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Labor Arbitrator and Mediator
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#1091

IN ARBITRATION PROCEEDINGS PURSUANT TO THE

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME

and

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Grievance # 27-35-20101029-0352-01-03

Grievant: Rock Nissen

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 ("the Union") and OHIO DEPARTMENT OF REHABILITATION AND CORRECTION ("the State") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator.

Hearing was held June 7, 2011 in Columbus, Ohio. Both Parties were represented by advocates who had full opportunity for the examination and

cross-examination of witnesses, the introduction of exhibits, and for argument.

Post-hearing briefs were timely submitted by both Parties.

APPEARANCES:

On behalf of the Union:

JAMES HAUENSTEIN, OCSEA Staff Representative.

On behalf of the Employer:

ALLISON VAUGHN, DRC Labor Relations Officer 3.

ISSUE

Was the Grievant removed for just cause? If not, what should the remedy be?

RELEVANT PORTION OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

April 15, 2009 – February 29, 2012

. . .

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....

...

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 (1) or more oral reprimand(s) (with appropriate notation in employee's file);

b. One (1) or more written reprimand(s);

c. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

...

d. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;

e. Termination.

...

...

STIPULATED FACTS

1. The grievance is properly before the Arbitrator.

2. There are no procedural objections.

3. The Grievant was hired on 10/16/2000 with the State of Ohio Department of Rehabilitation and Correction.

4. The Grievant has no active discipline.

5. The incident giving rise to the removal occurred on April 7, 2010 in the HF Hallway at the Toledo Correctional Institution.

6. On April 7, 2010, the Grievant was working first shift assigned to D1-2 Block.

7. The Signal 3 (man down) went out at 6:40am; it was cleared by Lieutenant Hahn at 6:42am.

8. The Grievant was placed on Paid Administrative Leave April 7, 2010.

9. The Grievant's Use of Force Interview occurred on May 4, 2010.

10. The Use of Force Report was signed and submitted on May 5, 2010.

11. The Grievant's Investigatory Interview occurred on July 5, 2010.

12. The Investigation Report was submitted to the Labor Relations Officer 2 on July 7, 2010.

13. The Pre-disciplinary Meeting occurred on September 24, 2010.

14. The Grievant was removed on October 29, 2010.

ADDITIONAL FACTS

On April 7, 2010, the Grievant, a CO working first shift, stopped Inmate W on the way to early chow because Inmate W did not have an early chow badge. The Grievant told Inmate W, "Hold up here; you don't have a badge." Inmate W responded, "Fuck you, I'm going." The Grievant responded, "C'mon, man; you're not going." Inmate W responded, "Fuck, I'm going." The Grievant placed the back of his hand on Inmate W's shoulder. Inmate W said, "Get your fuckin' hand off me." Inmate W punched the Grievant in the face; the Grievant saw stars. The Grievant punched Inmate W; the two men threw more punches at each other.[1]

Two other CO's who were in the vicinity of the altercation intervened. They broke up the fight and took Inmate W to the ground. After Inmate W was on the ground with one hand cuffed, the Grievant punched Inmate White in the face. Inmate W did not suffer any significant injury from the altercation.

[1] There is no videotape of the incident in the record. The record indicates the cameras in HF Hallway in D1-2 Block were pointed the other direction.

The removal letter provides in pertinent part:

> You are to be removed for the following infraction(s): #40 – Use of excessive force toward any individual under the supervision of the Department or a member of the general public.
>
> On April 7, 2010 you were involved in a use of force with Inmate [W]. Once the inmate was taken to the floor and being secured by Officer[s] Gilmore and Mong, the inmate was noncombative and not resisting, you then struck Inmate [W] in the face and Officer Gilmore had to push you away.

PARTIES' POSITIONS

State Position

1. The Union's "split second" defense – that the time between Inmate W being taken to the ground and the Grievant punching him in the face was only a matter of seconds – is unavailing because the Grievant refused to admit he punched Inmate W after Inmate W was on the ground being secured by CO's Mong and Gilmore.

2. The Union's "dazed and confused" defense – that the Grievant was not fully cognizant after being cold-cocked by Inmate W – is unavailing because the medical reports state the Grievant did not have a headache after the incident and was "alert and oriented."

3. Removal was appropriate rather than a two-day suspension because the Grievant had disengaged and then reengaged when he knelt down and punched the prone Inmate W in the face. The Grievant was removed due to his conscious decision, made after having been physically separated from Inmate W, to reengage and administer one last punch.

4. Disengaging and reengaging is more serious than applying extra force as a result of an adrenaline rush or of frustration.

5. The Grievant was angry due to Inmate W having initiated the physical fight and having landed a punch on the Grievant's face. The Grievant's anger is not a mitigating circumstance. He could and should have checked his anger.

6. The Grievant knew or should have known at the time he rendered the last punch that Inmate W's ability and/or opportunity to do harm was not

present. Nor was the Grievant in jeopardy at the time he threw the last punch.

