

**ARBITRATION DECISION NO.:**

600

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Rehabilitation and Correction

**DATE OF ARBITRATION:**

**DATE OF DECISION:**

March 8, 1996

**GRIEVANT:**

Marty Marcum

**OCB GRIEVANCE NO.:**

27-22-(95-06-06)-0269-01-03

**ARBITRATOR:**

Harry Graham

**FOR THE UNION:**

Michael A. Hill

**FOR THE EMPLOYER:**

David Burrus

**KEY WORDS:**

Corrections Officer

Criminal Charges

Inmate Abuse

Just Cause

Removal

**ARTICLES:**

Article 24 - Discipline

§24.01 - Standard

**FACTS:**

The grievant was employed as a Correctional Officer at the Pickaway Correctional Institution for three years prior to his removal. On March 10, 1995 the grievant had been supervising an inmate who had been given an extra duty assignment. After the grievant released the inmate, the inmate began to engage in horseplay with another inmate. Management asserted that the grievant then removed his badge and man down alarm, lunged at and choked the inmate and continued to strike the inmate in the head after other officers had intervened. The Union contended that the inmate lunged at the grievant and any injuries he suffered were sustained in the ensuing struggle.

After an extensive investigation conducted by officials at Pickaway Correctional Institution, management concluded that the grievant was responsible for the injuries sustained by the inmate. Not only were the

sustained injuries extensive, but three other officers implicated the grievant. Management subsequently discharged the grievant who promptly filed this grievance.

**EMPLOYER'S POSITION:**

The state argued that three other correctional officers witnessed and were involved in the confrontation. After initially filing their reports, all three officers recanted the initial reports and they were subsequently disciplined. The three officers' testimony supports the state's theory of events: the grievant removed his man down alarm and badge, challenged the inmate to settle their dispute like a man, lunged at and choked the inmate and repeatedly hit the inmate in the head.

During the months which elapsed between the grievant's discharge and the arbitration, the grievant allegedly telephoned each of the witnesses at least once. He urged the union witnesses to alter their testimony and attempted to intimidate them to do so. In addition, even though the grievant was acquitted by the Richland County Court of Common Pleas, the Arbitrator is not bound by that decision because the standard of proof is lower in arbitration than in a criminal case. The holding of the court is not binding on this arbitrator.

**THE UNION'S POSITION:**

The Union contends that the inmate instigated the confrontation. In the ensuing struggle involving the four correction officers, the inmate sustained his injuries. In addition, the inmate has continually asserted that another officer was the cause of his head injuries. Also, there was no medical evidence that the inmate was choked.

The Union also argued that the grievant was acquitted in a subsequent criminal trial. This result should control in these proceedings. The Union also contended that the grievant did not ask the other officers to change their story. Because the grievant was not responsible for the inmate's injuries, the Union urges the grievance to be sustained and the grievant to be made whole.

**ARBITRATOR'S OPINION:**

The Arbitrator stated that it was obvious that the inmate had suffered extensive injuries, as was shown by photographs taken after the incident. In addition, the Circleville court proceeding does not control the outcome of this arbitration. Although the outcome in that proceeding is a factor, it is not the controlling factor.

The Arbitrator held that all the evidence showed that the grievant put the inmate in a headlock. Because of the testimony of the other three officers, the Arbitrator concluded that the inmate was mistaken in his belief of who caused his injuries. Also the evidence conclusively shows that the grievant removed his badge and man down alarm prior to this incident. There was no evidence that the other officers showed any hostility towards the grievant, or that they had been involved in a conspiracy. The fact that they changed their stories and received discipline is evidence that the grievant did commit the alleged acts. Because all the stories of the union witnesses, except the grievant's, corroborated each other, the Arbitrator determined that management was justified in removing the grievant.

**AWARD:**

The grievance was denied.

