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#1058

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

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In the Matter of

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, AFSCME,
AFL-CIO

and

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTIONS

Grievance #27-03-(20080703)-0038-01-03

Grievant: Edward Woolum

ARBITRATOR'S
OPINION AND AWARD

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO ("the Union") and STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTIONS ("the Employer"), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be final and binding pursuant to the Agreement.

Hearing was held December 17, 2009 at the Chillicothe Correctional Institution ("CCI") in Chillicothe, Ohio. The Parties were afforded full opportunity

for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Post-hearing briefs were filed by each Party.

APPEARANCES:

On behalf of the Union:

LYNN BELCHER, OCSEA Advocate, 390 Worthington Rd., Westerville, OH 43082.

On behalf of the Employer:

BOBBY JOHNSON, ODRC, 777 W. Broad St., Columbus, OH 43222.

STIPULATED ISSUES

1. Did the Grievant's conduct constitute physical abuse?
2. If the Grievant's conduct did not constitute physical abuse, was the Grievant removed for just cause?
3. If the Grievant was not removed for just cause, what shall be the remedy?

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

March 1, 2006 - February 28, 2009

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

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STIPULATED FACTS

1. The Grievant was hired by the Department of Rehabilitation and Correction on September 13, 2004 as a Corrections Officer.
2. The Grievant's prior discipline record holds no active discipline.

3. The Grievant was removed on July 1, 2008 from his classification of Correction Officer. The Grievant was charged with violating Rule # 22 – Falsifying, altering, or removing any document or record and Rule # 42 – Physical abuse of any individual under the supervision of the Department.
4. The Union filed grievance 27-03-(20080703)-0038-01-03 on July 3, 2008. The grievance was duly processed in accord with the Parties' Agreement. No procedural defects are alleged and the matter is before the Arbitrator for a decision on the merits.
5. The Grievant signed for his Employee Code of Conduct on October 14, 2004.

ADDITIONAL FACTS

On May 8, 2008,¹ the Grievant and a fellow CCI Correction Officer transported Inmate H to Adena Regional Medical Center ("ARMC") for medical treatment.² Once at ARMC, Inmate H received treatment, including stitches in his arm. After receiving treatment and before being discharged from ARMC, Inmate H began to pull at the stitches. The Grievant attempted to stop the inmate from doing this by affixing flexible plastic handcuffs on him, which Inmate H attempted to use to cut himself, while calling the Grievant derogatory names, including "motherfucker, inbred, redneck, hillbilly."

In dispute is whether the Grievant lost his temper in response to being called the derogatory names. The Employer claims the Grievant did lose his temper and used his fist to strike the inmate in the face multiple times. The Grievant claims the inmate became agitated when he did not receive pain medication, and struck his own face against the metal handrail of his hospital bed, resulting in the busted lip.

At the time of the incident, a private citizen, Ms. Q, was in the adjacent cubicle of the ARMC Emergency Room with her husband, who was a patient. The

¹ All dates are 2008 unless otherwise indicated.

² The inmate was a patient of the CCI Residential Treatment Unit ("RTU"), a housing unit that provides mental health services to mentally ill inmates. Inmate H was a self-admitted "cutter." On May 8, he had purposefully mutilated his arm by cutting himself so severely, the wounds he created required stitches.

cubicles are separated by curtains approximately 3 feet off the floor. As part of the ARMC investigation of the incident, Ms. Q made the following written statement³ on the day of the incident:

I heard chains start rattling, making lots noise heard guards tell Inmate to "settle down" quit resisting" guards told him 4-6 times to "quit" quit resisting. Could hear Inmate struggling. Inmate was calling them names – "mother fucker – inbreed – redneck" they continued to ask him to settle down. Then you heard them hit Inmate at least 5 times. Then Inmate started saying they "beat me." Guards walked to hall & called for a nurse their was a pause before they called a nurse. They were (the guards) calm. Guards also said something like I told to "quit" after you heard the hits.

Inmate H made the following written statement to ARMC the day of the incident⁴:

I tried to cut myself so the Officers Woolum and S started punching me in the face. I now have to get stitches in my lip and they are trying to cover up what happened. My face hurts and it is starting to swell. The reason Woolum hit me is because I called him an "inbred hillbilly."

