OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio Department of Youth Services, Scioto Juvenile Correctional Facility
-AND-
Ohio Civil Service Employees Association AFSCME Local 11

Appearing for Scioto Juvenile Correctional Facility
Matthew Banal, Labor Relations Assistant
Marc C. Bratton, Deputy Superintendent of Programs
David A. Haynes, Labor Relations Officer
Leon Hill, Administrative Assistant
Michael Keels, Social Worker II
Mark Tackett, Advocate for the Agency
Rebecca Williams, Social Work Supervisor

Appearing for OCSEA
Calvin Collins, Chapter President
Rose Jeter-Howard, Unit Administrator
Wilson Humphrey, Second Vice President
David Justice, OCSEA Staff Representative
Tami Null, JCO
Otha Watson, JCO
Karl Wilkins, Jr. Chief Steward

CASE-SPECIFIC DATA
Grievance No.
35-07-20050208-0005-01-03

Hearing(s) Held
August 17, 2005

Closing Arguments at Hearing
August 17, 2005

Case Decided
September 27, 2005

Subject
Threatening/Intimidating Language, Use of Excessive Force

The Award
Grievance Sustained in Part and Denied in Part
Reinstatement Without Backpay

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Facts

This is a disciplinary dispute between the Scioto Juvenile Correctional Facility (a branch of the Ohio Department of Youth Services) ("DYS" or "Agency") and OCSEA, AFSCME Local 11 ("Union"),[1] which represents Mr. William E. Isaman ("Grievant"). The Agency removed the Grievant on February 4, 2005 for violating DYS Policy 103.17 and several General Work Rules, including Work Rule 3.1, Dishonesty; Work Rule 3.01, Verbal Written Abuse of Others; Work Rule 4.14, Excessive Use of Force; and Work Rule 5.1, Failure to Follow Policies and Procedures.[2] When he was removed, the Grievant was a Juvenile Corrections Officer ("JCO") with approximately thirteen years experience, no active discipline, and a satisfactory record of job performance.

A. Youth Smith Touches the Grievant

The Grievant's troubles began on November 24, 2004, when, Youth Smith, a youth inmate, walked passed the Grievant from behind and tapped him on the shoulder. The Grievant initially thought a coworker had touched him until he spotted that coworker standing across the room.

Concerns for his own safety and respect among the youth had long since prompted the Grievant to notify youth that he did not tolerate their unwelcome touches. Youth were fully aware of this standard. Moreover, the Agency has a rule that prohibits such touching.[3] Consequently, when the Grievant learned that Youth Smith had touched him, he drafted a Youth Behavior Incident Report ("YBIR"), which he presented to Mr. Marc D. Bratton, Deputy Superintendent of Programs. Mr. Bratton was in the office of Ms. Rose Jeter-Howard, Unit Administrator when the Grievant gave him the YBIR.

After Mr. Bratton read the YBIR, the Grievant said something like: "If it happens again, I might have to take care of it or do something to the youth."[4] Later that same day the Grievant again raised the matter

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[1] Hereinafter collectively referenced as the "Parties."

[2] Discipline Trail, First unnumbered page.

[3] *See* K-1 Rules of Youth Conduct, at 1, Section A(e), prohibiting youth from engaging in "disrespectful acts toward staff . . . including . . . unwelcome physical contact."

[4] DT 22.

to Mr. Bratton at the Officer's Club or area, saying that he (the Grievant) would have to "fuck Youth Smith up" if Youth Smith touched the Grievant again." ("F" phrase).

Mr. Bratton advised the Grievant that such a response was inappropriate and would trigger consequences. He told the Grievant to let the YBIR go through the process. After so advising the Grievant, Mr. Bratton felt no need to write an Incident Report on the matter because he thought it was settled.

Later that same day, November 24, 2004, accompanied by two youths, the Grievant submitted the YBIR to Mr. Leon Hill, Unit Administrator. As Mr. Hill read the report, and within earshot of the two youth's, the Grievant said he would "fuck Youth Smith up" if Management did not do something about Youth Smith. The Grievant repeated that statement before he left Mr. Hill's office.

