

#1906

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: Robert Reynolds

Case No. 35-07-(2004-05-20)-00268-01-03

Date of Hearing: September 1, 2006

Place of Hearing: Scioto Juvenile Correctional Facility

APPEARANCES:

For the Union:

Advocate: Mike Hill  
2<sup>nd</sup> Chair: Karl Wilkins

Witness:

Grievant: Robert Reynolds

For the Employer:

Advocate: Mark Tackett  
2<sup>nd</sup> Chair: Steve Wolfe

Witness:

Robert, Lohr

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: October 10, 2006

## **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 Department of Youth Services ("DYS") 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, Robert Reynolds ("Reynolds"), for violating General Work Rules 103.17, Level Three (3) Rule 3.1 - Dishonesty; Rule 3.8 - Interference in an investigation; Rule 4.14 - Excessive use of force, and Rule 5.1 - Failure to follow policies and procedures.

The removal of the Grievant occurred on or about May 19, 2004, and was appealed in accordance with Article 24 of the CBA. This matter was heard on September 1, 2006, and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties on or about September 14, 2006.

## **BACKGROUND**

Reynolds was hired September 5, 1995, and was classified as a Juvenile Correctional Officer ("JCO") for DYS. Reynolds worked at the Scioto Juvenile Correctional Facility ("SJCF") which is a high security facility and one of eight (8) institutions operated by DYS. JCOs provide security related services for the youth inmates.

On February 10, 2004, the date in question, Reynolds had to correct the behavior of youth Robert Lohr ("Lohr") during the dinner meal because he failed to remove his coat. Upon exiting the cafeteria, Lohr was placed at the rear of the line so that Reynolds could observe him because

of the negative behavior that Lohr had exhibited. Upon entering the housing unit, Reynolds escorted Lohr toward the laundry room and verbally confronted Lohr about his negative behavior. According to Lohr, Reynolds slapped him when they first entered the housing unit while they were in between the housing unit doors. (Joint Exhibit (JX) 3, p.15)

Upon returning from the laundry room, Lohr was placed in his unit room whereupon he started to bang his head on the wall. The youth was removed from his room by Reynolds and placed on a couch near the Staff Podium. JCO Curtis Winn ("Winn") was on the telephone with the Operations Manager informing him of the situation after Lohr was removed from his unit room. While on the couch, Reynolds observed Lohr choking himself and after making several verbal requests to stop, Reynolds had to physically intervene. Reynolds took Lohr to the floor with a technique JCOs are trained to employ. Reynolds and Lohr heard the youth's arm emit a popping sound, whereupon Lohr was released and medical treatment was sought. Lohr had a broken arm due to the takedown by Reynolds. DYS classified Reynolds' actions as "unnecessary, excessive and repugnant" (DYS Post Hearing Closing Statement, p. 3) resulting in his removal.

During the investigatory interview, Reynolds denied escorting Lohr toward the laundry room; however, when presented with a videotape at the pre-disciplinary hearing showing otherwise, Reynolds recanted his original position. According to the Union, Reynolds could not recall every detail but Reynold's lack of recollection was due, in part, to the length of time from the incident to the investigatory interview. DYS concluded to the contrary, and asserted that Reynolds' lack of honesty, failure to assist in the investigation, and failure to provide accurate information were additional reasons to impose discipline.

On May 19, 2004, Reynolds was removed for the following violations: DYS Policy 103.17 (General Work Rules) Rule 3.1 - Dishonesty; Rule 3.8 - Interference in an investigation; Rule 4.14 - Excessive use of force, and Rule 5.1 - Failure to follow policies and procedures. At the time of removal no prior discipline existed on Reynolds' record.

### **ISSUE**

Was the removal of the Grievant from his position as a Juvenile Correctional Officer 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 actions 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 GENERAL WORK RULES POLICY NUMBER 103.17**

### **LEVEL THREE**

#### **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, i.e., State Highway patrol, state auditor, etc.

### **RULE 3.8 INTERFERENCE IN AN INVESTIGATION**

Interfering in an investigation, including but not limited to, coaching, threatening, or attempting to intimidate or alter the statements of a witness (employees, youth or the general public) and/or withholding information or knowledge concerning a possible rule infraction or law violation.

