

ARBITRATION DECISION NO.:

659

-
UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

-
EMPLOYER:

Ohio Department of Rehabilitation and Corrections

-
DATE OF ARBITRATION:

November 9 and 17, 1997

DATE OF DECISION:

January 26, 1998

GRIEVANT:

Tony Mustard

OCB GRIEVANCE NO.:

25 05 (97 01 13) 0432 01 03

ARBITRATOR:

Ana DuVal Smith

KEY WORDS:

Agency Rules
Credibility of Witnesses
Evidence
Excessive Force
Grievant's Testimony
Inmate Abuse
Just Cause
Medical
Removal

ARTICLE:

Article 24 - Discipline
§24.01 - Standard

FACTS:

-
The grievant was employed as a Correction Officer (CO) at the Correctional Reception Center in Orient. At the time of the incident that led to his removal in December, 1996, he had worked as a CO for two and one half years and had a clean disciplinary record. The incident leading to the grievant's removal occurred on May 6, 1996, when he responded to an "officer needs assistance" call. A number of other officers responded to the call as well. A struggle ensued between the grievant, an inmate, and another CO, and the three of them fell to the ground.

The following morning, the inmate was interviewed and photographed. Because of the extent of the inmate's injuries, the warden ordered the chief inspector to conduct an investigation. Following the

investigation, the chief inspector issued the Use of Force Committee Report which concluded that the grievant had used excessive force against the inmate, and it recommended that the grievant be disciplined. The Employer removed the grievant on December 31, 1996, and as a result, this grievance was filed.

EMPLOYER'S POSITION:

The Employer argued that the grievant failed to follow policies and procedures, exercised poor judgment, and used excessive force against an inmate. The inmates who witnessed the incident and who claimed that the grievant used excessive force are credible because they did not know any of the parties involved. Furthermore, despite the fact that the inmates who witnessed the incident never had a chance to corroborate their stories, each version of the incident was essentially the same a white, stocky 200 pound CO with dark hair ran across the courtyard, brought the inmate to the ground, placed his knee on the side of the inmates face, and dragged the inmate's face across the cement.

The Employer challenged the credibility of the Union's witnesses by claiming that CO's follow all informal code of silence in order to protect one another from discipline. The Employer also doubted the Union's argument that the inmate's aggression justified the grievant's use of force because the inmate was cuffed and the other COs who responded to the call did not behave as if their assistance was needed.

UNION'S POSITION:

The Union argued that the grievant was only doing what was necessary and nothing more. Employees are authorized to use force that goes beyond slight force. The Union pointed to the fact that the inmate was a convicted felon with twelve months "good time" at stake. The inmate was an obvious threat to the security of the institution, and the grievant was merely ensuring his own safety and the safety of others when he detained the inmate. Testimony of the COs who made the call for assistance also supports the grievant's version of the events. One of the COs testified that the inmate was resisting and struggling to the point she feared she would lose control. Other COs stated that the inmate was struggling violently and was combative.

The inmate was a two time felon whose testimony cannot be given any credibility. His condition on the morning of May 7 was of his own doing. The CO who first noticed his injuries on May 7 stated that they were "open and seeping", but the nurse who examined the inmate on May 6 testified that the injuries should have scabbed over during the night and that the photographs taken on May 7 revealed more extensive wounds than what she had observed the night before.

The Union also contended that the warden was biased against the grievant. The warden had written that the grievant had a reputation for involvement in these types of cases. Despite the warden's claim, there are only three cases where the grievant used force. Two of those cases involved slight force, and the third of which was found to be justified.

ARBITRATOR'S POSITION:

The Arbitrator found that there was no question that the inmate involved was injured on May 6 during his encounter with the officers in the yard. While the inmate may have aggravated the injuries and/or inflicted new ones on himself to improve his case against the grievant and the Employer, this would have accounted for some of the discrepancies between what the nurse observed on May 6 and what the camera revealed on May 7.

