

McQuithy Opinion and Award

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

Hepper, Melinda, DYS/C.O. - LRO
Herriott, Kathleen, Witness/Investigator
Krake, Mary Ann, DYS/ORVJCF - LRO
Krueger, Tina, Deputy Director for H.R. -
Lindamood, Robert, Operations Manager
Trejo, Joe, OCB 2nd Chair

Appearing for OCSEA

Beals, Jody, JCO
Bowley, Donard, JCO Staff Representative
DuBois, James, JCO
Justice, David, OCSEA Staff Representative
Krueger, Tina, Deputy Director of Human Resources
McQuithy, John, Grievant
Whisman, Scott, Chapter President
Yates, Kathy, JCO

CASE-SPECIFIC DATA

Grievance Nos.

Grievance No.35-20-20060720-0024-01-03

Hearings Held

November 14, 2006

Case Decided

February 10, 2007

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. The Facts

1 The parties to this disciplinary dispute are the Department of Youth Services, Ohio River Valley Juvenile
2 Correctional Facility ("ORV" or "Agency") and Ohio Civil Service Employees Association AFSCME Local
3 11 AFL-CIO ("Union"), representing John McQuithy ("Grievant"). ORV is a high security juvenile
4 correction facility that houses 327 juvenile offenders. The Agency hired the Grievant as a Juvenile
5 Corrections Officer ("JCO") on March 22, 2004 at the Ohio River Valley Juvenile Correctional Facility and
6 removed him on July 11, 2006, approximately twenty-seven months later, for violating General Work Rule
7 Policy 103.17:3.7 "Failure to Report Physical Force or Verbal Abuse" and 4.12 "Inappropriate or
8 Unwarranted Use of Force."¹ During his tenure with ORV, the Grievant maintained a satisfactory record
9 of job performance. Comments in his evaluations included "follows policy and procedure," "will ask if not
10 certain," "performs duties in a professional manner," "is a team player," and "works well with coworkers
11 and supervisors."² Also, the Grievant had no active discipline when the Agency removed him.

12 The McKinley Unit houses mentally challenged youths. The Agency placed Youth Cooley in the
13 McKinley Unit in an isolation cell after he assaulted other JCOs in the Grant Unit, which houses chronic
14 disruptive violent youths for intensive programming.

15 The Grievant's troubles began on April 6, 2006 when he encountered Youth Cooley, a twenty-year-old,
16 5' 8" male, weighing 200 pounds with a history of assaulting JCOs. In fact, Youth Cooley has been indicted
17 for assaulting a JCO. On April 6, 2006, the Grievant was scheduled to work first shift from 6:00 AM until
18 2:00 PM in the Edison Unit, which was his bid position. However, he day traded out of his bid position to
19 work a double shift. He worked the first eight hours in Edison, and during the second eight hours, he served
20 as relief officer in the McKinley Unit with JCO Kathy Yates. On April 6, 2006, Youth Cooley began kicking

¹ Discipline Trail, at 1.

² Joint Exhibit 5.

1 his door and yelling. Staff summoned Operations Manager, John Terry ("OM Terry") who went to Youth
2 Cooley's cell, spoke to him, and calmed him down. Subsequently, however, Youth Cooley became upset
3 after receiving his snack. He smashed his milk and juice containers against his cell wall, and rubbed his
4 peanut butter sandwich on the window and floor of his cell. Although OM Terry was in the area, he did not
5 intervene because Youth Cooley was fully visible in his cell and posed no risk to himself or to others.

6 Shortly thereafter, Youth Cooley began kicking his cell door again. When the Grievant walked over to
7 check on him, the Youth threatened to kill himself. The Grievant reported this threat to JCO Yates who
8 noticed that Youth Cooley had smeared hair grease or gel over his body and on the floor of his cell. JCO
9 Yates also noticed two fresh scratches on Youth Cooley's neck. JCO Yates alerted OM Terry of this
10 situation, whereupon he obtained a video camera and proceeded to Youth Cooley's cell. Supervisors
11 customarily use video cameras to record the process of removing youths from their cells ("cell extractions").
12 Although the Grievant had participated in some cell extractions, he had received no formal training in that
13 process and had not engaged in a cell extraction with only one other JCO.

