#1208
Rec'd 3/28/2022

IN THE MATTER OF ARBITRATION	)	
	)	
BETWEEN	)	**GRIEVANCE: Earnest Gabbard**
	)	
OCSEA LOCAL 11/AFSCME-AFL-CIO	)	**Grievance: Discharge**
	)	**Grievance #DRC 2020-04521-03**
AND	)	**BEFORE: ROBERT G. STEIN, NAA**
	)	**ARBITRATOR**
OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, LEBANON CORRECTIONAL INSTITUTION	)	

FOR THE UNION:

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FOR THE EMPLOYER:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement" or "CBA") between The State of Ohio ("Employer" "ODRC") and The Ohio Civil Service Employees Association, OCSEA LOCAL 11/AFSCME-AFL-CIO ("Union" or "OCSEA" "Pickaway" "PCI"). That Agreement was effective from May 12, 2018, through February 28, 2021, and included the conduct which is the subject of this grievance. The department involved in this matter was the Department of Rehabilitation and Corrections ("ODRC," "Employer," "Department") Robert G. Stein was mutually selected by the parties to impartially arbitrate this matter, pursuant to Article 25 of the Agreement. A hearing on this matter was conducted on December 1 and 9, 2021, was held virtually. The parties mutually agreed to those hearing dates and that virtual format, and they were each provided with a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a written transcript, was subsequently declared closed upon the parties' individual submissions of post-hearing briefs.

No issues of either procedural or jurisdictional arbitrability have been raised, and the parties have stipulated that the instant matter is properly before the arbitrator for a determination on the merits. The parties have also agreed to the submission of thirty (30) joint exhibits and six (6) joint stipulations.

ISSUE

Was the Grievant removed from his position of Correction Officer for Just Cause? If not, what shall the remedy be?

I. RELEVANT CONTRACT LANGUAGE

The relevant contractual sections identified are:

25 Grievance Procedure

24 Discipline

5 Management Rights

BACKGROUND

The Grievant, in this matter is Earnest Gabbard ("Gabbard" or "Grievant"), a Correctional Officer with the Department for approximately eight (8) years at the time of his termination. He was serving as a Corrections Officer at Lebanon Correctional Institution, Lebanon, Ohio. He was terminated from his position as a Correction Officer with ODRC, Lebanon Correctional Institution ("LeCI") on 12/10/2020. According to the Employer, the Grievant was removed for violating the Standards of Employee Conduct (SOEC) Rules 7-Failure to follow post-orders, administrative regulations, policies, or written or verbal directives, Rule 42- Abuse, including physical, mental, or otherwise of any individual under the supervision of the Department, Rule 43-Using force on any individual under the supervision of the Department when force was no authorized to be used, and Rule 50-Any violation or ORC 124.34 …and for incompetency, inefficiency, unsatisfactory performance, dishonesty, drunkenness, immoral conduct, insubordination, discourteous

treatment of the public, neglect of duty, violation of such sections or the rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office (Jx. 3) The Employer in Joint Ex. 3 summarizes the incident leading to the Grievant's discharge as follows:

"*On June 8, 2020, you were involved in a use of force incident with an offender in the south corridor of the Lebanon Correctional Institution. The force utilized by you against the offender during this incident was not justified or appropriate under the circumstances. The knee and closed fist strikes delivered by you to the offender's head and facial area during this incident far exceeds reasonableness, rising to the level of abusive and deadly force. Your actions clearly violate DRC Use of Force policies and procedures (63-UOF-01 and AR 5120-09-01) and will not be tolerated."*

Based upon its findings the ODRC terminated the Grievant and the Union subsequently filed a grievance on behalf of Gabbard, and it was processed pursuant to Article 25 of the CBA. The grievance remained unresolved, and it was submitted to final and binding arbitration.by the Union. The parties have stipulated that the matter is properly before the Arbitrator for a determination on the merits.

