#2023

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF YOUTH SERVICES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION

AFSCME. LOCAL 11

Arbitration Date: March 26, 2009

Grievant Eric Avery: #35-20-20080924-0039-01-03

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Melinda Hepper
Ohio Department of Youth Services
51 N. High Street, Suite 101
Columbus, Ohio 43215

Advocate for the Union:

Dave Justice
OCSEA, AFSCME Local 11
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I. HEARING

The hearing was held at the Ohio River Valley Juvenile Correctional Facility on March 26, 2009. The hearing commenced at 8:55 A.M. The joint issue before the arbitrator is "Was the discipline for just cause? If not, what shall the remedy be?"

Testifying for the Ohio River Valley Juvenile Correctional Facility ("The Employer") were Joan Olivieri, Bureau Chief Labor Relations and Donald Richards, Juvenile Corrections Officer "JCO".

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME ("The Union") were Brian Holbrook, JCO and Eric Avery, the Grievant.

II. STATEMENT OF THE CASE

On December 2, 2007 an incident occurred at the "Employer's" facility resulting in Grievant, Eric Avery, being charged with the use of unwarranted physical force on Youth [redacted] Grievant was removed for violations of Ohio Department of Youth Services General Work Rules, Policy 103.17 specifically Rule 3.1 Dishonesty and Rule 4.12 Inappropriate or unwarranted use of force.

III. THE EMPLOYER'S CASE

The Employer's first witness was Joan Olivieri, Bureau Chief Labor Relations. Ms.

Olivieri testified she reviewed the Discipline packet regarding the incident with Youth [redacted] on December 2, 2007. Ms. Olivieri was referred to Investigation Exhibit Page one, the Investigation by the Chief Investigator's Office. This was reviewed by her. Ms. Olivieri was then referred to Investigation Exhibit Page 36 which is JCO Richards Youth Intervention Report (YIR). This report indicates JCO staff prevented Youth [redacted] from making an assault upon another Youth. She then read Investigation Exhibit Pages 56 - 58 which is Grievants YIR. Ms. Olivieri reviewed this statement to see why force was used. The statement was similar to that provided by JCO Richards.

Ms Olivieri's testimony as to evidence taken by Investigator Whipple was objected to by the Union. Mr. Whipple is now deceased and the Union has no way to cross- examine him. Ms. Olivieri's testimony was limited to saying she gave weight to Mr. Whipple's findings.

Ms. Olivieri then read Discipline Trail Exhibit Page 1, the Pre-Disciplinary Notice. She also read Discipline Trail Page 10 which is Grievants sign off on the General Work Rules. Ms. Olivieri read Discipline Trail Page 11, the sign in sheet for training of February 22, 2007 for Response to Resistance ("R2R") Instructors Re-Certification. Grievant was present for this training. She then read Disciplinary Trail Exhibit Page 23, the Hearing Officer's Pre-Disciplinary Report. Ms. Olivieri also reviewed Discipline Trail Page 22, this is the Order of Removal dated September 19, 2008 which was signed by the Director and given to the Grievant.

Ms. Olivieri said that when she receives the Pre-Disciplinary Report she meets with the appropriate people and then the Director. The Director has the final say.

Ms. Olivieri read Policy and Procedure Exhibit Tab 4 which is Policy 301.05, Management of Resistant Youth Behavior. She also reviewed Policy and Procedure Exhibit Tab 5, Physical Response and Report Document; Tab 6 Standard Operating Procedure ("SOP"); Tab 7 R2R Grid of Expectations for Response. She testified Grievant was trained on R2R. She then read Tab 6, the definitions of Active Resistance and Combative Resistance and then turned back to Tab 7. Ms Olivieri said on these facts there was no reason for staff to hit or kick the Youth.

She then went to Policy and Procedure Exhibit Tab 1, the General Work Rules which define Prohibited Staff Behavior. She then looked at Tab 2 page 3 of 9 and said Rule 3.1 calls for 1 - 3 days, Rule 4.12 calls for 5 days to termination. Ms Olivieri said only staff were involved in this incident with the Youth and there was a severe injury. Ms Olivieri said the Grievant's behavior was blatant and so he was removed.

On Cross-Examination Ms. Olivieri was referred back to Investigation Exhibit Page 99 which is an interview with Youth [redacted] The Grievant was not identified by name. Youth [redacted] referred to "other officers". She then read Investigation Exhibit Page 101 - 102 which is the Youth Grievance Form. Youth [redacted] refers to JCO Richards hitting his head on the wall but makes no reference to Grievant. Ms. Olivieri then read Investigation Exhibit Page 104 which is Youth [redacted] Grievance Form. Youth [redacted] saw the incident but could not identify Grievant. Youth [redacted] referred to "other officers".

