IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/DYS

Before: Robert G. Stein

Grievant(s): Linnelle Hamilton

Case # 35-04-2005-06-032-01-03

Termination

Advocate(s) for the UNION:

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INTRODUCTION

This matter came on for hearing before the arbitrator subsequent to the filing of grievance number 35-04-050506-032-01-03 by the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO (herein "Union") on behalf of Linnelle Hamilton (herein "Grievant" or "Hamilton"). The grievance was filed on May 11, 2005, subsequent to the termination of the Grievant's employment from the State of Ohio, Department of Youth Services (herein "Employer" or "DYS"). Robert G. Stein was selected by the parties to arbitrate this matter.

A hearing was held on both January 25, 2006 and March 3, 2006 at the Indian River Juvenile Correctional Facility, located at 2774 Indian River Road in Massillon, Ohio. The parties mutually agreed to those hearing dates and location, and they were given a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a full written transcript, was subsequently closed upon the parties' submission of written closing statements.

The parties have both agreed to the arbitration of this matter. No issues of either procedural or jurisdictional authority have been raised, and

the matter is properly before the arbitrator for a determination on the merits. The parties also agreed to provide the arbitrator with additional time due to the fact that he had two cases before him regarding the same incident.

ISSUE

Did the Department of Youth Services remove Linnelle Hamilton from his position of employment for "just cause?" If not, what shall the remedy be?

BACKGROUND

The Grievant began his employment with DYS on February 16, 1997. He was working as a Juvenile Corrections Officer (herein "JCO") on January 12, 2005 when an incident occurred at around 8:00 p.m. At that time, the Grievant was assigned to supervise the C Unit at Indian River, and he was the only JCO in the facility's gymnasium while monitoring the 20 to 25 male youths during their recreational period. When instructed by the Grievant to get into formation for movement back to the C Unit at the end of the recreation period, youth Taylor Arvanites (herein "Arvanites") refused to comply. Because the wall clocks in the gymnasium did not display the correct time, Arvanites insisted that he still had additional recreational time and began to kick and/or throw plastic cones and made oral threats and insults as part of his generally non-compliant conduct. At some point in response to increased agitation among the youths, Hamilton stated he used his radio to call for assistance, and fellow

JCO Louis Barrett and others responded to provide help in quieting the disruption and escorting the youths to their assigned unit.

Before Hamilton and Arvanites both briefly stepped out of the wall-mounted camera's range, Hamilton's arm was at Arvanites' shoulder. Both individuals then lost their balance, and the scuffle continued on the floor of the gymnasium until Barrett arrived to offer assistance. Hamilton had continued to restrain Arvanites' use of active resistance until Arvanites was ultimately placed in handcuffs and removed from the gym area. A medical follow-up indicated that no injuries were incurred by Arvanites or any other youths.

Following an investigation of this gym incident, which was conducted by the Indian River facility's operations manager Terry Smith, Hamilton was provided a pre-disciplinary hearing on March 25, 2005. The Grievant's employment was actually terminated on May 6, 2005 for violating the following policies, based on the April 15, 2005 decision of disciplinary hearing officer, Mrs. Johnetta Williams. The hearing officer determined that the Grievant had violated the following DYS rules:

Rule 4.14 Excessive use of force

> Use of excessive force toward any individual under the Supervision of the department or a member of the general public

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 5.1 Failure to follow policies and procedures

A grievance was filed on May 11, 2005 by the Union on behalf of Hamilton, challenging the latter's discharge. Because the matter remained unresolved after passing through the preliminary stages of the grievance procedure, the Union requested that the matter advance to the arbitration level pursuant to Section 25.02 of the collective bargaining agreement between the parties.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer basically refutes the Union's claims and insists that the Grievant's January 2005 conduct merited his termination based primarily on his alleged unwarranted use of excessive physical force in dealing with Arvanites. The Employer contends that the Grievant failed to properly utilize the more appropriate control or response methods for which he had received past in-service training and also failed to make a timely request for assistance after determining that a threat of potential harm or general unrest existed within the gym. The Employer also insists that the Grievant violated the existing resistance-to-resistance (R2R) policy (Joint Exh. 3) by grabbing Arvanites by the shoulder as the youth walked away

from the Grievant and toward the wall and thereby purportedly initiated the resulting physical confrontation. The Employer further claims that the disturbance or confrontation was heightened by the inappropriate actions of the Grievant, who engaged Arvanites without waiting for assistance, and that no request for assistance was made until G.A.T. John Fernandez pressed his "man down" alarm.