SUMMARY OF THE EMPLOYER POSITION

For purposes of accuracy and completeness the following postings identified by the Department are largely reproduced from the Employer's brief and represented the central basis for the Employer's findings in this matter:

"The Grievant testified that he was simply doing his job when he engaged Inmate Hogan in the Use of Force. The Grievant wants us to believe that his actions concerning his Use of Force was reactionary. Clearly, video evidence does not support this claim and the lack of immediate threat to harm by Inmate Hogan showed no rational for a reactionary response. Moreover, it was the Grievant who initiated force upon the offender. The Grievant claimed he was not aware that he had struck Inmate Hogan in the head. Further, the Grievant failed to deescalate the situation through other lesser means prior to engaging in force. The Grievant failed to call for a supervisor

or utilize OC spray/chemical mace prior to initiating physical force. The Grievant failed to consider a planned use of force that may have prevented the entire incident. Consequently, the Grievant's behavior and actions are in direct violation of the Ohio Department of Rehabilitation and Corrections Use of Force Policies and Procedures (63-UOF-01) and Ohio Administrative Code. (AR 5120-09- 01). The Grievant also stated that Inmate Hogan was not trying to escape nor attempting to take over a significant part of the institution. Video evidence reveals Inmate Hogan was not engaging in behavior that necessitated the Grievant to protect himself from the offender's immediate threat of death or serious physical harm. One of the three (3) previously mentioned tenants must exist for deadly force to be applied. The Grievant can be seen in the video forcefully compressing the head, neck, and shoulder of the offender into the concrete surface. The ODRC Use of Force Policy (63-UOF-01) defines the application of any force or weight to the throat or neck of another is deadly force. The Grievant utilized excessive force, including the potential of deadly force, to punish and cease the inmate's verbal harassment."

The Employer avers that two separate investigators, Jody Sparks ("Sparks") and Kevin Chamblin ("Chamblin") concluded that the Use of Force by the Grievant in this incident was not justified nor appropriate under the circumstances and that was the conclusion arrived at by Warden Chae Harris ("Harris"). Harris testified that an unnecessary use of force jeopardizes the safety and security of the staff and the inmates for which the Department has responsibility and a correctional Officer who uses force unnecessarily cannot be trusted with the care and safe custodian treatment of inmates. Additionally, the Employer points out that the Department has in the past been required to settle a 17.5-million-dollar lawsuit brought by a paralyzed inmate for and at the Chillicothe Correctional Institution. The Employer acknowledges that its employees have to endure verbal harassment and offensive comments from inmates, but that does not justify a use of force response to this type of provocation.

While the Employer in the hearing acknowledge the Grievant's long military service for the country, it contends that his work experience with the Department was marked by a prior and discipline for the same issue, an unauthorized and improper use of force for which he received a two (2) day suspension. That suspension, according to the Employer, apparently did

not produce a more positive approach to responding to an inmate displaying increasingly recalcitrance to following the directive of two other correctional Officers as described in the instant matter.

The Use of Force by Gabbard was beyond unreasonable and rose to a level of abuse and potential deadly force being applied in a situation where Gabbard injected himself into a situation where two correctional Officers, Officers Kull and Jones were present. The Employer in its brief describes the initiation of the interaction between the Grievant and the inmate.

Correction Officer A. Kull and Correction Officer M. Jones were walking behind a cooperative Inmate Hogan. Inmate Hogan was following Correction Officer A. Kull's order to "mask-up" and return to his housing unit.

Mr. Chamblin pointed out [2:42:09 PM] that while walking back to his housing unit, Inmate Hogan stopped to fix his pants with Correction Officer M. Jones standing near him and Correction Officer A. Kull walking away. At this point, Mr. Chamblin stated that if Inmate Hogan was such a threat, a safety risk or being non-compliant, Correction Officer A. Kull never would have left.

