

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

Department of Youth Services/Indian River Juvenile Correction Facility

-AND-

OCSEA/AFSCME Local 11

Appearing for DYS

Victor Dandridge, Labor Relations Officer 3

Raymond Sims, Youth

Terry Smith, Labor Relations Officer 2

Steve Wolfe, LRS

Appearing for OCSEA

Steve Wiles, Staff Representative

Jon A. Tersigni, Grievant

CASE-SPECIFIC DATA

Grievance Nos.

Grievance No. 35-04-20060620-0031-01-03

Hearings Held

January 22, 2007

Case Decided

June 22, 2007

Subject

Inappropriate or Unwarranted Force/ Inappropriate Communication/Failure to Follow Policies and Procedures

Award

Grievance Sustained in Part and Denied in Part

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

Table of Contents

I. The Facts 3

II. The Issue 4

III. Relevant Contractual and Regulatory Provisions 5

IV. Summaries of Parties’ Arguments 6

 A. Summary of Agency’s Arguments 6

 B. Summary of Union’s Arguments 7

V. Analysis and Discussion 7

 A. Evidentiary Considerations 7

 B. Inappropriate Communication/Inappropriate or Unwarranted Use of Force 8

 1. Inappropriate Communication 8

 2. Inappropriate or Unwarranted Use of Force 9

 3. Failure to follow Policies and Procedures 12

VI. The Penalty Decision 13

 A. Mitigative Circumstances 13

 B. Aggravative Circumstances 13

 C. Balancing the Aggravative and Mitigative factors 13

VII. The Award 14

I. The Facts

1
2 The parties to this disciplinary dispute are the Department of Youth Services, Indian River Juvenile
3 Correctional Facility (“Agency”) and the Ohio Civil Service Employees Association AFSCME Local 11
4 AFL-CIO (“Union”), representing Jon Tersigni (“Grievant”). The Agency hired the Grievant as a Juvenile
5 Corrections Officer (“JCO”) on or about September 24, 1990 and removed him on June 8, 2006,
6 approximately seventeen years later.

7 The instant dispute erupted on March 7, 2006 during the time that the Agency was conducting a class for
8 a group of exceptionally troubled youth. While the youths did their lessons at their desks, a conflict
9 developed between Youth Stafford and some JCOs. The Grievant assisted in restraining Youth Stafford. As
10 Youth Stafford and the JCOs struggled, another officer arrived, secured the Youth, and asked the JCOs to
11 release him. The other JCOs immediately released Youth Stafford, but the Grievant maintained his grip on
12 the Youth and had to be asked several times before he released Youth Stafford. After JCOs escorted Youth
13 Stafford out of the classroom, Youth Sims, who had a history of assaulting other youths, complained about
14 how the JCOs treated Youth Stafford and said they had better not try that with him (Youth Sims). The
15 Grievant asked Youth Sims to be quiet, but the Youth continued to complain. The Grievant began to walk
16 toward Youth Sims’ desk, and the Youth stood up and tied his shoes. The Grievant ordered Youth Sims to
17 sit down. Youth Sims obeyed but shortly thereafter stood up again. The Grievant again told Youth Sims to
18 sit down, and again the Youth obeyed the Grievant only to stand again.

19 At that point, the Grievant told the Youth that he must leave the classroom and escorted him outside
20 where the conflict escalated. As Youth Sims and the Grievant walked down the corridor, they came within
21 the purview of a security camera. At that point, the Grievant pushed Youth Sims into a wall. They walked
22 a few feet further, and the Grievant again shoved the Youth against a wall. Then the Grievant grabbed Youth
23 Sims a third time, apparently tried to throttle him, and they began to struggle. The Youth took the Grievant

Tersigni Opinion and Award

1 to the floor and fell on top of him. As the Youth and the Grievant struggled, other JCOs arrived and subdued
2 Youth Sims. The Grievant claims that he tried unsuccessfully to trigger his “Man Down” signal while
3 struggling with Youth Sims. Because the video camera was positioned behind the Grievant and Youth Sims,
4 it does not actually show whether Youth Sims was talking to the Grievant or making gestures with his hands.

5 Afterwards, the Grievant went to the hospital where medical staff determined that he had re-injured two
6 herniated discs, which caused him to be off from work. He eventually returned to work for light duty in E-
7 Unit where Youth Sims was assigned.

