

#1152

In the Matter of Arbitration Between the : Grievance Number: DRC-2015-03821-3
: STATE OF OHIO, DEPARTMENT OF :
REHABILITATION AND CORRECTION, :
LEBANON CORRECTIONAL INSTITUTION, : Grievant: Penny E. Bentley
: Employer :
and the : Date of Hearing: June 27, 2016
: OHIO CIVIL SERVICE EMPLOYEES :
ASSOCIATION, AMERICAN :
FEDERATION OF STATE, COUNTY :
AND MUNICIPAL EMPLOYEES, : Howard D. Silver, Esquire
LOCAL 11, AFL-CIO, : Arbitrator
: Union :

DECISION AND AWARD OF THE ARBITRATOR

RECEIVED / REVIEWED

APPEARANCES

SEP 22 2016

OCSEA - OFFICE OF
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PROCEDURAL BACKGROUND

This matter came on for an arbitration hearing at 9:00 a.m. on June 27, 2016 in a conference room at the Warren Correctional Institution, 5787 State Route 63, Lebanon, Ohio 45036. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The arbitration hearing concluded at 5:00 p.m. on June 27, 2016 following a view of a portion of the perimeter of the Lebanon Correctional Institution and a sally port at the Lebanon Correctional Institution, and the evidentiary record was closed at that time.

Post-hearing briefs were received from the parties by the arbitrator by August 12, 2016 and exchanged between the parties by the arbitrator on August 12, 2016.

This matter proceeds under a collective bargaining agreement in effect between the parties from March 1, 2012 through February 28, 2015, Joint Exhibit 1.

No issue as to the arbitrability of the grievance has been raised. Under the language of the parties' collective bargaining agreement, Joint Exhibit 1, the arbitrator finds the grievance to be arbitrable and properly before the arbitrator for review and resolution.

JOINT ISSUE

Was the Grievant, Penny Bentley, removed from her position as a Corrections Officer for just cause?

If not, what shall the remedy be?

JOINT STIPULATIONS

1. Grievant (Penny Bentley) was hired on December 16, 1996.
2. Grievant was placed on Administrative Leave on August 24, 2015.
3. Grievant was removed on October 9, 2015.
4. The Grievant was removed for violation of the following work rules:
 7. Failure to follow post orders, administrative regulations, policies or written or verbal directives.
 18. Threatening, intimidating or coercing another employee or a member of the general public.
 36. Any act or failure to act that could harm or potentially harm the employee, fellow employees(s) or a member of the general public.
 37. Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee.
 38. Any act, or failure to act, or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public.

JOINT EXHIBITS

1. Contract between the State of Ohio and OCSEA/AFSCME, Local 11.
2. Grievance Trail, A - D.
3. Discipline Packet, A – J.
4. Management Investigation, A – G.

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the State of Ohio, Department of Rehabilitation and Correction, Lebanon Correctional Institution, hereinafter the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter the Union, are parties to a collective bargaining agreement in effect from March 1, 2012 through February 28, 2015, Joint Exhibit 1. Within the parties' Agreement in Article 24, section 24.01 the Employer is not to impose discipline upon a bargaining unit member except for just cause.

The grievant in this proceeding, Penny E. Bentley, was hired by the Ohio Department of Rehabilitation and Correction on December 16, 1996 to work at the Lebanon Correctional Institution. Ms. Bentley continued in this employment until her removal that occurred effective October 9, 2015.

On August 24, 2015 Ms. Bentley, a Correction Officer at the Lebanon Correctional Institution was ordered onto Administrative Leave based upon an allegation that on August 21, 2015 at approximately 8:50 p.m., while working perimeter patrol at the Lebanon Correctional Institution, Officer Ms. Bentley pointed the muzzle of a Remington 870 shotgun at the face of a coworker, with the muzzle approximately one foot from the face of the co-worker.

On October 9, 2015, following the conclusion of pre-disciplinary procedures, the Employer issued a Notice of Disciplinary Action to Ms. Bentley notifying Ms. Bentley that she was being removed from her employment as a Correction Officer by the Ohio Department of Rehabilitation and Correction effective October 9, 2015. The reasons presented for the discharge of Ms. Bentley as presented in the Notice of Disciplinary Action, Joint Exhibit 3, refer to infractions of work rule 7, failure to follow orders, regulations and policies; work rule 18, threatening, intimidating or

coercing another employee; work rule 29, purposeful or inappropriate display of weapons; work rule 36, any act or failure to act that could harm or potentially harm a fellow employee; work rule 37, any act or failure to act that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee, and work rule 38, any act or commission that constitutes a threat to the security of the facility or staff. The Notice of Disciplinary Action issued to Ms. Bentley, Joint Exhibit 3, charges: "On August 21, 2015, while on duty, Officer Penny Bentley did, without authorization, point the muzzle of a state-issued shotgun at Officer Linda Kelly." This is a Notice of Disciplinary Action signed by the appointing authority on October 8, 2015 and is acknowledged received through a signature by Ms. Bentley dated October 9, 2015.

On October 13, 2015 the Union filed a written grievance with the Employer on behalf of Ms. Bentley. The grievance charged that the Employer had removed the grievant effective October 9, 2015 and had not had just cause to do so. The grievance filed on behalf of Ms. Bentley notes that Ms. Bentley had no prior discipline, and it is charged in the grievance that the discipline imposed upon Ms. Bentley was excessive and not commensurate with the alleged work rule violations. The grievance filed on behalf of Ms. Bentley by the Union seeks the reinstatement of Ms. Bentley with full back pay and the return of any and all lost benefits. The Union asks that part of the remedy include an order that all references to the discipline be removed from Ms. Bentley's work record and Ms. Bentley be made whole in every way.

The grievance remained unresolved between the parties and the grievance was moved to final and binding arbitration at the direction of the Union on or about January 20, 2016.

The arbitration hearing occurred on June 27, 2016. Post-hearing briefs from the parties were received by August 12, 2016.

SUMMARY OF TESTIMONY

Casey Barr

Casey Barr is an Investigator at the Lebanon Correctional Institution. Mr. Barr has worked for the Department of Rehabilitation and Correction for twenty-eight years - five years as a Correction Officer, five years as a Correction Lieutenant, and eighteen years as an Investigator.

Investigator Barr is familiar with the incident involving Ms. Bentley on August 21, 2015 as Investigator Barr was assigned the investigation of what was viewed as a possible incident of workplace violence.

Investigator Barr identified Joint Exhibit 4, pages 1 and 2 as an Investigation Summary Report from Investigators Casey Barr and Jason Hall directed to the Warden of the Lebanon Correctional Institution dated August 28, 2015. This Summary Report states that the following employees were involved in the investigation: Correction Officer Penny Bentley, Correction Officer Linda Kelly, Correction Officer Mark Conover, and Correction Officer Jennifer Wilson.

The first page of the Investigation Summary Report, Joint Exhibit 4 presents the following:

It is alleged that on August 21, 2015 at approximately 8:50 PM, Officers Kelly and Conover were confronted by Officer Bentley as they walked on the perimeter road near the Powerhouse. According to Kelly and Conover, Bentley, who was assigned to an armed (Glock 23 handgun and Remington 870 shotgun) perimeter patrol post, parked the patrol vehicle, exited the vehicle and stepped in front of them and stopped them. The Glock was holstered and the 870 shotgun was being held by Bentley in a "port-arms" position. They state that Bentley then took a step towards Kelly and asked her "Do you have something to say to me?" and Kelly responded "No ma'am." Bentley then lowered the shotgun to a position so that the muzzle was approximately one foot away from the face of Kelly. At this time Bentley again asked Kelly "Do you have something to say to me?" and Kelly again replied "No Ma'am." Conover then attempted to step between Bentley and Kelly but was ordered to stand aside by Bentley. Kelly was asked a third time by Bentley if she had something to say. When Kelly replied that she did not, Bentley replied "I didn't think so" and turned and entered her patrol vehicle and drove off.

Investigator Barr testified that the investigation of the August 21, 2015 incident included interviews of Officers Bentley, Conover, Kelly, and Wilson, and Correction Lieutenants J. Buckhalter and T. Bell.