The Arbitrator also stated that, although the testimony of an inmate is not normally credible, she would have to at least consider the testimony and subject the testimony to close scrutiny. The Arbitrator looked to the statements of others and the injuries of the inmate for corroboration. In this case, the Arbitrator found the

testimony of other inmates to be credible because they did not know the grievant, they did not have a chance to collaborate their stories, and there were enough variations in their stories to make it appear that each had witnessed the event in the manner to which he testified.

In sum, the Arbitrator concluded that the grievant over reacted to the situation, possibly based on what he assumed had happened to the CO who placed the call for assistance, and he used excessive force. The Union correctly pointed out that an employee is authorized to use more than slight force when necessary. The fact that the grievant was responding to a fellow officer's call for assistance, however, does not mean that the grievant was authorized to use the level of force he exercised in this situation. Furthermore, the Arbitrator did not believe that the inmate was behaving as violently as the grievant described.

AWARD:

The Arbitrator denied the grievance, and she upheld the removal.

TEXT OF THE OPINION:

* * *

VOLUNTARY LABOR ARBITRATION TRIBUNAL
December 21, 1997

In the Matter of Arbitration)	
Between)	OPINION AND AWARD
)	
OHIO CIVIL SERVICE)	Anna DuVal Smith, Arbitrator
EMPLOYEES ASSOCIATION)	
LOCAL 11, AFSCME, AFL/CIO)	Case No. 27-05-970113-0432-01-03-T
)	
OHIO DEPARTMENT OF)	Tony Mustard, Grievant
REHABILITATION &)	
CORRECTONS)	Removal

Appearances

For the Ohio Civil Service Employees Association:

Dave Justice, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Rehabilitation and Corrections:

Cynthia Sovell Klein
Colleen Ryan
Ohio Office of Collective Bargaining

1

Hearing

A hearing on this matter was held at 9:30 a.m. on November 9, 1997, and continued on November 17 at the Correctional Reception Center in Orient, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation to examine and cross examine witnesses, who were sworn or affirmed and excluded and to argue their respective positions. Testifying for the State was Warden Gary Mohr, Lt. Natalie Wehrs (nee Harris), Nicholas Menedis (formerly Chief Inspector, now Deputy Warden of Franklin Pre Release Center), William Sizemore, Lt Shawn Stephens and Nursing Director Robert Cotter. Testifying for the Union were Correction Office's Steve Helterbrand, Michael Myers and Amy L. Walker. Also testifying for the Union were James Matson, Mary Johnson, and the Grievant, Tony Mustard. Also in attendance was Bobby Johnson, Chapter President. A number of documents were entered into evidence: Joint Exhibits 1-8, State Exhibits 1-23 and Union Exhibits 1-3. The oral hearing was concluded at 11:45 a.m. on November 17. Written closing statements were timely filed and exchanged by the Arbitrator on December 4, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

Issue

Was the grievant, Tony Mustard, removed for just cause?
If not, what shall the remedy be?

2

Statement of the Case

The Grievant was employed at the Correctional Reception Center in Orient, Ohio, a facility receiving and assessing male inmates from 66 of Ohio's 88 counties. At the time of the hearing it had processed approximately 11,000 inmates during the year and currently housed about 2,200, including some in residential mental treatment. At the time of the incident that led to his removal in December 1996, the Grievant had been working as a correction officer for two and a half years and had a clean discipline record. The incident occurred during the evening of May 6, 1996, when the Grievant responded to an "Officer needs assistance" call while he was working second shift as "float" on B-3 and B-4 units. Although the record of this case is voluminous and convoluted, because of the many people involved and differences in their stories, the basic events of what happened that evening are fairly straightforward.