Please note, I tried to cut myself with the plastic restraints. The C/Os tried to stop me but started hitting me.

Once back at CCI, Inmate H made the following written "Inmate Use of Force Statement" that night:

I was trying to cut myself and C/O Woolum started punching me in the face over and over, my teeth pushed all the way thru my lip resulting in multiple approx 6 or 7 stitches.⁵

The Grievant made a DRC "Incident Report" that night. For the "Subject Of This Report," he checked "Use of Force." The Incident Report provides:

On the above date and time I C/O Woolum had Inmate H on a round trip at ARMC. After the Doctor put stitches to seal Inmate H self inflicted wounds to his right arm. Inmate H started messing and

³ Statements are set out with the original grammar, spelling, and punctuation.

⁴ The written statement is dated "06'08'08"; from the record, including the content of the statement, it appears certain it was written May 8, 2008, the day of the incident.

⁵ An AMRC "Medical Exam Report" made by an RN the day of the incident provides in pertinent part:

Subjective Evaluation: States "C/O punched me."
Objective Physical Findings: ...Laceration to inner lower lip, approximately 8 sutures present to outer lower lip.

pulling at his stitches. I C/O Woolum then put flex cuffs onto the Inmates cuffs to shorten his reach so he couldn't harm himself. Then Inmate H started rubbing the ends of the flexs on his side to cut himself. So then I C/O Woolum went back to the Inmate to make sure he couldn't hurt himself. When I did this Inmate H tried to bite me. I then jumped back and told the Inmate to stop resisting. Then Inmate H started beating his face and right side of his head on the bed rail. I then saw blood coming from his mouth. I then placed my hand on the inmates head to keep him from injuring himself future. I then yelled for a nurse and for the hospital security and told C/O S to call Capt. Ramirez. When the Hospital staff came in the Inmate stated that his injuries was caused by me C/O Woolum but I did not strike him nor did C/O S and then Inmate stated that he would catch me and Officer S Later on the yard. When ARMC security staff and the nurses arrived Inmate H become compliant and soon After Lt. McCray and Officer Swords relieved me of my duty.

Also on the night of the incident, the Employer contacted the Ohio State Highway Patrol, which began an investigation. As part of that investigation, Trooper Wells interviewed Officer S, who stated neither he nor the Grievant had hit Inmate H. Trooper Wells interviewed Officer S again on May 22. She told him she had reason to believe he was covering up for the Grievant, and if Officer S did not tell the truth he would be charged. Officer S stated no one had hit Inmate H. According to Officer S, later in this interview, Investigator Clever told Officer S if he told the truth, he'd have a 90% chance of keeping his job. (Trooper Wells stated in her "Report of Investigation" that Investigator Clever was not present during the May 22 interview.) Officer S spoke briefly on the telephone to an attorney. As set out in an undated typed statement signed by Officer S and entered into the record by the Union:

...This is when I decided to tell them what they wanted to hear so that I wouldn't lose my job or go to jail, which I had been threatened with over and over. After I told them that, Trooper Wells told me that I needed to go with investigator Clever to the wardens office because I was being put on administrative leave. When I entered the room I was met with my union rep...for the first time. I was instructed that I was being put on administrative leave for reason that I knew. I was then escorted out of the institution by [my Union rep]. While we were walking I realized that he didn't know what was going on since he was the one asking me what just happened. I told him that I was not going to jail for anybody.

As part of the Employer's investigation of the incident, Inmate H made the following written statement on May 28:

I was in the hospital and I was trying to cut myself with the extra flexcuffs when C/O S came over to me and C/O Woolum started choking me. He then started hitting me in the head and face, both officers demanding I stop resisting. Officer S was on the left side of me and Officer Woolum was on the right. I felt all the blows coming from the right side.

