

**OPINION AND AWARD**

**IN THE MATTER OF THE ARBITRATION BETWEEN**

**Department of Youth Services/Marion Correctional Facility  
-AND-  
OCSEA/AFSCME Local 11**

**Appearing for DYS**

Erica Berenesi, Legal Intern, OCB  
Victor Dandridge, Labor Relations Specialist OCB  
Melinda Hepper, Labor Relations Officer  
William R. Klaibe, Unit Manager  
John D. Lister, Labor Relations Officer 2  
Aaron C. Mohr, Unit Administrator  
Andrea Morbitzer, Deputy Director Institutions

**Appearing for OCSEA**

Randolph Bennett, JCO  
Bruce Bond, JCO, 5189 Vice President  
Mark Herron, Grievant  
Patricia Howell, OCSEA Staff Representative  
Harold Young, JCO, 5189 President

**CASE-SPECIFIC DATA**

**Grievance Nos.**

Grievance No. 35-07-20040513-0255-01-03

**Hearing Held**

October 12, 2007

**Case Decided**

April 7, 2008

**Subject**

Use of Inappropriate/Unauthorized force, Excessive Absenteeism, Failure to Use Planned Use of Force

**Award**

**Sustained in Part/Denied In Part**

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

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## I. The Facts

The parties to this disciplinary dispute are the Ohio Department of Youth Services, Marion Juvenile Correctional Facility (“DYS” or “Agency”) and the Ohio Civil Service Employees Association AFSCME Local 11 AFL-CIO ( “Union”), representing Mark Herron (“Grievant”). Marion is a high-security juvenile correctional facility that houses approximately 283 male juvenile offenders and can house the most difficult adjudicated youth felons. DYS hired the Grievant as a Juvenile Corrections Officer (“JCO”) on June 28, 2004 and removed him on May 9, 2007. The Grievant was an excellent Correctional Officer, well respected by the youth and had no active discipline when he was removed. DYS fired the Grievant for violating several General Work Rules and Policies.

### A. Thirteen-Day Absence

Credible testimonial and documentary evidence in the arbitral record establish the following facts. The Grievant’s troubles began with attendance related issues. From October 18, 2006 through November 10, 2006, he missed thirteen days from work,<sup>1</sup> eight of which found him incarcerated for “driving under the influence.” He missed five more days for other reasons.<sup>2</sup> However, the Agency waited until January 25, 2007 to launch its investigation, first interviewed the Grievant on February 21, 2007, and completed its interview on February 26, 2007, approximately 103 days after the Grievant’s last absence.

Because the Grievant lacked sufficient leave to cover these absences, the Agency charged him with violating General Work Rule 4.3.<sup>3</sup> However, the Agency did not hold a pre-disciplinary hearing until March 27, 2007, approximately *thirty-four* days after the end of the administrative investigation and approximately 137 days after the Grievant’s last absence on November 10, 2006. Ultimately, the Agency fired the Grievant on May 9, 2007, approximately forty-one days after the pre-disciplinary hearing and 178 days after his last absence. The Grievant’s thirteen-day absence was one of three general grounds on which the Agency relied

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<sup>1</sup> October 18, 2006; October 19, 2006; October 20, 2006; October 21, 2006; October 31, 2006; November 1, 2006; November 2, 2006; November 3, 2006; November 4, 2006; November 7, 2006; November 8, 2006; November 9, 2006; November 10, 2006.

<sup>2</sup> Disciplinary Trail, at 13-35.

<sup>3</sup> Policy and Procedure, at 5/9.

1 to remove him.

## 2 **B. Isolation-Cell Incident**

3 On January 13, 2007, the Grievant and JCO Bennett encountered a problem with Youth Webb. On that  
4 day, Youth Webb was placed in an isolation cell to calm down. However, the Youth was yelling and kicking  
5 the door to the isolation room, but the general din from buffers, televisions, and video games prevented JCO  
6 Bennett and the Grievant from understanding what the Youth was saying. Finally, the Grievant unlocked the  
7 door to the isolation cell and entered along with JCO Bennett to determine what was wrong. Upon entering  
8 the cell, they learned that Youth Webb needed to use the toilet, and the one in his isolation cell was  
9 malfunctioning. Youths must wear house slippers while they are outside of their cells. When the Grievant  
10 asked Youth Webb to exchange his shoes for house slippers,<sup>14</sup> the Youth became aggressive and resistant,  
11 thereby obliging the Grievant and JCO Bennett to “redirect Youth Webb to the ground” (subdue him) with  
12 approved ODYS techniques.<sup>15</sup> The Youth was uninjured, however.<sup>16</sup> Before they entered the isolation cell,  
13 neither the Grievant nor JCO Bennett notified an Operations Manager or developed a “planned use of force,”  
14 even though both Officers were aware that JCOs *customarily* observe such procedures before entering the  
15 cells of potentially combative or resistant youths. Customary is emphasized because these procedures were  
16 not reduced to a written work rule or policy.<sup>17</sup>

17 On January 23, 2007<sup>18</sup>, the Agency published its investigative report <sup>19</sup> of the isolation-cell incident. The  
18 Agency faulted the Grievant because he (rather than JCO Bennett) actually unlocked the isolation-cell door,  
19 even though JCO Bennett entered the cell with the Grievant and never contacted an Operations Manager or

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<sup>14</sup> Requiring Youth Moore to wear slippers inside his cell also deters him from kicking the door.

<sup>15</sup> During the Agency’s case in chief, the Union objected to a video of the area surrounding Youth Moore’s isolation cell because it did not receive a copy of the video until shortly before the arbitral hearing. Apparently, the Union representative was unaware that the Union could view the video in the agency after Step-3 of the grievance procedure.

<sup>16</sup> Disciplinary Trail, at 40.

<sup>17</sup> However, during direct examination, Mr. Aaron Mohr (Agency witness) testified that youths are placed in isolation cells to compose themselves.

<sup>18</sup> Disciplinary Trail, at 36.

<sup>19</sup> Disciplinary Trail, at 47-56.

