

Thomas J. Nowel, NAA
Arbitrator and Mediator
Lakewood, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

Arbitration Proceedings Between:)	
)	Case No. DYS-
Ohio Department of Youth Services)	2019-04388-03
)	
and)	ARBITRATION
)	OPINION AND
Ohio Civil Service Employees Association,)	AWARD
AFSCME Local 11)	
)	DATE:
Re: Daniel Lee Removal)	April 12, 2021

APPEARANCES:

Bradley A. Nielsen for the Ohio Department of Youth Services and Russell
Burkepile, Staff Representative, for the Ohio Civil Service Employees Association,
AFSCME Local 11.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, AFSCME Local 11. The Grievant, Daniel Lee, had served as a Juvenile Correctional Officer at the Circleville Juvenile Correctional Facility since January 19, 2016. Following an investigation conducted by the Employer, the Grievant's employment was terminated with the Department on December 5, 2019. The Union appealed the termination through the Grievance Procedure on December 9, 2019. The Employer denied the grievance, and the Union carried the matter forward to arbitration on October 28, 2020.

The arbitrator was selected to hear the matter pursuant to Section 25.05 of the collective bargaining agreement, and hearing was held on February 22, 2021 via video platform (Zoom). The parties agreed that the matter was properly before the arbitrator, and each had full opportunity to present their cases. Post hearing briefs were submitted on March 19, 2021, and the record of hearing was closed on that date.

WITNESSES

TESTIFYING FOR THE EMPLOYER:

Lauren Patris Debreuil, Former Behavioral Healthcare Provider at facility
William Stout, DYS Training Program Manager
Adrian Bowens, Juvenile Corrections Administrator

TESTIFYING FOR THE UNION:

John Zeigler, Juvenile Correctional Officer and Union Chapter President
Daniel Lee, Grievant

ISSUE

The parties agreed that the issue before the arbitrator is as follows. “Did the Ohio Department of Youth Services – Circleville Juvenile Correctional Facility have just cause to remove the Grievant from employment? If not, what is the remedy?”

JOINT STIPULATIONS

1. Grievance # DYS-2019-04388-03 is properly before the arbitrator.
2. Grievant commenced employment with the Ohio Department of Youth Services – Circleville Juvenile Correctional Facility on January 19, 2016, in the Juvenile Correctional (JCO) classification.
3. Grievant served continuously in the JCO classification until his removal.
4. Ohio Department of Youth Services removed Grievant from his JCO position on December 5, 2019.
5. At the time of his removal, the Grievant possessed the following active discipline.
 - a. February 19, 2019: Five (5) Day Working Suspension
 - b. October 28, 2017: Three (3) Day Working Suspension
 - c. August 31, 2016: Written Reprimand

RELEVANT PROVISIONS OF THE AGREEMENT

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient

or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Article 25.05. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

24.02 – Progressive Discipline. The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include: a. One (1) or more written reprimand(s); b. One (1) or more days(s) working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer. If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her. c. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer.

d. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The remainder of this section is not relevant.

24.06 – Imposition of Discipline The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-disciplinary meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-disciplinary meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within

the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or Union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose any discipline, including oral and written reprimands, the employee, if available, and Union shall be notified in writing. The OCSEA Chapter President shall notify the Agency Head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave, without loss of pay (except in cases that fall within ORC Section 124.388(B)) or reassigned while an investigation is being conducted except that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment or if the reassignment is to a position on the same shift and days off, without loss of pay and does not exceed 30 days. For cases that fall within ORC Section 124.388(B) as referenced above, any payment due the employee under subsection (B) shall be based upon the employee's total rate plus any applicable roll call pay. For purposes of this paragraph, "without loss of pay" shall mean the employee's total rate plus any applicable roll call pay.

GRIEVANCE

Statement of Grievance: JCO Lee was removed from his position for unjust cause. The alleged rule violation is as follows. Rule 5.01, Failure to follow policies and procedures. Rule 5.12, action that could harm or potentially harm to employee, youth or a member of the general public. Rule 6.05, use of prohibited physical response.

Resolution Requested: To be reinstated and made whole.

