IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF YOUTH SERVICES

AND

STATE COUNCIL OF PROFESSIONAL EDUCATORS (SCOPE)/OEA/NEA

Grievant: Daniel Bennett

Case No. 35-20-20090724-0035-06-10

Date of Hearing: November 24, 2009

Place of Hearing: Franklin Furnace, Ohio

APPEARANCES:

For the Union:
Advocate: Vickie Miller, Labor Relations Consultant
2nd Chair: John Storer, SCOPE Representative
Witnesses:
Daniel Bennett - Grievant
John Storer – SCOPE Representative

For the Employer:
Advocate: Melinda M. Hepper, Labor Relations Officer
2nd Chair: Victor Dandridge, Office of Collective Bargaining
Witnesses:
Amy L. Ast – Senior Bureau Chief of Facilities

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: January 26, 2010

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect July 1, 2009 through June 30, 2012, between the State of Ohio Department of Youth Services ("DYS") and the State Council of Professional Educators (SCOPE)/OEA/NEA ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Daniel Bennett ("Bennett") for violating the Ohio Department of Youth Services Policy 103.17, and General Work Rules, Sections 4.12 – inappropriate or unwarranted use of force, and 5.1 – failure to follow policies and procedures, specifically Policy 301.05.01 regarding physical response reporting and documentation requirements.

The removal of the Grievant occurred on July15, 2009 and was appealed in accordance with Article 13 of the CBA. This matter was heard on November 24, 2009 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were agreed to be submitted by both parties on or about December 8, 2009 but due to an extension granted, the final brief was submitted on December 15, 2009.

BACKGROUND

The Grievant was removed on July 15, 2009 because he utilized inappropriate force by placing a youth in a chokehold which caused him to lose consciousness and failed to report the use of force or ensure that the youth received proper medical attention by ODYS. (Joint Exhibit (JX) Discipline Trail, p. 23).

Bennett was employed as a math teacher at the Ohio River Valley Juvenile Correctional Facility ("ORV") which is a high-security juvenile correctional facility. The Grievant was hired in May 2006 and had no prior discipline of record as of April 27, 2009.

On April 27, 2009, Youth H obtained a writing marker from Bennett's desk and proceeded to a dry erase board and started writing. The Grievant came up behind Youth H and wrapped his left arm around the youth's neck and did a 360 degree turn. While still maintaining the chokehold, the youth was lifted off the ground for a few seconds, at which time the Grievant removed the chokehold and the youth's limp body was allowed to slide to the floor whereupon he hit his head.

The Grievant, seeing that Youth H was not moving, dropped to the floor and repeatedly called his name in an effort to revive him. The Grievant physically shook Youth H and the youth was revived although he rubbed his head and appeared woozy.

A video of the entire incident was captured by security cameras. The incident occurred near the end of the sixth period class. The Grievant allowed Youth H to return to his housing unit without reporting his contact with Youth H or requiring the youth to seek immediate medical assistance.

The Employer contends that the Grievant "choked out" the youth and failed to report the use of force prior to the end of his shift. The Union contends that the incident did occur, but the Grievant and the youth were engaged in horseplay. The Union also contends that the Employer has failed to follow its own policies and procedures regarding similar incidents and that removal was too severe a discipline under these facts.

ISSUE

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

RELEVANT PROVISIONS OF THE CBA, POLICIES, WORK RULES, AND PROCEDURES

ARTICLE 13 – PROGRESSIVE DISCIPLINE

13.01 Standard

Employees shall only be disciplined for just cause.

DYS POLICY NUMBER 103.17 – GENERAL WORK RULES (IN PART)

I. Policy Provisions (in part)

The policy of the Ohio Department of Youth Services is to establish uniform, written work rules regarding subjects that have general applicability for all employees. This policy shall provide employees the rules of conduct that specify prohibited behavior and penalties that may be imposed. [2-CO-1C-04]. The unauthorized activities contained herein are not considered as all-inclusive, but are intended to be representative examples of activities that warrant immediate corrective action. Violation of this policy and other Ohio Department of Youth Services policies and procedures shall constitute cause for corrective action, up to and including removal.

The penalties reflected on Attachment 103.17.B, DYS General Work Rules and Rule Penalties, shall provide a framework for equitable discipline. The actual discipline imposed by the Agency Director may vary depending on the circumstances and the appropriate Collective Bargaining Agreement (CBA), if applicable. For overtime exempt employees, the discipline issued may differ from the grid as required under the Fair Labor Standards Act.

DYS GENERAL WORK RULES

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.

