

#1910

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

**Department of Youth Services/Ohio River Valley Correctional Facility
-AND-
OCSEA/AFSCME Local 11**

Appearing for DYS

Krake, Mary Ann, Labor Relations Officer 2
Krueger, Tina, Deputy Director of Human Resources
Tackett, Mark, Labor Relations Officer 3
Whipple, Don, Senior Investigator
Wingert, Antonio, Witness
Wolfe, Stephen, Labor Relations Specialist

Appearing for OCSEA

Hamilton, Charles, JCO
Hawthorn, Wes, JCO
Justice, Dave, OCSEA Staff Representative
McIntyre, Joe, ex JCO
Meehan, Mike, Grievant
Whisman, Scott, OCSEA Chapter President

CASE-SPECIFIC DATA

Grievance Nos.

Grievance No. 35-20 (20060421-0014-01-03)

Hearings Held

August 24, 2006

Case Decided

November 14, 2006

Subject

Use of Excessive Force Against Youths

Award

Grievance Denied

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. Facts

The parties to this disciplinary dispute are the Ohio River Valley Correctional Facility ("Agency"), a branch within the Ohio Department of Youth Services ("ODYS") and the Ohio Civil Service Employees Association, AFSCME (OCSEA) Local 11 ("Union"),¹ representing Mr. Michael Meehan ("Grievant"). The Grievant joined the Agency as a Juvenile Correction Officer ("JCO") on January 3, 2000 and served in that capacity until April 7, 2006 when he was removed.

The facts and circumstances leading to the Grievant's removal are set forth below. On December 12, 2005, the Grievant and several other JCOs were working second shift and were either going on a smoke break or coming off one when they received a non-emergency call from Operations Manager Garol McCathren ("OM McCathren"). The call was issued because youth Rice was being loud and disrespectful to JCO Miranda Seth in the Gant Unit ("Gant").

Gant houses youths who misbehave excessively in the general population. Youths assigned to Gant remain in their rooms twenty-three hours a day with one hour of recreation. If they earn a phrase 2 or 3 rating, youths can regain some, if not all, of their privileges.

When the Grievant and other JCOs arrived at Gant, OM McCathren instructed the Grievant to assist in removing youths Rice and Wingert from their rooms. Other officers entered the rooms with the Grievant, handcuffed the youths' hands behind their backs, and escorted them from their cells. The Grievant did not handcuff any youths. OM McCathren then ordered the JCOs to escort youths Wingert and Rice to the mini gymnasium ("Gym"). As the JCOs walked past youth Chavarria's room en route to the Gym, the youth allegedly cursed OM McCathren, who then ordered the JCOs to handcuff youth Chavarria and take him along to the Gym. Security cameras placed along the

¹ Collectively referred to as "The Parties."

corridor leading to the Gym videotaped the JCOs and youths en route to the Gym. The cameras revealed that the Grievant escorted youth Wingert by walking behind him holding his arm or wrist in an elevated position. Apparently, to relieve the pain of being in that awkward position, youth Wingert walked in a bent-forward posture with his torso almost parallel to the floor, his head lifted back and high, and his cuffed hands slightly elevated behind his back. After being removed from their rooms, the youths were wholly compliant and obedient to the JCOs.

Once the JCOs and youths were inside the Gym, circumstances quickly worsened for the handcuffed youths, despite the presence of another security camera inside the Gym. First, the cuffs were left on and some cuffs were so tight on youths' wrists as to injure them. OM McCathren specifically instructed the JCOs not to complete any paperwork on activities involving the youths that evening. Upon entering the Gym with youth Wingert, the Grievant escorted him to a corner beneath the security camera, a "blind spot" for the camera. Some JCOs bent the youths' wrists in an upward direction causing considerable pain. At some point, youths Wynn and Amos were escorted to the Gym, where JCOs bent youth Wynn's wrists, swept his feet from beneath him, causing him to fall to the floor, and repeatedly struck him while he lay there. JCOs twice turned off the lights for a few seconds, apparently for effect. During this time, the Grievant bent youth Wingert's wrists and smashed his head against the wall. JCO Robert Gilley also abused youth Wingert. First he invited youth Wingert to head butt him so that he could "f— him up." Then JCO Gilley loosened youth Wingert's handcuffs, walked a few steps away, walked straight back, and alleged that youth Wingert had somehow secured a handcuff key and was trying to escape. JCO Gilley then bent youth Wingert's wrists, stepped on his foot, and bent his ear, while purporting to search for the "missing" handcuff key that youth Wingert allegedly placed either on or even inside