BACKGROUND

The Grievant, Daniel Lee, began his employment with the Ohio Department of Youth Services at the Circleville Juvenile Correctional Facility on January 19, 2016. He worked continuously in this position until the termination of his employment on December 5, 2019.

On August 8, 2019, the Grievant was assigned to the program area of the facility to monitor the movements of youth who were moving from one classroom to another location. Such assignment involved the proper movement of youth and ensuring their appropriate behavior. For purposes of this award and document, the involved youth will be known as DM. At approximately 3:00 pm, a class or program had been completed, and youth were leaving the assigned classroom. As Youth DM exited the room, the Grievant directed him to proceed to his next assigned class. DM had a history of aggressive behavior. He was 16 or 17 years old at the time and of fairly large stature. Evidence suggests that DM spoke to another youth and may have made a derogatory remark to the Grievant who urged him to move on. The Grievant and DM approached each other and stood very close to one another. They exchanged words with one another. The Grievant raised his hand to guide DM, and DM pushed his hand away. He

also pushed the Grievant. Evidence indicates that the Grievant's hands were placed on the youth's chest. Lauren Patris Debreuil, a Behavioral Healthcare Provider (social work field), was standing near the Grievant and DM. She quickly approached them in an attempt to verbally intervene. As DM raised his arm, the Grievant placed a "bear-hug" around his waist. The Grievant had also reached around DM in an attempt to grab his arm. The weight of both individuals caused them to fall to the floor with the Grievant on top of the youth. As they essentially wrestled on the floor, the arm of DM was around the Grievant's neck. As the Grievant attempted to move into a position which would allow for better leverage in restraining DM and setting him up to be handcuffed, he rolled and his knee made contact with the face of the youth. Additionally, his arm may have pressed against the throat of DM. There were at least seven staff members in the room, including a supervisor, and a number rushed over to assist in restraining DM. DM was handcuffed, lifted off the floor and removed from the room. As there was blood on his face, he was taken to the medical office. There was a small pool of blood where the take down had occurred.

A Use of Force Incident Review was conducted on August 14, 2019, and an extensive investigation of the incident was initiated on August 21, 2019 and was assigned to Investigator Bai Benson. Approximately eight staff members were interviewed along with approximately five youth who had been in the room at the time of the incident. DM was interviewed as well as the Grievant. The incident had been captured on video cameras from four angles. Investigative interviews continued throughout the month of September 2019. Staff members involved in restraining DM completed "Responder Reports."

The Grievant and Union were notified of a pre-disciplinary hearing which was scheduled on October 22, 2019. The notice of hearing contained alleged rule violations as follows.

Alleged Rule(s) Violated: Rule:

Rule 5.01P Failure to follow policies and procedures

Policy 163-01 UOF Preventing Use of Force incidents

Policy 163-02 Use of Force

Policy 163-UOF-03 Use of Force Reporting

Rule 5.12P Actions that could harm or potentially harm an employee, Youth, or a member of the general public

Rule 5.28P Failure to follow work assignment or the exercise in poor judgement in carrying out an assignment

Rule 6.05P Use of prohibited physical response.

Hearing officer Paul Rybicki determined that there was just cause for discipline following the pre-disciplinary hearing.

For purposes of progressive discipline, reprimands and suspensions are not considered after twenty-four and thirty-six months if no other discipline has been imposed pursuant to Section 24.07 of the collective bargaining agreement. The Grievant's record reflected three active disciplines at the time of his termination, a written reprimand, three day suspension, five day suspension.

The Grievant was removed from his position on December 5, 2019 for violations of Rule 5.01P, Rule 5.12P and Rule 6.05P. The termination of employment was grieved by the Union and the matter was appealed to arbitration.

POSITION OF THE EMPLOYER

The Employer states that the Grievant's employment was terminated following a verbal altercation which then resulted in an unnecessary use of force incident on August 8, 2019. The disciplinary grid dictates termination of employment in the case of a Level 5 or 6 violation for an employee with an active five day suspension.