**TEXT OF THE OPINION:**

IN THE MATTER OF ARBITRATION

BETWEEN

**OCSEA/AFSCME Local 11**

AND

**The State of Ohio, Department of**

## **Rehabilitation and Correction**

### **Case Number:**

27-22-(950606)-0269-01-03

### **Before:**

Harry Graham

### **Appearances:**

#### **For OCSEA/AFSCME**

##### **Local 11:**

Michael A. Hill  
OCSEA/AFSCME Local 11  
1680 Watermark Dr.  
Columbus, OH. 43215

#### **For Department of Rehabilitation and Correction:**

David Burrus  
Department of Rehabilitation  
and Correction  
1050 Freeway Drive, North  
Columbus, OH. 43229

### **Introduction:**

Pursuant to the procedures of the parties two days of hearing were held in this matter. At the hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

### **Issue:**

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

In accordance with Section 24.01 of the collective bargaining between the State of Ohio and OCSEA/AFSCME Local 11, was the Grievant's removal for just cause? If not, what shall the remedy be?

### **Background:**

Many aspects of the events that prompt this proceeding are disputed by the parties. Those upon which they agree may be succinctly presented.

The Grievant, Marty Marcum, had been employed at Pickaway Correctional Institution as a Correctional Officer for approximately three years prior to his removal. On March 10, 1995 he was involved in an altercation with an inmate, Melvin Reardon. Reardon had been given an extra duty assignment as discipline. At about 8:00 p.m. on March 10, 1995 Reardon had completed his work and was released by Officer Marcum. Shortly thereafter Marcum noticed a disturbance in the area and proceeded to investigate. He found that Reardon was at the disturbance. He was out of place. Reardon was also engaging in prohibited horseplay with another inmate. Marcum took Reardon into the Security Office. The parties agree on this much and little else.

According to the Employer Officer Marcum taunted and provoked Reardon. He verbally abused him and pushed Reardon into a chair. Thereupon he removed his badge and mandown radio and offered to settle

their differences "like a man." In the account of the State Reardon then lunged at Marcum who grabbed him around the throat to choke him. At that instant three officers who were in the room intervened. A struggle involving Marcum, Reardon and the other officers ensued. Ultimately, Reardon was taken to the floor. Thereupon Marcum continued to strike Reardon in the head, causing serious swelling to occur. (Photographs in evidence). At the conclusion of the struggle Marcum is reputed to have said "This is the way I love (or like) it." In due course three of his co-workers implicated him as the prime culprit in the beating of Reardon. With that, the State moved to discharge him from employment.

That account of events is challenged by the Union. In its version of events Reardon was concerned with what he perceived to be a lack of respect by prison officials. When he and Marcum entered the Security Office Reardon began shouting about how he was going to get respect. He then lunged at Marcum who parried the attack and struck Reardon. The other officers in the room immediately jumped into the fray. During the ensuing struggle all fell to the floor. Marcum had Reardon in a reverse headlock. When they fell Reardon landed on Marcum's wrist. It was broken. After a few seconds Reardon permitted himself to be handcuffed. When this incident came to be investigated Reardon asserted it was another officer, Duncan, who repeatedly slammed his head to the floor. He has maintained that view consistently. Only after some time had passed did Officer Duncan claim Marcum hit Reardon's head. In due course Marcum was tried on an assault charge. The case was dismissed.

When the State discharged Officer Marcum a grievance was promptly filed. It was processed through the procedure of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

### **Position of the Employer:**

The State points out that in addition to Reardon and Marcum other people were in the Security Office when this incident occurred. These included Officers Blackwell and Duncan and Sergeant Hinton. After initially filing their reports each recanted. They came forward and changed their stories. Each received discipline. None filed grievances to protest. According to Officer Blackwell he observed Marcum take off his mandown radio and badge. He also heard Marcum challenge Reardon to resolve their dispute "like men." Blackwell heard Marcum state that "this is the way I love (or like) it" at the conclusion of the incident. In his testimony Blackwell was of the opinion that Marcum provoked Reardon to lunge at him, thus sparking the incident.