The Employer also argues that the Grievant's termination was warranted because of his prior four-day "fine," based on the Grievant's record of repeated tardiness in reporting to work in 2004 and also Hamilton's alleged untruthfulness regarding the need to use force in responding to Arvanites' conduct based on the Grievant's initial claim that he had been threatened by Arvanites..

The Employer's arguments, as presented in its written closing, include the following:

> The case presented to you is consistent with the Department of Youth Services stance regarding improper, unwarranted use of excessive physical force. In this particular case the grievant did not comply or utilize the training bestowed upon him. The grievant chose to act in a manner which escalated the incident and turned it into physical confrontation between himself and Youth Arvanites. The grievant was an employee with eight (8) years of service and active discipline in his file at the time of the incident. While the union would have you believe that the grievant was a stellar employee the facts of this matter state otherwise. The grievant watched the youth in question as he began his defiant run around the gymnasium. The grievant did not request assistance or signal for assistance at that time. However, while testifying under direct the grievant said at that time he did consider the youth a threat to harm others including the grievant, himself. Yet a signal was not called. The grievant is seen in the video approaching the youth. He is clearly holding a clip board in his hand. While the youth is walking away from the grievant and towards the wall, the grievant reaches out and grabs the youth by the shoulder. This act is in violation of our R2R policy (joint exhibit E).
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> Arbitrator Stein, it is unquestionable that the grievant had been trained on this policy. Numerous documents in joint exhibit D provide proof that the grievant had completed several training sessions regarding response to resistance training (r2r). The grievant initiated the physical confrontation by attempting to grab the youth as he walked away from him (the grievant) and towards the wall. The wall where the grievant had in fact, directed the group to move towards. The grievant testified that as the youth walked away from him he attempted to restrain him using an "arm bar" technique. This is significant because the technique requires the use of both hands. When asked under cross, how were you able to attempt an arm bar technique with the log in your hand" the grievant replied that he was unsure. It was clear then as it is now. The grievant did not attempt an arm-bar restraint. In fact, the grievant could not attempt an arm-bar restraint under those circumstances. Under cross examination the grievant was asked repeatedly

and specifically whether or not the youth was a threat to him at the time of his physically touching the youth as the youth walked away from him. The grievant replied over and again that at the time that the youth was walking away from him, "he was not a threat". The union attempted to categorize this incident as a riot. It was a disturbance that was heightened by the inappropriate actions of the grievant. The grievant had the option of requesting assistance. The union claims that the grievant did in fact request such assistance. During the testimony it was proven that the grievant engaged the youth without waiting for assistance. Investigator Terry Smith discovered that G.A.T Fernandez was the employee who pressed his mandown alarm and requested assistance in the gymnasium. In fact in his Q & A (joint exhibit C page 26) Mr. Fernandez resolutely states that "Mr. Hamilton never pressed his". The grievant provided a recall filled with inconsistent embellished testimony. In case #27-32-020717-0512-01-03 OCSEA and State of Ohio/DRC, Arbitrator Stein you found that "the use of force against inmates is a cardinal principle for which correctional officers receive extensive training. When a Correctional Officer chooses to be dishonest and deceptive about this important matter, he places his employment at great peril". Linnelle Hamilton lied about his attempt to use an arm bar technique. In his statement taken after the incident and again as he watched the video before him, Mr. Hamilton was certainly untruthful about his need to use force on the youth because he was threatened (joint exhibit C page 18). We maintain that the Department of Youth Services has an obligation to provide the youth in its charge with a safe environment.