8 The Agency removed the Grievant for violating Policy No. 103.17. Specifically: 3.10, Inappropriate
9 communication/correspondence with, a youth, member of public or staff; 4.12, Inappropriate or unwarranted
10 use of force; and 5.1, Failure to follow policies and procedures. When he was terminated, the Grievant had
11 seventeen years of discipline-free service and, presumably, a satisfactory work record.

12 The Union challenged the Grievant’s removal with Grievance No.35-04-20060620-0031-01-03, claiming,
13 among other things, that the Grievant was removed for other than just cause. The Parties reached impasse
14 in the dispute, the Union demanded arbitration, and the Undersigned was selected to hear and resolve the
15 matter. The Undersigned heard the matter on January 22, 2007. The Parties agreed that the dispute was free
16 of procedural errors and properly before the Undersigned. All parties relevant to the resolution of the dispute
17 attended the arbitral hearing. Throughout the hearing, the Undersigned afforded the Parties a full and fair
18 opportunity to present admissible evidence and arguments supporting their positions. Specifically, the parties
19 made opening statements and submitted admissible documentary and testimonial evidence. The latter were
20 subject to relevant objections and cross-examination. At the close of the hearing, the Parties agreed to submit
21 Post-hearing Briefs instead of oral arguments. The Parties submitted their Post-hearing Briefs, and the
22 Undersigned closed the record.

II. The Issue

24 The parties agreed to the following joint issue: Was the Grievant, Jon Tersigni, removed for just cause? If

1 not, what shall the remedy be?

2 **III. Relevant Contractual and Regulatory Provisions**

3 **ARTICLE 24-DISCIPLINE**

4 24.01 -Standard

5 Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the
6 burden of proof to establish just cause for any disciplinary action.

7 24.02- Progressive Discipline

8 The Employer will follow the principals of progressive discipline. Disciplinary action will be commensurate
9 with the offense.

10 24.06 -Imposition of Discipline

11 Disciplinary measures shall be reasonable and commensurate with the offense and shall not be used solely
12 for punishment.

13 Rule 3.10–Inappropriate Communication/correspondence With a Youth, Member of Public Staff

14 Using insulting, malicious, threatening, or intimidating language.

15 Rule 4.12–Inappropriate or Unwarranted Use of Force

16 Use of inappropriate of unwarranted force toward any individual under the supervision of the Department
17 or a member of the general public.

18 Rule 5.1–Failure to follow Policies and Procedures

19 Included but not limited to the Response to Resistance Policy, post orders, timekeeping policies, verbal
20 strategies, etc.

21 **Policy 301.05**

22 I. Policy Provisions

23 * * * *

24 Staff response must be *reasonable and consistent with the degree of resistance* being demonstrated by
25 youth. When responding to a youth’s level of resistance, staff shall utilize the *least restrictive response*
26 likely to be effective under the circumstances to gain control of the youth. Staff may use force or control
27 situations involving the following:¹

28 * * * *

- 29 • To prevent imminent and *physical harm to self or to other* persons.²

30 **Combative Resistance**– Youth assaults or *attempts to assault* other persons, or uses a maneuver in the
31 manner that may result in physical harm to others (i.e.: punching, kicking, biting, elbowing, or throwing

¹ Emphasis added.

² Emphasis added.

1 objects), or serious physical harm to others (i.e., actions that create a substantial risk of death). . . .

2 **Active Resistance**– . . . This type of resistance also includes noninjurious actions such as . . . *spitting*. . . .

3 **Definitions**

4 **Reasonable Response to Resistance**– That degree of *intervention* or level of *response* which is *consistent*
5 *with the level of resistance displayed by the youth*, when staff are in the process of *protecting self*, others,
6 property, or to preserve institution safety and security. Staff shall use the *least restrictive level of response*
7 that is reasonably expected to be effective under the circumstances. Staff will choose a *reasonable level of*
8 *response to gain control* of the situation *based on departmental policy*, their *physical capabilities/*
9 *characteristics, experience*, assessment of the situation, and the *youth’s capabilities/characteristics*.¹³

10 **Verbal Resistance** - Youth verbally refuses to comply with staff requests or attempts to control a situation.
11 Youth may threaten staff with further resistance or may not respond to staff. Youth dialogue which offers the
12 threat of physical resistance to staff’s command is not normally considered active resistance until the youth
13 physically resists control. If dialogue is in the form of threats of physical injury, staff shall request additional
14 assistance.

