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APR - 4 2001
GRIEVANCE COORDINATOR

VOLUNTARY LABOR ARBITRATION TRIBUNAL

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In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 27-02-000808-0696-01-03
and	*	
	*	George Diaz, Grievant
OHIO DEPARTMENT OF	*	Removal
REHABILITATION & CORRECTIONS	*	

* *

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Michael A. Hill, Staff Representative
Anissia Goodwin, Acting Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Rehabilitation & Corrections:

Dean McCombs, Labor Relations Officer
Ohio Department of Rehabilitation & Corrections

Jeffery Wilson, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 10:30 a.m. on January 24, 2001, at the Allen Correctional Institution in Lima, 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 Ohio Department of Rehabilitation & Corrections (the "State") were Thomas Sovacool, Sited Administrator, Correctional Medical Services; Tracy L. Hartman, Activity Therapist, Correctional Medical Services; Robin Siefker, R.N., Correctional Medical Services; Warden James S. Haviland; and Dr. Barbara Brown. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Phil Kerns, Case Manager; Correction Officers Demetries Harvey, Louis Humphries, and Julian Tarini; Sgt. and Chapter President Phil Colley; and the Grievant, George Diaz. Also in attendance were Capt. Bishop and Chapter Representative Shawn Gruber. Joint Exhibits 1-12 were admitted into evidence. Written closings were timely filed and exchanged by the Arbitrator on February 16. By agreement of the parties, the State filed a written rebuttal on March 7, 2001, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

This case concerns a correction officer's alleged physical abuse of a mentally retarded, mentally ill inmate and then his failure to cooperate in the investigation of that incident.

Inmates with mental retardation and mental illness have qualities and needs that make them unsuitable for being housed with the general offender population. They do not understand direct orders, are noncompliant and easily frustrated, frequently act out, and are easily victimized by other inmates. The State of Ohio has a 63-bed unit known as the Sugar Creek Developmental Unit ("SCDU") or H-I-B at the Ohio Department of Rehabilitation and Corrections' Allen Correctional Institution in Lima, Ohio, where a portion of its dually-diagnosed offenders are housed and treated. Psychiatric services are provided by Correctional Medical Services ("CMS"), with which the State of Ohio has a contract. Treatment staff, who are CMS employees, work side by side with correction officers, who bid onto the unit pursuant to their union's collective bargaining agreement. These officers have therefore chosen to work with this difficult segment of the prison population. To assist them, they receive specialized training in mental health (beyond what all officers receive), as well as what they learn by working with the mental health staff.

The Grievant was hired at the Allen Correctional Institution as a correction officer on October 11, 1994. At the time of his removal on July 26, 2000, he had been working at H-I-B for approximately three years and had no active discipline on his record. The incident that led to his removal occurred during the second shift on April 28, 2000.

While Activity Therapist Tracy Hartman was conducting a bingo game for some inmates that evening, a level 2 inmate (who had been locked down since the level 2 lock-down

time of 5:30 p.m.) began banging on his cell door. The Grievant, who was helping inmates with the bingo game, testified that this inmate was originally unhappy about not being allowed to play bingo with the others and wanted a cigaret. The Grievant tried to calm him down, saying that if he settled down, he, the Grievant, would see about a cigaret. However, this strategy was unsuccessful because the inmate started acting out again. Concerned about this inmate disrupting the pod and possibly injuring himself, the Grievant stepped away from the bingo game and into the inmate's cell, while an officer from the adjoining H-1-A residential treatment unit, Sean Tidd (later probationally removed), stood at the door. According to the activity therapist, this occurred at about 7:20 p.m., and when the Grievant entered the cell, the inmate became quiet. What the therapist was unable to observe, but the Grievant later admitted to, was that he used his steel handcuffs to restrain the inmate by handcuffing one of the inmate's hands to the bunk. At this point, the stories diverge. The Grievant says that after he cuffed the inmate, he went to get him a cigaret, but when he returned, the inmate was lying down and wanted to sleep, so he uncuffed him and left the cigaret for him on his way out. The Grievant thinks that the inmate could not have been cuffed for more than five minutes, plus or minus. The therapist, however, testified that when she made her rounds (which the logbook shows to be from 7:45 - 8:15), she saw the inmate cuffed to the bed and told Robin Siefker, R.N., about it at approximately 7:50 p.m. The nurse and therapist testified that when the nurse asked the officers about it, the Grievant responded with "What?!" When the nurse went to see for herself, the inmate was unrestrained and asleep. No one reported this incident until the nurse, feeling bothered by it despite the inmate's apparent lack of distress or injury, told Case Manager Phil Kerns about it on May 2. Although abuse did not come to Kerns' mind, he

felt that the incident should be reported, so he filed an incident report on May 4 and an investigation was launched. The Grievant was reassigned that same date to Inmate Health Services, incident reports were requested from Siefker, Hartman and Tidd, and the inmate was examined. No injuries were found. The Grievant was interviewed on May 22, with Sgt. Phil Colley as Union representative. On June 17, the investigator concluded that the inmate had been handcuffed to his bed in his locked cell for about 35 minutes, that the incident had not been reported, and that the Grievant's statements about it were inconsistent compared to other witnesses'. He recommended further consideration for disciplinary action. The warden agreed, moving the case to pre-discipline for Rules 7, 24 and 43.

