

ARBITRATION DECISION NO.:

368

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Corrections, Chillicothe
Correctional Institution

DATE OF ARBITRATION:

July 10, 1991

DATE OF DECISION:

August 13, 1991

GRIEVANT:

Byron Turner

OCB GRIEVANCE NO.:

27-03-(90-10-19)-0059-01-03

ARBITRATOR:

Anna D. Smith

FOR THE UNION:

Richard Sykes

FOR THE EMPLOYER:

Margaret S. Lee, Advocate
Lou Kitchen, Second Chair

KEY WORDS:

Removal
Inmate Abuse
Knowingly Causing Harm
Mitigating Factors; Drug
Side Effects

ARTICLES:

Article 2 - Non-
Discrimination
 §2.01-Non-
Discrimination
 §2.02-Agreement Rights
Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline

§24.08-Employee Assistance Program

FACTS:

The grievant had been employed as a Corrections Officer 2 at the Chillicothe Correctional Institution since March 1988. He had received prior discipline, including a three day suspension, for non-inmate related rules violations. He was enrolled in an EAP program and taking the drugs Prozac and Klonopin. The grievant was working alone in the prison barber shop guarding several inmate barbers and patrons. The grievant asked one of the barbers why he had not reported to work the previous day. An argument followed in which the inmate used a racial slur and the grievant threatened the inmate. The grievant then came from behind his desk and struck the inmate, after which other inmates separated the two men. The grievant then reported the incident to management. The Highway Patrol investigated and brought assault charges. The grievant pleaded no contest to a reduced charge of disorderly conduct. The employer investigated the incident and removed the grievant for excessive use of force and abuse of an inmate.

EMPLOYER'S POSITION:

There was just cause for removal of the grievant for abuse of an inmate. The employer's investigation found that the grievant used excessive force. Inmate safety is a primary concern of corrections institutions and officers, and excessive use of force is abusive. The grievant also admitted to the violation by pleading no contest to the criminal charges. The grievant's acts meet the test in Ohio Administrative Code section 5123-3-14 as acts inconsistent with human rights that resulted in physical harm. There are no mitigating factors present to justify a reduced penalty including the grievant's enrollment in an EAP and use of medication. Lastly, the employer is not compelled to consider EAP participation when considering discipline and the arbitrator may not reduce any penalty upon a finding of abuse.

UNION'S POSITION:

There was no just cause for the grievant's removal. Corrections officers must command the respect of inmates and the inmate who was involved in the incident with the grievant had challenged the grievant's authority and directed a racial slur toward the grievant. The inmate was the aggressor. The grievant admitted striking the inmate and knows that it was wrong. The grievant pleaded no contest to disorderly conduct and it cannot be argued that he was guilty of assault. The grievant was enrolled in an EAP program and taking medication which causes side effects which the grievant was unaware of at the time of the incident. He did not inform the employer of the medication out of fear that the employer would not keep it confidential. Lastly, because abuse has not been proven, the arbitrator may reduce the penalty.

ARBITRATOR'S OPINION:

It has been proven that the grievant struck the inmate without the following justifying circumstances present: 1) self defense; 2) defense of third persons; 3) controlling or subduing an inmate; 4) preventing a crime; 5) preventing an escape; 6) preventing self-inflicted harm to inmates. While, excessive use of force may be abuse, it is not abuse in all cases. Abuse as defined in the Ohio Revised Code has been incorporated into the contract. Section 2903.33(B)(2) defines abuse as knowingly causing physical harm or recklessly causing serious physical harm. It has not been proven that the grievant knowingly caused harm due to the fact that he was provoked and the grievant was taking medication, (Prozac and Klonopin), which has been proven to cause side effects. The employer failed to consider this as a mitigating circumstance. The grievant did not recklessly cause serious harm as the inmate had only a minor injury from the incident. Therefore, it has not been proven that the grievant has met either test for abuse, however, he did use excessive force. The grievant cannot be faulted for not notifying the employer of the medication because he was not aware of the side effects at the time he was taking the medication.