Officer S also made a written statement on May 28 as part of the Employer's investigation. It provides in pertinent part:

...the doctor then proceeded to give [Inmate H] the stitches [on his arm]. I stood at the foot of the bed on the doctors side while Woolum stood on the [Inmate's] left hand side up by his head. [Inmate H] started running his mouth to the doctor at this time Woolum then moved closer to the [Inmate] and asked him to be quiet and let the doctor do his job. [Inmate H] told Woolum that he could say what he wanted and that Woolum couldn't do any thing about it. The doctor then finished up while he was doing so [Inmate H] at same time told the doctor he would remove the stitches. The doctor then left the room leaving the curtain closed. [Inmate H] soon started to mess with his bandages at this time C/O Woolum grabed two flex cuffs and proceeded to put one on each cuff and through the belly chain so that the [Inmate] wouldn't have any range of motion. C/O Woolum then tried to use another flex cuff to cuff the [Inmate's] right wrist to the bed rail. At this I seen what I would call the [Inmate] resisting. I then went to the [Inmate] left side and tried to perform an outside wrist turn on the [Inmate] right wrist to move it to the bed rail. While I was doing this I was giving [Inmate H] direct orders to stop resisting. [Inmate H] stated that he was not resisting I then looked down and relized that the flex cuff that Woolum had put on before was preventing me from using this technique properly. I then quit trying and went to tell Woolum to remove the first flex cuff. This is when Woolum started hitting [Inmate H]. I froze up and couldn't do anything I then remember seeing blood. Woolum was yelling for a nurse. He then told me to get a nurse and Security. I then opened the curtain and got a nurse and Security. Woolum also told me to contact the Capt. and tell him that the [Inmate] was acting stupid. The nurses were in the room as I called. I over heard Woolum say that the [Inmate] was hitting his head on the bed rail. I then reentered the room and Security asked me to step out and talk with him. He asked to see my knuckles. I showed him. I told the security that I needed to be in the room. The security officer then asked me and Woolum to fill out one of the Hospitals Incident reports. Woolum called our Capt. who said not to. [Inmate H] then filled one out while he was writing Woolum handed me the clip bored and he had wrote a note stayting that we have to stick together. Shortly after Lt. McCray and C/O Swords had arrived.

[Inmate H] was soon released. C/O Woolum brought the car back while C/O Swords, Lt. McCray and myself brought [Inmate H] in the van back. I then went to 2nd Shift Capt. office where Capt. Ramirez instructed me to go to the 1st shift office. C/O Woolum and a union rep. was already filling his report out. At this time C/O Woolum put what he had already wrote in front of me and told me to copy it word for word. the Union rep. said not to word for word but to keep the story straight.

At the end of the written statement, Investigator Clever wrote questions to which Officer S wrote answers. These are in pertinent part:

Q. Where did C/O Woolum hit Inmate H?

[A.] Head area

Q. Did C/O Woolum cause the injury to [Inmate H's] lip that required stitches?

[A.] Yes

Q. Why did C/O Woolum hit [Inmate H]?

[A.] I asked Woolum that night why he did it. Woolum told me he just flipped.

As a result of its investigation, the Employer decided to terminate both Officer S and the Grievant. The June 20 Notice of Disciplinary Action to the Grievant provides in pertinent part:

Pursuant to the authority granted in the collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11 AFL-CIO, this letter is to advise you that you are to be REMOVED from your position effective: 7-1-08.

You are to be REMOVED for the following infractions:

On May 8, 2008 you physically abused Inmate H[] by hitting him between five and ten times in the face while at Adena Regional Medical Center. The inmate was restrained to the hospital bed and was defenseless to your aggressions. The result of the physical abuse caused the inmate to receive stitches in his lip. You also falsified your incident report regarding this incident.

Your actions constitute a violation of rule #22. Falsifying, altering, or removing any document or record. 42. Physical abuse of any individual under the supervision of the Department. Of the Employees Standards of Conduct. [sic] Accordingly, I am REMOVING you.

...

PARTIES' POSITIONS

Employer's Position

The Employer showed the Grievant physically abused Inmate H. It is undisputed Inmate H ended up with a busted lip. What is in contention is how Inmate H received that injury.

The Grievant lost his temper and struck Inmate H. This was clearly proven by his testimony, and was confirmed by a private citizen, Ms. Q. She was so offended by the Grievant's behavior, she voluntarily came forward. She testified she heard four to six thumps, not chains rattling and not a metal bed handrail rattling. Nothing in the Union's evidence discredits Ms. Q's testimony.

