

ARBITRATION DECISION NO.:

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UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction
Ohio State Reformatory

DATE OF ARBITRATION:

January 13, 1987

DATE OF DECISION:

February 9, 1987

GRIEVANT:

Frederick Howard

OCB GRIEVANCE NO.:

G86-0223

ARBITRATOR:

Linda DiLeone Klein

FOR THE UNION:

Daniel S. Smith, Esq.

FOR THE EMPLOYER:

Gregory C. Trout, Esq.

KEY WORDS:

Progressive Discipline
Failure of good behavior
Disregard of procedural
requirements

ARTICLES:

Article 24-Discipline
§24.02-Progressive
Discipline

FACTS:

Grievant was employed at the Ohio State Reformatory as a Corrections Officer 2. Grievant

was removed, effective August 3, 1987, for neglect of duty and failure of good behavior. Grievant has been disciplined several times for neglect of duty between December of 1984 and February of 1986. Grievant has received one (1) written reprimand, a five (5) day suspension, a seven (7) day suspension, and a ten (10) day suspension, for neglect of duty. Grievant was finally removed for failure of good behavior, as a result of an incident in which excessive force was used on an inmate, by the Grievant.

There was a serious dispute between the parties regarding the circumstances surrounding the incident which led to Grievant's removal. The incident was investigated and reviewed by the use of force committee, in accordance with established agency procedure. The record of grievant's testimony during the committee proceeding was in conflict with certain elements of grievant's testimony at arbitration.

The Use of Force Committee weighed the evidence adduced at its hearings and reached the conclusion that the force used by the Grievant was unnecessary, excessive and unjustifiable. The committee further concluded that the Grievant violated established procedure by failing to handcuff the inmate and by failing to call a supervisor before unlocking and entering the inmate's cell.

EMPLOYER'S POSITION:

It is the contention of management as a result of the evaluation of the report of the Use of Force Committee, in conjunction with the Grievant's past record, that there was just cause for the Grievant's removal. Management further contends that the Grievant's actions in this incident constituted abuse upon an inmate in the custody of the State of Ohio, and under such circumstances, termination was warranted.

UNION'S POSITION:

It is the contention of the union that the severe discipline imposed by management was not justified. The union asserts that the Grievant acted reasonably in this situation; there was no supervisor in the area at the time in question and the Grievant exercised his best judgment when he attempted to comply with the instructions of his supervisors regarding the removal of trays after meals. The Grievant did not intend to harm the inmate, and, in fact, there is no evidence to demonstrate any physical abuse. The act of the Grievant was in self-defense, and therefore the Grievant was not at fault. The union contends that the rules and regulations of the facility have not been enforced or applied to other officers in the ****S2**** same manner. The Union asserts that the Grievant's testimony was credible and the punishment imposed by management was not commensurate with the nature of the incident. Finally it is the position of the Union that the discipline imposed was not progressive, and the Grievant should be reinstated and made whole for all losses

ARBITRATOR'S OPINION:

The Arbitrator reviewed the procedures set forth for incidents involving hostile inmates and concluded that the situation involved a routine act, and the Grievant was required to adhere to the required procedures before entering the cell of the inmate. Because the procedures were not followed, the Grievant created a high risk situation which could have jeopardized the security of the facility and the safety of the inmates and the employees.

In regard to the issue of the Grievant's credibility, the Grievant's initial written summary of the incident and his testimony before the Use of Force Committee are in conflict with Grievant's testimony at arbitration. Also, Grievant's testimony is in conflict with that of a fellow officer who was at the scene. The Arbitrator is of the opinion that the issue of credibility must be resolved in favor of management.

Finally, the Arbitrator concludes that the Grievant precipitated the situation, by a failure to comply with established procedures, and use of excessive force against an inmate without justification. The evidence indicates that the actions of the Grievant led to physical violence and mistreatment of the inmate.

AWARD:

From the testimony presented and the evidence introduced at the hearing, it was the opinion of the Arbitrator that there was just cause for removal in this case. The factual circumstances were investigated thoroughly by management and discipline was imposed in a timely manner. Based upon the nature of the offense as well as the Grievant's past record, removal was warranted.

TEXT OF THE OPINION:

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ARBITRATION PROCEEDINGS

BEFORE

LINDA DILEONE KLEIN

In the Matter Between:

**THE STATE OF OHIO
OHIO STATE REFORMATORY
MANSFIELD, OHIO**

-and-

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 11, A.F.S.C.M.E. AFL-CIO**

Opinion and Award

Grievance No.:
G86-0223

Discharge of Frederick Howard

Heard:
January 13, 1987

APPEARANCES

For the Employer
Gregory C. Trout, Attorney

For the Union
Daniel S. Smith, General Counsel
Frederick R. Howard, Grievant

ISSUE

Was the grievant disciplined for just cause?
If not, what shall the remedy be?

FACTS AND CONTENTIONS

In August, 1986, the grievant, a Correction Officer, received the following Order of Removal:
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"This will notify you that you are hereby removed from the position of Correction Officer 2 effective August 3, 1986.

The reason for this action is that you have been guilty of Neglect of Duty and Failure of Good Behavior in the following particulars, to wit: On April 20, 27, 30, 1986 and May 2, 10 and 15, 1986, you reported late for duty. Such behavior on your part constitutes neglect of duty. Additionally, on or about June 28, 1986 while assigned to duty on 1-South East Range you became involved in a dispute with inmate Hammond #R-134-429. You opened the inmate cell without proper security procedures and used excessive force on inmate Hammond. The Use of Force Committee found your physical contact with inmate Hammond inappropriate and unjustified and therefore, by definition excessive. Such behavior on your part constitutes failure to good behavior. It is noted that you received a letter of reprimand on July 7, 1985 for neglect of duty, on December 21, 1984 you received a five (5) day suspension for neglect of duty, on September 7, 1985 you received a seven (7) day suspension for neglect of duty, and on February 22, 1986 you received a ten (10) day suspension for neglect of duty. Therefore, no disciplinary action short of removal is appropriate."

There is a serious dispute between the parties regarding the circumstances surrounding the incident of June 28, 1986.

The grievant and Correction Officer Hristovski were working on 1 South East on the morning of June 28, 1986. This part of the facility is referred to as Security Control/Discipline Control (SC/DC), and it is the designated area for inmates who have had a variety of behavior problems while housed with the general population. Inmates in SC/DC can be considered "unruly and hostile".

The incident at issue began shortly after breakfast. The grievant was closing the cell door

chutes, and Officer Hristovski was passing out medication. According to Officer Hristovski, the grievant yelled for him to come to cell 14. Officer Hristovski testified that he responded at once and saw the grievant **3** unlock the door and enter cell 14. Officer Hristovski testified further that the grievant and the inmate were arguing; according to Officer Hristovski, the grievant said "cuss at me", and the inmate answered with "go back where you came from". Also according to Officer Hristovski, the inmate was in the corner of the cell and the grievant was standing in front of him. The Officer testified that the verbal confrontation continued and then the grievant struck the inmate. Officer Hristovski stated that he tried to separate the grievant and the inmate, but he was unsuccessful. At this point, Officer Hristovski pushed the "mandown" alarm and several officers and supervisors appeared on the scene. Correction Officer Werner was the first to reach cell 14; he testified that he saw Officer Hristovski standing between the grievant and the inmate, and he stated that he heard the grievant and the inmate arguing. Officer Werner grabbed the grievant's arm and took him out of the cell. Officer Werner testified that he did not see any punches being thrown, but the conversation from both participants was threatening. Officer Werner then assisted Officer Hristovski in handcuffing the inmate.

The testimony of the grievant contradicted the testimony of Officer Hristovski in various areas. The grievant stated that he was closing the chutes after breakfast, and the inmate in cell 14 pushed his tray out on to the range. The grievant pushed the tray back into the cell and asked the inmate what his problem was. According to the grievant's testimony at the hearing, he then opened the cell door to get the tray. The grievant **4** testified that up to this point, the inmate had not been hostile or unruly. The grievant testified further that the situation changed abruptly and the inmate jumped toward him; the grievant also testified that he held the inmate and asked him what was wrong. At the hearing, the grievant testified that he told a porter to get Officer Hristovski. According to the grievant, Officer Hristovski appeared immediately and told him to let the inmate go. The grievant testified that he released the inmate, but the inmate continued yelling and then began to hit and kick. The grievant denied throwing the first punch. The grievant was aware that the man-down alarm had been sounded, and he stated that other officers arrived to assist him.

In accordance with established procedure, this incident was investigated and reviewed by the Use of Force Committee. The grievant testified before the committee, and the record of his testimony during said proceeding was in conflict with certain elements of his testimony at arbitration. When testifying before the committee, the grievant stated that the inmate threw food at him and that the inmate threw a book at the bars and swore before any attempt was made to enter the cell to retrieve the tray. The grievant told the committee that he, rather than the porter, called for Officer Hristovski. The Arbitrator is noting the inconsistencies at this point for the reason that the arguments of the parties focus on the issue of credibility and the question of whether or not the grievant had reason to believe that the inmate was "hostile" before he entered cell 14. **5**

The Use of Force Committee weighed the evidence adduced at its hearings and reached the conclusion that the force used by the grievant was unnecessary, excessive and unjustifiable. The Committee concluded further that the grievant violated established procedure by failing to handcuff the inmate and by failing to call a supervisor before unlocking and entering cell 14.

Management evaluated the report of the Use of Force Committee in conjunction with the grievant's past record and made the determination that there was just cause for his removal. Management contends that the grievant's actions in this incident constituted abuse of an inmate in the custody of the State of Ohio, and under such circumstances, termination was warranted. The Employer requests that its position be upheld and that the grievance be denied.

The Union, however, contends that the severe discipline imposed by Management was not justified.

The Union submits that the inmate was not unruly or hostile when the grievant decided to enter

cell 14 to retrieve the food tray. The Union also submits that the grievant had no cause to believe that the inmate would attack him.

The Union states that the grievant acted reasonably in this situation; there was no supervisor in the area at the time in question and the grievant exercised his best judgment when he attempted to comply with instructions regarding the removal of food trays after meals. According to the grievant, supervisors **6** complain if trays are left in the cells and he felt that he was doing his job by entering the cell to retrieve the tray.

The Union claims that factors other than the actions of the grievant created this situation; there was no reasonable explanation for the sudden violent behavior of the inmate when the grievant reached for the tray. Prior to this, there was no basis for believing that anything out of the ordinary would occur, says the Union, and it is not a violation of any Post Order for an Officer to enter the cell of a non-violent, non-hostile inmate to remove a tray.

The Union argues that the grievant did not intend to harm the inmate, and in fact, there was no evidence to demonstrate any physical abuse. Had the grievant intended to harm the inmate, he would not have requested the presence of another officer, says the Union. The grievant was not at fault in this incident, claims the Union; his restraint of the inmate was an act of self-defense. The grievant was required to use some degree of force to subdue the inmate, says the Union, but the force was not excessive. The Union takes the position that the use of force does not necessarily constitute abuse; also, states the Union, what the grievant did to quell the inmate was not abusive in any way.

The Union contends that the rules and regulations of the facility have not been enforced or applied to other officers in the same manner as they were enforced and applied in the grievant's case. In addition, says the Union, the grievant was **7**trying to perform his duties in an antiquated facility which was understaffed on June 28, 1986.

The grievant's testimony was credible, claims the Union, and his conclusion that the inmate was not hostile prior to the opening of the cell door was reasonable under the circumstances; officers have to be able to use their discretion in "grey areas" such as this.

It is the position of the Union that the punishment imposed by Management was not commensurate with the nature of the incident. It is also the position of the Union that the discipline here was not progressive for the reason that the grievant's past record reflects only attendance related problems.

The Union requests that the grievant be reinstated and that he be made whole for all losses.

OPINION

The Post Orders for SC/DC clearly set forth the procedures to be followed in incidents involving hostile inmates. The addendum dated September 23, 1985, states that:

"In the event that an inmate that is housed on SC/DC becomes unruly, violent, or is considered dangerous to staff or to the security of the institution, he will be handcuffed prior to opening the cell door. If the inmate refuses the order to be handcuffed, the procedures for moving a reluctant/hostile inmate shall be followed.

GENERAL SECURITY PROCEDURE:

Moving a Reluctant/Hostile Inmate:

. . .

b) Decision to Move Inmate:

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When an inmate refuses to leave a cell (or is otherwise hostile or acting out in a violent manner) but is not self-abusing, the officer shall contact the supervisor in charge and report the status of the situation."

