

ARBITRATION DECISION NO.:

595

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Youth Services,
Maumee Youth Center

DATE OF ARBITRATION:

September 21, 1995
October 19, 1995
October 20, 1995

DATE OF DECISION:

January 23, 1996

GRIEVANT:

Tim Neely

OCB GRIEVANCE NO.:

35-05-(94-09-21)-0029-01-03

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Lois Haynes, Advocate

FOR THE EMPLOYER:

Ted Durkee, Advocate
Kim Browne, Labor Relations Specialist, Second Chair

KEY WORDS:

Excessive Force
Assault
Just Cause
Removal
Defective Notice
Progressive Discipline
Abuse of Resident, Patient, or Inmate

ARTICLES:

Article 24 - Discipline
 §24.01 - Standard
 §24.02 - Progressive Discipline
Article 25 - Grievance Procedure
 §25.03 - Arbitration Procedures
 §25.04 - Arbitration/Mediation Panels

FACTS:

The grievant was appointed as a Youth Leader (Juvenile Correction Officer) on November 23, 1987 at the Maumee Youth Center in Lucas County, Ohio. The grievant was removed from his position on September 14, 1994 for alleged violations of Directive B-19, Rule 23 - Physical Assault and Rule 24(a) - Using Excessive Force on a Youth. The grievant signed a copy of Directive B-19, the Department of Youth Services Directive, entitled General Work Rules at the time of his appointment and again on May 19, 1993. The grievant had been disciplined on nine previous occasions, and at least one of those disciplinary actions resulted from an allegation of the excessive use of force.

The altercation between the grievant and the youth took place while the grievant was escorting the youth away from the Evergreen unit. The youth had been at the center of an incident in the Evergreen unit earlier in the evening which required staff members to physically restrain the youth. According to testimony given by two other officers, the youth snatched his arm away from the grievant and fell against a wall. As the youth came off the wall, the grievant pushed him back against the wall. The scene was repeated several times. According to the officers' testimony, the pushing motion took place as the grievant placed his hands on the youth's throat and neck areas. After the last push, the grievant took the youth to the ground where the grievant pinned the youth to the floor. As a result of these actions, the grievant was removed.

EMPLOYER'S POSITION:

It is Management's position that just cause for removal existed due to violations of DYS Directive B-19, General Work Rules, Rule 23 - Physical Assault and Rule 24(a) - Using Excessive Force. Management contended that it was able to prove the truth of the charges, the penalty imposed was progressive and commensurate with the offense, and was not biased by any disparate treatment.

Management placed a great deal of emphasis on the testimony of witnesses and the grievant which indicated that the grievant "initiated the provocation." According to witness testimony, the youth did not hit the grievant, did not hit any other youth, did not destroy any state property, and was not a threat to himself. The youth's injuries are consistent with the alleged conduct of the grievant and are corroborated by medical evidence and observations.

The discipline was implemented in accordance with the principles of progressive discipline as the grievant had been disciplined ten times previously, and these disciplines included seven and ten day suspensions. Five of the ten disciplines reflected offenses related to the most recent incident, i.e. they deal with failure to follow procedures, threats and physical force. Furthermore, the grievant had received written reprimands as well as oral reprimands. Finally, with two prior major suspensions dealing with violations of Rule 24 - Physical Force, the disciplinary grid supports removal. The Arbitrator should be bound by the standard contained in Contract Article 24 which precludes modification of a removal for patient or inmate abuse.

UNION'S POSITION:

The Union argued that the grievant was removed without just cause on four grounds. First, the grievant acted within the guidelines prescribed by Management. Second, progressive discipline was not afforded the grievant as the grievant was not notified of some of the past disciplinary action. Negative notice rendered the prior disciplines useless for future discipline purposes which further negated the progression relied on by Management. Third, Management was guilty of disparate treatment as other employees who engaged in the use of excessive force were not removed. Finally, the grievant's removal was improperly imposed because the investigation was not properly conducted.

