

IN THE MATTER OF THE ARBITRATION BETWEEN

State of Ohio
Ohio Department of Rehabilitation
and Correction
Ross Correctional Institution

Grievance No.:DRC-2021-00306-03

AND

Ohio Civil Service Employees Association
Grievant: Barry Tanner

Arbitrator Meeta A. Bass

Opinion and Award

APPEARANCES FOR THE PARTIES

Advocate for the Employer:

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PROCEDURAL HISTORY

State of Ohio Department of Rehabilitation and Correction is hereinafter referred to as "Employer." The Ohio Civil Service Employee Association is hereinafter referred to as the "Union." Barry Tanner is hereinafter referred to as "Grievant."

The Employer and the Union were parties to the Collective Bargaining Agreement effective 2018 through 2021. The Union submitted this grievance to the Employer in writing pursuant to Article 25 of the Parties' Agreement. Following unsuccessful attempts at resolving the grievance, the Union advanced the grievance to arbitration. Pursuant to the Agreement between the Employer and the Union, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on February 17, 2022, and March 10, 2022, at the hearing of the above-captioned grievance held via a virtual platform.

The parties stipulated to the following issues for resolution by the Arbitrator:

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

During the hearing, this Arbitrator afforded both parties the full opportunity for the presentation of evidence, examination and cross-examination of the witnesses, and oral argument. Telephone call-in instructions sequestered witnesses other than the representatives. The following individuals testified at the hearing:

1. Antonio Lee, Assistant Chief Inspector
2. Clyde Spencer, Unit Manager RCI
3. Leslie Ervin, Unit Manager
4. Donald Morgan, Regional Director
5. Scott Ahart, Former Correction Officer
6. Barry Tanner, Grievant.

The Parties jointly stipulated to the following facts:

1. Grievant Barry Tanner worked as a Correction Officer at Ross Correctional Institution.
2. Grievant became employed with ODRC on March 6, 2017.
3. Grievant was working on April 4, 2020, when a fight between two offenders took place in his unit.
4. Grievant was removed from employment with ODRC on January 28, 2021.

The Parties jointly stipulated to the following exhibits:

- i. Joint Exhibit 1 - The 2018-2021 Contract between the State of Ohio and the Ohio Civil Services Employees Association.
- ii. Joint Exhibit 3 - Grievance Snapshot Tanner DRC-2021-00306-03
- iii. Joint Exhibit 5 - Notification of Disciplinary Action-Tanner Removal
- iv. Joint Exhibit 7 - Pre-Disciplinary Hearing Officer's Report/Packet Tanner
- v. Joint Exhibit 8 - DRC 31-SEM -02 Standards of Employee Conduct
- vi. Joint Exhibit 10 - DRC 1225 Standards of Employee Conduct Received - Tanner
- vii. Joint Exhibit 12 - Pre-Disciplinary Notice - Tanner
- viii. Joint Exhibit 13 - Investigation Attachment A - Doug Debord Incident Summary
- ix. Joint Exhibit 14 - Investigation Attachment B - Clyde Spencer Incident Report
- x. Joint Exhibit 15 - Investigation Attachment C - James Skaggs Incident Report
- xi. Joint Exhibit 16 - Investigation Attachment D - Daniel Farmer Incident Report
- xii. Joint Exhibit 17 - Investigation Attachment E - Disposition and Conduct Report on inmate Fisher A466-461
- xiii. Joint Exhibit 18 - Investigation Attachment F - Video Footage timeline
- xiv. Joint Exhibit 19 - Investigation Attachment H - OSP Polygraph Report for Inmate Hamilton A 720-003
- xv. Joint Exhibit 20 - Investigation Attachment I - News Articles
- xvi. Joint Exhibit 21 - Investigation Attachment 1 -DRC-1540 (E. Graves, C. Wright, S. Ahart, B. Tanner, D. Farmer, B. Wellinghoff, D. Debord L. Ervin, J. Skaggs, D. Bonham, M. Strickland)

