

In the Matter of Arbitration Between the : Grievance Number: DRC-2020-00972-03
: :
STATE OF OHIO, DEPARTMENT OF :
REHABILITATION AND CORRECTION, :
RICHLAND CORRECTIONAL : Grievant: Bradin Crabtree
INSTITUTION, :
Employer :
and the :
: Date of Hearing: October 29, 2021
OHIO CIVIL SERVICE EMPLOYEES :
ASSOCIATION, AMERICAN FEDERATION :
STATE, COUNTY AND MUNICIPAL :
EMPLOYEES, LOCAL 11, AFL-CIO, : Howard D. Silver, Esquire
Union : Arbitrator

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: State of Ohio, Department of Rehabilitation and Correction,
Richland Correctional Institution, Employer

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TABLE OF CONTENTS

	Page
Case Caption	1
Appearances	1
Procedural Background	3
Joint Issue	4
Joint Stipulations	4
Joint Exhibits	5
Statement of the Case	5
Summary of Testimony	8
Falisha Kennebrew	8
Frank Garcia	10
Stephanie Saunders	13
David Awbrey	14
Harold May	14
Positions of the Parties	15
Position of the Employer	15
Position of the Union	19
Discussion	22
Award	28
Certificate of Service	29

PROCEDURAL BACKGROUND

This matter came on for a remote arbitration hearing at 9:00 a. m. on October 29, 2021 via the teleconferencing platform Zoom. During the hearing both parties, the State of Ohio, Department of Rehabilitation and Correction, Richland Correctional Institution, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter referred to as the Union, were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded at noon on October 29, 2021 and the evidentiary portion of the hearing record was closed at that time.

Post-hearing briefs were filed by the parties on November 29, 2021 and exchanged between the parties by the arbitrator on November 29, 2021.

This matter proceeds under the authority of a collective bargaining agreement in effect between the parties from May 12, 2018 through February 28, 2021. This collective bargaining agreement contains Article 24, Discipline, which provides: “Disciplinary action shall not be imposed upon an employee except for just cause.”

No challenge to the arbitrability of the grievance has been raised by either party. Under the language of the parties' collective bargaining agreement this grievance is found to be arbitrable and properly before the arbitrator for review and resolution.

JOINT ISSUE

Was the Grievant, Brandin (sic) Crabtree removed for just cause? ¹

If not, what shall the remedy be?

JOINT STIPULATIONS

1. The grievance is properly before the Arbitrator.
2. The grievant was hired on April 4, 2016.
3. The grievant received the Standards of Employee Conduct.
4. The grievant was issued a Removal on March 6, 2020.
5. The Removal was issued for a violation of the following work rule:

Rule 24: Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

Rule 25: Failure to immediately report a violation of any work rule, law, or regulation.

Rule 38: Any act, or failure to act, or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervisor of the Department, or a member of the general public.

Rule 37: Unauthorized actions, a failure to act, or a failure to provide treatment that could harm any individual under the supervision of the Department. ²

6. Alleged violation of Article 24 of the Collective Bargaining Agreement between the State of Ohio and the The Ohio Civil Service Association.

¹ The grievant is referred to as Brandin Crabtree in the Joint Issue statement. The grievant is referred to as Bradin Crabtree by the Union and is referred to as Brandin Crabtree by the Employer. The arbitrator is persuaded by a preponderance of the evidence in the hearing record that the grievant's first name is Bradin. This conclusion is based upon handwritten signatures by the grievant at Tab 4, pages 37, 38, 39, 43, 45, 46, 47, and 49, and Tab 2, Grievance, which refers to Bradin Crabtree, as does the December 21, 2019 use of force report, Tab 4, Exhibit 26, page 44.

² The current edition of the Standards of Employee Conduct has renumbered Rule 37 to Rule 41. See Tab 3, Exhibit 4.

JOINT EXHIBITS

1. Grievance Trail.
2. Discipline Trail.
3. Management Investigation.
4. September 3, 2019 Standards of Employee Conduct.
5. OC tracking forms Monte Roose, Bradin (sic) Crabtree, and William Gingery.³

STATEMENT OF THE CASE

The parties to this arbitration, the State of Ohio, Department of Rehabilitation and Correction, Richland Correctional Institution, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter referred to as the Union, were parties to a collective bargaining agreement that was in effect from May 12, 2018 through February 28, 2021. Article 24 within the parties' collective bargaining agreement provides: "Disciplinary action shall not be imposed upon an employee except for just cause."

The grievant in this arbitration proceeding, Bradin Crabtree, was hired by the Employer on April 4, 2016. During all times relevant to this proceeding the grievant was employed as a Correction Officer, classification number 46531, at the Richland Correctional Institution. The grievant had no active discipline on his employment record.

On December 21, 2019 Correction Officer Crabtree was working as the Recreation/Utility Officer on the second shift. At about 9:15 p. m. Officer Crabtree received a report of a use of force

³ See footnote 1.

incident ongoing in Housing Unit 5 Lower (H5L). Officer Crabtree responded immediately to the housing unit upon receipt of the report. Upon arrival at the H5L dormitory Officer Crabtree found staff confiscating a television from an offender and the offender objecting to this seizure. The incident occurred in a dormitory setting with numerous two-tier bunk beds filling a large room, with an offender filling each bunk bed, with many more offenders present in the dormitory than staff.

