

ARBITRATION DECISION NO.:

300

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Youth Services
Training Center for Youth

DATE OF ARBITRATION:

September 28, 1990

DATE OF DECISION:

October 24, 1990

GRIEVANT:

Bruce Starks

OCB GRIEVANCE NO.:

35-16-(90-05-29)-0031-01-03

ARBITRATOR:

Anna D. Smith

FOR THE UNION:

Robert W. Steele
Staff Representative
Ronald Stevenson
Second Chair

FOR THE EMPLOYER:

Sally Miller
OCB, Advocate
Deneen D. Donough
DYS, Second Chair

KEY WORDS:

Removal
Patient Abuse
Burden of Proof
Admissibility of
Evidence

ARTICLES:

Article 24-Discipline
§24.01-Standard
§24.04-Pre-Discipline
§24.05-Imposition of
Discipline

FACTS:

The grievant was a Youth Leader 2 employed by the Ohio Department of Youth services. He had no prior discipline. The grievant was involved in an incident with one of the youths assigned to the grievant's group. There was physical contact which was claimed by the employer to be abusive, but was characterized by the union as reasonable restraint of an out of control youth. The incident was heard outside the unit but no one saw any physical contact. The youth was taken from the unit where he made a statement that the grievant abused him verbally and physically. The youth was taken to the clinic where the nurse reported the youth had bruises about his face. Photographs were taken of the youth and statements were taken from the other youths on the unit. The grievant was removed based on this evidence.

EMPLOYER'S POSITION:

There is just cause to remove the grievant. The statements of the youths on the unit are credible. Neither their mental health nor prior convictions negate the truthfulness of their statements. The statements made soon after the incident implicating the grievant must be given more weight than statements at arbitration because of the closeness in time to the incident. Additionally, because the youths are still in custody, their present testimony is less credible due to intimidation by the grievant's witnesses. Testimony by other employees is less credible due to the working relationship between the grievant and themselves.

There is no disparate treatment when compared to other similarly situated employees. Other employees accused of abuse but not removed were either accused of less serious conduct, there was insufficient evidence to support removal or the employer missed a time frame for discipline. There have been employees removed for patient abuse recently, including two at the grievant's facility.

Lastly, the arbitrator is limited in fashioning a remedy by section 24.01. That section prohibits the arbitrator from modifying the discipline if abuse has been proven.

UNION'S POSITION:

There is no just cause for discipline. The grievant was merely restraining an out-of-control youth. The youths' statements are inconsistent and therefore not credible. The complaining youth has stated that the injuries were self-inflicted and then accused the grievant of causing the injuries. No staff, including the nurse who examined the youth, reported any abuse. The youth was also returned to the unit with the grievant.

The employer violated the due process sections of the contract. No list of witnesses and documents was produced with the pre-discipline notice but was produced at the Step 3 hearing. The photograph of the youth's bruises should be excluded from evidence because the union had no access to the photos until one week prior to the arbitration. The union designee received no notice of removal required by section 24.05. The grievant was treated disparately when compared to other employees charged with abuse but not removed.

ARBITRATOR'S OPINION:

Patient abuse is a serious offense punishable by removal and therefore any doubt of guilt must be resolved in favor of the grievant. The cause of the complaining youth's injuries has not been proven to be abuse by the grievant. The youths on the unit have told conflicting stories and one of the stories told must be false. The employer claims undue influence has been exerted on the youths at arbitration while several youths admit to pressure exerted when the statements implicating the grievant were made. Therefore, the youths' statements cannot be relied upon as truthful. Of two youths no longer at the facility and therefore most credible, one testified that the complaining youth caused the injuries to himself and the other's testimony was inconclusive.

It has been proven that the grievant did use physical restraint beyond mere touching and that did constitute use of physical force. This event requires the grievant to file a report which was not done. There is just cause for discipline for this violation of work rules.

The photographs which the union argues should be excluded, are admitted into evidence. The photo's existence was known to the union and, therefore, no undue hardship was imposed on the union's case.