The Post Order dated October 1, 1984 advises Correction Officers that inmates in SC/DC need to be closely supervised and that they are to be viewed as high security risks. The Post Order goes on to state that these inmates have committed infractions of institutional rules. SC/DC item 200.09 provides that "Proper supervision and security of the unit must be maintained at all times. If help is needed, call the Control Room at once and/or radio for emergency assistance". Item 200.13 states "Keep cell doors and all other doors in the unit locked at all times". Item 200.282 provides "If difficulty should occur in the unit, immediately contact the Duty Captain by radio and/or call the Control Room for emergency assistance".

The rules concerning "Use of Force" define excessive force as that "force which, either by the type of force employed, or the extent to which such force is employed, exceeds that force which is reasonably necessary under all the circumstances surrounding the incident". These rules also provide that "force or physical harm shall not be used as prison punishment".

When new officers are trained, great emphasis is placed on the necessity of reporting problems with aggressive inmates to supervision by phone or beeper. Officers are also instructed to secure a sufficient number of people to handle the situation in question.**9**

It is clear from the documents submitted at the hearing that there are numerous rules and regulations which must be followed in situations involving the inmates in SC/DC, and there was evidence to establish that the grievant had been apprised of these rules on numerous occasions. By his own testimony, the grievant was aware that a supervisor should be called if an inmate becomes hostile and that the hostile inmate should be handcuffed before an officer enters his cell.

As the Arbitrator views this matter, the significant issue to be addressed is whether the grievant had cause to believe that the inmate was hostile before he unlocked the door and entered the cell.

It should be noted that under normal conditions, an officer is permitted to enter the cell of a non-hostile inmate in SC/DC to provide him with supplies to clean his cell and to remove food trays without calling a supervisor or handcuffing the inmate.

The Arbitrator is of the opinion that the situation at issue did not involve the routine act of removing a food tray from an inmate's cell. A review of the evidence, including the grievant's "summary of incident" report and his testimony before the Use of Force Committee, reveals that the inmate had been unruly in that he had thrown food out of his cell and he had sworn at the grievant. In addition, the inmate had thrown a book at the bars. Based upon this behavior, as well as the fact it is reasonable to suspect that an SC/DC inmate has a propensity for violence, the grievant was required to adhere to the above-**10** cited Post Orders before entering the cell. The grievant was required to contact the supervisor and to handcuff the inmate before unlocking the door and entering the cell. Discipline was justified for the grievant's violation of the rules.

Because the Post Orders were not followed, the grievant created a high risk situation which could have jeopardized the security of the facility and the safety of the inmates and the employees.

A significant credibility issue arises in this case. The grievant's initial written summary of the incident and his testimony before the Use of Force Committee are in conflict with his testimony at arbitration. Also, the grievant's testimony is in conflict with that of Officer Hristovski. After reviewing the evidence, the Arbitrator is of the opinion that the issue of credibility must be resolved in Management's favor.

Aside from the fact that the evidence establishes that the grievant had observed unruly behavior on the part of the inmate prior to entering the cell, there was also evidence to indicate that the grievant did not have to remove the tray from the cell. In other words, the grievant had no valid

reason to enter the cell. The inmate had sworn at the grievant, and the evidence suggests that the grievant responded angrily rather than adhering to procedures. The behavior of the inmate did not necessitate entry into his cell, nor did it warrant any use of force. The grievant precipitated what occurred in cell 14 by his failure to comply with established procedures, and he used excessive force **11** against an inmate without justification.

The grievant stated that he entered the cell without calling a supervisor and without handcuffing the inmate because the inmate was not unruly or hostile. Even if the Arbitrator were to accept this assessment of the situation, there is still the question of why the grievant did not hit his man-down alarm as soon as the circumstances changed. His failure to do so suggests that he was aware of the inmate's hostility and he was attempting to establish his authority over the inmate. Whatever the inmate said or did in this instance, the evidence indicates that the actions of the grievant led to physical violence and mistreatment of the inmate.

The Arbitrator finds from the evidence that there was just cause for removal in this case. The factual circumstances were investigated thoroughly by Management and discipline was imposed in a timely manner. Based upon the nature of the offense, as well as the grievant's past record, removal was warranted. It should also be stated that there was no evidence to demonstrate that the grievant was treated differently than any other Correction Officer with a similar record who had committed a similar offense.

AWARD

The grievance of Frederick Howard is hereby denied.

LINDA DILEONE KLEIN

Dated this 9th day of February, 1987 at Cleveland, Ohio.