- xvii. Joint Exhibit 22 - Investigation Attachment J - Investigative Summary Antonio Lee
- Book 2
- xviii. Joint Exhibit 23 - Investigation Attachment G - RCI Internal Phone Logs
 - xix. Joint Exhibit 24 - Investigation Attachment G - DOTS Detailed Entry Report
 - xx. Joint Exhibit 25 - Audio Recording of Staff Interviews: A. Cunningham, E. Graves, C. Wright, S. Ahart, B. Tanner, D. Farmer, B. Wellinghoff, D. Debord, L. Ervin, J. Skaggs, D. Bonham, M. Strickland, V. Fisher, N. Hay, C. Spencer, and Inmate Interviews: Davis, Fisher, Franklin, Hamilton.
 - xxi. Joint Exhibit 26 - Audio of OSP Interviews: Ahart, Tanner, Inmate Davis
 - xxii. Joint Exhibit 27 - Three (3) videos of the incident on April 4, 2020, at RCI

The Parties admitted the following Employer's exhibits:

- 1. Inmate Fisher Conduct Report
- 2. Inmate Fisher Job History
- 3. State Of Ohio Department of Correction Post Orders for Level 3 Housing Units, effective September 26, 2019
- 4. HA Logbook 4.20.20
- 5. Inmate Hamilton Conduct Report
- 6. Inmate Davis Conduct Report
- 7. Photo of Control Panel
- 8. Photo of Facility
- 9. Photo of Levels in Facility

The Parties admitted the following Union's exhibits:

- 1. Union Exhibit A - OSP Report of Investigation, Investigative Notes
- 2. Union Exhibit B - Photo of Cellblock C
- 3. Union Exhibit C - Power Plant Cordless Extensions
- 4. Union Exhibit D - Motion to Dismiss/Journal entry of Dismissal without prejudice
- 5. Union Exhibit E - Request for Discovery of Camera view "C."

The parties submitted their written closing statements on May 13, 2022, when the record was closed.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND POLICY PROVISIONS

ARTICLE 24 – DISCIPLINE

24.01 - Standard Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action...

24.02 - Progressive Discipline The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense...

Ohio Department of Rehabilitation & Correction, Standards of Employee Conduct, Policy Number 31-SEM-02

I. Authority

Ohio Revised Code 5120.01 authorizes the Director of the Department of Rehabilitation and Correction, as the executive head of the Department, to direct the total operations and management of the Department by establishing procedures as set forth in this policy.

II. Purpose

The purpose of this policy is to provide written guidelines and notify all employees regarding the written rules of conduct that specify prohibited behavior and penalties.

III. Applicability

This policy applies to all persons employed by the Ohio Department of Rehabilitation and Correction (ODRC).

Personal Conduct:

The Ohio Department of Rehabilitation and Correction has a reasonable expectation that all employees will conduct themselves in such a manner that their activities, both on and off duty, will not adversely affect their ability to perform their duties as public employees for the Department...

3. Employees shall not, without the express authorization from their Appointing Authority, show partiality toward or become physically, emotionally, or financially involved or establish a pattern of social fraternization with inmates, releases, or offenders under the supervision of the APA or any other individual currently under the supervision of the Department, or with any individual within 6 months following their release from custody or from supervision of the Department or families of same.

Employees of the Adult Parole Authority are also prohibited from engaging in any of the above activities with any individual under the supervision of any other criminal justice agency.

A. An employee shall not show favoritism, give preferential treatment, receive or offer or give to any inmate, release or offender under the supervision of the APA, or any individual currently under the supervision of the Department, or with any individual within six (6) months following their release from custody or supervision of the Department or a member of his/her family, or to any person known to be associated with him/her, any article, favor, or services which is not expressly authorized in the performance of the employee's duties or that which conflicts with or appears to conflict with the employee's duties.

POST ORDERS Security Control for Level 3 Housing Units, effective September 26, 2019, is incorporated herein as if entire- rewritten.

I. Authority:

This post order is issued in compliance with the Revised Code 5120.38 and direction from the Director of the Department of Rehabilitation and Correction, who delegates to the Managing Officer the authority to manage and direct all inmates, personnel, programs, and activities connected with the institution.

II. Purpose:

The purpose of this post order is to outline the general duties of the officers assigned to this post and to describe specific security measures essential for this post.

III. Applicability:

This post order applies to all Correctional Officers assigned to Level 3 Housing Units.