1 developed a "Planned use of Force."<sup>10</sup>

### 2 **C. Wrestling with Youth Moore**

3 On March 5, 2007, the Grievant and Youth Moore were teasing each other about who would dominate  
4 whom in their respective hometowns. During that verbal exchange, the Grievant placed Youth Moore in a  
5 headlock, lifted him off of the ground, spun him around, and dropped him on the ground. Youth Moore  
6 landed on his back and struck his head on the floor. Despite the roughness, the Grievant never intended to  
7 harm Youth Moore; they were playfully engaging each other. Nevertheless, a video clip showed Youth  
8 Moore rubbing his head shortly after the incident with the Grievant standing by in close proximity. Before  
9 leaving his shift on March 5, 2007, the Grievant never asked Youth Moore if he required medical care, tried  
10 to secure medical care for the Youth, or reported the incident to supervision. During the third shift that same  
11 day, Youth Moore vomited in his room, complained to JCO Smith of a headache, and requested medical  
12 attention, which JCO Smith obtained.<sup>11</sup>

13 The nurse found no injuries except for a "murky spot" on his head.<sup>12</sup> On March 6, 2007, the Agency  
14 began investigating the isolation-cell incident, and the Grievant telephoned Youth Moore to inquire about  
15 developments surrounding their March 5 wrestling match.

16 The Agency's investigation concluded that: "The allegation that JCO Herron placed Youth Moore in a  
17 headlock and did a maneuver by picking Youth Moore off of the ground and spending him onto his back and  
18 then dropping Youth Moore on his head is substantiated. . . ."<sup>13</sup> Based on its investigative report, the Agency  
19 terminated the Grievant on May 9, 2007 for allegedly violating: Rule 3.7, ("Failure to Report Physical  
20 Force"), Rule 4.3, ("3 or more days of unauthorized leave"), Rule 4.12 ("Inappropriate or Unwarranted Use  
21 of Force"), Rule 5.1 ("Failure to Follow Policies and Procedures"), Rule 5.12 ("Actions that could harm or  
22 potentially harm an employee, youth or a member of the general public"). In addition to these specific rules,

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<sup>10</sup> Disciplinary Trail, at 36.

<sup>11</sup> Disciplinary Trail, at 64.

<sup>12</sup> Disciplinary Trail, at 63.

<sup>13</sup> Disciplinary Trail, at 60.

1 the Agency charged the Grievant with: (1) entering Youth Webb's isolation cell without either the  
2 authorization or the presence of Operations Management; (2) failing to issue a Youth Behavioral Incident  
3 Report ("YBIR") to Youth Webb; (3) using inappropriate and unwarranted force against Youth Moore and  
4 injuring him; (4) failing to secure medical attention for Youth Moore; and (5) failing to report the use of force  
5 against Youth Moore.<sup>14</sup>

6 The Union filed Grievance No. 35-24 (20070515) 023-01-03 ("Grievance") challenging the Grievant's  
7 removal as being "'without just cause' . . . no progressive discipline took place."<sup>15</sup> When he was terminated,  
8 the Grievant had no active discipline and approximately three years of service with the Agency.<sup>16</sup>

9 The Parties could not resolve this dispute and selected the Undersigned to hear it. The arbitral hearing  
10 occurred on October 12, 2007. At the outset of that hearing, the Parties agreed that the dispute was free of  
11 procedural errors and properly before the Undersigned. All parties relevant to the resolution of the dispute  
12 attended the arbitral hearing. Throughout the hearing, the Undersigned afforded the Parties a full and fair  
13 opportunity to present admissible evidence and arguments supporting their positions. Specifically, advocates  
14 for the Parties made opening statements and presented admissible documentary and testimonial evidence.  
15 Both testimonial and documentary evidence was available for all relevant objections, and testimony was also  
16 available for cross-examination. At the close of the hearing, the Parties agreed to e-mail their Post-hearing  
17 Briefs to the Undersigned by October 27, 2007. The briefs were timely and the arbitral record was closed  
18 on that date.

## 19 II. The Issue

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

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<sup>14</sup> Disciplinary Trail, at 1. Policy No. 30.01.05 ("Management of Resistant Youth Behavior") was cited in the cases of Youth Moore and Youth Webb.

<sup>15</sup> Disciplinary Trail, at 1.

<sup>16</sup> Joint Stipulations.

### III. Relevant Contractual Language, Policies, 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 principals of progressive discipline. Disciplinary action will be commensurate with the offense.

\* \* \* \*

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

##### 24.06 -Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. Disciplinary measures shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

#### General Work Rules Policy 103.17

#### IV. Procedures

- C. Disciplinary action for violations of work rules falls under the relevant provisions of the civil code, not the criminal code. Therefore, employees do not have the right to withhold information regarding a possible infraction of the work rules, even if it may be self-incriminating.

### MANAGEMENT OF RESISTANT YOUTH BEHAVIOR 301.05

#### I. Policy Provisions

It shall be the requirement of ODYS that physical response shall only be used in instances of justifiable self-defense, protection of others, prevention of self-injury, protection of property, prevention of escapes, and to maintain or regain control.

\* \* \* \*

#### IV. Procedures

- A. Staff shall use the least restrictive level of response that is reasonably expected to be effective under the circumstances. Staff shall choose a reasonable level of response to gain control of the situation based on departmental policy, their physical capabilities/characteristics, training, experience, assessment of the situation, and youth's physical capabilities/characteristics.
- C. The use of physical response shall be used as a last resort after verbal response and all other forms of intervention have been unsuccessful. In no event shall physical force be justifiable punishment.

**STANDARD OPERATING PROCEDURE**  
**POLICY No. 301.05.01**

**I. Purpose**

Pursuant to ODYS Policy 31.05, Management of Resistant Youth Behavior, this Standard Operating Procedure shall establish specific guidelines for reporting and documenting when physical response is used. Because it is the Department's goal to limit the use of physical response, physical response shall be used as the last resort and may only be used in instances of self-defense from assault by a youth, protection of others, prevention of self-injury, and to prevent escape. At no time shall physical response be used as punishment. Every use of Physical Response shall be documented, reported, and when necessary, investigated both to protect staff from unfounded allegations and to eliminate the unwarranted use of Physical Response.

