

#1876

IN THE MATTER OF ARBITRATION
BETWEEN
OCSEA, LOCAL 11, AFSCME-AFL-CIO
AND
STATE OF OHIO/DYS

Before: Robert G. Stein

Grievant(s): Louis Barrett

Case # 35-04-2005-11-033-01-03

Termination

Advocate(s) for the UNION:

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INTRODUCTION

This matter came on for hearing before the arbitrator subsequent to the filing of grievance number 35-04-2005-11-033-01-03 by the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO (herein "Union") on behalf of Louis Barrett (herein "Barrett" or "Grievant"). The grievance was filed on May 11, 2005, subsequent to the termination of the Grievant's employment from the State of Ohio, Department of Youth Services (herein "Employer" or "DYS"). Robert G. Stein was selected by the parties to arbitrate this matter.

A hearing was held on December 2, 2005 at the Indian River Juvenile Correctional Facility, located at 2774 Indian River Road in Massillon, Ohio. The parties mutually agreed to that hearing date and location, and they were given a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a full written transcript, was subsequently closed upon the parties' submission of written closing statements.

The parties have both agreed to the arbitration of this matter. No issues of either procedural or jurisdictional arbitral authority have been raised, and the matter is properly before the arbitrator for a determination

on the merits. The parties also granted the arbitrator the right to hold his decision in this matter in abeyance, while another case involving JCO Linnell Hamilton, was brought to arbitration before the undersigned arbitrator. JCO Hamilton's case, also involved a discharge for his conduct during the same incident involving youth at Indian River.

ISSUE

Did the Ohio Department of Youth Services remove Louis Barrett from his position of employment for just cause? If not, what shall the remedy be?

BACKGROUND

The Grievant began his employment with DYS on December 4, 2000. He was working as a Juvenile Corrections Officer (herein "JCO") on January 12, 2005 when an incident occurred at around 8:00 p.m. At that time, JCO Linnelle Hamilton (herein "Hamilton") was the JCO assigned to supervise the C Unit at the Indian River facility while the twenty to twenty-five male youths had their recreational period. Youth unrest resulted when Hamilton instructed the youths to get into formation for movement back to the C Unit because the wall clocks in the gymnasium did not display the correct time, and youth Taylor Arvanites (herein "Arvanites") insisted that he had additional recreational time and began to kick and/or throw plastic cones and make oral threats and/or insults as part of his generally non-compliant conduct. At some point, Hamilton acted in response to the increased agitation among the youths and called for

assistance. Shortly thereafter, Barrett and others arrived at the gym in response to the "code blue" signal to provide assistance to Hamilton and General Activities Therapist (GAT) Fernandez (herein "Fernandez") in quieting the disruption and to escort the youths back to their assigned unit.

While a separate scuffle occurred on the floor of the gym between Arvanites and Hamilton, Barrett is shown on videotape actually skirting that area of activity in an effort to reach youth Marcus Stebleton (herein "Stebleton"), who was shown on the video with his hands on the wall of the gym in proper response to a signal 14 code alarm both before and after he briefly moved nearer the area where Hamilton was attempting to subdue youth Arvanites. Stebleton was subsequently pulled away from the wall by Barrett and also ended up in an on-the-floor skirmish with Barrett.

Following an investigation conducted by Indian River Operations Manager Terry Smith, Barrett was provided a pre-disciplinary hearing on March 28, 2005. The Grievant's employment was actually terminated on May 9, 2005 after disciplinary hearing officer, Mrs. Johnetta Williams, determined on April 15, 2005 that the Grievant had violated the following DYS 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

Rule 3.1 Dishonesty

Being dishonest while on duty or engaged in state business, including, but not limited to, deliberately withholding, giving false or inaccurate information, verbally or in writing, to a supervisor or appropriate authority . . .

