

IN THE MATTER OF ARBITRATION

BETWEEN

**STATE OF OHIO – DEPARTMENT OF YOUTH SERVICES
OHIO RIVER VALLEY JUVENILE CORRECTION FACILITY**

AND

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11
AFSCME, AFL-CIO**

Arbitration Date: June 15, 2009

Grievant Wesley Hawthorne: #35-20-20081124-0049-01-03

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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Westerville, OH 43082

I. HEARING

The hearing was held at the Ohio River Valley Juvenile Correctional Facility on June 15, 2009. The hearing commenced at 8:58 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 David Haynes, Senior Investigator and Joan Olivieri, Bureau Chief, Labor Relations.

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME ("The Union") were Brandon Doss, JCO and the Grievant, Wesley Hawthorne, JCO.

II. STATEMENT OF THE CASE

On December 2, 2007 an incident occurred at the "Employer's" facility resulting in Grievant, Wesley Hawthorne, being charged with dishonesty and actions that could cause harm to a Youth. The Grievant was specifically removed for violations of the Ohio Department of Youth Services (ODYS) General Work Rules Policy 103.17 Rule 03.1 Dishonesty and 5.12 Actions that could harm or potentially harm an employee, Youth or a member of the general public. The Grievant's effective removal date was November 21, 2008. The Union timely filed a grievance and the case is properly before the Arbitrator.

III. THE EMPLOYER'S CASE

The Employer's first witness for the Employer was David Haynes. Mr. Haynes has a Bachelors Degree from Bowling Green State University. Mr. Haynes has served as a DYS Youth Leader, a Duty Officer and a Unit Manager. In 1996 Mr. Haynes went to the Central Office and works for the Chief Investigator. Mr. Haynes supervises five (5) Investigators and reviews all investigations to be sent to the Chief Investigator. Mr. Haynes attended the Ohio Reed Program on conducting interviews and is a Trainer for Administrative Investigations. He has conducted over five hundred investigations, three Hundred (300) of which concerned use of force.

Mr. Haynes was referred to Investigation Exhibit Tab 1 which is his report of the investigation. The report shows Youth Barber was assaulted December 2, 2007. The case was first assigned to Asst. Principal, Mr. Martin, and then to Asst. Principal, Mr. Blevins, for investigation. The case was then assigned to Investigator, Don Whipple, and after Mr. Whipple passed away it was assigned to Mr. Haynes. The investigation was started December 14, 2007 and concluded May 8, 2008.

Mr. Haynes was then referred to Investigation Exhibit Tab 2 which is an addendum to the investigation report. The addendum was signed off on September 19, 2008. The purpose of the addendum was to check on other staff.

Mr. Haynes was asked how he conducts his investigation. He said he first looks at the AMS report. He looks for potential victims and interviews them first. Mr. Haynes then interviews the others involved. Mr. Haynes then reviewed Investigation Exhibit Page 265 which is the Youth

Injury and Assessment Form. The Form shows Youth Barber had an injury to his left eye and it was swollen shut. Youth Barber also had a small abrasion on his left eye. The Youth also had outside Medical treatment by an eye specialist. Mr. Haynes also reviewed Investigation Exhibit Pages 266 - 269 which are photos of Youth Barber's injuries. He then read Investigation Exhibit Pages 99 - 100 which is Youth Barber's statement to Asst. Principal Ray Blevins.

Youth Barber said he was involved in a restraint. The Youth said he was punched and kicked both on the Unit and in his room. The Youth identified JCO Richards but could not identify the rest of the staff involved.

Mr. Haynes then read Investigation Exhibit Page 103. This is Youth Calhoun's statement that staff were hitting and kicking Youth Barber, but could only identify JCO Richards. He then read Investigation Exhibit Pages 104 - 106 which is Youth Calhoun's Grievance concerning Youth Barber. Youth Calhoun named several staff involved in the incident but does not mention Grievant. Mr. Haynes then read Investigation Exhibit Page 109 which is Youth Jackson's statement to Asst. Principal Ray Blevins. This statement says JCO Richards kicked Youth Barber and Grievant held Youth Barber's ankles. Mr. Haynes also read Investigation Exhibit Pages 110 and 115 which says JCO Richards and other staff punched and kicked Youth Barber and put Youth Barber on the ground. Mr. Haynes read Investigation Exhibit Page 112 which is Youth Ross's statement. Youth Ross says staff were punching and kicking Youth Barber. He also read Youth Ceasar's Grievance Form in which he said he saw Youth Barber assaulted but only identified JCO Richards.