During count at about 9 p.m. on May 6. Inmate William Sizemore, who was assigned a floor bunk in unit R-1, was admonished by Officer Charles Gilbert to stop bouncing up and down on his bunk. A few minutes later, the inmate was summoned off his bunk again to talk to two other officers, Theresa Spires and Amy Walker. The inmate harrangued the two with obscenities. Walker and Spires claim he assaulted them, but the inmate claims he was the abused, not the abuser. In any event the two women handcuffed and escorted him out of R-1 unit towards the Segregation unit. A fourth officer, CO Harrison, let the trio out of the building and CO Gilbert placed a call for assistance. As Walker and Spires escorted the inmate towards the unit on the opposite side of the compound, Spires placed another call for assistance. A number of officers responded, running across the yard towards the

trio. COs Myers and the Grievant arrived first, followed in short order by COs Helterbrand and Dray. Myers, the Grievant and the inmate went to the ground in a struggle. the cause and details of which are in dispute. Dray and Helterbrand used their PR 24s to pick the inmate up off the ground and escort him to segregation, accompanied by Meyers and the Grievant In segregation, they were joined by Lt. Shawn Stephens, who along with Capt. James Matson, had observed at least part of the incident from outside the captain's office. The inmate was put on the floor and then picked up again and taken to a strong cell where he was placed in four way restraints and his clothing removed. The inmate claims he was physically abused at this point as well. Mary Johnson, LPN, examined him at 9:35 p.m., documenting abrasions and other injuries at various places on his body. She examined him again at 10:50 p.m. when he complained of difficulty breathing, and had him released from his restraints. Meanwhile, Myers and the two female officers who had initiated the escort reported for medical assessment and all officers wrote reports of the incident.

The next morning at around 5:30 or 6:00, Lt. Natalie Harris (now Wehrs) observed the inmate during count. She was alarmed by his appearance and reported this to her superior and to the warden. Warden Mohr interviewed the inmate, had photographs taken and ordered an investigation, calling in Chief Inspector Nicholas Menedis because high-ranking officers at the facility were implicated. Menedis and his committee interviewed those directly participating in the incident and a sample of inmates. Menedis issued the Use of Force Committee's report on July 15, concluding that the use of force against the inmate was excessive and recommending that staff discipline be considered.

4

Disciplinary proceedings ensued. Captain Matson, who was in charge of the shift the time, resigned. Officer Walker received a five day suspension (which was grieved); others were not disciplined at all. The Grievant, however, was found to have violated a number of rules in his handling of the inmate and participation in the investigation:

- Rule 7 Failure to follow post orders, administrative regulations, policies, procedures or directives .
- Rule 8 Failure to carry out a work assignment or the exercise of poor judgement in carrying out an assignment
- Rule 24 Interfering with or failing to permit an official investigation or inquiry
- Rule 41 Use of force toward any individual under the supervision of the Department or a member of the general public
- Rule 43 Physical abuse of any individual under the supervision of the Department

He was removed on December 31, 1996. This action was grieved on January 7, 1997, and processed through the grievance steps without resolution. Hence it came to arbitration, where it presently resides, for final and binding decision, free of procedural defect.

As for the inmate, he went before the Rules Infraction Board, receiving 15 days for disobeying instructions and shoving two officers, but was released from the institution before being returned to its general population.

Arguments of the Parties

Argument of the State

The State argues it proved the Grievant failed to follow policies and procedures, exercised poor judgment, interfered with an investigation and, more importantly, used excessive force and physically abused Inmate Sizemore. The inmates who witnessed the events are credible, it asserts, because they did not know one another, the Grievant or the victim (who never left security until he was released from the institution) and so had no

5

opportunity to collaborate. Their stories are consistent in their identification of the Grievant and what happened: a white, stocky, 200 pound correction officer with dark hair ran across the yard, side winded the inmate to the ground, placed his knee on the side of the inmate's face, and dragged his face across the cement.

The State challenges the credibility of the Union's witnesses, claiming the correction officers are following an informal code of silence, the former captain, who resigned in the aftermath, suspiciously cannot recall a thing, and the nurse even admitted she was less than forthcoming during the investigation.

As to the Union claim that the inmates injuries were self inflicted, the State contends it disproved this theory with Lt. Stephen's testimony about what he saw when he entered the segregation unit his request for medical attention for the inmate, and the nursing director's matching of the anatomicals taken on May 6 to the photographs taken on May 7.

Regarding the Union argument that the inmate's aggression justified the use of force, the State counters that facts show he was cuffed, correction officers were walking behind him with little or no contact, Spires and Myers did not behave as if their assistance was needed, and there is no evidence about what the inmate was doing, other than having a "sassy mouth," that would justify use of force, let alone the injuries Wehrs and Cotter both said were the worst they had seen.