IV. Policy:

It is the policy of the Ross Correctional Institution and its staff to operate the housing units in such a manner that ensures the safety and well-being of the facility, staff, and the inmates themselves. All employees assigned to this post should have the ability to use good sound judgment and perform their duties with accuracy and demonstrate professionalism at all times.

VI. Procedures:

Supervise unit porters to maintain the cleanliness of the unit. Ensure accountability of all cleaning equipment (mops, brooms, buckets, etc.). The

officer must confirm the cleaning equipment inventory at the beginning and again before being relieved by the next shift.

Officers must conduct security checks at staggered intervals and document each check in the Post Log Book. All security checks shall include a visual inspection of staff and inmates within the area to assure that they are individually safe and secured. These checks shall be randomly conducted on an irregular basis in which no pattern is to be set. Security checks are to be conducted within fifteen (15) minutes of assuming your post at the beginning of a shift or being relieved of duty on a particular post. The final security checks shall be conducted within (15) minutes of being relieved by the following shift. Security checks shall not exceed thirty (30) minutes between rounds. If incidents or unforeseen activities prevent you from making security checks within the thirty (30) minute time frame, you shall document the nature of the incident/activity in the post log and complete the security round as possible...

Specific Procedures for Cell Checks are:

1st and 2nd Shifts

- Make sure cells are in lock mode.
- Unlock the cell with your key to check the lock. Note: If the cell is open, pull the door shut and check the lock.
- Enter cell and inspect bars, windows, and screens in cell window, checking for breaks, cuts, damage, etc.
- Look for obvious contraband or rule violations upon entering/exiting the cell.
- Each assigned officer shall conduct at least 2 random cell shakedowns during each shift. As time permits, search Common Areas. Common Areas to be included but not limited to are; the day room, laundry room, activity, TV rooms, supply rooms, closets, walls, lights, accessible ceilings, showers, and etc. Yard #2 Officer will, during their unit security checks, provide a form which is for the purpose of logging your daily shakedowns.
- Ensure each cell is thoroughly shaken down at least once per quarter, and the shakedown is to be documented on the Unit Shakedown E-log and the Quarterly Shake down Log.

The #1 and #2 officers will work in unison to ensure that unit rules are enforced.

All cell doors must be secure, and windows will be unobstructed at all times.

The interior and exterior unit doors are to remain closed at all times-never propped open. The interior door will remain secured by the #1 Officer unless there is a mass movement in/out of the unit, e.g., chow, recreation, or release to work sites. The interior is to remain secured at all times, with the exception of staff/inmates entering the unit or staff/inmates exiting the unit. The Unit Officer releasing inmates from the unit shall remain at the door to ensure inmates are properly dressed, and the inmate has his ID clipped on his shirt or outerwear, coat, jacket, etc. Upon processing staff/inmates in or out of the unit, the interior door is to be secured prior to the officer leaving the door.

Unit Staff and Their Responsibilities

Unit Correction Officer

- This position is part of the Unit Team. The Correction Officer is under the direct supervision of the Unit Manager and is supported by the other members of the Unit Team.
- Executes duties as outlined in the unit plan and post orders.
- Completes all assigned security checks and maintains an effective level of communication with their assigned inmates.
- Supervises inmate workers in the unit and maintains necessary inventories of supplies and chemicals.
- Makes rounds throughout all assigned units in compliance with the post orders providing a physical and direct presence with the inmate population.
- Anticipates issues and incidents in advance and takes action to prevent those situations and advises unit team, so a comprehensive approach can be made to manage the unit and inmates.
- Serves as a member of the Unit Team that makes decisions regarding re-classification, job changes.
- Fills in for the other Unit Staff when necessary, commensurate with their level of training.
- May deliver programming and create productive activities for inmates.

STATEMENT OF FACTS

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the Parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either are necessary to understand the Arbitrator's decision.

Grievant worked as a Corrections Officer at Ross Correctional Institution. Employer hired Grievant on March 6, 2017. As a correction officer, Grievant is responsible for enforcing the institution's rules and regulations and providing a safe living and working environment to the inmates and staff. Grievant worked the first shift as a relief officer in Housing Unit 4A on April 4, 2020.

