

ARBITRATION DECISION NO.:

623

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Correction

Lebanon Correctional Institution

DATE OF ARBITRATION:

November 26, 1996

DATE OF DECISION:

December 18, 1996

GRIEVANT:

Kevin Hall

OCB GRIEVANCE NO.:

27-11-(94-12-28)-0291-01-03

ARBITRATOR:

James M. Mancini

FOR THE UNION:

Robert Jones

FOR THE EMPLOYER:

Joseph Shaver

Brian Walton

KEY WORDS:

Agency Rules

Credibility

Credibility of Witnesses

Discipline

Evidence

Excessive Force

Inmate Abuse

Just Cause

Medical

Suspension

Timely Discipline

ARTICLES:

Article 24 - Discipline

§ 24.02 - Progressive Discipline

FACTS:

The grievant was employed by the Department of Rehabilitation and Corrections (DRC) as a Correction Officer (CO) at the Lebanon Correctional Institution (LCI). On July 5, 1994, the grievant was returning to his post following his testimony before a Use of Force Committee when he came across an inmate who was handcuffed and being escorted by another CO from the inmate's cell block to the segregation unit. The grievant stopped to inquire as to what had happened. The CO suggested that the grievant ask the inmate to describe the events himself, and the grievant proceeded to ask the inmate why he was handcuffed. At that time, according to another CO who witnessed the confrontation, the grievant punched the inmate in the jaw. The witness also stated that the inmate was not being unruly at the time, and that the inmate was handcuffed behind his back. Following the incident, the inmate was taken to the LCI medical department where it was determined that he had been struck on the left side of his mouth, but it was noted that there was no swelling or cuts. The inmate was later referred to a dentist who found that the inmate had lost a filling and had suffered a fractured tooth.

In accordance with DRC policy, a Use of Force Committee was convened to investigate the July 5 incident. The grievant testified before the committee that when he asked the inmate why he was handcuffed, the inmate became abusive and spit on the grievant. The grievant stated that he reacted by pushing the inmate away so that the inmate would not spit at him again. The grievant recognized the fact that hitting an inmate in this situation would not have been justified. Despite the grievant's denial, the committee concluded that the grievant had used force on the inmate, the use of force was not justified, and that the use of force was excessive. A predisciplinary hearing was held on November 15, 1994 and it was concluded that on July 5, the grievant had violated LCI Rule #42, which prohibits the use of excessive force towards an inmate. The LCI warden recommended that the grievant serve a ten-day suspension. That suspension commenced on December 20, 1994.

EMPLOYER'S POSITION:

The Employer argued that it has clearly demonstrated that it had just cause to suspend the grievant for ten days. The evidence shows that the grievant violated Rule #42, which prohibits the use of excessive force towards an inmate. There was no need for the grievant to strike the inmate. The Employer cited the testimony of the CO who told the committee he witnessed grievant punch the inmate without provocation, and the medical reports that indicated the inmate had been hit on the left side of the mouth.

UNION'S POSITION:

The Union claimed that there was no just cause for the suspension in this case. The evidence did not clearly show that the grievant had used excessive force against the inmate on July 5, and even if the grievant was guilty of such misconduct, the ten-day suspension was excessive because this was the grievant's first excessive force charge.

The Union pointed to the fact that the CO who was escorting the inmate to the segregation unit testified that he did not see the grievant hit the inmate. The testimony of the grievant, who stated that the inmate spit on him and that he merely pushed the inmate away so that he would not spit on him again, should be viewed as being just as credible as the testimony of any other CO. Furthermore, the nurse who examined the inmate soon after the incident found no swelling or cuts on the inmate's face.

The Union also argued that the imposition of discipline was not rendered in a timely manner. Section 24.02 of the Agreement requires that disciplinary action be initiated as soon as reasonably possible. Over five months elapsed between the date of the incident and the date the grievant's suspension began. The Union requested that the grievant be paid for ten days lost wages.

ARBITRATOR'S OPINION:

The Arbitrator found that the grievant's use of force violated the DRC policy regarding the permissible use of force against an inmate. Essentially, the DRC policy is that it is permissible to use physical force against an inmate for self-defense, defense of others, controlling or subduing an inmate, or for prevention of a crime or escape. This situation was not one which called for the use of force to the degree exercised by the grievant.