### **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 5.1 SITUATION SPECIFIC LEVEL:**

Failure to follow policies and procedures.

## **POSITION OF THE PARTIES**

### **POSITION OF THE EMPLOYER**

On February 10, 2004, upon entering the cafeteria, Reynolds grabbed youth (Lohr) by the shoulder and told him to remove his coat. Upon leaving the cafeteria, Lohr was placed in the back of the line. According to Lohr, upon entering the housing unit, Reynolds pushed him and smacked him on the left side of his face out of the presence of any witnesses.

As opposed to proceeding to Lohr's Room, Reynolds took him to the laundry room and yelled at him. Reynolds and Lohr were in the laundry for several minutes out of the presence of any other JCO or inmate. Upon leaving the laundry area, Lohr was escorted to his unit and placed in his room.

While in his room, Lohr began to hit his head against the wall. Reynolds removed Lohr from his room and placed him in a chair. Lohr was sitting in the chair with his head down and hands around his face when Reynolds slammed the youth to the floor, thereby breaking his arm. No provocation existed to justify the use of force, which was excessive and unnecessary.

The testimony offered by the youth at the hearing was credible and contradicts Reynolds' claim that he was choking himself. At the hearing, the youth testified that he was not choking himself but had his head in his hands when Reynolds took him to the floor. The testimony that Reynolds slapped him in the entry way to the unit is corroborated, in part by the video tape. The explanation behind this theory is that if Reynolds lied about escorting the youth to the laundry room, then he also must have lied about not slapping the youth. The issue of credibility should be resolved against Reynolds because he was dishonest during the investigation.

During the investigation, Reynolds denied escorting the youth to the laundry room. (JX 3, p.19) David Haynes ("Haynes"), Institutional Investigator, report indicates the following responses were provided by Reynolds on February 18, 2004.

"Q. Prior to changing youth Lohr's roommate, did you take youth Lohr to the laundry room?

A. No.

Q. Did you at any time take youth Lohr down the hallway towards the laundry room?

A. No."

(JX 3, p.19)

A videotape, however, shows Reynolds leading the youth in the hallway leading to the laundry room and subsequently entering the laundry room. (JX 3, p. 9) Due to Reynolds' failure to be honest, his conduct intervened with the investigation contrary DYS Rule 3.1- (Dishonesty) and DYS Rule 3.8 - (Interference in an investigation). Reynolds, when confronted with the video tape, claimed he did not remember escorting the youth to the laundry area.

In summary, Reynold's behavior was unacceptable in that he used excessive force to intimidate and abuse the youth to whom he has a fiduciary responsibility to protect. Moreover,

he lied during the investigation, which indicates his intent to interfere with the investigation.

Finally, Reynolds' length of service should not mitigate his removal because of the severity of the conduct.

## **POSITION OF THE UNION**

On February 10, 2004, Reynolds escorted inmate youths from the Boone Housing Unit to the cafeteria. Upon arrival, Reynolds had to correct Lohr's behavior by reminding him to remove his coat, which is required of all youths during mealtime. After dinner, Lohr was placed in the rear of the line by Reynolds to monitor his conduct on the way back to the housing unit.

Upon entering the housing unit, DYS contends that Reynolds slapped the youth out of the presence of any witnesses. Other than Lohr's testimony, no other evidence including medical records was presented at the hearing to support this allegation. Based on the reasons articulated hereafter, and primarily because of Lohr's different versions of what occurred, he was not believable as a witness.

When Lohr was placed into his room, Reynolds and JCO Winn saw him banging his head against the wall. Reynolds testified that he verbally commanded Lohr to stop this behavior on at least two occasions, to no avail. To prevent Lohr from injuring himself, Reynolds moved him from his room and placed him on a couch in front of the Staff Podium. JCO Winn, at this time proceeded to contact the Operations Manager ("OM") Mike Kline ("Kline") to inform him of the situation.

While seated on the couch, Lohr began to choke himself around the neck with his hands. Reynolds verbally told Lohr to stop several times but when Lohr refused, Reynolds was required by policy and training to intervene. In direct examination, Lohr testified that he was not hitting his head against the wall or choking himself; however, when considered with his incident report

prepared on February 10, 2004, (JX 3, p. 14) Lohr's testimony is simply unbelievable. The February 17, 2004, Q&A prepared by Investigator Haynes was also in direct conflict with Lohr's arbitration testimony.