An employee who willfully and without reason violates the rules and engages in excessive and unwarranted physical interactions with the youth is not a tolerable liability. We again maintain that this grievant acted in a manner that is adverse to our mission and the position of employment that was entrusted to him. The violation of excessive force is considered a serious infraction by the department. With the grievant having "active" prior discipline of a four (4) day fine our disciplinary guidelines are clear. We do not utilize a two track disciplinary system in the Department of Youth Services. The unwarranted excessive actions of the grievant and his continued reluctance to be truthful warranted his removal.

For these reasons we respectfully request that you deny this grievance in its entirety and uphold the discipline issued by the agency.

Based upon the above arguments, the Employer requests that the instant grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union's basic contention is that DYS has violated Article 24, Section 24.01 of the parties' collective bargaining agreement by failing to prove that there was, in fact, just cause to merit the Grievant's termination. The Union insists that the investigation conducted exclusively by Terry Smith, rather than by an actual committee, was neither thorough nor fair because it did not include interviews with all witnesses to the January 2005 gymnasium incident. The Union specifically emphasizes that

the Grievant did not employ excessive force in attempting to limit Arvanites' escalating behavior and that there was a potential for other youths' active involvement in other defiant conduct in the absence of other DYS officers available to assist. The Union claims that the Grievant's response to Arvanites' conduct did not demonstrate the use of excessive force or any violation of any DYS policy or work rule.

The Union also asserts that, even after the Grievant's conduct was determined by DYS to have violated official policies, he was permitted to continue working with the same youths, including Arvanites, and in the same unit for 115 additional days after the gymnasium incident without ever having been placed on administrative leave. The Union also challenges the disparity in the discipline imposed when comparing all three DYS employees involved in the January 12 gym incident because Hamilton and Louis Barrett were both terminated and GAT John Fernandez was not subject to either any short-term or permanent disciplinary action.

The Union insists that Hamilton complied with the "Response to Resistance Policy" number 301.02 based on the potentially escalating nature of the incident and the absence of other supporting officers.

The Union's arguments, as taken directly from its written closing, are as follows:

The Union showed today that management has failed to meet it's burden of proof called for under Art:24-Sect 24.01 to establish just cause in the case that is before you today. At this time I would like to draw your attention to management's only witness testimony on cross examination.

First witness on cross is Terry Smith, Investigator. Mr. Smith, on cross examination, testified about the investigation. He stated that he felt that L. Barrett and L. Hamilton, (JLOs) actions on tape was excessive force and J. Fernandez (GAT) action was improper hold technique. Mr. Smith was asked if J. Fernandez was disciplined for the pulling of youth Hunt and he stated he was not. When asked if J. Fernandez should have been disciplined he said yes. Also on cross Mr. Smith was asked why Hamilton was charged with 3.1 Dishonesty (See JC page 14 of the investigation summary done by Smith) and J. Fernandez was not (See UTI page 3, Finding of Facts, page 1), he could not answer the question. Smith testified that youth Arvanties threw the cone at JCO Hamilton. When asked if other youth on the tape were fighting and being disorderly, Smith agreed they were. Smith was asked about and youth Arvanties falling to the floor (See JC Investigation Summary by Smith page 13, 7th sentence from the bottom). He testified, on cross, that Hamilton took the youth to the floor. Mr. Smith was asked what options JCO Hamilton had with youth Arvanties. He stated that Hamilton should have waited for assistance from the staff. Smith was then asked if he could tell what the other youth were doing outside the view of the camera and he stated he could not. When asked if youth Arvanties could have been a threat toward other youth and JCO Hamilton he said yes. Mr. Smith testified that youth Arvanties was non-compliant at times during the tape. Mr. Arbitrator, this concludes management's case with one witness and one witness only. At this point management rested their case.