The Arbitrator could not credit the grievant's self-serving denial that he struck the inmate. The grievant had considerable incentive for not telling the complete truth about the incident, and the grievant's testimony was contradicted by that of another CO and by the testimony of the inmate. The shift commander at LCI indicated that when he first asked the grievant if he had struck the inmate, the grievant completely denied the charge. Upon further questioning, however, the grievant admitted that he had in fact pushed the inmate away. Given the grievant's reluctance to honestly respond to initial questions about the incident, especially in light of the credible testimony offered by a fellow CO, the Arbitrator stated that the grievant's denial of the use of force could not be viewed as credible.

The Arbitrator also found that the disciplinary action against the grievant was undertaken by the Employer as soon as reasonably possible in compliance with Section 24.02 of the Agreement. The record reflected that the final report from the investigating committee was not released until September 27. Following a review of that report, the warden concurred with the findings of that committee and initiated predisciplinary action against the grievant on October 31, 1994. The predisciplinary hearing was held on November 15, and the suspension became effective on December 20.

AWARD:

The grievance was denied, and as a result the ten-day suspension was upheld.

TEXT OF THE OPINION:

**IN THE MATTER OF ARBITRATION
BETWEEN**

STATE OF OHIO

AND

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, AFSCME LOCAL 11**

CASE NO.

27-11-941228-0291-01-03

OPINION AND AWARD

KEVIN HALL GRIEVANCE

JAMES M. MANCINI, ARBITRATOR

APPEARANCES:

**FOR THE STATE
JOSEPH SHAVER
BRIAN WALTON**

**FOR THE UNION
ROBERT JONES**

SUBMISSION

This matter concerns a grievance filed on December 20, 1994 by Kevin Hall. The Grievant alleged that he had been improperly suspended for ten days in violation of the Collective Bargaining Agreement between the State of Ohio (hereinafter referred to as the Employer) and the Ohio Civil Service Employee's Association, AFSCME Local 11 (hereinafter referred to as the Union). The arbitration hearing was held on November 26, 1996 at the Lebanon Correctional Institution in Lebanon, Ohio. The parties submitted closing arguments at the hearing and waived their right to submit post-hearing briefs.

BACKGROUND

The Grievant, Kevin Hall, has been employed as a correction officer at the Lebanon Correctional Institution for approximately eight and one-half years. The Lebanon Correctional Institution is a facility of the Ohio Department of Rehabilitation and Correction which currently houses about 2,200 prison inmates.

The incident which led to the Grievant's ten-day suspension occurred on July 5, 1994. The Grievant who was working the second shift at the time was called from his cell block assignment to give testimony before a Use of Force Committee. During the Grievant's absence from his assigned D-block, an inmate, Benedict, had an encounter with another correction officer which resulted in the inmate being handcuffed and escorted away from cellblock D. Correction Officer Rick Meadows escorted inmate Benedict from the cellblock to the segregation unit. The Grievant who was returning following the giving of his testimony, saw Officer Meadows with inmate Benedict in the hallway. He stopped to ask Correction Officer Meadows what had happened. At that point, Officer Meadows referred the Grievant to inmate Benedict. The Grievant then asked Benedict what had occurred and a brief confrontation took place between them.

Captain Norman Halloway was the shift commander in charge of the second shift on July 5, 1994. Mr. Halloway testified that he received a telephone call from another correction officer, Jetty Bailey, who stated that he witnessed the Grievant using force on inmate Benedict. Captain Halloway then questioned the Grievant about the incident. The Grievant acknowledged that he had placed his hands on inmate Benedict but said that he did so only after the inmate had spit on him. Correction Officer Bailey subsequently submitted an Unusual Incident Report on July 15, 1994 wherein he stated that he saw the Grievant punch inmate Benedict with "his left hand to inmate's jaw area." He also indicated that inmate Benedict was not being unruly or offensive at the time and that he was handcuffed behind his back. Following the confrontation with the Grievant, inmate Benedict was taken to the institution's medical department where it was determined that he had been hit on the left side of his mouth but it was noted that there was no swelling or cuts. Inmate Benedict was referred to a dentist who later determined that he had lost a filling and had incurred a fractured tooth.