AWARD:

The grievance is sustained in part. There is no just cause for removal for patient abuse, but, there is just cause for discipline for failure to report use of physical force. The grievant will be reinstated with back pay, less interim earnings, and be made whole except for a three day suspension for failure to report use of force.

TEXT OF THE OPINION:

**In the Matter of Arbitration
Between**

**THE STATE OF OHIO,
DEPARTMENT OF YOUTH SERVICES**

and

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
A.F.S.C.M.E., AFL-CIO**

OPINION and AWARD

Anna D. Smith, Arbitrator

Case No. 35-16-9005290031-01-03

Removal of Bruce Starks

I. Appearances

For the State of Ohio:

Sally Miller, Advocate, Office of Collective Bargaining
Deneen D. Donough, Second Chair, Ohio
Department of Youth Services
Granville Potter, Jr., Witness,
Ohio Department of Youth Services
Falyce Yuill, Social Worker, Training Center for Youth
Christopher Simon, Witness, Training Center for Youth
Five youth (B.M., R.S., J.M., E.K., and P.H.) under
the custody of the State of Ohio, Witnesses
Yvette McGee, Observer, Ohio Department of Youth Services

For OSCEA/AFSCME Local 11:

Robert W. Steele, Staff Representative and Advocate
Ronald Stevenson, Staff Representative and Second Chair
Bruce Starks, Grievant
Kenneth Whatley, Steward
Ricardo Volley, Assistant Chief Steward
William White, Activity Therapist, Training Center for Youth
James Turner, Social Worker, Training Center for Youth
Marie Antoinette Hamilton, Teacher, Training Center for Youth
Thadus Turner, Youth Leader II, Training Center for Youth

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 9:30 a.m. On September 28, 1990 at the offices of the State of Ohio Office of Collective Bargaining, 65 East State Street, Columbus, Ohio before Anna D. Smith, Arbitrator. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument, 3:15 p.m., September 28, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

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

IV. Stipulations

The Parties stipulated to the following facts:

- 1) The Grievant, Bruce D. Starks, was a Youth Leader 2 hired on May 5, 1984;
- 2) The youth, B.M., was charged to Group L on March 20, 1990 and under the care of the Grievant;
- 3) The Grievant was charged with a violation of O.R.C. 124.34--Failure of good behavior--and of Directive B-19, Rule #1--abuse and/or mistreatment of youth;
- 4) The Grievant had no record of prior discipline in his personnel file;
- 5) The matter is properly before the Arbitrator.

In addition, the following documents were received as joint exhibits:

- 1) State of Ohio/OCSEA Local 11 Contract, 1989-91;
- 2) Grievance Trail;
- 3) Discipline Trail;
- 4) DYS General Work Rules (Chapter B-19).

V. Relevant Contract Clauses

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.

§24.04 - Pre-Discipline

. . .When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. . .

§24.05 - Imposition of Discipline

. . .If a final decision is made to impose discipline, the employee and Union shall be notified in writing. . .

VI. Background

On April 21, 1990, Bruce Starks, who had nearly six years of service with the Training Center for Youth, good performance appraisals (Union Exhibit 3) and a clean disciplinary record, was removed from his position as Youth Leader II for physically abusing a youth by striking him with his fist and hitting him with a chair. In the words of the removal order (Joint Exhibit 3), these actions constitute

“failure of good behavior in violation of and the Department of Youth Services Directive, General Work Rules, Chapter B-19 and Section 124.34 of the Ohio Revised Code.”

The specific rule of Directive B-19 (Joint Exhibit 4) with which Starks is charged as having violated is IV.A.1.:

“Abusing or mistreating youth entrusted to the Department's care; failing to immediately report the use of physical force on a youth as prescribed by local directive or rules.”

