

Thomas J. Nowel
Arbitrator and Mediator
Cleveland, Ohio

Arb
Decision
1/18

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In The Matter of a Controversy Between:)	Grievance No.
)	27-25-20121004-
Ohio Civil Service Employees Association,)	0110-01-03
Local 11 AFSCME, AFL-CIO)	
)	ARBITRATION
and)	OPINION AND
)	AWARD
Ohio Department of Rehabilitation and)	
Correction, Southern Ohio Correctional)	DATE:
Facility)	May 16,
)	2013
Re: Shannon Bear Termination)	

APPEARANCES:

Dave Justice, Advocate for OCSEA, Local 11 AFSCME; Garland Wallace, Advocate for the Ohio Department of Rehabilitation and Correction; and James Miller for the Ohio Office of Collective Bargaining

RECEIVED / REVIEWED
MAY 16 2013
OCSEA-OFFICE OF
GENERAL COUNSEL

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, Local 11 AFSCME. The parties are in disagreement regarding the termination of employment of Shannon Bear who had been employed as a Sergeant/Correctional Counselor, at the Southern Ohio Correctional Facility. The Grievant, Shannon Bear, was terminated effective October 3, 2012 by the Employer following an incident with an inmate and review by the Use of Force Committee and administrators. The Union states that the termination is not for just cause. Mr. Bear grieved the termination on October 4, 2012, and the Employer denied the grievance at Step 3 of the Grievance Procedure on October 29, 2012. The Union appealed the grievance to arbitration.

The Arbitrator was selected by the parties, pursuant to Article 25 of the collective bargaining agreement, to conduct a hearing and render a binding arbitration award. Hearing was held on March 27, 2013 at the Southern Ohio Correctional Facility near Lucasville, Ohio. At hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits including a video of the incident. Witnesses were sworn by the Arbitrator. The parties stipulated that the matter was properly before the Arbitrator. During the course of the hearing, the parties escorted the Arbitrator to the cell block (J-1) where the incident had occurred.

ISSUE

The parties stipulated to the following issue to be decided by the Arbitrator.
“Was the Grievant, Shannon Bear, removed from employment for just cause. If not, what shall the remedy be?”

JOINT STIPULATIONS

1. Grievant was classified as a correctional counselor/Sgt.
2. Date of hire: February 12, 1996.
3. Date of removal: October 3, 2012.
4. Grievant had no active discipline on his record at the time of removal.
5. Grievant signed for the Standards of Employee Conduct (SOEC) on November 1, 2009.

The parties submitted a number of joint exhibits at the onset of the hearing.

WITNESSES

TESTIFYING FOR THE EMPLOYER:

Joseph Nagle, Inmate

Harold Bell, Captain

Andy Bower, Labor Relations Officer, Chillicothe

Donald Morgan, SOCF Warden

Timothy Jones, Senior Parole Officer

TESTIFYING FOR THE UNION:

Kathy Joiner, Registered Nurse

Fred Denny, Sergeant

Darrell Logan, Training Officer

Nicholas Brabson, Sergeant

Shannon Bear, Grievant

RELEVANT PROVISIONS OF AGREEMENT

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. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

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 the 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. If a working suspension is grieved, and the grievance is denied or partially granted and all appeals exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.

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.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, 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. The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

24.06 – Imposition of Discipline

..... Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

GRIEVANCE

The grievance of Shannon Bear reads as follows.

“Contract article(s) allegedly violated: 24. The removal of Sergeant Bear was for no just cause. Remedy sought: Sergeant Shannon Bear be reinstated with back pay to his position as a Correctional Sergeant/Counselor with the Ohio Department of Rehabilitation and Corrections or in any other way, grievant will be made whole. 4 October 2012.”

BACKGROUND

The Grievant, Shannon Bear, had been employed at the Southern Ohio Correctional Facility since 2000. He advanced to the position of Sergeant, Correctional Counselor in 2006. He had been employed by the Ohio Department of Rehabilitation and Correction for nearly seventeen years.

The Southern Ohio Correctional Facility is a maximum security prison located in Lucasville, Ohio.