When the offender remonstrated against the taking of his television set and the temper of the incident appeared to be increasing, pepper spray (referred to as OC [oleoresin capiscum] or MK9) was deployed to disable the complaining offender. The blinded offender was then handcuffed with his hands behind his back. Correction Officer Crabtree escorted the blinded, handcuffed offender out of the dormitory to an adjacent common area, the housing unit's day room, where the restrained offender was directed to be seated in a chair, to which the offender complied. By this time the offender was thoroughly subdued, restrained, and compliant.

After a few minutes seated in the H5L common area the restrained offender was directed to stand, and with Correction Officer Crabtree guiding the offender through contact with the offender's arm, the offender entered the sally port located adjacent to the H5L common area in which the offender had been seated. The offender did as directed and both the offender and Correction Officer Crabtree stepped into the sally port where Correction Officer Roose was already located. Within seconds of entering the sally port, while Correction Officer Crabtree was standing next to the handcuffed offender with one hand on the handcuffs on the offender, Correction Officer Roose lunged at the handcuffed offender and punched and kicked the offender forcefully and repeatedly. Officer Roose used an MK9 cannister to beat the offender about the offender's head, driving the offender to the floor of the sally port where he was kicked repeatedly by Officer Roose.

Correction Officer Crabtree made no report of the use of force engaged in by Correction Officer

Roose in the sally port against the restrained offender during the remainder of his shift. Prior to the end of his shift Officer Crabtree was transported to a local emergency room by emergency medical technicians to attend to a hand injury sustained by Officer Crabtree.

When it was discovered at about 3:30 a. m. on December 22, 2019 that a use of force had occurred in the sally port on December 21, 2019 that had not been reported, those staff members in the vicinity of the H5L sally port during the use of force incident were ordered to submit a use of force report. Officer Crabtree had filed a use of force report about the use of force that had occurred in the H5L dormitory before leaving the institution on December 21, 2019 but did not submit a use of force report before the end of his shift about the use of force that had occurred in the H5L sally port.

An investigation was conducted by the Employer into the December 21, 2019 use of force incidents. The report resulting from this investigation was issued on January 16, 2020. After reviewing the investigation report and after reviewing the video recording of the events in question, the appointing authority directed an order of removal to the grievant on March 6, 2020. The order of removal charged the grievant with interfering with, failing to cooperate in, or lying in an official investigation or inquiry, in violation of Rule 24; failing to immediately report a violation of any work rule, law, or regulation, in violation of Rule 25; any act or failure to act which constitutes a threat to the security of the facility, staff, or any individual under the supervision of the Department, in violation of Rule 38; and unauthorized actions, a failure to act that could harm any individual under the supervision of the Department, in violation of Rule 41. The grievant's March 6, 2020 discharge was grieved and the grievance remained unresolved between the parties. The unresolved grievance was directed on to final and binding arbitration.

SUMMARY OF TESTIMONY

Falisha Kennebrew

Falisha Kennebrew is a Correction Captain employed at the Richland Correctional Institution. Ms. Kennebrew has been employed by the Ohio Department of Rehabilitation and Correction for twenty-three (23) years. On the date of the use of force incident, December 21, 2019, Ms. Kennebrew had been serving with the rank of Correction Lieutenant.

Captain Kennebrew explained in her testimony at the arbitration hearing that in the event of a use of force incident, an officer not involved in the use of force is to escort the offender involved to avoid further imposition of force. Captain Kennebrew recalled that a use of force incident had occurred on December 21, 2019 in a dormitory, Housing Unit 5 Lower, when an offender had objected to the taking of his television set by staff. (Then) Lieutenant Kennebrew responded to the housing unit and there found a handcuffed offender seated in a chair in the day room of H5L escorted by Correction Officer Crabtree. Lieutenant Kennebrew determined that the offender seated in the day room was the only offender involved in the use of force incident. Lieutenant Kennebrew asked Officer Crabtree if Officer Crabtree had been involved in the use of force. When Officer Crabtree answered: "Yes," Lieutenant Kennebrew directed Correction Officer to pass off the task of escorting the offender to Correction Officer Roose. See Tab 4, page 2, January 16, 2020 Use of Force Investigation Summary Report.

In her testimony at the arbitration hearing, Captain Kennebrew recalled that she had asked Officer Crabtree on December 21, 2019 following the use of force incident that had occurred in the H5L dormitory whether he was being affected by the OC that had been sprayed on the offender in the dormitory. Officer Crabtree is recalled by Captain Kennebrew as answering that he was not affected by

the OC spray. Captain Kennebrew testified that at that time she had not known that Correction Officer Monte Roose had been the staff member who had sprayed the offender with OC in the dormitory.

Captain Kennebrew recalled that she had asked Officer Crabtree whether he had been part of the use of force in the dormitory. When Officer Crabtree responded that he had been part of the use of force incident, Lieutenant Kennebrew reminded Officer Crabtree that an institutional policy prohibited an offender, following a use of force incident, from being escorted by an officer involved in the use of force. Because Officer Crabtree had confirmed he had been part of the use of force incident in the H5L dormitory, and because Lieutenant Kennebrew had not known at that time that Officer Roose had been involved in the use of force incident, Lieutenant Kennebrew directed Officer Crabtree to hand off escorting the offender to Officer Roose.