Rule 5.1 Failure to follow policies and procedures

A grievance was filed on September 11, 2005 by the Union on behalf of Barrett, challenging the latter's discharge. Because the matter remained unresolved after passing through the preliminary stages of the grievance procedure, the Union requested that the matter advance to the arbitration level pursuant to Section 25.02 of the collective bargaining agreement between the parties.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer basically refutes all of the Union's claims and insists that the Grievant's conduct during the January 2005 incident merited his termination based primarily on his alleged use of excessive force in dealing with Stebleton. After entering the gym in response to the signal 14, the Employer insists that the video clearly indicates that the Grievant was able to see Stebleton moving through or around the area where the on-the-floor skirmish was occurring between Hamilton and youth Arvanites and that Stebleton directly moved to a different standing position nearer

the entrance to the gym and then promptly placed both hands on the gym wall, as required to do in response to a signal 14, before the Grievant proceeded directly to Stebleton's location, pulled Stebleton away from the wall, and then used excessive force against the apparently compliant Stebleton, who ended up on the floor. The Employer stresses that the Grievant did not appear to utilize any verbal strategies pursuant to DYS policy and did not give Stebleton sufficient time to comply with any command or behavior initiated by the Grievant.

The Employer further contends that Barrett's conduct also demonstrates his lack of honesty because Barrett's original explanation or statements regarding the incident were not verifiable or credible upon review of the videotaped version of the series of events. The Employer insists that the Grievant's conduct of "tackling" Stebleton and lowering him to the floor was both unwarranted and excessive under the circumstances because Stebleton did not appear to be offering any active resistance to Barrett's efforts to help restore order among the youths assembled in the gym.

The Employer's arguments, as presented in its written closing, include the following:

The case presented to you is clear. The grievant (Louis Barrett) entered into the gymnasium and immediately confronted a youth who was compliant and standing with both of his hands on the wall as required by the signal 14 code. The grievant violently took the youth to the ground. The grievant did so despite testifying that he knows that is a violation of the R2R policy 301.05 (joint exhibit section E) to use physical force on a compliant youth. The video clearly shows that the grievant made a direct beeline towards the youth as he entered the gymnasium. It does not indicate that the grievant utilized any verbal strategies as required by the R2R policy. If the grievant is to be believed, that he gave a verbal order to the youth, it is without question proven in the video that the youth was not given time to comply with any command, as he was quickly assaulted by the grievant. The grievant insisted that he wanted to make

sure that the youth did not cause any injury to his co-worker as he was entangled with another youth on the floor. The grievant testified that the youth he took down did not have a history of violence in regards to any Juvenile Correctional Officers at the Indian River Juvenile Correctional Facility. In fact the grievant himself claimed to have an exceptional rapport with the youth. The grievant and the union would have you believe that there were riot like conditions existing in the gymnasium; however, the grievant's actions clearly indicated otherwise. The grievant could not explain why he would seek out a compliant youth rather than address any other youth who may have been non compliant at the time of his entry into the gymnasium. In fact JCO Dorothy Brown entered into the gymnasium immediately after the grievant and claimed that the gymnasium was "under control". It is clear that the grievant and union were exaggerating in their description of the atmosphere of gymnasium at the time of the event.

During cross examination the grievant was asked "if a youth disobeys an order are you allowed to force him to the floor?" His response was clear as he answered, "normally, no". He testified that he did not see the youth strike his co-worker, nor did the youth attempt to strike JCO Barrett or any other youth at the time of his being taken to the floor. The youth was not a threat to self or others nor was he attempting to escape. The testimony of JCO Barrett is clear and convincing evidence that the grievant acted inappropriately and with disregard to the policies and rules of the agency and institution. JCO Barrett was a four and one half (4 ½) year employee. The employer has an obligation to provide the youth in its charge with a safe environment. An employee who willfully violates the rules and engages in excessive and unwarranted physical interactions with the youth is not a tolerable liability. The agency maintains that the grievant acted in a manner which is adverse to the mission of the agency and the position of the Juvenile Corrections Officer. The discipline grid is clear. A violation of rule 4.14 Excessive use of force is a level four discipline. A level four is a serious infraction. The level of discipline could be nothing less than a removal when the action is determined to be unwarranted and excessive. It is significant as it is imperative that the agency maintain a safe environment while it attempts to rehabilitate the youth in its charge. A JCO who willfully violates the rules is a poor role model for youth in the charge of The Department of Youth Services. It is essential that the policies and procedures of the agency and the institution be obeyed and followed by its employees. The grievant took a violent course of action towards the youth that was clearly unwarranted and excessive. For these reasons we ask that you deny this grievance and uphold the discipline issued by the agency.