ARBITRATOR'S OPINION:

The Arbitrator concluded that the grievant was removed for just cause. The grievant's actions were in direct violation of Directive B-19, Rule 23 Physical Assault and Rule 24(a) - Using Excessive Force on a Youth. The grievant's prior disciplinary history dealing with related forms of misconduct provided the grievant with adequate notice regarding the types of misconduct which could lead to discipline.

The grievant's actions were in direct contravention of established policy. First, the grievant had no justifiable reason to intervene in the situation in the Evergreen Unit as he was not assigned to the unit and the unit's staff members had contained the situation. Second, the grievant initiated the physical intervention for an instance not involving self protection, protection of youth or other persons, prevention of property damage, or

prevention of escape. Finally, the grievant initiated an illegal take down which caused minor injuries to the youth.

Progressive discipline was adhered to by Management. The penalty imposed reflected the severity of the proven charges and the grievant's past disciplinary record. Even if the Union's contention as to notice deficiency was accepted, the penalty imposed was justified "based on the two prior substantive suspensions for related forms of misconduct."

Finally, the Union's claims of disparate treatment and unfair investigation are not supported by the record. The cases cited by the Union were distinguishable on the facts and circumstances surrounding those cases and as such they were not comparable. The Union failed to present evidence to substantiate its claim that the investigation was not fairly conducted. The Union did not expose any defects in the investigation.

AWARD:

The grievance was denied in its entirety.

TEXT OF THE OPINION:

STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING
IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF
YOUTH SERVICES, MAUMEE YOUTH CENTER

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE:

Tim Neely

(Discharge-Physical Assault and Using
Excessive Force on a Youth)

CASE NUMBER: 35-05-940921-0029-01-03

ARBITRATOR'S OPINION AND AWARD

Arbitrator: David M. Pincus

Date: January 23, 1996

APPEARANCES

For the Employer

Ted Durkee, Advocate

Kim Browne, Labor Relations Specialist (2nd Chair)

Nan Hoff, Superintendent, Maumee Youth Center

Linda Bess, Superintendent, Indian River

Rosalie Reynolds, Duty Officer

Dwayne Goodwin, Duty Officer

Gail Wright, Unit Manager

For the Union

Tim Neely, Grievant
 Lois Haynes, Advocate
 Felicia Strode, Chapter President
 Sean Tuggle, Juvenile Correctional Officer
 Albert Earl, Juvenile Correction Officer
 Velvet Goodwin, Chief Steward
 Margo Grier, Laundry Supervisor
 Mary K. Eagan, Deputy Superintendent (retired)

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration/Mediation Panels of the Agreement between the State of Ohio, The Ohio Department of Youth Services, Maumee Youth Center (MYC), hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as The Union, for the period March 1, 1994-February 28, 1997 (Joint Exhibit 1).

The arbitration hearing was held on September 21, 1995 at the ODOT District 2 office, Bowling Green, Ohio, October 19, 1995 at the Toledo Government Center, Toledo, Ohio and October 20, 1995 at the Maumee Youth Center, Lucas County, Ohio. The parties selected David M. Pincus as the Arbitrator.

At the hearing the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both parties indicated they would submit briefs.

STIPULATED ISSUE

Was the removal of Tim Neely for just cause? If not, what should the remedy be?

PERTINENT CONTRACT PROVISIONS

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 25.04 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

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 or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be

implemented only after approval from OCB;

- D. one or more day(s) suspension(s);
- E. termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in a performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of the Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

(Joint Exhibit 1, (S68-69)

STIPULATED FACTS

1. Tim Neely, grievant was appointed on November 23, 1987 as a Youth Leader (Juvenile Correction Officer) at Maumee Youth Center.
2. Grievant was removed on September 14, 1994 alleged violation of Directive B-19, Rule 23-Physical Assault and Rule 24a-Using Excessive Force on a Youth.
3. Grievant signed for a copy of Chapter B-19, the Department of Youth Services Directive, entitled General Work Rules on May 19, 1993 and at the time of his appointment on November 23, 1987.
4. Grievant had the following prior discipline:

<u>Date</u>	<u>Type</u>	<u>Rule</u>	
03/09/92	Written Reprimand	6	Failure to follow procedures
08/31/92	Oral Reprimand	6c	Insubordination - Failure to follow proper procedures
10/05/92	10 day Suspension	6c	Insubordination - Failure to follow proper procedures
		19	Verbal or Written Abuse
		24	Physical Force
12/30/92	Written Reprimand	6c	Insubordination - Failure to follow proper procedures
04/30/93	Written Reprimand	26c	Unauthorized Absence
		26e	Failure to provide proper documentation
06/21/93	Oral Reprimand	19	Verbal or Written Abuse of Others
02/15/94	15 day Suspension reduced to 7 days per expedited arbitration	24a	Using Excessive Force on a Youth
		1c	Failure to follow proper procedures
04/30/94	Written Reprimand	26a	Failure to notify supervisor of absence or follow call in procedures
		26e	Failure to provide proper documentation of absence when required
07/08/94	Oral Reprimand	26b	Tardiness

5. It is accepted practice that Juvenile Correction Officers should respond to units to offer assistance.

6. The grievance is properly before the Arbitrator to decide on the merits.
7. There are no procedural issues raised by either party.

CASE HISTORY

The Maumee Youth Center, the Employer, is located in Lucas County, Ohio. It is one of nine facilities run by the Ohio Department of Youth Services. As a minimum security residential facility, it houses boys within the ages of thirteen to seventeen years. These boys are typically charged with a wide variety of delinquency problems, usually dealing with third and fourth degree felonies.

At this particular facility, services are provided by 125 staff members. Educational, recreational and program activities are given to 155 youths. One of the critical program protocols is the Guided Group Interaction (GGI) program. This program has an underlying philosophy which emphasizes peer pressure as the mechanism which will receive long lasting behavioral modification of boys housed within the housing units. As such, Juvenile Correction Officers (JCO) and other staff serve as facilitators for group discussions. Groups within the units solve their own problems and make their own decisions. They often deal with issues of communal living, daily behavior, feelings and other problems.

Tim Neely, the Grievant, was appointed on November 23, 1987 as a Juvenile Correction Officer. At the time of his removal, the Grievant had approximately realized seven (7) years of service.

The incident in dispute took place on August 14, 1994; and had its genesis in the gym at approximately 8:30 p.m. Mike Brown and two other youths were being supervised by JCO Sean Tuggle when they decided to fall on the ground rather than staying in their group line. JCO Tuggle decided some negative consequences were in order because of the acting out behavior. He had them laying down and getting up as a form of behavior modification intervention.

The group of youths was eventually instructed to return to the Evergreen unit. Tuggle, moreover, instructed the three boys to continue the routine initiated in the gym. Mike Brown refused to continue, basing his refusal on ankle and leg injuries. This refusal caused JCO Esther Leiby to telephone Duty Officer Dwayne Goodwin, in accordance with the Physical Intervention policy, Directive H-3 (Joint Exhibit 6). Duty Officer Goodwin testified that upon his arrival to the Evergreen Unit he saw Mike Brown throw an isolation room tray against the wall, and was generally "acting out." JCO Tuggle attempted to de-escalate the situation by verbally calming Mike Brown; but this effort proved fruitless. As a consequence, JCO Tuggle and Duty Officer Goodwin determined a need to physically restrain Mike Brown by using an established and certified wrist and arm technique. Mike Brown resisted by attempting physical harm to himself by hitting his forehead against the wall. As a consequence, staff decided the best course of action was to take down Mike Brown in an effort to calm him. During this incident, JCO Leiby kept the remaining youths in the bunk area and attempted to get them calmed down.