AWARD:

The grievance is sustained in part. The removal was reduced to a thirty day suspension with full back pay

and benefits from the end of the suspension for excessive use of force. Reinstatement of the grievant was to a non-inmate contact position until the employer received assurance that a recurrence was not likely. The employer may order, at its expense, an examination by a physician of choice to determine the grievant's fitness.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

**STATE OF OHIO,
DEPARTMENT OF REHABILITATION
AND CORRECTIONS**

and

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

OPINION & AWARD

Anna D. Smith, Arbitrator

Case No.:

27-03-(10-19-90)-59-01-03

Grievant:

Byron Turner
Removal

I. Appearances

For the State of Ohio:

Margaret S. Lee, Advocate
and Labor Relations Officer,
Allen Correctional Institution
Lou Kitchen, Second Chair,
Office of Collective Bargaining
Lt. M. Arbogast, Correctional
Supervisor II, Chillicothe
Correctional Institute, Witness
Sgt. D. Danvers, Correctional
Supervisor I, Chillicothe
Correctional Institute, Witness
David Elliott, Inmate A226650,
Chillicothe Correctional Institute, Witness
Lynn Goff, Administrative
Assistant to Warden, Chillicothe
Correctional Institute, Witness
Arthur Tate, Jr., Warden,
Southern Ohio Correctional

Facility, Witness
Barbara Denton, Labor
Relations Officer, Chillicothe
Correctional Institute, Observer.

For OCSEA Local 11, AFSCME:
Richard Sykes, Advocate
and Staff Representative, OCSEA
Local 11, AFSCME, AFL-CIO
Byron A. Turner, Grievant
Jess McKee, Steward.

II. Hearing

Pursuant to the procedures of the parties a hearing was held at 9:30 a.m. on July 10, 1991 at the Chillicothe Correctional Institution, Chillicothe, Ohio before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument, 4:30 p.m., July 10, 1991. The opinion and award is based solely on the record as described herein.

III. Issue

By agreement of the parties, the issue is:

“Was the removal of Byron Turner, grievant, on September 28, 1990 for just cause? If not, what is the appropriate remedy?”

They further agreed that the matter is properly before the Arbitrator.

IV. Joint Exhibits and Stipulations

Joint Exhibits

- I. 1989-91 Contract between the parties;
- II. Discipline Trail
 - A. Use of Force Committee report 9/14/90
 - B. Chillicothe Correctional Institution Barber Shop Post Orders
 - C. Pre-Disciplinary Hearing notice 9/14/90
 - D. Pre-Disciplinary Hearing officer's report 9/24/90
 - E. Notice of Disciplinary Action 9/24/90-9/26/90
- III. Grievance Trail
 - A. Grievance #27-03-(10-19-90)-0059-01-03
 - B. Step 3 Response
 - C. Request for Arbitration
- IV. Ohio Dept. of Rehabilitation and Correction Employee Code of Conduct 6/1/90.

Joint Stipulations of Fact

1. Byron Turner was hired on 3/28/88 as a Correction Officer II at Chillicothe Correctional Institution.

2. Grievant has previously received/served the following discipline:
 4/9/90 Verbal Reprimand: Unauthorized Absence (1A)
 6/26/90 Letter of Reprimand: Carelessness/Failure to Follow Orders (5 & 8)
 9/12/90 (July incident) 1-day Suspension: Failure to Provide Physician's Verification (3g)
 9/24/90 (August incident) 3-day Suspension: Failure to Provide Physician's Verification (3g).
3. Grievant received the Department of Rehabilitation and Correction Standards of Employee Conduct and Ohio Ethics Law.
4. Grievant was assigned to the Second Shift post of Barber Shop when the incident occurred.
5. Grievant received training in Rules Infraction Board process, Use of Force, Inappropriate Supervision, while employed with the Department of Rehabilitation and Correction.
6. Grievant submitted a statement dated September 9, 1990 reporting the incident and admitted hitting Elliott, A226650.

V. Relevant Contract Provisions

Article 24 Discipline

§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.

§24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action.

VI. Background

The Grievant, Byron Turner, was employed by the Ohio Department of Rehabilitation and Corrections for 2 1/2 years as a Corrections Officer at Chillicothe Correctional Institution. This facility is a medium security prison for adult males. At the time of his removal in September, 1990, for excessive use of force and physical abuse of an inmate, he had accumulated four disciplinary actions for violations of rules unrelated to inmates. He had received his employer's rules, and received training in and understood the Agency's procedures and standards for supervising and disciplining inmates. Turner had also been under a psychiatrist's care through the Employee Assistance Program since June or July, 1989, and was taking psycho-pharmaceuticals (Prozac and Klonopin). His participation in the EAP and medical history pursuant to it were unknown to Turner's employer at the time the incident giving rise to his discharge occurred.