Lohr's sworn testimony at the hearing blatantly contradicts his written statements provided in February, 2004. As such, the question remains: did Lohr lie two years ago or did he lie at the Arbitration Hearing? Somehow, Lohr expects the Arbitrator to believe he was coerced into writing his statements in February of 2004, and therefore those earlier statements should have little evidentiary value; however, if Lohr believed that his written statement of February 10, 2004, was coerced, then why was that issue not resolved two years ago with Investigator Haynes?

The excessive force claim was not proven by DYS in any manner. Reynolds used the arm bar technique to take Lohr to the floor and the rear finger flex technique for control. While Lohr was on the floor Reynolds heard a popping sound and immediately released the hold, wherein the medical staff was summoned to treat Lohr. It is unfortunate that Lohr sustained a broken arm, however Reynold's conduct was appropriate and complied with DYS's policy on use of force.

Specifically, the Union contends that Reynolds complied with DYS Policy 310.05 (JX 5) by verbally directing the youth to stop banging his head and to stop choking himself; JCO Winn contacted OM Kline to inform him of the developing situation at the time physical force was used; and Reynolds only used the techniques that he was trained to employ. Moreover, Reynolds is permitted to use force "to prevent imminent and physical harm to self or other persons." (JX 5, p.1) Unfortunately, an injury occurred, but the takedown was clean and Investigator Haynes concluded that the facts did not substantiate that "inappropriate force" caused the injury to Lohr.



(JX 3, p. 11) Management has failed to establish that just cause exist for violating DYS Rules 4.14 - (Excessive use of force) and 5.1 - (Failure to follow policies and procedures).

Whether Reynolds violated DYS Rules 3.1 - (Dishonesty) and 3.8 - (Interference in an investigation) by failing to state that he escorted Lohr to the laundry room has everything to do with memory than dishonesty. Reynolds simply did not recall, until he saw the video, that they went into the laundry room. It is also undisputed that Reynolds did not touch Lohr while they were in the laundry room. Management has not carried its burden of proof that discipline was justified for violating DYS Rules 3.1 and 3.8.

Finally, the Union points out DYS presented **no** witnesses, notwithstanding Lohr, to support its evidentiary burden in this removal. The failure of DYS to offer direct or corroborating evidence is fatal, since their only witness is incredible. Therefore, Reynolds should be reinstated with all economic and seniority rights he otherwise would have been entitled to before his removal.

### **BURDEN OF PROOF**

It is well accepted in discharge and discipline related grievances that the employer bears the evidentiary burden of proof. See, Elkouri & Elkouri – “How Arbitration Works” (6<sup>th</sup> 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's 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).

### **DISCUSSIONS AND CONCLUSIONS**

Based upon the testimony at the hearing, exhibits and Post Hearing Statements of both parties, the grievance is granted. My reasons are as follows:

DYS removed Reynolds for two distinct reasons: (1) use of excessive force with youth Lohr; and (2) lying to investigator Haynes regarding the laundry room incident. The totality of the circumstances leading to the broken arm is pivotal in determining whether Reynolds violated DYS Policy 301.05 during his physical altercation with youth Lohr.

First, Reynolds' false statements were derived during investigatory interview of February 18, 2004. (JX 3, pp. 19-20) It is undisputed that the video captured Reynolds going to the laundry area with Lohr despite his denying such conduct during his interview with Investigator Haynes. Worth noting, however, is the timeline involved: the interview occurred eight days after the incident. As before mentioned, the Union contends that Reynolds' failure to recall every detail is a normal, everyday malfunction of memory, nothing more. For reasons explained below, I find merit in the Union's contention. Although Reynold's statements were false, the impact of such statements were not material to the use of excessive force charge, nor does the evidence offer any motive for Reynolds to be deceptive about taking Lohr to the laundry room.

Reynolds was charged with dishonesty and interfering with the investigation by providing the false statements previously cited. At the hearing, DYS offered no additional evidence to support the DYS Rule 3.1 - (Dishonesty) and Rule 3.8 - (Interference in an investigation) allegations. Therefore, in effort to assemble credible facts the Arbitrator carefully

reviewed certain exhibits including Investigator Haynes report; pre-disciplinary hearing report dated April 8, 2004; Lohr's incident report dated February 10, 2004; Lohr's Q&A's dated February 17, 2004; Reynolds' Incident Report dated February 10, 2004; Reynolds' Q&A's dated February 18, 2004; Winn's Q&A's dated February 13, 2004, and the video. In addition to the above, Reynold's testimony at the hearing was also given due weight on this issue.