The Union failed to discredit Inmate H's testimony. The Union wants the Arbitrator to believe Inmate H, while fully restrained with the Grievant at the head of the hospital bed, was able to inflict harm to himself by beating his head on the hand rail of the bed. The only witness who testified Inmate H hit his own head was the Grievant.

There are no exceptions when it comes to wards of the State being physically abused by those charged with their care. The result is removal.

The Grievant knows what he did was wrong. He could have stepped out for a minute to calm down, leaving the fully-restrained Inmate H with the second officer in the room. Instead, he lost his temper and assaulted Inmate H. The Grievant then resorted to what he thought to be his only option – to lie.

In accordance with Article 24.01, the grievance should be denied.

Union's Position

The Union demonstrated the Grievant was a good employee. His performance evaluations were good and he had no active discipline.

Inmate H reported to the criminal investigator the Grievant attempted to stop him from cutting himself with the flex cuffs. Inmate H receives mental health services and has a history of physically abusing himself.

The Grievant did not hit Inmate H. In fact, the Grievant acted quickly to minimize injuries Inmate H was trying to inflict upon himself. The Grievant saw Inmate H was bleeding, and stopped him from continuing to hit his head on the bedrail by trapping his head on the bed. The Grievant asked Officer S to get help. The first responder nurse verifies the Grievant's initial statement to her was, "[Inmate H] tried to bite me and he hit his face against the rail and caused the injury." The Grievant's entries in the May 8 suicide log kept on Inmate H are consistent with Inmate H harming himself. This spontaneous documentation is incongruent with the Employer's claim the Grievant formulated a story to cover an act of abuse.

It is undisputed Inmate H was agitated he was not receiving strong pain medication. The injury to Inmate H's lip did in fact result in his obtaining the stronger medication he was demanding. Inmate H has a history of cutting himself and despite his denial, a history of banging his head on objects when he is restrained from his chosen method of self-injurious behavior.

The State's only two witnesses with direct knowledge were Inmate H and Ms. Q. Neither provided credible testimony to counter the Grievant's consistent testimony.

Inmate H testified the Grievant struck him repeatedly on the right side of his face. Inmate H first reported to ARMC both officers struck him, then revised his statement to accuse only the Grievant of striking him 10 times. Inmate H testified the Grievant choked him. Inmate H first added this claim on May 13. May 8 photographs of Inmate H show no bruises around his neck. The CCI infirmary nurse testified Inmate H's lip injury could be the result either of hitting a

bedrail or from being struck. She also testified if Inmate H had been struck 5-10 times, she would have expected a more severe injury than she observed. The Grievant's and Officer S's hands were examined; it is highly unlikely the latex gloves worn would have protected an officer's hands from physical signs if the allegations of abuse were founded.

Ms. Q testified she heard noises. On the night of the event, she wrote she heard chains rattling. She did not see the Grievant strike Inmate H. She reported trying to peer under the curtain and also claimed she was so frightened she moved away from the curtain. She also incorrectly reported the Grievant left the examination area to get a nurse. Ms. Q's statement and statement were not malicious, but were unreliable. She and her husband could see only the feet of the officers. Thus, any claims that they were witnesses to an assault is sheer conjecture.

ARMC personnel did not determine Inmate H's injuries were consistent with his allegations of abuse by the officers. The doctor wrote, "Apparently the patient was trying to injure himself again and sustained a laceration to his lip."

The doctor's report provides in pertinent part:

Note, while suturing the patient, multiple times he accused me of treating him differently because he was a prisoner. Each time, I told him the standard care was not to give narcotic pain medicine prior to simple laceration and that way it would take a much longer time to fix him. Once I was finished with the procedure, he asked me for pain medicine again...I told him that I would write Motrin...I do not write strong narcotics for simple lacerations at which point he said when he got back to the jail he was going to pull all of his stitches out and bite a chunk out of his arm and basically that was the last interaction I had with the patient prior to being called into his room to evaluate his facial injuries...Note, the patient was given 1 mg of Ativan prior to procedure. The reason I did this prior to the procedure is that the patient was _____ towards me during the repair of his arm lacerations, although he did not try to physically harm me, I felt it would be better to have him a little calmer before I tried to suture the laceration close to his mouth, as there was a possibility that he could bit my hand while I was suturing.