Mr. Chamblin also said that at the 2:42:17 PM moment Inmate Hogan and Correction Officer M. Jones began to proceed down the hallway when they suddenly stopped, turned, and waited as Correction Officer Gabbard traveled from a distance down the hallway to insert himself into the matter. Mr. Chamblin stated the Grievant can be seen having a vocal and animated exchange with a compliant Inmate Hogan. At this point in the video, Mr. Chamblin testified that Inmate Hogan was found to NOT have a weapon on his person, and it was at this time too that Correction Officer M. Jones is seen holstering his pepper spray. Mr. Chamblin explained that with Correction Officer Jones putting his pepper spray away along with the offender being weaponless and not a threat, it further demonstrates that the offender was compliant and not a threat to anyone.

Mr. Chamblin pointed out that at this time, 2:42:45 PM, in the event Inmate Hogan continued down the hallway back to his housing unit with three (3) correction Officers trailing close behind him. Mr. Chamblin testified that Officer Gabbard was closest to Inmate Hogan and is seen engaging in a back-and-forth conversation with Inmate Hogan. Mr. Chamblin testified that at 2:42:51 PM, Inmate Hogan stops momentarily while turned toward the Grievant he appears to adjust his mask. Mr. Chamblin testified the Grievant then grabbed Inmate Hogan and forced him into the wall. Mr. Chamblin testified that the video showed that while the Grievant was trying to control Inmate Hogan he wrapped his arm around the neck or the throat of Inmate Hogan placing him in a frontal headlock [2:42:55 thru 2:42:57 PM].

Mr. Chamblin testified that the Grievant, while keeping Inmate Hogan in a frontal headlock, transitioned himself [2:42:58 PM] and threw repeated punches to Inmate Hogan's head and face [2:42:58 PM thru 2:42:59].

From that point, Mr. Chamblin testified that the Grievant is seen pulling [2:43:01] Inmate Hogan by the head and neck to the cement floor and pressing his head [2:43:03] into the ground while also pressing into his neck-shoulder area with his own body weight into the floor. Mr. Chamblin testified that Inmate Hogan is now neutralized by being flat to the ground with his arms over his head while trying to protect himself.

Mr. Chamblin pointed out that once Inmate Hogan was on the floor, the Grievant continued to press with his left hand onto the back of Inmate Hogan's neck with his right hand driving his head further into the cement. Mr. Chamblin mentioned that once Inmate Hogan was on the floor, in a prone position, with two Corrections Officers at his rear and the Grievant at the front/head, Inmate Hogan is not considered a threat. Regardless, Mr. Chamblin testified the Grievant continues [2:43:04] to throw closed hammer fist strikes to the head of Inmate Hogan who is seen continuing to cover his head trying to protect himself from the assault. Mr. Chamblin further states that the Grievant is seen [2:43:06] throwing multiple knee strikes into Inmate Hogan's head while holding the offender's shoulder and head pressed into the concrete floor. Shortly thereafter, Mr. Chamblin pointed out [2:43:09] that five (5) correction Officers are present on the scene with Correction Officer A. Kull returning and using her pepper spray to bring the event to close. (Hearing testimony of Kevin Chamblin, p. 5 of Employer brief)

The Employer in summary asserts that the record, including the video evidence demonstrates that Gabbard's actions were reactionary in nature and that he initiated force with inmate Hogan when Hogan was no immediate threat. Gabbard failed to both deescalate the situation and or use other lesser means prior to applying deadly force on Hogan, argues the Employer. Hogan's actions were both abusive and punitive and provided a just basis for his termination.

The Employer respectfully asks that the grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union first argues that Gabbard, a former long servicing military veteran with approximately fourteen (14) years of service in the U.S. Army and another eight (8) years in the U.S. Marine Corp and who had eight-plus (8+) years of service with OCRC had a good record marked by good attendance and excellent performance evaluations. The Union cites the hearing testimony of Warden Harris who acknowledged that Gabbard was a "good Officer." (Union brief, p. 2) The Union also points out that Officer Gabbard has demonstrated over his time in the Department professional dedication when he went beyond the call of duty to save the life of an inmate for which he earned a Gold Star Award.