15 **Active Resistance** – Youth makes physically evasive movements to defeat staff’s attempt to gain control, i.e.:
16 bracing, tensing, attempting to push or pull away from staff, but never attempt to strike staff. This type of
17 resistance also includes throwing feces, urine, water and spitting and minor destruction of property such as
18 scratching or marking room walls, floors, and fixtures.

19 **Combative Resistance** – Youth assaults or attempts to assault other persons, or uses a maneuver in a manner
20 that may result in physical harm to others (i.e.: punching, kicking, biting, elbowing, or throwing objects), or
21 serious physical harm to others (i.e.: actions that could create a substantial risk of death). This level of
22 resistance also includes a youth’s escape or attempt to escape.

23 **IV. Summary of Parties’ Arguments**

24 **A. Summary of Agency’s Arguments**

- 25 1. The video clearly and conclusively shows the Grievant violating the Agency’s policy and rules by
26 egregiously provoking a fight with Youth Sims.
27 2. The Grievant’s conduct toward Youth Sims plainly violates the Response-to-Resistance Policy, which,
28 clearly required the Grievant to request assistance and/or use verbal strategies.
29 3. The Grievant maliciously pushed Youth Sims twice in short succession and tried to choke the Youth.
30 At that point, Youth Sims was obliged to defend himself.
31 4. Before the Grievant attacked Youth Sims, the Youth was obediently walking with the Grievant down a
32 corridor.
33 5. In addition to physically attacking Youth Sims, the Grievant continually subjected him to verbal taunts.
34 6. At no time during the foregoing events did the Grievant trigger his personal alarm for assistance.
35 7. The Grievant’s conduct violates the Response-to-Resistance Policy, to which the Grievant has been
36 exposed. The Response-to-Resistance Policy requires JCOs to use verbal strategies to control youths who
37 exhibit only verbal resistance.

¹³ Emphasis added.

Tersigni Opinion and Award

1 8. Ms. Parrish and Ms. Austin offered statements that consistently depicted the Grievant cursing Youth Sims
2 and chocking him.

B. Summary of Union's Arguments

- 3
- 4 1. As the Grievant and Youth Sims walked down the corridor, Youth Sims was verbally threatening the
5 Grievant and clenching his fist. Consequently, the Grievant pushed Youth Sims to create personal space
6 between them. JCOs may use their own judgement to preserve and create their personal space if they feel
7 threatened by youths.
- 8 2. While walking down the corridor with Youth Sims, the Grievant was preoccupied with Youth Sims'
9 conduct and not the response-to-resistance rules. However, the Grievant admitted that, in hindsight he
10 should have requested assistance sooner.
- 11 3. Management's strict application of the response-to-resistance rules to the Grievant's conduct on the video
12 amounts to cherry picking those rules.
- 13 4. Youth Sims's history of membership in gangs and assaults on youths undermines his credibility as a
14 witness in these proceedings.
- 15 5. When testifying at the arbitral hearing, Youth Sims contradicted earlier statements he made in an
16 interview with the Union where he never mentioned that the Grievant threatened to "kick his ass."
- 17 6. In his investigative report, LRO Smith admits that the video does not reveal whether the Grievant pushed
18 Youth Sims to create personal space or to instigate conflict.
- 19 7. LRO Smith's investigative report also states that "each time Youth Sims moves into . . . the Grievant's
20 face . . . [the Grievant] responds in the same manner as Youth Sims."
- 21 8. The Grievant used profanity only after Youth Sims took him to the floor, at which time the Grievant said,
22 "He is kicking my fucking ass."
- 23 9. The Agency waited ninety-two days to fire the Grievant, during which time he worked in Unit E, which
24 housed Youth Sims.
- 25 10. By removing an employee with seventeen years tenure and no active discipline, Management flatly
26 ignored the contractual rules of progressive discipline.