The event bringing the Grievant to arbitration took place about six o'clock on the evening of September 9, 1990, when Turner was working in the prison's barber shop. The shop was filled with inmate barbers and patrons, but no other officers were present. The Grievant asked one of the barbers, Inmate Elliott, why he had not reported to work the previous evening. The discussion developed into an argument during which the inmate is alleged to have used a racial slur and the Grievant is alleged to have threatened the inmate. The confrontation escalated further with the Grievant coming from behind his desk and striking the inmate. Inmates who were in the shop broke up the altercation. Turner immediately reported the incident to his superiors. Statements were taken from the antagonists and from the inmate witnesses. None of the witnesses appears to have seen the complete incident nor heard all the words exchanged, but they are consistent in reporting that Turner did strike the inmate at least once, a fact which he freely admits.

Both men were medically examined on September 10. A small (1/4") abrasion was found on Elliott's lip, and a quarter-sized red area on the back of his head. Turner had a small abrasion on his left palm.

The Use of Force Committee investigated, concluding use of force by the Grievant was unjustified, and recommending disciplinary action. The matter was also reported to the Ohio Highway Patrol and a complaint ensued. Turner subsequently pled to disorderly conduct (fighting), rather than go to trial on the assault charge with a public defender.

A pre-disciplinary meeting was held on September 24, Warden Tate presiding. At the hearing Turner again admitted striking the inmate, but maintained (as he had throughout the investigation) that he believed his reaction was the result of stress and medication. Mr. Tate nevertheless ordered his removal, signing the order on September 24 and citing rules 42 (excessive use of force) and 43 (physical abuse of an inmate). The subject grievance was subsequently filed, alleging violations of Articles 2.01, 2.02, 24.02 and 24.08, and processed through to arbitration where it presently resides free of procedural defect.

VII. Positions of the Parties

Position of the Employer

The Employer argues that the rules with which the Grievant is charged are closely tied to the mission of the institution, which is to provide a safe, secure, humane environment for the inmates. The Grievant's own admission that he struck the inmate is clear and convincing evidence that he used physical force in violation of these rules. The Agency's internal investigation concluded that no amount of force was necessary. Under these circumstances, the Employer deems any use of force excessive and abusive, warranting removal.

The Employer goes on to contend that the Grievant's behavior meets several independent tests of abuse. He admitted to an act "inconsistent with human rights" that resulted in physical injury. This action was neither accidental nor taken in self defense (O.A.C. §5123-3-14). Inmate statements and testimony indicates that Turner had to be restrained to avoid further confrontation. The verbal altercation that preceded the physical attack confirms another test of abuse under O.A.C.: humiliation and degradation. The Administrative Code and statutory definitions of abuse and assault all coincide or interrelate. The Grievant was charged with assault, pled no contest and was found guilty. This is a conviction.

Officers like Turner, the Employer contends, have a reckless disregard for their job duties. A well-trained employee like Turner is willfully, wantonly and knowingly reckless when responding violently to inmate behavior. Employees such as this are disruptive to the operation of the institution and a liability for all employees. In the penal setting the employee's ability to control his emotions is critical. Arbitrator Rivera in the Carter decision (G87-1120) noted that 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."

Given the totality of the circumstances--Turner's admission, his knowledge of the rules, and the findings of the independent internal and external investigations that no force was necessary, the consensus that his actions were excessive, violent and, in the Agency's view, abusive--the Arbitrator should not return the Grievant to the workplace. To do so would be an affront to all staff who perform under the same circumstances and rules. The Employer urges the Arbitrator not to substitute her judgment for that of the Agency which is responsible for maintaining standards of care. The Agency gave no mitigating weight to Turner's claim that his medication was responsible for his abusive behavior. No doctor's statement was supplied until after the event. There were discrepancies in the testimony about whether he was restrained by the inmates and his failure to disclose his use of medications in an earlier investigation. In any case, use of medication does not abrogate accountability in the performance of job duties. The Department cannot afford to have officers who are not in the complete control of their faculties.