**IV. Procedure**

- A. When physical response is used when managing youth, a staff member involved in the incident shall:
1. Immediately notify the Unit Administrator, if available, and the Operations Manager.
  2. Notify medical personnel of the physical response including any immediate health concerns.
  3. Document all physical response incidents on the Youth Intervention Report, Form 301.05.01 .B, and complete a Youth Behavioral Incident Report ("YBIR"), Form 301.05.01.A, and obtain the youth's signature. These reports along with any Youth Intervention Witness Report, Form 301.05.01.C, shall be submitted to the Unit Administrator/Operations Manager as soon as possible following the incident and no later than departing the institution for the day.

**STANDARD OPERATING PROCEDURE**

**IV. Purpose**

Same as set forth above under Policy 301.05, IV, A & C

**DYS GENERAL WORK RULES**  
**RULE VIOLATIONS**  
**Offenses Infraction Levels**

**LEVEL ONE**

**Rule 3.7      Failure to Report Physical Force**

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

**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 4.3      3 or more days unauthorized leave**

Failure to return from an approved leave or unapproved absence of 3 days or more.

**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.



**Rule 5.1 Failure to Follow Policies and Procedures**

Included but not limited to the Response to Resistance Policy, post orders, timekeeping policies, verbal strategies, etc.

**Rule 5.12 Actions that could harm or potentially harm an employee, youth, 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. Thirteen-Day Absence**

- a. The Agency properly trained and apprised the Grievant of its attendance policies and work rules.<sup>17</sup> In addition, the Grievant had approximately three years of institutional experience, which should have further enhanced his understanding of the Agency's attendance policies.
- b. Regardless of the surrounding circumstances, the Grievant was absent from work for thirteen days without sufficient leave balances to cover those absences.
- c. The Grievant failed to submit the proper leave forms for all of his absences, and his leave requests were denied.<sup>18</sup>
- d. Despite the belatedness of its investigation, the Agency properly concluded that the Grievant accumulated thirteen days of unauthorized absences from work.
- e. The Agency runs a twenty-four/seven operation and, therefore, cannot tolerate employees amassing thirteen days of absences within one month.

**3. Isolation-Cell Incident**

- a. For the following reasons, the Agency had just cause to discipline the Grievant for the isolation-cell incident.
  - (1) The Grievant was trained on and knowledgeable of Policy Nos. 103.17<sup>19</sup> and 301.05,<sup>20</sup> both of which are relevant to this issue. On January 13, 2007, the Grievant ignored the Agency's Policies regarding the response-to-resistance rules and grid. Specifically, the Grievant:
    - (2) Violated Policy 301.05 by touching the Youth in the isolation cell. Policy 301.05 generally requires that before touching a youth, staff must use approved verbal strategies and request assistance from other staff.
    - (3) Failed to develop and implement a planned use of force.
    - (4) Failed to dialogue with Youth Webb before opening the door and before using physical force.
    - (5) Failed to contact the Operations Manager *before* using force against the youth.
- b. The Grievant is not a victim of disparate treatment in this matter, since he, and not JCO Bennett, actually opened the door of the isolation cell.

**4. Wrestling with Youth Moore**

- a. The Grievant violated Standard Operating Procedure 301.05.01 on March 5, 2007 by subjecting a nonresistant youth to an unwarranted, unprovoked, and inappropriate use of force.
- b. Then, to conceal his misconduct, the Grievant violated Rules 3.7 by not reporting the

<sup>17</sup> See Training Record, at 1, 3-12.

<sup>18</sup> Joint Exhibit 3, 18-23, 25.

<sup>19</sup> Joint Exhibit A-1, at 4.

<sup>20</sup> Joint Exhibit 5, Tab B.

incident<sup>21</sup> and 3.8 by telephoning Youth Moore on March 6, 2007.

- c. In addition, the Grievant failed to assist Youth Moore in getting medical attention.
- d. The Agency did not violate Article 24 of the Collective-bargaining Agreement.
- e. The Grievant's actions directly contravened the Director's plan for a "Cultural Change" within the Agency.

#### **B. Summary of Union's Arguments**

##### **1. The Grievant was removed for other than just cause as set forth below.**

###### **a. Thirteen-Day Absence**

- (1) The Agency's investigation of the Grievant's absences is fatally tardy. The Agency waited almost a third of a year to discipline the Grievant for his absences. Tardy discipline is punitive rather than corrective. Therefore, any discipline flowing from those absences is solely for punishment and therefore offends Article 24.06 of the Collective-bargaining Agreement.
- (2) Between the date of his last absence and the date of his discipline, the Grievant missed no more days from work, which establishes his rehabilitation and obviates his removal.

###### **b. Isolation-Cell Incident**

- (1) Youth Webb had been neither combative nor resistant on January 13, 2007, when the Grievant unlocked the door to the isolation cell and entered with JCO Bennett. Furthermore, as Mr. Mohr testified, it is not unusual for youths in isolation to yell and kick the door; such conduct was not usually deemed combative or aggressive. Youth Webb was not combative or aggressive before the Grievant and JCO Bennett entered his cell. Therefore, the Grievant had no reason either to notify supervision or to formulate a planned use of force before entering Youth Moore's room.
- (2) The Agency cited no work rule or policy that specifically prescribes how and when JCOs should enter isolation cells under any circumstances, including those prevailing on January 13, 2007. Without a published rule of which JCOs have sufficient notice, the Agency lacks just cause to discipline the Grievant for the January 13 incident.
- (3) Finally, the Grievant was the victim of disparate treatment because he and JCO Bennett entered the isolation room on January 13, 2007, but only the Grievant was disciplined therefor.