V. Analysis and Discussion

A. Evidentiary Considerations

27

28

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

B. Inappropriate Communication/unauthorized Force

The issues in this case are whether the Grievant used unauthorized force or physical response against Youth Sims or used inappropriate communication with the youth. There are essentially four pieces of evidence pertaining to these issues in this case: The Grievant’s account, Youth Sims’ account, the video, and Mses. Parrish and Austin’s testimonies. The Agency argues that, as the Grievant and Youth Sims walked down the corridor, the Grievant inappropriately communicated with Youth Sims, saying, “I’ll kick your motherfucking ass.” In contrast, the Union denies that the Grievant made inappropriate verbal responses to Youth Sims. According to the Union, the Grievant merely yelled, “He’s kicking my fucking ass” as he and Youth Sims struggled on the ground. In addition, the Agency contends that the Grievant gratuitously attacked Youth Sims as he and the Youth walked down the corridor, thereby forcing the Youth to defend himself. In contrast, the Union maintains that to preserve his personal space the Grievant simply and justifiably pushed the Youth who was verbally and physically threatening him.

1. Inappropriate Communication

Preponderant evidence in the record does not establish that the Grievant inappropriately communicated with Youth Sims during their encounter in the corridor. First, Ms. Austin’s written statement is not credible, since neither that statement nor her interview mentions that the Grievant and Youth Sims fell to the floor, during their scuffle. Yet, the video clearly shows the two scuffling around on the floor. If Ms. Austin could not recall that salient event, how reliable is her recall of other events between the Grievant and Youth Sims? Also, in her written statement, Ms. Austin specifically claimed that the Grievant yelled, “You motherfucker,” and Youth Sims said, “You’re not going to do anything.”⁴ The very next day, Ms. Austin could only recall the Grievant having said “Motherfucker something. The kid said something back.”⁵ It is curious how Ms. Austin’s memory could have faded in such a short time. Also, the Agency’s investigator discounted Ms.

⁴ Joint Exhibit at 70.

⁵ *Id.* at 72.

Tersigni Opinion and Award

1 Austin's statements as incredible because of her strained relationship with the Grievant. Finally, Ms. Austin
2 did not testify at the arbitral hearing before the Undersigned, thereby denying the Grievant an opportunity
3 to confront his accuser.

4 Ms. Parrish was the second witness who claims to have heard the Grievant speak inappropriately to Youth
5 Sims. In her written statement, Ms. Parrish claimed the Grievant told Youth Sims, " I will beat your
6 motherfucking ass. Do you hear me? I will beat your motherfucking ass." According to Ms. Parrish, Youth
7 Sims responded, "You won't do shit."⁶ During her subsequent interview, Ms. Parrish was asked whether she
8 heard the Grievant use inappropriate language, and she said she did. However, the interviewer failed to ask
9 her to specify what she allegedly heard; nor did Ms. Parrish volunteer those specifics. Also, like Ms. Austin,
10 Ms. Parrish did not testify at the arbitral hearing and thereby denied the Grievant an opportunity to confront
11 his accusers. In addition, Ms. Parrish statement is hearsay and warrants little probative force, absent some
12 independent corroborative evidence that the Grievant used inappropriate language toward Youth Sims.

13 In his statement, Youth Sims did not claim that the Grievant used inappropriate language toward him.
14 Instead, the Youth said the Grievant said, "I'll put your head threw (sic) this glass."⁷ During cross-
15 examination, Youth Sims admitted that during his interview with the Union's representative he never claimed
16 that the Grievant swore at him. Based on the foregoing discussion, the Arbitrator is unpersuaded that *more*
17 *likely than not* the Grievant either swore at Youth Sims or used any other profanity towards the youth.

2. Inappropriate or Unwarranted Use of Force

19 The issue here is whether the Grievant used unauthorized force against Youth Sims by pushing the Youth
20 three times in the corridor. Given the videotape, there is no doubt that the Grievant thrice pushed Youth Sims
21 in the corridor. Consequently, the only issue is whether the Grievant justifiably pushed the Youth. Relying
22 wholly upon the videotape, the Agency stoutly contends that the Grievant maliciously pushed Youth Sims

⁶ Joint Exhibit, at 76.

⁷ *id.*, at 101.

Tersigni Opinion and Award

1 three times, thereby causing a scuffle when Youth Sims was obliged to defend himself. In contrast, the Union
2 maintains that the videotape does not establish that the Grievant wrongfully pushed Youth Sims. According
3 to the Union, as the Grievant and Youth Sims walked down the corridor, Youth Sims verbally and physically
4 threatened the Grievant by uttering aggressive statements and by making threatening gestures with his hands,
5 none of which the video camera caught, since it was behind them. Conversely, during direct and cross-
6 examination, Youth Sims flatly denied those accusations, and claimed that the Grievant was the sole
7 aggressor.

