

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

Department of Youth Services/Scioto Juvenile Correctional Facility

-AND-

OCSEA/AFSCME Local 11

Appearing for DYS

Bourke, Kathleen, Inspector, Chief Inspector's Office
Dean, John, Labor Relations Specialist, OCB
Johnson, Tiffany, Youth
Tackett, Mark, Labor Relations Officer
Trejo, Joe, Labor Relations Specialist, OCB

Appearing for OCSEA

Collins, Calvin, Chapter President
Davis, Angela, Juvenile Corrections Officer
Fountain, Tyrone, JCO
Goggins, Karen L., Social Worker II
Hassan, Hafsa, Youth
Hill, Michael A., OCSEA Field Staff Representative
Shelby, Scott, JCO
Wilkins, Jr., Karl, JCO, Chief Steward

CASE-SPECIFIC DATA

Grievance Nos.

Grievance No. 3507 20060830880103

Hearing Held

March 16, 2007

Briefs Received

March 30, 2007

Case Decided

July 11, 2007

Subject

Sexual Misconduct Against Youth

Award

Grievance Sustained in Part and Denied in Part

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

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I. The Facts

The parties to this disciplinary dispute are the Department of Youth Services (“DYS”), Scioto Juvenile Correctional Facility (“Scioto” or “Agency”) and Ohio Civil Service Employees Association AFSCME Local 11 AFL-CIO (“Union”), representing Tyrone Fountain (“Grievant”).¹ Scioto is a high-security juvenile correctional facility that houses all female youths assigned to DYS and is the intake center for all DYS male and female juveniles. DYS hired the Grievant as a Juvenile Corrections Officer (“JCO”) on January 10, 2005² and removed him on August 25, 2006 when he was a second-shift Correctional Officer.³ DYS fired the Grievant for violating the following rules under its General Work Rule Policy 103.17: Rule 3.1, dishonesty; Rule 3.8, Failure to cooperate; Rule 3.9, Unauthorized correspondence with youth; Rule 4.10 Unauthorized contact with youth/family; Rule 5.17, Sexual conduct or contact with youth; and Rule 6.1, Abuse of any youth under the supervision of the Department.⁴ The record reveals that the Grievant had no active discipline when he was fired,⁵ and presumably he had a satisfactory performance record during his tenure.

This dispute began on March 16, 2006 when Youth Hafsa Hassan approached Officer Fountain and told him that Youth Tiffany Johnson had said that she (Youth Johnson) was in a relationship with Officer Fountain and was having sexual contact with him. After he clocked out that same day, Officer Fountain went to Hunter Cottage where Youth Johnson was housed and asked her if she had made those allegations, and she denied it. The Grievant and Youth Johnson also discussed her conflicts with Youth Hassan.

On or about March 23, 2006, Youth Sofonda Hire told her social worker, Ms. Karen Goggins, that the

¹ Hereinafter jointly referenced as “Parties.”

² Joint Issues and Stipulations.

³ Joint Exhibit 4, at 5.

⁴ *Id.*

⁵ *Id.*, at 7.

1 Grievant was having a sexual relationship with Youth Tiffany Johnson. When Ms. Goggins asked Youth
2 Johnson about the allegation, the Youth denied it. Later that same day Hunter Cottage’s Unit Administrator,
3 Ms. Barbara Atkins (“UA Atkins”) interviewed Youth Johnson. This time, however, the youth claimed that
4 the Grievant had frequent sexual contact with her from approximately March 6, 2006 to March 17, 2006.
5 Youth Johnson also stated that she did not report this “relationship” earlier because she wanted to avoid
6 trouble.⁶ UA Atkins quickly informed the Agency’ Operations Administrator, Mr. Leon Hill (“OA Hill”)
7 of the Grievant’s alleged sexual misconduct with Youth Johnson. The youth repeated her allegations to OA
8 Hill. In her first written statement on March 23, 2006, Youth Johnson said:

9 On several occasions [the Grievant] . . . touched me in my *private area* in the corner room and the
10 cleaning closet and in the laundry room most of the time its during shift change around 9:30-10:00.
11 He always asks me 2 (sic) follow him into places no one can see us. Also, he tells me that he will
12 miss me on a regular bases on his days off.”⁷

13 On March 24, 2006, Youth Johnson submitted second written statement containing the following account:

14 JCO Fountain first began making wrong touching in the supply room on Hunter Cottage. He
15 Fountain asked me to get another youth some toothpaste and he Fountain walked over and unlocked
16 Room 24. Fountain followed me in there and turned the cabinet around and began putting his hands
17 outside my pants and then he went inside my shorts. Fountain would call me in closed areas and put
18 his hands inside my pants and rub on my private area. Sometimes he would tell me that he was
19 gonna miss me on his days off. Fountain has also touched me in Hunters (sic) Cleaning Closet,
20 Laundry Room, and once by Staff’s Desk. All in the same place.”⁸

21 As noted above, Youth Johnson claimed that the Grievant sexually touched her at the “Staff’s Desk.”
22 However, the four video cameras that are trained on that desk 24/7 did not record any such conduct. Instead,
23 the cameras produced a grainy, dark recording of some relatively indistinct movements of what seems to be
24 Youth Johnson’s hand with the Grievant standing by.