The Union's and Grievant's straightforward view of the incident that occurred on June 8, 2020, involving Inmate Hogan is as follows:

The documentary evidence and testimony of the day in question (6/8/2020) shows the Grievant and others were only doing their job when they encountered an inmate in the south corridor of the institution who was refusing all direct orders to return to his cell. According to the Grievant and other responding staff the inmate wasn't only verbally and physically combative but refused to comply with all their directives. The situation escalated when the inmate became threatening. Force was used to only gain physical control of the offender. Neither the officers nor the offender were injured during the incident, not even a bruise. (Union brief, p. 4)

The Union disagrees with Warden Harris' conclusion that the Grievant has anger issues, and instead highlights the fact that in this matter the Grievant was simply doing his job and

responding to an inmate who was refusing a direct order to return to his cell and was threatening violence against the correction Officers who were present.

The Union points out that the force the Grievant utilized with inmate Hogan was not deadly force and according to Chapter President, Blaine Burchett, was an ordinary use of force that occurs on a daily basis. (See Union brief, p. 5) The Union concludes that the Employer in this matter failed to establish a just cause basis for its action to terminate Gabbard. It requests that the Grievant be reinstated to his former position with full back pay and benefits and be made whole for any losses incurred due to the lapse of medical coverage during the period from his termination to the present. The Union also requests that the Union should be reimbursed by the Employer for Union dues lost during this period of the Grievant's removal from his position.

DISCUSSION

The just cause" standard, commonly accepted principles routinely used by arbitrators in disciplinary matters "are intended to ensure a higher level of fairness and due process for employees accused of wrongdoing. They are also intended to increase the probability of workplace justice." *Paper, Allied Indus., Chem., and Energy Workers Int'l Union, AFL-CIO, Oren Parker Local 8-171, Vancouver, Wash. and Petra Pac, Inc.,* 05-1 Lab. Arb. Awards (CCH) P 3078 (Nelson 2004).

"Just cause" imposes on management the burden of establishing: (a) that the standard of conduct being imposed is reasonable and is a generally accepted employment standard which has been effectively communicated to the employee; and (b) that the evidence proves that the employee engaged in the misconduct which did occur in the instant matter. The proof must

satisfy both the question of any actual wrongdoing charged against an employee and also the appropriateness of the punishment imposed. *Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp*., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

> "Just cause" imposes on management the burden of establishing: (a) that the standard of conduct being imposed is reasonable and is a generally-accepted employment standard which has been properly communicated to the employee; (b) that the evidence proves that the employee engaged in the misconduct which did constitute a violation of that standard; and (c) that the discipline assessed is appropriate for the offense after considering any mitigating or extenuating circumstances.

Phillips Chem. Co. and Pace, Local No, 4-227, AFL-CIO, 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor 2000).

It is proper for an arbitrator to look at employer policies, rules, statutes, and regulations to determine whether or not a discharge was actually warranted. *E. Associated Coal Corp. and United Mine Workers of Am., Dist. 17,* 139 Lab. Arb. Awards (CCH) P 10,604 (1998). The purpose of "just cause" is to protect employees from unexpected, unforeseen, or unwarranted disciplinary actions, while at the same time protecting management's rights to adopt and to enforce generally accepted employment standards. *Phillips Chem. Co. and Pace, Local No. 4-227, AFL-CIO,* 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor 2000). The Employer here has retained specific rights in the Agreement, including the right to discipline employees, as long as its exercise of discretion in utilizing those specific rights is not unreasonable, arbitrary, capricious, or motivated by improper means. *Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264,* 115 LA 190 (Landau 2001). One arbitrator defined "just cause" as "that cause which, given the totality of circumstances, enables an impartial observer to determine that the adverse action taken against an employee is, in all respects, a reasonable assertion of authority designed to meet legitimate management objectives." *Gallatin Homes*, 81 LA 919 (Cerone 1985).