On June 13, 2012, Correctional Officer, Jeremy Oppy, was conducting rounds in cell block J-1 North, a maximum security area of the facility. Inmate Joseph Nagle reached through the bars of his cell and punched Mr. Oppy in the head as he walked down the cell block. The attack was unprovoked. Correctional Officer Breedlove placed the inmate in handcuffs and moved him to the shower room. Sergeant Brabson and CO Breedlove then walked Inmate Nagle from the upper level of the cell block and down a flight of stairs with the intention of moving him to a more secure and isolated cell with a solid door as opposed to bars. As the inmate was being escorted down a flight of stairs, the Grievant, Sergeant Bear, walked from the officers' area to the top of the stairs to provide assistance. As he arrived at the top of the flight of stairs, Sergeant Brabson forced the inmate to a prone position on the stairs. It was alleged that the inmate began to resist as he walked down the stairwell and, once down, attempted to bite Brabson. The Grievant was standing at the top of the stairwell and over the inmate and Brabson. The Grievant swung his foot three times at the inmate's shoulder or head. Inmate Nagle was then

restrained. Although he was in handcuffs, the inmate was not in leg restraints. The inmate was moved to the secure cell without further incident although he complained that the officers twisted his arms when the handcuffs were removed from his hands once he was in the cell. Inmate Nagle claimed that he had not resisted and had not attempted to bite Sergeant Brabson. He stated that the Grievant stomped on his face three times with the heel of his boot. The incident occurred at approximately 8:40 am.

Registered Nurse Kathy Joiner was directed to observe Inmate Nagle at 8:55 am. She made the observation outside bars which were six to eight feet from the door of the cell. The inmate stood at a small window in the door. The cell was dimly lit, but Nurse Joiner reported no visible injuries. The inmate stated that he was not injured in response to her inquiry regarding his condition. She was not aware that the inmate had been involved in an incident with correctional officers. Nurse Joiner received a call from Warden Donald Morgan to initiate a second assessment of Inmate Nagle which she performed at 1:13 pm. She moved inside the outer bars and looked closely at the inmate through the window of the cell. She reported being six or ten inches from the inmate. Her report noted no injuries and no abrasions on his face. The inmate raised his shirt and turned completely around as he was being examined by Nurse Joiner. Her report noted no abrasions, redness or swelling. Inmate Nagle again responded that he was not injured.

Inmate Nagle was removed from his cell by Lieutenant Miller and taken to the infirmary for a third medical examination. Nurse Arjayra Treadway examined the inmate and reported abrasions to the face and chest. Additionally the inmate

complained of knee pain. X-rays indicated no broken bones. The inmate's observable injuries were then photographed (Jt. Exb. 3, 57 – 62).

The Grievant completed an incident report a short time following the occurrence (Jt. Exb. 3, 22). The brief statement did not include the actions of the Grievant on the stairs. The Employer felt that the Grievant was less than forthcoming regarding the incident and attempted to cover-up his use of force with the inmate. At a later time, the Grievant was afforded the opportunity to view the video of the incident, and he wrote an amended Incident Report (Jt. Exb. 3, 18) which included contact with the inmate with his boot.

The Grievant was placed on administrative leave later in the day following the incident. His actions, and those of other employees who were involved with the moving of Inmate Nagle, were reviewed in detail by the facility's Use of Force Committee. The Committee, chaired by Captain Harold Bell, conducted interviews of all involved employees including the Grievant and the nurses who had examined the inmate. In addition, the committee reviewed the video of the incident which had been recorded by in-house cameras. The committee concluded that the Grievant's use of force was excessive and not justified. It stated that there was no evidence that the inmate attempted to bite Sergeant Brabson. The Employer concluded that the Grievant had kicked Inmate Nagle in the face on three occasions with the heel of his boot. The Use of Force Committee also concluded that the first Incident Report, written by the Grievant, was not accurate, and the second report was less than forthcoming. The Employer concluded that the reports, written by the Grievant, were dishonest.

