

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO
DEPARTMENT OF YOUTH SERVICES
INDIAN RIVER JUVENILE CORRECTIONAL FACILITY
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11
AFSCME. AFL-CIO

Arbitration Date: January 24, 2013

Grievant Kelly Johnson: # 35-04-20120718-0018-01-03

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Larry L. Blake
Department of Youth Services
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Columbus, Ohio 43215

Advocate for the Union:

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I. HEARING

The hearing was held at the Indian River Juvenile Correctional Facility on January 24, 2013. The hearing commenced at 9:37 A.M. The joint issue before the arbitrator is "Was the Grievant, Kelly Johnson, removed for Just Cause? If not, what shall the remedy be?"

Testifying for the Indian River Juvenile Correctional Facility ("the Employer") were Timothy Gillis, Investigator for the Chief Investigator's Office, Gary Hart, Facility Intervention Administrator, Rachelle M. Jones, Bureau Chief of Employee Relations.

Testifying for the Ohio Civil Service Employee's Association, Local 11 AFSCME ("the Union") were Starlet Arrington, Youth Specialist, William Relford, Unit Manager, and the Grievant, Kelly Johnson.

II. STATEMENT OF THE CASE

On April 20, 2012 an incident occurred at the Employer's facility resulting in the Grievant, Kelly Johnson, being charged with using inappropriate and excessive force. The Grievant was specifically removed for violations of Ohio Department of Youth Services (ODYS) General Work Rules Policy 103.17 Rules, 5.01P Failure to Follow Policies and Procedures, 6.02P Use of Excessive Force with injury and 6.05P Use of Prohibited Physical Response. The Grievant's effective date of removal was July 13, 2012. The Union timely filed a Grievance and the matter is properly before the Arbitrator.

III. THE EMPLOYER'S CASE

The Employer's first witness was Timothy Gillis. Mr. Gillis is an Investigator for the Chief Inspector's Office. Mr. Gillis has a degree in Criminal Justice from the University of

Dayton and twenty-seven (27) years with the Montgomery County Sheriff's Office. Mr. Gillis testified that his job is to investigate violations of Rules. He said he has taken numerous investigation courses and has done thousands of investigations, several hundred of which have involved Use of Force.

Mr. Gillis was referred to Tab 5, Page 1 and said it was his Report of Investigation. The date of the incident was April 20, 2012. He testified he started his investigation April 25, 2012 and concluded May 9, 2012.

Mr. Gillis was asked what steps he takes. He responded by saying he down loads information including checking for Institution and hand held video. He then contacts the Institution and talks to the victim. After that he interviews witnesses and then talks to the Employee involved. Mr. Gillis then said he gives the witnesses a print out and they can sign it or change it.

Mr. Gillis then read Tab 5, Page 2 and said it was a list of people interviewed. Mr. Gillis testified that the Youth said it started with him on Crutches. The Dr. said he could walk with the boot. The Grievant told him he had to use Crutches. The Youth then said Unit Manager, Relford came in and the Youth told Relford "Don't need Crutches". The Youth wanted to go to his room and the Grievant told him No. The Youth then threw Chemicals on the Grievant. Mr. Relford saw the Chemicals thrown. The Grievant then went after the Youth. Mr. Relford saw the Grievant choking the Youth but since the Youth was Yelling there was no danger.

Mr. Gillis read Tab 5, Page 67 and said it was the Youth's statement. Mr. Gillis then interviewed Utomhin Okoh, who didn't see anything. He interviewed Operations Manager, Dan

Grimsley, who also didn't see anything. He also interviewed Antonio James and Social Worker, Manchester. Nurse Ricky Blackwell and Nurse Barbara Davis did assessments of the Youth, Institution Video and hand held video. The Operations Manager has the hand held video. The Youth said the Grievant bit him.

Mr. Gillis read Tab 5, Page 43 and 44. This is the Youth Injury Assessment by Nurse Blackwell. The Nurse went to the Youth's room and the Youth said he was bitten by the Grievant. The Youth said he was bitten on the chest, back and left shoulder. Mr. Gillis said Tab 5, Page 44 is Nurse Davis' assessment and it tells of bite marks on the Youth. There was no documentation of Staff injury.