"While it is not an arbitrator's intention to second-guess management's determination, he does have an obligation to make certain that a management action or determination is reasonably fair." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 8, Local 1699*, 92 LA 1167 (1989). In the absence of contract language expressly prohibiting the exercise of such power, an arbitrator, by virtue of his authority and duty to fairly and finally resolve disputes, has the inherent power to determine the sufficiency of a case and the reasonableness of a disciplinary action or penalty imposed. *CLEO, Inc. (Memphis/Tenn.) and Paper, Allied-Indus., Chem., and Energy Workers Int'l Union, Local 5-1766*, 117 LA 1479 (Curry 2002).

Arbitrators do not lightly interfere with management's decisions in disciplinary and discharge matters, but that does not mean to suggest that they will sustain an action found to be unjust or unreasonable.

> The arbitrator should not substitute his judgment for that of management unless he finds that the penalty is excessive or unreasonable, or that management has abused its discretion.

Operating Eng'rs. Local Union No. 3 and Grace Pac. Corp., 01-2 Lab. Arb. Awards (CCH) P 3971 (Najita 2001; *Trans World Airlines*, 41 LA 142 (Beatty 1963): *Stockham Pipe Fittings Co.,* 1 LA 160, 162 (McCoy 1945)

After a thorough review of the hearing testimony and other evidence submitted, as well as the parties' individual arguments presented in the parties' post-hearing briefs, this arbitrator finds that the Employer met its evidentiary burden to establish that it did have a reasonable "just cause" basis for disciplining the Grievant via the herein challenged termination. I find that the standard of conduct imposed was reasonable and is a generally accepted employment standard

which has been effectively communicated to the employee. The standard is regularly communicated and is the subject of yearly training. (Employer brief, p. 8) In Joint Exhibit 19, the training Lesson Plan for the Use of Force, it is particularly noteworthy that Officers prior to using force need to consider the "Totality of Circumstances." That totality contains several factors that in the instant matter the Grievant failed to heed:

- Can I wait or do I have to act now?
- Availability of assistance
- Preclusion attempts made by the employee
- The number of offenders vs. the employees involved
- Discretionary time available the employee had to make a decision

In addition to these factors and other listed under the Totality of Circumstances on p. 8 of Joint Exhibit 19 it states:

- DRC policy 63-UOF01, states that whenever safe and possible to do so, employees shall call for assistance.
- If there is not an immediate threat of physical harm or death towards you or another, then using force can wait until you call for assistance…"
- Calling for assistance may eliminate the need for force or reduce the force needed to control the situation…Failure to call for assistance when possible makes it more difficult to defend your actions an easier for an attorney to prove you have used excessive force.

On p. 9 of Joint Exhibit 19 it clearly states:

- The employee must balance their safety against the ability to effectively respond to a given incident. As stated above, <u>when there is discretionary time available</u>, the employee must call for assistance to reduce or eliminate the need for force. (Emphasis added)

From the evidence and testimony and in particular the video, there was discretionary time and although arguably there may have been the beginning of a potential incident made for de-escalation strategy, the Grievant's sudden and forceful initiation of physical aggression made it unclear whether there was actually a potential threat from the Inmate. Fortunately, no physical harm came to Inmate Hogan, or the Officers engaged in this use of force, but the potential was certainly there particularly given the Grievant's apparent lack of warning to his fellow Officers that he was taking action, the nature of his physical interaction, and the size of the inmate versus those Officers involved. This had the appearance of a sole reactionary intervention and not a planned use of force. On page 15 of Joint Exhibit 19 (Lesson Plan Use of Force) it states