Rule 7.	Failure to follow past orders, administrative regulations, policies, procedures and directives.
Rule 24.	Interfering with or failing to cooperate in an official investigation or inquiry.
Rule 43.	Physical abuse of an individual under the supervision of the Department.

The pre-disciplinary hearing was conducted on June 26. Two days later, the hearing officer found just cause for discipline, with the removal order following on July 26, citing the Grievant's handcuffing the dually diagnosed inmate to the headboard of his bunk preventing him from reaching the sink, toilet and call button; failing to report the incident; and failing to cooperate fully in the investigation. This action was grieved on July 28 and processed through the grievance procedure until it came to arbitration on January 24, 2001, as aforesaid. Meanwhile, the two CMS employees involved, Activity Therapist Hartman and Nurse Siefker, were verbally reprimanded for their failure to report the incident and Correction Officer Tidd was probationally removed.

III. ISSUE

Was the grievant, George Diaz, removed for just cause?
If not, what shall the remedy be?

IV. PERTINENT PROVISIONS OF THE CONTRACT

ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.... (Joint Ex. 1).

IV. ARGUMENTS OF THE PARTIES

Argument of the State

The State first contends that the fact of the inmate being mentally retarded and mentally ill distinguishes this case from those of inmate abuse in the general corrections population, which typically involve substantial physical injury. To begin with, the Grievant bid on and received specialized training for this post. Second, in response to a consent decree settling a lawsuit, the Department developed policies to address the special needs of its mental health units. One of these, DRC 319-13, defines when and how physical restraints are to be used. The State's position is that the Grievant's behavior deviated from what constitutes the acceptable use of restraints.

There is no dispute that the Grievant did handcuff the inmate to his bed. Handcuffing an inmate is considered use of force. As such, it is governed by Administrative Regulation 5120-9-01, which sets forth in Section C six conditions under which force is appropriate. The

State maintains that none of these conditions existed at the time. The Grievant claims that he restrained the inmate to prevent him from harming himself, but the record does not establish that the Grievant was at risk of that. The fact is, the inmate was upset because he did not have a cigaret. The Grievant handcuffed him to calm him down while he went in search of a cigaret for him. Calming an inmate is not among the 5120-9-01's reasons justifying use of force, but handcuffing is the application of force. The State explains that the reason the case was not referred to a use-of-force committee is that this was deemed a case of physical abuse.

The State admits that the length of time of the incident is in dispute, but contends that it is irrelevant because the Grievant did not meet any of the standards for applying force. However, if the inmate was beating on his cell door for 30-40 minutes, such that force was required, why did the Grievant wait so long to respond and then not report it? And why didn't others notice? Allen Correctional Institution Policy #003 and DRC Policy 319-13 require authorization before using force and set forth an entire protocol for dealing with such situations. The fact that the Grievant did not follow that protocol leads to the conclusion that the Grievant intended to abuse the inmate.

The State submits that what the Grievant did rises to the level of physical abuse because of the inmate's mental condition. The fact that he is an inmate is irrelevant. While he was handcuffed to his bed, he was denied his basic needs (appropriate supervision, water and toilet facilities, and the ability to summon medical assistance). Therefore, he was physically abused. The fact that he was not physically injured does not negate the fact of abuse. The State urges the Arbitrator to view this case as if it occurred in the Department of Mental Health or Department of Mental Retardation and Developmental Disabilities.

Turning to the other charges, the State contends that the Grievant was uncooperative during the investigation in that he was untruthful. Examples of inconsistencies in his version of events abound: the statement that he did not ask Officer Tidd to accompany him to the cell, the claim that he made rounds of the "close watch" inmates, and his denial of participating in the bingo game. As for the charge of failure to follow procedure, the Grievant failed to report his use of force as required by policy.

Finally, the State turns to the Union's arguments. Regarding the contention that discharge is not commensurate with the offense, the State points out that physical abuse is a capital offense in the Department. Moreover, the Arbitrator's authority to modify a removal in abuse cases is limited by Article 24.01 of the Contract. Regarding the claim that what the Grievant did cannot be as serious as the State would have the Arbitrator believe because no one thought it serious enough to report at the time, the State says friction between contract employees and OCSEA bargaining unit members better explains their reluctance to report it. Finally, the State argues that the Grievant is not a victim of disparate treatment. The other officer was terminated for his involvement and failure to cooperate and the two contract employees were disciplined pursuant to their employer's policy and consistently with the Department's own policy and procedure. The Orient Correctional Institution case cited by the Union is significantly different from the instant case. For one, the Union did not establish that the incident in the Orient case rose to the level of physical abuse. In addition, the individuals involved were exempt, long-tenure personnel with different discipline rights and procedures. Moreover, although these individuals were not removed, they were demoted and are unlikely to be promoted for the rest of their careers, thus suffering substantial financial loss.