Investigator Barr noted that the Investigation Summary Report, Joint Exhibit 4, page 1 found that Correction Officer Bentley had violated DRC policy 31-SEM-08, Response to Workplace Violence and Workplace Domestic Violence. Workplace violence is defined in this policy as any act or threat of violence that occurs at the workplace and includes any act that has a reasonable potential for the infliction of physical or emotional harm or trauma. Workplace violence under this policy is divided into five categories: non-physical violence, physical violence, aggravated physical violence, domestic violence, and workplace domestic violence. This policy's definition of non-physical violence includes behavior that communicates a direct or indirect threat of physical harm, violence, harassment, intimidation, or other disruptive behavior. Physical violence in this policy is defined as any physical act that results in physical or emotional harm or trauma with or without the use of a weapon. Aggravated physical violence is defined in this policy as inappropriate use of firearms, weapons, or any other dangerous devices on state property. This policy acknowledges that some employees of the Ohio Department of Rehabilitation and Correction are authorized to perform their official job duties while in possession of firearms, weapons, or other dangerous devices but such employees are to use these firearms, weapons, or other dangerous devices only in accordance with departmental operating procedures, post orders, and all applicable state and federal laws.

Section V of policy DRC 31-SEM-08 states that the Ohio Department of Rehabilitation and Correction has "zero tolerance" for workplace violence, and threats or acts of violence among persons employed by the Department will not be tolerated. This policy provides that any individual

violating this policy is subject to disciplinary action.

Investigator Barr testified that there was no video or audio recording of the August 21, 2015 incident.

Investigator Barr identified Joint Exhibit 4(B), pages 1-7 (paginated 106 - 112 in the upper right corners) as the transcribed investigatory interview of Penny Bentley conducted on August 25, 2015. During this interview Ms. Bentley was asked about the August 21, 2015 incident at the Lebanon Correctional Institution involving Correction Officer Kelly, to which Ms. Bentley responded:

Yes. It started as I came out of the tower because at about 835 I came out of the tower and got into the car and see I don't usually I know you don't know, but I don't use the bathroom up there. So when I come down I go to the Powerhouse because it doesn't have anything up there for when you use the bathroom. So I called in my mileage, I drove around and went to the Powerhouse and parked there. So I always take my weapons in everywhere I go, I never leave them. So I got my shotgun out of my bag. Got out of the car and went to shut the door to go walk in. I heard some talking so I looked because I am seeing ... who is this. Because that is what I am supposed to do, address anybody who is on the perimeter, it was dark. I mean it was hard to see who it was until they got up on me. And then I just ... they got up by the car, I walked to the car. All day long she is out on the yard screaming "whore, whore, whore". This has been going on for a while. I told Lt Buckhalter about it. And then she gets the inmates doing it. So it was so bad that day I closed the window so I didn't have to listen to them. And I can see her. She comes around and ride and says "whore, whore" and then one time she stood up and did this ... in the Gator. I don't know what it meant and I just sat in there I actually closed the windows. So then I went down and got in the car and went around and went to use the bathroom. It was never me to stop because of her because I didn't know she was around there. So I went to the bathroom, got everything out, shut the door, I heard them talking. I looked and acknowledge who it was, so I seen (sic) it was her and a guy. I don't even know that guy. So they come up to the car, close enough to where I can see who they were. So I walked up, of course I had my gun here, a shot gun. I had my bag throwed (sic) over my shoulder and I had my Glock on cause you can never leave them in the car. I was going to the bathroom, not to say anything to them. They just happened to come up, I heard them and I made sure who it was. Then I just walked up and asked her "do you have something you want to say to me"? It wasn't a threat. It was, well When I walked up, the guy with her kinda (sic) assertively stepped. And I said "step back". And then I said "do you have something you need to say to me"? I had my gun and my bag here, and to tell

you the truth I really had to use the bathroom. And she didn't say "No mam". She said "no". She kinda (sic) threw her head back and said "No". And I said "alright" and turned around and went into the bathroom. I didn't get in the car and leave. I went into the bathroom and used the bathroom. I put my shotgun in there with me, put my Glock with me and take my ... you know, and used the bathroom. I came back out and got into the car and then started circling around. It was shortly, right after I come down cause seriously I don't use the bathroom up there because they say the high definition cameras you know and stuff and then the inmates were sitting there you know ... you gotta (sic) stay down so I just quit using the bathroom in there. And I go out to the Powerhouse and use it almost as soon as I come down. Sometimes I will circle around once, but usually I will go to the bathroom. I did it Thursday. That's the same thing I did on Thursday night. Because I am not always up there. Sometimes they put relief up there. Sometimes they put return to work up there. But I have been up there Thursday and Friday and both nights I came down and went to the restroom. No ... I don't think Thursday ... I waited til I got off work to do it.

Later in the interview at Joint Exhibit 4(B), page 4 (paginated 109 in the upper right corner)

Officer Bentley was asked how she had been carrying the weapon, to which Officer Bentley responded:

I try to keep it up, but I don't keep it way up here. I try to. But I am not saying that maybe sometimes it doesn't go down a little bit because you know, it was the end of the day. And I was carrying it ... and I had to use the bathroom. So I was holding, it might have went down a little bit, but I didn't do that, I didn't point it at her ... honestly. Or him ... Or him at all. I just asked him to step back. Cause he kinda (sic) ... assertively like and I'm like ... step back. And then I just asked her the question. She said "no". She said no and I just turned and walked away.

Officer Bentley was then asked whether she had made the statement: "Do you have something to tell me Kelly?" to which Officer Bentley answered: "Yeah, I said, yeah ... do you have something you need to say? Yeah ..." The questioner asked Officer Bentley whether Officer Bentley's question about whether Officer Kelly had something to say related to the "whore" comment, to which Officer Bentley responded:

Yeah, I didn't say whore to her, but she knew what I was talking about. And I have

addressed her another time. In the front parking lot her in her car. I pulled up beside her and I said the same ... "do you have something you need to say?" because I don't understand why she is doing that? I don't even know her. That's why I took a polygraph. And honestly - I take my gun. You can ask Rick. He watches me. Or anybody out there. I take my gun into the bathroom with me. I never leave it in the car, ever. That shotgun is with me everywhere I go. Now the Glock. I lock it down in the first range ... Yeah. But the I take up and I put it ... I unload it, count it. Put it back in, the ammo, I put the safety on and set it into the shotgun rack.

Investigator Barr explained that the Remington 780 shotgun carried by Officer Bentley during the August 21, 2015 incident is a pump action, twelve-gauge shotgun.

Investigator Barr identified Joint Exhibit 4(F), page 4 (paginated 139 in the upper right corner) as an incident report prepared by Lieutenant Bell dated August 27, 2015 that reads as follows:

On 21 Aug 2015, at or about 9:05 pm, I walked to the front circle and told Officer P. Bentley, that she was being relieved. Officer Bentley said that she had all of her "stuff", in the vehicle with her. I told Officer Bentley that she needed to get all of her belongings, and bring them with her. Once we started entering the building, Officer Bentley said "Lt Bell, I didn't point a gun at anyone". I told Officer Bentley that we weren't going to talk about it, here. As we come through the front lobby and approach the salleyport (sic) at the Key Room, Officer Bentley said "Ms Kelley (sic) called me a whore, I'm not a whore". I told Officer Bentley that we didn't need to talk about it, and that she needed to wait until union representation, showed up. Once in the DWO Secretary's office, Officer Bentley repeatedly told Officer Fry and I, "I took my weapons out of the car because I had to use the bathroom", and "Officer Kelley (sic) keeps calling me a whore, she walks by the tower and calls me a whore, when she comes by on the gator, she looks up and tells me I'm a whore. The Officer she was with knows, cause she told him, I'm a whore. I'm not a whore". Several times throughout the evening, I had to tell Officer Bentley, that we were not going to discuss the incident.

Investigator Barr identified Joint Exhibit 3(J), page 5 (paginated 96 in the upper right corner) as the Ohio Department of Rehabilitation and Correction's Firearms General Safety & Range Rules signed by Ms. Bentley on May 4, 2015. On the first page of this policy the first two general safety rules for handling firearms are presented as:

1. Treat all firearms as if they are loaded.
2. Unless participating in a controlled supervised training program, never point a firearm at anything unless you are prepared to destroy it.

Under questioning by the Union's representative, Investigator Barr confirmed that he had not been on duty at the time of the August 21, 2015 incident. Investigator Barr testified that the investigation of the incident occurred on the Monday or Tuesday of the week following the incident.

Investigator Barr testified that there were four eyewitnesses to the event in question, Correction Officers Kelly, Conover, Wilson, and Bentley.

Mark Conover

Mark Conover has worked for the Ohio Department of Rehabilitation and Correction as a Correction Officer for two years and seven months. Officer Conover was on duty at the Lebanon Correctional Institution on August 21, 2015 working an assigned post overseeing the recreation yard. Mr. Conover recalled that at some point recreation ended, the recreation yard was cleared of all inmates, and all recreation equipment was accounted for.

