

ARBITRATION DECISION NO.:

105

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Rehabilitation and Correction

DATE OF ARBITRATION:

January 28, 1988

DATE OF DECISION:

March 1, 1988

GRIEVANT:

Henry Carter

OCB GRIEVANCE NO

G-87-1120

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

John Porter

FOR THE EMPLOYER:

Greg Trout

KEY WORDS:

Just Cause

Abuse

Removal

Excessive Force

Due Process

ARTICLES:

Article 24 – Discipline

§24.01 - Standard

FACTS:

Grievant was employed at the Ohio State Reformatory at Mansfield as a Corrections Officer. On February 25, 1987, Grievant proceeded with other CO's to inspect cell blocks within the prison. While inspecting cell "C", grievant and an Inmate engaged in a water fight (each blaming the other for starting the incident). As a result, the inmate's water was turned off and Grievant was ordered to "clean up the mess." Grievant proceeded to clean the floor when Inmate apparently angered by the

water shutoff, threw toilet water probably containing urine on the Grievant. Grievant then ordered Inmate to come forward to be cuffed which Inmate refused to do. As a last resort, grievant took a fire extinguisher and thoroughly sprayed the Inmate. Grievant was written-up for the incident and later removed after disciplinary hearing.

EMPLOYER'S POSITION:

Grievant was removed for just cause. Although he was originally charged with a Rule 10 (horseplay) violation, it was changed to a Rule 2B (excessive force without intent to physically abuse) violation because of the seriousness of Grievant's behavior and his past disciplinary record. Grievant's behavior violated numerous rules and was premeditated. Moreover, his demeanor showed anger and retaliation which are never justified bases for using force against an inmate.

UNION'S POSITION:

Grievant's behavior does not constitute "abuse" under the terms of Article 24.01 of the contract. The Ohio Department of Rehabilitation and Correction violated the implicit due process concepts embedded in just cause under Section 24.01 of the contract because the Grievant did not receive notice of the true charge against him prior to his pre-disciplinary hearing. Such a failure of notice is prejudicial. And finally, under the circumstances, Grievant's behavior was reasonable and appropriate.

ARBITRATOR'S OPINION:

Based on the evidence, Grievant used excessive force against the inmate. However, Grievant's due process rights were violated when management changed the alleged violation without informing Grievant of the change. Although Grievant's due process rights were violated, the Arbitrator found that the grievant was not substantially harmed by the procedural violation hence his termination shall not be overturned.

AWARD:

To ensure future compliance with due process requirements Grievant is awarded full back-pay. However, the grievance is denied and termination is upheld.

TEXT OF THE OPINION:

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IN THE MATTER OF THE
ARBITRATION BETWEEN

Ohio Department of Rehabilitation
and Correction
and

Grievance No. G87-1120
(Grievant: Carter

OCSEA, Local 11, AFSCME AFL-CIO

Hearing Date:
January 28, 1988

For the Employer: Greg Trout

For the Union: John T. Porter, Esq.

Present at the Hearing were the following persons: Grievant Henry Carter, Union Counsel John T. Porter, Edward Faison, Correction Officer (Witness by Supoena), Dennis Cowell, Chief Steward, Butch Wylie, OCSEA Staff Representative, Brenda Persinger, OCSEA Staff Representative (Witness), Eric Dahlberg, DRC Superintendent (Witness), Richard Hall, DRC Labor Relations (Witness), Sgt. Robert Scott (Witness) and David Meeker, DRC Unit Manager (Witness).

Preliminary Matters

- Both parties agreed that the Arbitrator could tape the proceedings for the sole purpose of refreshing her recollection and on the condition that the tapes shall be destroyed when the opinion is rendered.

Both parties granted the Arbitrator permission to offer the

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- opinion for publication. The Arbitrator revealed a potential conflict to the parties.

Both parties waived any objection to the Arbitrator.

The parties stipulated that the matter was properly before the Arbitrator.

No request for sequestration of witnesses was requested. All witnesses were sworn.

Issue(s)

- The principal issue is whether the removal of the Grievant was for just cause pursuant to Article § 24.01?

Sub Issue (1). May the Arbitrator modify the termination pursuant to 5 24.01 which denies the Arbitrator power to modify the termination of an employee who is found to have "abused" a patient or another in the care or custody of the State of Ohio?