25 During the Ohio State Trooper’s criminal investigation, Youth Johnson told Inspector Ron Nichols that
26 the Grievant “touched her private area on the outside of her pants . . . put his hands inside her pants and

⁶ Joint Exhibit 4, at 5.

⁷ *Id.*, at 18 (emphasis added).

⁸ *Id.*, at 19.

1 continued rubbing. . . . manually stimulated her clitoris and digitally penetrated her vagina.”⁹ Also, Youth
2 Johnson claimed that on March 16, 2006, the Grievant came to her unit, discussed the allegations with her,
3 and said no one would believe her.¹⁰

4 On March 24, 2006, the Agency placed the Grievant on administrative leave on March 24, 2006,¹¹ and
5 Chief Inspector Kathleen Bourke (“Investigator Bourke”) launched an administrative investigation of the
6 Grievant’s alleged misconduct.¹²

7 Also, on March 24, 2006, during an interview with Investigator Bourke, Youth Johnson responded to some
8 of the Investigator’s questions as follows:

9 Question: Did he ever penetrate you?

10 Answer: Yes

11 Question: How?

12 Answer: He would play with my clit and then stick his fingers inside my vagina.

13 Question: Did this occur on the last incident?

14 Answer: Yes.¹³

15 Youth Johnson agreed to take a polygraph examination, which she passed, but the Grievant declined the same
16 invitation.¹⁴ On April 27, 2006, Youth Johnson retracted her allegation that the Grievant had “digitally
17 penetrated her.” When asked if the Grievant had inserted his finger inside her vagina, Youth Johnson said
18 he had not.¹⁵ During the arbitral hearing before the Undersigned, Youth Johnson admitted, during cross-
19 examination, that she was not a virgin during the time that the Grievant allegedly rubbed her clitoris and
20 inserted his finger into her vagina.

⁹ Joint Exhibit 4, at 9-10, 20, 23.

¹⁰ *Id.*, at 21.

¹¹ *Id.*, at 9.

¹² *Id.*

¹³ *Id.*, at 20.

¹⁴ *Id.*, at 11.

¹⁵ *Id.*

1 Investigator Bourke completed her report on June 12, 2006, concluding, among other things, that the
2 Grievant had sexual contact with Youth Johnson by “rubbing her pubic area through her clothing. In
3 addition, the Report concluded that the Grievant was guilty of touching [Youth Johnson in a] flirtatious
4 and/or playful nature . . . [and of] giving false and/or misleading information during the course of an
5 investigation.”^{\16} Finally, the Investigative Report concluded that Ms. Googins had falsely denied that she
6 and the Grievant spoke while he was on administrative leave. In fact, Ms. Goggins and the Grievant spoke
7 on two different occasions, though they deny that they discussed the Grievant’s alleged relationship with
8 Youth Johnson.^{\17}

9 On June 19, 2006, the Agency scheduled a Pre-disciplinary Hearing for July 5, 2006.^{\18} That Hearing
10 occurred on July 10, 2006,^{\19} after which the Pre-disciplinary Hearing officer found that just cause supported
11 “further administrative action, as just cause can be supported.”^{\20} The Agency terminated the Grievant on
12 August 25, 2006,^{\21} and, on August 28, 2006, the Union filed Grievance No. 3507 20060830880103 claiming
13 the removal was for other than just cause.^{\22} The Parties failed to resolve this dispute and, in a letter dated
14 January 2, 2007, the Union notified the Agency of its intent to arbitrate the matter.

15 The Parties agreed to present the dispute to the Undersigned and scheduled an arbitral hearing for March
16 16, 2007. At that hearing, the Parties agreed that the dispute was free of procedural errors and properly
17 before the Undersigned. All parties relevant to the resolution of the dispute were present. Throughout the
18 hearing, the Undersigned afforded the Parties a full and fair opportunity to present admissible evidence and

^{\16} Joint Exhibit 4, at 17.

^{\17} *Id.*, at 15, 25.

^{\18} *Id.*, at 1-2.

^{\19} *Id.*, at 3.

^{\20} *Id.*, at 4.

^{\21} Joint stipulation.

^{\22} Joint Exhibit 2.

1 arguments supporting their positions. Specifically, the parties made opening statements and submitted
2 admissible documentary and testimonial evidence, the latter of which fully available for relevant objections
3 and cross-examination. At the close of the hearing, the Parties agreed to e-mail their Post-hearing Briefs to
4 the Undersigned. The arbitral record was closed upon receipt of those Briefs.

5 **II. The Issue**

6 Was the Grievant, Tyrone Fountain, removed from his position of Juvenile Correction Officer for just
7 cause? If not, what shall the remedy be?"

8 **III. Relevant Contractual Language and Work Rules**

9 **A. Relevant Contractual Provisions**

10 **ARTICLE 24-DISCIPLINE**

11 **24.01 -Standard**

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

14 **24.02- Progressive Discipline**

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

17 **24.06 -Imposition of Discipline**

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

20 **B. Relevant Work Rules**

21 **Rule 3.1 Dishonesty**

22 Being dishonest while on duty or engaged in state business, including but not limited to, deliberately
23 withholding information, giving false or inaccurate information verbally or in writing to a supervisor or
24 appropriate authority. . . .