A small John Deere motorized utility vehicle known as the "Gator" is assigned to the recreation yard and at the end of recreation this vehicle is driven to a sally port where the Gator is cleared to exit the institution. The Gator is driven to a fueling station where it is refueled and the Gator is then driven to and parked at a landscaping shed. The driver of the Gator walks back to the front entrance of the institution to re-enter the institution.

At or about 8:45 p.m. on August 21, 2015, after returning the Gator to a landscaping shed, Officer Conover was walking back to the front entrance of the institution accompanied by Correction Officer Linda Kelly. While walking on the perimeter road that circles the institution,

Officer Conover observed Officer Bentley drive by in a patrol vehicle, turn around and drive back, and turn around again and again drive back. Officer Conover observed Officer Bentley park the vehicle she was driving in front of the Powerhouse. Officer Conover recalled that he and Officer Kelly had been walking in the direction of Officer Bentley's parked vehicle and as they approached the parked vehicle in front of the Powerhouse, Officer Bentley exited her vehicle and approached Officers Conover and Kelly.

Officer Conover recalled that Officer Bentley positioned herself in front of Officers Conover and Kelly while holding a shotgun in her left hand. Officer Conover recalled that Officer Bentley looked at them, grabbed the shotgun and pointed it at Officer Kelly's nose. Officer Conover recalled that the shotgun had been at an angle and Officer Conover stepped in front of Officer Kelly and asked Officer Bentley: "What's going on?" Officer Conover recalled that Officer Bentley held the shotgun horizontally and pushed her arms away from her body, making Officer Conover step back from Officer Bentley. Officer Conover recalled no physical contact with Ms. Bentley or the shotgun.

Officer Conover recalled that when he stepped back, Officer Bentley stepped in front of Officer Kelly and pointed the shotgun at Officer Kelly's face. Officer Bentley then asked Officer Kelly: "Anything you want to tell me?" to which Officer Kelly responded: "No." Officer Conover recalls Officer Bentley responding: "I didn't think so." Officer Conover recalled Officer Bentley walking away, getting back into her vehicle, and driving away.

Officer Conover testified that during the incident he had been afraid that someone was going to be shot. Officer Conover did not recall observing Officer Bentley enter the Powerhouse and testified that he had had no other interaction with Officer Bentley. Officer Conover testified that he did not trust Officer Bentley because of the events of August 21, 2015.

Under questioning by the Union's representative, Officer Conover confirmed that he had had a hand-held radio with him during the August 21, 2015 incident. Officer Conover recalled that the Gator had been returned to a landscaping shed.

Officer Conover denied that Officer Bentley had been doing her job during the incident in question, stating that Officer Bentley had known the two officers to whom she had been speaking and had been aware of what she was doing. Officer Conover confirmed that the Glock handgun and the Remington shotgun are standard-issue equipment at the Lebanon Correctional Institution.

Officer Conover confirmed there had been no contact by the shotgun with himself or Officer Kelly. Officer Conover recalled that Officer Bentley had had two hands on the shotgun.

Officer Conover confirmed that he filed no charge against Officer Bentley and testified that he had had no reason to hold any bias against Officer Bentley other than for what he experienced during the incident on August 21, 2015. Officer Conover testified that he had never heard Officer Kelly call Officer Bentley a whore.

Linda Kelly

At the time of her testimony in this proceeding, Linda Kelly had served as a Correction Officer for the Ohio Department of Rehabilitation and Correction for four years and six months. Ms. Kelly recalled that she had been scheduled to work on August 21, 2015, a regular work day for Officer Kelly at the Lebanon Correctional Institution. During her shift on August 21, 2015 Officer Kelly had been assigned to a post responsible for a recreation area, a fenced area within the perimeter of the institution. Ms. Kelly recalled that her duties had been to observe inmates; issue, receive, and account for recreational equipment, and insure the safety and security of inmates and staff. Ms. Kelly recalled that on August 21, 2015 when the scheduled recreation time ended recreational equipment was turned in to Officer Kelly and stored behind locked doors.

Ms. Kelly explained that the vehicle assigned to the recreation area, an all-terrain vehicle about the size of a golf cart known as the "Gator," was to be refueled following recreation and returned to a shed located outside the institution's perimeter fence.

Officer Kelly explained that there are zones in which alarms are set off when microwaves are disturbed. Upon entering such a zone the presentation of identification is required. Officer Kelly recalled that a vehicle pulled up to clear such a zone, a vehicle driven by Correction Officer Penny Bentley. Officer Kelly recalled observing Officer Bentley driving on and turning around and driving back while Correction Officer Mark Conover and Correction Officer Kelly refueled the Gator and moved it to the shed for storage. Officers Kelly and Conover then began their walk to the front entrance of the institution, walking on the institution's perimeter road.

Officer Kelly recalled observing Officer Bentley parking her patrol vehicle on the perimeter road in front of the Powerhouse. Officer Bentley was observed to exit her vehicle. Ms. Kelly recalled that this had been at 8:45 p.m. and Ms. Kelly remembers Officer Bentley approaching Officers Conover and Kelly.

Ms. Kelly recalled in her testimony that the approach of Officer Bentley occurred just past Tower 5 and Officer Bentley had been carrying a shotgun and had on her person a handgun. Ms. Kelly recalled Officer Bentley approaching Officer Kelly and asking Officer Kelly whether there was something Officer Kelly wanted to tell Officer Bentley. Officer Kelly recalled that when Officer Bentley had been approaching Officers Kelly and Conover the shotgun held by Officer Bentley had been pointed up. Ms. Kelly recalled that when Officer Bentley asked Officer Kelly whether Officer Kelly had something to say to Officer Bentley, Officer Bentley had lowered the muzzle of the shotgun, pointing it at Officer Kelly's nose.

Ms. Kelly recalled that when Officer Bentley pointed the shotgun at the face of Officer

Kelly, Officer Conover stepped in front of Officer Kelly while facing Officer Bentley. Ms. Kelly recalled Officer Bentley telling Officer Conover to step back because this didn't concern him, and recalled Officer Bentley stepping forward and lowering the muzzle of the shotgun so that it pointed at Officer Kelly's nose and asking again: "Is there anything you want to tell me?" Ms. Kelly testified that she felt threatened and had thought she was about to be shot.

Ms. Kelly recalled that one month prior to August 21, 2015 Ms. Kelly had been in a parking lot at the institution seated in her vehicle preparing to drive to her home when Ms. Bentley who was in her vehicle drove up alongside Ms. Kelly's vehicle, stopped, rolled her window down, and asked Ms. Kelly whether there was something Ms. Kelly wanted to say to Ms. Bentley.

Ms. Kelly testified at the hearing herein that she has never called Penny Bentley a whore and has never observed anyone calling Ms. Bentley a whore.

Officer Kelly testified that she fears Ms. Bentley, does not trust Ms. Bentley, and cannot work with Ms. Bentley.

Under questioning by the Union's representative, Ms. Kelly reiterated that she had never called Ms. Bentley a whore and had never filed an incident report about Officer Bentley prior to the incident on August 21, 2015.

Ms. Kelly confirmed that during the August 21, 2015 incident she had carried a radio and recalled that as Officer Bentley approached Officers Kelly and Conover carrying a shotgun, the muzzle of the shotgun had been pointed straight up. Officer Kelly testified that when she was confronted by Officer Bentley, the shotgun had been moved close to Ms. Kelly's face. Officer Kelly recalled that while the incident may have taken only one minute to transpire, it seemed to Officer Kelly to take much longer than that.

Ms. Kelly recalled that when Officer Conover stepped between Officer Kelly and Officer

Bentley, Officer Bentley had used the shotgun to create more space between Officer Bentley and Officer Conover.

Ms. Kelly testified that she had had no prior interaction with Officer Bentley and had been asked the same question, whether Officer Kelly had something to say to Officer Bentley, during the prior incident in the parking lot that had been put to Officer Kelly by Officer Bentley during the incident on August 21, 2015. Ms. Kelly testified that she prepared an incident report on August 21, 2015 about what had occurred that day.

Ms. Kelly testified that she did not talk to Officer Conover or Officer Jennifer Wilson about the August 21, 2015 incident prior to preparing her incident report. Officer Kelly testified that Officer Conover had walked with Officer Kelly to the front entrance of the institution following the incident involving Officer Bentley, a walk that required about two minutes to complete. Ms. Kelly said Officer Conover wanted to insure that Officer Kelly did not pass out on the way. Ms. Kelly did not file charges against Officer Bentley.