An ARMC security person testified he took photographs of the bedrail because he saw marks and blood and the officers stated Inmate H hit his head on the bedrail. The Union requested the Employer to produce the original photographs. The Employer said they were in the possession of ARMC. But ARMC had provided them to the criminal investigator. The Union is at a disadvantage because the Employer withheld information on the whereabouts of the original photographs. The photographs reveal no marks on either officer's hands to support the allegation either officer struck Inmate H.

The Agreement requires discipline be for just cause, which requires a fair and objective investigation be conducted. Investigator Clever reported his initial opinion was not supportive of either abuse or a use of force. The typical procedure on an abuse allegation is to place the officer(s) on administrative leave while investigating the charge. Inmate H was not transferred to another institution, inferring there was not a concern for his safety despite the abuse allegation.

Investigator Clever testified his opinion and the investigation changed when Inmate H was reported to be truthful in a polygraph administered as part of the criminal investigation. Arbitrator Fowler held it was error to use a polygraph to bolster the testimony of an inmate, particularly when the physical evidence did not support the inmate's abuse allegation:

The polygraph evidence relied upon by the Agency is subject to all the reservations normally associated with such evidence in arbitration hearings: In a 1979 examination and discussion of the polygraph, its degree of reliability, and court and arbitration decisions regarding its use, an arbitrator declared that "the conclusion is compelling that not matter how well qualified educationally and experientially may be the polygraphist, the result of the lie-detector tests should routinely be ruled inadmissible." Elkouri & Elkouri, How Arbitrations Works, 6th ed., A. Ruben, editor, BNA (2003) at p. 421 (footnotes omitted). FMCS Case No. 08/04400, 126 LA 136, Department of Justice, United States Penitentiary vs. AFGE.

The Grievant was removed based on unreliable, inconsistent, and fabricated statements of witnesses. On May 8, Officer S reported no one hit Inmate H. On May 29, he claimed the Grievant hit Inmate H. In his second statement, Officer S claimed he was assisting the Grievant with Inmate H when the Grievant struck Inmate H. But both the Grievant's and Ms. Q's statements report Officer S stayed at the bottom of the bed during the incident. Additionally, Ms. Q's report stated she did not hear anyone stating Inmate H hit the bedrail until the nurse and security arrived. Officer S reported Inmate H had struck his head on the bedrail. "I then opened the curtain and yeld[sic] for a nurse. Woolum then told me to go get security and report it to our capt." Officer S claimed his statement that night was coerced by the Grievant. The nurse reports her response was at 7:20pm. Capt. Ramirez reported receiving Officer S's call at 7:22pm. How did the Grievant have the opportunity or time to orchestrate his explanation for the injury? How would Officer S know what to tell Capt. Ramirez unless Officer S had not witnessed Inmate H hitting his head on the bedrail? Officer S's May 8 statement reports the ARMC nurse and security arrived at the same time Officer S called Capt. Ramirez. Even in Officer S's May 22 statement, he reports telling Capt. Ramirez "the I(nmate) was acting stupid and he said to strap him down if we had to." It is possible Officer S's second statement was accurate when he claimed he called Capt. Ramirez while overhearing the Grievant tell the nurse about the bedrail. But his own statement implies he called Capt. Ramirez outside Inmate H's room.

Several other instances corroborate the Grievant's version of the incident. For example, Officer S reported Ms. Q's husband had said he heard what sounded like someone being hit by a "billy-club." Additionally, some of Officer S's May 12 answers in his criminal investigation statement corroborate the Grievant:

- Q. Did either of you have your hands on [Inmate H] when his teeth went through his lip?
- A. No. C/O [S] went for ARMC staff for help. When [Inmate H] started bleeding. C/O Woolum then held the I(nmate) head to the back of the bed to prevent further injury.

The information referencing the billy-club and the restraining of Inmate H on the back of the bed were not mentioned in the May 8 incident reports. These details contradict the claim Officer S was instructed to simply copy an incident report written by the Grievant.