8 For the reasons set forth below, the Arbitrator holds that the Grievant was not justified in pushing Youth
9 Sims while they were in the hallway. At the outset, one must stress that the Union established fundamental
10 inconsistencies between Youth Sims' testimony and his earlier statements during a Union interview.
11 Therefore, the Youth's credibility is suspect, absent other independent corroborative evidence in the arbitral
12 record. As a result, the Arbitrator is left with the video tape, the Agency's interpretation of that tape, and the
13 Grievant's interpretation thereof. The Agency claims that the video shows that the Grievant maliciously
14 attacked Youth Sims three times—pushing him twice and attempting to throttle him—while the Youth was
15 obediently walking beside the Grievant down the hallway. The Grievant does not specifically deny pushing
16 Youth Sims, but he does deny choking the Youth. Essentially, the Grievant claims that he pushed Youth
17 Sims to create and preserve personal space between him and the youth. In other words, the Grievant claims
18 that the Youth was invading his personal space. More important, the Grievant claims that he needed some
19 personal space between himself and Youth Sims because, as he and Youth Sims walked down the corridor,
20 the Youth was verbally threatening the Grievant and physically threatening him by clinching his fists in a
21 menacing manner. Since the camera was behind the Grievant and Youth Sims, the videotape does not
22 substantiate the Grievant's claim. In stark contrast, Youth Sims claims that as they walked down the corridor,
23 the Grievant was verbally threatening him and that the Grievant eventually attacked him, as previously
24 described, for absolutely no reason. Youth Sims then went on to describe how the Grievant tried to push him

Tersigni Opinion and Award

1 into a room and eventually tried to choke him.

2 The Arbitrator finds that even though Youth Sims' credibility is somewhat compromised, the videotape
3 effectively corroborates the Youth's account of the events and not the Grievant's. The Arbitrator carefully
4 observed the video several times during the arbitral hearing, took copious notes from the testimonies
5 interpreting the videotape, and digitally recorded those testimonies. Several thorough reviews of this record
6 bring the Arbitrator to the same conclusion: The video supports Youth Sims' account rather than the
7 Grievant's.

8 In the final analysis, this conclusion turns on an application of the burden of persuasion. As noted earlier
9 in this opinion, the Agency has the burden of establishing its charges against the Grievant by a preponderance
10 of the evidence.¹⁸ Standing alone, the videotape establishes that charge. And, as pointed out above, Youth
11 Sims' testimonial account of the event tends to jibe with the video. Therefore, the Agency established the
12 charge of the inappropriate or unwarranted use of force.

13 At this point, it remains for the Union to refute the Agency's case. In an effort to do so, the Grievant
14 claims that he justifiably pushed Youth Sims who was verbally and physically threatening the Grievant.
15 However, the Arbitrator has only the Grievant's testimony to support that claim. Not one shred of evidence
16 in the record corroborates the Grievant's account. These actions violated the Response to Resistance Policy
17 set forth elsewhere in this opinion. Moreover, assuming, arguendo, Youth Sims threatened the Grievant, he
18 failed to summon assistance, as the Agency's regulations require and admitted that Youth Sims did not
19 engage in either *active or combative* resistance, which would or could have justified physical intervention
20 by the Grievant. Instead, the Grievant admitted that Youth Sims' only made verbal threats and clenched-fist
21 gestures.

22 The Union injects several contentions here. First, it maintains that JCOs may use their judgement when

¹⁸ In the Arbitrator's view, the charge of unauthorized force is less stigmatizing than "abuse" and, therefore, does not warrant application of the "clear and convincing" standard.

Tersigni Opinion and Award

1 deciding to create personal space between themselves and youths. That proposition makes sense if and only
2 if the judgement is substantively sound judiciously implemented. Neither standard is met in this case. Even
3 assuming, arguendo, that these gestures warranted more space between the Grievant and Youth Sims,
4 aggressively shoving and throttling the Youth was hardly the prescribed manner to attain it. That type of
5 conduct is almost guaranteed to provoke the Youth and either trigger or escalate violence.