14 Upon arriving at Youth Cooley's cell, OM Terry repeatedly asked the Youth to place his hands through
15 the bars for handcuffing, but the Youth profanely refused. OM Terry decided that he and the Grievant should
16 perform a cell extraction to keep Youth Cooley from injuring himself. Accordingly, he handed the video
17 camera to JCO Yates to record the cell extraction. OM Terry and the Grievant then entered the cell and
18 Youth Cooley backed up against the rear cell wall, verbally indicating he did not want to be handcuffed.
19 When the Grievant and OM Terry approached him and tried to turn him to handcuff his hands behind his
20 back, Youth Cooley violently resisted, and an intense, awkward struggle ensued because the officers could
21 not get a grip on the Youth's greased body and had difficulty maintaining their footing on the greased cell
22 floor. Sometime during the struggle against the wall, Youth Cooley bit the Grievant's forearm. OM Terry
23 then grabbed the Youth's leg and he and the Grievant took the Youth to the floor on his back. From that

1 position, however, Youth Cooley fiercely resisted the officers' attempts to roll him over and handcuff him
2 from behind. As the Youth lay on his back with OM Terry straddling him, the Grievant stood to the left of
3 the Youth, pressing various parts of his body against the floor to control him. Youth Cooley became
4 increasingly agitated and spat on the Grievant and cursed the officers. Despite their best efforts, the officers
5 could not turn the Youth on his stomach and handcuff him from behind. Finally, they had to settle for
6 handcuffing him from the front.

7 However, that handcuffing did not completely control the Youth, who then spat on the Grievant and tried
8 to bite his hand. As the officers tried to lift Youth Cooley to his feet, he began kicking the Grievant's leg.
9 Having lost his composure, the Grievant, immediately and instinctively kicked Youth Cooley in his torso.
10 They traded two such kicks. The struggle continued and Youth Cooley spat on the Grievant, who then kicked
11 the Youth in his chest area. Youth Cooley reacted delivering two more unanswered kicks to the Grievant's
12 leg before OM Terry instructed the Grievant not to kick the Youth. Youth Cooley continued struggling with
13 the officers, successfully resisting their combined efforts to lift him to his feet. Finally, OM Terry told JCO
14 Yates to call for assistance, and three officers responded.

15 Undaunted, Youth Cooley viciously struggled, kicking at OM Terry and the Grievant, and resisting all
16 efforts to stand him up. OM Terry ordered an officer to place the Youth in leg irons. Although Youth
17 Cooley never relented, the officers were able to secure him with the leg irons, get him to his feet, extract him
18 from his cell, and take him to a "safe" room. Even there, Youth Cooley continued to struggle with medical
19 personnel as they tried to raise his shirt to examine his torso. Ultimately, officers were obliged to take Youth
20 Cooley to the floor again and forcibly pull up his shirt so that the medical staff could physically inspect his
21 torso. During the cell extraction, the Grievant suffered a serious bite to his forearm, a punch to his jaw and
22 eye, a lacerated lip, and kicks to his leg. In addition, Youth Cooley repeatedly spat on the Grievant.

23 Afterward, the Grievant was anxious to report to the emergency room of the hospital to have the bite

1 treated. Nevertheless, regulations required him to complete an incident report before leaving the area. When
2 completing the report, he failed to state that he kicked Youth Cooley but did report that the Youth had kicked
3 him.

4 ORV has strict policies and regulations regarding the use of force against youths under the Agency's
5 care. DYS trained the Grievant in approved response and resistance techniques, and gave him annual
6 refresher training.

7 ORV fired the Grievant for excessive use of force and for failing to report the use of force against Youth
8 Cooley. The Union responded with Grievance No. 35-20-(2006-06-07)-0024-01-0-3, claiming, among other
9 things, that the Grievant was not removed for just cause. The Parties reached impasse in the dispute, the
10 Union demanded arbitration, and the Undersigned was selected to hear and resolve the matter. The
11 Undersigned heard the matter on November 14, 2006. At the outset of that hearing, the Parties agreed that
12 the dispute was free of procedural errors and properly before the Undersigned. All parties relevant to the
13 resolution of the dispute attended the arbitral hearing. Throughout the hearing, the Undersigned afforded
14 the Parties a full and fair opportunity to present admissible evidence and arguments supporting their
15 positions. Specifically, the parties made opening statements and submitted admissible documentary and
16 testimonial evidence. The latter were subject to relevant objections and cross-examination. At the close of
17 the hearing, the Parties agreed to e-mail their Post-hearing Briefs to the Undersigned by November 27, 2006.
18 The Parties submitted their Post-hearing Briefs, and the Undersigned closed the record.

19 II. The Issue

20 The Parties agreed upon the following issue: Was the Grievant, John McQuithy, removed for just cause?
21 If not what shall the remedy be?

22 III. Relevant Contractual and Regulatory Provisions

23 ARTICLE 24-DISCIPLINE

24 24.01 -Standard

25 Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the
26 burden of proof to establish just cause for any disciplinary action.

24.02- Progressive Discipline

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

24.06 -Imposition of Discipline

Disciplinary measures shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

EMERGENCY DEFENSE RESPONSE

Staff are authorized to use this response in the *most narrow of circumstances* when:

1. all other attempts to control the youth and defend oneself have failed **AND**
2. the resistant youth has superiority over or is gaining physical control of staff **AND**
3. there is a risk of serious physical harm to staff.¹³

Combative Resistance– Youth assaults or *attempts to assault* other persons, or uses a maneuver in the manner that may result in physical harm to others (i.e.: punching, kicking, biting, elbowing, or throwing objects), or serious physical harm to others (i.e., actions that create a substantial risk of death). . . .¹⁴

Active Resistance– . . . This type of resistance also includes noninjurious actions such as . . . *spitting*. . .

