

ARBITRATION DECISION NO.:

327

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Youth Services
Training Center for Youth

DATE OF ARBITRATION:

January 29, 1991

DATE OF DECISION:

February 26, 1991

GRIEVANT:

Kenneth Whatley

OCB GRIEVANCE NO.:

35-16-(90-07-10)-0049-06-03

ARBITRATOR:

Patricia Thomas Bittel

FOR THE UNION:

Ron Stevenson
Advocate
Robert W. Steele
Second Chair

FOR THE EMPLOYER:

Donald E. Elder
DYS Advocate
Sally P. Miller
OCB Second Chair

KEY WORDS:

Removal
Burden of Proof
Abuse of a Youth

ARTICLES:

Article 24-Discipline
§24.01-Standard

FACTS:

The grievant was a Youth Leader 2 employed for six years with the Department of Youth Services. He was in charge of a group of youths who had been convicted of crimes against persons and they tended to be emotionally disturbed and violent. While the grievant was giving a write up to a youth for misbehavior, the

youth became upset. The grievant restrained the youth and took him to isolation. Other Youth Leaders responded to a call for assistance but did not see the incident. They did not see any physical injuries on the youth at the time of the incident but redness and swelling around the youth's eye were found later. The grievant was removed for abuse of a youth.

EMPLOYER'S POSITION:

There is reliable evidence that the grievant committed abuse by inflicting physical injuries on a youth. Youths supervised by the grievant gave statements concerning the incident and stated that the grievant used improper physical force on another youth. The grievant allegedly struck the youth with his fists and a dustmop handle, choked him, and tore his shirt when the youth became agitated while being written up for misbehavior. The grievant had been placed on notice of the rule against use of physical force against youths and the penalty for violations. He has been given training on methods of controlling youths without being the aggressor. The employer must protect youths in its custody, therefore removal of the grievant is warranted.

UNION'S POSITION:

It has not been proven that the grievant abused the complaining youth. The grievant was writing the youth up for misbehavior when the youth became agitated. He used physical force but did not abuse the youth. The youths' statements against the grievant are not reliable. The complaining youth is among a group which controls the youths under the grievant's supervision and they conspired against the grievant. There are no management witnesses to the acts of abuse or physical injuries at the time of the incident. The injuries were not found until the youth went to the clinic more than a day later and the youth may have caused the injuries to himself. Therefore, just cause was not proven for the discipline imposed on the grievant.

ARBITRATOR'S OPINION:

There were no witnesses able to testify that the grievant actually was the aggressor, or hit or otherwise used force in an abusive way against a youth. The employer must then rely upon the youths, statements made in the course of the investigation. However, the statements were not subject to cross examination and the youths denied the truth of their prior statements during the arbitration. When there is reason to doubt the credibility of witnesses, cross examination is crucial. Therefore, the validity of all the youths' statements is suspect and were not sufficiently trustworthy. It was not proven that the grievant abused a youth.

AWARD:

The grievance was granted. The grievant was reinstated within fifteen working days with full back pay, with retroactive benefits and restored seniority. The award was reduced by any outside earnings and unemployment compensation received and did not include missed overtime opportunities.

TEXT OF THE OPINION:

February 26, 1991

In the Matter of Arbitration
between

The Ohio Department of Youth Services

and

**The Ohio Civil Service Employees
Association**

APPEARANCES**For the OCSEA:**

Ron Stevenson, Advocate
Robert W. Steele, Second Chair/Staff
Representative
Kenneth Whatley, Grievant
Paul A. West, Youth Leader II
Philip A. Rohrbacher, Youth Leader II
Rebecca Anderson, Activity Therapist

For the Department:

Donald E. Elder, DYS Advocate
Sally P. Miller, OCB 2nd Chair
Michael L. Burton, Unit Manager
Steven Bell, Unit Manager
Edward Browner, Youth
Eric Knipe, Youth
Larry Jessie, Youth

Arbitrator:

Patricia Thomas Bittel

BACKGROUND

This matter was heard on January 29, 1991 at the offices of the Ohio Civil Service Employees Association in Columbus, Ohio before Arbitrator Patricia Thomas Bittel, mutually selected by the parties in accordance with Article 25.04 of the Collective Bargaining Agreement.