During the investigation for an unrelated matter, the Unit Manager became aware of a possible fight between Inmate Davis and Inmate Hamilton that occurred on April 4, 2020. After reviewing the cameras on 4A, Unit Manager Spencer believed that a fight did happen between the two inmates, and Grievant and Officer Ahart facilitated the fight with the assistance of Inmate Fisher. The Unit Manager authored his report on April 21, 2020.

The surveillance video begins at 6:00 am and depicts the following jointly stipulated facts:

- 10:00 am Officer Ahart, and Tanner are sitting at the Officer's desk.
- 10:01 Two Unknown Inmates exit cell 265. Inmate Davis remains in the cell.
- 10:01:57 Inmate Davis looks out of cell 265 briefly.
- 10:02:34 Inmate Davis is seen looking out the cell again.
- 10:02:54 Inmate Fisher enters the screen with what appears to be food.
- 10:03:02 Inmate Davis again looks out of the cell
- 10:04:24 Inmate Hamilton is seen at the sally port unit door.
- 10:04:46 Inmate Fisher places food on the table and walks towards the unit door, where he appears to be speaking to Inmate Hamilton through the door.
- 10:05:06 Inmate Hamilton enters the unit and stops at the Officer's desk. Both Officers Ahart and Tanner are at the desk.
- 10:05:20 Inmate Fisher walks to the upper range to cell 265.

10:05:50 Inmate Hamilton appears to be speaking to Officers Ahart and Tanner.

10:06:38 Case Manager Ervin opens her office door to sanitize the door knob.

10:06:56 Officer Tanner walks to Ms. Ervin's office.

10:07:09 Inmate Fisher returns to the Officer's Desk.

10:07:15 Ms. Ervin and Officer Tanner exit the office and walk towards C-section.

10:07:53 Inmate Davis peaks his head out of Cell 265, then goes back in leaving the door ajar.

10:08:08 Inmate Hamilton and Inmate Fisher are at the Officer's desk. Officer Ahart is at the desk.

10:08:17 Inmate Fisher and Hamilton begin walking to the upper range. Inmate Hamilton removes his hoodie. Inmate Hamilton enters cell 265. He closes the door behind him. The door indication light turns from red to green.

10:09 Inmate Fisher is seen pacing back and forth in front of the cell.

10:09:56 Movement consistent with a physical altercation is seen through the cell window door.

10:10 Inmate Fisher continues to pace back and forth on the top range, then stops and looks in the cell.

10:12 Inmate Fisher walks to C-Section.

10:12:42 Inmate Fisher emerges with Officer Tanner. Officer Tanner stops at the Officer's desk and accesses the control panel. Inmate Fisher walks to cell 265.

10:12:50 The door indication light turns from green to red.

10:13 Inmate Fisher enters cell 265.

10:13:35 Inmate Fisher and Hamilton exit cell 265. Inmate Hamilton appears to wipe his mouth.

10:13:50 Inmate Hamilton returns to cell 265 to retrieve his hoodie.

10:14 Inmate Fisher and Inmate Hamilton start to walk down to the exit. Inmate Hamilton puts his hoodie on with the hood over his head. Inmate Fisher appears to be carrying a dark color T-shirt.

10:14:18 Ms. Erin and Officer Ahart emerge from C-section; however, as both walk towards the exit, Officer Ahart appears to distract Ms. Ervin's attention away from the exit by gesturing in the opposite direction as if he was pointing to show her something on the wall to prevent her from seeing Inmate Hamilton exit the unit.

10:14:34 Officer Tanner looks toward Inmate Hamilton as he passes the desk.

10:14:41 Inmate Hamilton exits the unit.

10:15 Officers Ahart and Tanner and Ms. Ervin return to the Officer's Desk.

10:15:32 Ms. Ervin enters her office.

10:16:07 Inmate Fisher is seen entering cell 265 with a towel.

10:16:36 Inmate Davis exits cell 268 shirtless with a towel over his head. He walks across the upper range towards his assigned cell on the lower range.

10:16:57 Inmate Fisher exits cell 265 and closes the door. The door indication light turns green.

10:17:08 Inmate Davis enters his assigned cell on the lower range.

10:19 Inmate Fisher enters Inmate Davis' cell.

10:19:38 Inmate Fisher exits inmate Davis' cell.

10:30:40 Inmate Franklin is seen approaching Cell 265. He appears to call down to the Officers because the door is locked. The door indication is green.