The State notes the Warden's testimony that, considering that the inmate was cuffed and the number of staff responding to the call, the Grievant did not use any technique he was trained for in the Academy. He could have used other techniques before force. The

6

Institution is trying to reduce the incidence of force and will not tolerate "cowboy" techniques, such as the Grievant's. The State asks, that the Arbitrator take note of the code of silence, find the Grievant's behavior intolerable, and sustain the grievance.

Argument of the Union

The Union points to the testimony of Menedis, who said that because none of the inmate's other allegations could be substantiated, the Grievant was only held accountable for the 35 60 seconds of

contact in the yard when the Grievant was responding to a fellow employee's call for assistance because she felt she was in danger. It argues that the Grievant was only doing what he had to do, nothing more. Employees are authorized by Administrative Rule 5120 9 01, Sections C and E, to use force, beyond slight force.

Facts about the inmate and his statement cast doubt on his allegations, claims the Union. He was a two time felon with 12 months good time at stake, not a naive newcomer to the system. His description of his alleged assailant does not fit the Grievant, his description of the alleged blow he received is tentative, and his breathlessness was from a phobia, not a blow. The Union also raises the inmate's discipline record while at CRC, arguing that Management must have agreed that he was a threat to the security of the institution.

Testimony of witnesses to the incident support the Grievant's innocence, contends the Union. Walker testified the inmate was resisting and struggling to the point she feared she would lose control, Helterbrand thought the inmate was a mental health inmate from the way he was struggling and Myers testified he was combative. The Grievant did not

7

strike the inmate, he grabbed his arm, they fell to the ground, the inmate continued to kick and thrash while on the pavement.

The inmate alleged he was abused again when they got to segregation, but Lt. Stevens testified he did not see any of this, though he arrived only moments later and was out of sight of the group only momentarily.

The Union submits that the inmate's condition when Lt. Harris saw him the next morning was of his own doing. What else would he be doing on a concrete floor under a steel cot in the dark? Harris testified his wounds were "open and seeping," but Nurse Johnson testified his injuries should have scabbed over during the night and that the photographs show more extensive wounds than what she observed and documented the night before, which report Cotter said was correct in detail and description.

The Union contends the Warden was biased. In an article he wrote that the Grievant had a "reputation for involvement in these types of cases," but there are only three cases of the Grievant's use of force, two of which involved slight force and one of which was determined to be justified. In this case, he was the only employee of several involved who was removed. Only one other officer was charged with anything, while the Grievant was the only one charged with using excessive force and abuse, even though he was responding to a call for assistance. The Union finds it unbelievable that Management can be so far removed from what happens on a daily basis to and with front line officers. It asks that the Arbitrator find Management violated the Contract, removing the Grievant without just cause, that the grievance be sustained in its entirety, and that the Grievant be made whole with reinstatement, full seniority, back pay, lost time, overtime, shift and days off.

8

Opinion of the Arbitrator

There being no question that the inmate was injured during the evening of May 6, the central question is

how he obtained those injuries. The answer to this depends on who one believes.

The inmate claims he was assaulted while still in R 1, again in the yard, again when he was brought in to SC/DC, and finally while in the strong cell. The State chose not to charge the Grievant with any of these except what it says occurred in the yard because it lacks corroborating evidence for the other alleged assaults. I concur with the State's decision. In R 1, SC/DC and the strong cell, there is only the word of the inmate, which by itself cannot be relied upon. Indeed, while there is no question in my mind that the inmate acquired the bulk of his injuries during his encounter with the officers in the yard, he may have aggravated them and/or inflicted new ones on himself to improve his case against the Grievant and the State. This would account for at least some of the discrepancies between what Nurse Johnson observed that evening and what the camera saw the next day, although some bruises may not yet have been apparent when she examined him.