DYS STANDARD OPERATING PROCEDURE
NUMBER 301.05.01 (IN PART)

I. Purpose

Pursuant to ODYS Policy 301.05, 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. [3-JTS-3A-31]

Persons injured in an incident must receive an immediate medical examination and treatment. [3-JTS-3A-29]

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IV. Procedure

A. When physical response is used when managing youth, the 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.

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POSITIONS OF THE PARTIES

EMPLOYER'S POSITION

The Grievant was removed for just cause pursuant to Article 13 of the CBA for the following reasons: use of unnecessary force; failure to report use of force; and failure to ensure that Youth H received proper medical attention.

The Grievant was properly trained regarding the policies and procedures at issue. (JX 3, Discipline Trail, p. 9). The policies are clear as to the youth behavior that would require intervention by staff.[1] Therefore, the Grievant had knowledge of the policies regarding use of force by staff with a youth, the requirement to report uses of force, and the requirement to obtain prompt medical intervention.

On April 27, 2009, the Grievant, without provocation, placed Youth H in a chokehold " . . . spun him around, carried him a few feet, leaned back, exerted pressure on the youth's neck and allowed the youth to fall to the floor." (Employer's Closing Statement, p. 3).

The video fails to indicate that any joking back and forth occurred and according to Amy Ast ("Ast"), Senior Bureau Chief of Facility Programs and Operations, who is responsible for reviewing use of force cases for the Employer, the Grievant engaged in use of force – not horseplay with Youth H. Ast also indicated that the youth was defenseless and the size disparity between the youth (5'5", 127 lbs.) in comparison to the Grievant (6'0", 280 lbs.) made the chokehold act more alarming. The video confirms that the chokehold lasted for twenty-three (23) seconds. (JX 4, p. 15). After the youth was released by the Grievant, he fell to the floor and the Grievant believed that the youth hit his head and was passed out. (JX 4, p. 19).

[1] General Work Rules Policy 103.17 (JX 5); Management of Resistant Youth Behavior Policy 301.05 (JX 6); Physical Response – Reporting and Documentation Requirements (JX 7); and Response to Resistant Youth Behavior (JX 8).

During the Grievant's investigatory interview on May 19, 2009, he made the following admissions: he didn't call for assistance; he didn't seek medical help; he became scared and confused; the youth appeared to hit his head on the floor; he tried to wake the youth by shaking his face; and the Grievant did tell a Juvenile Corrections Officer ("JCO") that the youth wanted to see a nurse, but failed to tell the JCO what happened. (JX 4, pp. 19-22). In fact, the incident occurred at the end of his work shift and, without doing any other act but informing the JCO that Youth H needed medical attention, the Grievant left the facility. (JX 4, p. 19).

The Employer contends that the use of physical force is the last resort and is authorized in limited situations such as self-defense, protection of others, prevention of self-injury or to prevent an escape. (JX 7, Tab 5). The facts are undisputed that conditions existed under which the Grievant could legitimately employ use of force. Also, the policy states the Grievant was to immediately notify the unit manager or the operations manager and contact medical personnel to address any health concerns. He did not do this. Finally, the Grievant was mandated to document any use of force incident on the Youth Intervention Form. (JX 7, Tab 5, p. 2). The Grievant failed to complete any of the required steps.

The behavior of the Grievant was egregious and cannot be tolerated by the Employer. The Union's attempt to demonstrate that other employees were treated differently who were engaged in similar conduct fails to show that the incident presented at the hearing is comparable. The Union contends that a youth fractured his arm and the employee was not removed. (Union Exhibit (UN EX) 1). The Employer points out that the youth was acting out and refused to comply with verbal directions. The youth made a physical motion in the direction of the DYS employee which resulted in a physical restraint to the floor and a fracture of the arm. None of those facts are applicable to the instant matter.

The Grievant had no reason to physically engage Youth H, let alone use force that rendered him unconscious. Moreover, the Grievant's failure to seek medical assistance or document this incident compounds the grounds for just cause under Article 13 of the CBA. The Employer's goal is to protect the youth under its custody, and it has promulgated policies for staff to follow in ensuring uniform management of youth behavior at the facility. The Grievant was removed for just cause, and the discipline was appropriate.

UNION'S POSITION

The incident on April 27, 2009 with Youth H involved horseplay, and nothing more. While the Grievant had his arm around Youth H, the youth lifted his feet off the ground which required that the Grievant lean backwards to maintain his balance.

Youth H appeared to lose consciousness and the Grievant immediately began attempts to revive the youth. The Grievant attempted to determine if Youth H was injured upon his revival. Youth H indicated that he wanted to see a nurse, whereupon the Grievant informed a JCO that the youth needed to see a nurse.