Mr. Gillis read Tab 5, Page 21 and said it is his conclusion. The Youth threw glass cleaner. The Youth then backs away and the Grievant goes after him and hit him with her radio. Mr. Gillis then read Tab 5, Page 54 which are the MSDS sheets. He testified that all chemicals here are diluted. Tab 5, Page 55 says the glass cleaner is mildly irritating to eyes and skin.

Mr. Gillis was then referred to Tab 5, Page 21 which says Training Manager Don Bird watched the video and said there was no need for Emergency Use of Force and that Grievant appears to be the aggressor. Training Manager Bird after reviewing photos of the incident said he believed the Grievant was using a "choke hold" and not the "guard technique".

Dr. Bradley said, after reviewing the institutional video, the still photos and the Youth Injury and Assessment, he believed the photo depicting markings on the Youth's back on the left side are consistent with bite marks; he said there does appear to be a bite mark on the posterior left shoulder of the Youth.

Mr. Gillis then read Tab 5, Page 22 and said: During the audio portion of the hand held video Grievant can be heard saying "Put that mug in room one, he ain't coming out for nothing", after the Youth had been secured and handcuffed. Mr. Gillis said this remark was inappropriate.

On Cross-Examination Mr. Gillis said he was not present on April 20, 2012. He testified he interviews all he knows to be witnesses. Mr. Gillis said he did not know the other Youth on video cleaning up was there so he did not interview him. Mr. Gillis said the cleaning fluid was not tested and there are 4 other chemicals in the Closet. It was substantiated that the Youth threw cleaning fluid and pulled the Grievant's hair. Mr. Gillis read Tab 5, Page 21 and said these are the Don Bird photos.

Mr. Gillis then read Tab 5, Page 101 and said these are the videos as stills sent to Don Bird. Mr. Gillis left some of the videos out in stills. Mr. Gillis said Unit Manager Relford did not tell Grievant what to do. Unit Manager Relford thought Emergency Response was appropriate. Mr. Gillis said the Nurses here only do First Aid. Mr. Gillis Read Tab 5, Page 45 and said these are photos of Grievant. Tab 5, Page 43 Nurse Blackwell says no photos taken.

Mr. Gillis read Tab 5, Page 12 which is Nurse Blackwell's statement. The Youth tells Nurse "No injuries". Nurse Davis took photos at second assessment at 8:00 P.M. Mr. Gillis said the Grievant is a victim and a subject. He interviewed the Youth for his assault.

On Re-Direct Examination Mr. Gillis read Tab 5, Page 2 and said the Report shows the Youth and Grievant as both subject and victim.

The Employer's next witness was Gary Hart. Mr. Hart is the Facility Intervention Administrator. Mr. Hart started in 1989 with Adults and in 1990 with Juveniles. Mr. Hart has

been a JCO, and Operation Manager and a Unit Manager. He has held this job from 2010 to present . He is also a trainer in Youth Resistance. "MYR" is Managing Youth Resistance. He has taught "MYR" since 2010 and also trains instructors. Mr. Hart testified he was trained by Don Bird.

Mr. Hart testified he became aware by reviewing Use of Force, watching videos and reading documentation. Mr. Hart read Tab 5, Page 27 which is Use of Force Review Form. Mr. Hart downloads all videos. He reads all statements and medical logs.

Mr. Hart looks at video to determine: Was it necessary to use force? If so how much? When the Youth in under control- were actions appropriate.

The video was played again for Mr. Hart. Mr. Hart testified that the Mop Closet should not have been open. He testified that the Youth backs up and the Grievant goes after him. The Youth got to the door and the Grievant hits him with her radio.

Mr. Hart then read Tab 8, Page 1, 301.5 and said it is the Management Youth Resistance Policy. He then read Tab 9, Page 1 and said it is Standard Operating Policy for Use of Force and Page 2 is the definition of Emergency Defense. Mr. Hart testified the video shows no need for Emergency Defense. The Youth had retreated back to the wall and never had Superiority. The Youth never punched the Grievant. Hitting with the radio is not approved. The choke hold is prohibited. The Grievant pushed the Youth's head to the floor and bit him. These are not approved techniques.

Mr. Hart testified that JCOs have sixteen (16) hours of training per year. The Grievant did not comply with Policy or Training. Mr. Hart said when the Youth retreated th Grievant could

have backed up. The second option would have been to “bear hug” the Youth and reduce risk of harm.

Mr. Hart then read Tab 3, Page 9 which is his note that he will back staff 100%. Mr. Hart said “If a Youth is targeting you, you can stop him before you get hit”. He then said hitting a Youth with your radio is not appropriate.

On Cross-Examination Mr. Hart said employees do not train with resistance partners. Management and employees take the same training. Mr. Hart read Tab 9, Pages 2 and 3 which is the definition of Physical Engagement and Targeted Engagement. The Youth was displaying these acts. Mr. Hart read Tab 5, Page 27 and said there was need for force. The Youth was a threat to the Grievant. He said Unit Manager Relford should have helped.

Mr. Hart was asked if Grievant was trying to do guard position. This position has arm around neck.

On Re-Direct Examination he said this was a choke hold. He was referred to Tab 5, Page 5 (4) and said the risk to the Grievant did not permit what she did.

On Re-Cross Examination Mr. Hart was asked “The Grievant was out to the side rrying to get into the Guard Technique”. He replied “The Grievant was not trying to get into the Guard Position”.

The Employer’s next witness was Rachelle M. Jones. Ms. Jones is the Bureau Chief of Employee Relations for the Department. Ms. Jones testified that after the Pre-Disciplinary Conference the file is sent to the Department for a recommendation to the Director. All Use of Force goes to the Central Office for discussion.

Ms. Jones testified that she looks at totality of facts, injuries and prior discipline. It is Policy to look at mitigation. Ms. Jones makes a recommendation to the Director and its his decision.

Ms. Jones said Harvey Reed became Director in March 2011. Mr. Reed has a No Tolerance Policy and looks at every case. The Director is concerned about liability and criminal charges. There is currently a pending lawsuit.

Ms. Jones read Tab 7 and said it is the General Work Rules. Tab 7 Page 1 is the Department of Youth Service Work Rules. Ms. Jones read Tab 3, Page 3 which is the Order of Removal. The Order cites Rules 5.01P, 6.02P and 6.05P. Ms. Jones read the Discipline Grid in Tab 7. The Grid says 5 day to termination for a Level 6. There are two Level 6 charges so termination. Ms. Jones testified it was an Un-warranted Use of Force. She read Tab 3, Page 3 and said the Youth was hit by a radio and bitten.

On Cross-Examination Ms. Jones said she was not present on the day of the incident. Ms. Jones did say that the Department does make settlements. Ms. Jones also said she doesn't know if there were any criminal charges. Ms. Jones was then asked "There are lots of cases of things being thrown a JCOs. Is there any special policy?" She replied "I don't Know".

IV. UNION'S CASE

The Union's first witness was Starlet Arrington. Ms. Arrington is a Youth Specialist and is a seven (7) year employee. Ms. Arrington was present the day of the incident and responded. She testified she saw the Youth go to the supply closet and then didn't see him anymore. Ms. Arrington said she called a Signal 5 and went to assist.

Ms. Arrington testified that the Grievant is a good officer and follows the rules. She testified the Youth is now transferred. She said the Grievant did what any reasonable officer would have done.

On Cross-Examination Ms. Arrington was referred to Tab 5, Page 80 and said this was her Question and Answer Interview. She testified she did not see the Youth strike Grievant or throw punches.

On Re-Direct Examination Ms. Arrington testified she saw the Youth and Grievant on the floor still tussling. She said she did not see the Youth pull the Grievant's hair but hair was found on the floor.

The Union's next witness was William Relford, Unit Manager. This is a Management Position. Mr. Relford testified he had just come in to talk to the Grievant. The Grievant was giving instructions to the Youth but the Youth didn't agree. The Youth got Chemicals and threw them on the Grievant. Mr. Relford testified the Grievant went to subdue the Youth. He never saw the Grievant strike or bite the Youth. Mr. Relford said the Youth was very assaultive. The Youth has since been transferred.

Mr. Relford testified he didn't know what the Youth was going to do and he feared for safety. Mr. Relford said Emergency Defense was justified.

On Cross-Examination Mr. Relford read Tab 5, Page 35 which is his Responder Report. He then went to Tab 5, Page 78 and said the Youth was not trying to strike or hurt the Grievant after he threw the chemicals.

On Re-Direct Mr. Relford read Tab 5, Page 78 and said Emergency Defense was

necessary.

On Re-Cross Examination Mr. Relford testified that the Youth in Unit A were serious offenders.

The Union's last witness was the Grievant, Kelly Johnson. She is unemployed. The Grievant has been a Youth Specialist about thirteen (13) years. The Grievant was working 1st shift from 6:00 A.M. to 21:00 P.M.

The Grievant testified the Youth had an injury and was left on the Unit. The Grievant said she was the only Youth Specialist on the Unit at the time. The Grievant testified that the Youth continually asked about going to school. The Grievant replied; "We don't have a medical release". The Grievant said she made several calls about the medical release.

The Grievant then testified that Unit Manager Relford arrived and talked to the Youth. The Youth then went to the Closet and got chemicals and threw them on her. She said she reacted to the Youth's violent behavior until assistance arrived. The Grievant testified she was in fear for her life as the Youth had assaulted so many people. The Grievant was afraid.

The Grievant testified she kept him secure until help came. Her vision was blurred. She said she didn't know what the Youth was going to do next.

The Union then introduced Union 1 which is an Article from the Columbus Dispatch about assaults system wide. The Grievant said she fears for her safety here. The Grievant testified the Youth came here from another institution where he had been assaulting people. The Grievant said she had never heard anybody say she was acting improperly. Her vision was blurry because of the chemicals.

The Grievant said staff brings in outside chemicals to clean as the Institution chemicals are watered down.

The Grievant testified she went to Mercy Medical where they flushed her eye and gave her eye drops. She also had an injury to her face. She also said the Youth pulled her hair.

The Union then introduced Union 2. This is the Youth Incident Summary Report on this Youth since his time in DYS. The report shows the Youth has never been held accountable and was a discipline problem.

The Grievant testified that she acted reasonably and that Emergency Defense was justified. She said "I had chemicals in my eyes and didn't know what he was going to do."

On Cross-Examination she said that after Use of Force you complete a Responder Report and a similar report is involved. The Grievant read Tab 5, Pages 39 and 40 and said it is the Youth Intervention Report and its details. The Grievant said it was not a detailed report. The report said she used a radio and doesn't say choke hold. She then read Tab 5, Page 60 which is another Youth Behavioral Report.

The Grievant then read Tab 5, Page 86 which is her statement to the Investigator. She said Department Policy permits outside chemicals. She doesn't recall who unlocked the closet. The Grievant opened the closet for someone to do off Unit cleaning. The Grievant did not note any contraband exception forms. The Youth asked Relford if he could go to school. The Grievant radioed to see if she could put the Youth in his room. The Grievant was pressured to get reports done.

The Grievant testified she was in fear when the chemicals were poured on her. She said

she had a visual on the Youth at the Closet.

The Grievant read Tab 5, Page 86 and said she hit the Youth upside the head with her radio. She then read Tab 5, Page 87 and said she went in the Youth's direction when the chemicals were thrown. The Grievant testified she intended to secure him against the wall awaiting assistance. She testified she was upset and in disbelief.

The Grievant read Tab 5, Page 87 and said she did not aggressively pursue the Youth. The Youth pulled her hair on the floor. The Grievant said she was not allowed to do a choke hold. The Grievant said she did an Accident and Injury Report.

The Grievant is remorseful the incident took place. She said she was fearful for her life.

The parties agreed to submit written closing arguments by the close of business February 8, 2013.