Ms. Kelly testified that correction officers are trained in the use of a shotgun and testified that during the August 21, 2015 incident Officer Kelly saw that the shotgun held by Officer Bentley had had its safety mechanism turned off, a mechanism located near the trigger guard on the shotgun. Officer Kelly pointed out that the safety mechanism on the shotgun must be in the off position to chamber a round.

Ms. Kelly confirmed that she did not ask Officer Bentley to lower the firearm; did not ask Officer Bentley to put the gun down, did not ask Officer Bentley for the reason the shotgun was being pointed at Officer Kelly, and did not ask Officer Bentley why Officer Bentley was threatening Officer Kelly. Ms. Kelly estimated that the angle of the slope of the shotgun when it was pointed at Officer Kelly's face had been about forty-five degrees.

Ms. Kelly testified that while she had suffered psychological harm from the August 21, 2015 incident she has suffered no physical harm. Ms. Kelly testified that she did not seek the services of a physician or a psychiatrist as a result of the August 21, 2015 incident. Ms. Kelly was asked whether during the incident on August 21, 2015 Officer Bentley had had her finger on the shotgun's trigger. Ms. Kelly testified: "Not that I recall."

Jennifer Wilson

Jennifer Wilson is employed as a Correction Officer at the Lebanon Correctional Institution. Ms. Wilson was hired by the Ohio Department of Rehabilitation and Correction in April, 2015. At the time of the incident on August 21, 2015 Ms. Wilson had been employed as a Correction Officer for three and one-half months.

Ms. Wilson recalled that on August 21, 2015 her assigned post had been Tower 5, an elevated post located on a perimeter road that circles the institution. Tower 5 at the Lebanon Correctional Institution is located on the east side of the institution near a sally port used to enter and exit the institution. Ms. Wilson testified that from Tower 5 she was able to observe people entering and exiting the institution through the sally port and had observed Officers Kelly and Conover coming through the sally port.

Ms. Wilson recalled observing Officer Bentley driving a vehicle on the institution's perimeter road and recalled observing the interaction between Officers Kelly, Conover, and Bentley on August 21, 2015 between 8:45 p.m. and 8:50 p.m. Ms. Wilson testified that she observed Officers Conover and Kelly exiting the sally port on the Gator and driving away. Shortly thereafter Officer Wilson observed Officers Conover and Kelly walking on the perimeter road in a northerly direction.

Ms. Wilson testified that as Officers Kelly and Conover walked past the parked vehicle

that had been driven by Officer Bentley Ms. Wilson observed Officer Bentley approach Officers Conover and Kelly. Officer Wilson recalled seeing Officer Bentley standing in front of Officers Conover and Kelly. Officer Wilson recalled Officer Bentley holding a weapon that was resting on her duty belt.

Officer Wilson testified that she observed the weapon being held by Officer Bentley coming down and being pointed at Officers Conover and Kelly. Ms. Wilson recalled “freaking out” when she observed this and recalled Officer Conover stepping between Officers Bentley and Kelly. Officer Wilson recalled Ms. Bentley moving the shotgun to a horizontal position and Officer Conover stepping back. Officer Wilson testified that the weapon went back to resting on Officer Bentley’s hip and Officer Bentley walked away.

Ms. Wilson testified that she recalls the barrel of the weapon held by Officer Bentley being pointed at both Officer Kelly and Officer Conover, and Ms. Wilson testified that she has no idea why. Ms. Wilson testified that what Officer Bentley had done was life-threatening and if it had been done to Ms. Wilson Ms. Wilson would have been scared for her life. Ms. Wilson recalled that when she observed the incident on August 21, 2015 Ms. Wilson had been terrified and wondered at that time: “What are these crazy people doing?!”

Ms. Wilson testified that she had had no prior interaction with Officer Bentley, is fearful of working with Ms. Bentley, and has no reason to be untruthful.

Under questioning by the Union’s representative, Ms. Wilson identified Joint Exhibit 4(F), page 1, (paginated 136 in the upper right corner) as Ms. Wilson’s incident report that was prepared by Ms. Wilson on August 21, 2015. Ms. Wilson’s incident report states that the incident occurred near Tower 5 and lists the incident time as 8:50 p.m. Ms. Wilson’s description of the incident in her incident report reads as follows:

On the above date and the approximate time, I Officer Wilson was conducting my shift duties in Tower 5. As I was walking around the cat walk, I saw two Recreation Officers, Officer Conover and Officer Kelly approaching a patrol car. At that time Officer Bentley was walking around her vehicle. As Officer Conover and Officer Kelly were about to pass Officer Bentley, Bentley pulled her weapon up, pointing it toward Officer Conover and Officer Kelly. Be advised Officers were near the powerhouse and I could not hear any of their conversation. I did see Officer Conover and Officer Kelly stop and step back and move their arms about. Officer Conover stepped between Officer Kelly and Officer Bentley. Officer Bentley then raised her weapon horizontally. Officer Kelly and Officer Conover then walked away. I then closed up Tower 5. I Officer Wilson then returned to the institution and advised Shift Captain. EOR.

Ms. Wilson recalled that the August 21, 2015 incident occurred over one and one-half minutes.

Ms. Wilson was referred to Union Exhibit 1, page 192 from the examination of Ms. Wilson on January 6, 2016 in the misdemeanor case of *State of Ohio v. Penny Bentley*. At page 192 of this transcript Ms. Wilson was asked how long she had observed the gun allegedly pointed at Officer Kelly to have remained on Officer Kelly. Ms. Wilson had responded: "Seconds."

Ms. Wilson identified Union Exhibit 2 as a shift activity sheet for the security post at Tower 5 reflecting Officer Wilson on duty on August 21, 2015 at 8:00 p.m.

Ms. Wilson thought that Officer Bentley had had a bag over her shoulder during the incident and testified that there had been nothing blocking Officer Wilson's view from Tower 5. Ms. Wilson recalled that during the incident the backs of Officers Kelly and Conover had been to Ms. Wilson and Officer Bentley had been facing Officers Conover and Kelly.

Ernie L. Moore

Ernie L. Moore has been employed by the Ohio Department of Rehabilitation and Correction for twenty-nine years, having begun as a Correction Officer in 1987 and having worked as a Warden, Regional Director, Assistant Director, and Chairman of the Parole Board. At the time

of Ms. Bentley's discharge Mr. Moore had been serving as the Warden and Appointing Authority at the Lebanon Correctional Institution.

Mr. Moore is today the Superintendent of the Corrections Training Academy.

Mr. Moore testified that he received a call at his home on August 21, 2015 informing him of the incident that had occurred that involved Officers Bentley, Kelly, and Conover. Mr. Moore recalled he had been concerned about the safety of all concerned. The Ohio State Highway Patrol was contacted. Officer Bentley was relieved of active duty on August 21, 2015 and placed on administrative leave effective August 24, 2015.

Mr. Moore recalled that Casey Barr had been assigned the investigation of the August 21, 2015 incident. Mr. Moore testified that Officer Bentley had had no prior discipline. Mr. Moore identified his signature on the Notice of Disciplinary Action issued to Officer Bentley on October 9, 2015, Joint Exhibit 3, page 1. Mr. Moore testified that he left the Lebanon Correctional Institution in January, 2016.

Rick Meadows

Rick Meadows has worked at the Lebanon Correctional Institution for twenty-six years. For the past twelve years Correction Officer Meadows has worked at Tower 5. Officer Meadows had not been on duty at the institution during the incident on August 21, 2015, having worked that day from 12:00 p.m. to 8:00 p.m.

Officer Meadows testified that he has known Correction Officer Penny Bentley for a long time and considers Officer Bentley a good officer. Officer Meadows testified that he knows that every night that Officer Bentley worked perimeter patrol she used the restroom in the Powerhouse.

Officer Meadows testified that Officer Bentley had known her duties and had understood her job. Officer Meadows recalled that on August 21, 2015 he had been relieved of his Tower 5

post by Officer Jennifer Wilson, and at the time he was relieved on August 21, 2015, the binoculars available in Tower 5 had been broken.

Officer Meadows testified that Officer Bentley has been a good officer, a good employee, has never presented a problem, and has always performed her duties as directed. Officer Meadows testified that he has no problem working with Officer Bentley and believes Officer Bentley is capable of coming back to work and performing her job.

Joseph Richard Griffith

Joseph Richard Griffith is an Ohio State Highway Patrolman who received a call on August 21, 2015 to contact the Lebanon Correctional Institution. Patrolman Griffith made that call and was apprised of a situation at the institution by Captain Frisby.