The Ohio Department of Youth Services is a state agency responsible for providing care and custody to youth felony offenders sentenced by the courts. The Department (DYS) becomes the legal custodian of the youths, assuming the duties of housing, clothing, educating and feeding them.

Grievant was employed as a Youth Leader at the Training Center for Youth (TCY) in Columbus, Ohio. TCY is specially geared to address the problems of youth with emotional or other mental health difficulties.

Grievant was terminated from his position July 10, 1990 for "abusing or mistreating youth entrusted to the Department's care". His termination was grieved as follows:

"Because of Management's failure to conduct itself in accordance with its own work rules and the violation of several Contract Articles between the State of Ohio and OCSEA along with its failure to consider the overwhelming supportive evidence presented by [Grievant's] co-workers and other documentation, it is felt that [Grievant's] dismissal is unwarranted, unreasonable and unfair."

The grievance was fully processed, culminating in the instant arbitration proceeding. The parties have stipulated the following issue is properly before the Arbitrator: "Was Kenneth Whatley terminated for just cause? If not, what shall the remedy be?" They have also stipulated to the following facts:

"The Grievant was employed as a full-time Youth Leader II at the Training Center for Youth from June 13, 1983 to July 27, 1983 at which time he resigned for 'personal reasons'.

He was rehired May 7, 1984 and continued employment as a Youth Leader II at the Training Center for Youth until the effective date of his termination, July 10, 1990.”

EVIDENCE PRESENTED

Michael Burton, Administrative Assistant to the Unit Manager, oversees the program for a particular group of youth referred to as Hamilton or Group "H". He said at the time this case arose, the majority of youth in his unit had been convicted of crimes against people. He claimed they tended to be emotionally disturbed and very aggressive.

He stated that mid-day on June 3, 1990 he heard a call for help from Group H on the walkie talkie and immediately responded. He said when he arrived he saw Grievant escorting a youth (hereafter referred to as E.B.) to isolation on the unit. He said he tried to talk to E.B. to find out what had happened but E.B. appeared upset and would not respond. He asserted E.B. had no visible injury at the time. He stated because the incident happened on the Sunday, coverage would have been one staff per group.

He explained that while in isolation the other youth would not be able to get to E.B. unless the door were left unlocked. He recalled the door to the isolation cell was locked when he left and Grievant had the key. He said E.B. was returned to the general population later that evening and the next morning had noticeable swelling around his left eye. He referred to the isolation log and observed it did not note when E.B. was released from isolation.

Burton said he interviewed the youth in Hamilton Group then presented their statements to higher management who deemed the investigation sufficient. He said he did not interview line staff.

Unit manager Steven Bell testified that the youth in TCY have emotional and mental health problems. Frequently they are in custody for crimes related to sex, and it is not unusual for them to be on psychotropic medication, he said. Bell explained the duties of the youth leader as security, control, monitoring the behavior and whereabouts of the youth and seeing to their needs.

He said he heard the call for help from Group H and immediately went there to find E.B. in his room, distraught, sobbing, shouting, swearing and in a highly emotional state. He said in his assessment there was no need to intervene. He described E.B. as a bully who would not injure himself unless it were manipulation. He claimed at some point E.B. told him he had been struck by the Grievant. Bell said he reported the accusation to Grievant whose response was to say "okay". On cross-examination Bell was uncertain about when E.B. made this accusation; he said it may even have even been prior to the incident, but in any event was no later than the next day.

E.B. was brought to the arbitration hearing but was hostile and refused to take an oath to tell the truth. The parties then agreed to stipulate to the authenticity of E.B.'s written statement. The following is a summary of events as E.B. described them in his statement:

“E.B. was in Grievant's office to talk about a write-up and began calling Grievant names and using vulgar language. He left the office and was followed by Grievant who hit his leg with a dustmop handle. He told Grievant not to hit him again, but Grievant did hit him again, at which point E.B. picked up a bookshelf to defend himself. Grievant took the bookshelf away and pushed E.B. down, causing him to hit his back on a heater. Grievant went back into his office while E.B. got up and ran for the door which was locked. At this point Grievant punched him, shook him and choked him with a dustmop.”

Another youth, E.K., testified the statement he originally gave to Management -- that Grievant came out of his office and started punching E.B. in the head -- was untrue. He claimed he was told to make this statement by members of staff. He said E.B. hit a window and Grievant simply restrained him.