his body. Throughout this torment, the youths were forced to sing "Jingle Bells." The Gym session ended about 9:45 P.M., and JCO Gilley escorted youth Wingert back to his room, where the JCO roughly removed the cuffs, dowsed the lights in the youth's room, bent youth Wingert's wrists some more, and punched the youth who, at that point, vainly tried to defend himself from this final round of assault.

Although the foregoing discussion is not an exhaustive account of the violence and abuse that JCOs heaped upon the youths on the evening of December 12, 2005, it is clear that the atmosphere within the Gym that evening resembled some kind of "feeding frenzy."

After reviewing the videotapes of the JCOs escorting the youths to the gym and the videos of them inside the Gym with the youths, the Agency launched an administrative investigation supervised by Investigator Donald Whipple. During that investigation, the Grievant was interviewed and flatly denied having seen JCOs mistreat or abuse any youths either in the corridors leading to the Gym or inside the Gym. Upon completion of the investigation, the Agency terminated the Grievant allegedly for having violated Rule 3.8, "Failure to Cooperate" and Rule 4.12 "Inappropriate or Unwarranted Use of Force."² On April 12, 2006, the Union filed Grievance No. 35-20(20060421-0014-01-03), which challenged the Grievant's removal as being for other than just cause.³

The Parties were unable to resolve that dispute and appointed the Undersigned from their panel of arbitrators to hear the matter. On August 24, 2006, the Undersigned conducted an arbitral hearing at the Ohio River Valley Correctional Facility in Franklin Furnace, Ohio. At the outset of that hearing, the Parties stipulated, among other things, that the matter was free of procedural errors and

² Discipline Trail, at 1.

³ *Id.*

properly before the Undersigned.

All parties relevant to the resolution of this dispute attended the arbitral hearing and both Parties were afforded a full and fair opportunity to present admissible evidence and arguments supporting their positions in the instant dispute. Specifically, the Parties were permitted to make opening statements and to introduce admissible documentary and testimonial evidence, all of which was available respectively for relevant objections and cross-examination. Finally, the Parties had a full opportunity to submit either closing arguments or post-hearing briefs. They opted for the latter and selected e-mail as their exchange medium obviating the need for the Undersigned to exchange briefs between the Parties. Upon receipt of the final e-mail, the Undersigned closed the record.

II. The Issue

The Parties submitted the following issue: Was the Grievant removed for just cause, and if not what should the remedy be?

III. Relevant Contractual Language and 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.

24.02-Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Rule 3.8 - Failure to cooperate-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 4.12-Inappropriate or unwarranted use of force-Use of inappropriate or unwarranted force toward any individual under the supervision of the Department or a member of the general public.

IV. Summaries of Parties' Arguments

A. Summary of Agency's Arguments

1. The Grievant was removed for just cause.
2. While escorting youth Wingert to the Gym, the Grievant pulled up on the youth's hands and arms, thereby forcing the youth to bend forward to relieve the pressure on his wrists.
3. Movement of youth for punitive purposes is explicitly prohibited.
4. The Union failed to produce consistent persuasive testimony to support its case.
5. Indeed, the Union's evidence from the County Children Services Agency concluded that the Grievant was lifting up on youth Wingert's arms while escorting him to the Gym.
6. The Grievant used excessive force against youth Wingert.
7. The Grievant's six years of service aggravates rather than mitigates the circumstances surrounding his removal, given his training in the proper use of force against youth. Removal, in this case, was commensurate with the Grievant's established misconduct.