Sub Issue (2). Did the State violate the due process rights of the Grievant when the Grievant was originally charged with a violation of Rule 10 (horseplay) but subsequently disciplined for Rule 12B (Use of excessive force)?

Sub Issue (3). Did the State violate the rules proscribed in the Administrative Code (Chapter 5120-9) with regard to Use-of-Force reports, investigations, and hearings?

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- Relevant Contract Sections, Administrative Code Sections, Post Orders, ORC Sections, etc.

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24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. (Emphasis added)

§ 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand;
- C. Suspension;
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employers' decision to begin the disciplinary process.

24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the

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meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut. (Emphasis added)

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

§ 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cases to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been not other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

O.R.C. § 2903.33B(l) and (2)

(B) (1) "Gross abuse" means knowingly causing serious physical harm to a person by physical contact with the person.

(2) "Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person or by the inappropriate use of a physical or chemical restraint, **4**

medication, or isolation on the person. (Emphasis added)

Chapter 5120-9-01(B)(l) and (B)(2)

(B) As used in this rule and rule 5120-9-02 of the Administrative Code:

(1) "Excessive force" means an application of 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.

(2) "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing. (Emphasis added)

Chapter 5120-9-01(C)(1), (2), (3), (4), (5), (6)

(C) There are six general situations in which a staff member may legally use force against an inmate:

(1) Self-defense from an assault by an inmate;

(2) Defense of third persons, such as other employees, inmates, or visitors, from an assault by an employees inmate;

(3) Controlling or subduing an inmate who refuses to obey prison rules and regulations;

(4) Prevention of crime, such as malicious destruction of state property or prison riot;

(5) Prevention of escape; and

(6) Controlling an inmate to prevent self-inflicted harm. (Emphasis added)

Chapter 5120-9-01(D)

Force or physical harm to persons shall not be used as prison punishment. This paragraph shall not be construed to affect or limit the disciplinary measures authorized in

rules 5120-9-06 and 5120-9-07 of the Administrative Code. (Emphasis added)

Chapter 5120-9-01(E)

The superintendent, administrator, or staff member of a correctional institution is authorized to use force, other than deadly force, when and to the extent reasonably believes that such force is necessary to enforce the lawful rules and regulations of the institution and to control violent behavior.

Chapter 5120-9-01(H)

Whenever, in the judgment of the shift supervisor, any application of force may have exceeded "slight force" as set forth in rule 5120-9-02 of the Administrative Code, a medical examination of the inmate ****5****

shall be conducted as soon as practicable following the incident.

Chapter 5120-9-02(A)

The use of force report form, DRC 2000, shall be used in all institutions.

Chapter 5120-9-02(B), (B)(1), (B)(2), (B)(3), (B)(4)

A force report shall be filed, prior to leaving the institution at the conclusion of the employees' work shift, when one or more staff members:

- (1) Discharges a firearm;
- (2) Strikes an inmate with either a part of his body or with a weapon;
- (3) Uses chemical mace on an inmate;
- (4) Struggles with an inmate, pushes an inmate or otherwise exerts physical restraint or control on an inmate. (Emphasis added)

Such report shall give a detailed description of the manner in which force was used and the extent to which force was used throughout the entire incident.

Chapter 5120-9-02(C)

The associate superintendent of custody shall decide, after any necessary interviews or consultations, whether or not the incident warrants investigation pursuant to paragraph (D) of this rule. All incidents in which an inmate was struck, or where chemical mace was used, shall be investigated. Also, all incidents which involved injuries to the inmate or which involved more than slight force shall be investigated. Force which does not exceed that degree of force described in paragraph (B) (4) of this rule is "slight force."

If the incident is determined to have been slight force, and does not require investigation pursuant to paragraph (D) of this rule, the associate superintendent of custody shall place the use of force report(s) in a file designated for such purpose. (Emphasis added)

If the incident is to be investigated, the associate superintendent of custody shall ensure that a physical examination of the inmate for injuries has been conducted. The examination report shall become a permanent part of the record.

(D) The following procedures shall be used in all

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institutions to investigate use of force reports.

