

ARBITRATION DECISION NO.:

665

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Rehabilitation and Corrections

Mansfield Correctional

DATE OF ARBITRATION:

February 18, 1998

DATE OF DECISION:

March 11, 1998

GRIEVANT:

Jon Davidson

OCB GRIEVANCE NO.:

27 20 (97 07 09) 3007 01 03

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ARBITRATOR:

Phyllis E. Florman

FOR THE UNION:

Tim Shaffer, Staff Rep

Doug Mosier, President

FOR THE EMPLOYER:

Collen Ryan, Office of Collective Bargaining

Pat Mogan, Office of Collective Bargaining

Jaqueline Visintine, Labor Relations Officer

KEY WORDS:

Just Cause

Removal

Use of Force

ARTICLES:

Article 24 – Discipline

§24.01 - Standard

§24.02 – Progressive Discipline

§24.05 – Imposition of Discipline

FACTS:

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The grievant worked as a Correction Officer at Mansfield Correctional Institution. Management removed him effective July 2, 1997 for violating Employee Code of Conduct Rule #41, use of force, and Rule #42, unauthorized actions that could harm or potentially harm any individual under the supervision of the

Department.

The grievant was assigned the duty of shaking inmates down in order to search their persons for contraband or weapons. It was alleged that while shaking down inmate Wells on March 13, 1997, the grievant "grabbed and squeezed the, inmate's scrotum/testicles with such force that the inmate had to have emergency surgery."

Inmate Robinson, who was present during the shakedown of Wells, testified grievant reach from behind Wells and grab him, and that Wells came up off the ground. Robinson also testified that he was not sure whether Wells jumped or was lifted off the ground. Robinson stated that Wells looked embarrassed, startled and visibly shaken, he did not scream, double up, nor fall to the ground. He further testified that Wells did not ask to go to the infirmary until he reached for a tool and yelled out in pain with tears in his eyes.

Health Care Administrator Cain testified that Wells had blood in his urine, and he was unable to walk due to the pain. She further testified that Wells was diagnosed with testicular varicocele and that this was not a preexisting condition. Wells did have a pre existing case of genital herpes though.

Maintenance employee Quick, who was present during the shakedown, testified that he did not see the grievant grab Wells in the groin area or notice anything different about Wells. He did testify that Wells reported that the grievant assaulted him in the aforementioned fashion once they arrived in the maintenance area.

The grievant testified that he did not assault Wells. He stated that nothing out of the ordinary occurred when he conducted the pat down of Wells. In the investigatory interview, the grievant stated that if he had assaulted Wells, "wouldn't the inmate have screamed in pain, or walked differently? How could this inmate walk from maintenance to [his unit] before reporting this to his supervisor, and that he had to walk right past the infirmary before getting to [his unit]".

EMPLOYER'S POSITION:

It is the position of the Employer that the grievant was removed for just cause. The grievant had the right to pat down Wells, but there was no need for any force. The discipline imposed was appropriate in light of the serious nature of the injury and tile grievant's poor work record.

The Employer claims the evidence supports its position. Inmate Robinson witnessed the event he has no reason to lie, the medical records show Wells sustained a trauma. It is irrelevant that he had herpes; also, the absence of screaming, falling down, or inability to push the tool cart merely confirms people have different tolerances for pain and for the fear of retaliation. No other valid reason explains the injury.

UNION'S POSITION:

It is the position of the Union that just cause did not exist to remove the grievant. The Union emphasized that the grievant was a good employee who provided good service. The Union argues that the Employer has not met its burden of proof The Union feels that the standard for the burden of proof should be beyond a reasonable doubt. This burden is not met because the grievant never used force. Wells failed to testify, denying the opportunity for cross examination. Mr. Quick saw nothing out of the ordinary; it was stipulated that Wells had an undiagnosed pre existing condition, and that the injury could have been caused by a fight, his herpes or possibly a gym injury.