Two pieces of evidence gathered on or after May 21 changed the course of the investigation. Officer S's recanting and Inmate H's polygraph results occurred during the criminal investigation. Additionally, Trooper Wells spoke with Inmate H's doctor, who reported Inmate H is medicated for his bipolar condition and borderline personality disorder. As Trooper Wells report states, "He stated the medication would not make the inmate lie but stated the inmate is anti-social and could possibly lie well."

Investigator Clever denied he participated in the criminal interviews of the Grievant or Officer S, contrary to both officers' statements.

Officer S was physically present during the events of May 8, but the Employer chose not to use him as a witness, demonstrating its lack of confidence in his statement. The absence of Officer S, considering the importance of his statement in changing the direction of the administrative investigation, is significant. The decision not to use Officer S as a witness infers his testimony would not have helped the Employer's case. White v. DRC, Lebanon Correctional Institution, Arb. 620, p.7.

The record in this case demonstrates a tendency of the criminal and administrative investigators to blur the lines in regard to Garrity Rights and the need to maintain separate investigations. It appears the investigations were conducted in tandem. The administrative investigator simply followed the lead of the criminal investigator, and did no independent investigation to determine the value or weight of any information received from the criminal investigation. No exculpatory evidence was either sought or considered by the administrative investigator. For example, the administrative investigator initially accepted the Inmate H's lip injury was self-inflicted. No effort was made to determine if the claims of abuse were consistent with the injury. Moreover, the witness statements used to corroborate Inmate H's statement were inconsistent with the physical evidence documented in the medical record.

In Buggs v. Department of Taxation, Arb. 985, the arbitrator held the investigation was not fair or objective because essentially the decision was already made on the veracity of the charges and witnesses before the investigation began. Arbitrator Smith noted, "In fact, the investigator was 'absolutely certain' of the co-worker's veracity before he interviewed any other witness." In the instant case, Investigator Clever relied heavily on the interviews and evidence gathered by Trooper Wells. Investigator Clever testified he was privy to the summary of the criminal investigation. In that summary, for example, the depiction of Officer S's recanting was described as the truth. While Investigator Clever did an investigatory interview of Officer S on May, he also accepted Officer S's statement without evaluating or searching for exculpatory evidence. Nor did Investigator Clever make any effort to investigate or evaluate the physical evidence despite the examinations by medical personnel.

A charge of abuse requires more than inference and speculation. "It is not required that the evidence be fully conclusive or 'beyond all reasonable doubt.'

But the evidence must be truly weighty and substantial and not flimsy or superficial.” J. Dunsford, “Arbitral Discretion: The Tests of Just Cause,” The Proceedings of the National Academy of Arbitrators, 1989, p. 49. In the instant case, the Employer did not meet the necessary standard of proof:

The act with which the Grievant is charged—physical abuse—is a serious one requiring a significant quantum of proof to sustain the Employer’s decision to discharge. Any real doubt must be resolved in favor of the Employee.”

Starks v. DYS, Arb. 300 (1990).

The second charge against the Grievant, falsifying his statement, falls on the same sword as the abuse charge. Essentially, the Grievant is charged with falsifying his report because the Employer does not believe he did not abuse Inmate H. The Union demonstrated that not only is the record lacking in proving the abuse but, in fact, the Grievant’s statement is the only consistent and logical description of the events of May 8.

If one or more of the elements of just cause are not met, then the just cause requirement of the Agreement has not been met. The Employer has not met the most fundamental element of just cause, the quantum of proof to justify the discipline imposed. Additionally, the investigation was flawed because the Employer did not look for exculpatory evidence. The Union requests the reinstatement of the Grievant with backpay and benefits, the cost of medical expenses, health insurance premiums, and any other expenses the Grievant incurred that he would not have incurred but for the unjust removal.

ARBITRATOR’S OPINION

This is an extremely serious matter, with weighty considerations on both sides. On the one hand is the Grievant, a Correction Officer reported to be a good employee with no active discipline, charged with abusing an inmate. On the other

hand is Inmate H, a mentally-ill felon who reported the Grievant assaulted him, resulting in various injuries to Inmate H's face. Pursuant to the Article 24.01 of the Parties' Agreement, a proven charge of abuse results in removal of the employee.