Ms. Olivieri then read Investigation Exhibit Page 1 and said this was part of the basis for her Opinion. This Exhibit indicates Youth [redacted] tried to assault another Youth. She was then

referred to Policy and Procedure Exhibit Tab 6,this is the Response to Resistance ("R2R") Standard Operating Procedure ("SOP"). She read the definition of Active Resistance and said a Youth pushing off the wall and causing staff to fall to the floor is Active Resistance. Youth struggling on the floor is Active Resistance. Youth attempting to assault another Youth is Combative Resistance. She then read Discipline Trail Exhibit Pages 11 - 12 which is an "R2R" Training Report. There was a two day training session for Re-Certification of "R2R" Instructors and Grievant was there both days. Ms Olivieri commented she hoped an "R2R" instructor would know what force to use.

On Re-Direct Examination, Ms. Olivieri testified concerning Policy and Procedure Exhibit Tab 6 which concerns Control Techniques. She said hitting and punching a Youth is not appropriate. She also said hitting and punching Youth are not appropriate Escort Techniques. She then reviewed Policy and Procedures Exhibit Tab 7 and said the level of response changes with the level of resistance. When asked if a Youth crawling on the floor was Active or Combative Resistance she said Active.

On Re-Cross Examination she was asked if Youth continue to struggle are the JCOs to continue to try restraint. Ms. Olivieri said they should quit trying to restrain the Youth.

The next witness was JCO Donald Richards. JCO Richards was a very reluctant witness. JCO Richards was subpoenaed to the hearing and resisted testifying without his own Union staff representative present. He was advised by the Arbitrator that he was subpoenaed to be present and that he could only invoke protection under the Fifth Amendment if he was going to confess to a crime. JCO Richards then agreed to testify.

JCO Richards was then referred to Investigation Exhibit Page 195 which was his second interview with Investigator Don Whipple. Grievant said this interview was accurate. He said he saw Grievant punch Youth [redacted] He said they were short punches in the middle of the head. JCO Richards said Grievant hit Youth [redacted] where no one could see it. JCO Richards then read Investigation Exhibit Page 205 and 206. He said Grievant hit Youth [redacted] six (6) or eight (8) times. He said Grievant hit Youth [redacted] on the left side of the face. JCO Richards says he never hit Youth [redacted]. JCO Richards admitted misleading the Investigator the first time because of peer pressure. He said he was threatened with jail for something he didn't do.

On Cross-Examination he read Investigation Exhibit Pages 91 & 92 which was his interview with Mr. Blevins. In that interview he did not say he saw any staff hit Youth [redacted] He was then referred to Investigation Exhibit Pages 36 - 37 which was his YIR and it gave no indication he saw any staff hit Youth [redacted].

JCO Richards was referred to Investigation Exhibit Pages 195 - 204 which was his first interview. He was interviewed twice on the same day. He said the recorder was not on the entire time and there was a conversation off the record.

JCO Richards said he joined the struggle with Youth [redacted] on the floor. He said Youth [redacted] was Active-Combative when he arrived. Youth [redacted] was trying to kick staff. JCO Richards held his leg. He said trying to kick staff is assertive behavior. Youth [redacted] continued to struggle on the floor and staff told him to be compliant. No supervisor told them to stop. JCO Richards then read from Investigation Exhibit 205, which is his second interview.

The tape was on the entire period of time. He said he saw Grievant hit Youth [redacted]. He said he had traded positions with JCO Jones and was trying to get the Youth in handcuffs.He said he told Grievant to use a pressure point on the Youth's jaw. The Grievant hit Youth [redacted] several more times.

He was asked why he had given three (3) statements that said he didn't see anything and in his fourth (4th) statement that he had. JCO Richards responded by saying he was threatened with jail by Investigator Don Whipple. He said his last statement that he saw Grievant hit the Youth is the truth.

JCO Richards said he talked to Grievant and told him to step up and take responsibility.

Grievant said "Don't say anything. They won't have nothing on us".

On Re-Direct he was shown Investigation Exhibit 266 and said it was Youth [redacted] photo.

On Re-Cross Examination he said he doesn't recall how Youth [redacted] looked after the struggle on the floor.

IV. THE UNION'S CASE

The Union's first witness was JCO Brian Holbrook. He testified that he has been a JCO for four (4) years and he calls the incident of December 2, 2007. JCO Holbrook was referred to Investigation Exhibit 1 which is a summary of the incident. He testified he responded to a Signal 88 in the mini-gym. Youth were fighting in the mini-gym. He placed a Youth in handcuffs and

took him back to the Unit. JCO Holbrook said a Youth came around the pod and tried to assault someone and Staff intervened. Youth [redacted] was not able to get to him. He said without staff intervention it could have gotten ugly.