Shortly after his conversation with the Grievant, Mr. Hill completed an Incident Report[5], summarizing his encounter and submitted that Report to Mr. Mason. In addition, Mr. Hill shared the same information with Mr. Bratton, who then drafted and submitted his own Incident Report,[6] detailing his earlier encounter with the Grievant. Finally, in a memorandum dated November 24, 2004, Mr. James Hieneman, Deputy Director, notified the Grievant that the Agency was investigating him for allegedly "making a 'physical threat' to a youth in front of a staff member."[7]

At approximately, 12:00 p.m. on November 24, 2004, Mr. Hill was standing near some vending machines in the visiting area when the Grievant stepped up close to him and said, "That was some coward ass shit you done." ("Coward" Phrase) As the Grievant turned to walk away, Mr. Hill said "I am not going to lose my job for you. . . ."[8]

B. Fight Between Youth Bell and Youth Johnson

On the morning of December 3, 2004, Ms. Tammy Null, JCO, was escorting a group of youths across

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[5] DT 6.
[6] DT 11.
[7] DT 12.
[8] Mr. Hill's testimony and written statement at DT 20.

the Agency's campus. Four or five of the youths were going to school, and two were pushing carts to the chemical pickup area. While the group was close to Davey Cottage, two females from the group, Youth Bell and Youth Johnson, began fighting. Ms. Null immediately activated her "Man Down" alarm, requesting officer assistance and verbally instructed the two youths to stop fighting.[9] Ms. Null attempted to separate the youths by pulling on Youth Johnson's jacket. As he exited Davey Cottage, the Grievant saw Youth Bell and Youth Johnson fighting and ran over to assist Officer Null. When approaching the two youths, the Grievant somehow lost his balance or footing and lunged into Youth Bell with sufficient force to take himself and Youth Bell to the ground. He immediately helped Youth Bell up and escorted her away.

C. Management's Response

The Agency launched an administrative investigation into the Grievant's conduct. First, Mr. Allen Kline, Operations Manager, initiated an administrative investigation on November 24, 2004.[10] and concluded that the Grievant made "a verbal threat toward a youth in front of other staff members."[11] Also, Mr. Kline concluded that, on November 24, 2004, the Grievant confronted "Mr. Hill about his statement after being informed that he [the Grievant] was under investigation."[12]

Next, on December 10, 2004, Mr. Andrew J. Janning began investigating the December 3 incident and, on December 20, 2004, offered the following conclusion: "Although the level of force utilized by . . . [the Grievant] during the physical intervention may not have been a purposeful act, . . . [t]he intent of JCO Isaman's forceful tackling Bell was never in question his alleged excessive force was. It is therefore clear that the physical intervention utilized by . . . [the Grievant] was outside the response to resistance policy in that he utilized excessive force in restraining youth Bell."

In other words, Mr. Janning concluded that even though the Grievant intended to forcefully intervene

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[9] The Agency trains JCOs not to separate fighting youths without assistance from at least one other officer, since youths could stage fights to draw a JCO into the fracas in order to beat up on them.

[10] DT 3-5.

[11] *Id.* at 5.

[12] *Id.*

between Youth Bell and Youth Johnson, he may not have intended to use as much force as he actually did. Nevertheless, in Mr. Janning's view, the amount of force the Grievant intentionally or unintentionally used exceeded the limits dictated by the Agency's Response to Resistance Policy.[13]

In a letter dated December 28, 2004, Mr. James Hieneman, Acting Superintendent, notified the Grievant that he (Mr. Hieneman) had scheduled a pre-disciplinary hearing for January 5, 2005[14] to assess charges against the Grievant for:

1. Making "verbal threats toward a supervisor about a youth that allegedly touched you."
2. Confronting a "supervisor who made the allegation against you by telling him, 'That was some coward ass shit you done.'"
3. Using "inappropriate force while restraining a youth on December 3, 2004."

