluntarily come forth and provide evidence against a co-worker. I particularly found JCO Daniels' and Abrams testimony truthful and forthright.

JCO Daniels, a recent hire at Circleville, testified that Prevost was making a lot of noise when he saw the Grievant grab him by the shirt in the neck area and smack Prevost with an open hand. Prevost continued to talk/curse at the Grievant, where upon, "...I saw the Grievant hit Prevost with a fist (short hand)." Abrams confirmed his personal observations and testified that he saw the Grievant hit Prevost with a closed hand.

Henderson, who heard a slap-like noise, arrived immediately after the punch and escorted Prevost back to his housing unit. Prevost did not present himself with any obvious injuries from the altercation. Henderson did not take Prevost to the clinic until approximately

one hour after the incident. The examination revealed redness on the neck and a superficial cut on Prevost's lip (EX. 1). The Union opines that if Prevost were hit by the Grievant, more physical damage would've occurred due primarily to the Grievant's physical size. Henderson testified that due to the emotional state of Prevost and the Grievant, he (Henderson) did not want to take Prevost past the security station where the Grievant was seated until both parties had settled down. I find this delay reasonable due to what happened and Henderson had legitimate concerns about placing Prevost and the Grievant in the same area after their confrontation.

This case is about accountability and honesty. No evidence or facts exist to indicate that Abrams, JCO Daniels and Henderson had the opportunity or a reason to conspire against the Grievant. Moreover, the tenet of Prevost, Jervis, Williams and Darrah's evidence corroborates what the Grievant's co-workers saw or heard. On the other hand, the Grievant's evidence and testimony falls short and lacks credibility and believability. In removal cases greater proof of wrongdoing is required by this Arbitrator to support the discipline. I find that the Employer met its burden and the clear weight of the evidence supports a violation of DYS Policy 103.17, specifically 4.14 (excessive use of force).

Having decided that DYS met the burden of proof to support discipline, the remaining inquiry involves mitigation. The Union submits basically three (3) arguments for lessening the removal: 1.) Prevost was out of control; 2.) Good performance evaluations; and 3.) A long-term employee with no active discipline. The Employer submits that the seriousness of the Grievant's actions was tantamount to abuse, making mitigation moot.

It is undisputed that Prevost used profanity and insulting words directed at the Grievant. Prevost also used physical force in attempting to break the Grievant's hold of his shirt. The Union characterized the Grievant's reaction as self-defense and Prevost's action as being out of control. I disagree. It seems the Union is arguing that some type of "force" was necessary due to Prevost's conduct, i.e., use of profanity. I find that name-calling or use of profanity did not

justify the physical response demonstrated by the Grievant. DYS has clearly scripted when physical intervention is expected and required, pursuant to DYS Policy No. 301.05. In, Tecumseh Products Co., 107 LA 371 (Keenan 1996), Arbitrator Keenan reaffirmed that words do not give permission to justify battery. In Tecumseh, the Employer had just cause to remove an employee who slapped a co-worker because curse words and abusive language was directed to the employee. The facts in this case are more egregious in that a slap and a punch occurred by an officer who is sworn to maintain a safe environment for those under his supervision. Moreover, as a JCO, the Grievant was trained to initiate institutional proceedings against, i.e., putting Prevost on paper, if his conduct so warranted it. Simply, no evidence indicates that the use of force was required on January 23, 2004, as a result of Prevost's use of profanity towards the Grievant.

It is undisputed that the Grievant's annual evaluations from 2000 until 2003 were favorable as a whole. As a result, the Union contends that the January 23, 2004, incident be balanced against his performance as a JCO. The Employer, on the other hand, through witness Mohr, testified that the Grievant's conduct was as "far" from the mission of the institution and he (Mohr) was convinced that the Grievant had struck the youth. Granted that the Grievant's recent performance is favorable, the Employer, upon cross-examination, pointed out that the Grievant had been suspended for various reasons eleven (11) times in twenty-six years. Given my earlier finding of the operative facts, the performance of the Grievant does not warrant a mitigation of the discipline.

The more substantive of the mitigation arguments of the Union is that the Grievant was a long-term employee without any active discipline. It is well established that a long-term employee's service should be considered as mitigating the discipline when appropriate. See, Elkouri & Elkouri "How Arbitration Works", (6th Ed., 2003), pp. 988-990.

In re International Extrusion Corporation, the Arbitrator Selvo found that although it would be difficult to fashion a hard-fast rule, long service is properly taken into account as a

mitigating factor for minor misconduct, but not for major misconduct. In re International Extrusion Corporation and Cabinet Makers and Millmen, Local 721, 106 LA 371 (Selvo 1996). Furthermore, while it may be that a senior employee has no greater rights than a junior employee, the senior's length of service must be recognized when the individual is dealt with by way of termination. In re Arch of Illinois, Captain Mine and United Mine Workers of America, District 12, Local 1392, 107 LA 108 (Feldman 1995).

As a long-term employee, the Grievant was clearly aware that his position required the highest of public trust and confidence. Furthermore, as a long-term employee, the Grievant was properly trained and whose conduct was expected to serve as a beacon for less senior JCO's. Troublesome to this Arbitrator is the Grievant's refusal to accept any responsibility for what happened and his aggressive behavior towards the youth before and after the slap. The record is void of any facts to suggest that the Grievant exercised proper judgment in grabbing the youth by the shirt. After the initial slap he could have retreated when his co-workers intervened, but he continued his assaultive behavior, by punching the youth. I find that a slap and punch were not minor violations as found in re International Extrusion Corporation, supra., and that his length of service acts as an aggravating factor by using excessive force without any justifiable reason. If the Grievant felt that he was in physical peril, why didn't he use his radio to call for back up? Under any analysis, the Grievant's conduct was so egregious as to eliminate length of service as a mitigating factor. Clearly, a long-term employee is entitled to mitigation under proper circumstances, however the facts of this case warrant no mitigation.

DYS seeks to provide a safe and efficient rehabilitation system for youths under its supervision with JCO's as the point persons, as required by DHS and expected by the public. The Grievant violated the General Work Rules in such an egregious manner that its clear he could no longer serve as a JCO. I cannot find that the penalty is excessive, arbitrary or unreasonable.

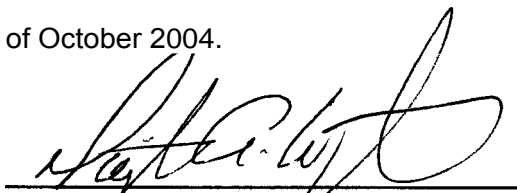
A review of all of the evidence presented to the Arbitrator warrants the conclusion that the Grievant's removal was for just cause and mitigation is not appropriate. The Grievant was the only witness presented to rebut the overwhelming evidence offered by DYS. The Grievant challenged the investigation, credibility and weight afforded to DYS evidence to no avail. Finally, the Arbitrator analyzed the plethora of reasons for mitigation and finds that all the reasons, independently or cumulatively, failed to lessen the discipline.

Therefore, for all the reasons cited above, the grievance is denied.

AWARD

The grievance is denied in its entirety.

Respectfully submitted this 28th day of October 2004.

A handwritten signature in black ink, appearing to read "Dwight A. Washington", is written over a horizontal line.

Dwight A. Washington, Esq., Arbitrator