The events leading up to Starks' removal and its subsequent arbitration are these: On March 16, 1990, a youth (B.M.) was placed on Group L of the Training Center for Youth because of depression and suicidal thoughts (Joint Exhibit 3). (The Training Center for Youth is charged with the care of youth felony offenders who have mental health problems or who are arsonists. Group L, which is distinguished by having two staff assigned to it rather than one, is the orientation unit of the facility and the unit to which youths with special problems are assigned.) The log (Joint Exhibit 3) kept by the 7-3 shift youth leaders, Whatley and Starks, shows nothing remarkable on March 16 and 17. However, the following entries were made for March 18-20:

“3/18/90

[B.M.] had visits today; when youth returned to group he was upset. He kept telling the youths on group to hit him because he didn't care. He also said kill me if you thank [sic] you can.

K.E. Whatley 7/3

3/19/90

Ms. Yuill come (sic) on group to see [B.M.]. He said he did not want see [sic] or talk to that bitch and she can go to hell. He said he wants to [illegible] home and he fill [sic] like dieing [sic].

K.E. Whatley 7/3

3-20-90 Tues.

[B.M.] on building restriction. Meals brought over. Lunch time--lunch brought back. After [B.M.] was informed he would be going to Millcreek, youth became [illegible] openly verbally [sic] defiant & aggressive.

Starks

Shortly after 1:00 p.m. on March 20, the youth asked about his medication. After being informed by the Grievant that he was not due for medications, words were exchanged which are in dispute and there was physical contact between both youth leaders on duty (Thadus Turner and the Grievant) and the youth. This interaction was witnessed by several youths but by no other staff. Based on statements obtained from the youth witnesses, the Employer claims the Grievant taunted the youth, hit him with his fist, threw a chair at

him, and pushed his face against a hot heater pipe. The Union denies the alleged assault, claiming the Grievant restrained the agitated youth. The disturbance was sufficiently loud to be heard by three staff outside the unit. Neither William White nor James Turner, who came on the unit during the disturbance saw Starks touch the youth. The youth's social worker, Falyce Yuill, arrived after he was subdued but while he was still upset, and took him from the unit.

When questioned by Yuill, the youth charged Starks with hitting him and wrote a statement to that effect, as well as accusing him of verbal and other physical abuse. Ms. Yuill and the youth testified that he was taken to the clinic where the nurse saw bruises on his forehead and treated him. (No documentation of this treatment was offered as evidence, although the Discipline Trail--Joint Exhibit 3--contains a nurse's report of 8:50 p.m. that evening.) Yuill calmed the youth down and returned him to the unit that afternoon. She then reported the incident.

The youth's art teacher, Toni Hamilton, went to see him at about 2:00-2:30 p.m. on the same day. She saw his bruises and asked him about them. According to her written statement given on March 22, 1990 (Joint Exhibit 3) and sworn testimony, the youth claimed to have self-inflicted them.

When the unit manager, Christopher Simon, was informed of the incident, he located the youth and took pictures of him, sometime between 3:10 and 3:30 p.m. These pictures were not made available to the Union until after the Step 3 meeting. Simon further interviewed all the youth witnesses to the incident and collected their written statements. Of the ten youths present during the incident in addition to the alleged victim, two claimed the Grievant was "restraining" the youth (Joint Exhibit 3, Statement F-1) and did not hit or kick him (Statement H-1). Neither of these youths testified at the arbitration hearing. The other eight youths claimed that the Grievant threw and/or dropped a chair on B.M., that he hit or "slammed" him, restrained him with his knee and/or held him against the heater (Statements B-1, C-1, E-1, G-1, I-1, K-1 and L-1). A second statement from one of these was collected by James Turner, who was unaware of the youth's original statement. The second statement from this youth (L-2) says only that the Grievant was trying to restrain B.M. Four of the remaining seven youths making statements unfavorable to the Grievant testified at the arbitration hearing. All four recanted their written statements in whole or in part.