ARBITRATOR'S OPINION:

The Arbitrator found that Management removed the grievant for just cause. The Arbitrator held that the correct standard of proof to apply is the clear and convincing standard . Even if the beyond a reasonable doubt standard were to be applied, the Arbitrator would find that the evidence would still demonstrate that the grievant did commit the offense.

The Arbitrator found direct evidence to prove the allegations. This included the testimony of Inmate Robinson, and Mr. Quick testified that Wells reported that the grievant abused him. Furthermore, the medical reports indicated that Wells suffered an injury to his scrotum.

The Arbitrator applied the "objective reasonableness " standard to determine if the use of force by the grievant was excessive. This standard was first adopted by the U.S. Supreme Court in Graham v. Conner, 106 L.Ed. 2d 443 (1989), and it addresses the law enforcement officials allegedly using excessive force. It states:

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight... [It] must embody allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain, and rapidly evolving...

The Arbitrator found that nothing would have prompted a reasonable and prudent Correction Officer to exert force of any type or extent on Inmate Wells during the pat down.

AWARD:

The grievance is denied in its entirety.

TEXT OF THE OPINION:

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ARBITRATION OPINION AND AWARD

In the Matter of Arbitration between

STATE OF OHIO
DEPT OF REHABILITATION AND CORRECTION

and
DAVIDSON

GR.27 20 970709 3007 01 03

JON

MANSFIELD CI

OHIO CIVIL SERVICE EMPLOYEES ASSN
AFSCME, LOCAL 11

APPEARANCES:

For the Employer:

Colleen Ryan, Operations Team Leader, OCB
Pat Mogan, Operations Team Leader, OCB
Jacqueline Visintine, LB Officer - ManCI

For the Union:

Burch Wylie, Lead Staff
Doug Mosier, President 7010
Tim Shaffer, Staff Rep 7010

ARBITRATOR:

PHYLLIS E FLORMAN
Louisville, Kentucky

By the terms of the Agreement between The State of Ohio ("the Employer") and Ohio Civil Service Employees Association, AFSCME Local 11 ("the Union"), disputes between the parties are to be settled in accordance with the grievance and arbitration procedures provided therein. Pursuant to such procedures, Phyllis E Florman was selected from the parties' panel of arbitrators as the arbitrator to hear a dispute concerning the discharge of the Grievant for use of excessive force and unauthorized actions.

A hearing was held on February 18, 1998 at the Mansfield Correction Institution, Mansfield, Ohio at which the parties were afforded full and equal opportunity to make statements and arguments, introduce evidence, and examine

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and cross examine witnesses. A tour of part of the facilities was taken. The proceedings were not transcribed. Post hearing briefs were not submitted.

ISSUE

The parties agreed the issue is whether the Grievant's removal was for just cause and, if not, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE 24 DISCIPLINE

21.01 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. Abuse cases which are processed through the Arbitration steps of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04.

24.02 Progressive Discipline The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. one or more oral reprimand [s] (with appropriate notation in Employee's file;
- B. one or more written reprimands (5);
- C. a fine in an amount not to exceed five (5) days pay; . . .
- D. one or more day[s] suspension[s];
- E. termination **2**

Disciplinary action taken may not be referred to in an Employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in a performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

24.05 Imposition of Discipline The Agency Head or designated Deputy Direct offer equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty five [45] days after the conclusion of the prediscipline meeting. . . . Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment. . . .

NATURE OF THE CASE

. Since April 10, 1989 the Grievant had been employed as a Correction Officer ("a C.O.") at ManCI. ManCI houses approximately 2300 close to maximum security inmates and is home to death row inmates. The institution employs about 700 staff. Of them, 450 are COs.

Assigned to the Maintenance Department, the Grievant was responsible for conducting pat downs or shake downs to insure inmates did not leave the Maintenance area with contraband or weapons. It is alleged that while shaking down, Inmate Darryl Wells on March 13, 1997, the Grievant, according to the Step Three Response; "grabbed and squeezed **3**

the inmate's scrotum/testicles with such force that the inmate had to have emergency surgery."

