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IN ARBITRATION PROCEEDINGS PURSUANT TO
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, Local 11, AFSCME

and

STATE OF OHIO,
DEPARTMENT OF YOUTH SERVICES

Case No. 35-07-08-08-20-0021-01-03

Grievant: Angela King

ARBITRATOR'S
OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME ("the Union") and STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES ("the Employer"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her decision shall be final and binding pursuant to the Agreement.

Hearing was held March 13, 2009 at the Scioto Juvenile Correctional Facility. The Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Both Parties submitted written Closing Arguments.

APPEARANCES:

On behalf of the Union:

**JENNIE LEWIS, OCSEA Staff Representative, 390
Worthington Rd., Westerville, OH 43082.**

On behalf of the Employer:

**VICTOR DANDRIDGE, Labor Relations Specialist,
Office of Collective Bargaining, 100 E. Broad St.,
Columbus, OH 43215.**

ISSUE

**Was the Grievant removed for just cause? If not,
what shall the remedy be?**

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

March 1, 2006 - February 28, 2009

. . .

ARTICLE 5 - MANAGEMENT RIGHTS

...

...the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees;....

...

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....

...

...

OHIO DEPARTMENT OF YOUTH SERVICES **RELEVANT POLICY AND PROCEDURE PROVISIONS**

POLICY NUMBER 301.05 Management of Resistant Youth Behavior (Institutions)

I. Policy Provisions

It shall be the policy of the Ohio Department of Youth Services (ODYS) to establish uniform procedures to manage resistant youth behavior. 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. The Ohio Department of Youth Services recognizes five levels of youth resistance and authorizes four levels of staff response. 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.**

- B. Verbal Response shall be the preferred response to youth resistance and shall be utilized, whenever practical, to assist a youth in maintaining or regaining self-control. The use of profanity, racial, gender, sexual orientation or ethnic slang to manage youth behavior shall be prohibited by ODYS staff.**
- 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 as a punishment.**

...

**Standard Operating Procedure Number 301.05.05
Response to Resistant Youth Behavior**

...

IV. Procedure

...

- C. Staff responses shall be acceptable based on the following continuum of youth resistance....**
 - 1. Verbal Resistance**
...
 - 2. Passive Resistance**
...
 - 3. Active Resistance**
...
 - 4. Destructive Resistance**
...

5. Combative Resistance

...

POLICY NUMBER 103.17 General Work Rules

...

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

LEVEL ONE:

...

Rule 1.12 Horseplay or practical jokes

Engaging in “horseplay” or practical jokes with other staff, youth, and the general public while on State property/time, regardless of whether injury occurs.

...

LEVEL FOUR:

...

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.

...

LEVEL FIVE:

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.

...

FACTS

The Grievant has been employed as a Juvenile Correctional Officer ("JCO") by the Ohio Department of Youth Services for approximately ten years. She was removed effective August 12, 2008.

The removal was based on a June 13, 2008 incident involving a youth under the Grievant's supervision. The incident largely involved "smack" talk between the Grievant and the youth that escalated to the Grievant slapping the youth on her arm.¹

The July 3, 2008 Pre-Disciplinary Notice provides in pertinent part:

...

It is alleged that on June 16 [sic], 2008, you used inappropriate force on a youth.

Your actions are alleged violations of the following DYS General Work Rules Policy 103.17 effective 2/1/02 and revised 11/25/05:

¹ As the Grievant approached the youth, the youth put her arms up in front of her face.

**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 POLICY AND
PROCEDURE, 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.**

...

The Pre-Disciplinary Hearing was held July 8, 2008. The Hearing Officer

found:

- 1) JCO King had inappropriate or
unwarranted force with a youth. Ms. King
admits in her own statement and Q&A
session that she "...accidentally ended up
smacking the youth...."**
- 2) JCO King failed to document/notify per
policy that this incident took place on the
unit.**

The Order of Removal states in pertinent part:

**On or about June 13, 2008, you use[d] inappropriate
or unwarranted use of force on a youth and failed to
document the incident.**

**Your actions are a violation of the following Policy
103.17 Rule(s) effective 11/25/05, specifically:**

Rule 4.12 [inappropriate force]

Rule 5.1 [failure to follow policy]

Due to the seriousness of the infraction, you are hereby removed from your position as Juvenile Correction Officer effective 8-12-08.