Reynolds has maintained since the April 8, 2004, pre-disciplinary meeting that he forgot about taking Lohr to the laundry room. Whether Reynolds forgot or not is debatable, what is undisputed, is the burden of proof required by DYS to present credible evidence to support both the charges of dishonesty and interference.

The following decisions support the principle that discharge based on the grounds of dishonesty is permissive under the appropriate circumstances. In re Yellow Freight Systems, Inc. and Teamsters Local 14, 106 LA 1062, 1066 (Briggs, 1996). In Yellow Freight, the grievant's discharge was upheld after it was discovered that his employee timecard had been fraudulently punched in for work on three full days for which he was absent. He gained three full days of salary as a result of this discrepancy and did not report the problem to management. Based on the circumstances surrounding the incident, Arbitrator Briggs found that the grievant had to have known of this discrepancy and chose to do nothing about it. The Arbitrator emphasized that he would only uphold the discharge if "absolutely convinced" of the grievant's guilt, which he was. Id.

The current case sits in stark contrast to Yellow Freight for two reasons. First, Reynolds gained no benefit from his untruthful statement during the investigation. The state of the evidence viewed in the light most favorable to DYS fails to establish that Reynolds' inability to recall the laundry room matter is synonymous to a purposeful design to deceive. Moreover,

Reynolds would have been inclined to cover up the laundry room incident if he had committed some malfeasance there; in this case, however, both parties are in agreement that nothing occurred in the laundry room that would warrant discipline for Reynolds.

Second, Reynolds' misstatement of fact is nothing more than an oversight, caused by normal memory lapse. He handles movement of multiple juveniles each day, and the investigatory interview occurred eight days after the incident in question. Consequently, based on the timeline involved, and the fact that Reynolds escorted numerous juvenile inmates over the preceding eight days, I find that faulty memory is a trait common to JCOs and other persons, and Reynolds is no different in that respect. The record as a whole fails to support a violation of Rule 3.1 for deliberately withholding or giving false information to Investigator Haynes.

Furthermore, contrary to the grievant in In re Associated Third Party Administrators and Office and Professional Employees International Union, Local 2, 109 LA 1047 (Kaplan, 1997), Reynolds has no prior record of dishonesty during investigations or otherwise. Similar to Reynold's situation, the Third Party employee was discharged after being dishonest about her whereabouts during work hours. Significant, the Third Party grievant had consistently lied in the past. Arbitrator Kaplan concluded that she left the work site to use illegal drugs, and lied to keep her drug habit from her employer. Regarding Reynolds, on the other hand, no evidence exists in the record to infer Reynolds exhibited similar dishonest conduct in the past or that he even had a propensity for untruthfulness. Furthermore, his misstatement was not an attempt to protect himself from further investigation.

Moreover, the record also contains another hole as to how Reynolds' alleged dishonest conduct interfered with the investigation. Were additional witnesses required to be interviewed by DYS? Were additional records required to be obtained by DYS due to Reynolds' conduct?

Was DYS required to use other technical equipment to gather evidence because of Reynolds' inconsistent statement? The video tape system was critical to the investigation of Reynolds. It is undisputed that DYS maintained and exercised control over the video system and its accessibility, not Reynolds. No credible evidence was offered to support a violation of Rule 3.8 for interfering with the investigation. Moreover, because I find that Reynolds did not act with dishonesty, it logically follows that I do not find he interfered with the DYS investigation.

Next, regarding the use of excessive force allegation, a review of the DYS Policy 301.05 reveals the guidelines set forth to manage youth behavior. Use of force is permissible under the following circumstances:

- Prevent imminent and physical harm to self or others
- Prevent damage to property
- Prevent or terminate escapes
- Preserve institution security and order

Depending on the circumstances, a JCO is required to use tactics that do not require physical intervention, such as verbal intervention techniques. However, JCOs are authorized to use force to prevent physical harm to oneself. The initial inquiry for resolution is whether Lohr engaged in conduct that could physically harm him on the day in question.