Union Position

1. The use of force in a correction facility is authorized by the Ohio Revised Code and the Ohio Administrative Code.

2. The Grievant's actions during the incident in question were part of a use of force as authorized by Ohio law.

3. A violation of Rule 40 under these circumstances would have taken place only if the Grievant had disengaged from the altercation, and then reengaged after Inmate W had been subdued. This is not what occurred.

4. CO Gilmore intervened below the Grievant's eye level when CO Gilmore took Inmate W to the floor. Unaware of CO Gilmore's intervention, the Grievant followed Inmate W to the floor. Inmate W was not fully subdued when the Grievant struck him on the floor.

5. The Grievant's judgment during the incident was impaired due to Inmate W having hit the Grievant in the head.

6. Due to there having been no just cause for the Grievant's removal, he should be reinstated and made whole with back wages, good days and shift, vacation and sick leave accruals, payment of medical bills, and any other make-whole remedy the Arbitrator deems appropriate.

ARBITRATOR'S OPINION

The record demonstrates the Grievant unnecessarily used excessive force when he punched Inmate W in the face while Inmate W was in process of being cuffed by another CO. Accordingly, the State has established the Grievant violated Rule 40 – Use of Excessive Force. Thus, the State had just cause for disciplining the Grievant for his Rule 40 violation.

The Disciplinary Grid for a Rule 40 violation provides for a two-day suspension or a removal for a first offense. The Grievant had no active discipline at the time.

Warden Keith Smith testified[2] he chose to remove the Grievant rather than issue him a two-day suspension because the Grievant had disengaged from his altercation with Inmate W and then reengaged when he knelt down and punched Inmate W. The Warden stated such disengagement and reengagement was an aggravating factor in assessing the appropriate discipline for excessive force. The Warden testified a two-day suspension would have been appropriate had the Grievant used the excessive force he did while still engaged.

Corrections cases involving excessive force involve three analyses. The first analysis is made by the CO while the incident is occurring. Often, as is the case here, the incident takes place quickly and adrenaline is running. The second analysis is made by the State after the fact. The State investigates the matter and reviews all available evidence, including any videotapes that exist. The third analysis is made by the Arbitrator. She compares the Grievant's perceptions and responses during the incident to the State's conclusions made after the incident.

There is no question the Grievant was angry after being cold-cocked by Inmate W. While CO's are highly trained to respond appropriately in a use of force situation, they also are human. The Grievant likely was a bit addled after

[2] Warden Smith transferred to the Toledo Correctional Institution in September 2010, a few months after the April 2010 incident in question. Warden Smith testified that in reaching the removal decision, he did

being punched in the face. The fact he was alert at a medical examination almost two hours later establishes little.

The Warden's choice of removal is understandable, given his conclusion the Grievant had disengaged, then reengaged before punching Inmate W when he was on the ground. The Warden based his decision on the contents of the investigation file, which does not include a videotape (because the hallway cameras were pointed the other way).

Based on the record, the Arbitrator is less certain than the Warden that the Grievant disengaged, then reengaged. The CO who took Inmate W to the floor did so below the Grievant's eye level, properly so to avoid being punched in the face by Inmate W. Inmate W was not completely cuffed when the Grievant crouched and punched him. Without a videotape, it is impossible to completely and accurately reconstruct exactly what took place during the incident.

While the Grievant may have been involved in previous incidents while employed at ToCI, disciplines for these incidents were no longer active at the time of this incident. The Arbitrator must review this matter as the Agreement requires – as a first offense.

As a first offense, the grid provides a choice of a two-day suspension or a removal. Given the lack of certainty the Grievant disengaged then reengaged, as well as the fact Inmate W did not suffer any substantial injury during the incident, the Arbitrator finds a two-day suspension to be the appropriate discipline for the Grievant's final punch.

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not consult with the previous ToCI Warden, though he did consult with ToCI Labor Relations.

AWARD

1. **For the reasons set out above, the grievance is granted in part and denied in part.**

2. **The State did not have just cause to remove the Grievant.**

3. **The State did have just cause to issue a two-day suspension.**

4. **Accordingly, the Grievant will be reinstated to his position with full backpay minus a two-day unpaid suspension.[3]**

5. **The Grievant shall be reinstated to the same "good days" and shift he was assigned at the time of his removal.**

6. **The Grievant's seniority, vacation, and sick leave accruals will be restored, plus any and all leave balances that would have accrued during the period of removal.**

7. **Any medical bills incurred by the Grievant due to lack of health insurance coverage due to his removal shall be reimbursed to him at the level they would have been covered had he had health insurance coverage during the period of removal.**

DATED: September 21, 2011

Susan Grody Ruben

Susan Grody Ruben, Esq.
Arbitrator

[3] The Arbitrator notes the Grievant was charged with a Rule 40 violation – excessive force, not a Rule 42 violation – abuse. Article 24.01 of the Parties' Agreement prohibits an arbitrator from modifying a removal if the arbitrator has found abuse. There is no such contractual limitation on an arbitrator modifying discipline for excessive force.