The pre-disciplinary hearing was held as scheduled, and on January 5, 2005, Hearing Officer Vins Spurlock found the Grievant guilty of all charges of misconduct.[15] Based on those findings and conclusions, the Hearing Officer found just cause for discipline.[16]

In a letter dated January 11, 2005, Mr. Hieneman advised the Grievant that he would be removed effective February 4, 2005 for violating the foregoing policy and work rules.[17]

The Union responded to the Grievant's removal with Grievance No. 35-07 (28/8/05/005-01-03) ("Grievance"), claiming that the Grievant's removal was not for just cause and violated the principles of progressive discipline.[18] The Agency denied the Grievance at every step of the Parties' negotiated grievance procedure. Consequently, in a letter dated May 23, 2005, the Union notified the Agency that it intended to arbitrate the decision to terminate the Grievant.[19]

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[13] DYS Policy 301.05.

[14] DT 1.

[15] Second unnumbered page of disciplinary trail.

[16] *Id.*

[17] First unnumbered page of Disciplinary trail.

[18] Grievance trail, at 1. Although Grievance No. 35-07 (2/8/05) 005-01-03 triggered the instant dispute, the Grievant filed several other grievances, regarding other issues (Grievance trail, at 6-7), all of which Management ultimately denied (Grievance trail, at 6-7). Ultimately, the Agency and the Union agreed to consolidate those grievances and to include them in the instant dispute. (Grievance Trail, at 5).

[19] Grievance Trail 6.

II. Relevant Contractual and Regulatory Provisions
A. Regulatory Provisions

General Work Rules---Policy Number 103.17
Violation of this policy and other Ohio Department of Youth Services policies and procedures as well as those addendums developed by each Managing Officer constitute cause for corrective action, up to and including removal.

The penalties reflected on the following grid shall provide a framework for equitable discipline. The actual discipline imposed by the Agency Director upon an employee . . . may vary depending on the circumstances and the appropriate agreement, if applicable.

* * * *

Disciplinary action for violations of work rules falls under the relevant provisions of the civil code, not the criminal code. Therefore, employees do not have the right to withhold information regarding possible infractions of the work rules, even if it may be self-incriminating.

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LEVEL TWO
Rule 2.1 Insubordination
Conducting oneself in a manner that is disrespectful to a superior.

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LEVEL THREE
Rule 3.1 Dishonesty
Being dishonest while on duty or engaged in state business, including but not limited to . . . deliberately withholding, giving false or inaccurate information, verbally or in writing, to a supervisor or appropriate authority. . . .

Rule 3.10 Verbal or written abuse of others
Using insulting, malicious, threatening, or intimidating language.

LEVEL FOUR
Rule 4.14 Excessive use of Force
Use of excessive force toward any individual under the supervision of the department. . . .

SITUATION SPECIFIC LEVEL
Rule 5.1 Failure to follow policies and procedures

POLICY NUMBER 301.05
The purpose of this policy is to provide guidelines and establish uniform procedures to manage resistant youth behavior. Management interventions include staff use of verbal responses, seclusion, physical responses and mechanical restraining devices in order to control and de-escalate a youth's resistant behavior. . . . Staff response must be reasonable and consistent with the degree of resistance being demonstrated by the youth. When responding to a youth's level of resistance, staff shall utilize the least restrictive response likely to be effective under the circumstances to gain control of the youth. Staff may use force to control situations involving the following: "to prevent imminent and physical harm to self or to others . . . to preserve

institution security and order.

* * * *

Slight Physical Response

Any reasonable response that can include where a staff struggles, pushes, or uses an escort technique to control a person and no injuries or allegations of injuries result from the incident.

Directive K-1 Rules of Youth Conduct

A. POLICY PROVISIONS:

The Department of Youth Services has adopted rules of conduct that shall be standard throughout the Department referred to as Category I Rules. . . . Category I Rule violations are as follows:

* * * *

e. Disrespectful acts toward staff or visitors . . . including unwelcome physical contact such as touching.

B. Contractual Provisions

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. . . .

24.02- Progressive Discipline
The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. . . .

24.05- Imposition of Discipline
Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

III. The Issue

The Parties stipulated to the following issue: "Was the Grievant removed for just cause, and if not, what shall the remedy be?"

IV. Summaries of the Parties' Arguments

A. Summary of the Agency's Arguments

1. Testimonies of three Agency witnesses clearly establish that the Grievant used the "F" Phrase to Mr. Hill and to Mr. Bratton. None of the Union's witnesses were present when the Grievant uttered that statement.
2. Mr. Hill's testimony and Mr. Kline's statement establish that the Grievant confronted Mr. Hill and used the "Coward" phrase.
3. Testimonies of two witnesses establish that the Grievant used excessive force against Youth Bell by tackling her. The Grievant's witnesses gave conflicting testimonies on this point.
4. Consequently, the Agency removed the Grievant for just cause, and the Arbitrator should deny the Grievance in its entirety.

B. Summary of the Union's Arguments

1. Youth Smith violated the Agency's policy by impermissibly touching the Grievant. Yet, the Grievant never confronted or threatened Youth Smith about his wrongful conduct.
2. Except for instructing the Grievant to stay away from Youth Smith, the Agency did nothing to keep the Grievant away from the youth.
   The Grievant denied using the "Coward" phrase. But even if he did, Mr. Hill was not thereby threatened. Mr. Hill though the comment was wrong, but he never claimed it was abusive or threatening.
3. Under the R2R Policy, the Grievant's intervention between Youth Bell and Youth Johnson constituted "Slight Force." The Agency failed to establish that the Grievant used excessive force against Youth Bell. The arbitral record contains only mixed testimony on that issue. Those closer to Youth Bell do not mention tackling. Nor did the Grievant injure Youth Bell in the incident. Finally, the Grievant never intended to harm Youth Bell.
4. The Grievant is popular with his coworkers.
5. For all of these reasons, the Arbitrator should sustain the Grievance in its entirety.

V. Analysis and Discussion

A. Evidentiary Preliminaries

Because this dispute involves discipline, the Agency has the burden of proof or persuasion regarding its charges against the Grievant. To establish those charges, the Agency must adduce *preponderant* evidence in the arbitral record as a whole, showing *more likely than not* that the Grievant engaged in the alleged misconduct. Doubts regarding the existence of any alleged misconduct shall be resolved against the Agency. If the Agency fails adequately to establish purported misconduct in the first instance, it cannot prevail, *irrespective* of the strength or weakness of the Union's defenses. Similarly, the Union has the burden of persuasion (preponderant evidence) as to its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

B. Whether the Grievant Used the "F" Phrase

The threshold issue here is whether the Grievant actually uttered the "F" Phrase. The Agency contends that it adduced evidence sufficient to establish that he did. According to Officer Jeter-Howard, the Grievant merely said he might have to "take care of it" if Youth Smith touched him again,[20] or that the Grievant said

[20] Officer Jeter-Howard's testimonial recall of the Grievant's statement to Mr. Bratton in her presence.

he might have to "do something" to Youth Smith.[21] Conversely, the Grievant testified that he merely said that he intended for Youth Smith to be held accountable for his conduct and that the youth suffer the severest penalties available under the Agency's rules.

Preponderant evidence in the arbitral record establishes that at the very least the Grievant used the "F" phrase in the presence of Mr. Hill and Mr. Keels. Evidence also strongly suggests that more likely than not the Grievant uttered the "F" phrase in Mr. Bratton's presence in the Officer's Club. Finally, it is unclear whether the two youths who accompanied the Grievant to Mr. Hill's office actually overheard the Grievant utter the "F" phrase. This conclusion turns largely on the credibility of Mr. Hill and Mr. Keels' testimonies, especially the testimony of Mr. Keels, who had absolutely nothing to gain by testifying against the Grievant, who apparently was a close worker to Mr. Keels. Nevertheless, the eyewitness accounts of Mr. Hill and Mr. Keels were credible, forthright, and suffered from neither internal nor external inconsistencies.[22] In contrast, as the Agency noted in its closing statement, the Union produced no witnesses who were actually present when the Grievant was in Mr. Hill's office or when he spoke to Mr. Bratton in the Officer's area. Furthermore, that the Grievant used the "F" phrase in Mr. Hill's office increases the *likelihood* that he also used that phrase in Mr. Bratton's presence.

C. Whether the "F" Phrase Violated Rule 3.10

Here the issue is whether the "F" Phrase violated General Rule 3.10, under the circumstances of the instant case, i.e., when not uttered in the presence of the intended subject, Youth Smith. Rule 3.10 expressly prohibits "Verbal or written abuse of others," including the use of "insulting, malicious, threatening, or intimidating language."[23]

The Agency maintains that utterance of the "F" phrase violates Rule 3.10, irrespective of whether the

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[21] DT 18, Officer Jeter-Howard's written statement of what the Grievant said to Mr. Bratton in her presence. This statement essentially tracks Officer Jeter-Howard's response in her question/answer session.

[22] In contrast, Mr. Bratton's testimony that the Grievant used the "F" Phrase in the Officer's Club did not jibe with his written statement (or his statement to the Investigator) that the Grievant used the "F" Phrase in Cedar Cottage. Because of these inconsistencies, Mr. Bratton is not as credible as Mr. Hill or Mr. Keels.

[23] DYS Policy 103.17, General Work Rules, at 6.

Grievant uttered that phrase either directly to Youth Smith or directly to Mr. Hill or Mr. Bratton in Youth Smith's absence. The Union, in contrast, seems to suggest that violation of Rule 3.10 turns on two preconditions: (1) The Grievant actually uttered the "F" phrase directly to Youth Smith; and (2) Youth Smith was actually insulted, threatened, or intimidated by that utterance. In other words, according to the Union, the Grievant could not have run afoul of Rule 3.10 by uttering the "F" phrase to Mr. Bratton or to Mr. Hill in Youth Smith's absence.

Again, the Agency's arguments prevail. The basis for this holding is that Rule 3.10 does not explicitly require that one actually utters the language in a given case directly to the subject of the language, or even in that person's presence. Instead, Rule 3.10 broadly prohibits "threatening, or intimidating language." The "F" phrase is *inherently* threatening (if not outright intimidating), irrespective of whether the Grievant uttered it directly to Youth Smith or whether Youth Smith was thereby threatened or intimidated. The phrase *is* threatening in and of itself and is *likely* to have that effect on any person of ordinary sensibilities. Thus, the test, under Rule 3.10 is not whether the words were either uttered directly to its intended target or that it actually intimidated that person. Instead, the test is whether the phrase was uttered to anyone, especially managers or coworkers. The broad language of Rule 3.10, therefore, clearly sweeps within its boundaries the "F" phrase given the circumstance under which the Grievant uttered that phrase in the instant dispute.

D. Dishonesty Under Rule 3.1

The Agency charged that the Grievant was dishonest in contravention of Rule 3.1 because, he continually denied having uttered the "F" phrase. Closing arguments of neither Party squarely addressed this issue. Nevertheless, the Agency leveled this charge against the Grievant, and, thereby obliged the Arbitrator to assess the validity of that charge.

In this particular case, evidence that the Grievant used the "F" phrase is so clear and unequivocal as to leave little or no basis for believing his denial. This is not an instance where the truth is buried somewhere beneath a sea of conflicting reasonable inferences. Mr. Keels's testimony, without more, was sufficient to

persuade the Arbitrator that the Grievant used the "F" Phrase. Moreover, as mentioned before, there were no Union eyewitnesses to contradict the Agency's witnesses. Even the witnesses who testified for the Union did (and apparently could do) little to assist the Grievant. For example, Officer Jeter-Howard's testimony that the Grievant said: "If this youth puts his hands on me again, I might have *to do something to him*." is perhaps only slightly less threatening than the "F" phrase. The pivotal difference between the two statements is the "F" phrase's profane taint. Arguably neither of the youths who accompanied the Grievant to Mr. Hill's office heard him use the "F" phrase.[24] This, however, does not mean that the Grievant did not use the phrase, only that the youths may not have heard him use it. Similarly, Officer Jeter-Howard's testimony that the Grievant never used the "F" phrase in her presence hardly rebuts or even weakens the eyewitness, unrebutted testimonies of Mr. Hill and Mr. Keels. Given the clarity and character of their testimonies together with supporting evidence from Mr. Bratton, the Arbitrator holds that the Grievant clearly and undoubtedly uttered the phrase and therefore was "dishonest" under Rule 3.1 when he continually denied uttering the "F" phrase.[25]

E. The "Coward" Phrase

The threshold issue here is whether the Grievant uttered the "Coward" phrase to Mr. Hill in the visiting area near the vending machines. Mr. Hill claims he did; the Grievant says he did not. Again, credibility alone dictates the outcome. Mr. Hill testified that after the Grievant uttered the "Coward" phrase and turned to walk away, Mr. Hill told the Grievant, "I am not going to lose my job for you. . . ."[26] Mr. Kline offered a corroborative written statement, asserting that he overheard Mr. Hill say that.[27] The difficulty with Mr. Kline's statement, however, is that it does not seem to jibe with Mr. Hill's. Specifically, Mr. Kline said he

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[24] One investigator reported that the two youths who accompanied the Grievant to Mr. Hill's office heard no profanity but did hear the Grievant refer to Youth Smith. DT 9-10.

[25] Because neither Party actually offered argument regarding Rule 3.1, the Arbitrator expresses no opinion on the question of whether that Rule effectively (properly or improperly) denies *grievants* (as opposed to mere witnesses) the right to fashion defenses to the Agency's accusations. Nor does the Arbitrator express on whether Rule 3.1 (properly or improperly) relieves Management of its burden of proof in civil matters.

[26] Mr. Hill's testimony and written statement, at DT 20.

[27] DT 21.

overheard Mr. Hill making his statement as the Grievant and Mr. Hill walked through the *roll call room.*[28] However, Mr. Hill testified that he made the statement *near the vending machines in the visiting area.* The arbitral record does not state whether the roll call room is proximate to or the same as the visiting area. Because they have different names, the Arbitrator cannot reasonably assume that they are the same. Therefore, Mr. Kline's written statement (and to some extent Mr. Hill's claim about the "Coward" phrase) lacks some credibility. On the other hand, the Grievant's general credibility in this dispute leaves much to be desired. First, in the face of formidable proof, he continually denied having made the "F" phrase. Second, on November 24, 2004, he signed a written document, containing the following statements: "I informed . . . [Mr. Hill] that the youth involved [Youth Smith] put his hands on my shoulder and *called me a four-eyed bitch*. . . . I informed Mr. Hill that . . . if it happened again, I would feel *compelled to protect my space and physical being*." Nowhere does the Grievant's testimony reference the allegation that Youth Smith called him a *four-eyed bitch*. Yet, such a revelation certainly would not have hurt the Grievant's case, and very well could have helped it. Such a derogatory reference to the Grievant is far and away more egregious and disrespectful than simply touching the Grievant on the shoulder.[29]

Also, in contrast to the statement in the foregoing quote, the Grievant, during his testimony, sought to sterilize any of his language that one might reasonably interpret as threatening or intimidating. In this respect, the Grievant testified that any actions he contemplated taking against Youth Smith were procedural, such as pressing charges or seeing to it that Youth Smith was disciplined to the fullest extent under the Agency's rules. But this characterization of his intent does not explain the clear threat of physical force inherent in the statement "I would feel compelled to *protect my space and physical being*." Finally, Officer Jeter-Howard's statement that the Grievant said, "I might have to do something to him" supports the same conclusion. These inconsistencies and unexplained allegations tend to undermine the Grievant's credibility

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[28] *Id.*

[29] Observed, however, such a statement by Youth Smith still would not somehow warrant or justify use of the "F" phrase, especially by JCOs who serve as role models for their youthful charges.

relative to Mr. Hill's. As a result, the Arbitrator finds Mr. Hill to be more credible than the Grievant and therefore, holds that more likely than not, the Grievant uttered the "Coward" phrase statement to Mr. Hill.