6 Next, the Union seeks to corroborate/establish the Grievant's account of the event by insisting that Youth
7 Sims is inherently incredible as a witness. The Union's basis for this contention is that Youth Sims has a
8 history of gang membership as well as assaulting fellow youths and even, allegedly, JCOs. Furthermore, the
9 Union correctly points out that Youth Sims admitted, during cross-examination, that he has lied on other
10 occasions. However, the Youth also stoutly denied that he gave false testimony during the arbitral hearing
11 before the Undersigned. While it is quite possible that Youth Sims could have falsely testified against the
12 Grievant in this dispute, the evidence in the arbitral record as a whole does not support that conclusion. And,
13 as pointed out at the beginning of this section of "Analysis and Discussion," the Union has the burden of
14 persuasion regarding its allegations and affirmative defenses. In this instance, the Arbitrator doubts whether
15 Youth Sims falsely testified at the arbitral hearing, and that doubt is hereby resolved against the Union, which
16 as the burden of persuasion on this issue. In sum, evidence in the arbitral record as a whole establishes that
17 the Grievant was not justified in pushing and trying to choke Youth Sims. Therefore, the Grievant used
18 *inappropriate or unwarranted force* against the Youth.

3. Failure to Follow Policies and Procedures

19
20 The Grievant's use of inappropriate or unwarranted force against Youth Sims clearly violates Rule 4.12
21 and thereby violates Rule 5.1, which requires employees to comply with the Agency's policies and
22 procedures.

VI. The Penalty Decision

23
24 A preponderance of evidence in the record indicates that more likely than not the Grievant used

Tersigni Opinion and Award

1 inappropriate or unwarranted force against Youth Sims on March 7, 2006 as they walked down a corridor.
2 Moreover, proof of this charge also established that the Grievant failed to follow policies and procedures as
3 set forth under Policy 301.05. Consequently, the Agency has established that the Grievant engaged in two
4 of the three episodes of alleged misconduct, thereby warranting some measure of discipline. Assessment of
5 the proper quantum of discipline involves an evaluation of the mitigative and aggravative factors in this
6 dispute and ultimately a determination of whether removal is in bad faith constitutes an abuse of discretion,
7 or is otherwise unreasonable, arbitrary, capricious, or discriminatory under the circumstances of this case.

A. Mitigative Circumstances

8
9 The strongest mitigative factors for the Grievant are his approximate seventeen years of service with the
10 Agency his presumably satisfactory record of job performance, and his discipline-free record. Another
11 mitigative factor is that the Agency failed to prove that the Grievant used inappropriate communication
12 toward Youth Sims.

B. Aggravative Circumstances

13
14 The major aggravative factor is that the Grievant used inappropriate or unwarranted force against Youth
15 Sims on three occasions in the corridor. Nothing in the record remotely justifies the Grievant's aggression
16 against Youth Sims.

C. Balancing the Aggravative and Mitigative Factors

17
18 An assessment of the foregoing aggravating and mitigating factors indicates that the Grievant's removal
19 was *unreasonable*, though it was not so lacking as to be arbitrary, capricious, an abuse of discretion, or in bad
20 faith. The removal was unreasonable in light of the Grievant's seventeen years of service, discipline-free
21 record and, presumably, satisfactory work record.

22 Finally, although the Arbitrator strongly embraces the view that JCOs must be held to a higher standard
23 than other employees who do not serve as role models for their charges, he tempers that view with a
24 practicality: JCOs are *not perfect*, and one cannot reasonably expect perfect implementation of applicable

Tersigni Opinion and Award

1 rules and regulations without fail in the “heat of battle.” In other words, one must afford JCOs some “field
2 discretion.” While enforcing the rule against inappropriate or unwarranted use of force, one must avoid
3 undue inflexibility by infusing the application of that rule with some degree of tolerance.

4 In light of these considerations, the Arbitrator holds that the Grievant’s was not removed for just cause.
5 It is unreasonable to extinguish the career of a seventeen-year, well-behaved, otherwise satisfactory employee
6 for initiating a shoving/wrestling match with a youth, as unacceptable as that misconduct undoubtedly is.
7 Accordingly, a healthy dose of discipline is clearly warranted to impress upon the Grievant and other JCOs
8 of like mind and demeanor that the misconduct in this case is wholly unacceptable and will not be tolerated.
9 Under these circumstances, the Agency is hereby ordered to *reinstate* the Grievant *without* backpay but with
10 his *seniority* intact. Except for his seniority, the Grievant is entitled to no other benefit during the interim of
11 his removal

12 **VII. The Award**

13 For all the following reasons, the grievance is hereby **Denied in Part and Sustained in Part**.

14 Respectfully,



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