10:32 Officers Tanner and Ahart approach cell 265, unlock the door manually and look in.

10:32:25 Inmate Franklin enters Cell 265.

10:32:32 Officer Tanner and Ahart walk away from the cell.

10:33 Inmate Franklin appears to be cleaning the sink and toilet.

10:34 Inmate Franklin exits cell 265.

Upon determining that a fight occurred, the Warden directed that Inmates Davis and Hamilton be placed in restrictive housing and checked by medical. On April 21, 2020, Officer Skaggs escorted Inmate Davis to medical. Inmate Davis demanded to speak to STG Coordinator Graves and stated that the STG Coordinator Graves was aware of the fight. Officer Skaggs then authors an incident report regarding the statements made by Inmate Davis. The Warden learned of the allegations against STG Coordinator Graves on April 29, 2020. He then reassigned the investigation to an external State Trooper and the Chief Inspector's Office due to a conflict of interest within the institution; STG Coordinator Graves, Officer DeBord, and the OSP Officer work closely together in the same office.

The Assistant Chief Inspector submitted his investigative report to the Warden on October 15, 2020. His report describes what each person stated in their respective interviews and the inferences drawn. The Chief

Inspector's Office concluded that "Officer Ahart allowed the fight to happen, and Officer Tanner had full knowledge of what was transpiring. A polygraph test conducted on and passed by Inmate Hamilton confirmed the allegations to be true that Officer Ahart allowed the fight to occur. Lastly, there was no definitive evidence to suggest Eric Graves authorized the fight between Inmate Hamilton and Inmate Davis. Based on the conclusions outlined in this investigation report, Officer Ahart and Tanner did violate the employee standard of conduct. Therefore further action is recommended." As a result of the investigation of the Ohio State Highway Patrol, the case was submitted to the Chillicothe Law Director's office for review.

Inmate Davis' mom reported the incident to Channel 10 News and facilitated a three-way call with herself, her son, and the reporter to discuss the incident. The incident was published in a somewhat inflammatory manner on July 2, 2020; it was dubbed a Fight Club. The Ohio State Highway Patrol and the Chief Inspector's Office found no evidence of inmates being forced to fight and officers taking bets on the alleged fights. The overwhelming evidence at the arbitration established that the fight occurred to resolve gang-related issues to avoid a more significant incident between gang members.

On January 28, 2021, Employer issued a Removal Letter for the incident which occurred on April 4, 2020, which narrative read as follows:

"On April 4, 2020, you permitted an inmate enter the housing unit (4A) where you were working who did not live there. The Inmate in question spoke directly to you and you allowed him to enter the range and go into a cell, unsupervised and fight another inmate. When you became aware of the situation, you failed to take appropriate action. You failed to notify a shift supervisor or report the incident as required. You failed to seek medical assistance for the injured inmates or write a conduct report against the Inmate involved in the fight. Your actions or failure to take appropriate action was clearly deliberate and jeopardize the safety and security of the institution and wellbeing of the offenders. You were served with a summons

in lieu of arrest and charged with a misdemeanor of the second degree for Dereliction of Duty by the Ross County Municipal Court.”

Employer charged Grievant with violating the Employees Code of Conduct, Rule 7, 8, 38, 39, and 50. At the time of removal, Grievant had no active discipline.

On January 28, 2021, Grievant appealed the disciplinary action and denied the allegations. The Grievant states that:

"Through the investigation there was information that came out that another employee at the institution might've had something to do with the setup of the altercation. Officer Tanner is being targeted as the fall guy in this to try and cover up another employee's actions. The discipline is excessive."

The grievance requested reinstatement and full back pay and benefits, and the Employer denied the same. The Parties advanced the grievance in accordance with the provisions of their collective bargaining agreement, and the Parties stipulated that the grievance is properly before this Arbitrator.

POSITION OF THE PARTIES

POSITION OF EMPLOYER

Employer contends that the evidence established that Grievant and his coworker conspired with an inmate to help organize and facilitate a fight between two rival gang leaders. Employer argues through its summary of the audio and video evidence and the witness testimony that Employer has satisfied its burden of proof regarding the Grievant's misconduct. Employer concludes there is just cause for discipline.