In accordance with department policy, a Use of Force Committee was convened to investigate the incident. Mr. Bob Couch, currently Unit Manager-Administrator, was one of the three members assigned to the investigative committee. Mr. Couch testified that the committee reviewed the reports filed over the incident as well as the statements given before the committee by the various witnesses involved. Mr. Couch stated that the committee determined based upon Officer Bailey's statements as well as those from inmate Benedict that the Grievant had punched Benedict "in the jaw/mouth area with his left hand, without provocation..." The committee did note the Grievant's statement indicating inmate Benedict had verbally abused him and spit on him to which he responded by pushing and grabbing at him. However, the committee found from the statements of other witnesses that no assault or provocation occurred which justified the Grievant in using force against inmate Benedict. The investigating committee concluded that the force which the Grievant used "was not justified and excessive." Mr. Couch further indicated during his testimony that there was excessive force used by the Grievant and that it exceeded what was necessary to control the situation especially considering the fact that the inmate was handcuffed behind his back. Mr. Couch stated that even if the Grievant had been spit upon by inmate Benedict, this would not have justified his striking the inmate in the jaw or mouth area.

Warden Harry Russell testified that the use of excessive force by a correction officer is a very serious offense. The Warden stated that correction officers receive extensive training in the use of force. The

Warden concluded that in the instant case, the Grievant clearly had used unnecessary and excessive force by punching inmate Benedict in the jaw while he was handcuffed behind his back. In the Warden's view, such excessive force warranted a ten day suspension which is what he recommended here. The Warden further noted that the inmate eventually sued the State for violation of his constitutional rights and received approximately \$20,000 as a settlement on his case.

The Grievant testified at the hearing that he never struck inmate Benedict in the face or mouth area. The Grievant stated that on the evening of July 5, 1994, while he was returning back to his block, he saw Officer Meadows walking inmate Benedict up the hallway. He asked Correction Officer Meadows what was going on since inmate Benedict was out of his block. When he turned to ask Benedict what had happened, Benedict became loud and abusive and spit at him. According to the Grievant, he reacted by pushing inmate Benedict out of the way so that he would not be spit upon again. The Grievant indicated that he did not believe that he had violated the Use of Excessive Force Policy. The Grievant admitted that he would not be justified in striking an inmate for spitting at him. The Grievant also acknowledged that he received a copy of the department's Revised Standards of Employee Conduct.

Following a review of the report from the Use of Force Committee, Warden Russell initiated predisciplinary proceedings against the Grievant for having used unjustified excessive force against an inmate. A predisciplinary hearing was held on November 15, 1994. It was concluded that Officer Hall violated rule number 42, Use of Excessive Force Towards an Inmate. The Warden subsequently recommended that the Grievant's misconduct warranted a ten day suspension. The Grievant's suspension became effective on December 20, 1994.

POSITIONS OF THE PARTIES

POSITION OF THE EMPLOYER

The Employer contends that it has clearly demonstrated that it had just cause to issue the Grievant a ten day suspension in this case. The evidence showed that the Grievant violated work rule number 42 which is the Use of Excessive Force Towards an Inmate. Such violation allows for a penalty up to and including removal depending upon the seriousness of the violation. In this case, the ten day suspension for the Grievant's misconduct in using excessive force against an inmate was appropriate.

The Employer points out that in accordance with the policies of the Department of Rehabilitation and Correction, a Use of Force Committee was convened to investigate the July 5, 1994 incident involving the Grievant. That committee reached a finding that excessive force had been used by the Grievant. The Employer cites the testimony of Correction Officer Jetty Bailey who told the committee that he clearly saw Officer Hall punch inmate Benedict without provocation. Although Officer Bailey was reluctant to give such testimony at the hearing, it is evident that this is due to some form of peer pressure from other correction officers in the department. It is clear from Correction Officer Bailey's previous testimony as well as that of Inmate Benedict, that the Grievant used his fist to punch Benedict in the side of his jaw.

The Employer submits that such conduct cannot be tolerated in a correctional setting because of the resultant litigious exposure which the department faces. Indeed, inmate Benedict filed a lawsuit and was awarded \$20,000 in settlement of the matter.