Mr. Arbitrator the union argues that management failed to prove just cause today. Because of the following reasons: The investigation was neither thorough nor fair in that not all witnesses to the incident were questioned or interviewed. In addition, out of the three employees, two were removed and one was not charged at all.

The union argues that management was lax in the enforcement of their work rules. JCO Hamilton was never put on administrative leave and continued to work the same unit with the same youth, including youth Arvanties, for a sum total of one hundred and fifteen days.

The union's first witness was GAT John Fernandez who testified to what took place on that day in the gym. Mr. Fernandez testified he could only remember two staff being in the gym, himself and Mr. Hamilton. He also stated that fights and horseplay were going on outside the view of the camera and some of the youth were being non-compliant. He also stated youth Arvanties was running around the gym kicking and throwing cones. Mr. Fernandez then stated that he felt that youth Arvanties was threatening that day and knew from his past experience with this youth that his behavior would escalate. He stated he was not disciplined for excessive force or dishonesty.

Mr. Fernandez gives the picture the broken camera in the gym didn't. His testimony verifies what the grievant has said all along. The situation in the gum was a riot in the making. He was the eyes the camera couldn't reach when it came to youth Arvanties's actions that day (See union 11, pages 25, 26, 28, and 29).

The union's second witness's, JCO Hamilton, testimony is consistent with the record. He testified that day his partner took one of the youth back to Unit C. He then testified that at that point he phoned his OM to see if they were going to replace his partner with another JCO in the gym. He was told they had no one to send. Hamilton stated how youth Arvanties started getting upset because he thought there was more recreation time due to the clocks in the gym being off time. He then told how other youth started fighting and being non-compliant while he was trying to get them to line up. Youth Arvanties's behavior escalated. He started kicking, throwing cones, swearing, and encouraging other youth to resist Hamilton's orders. It was at this point that JCO Hamilton radioed for assistance (man down). Hamilton testified he was verbally instructing youth Arvanties to stop what he was doing and line up. The youth then flinched at him so Hamilton attempted an arm bar technique. The youth resisted and started to elude. JCO Hamilton stated he then pressed his man down. Officer Hamilton ended up on the floor with the youth still fighting until help arrived. The youth was then put in hand cuffs and taken from the gym. JCO Hamilton testified about his experience during a riot situation at another DYS facility.

The union proved by GAT Fernandez's testimony that the situation in the gym was out of control and near riot condition and that youth Arvanties was the ring leader leading the revolt (Also see J-C page 8 paragraph1).

The union also showed that JCO Hamilton followed policy 301.05 (See J-E response to resistance policy).

Management has argued throughout this case that JCO Hamilton should have waited for assistance. But in this situation management bears some of the responsibility for the following reasons; Youth Arvanties was upset because the clocks weren't working not what JCO Hamilton was doing. It was management's responsibility to make sure all the clocks were working. Not only for the safety of the youth but the staff as well. When Hamilton's partner was pulled he called the OM for a replacement and was told there would be none. This left him in the situation of

trying to control twenty five non-compliant youth. Mr. Hamilton then followed procedure and radioed for help. He then pressed his man down (code14) and it took between two to four minutes for help to arrive.

For the above stated reasons the union asks that the grievant be returned to his former position as JCO and to his former shift with full back pay, roll call, no break in seniority, no loss of benefits, and to be made whole.

Based on the above, the Union requests that the Grievant be reinstated to his former position and shift as a juvenile corrections officer with full back pay, no loss of benefits, and reinstated seniority so that he is made whole for all losses sustained.