The question then, is what happened in the yard? Ordinarily, I would have little problem writing off the testimony of this inmate. As the Union points out, he was not a naive first offender and he did and does have something to gain by lying. When Johnson examined him, he was already talking about a lawsuit, and he boasted about it during the arbitration hearing. But this does not, in itself, mean the entirety of his testimony should be written off, only that it be subjected to close scrutiny. One looks to physical evidence

9

and the statements of others for points of corroboration, as well as to the inmate's statements, interviews, and testimony. In this case, corroboration comes from other inmates, whose statements I find persuasive for several reasons. The fact that they were new to the system, not long at CRC and in different units at the time, reduces the probability of collaboration, as does the fact that they did not know the Grievant and never saw the victim after he went to segregation. Some or all of them may have picked up gossip that they used to fill in gaps, but there are places where they admit this (talking at chow, what a cellmate said he saw) and other places where they also say they could not see for one reason or another (it was dark, the group moved out of view). On the whole, their stories vary enough to be genuine, reflecting different perspectives and recollections, and are similar enough to corroborate the inmate's, not the Grievant's, version of what happened. Notably, they have it that the inmate was cuffed with his hands pulled up high behind him, shouting obscenities, but pretty much physically subdued when being escorted by the female officers. A short, stocky, white officer with dark hair came running across the yard and hit him or swung at him, after which he fell. One describes the officer's knee on the inmate's head, grinding his face on the ground. These observations comport with what Sizemore reported in his statement and testimony. I do take note that Sizemore had the height of his assailant wrong, but his bent over position when the women had him would hardly have given him the perspective to make an accurate estimate, he was in front of the when he was picked up and taken to security, and either on the floor or the bed in security, again distorting his perspective.

10

I also studied the interviews, statements and testimony of the officers, but did not find them to be reliable. Matson recalled too little and exhibited a hostile attitude that may have colored his testimony. It is impossible for me to believe that the female officers, whom everyone had placed as walking behind the inmate during their escort, did not see the men fall to the ground and never looked back once they went around the group

and headed towards the captain. As for the Grievant, himself, the transcript of his interview also shows him to be not entirely forthcoming. This casts doubt on the veracity of what he did say. To be sure, the officers' statements and testimony are consistent on many points (even on some that do not make sense), but they did have opportunity as well as motive to collaborate, much more so than the inmates. There were also some contradictions between some of the statements that support the State's theory of an attempted cover up. For example, Lt. Stephens said that he was told there was no film for the camera, but in his statement, Officer Myers says he got the camera but was told it wasn't needed.

In sum, what I conclude is that the Grievant over reacted, possibly based on what he assumed happened to Walker, used more force than was necessary with the inmate, caused him physical harm in the process, and then participated in a cover up. The Union is correct in that employees are authorized to use more than slight force when necessary, and that the Grievant was responding to a fellow officer's call for assistance, but I am convinced the inmate was not behaving as the officers portrayed him and that his treatment at their hand was unwarranted.

The Union has argued that the Warden singled the Grievant out. I have carefully considered the evidence of that. There is a use of force case involving an inmate's charge

11

that the Grievant beat him in which the Grievant denied the entire episode (Ford case, Joint Ex. 7A), and for a period of time there was as distinct pattern in the tickets the Grievant wrote on inmates. This does not mean the Grievant was guilty in those instances, but it does support a reputation for involvement as the Warden remarked in his article. even though the Grievant has never been disciplined before now. However, the fact that the Warden wrote an article about the Department's efforts to reduce uses of force at CRC does not taint his decision to remove the Grievant That decision stands or falls on the quality of the investigation, the weight of the evidence, and the seriousness of infraction, giving consideration to mitigating and aggravating factors and treatment of similarly situated employees, if any. In this case, there is no challenge to the completeness of the investigation and the evidence convincingly establishes that the Grievant physically abused the inmate using excessive force, an act that justifies removal for a first offense, and then interfered with the investigation. As. for disparate treatment, no other officer was clearly identified as having inflicted the injuries suffered by the inmate with the possible exception of Officer Walker, whose case is for another arbitrator and whose involvement was different than the Grievant's. That being the case, the State did not err in choosing to remove the individual against whom it had convincing proof of grave misconduct.

12

Award

The Grievant, Tony Mustard, was removed for just cause. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
January 26, 1998

****13****