Captain Kennebrew testified that on the day in question, December 21, 2019, a second use of force incident occurred against the same offender who had been the target of the earlier use of force incident in the H5L dormitory. This second use of force incident occurred within the confines of the sally port located adjacent to the H5L day room. The second use of force incident occurred around 9:25 p. m. when the offender had been handcuffed behind his back, standing next to Officer Crabtree in the sally port, and recovering from being pepper sprayed earlier. The offender stood in the sally port next to Officer Crabtree and with his back to Officer Roose who was standing in the sally port. Officer Roose attacked the offender in the sally port from behind, beating the offender about the head with what the offender said had felt like a walkie talkie, knocking the offender to the floor of the sally port, and repeatedly kicking the offender.

Lieutenant Kennebrew remained in the H5L housing unit to insure order had been restored and later, at 3:30 a. m. on December 22, 2019, discovered that no officer had filed a use of force report about what had occurred in the sally port. Correction Officers in the vicinity of the second use of force

incident were directed to complete a use of force report about what occurred in the sally report and submit it immediately. On December 22, 2019 Officer Crabtree submitted the following written report of the second use of force incident that had occurred on December 21, 2019:

On the above date and time after responding to an incident in 5 lower I was given a directive by Lt. Kennebrew to escort Inmate Daniels 751-766 out of the area. Inmate Daniels was already cuffed, I placed my hand on his left arm and escorted him out of 5 lower to be handed off to the yard officer. Officer Roose was standing in the sally port with the door open. At that time I heard Officer Roose state "Don't do it!" At that point my eyes clinched shut due to a level 1 contamination of OC spray. The inmate pushed backwards into me and we both fell to the ground and I attempted to put my head in the small of the inmate's back as to protect myself. I could hear Officer's (sic) giving the inmate direct orders to stop resisting. While trying to keep control of the inmate's arms and hands I began to continuously blink my eyes to try and get my vision back. Once I felt the inmate start to stand up I stood up with him and passed him off to the yard Officer.

See Tab 4, page 44, Bradin Crabtree Use of Force Report

In an interview of Officer Crabtree on January 15, 2020 Officer Crabtree was asked if he had reported the use of force incidents, to which he responded: "Not right away. I came in the next morning and did the paperwork. I went out by squad that night due to a hand injury (during UOF in the dorm) immediately prior to the sally port." See Tab 4, pages 48, Bradin Crabtree Investigatory Interview 1-15-20.

Under cross-examination by the Union representative, Captain Kennebrew recalled that Officer Crabtree had been taken out of the institution on December 21, 2019 by emergency medical technicians.

Frank Garcia

At the time of his testimony in this proceeding Frank Garcia was working at the Grafton Correctional Institution with the rank of Correction Major. Major Garcia had previously served as a

Correction Captain at the Richland Correctional Institution. Major Garcia has been employed by the Ohio Department of Correction since June 2000.

Major Garcia identified Tab 4, Exhibit 10, pages 1 – 6 as the Use of Force Investigation Summary Report about two use of force incidents that occurred on December 21, 2019 at the Richland Correctional Institution in Housing Unit 5 Lower. This summary of the Employer's investigation of the uses of force that occurred on December 21, 2019 at the institution was prepared and signed by (then) Captain Frank N. Garcia, Jr., dated January 16, 2020. In this summary, at pages 3 - 4, Captain Garcia concluded that:

... The incident I was assigned to investigate was when Offender Daniel is escorted into the sally port of Housing Unit 5 Lower. The incident was brought to light when several offenders in H5L began to scream and yell at Correction Lieutenant Kennebrew. They told Lt. Kennebrew the officers were beating Daniel. When Lt. Kennebrew went over to the sally port, she only observed Daniel being escorted out. However, when Lt. Kennebrew returned to the shift office (Approx. 3:00 AM) she inquired about the incident and it was discovered a UOF took place in the sally port of H5L and the Officers had not reported to shift. Correction Lieutenant Gillespie was already working on a UOF packet in the shift office and was never advised of the UOF that took place in the sally port of H5L either.

At page 4 of the investigation summary report issued by Captain Garcia on January 16, 2020 Captain Garcia concluded that no OC was deployed in the sally port, and determined that Officer Crabtree had been a witness to the use of force in the sally port perpetrated by Officer Roose when Officer Crabtree had been standing next to the offender who had been beaten and kicked by Officer Roose while in the sally port, but made no report of this use of force until such a report had been demanded from him. In referencing the video of the incident Captain Garcia found:

... Video clearly shows Mr. Crabtree grabbing the entrance door and looking back as if to see if anyone was watching after the incident took place. I do not believe OC was deployed in the sally port. The can of OC in question is an MK9 which would

contaminate the smallest of area and be very effective due to its size. I do believe Mr. Crabtree was a witness to a UOF that took place in the sally port of Housing Unit 5 Lower. Mr. Crabtree was next to Offender Daniel when Daniel was struck by Mr. Roose...