Trooper Griffith testified that he interviewed a number of people at the institution and secured statements from Correction Officers Kelly, Conover, and Wilson. Trooper Griffith recalled that after reading to Officer Bentley her *Miranda* rights, Officer Bentley elected to decline to answer questions.

Trooper Griffith recalled that Correction Officer Wilson had told Trooper Griffith that Officer Wilson had not been able to hear what had transpired between Officers Bentley, Kelly, and Conover during the August 21, 2015 incident, and Officer Wilson had told Trooper Griffith that initially Officer Wilson had believed that a joke was being played on Officer Wilson, until Officer Wilson saw the shotgun carried by Officer Bentley.

Trooper Griffith testified that when he examined the shotgun that had been carried by Officer Bentley during the August 21, 2015 incident he found no round chambered in the shotgun.

Trooper Griffith signed a complaint against Officer Bentley and Officer Bentley was arrested. Trooper Griffith testified that the trial of Ms. Bentley based on the events of August 21,

2015 had resulted in a hung jury.

Penny E. Bentley

Penny E. Bentley, the grievant in this proceeding, has worked as a Correction Officer at the Lebanon Correctional Institution for nineteen years. During summer months Officer Bentley was assigned to Tower 3. During winter months Officer Bentley was assigned to patrolling security zone B at the institution.

Ms. Bentley recalled serving at a variety of posts at the Lebanon Correctional Institution. Officer Bentley has served in relief, on towers, on patrols, and has served in Central Control B, a vantage point from which cell blocks are watched. Ms. Bentley testified that during her tenure at the Lebanon Correctional Institution she had worked first, second, and third shifts.

Ms. Bentley possesses an associate's degree in corrections from Wilberforce University.

Ms. Bentley testified that she liked working in corrections, had worked overtime, had received good work performance evaluations, and had received no prior discipline.

Ms. Bentley identified Union Exhibit 3 as the annual performance evaluations of Officer Bentley from 2012, 2013, 2014, and 2015.

Ms. Bentley explained that a misdemeanor disorderly charge had arisen in 2010 from the separation of Ms. Bentley and her fiancé.

Ms. Bentley recalled that on August 21, 2015 she had worked Tower 3 and then commenced a vehicle patrol in zone B. Officer Bentley's duties at Tower 3 called for her to watch the yard. Officer Bentley's vehicle patrol duties called for her to clear security zones and roads.

Officer Bentley testified that when she was on vehicle patrol she had with her handcuffs, a twelve-gauge shotgun, four shotgun shells in a tube, a Glock handgun, and two magazines, each containing twelve bullets. Also with Officer Bentley while on vehicle patrol was a radio, a

dispenser of mace, and a force pager.

Ms. Bentley recalled that when she commenced her vehicle patrol on August 21, 2015 she drove to the Powerhouse to use the restroom located there and took the weapons from her patrol car with her when she exited the vehicle. Ms. Bentley recalled carrying the shotgun in her right hand and the Glock handgun was holstered on Officer Bentley's right side.

Officer Bentley recalled that as she was walking in the direction of the Powerhouse to use the restroom she heard talking and laughing and noticed that it was getting dark. Ms. Bentley recalled Officers Kelly and Conover walking toward Officer Bentley and recalled saying to Officer Kelly: "Do you have anything to say to me?" Ms. Bentley explained in her testimony at the arbitration hearing that on three occasions earlier Officer Kelly had insulted Officer Bentley, which Officer Bentley thought odd since Officer Bentley had not known Officer Kelly.

Ms. Bentley testified that she had not known Officer Conover.

Ms. Bentley recalled that when she was walking toward the Powerhouse to use the restroom there she had been carrying a bag that had contained tissues, sunglasses, reading glasses, gloves, and lotion. The bag was carried by Officer Bentley over her right shoulder.

Ms. Bentley noted that there are cameras on Towers 3 and 5.

Ms. Bentley recalled that on August 21, 2015 while she was working Tower 3, between 4:00 p.m. and 4:30 p.m., Officer Kelly went by Tower 3 and as she did so called Officer Bentley a whore. Ms. Bentley testified that Officer Kelly came back on two additional occasions and passed Tower 3, and in each case while passing the tower called Officer Bentley a whore. Ms. Bentley testified that inmates had heard Officer Kelly call out these insults and picked up the call from Officer Kelly. Ms. Bentley noted that at 8:45 p.m. the recreation yard is closed.

Ms. Bentley testified that she does not know why Officer Kelly called Officer Bentley a

whore; Officer Bentley did not write up the incident; Officer Bentley did talk to her supervisor about these incidents.

Ms. Bentley recalled that thirty days prior to August 21, 2015, in a parking lot at the Lebanon Correctional Institution, Officer Bentley had spoken to Officer Kelly, having pulled her vehicle next to Officer Kelly's vehicle and asking Officer Kelly: "Is there something you need to say to me?" Ms. Bentley testified that she had had no trouble with anyone at the institution except Officer Kelly.

Ms. Bentley recalled that during the August 21, 2015 incident Officer Conover had stepped into Officer Bentley's path and Officer Bentley had ordered Officer Conover to step back, which he did. Ms. Bentley recalled asking Officer Kelly: "Do you have something to say to me?" to which Officer Kelly had responded: "No ma'am." Ms. Bentley testified that that was it; Officer Bentley walked to the Powerhouse; the safety on the shotgun carried by Officer Bentley had been in the on position during the entire incident; no one involved in the incident had been endangered; there were no rounds chambered in the shotgun during the incident.

Ms. Bentley testified that she never rested the butt of a shotgun on her utility belt.

Ms. Bentley estimated that the August 21, 2015 incident occurred over eight to ten seconds. Ms. Bentley testified that she entered the Powerhouse after the incident was over to use the restroom there.

Ms. Bentley recalled that shortly after the incident on August 21, 2015 she was relieved of her duties and was later that evening arrested and taken to jail.

Ms. Bentley was asked whether she had pointed the shotgun at anyone during the August 21, 2015 incident to which she responded: "No." Ms. Bentley testified that she did not use the shotgun to move Officer Conover out of the way. Ms. Bentley testified that she did not threaten

harm to anyone during the incident, saying that she had gotten along with everyone at the institution except Officer Kelly.

Ms. Bentley denied that she had said to Lieutenant Bell: "I didn't point a gun at anyone." Ms. Bentley testified that when she had accompanied Lieutenant Bell through a lobby at the institution she had not known what she had been accused of.

Ms. Bentley testified that she did not point a gun at anyone and has no hard feelings toward Officers Kelly, Conover, or Wilson.

Ms. Bentley testified that she had had no issues with Officer Conover and had had no issues with Officer Wilson. When asked why Officer Conover had testified the way he had in this proceeding, Ms. Bentley testified that it was because Officer Conover and Officer Kelly are a pair. When asked why Officer Wilson had testified as she had in this proceeding, Ms. Bentley testified that Officers Conover and Kelly had told Officer Wilson what to say.

Charles Wallace

Charles Wallace was asked about cameras at Tower 5. Mr. Wallace stated that the camera at Tower 5 had not been working.

POSITIONS OF THE PARTIES

Position of the State of Ohio, Department of Rehabilitation and Correction, Lebanon Correctional Institution, Employer

The Employer in this proceeding, the State of Ohio, Department of Rehabilitation and Correction, Lebanon Correctional Institution understands that the incident that occurred on August 21, 2015 involved the approach by Officer Bentley to Officers Conover and Kelly while Officer Bentley had a holstered forty caliber handgun and a twelve-gauge shotgun on her person. The

Employer points out that when Officer Bentley came within a couple of feet of Officer Kelly, Officer Bentley stated to Officer Kelly: "Do you have something to say to me?" while pointing the muzzle of the shotgun held by Officer Bentley directly at Officer Kelly. This action by Officer Bentley so alarmed Officer Conover that he stepped between Officers Kelly and Bentley, whereupon Officer Bentley, in a stern instruction, ordered Officer Conover to step back, and he did. Officer Bentley again asked Officer Kelly: "Do you have something you need to say to me?" to which Officer Kelly replied: "No ma'am," which prompted Officer Bentley to respond: "That's what I thought" and walked back to her patrol vehicle.

The Employer points out that this interaction between three Correction Officers was witnessed and corroborated by Correction Officer Wilson who had been located in Tower 5 next to the institution's perimeter road, near a sally port and the Powderhouse.