25 **Rule 3.8 Failure to Cooperate**

26 Interfering in an investigation, including, but not limited to, coaching, threatening, or attempting to
27 intimidate or alter the statements of a witness (employees, youth or the general public) and/or
28 withholding information or knowledge concerning a possible rule infraction or law violation.

29 **Rule 3.9 Unauthorized Correspondences with Youth**

30 Corresponding with or accepting correspondence from youth under ODYS supervision or youth's family,
31 except as part of the employee's job responsibility for official work purposes, unless authorized to do
32 so by the appropriate managing officer.

33 **Rule 4.10 Unauthorized Contact with Youth/Family**

34 Having contact with or visiting a youth or a youth's family, except as defined in Rule 3.9, and except as

1 authorized by the managing officer as part of the employee's job responsibility.

2 Rule 5.17 Sexual Conduct or Contact with Youth

3 Engaging in sexual contact/activity with a youth in DYS custody or supervision or allowing the youth
4 to engage in sexual contact/activity with another staff or youth.

5 Rule 6.1 Abuse of any youth under the supervision of the Department

6 **IV. Summaries of the Parties' Arguments**

7 **A. Summary of Agency's Arguments**

- 8 1. Evidence in the arbitral record establishes that the Grievant had sexual contact with Youth Johnson.
9 2. Pressure and the fear of fomenting trouble caused Youth Johnson to deny her relationship with the
10 Grievant when Ms. Googins interviewed Youth Johnson and Youth Hire together.
11 3. Youth Johnson's crying proves that she was under pressure when she initially denied that the Grievant
12 had sexually assaulted her.
13 4. Except for her initial denial and confusion about vaginal "penetration." Youth Johnson offered a
14 consistent account of the Grievant's alleged misconduct throughout the administrative investigation.
15 Initially, Youth Johnson honestly believed that touching constituted "penetration."
16 5. Investigator Bourke believed Youth Johnson.
17 6. Because the video does not show sexual touching between the Grievant and Youth Johnson does not
18 mean it did not occur as Youth Johnson asserts.
19 7. None of the Union's witnesses offered testimony that assisted the Grievant.
20 8. Relative to Youth Johnson, the Grievant has more to gain from lying.

21 **B. Summary of Union's Arguments**

- 22 1. Upon learning of the allegations against him, the Grievant immediately notified OM Hawkins and UA
23 Adkins.
24 2. The Grievant offered un rebutted testimony that he immediately notified OM Hawkins, and the Agency
25 failed to introduce any documentary or testimonial evidence by OM Hawkins that either rebutted or
26 denied that the Grievant immediately reported the incident to him. Instead, the Agency presented only
27 Investigator Bourke's hearsay testimony and written account.
28 3. UA Adkins also did not testify at the arbitral hearing or submit any written statements. Furthermore, the
29 Agency obviously decided not to produce these witnesses because their testimony would not have proved
30 helpful?
31 4. The Grievant did not refuse to cooperate in the administrative investigation. The Agency had to
32 reschedule only one interview due to an inability to contact the Grievant.
33 5. Since the Agency alleges that it could not contact the Grievant, the Agency must establish that it called
34 the correct numbers. The Union does not have to prove the reverse.
35 6. There is no proof that the Grievant was dishonest. This charge is based on the Grievant's denial of the
36 charges.
37 7. The Agency failed to prove that the Grievant had sexual contact with Youth Johnson.
38 8. Youth Johnson is not a credible witness in these proceedings. She lied about being digitally penetrated.
39 As a non-virgin when the alleged contact occurred, Youth Johnson had to have known the difference
40 between penetration of her vagina and rubbing of her pubic area.
41 9. The polygraph examination that Youth Johnson took and passed proves nothing because those
42 examinations are so unreliable as to be inadmissible in most courts.

- 1 10. There is no proof that the Grievant had sexual contact Youth Johnson because there is no video evidence
2 of such conduct.
- 3 11. Youth Johnson alleged that the Grievant was touching her when they were at the staff podium; yet not
4 one of the four security cameras covering the podium recorded such conduct. Nor did those cameras
5 show the Grievant and Youth Johnson flirtatiously or playfully touching.
- 6 12. There is no proof that the Grievant returned to Youth Johnson's unit to discuss the alleged sexual contact
7 with her. There is no video of that event, and Officer Davis testified that he did not see the Grievant
8 return.

9 **V. Analysis and Discussion**
10 **A. Evidentiary Preliminaries**

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

19 **B. Sexual Conduct or Contact with Youth**

20 The issue here is whether the Grievant violated Rule 5.17 by having sexual contact or engaging in sexual
21 activity with Youth Johnson between March 6, 2006 and March 17, 2006. The Agency devoted virtually all
22 of its adversarial energy to proving this charge and, as set forth below, relatively little, if any, energy to
23 establishing the remaining charges against the Grievant.

24 Rule 5.17 explicitly prohibits staff from: "Engaging in sexual contact/activity with a youth in DYS
25 custody or supervision or allowing the youth to engage in sexual *contact/activity* with another staff or
26 *youth.*"²³ Resolution of the charges under Rule 5.17 turns almost entirely on the credibility of Youth
27 Johnson and the Grievant who were the only eyewitnesses to the alleged misconduct. Therefore, close

²³ Joint Exhibit 4, at 17 (emphasis added).