Captain Garcia found Officer Crabtree to have been less than truthful in his interview when he had claimed not to have witnessed the use of force that occurred in the sally port, and had failed to report the use of force as required by institutional rules and policies.

Major Garcia identified Tab 4, Exhibit 17, page 22 as the Marquez Daniel #A751766 Use of Force Statement. This handwritten statement, signed by Marquez Daniels before a staff witness on December 23, 2019, reads as follows:

As I was escorted into the sally port by an c. o I could barely see. I blinked once or twice, and seen myself entering the sally port. When inside the sally port I first felt a punch to the face. Then a voice said "So you wanna fight with officers huh?" Then I got punched 4 more times, and kneed once, also they bent my arms [u]pward. Then a voice said "Get him the fuck out of here."

2 Face 2 – Head – Someone hit me with an object in back of head.

– Could Not See – Cannot Describe Staff

Did Not Say Anything Prior. Did Not Act to Spit.

– In Sally Port I Said "I Am Sorry, I regret it" While I was hit

– Did Not Report Hits but Face was burning bad.

Major Garcia testified that in comparing Offender Daniels's written statement to the video of the incident in question, Offender Daniels's written statement appears to be an accurate description of what had occurred.

Under cross-examination by the Union representative, Major Garcia confirmed that Officer Crabtree had never said that Officer Roose had sprayed Offender Daniels. At Tab 4, Exhibit 25, Bradin

Crabtree Investigatory Interview 12-21-2019, page 42, Officer Crabtree is asked to explain what happened in the H5L sally port. Officer Crabtree's response was:

When I tried to pass him off when we went thru the door, I felt the inmate come backward. The OC reactivate again and my eyes clinched shut. I then felt the inmate go to the ground. I then went down to try to keep control of him. After watching the video its not how I remember it.

Stephanie Saunders, R. N.

Stephanie Saunders is a Registered Nurse who, on December 21, 2019, had been employed at the Richland Correctional Institution. By December 21, 2019 Ms. Saunders had been employed by the Ohio Department of Rehabilitation and Correction for one year.

On December 21, 2019 Ms. Saunders examined Offender Daniels and Officer Crabtree. Officer Crabtree complained to Nurse Saunders of a runny nose and burning eyes. Ms. Saunders confirmed however that she did not include in her report of the examination of Officer Crabtree any mention of Officer Crabtree's eyes being red or watering.

Under questioning by the Union representative, Ms. Saunders recalled that she had conducted the examinations of the offender and the officer at the end of her shift. She had traveled to H5L where she found everyone outside, coughing. Ms. Saunders said she was refused admittance due to the OC in the air.

Ms. Saunders recalled that when she arrived at H5L she found Officer Crabtree seated in a golf cart, saying he had hurt his hand and could not see. Ms. Saunders called a squad to take Officer Crabtree out of the institution for treatment at a local hospital's emergency room. Ms. Saunders explained that medical personnel at the institution were not permitted to provide treatment to staff. Ms. Saunders recalled that Officer Crabtree had not wanted to leave but was ordered to do so. Ms. Saunders

stated that one of Officer Crabtree's fingers appeared to be dislocated or broken.

David Awbrey

David Awbrey works from a Correction Specialist position at the Richland Correctional Institution performing the duties of a unit manager. Correction Specialist Awbrey has worked at Richland Correctional Institution for fourteen years. Mr. Awbrey has also served as a use of force instructor and is a member of the SRT, the Special Response Team, a squad of employees who have received special training in responding to incidents of violence in the institution.

Mr. Awbrey stated that a use of force report must be filed within seventy-two (72) hours of the use of force.

Under questioning by the Union representative, Correction Specialist Awbrey stated that the current policy at the institution is that a written use of force report must be submitted within seventy-two (72) hours of the use of force.

Under re-direct questioning by the Employer representative, Mr. Awbrey stated that a report of a use of force would be expected by the end of the shift upon which the use of force occurred.

Harold May

Harold May is the Warden of the Richland Correctional Institution and was so employed on December 21, 2019.

Warden May referred to the video recording of the events in the H5L sally port on December 21, 2019. Warden May testified that when he viewed the video recording he observed the offender going down to the floor of the sally port and being assaulted by Officer Roose. Warden May stated that he watched the video before deciding to terminate the employment of the grievant. Warden May referred to Tab 3, Exhibit 4, the notice of removal signed by Warden May on February 20, 2020; signed

by Director A. C. Smith on March 6, 2020; and signed by Bradin Crabtree as received on March 6, 2020.

Warden May stated that he had read the investigation report before deciding to discharge the grievant. Warden May stated that Mr. Crabtree had agreed to provide testimony in the prosecution of Officer Roose for the assault on Offender Daniels in the H5L sally port on December 21, 2019. Warden May concluded that for Mr. Crabtree to provide testimony against Officer Roose in the criminal trial about what occurred in the sally port, Officer Crabtree must have seen what happened in the sally port.

Under questioning by the Union representative, Warden May stated that the use of force by Officer Roose was reviewed by a use of force committee and found to have been an unjustified use of force. It was also found to have been an excessive use of force. Warden May recalled that Officer Roose had been charged with assault, found guilty of using excessive force upon Offender Daniels, pled guilty to a lesser charge, and resigned from his employment at the institution.