Based upon the above arguments, the Employer requests that the instant grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union's basic contention is that DYS has violated Article 24, Section 24.01 of the parties' collective bargaining agreement by failing to prove that there was, in fact, just cause to merit the Grievant's termination. The Union insists that the investigation conducted individually by Terry Smith, rather than an actual committee, was neither thorough nor fair because it did not include interviews with all of the actual witnesses to the January 2005 gymnasium incident.

The Union insists that the Grievant did not use excessive force in responding to the volatile situation but was properly responding to the call for assistance in maintaining the control and safety of the affected youths in the gym.

The Union also asserts that, even after the Grievant's conduct was determined by DYS to have violated official policies, he was still permitted to continue to work with the same youths for an additional 119 days after the actual gym incident without ever having been placed on any administrative leave.

The Union's arguments, as taken directly from its written closing, are as follows:

The Union showed today, that Management has failed to meet its burden of proof called for under Article 24 Section 24.01 to establish just cause in the case that is before you today. At this time I would like to direct your attention to each of the Management witness testimonies on cross examination.

First witness is Mr. Geis, LRO testified on cross examination when asked about why Mr. Barrett was not put on Administrative Leave instead of working five months after the incident he states, this happens frequently. He gave no evidence to whom it happened to he also testified to employees can protect themselves from imminent harm from youth and that if a J.C.O. in imminent harm from another youth another J.C.O. could intervene. He also testified that Policy (301.05 see J-G) allows employees to use their own judgment when dealing with an aggressive youth or imminent harm from the youth. Mr. Arbitrator this shows that the Union opening statement says that Management lacks that the enforcement work rules in that the Grievant was allowed to work a total of 119 days after the incident and that Management's interpretation as the Grievant in the Union would argue. The only other issue that Mr. Geis testified to was the three purposed disciplinary actions and his recollection of each draft. This shows that Management was not only indecisive on what rule was broken but which penalty should be enforced.

Second witness on cross is Terry Smith, Investigator. Mr. Smith on cross examination was asked how long he has been with the department he replied five years and was promoted as Investigator in June of 05. When asked about this particular investigation why he did not ask other employees questions surrounding this investigation he stated that they would have nothing to add because it was all on tape. When Smith was asked if youth Stebleton was compliant when he was off the wall he said no. He also testified that the youth Stebleton could have hit J.C.O. Hamilton who was on the floor with youth Arvanites he replied yes. He also testified that G.A.T. (J. Fernandez) seen on the film pulling youth Hunt by the collar across the floor was not proper. When asked if G.A.T. (J. Fernandez) should be disciplined he said yes. Mr. Arbitrator this shows that Management's investigation was flawed and that Investigator Smith never questioned other employees that were in the gym that day as the film is shown there were 10+ J.C.O.'s besides the Grievant this would all add more ground work for the Union to show how chaotic the situation was Mr. Smith's answer was that the incident that was on tape may have held more water if all the cameras were working that day although Mr. Smith agrees that youth Stebleton was not compliant for the duration of the tape he readily admitted that youth Stebleton could have been a threat to Officer Hamilton. He also admitted that G.A.T. Fernandez should have been disciplined for his actions with youth Hunt this shows that the Grievant should not have been disciplined in his actions to ward off youth Stebleton from attacking J.C.O. Hamilton in that G.A.T. Fernandez pulling youth Hunt away from J.C.O. Hamilton's situation.

Union witnesses first witness D. Lapp J.C.O. Officer Lapp testified that there was a lot of kids running around in the gym that day and he also testified that all the youth were taken from the gym and put in their rooms to see who was involved and to have them looked at by the medical department. Mr. Arbitrator this supports the Union's arguments that there was a chaotic situation in the gym that day with multiple fights and youth running around and disobeying orders.

Second witness D. Brown, Miss Brown testified consistent with her statement and that the Grievant had the youth secure and that the situation in the gym was somewhat under control.