Definitions

Reasonable Response to Resistance– That degree of *intervention* or level of *response* which is *consistent with the level of resistance displayed by the youth*, when staff are in the process of *protecting self*, others, property, or to preserve institution safety and security. Staff shall use the *least restrictive level of response* that is reasonably expected to be effective under the circumstances. Staff will choose a *reasonable level of response to gain control* of the situation *based on departmental policy*, their *physical capabilities/characteristics*, *experience*, assessment of the situation, and the *youth's capabilities/characteristics*.¹⁵

Verbal Resistance – Youth verbally refuses to comply with staff requests or attempts to control a situation. Youth may threaten staff with further resistance or may not respond to staff. Youth dialogue which offers the threat of physical resistance to staff's command is not normally considered active resistance until the youth physically resists control. If dialogue is in the form of threats of physical injury, staff shall request additional assistance.

Active Resistance – Youth makes physically evasive movements to defeat staff's attempt to gain control, i.e.: bracing, tensing, attempting to push or pull away from staff, but never attempt to strike staff. This type of resistance also includes throwing feces, urine, water and spitting and minor destruction of property such as scratching or marking room walls, floors, and fixtures.

Destructive Resistance –Youth engages in behavior that could result in physical harm to self. . . .

¹³ Joint Exhibit 7, at 12.

¹⁴ Joint Exhibit 7, at 3.

¹⁵ Emphasis added.

Combative Resistance – Youth assaults or attempts to assault other persons, or uses a maneuver in a manner that may result in physical harm to others (i.e.: punching, kicking, biting, elbowing, or throwing objects), or serious physical harm to others (i.e.: actions that could create a substantial risk of death). This level of resistance also includes a youth's escape or attempt to escape.

Staff Response: Physical Response

Physical actions taken by staff, either immediate or calculated, to the body of a youth in such a way to limit the youth's physical activity. Staff's physical actions shall not be punitive. This level of response encompasses Escort, Control, *Self-Defense Techniques*, and *Emergency Defense Responses*.¹⁶

Physical Harm to Self or Others – an injury regardless of its degree or duration.

The Union refers to the arbitration *The State of Ohio, Department of Mental Health vs. OCSEA/AFSCME Local 11*, Case No. 23-09(89-06-23)-123-01-04. Arbitrator Harry Graham.

Policy Number 301.05

I. Policy Provisions

* * * *

Staff response must be *reasonable and consistent with the degree of resistance* being demonstrated by youth. When responding to a youth's level of resistance, staff shall utilize the *least restrictive response* likely to be effective under the circumstances to gain control of the youth. Staff may use force or control situations involving the following:¹⁷

* * * *

- To prevent imminent and *physical harm to self or to other persons*.¹⁸

IV. Summaries of Parties' Arguments

A. Summary of Union's Arguments

1. The Grievant acted properly.
 - a. The Grievant kicked Youth Cooley in self defense, and the Agency allows JCOs to use physical force to defend themselves.
 - b. The Grievant was trapped and could not escape Youth Cooley's kicks. In any event, the Grievant would not have left his Partner.
 - c. The Grievant was in an emergency situation.
 - d. Youth Cooley verbally resisted the Grievant and OM Terry.
 - e. Youth Cooley actively resisted the Grievant and OM Terry.
 - f. Youth Cooley engaged in combative resistance.
 - g. The Grievant was attempting to prevent Youth Cooley from hurting himself, the Grievant, and OM Terry.
2. Removal is an unduly harsh measure of discipline in this case and violates Article 24.01.
3. Management violated Article 24.02 by not progressively disciplining the Grievant.
4. Management violated Article 24.06 by removing the Grievant.
5. Management ignored mitigating factors when removing the Grievant.

¹⁶ (emphasis added).

¹⁷ (emphasis added).

¹⁸ (emphasis added).

6. OM Terry displayed poor judgement by attempting to extract Youth Cooley from his cell with only two JCOs, given the Youth's violent history. This judgmental error unnecessarily jeopardized the Grievant, OM Terry, and Youth Cooley.
7. Make the Grievant whole. Return him to work with all contractual entitlements, including all backpay, benefits, seniority, medical expenditures, holiday pay, and all leave balances (sick, personal, and vacation) he would have accrued but for his wrongful removal.