The Employer further maintains that correction officers receive training in the area pertaining to proper use of force. They are taught that even when force is needed it can only be that which is reasonably required to control the situation at hand. In the instant case, it is evident that there was no need for the Grievant to strike inmate Benedict who at the time was handcuffed behind his back. Without question, the Grievant committed a serious infraction which warranted his ten days suspension.

POSITION OF THE UNION

The Union contends that there was no just cause for the ten day suspension in this case. The evidence produced did not clearly show that the Grievant was guilty of using excessive force against inmate Benedict. Moreover, this was the Grievant's first excessive force charge and even if he was guilty here of engaging in such misconduct, the ten day penalty rendered was excessive.

The Union cites the testimony of the Grievant who stated that inmate Benedict spit on him and that he merely pushed him out of the way so that he would not spit on him again. The Union argues that the push by the Grievant did not amount to the use of excessive force as charged by the Employer. Moreover, the nurse who saw inmate Benedict soon after the incident found no swelling or cuts on him. Officer Meadows also stated that he did not see the Grievant hit inmate Benedict. Thus the evidence fails to clearly prove that Correction Officer Hall hit inmate Benedict in the jaw.

The Union further maintains that the imposition of the discipline in this case was not timely rendered. Article 24.02 says that the disciplinary action shall be initiated as soon as reasonably possible. The incident occurred on July 5, 1994 and Mr. Hall did not receive his suspension until December 20, 1994. Clearly, this was not timely. The Union requests that the Grievant be paid for ten days lost wages.

OPINION

The basic issue presented is whether the Grievant was suspended for just cause and if not what shall the remedy be. A review of the record before this arbitrator convinces him that the Employer had just cause to issue the ten days suspension against the Grievant in this case. The evidence clearly shows that the Grievant violated work rule number 42 by using excessive force against an inmate. Considering the seriousness of the violation, this arbitrator has determined that the ten day suspension was an appropriate penalty.

The evidence clearly demonstrates that on the evening of July 5, 1994, the Grievant during a confrontation with inmate Benedict used his fist to strike him in the jaw. It is undisputed that at the time, inmate Benedict was handcuffed with his hands behind his back. Correction Officer Bailey in his initial incident report dated July 15, 1994 stated that he witnessed the Grievant punch inmate Benedict with his left hand to the jaw area. Significantly, Officer Bailey gave testimony before the Use of Force Committee which investigated the incident that he saw the Grievant punch inmate Benedict "with his left arm in the jaw/mouth area." He also stated to the investigators that as far as he could see, the inmate had not done anything to provoke Officer Hall. He also described the hit by the Grievant on the inmate as being "very hard." Although Officer Bailey attempted to back off of his testimony at the arbitration hearing, this arbitrator finds that the statements which he initially gave to the investigating committee are sufficiently convincing to show that the Grievant struck inmate Benedict in the face with his fist on the evening of July 5, 1994.

This arbitrator finds that the investigating committee report provides further support for the conclusion that the Grievant was guilty of striking inmate Benedict without provocation. The investigators interviewed inmate Benedict who stated that the Grievant punched him in the face and knocked a filling out of his tooth. A subsequent dental report supported inmate Benedict's statement by finding that he had indeed lost a filling and fractured a tooth. Considering the statements from Officer Bailey as well as inmate Benedict combined with the dental report relating to the injuries he sustained, this arbitrator would have to concur with the findings of the investigating committee which was that the Grievant was guilty of using excessive force without justification.

This arbitrator cannot credit the Grievant's self serving denial that he struck inmate Benedict. The Grievant of course had considerable incentive for not telling the complete truth about the incident. As indicated, the Grievant's testimony was completely contradicted by the credible testimony of Officer Bailey as well as the statement furnished to investigators by inmate Benedict. Moreover, Captain Halloway who was the shift commander on the night in question testified that Officer Bailey had immediately reported to him that night that he witnessed the Grievant using force on inmate Benedict. This of course lends further credence to Officer Bailey's account of the incident. Captain Halloway further indicated that when he asked the Grievant if he had hit the inmate, the Grievant at first denied it. Upon further questioning, the Grievant reluctantly acknowledged that he had in fact put his hands on inmate Benedict. Given the Grievant's reluctance to even respond to initial inquiries about the incident from Captain Halloway especially in light of the credible testimony offered by Correction Officer Bailey, this arbitrator must find that the Grievant's denial of the use of force incident cannot be credited.