Third witness L. Barrett the Grievant. Officer Barrett testified consistent with his statement. Mr. Barrett testified that he answered the code in the gym and upon entering he looked through the window and saw youth Stebleton standing over J.C.O. Hamilton with his hand bawled up like he was going to punch him. He yelled at the youth for the youth to get on the floor. He then attempted to use an arm shoulder lock which resulted in both of their feet getting tangled up and them falling to the floor. Officer further testifies that he stayed with the youth not on top of him but beside him on his knees still giving him directions. Officer Barrett states that the situation in the gym was out of control with multiple fights and kids running around. Officer Barrett testified throughout the Arbitration that he was following policy (301.05 Section 1) to prevent imminent and physical harm to self or other person and to preserve institution security and order. Mr. Arbitrator looking at the evidence policy (301.05 Section J-G) gives the J.C.O. latitude to respond to situations that may happen throughout the institution which states on page 3-20 (combative resistance) which states youth assaults or attempts to assault other persons. Or uses maneuvers in a manner that may result in physical harm to others. Looking at youth Stebleton's manners in the film and Officer Barrett's response to youth Stebleton's actions all fall within the guidelines of policy (301.05). The Union showed beyond reasonable doubt today that the situation in the gym was somewhat out of control and chaotic. This would have been given more weight in that all the witnesses were questioned and all the cameras were working that day. In that these two things did not happen the testimony from the Union witnesses will bare this out. If one would look at the limited view from the camera it clearly shows other J.C.O.'s coming through the door of the gym and going out of the view of the camera to deal with other youth. This is somewhat supportive by all the youth being escorted to the unit and to their rooms.

The Union closes now with the three arguments that we started with. Those being the investigation was flawed, that not all witnesses were questioned and not all the discipline was evenly handed out. The next being lacks enforcement of the work rules and that the Grievant was removed for excessive force towards youth Stebleton but allowed to work for three months after the incident with this youth. The last argument would be that Management's three proposed disciplines shows that Management was indecisive as to what was violated and also to what penalties should be served. For the above stated reasons the Grievant should be reinstated with full back pay no loss of benefits, the same shift and days off, all loss roll call holiday and over time pay from the date of removal to date of present, all sick leave, vacation and personal leave accrued from removal date, all PERS time and money reimbursed from the removal date and the removal be expunged from his record and E-Hawk file, and no break and seniority.

Based on the above, the Union requests that the Grievant be reinstated to his former position and shift as a JCO with full back pay, no loss of benefits, and restoration of seniority, so that he is made whole for all losses sustained.

DISCUSSION

As indicated, *supra*, the issue to be resolved in this arbitration proceeding is whether the Employer had "just cause" to terminate the

Grievant's employment based on the January 2005 incident. In making this determination, the arbitrator must determine whether the Employer has proved clearly and convincingly that the Grievant committed an act warranting discipline and that the penalty of discharge was appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 102 LA 555 (Bergist 1994). If the Employer does not meet that burden, then the arbitrator must decide whether the amount of discipline imposed was reasonable. In making that determination, the arbitrator may consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work record, and whether the Employer has acted consistently with regard to similar offenses committed previously by other employees. *Presource Distrib. Servs., Inc. and Teamsters Local 284, FMCS No. 96-01624* (1997).

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for "just cause," but does not define what does constitute "just cause," it is proper for an arbitrator to look at employer policies, rules, statutes, and regulations to determine whether or not a discharge is actually warranted. *E. Associated Coal Corp. and United Mine Workers of Am., Dist. 17*, 139 Lab. Arb. Awards (CCH) P 10,694 (1998). The "just cause" standard requires an employer to conduct a fair, impartial, and thorough

investigation before determining an employee's guilt and initiating discipline. It also requires the employer to impartially examine all of the evidence, including all of the circumstances surrounding the disputed conduct and possible mitigating factors which might reasonably employee's conduct. Ultimately, the "just cause" standard requires that the employer's investigation produce substantive proof of the employee's misconduct. *Yolo County Corr. Officers Ass'n and Yolo County Sheriff-Coroner's Dept., Woodland, Cal., 04-1 Lab. Arb. Awards (CCH) P 3697 (Nelson 2003).*