1 scrutiny of their testimonies is indicated. The Parties' credibility-based arguments will be the point of
2 departure.

3 The Agency offers essentially three arguments in support of its position that Youth Johnson is the more
4 credible witness. First, it contends that except for her initial denial of the alleged sexual encounters during
5 her meeting with Youth Hire and Ms. Googins, Youth Johnson consistently recounted the Grievant's alleged
6 sexual assaults. Second, the Agency contends that Youth Johnson's unfortunate statement about digital
7 penetration essentially resulted from her ignorance of the female anatomy. Youth Johnson was, according
8 to the Agency, genuinely confused about whether the Grievant digitally penetrated her vagina or rubbed her
9 clitoris and vaginal lips. Third, the Agency maintains that Youth Johnson's success on the polygraph
10 examination punctuates or underscores her veracity in this dispute.

11 In contrast, the Union stoutly insists that Youth Johnson is anything but credible in this matter and offers
12 several arguments to serve that position. First, the Union argues that Youth Johnson deliberately falsified
13 the record by claiming that the Grievant digitally penetrated her. In support of this position, the Union points
14 first to Youth Johnson's actual statement, noting that she clearly distinguished the difference between digital
15 penetration and clitoral manipulation. In addition, the Union stresses that Youth Johnson explicitly admitted
16 that she was not a virgin during the two-month period when the Grievant allegedly assaulted her.
17 Accordingly, the Union insists that Youth Johnson must have known the difference between clitoral rubbing
18 and vaginal penetration. Second, the Union points to the absence of any video record of sexual, or even
19 flirtatious, activity around the staff podium in Hunter Cottage as virtually irrefutable proof of Youth
20 Johnson's mendacity in this dispute. Third, the Union wholly discounts Youth Johnson's passing a
21 polygraph examination and the Grievant's refusal to take the test. Here the Union declares that polygraphic
22 results are highly suspect and inadmissible in most courts. Finally, the Union notes that no one observed the
23 Grievant sexually assaulting Youth Johnson.

1 **C. Assessment of Witnesses' Credibility and Parties' Arguments**

2 After examining the Parties' arguments as well as the strengths and weaknesses of Youth Johnson's and
3 the Grievant's statements, the Arbitrator concludes, for the ensuing reasons, that Youth Johnson is less
4 credible than the Grievant. And, because Youth Johnson is not a credible witness and because she is the
5 Agency's primary witness, preponderant evidence in the arbitral record does not demonstrate that the
6 Grievant engaged in either sexual contact or sexual activity with Youth Johnson between March 6 & 17,
7 2006.^{\24}

8 Turning first to Youth Johnson's account of the alleged sexual assault, the Arbitrator finds that it
9 contained some pluses but more minuses. One plus is Youth Johnson's success on the polygraph
10 examination. Although, the Undersigned views polygraphic results as lacking sufficient reliability to
11 constitute *independent* evidence of either the existence or the nonexistence of a disputed fact, those results
12 can corroborate or support independent evidence, assuming polygrapher competence and procedural
13 regularity. A second, and more important, plus is that Youth Johnson offered a relatively detailed account,
14 including not only the manner, time, and location of the alleged assaults, but also the distractions and/or
15 excuses that Grievant allegedly used to be alone with Youth Johnson.^{\25} Regarding the latter, Youth Johnson
16 claimed the Grievant would get her alone by, for example, asking her to get toothpaste or to empty a water
17 bucket, etc.^{\26} With respect to the physical sites of the alleged assaults, Youth Johnson stated that the
18 Grievant assaulted her in the following areas of Hunter Cottage: the laundry room, the supply room, the

^{\24} This finding is not intended to suggest that the Grievant has impeccable credibility; he does not. However, it is the Agency's duty to adduce preponderant evidence that the Grievant sexually assaulted Youth Johnson, but the Agency cannot sustain that charge where, as here, the account of its sole eyewitness, Youth Johnson, suffers multiple internal and external inconsistencies.

^{\25} Joint Exhibit 4, at 20-21.

^{\26} *Id.*, at 19, 23

1 cleaning closet, room No. 24, the mop closet, and the staff podium or desk.²⁷ Standing alone such a detailed
2 account suggests veracity.

3 In this case, however, Youth Johnson’s detailed account does not stand alone. Instead, it harbors the
4 seeds of its own destruction in the form of *internal/external* contradictions and inconsistencies. An
5 assessment of those contradictions and inconsistencies, along with the Agency’s attempts to explain and/or
6 justify them is indicated. First, when initially approached by Ms. Googins about the alleged sexual assaults,
7 Youth Johnson flatly denied them. Later that same day, however, in a subsequent interview with UA Adkins,
8 Youth Johnson explicitly alleged that the Grievant had sexually molested her between March 6 & 17, 2006.
9 Confronted with this blatant, fundamental contradiction, the Agency vainly offers several explanations and/or
10 justifications to rehabilitate Youth Johnson’s credibility. First, the Agency stresses that Youth Johnson
11 sobbed while reversing herself on the alleged assaults. According to the Agency, this sobbing is difficult to
12 feign and, thus, establishes that Youth Johnson was genuinely fearful and emotionally distraught and bolster
13 her credibility. While the sobbing reasonably suggests that Youth Johnson was upset and perhaps scared,
14 her sobbing is hardly a reliable basis for inferring truthfulness. Indeed, it could just as well indicate guilt for
15 any number reasons.