As a result, the Grievant was removed from employment on July 2, 1997 for violating Employee Code of Conduct Rule #41, use of excessive force toward any individual under the supervision of the Department or a member of the general public, and Rule #42, unauthorized actions that could harm or potentially harm any individual under the supervision of the Department.

JOINT STIPULATED FACTS

- 1. The Grievant has been employed by the Department since 4/10/89.
- 2. The Grievant's removal was effective 7/2/97.

3. The Grievant has been properly trained on Use of Excessive Force.
4. The Grievant acknowledges that he received the Department's of Employee Conduct.
5. Inmate Well's was working maintenance as a plumber on 3/13/97.
6. Inmate Well's is incarcerated for felonious assault.
7. Inmate Robinson was working maintenance as a plumber on 3/13/97.
8. Inmate Robinson is incarcerated for murder.
9. The Grievant's post on 3/13/97 was relief – working in the maintenance area.
10. The Grievant has worked that post on previous occasions.
11. It is proper to conduct some pat down or 'shakedown' of inmates while working that post.
12. The issues are properly before the arbitrator.
13. The Grievant has been involved in and the subject of prior Use of Force Committee investigations and has never been disciplined for failure to cooperate in an investigation.
14. Inmate Wells' medical records indicate a potential undiagnosed pre-existing condition. **4**

15. Inmates Wells and/or his family contacted the Department of Justice and the Federal Bureau of Investigation initiated an investigation into this incident.
16. The Department of Public Safety, State Highway Patrol, did not file criminal charges against the Grievant.
17. The Patrol did not interview the Grievant.
18. Inmate Wells appeared at nurses' sick call on 12/19/96.

ADDITIONAL STATEMENT OF FACTS

On March 14, 1997 the Grievant was placed on Administrative Leave pending investigation. After talking to witnesses and reading the Grievant's incident report and clinic documentation, Warden Ralph Coyle recommended the matter be reviewed by a Use of Force Committee. Warden Coyle's March 13, 1997 recommendation stated in part:

My findings are that on 3 13 97 at about 12:30 pm, maintenance Employee Greg Quick and two inmate workers Robinson, #A302880 and Wells, #A255343 were leaving maintenance to go do repairs in 4D. [The Grievant] pat searched Robinson and then Wells prior to them leaving maintenance. Greg Quick was present. Wells states [the Grievant] grabbed his scrotum and squeezed it and used his forearm in Wells' crotch to raise Wells up off the floor before he let go of him. The inmate and staff statements indicated that something may have occurred such as Wells described. Wells told Quick on the way to 4D that he was in pain. Quick called the infirmary from 4D and sent Wells to the infirmary for a check.

The clinic report shows he had an engorged vein on his scrotum. He had blood in his urine. On 3 24 97 Wells was in so much pain he could not

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stand. He was taken to the infirmary in a wheelchair. He still had blood in his urine and was sent to OSU Hospital where he had surgery.

Mr. Quick stated to me that Mr. wells had worked with him all morning on 3 13 97, went to lunch, and returned to maintenance about 12:15 pm. He had been fine prior to leaving maintenance and being pat searched after lunch. When Mr. Quick sent Wells to the infirmary, Wells was in tears.

When I met with [the Grievant] on 3 19 9 1 to re write his incident report, he said that until just minutes before I arrived in the building he had no idea why he was on Administrative Leave. . . . He said he has no idea who inmate Wells is and he has no knowledge of the incident Wells describes.