Eventually, Mike Brown became less resistant and began to control himself. He was released from the floor and Duty Officer Goodwin called over some youths from Mike Brown's group and initiated the GGI protocol. He hoped that this intervention would eliminate any additional negative behavior on the part of Mike Brown.

In accordance with policy and procedure, Duty Officer Goodwin called Senior Duty Officer, Rosalie Reynolds. He reported the incident and advised her of the circumstances.

Duty Officer Reynolds arrived at the Evergreen Unit shortly after the telephone call. The unit appeared noisy and somewhat anxious. She testified that Mike Brown was standing with several other youths in front of a glass-encased fire extinguisher. She heard Mike Brown state "I'm okay," and also remembered Duty Officer Goodwin remarking that everything was under control.

Duty Officer Reynolds also observed the presence of the Grievant on the Evergreen Unit. He was assigned to another unit at the time of the incident, but entered the Evergreen Unit when he heard a commotion as he was passing by. Duty Officer Reynolds testified the Grievant was leaning on a desk at the front of the unit, while JCO Leiby was with some individuals by the front of the bunk area.

Fearing a potential accident, DO Reynolds instructed the youths to move away from the fire extinguisher.

Both DO Goodwin and JCO Tuggle testified the Grievant decided to intervene as a consequence of DO Reynolds' instruction. He asked JCO Tuggle where Mike Brown was supposed to be, and was directed toward a certain area in the unit. He grabbed Mike Brown by his sweat shirt, began to escort him, followed by the youths that were talking to Mike Brown prior to his involvement.

The following version is somewhat in dispute and reflects the Employer's view of the circumstances. JCO Tuggle and DO Goodwin testified that during the escort Mike Brown snatched his arm away and fell against a wall. As Mike Brown came off the wall, the Grievant pushed him back against the same wall. This action took place a number of times. The pushing motion, more specifically, took place as the Grievant placed his hands on Mike Brown's throat and neck areas. After the last push the Grievant took Mike Brown down, which resulted in Mike Brown being pinned to the floor by the Grievant's body. The Grievant also acknowledged he restrained Mike Brown by placing his forearm across his neck.

Eventually, the Grievant released Mike Brown. He left the unit, without further incident, shortly after the release.

On August 23, 1994, a pre-disciplinary hearing was held. It was determined that excessive force was used and sufficient force to be deemed physical assault (Joint Exhibit 2). As a consequence, on August 24, 1994, the Grievant was removed from the position of Juvenile Correctional officer. The removal order contained the following relevant particulars:

On or about 8/14/94, you were assaultive towards a youngster and used excessive force by grabbing him around the neck and throwing him to the floor.

Your actions violates DYS Directive B-19 Rule #23 Physical Assault and Rule #24(a) Using Excessive force on a youth.

For your actions, you are hereby removed form the position of Juvenile Correctional Officer at Maumee Youth Center. Effective Sept. 14, 1994.

(Joint Exhibit 2)

As a consequence of the imposed discipline, the Grievant filed a grievance. It contained the following Statement of Facts:

Mr. Neely was removed from MMYC on 9/13/94 due to physical assault and using excessive force on a youth. The Union feels the discipline is too severe and is unwarranted, due to the youth attacking Mr. Neely before any type of force was implemented

(Joint Exhibit 3)

The parties were unable to resolve the disputed matter. Neither party raised procedural nor substantive arbitrability concerns. As such, the matter is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

It is the opinion of the Employer that it had just cause to remove the Grievant for violation of DYS Directive: B-19, General Work Rules, Rule 23-Physical Assault and Rule 24(a) - Using Excessive Force on a Youth (Joint Exhibit 5). The Employer maintained it was able to prove the authenticity of these charges, the penalty imposed was progressive and commensurate with the offenses and was not biased by any disparate treatment

action.

Evidence and testimony established that the actions engaged by the Grievant clearly violated the previously specified work rules. Several witnesses, including the Grievant, testified that he initiated the provocation. Immediately prior to the intervention, Mike Brown did not hit the Grievant, did not hit any other youth, did not destroy any state property, and was not a threat to himself. If anything, the GGI intervention had calmed Mike Brown. By pushing Mike Brown, placing his hands on his chest and neck areas and taking him down with an unauthorized take down hold, the Grievant physically assaulted Mike Brown and used excessive force.