The Employer points out that when Officers Kelly and Conover arrived at the front entrance to the institution they initiated proper reporting to their supervisors about the encounter they had just had with Officer Bentley. Officer Bentley was pulled from her assigned post; the Ohio State Highway Patrol was contacted; Officer Bentley was arrested and a criminal complaint was lodged against her for Aggravated Menacing, a misdemeanor of the first degree. A jury trial was held before the Lebanon Municipal Court in January, 2016. The trial resulted in a hung jury and the declaration of a mistrial.

The Employer does not believe that the criminal trial involving Ms. Bentley is relevant to the arbitration proceeding herein. The Employer points out that the parties in the two cases are not the same and the issue in the criminal trial had been whether proof beyond a reasonable doubt had been presented establishing the elements of the crime charged. The Employer points out that the burden of proof in arbitration proceedings is usually proof by a preponderance of the evidence.

In some cases the burden of proof is determined to require clear and convincing evidence.

The Employer points out that the arbitration proceeding herein involves the issue of whether the grievant violated Standards of Employee Conduct, and on the particular facts of this case whether the grievant had engaged in a serious threat of aggravated physical violence under Ohio Department of Rehabilitation and Correction Policy 31-SEM-08, Response to Workplace Violence and Workplace Domestic Violence. ODRC policy 31-SEM-08 defines “aggravated physical violence” as any physical act committed with the intent to cause serious physical harm or death to another, including inappropriate use of firearms, weapons, or any other dangerous devices on state property.

The Employer points out that the 31-SEM-08 policy of the Ohio Department of Rehabilitation and Correction states explicitly that the Department has “zero tolerance” for violence in the workplace, and threats or acts of violence among persons employed by the Ohio Department of Rehabilitation and Correction will not be tolerated. The 31-SEM-08 policy provides that an individual violating this policy is subject to disciplinary action.

The Employer points to the testimony provided by Officers Conover, Kelly, and Wilson, corroborating each witness’s recollection of what occurred between Officers Kelly, Conover, and Bentley around 8:50 p.m. on August 21, 2015.

It is the position of the Employer that there is clear and convincing evidence in the hearing record proving that the grievant knowingly and deliberately approached Officers Kelly and Conover and intentionally pointed the muzzle of a twelve-gauge shotgun at Officer Kelly. The Employer states that the claims made by Ms. Bentley about being called a whore on a number of occasions by Officer Kelly are not corroborated by any evidence in the hearing record.

The Employer argues that because there is no video or audio recording of the incident in

question this matter must be decided on the basis of the credibility of witnesses. In this regard the Employer cites factors enumerated by Arbitrator Robert Stein as helpful in determining the credibility of witnesses. These factors are:

1. The strength of the witness's recollection.
2. The position of the witness to observe what he/she testifies to.
3. The experience of the witness.
4. The consistency of testimony over time/with other statements.
5. Any inconsistency or self-contradiction.
6. Evidence of bias or prejudice.
7. Evidence of motivation(s) to misrepresenting the known facts.
8. The reasonableness and probability of the testimony with regard to all known evidence and testimony.
9. Corroborating testimony.
10. The demeanor of the witness.
11. The character of the witness.

See: Ohio State Highway Patrol and Ohio Civil Service Employees Association, Case No. 15-00-990706-0072-01-09, OCB No. 1447.

The Employer emphasizes the credibility of Officers Kelly, Conover, and Wilson in their testimony in the proceeding herein. The Employer points out that the recollection of each of these witnesses was strong and each witness was in a position to observe what was occurring, although Officer Wilson was not in a position to hear what was said. The Employer notes that the testimony from Officers Kelly, Conover, and Wilson is in accord and consistent. The Employer claims that there has been shown no bias or prejudice on the part of Officers Kelly, Conover, and Wilson. The

Employer emphasizes that these witnesses had no motive to misrepresent what they experienced and what they observed.

The Employer argues that there is more than a preponderance of evidence in the hearing record, evidence that is clear and convincing, that establishes the grievant's violation of Employee Standards of Conduct rule 7, failure to follow post orders, administrative regulations, policies or written or verbal directives; rule 18, threatening, intimidating or coercing another employee or member of the general public; rule 36, any act or failure to act that could harm or potentially harm the employee, fellow employee(s) or a member of the general public; rule 37, actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee; rule 38, any act, or failure to act, or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public.

It is the Employer's position that Officer Bentley was removed from her employment at the Lebanon Correctional Institution for just cause. The Employer claims that the action of Officer Bentley in pointing the muzzle of a twelve-gauge shotgun at the face of a co-worker caused serious fear in the co-worker and the act of the grievant was a life-threatening and hostile act. The Employer claims that this misconduct was so egregious, so dangerous, and so harmful that the termination of the employment of the grievant is warranted and supported.

The Employer urges the arbitrator to deny the grievance in its entirety.

Position of the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union

The Union in this proceeding, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, reminds the arbitrator

that the grievant, Penny Bentley, is a nineteen-year employee of the Ohio Department of Rehabilitation and Correction at the Lebanon Correctional Institution with no prior discipline, and contends that Ms. Bentley was removed from her employment without just cause. The Union claims that the State of Ohio has failed to carry its burden of proof in this matter, failing to prove that the Employer had just cause for the discharge of the grievant, a requirement of the Employer if the disciplinary action is to be upheld. In the absence of sufficient proven just cause for the removal of the grievant, the discharge must be found to be improper and reversed.

The Union claims that what occurred during the August 21, 2015 incident has not been established. All that the hearing record contains is the testimony of three Correction Officers who say that Officer Bentley pointed a shotgun at Officer Kelly. The Union contends that this testimony is not credible due to inconsistencies encountered at every step of the way.

As to the testimony of Officer Jennifer Wilson, the Union points out that at the time of the alleged incident Officer Wilson had only been working at the Lebanon Correctional Institution for four months. Officer Wilson was still on probation on August 21, 2015 and assigned to Tower 5, three stories above ground level. The Union points out that the incident is alleged to have occurred at dusk. The Union claims it is not credible that Officer Wilson would have been able to hear and/or see the events in the detail she described in her testimony from the height and distance of her location from the events described. The Union claims that Officer Wilson's inconsistencies make her testimony not incredible.

The Union points out that Officer Wilson in her incident report says Penny Bentley saw Mark Conover and Linda Kelly and pulled the weapon up and pointed it toward them. During an investigative interview Officer Wilson stated that Penny Bentley had been holding a shotgun with two hands, while in a court transcript Officer Wilson said that Officer Bentley had been holding

the shotgun in one hand, and her hand on the shotgun had been by the slide. See Union's Exhibit 1, page 163, line 4 and page 163, line 21. The Union claims that these inconsistencies make clear that either Officer Wilson did not see the alleged incident or she changed her testimony to match what she had heard others say.

The Union notes that in the court transcript, when asked what hand Officer Bentley had used to carry the shotgun, Officer Wilson had said the left hand. See Union's Exhibit 1, page 180 and page 181, lines 1-2.

The Union points out that when asked in court proceedings if the shotgun had been on Penny Bentley's belt or hanging free, Officer Wilson had said she was not 100% sure. In court Ms. Wilson testified that Officer Bentley had been carrying a bag on her right arm but Ms. Bentley testified that she carried the bag on her left arm, her weaker side. Ms. Bentley testified that she carried the shotgun in her right hand as it is her stronger side, not her left hand as Officer Wilson testified in the court proceeding.

The Union points out that when Ms. Wilson was asked how long the alleged incident had lasted, she first said about a minute and one-half but in court proceedings stated that the incident had lasted seconds.

The Union notes that Officer Wilson had said in her testimony that when Penny Bentley was walking away the shotgun was pointed to the sky.

The Union points out that Officer Wilson had first thought that the incident was a joke and because she was still on probation she did not want to do anything to harm her job so she did not contact a supervisor nor radio the other patrol vehicle to come to her location. She made no yell to Officers Conover, Kelly, or Bentley to let them know she was watching them.

As to the testimony provided by Mark Conover, Mr. Conover had said that he had stepped

in front of Officer Kelly and there had been two to three feet between Penny Bentley, Linda Kelly, and himself. At his investigative interview Mr. Conover stated that the distance had been 1.5 feet to 2.0 feet. The Union asks which version the arbitrator is to believe.

At his investigatory interview Officer Conover stated that after the incident Officer Bentley had driven off. In his incident report Officer Conover stated that Ms. Bentley had walked away. At the court proceeding Officer Conover stated that he did not know what Officer Bentley had done after the incident.

The Union points out that Officer Conover had had a hand-held radio (walkie-talkie) on August 21, 2015 but did not use it to call a supervisor or the other patrol vehicle. The Union claims that the testimony and statements from Mr. Conover, over time, had changed several times and the Union claims that these changes were done to protect Ms. Kelly.