Employer also contends that the evidence established that Grievant permitted Inmate Fisher, a well-known gang leader of Gangster Disciples and drug dealer at the Ross Correctional Institution, to conduct illegal gang activities even while on formal sanctions. Employer maintains that Grievant committed a "cardinal sin" when he fostered an environment that permitted unlawful acts and gang activity. Employer argues that Grievant's actions betray and threaten the institution's security. Employer explains that when a correction officer crosses the line as Grievant has, it jeopardizes the lives and well-being of employees and offenders, and his actions cannot be accepted or tolerated. Employer asserts that Grievant's actions create a severe security breach and threaten the safety and security of the institution, staff, and offenders while placing significant liability on the Department. Employer concludes there is just cause for termination.

Lastly, it is the position of the Employer that he has met his burden of proof in accordance with the Just Cause Standard. Employer requests that this Arbitrator deny the grievance in its entirety.

POSITION OF UNION

Union contends that Employer failed to meet its burden of proof to establish just cause for discipline. Union argues that Grievant did not arrange or facilitate a fight between the two inmates. Union argues that any violations of established rules were modified by common practice in the workplace. Union asserts there was not a fair investigation of the incident on April 4, 2020. Union also asserts disparate treatment in that other individuals were not disciplined. Union maintains there was no just cause to discipline.

Union contends that contrary to the assertion of the Employer that Grievant cleared out the cell and prepped it for the fight, Grievant testified that he was conducting an area search, an area shakedown, of the cell 265. Union argues that the Grievant was inside the room for approximately one minute and left it unlocked so the porter could clean the room as the inmate had moved out. Union also argues that the testimony of the Unit manager that a "shakedown is a daily requirement of unit correctional officers" corroborates Grievant's testimony. Union maintains that the Employer's assertion is without merit.

Union also contends that the assertion of the Employer that Inmate Hamilton was out of place is without merit. Union points to the investigative audio of Officers Hay and Bonham and the testimony of Unit Manager Spencer and Case Manager Ervin that the normal practice for porters to go back and forth between the units because the units were sharing supplies. Union asserts that neither Grievant nor Officer Ahart requested Inmate Hamilton to come to the Unit. Union argues that Officer Bonham and Hayes's audio statement establishes that Inmate Hamilton asked to go to Unit 4A to obtain supplies. Union maintains that Officers Bonham, Hay, Grievant, and Ahart consistently testified or provided an audio statement that the protocol of inmates going back and forth between the units is typical.

Union also contends that Grievant did not know that Hamilton was in Cell 265. Union argues that the evidence established that Inmate Fisher requested him to open the door to Cell 265 to clean. Union argues that the evidence showed that Grievant escorted Case Manager Ervin to C-Section while Inmate Hamilton was at the Officer's desk. Upon his return, Grievant was unaware that Hamilton was still in the Unit. Union maintains that Grievant did not open the door to Cell 265 to allow Hamilton to exit the cell.

Further, Union contends that Employer theorizes that Officer Ahart and Grievant attempted to distract Case Manager Ervin so that the prearranged fight could occur. Union argues that the testimony of Case Manager Ervin contradicts the theory of the Employer. Union asserts that the testimony of Case Manager Ervin establishes that she was already headed to the supply

closet when Grievant requested supplies. Union also states that Case Manager Ervin is responsible for the work orders to fix the ice machine and explains that is the stated reason why Officer Ahart directed her attention to the ice machine and not to distract her. Union also argues that Officer Ahart and Grievant admitted to going into Cell 265 while making rounds to see if Inmate Franklin cleaned the cell. Union maintains that there was no prearranged fight.

In addition, Union contends that Grievant and Officer Ahart had nothing to gain from the inmates' altercation. Union points to the statements indicating Inmate Fisher admits that he orchestrated the fight through SGT Coordinator Graves to avoid a more significant gang situation. The Union asserts that the meeting to set up the fight occurred in STG Coordinator Grave's office on Tuesday, and Tuesdays are the days off for Grievant and Officer Tanner. The Union points to the audio statement of the Unit Manager that Grievant and Officer Ahart did not have the "power to arrange something like this." The Union points out that the fight went undetected for seventeen (17) days. Union argues that it was intimidation to have SGT Coordinator Graves, named as a suspect in this investigation, attend the investigation of the Grievant regarding the incident. Union reminds this Arbitrator that Employer did not charge STG Coordinator Graves.