##### **2. Wrestling with Youth Moore**

- a. The physical encounter on March 5, 2007 was mere horseplay under Rule 1.12 and should be disciplined accordingly. The Investigator's interrogatories, Youth Moore's comments, and the comments of JCOs Bennett and Smith referenced the Grievant's conduct as horseplay, which is a level-one work rule violation that contemplates an oral reprimand for employees like the Grievant with no active discipline.
- b. The only report that the Grievant could have logically submitted was YBIR for horseplay.
- c. Since Management's own witness, Ms. Morbitzer, testified that the Youth was not resistant, application of the Response to Resistance Policy is contraindicated.
- d. The Agency has never published a "Zero Tolerance Policy" regarding staff placing their hands on youth. Therefore, due to lack of proper notice, a "Zero Tolerance Policy" offends just cause.
- e. The Agency failed to conduct a thorough and proper investigation, insofar as the Agency took statements from only two of the three youths who directly witnessed the March 5 incident. Furthermore, the investigation was improper because the Investigator augmented

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<sup>21</sup>

Joint Exhibit A-1, at 4.

- 1 the youths' answers and subjected the youths to leading questions.
- 2 f. The Grievant is a victim of disparate treatment because JCO Bennett was not disciplined,
- 3 even though he and the Grievant entered Youth Moore's isolation cell together.
- 4 g. The Grievant neither knew nor had reason to know that Youth Moore needed medical
- 5 treatment after their physical encounter on March 5, 2007.

## 6 **II. Analysis and Discussion**

### 7 **A. Evidentiary Preliminaries—Measure of Persuasion**

8 Because this is a disciplinary dispute, the Agency has the burden of proof or persuasion regarding its

9 charges against the Grievant. To establish those charges, the Agency must adduce *preponderant* evidence,

10 in the arbitral record as a whole, showing that *more likely than not* the Grievant engaged in the alleged

11 misconduct. Because the Agency has the burden of persuasion regarding its charges against the Grievant,

12 doubts about the existence of any alleged misconduct underlying the charges shall be resolved against the

13 Agency. If the Agency fails adequately to establish the alleged misconduct in the first instance, it cannot

14 prevail on the related charge, *irrespective* of the strength or weakness of the Union's defenses. Similarly, the

15 Union has the burden of persuasion (preponderant evidence) regarding its allegations and affirmative

16 defenses, doubts about which shall be resolved against the Union.

### 17 **B. Thirteen-Day Absence**

18 Because the Grievant's thirteen absences and the Agency's tardy investigation thereof are established,

19 the remaining issue here is whether the tardiness of the investigation bars the Agency from disciplining the

20 Grievant for being absent.

#### 21 **1. Agency's Arguments**

22 The Agency essentially argues that despite the inordinate delay of its investigation, the conclusion thereof

23 nevertheless establishes the Grievant's misconduct. In addition, the Agency stresses that it runs a 24/7

24 operation and can scarcely afford to have employees missing thirteen days within two months. The Grievant

25 absences violate General Work Rule 4.3.<sup>22</sup>

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<sup>22</sup>

Joint Exhibit 1, Joint Stipulations.

## 2. Union's Arguments

In contrast, the Union emphasizes the tardiness of the agency's investigation claiming that any resulting discipline offends Article 24.02 and Article 24.06. In the Union's view, the disciplinary tardiness fatally taints any resulting discipline as punitive rather than corrective. The Union stresses that the agency launched its investigation on January 25, 2007 (approximately 76 days after the Grievant's last absence), held the pre-disciplinary hearing thirty-four days after the last absence, and charged the Grievant with violating Rule 4.3 on March 27, 2007 (approximately 137 days after the Grievant's last absence).

## 3. Assessing the Parties' Arguments

Article 24.02 provides in relevant part: "Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the *timeliness* of the Employer's decision to begin the disciplinary process."

Similarly, Article 24.06 states in pertinent part: "The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting."

The Union's position is more persuasive here. Absent some *extraordinary reason*, one hundred thirty-seven days after the Agency either knew or should have known about the thirteen absences is simply too long to impose discipline under either Article 24.02 or Article 24.06. And the Agency offers no reason, not to mention justification, for this extended delay. Although the Grievant is hardly guilt-free in this matter, disciplining him so long after his absence is tantamount to punitive discipline. Furthermore, from a purely procedural/evidentiary perspective, unduly delayed discipline could very well deprive the Grievant of a meaningful opportunity to defend himself. Under these circumstances, fundamental fairness or procedural regularity obliges the Undersigned to hold that the charge of excessive absenteeism against the Grievant is barred due to the procedural error of undue delay in the imposition of discipline.

1 **C. Isolation-Cell Incident**

2 The issues here are: (1) Whether the Grievant should have notified supervision *before* entering Youth  
3 Webb's isolation cell and, (2) whether the Grievant should have developed a planned use of force before  
4 entering Youth Moore's cell.

5 **1. Agency' Arguments**

6 The Agency vigorously contends that before he entered Youth Webb's cell, the Grievant had a duty to  
7 contact an Operations Manager and to develop a planned use of force. The sole premise for this position is  
8 that before the Grievant and JCO Bennett entered the isolation cell, Youth Webb was being combative and  
9 resistant as evidenced by his yelling and kicking the door to his isolation cell. In short, the Agency essentially  
10 contends that any reasonable person would have deduced from his conduct that Youth Webb was combative.

11 In addition, the Agency rejects the Union's contention that disciplining the Grievant and not JCO Bennett  
12 constitutes disparate treatment. In the Agency's view, the Grievant's conduct is sufficiently distinguishable  
13 from JCO Bennett's, since the Grievant actually unlocked the door to the isolation cell.

14 **2. Union's Arguments**

15 The Union embraces two arguments and one affirmative defense. First, according to the Union, Youth  
16 Webb's yelling and kicking the door to his isolation cell on January 13 constituted neither combativeness  
17 resistance, nor aggression because youths in isolation often behave like that without being deemed combative  
18 or aggressive. Therefore, before entering Youth Webb's cell, the Grievant had no reason to view Youth  
19 Webb as being aggressive and, hence, no duty either to develop a planned use of force or to summon  
20 Operations Management before entering Youth Webb's cell. Second, the Union stresses that the Agency  
21 failed to adduce a work rule or policy specifically detailing when and/or how JCOs should enter isolation cells  
22 under the circumstances of January 13, 2007. The Union maintains that without a published rule of which  
23 JCOs have sufficient notice, the Agency lacks just cause to discipline the Grievant for the January 13 incident.  
24 Third, the Union posits that the Agency subjected the Grievant to disparate treatment by failing to discipline  
25 JCO Bennett who accompanied the Grievant into Youth Moore's cell on January 13, 2007.