Mr. Howard Dahill, Deputy Warden of Special Services, was appointed to chair the Use of Force Committee. Hearings were held on May 8th and 13th, 1997. The Committee's Conclusions were:

[The Grievant] refused to cooperate and tell the Committee his version of this incident. Based on the statement of Inmate Wells that [the Grievant] grabbed his testicles and lifted him off the ground, the statement from inmate Robinson that he personally saw [the Grievant] grab inmate Wells' testicles, and the immediate clinic check confirming swelling of the left testicle and blood in the urine, the Committee believes that [the Grievant] did use unnecessary and excessive force on inmate Wells.

A Predisciplinary Conference was held on June 3, 1997. Hearing Officer Robert Riddle's Report concluded, "There is **6**

just cause for discipline for both Rule #41 and #42." His report included the following:

. . . [Capt.] Leclair related there may be mitigating factors involved such as why did the inmate not react more strongly if he had been lifted up by the officer, or how could the inmate have walked to 4D after such an incident? . .

FINDINGS: . . . medical reports refer to a varicose type of blood vessel in the inmate's scrotum. [This] may have been a preexisting conditions. . . . However, there is evidence to support [the Grievant] did cause some type of trauma or exacerbation of the area. . . . it is this writer's opinion an inmate who is attempting to get an officer in trouble, as the union would hypothesize, would choose a less painful and sensitive area or way. . .

The Grievant was removed from employment effective July 2, 1997. On July 7, 1997 he filed the grievance. It states:

. . .The discipline imposed is: without just cause, not progressive; not commensurate to the offense; excessive; disparate by comparison with other disciplines involving other Employees in similar situations; imposed without taking extenuating or . mitigating circumstances into consideration; imposed solely for punishment.

Deputy Warden Dahill testified at the arbitration hearing that the purpose of a Use of Force Committee is to find out what occurred, and whether force was justified, necessary, or excessive; and Administrative Regulation 5120 9 01 sets out circumstances when force may be used lawfully:

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(B)(1) 'EXCESSIVE FORCE' means an application of force which, either by the type of force employed, or the extent to which such force is employed, exceeds that force which is reasonably necessary under all the circumstances surrounding the incident.

(2) 'Force' means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

(C) There are six general situations in which a staff member may legally use force against an inmate:

- (1) Self defense . . . ;
- (2) Defense of third persons. . . ;
- (3) Controlling or subduing refuses to obey. . . ;
- (4) Prevention of crime. . . ;
- (5) Prevention of escape; and
- (6) Controlling an inmate to prevent self inflicted harm.

Mr. Dahill emphasized the Committee interviewed the Grievant, Inmate Wells, Inmate Robinson, Health Care Administrator Alice Cain, Supervisor Greg Quick, and Father David Foxen; summaries of their statements were written up and signed by them; Inmate Wells' medical records were reviewed; and the Committee determined the Grievant used excessive force due to the way the pat down was done, force was used, none of the justifications of using force were raised, and any force used must only be the amount reasonable to control the situation.

Mr. Dahill acknowledged the Committee never received a version of the facts from the Grievant because he requested Garity Rights, but noted such request did not make him believe the Grievant was guilty; the Grievant answered all preliminary questions; summaries are not word for word **g**

transcriptions; Administrative Regulation 5120 9 20 requires Employees to file a written report at the end of the shift on the day of the occurrence but this was not done until the next day; and inmate Wells did not struggle, shout, or indicate he was in pain.

Inmate Kenneth Robinson testified he has been at ManCI since 1995; his job is plumber; he works with Inmate Wells but did not know him; on the day in question he asked Supervisor Quick to watch the Grievant do the shakedown because the day before he "did not like how he did it" to him; after Supervisor Quick went through, the Grievant shook him down, then he shook down Inmate Wells who was pushing the cart containing the tool box; and after Inmate Wells went through, he saw the Grievant reach from behind and grab him and inmate Wells came up of the ground.

Inmate Robinson further recalled Inmate Wells looked embarrassed, startled, and visibly shaken; he did not scream, double up, fall to the ground, or look scared; he could not say whether Inmate Wells jumped or was lifted off the ground; he believed it was horseplay because it was a horseplay type of atmosphere with other inmates laughing; and Inmate Wells proceeded to push the tool cart and walk to 4D, said he did not feel "so hot down there", and did not ask to go to the infirmary until he "reached for a tool, yelled out in pain,

doubled over, and had tears in his eyes.”