(1) The managing officer or his designee shall appoint a three-person investigating committee, one of whom shall be from treatment. The committee may include one correctional officer, but in no case may an officer involved in the incident, or his direct supervisor, be on the committee. Also, members of the rules infraction board or the hearing officer who conducted or will be likely to conduct hearings against the inmate arising from the same incident in which force was used shall not be on the three-person investigating committee. Notwithstanding the foregoing provisions, whenever use of force by one or more employees results in death of or serious physical harm to an inmate, or in any case where the director deems necessary, the director may appoint a use of force committee, consisting of any three persons the director may select, which shall perform the functions of a use of force committee under this rule.

(7) The managing officer or director shall review the entire record. He may send it back to the committee for additional investigation if he feels that this is necessary. Any additional interviews must also be in writing and signed. Once the managing officer or director is satisfied that the incident has been completely investigated, he may either accept or reject the investigating committee's conclusions. In either case, if it is determined either that the employee involved was not justified in using force, or that excessive force was used, the managing officer shall discipline the employee subject to applicable civil service regulations or union contracts. The options open to the managing officer include both administrative discipline, such as a verbal or written reprimand, suspension without pay, transfer, or discharge, and recommendation for criminal prosecution of the staff member. Such recommendation shall be made to the director or his designee.

Post Order (Local Control)

LC 300.252 - Procedure, Inmate & Cell Inspections

It is the responsibility of the Local Control supervisor to enforce all procedures specified for the L/C Inmate and Cell Inspection. Inspections are to be completed every day, seven (7) days each week.

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3. All inmates shall be properly secured according to policy and procedures before any cell doors are unlocked. In the event an inmate refuses to be handcuffed, procedures for movement of a reluctant/hostile inmate shall be followed.

LC 300.26 - Procedure for Moving a Reluctant/Hostile Inmate

Whenever moving a reluctant/hostile inmate ALWAYS follow the general security procedure as outlined in the departmental policy statement listed below regarding

reluctant/hostile inmate/s. The procedures established allow for controlling inmate behavior, but also provide for the safety of the officers and other employees of the department. The safety and well being of employees while performing their duties is of utmost importance.

LC 300.261 - General Security Procedure for Moving a Reluctant/Hostile Inmate

A. Initial Order: Upon receiving an order, or when judgment dictates that an inmate be moved, the officer/s shall convey the order to the inmate. He shall specify to the inmate exactly what is expected and induce the inmate to obey the order.

B. Decision to Move Inmate: 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 officer and supervisor shall evaluate the actual need or importance of moving the inmate at that moment. If it is not imperative to move the inmate immediately, the inmate should not be moved until:

1. The situation changes such that immediate movement/removal is necessary, or
2. A plan for moving the inmate is devised which reduces the change of injury to both the staff and inmate.

NOTE: Unless a situation demands immediate action officers shall always consult the supervisor in charge before taking action alone.

C. When Inmate Movement is Imperative: If it is decided that inmate movement/removal from a cell is imperative, every precaution should be considered to reduce the possibility of injury to staff and inmate. The following guidelines shall be followed:

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1. Action shall be initiated only after adequate numbers of staff are assembled. The general plan of action shall be explained to all who will be assisting. (Emphasis added)
2. All forced inmate moves must be video taped. Equipment shall be assembled and a staff member designated to film the move before any action is taken.
3. Staff shall prepare for and use the minimum amount of force necessary to control the inmate/situation. Employees shall use appropriate self defense techniques when protecting themselves. Administrative Regulations 5120-9-02 and 5120-9-03 shall be followed.
4. Before acting, a warning shall be issued. Whenever possible, the inmate shall be verbally induced to cooperate.
5. Every effort shall be made to induce the inmate to cooperate/obey the order without opening the cell. Several methods may be considered, including:
 - a. Use of high pressure water hose

b. Use of chemical/liquid mace

Standards of Employee Conduct

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Personal Conduct

4. Brutality, physical violence, or intimidation of inmates, parolees, probationers, furloughees, and/or their families, by employees will not be permitted, nor will force be used beyond that necessary to subdue him/her. Employees should understand and be familiar with Ohio Administrative Code Sections 5120-9-01, 5120-9-02, 5120:1-1-39, and Adult Parole Authority Bulletin 410, which deal with the subject of use of force.

5. Use of obscene or verbally abusive language by employees toward inmates, parolees, probationers, furloughees, or others will not be tolerated. Employees will conduct themselves in a manner which will not be demeaning to inmates, parolees, probationers, furloughees, staff, visitors, and members of the public.