Youth L.J. testified E.B. was "playing" and would not heed Grievant's command to stop. E.B. ran past the bookshelf and knocked it over, he said, then grabbed the dustmop. He claimed someone went to grab E.B. and Grievant told them to let him be, then E.B. backed into a corner and fell. L.J. stated Grievant did not punch E.B. despite the fact that his statement clearly says “then [Grievant] started punching [E.B.]”. L.J.

explained his statement, saying he really meant to say Grievant pushed him. "At no time did he punch him", stated L.J. He denied any coercion from Management about giving his statement and said his instructions were simply to write down what he saw.

On behalf of the Union, Youth Leader II Paul A. West testified that when Grievant called for assistance he responded as quickly as he could. When he arrived E.B. was going to his room as he was told. He said when he asked E.B. what was wrong, E.B. would not reply although he was crying. He stated the door was then locked, with the Youth Leader retaining the keys.

Youth Leader II Philip Rohrbacher stated when he saw E.B. in isolation he was neither crying nor complaining. He said he did not notice anything broken or misplaced in the area and noted nothing unusual about the situation. His testimony matched his prior written statement where he said he arrived within a minute or at most a minute and a half after the call, at which point he observed that E.B. "looked to be in good shape. I observed no injuries on his face, head or body, no bumps or bruises, no cuts or abrasions and he looked healthy. He did not even look like he was in any distress or pain." Rohrbacher stated since everything looked under control he left the group.

Grievant testified he had six years of service as a Youth Leader II. He stated on June 3, a Sunday, he took Group Hamilton to lunch. He said E.B. and another youth began "fussing with" youth from another group and E.B. walked away with one youth's whole lunch tray. Grievant stated he advised the youth that they would get a write-up when they got back to the unit.

After they got back from the cafeteria, Grievant said he went to his office and began writing up the youth. At this point E.B. approached him, he said, and asked if he was really going to write him up. According to Grievant, when he told E.B. "yes", E.B. said "Fuck you and the write up."

Grievant said he told E.B. to sit down and E.B. again replied with vulgarities, insisting he did not have to sit down. Grievant said E.B. then claimed he was not one of these "punk-ass kids in Group Hamilton" and threatened to "fuck him up."

E.B. came towards him, Grievant said, admitting he pushed him back. E.B. then turned and picked up a bookcase, said Grievant, explaining he pushed Grievant into the wall. E.B. dropped the bookcase and ran toward the door hitting the office window on the way, stated Grievant. He said he told E.B. to stop and E.B. turned and swung at him.

Grievant said he wrestled him to the corner at which point E.B. slipped to the floor. Grievant said during the wrestling, his walkie talkie fell loose and one of the youth called for help. E.B. then agreed to go to isolation, stated Grievant, flatly denying that he hit E.B. at any point during their tussle. He claimed a member of staff checked E.B. and determined he was all right and did not need to go to the clinic. Grievant stated the other youth did not have access to E.B. after he was locked up in isolation.

Grievant made a statement the following day describing separate but related facts. His statement is summarized below:

"When the group returned from lunch they were very hyper and throwing books and paper at each other. They were told they were going to receive a write-up for acting out. Grievant called in the disruption, then began writing the write-ups.

E.B. looked in his office, then told other youth that Grievant was writing them up. He said several youth got together with E.B. and began talking softly. A few minutes later, he said, two supervisors arrived and began speaking with the youth. Burton took the youth off one by one to get statements. He noticed as they were walking off the group that E.B. had a dark mark under his eye.

E.B. is one of four youths in Group Hamilton referred to as the Four Horsemen. He said the Horsemen claim to run the group and if anyone wants to do anything, they have to ask one of the Horsemen. Some of the youth have stated they hate it when Grievant works their group because he writes them up more than all the other staff put together."

E.B. was given a write-up on June 3 for the lunchroom incident of grabbing another youth's lunch tray. In

addition five youth received write-ups for their disruptive conduct on June 4 in throwing books and paper. Each of the write-ups resulted in decision by the Management to discipline the youth involved.

On cross-examination Grievant admitted he was trained in verbal strategies as well as in unarmed self defense, though he claimed he did not feel qualified in unarmed self-defense.

Union Steward Rebecca Anderson testified that she investigated the incident for the Union and obtained statements from the youth. She stated E.B. had a long history of assaults and could go into a rage and not remember what happened. She said he had other behavioral problems but assault was the largest concern. He always grabs for something and never attacks empty handed, she stated.