The Grievant was notified on August 15, 2012 that a pre-disciplinary conference was to be conducted on August 29, 2012. The notice cited a number of policies as potential violations. The hearing officer concluded that there was just cause for disciplinary action (Jt. Exb. 2, 1). The Grievant's employment was terminated on October 3, 2012 (Jt. Exb. 1, 1). The notice of termination stated in part:

It was concluded that on June 13, 2012, you utilized excessive force on Inmate Nagle A#589-333. It was also concluded that you failed to describe the force that you utilized in your initial report. It was also determined that you failed to provide complete information that fully captured what you did and observed in your initial incident report and during the investigation regarding the events that took place during this incident. This constitutes a violation of Rule(s) 24 & 40 of the Standards of Employee Conduct effective November 1, 2009. Therefore, you are to be removed from your position as a Corr. Sgt/Counselor.

The Union grieved the termination of the Grievant, and the Employer denied the grievance. The Union moved the matter to arbitration.

POSITION OF THE EMPLOYER

The Employer states that Inmate Nagle struck Officer Oppy in the face and was then removed from his cell; he was first placed in the shower area; and he was then escorted to a more secure cell with a solid door in the lower level of the cell block. The Employer argues that the Grievant decided to act outside of policy and exert his own brand of punishment by striking the inmate with the heel of his boot three times to the right of the head and face. The Employer states further that the Grievant's reports regarding the incident were neither forthcoming nor truthful.

The reports failed to describe the force that he used and the force he witnessed by the other officers when the inmate was taken down in the stairwell.

The Employer argues that excessive force cannot be tolerated, and the Grievant clearly engaged in activity that violated Rule 40 which prohibits the use of excessive force against any individual under the supervision of the Department of Rehabilitation and Correction. The Employer states that the actions of the Grievant were thoroughly investigated by the Use of Force Committee and then reviewed by an independent administrative official. The Employer argues that the Grievant has received extensive training regarding the appropriate use of force and in the importance of accurate report writing. The Employer states further that Warden Morgan determined that the kicks to the head and face, while the inmate was cuffed, were egregious and violations of Department policy. He felt that termination of employment was his only option especially in light of the Grievant's failure to be honest regarding the incident. The Employer states that video evidence is conclusive regarding the actions of the Grievant. It is clear that the inmate did not aggressively turn toward Sergeant Brabson; did not attempt to pull away; and did not attempt to become dead weight. Inmate Nagle was compliant during the entire incident.

The Employer states that the Grievant was not truthful when he wrote the first Incident Report and changed his story when he wrote the second report because he realized that the video illustrated his assault on the inmate. He failed to cooperate in the investigation which followed the incident.

The Employer states that the video clearly captures the inmate being slammed on the stairs with his hands cuffed behind his back. The video also confirms that the inmate did not attempt to pull away or use dead weight. It captures the Grievant cocking his boot over the head of the inmate and striking him three times to the head and face area. The Employer argues that the shadow of the boot passes over the shoulder of the inmate and strikes him in the face. The Employer states that a strike to the head is considered deadly force. The injury to the inmate's face was in the shape of a boot.

During the hearing, the Union attempted to introduce testimony regarding a Last Chance Agreement which was negotiated for Sergeant Brabson by the parties. The Employer objected to the testimony regarding the agreement. The Arbitrator allowed the question and response as a copy of the Last Chance Agreement was not readily available at hearing, but he asked the parties to review a copy of the agreement following the hearing and argue their respective positions in their post hearing briefs. The Employer states that this agreement says in part that "The Agreement shall not be introduced, referred to, or in any other way utilized in any subsequent arbitration, litigation, or administrative hearing except as may be necessary to enforce its provisions." The Employer argues that the Last Chance Agreement should be excluded from the record of this case.

The Employer argues that the grievance of the Union should be denied in its entirety. The Grievant should not be permitted to continue employment in a prison setting, and he brings discredit to the Department and Southern Ohio Correctional Facility.

POSITION OF THE UNION

The Union states that the Grievant had been employed by the Department of Rehabilitation and Correction for sixteen years and eight months and has no record of discipline during his lengthy tenure. Sergeant Bear has been a member of the Special Response Team and has been considered one of the best by his superiors. The Union states that his evaluations have been at the “meets” level or above.

The Union states that the video indicates that the inmate was already down on the steps when the Grievant arrived at the top of the stairwell. The Union argues that the Grievant hesitated before he moved his foot in order to allow Inmate Nagle to comply with verbal orders. The Union argues that, when he failed to comply, the video captures the Grievant using the side of his foot in an attempt to move the inmate’s head away from Sergeant Brabson. The Union states that the video does not show that the Grievant stomped on the inmate. The Union argues further that the video does not illustrate where the kicks landed if anywhere.