Duncan testified that he saw Marcum hit Reardon two or more times on the head before all involved went to the floor. He also testified that he saw Marcum bang Reardon's head onto the floor. Duncan saw Reardon's head bounce up off the floor a second time but did not see how it came to be involved in that situation.

Sergeant Hinton related that when Reardon and Marcum were arguing he saw Marcum grab Reardon's throat and choke him. In his view, this was not a placement of his hands on Reardon's neck by Marcum. The Grievant was intent upon choking Reardon in his view.

By his own admission Marcum had Reardon in a reverse headlock as they fell to the floor. Notwithstanding whatever to the contrary is believed by Reardon, it was Marcum who had hold of his head during the struggle. The photographs of Reardon taken following the fight show him with substantial damage to his head. There is a great amount of swelling and bruises. Marcum is the only person who was in position to inflict that sort of damage on Reardon.

During the many months that elapsed between Marcum's discharge and the arbitration hearing he telephoned each of former colleagues at least once. He urged them not to testify at the hearing or to alter their testimony in a manner favorable to him. In his telephone conversations with Duncan, Blackwell and Hinton he told them he was contemplating litigation against the State over this incident. The implication, according to the Employer, was that if they did not support him in this proceeding that he would join them in his litigation. He attempted to intimidate them. He would not have done so if he had nothing to hide in the State's view.

The Marcum was exonerated of assault does not mean that the Arbitrator is bound by the holding of the

Court. In another proceeding, Case Number 27-20-(911008)-1383-01-03, I sustained the discharge of a Correctional Officer at the Mansfield Correctional Institution. He had been acquitted of drug dealing by the Richland County Court of Common Pleas. In that situation the State urged that the evidence against the Grievant supported its discharge action. Notwithstanding the holding of the Richland County Court, I agreed, finding the evidence of drug dealing convincing. In this situation the State urges that the same sort of neutral review be applied. No matter what the disposition of the assault charge, the State urges the evidence be examined de novo by the Arbitrator. When that is done, it asserts that the discharge at issue in this proceeding should be upheld.

The State acknowledges that the Inspector General of Ohio came to examine the conduct of the internal investigation that prompted Officer Marcum's discharge. The Inspector General issued a critical report. Significantly, that report is not critical of the findings of the investigation. Rather, it took issue with some of the procedures used by the investigators. The conclusions were not disputed. As that is the case, the report of the Inspector General containing criticism of the internal investigation should be disregarded according to the Employer.

The investigation conducted by officials at Pickaway was thorough. They concluded that Marcum was responsible for the injuries sustained by Reardon. His use of force on the inmate was excessive. So much so that it must be considered to constitute abuse. This is especially the case when consideration is given to the fact that Marcum was thoroughly trained. Among the extensive training he received were courses in de-escalation of potentially violent or volatile situations. He should have utilized his training to deal with this situation without recourse to the excessive force he employed in this instance. Given what the State regards as the clear evidence that Marcum perpetrated abuse upon Reardon, the State urges that such a finding be made. When that is done the Agreement mandates discharge. Consequently, the Employer urges that the grievance be denied in its entirety.

### **Position of the Union:**

As noted above, the account of events proffered by the Union is substantially different from that provided by the State. As the Union relates events, Marcum "guided" Reardon to a seat after Reardon refused to be seated. Shortly thereafter, Reardon lunged at Marcum. Marcum parried Reardon's attack. Thereupon all in the room fell to the floor in a struggle. Reardon has consistently asserted it was Officer Duncan who slammed his head into the floor. He has not waived in that story. Who better than the inmate to know his assailant in the Union's view.

No choking of Reardon by Marcum occurred in this situation. Upon the conclusion of the incident Reardon received medical attention. There was no record of any choke marks made in the medical records. That is because there was no evidence of choking according to the Union.

Marcum stood trial for his role in this affair. He was acquitted in the Court located in Circleville, OH. This result should control the outcome of this proceeding the Union asserts.