JCO Holbrook said he wasn't sure whether Youth [redacted] was coming after him or the Youth he was escorting. He said he doesn't recall Youth [redacted] being put on the wall. He said he saw a large group and couldn't see what was going on on the floor. He said he had a Youth behind him in handcuffs and he spent most of the time watching the Youth. JCO Holbrook said he did not see staff hit or kick Youth [redacted]. He also said he didn't hear staff say anything. JCO Holbrook testified the struggle continued while Youth [redacted] was on the floor and the Youth was very resistant. He said he has been in several restraints and never had management tell him to stop and back off a restraint.

The last witness for the Union was the Grievant Eric Avery. He had been a JCO for three (3) years and eight (8) months.

The Union introduced the Grievant's Performance Evaluation as Union Exhibit 1. The Grievant testified the Operations Manager does these evaluations and that he never had a bad evaluation. Union Exhibit 1 covers the entire time of his employment.

Grievant said he responded to a Signal 88 in the mini-gym and when he arrived the situation was under control. JCO Holbrook was taking a Youth to the Unit, Youth [redacted] ran across the pod and staff had to restrain him. He said he fell to the floor and hurt his elbow. Youth [redacted] continued to roll around on the floor and was resistant. Grievant was then referred to Investigation Exhibit Pages 56 - 58 which is his YIR on Youth [redacted] Page 56 covers levels.

Level 1 is Verbal. He also reviewed Levels 2,3, and 4. He said staff response was within the Levels.

Grievant then read Policy and Procedure Exhibit Tab 7, Levels of Restraint. He said Youth [redacted] was all up and down the scale. Youth [redacted] had his hands locked under him and continued to roll and try to get away. He was not sure how long it took. Management never told them to break off the restraint. Grievant said staff continuously told Youth [redacted] to quit resisting. The Youth did not stop until handcuffed.

Grievant testified he is an "R2R" Instructor and is proficient. He knows what excessive use of force is and he saw no excessive use of force. JCO Richards was trying to hold Youth [redacted] on the ground. He said the Youth's injuries could have been caused by the fall to the floor but really has no idea. Grievant denies striking the Youth. He said he had no conversation with JCO Richards about pressure points. Grievant said JCO Richards said Central Office was after him for having one hundred (100) plus restraints and he wanted Grievant to take the heat off him. Grievant also said he was never interviewed by Mr. Blevins.

Grievant read Investigation Exhibit Page 125 which is a Log Entry at 12:05 showing Grievant had a fractured elbow and was under a Dr.'s care for three (3) days. He also said he was working 2nd shift on mandation and it was not his regular shift.

On Cross-Examination he said he is an "R2R" instructor and knows what's appropriate. He looked at Investigation Exhibit Page 266 and says it is a Photo of Youth [redacted] He said the fall to the floor could have caused injury and there is no technique for this. During a struggle anything

could happen. He was then referred to Investigation Exhibit Pages 220 - 233. This is his Question and Answer with Investigator Whipple. He said he was closest to the Youth. JCO Richards was there also. Grievant also said everybody fell on him. Investigator Whipple said he has witnesses Grievant hit the Youth. Grievant read Investigation Exhibit Page 228 where he said Youth [redacted] was hurt by an Elbow holding him down. He read Investigation Exhibit Page 229 which indicated he had no conversation with JCO Richards while on the floor. He may have spoken to JCO Richards afterwards.

Grievant then read Investigation Exhibit Page 229 which said JCO Richards used excessive force. He then read Investigation Exhibit 230 and said Unit Manager Doss was present the entire time. He said he didn't tell anyone he saw excessive force. He also said he didn't work the Unit and he didn't know Youth [redacted] and [redacted] didn't know him.

On Re-Direct Grievant was referred to Investigation Exhibit Page 226. He said he doesn't know what caused injuries. Youth [redacted] was really struggling and JCO Richards was trying to hold his head down. Youth [redacted] was jerking his head around and he did not see any excessive force.

Grievant was then asked why he had told Investigator Whipple it was excessive force. Grievant replied Youth [redacted] was banging his head on the floor. JCO Richards was trying to stop this and prevent self- injury. He doesn't know what caused the Youth's injuries.

Grievant was shown Investigation Exhibit Page 266, the photo of Youth [redacted] injuries. He said some injuries could have occurred in the fall to the floor or restraint. He also said

Investigator Whipple recorded the conversation.

Grievant was then referred to Investigation Exhibit Page 223. He said Youth [redacted] was resistant on the floor. He said the Youth was a big boy and had his hands underneath him. He said people are lying who said he hit Youth [redacted] Grievant then read Investigation Exhibit Page 224 and said he told Investigator Whipple about his conversation with JCO Richards.