16 In a more detailed explanation, the Agency would diminish the impact of Youth Johnson’s polar
17 positional shift by arguing that she was in a “precarious [or stressful] position [because] she had to explain
18 in the presence of another youth how a well-liked employee had sexually abused her.”²⁸ Perhaps, but this
19 explanation stumbles over two salient facts: (1) Youth Johnson had already apprised Youth Hire of the
20 Grievant’s alleged misconduct, and (2) Youth Hire was the “other youth” present when Ms. Googins
21 questioned Youth Johnson about her allegations. Therefore, why would Youth Johnson be either scared or

²⁷ *Id.*

²⁸ Agency’s Post-hearing Brief, at 3.

1 pressured by having to repeat her story in Youth Hire’s presence?

2 In addition to the foregoing polar shift in Youth Johnson’s account, other internal and external
3 inconsistencies undermine her credibility, regarding the Grievant’s alleged sexual misconduct. For example,
4 during direct examination, Youth Johnson claimed ignorance of the distinction between having her clitoris
5 rubbed and having her vagina penetrated.^{\29} However, the following written statement of March 24, 2006
6 belies her alleged ignorance: “He [the Grievant] would play with my clit *and then* stick his finger *inside* my
7 vagina.”^{\30} The phrase “and then” and the term “inside” manifestly suggest that Youth Johnson clearly
8 distinguished and understood the difference between clitoral rubbing and vaginal probing. Also observe that,
9 on April 27, 2006, Investigator Bourke *specifically* asked Youth Johnson if the Grievant “ever put his finger
10 *inside* her vagina,” Youth Johnson explicitly and specifically answered “*no*.” Thus, on April 27, when
11 Investigator Bourke asked Youth Johnson essentially the same question she asked her on March 24, using
12 essentially the same descriptive terms, e.g., “inside,” Youth Johnson gave a diametrically opposite answer,
13 which constituted a second polar shift in her account.^{\31} Moreover, her answer on March 24 and April 27
14 reflect neither confusion nor ignorance regarding the female genitalia. Finally, during cross-examination,
15 Youth Johnson essentially removed any basis for claiming such ignorance by explicitly admitting that, during
16 the time that the Grievant allegedly assaulted her, she was *not a virgin* and *understood* vaginal penetration.
17 This coital experience supports a reasonable inference that more likely than not Youth Johnson recognized
18 and understood the difference between clitoral fondling and vaginal penetration. Neither the Agency nor
19 Youth Johnson satisfactorily explained her professed confusion or ignorance regarding the foregoing matter.
20 Consequently, inasmuch as Youth Johnson understood the distinction in question, one can reasonably

^{\29} Joint Exhibit 4, at 16.

^{\30} *Id.*, at 20 (emphasis added).

^{\31} Joint Exhibit 4, at 11.

1 conclude that her claim of digital penetration was not accidental and not the product of anatomical ignorance
2 about the female genitalia.

3 Yet another inconsistency undermines Youth Johnson’s credibility. She claimed that the Grievant
4 sexually touched her while they were near the staff podium in Hunter Cottage (“Podium assault”). The
5 difficulty for Youth Johnson is that security cameras constantly surveil all four sides of that podium. Yet,
6 there is no video recording of sexual conduct between the Grievant and Youth Johnson between March 6 &
7 17, 2006. This evidentiary gap assumes significant import here. Among the several alleged episodes of
8 sexual misconduct, the alleged podium assault is the only episode that arguably lends itself to some degree
9 of independent verification, which in turn could substantially diminish (if not remove) the taint of
10 “he-said-she-said” in this dispute.

11 Finally, in her March 24 interview,¹³² Youth Johnson said that she initially *refused* to see the Grievant
12 when he came to her unit on or about March 16, 2006. In contrast, during his May 8 interview with
13 Investigator Bourke, the Grievant said that he visited Youth Johnson’s cell because Youth Otts told him that
14 Youth Johnson and Youth Hansen had a conflict and that Youth Johnson did not say she liked the Grievant
15 but that she *wanted* to see him.¹³³ Although the Grievant’s statement contradicted Youth Johnson’s March
16 24 statement, during cross-examination, she essentially reconciled that contradiction by expressly testifying
17 that she *wanted* to see the Grievant when he visited her cell on March 16.

18 Despite the foregoing chinks in Youth Johnson’s credibility, the Agency generally exhorts the Arbitrator
19 to credit her account of the alleged sexual misconduct over the Grievant’s because as the defendant he has
20 more reason to prevaricate. In other words, the Agency asks the Undersigned either to *presume* or to infer
21 (draw an adverse inference) that the Grievant is more likely to falsify solely because he is the defendant.

¹³² Joint Exhibit 4, at 2.

¹³³ *Id.*, at 148.

1 While some arbitrators embrace this type of deductive reasoning, the Undersigned does not. The problem
2 is that this reasoning essentially relieves the Agency of its *affirmative* duty or burden to establish its
3 witnesses' credibility while enhancing the Grievant's burden of establishing his credibility by converting his
4 status as the accused into an additional hurdle. The Grievant's credibility is more fairly assessed by
5 examining his testimony relative to that of opposing witnesses as well as all relevant facts and circumstances
6 surrounding those testimonies, excluding the Grievant's status as the defendant. That the Agency imposed
7 this status on the Grievant and now seeks to benefit from it definitively underscores the inequity and
8 unfairness of this line of reasoning. Where all other approaches have failed to determine who is credible
9 regarding a given charge or accusation, a more equitable approach is to resolve doubts against the *proponent*
10 of the charge or accusation. In any event, the Agency must *prove* its case against the Grievant, and where
11 that proof turns on credibility, the Agency must *affirmatively* establish the credibility of its witnesses,
12 thereby either implicitly or explicitly discrediting the Grievant. However, the Agency may not circumvent
13 that responsibility by first making the Grievant the defendant (accusing him of misconduct) and then relying
14 on that classification to discredit him through either presumption or inference. That type of reasoning
15 effectively eviscerates the burden of persuasion to the Grievant's detriment.

16 Turning now to the Grievant's credibility, the Arbitrator finds it less than pristine, but his account of the
17 alleged sexual misconduct is less fractured than Youth Johnson's, a pivotal finding because the Agency has
18 the burden of persuasion regarding the Grievant's alleged violation of Rule 5.17 and Youth Johnson is the
19 Agency's only eyewitness. The greatest harm to the Grievant's credibility derives from his evasiveness and
20 dismissive attitude about his interactions with Youth Johnson and other youths.¹³⁴ The Grievant's blatant
21 evasiveness during his May 8 interview with Investigator Bourke hardly bolstered his credibility. For
22 example, instead of flatly denying that he was in a dark room with Youth Johnson or some other youth, the

¹³⁴ See discussion below of the alleged Rule 3.8 violation, "Failure to Cooperate."

1 Grievant could only assert that he could not recall being in that situation. Yet, how could anyone reasonably
2 forget being in such an obviously inappropriate situation? These types of memory lapses permeate and taint
3 the entire interview. Such inexplicable “short circuits” in the Grievant’s recollection of clearly inappropriate
4 events are guaranteed to foster considerable *suspicion*. Nevertheless, suspicion is not proof. In addition
5 to his evasiveness, the Grievant also expressed a rather cavalier attitude about matters such as playfully
6 touching Youth Johnson (and perhaps other youths) and allowing Youth Johnson to follow him around
7 Hunter Cottage like a “little puppy dog.”¹³⁵ The Grievant claims that he interacts with youths in this manner
8 to better perform his duties as a JCO. Nevertheless, the bottom line is that despite the suspicion generated
9 by the Grievant’s responses in the May 8 interview, there is insufficient evidence in the interview to establish
10 that more likely than not he sexually assaulted Youth Johnson and her testimony and written statements are
11 fatally compromised by inconsistencies and polar reversals in her position.¹³⁶

12 Nor does the Grievant’s refusal to submit to a polygraph test establish his guilt. The slight probative
13 value of polygraphic examinations disqualifies them as independent evidence and relegates them to mere
14 corroborative roles. Based on the foregoing discussion, the Arbitrator holds that the Agency failed to
15 establish by preponderant evidence in the arbitral record that the Grievant engaged in either sexual activity
16 or sexual contact with Youth Johnson between March 6, 2006 and March 17, 2006.

17 **D. Abuse of Youth**

18 The issue here is whether the Grievant abused Youth Johnson in violation of Rule 6.1. The problem for
19 the Agency is that, except for the Union’s Post-hearing Brief, nothing in the arbitral record directly
20 addresses, let alone proves that the Grievant is guilty of this infraction. The Agency simply omits any

¹³⁵ Joint Exhibit 4, at 144.

¹³⁶ This is not to say that *as a matter of fact* the Grievant *did not* sexually assault Youth Johnson or that the Grievant is free of suspicion in that respect. Instead, the Arbitrator is saying that because of Youth Johnson’s diminished credibility, the Agency cannot establish a violation of Rule 5.17, *notwithstanding* the Grievant’s evasiveness and cavalier attitude toward interacting with Youth Johnson and other youths.

1 *specific* discussion of this issue in either its Post-hearing Brief or its case in chief. Rule 6.1 prohibits the
2 “Abuse of any youth under the supervision of the Department.”³⁷ Ultimately, in this particular dispute, the
3 alleged violation of Rule 6.1 is derivative of and wholly dependent on a violation of Rule 5.17. Having failed
4 to establish a violation of Rule 5.17, the Agency would be hard-pressed to sustain the Rule 6.1 violation.
5 Accordingly, the Arbitrator holds that preponderant evidence in the arbitral record does not establish that,
6 under Rule 6.1 the Grievant *abused* Youth Johnson between March 6, 2006 and March 17, 2006.

7 **E. Dishonesty**

8 There also is the issue of whether the Grievant was dishonest as set forth in Rule 3.1 during the Agency’s
9 administrative investigation. Again, the Agency does not specifically address this issue. However, in its
10 Post-hearing Brief, the Union claims that the basis for the Rule 3.1 charge is the Grievant’s denial of the Rule
11 5.1 charge. Rule 3.1 prohibits employees from “[B]eing dishonest while on duty or engaged in state
12 business, including but not limited to, deliberately withholding information, giving false or inaccurate
13 information verbally or in writing to a supervisor or appropriate authority. . . .”³⁸ With only the Union’s
14 argument in the record, the Arbitrator holds that the Agency failed to prove the Rule 3.1 charge. The Agency
15 may charge the Grievant with dishonesty as defined in Rule 3.1, provided there is ample reason to believe
16 he was dishonest. However, the Agency should not use Rule 3.1 merely to discourage the Grievant from
17 proclaiming his innocence. In any event, preponderant evidence in the record does not establish that the
18 Grievant violated Rule 3.1.

19 **F. Failure to Cooperate**

20 Here, the issue is whether the Grievant violated Rule 3.8 by not fully cooperating in the Agency’s
21 administrative investigation. Although the Agency did not specifically address this issue in its case in chief

³⁷ Joint Exhibit 4, at 18.

³⁸ *Id.*, at 13.

1 or Post-hearing Brief, Investigator Bourke’s Report accused the Grievant of evasiveness in the May 8
2 interview.¹³⁹ Moreover, that Report noted that on or about May 2, 2006, OA Hill could not contact the
3 Grievant who was then on administrative leave.¹⁴⁰ Investigator Bourke properly noted that the Grievant could
4 not recall much of the alleged touching and interactions between him and Youth Johnson. Also, Investigator
5 Bourke noted that the Grievant contradicted himself in one respect by saying he could not recall playfully
6 touching Youth Johnson but later stated that he possibly touched her playfully or jokingly.¹⁴¹ In its
7 Post-hearing Brief, the Union only responded to the need to reschedule the **May 3** interview.¹⁴² Although the
8 Union admitted the need to reschedule the interview, it claimed the Union was not to blame since the Agency
9 called the wrong telephone number. But Inspector Bourke said that the Agency used the numbers on file for
10 the Grievant.

11 Rule 3.8 prohibits employees from “Interfering in an investigation, including, but not limited to,
12 coaching, threatening, or attempting to intimidate or alter the statements of a witness (employees, youth or
13 the general public) and/or **withholding** information or knowledge concerning a possible rule infraction or
14 law violation.”¹⁴³ The Grievant’s mere unavailability for an interview on May 2, 2006 is insufficient to hold
15 that he violated Rule 3.8, since the arbitral record contains evidence describing the Grievant’s duties while
16 on administrative leave.

17 Inspector Bourke’s allegations of evasiveness have some foundation in the record. Although the
18 Grievant’s deliberate, evasive, and vague answers (noted in the preceding discussion of Rule 5.1) do not

¹³⁹ Joint Exhibit, at 16-17.

¹⁴⁰ See *Id.*, at 12.

¹⁴¹ *Id.*, at 16.

¹⁴² Investigator Bourke’s Report notes that the omitted interview occurred on May 2, 2006. See, e.g. Joint Exhibit 4, at 12.

¹⁴³ Joint Exhibit 4, at 14.

1 violate Rule 5.17, they do establish an unacceptable willingness to be forthright in answering all legitimate
2 questions during the May 8 interview. Careful review of that interview reveals that the Grievant did not
3 make an earnest, good-faith attempt to answer Investigator Bourke's questions, which were straightforward.
4 Yet, the Grievant claimed he could not recall touching inmates in playful banter or being in dark rooms with
5 them. This is preposterous, since the Agency hardly condones that type of conduct between JCOs and
6 inmates. The Grievant's pervasive memory lapses about clearly memorable events are unpersuasive,
7 suspicious, and uncooperative. Such cooperation is not only necessary but lies at the heart of that Rule.
8 Unlike the charges of abuse and dishonesty, on its face, the May 8 interview plainly establishes the
9 Grievant's failure to cooperate under Rule 3.8.

10 **G. Unauthorized Correspondence with Youth**

11 Here, the issue is whether the Grievant improperly corresponded with Youth Johnson. Again, there is
12 scarce evidence and virtually no argument in the record to sustain this charge. Rule 3.9 condemns
13 employees,' "Corresponding with or accepting correspondence from youth under ODYS supervision or
14 youth's family, except as part of the employee's job responsibility *for official work purposes*, unless
15 authorized to do so by the appropriate managing officer." The Agency has not demonstrated a violation of
16 Rule 3.9.

17 **H. Unauthorized Contact with Youth/Family**

18 Here, the issue is whether the Grievant improperly contacted Youth Johnson. During his May 8
19 interview, the Grievant admitted that at the end of his shift on or about March 16, 2006, he went to Hunter
20 Cottage and discussed the alleged assaults and other subjects with Youth Johnson. The Grievant claimed
21 that he visited Youth Johnson's cell because Youth Otts had told him that Youth Johnson and Youth Hassan
22 had a conflict, that Youth Johnson never told Youth Hassan that she liked the Grievant, and that Youth

1 Johnson denied having accused the Grievant of sexual misconduct.^{\44} The Grievant’s defense for this conduct
2 is that he was doing his job by assisting Youth Johnson with a problem and by saving the next shift from
3 grappling with problems that arose on the Grievant’s shift.^{\45} The Grievant admitted that he met Youth
4 Johnson and discussed her conflict with Youth Hassan as well as Youth Johnson’s accusations against him.^{\46}
5 When Inspector Bourke questioned whether it was proper for the Grievant to discuss the problem with the
6 youth, the Grievant responded that he did not initiate the conversation about the sexual misconduct.

7 Here again, the Agency offered no specific, reasoned argument describing exactly how the Grievant
8 violated Rule 4.10, and the Union stressed that there was no video depicting the Grievant actually visiting
9 Youth Johnson during the time in question. However, the Grievant’s admission essentially rebuts the
10 Union’s argument.

11 Rule 4.10 prohibits employees from, “Having contact with or visiting a youth or youth’s family, except
12 as defined in Rule 3.9, and except as authorized by the managing officer as part of the employee’s *job*
13 *responsibility*.”^{\47} As pointed out, the Grievant apparently believed it was his job to assist youths with their
14 problems and to diffuse issues arising on his shift. Moreover, it was unclear from the May 8 interview
15 whether the Grievant was still performing some job-related duties when he visited Youth Johnson’s cell.
16 Given the lack of testimony at the hearing and the lack of focused, cogent argument on this issue by either
17 of the Parties, the Arbitrator has no basis on which to decide whether the Grievant violated Rule 4.10. It is,
18 for instance, unclear whether the Grievant was technically still on duty even though he had “clocked out”
19 when he visited Youth Johnson. In addition, on its face, it is unclear whether Rule 4.10 was intended to

^{\44} Joint Exhibit, at 147-148.

^{\45} *Id.*, at 146.

^{\46} *Id.*, at 146-147.

^{\47} *Id.*, at 14.

1 cover this situation. Consequently, the Arbitrator holds that evidence in the record does not demonstrate that
2 the Grievant violated Rule 4.10 by visiting Youth Johnson on her unit to discuss the aforementioned subjects.

3 **VI. The Disciplinary Decision**

4 The Agency has established by preponderant evidence in the arbitral record as a whole that the Grievant
5 failed to cooperate fully in its administrative investigation as required under Rule 3.8. Because the Agency
6 established a violation of Rule 3.8, some measure of discipline is indicated. Assessment of the proper
7 quantum of discipline involves an evaluation of the mitigative and aggravative factors in this dispute and
8 ultimately a determination of whether removal was unreasonable, arbitrary, capricious, discriminatory, or
9 an abuse of discretion under the circumstances of this case.

10 **A. Mitigative Circumstances**

11 The strongest mitigative factor for the Grievant is his discipline-free record and presumptively
12 satisfactory work record. His tenure of approximately 1.5 years is too short to be mitigative.

13 **B. Aggravative Circumstances**

14 The major aggravative factor is the Grievant's demonstrated dismissive attitude toward the Agency's
15 administrative investigation. This is especially troublesome where, as here, the Grievant is the primary target
16 of that investigation. Under no circumstances is the Grievant permitted to essentially play games with the
17 Agency's interviewer as he apparently did in this case. Although that attitude together with the Grievant's
18 apparent penchant to playfully touch and hit the youths and to allow them into his personal space, etc. did
19 not establish his guilt under Rule 5.1, they pushed him to the edge of the precipice. One can only hope that
20 the Grievant learns a sound lesson from this experience.

21 **C. Proper Measure of Discipline**

22 An assessment of the foregoing aggravative and mitigative factors indicates that termination is
23 *unreasonable* in this case, since the Agency did not prove the major charge against the Grievant and only

1 one of the relatively lesser charges.⁴⁸ Careful assessment of this balance of mitigative and aggravative
2 factors indicates that the Grievant's removal should be reduced to a three-month (3-month) suspension,
3 which shall run from August 25, 2006 until November 25, 2006. The Agency shall make the Grievant whole
4 from November 26, 2006 until the Grievant is reinstated pursuant to this opinion and award ("Reinstatement
5 Period"). However, the Agency is entitled to *deduct* from any and all *backpay* owed to the Grievant during
6 the reinstatement period any and all *wages* he either *did or could have earned* with due diligence and a good-
7 faith effort to secure alternative employment. Beyond those deductions in backpay, however, the Grievant
8 is fully entitled to Roll Call Pay, Shift Differential, and Holiday Premium Pay. In addition, the Grievant shall
9 receive overtime pay for any overtime that *he can prove* he normally would have worked based on his
10 historical work record. Also, the Grievant shall receive any Vacation Leave, Sick Leave, and Personal
11 Leave that he would have accrued during the reinstatement period. Furthermore, any leaves the Grievant had
12 on the books and cashed out shall be restored to his balances without cost to him. In addition, the Agency
13 shall fully compensate the Grievant for any medical or dental costs he actually incurred during the
14 reinstatement period and for which he was not otherwise compensated. Finally, the Grievant shall suffer no
15 loss of seniority or good days and shall be restored to the shift and post that he held immediately before his
16 removal in this dispute. The Arbitrator shall retain jurisdiction of this matter until September 9, 2007.

17 VII. The Award

18 Accordingly, the Grievance is hereby **sustained** in part and **denied** in part.

Respectfully,



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

19

⁴⁸ There is no penalty table in the arbitral record.