### 3. Assessing the Parties' Arguments

Again, the resolution of this issue is relatively straightforward. The first sub-issue is whether Youth Moore was exhibiting aggression or being combative by yelling and kicking the door to his isolation cell. While testifying for the Agency, Mr. Mohr conceded that it was *not* uncommon for youths in isolation to display such behavior, which was not viewed as aggressive or resistant. Moreover, both the Grievant and JCO Bennett offered un rebutted testimony that Youth Webb was yelling and kicking the door because he had to use the outside restroom; the one inside the isolation cell was broken. Beyond that, both officers testified that the area around the isolation cell was too noisy which made it difficult to hear what Youth Webb was yelling. This might also explain why the Youth was kicking the door to his isolation cell—to get the Grievant's and/or JCO Bennett's attention.<sup>22</sup> Although it is not entirely unreasonable for one to *speculate* that Youth Webb was upset and being combative, no *evidence* in the arbitral record supports such speculation. Consequently, the Arbitrator holds that the Agency, which has the burden of persuasion to establish that Youth Webb was being aggressive or combative, failed to establish its position on this issue. Accordingly, the Arbitrator holds that Youth Webb was not being disruptive or combative on January 13, 2007 when he kicked the isolation-cell door and yelled. As a result, there was no need for the Grievant to have expected the Youth to behave aggressively when the Grievant unlocked the door to the cell. Nor, under those circumstances, did the Grievant have a duty to either employ a planned use of force or to contact supervision *before* entering the isolation cell. The Grievant decided to enter the Youth's cell.

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<sup>22</sup> Inconsistencies and gaps plague the Grievant's testimony and written statements about the January 13 event. For example, in his written statements on January 13, 2007 (disciplinary Trail, at 43) and on February 1, 2007 (Disciplinary Trail, at 53), the Grievant asserted that Youth Webb was kicking the door. However, during cross-examination at the arbitral hearing, the Grievant testified that Youth Webb *was not* kicking the door. Instead, the Grievant explained that he either *could or did* communicate with Youth Webb through a hole in the isolation-cell door—placing his mouth to the hole to ask Youth Webb what was wrong, and then placing his ear to the hole to hear Youth Moore's response. Standing alone, these inconsistencies would destroy a witness's credibility. But there is more. The Grievant then offered yet a third account of how he learned that Youth Webb needed to use the outside restroom. According to the Grievant, JCO Bennett told him that Youth Webb needed to go to the restroom. Only after the cross-examiner confronted the Grievant with his January 13 written statement that Youth Webb was kicking the door did the Grievant admit that fact. Consequently, the Grievant's account of what Youth Webb was doing in the isolation cell and why he was doing it is incredible.

Indeed, but for corroborative support from JCO Bennett's credible testimony on two fundamental issues here, the Arbitrator would have discounted the Grievant's account. First, JCO Bennett credibly testified that Youth Webb was kicking the isolation-cell door and yelling to alert JCO Bennett and the Grievant that he (Youth Webb) needed to use the outside restroom. Second, JCO Bennett credibly testified that neither he nor the Grievant could understand Youth Webb due to the surrounding noise of buffers, televisions, and video games. Thus, JCO Bennett's credible account corroborates the essentials of the Grievant's account, thereby infusing adequate persuasive force and credibility into the Grievant's, otherwise incredible account.

1 Absent proof that Youth Webb's kicking and yelling constituted aggression or combativeness, the  
2 Agency cannot prevail on this issue and, consequently, lacks any basis for disciplining the Grievant regarding  
3 his conduct in this matter. Finally, this holding precludes a detailed assessment of the Union's argument of  
4 disparate treatment, except to say that the argument is not bereft of merit.

#### 5 **D. Wrestling With Youth Moore**

6 Three issues surface here: (1) Whether the Grievant's physical encounter with Youth Moore on March  
7 5, 2007 violated one or more of the General Work Rules 4.12, 5.1, and/or 5.12 ("Rules"), or whether the  
8 Grievant's actions constituted mere "horseplay under Rule 1.12; (2) Whether the Grievant neglected a duty  
9 under Policy No. 301.05.05, IV, Procedure, A, 2 ("Procedure No. 2") to secure medical attention for Youth  
10 Moore after their March 5 physical encounter; (3) Whether the Grievant knew or should have known that  
11 Youth Moore was injured, since such knowledge would have obligated the Grievant to get medical care for  
12 the Youth; and (4) Whether the Grievant shirked his duty under Rule 3.7 to report his March 5 physical action  
13 against Youth Moore.

#### 14 **1. Violation of Rules 4.12, 5.1, 5.12**

##### 15 **a. Agency's Arguments**

16 The Agency argues that by picking up Youth Moore, spinning him around, and casting him to the ground,  
17 the Grievant used unauthorized and inappropriate force against the Youth in violation of General Work Rules  
18 4.12, 5.1, and 5.12 as well as Policy Nos. 301.05, 301.05.01, and 301.05.05. The three Policies cover physical  
19 responses to resistant youths

##### 20 **b. Union's Arguments**

21 In contrast, the Union essentially contends that the above-cited Rules and Policies are inapplicable to this  
22 issue. Specifically, the Union argues that Policies governing physical responses to resistant youths are inapt  
23 because Youth Moore was not resistant. Next, the Union asserts that the General Work Rules cited against  
24 the Grievant are similarly inapplicable because the Grievant's conduct towards Youth Moore is mere  
25 "horseplay."

1 **c. Assessing the Parties' Arguments**

2 For the following reasons and rationale, the Undersigned holds that the Grievant's physical actions  
3 against Youth Moore on March 5, 2007 violated Rules 4.12, 5.1, and 5.12. Still, one notes at the outset that  
4 the Union proffers one valid observation and one persuasive argument: (1) The policies pertaining to physical  
5 responses to resistant youths are inappropriate here because Youth Moore displayed no semblance of  
6 resistance or aggression toward the Grievant before their physical encounter; (2) As a result, Policy Nos.  
7 301.05, 301.05.01, and 301.05.05, which address JCOs' physical responses to resistant youths have neither  
8 facial nor interpretative application here.