Marcum did not ask any participants to change their testimony in this situation. To the contrary, he asked that they tell the truth. In this proceeding, they did not do so. As the employer has not proved that it was Marcum who was responsible for slamming Reardon's head on the floor nor proved that he caused the bruises evident in the photographs, (Employer Exhibit 1) the Union urges the grievance be sustained in full. It desires the traditional "make whole" remedy.

### **Discussion:**

It is obvious from Employer Exhibit 1, the photographs of Reardon taken after the incident, that he experienced substantial injury. His head and face are severely swollen and bruised. The difficulty is in sorting out the conflicting accounts of events and assigning responsibility.

The result of the proceeding in the Circleville court does not control the outcome of this proceeding. In the dispute involving discharge of a corrections officer at Mansfield Correctional Institution I found that notwithstanding the dismissal of charges against the Grievant in Court, the evidence before me compelled

that the discharge be sustained. The analogy may be made between the outcome in any other proceeding, eg. Unemployment Compensation or Workers' Compensation, and the determination of an arbitrator. Just as the finding of those forums does not serve to bind an arbitrator, neither does the determination of a Court. The determination of the Circleville Court is a factor, but not a controlling factor, in determination of this dispute in this forum. The conclusion of that Court does not eliminate consideration of the testimony and evidence in this forum.

At the hearing all involved, whether from the Union or the Employer, agreed that during the altercation Marcum had Reardon in a reverse headlock. Marcum acknowledged as much and demonstrated his position at the hearing. This casts serious doubt on Reardon's repeated assertion that Duncan, not Marcum, was responsible for his injuries. In spite of Reardon's statement the testimony of all concerned, including that of the Grievant, indicates that he had Reardon about the head when all fell to the floor. Neither testimony nor evidence places Duncan at Reardon's head. All accounts put him at Reardon's feet. (Testimony at the hearing and Joint Exhibit 2) The Arbitrator concludes that Reardon was mistaken in his belief that it was Duncan who caused his injuries.

On March 30, 1995 Officer Blackwell was interviewed concerning this incident. He testified that prior to the fight Marcum had removed his mandown and badge. This testimony was corroborated by Sergeant Hinton during his second interview. In his statement, Reardon also indicated that Marcum had removed his mandown and badge. (Joint Exhibit 2). The testimony on this point is consistent with one exception, that of the Grievant. Of course, it is difficult to make a credibility determination. Given the consistent testimony on this point it is believed that as the incident began, Marcum took off his mandown and badge.

In this situation it has not been shown that Marcum's colleagues harbor any hostility towards him. There is no suggestion that they are part of a plot or conspiracy to "get" him. To the contrary, all officers, Duncan, Blackwell and Hinton, experienced discipline as a result of their roles in this event. It would have been easier for them to maintain the cover-up in the hope and expectation that all would avoid discipline. In order to credit the notion that Reardon, Hinton and Blackwell conspired to coordinate their stories concerning Marcum's removal of the mandown and badge it would require a showing that they at least had the opportunity to do so. This has not be either suggested or shown by the Union.

Similarly, examination of the material in Joint Exhibit 2 shows Blackwell, Reardon and Hinton to have testified that Marcum said I "love" or "like" it like this at the end of the incident. (Presumably being engaged in an altercation). Blackwell and Hinton testified in the same fashion at the arbitration hearing. Once again, there is no reason to suspect or believe that they coordinated their stories on this point.

What the record shows in the final analysis is that the stories of all involved, Reardon, Duncan, Blackwell and Hinton are closely aligned. Only the testimony of Marcum differs significantly from that of the inmate and the other correction officers. In essence, the Union asks the Arbitrator to suspend belief, and credit that all but Marcum are mistaken or lying. As all involved, including Marcum, place him at Reardon's head during the fight that is impossible to do.

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**Award:**

The grievance is denied.

Signed and dated this 8th day of March, 1996 at Solon, OH.

Harry Graham  
Arbitrator