The Employer further argues that it is not required by §24.08 to take EAP participation into account in the assignment of discipline, but that the Arbitrator is constrained by §24.01 from adjusting the penalty of removal when abuse has been found. The Employer therefore asks that the grievance be denied in its entirety.

Position of the Union

The Union points out that the Department requires excellence of its employees in a demanding environment. In the penal setting an officer must command the respect of the inmates to function properly. On the evening of September 9, Inmate Elliott challenged Officer Turner's authority in the presence of other inmates. He baited Turner with his demeanor, posture and racial slur. The warden, Mr. Tate, testified that a person would not know what he would do until he was in that situation. The Grievant knows what he did was wrong, but in the Union's view it was not abuse under the Ohio Revised Code §2903.33 (B) (2) standard set by the Dunning decision. Although the physical harm done was minor, both the Union and Inmate Elliott understand how and why the Use of Force Committee arrived at its decision. The mountain of inmate statements presented was conflicting and only one inmate testified. Mr. Tate testified to a number of things that have not previously come to light: that Turner backhanded Elliott and knocked him over a table. The offense that Turner pled no contest to was the misdemeanor disorderly conduct. The Union emphatically denies that he was found guilty of the felony charge. As for the Grievant, he told the truth. He was aware he had problems and sought help. He did not inform his employer because he did not trust Management to keep the matter confidential.

In the Union's view, the Arbitrator does have the authority to modify the discipline, for Management has not proved abuse. It asks that Turner be returned to work, granted back roll call and holiday pay, and made whole.

VIII. Opinion of the Arbitrator

Finding on Use of Force

Whatever else happened on the evening of September 9, there is no doubt that the Grievant struck the inmate, and that he did so without any of the six conditions justifying the use of force:

- (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 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.

Administrative Rule 5120-9-01; Management Exhibit 1

The Use-of -Force Committee's conclusion of unjustified use of force and the disciplinary finding on Rule 42, excessive use of force, are sound and cannot be disturbed. I am not, however, persuaded that the Grievant's actions constitute abuse.

Definition of Abuse

Management witnesses were inconsistent as to what constitutes abuse. On the one hand, the chairman of the Use-of -Force Committee defined it as unauthorized use of force. This would necessitate the conclusion that the Grievant is guilty of abuse because his force was unjustified. In the face of two separate rules, 42 and 43, and the warden's testimony that 42 is the lesser of the two, I find this argument faulty. Excessive use of force is not per se abuse, although a given act may qualify as both.

Another view of abuse was given by the warden, who testified that in the absence of a specific administrative rule, reliance is placed upon the statutory definition. This is consistent with the Dunning decision (G87-0001) which incorporated applicable state laws. Accordingly, the standard for determining whether abuse has occurred is Section 2903.33(B)(2) O.R.C., which defines abuse as "knowingly causing physical harm or recklessly causing serious physical harm...."

Finding on Abuse

From the testimony of witnesses at arbitration and jointly-submitted statements relied upon by Management in disciplining the Grievant, some facts are fairly certain: the blow was struck following an argument in which both participants were loud and appeared angry. Probably both felt threatened, the Grievant by the disrespectful posture and attitude of the inmate. Whether the inmate used the alleged racial slur cannot be determined one way or the other: no one but the Grievant heard it, but many heard Elliott mumble something low in the noisy shop that evening. Whether the slur was used is largely irrelevant, for it is a fact of prison employment that correction officers will be taunted by inmates and must nevertheless not retaliate violently. The Grievant knew this and knew the proper response. Nevertheless he "lost it," struck the inmate and used threatening language. When the altercation was broken up, he quickly regained his composure and reported the incident. Although his actions were inappropriate and cannot be justified, I do not believe they were done in cold-blooded, brutal retaliation or by a deliberate, conscious decision or without provocation, as variously characterized by Management. I also have reason to believe this could have been something other than a simple loss of temper: the Grievant testified that he had been subjected to racial epithets before and had not similarly responded, his record is clear of inmate-related offenses, witnesses stated he was "transformed," he had been experiencing dizzy spells and agitation for which he had sought help in the months prior to the incident, and he was on psychotherapeutic drugs with known adverse side-effects such as could explain his uncharacteristic behavior as being drug-related. In the mind of the Arbitrator, there is real doubt that the Grievant knowingly caused physical harm to the inmate, and any such substantial doubt must be resolved in his favor. I thus do not find Turner guilty of abuse within the meaning of the Contract. By the evidence submitted here, the inmate sustained only minor, temporary injuries, thus not suffering "serious physical harm," and the Grievant cannot be said to have "knowingly" caused "physical harm" if, as here, it is not clear that he was in control of his faculties.