9 Beyond this point, however, the Union's arguments are unpersuasive for the following reasons. First,  
10 Policy No. 103.17, I "Policy Provisions" states in relevant part: "This policy shall provide employees [with]  
11 the rules of conduct that specify prohibited behavior and penalties that may be imposed. . . . The unauthorized  
12 activities contained herein are not considered as all-inclusive, but are intended to be representative examples  
13 of activities that warrant immediate corrective action. Violation of this policy . . . shall constitute cause for  
14 corrective action, up to and including removal."<sup>24</sup> Note the sweeping breadth of this language. Nowhere  
15 does it limit itself to a particular genre of conduct such as responses to resistant youths.

16 Policy No. 103.17 also provides: "The Department shall not permit staff to engage in *physical violence*,  
17 *abuse . . . or intimidation* of youth incarcerated . . . . *Any force* used upon an individual in the care or  
18 custody of the Department of Youth Services shall be in accordance with the state regulations and Department  
19 policy and procedure. Employees shall *document* every use of force on the shift [where] it occurs before  
20 leaving the work site."<sup>25</sup>

21 The foregoing provisions clearly proscribe the use of "*physical violence*" against youths and indeed  
22 prohibit "*any force*" used against youths in the Agency. Moreover, the provisions clearly reference the

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<sup>24</sup> Policy & Procedure, at 1/10.

<sup>25</sup> Policy & Procedure, at 4/10 (C. Personal Conduct, 4, e).



1 General Work Rules, which pour content into Policy 103.17.<sup>26</sup> And, contrary to the Union's contention,  
2 nothing in either the General Work Rules or Policy 103.17 suggests that the Parties somehow intended to  
3 limit the application of those Rules and that Policy only to situations involving physical responses to resistant  
4 youths. Instead, on their collective face, Policy 103.17 specifically addresses "*any force*" used against  
5 youths within the Agency. And since they animate Policy 103.17, General Work Rules Nos. 4.12, 5.1, and  
6 5.12 are fully applicable to the Grievant's physical conduct against Youth Moore on March 5, 2007. Against  
7 this backdrop, the Union's contention that the Grievant's physical action against Youth Moore amounted to  
8 mere horseplay under General Work Rule No. 1.12 (which does not define "horseplay") is unpersuasive.

9 Still, the Union's citation of Rule 1.12 which prohibits "horseplay" obliges the Arbitrator to assess its  
10 relationship to the foregoing General Work Rules and Policy 103.17. Scrutiny of this relationship reveals  
11 a certain tension between Rule 4.12, prohibiting horseplay, and the General Work Rules and Policy 103.17.  
12 The upshot here is that the scope of coverage that the Union suggests for Rule 1.12 will essentially eviscerate  
13 the cited General Work Rules and Policy 103.17. Implicit in the Union's broad interpretation of Rule 1.12  
14 is the proposition that any physical "horseplay," however forceful or violent, against a youth would only  
15 violate Rule 1.12 (a level-one offense) and be squeezed into the category of horseplay. Thus, according to  
16 the Union, the Grievant's lifting Youth Moore up, spinning him around, and dropping him to the floor only  
17 violates Rule 1.12, irrespective of the harm or potential harm to the Youth. Moreover, such conduct warrants  
18 only verbal reprimands for employees who have no active discipline. The question becomes how much force  
19 must a JCO use against a youth to invoke the provisions and sanctions of the foregoing General Work Rules  
20 and Policy 103.17? The Union's sweeping interpretation of Rule 1.12 would effectively read out the  
21 prohibitions against use of force out of Policy 103.17, 4, C, e.<sup>27</sup> It strains credulity to contend that Rule 1.12  
22 was intended to swallow up the other General Work Rules that *specifically* address "physical violence,"

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<sup>26</sup> Policy & Procedure, at 1/9 - 9/9.

<sup>27</sup> Policy & Procedures, at 4/10.

1 “abuse,” “force,” or “intimidation,” while Rule 1.12 does not define “horseplay.”<sup>128</sup> Although it is unclear  
2 exactly what physical dimensions Rule 1.12 seeks to address, commonsense and the canons of contract  
3 interpretation resist and ultimately rebut the Union's argument that the Grievant's physical conduct against  
4 Youth Moore is mere “horseplay.” Restated, the rationale here is that acceptance of the Union's argument  
5 would mean that virtually *any physical action* against youths could constitute “horseplay” and frustrate the  
6 provisions of Policy 103.17 and the corresponding sanctions of the General Work Rules.<sup>129</sup> For the foregoing  
7 reasons, the Arbitrator holds that the Grievant's physical actions towards Youth Moore on March 5, 2007  
8 exceeded the reasonable scope of “horseplay” under Rule 1.12 and constituted: Inappropriate or Unwarranted  
9 Use of Force under Rule 4.12, Failure to Follow Policies and Procedures under Rule 5.1, and Actions that  
10 Could Harm or Potentially Harm . . . youth. . . .<sup>130</sup>

#### 11 **E. March 6 Telephone Call To Youth Moore**

12 The issue here is whether the Grievant is subject to discipline for telephoning Youth Moore on March  
13 6, 2007, the day that the Agency initiated its administrative investigation of the March 5 incident. Since it  
14 is undisputed that the Grievant telephoned Youth Moore on March 6, 2007, the remaining issue here is the  
15 purpose of the Grievant's telephone call. That is, whether he telephoned Youth Moore to subvert the  
16 Agency's administrative investigation by dissuading Youth Moore from inculcating the Grievant when  
17 making written statements or answering questions during investigative interviews.

#### 18 **1. Agency's Arguments**

19 The Agency argues that the Grievant telephoned Youth Moore to smooth things over so as to conceal the  
20 facts and avoid discipline. The Union's Post-hearing Brief does not address this issue.

#### 21 **a. Assessing Agency's Arguments**

22 In its Post-hearing Brief, the Agency contends that by telephoning Youth Moore with the motive of

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<sup>128</sup> This oversight or gap warrants careful review.