The Union states that the Grievant had been involved in numerous use of force incidents and was never accused of excessive force. The Union argues that, in the instant case, the Grievant responded to an aggressive act by an inmate against another employee. Policy provides that an officer may evaluate the level of threat and make appropriate response. The Grievant responded based on his training and long term experience. Inmate Nagle did not suffer significant injury or harm. The Grievant used the response of kicking because he was standing at the top of the stairwell above the inmate and correction officers.

The Union states that the Employer did not provide the Grievant with an opportunity to review the video immediately following the incident but instead was placed on administrative leave and forced to wait five days. The Union argues that this is a violation of policy. The Union argues that the Grievant wrote an accurate addendum after viewing the video, and he participated honestly in the investigation conducted by the Use of Force Committee and during the investigatory interview.

The Union argues that the Grievant was in compliance with the “Response to Resistance Continuum” when the inmate failed to comply with verbal orders and based on his physical position at the top of the stairwell.

The Union states that the two initial medical assessments of the inmate indicated no visible injuries, and he stated on both occasions that he was not injured. The third assessment noted two small injuries. It is only speculation that the Grievant caused the injuries, and Nurse Joiner had stated to the Use of Force Committee that it was possible the inmate self inflicted his wounds.

In response to the objection of the Employer regarding the introduction of testimony regarding the Brabson Last Chance Agreement, the Union states in its post hearing brief that the agreement does indeed include language which prohibits its reference “in any subsequent arbitration, litigation or administrative hearing.”

The Union argues that the termination of employment of the Grievant was not for just cause and was in violation of the Agreement. The Union requests the Arbitrator to reinstate Sergeant Bear with all lost wages, benefits, leave balances, insurance and seniority.

DISCUSSION AND ANALYSIS

The Employer states in its post hearing brief that “Excessive force cannot be tolerated at any level within the Department of Corrections.” This statement is absolutely on point. The question before the Arbitrator is whether the Employer proved that the Grievant used excessive force. Additionally, it must be shown that he intentionally falsified or deleted critical information from the two incident reports. In the instant matter, the Grievant was not only terminated as a State of Ohio corrections officer, but his career in this field or any other law enforcement occupation is probably ended if the removal stands. Nevertheless, excessive force cannot be tolerated, and such behavior deserves disciplinary action. It is critical that the Employer makes its case and meet a level of proof to match the seriousness of the charges against the Grievant.

Concerning the quantum of required proof, most arbitrators apply the “preponderance of the evidence” standard to ordinary discipline and discharge cases. However, in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a “clear and convincing evidence” standard....

How Arbitration Works, Elkouri and Elkouri, Sixth Edition, Alan Miles Ruben, Editor-in-Chief, pg. 950-951

In an often referenced case of discharge, Arbitrator Russell A. Smith made the following observation.

... it seems reasonable and proper to hold that alleged misconduct of a kind which carries the stigma of general social disapproval as well as disapproval under accepted canons of plant discipline should be clearly and convincingly established by the evidence. Reasonable doubts raised by the proofs should be resolved in favor of the accused.

Kroger Company and Teamsters Local 406, 25 LA 906 908 (Russell A. Smith)

And Arbitrator McDonald provided the following insight.

In deciding the amount of proof to be produced, I do not believe that labor arbitration should be bound by criminal law doctrines such as "beyond a reasonable doubt." At the same time, I do believe that in cases as serious as this involving discharge, and certainly involving a person's reputation, a degree of proof above and beyond that normally used should be required. As such, I am convinced that the best standard is requiring that the Employer carry the burden of demonstrating by "clear and convincing evidence" reasons that would justify the serious penalty of discharge.

Michigan Milk Producers Assn. and United Dairy Workers, Retail, Wholesale and Department Store (RWDSU) Local 86, 114 LA 1024 1029 (Patrick A. McDonald)

The Grievant was charged with excessive force on Inmate Nagle when he was moved to a secure cell following his assault of Corrections Officer Oppy. In addition the Grievant was charged with omitting from his initial incident report the force which was utilized to control the inmate. The charges state further that the Grievant failed to provide complete and accurate information in his follow-up incident report and during the Employer's investigation.