According to Anderson, the Union alleged disparate treatment at the Step III meeting. She named a teacher in the institution (represented by a different Union) who only received a verbal reprimand after being found to have abused a youth by hitting him in the face, bruising the area around his eye. She named another teacher who was found to have physically abused a youth by hitting him in the face and who received a ten-day suspension for the offense. She admitted that others have been removed for abusing youth.

Anderson claimed Grievant is a highly-respected employee and other employees in all departments were outraged when they learned of his discharge. She said he was liked by all the youth leaders and has a strong reputation of going by the book.

In addition to the above testimony, Management provided the statements of other youth which are briefly summarized below:

LP: Grievant hit E.B. two times, choked him, pushed him into bookshelf; E.B. picked up shelf to try and stop Grievant from hitting him; Grievant pushed E.B. again causing him to land on heater, then choked him again.

J.T.: Grievant hit E.B. with dustmop piece; E.B. picked up bookshelf and told Grievant if he hit him again he would throw it; Grievant hit, smacked, pushed E.B. After E.B. hit window, Grievant hit E.B.'s head repeatedly then smacked him and choked him.

D.S.: Grievant hit E.B.'s head, then tore his shirt off.

R.G.: Grievant hit E.B. with metal part of mophead; pushed E.B. into register; E.B. picked up bookcase to block, went to quiet area; Grievant choked him with mophead; Grievant pushed E.B. into corner, started punching him in head, pushed him and choked him; Grievant ripped off E.B.'s shirt, pushed him down hall.

J.P.: Grievant beat up on E.B. then hit him with dustmop frame. E.B. attempted to protect self with bookcase; Grievant would not stop bothering him, so E.B. ran over to another area, crying. Grievant started on him again, punching him in face.

G.K.: E.B. refused to do as Grievant said; Grievant got piece of dustmop and hit him two times with it, second time so hard metal part bent. He pushed E.B., kept hitting him until he pushed him over causing him to hit lower back on heat register. Grievant went back to office then returned, started hitting E.B.'s face with closed fist as hard as he could, grabbed E.B.'s shirt and ripped it as he pushed him.

A.W.: Grievant hit E.B. with piece of steel off dustmop. There was shoving, then Grievant punched E.B. three times in head.

T.V.: Saw Grievant hitting E.B.

R.R.: Grievant hit E.B. and E.B. kept getting smart with him by telling him he wasn't going to do nothing.

P.G.: Grievant hit E.B. on leg with metal part of broom; E.B. picked up bookshelf, threatened to hit Grievant; Grievant told E.B. to go to isolation and E.B. refused so Grievant hit him on side of face three times, then put

him in isolation.'

ARGUMENTS OF THE PARTIES

Management argued Grievant inflicted injury on a youth, an act which constitutes abuse of a client. In Management's view Grievant struck E.B. with his fist and with a dustmop handle, choked him and tore his shirt. Management argues these actions are extremely serious and warrant removal for the first offense.

Management maintains that at no time is any degree of physical force to be used against the youth in its custody. It asserts it is especially important not to abuse youth who have emotional difficulty. It contends the evidence supports the fact Grievant did in fact abuse E.B.. It argues Grievant was well on notice of the rules against abusing youth and also knew the violation was serious enough to warrant removal. It pointed out he had received training on how to control youth without being the aggressor.

When the situation involving abuse of youth is as obvious as the one in this case, it is incumbent upon Management to do everything possible to avoid repetition of the incident, it asserts. This is especially true when the offense involves abuse of youth with emotional difficulty, it claims. On these grounds it maintains the Arbitrator should deny the grievance in its entirety.

ARGUMENTS OF THE UNION

The Union contends there was a conspiracy among the youth in Group Hamilton which was instigated by the Four Horsemen. It further argues progressive discipline was lacking though it had been given to other employees at the institution. It claims other employees have received much lesser discipline for the same offense.

The Union asserts Grievant has no prior discipline and was responsible for the most aggressive youth in the institution. It claims E.B. has a history of aggressive bizarre behavior and became hostile and aggressive on the day in question.

It argues Management's case is fatally flawed. There was no Management witness either to an act of violence or to a visible sign of the youth being injured at the time of the incident, it asserts. E.B. could have been injured in the 18-hour period after the incident, it claims, pointing out E.B. was not taken to the clinic until 25 or 26 hours after the alleged incident.