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Responsiveness

A. Inattention to duty in a correctional environment can result in escapes, assaults and other incidents. Therefore, employees are required to remain fully alert and attentive during duty hours.

Rule

		Penalty Points for Each offense		
		1 st	2 nd	
3 rd	4 th			
No. 10.	Engaging in horseplay, scuffling, throwing things or initiating, conducting, or participating in demonstrations.	2	3	5
No. 12b.	Use of excessive force without intent to physically abuse the inmate, furloughee, parolee or probationer.	5	5	

Facts

This situation arose at the Ohio State Reformatory at Mansfield, Ohio. The particular area involved is called "Local Control." The Local Control area houses inmates who are locked in

their cells for disciplinary reasons. Two inmates are housed per cell. These inmates are allowed out of their cells for only limited and very specific purposes.

This incident took place on the third shift on February 25, 1987. Assigned to Local Control that evening were Sgt. Robert A. Scott, Correction Officer Faison, and the Grievant, a Correction Officer.

Certain discrepancies and contradictions appear in the **10**

stories of the Grievant and Sgt. Scott. However, the relatively dispassionate account of the night's activities and events presented by C.O. Faison coupled with those parts of Scott's and the Grievant's accounts which concur with Faison's, present the Arbitrator with a basically clear picture of the facts necessary to understand the situation.

A basic job of C.O.'s, as a team, is to inspect all cells. That evening C.O.'s Faison and the Grievant proceeded as a team to inspect A & B blocks. They then proceeded to the second floor to inspect C & D blocks. Sgt. Scott remained at the desk. After passing the last cell (#15) at the end of C block, C.O. Faison proceeded to D block. He heard the sound of loud voices, the exchange of profanity, and splashing of water come from C block. The Grievant appeared shortly thereafter and told Faison that "the asshole threw water on me" (Grievant's testimony). Faison noted that the Grievant had water spots on his shirt. How the water came to be thrown is disputed. The Grievant claims that Inmate Blake called him to the grill and spontaneously threw the water. The inmate claims that the Grievant called him over to the door to see a baby frog that the Grievant claimed to have in his hands. When the inmate came close, the Grievant smashed his hands together and sprayed water in the inmate's face. The inmate admits throwing a half cup of water on the Grievant in retaliation. The inmate claims that the Grievant laughed and said "I'll be back". The Grievant admits taking a fire extinguisher, displaying it to the inmate and "letting that boy know that if he

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did it again, I'd use the fire extinguisher."

Subsequently, Sgt. Scott inspected the cell block. He observed water on the floor. As he remembers the night, he questioned the inmate who replied "ask your officer." Sgt. Scott testified that he questioned the Grievant at this time who allegedly replied "don't worry I already took care of it." To which Scott replied, "I wish you hadn't told me that." After his discovery of the water, Sgt. Scott shut off the water to that cell block, the standard discipline for a water fight. According to C.O. Faison, Sgt. Scott ordered the Grievant to get a porter and get the water cleaned up. Scott then left the area to take in the "count". Apparently at this time, the Grievant proceeded back to C block while there, Inmate Blake, apparently angered by the water shut off, threw toilet water probably containing urine on the Grievant. According to the Grievant's own testimony "I was on fire" "Nobody throws urine on me" "I was on fire"!

The Grievant states that he went immediately to the phone, called Sgt. Scott, reported the

event, and asked what to do. The Grievant claims Scott told him "to prepare the inmate to come out." Sgt. Scott denies this order. Scott states that he told the Grievant "held be right down." The Grievant claims he returned to the cell and ordered the cell mate of Blake to come forward to be cuffed, which he did. According to the Grievant, then yelled to Faison to send the porter with a second set of cuffs which apparently Faison did. Grievant claims that when Inmate Blake refused to be cuffed, the Grievant got the fire

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extinguisher and sprayed the inmate thoroughly.

Testimony by Faison and the use of a diagram indicate that to reach the phone the back gate had to be unlocked. To receive cuffs from the porter the middle and front gates had to be unlocked. The stand pipe with a high pressure hose was located between the front gate and the middle gate.

The Grievant claimed that his use of the fire extinguisher was necessary to obey the alleged order from Sgt. Scott. He claimed that he did not use the hose because the hose required two persons. Lastly, he admitted that in his written statement he had said "I sprayed him (the inmate) to let him know where he was at.". The Grievant characterized these words as "how I felt then."