The Union points out that Trooper Griffith who responded to the institution had been told that there was no video recording of the incident. The Union claims that Trooper Griffith could have more thoroughly investigated the scene and could have confirmed that video evidence did not exist or could have asked why no video evidence existed.

The Union points out that Officer Kelly was interviewed on August 25, 2015; Penny Bentley was interviewed on August 25, 2015; Jennifer Wilson was interviewed on August 25, 2015; Mark Conover was interviewed on August 27, 2015, and Linda Kelly was interviewed again on August 28, 2015. The Union contends that the investigation was not timely because the delay of the investigation gave Ms. Kelly, Mr. Conover, and Ms. Wilson ample time to meet and talk about the evening of August 21, 2015. The Union claims this is a violation of Article 24.02 of the parties' collective bargaining agreement.

As to the testimony provided by Ms. Kelly, the Union claims that the description of the

events provided by Ms. Kelly as to the August 21, 2015 incident is not only inconsistent with other testimony in the hearing record, but impossible. The Union claims that the description of the incident provided by Ms. Kelly is not consistent with the description of the event provided by Ms. Wilson or Mr. Conover. The Union points out that Ms. Kelly had said the incident had lasted several minutes but Ms. Wilson and Mr. Conover had testified the incident took only a few seconds. The Union notes that Officer Kelly had been assigned a hand-held radio (walkie-talkie) on August 21, 2015 but did use the radio to call a supervisor or call the other patrol vehicle.

The Union claims that Mr. Conover testified that he assisted Officer Kelly on her walk to the front entrance of the institution after the interaction with Officer Bentley yet Ms. Kelly recalled that she had walked to the front entrance unassisted.

The Union claims that the one consistent piece of testimony in this case is Ms. Bentley's claim that Ms. Kelly had repeatedly called Ms. Bentley a whore. The Union claims that proof of this misconduct on the part of Ms. Kelly was the conversation between Ms. Bentley and Ms. Kelly in the parking lot of the institution thirty days prior to August 21, 2015 when Ms. Bentley had asked Ms. Kelly the same question put to Officer Kelly by Officer Bentley on August 21, 2015: "Do you have something to say to me?"

The Union acknowledges that Mr. Conover testified that he had never observed Officer Kelly calling Officer Bentley a whore, but the Union reasons that if Officer Conover had been willing to step in front of Officer Kelly to protect her from a shotgun pointed at her, Officer Conover would likely be willing to help Officer Kelly cover up her misconduct.

The Union emphasizes that Officer Kelly suffered no physical harm and sought no professional services as a result of the incident. The Union claims that Ms. Kelly had said she was "shell-shocked" after the incident and had not known what had just happened until Mr. Conover

told her what had just occurred.

The Union points out that Rick Meadows described Penny Bentley as a good officer and corroborated Ms. Bentley's testimony about always going to the Powerhouse to use the restroom there. Rick Meadows has never had a problem working with Officer Bentley.

As to the grievant, the Union points out that Ms. Bentley has nineteen years of service at the Lebanon Correctional Institution and had good work performance evaluations. Ms. Bentley had received no prior discipline and Ms. Bentley possessed two corrections degrees.

The Union points out that throughout the investigation of the alleged incident, throughout incident reports prepared about the alleged incident, throughout transcribed court proceedings, and during the arbitration hearing herein, only one person has provided testimony and statements that have never changed - that person being the grievant, Penny Bentley.

The Union notes that Ms. Bentley has testified that on August 21, 2015 Officer Kelly was calling Officer Bentley a whore while riding by Tower 3 and testified that Officer Bentley had verbally reported these and similar incidents to several supervisors. Ms. Bentley testified that at no time did she point or aim a firearm at anyone, nor did she intend any harm to a co-worker. Ms. Bentley testified that Ms. Kelly, Ms. Wilson, and Mr. Conover are not being truthful in their testimony in this proceeding.

The Union points out that because Ms. Bentley was arrested, charged, and taken to jail, she had had to hire an attorney. The Union points out that Ms. Bentley's attorney arranged for Ms. Bentley to take a polygraph examination which she passed. The Union notes that Ms. Bentley went to court in January, 2016 and her case was dismissed without prejudice.

The Union notes that the arbitrator is the sole determiner of the facts in this case and will determine them based on the evidence presented and the credibility of the witnesses who testified

in this proceeding. Factors to be applied by the arbitrator, argues the Union, include the appearance of each witness while on the witness stand, the manner in which each witness testified, the reasonableness of the testimony from each witness, and the credibility of each witness.

The Union claims that with all the inconsistencies in the witnesses' testimony appearing in the hearing record it is near impossible to discern the truth in this case. The Union claims that on one side there are three witnesses, two of whom have reason to lie, and the other had a vantage point from which very little could be seen or heard. The Union claims that all three of these witnesses, Ms. Kelly, Mr. Conover, and Ms. Wilson, have glaring inconsistencies in their testimony, and these witnesses do not agree among themselves on where the gun was located, how the gun was held, what was being carried by Officer Bentley, how each hand of Officer Bentley was being used, or how Officer Bentley left the scene of the alleged incident.

On the other side, argues the Union, is a nineteen-year employee, Ms. Bentley, whose story has remained consistent. The Union claims that the grievant was harassed for a long period of time by Officer Kelly.

The Union claims that the Employer has failed to prove what happened on August 21, 2015. The Union claims that all the Employer has presented to the hearing record is the testimony of four people who have related vastly different stories about what purportedly occurred.

The Union argues that three inconsistent witnesses do not equal just cause.

The Union also argues at page 8 of its post-hearing brief:

We also heard that the court dismissed the case related to this incident. While the standard in court is different than the standard at arbitration, the arbitration standard of just cause is a *higher standard* than the reasonable doubt standard in court.

The Union claims that the Employer failed to prove just cause and failed to prove that the

grievant knowingly engaged in misconduct. The Union claims that Ms. Bentley did not believe at any time she was committing a wrongful act or that she was causing any serious reaction to her behavior. The Union claims that Ms. Bentley during the events in question had been doing her job and the Union contends that there is no proof that the grievant acted in such a way as to threaten physical harm or serious physical harm against a co-worker.

The Union urges the arbitrator to grant the grievance in its entirety, return the grievant to her employment with full back pay, benefits, and seniority, and make the grievant whole in every way by placing the grievant in the position she would have been in had the discipline not occurred.

DISCUSSION

Article 24, section 24.01 in the collective bargaining agreement between the parties to be applied in this proceeding, Joint Exhibit 1, provides that disciplinary action is not to be imposed upon an employee except for just cause. The arbitrator understands that this language places on the Employer the burden of proving facts that reflect just cause, both to substantiate the charged misconduct and to establish the seriousness of the proven misconduct.

Because the grievant in this proceeding is a bargaining unit member with nineteen years of service with the Employer and no prior discipline, and because this case addresses the ultimate disciplinary action that may be imposed by the Employer, termination of employment, the arbitrator understands that the burden of proof that must be carried by the Employer for the Employer to prevail in this case is between a minimum of a preponderance of the evidence in the hearing record and a maximum of clear and convincing evidence, a higher standard that may be justified by the severity of the disciplinary action imposed, the discharge of a long-term employee who has had no prior discipline.

The vast majority of the facts underlying the events alleged to have occurred on August 21, 2015 are not disputed by the parties or among the four eyewitnesses to the incident who testified in this proceeding. The Union is correct that not every witness's testimony is 100% consistent with other witnesses' testimony. The Union has cited in detail and with admirable specificity the differences found among the testimony, incident reports, and interviews provided by Officers Bentley, Kelly, Conover and Wilson. The Union has concluded that because of these variances in the testimony and incident reports among these four eyewitnesses the "truth" of what actually occurred during the incident in question can never be known. The Union argues that the three eyewitnesses presented by the Employer should not be found to be factual or accurate due to the inconsistencies found among their respective testimonies, incident reports, and interviews as presented in the hearing record.

The arbitrator acknowledges the differences that arise in the testimonies, incident reports, and interviews of the four eyewitnesses to the incident in question. The arbitrator however does not reach the same conclusion as the Union as to what those inconsistencies mean in evaluating the credibility of these four eyewitnesses.