Medical evidence and related observations support the excessive nature of the Grievant's actions. Shortly after the incident, several staff noted red marks and bruising around Mike Brown's neck and chest. Rhonda R. Miller, Institutional Nurse, examined Mike Brown on August 15, 1994. Her report (Joint Exhibit 2) contained the following remarks: "He had bruising noted on right side, back of neck. He also had a bruise above R (right) eye."

The discipline imposed was implemented in accordance with the principle of progressive discipline. Within seven (7) years of service, the Grievant had been disciplined ten (10) times; including a seven (7) day suspension and a ten (10) day suspension. Five of the ten disciplines, moreover, reflect offenses related to those most recently imposed. That is, they deal with failure to follow procedures, threats and physical force.

Progressive discipline was not violated because the Grievant did receive copies of written reprimands of December 30, 1992, April 30, 1993 and May 2, 1994. In addition, copies of the oral reprimands of June 21, 1993 and July 14, 1993 were also received by the Grievant. Gail Wright, the Unit Manager, supported this allegation by stating she had given these copies to the Grievant. Two (2) grievances (Employer Exhibit 3) filed on behalf of the Grievant contained references to Wright meeting with the Grievant and a Union representative to discuss the disputed matters.

Even if the Arbitrator places some weight on the Union's notice arguments dealing with the written and oral reprimands, the Employer still adhered to the progressive discipline principle. With two (2) major prior suspensions dealing with violations of Rule 24-Physical Force, the disciplinary grid supports removal as the appropriate penalty.

A finding that the Grievant violated Rule 23-Physical Assault and Rule 24(a) should be viewed by the Arbitrator as an act of abuse of a youth in the care and custody of the State of Ohio, Department of Youth Services. As such, the Arbitrator should be bound by the standard contained in Article 24 which does not provide him with authority to modify the removal.

The Employer strongly contested the Union's disparate treatment claim. The Employer opined the Union failed to provide sufficient specificity for relevant comparisons of the work rule violations, the discipline imposed, and employment and discipline histories. Proper penalties were imposed in each instance because the circumstances differed in terms of restraints imposed, whether the individuals involved served as aggressors, and dissimilar prior discipline and work histories. The comparison individuals designated by the Union in support of the argument could be significantly distinguished in virtually all these case characteristics.

The Union's Position

The Union argued that the Grievant was inappropriately removed without just cause. Arguments dealing with the proofs obtained, progressive discipline, disparate treatment and the nature of the investigation were used in support of the primary premise.

The Grievant was unjustly removed because he did not violate the Employer's Incidents of Physical Intervention policy (Joint Exhibit 6). The Grievant, more specifically, did not exceed his authority; he acted well within the guidelines promulgated by the Employer. The Grievant attempted to calm the resident, but only escalated his response by increasing the level of force used when the resident placed his hands around the Grievant's neck. He responded by trying to protect himself by initially pushing the resident away. The take down only took place once the Grievant determined his initial attempts proved to be futile.

Progressive discipline was not afforded the Grievant as a consequence of notice deficiencies. The Employer relied on prior written and oral reprimands (Joint Exhibit 9) in support of its progressive discipline theory. The Grievant, however, testified that he was not aware of some of these prior reprimands and related charges, nor did he sign them as evidence of their proper transmittal. Velvet Goodwin, the Chief Steward,

testified it was common practice to have employees sign grievances acknowledging receipt of discipline. She submitted a series of prior grievances (Union Exhibit 1) in support of her testimony.

Progressive discipline was not properly implemented as a consequence of these defects, which caused the Employer to violate its own Directive B- 19 - General Work Rule (Joint Exhibit 5). Since the Grievant never received these prior reprimands, this caused a certain notice defect. He was never properly forewarned of the possible consequences of continued use of excessive force and inappropriate physical interventions. Also, negative notice rendered the prior disciplines useless for future discipline purposes which further negated the progression relied on by the Employer.

Velvet Goodwin provided testimony in support of the disparate treatment claim. She reviewed several prior incidents involving other employees who engaged in excessive force behaviors (Employer Exhibit 1). And yet, the Employer failed to remove these individuals. In fact, some of them failed to realize any form of discipline even though they were similarly situated in terms of conduct.

The Grievant's removal was also improperly imposed because the investigation was not conducted properly. A reasonable inquiry regarding the incident was never undertaken prior to the Grievant's removal. Even though witness statements were taken, no further investigation was conducted before assessing punishment.

THE ARBITRATOR'S OPINION

AND AWARD

From the evidence and testimony introduced at the hearing, a complete review of the record including pertinent contract provisions, it is my judgment that the Grievant was removed for just cause. The Employer obtained substantial evidence or proof that the Grievant was guilty as charged. Also, none of the due process issues raised by the Union in terms of progressive discipline, disparate treatment and failure to investigate fairly were properly supported to influence a modification or reversal of the imposed penalty.

The Grievant did engage in acts in direct violation of Directive B-19, Rule 23 Physical Assault and Rule 24(a) - Using Excessive Force on a Youth (Joint Exhibit 5). Even though he was somewhat evasive at the hearing regarding his prior knowledge of these rules, the parties stipulated he received these rules at the time of his appointment on November 23, 1987. His prior disciplinary history, however, dealing with related forms of misconduct placed him on adequate notice regarding the types of misconduct which could lead to potential discipline. In a similar fashion, the Grievant initially seemed reluctant to acknowledge his understanding of guidelines contained in Directive H-3 - Incidents of Physical Intervention (Joint Exhibit 6). And yet, under cross examination he was able to recite in relatively clear terms the justifiable reasons to physically intervene in any given situation. His credibility regarding the altercation in dispute was significantly lessened as a consequence of his evasive conduct.

Clearly, the Grievant's actions were in direct contradiction of Directive H-3 (Joint Exhibit 6). He had no justifiable reason to intervene at all, let alone physically intervene in the manner described, and supported, at the hearing. Brown was engaged in a GGI activity and had calmed down in terms of his acting out mannerisms when the Grievant grabbed him by his sweatshirt. The Grievant, more specifically, initiated the physical intervention in an instance not involving self protection; protection of youth or other persons; prevention of property damage; and prevention of escape. Once the altercation escalated he did not use the minimum power or strength necessary to control or restrain Mike Brown. Rather than de-escalating the situation by stepping away or asking for assistance that was readily available, the Grievant pushed Mike Brown against the wall a number of times by placing his hands on Mike Brown's neck and chest areas. He, then, initiated an illegal take down which caused him to fall on top of Mike Brown. The Grievant not only used his extensive size to restrain Mike Brown, but also placed his forearm across Mike Brown's neck and chest areas.

These events were strongly supported by the record. Testimony provided by Goodwin, Tuggle and Reynolds were consistent and corroborated by statements (Joint Exhibit 2) provided shortly after the incident. The Grievant, himself, acknowledged he grabbed the Grievant on the neck and shoulder areas. He reviewed these actions at the hearing and supporting statements contained in his written statement and accident

incident report (Joint Exhibit 2). Collateral evidence provided by Mike Brown in a transcript (Union Exhibit 3) taken in the Municipal Court of Napoleon, Ohio further supports the charges in dispute.

The Grievant's review of the events lacks credibility when compared against the previously described record. At the hearing, he introduced certain events not contained in his original written statement (Joint Exhibit 2). Especially concerning are his remarks dealing with the GGI group restraining Mike Brown against the wall and keeping him from DO Goodwin because he was threatening this officer. As such, at the hearing, he noted his intervention was caused by the threats being uttered by Mike Brown, and the GGI group physically restraining Mike Brown. None of these assertions were contained in his original statement (Joint Exhibit 2), nor supported by other witnesses. They clearly represent attempts to rehabilitate the record by introducing contrived justifications in support of his actions.