The Grievant was placed on administrative leave on May 1, 2009 and returned to the facility on May 19, 2009 for his investigatory interview.

Regarding Youth H, the Employer failed to provide any medical assistance until four hours after the incident, and the nurse examination disclosed no visible signs of injury. (JX 4, p. 38). Moreover, Youth H was never examined by a physician.

The Grievant was not terminated for just cause nor was the discipline progressive considering that Grievant had no prior discipline during his three (3) years of employment. The Union contends that the Grievant ". . . did not use unwarranted physical force . . . he engaged in

horseplay. Mr. Bennett did violate the work policies regarding reporting of physical contact, but that violation does not warrant termination." (Union Post Hearing Closing Statement, p. 4).

DYS Policy 103.17 and General Work Rule 1.12 specifically address horseplay and practical jokes. (JX 5). Rule 1.12 is a level one offense and states:

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

The Employer presented no evidence to define horseplay or under what circumstances could horseplay cause an injury. The facts indicate that Youths S and T who also witnessed the incident, did not believe a chokehold was being applied until Youth H pulled his legs off the floor. Prior to the incident, Youths S and T also described the classroom environment as one of horseplay. As an example, Youth T had playfully jabbed the Grievant and took his chair and rolled it to the rear of the class. (JX 4, p. 32). Youth H confirmed that he and the Grievant were playing prior to being placed in the chokehold. (JX 4, p. 24).

Simply, every incident of physical contact during horseplay does not constitute use of force. The Grievant did not violate Rule 4.12 as concluded by the Employer's investigator who stated " . . .Daniel Bennett was involved in horseplay or playful physical contact with Youth H and other youth in the classroom on 4/27/09." (JX 4, p. 15). The Grievant did not engage in use of force; he did engage in horseplay.

The Union admits that the Grievant violated Rule 5.1 by failing to properly report the incident. The discipline grid provides a range of verbal reprimand to removal for such offenses. (JX 5). Given the Grievant's lack of discipline and other mitigating circumstances, removal is not warranted.

Finally, the Union contends that the incident involving the youth who fractured his arm is comparable in that the youth was being restrained with the use of force, and that force was

found as unwarranted. The employee received a five day suspension. In this matter, the Grievant did not apply use of force, but was engaged in horseplay, a lesser offense, and was removed. The Employer did not remove the Grievant for just cause, and the grievance should be sustained.

DISCUSSION AND CONCLUSIONS

Based upon the sworn testimony at the arbitration hearing, exhibits, and the post hearing statements, the grievance is denied. My reasons are as follows:

The incident on April 27, 2009 was witnessed by several youths. All of them indicated that immediately preceding the chokehold, the Grievant was playing with the youths. (JX 4, pp. 24-26, 29-32). Youth T indicated that he was jabbing the Grievant and took his chair before the incident. (JX 4, p. 32). Youth S indicated that he had witnessed the Grievant's horse play with the youth both in the past and immediately preceding the incident and stated ". . . I don't remember why we were tussling. We were probably just horse playing." (JX 4, p. 30). Youth H confirmed the foregoing by adding ". . . me and the teacher Bennett were playing and he put me in a headlock and I fainted . . . " (JX 4, p. 24).

The Union contends that the Grievant and Youth H were involved in horseplay. The Employer contends that the Grievant used inappropriate or unwarranted force in violation of General Work Rule 4.12. However, the investigator concluded that the Grievant was involved in horseplay or playful physical contact with the youths on April 27, 2009, and I concur. (JX 4, p. 15).

The facts do not support the Employer's theory that Grievant's conduct violated Rule 4.12. This conduct was horseplay, not use of force. Therefore, while engaged in horseplay did the Grievant's conduct warrant removal or lesser discipline for a violation of Rule 1.12? As

advocated by the Union, Rule 1.12 is a level one violation with an oral reprimand being the appropriate discipline. (JX 7, Tab 3). However, a closer look is necessary to discern whether horseplay and use of force are mutually exclusive of each other. I surmise that they are.

Use of force normally occurs when a youth refuses to comply with verbal direction, engages in physical behavior toward self or others, and/or attempts to escape from the facility. Generally, some demonstrative act occurs which causes use of force to be employed. Those are not the facts before the Arbitrator. Therefore, it is immaterial for this analysis whether the proper technique was used or whether the response was appropriate or excessive. Moreover, the incident involving the youth which resulted in a fractured arm is not comparable because the restraint was the direct consequence of the youth's refusal to comply with verbal directions and a motion (physical) directed toward staff. (Union Exhibit (UX) 1). The actual question before this Arbitrator in this matter is whether or not excessive horseplay can be grounds for discipline, including removal.