DISCUSSION

Generally, in an employee termination matter, an arbitrator must determine whether an employer has proved clearly and convincingly that a discharged employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 102 LA 555 (Bergist 1994). If an employer does not meet this burden, then an arbitrator must decide whether the amount of discipline imposed is reasonable. In making this determination, the arbitrator may consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work record, and whether the employer has acted consistently with respect to similar previous offenses. *Presource Distrib. Servs., Inc. and Teamsters Local*

284, FMCS No. 96-01624 (1997) The right of an arbitrator to change or modify penalties found to be improper or too severe is inherent in the arbitrator's power to determine "just cause." That right is also inherent in the arbitrator's authority to finally resolve a dispute. Generally, an arbitrator will not substitute his own judgment for that of an employer unless the challenged penalty imposed is deemed to be excessive, given any mitigating circumstances. *Verizon Wireless and DWQ, Local 2236*, 117 LA 589 (Dichler 2002).

> Discharge from one's employment is management's most extreme penalty against an employee. Given its seriousness and finality, the burden of proof generally is held to be on the employer to prove guilt of a wrongdoing in a disciplinary discharge or to justify or show "good cause" for terminating an employee. This is especially true in cases, like this one, where the parties have agreed that the collective bargaining agreement requires "just cause" for disciplinary action, including discharge.

Int'l Assoc of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000)

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for "just cause," but does not define what does constitute "just cause," it is proper for an arbitrator to look at employer policies, rules, statutes, and regulations to determine whether or not a discharge was actually warranted. *E. Associated Coal Corp. and United Mine Workers of Am., Dist. 17,* 139 Lab. Arb. Awards (CCH) P 10,604 (1998).

> "Just cause" is a contractual principle that regulates an employer's disciplinary authority. It is an amorphous standard, ordinarily open to arbitral interpretation on a case-by-case basis. Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances of the misconduct, any mitigating factors, and whether the aggrieved employee received his/her contractual and legal due process protections.

State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County, and Mun. Employees, AFSCME State Council 61, Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001).

In this particular matter, facts are in dispute regarding the Grievant's actual conduct involving his use of physical force in dealing with youth Arvanites. The main issue centers on the tactics and amount of force actually employed by the Grievant in responding to Arvanites' unacceptable conduct. The evidence submitted at hearing included a videotaped record of the actual incident, as viewed from a permanently mounted observation camera's view of a portion of the gym. Although the filmed evidence clearly shows the Grievant involved in a lengthy attempt to gain control of Arvanites on the floor of the gym, there is an absence of sound to indicate what instructions the Grievant had actually provided to the entire group of juveniles and to Arvanites in particular before the Grievant and Arvanites became engaged in the actual physical skirmish on the gym floor. There was also no specific indication on the taped episode of what was actually said or done when the Grievant and Arvanites were both out of the camera's range or what

caused them initially to be on the floor, rather than in a standing position. No audio was available to demonstrate any of the on-going dialogue among the sizeable group of other youths to indicate the intensity of their alleged disruptiveness and the role that Arvanites purportedly attempted to assume in encouraging other active resistance among his colleagues against Hamilton, as the single JCO authority when the disruption was initiated. The other evidence presented does indicate that Arvanites was the instigator or leader in the incident involving a potential for unrest or a disruption involving a significant number of other juveniles, which needed to be quickly quashed. The video footage submitted into evidence also does not demonstrate the on-going disruptive conduct, including a fight between two youths allegedly occurring out of the range of view of the one operational video camera.

The "just cause" standard requires an employer to conduct a fair, impartial, and thorough investigation before determining an employee's guilt and initiating discipline. It also requires the employer to impartially examine all of the evidence, including the totality of the circumstances surrounding the conduct in question and possible mitigating factors that might reasonably explain an employee's behavior. Further, this "just cause" standard requires that the employer's investigation produce substantive proof of the employee's misconduct. *Yolo County Corr. Officers Ass'n and Yolo County Sheriff-Coroner's Dept., Woodland, Cal.,*

04-1 Lab. Arb. Awards (CCH) P 3697 (Nelson 2003) In this particular instance, the investigation was conducted individually by Terry Smith, rather than by a committee and included written statements from Hamilton, Arvanites, Fernandez, and Corey Jones.