POSITIONS OF THE PARTIES

Position of the Employer

The Employer understands the Joint Issue in this proceeding to be whether the grievant was removed for just cause, and if not, what the remedy shall be.

The Employer contends that a preponderance of evidence in the hearing record proves that the grievant violated Rules 24, 25, 38, and 41 of the Standards of Employee Conduct. The Employer argues that these charged violations are substantiated by the video recording of the two (2) uses of force on the day in question, December 21, 2019.

The Employer argues that while the Union has made assertions about the amount of OC deployed, and the effect of that deployment on the housing unit, the hearing record contains no

evidence on these points. The Employer points out that there is no evidence in the hearing record indicating that physical examinations could not have been conducted in the institution's infirmary due to the OC deployment. The Employer does not dispute that Nurse Saunders testified that she could not conduct the examinations in the H5L dormitory due to the OC deployment therein, but this was the only testimony on this point provided by any witness at the arbitration hearing and no mention had been made of the infirmary being so contaminated as to be out of use.

The Employer does not contest the fact that Officer Crabtree was transported to a local hospital on December 21, 2019 by EMTs during his assigned shift. The Employer points out however that Officer Crabtree managed to report in writing the first use of force incident that had occurred in the H5L dormitory prior to leaving the institution for medical assistance, but had made no mention of the second use of force incident that had occurred in the H5L sally port only minutes after the first use of force.

As to the Union's claim that different Correction Officers were treated differently, the Employer points out that there were three (3) Correction Officers in the H5L sally port during the assault upon Offender Daniels by Correction Officer Roose – Officers Roose, Picklesimer, and Crabtree. All of the officers in the sally port were treated the same.

The Employer recalls the testimony of Captain Kennebrew wherein she testified that she had interacted with Officer Crabtree after the first use of force had occurred in the H5L dormitory and prior to the second use of force that occurred in the H5L sally port. Captain Kennebrew recalled that she observed Officer Crabtree and spoke to him, and he had not appeared to be affected by the OC that had been deployed in the dormitory.

The Employer notes that on the night in question Lieutenant Kennebrew had been told by Officer Crabtree that Officer Crabtree had participated in the use of force that had occurred in the

dormitory, but Lieutenant Kennebrew had not known at that time that Officer Roose had also participated in the use of force that had occurred in the dormitory. With this imperfect knowledge, Lieutenant Kennebrew had directed Officer Crabtree to turn over the responsibility of escorting the offender to Officer Roose. The Employer points out that despite this direction from Lieutenant Kennebrew, Officer Crabtree continued to escort the offender to the interior of the sally port, in direct contradiction of his supervisor's order.

Captain Kennebrew recalled in her testimony at the arbitration hearing that while she had been attending to restoring order in the H5L dormitory, offenders in the dormitory began yelling that Offender Daniels was being beaten in the H5L sally port. Lieutenant Kennebrew did not observe the assault in the sally port but later viewed a video recording of the sally port incident after returning to her office office about 3:00 a. m. It was then noticed by Lieutenant Kennebrew that while the first use of force in the dormitory had been reported, no report had been received about the second use of force incident that occurred in the H5L sally port. Lieutenant Kennebrew directed that shift supervisors contact the officers involved in the second incident to return to the institution and complete their respective use of force reports about the second incident.

The Employer refers to the use of force report prepared and submitted by the grievant on December 22, 2019 about the second use of force incident that had occurred in the H5L sally port. The Employer argues that there was no reason for the delay in reporting the second incident. The Employer points out that the grievant had had the time and opportunity to prepare and submit the first report on December 21, 2019 and nothing stood in the way of a report of the second incident at the same time, prior to leaving for the hospital to have a hand injury attended to. The Employer also points out that the grievant did not report the second use of force incident until after the grievant had been ordered to do so. The Employer claims that the grievant had had the time and the opportunity to report the first use of

force incident and had had the time and opportunity to report the second use of force incident but made no report of the second use of force incident on December 21, 2019.

The Employer refers to the testimony from Major Frank Garcia, a Captain at the Richland Correctional Institution on December 21, 2019. Captain Garcia had led the Employer's investigation of the use of force that had occurred in the H5L sally port. Captain Garcia was the author of the investigation report about the incidents of use of force on December 21, 2019 in H5L. Captain Garcia stated in the investigation report that as to the use of force in the sally port, there had been no attempt to deescalate the situation, the offender who had been attacked had been handcuffed behind his back and recovering from having been pepper sprayed, the offender had been compliant at the time of the use of force, and the offender exhibited no sign of aggression or an intention to inflict harm.

Major Garcia testified that had MK9 been deployed inside the sally port, no one in that limited space would have been able to see. By the time he issued the investigation report on January 16, 2020, Captain Garcia found the statements from the offender about what had happened in the sally port to be credible and supported by the video recording of the event.