Grievant testified he told Mr. Nelson, the Acting Superintendent about it. He told Mr. Nelson it was JCO Richards.

Grievant said "R2R" instruction has no teaching on pressure points. He read Investigation Exhibit Page 229 and said he didn't think JCO Richards used excessive force even though he told Investigator Whipple it was.

The hearing was concluded at 12:14 P.M.

V. OPINION OF THE ARBITRATOR

The Union raises a timeliness argument in it's Closing. This is always a troublesome issue. As this issue was not raised during the hearing the Arbitrator does not know what the Employer's response would have been.

The Union cites Article 24.02 of the Collective Bargaining Agreement which says in pertinent part "an Arbitrator deciding a disciplinary case must consider the timeliness of the employer's decision to begin the disciplinary process".

The Union is correct that the pre-disciplinary hearing was not conducted until three months after the investigation was concluded.

The Union however has offered no evidence that this delay had an adverse impact. For example there is no evidence that evidence favorable to the Grievant was lost or otherwise unavailable. The Arbitrator finds no adverse effect because of the timeliness of the proceedings.

The first issue on the Removal was 3.1 Dishonesty. The evidence is clear that only staff touched Youth [redacted] The Grievant's YIR did not mention inappropriate or unwarranted force by himself or others. In Grievants interview with Investigator Don Whipple Grievant, after being advised that Investigator Don Whipple had a witness who saw Grievant hit the Youth six (6) to eight (8) times, said JCO Richards had his elbow across Youth [redacted] head and that this was the cause of the injuries.

The Union's main argument on this issue is an attack on the investigative summary of Investigator Haynes. The Union contends that the statements by Investigator Haynes concerning Grievant and JCO Richards are false and misleading. This is a serious allegation. This investigative summary is indeed part of the Investigative Exhibit.

The Employer has placed little or no emphasis on Investigator Haynes summary and Investigator Haynes did not testify at the hearing. The Employer's evidence at the hearing was based upon the testimony of Ms. Joan Olivieri, JCO Donald Richards, and Cross-Examination of the Grievant with the interview with Investigator Don Whipple and JCO Richards statements. The Grievant did deny that he was ever interviewed by Mr. Blevins.

The Grievant is guilty of dishonesty. His YIR fails to mention either his assault upon

Youth[redacted] or any allegation against JCO Richards. As the Employer points out this is consistent with his statement to JCO Richards that nothing would happen if JCO Richards didn't say anything.

The other reason for removal was 4.12 Inappropriate or unwarranted use of force. The Grievant asserts that those who accuse him of this are liars.

Ms Olivieri testified that Youth[redacted] was engaged in Active Resistance and that hitting and punching him was not appropriate. It is interesting to note that Grievant in his YIR refers to the resistance as being active. Grievant also told Investigator Don Whipple that Youth[redacted] was Active Resistant and he had his hands underneath him. As Grievant is a Certified R2R Instructor he clearly knows the difference between Active and Combative Resistance.

There was considerable evidence that Youth[redacted] and the other Youth who gave statements could not identify Grievant by name. Grievant, however, testified he was working second shift on mandation and did not ordinarily work this Unit. Grievant said he did not know Youth[redacted] and Youth[redacted] did not know him. The evidence does support that staff did hit and punch Youth[redacted]

JCO Donald Richards testified that he saw Grievant punch Youth[redacted] six (6) to eight (8) times. JCO Richards was interviewed several times before he made this statement. The Union points this out and it is indeed troubling. JCO Richards testified that Investigator Don Whipple threatened him with jail. The Employer contends there is a culture at this facility of employees resisting or refusing to testify against co-workers. Whether this is true or whether JCO Richards

had motives of his own is unclear. There is testimony that JCO Richards had over one hundred (100) restraints and was concerned about Central Office. That may have been his motive.

What is clear is his unshakeable testimony that he saw Grievant hit Youth [redacted] six (6) to eight (8) times. This is consistent with the Photos of Youth [redacted] injuries.

The Union disputes the fact that there was a conversation during the struggle between Grievant and JCO Richards about the use of pressure points. This may be so. However, the only dispute over punching Youth [redacted] is the Grievant's denial. The fact that other witnesses could not identify Grievant by name is consistent with the fact that this Unit was not Grievant's regular assignment.

It is clear that Grievant used Inappropriate and unnecessary force on Youth [redacted] Youth [redacted] hands were underneath him and the other witnesses support the testimony of JCO Richards. The Grievant had a blatant disregard of the rules.

I deny the grievance. The Grievant was discharged for Just Cause. The discipline was commensurate with the offense.

Decision rendered this 14th day of April, 2009 at Ironton, Ohio.

Craig A. Allen
Arbitrator