B. Summary of Union's Arguments

1. The Grievant was removed for other than just cause.
2. Investigator Whipple offered no direct evidence to support the conclusions and allegations against the Grievant.
 - a. JCOs did not force the youth to sing "Jungle Bells" in the gym.
 - b. Nothing in the videos showed the Grievant lifting up on youth Wingert's wrists, handcuffs, or arms.
 - c. Instead, youth Wingert was voluntarily bending over as the Grievant escorted him to the Gym. Video 200000012, Time 8:14:17 shows youth Wingert's hands lying against his back.
 - d. Video 20000003 8:00 P.M. - 9:00 P.M. and 21000003 9:00 P.M. to 9:45:41 establishes that the Grievant did not bend youth Wingert's wrists.
 - e. Several JCOs were eye witnesses to all of the events in question and specifically testified that the Grievant never lifted up on youth Wingert's handcuffs, wrists, or arms.
 - f. Nor did the Grievant interfere with the investigation. Instead, he affirmatively assisted it.

V. Analysis and Discussion

A. Evidentiary Preliminaries

Because this is a disciplinary dispute, the Agency has the burden of proof or persuasion regarding its charges against the Grievant. To establish those charges, the agency must adduce *preponderant* evidence in the arbitral record as a whole, showing that *more likely than not* the Grievant engaged in the alleged misconduct. Also, because the Agency has the burden of persuasion, doubts about the existence of any alleged misconduct shall be resolved against the Agency. If the Agency fails adequately to establish the alleged misconduct in the first instance, it cannot prevail, *irrespective of*

the strength or weakness of the Union's defenses. Similarly, the Union has the burden of persuasion (preponderant evidence) regarding its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

B. Impact of Videos

1. Youth Abuse in Corridor

Although the Parties produced a rather voluminous record in this case, there are three basic issues. First, whether the Grievant lifted up on youth Wingert's arm while escorting him to the Gym. Two pieces of direct, documentary evidence address this issue: footage from cameras in the hall leading to the Gym, and footage taken inside the Gym. The Union argues that both videos on December 12, 2005 absolutely exonerate the Grievant of any alleged excessive force against any youth, including youth Wingert. In contrast, the Agency stoutly contends that footage from the corridor video clearly shows the Grievant lifting up on youth Wingert's arm or wrist, causing him to bend over almost parallel to the floor as he walked toward the gym. Also, the County Children Services Agency concluded that the Grievant indeed lifted up on youth Wingert's wrists or arms as he escorted the youth through the corridor.

After scrutinizing the videos with the greatest of care, the Arbitrator concludes that, while the footage is not crystal clear, it does show the Grievant lifting up on youth Wingert's arm as he escorted the youth to the Gym. In support of this conclusion is the fact that youth Wingert is bent over almost to a right angle with the floor as the Grievant escorts him to the Gym. Although the Union claims that youth Wingert is bent over of his own volition, the question remains why would the youth assume such an abnormal position? Ultimately, youth Wingert's posture is wholly consistent with posture that one would assume to relieve upward pressure placed on the wrists or arms in handcuffs. Consequently, the Arbitrator holds that more likely than not, the Grievant placed

upward pressure on youth Wingert's wrists/arms and to escape that pressure and pain, youth Wingert bent forward as he walked toward the Gym.

2. Youth Abuse in Gym

Having concluded that the Grievant bent youth Wingert's wrists up, the next issue is whether the Grievant abused youth Wingert inside the Gym. At the outset, one notes that footage from cameras inside the Gym are completely indeterminate as to whether the Grievant either bent youth Wingert's wrists or pushed his head against the wall. Therefore, the Arbitrator holds that footage from within the Gym does not advance the resolution of this issue for either side.

One is, therefore, left with the testimony of youth Wingert and the Grievant. The Union points out that youth Wingert is a gang member who offered unsubstantiated testimony regarding his treatment in the Gym. The Agency, of course, insists that youth Wingert was a credible witness.