Penalty

Having found evidence for excessive use of force but not for abuse, the issue of appropriate penalty remains. There is no question that employees with inmate contact must have self-control. Failure to restrain their behavior may subject them, their co-workers, inmates and the public to danger. It also exposes their employer to financial liability. The act committed by the Grievant is, therefore, a dischargeable offense because it jeopardized the security of the institution.

Against the seriousness of the offense is the probability that the Grievant's loss of control was caused by his medication. The Employer suggests that the Grievant had the duty to inform the Agency of his condition and treatment before it affected his behavior. The Arbitrator agrees that if the employee is aware of a condition that would place the institution at risk, he has the responsibility to report it. In this case, however, the Grievant was not aware of side-effects of the medication except as indicated by his doctor's questions about drowsiness and suicidal thoughts, neither of which he apparently experienced. When he became dizzy and agitated, he thought the problem might be high blood pressure and went to the dispensary. It was not until his unusual reaction to the inmate's challenge that Turner's suspicions were aroused. Then he promptly reported his condition. The Grievant cannot be held responsible for failing to report possible drug side-effects of which he was unaware.

The Agency also argues that it considered the Grievant's medical condition but gave it no weight. I am not convinced that the Employer gave any consideration at all to this mitigating factor until Step 3 of the grievance procedure, despite the fact that the Grievant raised the issue before he was charged with any rule infraction, and did so consistently thereafter. The pre-disciplinary hearing officer, who also signed the removal order and did so on the same day as the hearing, testified that the Grievant hit the inmate "with such force that he went back over a table" and that the inmate did not "deserve being back-handed over a table." He said that although he tries to give employees the benefit of the doubt, he did not do so here because of the viciousness of the unprovoked attack. The record here simply does not support the picture drawn by the warden. Coupled with the lack of testimony or documentation of consideration given to the Grievant's claim,

the Arbitrator concludes that the Agency discharged Turner under the false belief that he was guilty of brutal abuse. This belief, possibly supported by concern for financial liability, so prejudiced the Agency that it did not hear the Employee's repeated claim (which was made with some substantiation) that he was not fully responsible for his actions. I therefore hold that in removing the Grievant, the Employer failed to give sufficient weight to a significant mitigating factor. The Grievant was consequently not removed for just cause.

Nevertheless, what the Grievant did was wrong and he must be held accountable for his actions. That is, his medical condition may explain, but it does not justify, his behavior. Some discipline is warranted and a 30-day suspension is ordered.

Further, I am not convinced that Turner is capable of controlling his behavior, despite the post-discharge change in his medication. I am also cognizant that returning the Grievant to an inmate-contact position may subject him to further stresses with which he may not yet be able to cope. The Employer is entitled to protect the institution until it receives assurances that a recurrence is unlikely. I therefore order his immediate reinstatement, but to a non-contact post until such a time as his doctor certifies his fitness for inmate contact duty. The State, at its option and expense may also require examination and certification by a physician of its choice.

Further, the Grievant is cautioned that he now has a serious inmate-related rule infraction on his record. Another similar offense could result in his discharge.

IX. Award

The grievance is sustained. The Grievant, Byron Turner, was not removed for just cause. His record will be adjusted to show that he was exonerated of the charge of abuse. The removal is reduced to a thirty-day suspension without pay or benefits for excessive use of force. The Grievant is to be reinstated forthwith to his former position as a Correction Officer II, but assigned to a non-contact post pending certification by his physician that he is fit for inmate-contact duty. The State, at its option and expense, may also require examination and certification by a physician of its choice. The Grievant is to suffer no loss of pay or benefits as a result of this assignment. He is to receive all back pay and benefits, and otherwise made whole, from the end of the 30-day suspension to the date of his reinstatement, but back pay is to be reduced by such interim earnings as the Grievant may have had. He is to supply the Employer with such evidence of earnings as it may require.

Anna D. Smith, Ph.D.
Arbitrator

August 13, 1991
Shaker Heights, Ohio