Health care Administrator Alice Cain testified she oversees daily activities of inmates' health services; medical records reflect on March 13, 1997 Inmate wells was seen by a doctor for left testicle pain claiming a C.O. grabbed his scrotum; on that date varicocule was noted, a large amount of flecks of blood was seen in the urine specimen, and he was referred to a urology clinic; and on March 14, 1997 Inmate Wells was unable to walk due to testicular pain, he was transferred to clinic via wheelchair, urine lab stix 3+ large amount of blood was in the urine which was orange and cloudy.

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Ms. Cain noted on March 27, 1997 he was diagnosed with testicular varicocele, which is a dilatation of the vein which empties the testes, after an echogram of his scrotum on March 24, 1997 confirmed perfusion of both testes; the testicular varicocele diagnosis was not a pre existing condition; trauma can cause blood in the urine; and inmate Wells underwent a varicocelectomy on October 16, 1997.

Ms. Cain acknowledged she is not a doctor urology specialist; she did not examine Inmate wells; he had a pre existing condition of Herpes noted December 19, 1996; he failed to tell the doctor of his Herpes in giving a health history on March 13, 1992; inmates can possibly tamper with a urine test; and medical records do not indicate whether Inmate Wells was observed when giving urine.

Security Administrator Ralph Coyle testified he was the Warden at the time of the incident; Standards of Employee Conduct set out Rule Violations and Penalties; for Rule #41, Use of Excessive Force and Rule #42, Unauthorized Actions the standards provide:

OFFENSES

	1 st	2 d	3 d	4 th	5 t h
Rule #41	3 5/R	5 10/R	R		
Rule #42	WR/R	1 3/R	3 5/R	5 10/R	R

and he recommended R Removal based upon the seriousness of the offense, the seriousness of injury to an inmate, the responsibility to maintain security of inmates and of the institution, the Grievant's prior record, and the Hearing Officer's reports.

Mr. Coyle emphasized that in his office during the process of removal on July 1, 1997 the Grievant was agitated, verbally abusive to him, and kicked and flipped a

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chair; in the first few weeks when he was in the facility, the Grievant "flipped me off"; on the arbitration day the Grievant looked at him and said, "There's the Chief of B.S."; and due to his unprofessional, unpredictable, troubling behavior, the Grievant would not be a good candidate for reinstatement.

Mr. Coyle acknowledged in deciding on removal rather than suspension, he considered the Rule #24 violation for interfering with or failing to cooperate in an official investigation or inquiry, even though that allegation was later dropped; he considered the entire medical file which stated Inmate Wells required surgery on March 13, 1997, even though he did not have surgery until October 1997; and incident reports were not filled out on March 13, 1997 even though AR 5120 9 02 requires it.

Labor Relations Officer Jacqueline Visintine testified she sent out the Use of Force package; it did not include all of Inmate Wells, medical records because they are confidential; but it did include the consult from Urology and infirmary notes of March 13, 1997; and when the Warden issued the removal the Grievant "acted out", threw his chair into the wall at least once, had to be calmed down, and State Troopers were called in.

Maintenance Employee Greg Quick testified he was a C.O. for three years and has been a plumber for five years; he is a union Steward; four inmates work with him to perform cell repairs and water line breaks; he has taught new hires how to conduct searches and pat downs; and pat downs can detect plexiglas and wood weapons.

Mr. Quick recalled that Inmate Robinson did complain about how the Grievant was doing the pat down so on March 13, 1997 he watched; because he stepped outside the small area after Inmate Wells was patted down in front, he did not see the Grievant grab him in the groin area from behind; and he did not see any horseplay, hear the Grievant laugh, or notice anything different about Inmate Wells.