The Union filed a grievance, stating in pertinent part:

There was no just cause for Ms. Angela King to be removed from her position at Scioto Juvenile Correctional facility. This discipline was used to punish[] Ms. King.

POSITIONS OF THE PARTIES

Employer Position

The Grievant was removed for just cause. She violated work rules 4.12 and 5.1. The Grievant struck a youth without provocation or cause. This was not horseplay; rather, it was an unwarranted use of force. The Grievant, in a state of anger, slapped a youth who was not a threat to other youth, herself, or the Grievant.

JCO's are charged with providing a safe environment for the youth who reside at the facility. The Grievant used unwarranted force and failed to report the incident.

Through court orders and through its own policies, the Employer has declared a zero-tolerance of staff assaults on youth. The Grievant was aware of the Employer's stance and its policies.

Union Position

The Employer did not have just cause to remove the Grievant. The Employer's decision to terminate the Grievant was extreme and unwarranted.

The Grievant has never denied coming into physical contact with the youth. She does, however, deny she had any intent to harm the youth. The incident was a result of horseplay.

The Employer has been inconsistent in imposing discipline for physical contact with you. Recently, a JCO at the same facility received a two-day fine for throwing a book at a youth, striking her in the back of the head. Such discipline contradicts the zero-tolerance policy alleged by the Employer.

The Employer failed to consider the Grievant's ten years of service and her lack of any other discipline involving improper contact or unwarranted force. Based on such factors, arbitrators have reinstated JCO's involved in more serious physical altercations than that of Grievant's. See OCSEA (Herron) and DYS, Case No. 35-07-040513-0255-01-03 (Brookins, 2008); OCSEA (Peacock) and DYS, Case No. 35-07-20071012-0060-01-03 (Washington, 2008); and OCSEA (Tersigni) and DYS, Case No. 35-04-20060620-0031-01-03 (Brookins, 2007).

OPINION

This case involves the termination of the Grievant's employment for alleged misconduct. As such, the Employer has the burden of proving just cause, consisting of whether:

- 1. The Grievant did what she is accused of doing;
and**
- 2. Under all the circumstances, removal was appropriate.**

The Grievant's Alleged Misconduct

The Employer charged the Grievant with "inappropriate or unwarranted use of force on a youth" and "fail[ure] to document the incident," violations of:

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.

and

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.

The record conclusively establishes:

- 1. The youth verbally taunted the Grievant;**
- 2. The Grievant lost her temper for a moment;**

3. The Grievant slapped the youth once on her arms or hands, which the youth had placed in front of her face;
4. The youth was not physically harmed; and
5. The Grievant did not log or otherwise report the incident.

Thus, it is clear the Grievant's conduct violated Rules 4.12 and 5.1.

Whether Removal was Appropriate Under All the Circumstances

The record establishes the Grievant had no active discipline at the time of the incident. Accordingly, the disciplinary grid provides the range of a five-day suspension to removal.

The Grievant had ten years of service. She presented herself at the arbitration as an intelligent, competent, and effective JCO. Functioning effectively as a JCO is not an easy task. Though it certainly is important for a JCO to keep her emotions in check, it can be challenging to do so every minute of the workday, month after month, year after year. The JCO's at this facility work with a difficult population. Considering all the circumstances, the Grievant had an isolated and momentary lapse in judgment. There was no physical harm or other dire consequences from this momentary lapse.

Conclusion

The record establishes the Grievant committed the misconduct she is accused of. The recent arbitration awards between the Parties submitted, however, uniformly reinstated without back pay employees involved in

physical altercations more substantial than the Grievant's. Accordingly, the Employer had just cause to discipline the Grievant, but not to remove her.

AWARD

For the reasons set out above, the grievance is granted in part and denied in part.

- 1. No later than June 26, 2009, the Employer shall offer reinstatement to the Grievant at the same facility; or, the Employer and the Grievant, if they so choose, can agree by July 10, 2009 on an alternate facility. In either event, if the Grievant accepts the offer of reinstatement, she shall be reinstated no later than July 20, 2009.**
- 2. Reinstatement shall be without back pay, but with seniority restored, including seniority credit for the period between removal and reinstatement.**
- 3. Except for her restored seniority, the Grievant is not entitled to any other benefits for the period between removal and reinstatement.**
- 4. Discipline of record shall be a 10-day suspension.**

The Arbitrator reserves jurisdiction through August 28, 2009 as to remedy only.

DATED: June 12, 2009


Susan Grody Ruben, Esq.
Arbitrator