Warning signs of a career or life-altering event are: taking offenders words personally or as a challenge, acting on non-credible threats, responding in kind-exchanging expletives with offenders, threatening outside of the scope of your authority. Creating jeopardy by intentionally or recklessly placing yourself or co-workers in a force situation is unacceptable. It must be established by our professionals the critical difference between an immediate threat response (reactive force) and putting yourself in harm's way unnecessarily…"

The Union Chapter President, Blaine Bruchett ("Bruchett") in the arbitration hearing forthrightly stated the use of force is commonplace and that he estimated there were on the average three (3) use of force issues daily at LeCI. This statement was made on behalf of the Grievant indicating the normalcy of such actions, yet when coupled with the Employer's account of a recent 2021 seventeen and a half (17.5) million-dollar lawsuit settlement brought by an inmate (paralyzed during a use of force incident at another institution) it underscores just how central this issue is to all concerned. The potential physical and possible psychological harm that may be caused to Officers and inmates, in addition to the safety of the institution and the attending liability to the Department is of significant importance. It is also worth noting that if use of force incidents is a daily occurrence there was no evidence presented into the record to

indicate that Officers are frequently found to use said force inappropriately as is the case in the instant matter.

Secondly, the totality of the evidence, and particularly what the video shows, proves that the employee engaged in the misconduct which did constitute a violation of that standard. The video evidence alone, even without sound demonstrates the Grievant initiated the physical contact with Inmate Hogan absent definitive evidence of urgent circumstances. While there is sufficient reason to believe Inmate Hogan was belligerent, loud, making threats, and displaying a defiant reluctance to follow directives to move along at a reasonable pace, the video evidence and statements of the Officers present does not support the Grievant's contention that the Inmate posed an immediate physical threat.

The Employer insists that this use of force was unnecessary and could have been avoided or at least minimized. As previously stated, the evidence supports the Employer's argument that the Inmate was certainly verbally belligerent and was making verbal threats to the Officers escorting him, he was still moving along, albeit slowly, with the other Officers on the scene and was not being physically aggressive or threatening at the moment the Grievant intervened. Interviews with Officers on the scene, Grievant Gabbard, M. Jones, J. Snyder, A. Kull, confirmed Inmate Hogan's verbal threats and display of argumentative resistance to directives, but neither the video or the statements of Snyder, Jones, or Kull, mentioned Inmate Hogan throwing an elbow at the Grievant, which he claims occurred. The video also depicts Officer Jones holstering his pepper spray while the events preceding the physical confrontation ensued and also Officer Kull left the area. Both of these actions undermine the Grievant's contention that Inmate Hogan was an immediate threat. An accused employee is presumed to have an incentive for not telling

the truth, and when [his] testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed. *United Parcel Serv., Inc. and Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 89*, 66-2 ARB 8703 (Dolson 1966).

During the pre-disciplinary phase of this case and in the grievance process the Union raised the specter of a "pre-determination-bias" on the part of Captain Jody Sparks, who initially investigated this incident and was present when Warden Harris placed Gabbard on administrative leave and when Warden Harris verbally concluded with Sparks present and prior to the initiation of the investigation that the Grievant was guilty of a "bad use of force" due to excessive strikes. The Union contends that this predisposed Sparks to find the Grievant guilty of using excessive force. Absent video evidence of the incident and if the Employer had not heeded this objection early in the investigatory stages of this matter, the Union's argument would have been worthy of thoughtful consideration regarding predisposition. However, the incident was captured on video, and in spite of lacking sound it served as an unbiased record of what took place on June 8, 2020. Furthermore, the Employer, avoiding serious accusations of predetermined bias, utilized a second investigator. Investigator Chamberlin, who testified at the hearing. reviewed the evidence and his investigation validates much of what Sparks concluded. Both investigations are supported by the video of the incident.

The Employer's Use of Force policy 63-UOF-01 defines Excessive Force as follows.

An application of force which, either by the type of force employed, or the extent to which such force is employed, exceeds that force which reasonably appears to be necessary under all the circumstances surrounding the incident.