On March 21, Starks was served with a Notice of Investigation for violation of Section 124.34 O.R.C. and Directive B-19 Paragraph IV-A, Rule #1, cited above at length. Starks denied knowledge of the incident. On March 27 he was placed on administrative leave and notified of a pre-disciplinary hearing to be held March 30. His steward, Whatley, signed both documents, acknowledging receipt of Summary of Youth Statements (Joint Exhibit 3). Neither the Grievant nor his Union was told the identity of his accuser until the pre-disciplinary hearing, and the identities of the youth witnesses were withheld until after the Step 3 meeting. On April 20, Starks was removed, effective April 21, 1990. The removal order was not signed by the Grievant, but was sent to him by certified mail (Joint Exhibit 3). Asst. Chief Steward Volley, Union designee, did not receive a copy of the removal order.

A grievance on this matter was subsequently timely filed and processed through to arbitration where it presently resides without challenge to its arbitrability.

VII. Positions of the Parties

Position of the Employer

The Employer contends that it had just cause to remove Bruce Starks. As the legal custodian of the youth felony offenders sentenced to its facilities by the courts, the Department has an obligation to provide a safe and secure environment. The actions of the Grievant strike at the heart of its mission.

The Employer claims it has proof that the Grievant abused a youth committed to the care of the Department of Youth Services. It has eyewitness accounts to the incident and evidence of injury in the form of staff observations and photographs taken shortly after the incident. With respect to the credibility of the youths who witnessed the incident, neither their mental health nor felony convictions negate the truthfulness of their statements. Three panel arbitrators--Bittel, Cohen and Smith--have supported this position. The written statements of these youths, which were taken the afternoon of the incident when memories were

fresh, must be weighed more heavily than their testimony at the arbitration hearing. All five youth still in the custody of the State testified. Of these, three are still under the supervision of the Grievant's witnesses. The youths were admittedly nervous and, in all likelihood, intimidated by the presence of the Grievant's witnesses. Their written statements must be considered to be more credible than their testimony under these circumstances. That staff present in the area did not support the Employer's version of the altercation is not surprising, given that co-workers rarely testify against each other. The Union's account of the incident--that all Starks did was restrain an out-of-control youth--is not credible. Restraint does not encompass hitting, throwing a chair or causing injury. Clearly, injury was sustained, since Yuill, Simon, Hamilton and the nurse all saw bruises. Moreover, no evidence was offered that these bruises were self-inflicted after the encounter with Starks.

As a minimum, Starks has been proved by his own admission to have physically restrained the youth. Yet he did not report this fact, as required by the rule under which he was discharged.

With respect to the Union's procedural contentions, the Employer argues thusly:

1. The reference to §124.34 O.R.C. in the discipline documents does not invalidate the action taken by the Employer, since the citation is not used to supercede the contractual standard of just cause. This position has been supported by panel Arbitrators Cohen and Smith.
2. The pre-disciplinary meeting is merely an opportunity for the employee to present his side of the story, not a full defense, according to the Loudermill decision. Thus, summaries of the youth witnesses' statements are sufficient for notice. Additionally, §24.04 of the Contract provides only that a list of witnesses and documents be provided, and the steward did sign a statement that he had received such.

The Employer further contends that it did not treat the Grievant disparately by removing him as claimed by the Union. Fox received a lesser penalty because the mistreatment was not as severe and he reported the incident; Norris was not disciplined because the Employer missed a deadline; Thadus Turner was not disciplined for an incident in December because the information available would not sustain such action. On the other hand, three removals for abuse have been upheld by panel arbitrators this year, including two at this facility. Because they occurred prior to this incident, the Grievant had forewarning of the consequences of his actions.

Finally, the Employer calls attention to §24.01 of the Contract which prohibits the Arbitrator from modifying the termination of an employee when abuse has been found.

The Employer therefore requests that the grievance be denied in its entirety.

Position of the Union

The Union contends that the Grievant merely restrained an out-of-control youth, an action for which discharge is unwarranted. It points out that the alleged victim, who was on psychotherapeutic drugs has provided different versions of the incident and even in his testimony was not sure what happened. Other youth witnesses' statements and testimony were inconsistent and contradictory. Moreover, no staff present were able to support the Employer's claim of abuse. The nurse did not report abuse, Hamilton testified the youth told her the bruises were self-inflicted, and Yuill returned him to the group and care of the Grievant, an action inconsistent with the charge.