In this particular matter, the investigation was conducted individually by Indian River Operations Manager Terry Smith, rather than by a committee, and included written statements from the Grievant, as well as fellow employees Hamilton, Fernandez, and Jones. Facts are in dispute regarding the Grievant's actual conduct involving his use of physical force in dealing with youth Stebleton. The evidence submitted at hearing included a videotaped record of the actual incident, as viewed from a permanently mounted observation camera, which showed the activity in one section of the gym. Although the filmed evidence does show the Grievant's hand on youth Stebleton's back or neck before both individuals dropped to the floor, there is unfortunately an absence of audio, which would have indicated the level of unrest among the youths in the gym and would purportedly have reflected the specific directions

provided by Barrett to Stebleton which Barrett claimed were completely ignored before Barrett and Stebleton became physically engaged. Under the circumstances evident in the video, there is no active physical resistance initially displayed by Stebleton to merit the response made by Barrett.

Ohio courts have recognized the "objective reasonableness standard" to be employed in determining whether law enforcement personnel's conduct constitutes the use of excessive force:

When addressing excessive force claims, the reasonableness of any use of force must be judged from the perspective of a reasonable officer on the scene without the use of 20/20 hindsight vision. In considering what is reasonable, every attendant circumstance must be considered, including the severity of the offense, the threat of safety for the officer and others nearby, and any attempts by the subject to interfere with the officer's duties.

Strickland v. Tower City Mgmt. Corp., 1997 Ohio App. Lexis 5802; *Gammon v. Blakely*, 1997 Ohio App. Lexis 5424. In other words, "reasonable force" is defined in terms of what an average person looking back on an event would think was justified. Fortunately, no injuries were incurred in the January 2005 Indian River gymnasium incident, but it is obvious to the arbitrator that Barrett failed to exercise appropriate discretion in responding to the potentially volatile situation. However, the arbitrator does find that Barrett's conduct did not constitute "excessive force" and did not merit his termination from employment.

Arbitrators generally agree that, once proof of an offense has been established, the determination as to the appropriate penalty to be imposed lies within the discretion of management. *Greene County Dept. of Human Res. and Teamsters Local 957, FMCS Case No. 97/08895* (Sergent 1997). Arbitrators do not lightly interfere with management's decisions in discipline and discharge matters, but that does not suggest that they will sustain an action found to be unjust or unreasonable under the circumstances. The "just cause" principle applies to the level of discipline, as well as to the reason for the discipline in dispute. There must be some proportionality between an employee's offense and the punishment imposed. The Employer must use progressive discipline, except in the most extreme cases, and the Employer must weigh all mitigating factors, such as the employee's seniority, the magnitude of the offense, and the employee's prior work record in determining the appropriate level of discipline to impose. *Lorillard Tobacco Co., Greensboro, N.C. and Bakery, Confectionary, and Tobacco Workers Int'l Union, Local 3171T, 00-1 Lab. Arb. Awards (CCH) P 3433* (Nolan 2000).

"Progressive discipline" is defined in Ohio Administrative Code § 124-1-02(8) as follows:

Progressive discipline generally means the act of discharging an employee in graduated increments and progressing through a logical sequence, such as a written reprimand for a first offense, a short suspension for the second offense, and a longer suspension or removal for the third offense. The severity of the offense may negate the use of progressive discipline.

The intent of progressive discipline is correction, and most offenses call for warnings to be used before termination is imposed. *City of Bell Gardens (Cal.)*, 00-2 Lab. Arb. Awards (CCH) P 3489 (Pool 2000). It is a serious violation of arbitral standards not to consider an employee's past work or performance record. *City of Houston (Tex.)*, 07-2 Lab. Arb. Awards (CCH) P 8575 (Williams 1986). In the instant matter, the Grievant's past work record is void of any infractions related to his actual work performance in the Indian River facility, and there is nothing in his employment history to suggest that he could not be remediated pursuant to an opportunity to receive additional training regarding the use of appropriate control procedures and tactics. The Employer's choice to maintain the Grievant as a DYS employee continuing to work with the same youths for an extended period after the January 2005 incident and the disciplinary hearing suggest that the Employer did not find the Grievant's performance to be unacceptable in all regards or aspects. Even though no recent performance evaluation materials were presented as evidence, it appears that the Grievant's performance was generally deemed by the Employer to be of a satisfactory and acceptable nature.