<sup>129</sup> This is especially true if one defines horseplay as any physical action devoid of malicious intent to harm.

<sup>130</sup> Policy & Procedure, A through A-1.

1 influencing how the Youth participates in the Agency's administrative investigation, the Grievant violated  
2 General Work Rule 3.8. The Agency's argument is fatally flawed. The arbitral record does not reveal that  
3 the Agency either charged the Grievant with violating Rule 3.8 or relied on that alleged Rule violation when  
4 deciding to remove him.<sup>131</sup> Consequently, it is too late in the day for the Agency to accuse the Grievant of  
5 violating Rule 3.8. Consequently, further consideration of this charge is not indicated.<sup>132</sup>

6 **F. Grievant's Duty Re Medical Care: Policy No. 301.05.01, IV. Procedure, A, 2<sup>133</sup>**

7 The issue here is whether the Grievant violated a duty under Procedure No. 2 to secure medical attention  
8 for Youth Moore after their March 5 encounter.

9 **1. Agency's Arguments**

10 In its Post-hearing Brief, the Agency argues that Procedure No. 2 obliged the Grievant to secure medical  
11 attention for Youth Moore on March 5, 2007 because the Grievant used a "physical response" against Youth  
12 Moore.

13 **2. Union's Arguments**

14 The Union does not appear to contest the Agency's proposition that the Grievant had a general duty under  
15 Procedure No. 2, to get medical attention for the Grievant. Instead, the Union questions whether Youth  
16 Moore ever asked the Grievant for medical attention. Additionally, the Union argues that the Grievant was  
17 a victim of disparate treatment, since JCO Bennett also knew of the Grievant's encounter with Youth Moore  
18 but failed to seek medical care for the Youth.

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<sup>131</sup> Disciplinary Trail, at 1.

<sup>132</sup> Nevertheless, the Arbitrator is constrained to note more of the Grievant's inconsistencies and gaps. The Grievant admitted telephoning Youth Moore on March 6, 2007 when the Agency launched its administrative investigation into the March 5 incident. But, during cross-examination at the arbitral hearing, the Grievant *denied* that he called to contour Youth Moore's participation in the investigation. The Grievant initially testified that during that telephone conversation, he simply asked Youth Moore "what happened." When the cross-examiner pressed the issue by asking the Grievant if he really asked Youth Moore "what's happening," as in what's going on with the investigation, the Grievant reiterated that he simply asked Youth Moore "what happened?" Furthermore, the Grievant claimed that this skeletal inquiry was not intended to reference the March 5 incident. The Arbitrator finds this line of testimony to be devoid of credibility and even nonsensical. It makes no sense for the Grievant to call Youth Moore and ask "what happened" with no additional context. Even though the Agency cannot prevail on the Rule 3.8 charge, the Grievant's testimony on this issue does little to bolster his already tattered credibility.

<sup>133</sup> Hereinafter referenced as "Procedure No. 2."

### 3. Assessing the Parties' Arguments

The Arbitrator holds that neither the literal language nor any reasonable interpretation of Procedure No. 2 contemplates the Grievant's conduct. Thus, that provision did not oblige the Grievant to obtain medical care for Youth Moore. Although the Parties verbally jostled about whether the Grievant knew or should have known that Youth Moore needed medical attention, Procedure No. 2 requires neither actual nor constructive knowledge as a precondition to the obligation to get medical help for a youth. In fact, knowledge of the need for medical assistance is basically irrelevant under Procedure No. 2. The duty to secure medical aid under procedure No. 2 arises from the *mere existence* of a physical response to a resistant youth, i.e., whenever a JCO subjects a youth to a "physical response." The *existence* of the "physical response" itself is the precondition for the duty.

The remaining bone of contention is whether the Grievant's conduct constituted a "physical response" under Policy 301.05.01, which defines physical response as, "Trained interventions by staff, either immediate or calculated, designed to manage the *youth's resistant behavior*."<sup>124</sup> Just as a physical response is a precondition to the duty to get medical assistance, youths' resistant conduct is the precondition for "physical responses." Recall, however, that Youth Moore exhibited no "resistant behavior" on March 5, 2007. Because the Grievant's physical action against Youth Moore could not have constituted a "physical response," he could not have had a duty under Procedure No. 2 to secure either medical treatment or medical screening for Youth Moore. Thus, the Agency tries in vain to *squeeze* the Grievant's March 5 physical action into the narrowly defined rubric of a "physical response."<sup>125</sup> On balance, the Undersigned holds that preponderant evidence in the arbitral record does not establish that the Grievant had a duty under Procedure No. 2 to seek medical attention for Youth Moore.

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<sup>124</sup> Standard Operating procedures, 302.05.01, III Definitions, at 2/6.

<sup>125</sup> Policy No. 301.05.01 is entitled "Physical Response Reporting and Documentation Requirements" and thus leaves no doubt that it was intended to deal with "physical responses." Moreover, this Policy specifically and narrowly defines "Physical response." On the other hand, nothing in the arbitral record *specifically* imposes a duty on JCOs to secure medical attention for youths who are injured while horse playing with staff. This is undoubtedly an unreasonable outcome, but the answer is not a *strained* interpretation of Policy No. 301.05.01, as the Agency attempts in this dispute.

1                   **G. Grievant's Duty Re Medical Attention: Knowledge of Youth's Injuries**

2           The issue here is whether a duty to obtain medical treatment or screening for Youth Moore might spring  
3 from a different source. Specifically, whether the Grievant would have had a duty to secure medical  
4 assistance for Youth Moore if the Grievant either knew or should have known that the Youth was injured,  
5 especially where, as here, the Grievant likely inflicted that injury. Unlike Procedure No. 2 where "physical  
6 responses" are the precondition for the duty, here actual or constructive knowledge of a youth's injury  
7 triggers the duty.

8                   **1. Agency's Arguments**

9           The Agency argues that the Grievant must have known that Youth Moore was injured when he began  
10 rubbing his head after he picked himself up off the ground and sat at a table. In addition, the Agency stresses  
11 that Youth Moore subsequently claimed that he specifically asked the Grievant to take him in for a medical  
12 examination.