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Mr. Quick stated that after they left the maintenance area Inmate Wells told him the Grievant had grabbed and squeezed his scrotum, and in 4D he had tears in his eyes and said he was hurt; but he denied having seen the Grievant grab Inmate Wells even though Nurse Supervisor Brian Cain's and Father Toxin's incident reports state he said he saw the Grievant grab Inmate Wells by the groin.

Nurse Dave Bailey testified he performs procedures ordered by doctors but does not diagnose inmates; he is a union Steward and a member of the union's Board; records show Inmate Wells has had Herpes since 1991; Herpes' principal symptoms are burning and stinging, and regional lymph nodes may be swollen and tender; and genital herpes can cause inflammation, itching, lesions, bleeding, and painful ulcers.

Nurse Bailey noted urine tests are observed if the doctor orders them to be; and inmates have been known to scratch their noses or mouths to draw blood and put it into the urine cup. He acknowledged regional lymph nodes are not in the scrotum, and genital herpes can be "managed" although it never goes away entirely.

Corrections Officer Doug Moiser testified he is union President; an inmate's groin area is touched during the course of a pat down search in accordance with Policy 310 31 procedures for conducting security inspections; the maintenance area is historically a major source of inmate weapons; Policy 3A.052 is a Post Order for managing that area; and no one approached him about any problem with the way the Grievant was handling pat downs.

Mr. Moiser said he was present when Warden Coyle issued the removal order; the Grievant got upset; when the Grievant stood up he knocked the chair over; but he did not kick it or curse.

The Grievant testified his responsibility is to provide a safe and secure atmosphere; a C.O. has discretion **12**

to pat down inmates or just rely on the metal detector; he chooses to pat down all inmates because items like wood and plexiglas from the maintenance area can be fashioned into weapons, and the detector does not detect them; and no one complained about how he conducts pat downs.

The Grievant stated nothing out of the ordinary occurred on March 13, 1997; his Incident Report noted, "I have no idea what or which Inmates is in question"; the Investigatory Interview Report states in part:

[The Grievant] brought up some good points, that if he indeed had done what he is accused of, wouldn't the inmate have screamed in pain, or walked in differently? How could this inmate walk from maintenance to Unit 4 D before reporting this to his supervisor, and that he had to walk right past the infirmary before getting to Unit 4 D.

The Grievant emphasized he cooperated in the investigation; his annual evaluation ratings from 4 10 89 to 4 10 95 are "meets" and "above"; he received letters of citation in 1991, 1992 and 1993; he was upset when removed and did say it was "lies" and "a Bunch of B.S." but he did not throw a chair; last week the Warden laughed in his face, so he "said things"; and he denied any improper conduct towards the Warden on the day of the arbitration.

It was also stipulated that Inmate Wells is at ManCI; he was not present at the arbitration; and he said he was too scared to testify.

POSITION OF THE EMPLOYER

It is the position of the Employer that removal was for just cause; the Grievant had the right to pat down Inmate Wells, but there was no need for any force; and the discipline imposed was appropriate in light of the serious

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nature of the injury and the Grievant's work record. In support thereof, several arguments are advanced,

The Employer argues the mission of the Department of Rehabilitation and Correction is to provide a safe, secure, humane environment to persons remanded to its custody; inmates are human beings entitled to be treated as such; and the Grievant's conduct did not enable the Department to complete its mission.

The Employer asserts there was no need to use any force; the amount of force used exceeded force reasonably necessary under the circumstances; Inmate Wells was harmed as a result; and none of the six circumstances justifying use of force was present.

The Employer claims the evidence supports its position; Inmate Robinson witnessed the event, has no reason to lie, and took a risk testifying; medical records show Inmate Wells sustained a trauma; it is irrelevant that he had Herpes; the absence of screaming, falling down, or inability to push the tool cart merely confirms

people have different tolerances for pain and for fear of retaliation; and no other valid reason explains the injury.