The record is voluminous and comprehensive. There are numerous witness statements, investigative reports, and witness testimony. There are a number of inconsistencies among these records and testimony. Of greatest significance are the statements and recantations of Officer S, who worked with the Grievant on May 8, taking Inmate H to the hospital. At first, Officer S corroborated the Grievant's version of events – Inmate H's injuries were caused by him knocking his head against the bedrails of his hospital bed. Later, Officer S recanted, corroborating Inmate H's version of events – the Grievant had hit him in the face multiple times.

The Arbitrator's only task in this case is to determine whether the Employer met its high burden of proving abuse occurred. If it did occur, Article 24.01 deems the abuse to be just cause for removal.

The four witnesses closest to the events of May 8 are the Grievant, Officer S, Inmate H, and a private citizen, Ms. Q.

The Grievant

The Grievant has consistently given a coherent version of the events of May 8. I.e., Inmate H was aggravated because the ARMC doctor would not give him strong pain medication. Inmate H began pulling at the stitches in his arm the doctor had just sewn in. The Grievant placed plastic flex cuffs on Inmate H's wrists to limit his freedom of movement. Inmate H rubbed the edges of the flex cuffs on his body to try and cut himself. The Grievant went back toward the head of the bed. Inmate H tried to bite the Grievant. The Grievant jumped back and told Inmate H to stop resisting. Inmate H then started beating his face and the right side of his head against the bedrail. The Grievant saw blood coming from Inmate

H's mouth. The Grievant put his hand on the Grievant's head to stop the head banging. The Grievant called out for a nurse and for hospital security, and told Officer S to call Capt. Ramirez. Hospital staff arrived; Inmate H told them the Grievant had beaten him. Inmate H said he would catch the Grievant and Officer S later in the prison yard.

Officer S

Officer S first said neither he nor the Grievant had hit Inmate H. He heard the Grievant tell ARMC personnel Inmate H had been hitting his head on the bedrail. While Inmate H was writing a statement, the Grievant handed Officer S a clipboard on which the Grievant had written a note stating "we have to stick together." Later that night, back at CCI, Officer S joined the Grievant and a Union representative at the first shift office. The Grievant was writing a multi-page statement. He gave Officer S what he'd already written and instructed Officer S to "copy it word for word." At some point that night, Officer S asked the Grievant why he hit Inmate H. The Grievant said he had "just flipped." A few weeks later, Officer S recanted, stating the Grievant hit Inmate H in the head, which split Inmate H's lip, requiring stitches.

Inmate H

Inmate H told a coherent version of the events of May 8. He tried to cut himself with the plastic flex cuffs the Grievant had placed on his wrists. The Grievant tried to get Inmate H to stop, Inmate H called the Grievant an "inbred hillbilly," the Grievant and Officer S punched Inmate H in the face "over and over."

Ms. Q

If this had been a TV episode of "Law and Order," there would be a Ms. Q. Remarkably, she was in the adjacent ER cubicle accompanying her husband. She heard chains rattling in Inmate H's cubicle, and heard the "guards" tell him to "settle down" and "quit resisting." She readily testified she was "nosy," and

looked under the 3-foot bottom gap in the dividing curtain to see what was happening. She could see the movement of legs and feet. She heard Inmate H say "motherfucker, inbreed, redneck," and his being told again to "settle down." Ms. Q then heard the guards hit Inmate H "at least 5 times." She stated, "it sounded like a person being punched, a thud sound, it was all in a row, bam, bam, bam." During the hits, there were no rattling of metal sounds, nor shaking bed sounds. She heard Inmate H say, "they beat me." She heard the guards say something to the effect of, "I told you to quit." For one to two minutes, it was quiet in Inmate H's cubicle. The guards called for help. When ARMC personnel arrived at Inmate H's cubicle, Inmate H said, "they hit me." The guards said, "he hit his face on the bed." Upon hearing the guards' explanation, "me and my husband looked at each other with our mouths dropped open." Ms. Q went to the nurses' station and said the guards were lying.