F. Whether the "Coward" Phrase Violated Rule 3.10

Having found that the Grievant uttered the "Coward" phrase, the issue now is whether that phrase violated any Rules *actually relied on* to remove the Grievant in the instant case. Again, neither party specifically addressed this point in their closing arguments. Still, Rule 3.10 is the only cited Rule with any applicability to the "Coward" phrase. Again, Rule 3.10 generally prohibits "Verbal or written abuse of others" and specifically forbids the use of, "insulting, malicious, threatening, or intimidating language." The "Coward" phrase either is or is likely to be insulting to any reasonable person, especially a supervisor, even though Mr. Hill never claimed that the "Coward" phrase actually insulted him. The statement explicitly characterizes Mr. Hill's official conduct as cowardly. Few individuals, let alone supervisors, would view such a statement as anything but "insulting." Therefore, whether or not Mr. Hill was personally insulted, the "Coward" phrase is inherently insulting and, therefore, violates the broad language of Rule 3.01.[30]

G. Whether the Grievant's Fight Intervention Violated Rule 4.14

Before addressing the one remaining issue here, one should simply note the relevant issues that are undisputed. First, there is no dispute as to whether the Grievant crashed or lunged into Youth Bell on December 3, 2004, knocking her to the ground. Indeed, the Grievant admits as much. Nor is there disagreement about whether lunging or crashing into Youth Bell constituted "excessive force." Officer Jeter-Howard and the Grievant testified that the "fight breakup" technique was the proper response to separate Youth Bell and Youth Johnson and that this technique neither contemplates nor calls for knocking youths to the ground.

Therefore, the sole issue remaining Under Rule 4.4 is whether the Grievant *intentionally* lunged into or

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[30] Observe, however, that a more apt charge in this case would have been violation of Rule 2.1 "Insubordination." This rule defines insubordination as, "Conducting oneself in a manner that is disrespectful to a superior." In any event, the Agency did not allege violation of this Rule, the Arbitrator did not consider it, and Rule 2.1 played no part in this opinion and award.

tackled Youth Bell. The Agency argues that he did; the Union insists he did not. The Agency relies on testimony from Mr. Bratton and Ms. Rebecca Williams, Social Work Supervisor. The Union, in turn, relies on testimonies from the Grievant, Officer Jeter-Howard, and Mr. Curtis Johnson, Social Worker.

Both Mr. Bratton and Ms. Williams claim they saw the Grievant execute some kind of lunge or tackle against Youth Bell, intentionally knocking her to the ground. Youth Johnson also agreed with Mr. Bratton and Ms. Williams. Although the Grievant admits knocking Youth Bell to the ground, he stoutly denies intentionally doing so. Instead, he claims that as he ran to assist Officer Null in separating the fighting females, he somehow lost his footing and his momentum carried him into Youth Bell, causing her to fall to the ground and him to fall on top of her. The Arbitrator finds the Agency failed to carry its burden of proof on this issue by establishing through preponderant evidence that more likely than not the Grievant *deliberately* tackled or lunged into Youth Bell.

Several reasons support this holding. First, merely because the Grievant lunged into Youth Bell does not establish that he did so intentionally. Second, given the distance separating Mr. Bratton and Ms. Williams from the fight (The Arbitrator visited the site of the incident), they could not have definitively assessed whether the Grievant lunged into Youth Bell either because he lost his footing or because he intended to do so. This is especially true since the entire incident lasted only seconds. Third, Youth Johnson's written statement that the Grievant tackled Youth Bell flies in the face of the fact that Officer Null used the "fight breakup" technique on Youth Johnson to turn her away from Youth Bell just as the Grievant came onto the scene. Although, as discussed below, Officer Null did not offer credible testimony about *how* the Grievant intervened in the fight, there is no dispute that she used the "fight breakup" technique on Youth Johnson. Nor is there any dispute that using that technique against Youth Johnson would have placed her back toward the Grievant and Youth Bell. Therefore, more likely than not, Youth Johnson was in no position

to observe how Youth Bell and the Grievant ended up on the ground.[31]