The Employer emphasizes the Grievant's denial is self serving; his evaluations were "stellar" until 1994; and his active prior disciplinary record includes:

04/22/97	written reprimand	leaving work area w/o permission
01/15/97	written reprimand	failure to follow orders
10/09/96	verbal reprimand	Sick Leave Policy
09/04/96	verbal reprimand	Sick Leave Policy
07/08/96	written reprimand	Sick Leave Policy
06/17/96	3 day suspension	Sick Leave Policy
05/10/96	verbal reprimand	Shift Tardiness & failure to notify supervisor or absence
04/30/96	Verbal reprimand	Sick Leave Policy
04/09/96	1 day suspension	Inattention to duty
03/02/96	1 day suspension	Shift tardiness & failure to complete standard request for leave form
02/21/96	written reprimand	threatening, intimidating or coercing Employee
01/19/96	written reprimand	threatening, intimidating or coercing Employee

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10/20/95	verbal reprimand	failure to follow orders
10/05/95	written reprimand	shift tardies & absenteeism
10/05/95	verbal reprimand	failure to complete standard request for leave form
09/18/95	verbal reprimand	failure to notify of absence

POSITION OF THE UNION

It is the position of the union that just cause did not exist to remove the Grievant from his employment; he has always been a good Employee who provided good service and gave 100% effort; evidence failed to establish violations of Rule #41 and or Rule #42; and removal for a first offense is improper. In support thereof, several arguments are advanced.

The union argues the burden of proof is on the Employer; the beyond a reasonable doubt standard should be applied because the nature of the allegations are not acceptable to the public, the Grievant has nine years seniority, and the ultimate penalty was imposed; and the Employer failed to meet its burden.

The union contends the Employer asserted facts which were shown not to exist such as the Grievant failed to cooperate in an official investigation, that Inmate Wells required emergency surgery the same day, and that there was a charge of violating Rule #24.

The union insists the Grievant never used force; Inmate Wells failed to testify, denying the opportunity for cross examination; Mr. Quick saw nothing out of the ordinary; it was stipulated Inmate Wells has a "potential undiagnosed pre existing condition"; and the injury could have been caused by a fight, by a gym injury, by lifting the heavy tool box, or from his Herpes.

DISCUSSION

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In Article 24 of their Agreement the parties specified that disciplinary action shall not be imposed except for
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just cause. Under the just cause standard, an Employer has two burdens. One, it must establish that the Grievant committed the offense[s] with which he was charged. And two, if this showing is made, to establish that the penalty imposed was justified under the circumstances. The Grievant and his union have the burden of establishing factors in mitigation.

Section 24 01 recites that "The Employer has the burden of proof to establish just cause for any disciplinary action." But the provision is silent as to which standard of proof applies. The union insists it should be the beyond a reasonable doubt standard.

Some arbitrators apply the criminal law standard. The majority of arbitrators require less than beyond a reasonable doubt but more than a preponderance of evidence. The clear and convincing evidence standard is generally applied where, as here, the alleged misconduct carries the stigma of general social disapproval and discharge is the penalty.

Under our facts, despite the Grievant's protestations of innocence, it is found that under any one of the three burdens of proof it was established that he committed the offenses with which he was charged. Both direct and circumstantial evidence support this.

Direct evidence includes eyewitness accounts, admissions, and scientifically recorded or physical or demonstrative evidence. In this category the following establish the incident and the resulting injury: Inmate Robinson witnessed the incident; his March 14, 1997 Statement Form and his May 8, 1997 Use of Force Statement Summary are consistent with his testimony; Mr. Quick noted that on the way to 4D Inmate Wells said the Grievant had squeezed his scrotum; once in 4D Mr. Quick had to call the clinic and have Inmate Wells checked; clinic notes of March 13 and 14, 1997 reflect an engorged vein on his scrotum, edema to the left side of the scrotum, and blood in

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his urine, and pain; an echogram of the scrotum on March 24, 1997 showed a large varicocele on the left side; and he underwent a varicocelectomy in October 1997.