By engaging in an excessive unjustifiable physical intervention, the Grievant further violated Rule 23 - Physical Assault (Joint Exhibit 5). This assault is not only supported by the actions engaged in, but further reinforced by medical observations introduced at the hearing, and gathered during the course of the investigation. Some of Mike Brown's injuries were the result of injuries realized in the gym. Other injuries were self-inflicted while banging his head against the wall at the Evergreen Unit. Still, certain specific injuries are totally attributable to the Grievant's actions. The marks on the chest and neck could not have been self-inflicted nor caused by the prior events. Several staff members observed these injuries after the incident. Also, Miller's nursing report (Joint Exhibit 2) supports these observations.

Progressive discipline was adhered to by the Employer and was not violated. The penalty imposed reflected the severity of the proven charges and the Grievant's past disciplinary record. Even if one agrees with the Union's prior notice argument, the penalty imposed reflects a justified imposition based on the two (2) prior substantive suspensions for related forms of misconduct. The majority of the contested oral and written reprimands took place prior to the penalty modification resulting from the expedited arbitration. (15 day suspension reduced to 7 day suspension). Nothing indicates the penalty was modified as a consequence of notice deficiencies. I, therefore, have to assume that these deficiencies were not raised before even though the Grievant's disciplinary record was probably exposed at the expedited hearing. Some of the disputed reprimands, moreover, were discussed with the Grievant and/or a Union representative as attested to by Gail Wright and supported by documents (Employer Exhibit 3) introduced at the hearing.

This Arbitrator does not, however, concur with the Employer's view regarding the application of the abuse language contained in Section 24.01. I deem it inappropriate to infer a charge of abuse when the Employer, regardless of the reasons, fails to include this charge in its own guidelines (Joint Exhibit 5) and/or removal order. The parties have restricted an arbitrator's authority when dealing with abuse cases to a factual determination without allowing any consideration of modifying penalties based on procedural defects and other types of mitigating circumstances. Cases tried within this framework have their own strategy and unique outcomes. If the Employer was so inclined to cloth the present proceeding with an abuse allegation, it should have raised this matter at the pre-disciplinary stage of the process. A stipulated issue containing a just cause phrase is also totally inappropriate if one wishes to raise an abuse allegation. It may be argued in the alternative, but should not serve as the initial focus of any proceeding. An alternative interpretation would supersede the parties agreed to Section 24.01 proviso and the Ohio Supreme Court Dunning ruling.

The disparate treatment claim was not properly supported by the Union. I agree with the Employer's analysis regarding this argument. The situations raised by the Union did not indicate that similarly situated employees have been treated differently. The Union's presentation focused on the disciplinary outcome and nature of the offense and nothing more. Superintendent Bess readily distinguished the prior cases raised by the Union. She showed that the cases cited differed from the presently disputed matter on a number of legitimate characteristics: employees were using approved restraint techniques to break up a fight or restrain a youth; were not the aggressor, had no prior discipline nor dissimilar work record; and were not charged with the same rule violation. Within this contest, one would be hard pressed to support a disparate treatment claim when the prior disciplinary histories are not closely comparable.

The Union's fair investigation claim is also misplaced and unsupported by the record. The Union never fully articulated this defect at the hearing. It basis this claim on the Employer's failure to investigate prior to the removal decision. It never raised any specific defects in terms of what should have been done or that the investigation was half-hearted at best. The record, moreover, fails to expose any particular defect. All

relevant participants wrote statements and/or were interviewed. In addition, a proper pre-disciplinary hearing was held allowing the Grievant an opportunity to counter the employer's concerns.

AWARD

The grievance is denied. The Employer had just cause to remove the Grievant.

Dr. David M. Pincus
Arbitrator

Date: 1/23/96