The most significant evidence is the video which captured the involvement of the Grievant in the struggle with the inmate as he was being moved from his cell to secure lock-up following the assault on Oppy. At least one version of the incident has the Grievant involved with the escort of the inmate from the shower cell to lock-up, but the video makes it clear that his intervention commenced as the inmate was being escorted down the stairwell to the secure cell. As Sergeant Brabson and others were walking the inmate down the stairs, the Grievant arrived from the officers' area at the top of the stairwell at the time Inmate Nagle was taken down on the bottom steps. Camera # 8 shows that the Grievant arrived at the top of the stairs

at the moment the inmate was taken down. He was not involved with the take down and could only assume that Inmate Nagle had resisted during the escort to the secure cell. The Grievant claimed that his leg was caught under the inmate at the top steps. Although the Employer would suggest that this may not have been the case, the video does not provide clear evidence one way or the other. The Grievant is shown swinging his foot in a downward movement three times on camera # 8. The Employer states that the Grievant kicked the inmate in the head with the heel of his boot, and the video suggests this may have been a possibility. The Grievant stated that he attempted to kick the inmate in the shoulder area in order to prevent him from biting Sergeant Brabson. Both versions are possible as there is no clear view of the inmate's head or shoulder on the video tape, and the recording does not confirm if the inmate attempted to bite Sergeant Brabson. Although camera # 9 presents a frontal view of the incident, the placement of the Grievant's foot or boot cannot clearly be determined. The Employer stated that the Grievant kicked the inmate with his heel, and Inmate Nagle testified at hearing that the Grievant stomped on his face three times. Camera # 9 shows the inmate being brought to his feet, and there is a clear view of his face. There is no indication of serious injury to his face as would be expected from being stomped directly in the face with the heel of a boot. The Grievant is a large man. It would be a reasonable assumption that three stomps to the face with work boots would have caused immediate and recognizable injury. The video from camera # 9 does not suggest such injury. The Employer argues that the Grievant certainly kicked the inmate in the head because the shadow of his boot is shown passing over the shoulder area. Nevertheless, it is

not clear from the video that the Grievant kicked or stomped on the inmate's head or face. Relying on a shadow is not conclusive evidence. The Grievant indicated that, in his attempt to kick the inmate in the shoulder area, he may have grazed the side of his head. The video does not provide clear evidence regarding the foot strikes. Therefore the Grievant's explanation is as credible as that of the Employer.

Inmate Nagle testified at hearing that the Grievant stomped on his face. This is the same witness who punched Corrections Officer Oppy unprovoked as he was walking in the cell block a short time prior to the incident on the stairs and whose record is documented with assaultive and violent behavior. He testified to his complete veracity a number of times at hearing, but, based on his actions on June 13 and his overall criminal record, the Union's argument that the inmate was not a credible witness is meritorious.

With the exception of the testimony of the inmate, there was no evidence at hearing that placed the boot of the Grievant on the face or head of Nagle. But the testimony of Nurse Kathy Joiner was persuasive. Her two medical reports indicated no injuries to the inmate. Her second assessment of the inmate occurred approximately five hours following the incident. She examined Nagle in his cell from a distance of six to ten inches and had him turn in a circle with his shirt raised. She reported no injuries. Her statements to the Use of Force Committee and during the investigation were consistent with her written reports, and her testimony at the arbitration hearing reiterated what had been her assessment when it was written on June 13, 2012. Approximately six hours following the incident in the stairwell, Nurse Treadway examined the inmate in a medical examination room and noted

clearly that he was bruised near his eye, right of his face and chest. Photographs of the inmate, taken that same afternoon, indicated significant bruising on the right side of his face and scraped skin on his shoulder. Nurse Joiner had not observed these injuries when she examined the inmate earlier in the day and consistently stated and emphasized this fact, and she suggested that it was possible that he self inflicted. Nurse Treadway stated to the Use of Force Committee that it could not be determined when the inmate incurred his facial injuries. It is possible that Inmate Nagle received facial injuries from kicks from the Grievant. There are a number of possibilities. The bruises on the face and chest could have been a result of being forcibly taken down on cement stairs. It is difficult to conclude with any certainty that the Grievant was the cause of the injuries.