The Employer refers to the testimony of Stephanie Saunders, RN. Nurse Saunders had responded to H5L upon receiving a report of a use of force there. Nurse Saunders examined the grievant and found him to have an edema and discoloration on his right hand and to have had watery eyes. Nurse Saunders recalled that when she arrived at the H5L dormitory there had been a lot of OC in the ambient air, and physical examinations had occurred outside the dormitory due to that circumstance. The Employer points out however that not one other witness testified of a lot of OC in the H5L sally port.

The testimony of David Awbrey is recalled in which he stated that in 2019 the institution's policy had been that a use of force was to be reported no later than the end of the shift upon which it

occurred. Today the rule requires a report within seventy-two (72) hours of the use of force.

As to the testimony provided by Warden May, the Employer notes that Warden May found the use of force in the H5L sally port on December 21, 2019 to have been an assault on an offender. The Warden May testified that he had viewed the video recording and had agreed with the conclusions reached in the investigative report of the incident. Warden May found the use of force unjustified and excessive and found the removal of the grievant to be supported by the evidence.

The Employer argues that the video recording of the uses of force that occurred on December 21, 2019 clearly shows that the grievant was able to see what was occurring around him. The Employer claims that the grievant has lied about his ability to observe what occurred in the sally port to protect Officer Roose, and this refusal to report what had happened in the assault on the offender comprises an incident of dishonesty and a violation of Rule 24 of the Standards of Employee Conduct. The Employer claims that the failure of the grievant to report what he observed of an unjustified and excessive beating of an offender on December 21, 2019 also comprises a violation of Rules 25, 38, and 41 of the Standards of Employee Conduct.

The Employer argues that there is more than sufficient evidence in the hearing record to substantiate the just cause needed to uphold the removal of the grievant. The Employer urges the arbitrator to deny the grievance in its entirety and uphold the discipline imposed as supported, justified, and proportionate.

Position of the Union

The Union understands the issue before the arbitrator in this case to be whether the grievant violated any of the rules listed in the order of removal, Rules 24, 25, 38, or 41, and if not, whether the removal of the grievant was for just cause. If just cause is not found, the issue becomes the remedy to

be awarded to heal the Employer's breach of the parties' collective bargaining agreement through imposing discipline without just cause.

The Union contends that the Employer has failed to present a preponderance of evidence to the hearing record substantiating just cause for the discharge of the grievant. The Union claims that the investigation conducted at the direction of the Employer was not a fair investigation. The Union claims that the Employer had already concluded that the grievant had witnessed an undocumented use of force and reached this conclusion without considering mitigating circumstances.

The Union argues that Warden May approached the situation with preconceived notions about an assault and criminal charges that applied to Officer Roose but not to Officer Crabtree. The Union stresses that there is nothing in the hearing record to indicate that the grievant assaulted the offender and nothing in the evidence presented that would connect the grievant's conduct to the criminal misconduct engaged in by Officer Roose. And yet, stresses the Union, the grievant has been treated the same as Officer Roose in terms of his employment, even though the grievant had not acted in the same manner as Officer Roose.

The Union points out that Major Garcia in his testimony at the arbitration hearing conceded that he was unable indicate where Officer Crabtree had lied in the investigation conducted by the Employer.

The Union notes that a supervisor of the grievant, Lieutenant Gillespie, had said in an interview during the investigation that without a doubt the grievant had observed the use of force in the sally port against the offender by Officer Roose, yet it was undisputed that Lieutenant Gillespie had not been present when the assault had occurred.

The Union argues that the rules at issue in this case alleged by the Employer to have been violated have not been enforced equally or fairly by the Employer. The Union points to Officer Nwaobia who the Employer believed had been a witness to the use of force in the sally port on the day

in question, had not believed Officer Nwaobia's denial of having seen the incident, and yet Officer Nwaobia received no discipline of any kind.

The Union points out that Officer Crabtree had said that he did not observe the use of force in the sally port perpetrated by Officer Roose against Offender Daniels due to a level one OC contamination.

The Union asks, if the grievant had not seen the use of force, how could the Employer find him guilty of failing to report the event immediately or of failing to intervene? The Union claims that the assertions made by the grievant in this regard are supported by evidence in the hearing record and are truthful.

The Union reminds the arbitrator that over eighty-two (82) grams of OC were deployed just minutes before the use of force that occurred in the sally port. The OC in the ambient air had been so strong that physical examinations had to be performed outside the infirmary. It is also the case, notes the Union, that the grievant was rushed out of the institution prior to the end of his shift by EMS personnel due to a hand injury suffered by the grievant. This circumstance, argues the Union, served to hinder a proper physical examination of the grievant on the date in question.

The Union argues that Lieutenant Kennebrew failed to follow institutional rules when she directed Officer Crabtree to escort Offender Daniels out of the H5L dormitory and then directed that this assignment be handed off to Officer Roose when both Officer Crabtree and Officer Roose had been involved in the first use of force in the H5L dormitory. Because of their participation in the first use of force incident, neither officer should have been escorting the offender involved in the use of force incident. The Union claims that these instructions from Lieutenant Kennebrew had put the offender and the correction officers in harm's way and contributed to the chronology of events leading to the use of force in the sally port engaged in by Officer Roose. The Union contends that had institutional policies

been followed in escorting Offender Daniels from H5L, the misconduct could have been avoided.