Inconsistencies

Certainly, there are inconsistencies in the record that leave open questions. What was Officer S's exact involvement at ARMC the night of May 8? Did the Grievant try to choke Inmate H? When was Officer S telling the truth, and when was he lying? What was the relationship between the administrative investigation and the criminal investigation? At which meetings was Investigator Clever present? How reliable are Ms. Q's recollections from the incident? What exactly did she see and hear, and when did she see and hear it? What is the significance of Ms. Q's husband stating he heard what sounded like someone being hit by a billy-club? If the Grievant punched Inmate H five to ten times, why weren't Inmate H's injuries more severe, and why weren't there marks on the Grievant's hand? Did Inmate H's mental health have an effect on his veracity? What is the import of Inmate H's polygraph results?

Conclusion

The task for the Arbitrator is to weigh the inconsistencies against what has been proven, and to determine whether any of the inconsistencies affect the high quantum of proof the Employer must have to uphold its finding of abuse.

It is not necessary to know what Officer S's exact involvement at ARMC was on the night in question. I.e., what did he say, when did he say it, did he hit Inmate H? It is not necessary to know because this arbitration is about the Grievant's actions on May 8.⁶ While Officer S's actions on May 8 and after certainly are relevant to determining whether the Grievant abused Inmate H, none of the open questions about Officer S in the record materially affect the analysis of the Grievant's actions. This lack of material effect is largely due to Ms. Q's observations and actions the night of May 8.

Nor is it necessary to know whether the Grievant tried to choke Inmate H. Choking or not, the alleged 5-10 punches certainly constitute abuse on their own.

It is unclear from the record just what the relationship was between the administrative and criminal investigations. Certainly, they overlapped. To an extent, such an overlap is unavoidable in a case such as this. In any event, the Arbitrator finds the overlap not to have deprived the Grievant of a fair investigation and a fair hearing.

The presence of Ms. Q has an enormous impact on this case. She is a public citizen who knows none of the individuals involved. She was right next to Inmate H's cubicle, separated only by a curtain that was three feet off the floor. She looked under the curtain. She couldn't see much, but what she did see was consistent with what she heard. She distinctly heard multiple punches. Her

⁶ Officer S also was removed, and had his own arbitration with a different arbitrator. To this Arbitrator's knowledge, that decision has not yet been rendered. Even if it has been rendered,

perceptions may not be accurate with regard to whether Officer S punched Inmate H. Seeing the Grievant's location in Inmate H's cubicle, though, confirmed the Grievant definitely punched Inmate H. With regard to the Grievant's and Officer's S's other statements and actions, she may not precisely remember who said what, when did they say it, and what was the exact sequence of their actions. Her recollections, however, to an extremely high degree, are coherent and convincing. The fact Ms. Q's husband stated he heard what sounded like someone being hit by a billy-club does not take away from Ms. Q's reliability or veracity. She heard what she heard, and saw what she saw. And what she heard and saw propelled her to go immediately to the nurses' station and report Inmate H had been punched. Combined with the rest of the record, the Arbitrator finds Ms. Q's initial report and subsequent statements compelling and true.

The Arbitrator cannot say with any authority why Inmate H's injuries were not more severe, and why the guards' hands were unmarked. While the CCI nurse was surprised Inmate H's injuries were not more severe if he had been punched multiple times, that comment does not take away from the heavy weight of the evidence that the Grievant punched Inmate H. Certainly, the latex gloves worn by the officers could account for their unmarked hands.

As for Inmate H, the record informs us he regularly is on 7-8 anti-psychotic medications. The record also informs us these drugs would not cause him to lie, though his anti-social behavior results in him being a skilled liar. If Ms. Q were not in the exact place at the exact time she was, the Arbitrator would have difficulty relying heavily on Inmate H's testimony. But everything he and she said throughout this matter has been sufficiently consistent that it enhances both their credibility. As for the results of Inmate H's polygraph, the Arbitrator has not relied on it in making her decision.

this Arbitrator has not seen it and is unaware of the outcome.

AWARD

For the reasons set out above, the grievance is denied. The Employer has proved to a high degree of certainty the Grievant's actions the night of May 8, 2008 constituted abuse. Accordingly, pursuant to Article 24.01, his removal stands.

DATED: March 17, 2010

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator