***Cuyahoga County Court*, 134 LA 246 (Szuter. 2014)., Full Text**

**134****LA****246**

**Cuyahoga****County****Court**

**Decision of Arbitrator**

June 6, 2014

**In re****CUYAHOGA****COUNTY [Ohio] COMMON PLEAS****COURT and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 860**

**Arbitrator(s)**

Arbitrator: Gregory P. Szuter

**Headnotes**

**EVIDENCE**

**[[1]](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5b6u6_1ref" \t "_self)Burden of proof**[**▸100.0775**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=laco_100_0775&vname=lelacases)

County court has burden of proving just cause for its disciplinary action through clear and convincing evidence, since that is standard that applies when equitable interests are at stake.

**ARBITRATION**

**[[2]](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5b6u6_2ref" \t "_self)Prior award**[**▸100.0783**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=laco_100_0783&vname=lelacases)

Prior award is not given deference, where decision was procedurally wrong, and dismissed just cause jurisprudence of half century as formulaic and surmised that just cause is subjective and situational.

**DISCHARGE**

**[[3]](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5b6u6_3ref" \t "_self)Insubordination**[**▸100.552540**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=laco_100_552540&vname=lelacases)

County court did not have just cause to discharge detention officer for insubordination, even though he disobeyed order telling him not to bring meals to difficult detainee, who attacked grievant and was hit by grievant in return, where grievant did not explicitly understand he was not to bring meal to detainee, grievant did not read e-mail about detainee until after incident, and grievant was not informed of consequences of failing to reply.

**[[4]](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5b6u6_4ref" \t "_self)Excessive force**[**▸100.552510**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=laco_100_552510&vname=lelacases)

County court did not have just cause to discharge detention officer for using excessive force, where officer was attacked by detainee and was only defending himself when he hit detainee with communication device.

**Attorneys**

For the employer—Marc J. Bloch and Peter Zwadski (WalterHaverfield LLP), attorneys.

For the union—Basil W. Mangano (Joseph J. Guarino, Mangano Law Offices Co. LPA, with him on brief), attorneys.

**Opinion Text**

**Opinion By:**

SZUTER, Arbitrator.

**Introduction**

The parties to this arbitration are Cuyahoga County Common Pleas Court, Juvenile Court Division, (“Employer” or “Court”) and Laborers’ International Union of North America, Local 860, (“Union”). This arbitration arises from the grievance filed on September 3, 2013 by H\_\_ (“Grievant” of “H\_\_”) under the collective bargaining agreement between the Court and the Union, effective, January 1, 2013, through December 31, 2015. (“CBA” or “Agreement”)

**The Grievance**

Grievance #G1313, filed September 3, 2013 [1](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m4x2" \t "_self) stated:

[1](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m4x2_reffirst_footref" \t "_self) All date references herein where the year is unstated are to 2013.

Date Grievance Occurred: 8/30/13

Specifics of Grievance: H\_\_ Termination

**Provisions of the Collective Bargaining Agreement****[2](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m4x7" \t "_self)**

[2](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m4x7_reffirst_footref" \t "_self) Italics are inserted in the quoted matter in this section and the next are not for emphasis but for ease of location for the reader. Italics used elsewhere are emphasis added except when noted as in the original.

The following excerpts from the CBA indicate some of the terms considered or construed herein by the parties or by the Arbitrator. As to the merits:

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***ARTICLE 5
MANAGEMENT RIGHTS***

\* \* \*

Section 2. Except as limited under this Agreement, the management rights include, but are not limited to, … *discipline for just cause* which includes reprimand, suspend, discharge, discipline, or termination for just cause, …

\* \* \*

***ARTICLE 8
DISCIPLINE***

Section 1. No bargaining unit member shall be removed, reduced in pay, suspended, reprimanded except *for just cause*. However, whenever it becomes necessary to discipline its employees, the Court shall retain all of those rights which are traditionally reserved thereto, subject only to those other procedures, limitations and options which are set forth in this Article and Article 9.

Section 2 {off duty regulations}

Section 3. *Progressive discipline shall be used in all cases except those where the**Court determines the circumstances of an offense or violation are of such a serious nature that prior progressive discipline is not deemed appropriate*. The parties agree that progressive discipline shall consist of the following elements, to be pursued in the following order:

(1) prior to the written warning, the Court shall counsel the employee of the fact that if his/her conduct continues, it will lead to further discipline;

(2) documented verbal warning;

(3) written warning;

(4) suspension;

(5) termination.

Prior to initiating discipline hereunder, the Employer will counsel employees. Counseling shall not be considered discipline.

Section 4 {Weingarten/Garrity rights}

Section 5. Pre-disciplinary Hearing.

(A) No layoff, suspension or other disciplinary action may be taken until the employee involved has had an opportunity to have a disciplinary conference. *The purpose of that hearing shall be to advise the employee of the basis for the disciplinary action. The employee may, if he or she desires, have a Union representative of his or her choice in attendance at that hearing and may offer evidence in opposition to the Court's charges at that time*. When such a request is made, the meeting shall not proceed until the representative is present. No Union representative shall be permitted to attend the pre-disciplinary hearing if the employee who is subject to disciplinary action asks that the Union not be present. All such meetings shall be conducted during the employee's work shift, or if an employee is called in for such a meeting at a time other than his work shift, s/he shall be paid for such time as consumed by the meeting, but in no case for less than one (1) hour.

(B) The Court shall issue a decision within one (1) week of a pre-disciplinary hearing. The employee shall have the right to appeal any disciplinary action taken pursuant to the established grievance process.

(C) {discipline pending the grievance process}

(D) Timely Processing of Discipline, No employee may be disciplined for any conduct about which the Employer knew where notice of the discipline to be imposed is more than thirty (30) days after the Employer's knowledge of the alleged conduct, provided, however, if the Employer in conducting an investigation which will extend beyond the thirty (30) day period, the Employer may request additional time to complete its investigation. The Union shall not unreasonably withhold its consent.

Section 6 {discipline sunset}

Section 7 {Performance Improvement Plan}

As to the arbitration proceeding:

***ARTICLE 9
GRIEVANCE PROCEDURE AND ARBITRATION***

\* \* \*

Section 3.

(A) Once a matter has been approved for arbitration, the Union shall request a panel of seven (7) arbitrators from the Federal Mediation and Conciliation Service (FMCS). The parties shall be bound to select an arbitrator within twenty-one (21) days from the receipt of said panel by the strike off method, the Union and the Employer alternatively striking a name from the panel, the last remaining person on the list shall be deemed the mutual selection of the parties.

(B) The decision of the Arbitrator shall be final and binding upon the Court, the Union and the employee(s) and shall be implemented within fifteen (15) days. The arbitrator's authority shall be limited to interpretation and application of the Agreement, and he shall have no authority to (1) add to or subtract from, or modify in any manner, the provisions of this Agreement, (2) to pass upon issues governed by law, or (3) to make an award in conflict with law. The parties shall equally share the cost of services provided by the arbitrator. All other costs borne by the respective parties….

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**Extra Contractual Policies**

The Employer Policies (JX 5) on which the discipline relies are Work Rule 6.12, and Court Policy 9.6. Work Rule 6.12 states, in part:

Violation of any Court policies and procedures may lead to discipline up to and including termination. Unauthorized activities that may result in discipline up to and including termination include, but are not limited to:

8 - Any violation of or disregard for any safety and/or security policy, regulation and/or practice;

10 - Physical assault, fighting or threats thereof;

11 - *Physical force or threat thereof*;

26 - *Insubordination*;

32 - Improper use and/or abuse of any Court or County property, including but not limited to, stationery, equipment, teledata, telecommunications, e-mail, photocopiers, facsimile machines, automobiles, computer hardware and/or software, pagers and cellular phones;

34 - Carelessness; and

49 - Any act of misfeasance (improper performance of a legal act), malfeasance (the commission of an unlawful act or an act which a person ought not to perform), or nonfeasance (the omission of an act that one has a duty to perform) in employment.

Court Policy 9.6 (“Use of Physical Force”) provides, in part:

It shall be the policy of the Cuyahoga County Juvenile Detention Center (CCJDC) that *use of physical force by* CCJDC staff with CCJDC residents *shall be limited to instances of self-protection, protection of the residents or others, prevention of property damage and prevention of escapes, and then only as a last resort and in accordance with appropriate statutory authority. In all instances, CCJDC staff shall use the least amount of physical force or contact necessary. Physical force may not be used as punishment. Violations of this policy may result in disciplinary action up to and including immediate termination*.

\* \* \*

Preventative measures, such as the following, shall always be used before CCJDC staff employs the use of physical force with residents:

1. Using Behavior Management Program techniques.

2. Separating the resident(s) from the area of conflict.

3. Call for an alert on the hand-held radio to obtain the presence of other CCJDC staff in a “show of force” to assist in de-escalating the conflict.

4. Using Crisis Prevention Institute (CPI) intervention techniques to de-escalate conflict thus negating the need for use of physical force.

\* \* \*

If use of physical force becomes necessary with a resident(s), CCJDC staff shall do the following:

1. Call for an alert on the hand-held radio to call for additional staff assistance.

2. Physically intervene to restrain the resident using only approved CPI intervention techniques. *Any use of physical force beyond the CPI intervention techniques that all CCJDC staff is trained in annually is not permitted*.

**Arbitrability**

The parties stipulated the grievance arose under the Agreement and was processed in procedural compliance with the Agreement. Pre-hearing the parties stipulated to the appointment of the arbitrator *ad hoc* without the FMCS administration per Article 9 Sec. 3. After certain disclosures before and at the hearing made by the Arbitrator, the parties confirmed his retention.

**Statement of the Issues for Decision**

The parties agreed at hearing that the Arbitrator would frame the issues from the evidence and proposals of the parties. It is found that the issues to be decided are:

1. Did the Employer discharge Grievant from employment for just cause, and if not what shall the remedy be?

**Positions of the Parties**

***A. The Employer's Position***

The Court had just cause to discharge Grievant because he violated a direct order of his supervisor and engaged in excessive use of force.

H\_\_ ignored policy, procedure and a clear order from his supervisor and assaulted “MR,” an individual whose care, welfare, safety and security was the responsibility of the Juvenile Detention Center. It cannot legitimately and reasonably be asserted that violating Ohio law, Court protocol, the Employee Handbook, Detention Policies and Procedures,

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and H\_\_’s training by repeatedly punching a resident does not provide just cause for H\_\_’s termination. This is particularly true where, as here, H\_\_’s own misconduct placed him and the resident at risk and created a dangerous situation. The Court respectfully requests that the Arbitrator wholly deny the instant grievance and uphold the termination of H\_\_.

H\_\_’s supervisor ordered in writing that MR was to be treated with caution and the employees were not to be alone with him. It could not be clearer. But H\_\_ chose to ignore his training, Court policies and procedures, work rules and the unequivocal direct written order three times on July 17, 2013. Each time he put himself in a one-on-one situation with MR: (1) H\_\_ allowed MR to use the restroom; (2) H\_\_ tried to retrieve a mattress from MR's bedroom; and (3) H\_\_ attempted to serve MR a meal. Each was entirely avoidable. H\_\_ could have avoided, should have avoided, was trained to avoid, and had a duty to avoid.

To compound this insubordination H\_\_ used excessive force. Video footage shows that acting as the physical aggressor, H\_\_ struck MR six times on the head with a communication device (PDA). Thus, aside from his insubordination, H\_\_’s use of force was excessive and entirely unjustified and unreasonable under the circumstances.

The Court thoroughly investigated the allegations, held a hearing to determine rule violations, and H\_\_ insubordination and use of excessive force was just cause to terminate H\_\_’s employment. There are no circumstances that can mitigate the fact that H\_\_ ignored his training and his supervisor's orders, and repeatedly pummeled a resident with a PDA.

MR did not create the incident, H\_\_ did. The video and H\_\_’s own testimony prove that H\_\_ used excessive force and are undeniable evidence of just cause for termination of H\_\_.

MR's age and history are not mitigating factors. H\_\_ claimed that he was not trained to deal with older residents. The terms in Policy 9.6 clearly apply to any employee interaction with any “resident” no matter his or her age. The prohibition against excessive force rule or the “no punching” rule is not limited to a certain population or age group. Such an argument is unreasonable, as it implies that a detention officer is permitted to use excessive force or is allowed to punch a resident who is deemed not to be a “child.” H\_\_ would be hard-pressed to find an adult prison that tolerates the use of punching and excessive force against inmates.

The Court's Physical Force Policy and the nonviolent crisis intervention techniques (CPI) do not mitigate H\_\_’s discipline. The record contains a plethora of opinion claiming the Court's training is inadequate—all by H\_\_ and only H\_\_—but not a shred of evidence in support. Therefore, this claim too has no basis in law or fact.

H\_\_’s claim that he was not adequately trained is patently incorrect. This record contains a plethora of opinion claiming the Court's training is inadequate—all by H\_\_ and only H\_\_—but not a shred of evidence in support. Therefore, this claim too has no basis in law of fact.

Self-defense is not a factor that mitigates H\_\_’s termination. H\_\_ was the aggressor and cannot reasonably claim self-defense. When a resident threatens harm, the reasonable detention officer does not place himself in harm's way. H\_\_ knew that assistance was available because he called for assistance to retrieve the mattress. Although the Sheriff's Department concluded that H\_\_ did not assault MR, it was determining whether a crime was committed. In contrast, the Court investigated the facts of the incident to determine whether there is just cause to discharge. The different context necessarily entails different standards of review and consideration.

Failure to read the supervisor's e-mail does not mitigate H\_\_’s actions and only further proves his carelessness, insubordination, misfeasance, and nonfeasance. H\_\_ testified that his failure to read the e-mail was inconsequential because the e-mail did not apply to him. H\_\_’s failure to read the e-mail for two days is further insubordination and neglect of duty.

Typically in discharge cases, there are two prongs to the just cause test: (1) whether there is just cause for taking any disciplinary action (i.e., did H\_\_ actually commit the offense); and (2) whether there is just cause for the penalty imposed. *Texas Lime Company*, [83](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_83_116&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_83_116&vname=lelacases)[116](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_83_116&vname=lelacases), 121 (Neas, 1984). In this case, not only is there recorded evidence to prove that H\_\_ committed the offense, but he also admitted it during arbitration. Hence, the Court will only focus in this brief on the second prong of just

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cause, i.e., whether there is just cause for the penalty imposed, which is termination.

While there is no definition of “just cause” in the CBA, other arbitrators have defined it. It means that an employer “must have a reasonable basis for its actions and follow fair procedures.” *Beatrice Foods Co.* [74](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_74_1008&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_74_1008&vname=lelacases)[1008](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_74_1008&vname=lelacases) (Gradwohl, 1980); *Gate Gourmet*, [125](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_125_80&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_125_80&vname=lelacases)[80](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_125_80&vname=lelacases) (Wolff, 2008). As demonstrated, the Court clearly had a reasonable basis for terminating H\_\_ and it also followed all fair and appropriate procedures during his investigation and through his termination.

The Court's action in terminating H\_\_ meets the seven tests of Arbitrator Carroll Daugherty's well-known tests for just cause. Arbitrator Daugherty's often-cited seven tests for just cause originally set forth in 1966 in *Enterprise Wire Co.*, [46](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_46_359&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_46_359&vname=lelacases)[359](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_46_359&vname=lelacases) has been recognized as the common law set of guidelines for determining just cause under a labor contract by countless arbitrators to date. See, e.g., *Greater Cleveland RTA*, [131](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_131_1286&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_131_1286&vname=lelacases)[1286](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_131_1286&vname=lelacases) (Fullmer, 2013) and *Healthcare Services Group Inc.*, [131](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_131_975&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_131_975&vname=lelacases)[975](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_131_975&vname=lelacases) (Clark, 2013).)

1. H\_\_ had knowledge of the rules and possible disciplinary consequences of his conduct.

2. The Court's rules are reasonably related and inextricably linked to the orderly and safe operation of the DC and are consistent with its mission.

3. The Court made a thorough effort to investigate and found that H\_\_ egregiously violated multiple Court rules.

4. The Court's investigation was conducted fairly and objectively.

5. The Court obtained substantial and compelling evidence that H\_\_ committed the offenses before it discharged him.

6. The Court applied its rules and regulations evenhandedly and without discrimination.

7. The degree of discipline issued to H\_\_ is reasonably related to the seriousness of the offense and his record of discipline with the Court. Physical abuse of a resident is the most serious offense that a Detention Officer can commit.

Leniency is the prerogative of the employer (in this case, the Court). *Enterprise Wire Co.* [46](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_46_359&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_46_359&vname=lelacases)[359](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_46_359&vname=lelacases) (1966). The arbitrator may not substitute his judgment for the Employer's unless there is compelling evidence that it abused its discretion (which, in this case, does not exist). Arbitrator Daugherty opined that had he been the original “trial judge,” might have imposed a lesser penalty but the arbitrator's function is limited to more of an “appellate” role, that is, determining whether the Court's decision was within the bounds of reasonableness.

The principle of just cause requires consideration of whether or not any overriding factors should mitigate the imposition of a discharge in favor of a less serious penalty. Such factors may include an employee's seniority, good work record, good faith and the absence of serious harm from the employee's conduct. *First Transit*, [128](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_128_586&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_128_586&vname=lelacases)[586](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_128_586&vname=lelacases), 589 (Goldberg, 2010). H\_\_ did not have a record of prior discipline, as is its contractual right, the Court determined that the July 17 incident amounted to an act of physical abuse and excessive force against a resident, and was such a serious violation that it warranted termination. H\_\_ may not have snapped for 20 years but he did snap on July 17. The Court cannot be exposed to liability for an employee's use of excessive force. [3](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5g0" \t "_self) In *CCCP Juv. Div. and Laborers Local 860*, (October 29, 2013, Belkin, Arb.) found in a case where the detention officer was clearly the aggressor, that the Court cannot employ a detention officer who has a history of beating juveniles. The CBA and Employer's policies take preference over the arguable mitigating factors. H\_\_’s lack of prior discipline is wholly outweighed by the seriousness of his actions, the jeopardy it creates and the Court's objectives behind its rules and policies.

[3](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5g0_reffirst_footref" \t "_self) The Court cited various sources reporting that “juvenile detention centers are constantly embattled in lawsuits when detention officers aggressively subdue residents.” Employer Brief. p. 14 *Cf.* *S.H. v. Taft*, No. 2:04-cv-01206 (S.D. Ohio filed Dec. 20, 2004) and “Girls Sue State over Alleged Prison Abuse,” AKRON BEACON J., Dec. 22, 2004, at B6. Others at “Lawsuit Seeks to Improve Juvenile Correction System, DAYTON DAILY NEWS, Apr. 5, 2007, A4; *S. W. v. Stickrath*, No. 2:04-cv-1206 (S.D. Ohio filed Apr. 4, 2007), Complaint at 728-31. It was followed by a reference to “T151-53.” The latter cannot be the transcript here suggesting it was copied from elsewhere. None of this was in the record as evidence. However, the Union did not object to including it in the Employer's argument (*viz* brief.) That being said, the Employer may certainly argue that behavior of employees, particularly law enforcement related professions, can create liabilities. That is the full extent that the material can legitimately serve.

H\_\_ was fully aware of the rules and policies. In fact, H\_\_ cannot reasonably claim that punching a resident with a PDA was NOT a violation of work rules and Court policy, and grounds for dismissal. H\_\_ demonstrated his attitude in high relief: he is not constrained by

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rules, regulations, directives or direct orders as are the other Court employees. H\_\_’s excuses are demonstrably flimsy, self-serving and wholly inadequate to justify his use of excessive force to deal with a resident known to him, H\_\_, to be in an agitated state. Court requests the Arbitrator deny the grievance filed by H\_\_ in its entirety and uphold his discharge.

***B. The Union's Position***

The Court has not met its burden of proof in this case. The Court may discharge an employee only for “for just cause.” CBA Article 8, Sec. 1.

H\_\_ was discharged because he defended himself while an 18 year-old resident physically accosted and battered him. It is important to note, H\_\_ was not disciplined for an altercation with a minor. According to the video, the Cuyahoga County Deputy Sheriff investigating the incident, the expert witness, and H\_\_, himself, testified that H\_\_ was pinned and was merely trying to escape from the 18-year-old who lunged at him. H\_\_’s mere seconds of self-defense resulted in the imposition of the industrial death penalty.

Discharge is the most extreme penalty an employer may impose on its employees and is equated to “industrial capital punishment.” Koven & Smith, Just Cause: The Seven Tests 27 (2nd ed. 1992), at 382. Not only does a discharge deprive an employee of his or her employment, it also cuts off their income, deprives them of seniority and other accrued benefits, and often jeopardizes their ability to find another job. *Red Cross Blood Serv.*, [90](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_90_393&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_90_393&vname=lelacases)[393](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_90_393&vname=lelacases), 397 (Dworkin, 1988).

The Arbitrator should reject the Belkin decision and employ the test that every other arbitrator has utilized in discipline and discharge cases based upon the research the undersigned conducted. Arbitrators require employers to prove their case for just cause based upon the clear and convincing evidentiary standard. The clear and convincing evidence standard requires evidence “so clear, direct, weighty and convincing as to enable the court to make its decision with a clear conviction.” *Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747, 752 (3d Cir. Pa. 1994). Arbitrator Belkin shifted the burden of proof to the Union to demonstrate by a preponderance of the evidence, “that the Court acted in an arbitrary or capricious manner, or engaged in disparate or discriminatory treatment, or perhaps management was motivated by personal animosity against the grievant.” Not only was the burden of proof shifted, the just cause was eviscerated into abuse of discretion.

To establish just cause the Court is required to demonstrate that H\_\_ used physical force as punishment, or that he was not using physical force in self defense. Per Rule 9.6 the use of physical force is authorized, but only in “instances of self-protection, … and then only as a last resort.” The only express prohibition on the use of force is that “[p]hysical force may not be used as punishment.” there is absolutely no evidence that H\_\_ used physical force as a form of punishment. There was not such even an accusation.

The Court also failed to demonstrate that Rule 9.6 did not authorize H\_\_’s use of force because that use of force failed to amount to self defense. There is no dispute that H\_\_ was suddenly, and without warning, engaged by the 18-year-old resident. As all witnesses testified, H\_\_ was merely trying, via the only means at his disposal under the circumstances, to repel the resident from continuing to assault him. Deputy Varga and Officer Kwan both testified that H\_\_ was acting in self defense throughout the altercation.

Nevertheless, the County has taken the approach that any physical contact with a resident that does not strictly conform the CPI constitutes a violation of the use of force policy; even though such a position conflicts with the express language of Rule 9.6. Even assuming that CPI techniques were required, the testimony demonstrated that H\_\_ did attempt to utilize those techniques. The Court's own witness and the Union witnesses testified that H\_\_ used CPI techniques prior to being forced to strike the resident until the resident's hold was released. So, the Court cannot meet its burden to show H\_\_ disregarded those techniques. The CPI techniques, however, should have to be used in this type of situation because the techniques are wholly inadequate during sudden attacks. Holding H\_\_ accountable for not utilizing these ineffective techniques in the face of grave, bodily harm flies in the face of equity.

As to insubordination, the Court cannot demonstrate H\_\_ disobeyed an express directive not to have one-on-one contact with MR because it was unable to establish that H\_\_ had prior notice of the directive. The only evidence

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was H\_\_’s testimony that he had not read the supervisor's e-mail until later, and his written statement signed on August 12 that he had read it. At no point during the pre disciplinary process did any of the Court's representatives ask H\_\_ the crucial follow up question of when he had read that directive.

The Court failed to demonstrate that H\_\_ did not comply with a directive that he had prior knowledge of before the incident occurred. Had he read the e-mail, it was not applicable to the incident since there was not a floater on duty who could have even assisted him in opening MR's door to give him his meal. Finally, the Court still cannot make out a case of insubordination because the there is no evidence that H\_\_ was apprised that if he failed to obey the directive, he would be subject to discharge. Such notice within the directive is a prerequisite for proving any actionable insubordination.

Procedural issues require the discipline be overturned. The Court sat on its ability to discipline H\_\_ until after the contractually agreed to time, 30 days, for issuing discipline for the offense had expired. Article 8, Section 5(D) The incident occurred on July 17. The Court only had until August 16 to discipline H\_\_ but did not issue the discipline until August 30. In fact, Bruehler's pre-disciplinary summary was dated August 22, which was already past time. There is no evidence the Court requested any additional time within which to conduct and complete its investigation. Accordingly, the discipline was inconsistent with the contract. As such, the grievance should be sustained, and the discipline should be overturned.

This Arbitrator should sustain the grievance because the City failed to conduct a full and fair investigation prior to discharging H\_\_. A fair investigation is an one that is careful and unbiased, and leads to the conclusion that sufficiently sound reasons exist for discipline. Regardless of the culpability of grievants, arbitrators will reverse or substantially reduce penalties in cases where discharge is imposed before investigating. [4](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5h5" \t "_self)

[4](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5h5_reffirst_footref" \t "_self) *Southern California Edison Co.*, 88-1 ARB ¶8129; see also *Inland Mills, Inc.*, [42 Lab. Arb. 840](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_42_840&vname=lelacases), 843 (Davey, 1946); *American Smelting & Ref. Co.*, [31](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_31_350&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_31_350&vname=lelacases)[350](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_31_350&vname=lelacases) (Seligson, 1985); *Goodyear Tire & Rubber Co.*, [98](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_98_941&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_98_941&vname=lelacases)[941](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_98_941&vname=lelacases) (Nicholas, 1992); *Alpha Beta Co.*, [91](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_91_1225&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_91_1225&vname=lelacases)[1225](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_91_1225&vname=lelacases" \t "_top) (Wilmoth, 1988).

The Court woefully failed to conduct a full and fair investigation. The individuals with the authority to effectively recommend discipline never even interviewed H\_\_. Bruehler did not ask whether the Sheriff's Office had completed its investigation. Bruehler failed to obtain statements from the residents until 13 days after the July 17th incident. Bruehler made no effort to interview the supervisor about his e-mail. Bruehler asked the Grievant to write the 8/12/13 statement without any follow up questions to determine when he had read the e-mail. Bruehler did not even confirm whether there was a “house floater.”

Paul Miller, the Pre-Disciplinary Hearing Officer, was relatively inexperienced at the process. Miller admitted to considering Bruehler's statements that H\_\_ attempted to employ several of the CPI techniques, but did not include those in his Report. He also admitted not asking follow up questions of H\_\_.

Terrance Jenkins, the Superintendent of Detention Services, who had the responsibility to make a discharge decision only had the two-page Hearing Officer Report and Bruehler's investigation report. He had no contact with Miller. Jenkins did not personally interview MR or H\_\_. The only meeting he had with H\_\_ was after he already determined on the discharge. As such, the Court failed to fully and fairly investigate the incident prior to making the decision to terminate H\_\_’s employment. That failure warrants this Arbitrator sustaining the grievance, and reinstating H\_\_ to his former position with the Court.

The Court's procedures also failed to consider important mitigating factors. Where employers fail to consider mitigating factors before imposing harsh discipline, arbitrators have reduced discipline or reinstated employees. The length of the employee's service is most commonly considered. [5](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5j1" \t "_self) Other arbitrator's have weighed the employee's previous good record as a deciding factor. [6](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5j3" \t "_self) Other acceptable mitigating factors that must be considered include: the employee's age, likelihood of finding alternative employment, the

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employee's attitude, and whether the employee is remorseful and offers an apology.

[5](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5j1_reffirst_footref" \t "_self) *Manufacturers and Repairers Association*, [39 Lab. Arb. at 390](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=bna_reporter_page_la_39_390&vname=lelacases); *Bell Foundry*, [92 Lab. Arb. 1214](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_92_1214&vname=lelacases), 1219 (Prayzich, 1989).

[6](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5j3_reffirst_footref" \t "_self) *Northwest Airlines*, [50 Lab. Arb. at 777](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=bna_reporter_page_la_50_777&vname=lelacases); *National O Ring*, [97 Lab. Arb. at 603](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=bna_reporter_page_la_97_603&vname=lelacases); *ITT Thompson Industries, Inc.*, [67 Lab. Arb. 96](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_67_96&vname=lelacases), 97 (Cocalis, 1976). Similarly, in *Consolidation Coal Co.*, [92 Lab. Arb. 813](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_92_813&vname=lelacases), 818 (Seidman, 1989), *Arch. Of Ill.*, [107](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_107_178&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_107_178&vname=lelacases)[178](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_107_178&vname=lelacases" \t "_top), 181 (Feldman, 1995).

The only two mitigating factors considered by Miller were that the Grievant “was fearful of being overpowered due to the speed and strength of the resident,” and that H\_\_ “had recent unrelated injuries.” Miller admitted that he did not take into account the Grievant's years of service. “impeccable work record or lack of discipline.” The failure to consider these important mitigating factors warrants overturning H\_\_’ discharge. As such, this Arbitrator should sustain the grievance, and order that H\_\_ be reinstated.

The major mitigating factor is that the Detention Officers were inadequately trained to deal with violent adult residents. The DO's were not trained to deal with 18-21 year olds. This is not in dispute. Despite any arguments related to CPI training, etc., none of that is applicable to these adult residents. Instead, the Court places the DO's, including H\_\_, into dangerous situations for which they are not trained, and then disciplines them when the inevitable happens. Imposing the industrial death penalty is more the travesty considering MR was charged by the Sheriff and bound over to adult court by the Court but H\_\_ was cleared of all charges.

For these reasons, this Arbitrator should sustain the grievance; direct the Court to reinstate H\_\_ to detention officer, with back pay, full seniority, and other rights and benefits under the Agreement; and direct the Court to remove any reference to the discharge from H\_\_’s personnel file. Alternatively, the Arbitrator should, under these circumstances, impose progressive discipline under Article 8 of the Agreement; convert the discharge into a lesser form of discipline; and direct that all references to the discharge be removed from H\_\_’s personnel file. Local 860 further requests that the Arbitrator maintain jurisdiction over this matter for a period of sixty (60) days to resolve any ancillary issues that may arise

**Discussion and Decision**

***A. The Findings of Fact***

***Background***

The Juvenile Detention Center is operated as part of the Juvenile Division of Cuyahoga County Common Pleas Court (“Court”) as part of the Court's statutory duty under R.C. Chapter 2151. The Detention Center is a public facility designed to physically restrict the movement and activities of children for the temporary care of children pending court adjudication or disposition, or execution of a court order. R.C. 2151.011 Although the Court has been housing older juveniles who are at least eighteen years old as early as 1993, Senate Bill 337 (2012) caused an influx of adults 18 to 20 year olds. This has increased the average daily population of residents to above 120 residents the level the center was designed for. The Administrative Judge for the Court, when requesting additional funding during the October, 2013 budget meeting, said the Detention Center now houses 18 to 21 year olds who have engaged in murder, aggravated robbery, felonious assaults, and rape. He also testified that these residents are both less cooperative and more aggressive. H\_\_ testified that several of the adult felons are members of a gang named Heartless Felons (or “HF”) who gain entry and status by attacking residents and staff. Tr. 293 ff.

The Detention Center employs Detention Officers (DO) which is one of the classifications represented by the Laborers’ International Union of North America, Local 860, (“Union”). The Union replaced the Service Employees Dist. 1199 as the bargaining agent and entered its Agreement with the Court for the January 1, 2013 to December 31, 2015 term. The testimony on the interim effect of the language of SEIU agreement was addressed in an e-mail had it but it was not presented on the record. (Tr. 156) The Court Personnel Administrator testified she was aware of the terms of the Agreement as of the time of the incident in this case which was before the CBA was ratified at least by the County on November 8, 2013. The Management Rights, Article 5 of both agreements are identical but the respective language of Article 8, Discipline, differs in some respects.

H\_\_ was first employed as a Detention Officer in 1992. At the time he was also working as a special education teacher which he did for 32 years before retiring. He also retired from the from the Detention Officer position in June 2012. The Court re-hired H\_\_ in January 2013. He served in that position until he was discharged on August 30, 2013.

During the almost 22 years with the Court, H\_\_ had a clean work record: no previous discipline, no attendance issues, never counseled

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or enrolled in a performance improvement plan. He has, no criminal history, or history of physical abuse or violence whatsoever Jack Montgomery, the Unit Manager for House Three, testified that he had known H\_\_ for approximately 15 years and considered him a valuable employee.

***The Employer's Policy and Training***

On January 14, 2013, H\_\_ signed the Employee Handbook Acknowledgment of Receipt. It contains as applicable here, Section 6.12, Work Rules. Further, just a few weeks later, on February 7, 2013, H\_\_ signed Statement of Policy Regarding Behavior Management, The latter states in relevant part:

There are times when it will be necessary to physically restrain a resident. At those times, however, I realize that I may not use excessive force nor resort to punching and kicking. It has also been explained to me that failure to comply with the policy detailed here may result in disciplinary action, including dismissal. EX 6.

The Court promulgated its Policy 9.6, “Security and Control: Use of Physical Force” effective 1988, revised May 28, 2013 from the immediate prior revision of 2011. [7](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5k9" \t "_self) Both it and the policy regarding Behavior Management refer to “CPI.”

[7](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5k9_reffirst_footref" \t "_self) The record is barren of any indication that this Employer policy was disseminated beyond management, such as to H\_\_. However, beyond the revision occurring after the Belkin Decision, the Union did not address those facts.

The Court institutionalized for its training regimen of the DO's the program developed by Crisis Prevention Institute (CPI). The Institute developed certain de-escalation and intervention techniques with the object of de-escalating conflict thus negating the need for use of physical force. CPI training is given approximately about once per year. The last training H\_\_ had taken was around the time he returned from retirement, 2012. It consists of four to five classroom sessions using reading materials, answering questions, watching a video, and quizzing each other.

CPI counsels using behavioral management techniques and certain physical maneuvers (“Nonviolent Physical Crisis Intervention”) as a last resort designed to neutralize the activity and bring about avoidance, release control and transport in order to de-escalate the crisis and, optimally, remove oneself from the conflict until assistance is obtained. The three major components were referred to as “jump back,” “block a blow” and “call for assistance.” None of the demonstrated techniques depict striking with the hand, foot or anything else or any activity remotely appearing to be combative. The diagrams picture conflicts with small children but some show females opposing a larger male. Practicing the CPI physical maneuver was not included in the annual refresher but was given in the first session. For H\_\_ that was a decade or so ago.

H\_\_ testified the CPI techniques were ineffective against juvenile attackers, and even less so with the 18-21 year old residents. H\_\_ had no other form of self defense training while a DO. Neither did he receive training particular to the Court's use of force policy nor did he receive any instruction on handling violent, and non-compliant 18-21 year-old, young adults.

Other DO's also complained that the CPI techniques were not effective. Superintendent Terrance Jenkins and the former Superintendent reviewed the CPI techniques used by the Court. The review included a survey in 2012 by asking other courts in the State of Ohio about the types of techniques each employed. To date that review resulted in no changes.

Superintendent Jenkins stated at the October, 2013 budget meeting in, that the Court does not provide formal training to work with young adults aged 18-21. Deputy Superintendent Craig Bruehler testified that had not changed to date. Policy 9.6 does not limit the use of force standards under CPI to any particular age level.

George Kwan, a Cleveland Police Officer and an instructor on use of force at the City Police Academy and Cuyahoga County Community College, testified that the CPI techniques were not adequate technique for self protection. In his critique he said CPI does not give enough options since it uses behavioral management techniques almost exclusively. The CPI training manual is deficient in offering an employee options on protecting themselves. When physical maneuver is involved, Officer Kwan testified that the “practical portion, the hands-on training, is the most important part of training.” He believed frequent repetition was necessary to train muscle memory and reduce response times and even to demonstrate newer techniques that assailants use.

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The fact is found that the CPI training does not provide a self defense manual but a duty to flee manual based on its contents and the critique by Officer Kwan. It has been challenged as inadequate for the current resident population by Grievant and other DO's as acknowledged by management but has not yet been improved.

***The Montgomery E-mail Directive***

An 18 year-old resident of House Three, MR, had been the source of several recent problems as of July 17, 2013. In May he was fighting with another resident of the same age. The same day he took another resident's lunch. On July 12 two reports were generated on his transport to the hospital in which his behavior was out of control and he threatened to escape. On July 13 an incident log reported MR threatened to kill DO Helton and his family when he got out. He also exposed himself. On July 14, he attacked a resident and resisted movement to another room. He was confined to the room but persisted with threats to staff. On rest room break he pulled the fire alarm. He feigned illness and became abusive to the nurse. In the afternoon he later caused a sprinkler to burst. H\_\_ was the DO that day.

At noon July 15, Jack Montgomery the House Three Unit Manager and H\_\_’s supervisor, sent a memo entitled “Contingency Plan MR.” (EX 4) It was a directive to all employees, including H\_\_, that ordered MR confined and prohibited all employees from engaging MR one-on-one:

Because of the incidents with MR, he is to be confined until further notice. He is to be allowed out of his room at 8:00 AM to shower and take care of personal hygiene. After that every 2 hours, staff is to ask him wether [sic] he has to use restroom. If he refuses, you are not to let him out at any other time! Also, the person assigned to the Pod is to call for assistance from the floater, before he is let out. At no time do I want a staff 1-on-1 with the resident!

At 10:50 PM allow him out to use the restroom, he should not be allowed out until 8:00 AM the next morning. Make sure all documentation (confinement logs) is up to date and complete.

He is to be confined in the room on Pod B, that has the sprinkler off.

Montgomery testified that he did not know whether all of staff read it, but that it was “policy” that they read the e-mails and he assumed they had. The read-receipts printed in August showed for various recipients that it was read, “emptied” or deleted.” For H\_\_ it shows emptied July 24. Montgomery did not post the memo.

H\_\_ testified that he saw no directive related to MR prior to the incident of July 17. He specifically remembered that on July 17, when he was walking out of the Pod holding his lip, someone stated, “you know you got an e-mail about him.” H\_\_ testified his response was surprise. H\_\_ testified he read the e-mail days after July 17. At that time he could not see how it pertained to the incident. He understood it to mean that there should be a floater to assist when MR was let out to restroom. On July 17, H\_\_ did not let him out of the room. When he brought the food, he was outside the room; MR was inside. He had no intent on letting him out.

H\_\_ worked July 18 and on July 19 began his vacation to Jamaica. He came back for a week and was off again on August 6 to Disneyland and returned August 12. However, the read-receipt for the Montgomery e-mail shows H\_\_’s copy emptied on July 24. Deputy Varga confirmed he could not reach H\_\_ on July 19 but spoke to him on July 30.

Deputy Superintendent Bruehler delayed his investigation because of the vacation and obtained a statement from H\_\_ on August 12. The statement addresses the lack of routine for providing breaks for MR in five lines stating that it was irregular. Deputy Superintendent Bruehler had asked H\_\_ if he was aware of the e-mail, and H\_\_ responded, “yes.” (Tr. 298.) As an obvious add on to his statement on completely different subject, the last sentence said, “Yes I *viewed* the e-mail.” It does not state when that was. Bruehler's Summary stated H\_\_’s statement indicated ambiguously he was “*aware*” of the e-mail.

What was proven is that H\_\_ did not read the e-mail until after July 17 as he testified. Even though it was unexplained how the empty-receipt might happen while he was probably in vacation, it happened July 24, a week later. As Bruehler testified it is unknown from the receipt whether it was read or not. The receipt was ambiguous. The August 12 statement and the finding of Bruehler's Summary are also ambiguous as to time of actual knowledge. The only evidence of actual knowledge is H\_\_’s testimony.

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Nothing seriously contradicts this finding. Some testimony of PDC Hearing Officer Miller appears contrary but it is flimsy and thus not credible in context of the rest. On direct when describing the hearing he said H\_\_ acknowledged receiving the e-mail before the incident and deleted it after reading it which is “normal” and “not uncommon.” He was completely unaware that conflicted with the receipt of July 24. Then he said in a narrative answer on his rationale that H\_\_ “concurred that he *read* the e-mail prior to the incident, was *aware* of it.”(Tr. 101.) Without challenge or prompt, he said “read” and then immediately corrected to “aware,” which is the ambiguous language of the Bruehler Summary that he had at the hearing. He is backpedaling. On cross examination Miller would not say whether he had testified that H\_\_ immediately deleted it after reading or waited five days before deleting. When confronted with July 24 receipt, he said he did not recall it. Tr. 107-108 Although this was one of his concerns at the PDC, his Hearing Officer's Report did not mention any such admission by H\_\_. H\_\_ vehemently denied making such a statement at the PDC. The Arbitrator is not convinced the Employer proved H\_\_ read the e-mail before the incident on such testimony, even with reference to the other ambiguous evidence offered to refute H\_\_.

***The July 17. 2013 Incident***

The Detention Center is architecturally organized into a series of Houses, each having three pods (A-B-C). A pod consists of a ten rooms (or “bedrooms”) surrounding a day room. There is one resident per room. When overcrowded, as in July 2013, residents housed in the pod who do not have rooms sleep on cots and mattresses in the day room. The bedrooms can be secured when required. The day room has upholstered chairs in rows all facing a television. Access to the pod is from the common room where the staff meet when necessary. It is separated from the pods by a glass wall. The supervisor is usually there. Each pod has one DO and there is a floater who assists in the house at whatever pod he is needed.

The PDA is an electronic device the size of a 12 oz. soda can, and about the same weight when full. Once logged on, the DO does not need to re-log in when using the device. It is used to communicate, to open doors to the bedrooms in the pods, to view video cameras, and enter other information. Opening doors requires pushing two buttons on the PDA. Alerts are communicated by the touching both of the yellow buttons on the side. Residents have seen the PDAs often enough that is assumed they know it opens doors and could figure out how to use it quickly.

The incident occurred at House Three, Pod B. on July 17. Aggressive, violent, and manipulative residents stay in House Three, Pod B. Residents under the age of 18 do not stay in this Pod unless there are quite violent. There were more than 10 residents that day (testimony varied 12 to 16). The nearest other staff were in the common room outside the Pod. MR's room was furthest from the day room door and behind all the rows of chairs.

The events of the morning of July 17 began with H\_\_ as DO in House Three, Pod B. He was eleven weeks post surgery on his shoulder but was still undergoing physical therapy. There was no floater assigned to House Three that day. Prior to July 17, H\_\_ said he had only minor problems with MR, his opinion of him was that he was, “All mouth, all talk, no action. Follower.” (Tr. 282.) In fact the resident had told him that he respected him and would never put hands on him.

MR was locked in his room. H\_\_ let MR out of his bedroom to use the restroom just before 10:00 a.m. While out of his bedroom, MR took a mattress from another resident in the day room and reentered his own room. When confined to their room, residents are prohibited from having a mattress in their rooms except at night. H\_\_ tried to retrieve the mattress. First he asked for it back. MR being loud, laughing and silly and would not give the mattress up. H\_\_ was concerned about tugging the mattress away from MR because of his shoulder injury. He closed MR in his bedroom and called for assistance. Montgomery was summoned and then another DO and the mattress was retrieved from MR's room. As they did so MR became loud, threatening and belligerent. H\_\_’s incident report stated that MR “tried to hit and kick us,” “made threats toward staff,” and “threatened to retaliate.” He explained that MR was antagonistic toward Montgomery who had confined him to his room. Whenever MR had asked H\_\_ to let him out, H\_\_ told him Montgomery said he could not get out.

After the mattress incident, breakfast was distributed around the pod. It was over an

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hour late. H\_\_ delivered the meals to all other residents first. For any on confined in their rooms, the procedure was to open the door and put the food on the floor. It was the same routine he had used throughout his employment.

The activity in the Pod is recorded on a Court network video recorder. The video evidence accurately reflects H\_\_’s testimony and was described other witnesses that studied it, Deputy Varga and Officer Kwan. This testimony reflects what the Arbitrator has perceived. It is contradicted by the Employer mostly as a matter of emphasis rather than as to what appears. The critical video frames in the Arbitrator's review are as follows. The principal event transpired between in one minute, between 10:09:27 when H\_\_ brought in MR's meal and 10:10:09 when staff entered.

*10:00.* H\_\_ is already in process of retrieving the mattress, food tray is in the room. H\_\_ is visible alone at MR's room (MR is not).

10:02 H\_\_ goes to the door to call for help. On his way back H\_\_ moves the food cart to in front of MR's room.

10:04:13 Supervisor arrives at the room at.

10:04:32 A second person is summoned by resident probably; Montgomery goes out of the room to put his keys/tags on the food cart. The two go in the room where H\_\_ had been all along and the mattress is extracted.

10:05:09 The two leave and the door closes.

10:06:02 Montgomery picks up his items from the food cart. H\_\_ follows the two to the door, then returns to the food card and delivers the food.

10:08:49 He takes the cart out of the day room

*10:09*

09:04 Returns with MR's meal.

25:856 Nearest resident begins to turn around while H\_\_ is opening the door to the room.

27:025 H\_\_ extends the tray into the room, hand appears from inside.

27:359 MR contact with tray, H\_\_ body relaxed.

28:226 H\_\_ moves left arm (“*peace sign*”), MR head visible

28:360 MR right hand coming forward, H\_\_ left hand visible above

28:460 Both MR arms coming forward, H\_\_ *plants feet*, left arm extended (pushing),

28:598-793 MR pushes H\_\_ arm up, MR body moves back

28:660 H\_\_ leaning into room

28:627 MR grabs H\_\_’s left arm which is twisted

28:727 MR push H\_\_’s left arm up

*28:927* *H\_\_ right arm* moves first time

29:060 MR arm above H\_\_ head

29:127 MR body moving forward, H\_\_ right arm coming down

*29:194* H\_\_ and MR body to body contact visible in window (Grievance answer identified this as the first strike although not apparent)**#0**

29:327 MR head below H\_\_ chest

*29:394* *MR right hand visible on H\_\_ belt first time*

29:258 to 30:061 MR pushes H\_\_ back and emerges from room still holding belt

29:995 H\_\_ raises right arm PDA in hand, MR under him pushing

30:061 H\_\_ right arm comes down

30:128 H\_\_ right arm raised, strikes MR with PDA **#1?**

30:195 Both men moving into corner of room

30:596 H\_\_ strikes MR **#2**

31:129 Last view of MR right hand on belt

31:563 H\_\_ strikes MR **#3**

32:030 H\_\_ strikes MR **#4**

32:430 MR head next to H\_\_ head, H\_\_ strikes MR **#5**

31:553 A second resident looks over.

32:624 H\_\_ strikes MR **#6**

32:963-297 MR grabs for PDA with left hand, H\_\_ pulls it back twice

33:137 All residents looking toward the corner.

The two men stand full extension body to body at the corner then move out of the corner

*39:337* *MR left hand visible off belt* moving up H\_\_ right side.

40:539 MR right arm, H\_\_ left arm disentangle

40:839 MR right hand reach for PDA

42:808 MR right hand holding H\_\_’ shirt, H\_\_ hold released

*43:108 The men break clean*

**10:10** The two walk around the day room, H\_\_ apparently trying to get MR back to his room

*09:601 Day room door opens*

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H\_\_ testified [8](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5v6" \t "_self) as he opened the door to set the food on the floor, “he just was on me, just lunged at me. They say he knocked the tray down. I don't remember his tray down, I remember him coming at me. I put my hand up to try to stop him. He came at me. That's when he grabbed me.” … “I was trying to stop him from coming at me, trying to push him back, …[he] grabbed me and put me in a hold … I didn't know he had me by the belt. I couldn't move my left arm. I felt my head throbbing from the knot I had on my head. I started to feel blood in my mouth.” … “The first thing I said was, MR stop doing this, quit playing…. let me go, you're going to get in trouble. Stop it, again.” MR never responded. At that point he called to the residents in the day room to hit the alert button. There were alert buttons in the old building on the wall but not in the new one. That is when some of them said “knock him on his old ass, take his ass to the ground.” … “[H]e had his arm around me and was trying to take me down.” H\_\_ who had wrestled in high school recognize the move to pull someone towards you and force them back over. And I felt he was trying to take me down and I was still trying to get away. “At one point he put his mouth onto my neck, I thought he was going to bite me.” He was afraid MR would beat him and he could be killed. [9](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5v8" \t "_self) “I was trying to hit him with my hand. I wasn't even aware I had the PDA in my hand at that point. All I wanted to do was get away.”

[8](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5v6_reffirst_footref" \t "_self) Excerpts taken from Tr. 286-88.

[9](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5v8_reffirst_footref" \t "_self) H\_\_ testified he was in fear of others joining in because at least one other resident was an HF leader, the one sitting nearest the altercation.

MR was trying to get the PDA out of H\_\_’s hand. Nobody was in the pod when MR released H\_\_. “I didn't say anything to him. All I wanted to do was get away. I started walking out. By that time Montgomery was coming in and I just left. Went out to the room, grab a paper towel, put it on my lip.” (Tr. 290.)

Officer Kwan described the video. When H\_\_ hands him the tray with his right hand, it is knocked out of his hand. There was enough of a pause for the verbal interaction H\_\_ described. MR aggressively moves towards H\_\_; H\_\_ puts his hands up in a defensive fashion as MR lunges for him. H\_\_ pushes back with his left hand. Then MR lunged towards H\_\_’s waistband, grabbed him “real deep into a hold.” H\_\_’s left arm appeared to be trapped by the grab.

Deputy Varga described the video. The food was smacked out of H\_\_’s hands then MR grabbed H\_\_. Using his left hand H\_\_ shoves MR back a few times while stepping back all in one motion. Then MR was able to “bear hug” around him. MR with his right hand grabs H\_\_’s belt, preventing him from being able to push MR off.

The Employer claims the video shows that H\_\_ entered MR's room and handed MR his meal. One second later, with no physical provocation H\_\_ pushed MR with his left hand, and one second after that, using his right hand H\_\_ struck MR on the head with his PDA. During the next three seconds the video shows that MR grabbed H\_\_’s belt and H\_\_ landed five (5) more blows to MR's head with the PDA. It claims the video does not show is any attempt or effort by H\_\_ to dissuade MR or to avoid the confrontation. It says H\_\_ stopped “his attack” only when other staff entered the pod. The Employer emphasizes the fact that H\_\_ never denied that he struck MR and that he used the PDA as a weapon. In addition, disregarding the Montgomery directive repeatedly, he did not get assistance with the meal when he knew that assistance was available because of the mattress caper. He also let MR out to go to the restroom earlier. Thus he himself is responsible for initiating the incident.

The video does not support finding the facts as the Employer paints them. Foremost, H\_\_ had no motive to attack It might be said (but was not) that he was a punitive personality and was retaliating for the mattress mischief. He had not been the brunt of the abuse over the mattress, Montgomery was. More likely MR was rankled that H\_\_, whom he had respected, sided with Montgomery over the mattress. Superintendent Jenkins admitted H\_\_ had not used force in a punitive manner. (Tr. 185) H\_\_ is not a punitive a person. A career as a special education teacher where patience is a job requirement might suggest that, but there is more. H\_\_ appeared quite laid back and self deprecating. Describing his return to work the next day, he said about the residents’ reactions, “I was entertainment, and entertainment was over.”

H\_\_ was not in the room but in the door way with his position partly obscured by the door. Although the audio is only available

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from H\_\_, all say in the initial movements there was time for him to attempt to call MR off as he said he did. It was defensive, not aggressive.

The facts found are as follows. H\_\_ intended to put the tray on the floor and MR hit it away out of his hand. MR came at him. H\_\_ used his left hand to deflect the oncoming rush of MR after the tray was hit away. He put his hand up in “peace sign” to block MR then used it to push MR back as he kept coming. MR hit at him and grabbed H\_\_ around the body holding his belt and pinning his left arm in an attempt to bring him down. The bystanders clearly understood that in the *res gestae* comments. H\_\_ defended himself by hitting MR rapidly six times in the head with the PDA. He called for help to the residents. Striking MR with the PDA appears prompt but a grab or hit by MR came first, before putting him in a deep hold with the belt. H\_\_ hit him to get released. The result was the unconscious use of the PDA to strike MR. MR grabbed for the PDA twice with his left and then released H\_\_ to go for the PDA from his right hand. As he released, H\_\_ began to back off. Montgomery came in when the two were walking it off. H\_\_ sought to de-escalate, deflect then defended himself as a last resort and disengaged at the first safe chance.

***Testimony on the Use of Force***

The incident was reported to Deputy Varga on July 19. He investigated through interviews, record reviews and analysis of the video, which he played 25 times and parsed into four sections. He and his supervisor, Sergeant Carroll, on behalf of the Sheriff Office determined that H\_\_ would not be charged but that charges would be filed against MR. The Court filed a motion to have MR bound over to the adult court and to county jail “due to the intensity of his uncontrollable behavior and aggressive behavior.” (Tr. 84-85.)

In his testimony Deputy Varga disagreed that H\_\_ failed to use de-escalation techniques. *He saw MR grab H\_\_ first, before the belt hold.* H\_\_ attempted to block or deflect MR which is a retreat. Deputy Varga testified it was appropriate under the circumstances, for H\_\_ to strike MR even with the PDA. He also said it conformed with CPI.

Officer Kwan reviewed the video footage, the Detention Center's policy on use of force, and a document on remedial CPI training. He also reviewed some of the CPI information available on the internet prior to testifying.

Officer Kwan testified, H\_\_ did everything possible to defend himself with his limited resources. H\_\_ was not using force in a punitive manner. Kwan analyzed the situation in terms of “fight, flight, or submit.” (Tr. 261.) H\_\_ had no way to run away because the resident had him in a deep hold. Submission was risky. The attack could de-escalate as well as escalate. MR's recent history assists that he would not give up until he had to. Kwan's opinion was that H\_\_ had only one reaction, to fight. As he explained, in a fight a combatant refers back to any training that they might have had. It may be self defense or it may be sports. With no training whatsoever, they will react instinctually.” H\_\_, in his opinion, “… was resorting back to instinctual type behavior to protect himself.” (Tr. 256-57.)

Deputy Superintendent Bruehler testified that he gave his opinion at the PDC that H\_\_ had attempted to use all three of the major components of CPI but was unable to do so. Bruehler testified that the H\_\_ was unable to “call for assistance” because the interaction with the resident was immediate, and he did not have time to use the verbal de-escalation techniques of CPI.

***Investigation and Termination***

Deputy Superintendent Bruehler was appointed by Superintendent Jenkins to collect evidence and provide a summary for the pre-disciplinary hearing officer. Superintendent Jenkins told Bruehler the Court intended to have MR charged criminally for the July 17th incident.

Bruehler gathered evidence and provided a Pre-Disciplinary Summary. His investigation entailed examination of the video recording, a collection of witness statements, the incident reports relating to MR and the Montgomery e-mail. He began around July 30 when he obtained statements of the Residents. Bruehler asked the H\_\_ to write the statement on August 12. That is the statement where H\_\_ acknowledged he had viewed the Montgomery e-mail. Bruehler did not interview Montgomery. Although the Sheriff's investigation had been completed, Jenkins did not tell Bruehler, and the latter did not ask, whether Sheriff's Office had decided if either the Resident or the Grievant were going to be charged. After consideration of the Court's rules and policies and

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the facts, Bruehler concluded that the evidence could support violations of Work Rule 6.12 Sections 8, 10, 11, 26, 32, 34, and 49 and Court Policy 9.6 (“Use of Physical Force”). On August 22, Bruehler issued a comprehensive report containing the information he accumulated.

A pre-disciplinary hearing was held on August 26 by Deputy Director Miller as hearing officer. The hearing lasted approximately 30 to 40 minutes. At the hearing, Miller reviewed the video several times, took explanation from those in attendance, and reviewed Bruehler's Pre-Disciplinary Summary and the statements and other documents attached to it. After the hearing Miller determined that H\_\_ violated the work rules and policy as cited by Buehler's Summary. Miller issued a report on August 29 finding the identical violations.

In finding the violation Miller focused on H\_\_ not complying with the e-mail and the use of force with a PDA. As to the e-mail Miller testified his concerns were whether H\_\_ complied with Montgomery's e-mail and whether he had received it. H\_\_’s actions were contrary to the e-mail. He also concluded that he did read it, but his testimony on that was deficient. *supra.* No such affirmative statement was made. Instead Miller jumped to that conclusion from the ambiguous phrasing of the August 12 written statement taken from H\_\_ by Bruehler. As for the use of force, he testified that the Employer's policies nowhere permit striking a resident. Miller admitted that at PDC Bruehler had testified about his opinion H\_\_ attempted to use all three major components of CPI but was unable to do so. Miller did not include that testimony in his Hearing Officer's Report. Therefore it was not available for Superintendent Jenkins and Administrator Kavalec. Miller did not take into account the H\_\_’s years of service. The only mitigating factors he considered were that the H\_\_ fearful of being overpowered and his shoulder injuries.

Superintendent Jenkins, reviewed the Hearing Officer Report, the video recording and the other evidence. On August 30 he recommended to the Court Administrator, Marita Kavalec, that H\_\_ be terminated. On the same day Kavalec authorized H\_\_’s discharge because his actions “violated the Employee Handbook.”

H\_\_ filed his grievance on September 3. There was a conference on November 7 when the Union raised four issues. They were that H\_\_ did not violate the Montgomery directive, that he did strike MR until pleading with him to stop and when he could not escape, CPI did not train for self defense, and discipline was not progressive. On November 14 Timothy McDevitt, Director of the Probation Department, provided the Employer's response addressing all four items raised.

***B. Has the Employer discharged Grievant from employment for just cause and if not what shall the remedy be?***

***1. Burden and Quantum of Proof***

**[**[**1**](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0#a0g0d5b6u6_1)**]**The Employer has the burden of proving just cause for its disciplinary and discharge actions and to support it with a relatively high degree of proof, clear and convincing evidence. [10](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5y3" \t "_self) It is the standard that applies where equitable interests are at stake. Clear and convincing is not a moral certainty but it is beyond mere probability. It is the proof needed to form a firm belief. [11](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5y5" \t "_self) Specific performance of an employment contract is a cause in equity and is identical to the function of just cause in labor arbitration. Any other standard is not adequate to the task. [12](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5y7" \t "_self)

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[10](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5y3_reffirst_footref" \t "_self) *Coatal Resin Co.*, [61](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_61_686&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_61_686&vname=lelacases)[686](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_61_686&vname=lelacases" \t "_top), 687 (Jenkins, 1973).

[11](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5y5_reffirst_footref" \t "_self) “Clear and convincing proof,” *Black's Law Dictionary* 5th ed., *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, paragraph three of the syllabus, approved and followed *State ex rel. Husted v. Brunner*, 2009-Ohio-5327, 123 Ohio St.3d 288, (Ohio 2009) at 293-4. “Clear and convincing” was first adopted in Ohio when it was distinguished from “clear and unequivocal,” the prior standard for equity in Ohio, because “unequivocal” denoted certainty, which is proof of a character equal to or exceeding the standard for criminal offenses. *Merrick v. Ditzler*, 91 Ohio St. 256 (1915) at 260.

[12](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5y7_reffirst_footref" \t "_self) A preponderance requires the case to break over the 50 yard line of more probable than not. Clear and convincing is the play with the goal-to-go. It is not a goal (*viz.* reasonable doubt) but sure looks like it might be. In the other direction, “substantial evidence” is just enough evidence to make the argument. In other words, it is a completed play even if it is short of the 50 yard line. It is a nice try. “Reasonableness” (i.e. the arbitrary and capricious standard) is even less than that. It is a good play call even if it ends in an incompleted pass. It is merely a good idea. Arbitral jurisprudence (e.g.*CCCP Juv. Div. and Laborers Local 890* *supra.*) that puts stock exclusively in the reasonableness standard for just cause is misguided. That said it has its place where the agreement calls for otherwise unfettered management discretion. Just cause does not do that.

***2. Standards for Just Cause***

Proof of just cause in labor arbitration typically involves a multi-factor analysis. *Enterprise Wire Co.*, [46](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_46_359&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_46_359&vname=lelacases)[359](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_46_359&vname=lelacases) (1966) by Arbitrator Carroll R. Daugherty is a traditional source for explaining just cause has become subject to multiple renditions and commentaries. [13](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5z1" \t "_self) One is the list in *Zellerbach Paper Co.*, [73](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_73_1140&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_73_1140&vname=lelacases)[1140](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_73_1140&vname=lelacases) (Sabo, 1979). [14](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5z3" \t "_self)

[13](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5z1_reffirst_footref" \t "_self) Koven & Smith, Just Cause: The Seven Tests (BNA 3rd ed., 2006, K. May), summarized the Daugherty analysis into its chapter headings: notice, reasonable rules and orders, investigation, fairness of investigation, proof, equal treatment, penalty.

[14](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m5z3_reffirst_footref" \t "_self)

1) did the employee have forewarning of the possible consequences of his action;

2) whether the Grievant's action is so detrimental to the employer's interest as to preclude the continuation of the relationship;

3) did the employer make an effort to discover whether the individual was guilty of what he was charged with prior to the discipline;

4) was the investigation conducted fairly and objectively;

5) did the investigation result in a conclusion that there was substantial evidence of the employee's guilt;

6) has the company applied its rules and penalties even-handedly and without discrimination; and

7) was the degree of discipline reasonably related to both the seriousness of the alleged offense and the past record of the employee. *In Re. Zellerbach Paper Co.*, [73](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_73_1140&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_73_1140&vname=lelacases)[1140](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_73_1140&vname=lelacases" \t "_top), 1142 (Arb. Sabo 1979).

Arbitrator Nolan more succinctly encapsulated the seven test analysis into two considerations split between the substantive and procedural elements, “[f]irst, the Employer must show that the employee committed the acts for which discipline was imposed; and second, the Employer must show that the level of discipline imposed was appropriate.” [15](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6a3" \t "_self) Within the two Nolan headings subsist the Daugherty questions. The Daugherty questions are more of a checklist of considerations. The first of the Nolan inquiries is the substantive just cause element [16](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6a5" \t "_self) and the last is comprised of the procedural just cause elements.

[15](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6a3_reffirst_footref" \t "_self) *Marine Corp. Air Station*, [82](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_82_28&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_82_28&vname=lelacases)[28](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_82_28&vname=lelacases) (Nolan 1983). The Employer cites the similar *Texas Lime Company*, [83](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_83_116&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_83_116&vname=lelacases)[116](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_83_116&vname=lelacases" \t "_top), 121 (Neas, 1984).

[16](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6a5_reffirst_footref" \t "_self) Using the *Zellerbach* rendition of Daughterty's seven tests, the substantive just cause inquiry is chiefly the second test of the listing with some overlap into others.

Arbitrator Nolan's first inquiry, the substantive justice inquiry, examines whether the act initiated by the employee in an antagonistic posture against the nature of the employment: whether the act done at Grievant's initiative is so detrimental to the employer's interest as to preclude the continuation of the relationship without any attempt at correction. It examines the employee's fault [17](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6a8" \t "_self) and only if that is present need the employer's procedure be examined.

[17](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6a8_reffirst_footref" \t "_self) Fault is often defined by reference to the Employer's legitimate standards of conduct or performance published in a reasonable set of work rules. See Koven & Smith, Just Cause: The Seven Tests, K. May ed. (BNA 2006, 3rd ed.), Ch. 5.II.A., “Proof”, at 311.

The Employer minimizes the substantive just cause inquiry as a question of the identity of the grievant as the employee performing the actions that lead to discharge. It identified H\_\_ as the employee in the altercation and dispensed with any other analysis of this factor. Even so, it managed to address all the Daugherty tests so its bypass of the first inquiry did not flaw its argument.

**[**[**2**](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0#a0g0d5b6u6_2)**]**On the other hand the Employer argued for the analysis of the Belkin Decision by passing reference if not in rhetoric. The Union's critique of that case was correct as far as it went. However, the decision is more than procedurally wrong. It is wrong headed. It dismisses the just cause jurisprudence of a half century as formulaic and surmises that just cause is subjective and situational. (*qv.*, p. 16) That is fundamentally contrary to the legal foundation for the public policy favoring labor arbitration as to just cause or anything else. While there is flexibility to consider different situations particularly as to remedies, arbitration is not the mere substitution of the subjectivity of one arbitrator for another, or for the parties’ intent. [18](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6b2" \t "_self) Arbitral just cause is a legal

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artifact that deserves its tradition honored as much as any other. If it is in the eye of the beholder then the parties will have no use of it in their agreements.

[18](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6b2_reffirst_footref" \t "_self) “When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsman may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless an arbitrator is confined to interpretation and application of the collective bargaining agreement; *he does not sit to dispense his own brand of industrial justice.* He may of course look for guidance, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.” *United Steelworkers v. Enterprise Wheel & Car Corp.*, 80 S.Ct. 1358, 1361 [[34](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_34_569&vname=lelacases)[LA](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_34_569&vname=lelacases)[569](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490569&fname=la_34_569&vname=lelacases" \t "_top)] (1960)

For substantive just cause to discharge H\_\_, the Court relies on its policies on insubordination and excessive force. The Union defends that the substantive cause was allegedly unproven. The procedural just cause elements put into consideration by the Union are the fairness of the pre-discipline investigation and hearing, and the progressivity and mitigation (proportionality) of the penalty. As elements of just cause the Employer retains the burden but using Daugherty/*Zellerbach* as a checklist, any procedural factors not contested are deemed satisfied.

***a. The Substantive Just Cause Element***

***The Substantive Justice Element: Insubordination***

Grievant is charged with insubordination, Rule 6.12, by failing to follow a direct order not to confront MR one on one. However, it is not proven to be insubordination on the facts.

In labor relations, insubordination has also been identified with the “obey now and grieve later” rule on the principle that the workplace is not a debating society but a hierarchal organization that requires the chain of command to be respected in order to operate efficiently. [19](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6b9" \t "_self) As a substantive cause of termination, insubordination is unique in a number of ways. It is an offense to the Employer's inherent rightful authority rather than the Employer's right to control the environment and its operations. It is an offense not so much of a prohibited affirmative act but of a non-act (nonfeasance). It has elements of specific intent to a degree many other offenses have not.

[19](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6b9_reffirst_footref" \t "_self) *Common Law of the Workplace*, 2nd Ed. (BNA, 2005) St. Antoine, Ed., “Discipline and Discharge” Section 6.8 “Obey Now and Grieve Later.”

To constitute a charge of insubordination the facts and circumstances must satisfy well defined specifications. [20](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6c2" \t "_self) First, the order must be given explicitly so that the employee may understand it. Second, it must be reasonable and work related. Third, it must be given by someone in authority or someone understood to possess authority. Fourth, the employee's refusal must be knowing, willful and deliberate, not merely negligent. Fifth, the employee must be made aware of the consequences of failing to comply. Finally, if practical, the employee must be given the opportunity to correct purportedly insubordinate behavior. Once having established those specifications, the employee may still be exempt from discipline if the order falls into one of the four recognized exceptions. They are, if the action required was illegal, unethical or immoral, or if it would place the employee in physical danger, or if it would place the employee in substantial (non-physical) jeopardy that lacked any satisfactory remedy afterwards, or if there is no feasible way to resolve the dispute through the grievance procedure. [21](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6c4" \t "_self) The Employer has the burden of proof of all of these specifications.

[20](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6c2_reffirst_footref" \t "_self) *Discipline and Discharge in Arbitration*, Brand, Ed. (BNA, 1999) “Refusals to Perform Work or Cooperate”, pages 156-157. The sequence was modified here from Brand in order to facilitate logical progression of the analysis so that the order would precede the refusal.

[21](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6c4_reffirst_footref" \t "_self) *Common Law of the Workplace*, 2nd Ed. (BNA, 2005) St. Antoine, Ed., “Discipline and Discharge” Section 6.8 “Obey Now and Grieve Later.”

**[**[**3**](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0#a0g0d5b6u6_3)**]**Here a reasonable and work related order (second) was made by someone in authority (third). It was not practical for H\_\_ to correct himself since the incident was so rapid and brief. (sixth) However the Employer has not proven the other specifications for insubordination by H\_\_.

The order given was not explicitly understandable by the employee. (first) While all the Employer's managers found it clear that no-one-on-one included delivering meals, it is the employee's understanding that is the focus. This is not a subjective consideration to be influenced by intentional or self serving misunderstandings of the order. H\_\_’s understanding is not unreasonable. H\_\_, when he read the e-mail, thought it meant no-one-on-one referred to when MR was let out of his room and not when he was in his room such as for meals. The text of the order, unexplained by Montgomery at hearing or in the pre-disciplinary process, leaves that open. Food delivery is as common as restroom/shower breaks but only the latter are given as a specific examples. The entire context is one of letting him out of the room.

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During the mattress extraction Montgomery knew H\_\_ was delivering food and that MR did not have his. If the order was no-one-on-one when delivering food into the room, Montgomery could have had the food given to MR then, or at least come back when H\_\_ brought it in, or could have told him not to do it alone. After an energetic event with MR, Montgomery did not behave as if H\_\_ should not be alone to deliver the food. Montgomery's interpretation of the order during the mattress caper also supports H\_\_. He said H\_\_ was not in a one-on-one situation. Tr. 237 However, H\_\_ was alone with MR when it began. On video he was alone with MR four minutes other than a few seconds when he summoned help. Montgomery not only did not remonstrate with H\_\_ over this but admitted he acted in accord with the e-mail. The Employer did not prove the order was calculated to be clearly understandable to apply the in room meal delivery function.

H\_\_ did not knowingly disobey/refuse. (fourth) The fact is he did not know of the e-mail until after the incident and did not read it until after that. The Employer argues alternatively that he should have known and his failure to read it is insubordinate also. There is no such thing as constructive insubordination. At a minimum the employee must both know and disobey. As for the obligation to read e-mails, the Employer would have to prove all the specifications as to that but there is no evidence beyond Montgomery's statement that it is “policy.” If proven, it would support only ordinary not gross insubordination since Montgomery's “policy” did not express the warning of possible discharge for failure to read e-mails, which is the fifth factor.

Montgomery's directive did not state the consequences of failing to comply. (fifth) This factor is often the critical one in determining the difference between gross (terminable) insubordination and ordinary insubordination. If the employee is told the consequences and persists, he knows that he is subjecting himself to termination. If that specification is omitted, it is more difficult to justify termination, if at all.

In this case since the order and its consequences were not clear and not known, the attempt to prove that H\_\_ refused or disobeyed fails to support both gross and ordinary insubordination. The Employer failed the burden of proof to convince that H\_\_ was insubordinate. [22](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6d2" \t "_self)

[22](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6d2_reffirst_footref" \t "_self) Since the specifications for establishing insubordination were not proven, the exceptions are not relevant and not discussed.

***The Substantive Justice Element: Excessive Force***

The discharge letter stated that H\_\_ was terminated for violating the Employee Handbook. The Employer argues that all Handbook charges, aside from insubordination, that were the basis of the recommendation and termination relate to excessive use of force. [23](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6d6" \t "_self) “Physical force,” Sec. 6.12.11 is not defined but must differ from “Physical assault, fights,” Sec. 6.12.10. The Court's Policy 9.6 was not cited in the discharge letter and it was not proven to be known to non-management personnel. Nonetheless management is guided by it and management may define “Physical force” consistent with that Policy. [24](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6d8" \t "_self)Policy 9.6 mentions the Statement of Policy on Behavior Management which was known to employees. It helps define “physical force.”

[23](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6d6_reffirst_footref" \t "_self) Two expressly do so, (6.12.10 Physical assault, fights; 6.12.11 Physical force ). One focuses on particular parts of the event (6.12.32 Improper use of Court property, ie the PDA) ant others are vague and unspecific (6.12.34 Carelessness ie negligence; 6.12.8 disregard for safety (not specified); 6.12.49 misfeasance etc., a catchall). These may not alone be terminable but add specification to the excessive force charge.

[24](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6d8_reffirst_footref" \t "_self) Any just cause notice or forewarning issues this may raise are ignored for now.

The policy statement in Policy 9.6, its first sentence is: “It shall be the policy of [the Court] that the use physical of force [25](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6e1" \t "_self) … shall be limited to instances of self-protection, … and then only as a last resort and in accordance with statutory authority.” It proceeds to state that only the least amount of physical force necessary may be used and never as punishment.

[25](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6e1_reffirst_footref" \t "_self) Same phrase as Sec. 6.12.11.

To this point the evidence shows that H\_\_ was not being punitive (Jenkins) and that his actions were not contrary to statutory authority at least with reference to criminal statutes. (Varga) [26](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6e4" \t "_self) What remains is whether the physical force was limited to self protection, whether it was a last resort and whether it was more than the least amount necessary.

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[26](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6e4_reffirst_footref" \t "_self) The lack of criminal charge could also eliminate any consideration of Sec. 6.12.10, physical assaults, as supportable from the evidence.

The balance of Policy 9.6 addressees the procedures for use of physical force when it “becomes necessary” i.e. for self protection. It states Behavior Management, alerts and de-escalation are to be employed first. The Behavior Management policy is concerned with “discipline, punishment or control” most of which is inapplicable (i.e. punishment, outline head A/B and E) or otherwise not relevant here (head C, D). However, it does add: “There are times when it will be necessary to physically restrain the resident. At those times … (employees) may not use excessive force nor resort to punching and kicking.” It concludes with a preference to team restraint.

Beyond alerts and restraint of the Behavior Management policy, the procedure of Policy 9.6 requires a call for aid and using only CPI techniques and nothing beyond that. Since use of physical force is “necessary” only for self protection, the policy is that only CPI maybe used for any necessary self protection.

**[**[**4**](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0#a0g0d5b6u6_4)**]**The record establishes that H\_\_ was defending himself as a last resort. In an incident of less than one minute, H\_\_ had no opportunity to call for alert, use restraint (even less so team restraint), or any other behavior management to any effect. Nonetheless, without dispute he did attempt to de-escalate. When the tray went in the room (10:09:27) MR came at him as he tried to deflect with his left hand it holding it up like a peace sign which moved quickly into a push as MR continued the approach. MR pushes the hand away. H\_\_’s undisputed testimony was that he verbally tried to call MR off. There were about three seconds from the start before H\_\_ planted his feet to ready for action. He even tried to call for help to the residents later (10:09:31) but to no avail. The de-escalation effort was made consistent with CPI given the circumstances.

The Employer's argument was that excessive force was used by H\_\_ who, unprovoked, attacked MR and pommeled him six times with a hand held weapon, kept pressing the attack, pinned him in the corner and only stopped when another officer came in. That is shockingly disconnected with the evidence except that H\_\_ did strike MR with the PDA a number of times.

The video sequence as seen by Kwan/Varga and the Arbitrator shows MR being aggressive as soon as the door opened. He hit the tray, tried to get out and was pushed back, then he came full at H\_\_. The door obscures much of the initial interaction. H\_\_’s testimony can be relied upon since what is visible confirms it. As MR came at H\_\_, he grabbed H\_\_’s belt in an effort to control H\_\_’s body and take him down. As they clear the door in the video MR's hand is already on the belt with his right arm across H\_\_’s left arm. H\_\_, being pushed back out of the door, was able to wheel MR into the corner but he was still being held with only one arm free. MR's hold persisted and H\_\_ struck him a number of times with the PDA in his right hand. MR's right arm did not release the hold on H\_\_’s belt and arm until he failed twice to reach the PDA with his left hand. He released his hold and eventually reached for the PDA with his right. As the hold was being released, H\_\_ relaxed and started backing off. MR was the last in contact, holding H\_\_’ shirt. The whole event took 34 seconds. The day room door did not open for another 26 seconds.

H\_\_ was not the aggressor. He did not, unprovoked, corner and pommel MR. He did strike him. The witnesses question how many times, five or six, and the Employer argues one is too much. There are at least five clear strikes (*supra.* pg. 25, #2 to #6), possibly a sixth (#1). All were after the belt grab and before the release. The belt grab and hold make them all defensible.

The grievance response places the first strike at 10:09:29:194 (#0) which is before MR's hold on the belt becomes visible 200 milliseconds later. The Arbitrator's repeated view of the evidence cannot confirm that with conviction. [27](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6f3" \t "_self) It appears the arms are grappling or flailing behind the door. When H\_\_ pushes, MR grabs and twists H\_\_’s left arm before H\_\_’s right arm ever moved. H\_\_’s right arm did come into the room but it cannot be said clearly convincingly that it is a push, a strike, or a miss, or a block. Notwithstanding what millisecond the belt grab occurred behind the door, enough aggression was happening there that H\_\_ fended off with his left hand alone that needed his right to move for the first time, 20 seconds into the 34 second altercation that MR began.

[27](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490569&vname=lelacases&wsn=505540400&searchid=24309127&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0d5m6f3_reffirst_footref" \t "_self) Varga confirms MR stuck H\_\_ first then MR emerges holding the belt.

It comes to this. Is striking the resident excessive self protection particularly since it is not prescribed by CPI? Its hallmark physical techniques are: jump back, block the blow and

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call for help. To limit self protection to such techniques is to remove physical force from self protection. Even so, H\_\_ did all those. Then of course, there are the restraint holds. The grievance response suggests these are self defensive. The problem, as the Arbitrator sees it, is what CPI technique should be used when it is the officer that is being restrained? The stated purpose of CPI is to negate the need for use of physical force. What is the technique that negates the need for physical force in that case? CPI and the Court's policies have no answers. But H\_\_ needed one, fast.

Officer Kwan explained convincingly that combatants in a fight resort to their training, and if none, then to instinct. Based on the evidence that CPI is not a self defense technique (Kwan, Varga), H\_\_ was untrained. His resort to sports (high school wrestling) or instinct (blows) is legitimate self defense which is the reason he was not criminally charged. The Employer argues criminal responsibly differs from its standards and is not a consideration. That theory ends in the *cul d sac* that the employees must surrender the right to defend their person as a condition of employment but the Arbitrator will not impugn the Employer with that. Of course it is relevant. Nothing else, nothing the Employer offers in particular, answers the question: what does the officer do if he is the one being restrained? The best answer is what H\_\_ did. He backed up as he was attacked, turned the resident to the wall to *restrain* him until he was released from the hold, striking him instinctively, then stopped when freed.

It may have been unfortunate for MR that H\_\_’s free hand had a PDA in it. However, given the security sensitive nature of the device, H\_\_ could hardly drop it to free his right hand, even if he had time to think of it. With a free right hand he might have options other than striking MR, but then the PDA would be open for other mischief against H\_\_.

The Employer did not clearly convince the Arbitrator that striking the resident in these circumstances was excessive self protection. Since it is Policy that the use of force is limited to self protection as long as it is not excessive, the Employer failed to prove the substantive just cause to discharge H\_\_.

***The Substantive Justice Element: Other Offenses***

Quite often when the charged misconduct is not proven, and does not sustain a discharge, a lesser offense might have been proven that would sustain a lesser penally. The failure of the proof on the necessary specifications for ordinary insubordination precludes that from supporting any form of penalty. The charge of excessive force is not susceptible of parsing. It cannot be rationally said that an action is both excessive self defense and wrongful. It is a complete vindication.

There are other charges the Employer made that fail proof entirely. Improper use of the PDA was not an intentional act and even excusable. Carelessness, safety, and misfeasance have no evidentiary support beyond what supports insubordination and excessive force charges generally. The record does not support finding a “lesser included” offense was proven.

***b. Procedural Just Cause Elements***

Some of the elements of procedural just cause have been contested. The Union argues that the investigation was unfair and non-contractual and that the discipline was not progressive and not proportionate. Inasmuch as other matters are dispositive, these need not be examined.

***C. Conclusion***

In light of the record in this matter taken as a whole, the grievance is sustained. The Grievant shall be made whole. The Union requested continuing jurisdiction be retained pending the implementation of the remedy. The Arbitrator hesitates to do so without a bilateral agreement to such jurisdiction. The parties will have leave to invoke continued jurisdiction within the 60 days following the award.

**AWARD**

I, The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into between the above named parties, and having duly heard the proofs and allegations of the parties, hereby AWARD as follows:

A. The Arbitrator finds for Laborers’ International Union of North America, Local 860 and against Cuyahoga County Common Pleas Court, Juvenile Court Division, that there was not just cause to discharge Grievant H\_\_ from employment.

B. Grievant will be reinstated to employment with his discipline record restored to its

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status before July 17, 2013 and shall be provided back pay and otherwise made whole.

C. The parties may invoke the Arbitrator's continued jurisdiction solely for the implementation of the remedy during the 60 days following the issuance of this Award.

D. The arbitrator's expenses and compensation shall be borne equally by parties.

The foregoing is in full settlement of all disputes presented in the hearing of this matter.