The Union claims that the Employer ignored the mitigating factors described above and found the grievant guilty of rule violations in the absence of corroborating evidence. The Union notes that neither Offender Daniels nor any staff member has asserted that Officer Crabtree observed the use of force in the sally port perpetrated by Officer Roose, a use of force not perpetrated by Officer Crabtree. The Union argues that without such evidence there is no proof of just cause, and without proof of just cause the discipline imposed must be vacated.

The Union urges the arbitrator to grant the grievance in its entirety, expunge the record of discipline from the employment record of the grievant, reinstate the grievant to his former employment retroactive to March 6, 2020 with full back pay, restore missed overtime, with no loss in seniority or benefits, order reimbursement of Union dues, and direct that the grievant be made whole by placing him in the position he would have been in had the discipline not occurred.

DISCUSSION

The parties' collective bargaining agreement to be applied in this arbitration proceeding, in Article 24, prohibits the Employer from imposing discipline upon a bargaining unit member without just cause. The Employer carries the burden of proving that the Employer possessed the just cause necessary to discharging the grievant from his employment.

The grievant in this proceeding was hired by the Employer on April 4, 2016 and removed by the Employer on March 6, 2020, a term of service of almost four (4) years. The grievant at the time of his discharge had no active discipline on his employment record.

The charges of misconduct made against the grievant in the March 6, 2020 order of removal are allegations of acts of omission rather than alleged acts of commission. It bears noting that nothing in

the hearing record indicates that the grievant engaged in the violence directed at Offender Daniels by Officer Roose in the H5L sally port on December 21, 2019. There is no indication in the evidence presented of the grievant harming or threatening to harm the offender he escorted to the H5L day room and then the H5L sally port.

There was, regrettably, during the events at issue, a fairly brutal attack upon a restrained offender who was compliant and not threatening any form of aggression. It should be remembered that at the time of the attack upon Offender Daniels in the sally port by Officer Roose the offender had been handcuffed behind his back and still recovering from a blinding and excruciatingly painful experience that had occurred only minutes previously. The OC sprayed in the face of Offender Daniels blinded him, made it difficult for him to breathe, produced severe pain from a burning sensation in his eyes, nose, and throat, all while having his hands restrained behind his back. While in this condition the offender was struck four times about the head and face and kicked repeatedly by Officer Roose in the H5L sally port. The initial punch to the offender's face by Officer Roose occurred around 9:21 p. m. causing the offender to fall to the floor whereupon Officer Roose commenced kicking the offender. The grievant can be seen closing the sally port door; through a window in the sally port door Officer Roose can be seen to kick the offender.

Once again, there is nothing to indicate that the grievant punched or kicked the offender at any time. There appears to be no question however that when the assault upon the offender had occurred in the H5L sally port the grievant had been standing immediately next to the offender, close enough to have one hand on the handcuffs restraining the offender behind the offender's back. This was more than proximity, this was a sharing of space by the grievant and the offender. The sally port offered only a very limited amount of floor area, and the number of people in the sally port at the time of the use of force required their close proximity to accommodate everyone who filled that very limited space.

The grievant does not dispute what is depicted on the video recording of the use of force in the sally port but claims that he observed none of it due to a level 1 reactivation of the OC that had been deployed in the housing unit's dormitory. The grievant in written statements and interviews has recalled having his eyes forced shut by the effects of the residual pepper spray in the clothing and air present in the sally port, producing a blinding effect. The Union and the grievant ask how the grievant can be held accountable for failing to report an incident he did not see. The Union and the grievant ask how the grievant can be held to account for not intervening in a use of force when the grievant did not know at the time of the use of force that it was occurring.

The arbitrator does not find the hearing record to corroborate the grievant's claim of incapacity suffered at the time of the use of force incident in the sally port on December 21, 2019. Some minutes after the deployment of the OC spray in the H5L dormitory on December 21, 2019, in the day room of H5L, the grievant had engaged in a discussion with Lieutenant Kennebrew about the effect of the deployed pepper spray upon the grievant. Officer Crabtree answered Lieutenant Kennebrew's questions about his physical capacity to carry on and assured Lieutenant Kennebrew that the grievant was not negatively affected by the OC deployment. The video of the events in question give no indication that the grievant had been disabled and no indication that his physical capabilities had changed from the time he entered the sally port to when he closed the door of the sally port as the assault upon the offender by Officer Roose was ongoing.

Because of the limited space in the sally port and the number of people in that space, any change to the OC content in the air in that space would have been felt equally by all. It is not believable that some increase in OC in the sally port afflicted the grievant at the time of the assault on the offender but affected no one else. There is no question that when the offender was first struck by Officer Roose and sent to the floor of the sally port the grievant, who had been holding onto the offender's handcuffs,

went to the floor in conjunction with the offender's collapse, but there is nothing to indicate that his sight had been impaired or that he had been rendered incapable of assessing what was happening in his immediate vicinity during an assault that included four punches to the face of the restrained offender and repeated kicking of the offender. With the grievant physically located right next to the target of the beating, and exhibiting the visual and physical ability to close the sally port door, the arbitrator does not find credible the grievant's claim of having been incapable of appreciating that an assault was occurring in the sally port against the offender the grievant was escorting.

