

#2000

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO – DEPARTMENT OF YOUTH SERVICES
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME. LOCAL 11

Arbitration Date: October 10, 2008
Hardy Felder: #35-03-20071129-0038-01-03

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:
Mary L. Brown, Labor Relations Officer 3
Ohio Department of Youth Services
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Advocate for the Union:
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I. HEARING

The hearing was held at the Cuyahoga Juvenile Correctional Facility on October 10, 2008. The hearing commenced at 9:14 A.M. The joint issue before the arbitrator is “Was the discipline for just cause? If not what shall the remedy be?”

Testifying for Cuyahoga Juvenile Correctional Facility (“The Employer”) were Edward Glennon, APC Action Coordinator-Health and Safety; Don Bird, DYS Training Academy Manager and Joan Olivieri, Bureau Chief Employee Relations.

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME (“The Union”) were Geneva Foster JCO; Candace Foster, Training Officer and Hardy Felder, the Grievant.

II. STATEMENT OF THE CASE

On September 15, 2007 an incident occurred at the "Employers" facility resulting in Grievant, Hardy Felder being charged with the use of unwarranted physical force on youth Stargell and Carter. Grievant was removed for violations of DYS Work Rules 3.1 Dishonesty, 4.12 Inappropriate or Unwarranted use of force, 5.1 Failure to follow policies and procedures and 5.12 Actions that could harm or potentially harm an employee, youth, or member of the general public. The Union timely filed a grievance and the case is properly before the Arbitrator.

III. THE EMPLOYER'S CASE

The Employer's first witness was Edward Lennon. He is an A.C. Action Coordinator - Health and Safety. Mr. Lennon has twenty-one years at another facility and was called in to do this investigation. He testified he has conducted over one hundred use of force investigations and has held about twenty pre-disciplinary hearings. Mr. Glennon reviewed J-10 Management of Restraint Youth Behavior and J-10 (a) Standard Operating Procedure. Mr. Glennon then testified concerning J-3 (a) his investigation of the youth Stargell incident and J-4 (a) his investigation of the youth Carter incident. Both incidents happened on the same day. The witness also viewed the video and gave his interpretations of what he saw on the video.

Mr. Glennon then read J-3 ©), Pg. 6, his hearing office report and his conclusion that there was just cause for removal. He also reviewed his hearing officer report at J-4 (c), Pg. 5, and said his conclusion was there was clear evidence that the Grievant could have moved back from the youth.

On cross-examination Mr. Glennon said there was no sound on the video. He also said Exhibit J-3 (c), Pg. 2 shows grievant reporting that Youth Stargell had threatened him. The further testimony was that there are thirty to forty youths in the bedroom and that no reports were taken from any other youth.

On re-direct Mr. Glennon said the grievant had said that Youth Stargell threatened him , but that Stargell did not appear combative on the video. He said “ let the Youth cuss as long as he walks”.

Don Bird was the next witness. He has been a Training Manager for four years at the DYS Training Academy. He teaches Verbal Strategy, Restraints, and Response to Resistance (“R2R”). He has taught “R2R” since 1999. Mr. Bird teaches Verbal 1st and physical as a last resort.

Mr. Bird reviewed J-10, Pg. 2 (a), which shows the five levels of youth resistance and the four levels of staff response. He said JCO’s are to use the least restrictive level of response and a response that is reasonable under the circumstance. Mr. Bird then reviewed J-10 (a), the Standard Operating Procedure at Pg. 2, IV (A)(1) concerning physical response.

Mr. Bird then testified concerning J-10 (e) “R2R”; Document Training; Techniques; “R2R” Advanced Course; Report Writing and Verbal Strategy. Mr. Bird then viewed the video. He said as to Youth Stargell, the hand on neck was not an approved technique. He also said, as to Youth Carter, it was not an approved technique to advance forward if the Youth was walking backwards. On cross-examination Mr. Bird was given Exhibit Union 1. The exhibit shows “R2R” was a growing safety concern.

Visits were made to every institution and JCO's were interviewed. Mr. Bird testified that in 2008 training was increased from eight hours a year to sixteen hours per year.

Mr. Bird then viewed the video and said it was not an approved technique for JCO's to put their arm around a youths neck.