Lastly, it is the position of the Union that the grievance should be sustained in its entirety. Union contends that Grievant has no active discipline on his record for his three and a half (3.5) years of service. Union requested that this Arbitrator reinstate Grievant to his position as a correction officer with Ross Correctional Facility, payment for all lost wages, including overtime opportunities and missed holidays, all leave balances, and seniority to last date of hire that would have been accrued from the date of removal be restored, payment for all medical, dental, and vision expenses that Grievant and their family had incurred since their removal, until they are again covered by insurance, the shift, assignment, and days off that they held when they were removed be restored, payment of all retirement contributions, reimburse unpaid union dues, and make them whole and award any other remedies deemed appropriate.

DISCUSSION

It is well established in arbitration proceedings that the Employer has the burden to prove that the Grievant was guilty of the charged misconduct and that the level of discipline is appropriate for the infraction. In the present case, Employer terminated Grievant for his conduct on April 4, 2020. The alleged misconduct was that Grievant arranged and facilitated a fight between two gang leaders. Employer charged Grievant with violation of the following Employer's Standards of Employee Conduct Rules:

- Rule 7 Failure to follow post orders, administrative regulations, policies, or written or verbal directives,
- Rule 8 Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment,
- 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 supervision of the Department, or a member of the general public,
- Rule 39 Any act that would bring discredit to the Employer,
- Rule 50 Any violation of 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.

Generally, absent a demonstration of a clear nexus to show a potential injury on the Grievant's employment record, the preponderance of the evidence is applied toward progressive discipline cases. In this instant, the clear and convincing standard is applied when the conduct giving rise to the termination relates to a criminal offense.

On April 4, 2020, Grievant was assigned the relief position in Housing Unit 4A. The other officer on duty was the regular duty officer, Ahart, who has previously worked with Grievant. The post order states that Unit #1 and

#2 officers will work in unison to ensure that unit rules are enforced. Thus, each officer is responsible for catching any lapse in performance to ensure that the institutional rules and procedures are followed, and they share the burden of liability for the results of such lapse.

From a careful review of this record, the camera depicts minute by minute actions of Inmate Fisher, a resident of 4A. Grievant and Officer Ahart allowed Inmate Fisher inappropriate freedom to move about within the unit during their shift. This inappropriate freedom of movement is clearly in noncompliance with the sanctions imposed by the Chairman of The Rules of Infraction Board on March 10, 2022. At that time, The Infraction Board found Inmate Fisher guilty of violating Rule 39, Unauthorized Possession of a Controlled Substance. It recommended sanctions of six (6) months package, commissary, visiting, J-pay, and phone restrictions, loss of all audio/video equipment, which was to be stored in the central vault, and adjustment to pay category C, which is \$9.00 per day, and sixty (60) days dayroom restrictions, which were approved.

The fact that Case Manager Ervin obtained an informal modification of those sanctions from Unit Manager Spencer for Inmate Fisher to act as her program aide is irrelevant as the evidence proved that there were no duties for an aide to perform on a Saturday, April 4, 2020. At that time, Case Manager Ervin was preparing for a unit inspection. The evidence also established that while there is a list of approved porters, it was a common practice of the staff to use inmates as porters with whom they were familiar but outside of the Institution's list of porters. Officer Ahart's testimony to such practice was corroborated by Case Manager Ervin and further substantiated by the audio statement of Officer May, who was utilizing Inmate Hamilton in that role at that time. Such practice does not condone the use of Inmate Fisher in that role. The sanctions on Inmate Fisher should have prevented his services as a porter.