The totality of the evidence and testimony supports the Employer's charge of an excessive use of force by the Grievant on June 8, 2020.

The final component of a just cause analysis is to determine that the discipline assessed is appropriate for the offense after considering any mitigating or extenuating circumstances. The Union strongly disagrees that the Employer's claim and charge that "deadly force" was used by the Grievant. The Union asserts this "is clearly an exaggeration" and this incident was nothing out of the ordinary. (Union brief, p. 4, Blaine Burchett's testimony) Whether what the Grievant engaged in on June 8, 2020 when he physically subdued Inmate Hogan can be considered "deadly force" as opposed to excessive force, appears to rest on the video evidence of the Grievant's application of force or weight that he imposed on the Inmate's neck or throat area and his actions in striking blows to the head and body of the inmate with his knee(s). According to Chamberlin's investigative report that concludes based upon the video that the Grievant intentionally placed Inmate Hogan in a headlock, which would involve force to the neck or throat area, one of the areas utilized in Policy 63-UOF-01 to define the term "deadly force." In his statement to Chamberlin the Grievant denies intentionally using a headlock to subdue Inmate Hogan. And the video and the conclusion of the Employer's investigation also points to closed fist head blows and knee strikes issued by the Grievant to the head area of Inmate Hogan.

. Mr. Chamblin testified and as depicted in the video of the incident the Grievant continues [2:43:04] to throw closed hammer fist strikes to the head of Inmate Hogan who is seen continuing to cover his head trying to protect himself from the assault. Mr. Chamblin further states that the Grievant is seen [2:43:06] throwing multiple knee strikes into Inmate Hogan's head while holding the offender's shoulder and head pressed into the concrete floor.

The Grievant claims his delivery of "repeated strikes" was to Inmate Hogan's upper shoulder and chest area. In addition to the video evidence of the incident and working against the Grievant's credibility is his own prior disciplinary record where on 1/9/2018 he received a two (2) days suspension for the violation of Rule 12B and 40 for slapping an inmate in the face

who at the time was handcuffed and compliant. And, he continued to be angry and agitated while subsequently being counseled for it. (Jx. 29) This discipline was active on his record, when seventeen (17) months later he once again used force that involved striking an inmate. This arbitrator specifically found that the Grievant's hearing testimony was inconsistent with the facts and video evidence, and in part inconsistent with the account given by his other Correctional Officers on the scene. It also was less than forthright in terms of his physical aggression although it is not unusual in the heat of a short-term physical confrontation to have perfect knowledge of what took place. Yet, the critical issue given all of this is whether the use of force here was at all necessary. The totality of the evidence supports a reasonable conclusion that it was not.

The Union's strong defense of the Grievant citing his long military experience and a prior on duty humanitarian lifesaving act involving an inmate during his relatively short eight (8) year career was considered in analyzing the Employer's imposition of termination versus a lesser penalty. However, the circumstances in this matter coupled with the Grievant's active and relatively recent disciplinary record for similar improper excessive use of force used against another inmate underscore the tremendous liability the Department would have been subject to if this unnecessary use of force incident would have resulted in serious injury to the inmate or the Officers involved, including the Grievant. Therefore, in this case there is no reason to second guess management on its decision in this matter.

Yet, long service to our country is uncommon and should not go without recognition. If the Grievant, through the Union, submits a letter of resignation to the Employer that is back dated to the date of his removal, he shall be able to substitute his discharge with a voluntary resignation in order to enhance his opportunity for other employment.

AWARD

Grievance denied.

However, if the Grievant, within thirty (30) calendar days following the date of this Award submits to the Employer, through the Union, a letter of resignation he shall be allowed to have his record reflect such voluntary resignation for purposes of reference by future employers. If he fails to exercise this option withing thirty (30) calendar days, his termination shall remain as is currently stated in his record.

Respectfully submitted to the parties this _____ day of March 2022,

_____

Robert G. Stein, Arbitrator