Mr. Haynes then reviewed Investigation Exhibit Pages 195 and 220. The Union objected as Mr. Whipple is deceased and not available for cross-examination. The witness was only allowed to say he had looked at these reports.

Mr. Haynes then read Investigation Exhibit Pages 59 - 72 which is the Grievant's Youth Intervention Report (YIR). Grievant was involved with Youth Barber. Youth Barber runs toward Youth Jackson. Youth Barber throws a punch at Youth Jackson. Grievant was first on Youth Barber's left arm and then on Youth Barber's right arm after they fell to the floor until Youth Barber was handcuffed. He then read Investigation Exhibit Page 59 which is the list of restraints Grievant said he used on Youth Barber.

Mr. Haynes then read Investigation Exhibit Pages 256 - 259 which is Mr. Haynes interview of Grievant. Grievant said Youth Barber ran towards Youth Jackson. Grievant also indicated he used other restraints than he listed in his original report. Grievant says he saw no excessive force. He then read Investigation Exhibit Pages 73 - 75 which is JCO Holbrook's "YIR" and incident statement. These documents show Youth Barber running at Youth Jackson.

Mr. Haynes then read Investigation Exhibit Pages 250 - 255, an interview with JCO Jones. JCO Jones said he was involved in the incident and was trying to control Youth Barber's left arm but was unable to do so. JCO Richards then took the Youth's left arm and JCO Jones took his legs. JCO Jones said the Youth was bleeding when he responded. Mr. Haynes then was referred to Tab 2 Page 15 which is his conclusion. Mr. Haynes said the Grievant was present and failed to protect Youth Barber. He said Grievant had a view of the Youth's face and was dishonest in his interview.

He said the Youth's medical condition was also a factor. Mr. Haynes then read Investigation Exhibit Page 173 which is JCO Doss's Youth Behavior Incident Report (YIRB) and said JCO Doss is the only one who did a YIRB. Any staff involved are to do one.

On Cross - Examination Mr. Haynes said all staff present are not required to do a YBIR as long as one of the staff does it. Mr. Haynes then looked at Investigation Exhibit Page 266, the Photos of outh Barber and said there were no allegations that Grievant struck Youth Barber. Grievant also said he never went into Youth Barber's room.

Mr. Haynes then read Investigation Exhibit Page 259 and said there were some discussions of the questions off the record prior to the recorded interview. Investigation Exhibit Page 256 shows the interview with Grievant was on March 10, 2008 but the incident was December 2, 2007. The time on the interview shows the entire interview took five minutes.

Mr. Haynes then read Investigation Exhibit Page 118 - 119 which is Youth Ceasar's Grievance. Youth Ceasar says Youth Barber was assaulted by Staff. He then looked at Tab 1 Page 13 which is a still Photo of the Unit showing JCO Holbrook and Youth Jackson. Tab 2 Page 14 is a Photo of Youth Barber running toward Youth Jackson. The Grievant is not in the video. Mr. Haynes said he based his conclusion on statements. He said there were no other Youth on the video running towards Youth Jackson. Mr. Haynes said there were other Youth on the video but not going towards Youth Jackson.

Mr. Haynes then read Tab 1 Page 59 which is Grievants YIR. Grievant tried a C - grip. He was asked "If a Youth pulls out of a C - grip with hands in fists and in a threatening posture is that active resistance". Mr. Haynes answered, it all depends on interpretation.

Mr. Haynes then reviewed Investigation Exhibit Tab 1 Pages 59 - 72 and said this was all written by the Grievant. He said the Grievant's statements were the longest turned in. Mr. Haynes then read Investigation Exhibit Tab 1 Page 85 which is JCO Layne's Incident statement. JCO Layne says Youth Ross also ran towards Youth Barber. He then turned to Tab 1 Page 61 which is Grievant's YIR where Grievant says he saw other Youth on "A" Pod. Mr. Haynes said he couldn't tell Grievant's position from the video and relied on statements. Tab 1 Page 258 Grievant said he was kneeling. Tab 1 Page 109 Youth Jackson says Grievant was holding Youth Barber's ankles.