The arbitrator finds the grievant had observed and been aware of the assault upon the offender in the H5L sally port on December 21, 2021. This use of force, the beating of a restrained and disabled offender, was not the result of the grievant's actions but this incident of force nonetheless obligated the grievant to report what he had observed, to intervene in the incident, and to be truthful and complete in reporting the incident he had observed.

The use of force incident in the H5L sally port on December 21, 2019 was a sufficiently violent and unjustified violation of institutional rules to warrant a prompt, complete, and truthful report of what had been observed of the incident. The use of force in the H5L dormitory on December 21, 2019 that had occurred at around 9:18 p. m. had been reported by the grievant prior to leaving the institution that day but the grievant did not report the use of force that had occurred in his presence in the sally port that day. The grievant did submit a use of force report on December 22, 2019 but made no mention of the offender being punched and kicked by Officer Roose, claiming an inability to see what was happening "... due to a level 1 contamination of OC spray." See Tab 4, Exhibit 26, page 44.

As noted above, the arbitrator is not persuaded that the grievant had been incapacitated to the extent he had not been able to comprehend the beating being meted out by Officer Roose to the restrained offender in the H5L sally port. The circumstances surrounding the use of force in the sally

port do not support the Union's claims of incapacity of the grievant. The arbitrator finds the grievant did know what was happening at the time of the assault of the offender in the sally port and based on that knowledge was obligated to report it accurately and promptly and to intervene to the extent possible to ameliorate the harm otherwise threatened by this violence.

Rule 24 in the Employer's Standards of Employee Conduct comprises a work rule that prohibits failing to cooperate with, or interfering with, or lying in an official investigation. The arbitrator is not persuaded that the grievant reported what he knew to have occurred in the H5L sally port on December 21, 2019. The claim from the grievant that he knew nothing of the assault is not credible and does not avoid the enforcement of Rule 24 or the other rules alleged to have been violated by the grievant's acts of omission. A preponderance of clear and convincing evidence in the hearing record substantiates the violation of Rule 24 by the grievant through failing to cooperate in the investigation of the use of force incident in the sally port on December 21, 2019.

Rule 25 in the Standards of Employee Conduct requires an immediate report of a violation of any work rule, law, or regulation. The grievant's report of the use of force in the sally port occurred on the day following the day upon which the use of force occurred. The timeliness of the report would apparently not be questioned today as it appears the present policy at the institution requires a report of a use of force within seventy-two (72) hours of the incident. The grievant did submit a use of force report but only after being directly ordered to do so, and his report, as indicated above, was neither an accurate nor a complete account of what the grievant had known to have occurred.

Rules 38 and 41 refer to failures to act in meeting a threat to the security of the institution and a failure to act in protecting an individual under the supervision of the Department of Rehabilitation and Correction.

There is no indication in the hearing record of the grievant taking any affirmative action to

intervene in the beating of Offender Daniels by Officer Roose in the sally port. It can be debated whether the grievant had had sufficient time or opportunity to aid the offender as the offender was being beaten by Officer Roose. As stated above, the grievant has always claimed that he had no idea the offender was being beaten during the assault by Officer Roose and therefore had no reason to intervene. The arbitrator is persuaded that the grievant knew an assault was occurring in the sally port and made no effort of any kind to intervene in that unjustified and unlawful misconduct.

The arbitrator understands that the misconduct perpetrated by Officer Roose against Offender Daniels was not the misconduct charged against the grievant herein. However, the Employer has explicit work rules, known to all concerned, delineating what is expected from employees in investigations or inquiries conducted by the Employer. An incident of a use of force at the institution is entitled to be reported promptly, completely, and accurately by employees having knowledge of the incident. To have observed a use of force incident but refusing to share that knowledge with the institution is to become complicit in the incident. It can be difficult to report the misbehavior of a co-worker, but considering the circumstances in this case, the restrained and compliant offender coupled with the brutality of the assault upon the offender, the refusal to honestly report what the grievant knew to be true about the assault and the failure to take any action to intervene provide the just cause needed to uphold the removal of the grievant.

The Employer has presented a preponderance of evidence proving that the grievant did violate Rules 24, 25, 38, and 41 of the Standards of Employment Conduct. These violations are found sufficiently serious to support the discharge of the grievant. Accordingly, the grievance is denied in its entirety.

AWARD

1. Under the language of the parties' collective bargaining agreement applicable to this proceeding, the grievance at issue herein is found by the arbitrator to be arbitrable and properly before the arbitrator for review and resolution.
2. The Employer presented a preponderance of clear and convincing evidence proving that the Grievant, Bradin Crabtree, was removed for just cause.
3. The grievance is denied.

Howard D. Silver

Howard D. Silver, Esquire
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Columbus, Ohio
December 28, 2021

CERTIFICATE OF SERVICE

I hereby certify that duplicate originals of the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the State of Ohio, Department of Rehabilitation and Correction, Richland Correctional Institution, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, grievance number DRC-2020-00972-03, Grievant: Bradin Crabtree, were directed electronically to the following this 28th day of December, 2021:

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Labor Relations Officer 2
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and

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Columbus, Ohio
December 28, 2021