The evidence indicates that the Grievant responded physically to the active resistance being invoked by youth Arvanites in an attempt by the Grievant to preserve institutional security and order. DYS Policy Number 301.05, entitled "Management of Resistant Youth Behavior," is intended "to provide guidelines and establish uniform procedures to manage resistant youth behavior." That policy specifically provides the following guidelines:

> 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. These interventions are never to be used as punishment or for the convenience of staff and are applied only with the approval of the Superintendent or designee. 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:
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> - To prevent imminent and physical harm to self and other persons.
> - To prevent damage to property.
> - To prevent or terminate escapes.
> - To preserve institutional security and order. (Emphasis added)

Subsection III—Definitions, included on page two of Policy 301.05,

indicate that the "reasonable response to resistance" is "the least restrictive level of response that is reasonably expected to be effective under the circumstances" based on the DYS individual employee's "assessment of the situation" and the "youth's physical capabilities/characteristics." Section IV(C) of the same policy specifically provides the following language detailing the use of a physical response to "control" juveniles' conduct:

> The physical power, strength, or techniques employed to restrain or control a youth shall be the minimum necessary under the circumstances when taking into account staff's physical capabilities/characteristics and the youth's physical capabilities/characteristics. **Physical response is a temporary measure used only until control has been gained or to prevent escalation of an incident.** (Emphasis added.)

The evidence, including the videotape footage, does not clearly indicate at what point Arvanites became resistant and combative, but does clearly indicate the youth's strength and ability to physically respond to and individually defeat the Grievant's control efforts until other adults arrived in the gym to render assistance. Under these circumstances, it has not been clearly proven by the Employer that Hamilton's conduct was , in fact, excessive, was not a reasonable response to the resistance rendered by Arvanites, and was not necessary "to prevent escalation" of this specific incident. The arbitrator does note the absence of the requisite evidence to support DYS's finding that the Grievant's response to Arvanites' disruptive behavior was, in fact, unreasonable under the circumstances, especially when considering that for a considerable time

period the Grievant was the sole JCO present to control an escalating situation. (see Fernandez Investigation of 5/11/05) Moreover, the evidence indicates that the atmosphere was volatile during the time the Grievant was attempting to get youth Arvanties under control. As was previously stated, a fight was occurring between two other youths, Boyers and Schywtzer, in another part of the gym. (see Union Exhibit 2, Fernandez investigation and findings)

Section 24.01 of the parties' collective bargaining agreement provides:

> 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 . . .

The "just cause" principle applies to the level of discipline, as well as to the reason for the discipline being challenged. That means that there must be some proportionality between the offense and the punishment imposed. The Employer must weigh all mitigating factors, such as the employee's seniority, the magnitude of the subject offense, and the employee's prior work record. *Lorillard Tobacco Co., Greensboro, N.C. and Bakery, Confectionary and Tobacco Workers Int'l Union, Local 317T,* 00-1 Lab. Arb. Awards (CCH) P 3433 (Nolan 2000).

The intent of progressive discipline is correction, and most offenses call for warnings to be used before termination is imposed. *City of Bell Gardens (Cal.),* 00-2 Lab. Arb. Awards (CCH) P 3489 (Pool 2000). An

important factor in the instant matter is that progressive discipline was not utilized or apparently even considered in response to the first incident in the Grievant's tenure with DYS involving his alleged failure to employ a reasonable response to any youth's resistance or other misconduct. Most arbitrators emphasize that the purpose of progressive discipline is not to punish, but rather to correct. Thus, except for the most egregious situations, arbitrators generally insist on progressive discipline in an attempt to correct errant employee behavior before the imposition of the ultimate penalty of discharge.

In this specific case, the evidence indicates that a fine of four eight-hour working days was levied on the Grievant based on his tardiness in reporting to work on eight occasions during a three-month period in 2004. Although certainly evident of the Grievant's attendance problem at that time, there is no connection or correlation (other than the application of progressive discipline) between the Grievant's tardiness and his alleged failure to use reasonable force in response to Arvanites' resistant conduct. No evidence was presented regarding recent evaluations of the Grievant's on-the-job performance, and no reference was made to any prior cited deficiencies in his actual on-the-job conduct in dealing with the Indian River population for over eight years.