On Re - Direct Mr. Haynes read Investigation Exhibit Tab 1 Page 119 which is Youth Ceasar's Grievance and said this could refer to two separate incidents.

Mr. Haynes then read Policy and Procedure Exhibit Tab 6 the definition of "Active Resistance". He also read the last page of Policy and Procedure Exhibit Tab 7 which is the Response to Resistance Continuum and "Active resistance" only permits control techniques. He was shown Investigation Exhibit Page 266, a Photo of Youth Barber and asked if resistance to a C - grip could cause these injuries and he said "NO".

The last witness for the Employer was Joan Olivieri. Ms. Olivieri is the Bureau Chief of Labor Relations. She does negotiations and reviews grievances. Ms. Olivieri says the case came up internally. She reviews the entire investigation and considers the credibility of witnesses and prior discipline. Ms. Olivieri goes over the case with the Director and he makes the final decision.

Ms. Olivieri said she had received the Exhibits that were statements taken by Investigator Whipple. She said she relied more upon still photographs than she did upon the video.

Ms Olivieri reviewed Investigation Exhibit Page 265, the medical report on Youth Barber and Investigation Exhibit Pages 266 - 269 the photographs of Youth Barber and said she had used this in her decision. She also said the Director wants the culture of DYS changed.

Ms. Olivieri then was referred to Policy and Procedure Tab 2, Specific Rule Violations 3.1 and 5.12. She then read Tab 3 the Discipline Grid. She said Rule 3.1 called for a 1 - 3 day suspension and Rule 5.12 called for a verbal to a maximum of termination.

Ms Olivieri said the Grievant was removed because of the seriousness of the injury. She also said the Grievant was there the entire time and failed to report what the staff did to Youth Barber.

On Cross - Examination Ms. Olivieri said she had watched part of the video. She said the video comes marked with the part concerning the incident. Ms. Olivieri said the Grievant was not identified by name in the video and she had relied more upon the still photography. Ms Olivieri said her decision was based upon Youth and staff statements more than upon the photographs. She said other staff said they saw staff hitting Youth Barber and that JCO Avery and JCO Richards identified each other.

IV. THE UNION'S CASE

The Union's first witness was JCO Brandon Doss. JCO Doss said he was involved in the incident with Youth Barber on December 2, 2007. At the time he was Acting Unit Manager.

JCO Doss was in the mini-gym when a fight broke out. He took a Youth to his room. JCO Doss saw another JCO with a Youth in handcuffs. He saw another Youth running toward the JCO and tried to put the Youth upon the wall. The Youth was resistant.

JCO Doss said he dropped his keys and went to find them. He then returned and restrained Youth Barber's feet. He did not witness any staff using force or punching and kicking Youth Barber.

JCO Doss was then referred to Investigation Exhibit Page 14 which are still photographs of the incident. The photograph at the top of the page shows JCO Doss putting a Youth in his room. He looked at the second photograph and said he cannot identify the JCO in the photograph. He said he wasn't sure if the Grievant was there.

JCO Doss was then referred to Investigation Exhibit Page 96 which is his Question and Answer statement to Asst. Principal Ray Blevins. His statement says he did not see anyone punching or kicking Youth Barber. He said JCO Holbrook was escorting Youth Jackson and Youth Barber was the only other Youth he recalled.

JCO Doss said there were 5 or more officers on the floor with Youth Barber. He said he couldn't see what other JCOs were doing. He said Youth Barber was resistant and had his fists clenched. JCO Doss said he gave Youth Barber verbal commands to stop which Youth Barber ignored. After Youth Barber was handcuffed he was taken to his room and sat upon his bed while JCO Doss talked to him.

The Employer had no questions on Cross - Examination of JCO Doss.

The Grievant Wesley Hawthorne was the Union's next witness. The Grievant said he has been a JCO for about 8 ½ years. The Grievant said he was involved in the incident with Youth Barber on December 2, 2007. Grievant said he received a Signal 88 just before 3 o'clock. When he arrived JCO Holbrook and Youth Jackson were going into the Unit. JCO Holbrook and Youth Jackson were going to "B" Pod. Youth Barber was by "C" Pod and started toward Youth Jackson. Grievant said there were two Youth by "A" Pod who started towards Youth Jackson.