13                   **2. Union's Arguments**

14           The Union maintains, in contrast, that the Grievant had no reason to suspect that Youth Moore  
15 was injured after the encounter. In addition, the Union stresses that the physical examination of  
16 Youth Moore revealed no injuries, including the alleged lump on his head.

17                   **3. Assessing the Parties' Arguments**

18           Preponderant evidence in the arbitral record establishes that the Grievant had to have either known or  
19 suspected that Youth Moore might have been injured after the Grievant dropped him on the floor. The basis  
20 for this conclusion is the Grievant's proximity to Youth Moore when the Youth was rubbing his head. At  
21 that point, the Grievant was standing next to Youth Moore and had to have recognized that the Youth was  
22 at least shaken up if not injured from the fall. The video tape establishes this conclusion, which is wholly

1 independent of whether Youth Moore asked the Grievant for medical attention.<sup>36</sup> Accordingly, the  
2 Undersigned holds that the Grievant clearly should have known that Youth Moore could be injured from  
3 the fall. Therefore, the Grievant had a duty to get medical attention for Youth Moore, especially since the  
4 Grievant's inappropriate, careless conduct either caused or contributed to any injuries Youth Moore suffered  
5 from the fall. Thus, having directly injured Youth Moore or wrongfully exposed him to the risk of injury,  
6 the Grievant had an affirmative duty to insure that the Youth received proper medical scrutiny.

#### 7 **H. Duty to Report Wrestling With Youth Moore**

8 The issue here is whether the Grievant had a duty to report his physical encounter with Youth Moore.  
9 The Agency points to Rule 3.7 and stoutly contends that the Grievant not only had a duty to report the  
10 physical encounter but failed to effectuate that duty. The Union does not contend that the Grievant lacked  
11 a duty to report the incident. Instead, the Union contends that the Grievant had only a duty to submit a YBIR  
12 for horseplay, since that was the extent of his misconduct.

13 Again, the Arbitrator adopts the Agency's position. Specifically, the Arbitrator has found that the  
14 Grievant violated the General Work Rules and Policies discussed under the March 5 incident, which involved  
15 unauthorized or inappropriate physical force against Youth Moore. And Rule 3.7 clearly requires the  
16 Grievant to report his use of physical force against Youth Moore on March 5, 2007. Accordingly, the  
17 Arbitrator holds that the Grievant violated Rule 3.7 by failing to report the use of that physical force against  
18 Youth Moore.

#### 19 **VI. Disciplinary Decision**

20 Because preponderant evidence in the arbitral record as a whole establishes that the Grievant violated  
21 General Work Rules 4.12, 5.1, and 5.12, some measure of discipline is indicated. Determining the proper  
22 quantum of discipline for these infractions involves a balancing of the relevant mitigative and aggravative

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<sup>36</sup> Indeed, standing alone, Youth Moore's claim that he asked the Grievant for medical attention lacks credibility for two reasons. First, Youth Moore offered inconsistent written statements. The initial statement suggested that he was injured in a physical encounter with another youth; in his later written statement, Youth Moore squarely blames the Grievant for his injuries and alleges that he specifically asked the Grievant for medical attention. Second, these inconsistent statements are uncorroborated hearsay and, to aggravate matters, Youth Moore did not testify at the arbitral hearing. Therefore, standing alone, Youth Moore's allegation that he specifically asked the Grievant for medical attention on March 5, 2007 is incredible.

1 factors and ultimately a determination of whether removal was unreasonable, arbitrary, capricious,  
2 discriminatory, or an abuse of discretion under the circumstances of this case.

### 3 **A. Mitigative Circumstances**

4 The strongest mitigative factors for the Grievant are his approximately three years of tenure, presumably  
5 satisfactory record of performance, and no active discipline. Another substantial mitigative consideration is  
6 that the Agency established only one of the three major charges that it leveled against the Grievant. Finally,  
7 nothing in the arbitral record suggests that the Grievant held ill will against Youth Moore or sought to harm  
8 him, and on one occasion, the Grievant admitted that he had acted wrongfully.

### 9 **B. Aggravative Circumstances**

10 The major aggravative factors are that the Grievant violated Rules, 3.7, 4.12, 5.1, and 5.12 as discussed  
11 above. These are serious violations that reflect poorly on the Grievant's judgement and professionalism as  
12 a JCO. As the Undersigned has stated in previous opinions, JCOs may not behave like their juvenile charges  
13 with impunity. No other standard is workable in an environment like that in DYS. Further aggravating the  
14 Grievant's situation are his patent inconsistencies in this dispute. They were not only thinly veiled but also  
15 flatly nonsensical in one instance. Such obvious attempts to avoid responsibility for his conduct reflect  
16 poorly on the Grievant's character.

### 17 **C. Proper Measure of Discipline**

18 Although removal is unreasonable under the foregoing mix of aggravating and mitigating factors, it is  
19 only barely so in light of the Grievant's poor judgement and his less than credible performance on the witness  
20 stand. The primary reason for this reinstatement is that, despite the foregoing serious problems, the Grievant  
21 never intended to harm Youth Moore. Nevertheless, the Grievant will be reinstated on under very strict  
22 conditions: (1) He is entitled to no back pay or other benefits during the period of his separation from the  
23 Agency; (2) However, his seniority shall remain intact as if he were never removed; and (3) He shall be  
24 reinstated pursuant to a two-year probation plan, under which he shall violate *no rule or policy* involving any  
25 youth under the care or authority of DYS. Failure to comply with this requirement shall be grounds to

1 remove the Grievant for just cause.

2 The Arbitrator shall retain jurisdiction of the remedial portion of this dispute until the Grievant is  
3 reinstated. Finally, the Arbitrator sincerely hopes that the Grievant takes full advantage of this opportunity  
4 to rehabilitate himself. Another such opportunity may be difficult to secure.

5 **VII. The Award**

6 For all of the foregoing reasons, the Grievance is hereby **SUSTAINED IN PART AND DENIED IN**  
7 **PART.**

8 Respectfully,

9 *Robert Brookins*

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