> In evaluating whether the penalty of termination was warranted, a wide range of factors may be considered. These include the grievant's work history; prior discipline; compliance with

procedural or contractual requirements regarding progressive discipline; and any aggravating or mitigating circumstances.

Communication Workers of Am., AFL-CIO and Quest Communications Int'l, Inc., 01-2 Lab. Arb. Awards (CCH) P 3903 (Landau 2000). Arbitrators have recognized that managers must have some latitude in disciplinary matters and should exercise discretion to treat employee misconduct on a case-by-case basis, reflecting the circumstances of each incident and the employment record of the individual employee. But the arbitrator also recognizes the rather blatant disparity in the discipline employed in response to the behaviors of the Grievant and John Fernandez. Despite the fact that the latter employee is shown in the videotape dragging one of the other youths by the shirt away from the struggle between the Grievant and Arvanites, it was ultimately determined that discipline against Fernandez was not warranted because Fernandez's "pulling of the youth by his shirt around the shoulder area constituted reasonable force under the circumstances."

In the instant matter, the Grievant's conduct justified progressive discipline being imposed. The arbitrator recognizes that the Grievant, as a veteran employee with required on-the-job training, failed to take the most appropriate course of action in responding to Arvanites' misbehavior and was unable to timely anticipate the need to seek assistance from other DYS officers. However, the charge of dishonesty levied against the Grievant lacks sufficient evidence to be sustained. This incident

happened over a period of minutes and was out of camera range during a crucial instance of engagement with Arvanties. Moreover, it is noted that GAT Fernandez's statement was "too vague in pertinent areas" and was inconsistent with the level of his intervention depicted on the video, but unlike the Grievant he was not charged with dishonesty (Union Exhibit 2). There is nothing in the Grievant's employment record to suggest that he could not be remediated with an opportunity to receive additional training regarding the use of alternative and appropriate responses to youth residents' misconduct and inappropriate behavior. The Employer's decision to permit the Grievant to continue his employment for an extended period after January 2005 certainly suggests that the Employer did not anticipate any additional problems.

In light of the above and the mitigating factors recognized by the arbitrator, including the Grievant's reasonably satisfactory job performance with DYS, the likelihood of his remediation, and the absence of clear and convincing evidence that his conduct demonstrated an excessive use of force, his summary discharge in response to this one performance offense does not fit the "crime," is excessive, especially when viewed in comparison with the absence of discipline imposed against Fernandez, and does not fundamentally comport with either progressive discipline or "just cause." The discipline penalty imposed should be determined after evaluating the actual harm resulting from an

employee's conduct, rather than on speculation, to be congruent with progressive discipline and "just cause." *Yolo County Corr. Officers Ass'n.* The discipline utilized by the DYS must be consistently and even-handedly applied. It is noted that in the investigation involving GAT Fernandez the hearing officer concluded, "GAT Fernandez felt he was doing the right thing at the time, and had no intent to use excessive force, or injure Youth Hunt." (see p. 4 of Union Exhibit 2). Other than utilization of an inappropriate technique, the weight of the evidence demonstrates that the Grievant, like GAT Fernandez, felt he was doing the right thing at the time and had no intent to use excessive force or injure youth Arvanties.

AWARD

The grievance is granted in part and denied in part. The Grievant is to be returned to his shift and previous assignment, unless otherwise determined by the parties. He is to be returned to work within two (2) pay periods from the date of this Award and is to receive back pay, less seven (7) paid days, (and less deductions for W-2 income earned or unemployment paid), back benefits, and shall have his seniority bridged. Based upon progressive discipline, the Grievant's discharge is to be converted to a seven (7) day suspension without pay for violation of Rule 5.1.

Respectfully submitted to the parties this 1st day of June 2006.

Robert G. Stein, Arbitrator