Bell's testimony is inconsistent, claims the Union, because he said he placed shackles and handcuffs on E.B., then testified there was no need for intervention. More importantly, the key witness in the case -- E.B. - refused to give truthful testimony, notes the Union.

Testimony from the other youth was worthless, asserts the Union, claiming youth either would not testify or were told what to write. In the Union's analysis, Management has failed to meet its burden of proof.

DISCUSSION

Despite the fact that a number of youth witnessed this incident, Management was unable to produce a single witness to testify that Grievant hit, used force or aggressed against E.B. in an abusive way. Neither E.B. nor any other eye witness would testify against Grievant. Not a single witness confirmed that his original statement was accurate on the point of violence. There simply was no testimony given at hearing that Grievant actually abused E. B..

Management's case, therefore, falls exclusively to the unsworn statements of youth felons not subject to cross-examination. The statements, taken by themselves, are supportive of a conclusion that Grievant indeed abused E.B.. However, the writers of witness statements who testified at hearing denied the truth of the statements they wrote. This certainly calls into question not only the validity of those statements but also of all the statements given by youth. There was no indication that other youth who witnessed the incident were unavailable to testify. Hence, there is no rational basis for crediting their statements thereby denying the Union its right to test their credibility. Grievant promptly reported facts to Management indicating a

conspiracy among the youth to get into trouble a youth leader known as a stickler for the rules. Given the environment at TYC, this explanation is not incredible on its face.

Arbitration is not a court of law and therefore is not bound by legalistic rules requiring exclusion of hearsay evidence. Even so, the Arbitrator must insure the fundamental fairness of the process by discounting unreliable or untrustworthy evidence. The youth statements offered by Management are hearsay and lack important safeguards of veracity: an opportunity for cross-examination, an opportunity to observe witness behavior and administration of an oath to tell the truth. Without these safeguards, evidence loses apparent reliability. As such, the capacity of such evidence to prove facts is diminished.

The right to cross-examination is basic to the arbitration process as it allows a party to test and understand the validity of the statements and facts relied on by the other party. It provides an opportunity to impeach the credibility of witnesses not deserving of trust. It insures to the fullest extent possible an opportunity to discredit the liar and protect the falsely accused. The opportunity to cross-examine allows the Grievant to question his accuser and have the witness responses and behavior evaluated by a neutral third party. These crucial elements of fairness would be entirely lost were parties allowed to simply submit witness statements in lieu of testimony.

The Arbitrator recognizes the extreme difficulty of proving certain types of abuse in an institutional setting, and is aware that the burden upon Management in establishing offenses of this nature weighs heavily, as does the responsibility of protecting the youth in its custody. However, these concerns cannot be allowed to absolve Management from its duty under the Agreement to show just cause for terminating an employee.

Where there are grounds to doubt the credibility of a witness, the right of cross-examination becomes paramount. Such grounds exist in this case. Grievant's reputation for going "by the book" was validated not only by the write-ups he actually issued, both for the lunchroom conduct and the book throwing conduct, but also through the testimony of a co-worker. No eyewitness testified to abuse. No supervisor or staff person present at the time was able to discern any injury to E.B..

The youth at hearing were alternatively uncooperative or lacking in respect for and appreciation of the seriousness of the proceeding. Not one youth credited his own statement. The Arbitrator simply has no basis for either crediting statements which have been flatly denied or for supposing youth not available to testify nevertheless have given accurate and trustworthy written statements.

While the Arbitrator has admitted the youth statements into evidence and given them consideration, she does not find them sufficiently trustworthy and reliable to establish the truth of the facts described. Given the lack of any other convincing evidence of abuse, the Arbitrator must conclude Management has not met its burden of proof in this case.

AWARD

The grievance is granted. Within fifteen working days of this award Grievant shall be reinstated to his position as Youth Leader II. He shall be awarded full back pay at his straight time rate. Grievant shall not receive back pay for missed overtime opportunities. Management shall subtract from Grievant's back pay any compensation from other employers and any unemployment compensation he has received in the interim since his termination. Grievant's seniority shall be restored and he shall be accorded full retroactive benefits.

Respectfully Submitted,

Patricia Thomas Bittel
February 26, 1991