Circumstantial evidence is evidence of facts or circumstances from which other connected facts may be inferred which reasonably follow according to common experience. Here, such evidence includes: Warden Coyle's March 19, 1997 findings that Inmate Wells was fine prior to leaving the Maintenance area and being pat searched after lunch but when Mr. Quick sent him to the infirmary, he was in tears; medical personnel determined he should be seen at the Urology clinic on March 14, 1997 and he was given a lay in for two days; and the principal Herpes symptoms of burning and stinging are different from what medical evidence established were Inmate Well's principal symptoms.

The offense under Rule #41 is use of excessive force. Administrative Regulation 5120 9 01 defines it as

"application of force which either by the type . . . or extent . . . exceeds that force which is reasonably necessary under all the circumstances" In *Graham v. Conner*, 105 L.Ed.2d 443 (1989), the U.S. Supreme Court adopted the "objective reasonableness" standard for claims of law enforcement officials using excessive force. It, states:

The 'reasonableness, of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight [It] must embody allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain, and rapidly evolving. . . .

Here, there was no allegation or showing that a "tense; uncertain, and rapidly evolving" situation existed either in fact or in the perception of the Grievant. None of the six circumstances set out in that Administrative

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Regulation were claimed to exist at the time. In other words, nothing would have prompted a reasonable and prudent Corrections Officer to exert force of any type or extent on Inmate wells during the pat down.

The offense under Rule #42 is unauthorized actions that could harm or potentially harm any individual under the supervision of the Department. Here, the Grievant was authorized to conduct a pat down. He was not authorized to handle Inmate Wells' body in the way the facts establish he did. The resulting harm is well documented in the medical records.

The remaining question concerns the penalty of a discharge. The parties agreed in Section 24.05 that discipline "shall be reasonable and commensurate with the offense and shall not be used solely for punishment." It was also agreed in Section 24.02 that "The Employer will follow principles of progressive discipline" and that an arbitrator "must consider the timeliness of the Employer's decision to begin the disciplinary process."

A schedule of penalties was established in the STANDARDS OF EMPLOYEE CONDUCT which, for a first offense of Rule #41, permits either a suspension of three to five days or removal. For a first violation of Rule #42, the STANDARDS permit a written reprimand or removal. The Article 24 just cause standard requires consideration of factors in mitigation with those in aggravation. Applying the above parameters to the discipline imposed, there is no basis for modifying it.

First, progressive discipline was being applied. At the time of his removal, the Grievant's active disciplinary record contained seven Verbal Reprimands, seven Written Reprimands, and two Suspensions. As Section 24.02 reflects, after suspension the next step is termination.

Removal was not being used solely for punishment. Nothing in the record suggests 'the timeliness of the

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decision to begin the disciplinary process was improper, was delayed, or somehow prejudicial to the Grievant.

Next, factors in mitigation are found to include that the Grievant had been employed nine years; until

1994 he received commendations; it would have been inappropriate to take into consideration allegations of a violation of Rule #24 once that allegation was dropped, but there was no showing of when that occurred.

Third, factors in aggravation significantly outweigh those in mitigation and are found to include that not just one but two rule violations occurred; each violation strikes at the heart of the Department's mission; law and humanitarian considerations make such behavior unacceptable; such conduct tarnishes the reputation of the Employer, the institution, and co employees; the Grievant's disciplinary record does not inspire confidence that progressive discipline has been effective or that the Grievant is responsive to it; and the resulting harm to Inmate Wells was substantial, serious, and unreasonable in its nature and extent. Finally, it cannot be said it is unreasonable and not commensurate with the offenses to select removal over suspension under the circumstances.

AWARD

The grievance must be, and is, denied.

DATED: March 11, 1998

PHYLLIS E FLORMAN
Arbitrator

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