Ultimately, Social Worker Curtis Johnson's statements hopelessly cloud the issue of whether the Grievant intentionally tackled Youth Bell. This uncertainty about the Grievant's intent hurts the Agency's case by preventing it from satisfying its burden of proof as to the Grievant's sate of mind. Specifically, Social Worker Johnson's written statements, tend to corroborate the Grievant's version of the incident, thereby shoring up the Grievant's credibility on this issue. Referring to the Grievant, Mr. Johnson wrote: "May have been from speed and impact from response (*not intentional but forceful*) Not *able to stop self before making contact.*[32] Mr. Johnson also submitted a statement saying, he saw "youth being *restrained* forcefully by JCO's and recall youth falling to the ground."[33] Mr. Johnson's vantage point was neither significantly better nor significantly worse than that of Mr. Bratton or Ms. Williams. Yet, his observations contradict theirs and support the Grievant's position. This is not to say that Mr. Bratton and/or Ms. Williams deliberately misrepresented the truth. It is to say that, in light of all relevant testimony, it remains unclear whether the Grievant deliberately or intentionally lunged into Youth Bell. Since the Agency has the burden of proof on this point, the Arbitrator resolves doubts against the Agency and holds that preponderant evidence in the arbitral record as a whole *does not establish* that the Grievant deliberately tackled or lunged into Youth Bell. Instead, a reasonable inference from the relevant credible evidence is that he very well could have accidentally stumbled into her in his haste to assist Officer Null and to prevent Youth Bell and Youth Johnson from further injuring each other.

VI. The Penalty Decision

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[31] Nor is Youth Bell's written statement very useful. Her statement suggests that the Grievant had an opportunity to or perhaps even tried unsuccessfully to use the "fight breakup" technique on her. Specifically, Youth Bell said, "I was kind of fighting back with him so he took me to the ground but not hard. . . ." DT 37. This contradicts testimony by the Grievant, Ms. Williams, and Mr. Bratton that the Grievant ran to the scene and lunged into Youth Bell. A similar conclusion applies to Officer Null's testimony. She flatly stated that the Grievant used the "fight breakup" technique against Youth Bell, even though the Grievant, himself, testified that he attempted that technique but stumbled into Youth Bell. As a result, Youth Bell's and Officer Null's positions on this issue are incredible.

[32] DT 49.

[33] DT 69.

Because the Agency established two of the three charges leveled against the Grievant, some measure of discipline is indicated. Assessment of the proper quantum of discipline requires an evaluation of the mitigative and aggravative factors as well as an ultimate determination of whether the penalty of removal is unreasonable, arbitrary, or capricious under the circumstances of this case.

A. Aggravative Factors

The aggravative factors in this case are the Grievant's decision to employ threatening language instead of allowing his YBIR to go through the process. His decision is even more unfortunate or troublesome because he is a JCO with a responsibility to serve as a model for the youth and not to adopt conduct that they might be expected to embrace. Of course, a second aggravative factor is the Grievant's decision to insult a supervisor, Mr. Hill, who apparently was only doing his job. Finally, the Grievant elected to continually and categorically deny that he used the "F" phrase in the face of almost insurmountable proof to the contrary. This, too, is conduct most unbecoming of JCOs, who are held to higher standards because they are (or should be) role models for the youth.

B. Mitigative Factors

The mitigative factors in this dispute include the Grievant's almost thirteen years of apparently satisfactory service to the Agency, the absence of *any* active discipline on his record, and his apparent favorable position or stance with the youth, many of his colleagues, and some supervisors.

C. Propriety of Removal

This balance of mitigative and aggravative factors prompt the following holding: Termination of the Grievant in this case was unreasonable, arbitrary, and capricious and *not for just cause.* Although the Grievant suffered a lapse in good judgement, none of the misconduct established in this case shows that he is immune to rehabilitation, especially if subjected to a dose of strong discipline.

VII. The Award

For all the foregoing reasons, the Grievance is hereby **Sustained in Part and Denied in Part**. The

Grievant's removal shall be reduced to *reinstatement without backpay*. To clarify, from the date of the Grievant's effective removal to the date of his reinstatement pursuant to this award, he is not entitled to any *regular or overtime wages* to which he otherwise would have been entitled but for his removal. Nothing in this Award is intended to have (or shall be interpreted as having) any effect *whatsoever* on any other benefits to which the Grievant otherwise would have been entitled, but for his removal in this case. Finally, the Grievant's seniority shall not be diminished by either his removal or this opinion and award.

Robert Brookins, Professor of Law, Labor Arbitrator, J.D. Ph.D.