B. Summary of Agency's Arguments

1. By kicking Youth Cooley, the Grievant violated the Agency's policies and rules covering abuse and use of force.
 - a. When the Grievant and Youth Cooley exchanged kicks, Youth Cooley lay handcuffed on his back on the floor. This situation did not warrant self-defense and/or emergency tactics because Youth Cooley was not at risk and could not gain superiority over either the Grievant or OM Terry.
2. The Agency trained the Grievant on the use and abuse of force against youths.
3. Removal is the proper measure of discipline in this case
 - a. The Grievant's reaction to Youth Cooley proves he is unfit to be a JCO. If the Grievant felt the instinct to kick Youth Cooley, what might he instinctively do the next time?
5. The Undersigned has held that "JCOs ...are held to a somewhat higher standard than other employees..." and "...JCOs may not behave like some of their charges..." That is exactly what the Grievant did in this case."
6. The Grievant violated Rule 3.7 by failing to report that he had kicked Youth Cooley.

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. Nature of Agency's Use-of-Force Policy

The Agency's has promulgated Policy No. 301.05 which is its Use-of-Force Regulatory Scheme. Policy

No. 301.05 contains the three groups of guidelines that address the use of force against youths: (1) A hierarchy of levels of youth resistance, (2) A hierarchy of levels of staff responses keyed to the hierarchy of levels of youth resistance, and (3) A list of definitions that further explains or delineates the levels of youth resistance and staff responses.⁹ This entire regulatory scheme rests on a common specific behavioral foundation or focus: (1) The level of force used, and (2) The purpose, goal, or motive for which the force is used. The fundamental rule regarding the level or quantum of force used states: “Staff responses must be *reasonable* and *consistent* with the *degree of resistance* being demonstrated by the youth.”¹⁰ And with respect to the purpose for which force is used, the rule states “When responding to a youth’s *level of resistance*, staff shall utilize the *least restrictive* response likely to be *effective* under the circumstances to *gain control* of the youth.”¹¹

Thus, there is a flexible, situational limit or cap on the level of force that staff may use against youths in any given set of circumstances. For all practical purposes, that cap is inextricably yoked to the level of a youth’s resistance and the level needed to control the youth. Thus, staff should modulate the level of force used against youths to the quantum needed to control the youth. Quantum and control constitute the Agency’s behavioral loadstar.

Finally, Policy No. 301.05 addresses *when* (under what specific circumstances) staff may use force against youths. In the instant case, the relevant rule provides that, “Staff may use force to control situations involving the following: to prevent *imminent* and *physical harm to self* or to *other persons*.”¹² With these principles in hand, the Arbitrator now assesses the Parties’ arguments and positions regarding whether kicking Youth Cooley was permitted in this case.

⁹ Joint Exhibit 7, Policy No. 301.05, Tab “B,” at 1-20.

¹⁰ Joint Exhibit 7, Policy Number 301.05, Section I.

¹¹ *Id.* (emphasis added).

¹² *Id.* (emphasis added).

C. Propriety of Grievant's Kicks
1. Grievant's Kicks as EDR

The issue here is whether the circumstances surrounding the Grievant's kicking Youth Cooley qualifies as an EDR. Because an EDR involves some of the most forceful responses that staff can use against a youth, the Agency narrowly construes the circumstances under which EDRs are permissible. The first criterion for using an EDR is that a youth must have exerted "combative resistance."¹³ In its Post-hearing Brief, the Agency concedes that Youth Cooley engaged in combative resistance by, for example, kicking the Grievant.¹⁴ Nevertheless, the Agency stoutly insists that it is never appropriate for staff to kick youths. Moreover, according to the Agency, the situation did not justify use of an EDR because Youth Cooley was handcuffed on his back on the floor when the Grievant kicked him.

Although the Union does not specifically argue that the Grievant was entitled to use an EDR, or that kicking Youth Cooley was an EDR, it does argue that the Grievant was in an emergency situation because he feared for his safety and could not exit the cell without risking being kicked in more sensitive areas of his body. Also, the Agency stresses that EDRs are authorized only, "in the *most narrow of circumstances* when:

1. all other attempts to control the youth and defend oneself have failed **AND**
2. the resistant youth has superiority over or is gaining physical control of staff **AND**
3. there is a risk of serious physical harm to staff.¹⁵

The Agency also stresses that satisfaction of all three criteria is a precondition for using "EDRs." Arguably, the circumstances surrounding the Grievant's kicking Youth Cooley satisfied the first and third criteria. When the Grievant was being kicked, he was in a corner with OM Terry partially blocking the path to the door of the cell. Furthermore, as the Grievant testified, his only exit from the cell would have brought him within range of Youth Cooley's kicks, one or more of which could have struck the Grievant in the groin or

¹³ Joint Exhibit 7, at 2, Policy No. 301.05 Section III, "Response to Resistance Continuum."

¹⁴ *Id.*, at 3.

¹⁵ Joint Exhibit 7, at 12.

1 some other sensitive area.

2 However, these circumstances clearly do not satisfy the second criterion. Nothing in the arbitral record
3 suggests that Youth Cooley either had or was likely to *gain superiority* over either the Grievant or OM Terry.
4 As the Agency correctly stresses, the Youth was handcuffed and laying on the floor on his back.
5 Accordingly, the Arbitrator holds that the Grievant had no authority or right use an EDR against Youth
6 Cooley when he kicked the Youth Cooley three times; therefore, the kicks are not protected as EDRs.

7 2. Grievant's Kicks as Self-defense Response

8 The Union contends that the Grievant kicked Youth Cooley in self-defense to avoid further injuries from
9 the youth who had already bit the Grievant's forearm and kicked his leg. The Agency does not explicitly
10 address whether the Grievant acted in self-defense, but it does broadly classify the Grievant's kicking Youth
11 Cooley as: "egregious," "punitive," "reactive," "improper," and "intolerable." Also, under direct
12 examination, Ms. Tina Krueger testified that "Kicking is not an ODYS-approved tactic and is *never*
13 appropriate."¹⁶ Certainly, these comments suggest that the Agency does not concede that the Grievant kicked
14 the Youth in self-defense, even though, in its Post-hearing Brief, the Agency admits that Youth Cooley's
15 conduct in the cell constituted "combative resistance." Furthermore, the "Response to Resistance
16 Continuum" permits "self-defense techniques" as responses to "combative resistance."¹⁷ Consequently, the
17 issues are: (1) whether kicking can be an authorized self-defense response to combative resistance under any
18 circumstances; and (2) if so, whether the Grievant's kicking Youth Cooley qualifies as a self-defense
19 response.

20 For the reasons set forth below, the Arbitrator holds that kicking is not an authorized self-defense
21 response and that the Grievant's three kicks to Youth Cooley's body do not qualify as self-defense responses.

¹⁶ Testimony of Ms. Krueger (emphasis added).

¹⁷ See Joint Exhibit 7, at 2.

1 First, kicks are a form of “force,” and staff may use “force to control situations . . . [in order] . . . to prevent
 2 imminent and physical harm to self or other persons.”¹⁸ As a category of “Staff Response”¹⁹ “Physical
 3 response” is the closest reference to “force.”²⁰ And “Physical response” is specifically defined as
 4 “[P]hysical actions by staff, either immediate or calculated, to the body of the youth in such a way to limit
 5 the youth’s physical activity. Also, “Staff’s physical actions shall be nonpunitive”²¹ This level of response
 6 encompasses . . . self-defense techniques.”²² Thus self-defense responses are forms or subsets of “physical
 7 actions,” which entail the use of force.²³

8 At this point in the analysis, the issue is whether kicks are a recognized or authorized form of “physical
 9 action.” Before examining Policy No. 301.05, the Arbitrator notes that Ms. Krueger offered un rebutted direct
 10 testimony that “Kicking is not an ODYS-approved tactic and is *never* appropriate.”²⁴ Although Ms.
 11 Krueger’s opinion has probative value with respect to the permissibility of kicking as a physical action, it
 12 is not dispositive of that issue.²⁵

13 If the Agency is to prohibit kicks as a form of “physical actions” under Policy No. 301.05, then that
 14 Policy must afford staff explicit or implicit notice of that prohibition. Since Policy No. 301.05 does not
 15 expressly mention kicks, one must look for implicit references that approve or disapprove that type of

¹⁸ *Id.*, at 1 (Policy No. 301.05, Section I). Also, the Union argued that the Grievant was attempting to prevent Youth Cooley from hurting himself. Although that is a legitimate reason to use force, that reason did not relieve the Grievant of the duty to use the proper quantum of force and for the proper purpose of controlling the Youth.

¹⁹ Joint Exhibit I, at 3-4 (Policy No. 301.05, Section III).

²⁰ *Id.* at 3. (Policy No. 301.05, Section III).

²¹ *Id.*

²² *Id.* at 3 (emphasis added).

²³ In some instances of violence, provocation is an affirmative defense. With respect to unwarranted or inappropriate force against youth, however, Policy No. 301.05 neither implicitly nor expressly contemplates provocation as an affirmative defense.

²⁴ Testimony of Ms. Tina Krueger.

²⁵ Nor is there evidence that any training the Grievant received explicitly permitted or prohibited kicking as a “physical action.”

1 “physical action.”¹²⁶ As discussed, above, guidelines in Policy No. 301.05 generally require staff to use the
 2 least amount of force necessary to control youths.¹²⁷ This general requirement applies to any form of
 3 “physical action” or force, including kicks.

4 3. Force of Grievant's Kicks

5 Therefore, to qualify as an approved “physical action,” the Grievant's kicks must have been the least
 6 forceful form of “physical action” available. The Grievant's own testimony is dispositive of this issue.
 7 During the arbitral hearing, the Grievant testified that after he was bitten, he “lost it” and instinctively kicked
 8 Youth Cooley. On its face, this statement clearly reveals that the Grievant did not select kicking as a form
 9 of “physical action” because it was the least forceful of the available “physical actions.” Indeed, the Grievant
 10 does not even claim that he considered whether kicks were the least forceful response to Youth Cooley's
 11 “combative resistance.” Instead, his testimony establishes that he “lost it” and kicked Youth Cooley out of
 12 instinct and frustration. In other words, any modulation of the force of the kicks was purely incidental.¹²⁸
 13 In addition to the Grievant's testimony, the video of the event corroborates this conclusion. The Grievant
 14 merely responded in kind out of frustration and/or loss of temper. The force of his kicks was random.

¹²⁶ Indeed, the categorical and absolute exclusion of kicking as a physical action is most likely an overstatement. If, for example, a JCO's life was at risk, one might view kicking as being infinitely preferable or appropriate relative to other more lethal and/or debilitating authorized techniques the JCO might use.

¹²⁷ See, e.g. Policy No. 301.05, Section III, which requires that physical actions . . . to the body of the youth [must be designed] to limit the youth's physical activity.” (emphasis added). Similarly, Policy No. 301.05, Section I provides in relevant part: “When responding to a youth's level of resistance, staff shall utilize the least restrictive response likely to be effective under the circumstances to gain control of the youth. Joint Exhibit 1, at 3. (emphasis added). Similarly, Policy No. 301.05, Section III defines “Reasonable Response to Resistance” as:

That degree of intervention or level of response which is consistent with the level of resistance displayed by the youth, when staff are in the process of protecting self. . . . Staff shall use the least restrictive level of response that is reasonably expected to be effective under the circumstances. Staff will choose a reasonable level of response to gain control of the situation based on departmental policy, their physical capabilities/characteristics, experience, assessment of the situation, and the youth's capabilities/characteristics. Joint Exhibit 1, at 2 (emphasis added)) The salient components in both of these Sections are: (1) using the least amount of force, (2) necessary to control a youth.

¹²⁸ Clearly, the Grievant modulated the force of his kicks in the sense that he could have kicked Youth Cooley with more force, but the issue is not whether more or less forceful kicks were available but whether the Grievant used the least forceful “physical action” consistent with a purpose of controlling Youth Cooley.

4. Purpose of Grievant's Kicks

Evidence in the arbitral record suggests the Grievant kicked Youth Cooley essentially to punish the Youth for biting and kicking him. The foregoing discussion about the force of the Grievant's kicks is to some extent probative of whether the Grievant kicked the Youth with the proper purpose of controlling or calming him. First, because frustration and a loss of temper triggered the Grievant's kicks, it is highly unlikely, and nothing in the record suggests, that he kicked the Youth with the *purpose* or goal of controlling him. Instead, the purpose was most likely retribution: You kicked me, so I will kick you. The Grievant's kicks flowed from anger and annoyance, and Youth Cooley's kicks were the "last straw" that set the Grievant off. Note, for example, that after the Grievant and Youth Cooley exchanged two kicks, Youth Cooley spat on the Grievant, and the Grievant kicked him again. Then Youth Cooley delivered two unanswered kicks. If the Grievant's kicks were intended to stop the Youth from kicking, why would he kick the Youth a third time after the Youth spat on him? One can reasonably conclude that the purpose of the kicks was not to control or deter the Youth but to punish him. Any tendency for the Grievant's kicks to stop Youth Cooley from kicking was purely incidental.¹²⁹ For the foregoing reasons, the Arbitrator holds that the Grievant's kicking Youth Cooley does not comply with the general guidelines of Policy No. 301.05, Sections I and III.

Additionally, the Union contends that the Grievant was entitled to kick Youth Cooley because the Youth verbally and actively resisted the Grievant and OM Terry. However, if, as the Arbitrator has already held, the Grievant was not authorized to kick Youth Cooley for engaging in combative resistance, surely he was not entitled to kick him for verbal and/or active resistance, both of which are lesser forms of resistance.¹³⁰ Nor can Youth Cooley's *history* of aggression and violence justify the Grievant's reactive, instinctive,

¹²⁹ Clearly, the Grievant's kicks could have had the *incidental* effect (as distinguished from purpose) of controlling Youth Cooley in the sense that the Grievant's kicks could have discouraged the Youth from continuing to kick the Grievant. But the incidental effect of the kicks on the Youth's conduct does not bring them within the parameters of the guidelines, which require a two-step focus on degree and purpose of force used.

¹³⁰ See Joint Exhibit 1, at 2 ("Response to Resistance Continuum").

1 punitive kicking. Rather, the Youth's violent history should have given the Grievant and OM Terry pause
2 to summon assistance before entering the cell, unless Youth Cooley was in imminent and grave danger of
3 seriously injuring himself. The record does not establish that situation. Instead, the Youth had
4 approximately two scratches on his neck. Or, as the Agency contends, once Youth Cooley started to resist,
5 OM Terry and the Grievant should have stepped out of the cell and summoned assistance.

6 **D. Grievant's Failure to Report Kicking Youth Cooley**

7 After the JCOs brought Youth Cooley under control, the Grievant completed an incident report en route
8 to obtaining medical care for the bite on his forearm. The Grievant reported that Youth Cooley had bit and
9 kicked him but omitted that he had kicked Youth Cooley. The Grievant suggests that this omission resulted
10 from his concern that the bite could cause an HIV infection. The Agency argues that the Grievant's omission
11 violates Rule 3.7,³¹ which requires JCOs to report the use of force against youths. The Agency does not
12 explicitly accuse the Grievant of intentionally omitting that fact in his incident report. In contrast, the Union
13 argues that the Grievant did not *intentionally* or *deliberately* omit reporting that he had kicked Youth Cooley.
14 Although intent or purpose is not an explicit component of Rule 3.7, it is implicit therein. Otherwise, Rule
15 3.7 becomes a Rule of strict liability; that is liability without fault. As a result, the Arbitrator presumes that
16 Agency does not interpret Rule 3.7 to prohibit any and all omissions regardless of how slight or innocent.

17 In this case, however, evidence does not support an inadvertent omission. The Grievant claims that his
18 concern about the bite caused him to simply forget to report that he had kicked the Youth three times. Yet,
19 that same bite did not prevent him from reporting that Youth Cooley had bit and kicked him. Furthermore,
20 the Grievant's violent confrontation with Youth Cooley had been sufficiently traumatic and annoying to
21 cause the Grievant to lose his temper and to act instinctively and punitively against the Youth. Clearly, this
22 was a momentous, violent event in which the Grievant was injured, which had happened only hours earlier,

³¹ Failure to report physical force or verbal abuse--Failing to report the use of physical force, unauthorized restraints, or verbal abuse on a youth.

1 if that, and which must have been quite fresh in the Grievant's mind. Under these conditions, commonsense
2 and logic dictate that when the Grievant recalled the transaction in which he was bitten and kicked, he
3 recalled that he had kicked Youth Cooley. At a point so close to the confrontation, it is unlikely that the
4 Grievant would recall only the Youth's part in the conflict and not his own. True, selective perception is
5 common among humans but not likely to this degree. Accordingly, the Arbitrator finds that more likely than
6 not (preponderance of the evidence) the Grievant simply elected not to report that he kicked Youth Cooley
7 out of fear of the repercussions. That omission violates the letter and the spirit of Rule 3.7.

8 **VI. Impact of the Union's Precedent**

9 The Union submitted two arbitral opinions to support its position that removal of the Grievant was not
10 for just cause. The Agency does not address the propriety of this precedent but does cite the Undersigned's
11 position that JCOs must be held to a higher standard and may not behave like the youths, over whom they
12 have control and for whom they may be role models. For the following reasons, the Undersigned finds that
13 the essential facts of the Union's precedent are distinguishable from those in the instant case.

14 **A. Distinctions Between Threats in Lillie and McQuithy Opinions**

15 The imminence and magnitude of the threat of serious bodily harm to the Grievant in the Lillie Decision
16 ("*Lillie*") were substantially greater than that to the Grievant in the instant case. In *Lillie*, the patient was
17 forcefully biting the Grievant's hand and would not release it. Moreover, the Grievant, in *Lillie*, was
18 positioned behind the patient and could not execute the defensive responses, which she learned two years
19 earlier and which had not since been refreshed or rehearsed. The Grievant, in *Lillie*, confronted an imminent,
20 clear, and present danger of serious bodily injury, and was obliged to use an unauthorized response—bite the
21 patient on the back of the neck—to free her hand from the patient's mouth. In the instant case ("*McQuithy*"),
22 Youth Cooley was handcuffed on the floor on his back when he intermittently kicked the Grievant. Under
23 those circumstances, the Youth's kicks were unlikely to have posed the same imminence and magnitude of

1 risk of serious bodily injury as the patient's bite to the Grievant's hand in *Lillie*. Moreover, the Grievant,
2 in *McQuithy*, could have used defensive responses other than kicks, and, according to Ms. Krueger, the
3 Agency gave the Grievant annual refresher training courses.

4 **B. Purposes of Kicks in *McQuithy* and Bite in *Lillie***

5 Different purposes precipitated the kicks in *McQuithy* and the bite in *Lillie*. The Grievant, in *Lillie*, bit
6 the patient *solely* out of dire desperation to free her hand from the patient's mouth and not to punish the
7 patient. In the instant case, the Grievant kicked Youth Cooley solely out of frustration, and annoyance with
8 the purpose of punishing the Youth for biting and kicking the Grievant. There is no credible evidence that
9 the Grievant's kicks were born of an equivalent urgency or desperation to liberate himself from an imminent
10 sizeable threat of serious bodily injury.