Management, the Union claims, erred in placing this youth, whom the Union has shown to be problematic, on the group without providing extra staff.

The Union further argues that the Employer has violated two contractual procedural requirements. First, in violation of §24.04 it did not supply a list of witnesses and documents with the pre-disciplinary hearing notice, and not even until after the Step 3 hearing were the youth witnesses identified. Additionally, the Union designee did not receive in writing notice of removal, as required by §24.05. The Union's defense of its member was therefore impeded and he did not receive a full and fair hearing.

The Union points to the good record of the Grievant, and states that he has been treated disparately.

Management itself has shown that neither Fox nor Norris, both of whom were charged with the same offense, were removed.

In sum, the Union claims the Employer did not have just cause to terminate the Grievant, and asks that he be returned to his position as Youth Leader II with no loss of benefits or wages, including overtime, and that he be made whole.

VIII. Admissibility of Evidence

During the course of the hearing, the Employer sought to admit as Employer Exhibit 2, photographs taken of the alleged victim by Christopher Simon on the afternoon of the incident. The Union objected on the grounds that they had not been provided at the pre-disciplinary or Step 3 meetings, and that they had been viewed only in the week of the arbitration hearing. The Arbitrator indicated she would receive the photographs and rule on their admissibility in her opinion.

The labor agreement under which this dispute has arisen requires the Employer to provide a list of witnesses and documents used to support disciplinary action (§24.04 quoted above at length). It is evident that the photographs in question were used to support the action taken against the Grievant because they are referred to on the first page of the pre-disciplinary report (Joint Exhibit 3): "He was photographed by Mr. Simon on 3/20/90 and the photos seem to show a mark encircling his right eye." Even allowing for the Employer's interest in protecting the youth from retaliation by suppressing his identity until the pre-disciplinary hearing, the Employer had the contractual obligation to inform the Union and employee of the existence of the photographs. However, the Union does not claim that it did not know about the photographs, only that it did not see them until it was preparing for arbitration. Indeed, page 2 of the same document contains a reference that strongly suggests the employee knew of the photographs at the time of the pre-disciplinary hearing: "It is Mr. Starks' contention that [B.M.] could well have injured himself prior to being photographed and examined by the nurse." In addition, there is no evidence that the Employer deliberately suppressed this evidence as, for example, keeping secret their existence or refusing a request by the Union to see them. Moreover, the photographs do not establish a new fact, but merely corroborate the statements of several witnesses--including a Union witness--that the youth had marks about his face on the afternoon of March 20. I therefore see no undue hardship in admitting and crediting this evidence. The Union's objection is over-ruled.

IX. Opinion

The act with which the Grievant is charged--physical abuse--is a serious one requiring a significant quantum of proof to sustain the Employer's decision to discharge. Any real doubt must be resolved in favor of the Employee. For reasons set forth below, the Employer was unable here to sustain its burden of proof.

In making its case against the Grievant, the Employer has had to rely on eyewitness accounts given by youth offenders under its custody and charged to the care of the Grievant and his witnesses. As set forth above, these accounts are controverted and sometimes either fails to accuse the Grievant in the first place or significantly retracts or amends the original accusations. It is obvious that those who recanted their original stories cannot have been telling the truth both times. The Employer argues that their first versions should be credited, since the statements were given shortly after the events they relate and the testimony was given under intimidating circumstances. Several of the youths, on the other hand, claim undue pressure was placed on them when they first gave their statements, a charge Mr. Simon, who took the statements, denies. In an attempt to resolve these counterclaims I have carefully scrutinized both versions of all witnesses and come to the conclusion that the bulk of the youths' stories is simply too unreliable to sustain the removal.