The Employer states that the youth involved, DM, had refused the Grievant's verbal instructions to move to his next class, but he had a number of options rather than utilizing force. The Employer states that there were numerous members of the staff in the room, including the Operations Manager, who could have been called to assist. In addition, the Behavioral Healthcare Provider, Ms. Patris Debreuil, was standing nearby, and she offered to engage the youth verbally and de-escalate the encounter. Instead, the Grievant engaged DM in an inappropriate use of force which caused the youth to fall to the floor causing injuries to his face and head. The Employer states that the Grievant has been properly trained in de-escalation techniques, but he instead stood toe to toe with the youth and engaged in a verbal confrontation which escalated the encounter. The Employer argues that the Grievant intentionally touched and grabbed at DM which created the unnecessary use of force incident. The video clearly demonstrates that DM attempted to avoid the grabbing and touching of the Grievant. Ms. Patris Debreuil testified at the arbitration hearing that the Grievant "jumped the gun."

The Employer states that the Grievant completed a Youth Intervention Report following the incident, but none of his statements were truthful. The youth did not engage in a violent

act and did not pose a threat to anyone in the room. Four cameras in the room captured the incident on video. The video makes clear that the Grievant's statements that DM head butted and pushed him were not truthful. The Grievant repeated his false narrative during the investigation conducted by the Department. The response of the Grievant violated the Use of Force Continuum and the list of prohibited techniques which are outlined in policy. While on top of DM, the Grievant's knee struck him in the face, which caused an injury, and placed his arm on his throat. When DM was cuffed and removed from the room, he was dazed and bloody. Video footage captured the incident.

The Employer states that the Grievant received a three day suspension for an incident which involved an injury to a youth he was supervising. The Grievant was given a second chance but has illustrated that he is unable to supervise difficult youth in a professional manner and in compliance with policy. While the Union argued that the Grievant should have been provided with a Last Chance Agreement, as occurred in a different case, the Employer argues that an LCA is not an employee right, and in this case, there were no mitigating factors to justify this approach. The Department had just cause to terminate the Grievant and argues that the grievance be denied in its entirety.

POSITION OF THE UNION

The Union states that the Department did not have just cause to terminate the Grievant's employment. He intervened when DM slapped his hand and pushed him in the

chest. The Grievant protected himself from severe bodily injury. If a youth displays physical engagement, an employee is permitted to use force to control the individual. Department records indicate that DM had a history of assault and had engaged in violent acts in the past.

The Grievant's training records indicate that he was not trained in use of force policies which have been used by the Employer to justify his removal. While employees are to be trained annually, the Grievant did not participate in training which would have aided in the August 8 incident. Instead, the Grievant reacted as he had previously been trained in dealing with an assaultive youth.

The Union states that the Operations Manager (supervisor) who was present in the room did not see anything inappropriate in the manner in which the Grievant engaged the youth. None of the witnesses interviewed by the investigator indicated that the Grievant acted in an inappropriate manner. Video is misleading as it only captured the incident in one second increments. The Grievant chose a reasonable level of physical response in order to gain control of DM. He used a technique which is not prohibited by policy and was progressive in order to immobilize the aggressive youth. The Union cites the United States Supreme Court decision in *Graham v Connor* which held that the use of force must be judged from the perspective of the officer who is involved at the scene as opposed to hindsight. This standard of review is relevant in the instant matter. A reasonableness standard justified the actions of the Grievant.

The Union states that the Employer only wished to punish the Grievant, but the collective bargaining agreement establishes the principle of progressive discipline and states that disciplinary action must be commensurate with the offense. The Employer has failed to

apply these contractual principles. Additionally, the Union argues that discipline was not administered even handedly. Other Juvenile Correctional Officers with previous discipline have been provided with a second chance through the use of Last Chance Agreements. The Union cites the case of employee Tackett whose actions mirrored those of the Grievant but who retained employment based on a Last Chance Agreement. The Employer had other options when it considered the disciplinary penalty in the instant case.

The youth physically engaged the Grievant. His arms were placed around the Grievant's neck. The Employer has failed to provide clear and convincing evidence or even a preponderance that the Grievant violated Department policy. Longtime employee, Juvenile Correctional Officer Ziegler, testified at the arbitration hearing that the Grievant was a good employee and that he acted as any other officer would have responded in same or similar circumstances. The Grievant was a nearly four year employee with limited training. The termination of his employment was not for just cause. Evidence demands that the grievance be sustained; the Grievant fully reinstated; and that he be made whole in every way.

ANALYSIS AND OPINION

The Union argues that the Grievant's physical response in engaging DM were appropriate and based on policy and training. On the other hand, the Union also argues that the Grievant should have been provided another opportunity to maintain his position at the facility as might be provided by a Last Chance Agreement. The Union cites the case of

employee Tackett whose actions and discipline record, the Union argues, mirrored those of the Grievant in this case. The Union argues that the Grievant is a victim of disparate treatment and offered the Last Chance Agreement for employee Tackett as an exhibit during the arbitration hearing. Section 24.01 of the collective bargaining agreement states that, in cases of termination, “if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.” The parties have bargained a limitation to an arbitrator’s ability to mitigate the penalty of termination which then limits the ability to consider issues of disparate treatment. Further, the Tackett Last Chance Agreement, which has been introduced by the Union, contains the following statement.

All parties to this Agreement hereby acknowledge and agree that this Agreement is in no way precedent setting. This Agreement shall not be introduced, referred to, or in any other way utilized in a subsequent arbitration, administrative hearing, or litigation except as may be necessary to enforce its provisions and terms.

The arbitrator’s ability, in the instant matter, to consider the Tackett case is barred by the prior agreement of the both the Employer and Union.

The Employer has asserted that the Grievant engaged in a verbal altercation with DM and then escalated to an unnecessary use of force when he attempted to direct the youth to leave the game room and proceed to his next class. The testimony at the arbitration hearing of Lauren Patris Debreuil was compelling and supports this assertion. Ms. Patris Debreuil is currently employed at Nationwide Children’s Hospital, but, at the time of the August 8, 2019 incident, she was a Behavioral Healthcare Provider engaging in social work at the Circleville facility. DM was on her caseload, and she had a working relationship him. She testified during

the arbitration hearing that moving from one room to another is often stressful for involved youth, and this was the case with DM. Ms. Patris Debreuil was working on her laptop just a few feet from the Grievant and DM. She observed the verbal confrontation between the two and attempted to intervene using verbal de-escalation techniques. She testified that the Grievant was “toe to toe” with DM which, in the immediate situation, only escalated the confrontation. She criticized the Grievant for the “toe to toe” stance and his argumentative approach. She stated that the Grievant used no de-escalation techniques. Ms. Patris Debreuil testified that there was no justification for the physical approach used by the Grievant. She stated that the Grievant “jumped the gun.”

The Grievant, in his report concerning the incident and during the investigation, stated that DM head butted and pushed him. Ms. Patris Debreuil testified that neither allegation was accurate. She was four or five feet from the two individuals. She stated that the Grievant placed a bear-hug around the waist of the youth, and both fell to the floor. She stated that DM was bleeding in his facial area, and there was a small pool of blood left on the floor when he was removed by staff. Ms. Patris Debreuil testified that, when DM was handcuffed and removed from the room, the Grievant stated to those in the room that the youth had him confused with another individual. She admitted that the youth had a history of violent acts. Ms. Patris Debreuil stated that the Grievant did not allow her to intervene prior to the physical altercation and that he should have backed away and allowed her and other staff in the room to intervene and attempt to handle the matter using verbal de-escalation techniques. As stated earlier, the testimony of Ms. Patris Debreuil was compelling, and is supported by the video footage of the incident. The Grievant completed a Youth Intervention Report following the

incident, but most of what he wrote supported his version of the incident, much of which has not been supported by close observation of the video.

While DM pushed the Grievant, the video indicates that it was not a particularly violent act. Had the Grievant backed away and asked for assistance from other staff in the room, the use of force may have been avoided. Nevertheless, video footage and testimony indicate that the Grievant reacted very quickly and forcefully which caused, as the Employer argues, an unnecessary use of force which did not significantly injure DM. Nevertheless, the hard fall to the floor could have caused significant injury to the youth and even the Grievant. Utilizing proper technique and protocol may have averted the incident. The Union's contention, that the Grievant was protecting himself from "severe bodily injury," is not supported by evidence. The video suggests that the Grievant's arm was pressed against the youth's throat for a short period of time, and that he kicked DM as he rolled over. The Union argues that these acts were accidental as the Grievant had recently recovered from a leg injury. Nevertheless, the fall to the floor could have been avoided.

The Union's argument regarding the U. S. Supreme Court decision in *Graham v Connor* is not particularly relevant in this case as the decision was in response to the actions of law enforcement and not necessarily directed at incidents relative to the instant matter.

The termination of the Grievant's employment was focused on a number of Department of Youth Services Policies. The charge of Rule 5.01P is based on violation of Policies 163-UOF-01 and 163-UOF-02, both related to use of force. The Grievant failed to request the assistance of additional staff for the purpose of managing the incident in an attempt to redirect the youth.

The initial response of DM did not pose a security threat. The Grievant failed to step back to make an assessment and request assistance. The charge of Rule 5.01P violation is a correct assessment on the part of the Employer.

The Grievant was charged with violation of Rule 5.12P. Youth DM sustained only a minor facial abrasion, but, when the Grievant placed him in a bear-hug, they both fell to the floor with the Grievant landing on top. There was potential for a more serious injury. The Grievant reacted too quickly and without evaluating the actions of the youth or calling for assistance. The Grievant's actions were in violation of the Rule.

Finally, the Grievant was charged with violation of Rule 6.05P. This rule requires staff to avoid the use of prohibited response. While it may have been accidental, the Grievant momentarily placed pressure on the throat of the youth and kicked him as he rolled over in an attempt to begin the cuffing of DM. Nevertheless, evidence indicates that the Grievant reacted without utilizing other approved techniques in re-directing the youth or controlling his agitation. As witness Patris Debreuil stated, the Grievant "jumped the gun." The video has no audio, but undoubtedly DM was verbally aggressive, using expletives and threatening language. The Grievant has been sufficiently trained to deal with aggressive youth and behavior of this nature. The Grievant's actions were in violation of the Rule.

The aforementioned Rule violations are, according to the Department disciplinary grid, level six and level seven violations. The discipline grid indicates that termination of

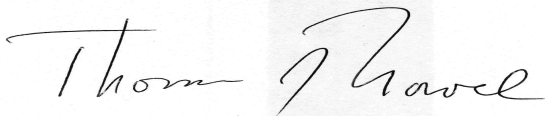
employment is the penalty for these violations following a record of active discipline at the five day suspension level which is the maximum disciplinary suspension the Employer may impose. The collective bargaining agreement provides for a sunset provision which ignores prior discipline after a stated period of time. The Grievant's employment with the Department commenced on January 19, 2016, and he was terminated on December 5, 2019. At the time of his termination, the Grievant's record included three active discipline penalties, a written reprimand, a three day suspension and five day suspension, the maximum suspension penalty allowed by the collective bargaining agreement. This is problematic for an employee with less than four years of service.

The Employer had just cause to terminate the employment of Grievant Lee. Section 24.01 of the Agreement prohibits the arbitrator from mitigating the penalty of termination in the case of the "abuse of a patient or another in the care or custody of the State of Ohio..." And in any event, the Employer did not violate the progressive discipline provision which is contained in Article 24 based on the Grievant's record of active discipline. The Employer did not violate Article 24 of the Agreement when the Grievant's employment as a Juvenile Correctional Officer with the Department of Youth Services was terminated. The grievance is denied.

AWARD

The Employer did not violate Article 24 of the Agreement when the Grievant's employment as a Juvenile Correctional Officer with the Department of Youth Services was terminated. The termination was for just cause. The grievance is denied.

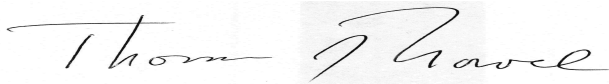
Signed and dated this 12th day of April 2021 at Lakewood, Ohio.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

Thomas J. Nowel, NAA, Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of April 2021, a copy of the foregoing award was served by electronic mail upon Bradley Nielsen for the Ohio Department of Youth Services; Kate Nicholson and Victor Dandridge for the Ohio Office of Collective Bargaining; and Russell Burkpile and Jessica Chester for the Ohio Civil Service Employees Association, AFSCME Local 11.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a white background.

Thomas J. Nowel, NAA

Arbitrator