Lohr prepared an incident report on the date of the incident, wherein he stated in part:

“...he took me down to my room and I started to **bang my head**  
and he took me out of my room and I sat down and I started to  
**chock (sic) myself...**

(JX 3, p. 19 emphasis added)

On February 17, 2004, Lohr was interviewed by Investigator Haynes where he stated that upon returning to his room, he banged his head on the wall until Reynolds removed him. Lohr further added that while seated he grabbed himself with both hands and attempted to choke

himself because he was upset with the staff. (JX 3, p. 10) Lohr's Q&A to Investigator Haynes indicates that he squeezed his neck in an effort to choke himself. (JX 3, p. 15) JCOs Winn and Reynold's incident reports dated February 10, 2004, (JX 3, pp. 17, 21) confirm that the head-banging and choking incidents took place in their presence.

At the hearing, however, Lohr testified that on February 10, 2004, that he did not bang his head against a wall, nor did he attempt to choke himself. Lohr indicated that he had his head in his hands when Reynolds intervened. Lohr further added that his previous statements were coerced by Management. Lohr's hearing testimony is in conflict with all his prior written statements provided shortly after the incident. This testimony is also at odds with all the other evidence in the record regarding the head-banging and the choking incidents. If Lohr did not perform either of the acts, why did he neglect to inform Investigator Haynes of this on February 17, 2004? Lohr's testimony, in short, I find was not credible or believable. I also find that Lohr banged his own head against a wall and caused physical harm to himself by attempting to choke himself prior to Reynold's intervention. The use of force by Reynolds was in accord with JCO policy aimed at preventing Lohr from causing imminent harm to himself or others.

In the alternative, a different result may have occurred if the record contained any evidence that Lohr's conduct was unable to cause physical harm, and therefore Reynolds' response was excessive since no harm was imminent. No evidence was offered, however, to establish whether this type of choking was likely to cause physical harm.

The next area of inquiry for this topic is whether the use of force, while in accord with DYS protocol, was excessive. The answer is no. Prior to the use of force, JCO Winn was on the phone with OM Kline, providing an update as to what was occurring with Reynolds and Lohr. Investigator Haynes verified that this conversation occurred in his report. (JX 3, p. 9)

Interestingly, OM Kline was also not called as a witness to share the content of the phone conversation with JCO Winn which was happening as the takedown was occurring.

Moreover, Reynolds, as verified by JCO Winn, verbally directed Lohr on several occasions to stop choking himself, to no avail. When Lohr refused, Reynolds intervened and applied the takedown technique using the arm bar methodology. Once on the floor Reynolds used another technique known as the rear finger flex, for control. Both techniques were properly implemented to impose the required force to control Lohr under the circumstances by Reynolds. No evidence, including the video, indicates that Reynolds used inappropriate techniques or that the force used under the circumstances was extreme. The injury which occurred appears simply to have been an accident, and nothing more. The evidence does not support that DYS had just cause to discipline Reynolds for violation of Rules 4.14 and 5.1.

DYS had the opportunity to present testimony or other evidence such as medical records or other witnesses to meet its burden. DYS proffered no witnesses, other than Lohr. As indicated earlier, Lohr's two stark versions of what happened made him less than a credible witness. Either Lohr lied at the hearing or when he provided his written statements – it's simply impossible to know if and when he is telling the truth.

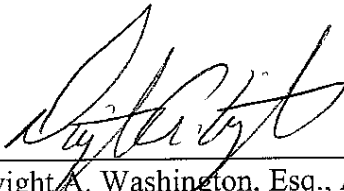
In conclusion, for the foregoing reasons, the numerous evidentiary gaps left unaccounted for by DYS convinced this Arbitrator that the burden of proof needed in this case to support the removal was absent.

## AWARD

The grievance is granted. The Grievant was not disciplined for just cause. As a result, the Grievant is entitled to the following:

1. Reinstatement with back pay (less interim earnings)
2. Back pay shall not include roll call, shift differential or holiday pay
3. No other economic benefit is awarded
4. Restoration of institutional or other applicable seniority rights.

Respectfully submitted this 10th day of October, 2006.



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Dwight A. Washington, Esq., Arbitrator