Grievant said he kicked some chairs out of the way and tried to get Youth Barber in a C-grip. Youth Barber had his fists clenched and he was unable to get him in a C-grip. JCO Hankins had the Youth's right arm. They fell to the floor and the Youth's arm was to his side. Grievant said he put Youth Barber's arm in a wrist lock and used the wall to help. Several other staff arrived and piled on.

Grievant said he got his handcuffs and put them on the Youth's right wrist and other staff put the handcuffs on the Youth's left wrist. Grievant said he then went to pick up his hat and Youth Barber went to his room with JCO Doss.

Grievant was referred to Investigation Exhibit Page 59 which is Grievant's YIR on Youth Barber. Grievant said he did not write up a YBIR as the Unit staff does that report. He said his statement is accurate.

Grievant said he did not see staff use any unnecessary force. He said he did not see anyone punch or kick Youth Barber. Grievant said he was not placed on Administrative leave and continued to work. He was also not placed in "No Youth Contact".

Grievant said his first interview was in March and he was only interviewed once. He then looked at Investigation Exhibit Page 256 which is his Question and Answer interview with Mr. Haynes. Grievant said he saw JCO Doss at a later time. He said other Youth were going toward Youth Jackson. Two of these Youth were from Pod "A".

The Grievant then reviewed the Video Segment 14000002. Video Frame 25701 shows Grievant in the video in a somewhat kneeling position. Staff are all over Youth Barber. Grievant said he was above everyone else and when he looked down all he could see were blue shirts and the backs of heads. Grievant said he was the only one with a black Jacket. Video Frame 25910 shows Youth Barber in handcuffs. Video Frame 25917 shows Youth Barber on his feet. Grievant said he went to get his hat and did not escort Youth Barber to his room.

On Cross - Examination he said JCOs Moore and Layne were in the video. He also said this was not his regular Unit. He was then shown Investigation Exhibit Page 257 which indicates a finger flex and Investigation Exhibit Page 59 which does not say finger flex. He then read Investigation Exhibit 257 and said one of the "A" Pod Youth collided with JCO Holbrook and Jackson.

Grievant was then shown Investigation Exhibit Page 266 which are photos of Youth Barber and said he did not see how the injuries occurred. He also said he did not see Youth Barber's face when he came off the floor and did not hear him cry out. He also did not see blood on the Youth or staff. Grievant said when he saw Youth Barber in his room he only saw the back of his head.

On Re - Direct Grievant said he never tried to control Youth Barber's feet. He also said Video Frame 2554 shows other Youth from "A" Pod and Video Frame 2556 shows other Youth behind JCO Holbrook.

When the Grievant was questioned about JCOs Layne and Moore he said JCO Layne is 10 - 12 inches taller than JCO Moore. He said JCO Moore stayed at the table most of the time.

Grievant said he wrote a long report. He said he usually does this as it makes it easier to testify later. He also said he had never lied and had told the truth.

The hearing concluded at 12:31 P.M. The parties agreed to file written closing arguments by the close of business June 29, 2009.

V. OPINION OF THE ARBITRATOR

The Grievant has been employed at this Facility for eight and one-half (8 ½) years and has no discipline of record.

The Employer removed the Grievant for two violations of Ohio Department of Youth Services (ODYS) General Work Rules Policy 103.17.

The first specific charge was a violation of 3.1 Dishonesty. Being dishonest while on duty or engaged in state business, including but not limited to deliberately withholding information, giving false or inaccurate information verbally or in writing, to a supervisor or appropriate authority, i.e. State Highway Patrol, State Auditor, etc.

The Employer, in its' Closing Argument says the Union highlights Grievant's writing of a

detailed account of the incident but asserts the report is worthless as it is inaccurate. The Employer says Grievant testified that another Youth "came together" or "collided" with Youth Barber but says Youth Barber nor other staff did not see this.

The Union points out that the testimony of Officer Layne says that Youth Ross ran towards Youth Barber in a threatening manner but he does not say Youth Ross "came together" or "collided" with Youth Barber.