It is evident here that the Grievant's use of force on inmate Benedict on July 5, 1994 violated

departmental policy regarding permissible use of physical force against an inmate. It was shown that correction officers including the Grievant receive extensive training in the important area regarding use of force against inmates. Essentially, departmental policy is that it is permissible to use physical force against an inmate for self defense, defense of others, controlling or subduing an inmate, or for prevention of a crime or escape. It is apparent that the Grievant's use of force in the instant case was not for one of the six general situations for legal use of force against an inmate described in departmental policy. As attested to by Warden Russell, it was clearly improper for the Grievant in this case to punch inmate Benedict in the jaw while he was handcuffed behind his back. It is also important to note, again as attested to by Warden Russell, that even if inmate Benedict had spit at the Grievant, Officer Hall would not have been justified in using physical force against the inmate. Moreover, correction officers are taught that even when force is needed it can only be the amount of force reasonably required to control the situation at hand. In this case, even if inmate Benedict had spit at the Grievant, it is clear that physical force to control the situation was not needed because of the fact that the inmate was handcuffed behind his back.

This arbitrator finds that the Grievant's excessive use of force violated rule 42 of the Departmental Rules of Conduct. Rule 42 prohibits excessive use of force against an inmate and provides for a penalty for a first offense ranging from three to five day suspensions up to removal. Thus although this was the Grievant's first use of excessive force offense, the ten day penalty imposed was clearly within the range of penalties provided for a rule 42 violation.

This arbitrator further finds that the ten day suspension imposed in this case was an appropriate penalty. The Grievant clearly committed a serious offense by punching inmate Benedict on the side of his jaw while he was handcuffed behind his back. Indeed, the seriousness of the offense is demonstrated by the fact that inmate Benedict subsequently sued the State over the Grievant's actions. The result was that the Grievant was awarded \$20,000 in the settlement of the lawsuit. Clearly, such conduct as that exhibited by the Grievant in this case cannot be tolerated in correctional institutions because of the possible litigious exposure which the Employer could end up facing. In any case, this arbitrator finds that the ten day suspension imposed was a reasonable penalty given the serious violation of rule 42 committed by the Grievant in using unjustified excessive force against inmate Benedict.

Finally, this arbitrator finds no merit to the Union's claim that the disciplinary suspension was not imposed in a timely fashion in violation of Article 24.02 of the parties' agreement. Said provision does state that disciplinary action shall be initiated "as soon as reasonably possible..." In this case, the record reveals that the final report from the investigating committee was not released until September 27, 1994. Following a review of that report, Warden Russell on October 31, 1994 concurred with the findings of the committee and initiated predisciplinary action against the Grievant. The predisciplinary hearing was held a short time later on November 15, 1994. The ten day suspension was imposed on the Grievant effective December 20, 1994. This arbitrator finds from this record that the disciplinary action against the Grievant was undertaken by the Employer as soon as reasonably possible in compliance with the requirements of Article 24.02. Although the incident occurred on July 5, 1994 and the Grievant was not suspended until December 20th of that year, it is apparent that there were no undue delays in the disciplinary process which prejudiced the Grievant's rights in this case. Indeed, the record shows that discipline was rendered in this case only following a fair and thorough investigation of the incident. Clearly in this case, the disciplinary suspension was imposed against the Grievant in a fair and timely manner.

In conclusion, this arbitrator finds from the clear and convincing evidence produced that the Employer satisfied its burden of proving that it had just cause to issue the ten day suspension against the Grievant. The evidence clearly showed that the Grievant did in fact strike inmate Benedict in the jaw on the evening of July 5, 1994. The Grievant's actions were unjustified and amounted to an excessive use of force on an inmate. Considering the seriousness of the offense committed by the Grievant on inmate Benedict, the ten day disciplinary suspension was an appropriate penalty. The grievance presented by Kevin Hall must therefore be denied.

AWARD

The grievance is denied.

December 18, 1996

JAMES M. MANCINI, ARBITRATOR