The most reliable of the witnesses would seem to be those no longer incarcerated at the Training Center for Youth. Two of these testified--the alleged victim (B.M.) and one witness to the incident, P.H. B.M.'s statement given immediately after the incident is a brief one. Since he was undeniably upset at the time, one would not expect his statement to be complete. That it does not mention a chair is, therefore, not

particularly troublesome by itself. However, in his testimony he could not remember whether he went to see the nurse or whether the Grievant was on the unit when he returned to it with Yuill. That he could not remember the presence or absence of the man who had allegedly so viciously attacked him such a short time ago raises some doubt in my mind about his version of the incident. B.M. also provided a reasonable alternative explanation for marks on his body: the previous night, he said, he tried to hang himself. No other witnesses mentioned this, although Hamilton said the youth claimed to have hurt himself. Either the attempted suicide did not occur and the youth's testimony is false, or it did occur and possibly accounts for marks about his neck and face. This testimony, coupled with the log kept by the youth leaders of the group (Joint Exhibit 3), testimony of all witnesses about the commotion created by the youth, and Ms. Hamilton's testimony about what the youth told her yields the conclusion that the B.M.'s emotional state was too aroused for his account of the events to be relied upon. The source of his injuries therefore remains unknown. He may have received them in a scuffle with the Grievant, at his own hand in a suicide attempt, or in his thrashings during the incident, or by some other means.

The second eyewitness no longer at the Training Center for Youth, P.H., is consistent in written statement and testimony on several points. He clearly saw a chair thrown by staff, but could not identify which staff threw it. He thought staff caught it. He testified that B.M. said the chair hit his head, but P.H. did not see this happen. He also did not see the Grievant hit the youth. Most of his testimony about what occurred is tentative: "I guess he went out of control. I guess his knee was on him He said it was burning" (emphasis added). His written statement, too, shows that he drew conclusions: "I believe while staff had him down staff hit him a few times in the face cause he yell it aloud. . . ." (Joint Exhibit 3, C-1, emphasis added).

Without a reliable eyewitness to the physical contact between the two or overwhelming circumstantial evidence, I am not convinced that the Grievant abused the youth. Most certainly the youth had bruises, was upset and engaged with the Grievant in a physical encounter. Probably a chair was involved, but in what way and with what effect I cannot say. Nor can I conclude with reasonable certainty that the youth made contact with a hot heater pipe as a result of the Grievant's actions, and was thereby burned. Although I am inclined to believe that the Grievant minimized in his testimony and statement, it is well within the bounds of reason to believe that the youth was acting out, became out of control, and was subdued by the Grievant. In short, the Employer's case for physical abuse is not proven by the evidence offered.

However, the Grievant admits to using physical restraint on the youth beyond mere touching. And it is evident that whatever occurred between the two constituted physical force, since the Grievant had to release him before he could get up. This warrants a report as called for in Rule #1 and testified to by Potter, Yuill and Simon. The Grievant admittedly did not file such a report, and for this the Employer might rightfully discipline him. Removal, however, is too harsh a penalty for a first offense of this type. In the absence of guidance on practice in the facility for the offense of failure to report the use of physical force, the Arbitrator must rely on her own judgment. The Grievant will accordingly receive a 3-day suspension.

X. Remedy

The Union asks that the Grievant be made whole for lost overtime pay. In the absence of overtime required by the Contract or evidence as to the Grievant's attendance and overtime record as well as overtime worked by other employees in his classification at his facility during his absence, determination of overtime pay is too speculative to be considered "earnings lost."

XI. Award

The grievance is denied in part, sustained in part. The Employer did not have just cause to remove the Grievant, Bruce Starks, for physical abuse, but did to discipline him for failure to report use of physical force. Accordingly, the discharge is reduced to a three-day suspension without pay or benefits. The Grievant is to be reinstated to his former position as Youth Leader II and otherwise made whole. Back pay is to be reduced by such interim earnings as the Grievant may have had and he is to supply the Employer with such evidence

of earnings as it may require.

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
October 24, 1990