Captain Bell testified on behalf of the Use of Force Committee at hearing. He possesses significant experience as a member of the committee and its chair. It was his determination that the Grievant used excessive force. He viewed the video and interviewed all involved. He also came to the conclusion that the reports of the Grievant were not accurate. At hearing, Captain Bell testified that a kick may be appropriately used in certain circumstances to divert the attention of a resisting inmate. And although Inmate Nagle claimed that the Grievant stomped on him, and the Employer supported this contention, Captain Bell testified on cross examination that Sergeant Bear may not have stomped on him. He testified that Inmate Nagle did not fully cooperate with the correction officers and was considered, based on his history, to be assaultive and difficult. While the Use of Force Committee completed

a comprehensive investigation of the incident, and Captain Bell was thorough in his review of the matter and report, his testimony at hearing was not conclusive.

Employer witness, Andy Bower, conducted the pre-disciplinary hearing and recommended that there was just cause to discipline the Grievant. His written report stated that the Grievant “kicked the inmate in the head/shoulder area three times.” At hearing he stated that he viewed the video of the incident. He testified that he observed the kicks made by the Grievant, but he also stated that he did not observe them make contact with the inmate. He stated that the kicks may have landed on the head or shoulder area. The difference between his written report and testimony at hearing allowed for a lack of clarity required to convincingly support the case of the Employer.

Employer witness, Timothy Jones, is a national expert regarding the use of force, and he assisted in the development of the “Response to Resistance Continuum,” a concept and standard familiar to this Arbitrator based on previous law enforcement arbitration (Jt. Exb. 6-21). Mr. Jones testified that he viewed the video, and, based on the “Continuum,” he stated that the Grievant used excessive force. He stated that three large correction officers were in control of a much smaller inmate who was cuffed from behind. He stated further that, before using force, officers must consider all circumstances before deciding upon a response. He testified that the response of the Grievant was excessive.

Union witness, Darrell Logan, has been the training officer at the Southern Ohio Correctional Facility for eighteen years. He testified at hearing that the Grievant serves on the Special Response Team and has received significant training

in the use of force and self defense. Mr. Logan stated that he has provided training at SOCF since 1987. Like witness Jones, Mr. Logan testified that he viewed the video of the incident. He stated that, in his view, the Grievant did not stomp on the inmate's head and did not use excessive force. He testified that the Grievant arrived on the scene after the inmate had been taken down on the stairs. He stated that the Grievant used "reactive force" in an attempt to assist in regaining control of the inmate. Logan testified further that use of force is permissible when defending against an attempt to bite, and he stated that he was certain, based on the video, that Inmate Nagle attempted to bite Sergeant Brabson. He testified that the Grievant properly engaged in diversionary kicks in an attempt to prevent the biting of Sergeant Brabson.

Both witnesses, Jones and Logan, provided credible testimony. Mr. Logan's testimony was particularly compelling as he has been the facility trainer for many years and is particularly familiar with the facility and correction officers assigned to it. Although the Employer questioned his expertise based on a disciplinary suspension in 2005, Logan continues as the facility's training officer, and this was his only discipline during a twenty-seven year career. Mr. Logan possesses significant experience and knowledge, and his testimony at hearing was credible.

The Employer has charged the Grievant with failing to describe the use of force in his initial report and failed to provide complete information in the second report and during the investigation. Trainer Logan testified that it is not unusual for an employee to fail to cover every detail of an incident when writing an initial report. He stated that, in a use of force scenario, things happen very fast. An

involved employee has tunnel vision initially. A supplemental report allows the writer to capture many of the details missed in the initial document as memory is clarified after a period of time. The Grievant testified that he was required to write the initial report almost immediately following the incident, and that he did not remember every detail. He stated that he is being treated for post traumatic stress syndrome and therefore has short term memory loss, but he also admitted at hearing that his initial report was not well written, "it was a terrible report." There was no evidence at hearing that the Grievant is being treated for post traumatic stress syndrome other than his own testimony.