Sgt. Scott stated that he reported the incident to his superiors who instructed him to "write up" the Grievant. Scott indicated that he did so. The Grievant claims that the night of the incident he filled out various forms about the incident under Sgt. Scott's supervision. C.O. Faison remembers some forms being filled out. Sgt. Scott stated that normally forms would be filled out but that he does not remember that night. If forms were filled out that night, they are no longer in existence. The Grievant was on leave the next two days. On March 1, 1987, his next regular day, the Grievant wrote an IOC to Maj. Pollard about the incident and completed a form entitled "Special Incident and/or Use of Force." At the top of this form, "Use of Force" was not checked. "Other" was checked with the-explanation "Throwing of Toilet Water". However, C.O. Faison's statement was dated

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2/25/87 and labled "special incident" and checked "other". The inmate's is also dated 2/27/87. The cell mate's statement is dated 2/28/87. (Joint Exhibit #3) A discipline work sheet dated 2/27/87 was prepared by Sgt. Scott which alleged a violation of Rule 10 (horseplay). On March 9, 1987, a notice of Pre-disciplinary hearing was sent to the Grievant. The notice stated "Such behavior on your part constitutes engaging in horseplay." On March 17, 1987, a pre-disciplinary hearing was held Subsequently the Administrative Hearing officer filled out a Disciplinary Summary/Recommendation Sheet. The sheet under Charge states "Rule 10 (amended to Rule 12-B) and assesses 5 points. The Recommendation by the Appointing Authority is for removal because 12b is a 5 point offense which, when coupled with previous discipline, cumulates to 10 points, the removal standard.

Evidence of previous discipline was jointly introduced:

6-1-84	Letter of Reprimand: inattentiveness to duty
8-31-84	3 day suspension for sleeping on duty

10-19-84 5 day suspension for taking security keys from institution
3-26-85 Letter of Reprimand: playing chess with inmate;
leaving keys unattended
10-18-86 5 day suspension for sleeping on duty

The Union notes and the Arbitrator takes notice that only the last discipline (10-18-86) occurred under the contract and the "just cause" standard. Secondly, of the previous 4 disciplines, only
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the 5 day suspension was appealable.

At the hearing, the following testimony, which the Arbitrator finds credible and helpful, was given by each of the persons named:

Sgt. Scott testified that inmates often threw water and sometimes urine on officers. He maintained that no policy allowed the use of a fire extinguisher on an inmate. Lastly, he described the appropriate procedure for removing an inmate from a cell. His description matched the post order (see above). He indicated that force may never be used for retaliation.

David Meeker also testified that inmates threw water, urine and sometimes feces out of cells at officers. He said C.O.'s should not be shocked nor retaliate but rather follow procedures (i.e., post orders).

Mr. Hall, the labor relations officer, testified that he handled the pre-disciplinary hearing. He agreed that the original charge had been under Rule #10 but that after the hearing he changed it to 12B "use of excessive force without intent to physically abuse." Hall testified that Grievant's testimony indicated that Grievant was very angry and retaliated against the inmate. Hall admitted that no Use-of-Force Committee was formed. He said he believed the reason was that "no use of force report had been filed". Hall characterized Grievant's behavior as "slight force."

Superintendent Dahlberg testified that he received the discipline as a #12B charge. He said no Use-of-Force Committee
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was called for a variety of reasons.

1. The Grievant did not label the incident "use-of-force".
2. Under the rules, Use-of-Force Committees are not required in all instances.
3. A Use-of-Force Committee investigation was unnecessary because no dispute existed as to the basic facts.

Lastly, Dahlberg said he opted for removal because of the seriousness of Grievant's behavior which he labeled "abuse" coupled with the Grievant's past disciplinary record. On cross

examination, Superintendent stated that ODRC had no written definition of abuse, that "abuse" was "clear enough for anyone to understand, a common term defined in a dictionary." He said he was unaware of any definition of abuse in the Administrative Code which applied to ODRC.

Union's Position

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1. The Grievant's behavior does not constitute "abuse" under the terms of Art. 24.01 of the contract, so if the Arbitrator concludes modification is appropriate, she may do so.

a. Abuse is defined by the Administrative Code 2903.33(B)(2) which applies to all state agencies including ODRC.