On re-direct Mr. Bird said "R2R" is to use physical techniques to protect yourself and others, to prevent escape, self-injury to the youths, protect property and regain control.

Mr. Bird reviewed Union 1, Pg. 7 - 3(d) and said a fourteen year employee is not "new staff". On re-cross Mr. Bird said for JCO's to put hands on a youth's shoulders as a "calming technique" is not approved.

Joan Olivieri, Bureau Chief Employee Relations, testified she does disciplinary review of cases and meets with the Director. The Director has the final say. Ms. Olivieri testified about J-3(a) the first investigative report and J-3 (c), the Hearing Officer's report on the first investigation. She also testified concerning J-4 (a), the investigative report on the second incident and J-5, the Removal Notice. Ms. Olivieri was then referred to the DYS Disciplinary Grid on the last page of J-2. The grid shows 3.1 1-3 days, 4.12 5 days to Termination, 5.1 Verbal to Termination, 5.12 Verbal to Termination. She said she looks at the most serious charge to make a decision.

Ms. Olivieri said she took grievant's fourteen years into consideration and thought he should have known better.

IV. THE UNION'S CASE

Geneva Foster was the first witness for the Union. She has been a JCO for 18 years. Ms. Foster is also an Instructor in "R2R" and Planned Intervention. Ms. Foster read Exhibit Union 2. Level 1, Respond, Level II Seclusion, Level III Defense. She gave an example of a JCO knocked to the ground. Ms. Foster said Level I, concerns youth saying "won't comply". She said JCO's have training four times a year on "R2R".

Ms. Foster then read Exhibit Union 3, which is an agreement by JCO's to follow instructions. The C-Grip is where the JCO places his or her hand on the wrist. The Advance Test is Transport/Arm-Youth to the ground. The Safety Test -Escape from Youth Assault. The JCO's also practice holds, etc...

Ms. Foster further testified that if the situation escalates summon other JCO's to help. She also testified she knows Youth Stargell. He is a problem as he assaults other Youth. Ms. Foster read Exhibit Union-4, which is Youth Stargell's record. She also knows Youth Carter and says he acts like Stargell. She read Exhibit Union-5, which is Youth Carter's record.

Ms. Foster looked at Exhibit Union-6, the still photos from the Video. She said JCO Webster should have stayed with Youth Stargell and told grievant to stay away.

Ms. Foster says she knows grievant and he is firm, fair and consistent. ON cross-examination Ms. Foster testified that if Youth are loud, the JCO's are to use verbal responses or call staff. JCO's are never to use physical response to verbal abuse. She was asked what Unwarranted Use of Force meant and she said unnecessary. Ms Foster was referred to J-3 (a), Pg. 13 of the Investigative Report, which said "Felder pushed Stargell".

She also read J-3 (a), Pg. 16 where JCO Graham says "Felder pushed Stargell".

On re-direct examination she said the statements say "pushed not slammed. Candace Foster testified she has been a Training Officer for 2 years and a Youth Leader for 13 years. She is also the Chapter President. As a Training Instructor she coordinates training and participates in classes. Ms. Foster read Exhibit Union 7, the DYS rules and said grievant's charges do not require termination. She said the Union's request for a thirty day suspension is appropriate. Ms. Foster is not an "R2R" instructor.

She knows Youth Stargell. He has spit on staff, committed theft, thrown feces, started fires and assaulted staff. Ms. Foster also knows Youth Carter. He also assaults youth, and threatens and assaults staff. She said grievant is a strict JCO with high standards. Grievant has a good routine and is firm but fair.

Hardy Felder, the grievant, then testified. Grievant is a 14 year employee. He read his performance evaluations in J-8, Pg. 28.

On September 15, 2007, grievant was on the 3rd shift. He was asked what Inappropriate or Unwarranted force meant and he said it was self-explanatory. Grievant said he had problems with Youth Stargell. Youth Stargell had invited him to fight and he felt Stargell was targeting him. He reported this to supervisors at roll call.

Grievant then read Exhibit, Union 8, which is a Youth Behavior Incident Report "YBIR", which shows his problems with Youth Carter. The grievant then said the incidents happened within minutes of arriving at work. He reviewed the video of the incidents. He read J-3 (a), Pg. 4, which was his statement.