The fact that Youth Barber and other staff did not see Youth Ross does not make Officer Layne's statement untrue. Youth Ross was clearly in the vicinity of Youth Barber. The fact that Grievant says the other Youth "came together with" or "collided" with Youth Barber may have been his perception from where Grievant was standing. The Employer claims Grievant was "inaccurate" or basically lying about this. People are untruthful either for gain or to prevent harm, economic or otherwise, to themselves. The Arbitrator can see no gain or harm to Grievant and therefore sees no dishonesty in this statement.

The Employer then attacks Grievant by saying he is dishonest in his statement as to what he saw as to staff using inappropriate or unwarranted force on Youth Barber. The Employer points out that Grievant said he was right next to JCOs Avery and Richards, who were found to have used unnecessary force, but says he saw nothing.

The Grievant says he was in an elevated position, on his knee, and saw only the backs of heads and blue shirts. The Grievant says he was trying to get handcuffs on Youth Barber. Grievant said he got the handcuffs on the Youth's right arm and passed the handcuffs to other staff who got them on the Youth's left arm.

The Grievant reviewed the video and, as the Employer points out, was very specific as to what he did but not as to other staff.

The Union, in its' Closing Arguments, has a minute by minute review of the video which shows the Grievant in a kneeling position by the wall. The Union also asserts that the video shows other staff on their knees blocking Grievant's view of Youth Barber.

The entire thrust of the Employer's argument is based upon proximity and the 'culture' at the Facility. The mere fact of proximity does not mean you saw or heard something. This is particularly true if you are engaged in trying to restrain someone. The Employer has a presumption reasonable on its face but it is not supported by the evidence.

There is no testimony from JCOs Avery or Richards that this Grievant saw anything. If anyone would have been concerned about witnesses it certainly would have been them. While the Arbitrator would not have expected JCOs Avery and Richards to volunteer this fact there is no evidence they contacted this Grievant to ask for his silence. In the evidence in JCOs Avery and Richards case there was evidence of an effort to silence witnesses.

The Employer has no direct evidence that Grievant saw anything. There is no testimony from Youth or staff. There were enough witnesses involved in this case that if Grievant had seen something there should be someone who says "he was looking right at JCO Richards when he hit Youth Barber" or similar testimony.

The second charge is 5.12 Actions that could harm or potentially harm an employee, Youth , or a member of the general public".

The Employer's contention on this charge is that Grievant should have protected Youth Barber. The Employer has no evidence as to how this should have been done. In most arbitrations the Employer offers evidence as to what the Grievant should have done i.e. "Follow Post Orders". There is evidence that JCO Moore was at the desk. Should Grievant have called to him to send for Supervision?

The Employer contends that since the Grievant was not alleged to have used inappropriate or unwarranted force that the Union's argument that he was not placed on "No Youth Contact" or administrative leave is not well taken. The Arbitrator disagrees. The Employer apparently felt that Grievant's failure to protect the Youth was grounds for Removal. The Employer's failure to take interim action precludes its' claim that this is a removable offense.

The Arbitrator is also troubled by the fact that the incident occurred December 2, 2007 but Grievant was not interviewed until March 10, 2008. In addition the entire interview took less than five minutes. There is an extensive record in this case and other interviews were taken in a much shorter time frame. There is no evidence that Grievant was unavailable during this time. It is a direct contradiction to claim Grievant is guilty of such severe rule infractions that he should be removed and then to ignore him for ninety (90) days.

The Employer also contends that there is a "culture" at the Facility that causes cover up. The evidence does not support this. The Employer has cited the Arbitration Decisions concerning JCOs Avery and Richards. In those cases JCOs testified against each other. There have been other cases at this Facility where staff have testified against each other.

I grant the grievance.

VL AWARD

The Grievant is to be reinstated to his post, shift and days off,

Paid his lost pay less applicable deductions,

Loss of vacation,

Personal and sick leave he would have accrued,

Benefits he would have been entitled to,

Reimbursement for medical expenses normally covered,

Restored his seniority,

The discipline removed from his record.

Entered at Ironton, Ohio this 6th day of July 2009.



Craig A. Allen
Arbitrator