2. ODRC violated Chapter 5120-9-02 by not convening a Use-of-Force Committee to consider Grievant's behavior.

3. ODRC violated the implicit due process concepts imbedded
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in just cause under § 24.01 of the contract because the Grievant did not receive notice of the true charge against him prior to his pre-disciplinary hearing. The union claims such a failure of notice was prejudicial.

4. The Grievant's discipline was not progressive because the prior discipline was not judged under a just cause standard.

5. The Grievant did not violate either #10 or #12b because he was following an order to prepare an inmate to be removed from his cell, and in that context his behavior was reasonable and appropriate pursuant to Post Orders.

Management's Position

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1. Grievant's action constitutes "abuse" as defined by the dictionary and common usage; therefore, the Arbitrator must either deny or sustain the grievance but may not, under § 24.01, modify the discipline.

2. Since Grievant's behavior fell under "slight force" (5120-9-02(B)(4)), no Use of Force Committee was mandatory.

3. Due process was not violated because the facts alleged for a #10 violation were the same for a #12(b) violation and the Grievant had notice of those facts.

4. Grievant had received both letters of reprimand and suspensions prior to this incident which gave ample opportunity to remedy his behavior standards. Moreover, his suspension for 5 days, a serious level of discipline, was under the just cause

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standard.

5. The Grievant's behavior violated numerous rules and was premeditated. Moreover, his demeanor showed anger and retaliation. Under 5120-9-01(D), force can never be used as a punishment. Grievant's removal was for just cause.

Discussion

The Arbitrator will discuss the Arguments in reverse order. The Arbitrator finds that, based on the evidence, the Grievant used excessive force, i.e., "application of force which, either by the type of force employed, or the extent to which force is employed, exceeds that force which is reasonably necessary under all the circumstances. Clearly, the use of a fire extinguisher against an inmate locked in a cell is force [5120-9(B)(2)]. Grievant claims that the force was reasonable and not excessive because he was carrying out a lawful order of his superior. The Arbitrator finds that no such order was given. A close examination of the post orders indicates that even if the inmate were to be removed from the cell, the Grievant's actions were inconsistent with standard procedures. Removal is only forcible when "imperative". As C.O. Faison so eloquently remarked, "The best thing when folks are riled are to leave them alone to cool down." No evidence was presented to indicate that the move was "imperative". Moreover, when a move is imperative, post orders indicated action is to be initiated "only after adequate numbers ****18****

of staff are assembled, "I" plan of action is explained" and video equipment obtained. Moreover, the Grievant used a fire extinguisher. The post orders only permit mace or a high pressure hose. No manipulation of words can authorize a fire extinguisher. Lastly, the Grievant's own testimony at the arbitration hearing both his words and his manner indicated that he was extremely angered by the inmate's acts and was motivated by retaliation. The nature of a C.O.'s job is to be subject to various kinds of unpleasant inmate behavior without retaliation or use of force. The ability to control one's emotions in such a situation is crucial to the performance of one's duties.

The Grievant claimed that his discipline was not progressive. His last discipline, under the contract, was for sleeping on duty for which he was suspended 5 days. Sleeping on duty in a prison is also a serious disciplinary breach that puts others in danger. Moreover, while the Grievant's other discipline was not under the just cause standard, the Grievant admitted a number of the behaviors during his testimony. The Arbitrator concludes that the Superintendent could reasonably find that dismissal was proper in this case.

The Grievant's claim that he was denied due process because the charge was changed from violation of Rule #10 to Rule #12(b) during (I presume) the midst of the pre-disciplinary hearing is well founded. Grievant's supervisor wrote him up for "horseplay"; the pre-disciplinary hearing notice alleged "horseplay". Horseplay carries only a 2 point penalty versus 5 points for

of staff are assembled," "plan of action is explained" and video equipment obtained. Moreover, the Grievant used a fire extinguisher. The post orders only permit mace or a high pressure hose. No manipulation of words can authorize a fire extinguisher. Lastly, the Grievant's own testimony at the arbitration hearing both his words and his manner indicated that he was extremely angered by the inmate's acts and was motivated by retaliation. The nature of a C.O.'s job is to be subject to various kinds of unpleasant inmate behavior without retaliation or use of force. The ability to control one's emotions in such a situation is crucial to the performance of one's duties.