The hearing concluded at 1:45 P.M.

V. OPINION OF THE ARBITRATOR

The Grievant's Date of Hire was August 29, 1999 and she has no active discipline of record.

The Employer removed the Grievant for violations of Ohio Department of Youth Services (ODYS) Policies 103.17 General Work Rules, 301.05 Management of Resistant Youth Behavior and 301.05.01 Use of Force with attached Response to Resistance Continuum.

The specific incident that caused the Removal was on April 20, 2012, after being splashed with window cleaner, the Grievant responded by charging the Youth, striking in the head with her radio, placing the Youth in a choke hold, biting the Youth and pushing the

Youth's head to the floor.

The Employer argues that the Grievant pursued a retreating Youth.

The Employer also cites the Grievant's statement: "I don't know why I have to defend my actions in regards to my response. I immediately got up and hit him upside the head with my radio".

The Employer also cites the Youth's statement: "She was biting me". There is medical evidence that the Youth was bitten.

The Employer also asserts that no verbal strategies were utilized by the Grievant and that staff assistance from Unit Manager Relford was available prior to engaging in physical response.

The Grievant was last trained on MYR January 13, 2012 and she has thirteen (13) years experience.

The Employer also cites the Grievant's statement that "the Youth is not going to pour chemicals on me and think that is OK and not have anything done or said to him".

The Employer also puts credence in the testimony of Mr. Hart who testified "the actions of the Grievant, hitting the Youth in the head with the radio, biting the Youth, placing him in a choke hold and pushing his head to the floor are not techniques taught or approved by DYS".

The Employer argues that the Union Exhibit Union 1 is not relevant as the statistics in the Columbus Dispatch were for the prior year.

The Employer also reviewed Union Exhibit Union 2 which is the Youth Incident Summary Report for the Youth. This shows the punishment the Youth received for his conduct.

The Union argues that the Youth threw chemicals on the Grievant, and that both the

Grievant and Unit Manager Relford testified they were in fear for their own safety. The Union argues the Grievant was justified in using Emergency Force.

The Union also argues that there should have been two (2) JCOs on the Unit.

The Union also points out that the Grievant was a thirteen (13) year employee with no active Discipline.

The Union argues that the Grievant already had the radio in her hand and that Unit Manager Relford should have assisted.

The Union points out that Mr. Hart said use of force was necessary. However he also said the actions of the Grievant were improper.

The Grievant denies biting the Youth but there is medical evidence to the contrary.

The Union cites the U.S. Supreme Court case of Graham v Connor in support of its argument that "The reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight".

The Employer argues the Case is not relevant because this is a dispute covered by a Collective Bargaining Agreement.

The Graham v Connor case concerns a Civil Rights Action. The Court does an extensive analysis of claims under several amendments to the Constitution of the United States and then remanded the case back to the District Court for further proceedings. The Case is not relevant to this Case.

This is a very difficult Case and the Advocates for both parties have done an excellent job in presenting their case.

The Grievant's problem is that after the Youth threw the chemicals on her he began to retreat. At this stage, as the testimony points out, the Grievant had some options. The Grievant made no effort to use any verbal strategy. Unit Manager Relford did not seem to participate but she could have summoned other assistance.

The Grievant admits hitting the Youth with her radio. The Grievant then tried to subdue the Youth. The Youth pulled her hair and she bit him. The evidence supports these facts.

The Grievant also claims she was trying to get into the Guard position but the evidence is she was using a choke hold.

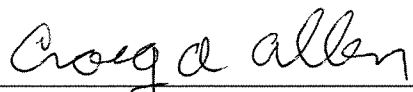
The Union urges the Grievant's length of service and no discipline of record as mitigation. The Union also says the Discipline is not progressive. The Discipline Grid does however say this offense can lead to termination.

The Grievant has had many training sessions on Use of Force.

The evidence shows the Grievant retaliated against the Youth instead of following the Procedure upon which she had been trained.

The Grievance is denied.

Issued at Ironton, Ohio this 25th day of February, 2013.



Craig A. Allen
Arbitrator