As mentioned also in the arbitrator's decision regarding the termination of fellow JCO, Hamilton, a questionable disparity exists surrounding the discharge decisions in response to the conduct of both Barrett and Hamilton and the absence of any disciplinary action taken

against John Fernandez, who was also involved in the same gymnasium incident and was actually dragging a youth on the floor of the gym by the youth's own shirt. In resolving the Fernandez matter, it was determined by the Indian River Superintendent, Joe Marsilio, that Fernandez' conduct in using an "unorthodox escort technique" "constituted reasonable force under the circumstances" and merited Marsilio's rejection of the hearing officer's determination that Fernandez had violated DYS policy because the evidence gathered during the investigation of Fernandez' conduct during that same January 2005 incident "was not substantial enough to warrant further action." JCO Barrett was charged with dishonesty because the "video contradicts JCO Barrett's statement." Yet, it is also noted that Barrett stated in the Pre-D hearing that he did not remember all the details of his actions on January 12, 2005. Given the fact that what occurred involving the Grievant took place over a very short period of time and in response to a Signal 14, it is not clear that what Barrett claimed he saw when he entered the Gym (youth Stebleton standing over JCO Hamilton with clenched fists), or the techniques he thought he employed ("Arm shoulder lock" R2R) were deliberate acts of dishonesty or were mischaracterizations of what he thought he saw and what he believed he did in the heat of the moment. It is noted that Fernandez was never charged with dishonesty, although

his written statement inaccurately depicted the amount of intervention he employed during the January 12, 2005 incident.

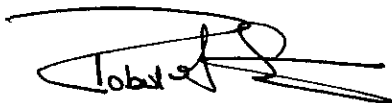
Based particularly on the disparity regarding the levels of discipline imposed, the significance of the Grievant's inappropriate response to Stebleton's activity in the gym incident, and the Grievant's previous work record with DYS, the arbitrator finds that the Grievant's summary discharge in response to this one performance offense is excessive, does not fit the "crime," and does not fundamentally comport with either progressive discipline or "just cause." However, it must be stated that the misjudgments of the Grievant in this case differ from the actions of JCO Hamilton. The seconds preceding JCO Hamilton's taking youth Arvanites to the floor are not revealed on video, and there is no audio evidence to demonstrate the level of verbal defiance that was in play at the time. Although from the prior conduct of Arvanites as depicted on the video, there is reason to believe that he was continuing to act in a belligerent and defiant fashion while JCO Hamilton was attempting to get him under control. Therefore, conclusions regarding the impropriety of Hamilton's actions are based upon a different set of facts as detailed in the arbitration decision regarding JCO Hamilton. The facts surrounding JCO Barrett's actions differ from those of Hamilton. The video clearly shows that Barrett had a choice to keep youth Stebleton against the wall in the position he is supposed to assume during a Signal 14. However, it is also

clear that moments earlier youth Stebleton came off the wall and was engaged in inappropriate conduct under a Signal 14 alarm and that Barrett witnessed this defiance. His choice to take the Youth off the wall and to the floor was presumably to prevent youth Stebleton from causing any trouble. Was this necessary or reasonable under the circumstances? What message does it convey to youth who comply with institutional directives? The totality of the evidence and testimony support a conclusion that the Grievant's actions represented a serious misjudgment that needs to be addressed with appropriate progressive corrective action as called for in the parties' Collective Bargaining Agreement.

AWARD

The grievance is granted in part and denied in part. The Grievant's discharge will be vacated and converted into a fifteen (15) day suspension without pay for violation of Rule 5.1. He shall be returned to work within two (2) pay periods from the date of this award and shall receive back pay, less fifteen (15) days, (and less deductions for W-2 income earned or unemployment paid), back benefits, and shall have his seniority bridged. The Grievant needs to understand that in spite of his best intent to calm a potentially riotous situation, his taking of a youth, who was in a proper position during a Signal 14, to the floor under the circumstances present during January 12, 2005 was a serious misjudgment that should not be repeated.

Respectfully submitted to the parties on this 1st day of June 2006.



Robert G. Stein, Arbitrator