First and foremost, most of the details of what occurred during the chronology of events that make up the August 21, 2015 incident are not disputed between the four eyewitnesses and are remembered in very similar ways. For example, there is no dispute between the eyewitnesses as to where the incident occurred; there is no dispute as to who were involved in the incident; there is no dispute as to when the incident occurred. None of the eyewitnesses disagreed on how the three direct participants in the incident approached each other on the perimeter road near Tower 5 at the institution at around 8:45 p.m. There is no dispute that during the incident Officer Conover stepped in front of Officer Kelly facing Officer Bentley, interposing himself between Officer Kelly and

Officer Bentley. There is no dispute that during the incident in question Officer Bentley asked Officer Kelly whether Officer Kelly had something to say to Officer Bentley; there is no dispute that the incident ended with Officer Bentley walking away from Officers Kelly and Conover toward the Powerhouse and the patrol vehicle assigned to Officer Bentley; there is no dispute that the incident ended with no physical harm inflicted upon anyone.

The single significant aspect of the incident in question that is disputed between the parties is whether Officer Bentley during the August 21, 2015 incident pointed the muzzle of a twelve-gauge shotgun she was holding at the face of Officer Kelly, positioning the muzzle of the shotgun about twelve inches from Officer Kelly's nose, pointed directly at Officer Kelly's face. Officer Bentley denies that she at any time pointed the shotgun at Officer Kelly and denies that at any time during the incident in question she had had any intention of aiming a weapon at Officer Kelly.

In contradiction to Ms. Bentley's testimony, Officers Kelly, Conover, and Wilson at the arbitration hearing, at Ms. Bentley's criminal trial, reported in an incident report prepared on the day of the incident, and during investigatory interviews stated that Officer Bentley had pointed the muzzle of the shotgun she was holding at the face of Officer Kelly while asking Officer Kelly whether Officer Kelly had something to say to Officer Bentley.

The Union questions the credibility of Officers Kelly, Conover, and Wilson on the issue of the placement of the shotgun by Officer Bentley, implying that Officers Kelly and Conover, for personal reasons, were supporting each other's claims in this regard, and the Union argues that Ms. Wilson testified as she did in this case because from her vantage point during the incident in question Officer Wilson had not been in a position to clearly see what was transpiring. The Union points out that Officer Wilson, while located in Tower 5 during the incident in question, could not hear what was being said.

The arbitrator finds the testimony of Ms. Kelly, Mr. Conover, and Ms. Wilson to have been consistent and corroborative of the assertion that Officer Bentley pointed the muzzle of a twelve-gauge shotgun at the face of a co-worker, placing the muzzle of the shotgun twelve inches from the face of the co-worker while demanding to know whether the co-worker had something to say to Officer Bentley. In finding the testimony on this point from Officers Kelly, Conover, and Wilson to have been credible, the arbitrator is not necessarily finding that Ms. Bentley is lying in her denial of this conduct. Ms. Bentley gave every outward indication during her testimony at the arbitration hearing that she believes she had done nothing wrong during the incident in question and at no time pointed the shotgun at anyone.

The arbitrator has been told by the grievant in this case, during her testimony at the arbitration hearing, that the reason Officer Bentley put the question to Officer Kelly during the August 21, 2015 incident of whether Officer Kelly had something to say to Officer Bentley was based on Ms. Bentley's understanding that Officer Kelly over a span of time had been publicly insulting Officer Bentley by calling Officer Bentley a whore. The grievant has claimed that on at least one occasion Officer Kelly's harassment of Officer Bentley prompted inmates in the recreation yard to call Ms. Bentley a whore. The hearing record contains the claims in this regard made by Ms. Bentley. The hearing record contains no other evidence that would corroborate these claims of harassment made by the grievant.

While Ms. Bentley testified that Officer Kelly had been insulting Officer Bentley over an extended period of time, Ms. Kelly testified that she had never called Officer Bentley a whore. Mr. Conover testified that he had never observed Ms. Kelly call Officer Bentley a whore. No other witness in this proceeding claimed to have observed the misconduct ascribed to Officer Kelly by the grievant. Ms. Kelly testified that she had had no interaction with Officer Bentley, and Officer

Conover in his testimony said he had had no previous interaction before with Officer Bentley.

Even if Officer Bentley had suffered taunts from a co-worker, such misbehavior would not justify the threatened use of deadly force. The allegations of wrongdoing made by Ms. Bentley against Ms. Kelly are not supported by a preponderance of the evidence in the hearing record and these allegations made against Ms. Kelly have not been substantiated. The arbitrator in this case does not express an opinion as to whether this misbehavior ascribed to Ms. Kelly occurred; the arbitrator finds in this proceeding that such alleged misbehavior ascribed to Ms. Kelly has not been proven by a preponderance of the evidence.

Without proof of the misconduct alleged by the grievant against Ms. Kelly, the question repeatedly put to Officer Kelly by Officer Bentley about whether Officer Kelly had something to say to Officer Bentley remains unexplained. It may be that Officer Bentley believed that this harassment had occurred when in fact it had not occurred, or it may be that the harassment occurred and it has not been proven to have occurred. In either event, the threat of the use of deadly force against a co-worker remains unjustified and is found to be egregious misconduct, opening a person who engages in such threatening behavior to a severe disciplinary response based on the seriousness of the misconduct and the serious physical harm such misconduct threatens.

The arbitrator is particularly struck by the lack of any self-interest on the part of Ms. Wilson to make up a story or fashion her testimony so as to incriminate Officer Bentley. Officer Wilson on August 21, 2015 was a relatively new employee with only a few months of experience on the job, and not surprisingly harbored the insecurities of a new employee who is less familiar with the staff and operations of the institution than more veteran officers. Ms. Wilson testified that because she was at that time a probationary employee, her first thought upon seeing the interaction between Officers Bentley, Kelly, and Conover was that a prank was being played upon Officer Wilson.

While Officer Wilson had not been in a position to hear what was said between Officers Bentley, Kelly, and Conover, Officer Wilson was able to discern from the visuals of the officers' interaction a sufficient amount of the activity to understand that this was no prank. During the events in question Officer Wilson saw enough to understand that a serious threat to the safety of a co-worker was occurring through the use of a deadly weapon. Officer Wilson's alarm based upon what she had observed from Tower 5 lends credence to the claims made by Officers Kelly and Conover that Officer Bentley had aimed the shotgun at Officer Kelly, threatening the use of deadly force against Officer Kelly. The evidenced in the hearing record is clear, convincing, and overwhelmingly to the effect that Officer Bentley pointed the shotgun's muzzle at the face of a co-worker.

The Employer has presented the work rules that are alleged to have been violated by the grievant when Officer Bentley pointed the shotgun at Officer Kelly on August 21, 2015. These work rules are prohibitions as to coercing, threatening, or intimidating another employee, acting in a way to potentially harm another employee, acting to compromise or impair the ability of an employee to effectively carry out her duties as a public employee, and acting in such a way as to constitute a threat to the security of the facility and staff. The aim of the muzzle of the shotgun held by Officer Bentley at the face of Officer Kelly, twelve inches from the face of Officer Kelly, presents a violation of work rules 18, 36, 37, and 38 within the Employer's Standards of Employee Conduct, presented in policy 31-SEM-08.

The conduct of Officer Bentley during the events in question that includes the pointing of a shotgun's muzzle at the face of Officer Kelly presents the threat of deadly force without sufficient justification and presents a serious breach of the standard of conduct demanded under the rules of the Employer in effect during the incident at issue. The pointing of the shotgun at the face of a co-worker threatened an outcome that could have been catastrophic. The likely result of this incident

had the firearm pointed at the nose of Officer Kelly discharged is so gruesome and horrific as to require no deep analysis. The conduct of the grievant in this case was so dangerous, so reckless, so coercive and intimidating that these actions of the grievant are found to comprise just cause for severe disciplinary action and are found to be sufficiently egregious to support the discharge of the grievant.

Accordingly, the arbitrator finds that the Employer did have just cause to discharge the grievant for her misconduct during the events that occurred on August 21, 2015. The arbitrator therefore declines to grant the grievance.

AWARD

1. The grievance at issue in this proceeding is found to be arbitrable and properly before the arbitrator for review and resolution.
2. The Grievant, Penny Bentley, was removed from her position as a Corrections Officer for just cause.
3. The Employer presented to the hearing record clear and convincing evidence proving that on August 21, 2015 grievant Penny Bentley pointed the muzzle of a shotgun at the face of a co-worker without justification.
4. The grievance is denied.

Howard D. Silver

Howard D. Silver, Esquire
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Columbus, Ohio
September 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the State of Ohio, Department of Rehabilitation and Correction, Lebanon Correctional Institution and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Grievant: Penny E. Bentley, Grievance Number: DRC-2015-03821-3, was served electronically upon the following this 22nd day of September, 2016:

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September 22, 2016