11 **C. Distinctions Between Reynolds and McQuithy Opinions**

12 Similarly, the essential facts in the Reynolds Decision ("*Reynolds*") are readily distinguishable from
13 those in *McQuithy*. In *Reynolds*, the arbitrator found that the Grievant used an *authorized* response to
14 perform his duty of stopping a youth from choking himself. In stark contrast, the Grievant in the instant
15 case, used an *unauthorized* response, kicking, under circumstances that were not as compelling as those in
16 *Reynolds*. Also, the arbitrator in *Reynolds* found that the Grievant *accidentally* broke the youth's arm. In
17 the instant case, any injuries that Youth Cooley suffered from the Grievant's kicks were deliberate and the
18 result of the Grievant's efforts to punish the Youth for biting and kicking him. That type of mind set was
19 absent in the *Reynolds* case.

20 **VII. The Penalty Decision**

21 The Agency has established by preponderant evidence in the arbitral record as a whole that the Grievant
22 kicked Youth Cooley three times in the torso area. The Agency also adduced preponderant evidence that
23 those three kicks constituted inappropriate or unwarranted force under Rule 4.12. Preponderant evidence

1 in the arbitral record also demonstrates that when completing an incident report about his confrontation with
2 Youth Cooley, the Grievant failed to state that he had kicked the Youth three times. Circumstances
3 surrounding that failure indicate that it was unlikely that the Grievant's omission was a mere innocent
4 oversight.

5 Because the agency has established that the Grievant engaged in the alleged misconduct as charged, some
6 measure of discipline is appropriate. Assessment of the proper quantum of discipline involves an evaluation
7 of the mitigative and aggravative factors in this dispute and ultimately a determination of whether removal
8 was unreasonable, arbitrary, capricious, discriminatory, or an abuse of discretion under the circumstances
9 of this case.

10 **A. Mitigative Circumstances**

11 The strongest mitigative factors for the Grievant are that the Agency had not trained him to perform cell
12 extractions and he had limited experience in that area when he and OM Terry sought to extract Youth Cooley
13 from his cell. Furthermore, OM Terry must assume some responsibility for placing the Grievant in Youth
14 Cooley's cell. It was OM Terry's responsibility to use proper judgement and either call for reinforcements
15 before entering Youth Cooley's cell, or withdraw and summon assistance when Youth Cooley displayed such
16 heightened hostility inside the cell. Two other mitigating factors are the Grievant's satisfactory performance
17 record during his two-tenure with the Agency and his unblemished disciplinary record when he was
18 removed.

19 Finally, a comment about holding JCOs to a higher standard is indicated. Although the Arbitrator
20 strongly embraces this view, he tempers it with a sobering, practical realization: JCOs are *not perfect* and
21 one cannot reasonably expect perfect implementation of applicable rules and regulations without fail in the
22 "heat of battle." In other words, one must afford JCOs some "field discretion." That is, as a practical matter,
23 one must factor into one's assessment of JCOs' interactions with youths some degree of tolerance (consistent

1 with prohibitions against abuse and use of excessive force) for slight deviations from the strict application
2 of rules governing those interactions.

3 **B. Aggravative Circumstances**

4 There are also a number of aggravative considerations, the weightiest of which is the nature of the
5 Grievant's established misconduct. The Grievant kicked Youth Cooley three times while the Youth was
6 handcuffed, on his back on the floor of his cell. Two of the kicks were in response to Youth Cooley's
7 kicking the Grievant; the third kick responded to the Youth's spitting on the Grievant. Clearly, the third kick,
8 as well as the first two were not intended to control Youth Cooley but to punish him. This is wholly
9 unacceptable. The Grievant admitted that he knew he should not have kicked the youth but he lost his temper
10 after the Youth bit him on the arm. As a JCO, the Grievant can ill afford to lose his temper and lash out at
11 youth. Such conduct makes him a serious liability for the Agency, one that it should not and need not
12 tolerate.

13 **C. Proper Measure of Discipline**

14 An assessment of the foregoing aggravating and mitigating factors indicates that termination was not
15 unreasonable in this case. Essentially, the Grievant did everything wrong: (1) He used an unauthorized
16 "physical action" in the form of kicks; (2) He made no effort to modulate the force of the kicks in compliance
17 with Policy No. 301.05; (3) He used the unauthorized form of "physical action" to punish or retaliate against
18 Youth Cooley rather than to control him, and (4) To further aggravate matters, the Grievant failed to report
19 that he kicked Youth Cooley three times, but readily reported that the Youth had assaulted him. The latter
20 conduct is both puzzling and exacerbatng.

21 Having very carefully considered and weighed the mitigating factors, the Arbitrator cannot escape the
22 conclusion that those factors simply do not sufficiently diminish the flagrance of the Grievant's misconduct
23 in this case. As a result, the Undersigned holds that the decision to remove the Grievant was not

1 unreasonable, arbitrary, or capricious in this case.

2 **VIII. The Award**

3 For all the following reasons, the Grievance is hereby **Denied**.


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