Although youth Wingert was not perfectly consistent, he was nevertheless a credible witness. Not once during his testimony did youth Wingert so much as flinch or blink nervously when confronted with probing questions on both direct and cross-examination. He offered no evasive or dissembling answers to any questions. This type of general honesty on the witness stand lends substantial credibility to the particulars of youth Wingert's testimony. In addition, the written statements of other youths corroborate youth Wingert's testimony in many respects. For example, youth Wynn's written statement about his abuse in the Gym coincides rather closely with how youth Wingert said the JCOs treated youth Wynn. Also, the written statement of JCO Martin tends to corroborate youth Wingert's testimony about the nature of events in the Gym. JCO Martin stated that he observed other JCOs abusing youths and that he joined in. Indeed, the record is replete with testimonies from other youths claiming to have been roughed up or abused inside the Gym. One

simply cannot ignore the consistency of their written statements, especially where, as in this case, they had little or no opportunity either to conspire or to fabricate false stories. Finally, according to the Union's witnesses, nothing—or almost nothing—untoward occurred either in the corridor leading to the Gym or in the Gym. However, a preponderance of evidence in the record flatly rebuts their position.

3. Grievant's Participation in Administrative Investigation

The Agency claims that the Grievant interfered with or otherwise undermined its administrative investigation, essentially by withholding information. Specifically, the Agency claims that the Grievant lied about not having seen other JCOs abuse youths. Clearly, it is unlikely that the Grievant witnessed absolutely no misconduct, given the number and magnitude of events on December 12, 2005. Still there is no absolute proof to countermand the Grievant's claim, so it must stand.

In addition, the Agency asserts that the Grievant failed to report the abuse that occurred in the Gym. Here the Union correctly argues that the Grievant did not report any of the events of December 12 because he followed OM McCathren's direct order not to report those events. Although an employee cannot always successfully shelter his misconduct beneath the mantle of a supervisory order, in this case, one cannot reasonably expect an employee to disobey a direct order from his supervisor. Consequently, the Arbitrator holds that the Agency failed to prove that the Grievant somehow interfered with or otherwise hampered its investigation of the December 12 events.

VI. Penalty Decision

Because the Agency established that the Grievant engaged in misconduct, some measure of discipline is appropriate. Assessment of the proper quantum of discipline involves an evaluation of

the mitigative and aggravative factors in this dispute and ultimately a determination of whether removal is unreasonable, arbitrary, capricious, or discriminatory under the circumstances of this case.

A. Mitigative Circumstances

The strongest mitigative factors for the Grievant are his six years of tenure, job performance, which is above average, and his discipline-free work record. The Arbitrator also notes that the Grievant won an award for "JCO of the Month" for June 2004, all of which is commendable.

B. Aggravative Circumstances

The weightiest aggravative factors are the nature and responsibility of the Grievant's position as a JCO. In this position, the Grievant should and must be held to a somewhat higher standard than other employees. One hardly needs to recall that JCOs may not behave like some of their charges. In this case, the Grievant deliberately used excessive force on a youth who was totally complying with the Grievant's directives. What more could the youth do?

The other major aggravative factor is the nature of the Grievant's misconduct: physically abusing youth. Again, as a JCO, the Grievant is a role model for the youths, yet, what kind of example did he set on the evening of December 21, 2005? Are the youth to follow his example? One would hope not.

Finally, the Agency argues that the Grievant's six years of service should be an aggravative factor because he should have known not to embrace such destructive, unacceptable behavior. The Arbitrator cannot agree that the more tenure an employee has the less secure his job if he should engage in misconduct. Such a rule would turn remedial analysis, not to mention a long-lived arbitral principle and major benefit of tenure or seniority, on its ear.

Ultimately, the nature of the Grievant's misconduct and the abuse of his position as JCO warrant

his removal, even though the Agency's penalty table does not absolutely demand that measure of discipline. Under these circumstances, the Grievant's continued employment with the Agency is inconsistent with its policy and fundamental mission.

VII. The Award

For all the foregoing reasons, the Grievance is **DENIED IN ITS ENTIRETY.**

Respectfully,

Robert Brookins

Robert Brookins, Professor of Law, Labor Arbitrator, J.D., Ph.D.