For all these reasons, the State urges the Arbitrator to uphold the discipline and deny the grievance in its entirety.

Argument of the Union

The Union first focuses on the charge of abuse, saying that the Grievant admits that he handcuffed the inmate to his bed and that he could have used better judgment. However, what he did does not rise to the level of abuse. To begin with, the State did not prove that the inmate was restrained for thirty minutes. The activity therapist said that she saw the inmate cuffed to his bed around 7:50 p.m. while she was doing cell inspections, which the log shows to have been over at 8:15. She also admitted that she could be off on the time by ten or fifteen minutes. However, the nurse said that the therapist informed her at around 7:50. On the other hand, both the Grievant and Officer Tidd reported that the incident took place about or after 8:00 p.m. The Union submits that the only credible witness on this point is the Grievant, who said that he cuffed the inmate for five or ten minutes while he went to find a cigaret for him.

Other factors support the conclusion that no abuse occurred. One is the virtually non-existent discipline received by the two CMS employees, though they failed to report the incident or examine the inmate for six days. Another is the absence of a use of force hearing. Since there was no such hearing, the State must have concluded that there was no use of force. Thus, there was no excessive use of force, and therefore, no abuse. Neither the sergeant nor case manager, the latter of whom investigated such cases when he was a State trooper, viewed what occurred as abuse, and several co-workers testified that the Grievant was dependable and non-abusive.

The Union commends the parties' *Winfield*[1] case to the Arbitrator, arguing that it is similar in several relevant aspects to the case at bar, notably the lack of physical evidence of abuse and lack of a medical examination. Because of this, the arbitrator of that case found that no abuse occurred, as this Arbitrator should do here. The Union also points to a recent case coming out of Orient Correctional Institution in which a blind inmate was held in isolation for three months, yet the managers responsible were treated leniently. The Union reminds the Arbitrator that she took a dim view of differential treatment of managers in the *Van Leer*[2] case, and asks her to find disparate treatment here as well.

With respect to the Rule 24 charge, the Union argues that the Grievant did not interfere with or fail to cooperate in the investigation. He admitted all along that he had handcuffed the inmate. He did originally deny playing bingo, then later admitted he was at the table, but was only helping the play.

As for the Rule 7 charge, it is true that the Grievant did not make a report, but neither did the two CMS employees. Yet the Grievant was removed while they went essentially unpunished.

The Union concludes by saying that removal in this case is unreasonably harsh and is not commensurate with the offense. It asks that the grievance be sustained with the Grievant granted all back pay, including roll call pay, and to suffer no loss of benefits or seniority.

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[1] *Ohio Department of Rehabilitation and Corrections and OCSEA/AFSCME Local 11 (Geraldine Winfield, Grievant)*, Case No. 27-21-930713-0950-01-03 (Graham, August 17, 1995).

[2] *Ohio Department of Youth Services and OCSEA/AFSCME Local 11 (William Van Leer, Grievant)*, Case No. 35-03-950526-056-01-03 (Smith, December 19, 1996).

V. OPINION OF THE ARBITRATOR

The most serious charge against the Grievant is that of physical abuse. There being no dispute that the Grievant did handcuff the inmate to his bunk for 35 or fewer minutes, the question is whether this conduct constitutes abuse. The Department does not offer its own definition of "physical abuse," but urges the Arbitrator to apply the standards of the mental retardation and mental health departments. I agree that those standards could have some relevance here because of the inmate's mental condition, but only if the Grievant was clearly on notice that he would be held to the higher standard. The record does indicate that the Grievant received training in mental health, but none of the documents or testimonies speak specifically to those departments' abuse standards. I therefore follow Arbitrator Graham in looking to the statute, which contains the concept of physical harm, for guidance. Application of this standard simply does not lead to the conclusion sought by the Department for there is no evidence of physical harm or even evidence that, had the inmate been examined at the time, some physical injury would likely have been found. Indeed, the inmate was silent after the Grievant went into the cell, not crying out in distress, despite the fact that he was evidently able to do so. This does not mean that the Grievant is innocent, however. While he is not guilty of physical abuse, handcuffing the inmate to the bed does constitute use of force and, under these circumstances, inappropriate use of force that might have resulted in injury. This misconduct is aggravated by his failure to report this use of force, which this Arbitrator deems excessive. While it is to his credit that he admitted the essential facts of what he did, his story also contains some inconsistencies that are indicative of an attempt to minimize the seriousness of his poor judgment. Given the Grievant's history with the Department, the incident does not

warrant termination. Discipline is called for, but discharge is too severe. The Grievant will be restored to his former position, but will receive a five-day suspension.

VI. AWARD

The grievance is granted in part, denied in part. The Grievant is to be reinstated to his former position forthwith. He is awarded all monies he would have earned less normal deductions including any earnings he may have had in the interim on account of his unjust dismissal, and made whole for lost seniority and benefits. The Department may require reasonable proof of interim earnings. Given the finding of excessive use of force, the discharge is converted to a five-day suspension without pay. The Arbitrator retains jurisdiction for a period of sixty (60) days on the sole issue of remedy.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
April 2, 2001

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