As pointed out by the Union, horseplay could involve "rough or boisterous play" between individuals. On the other hand, Ast testified horseplay only includes joking but never touching or placing hands on a youth. In Ast's estimation, if any physical contact during horseplay occurs, the use of force policy governs. I disagree. The limited application by the Employer fails to account for the myriad of possibilities involving horseplay antics. However, given the unlimited possibilities of what could constitute horseplay, the participants, particularly adults in positions of authority, must be held accountable for their behavior during horseplay, whether intentional or not.

The facts are undisputed that, for twenty three seconds, the Grievant held Youth H in a chokehold. Youth H blacked out, hit his head on the floor and had to be revived by the Grievant.

In short, it was horseplay that went terribly wrong. The evidence was not credible to find that Youth H contributed to his blacking out by lifting his feet off the floor. In fact, Youth T indicated that the Grievant had mockingly used restraint moves similar to the chokehold applied to Youth H while playing with the youths prior to April 27th. (JX 4, p. 32).

The situation of April 27, 2009 was very serious, and a review of the video indicates the actual peril of Youth H as he slumped to the floor unconscious. The Grievant's behavior was egregious and could have seriously injured the youth. The Employer's conduct in not providing medical treatment to Youth H for approximately four hours is also disturbing but does not mitigate the Grievant's conduct or the appropriate discipline.

As pointed out by the Union, the Grievant admitted to violating Rule 1.12 and the disciplinary grid for this level one infraction allows for an oral reprimand if there is no prior discipline of record. Successive progressive discipline up to and including termination can occur based upon subsequent violations. Based upon the record, a violation of Rule 1.12 did occur and just cause exists to discipline the Grievant, with the appropriate discipline being an oral reprimand based upon Article 13 of the CBA and the Work Rule(s) 1.12. It must be stated that CBA Article 13.04 recognizing the principles of progressive discipline, **also** notes that ". . . Disciplinary action shall be commensurate with the offense." For reasons stated below, it was unnecessary to decide whether disciplinary action greater than an oral reprimand was appropriate for violation of Rule 1.12 by the Grievant.

The Grievant was also removed for violating Rule 5.1 and his failure to report the incident, which is a level 5 infraction. (JX 5). The disciplinary grid for all level 5 offenses provides a range of verbal reprimand to termination. (JX 5). The disciplinary grid for a level 5 offense allows for some discretion based upon the circumstances involved in the offense.

The Grievant's statement on May 19, 2006 contains the following two passages of some note:

> ". . . During this time Youth H apparently passed out and when I stopped supporting his body weight he fell to the ground. I did not realize he had lost consciousness . . . [he said] his head hurt and asked me to tell a guard that he would like to see a nurse. I told a young female JCO that he needed to see a nurse. It was time to go home when this happened so I left." (JX 5, p. 19).

The Grievant failed to call for assistance, even though Youth H had blacked out and requested medical intervention as a direct result of Grievant's horseplay behavior. Not only did the Grievant fail to seek immediate medical help for Youth H, but he also left the facility on April 27, 2009 without completing any written reports regarding the incident. Further, the verbal notice given to the JCO was woefully inadequate compared to what is required under Rule 5.1. Finally, the Grievant was required to report any and all physical contact with a youth which may have resulted in an injury. The health condition of Youth H was simply ignored by the Grievant to the peril of both Youth H and, ultimately, the Grievant. A review of all of the applicable rules and guidelines allows but one conclusion -- that the Employer has not acted arbitrarily or unreasonably in removing the Grievant for violating Rule 5.1.

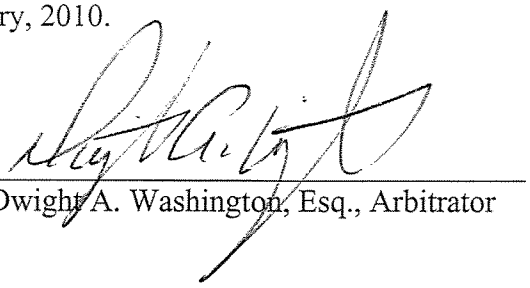
The Union contends that mitigating circumstances exist in that the Grievant had no prior discipline and his admission of his failure to report supports some discipline but not termination. The record is unrefuted that the Grievant was properly trained and aware of his obligation(s) to provide a safe environment for the youths under his supervision. The Grievant's behavior could have seriously injured the youth, and the Grievant's failure to notify the proper individuals exacerbated the event. Under these facts, no mitigation is warranted.

I find just cause existed for the Employer to remove the Grievant.

AWARD

The grievance is denied.

Respectfully submitted this 26th day of January, 2010.



Dwight A. Washington, Esq., Arbitrator