Grievant said he pressed Stargell to the door and then took him to the floor. He read J-3 (a), Pg. 5 and said he was threatened. Grievant denies throwing Stargell against the door. Grievant said he told the Operations Manager at roll call of Stargell's threats.

Grievant read J-4 (a), Pg. 4 and said there was no intent to be dishonest in any statements. Grievant said the incidents are not representative of how he does his job.

On cross-examination he read his Performance Evaluation at J-8, Pg. 7, which says he "tests the limits". Grievant said he did not write an "YBIR" on the threat, but he should have. He was questioned about his Notice of Discipline of October 13, 2002 and said he didn't remember the details. He was then asked if he knew JCO Graham and said he did not. He did know the other JCO.

On re-direct he read Union 7, which says verbal to termination. The suspension is not in his personnel file as it is too old.

V. OPINION OF THE ARBITRATOR

The issue before the Arbitrator has been well presented by both parties to this dispute. This case is not a simple one and the case has been well presented, well briefed, and well argued.

The Employer contends, with merit, that the grievant acted contrary to the Employer's Training and the Employer's Directives. All the witnesses qualified to discuss this matter agreed. The Employer argues in its brief that the only remedy is termination. The video of the events is in line with the Employer's position that the events occurred. The Employer has provided in its brief decisions of other arbitrators. The Employer also provided detailed testimony as what is appropriate for "R2R".

The Union contends in its brief that there is a "climate of fear" in the work place. The Union also contends there were inactions by other JCO's and actions by JCO's that were not approved techniques. The Union stresses grievants 14 years on the job and his good performance evaluations. The Unions' real argument is for mitigation of the penalty. The grievant admits he acted inappropriately. The Union has also provided copies of Arbitrator's Decisions it thinks are on point.

This arbitrator has read the decisions of the other arbitrators provided. Facts drive cases. The decisions of the other arbitrators reach a variety of different answers.

A review of the exhibits indicates several important facts not evident in the video. As to Youth Stargell the statement of JCO Mogaji in J-3 (a) says " Youth began to get combative and was taken down."

As to Youth Carter, JCO Clemente said in J-4 (a), Youth Carter said he would "whip grievants ass and put his fists up". The statement also shows Carter "pushed through me, Webster and Gaines towards Felder". JCO Webster said at J-4 (a), "Youth was walking out the door and attempted to swing at JCO Felder".

The Union is correct in its argument that the video has no sound and some evidence is missed because of this. It is clear that physical response is not appropriate to verbal abuse. What is important about this fact is that the Youth's made verbal comments that were tied in to their combative behavior. The Employer contends in its brief that grievant did not do any "YBIR" reports until September 15, 2007. However, Exhibit, Union 8 is a "YBIR" report concerning Youth Carter signed by grievant July 18, 2007. Grievant also reported his problems with the Youth during roll call. I certainly believe there were grounds for discipline, but do not think removal is warranted.

The Employer contends that because of grievants 14 years on the job he should know better. This sword has two edges. It is also true that the grievants record and the comments of the JCO's can not be ignored. The Employer used a prior discipline, barred by time, in an apparent attempt to impeach the grievant. The grievant had already admitted he was wrong, so it is irrelevant.

I think that when the statement of other JCO's are considered in light of the video that the posture of the case changes.


I find that considering the total evidence in this case that the discipline was not progressive and needs to be modified. I sustain the grievance in part and deny it in part.

VI. AWARD

1. JCO Felder be reinstated to his position as Juvenile Corrections Officer.
2. The termination be stricken from his record including any employee electronic record, and a forty-five day time served suspension be reflected in his personnel file.
3. The forty-five day suspension will be for Rules 4.12 and 5.1. Rules 3.1 and 5.12 will be removed from JCO Felder's disciplinary record.
4. All lost wages, except for the forty-five day time served suspension, less any interim earnings and appropriate deductions including Union dues.
5. All leave balances that would have accrued from date of removal.
6. No loss in seniority.
7. The post, shift and good days JCO Felder held when he was removed.
8. Payment for any medical, dental or vision expense that would have been covered under his insurance less appropriate deductible and co-payments; provided, however, if JCO Felder had medical insurance in another job this shall not apply to the extent of that coverage.

The Arbitrator will retain jurisdiction for 60 days.

Decision rendered the 13th day of November, 2008 at Ironton, Ohio.



Craig A. Allen, Arbitrator