The Union introduced testimony regarding the Last Chance Agreement negotiated for Sergeant Brabson. The Employer objected in that the parties had agreed that it would not be introduced in any arbitration proceeding or litigation. The post hearing brief of the Employer provides conclusive and meritorious argument that the Arbitrator must not consider the document in the instant matter, and the Union's closing argument confirmed this agreement between the parties. The Last Chance Agreement is not included in the record of this matter.

The Grievant was charged with violation of Rule 40, "Use of excessive force toward any individual under the supervision of the Department or a member of the general public." The Grievant is a long term employee with no discipline. He is trained in use of force techniques, and his past actions, regarding use of force, have been reviewed by the Use of Force Committee on many occasions with no findings of violation. Had the Grievant been disciplined in the past for use of excessive force following the many reviews by the Committee, the Employer's burden may have

been made easier in the instant matter, but, based on the lack of conclusive evidence from the video and no witnesses to support the Employer's contention that the inmate was kicked in the face (except Nagle's own and possible self-serving testimony), there is no clear and convincing evidence to sustain the charge of excessive force and violation of Rule 40.

The Grievant was charged with violation of Rule 24, "Interfering with, failing to cooperate in, or lying in an official investigation or inquiry." The initial report of the Grievant completely fails to chronicle the events on the stairs and his own role. Trainer Logan provides insight regarding the lack of detail, but the Grievant is well trained and has significant experience in completing use of force incident reports. He had completed many similar reports in the past. He admitted during hearing to have failed in this regard. Beyond the initial report, there is no clear evidence that the Grievant was intentionally dishonest and that he failed to cooperate in the investigation. Nevertheless, the Grievant violated Rule 24 based on the initial report he completed following the incident.

This is a difficult case with critical competing interests. The abuse of an inmate and use of excessive force by an employee of the Department cannot be tolerated, and the Employer is duty bound to enforce its policies. The environment of a maximum security correctional facility and cell block requires split second decisions in regard to the safety of employees and inmates. The Employer's burden and proofs in the case of a removal, which may be career ending, must be clearly and convincingly established, and, as Arbitrator Smith stated in Kroger Company (25 LA

906 908), “reasonable doubts raised by the proofs should be resolved in favor of the accused. “

The grievance of the Union is sustained in part and denied in part. The Employer violated Article 24, Section 24.1, when the Grievant’s employment was terminated for violation of Rule 40. There is no clear and convincing evidence to sustain the charge of excessive force. The Grievant, by his own admission, violated Rule 24 based on his initial incident report which failed to describe the take down of the inmate and his actions utilized to control the situation. This is a serious violation and cannot be excused based on the Grievant’s extensive training and experience. The Employer did not violate the collective bargaining agreement when the Grievant was disciplined for this failure and violation. The termination of the Grievant is modified to a five day disciplinary suspension, the maximum suspension the Employer may impose pursuant to Section 24.02 of the collective bargaining agreement. The Grievant is to be reinstated to his position of Correction Sergeant/Counselor at the Southern Ohio Correctional Facility minus a five day disciplinary suspension and less any interim earnings including unemployment compensation if applicable. Lost wages, benefits, pension contributions and seniority are to be restored less the five day disciplinary suspension.

AWARD

The removal of the Grievant, Shannon Bear, was not for just cause. The termination of employment is modified to a five day disciplinary suspension, the maximum suspension the Employer may impose pursuant to Section 24.2 of the collective bargaining agreement. The Grievant is to be reinstated to his position of Correction Sergeant/Counselor at the Southern Ohio Correctional Facility less any interim earnings including unemployment compensation if applicable. Lost wages, benefits, pension contributions and seniority are to be restored less the five day disciplinary suspension. The Arbitrator will retain jurisdiction for thirty days for purposes of remedy only.

Signed and dated this 16th Day of May, 2013 at Cleveland, Ohio.



Thomas J. Nowel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th Day of May, 2013, a copy of the foregoing Award was served upon Dave Justice, Advocate for OCSEA, Local 11 AFSCME; Garland Wallace, Advocate for the Department of Rehabilitation and Correction; Jim Miller and Alicyn Carrel, Office of Collective Bargaining, by way of electronic mail.



Thomas J. Nowel
Arbitrator