The Grievant claimed that his discipline was not progressive. His last discipline, under the contract, was for sleeping on duty for which he was suspended 5 days. Sleeping on duty in a prison is also a serious disciplinary breach that puts others in danger. Moreover, while the Grievant's other discipline was not under the just cause standard, the Grievant admitted a number of the behaviors during his testimony. The Arbitrator concludes that the Superintendent could reasonably find that dismissal was proper in this case.

The Grievant's claim that he was denied due process because the charge was changed from violation of Rule #10 to Rule #12(b) during (I presume) the midst of the pre-disciplinary hearing is well founded. Grievant's supervisor wrote him up for "horseplay"; the pre-disciplinary hearing notice alleged "horseplay". Horseplay carries only a 2 point penalty versus 5 points for

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12(b). Given the Grievant's past record, the difference is significant. If found to have violated rule #10, the Grievant faced a discipline of perhaps a suspension. However, if found to have violated 12(b) his penalty could be removal. Due process fairness requires a grievant to actual notice of the violation and its consequences. Management's claim that no notice of the 12(b) was required because "the facts were the same" is at best disingenuous. once management became apprised of the nature of the behavior (i.e., 12(b)) fairness required that the Grievant be renotified and that the hearing be reconvened. The concept of fair notice is basic to the notion of due process. The violation of this principal cannot be overlooked by the Arbitrator. Moreover, the procedure applied to this Grievant has been continuously characterized by "strange" procedural problems. The "missing" forms apparently filled out by the Grievant on 2/25/87 have not been accounted for. A perusal of the Step 3 record indicates procedural issues have been at question for some time. "Just Cause" embodies implicitly fair procedures all along the line.

The Union's claim that Management was required to convene a Use of Force Committee is not found in the statute. A close reading of 5120-9-02(C) says that the associate superintendent of custody shall decide, after any necessary interview or consultations, whether or not the incident warrants investigation pursuant to Paragraph (D). Thus, the Associate Superintendent could decide that no investigation was warranted. Paragraph (C)

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does mandate Paragraph D investigation in certain cases, e.g., where an inmate is struck, where mace is used, and where more than slight force was used. Examining § B (I)-(4), the force used does not fall into (I)-(3) and does not exceed the force in B(4), e.g., the force used was "slight".

While a use of force investigation might have been wise, the investigation was not required.

The finding of the Arbitrator is that the Grievant did violate Rule 12(b) and that termination was the appropriate discipline. However, that conclusion must be mitigated by the finding that the Employer (ODRC) violated the Grievant's right to notice and hence due process.

Cases arise in the arbitration process where the discipline imposed is substantively correct but during the disciplinary process, the employer violates procedures. Violations can be of three kinds: (1) Employer violates the explicit procedures of the contract, (2) the Employer fails to follow its own rules set up under the contract, and (3) Employer violates basic notions of essential fairness. In assessing a procedural violation of the third type, the Arbitrator must assess the degree of prejudice to the Grievant and simultaneously the need to persuade the parties to follow the rules (See R. Fleming, The Arbitration Process, pp. 139-40 (1965).) Compliance with the rules not only benefits the individual but all employees for whom the contract is negotiated. Where explicit contract procedures are violated, the Arbitrator is often compelled to set aside what may have been a substantively correct decision. However where Employer failures are of a lesser

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nature, a different remedy is appropriate. First, the Arbitrator does not find -that the Grievant was substantially harmed by the procedural violation. Hence, his termination shall not be overturned. However, the Arbitrator does wish to ensure future compliance by ODRC with the essentials of due process. Therefore, the Arbitrator awards to the Grievant back pay (less normal deductions) for the period from his removal to the date of this opinion. (See Kaiser Steel Corp., 78 Lab. Arb. (BNA) 185 189-90 (1982) Leonard, Arb.)

The Arbitrator finds it unnecessary to reach the question of whether this case constitutes "abuse" under 24.01 because the "termination" itself has not been modified.¹

Award

- Grievance is denied; termination is upheld with back pay from date of removal to date of this award.

March 1, 1988
Date

Rhonda R. Rivera
Arbitrator

¹However, the Arbitrator notes that § 2903.33(B)(2) does not appear under Article 5 43.01 to "conflict" with the contract and hence may be persuasive as a definition of abuse.

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