The video also depicts Inmate Fisher accessing the J-Pay Program. J-Pay is a program where inmates can communicate with family members, i.e., by email. His sanction order read no J-Pay for six months. Grievant and Officer Ahart should not have allowed Inmate Fisher free access to roam the unit and escort other inmates on inmate business. Specifically, the video indicates the following chain of events that culminate in the fight:

- 10:04:46 Inmate Fisher places food on the table and walks towards the unit door, where he appears to be speaking to Inmate Hamilton through the door.
- 10:08:08 Inmate Hamilton and Inmate Fisher are at the officer's desk. Officer Ahart is at the desk.
- 10:08:17 Inmate Fisher and Hamilton begin walking to the upper range. Inmate Hamilton removes his hoodie. Inmate Hamilton enters cell 268. He closes the door behind him. The door indication light turns from red to green.
- 10:09 Inmate Fisher is seen pacing back and forth in front of the cell.
- 10:09:56 Movement consistent with a physical altercations seen through the cell window door.
- 10:10 Inmate Fisher continues to pace back and forth on the top range, then stops and looks in the cell.
- 10:12 Inmate Fisher walks to C-Section.
- 10:12:42 Inmate Fisher emerges with Officer Tanner. Officer Tanner stops at the officer's desk and accesses the control panel. Inmate Fisher walks to cell 268.
- 10:12:50 The door indication light turns from green to red.
- 10:13 Inmate Fisher enters cell 268.
- 10:13:35 Inmate Fisher and Hamilton exit cell 268. Inmate Hamilton appears to wipe his mouth.
- 10:14 Inmate Fisher and Inmate Hamilton start to walk down to the exit. Inmate Hamilton puts his hoodie on with the hood over his head. Inmate Fisher appears to wipe his mouth.

The failure of Grievant and Officer Ahart to enforce those sanctions against Inmate Fisher constitutes a violation of Rules 7, 8, and 38.

Inmate Davis, a participant in the fight, resides in Unit 4A, and Inmate Hamilton, a participant in the fight, resides in Unit 4B. The video indicates at

9:09 am Inmates Davis and Hamilton are speaking at the door of Unit 4A. Inmate Davis returns to the Officer's Desks and talks to Grievant. The video is not equipped with audio, but Grievant's subsequent actions indicate that the conversation was about the upcoming fight, otherwise known as the "inmate business." Grievant is observed leaving the desk, walking to the upper range, and opening Cell 265 at 9:10:55 am. Cell 265 is vacant. A vacant cell is kept locked out from the control panel to prevent the cell from being accidentally opened. Grievant opens the cell with his key and shakedowned the cell. Although there is conflicting testimony about shaking down a vacant cell, there is clear testimony that the cell door shall remain locked when unattended. The video indicates that Grievant exits the cell shutting the door, which automatically locks. He then returned to open the door with his key and knowingly left the door ajar at 9:13:03 am. After that, the video depicts inmates freely entering Cell 265 at the following designated times:

- 9:19:13 An unidentified Inmate enter cell to 265 and can be seen arranging furniture.
- 9:21:48 Two different offenders enter cell 265 are moving furniture and fixtures around.
- 9:27:29 A third offender enters cell 265.

None of these events would have occurred had Grievant and Officer Ahart complied with the rule whose purpose was to prevent such activity. There is a security risk in having inmates in vacant cells.

In addition, at 9:49:16 am, Grievant can be seen on the 2nd range conducting a range check and walking past Cell 265. The red light on the door indicates that it is open, and he does not close it. Post orders direct correction officers to "make sure cells are in lock mode unlock cell with your key to check the lock, NOTE: if a cell is open, pull the door shut and check the lock."

Post Orders also mandate that the correction officer ensure each cell is thoroughly shaken down, which Grievant did, but shakedown must be documented and logged in the system. Grievant did not log the shakedown into the system or direct Officer Ahart to log the event in violation of the post orders.

Officer Ahart, who was at the Officer's desk and should have seen the light indicator that Cell door 265 was unlocked on the control panel, advised Grievant that Cell door 265 was unlocked and did not. Officer Ahart explained that the door was left open because he had instructed the porter, Inmate Franklin, to clean the cell. The video, however, does not depict Inmate Franklin entering the cell until 10:32:25 am which corroborates Officer Ahart's further testimony that he directed Inmate Franklin to clean the cell when he returned from C-Section. The testimony established that the vacant cell should remain locked at all times to prevent a security or safety incident, specifically such as that which occurred. Employer established that Grievant and Officer Ahart violated Rule 7, 8, and 39.

The video indicates that Hamilton, one of the fighters, entered Unit 4A at 10:04 am. Unit lockdown/Dayroom Closure is at 10:00 am. All inmates, except for porters and maybe other yard movements, should be in their cells during this period. Although Inmate Hamilton left his cell under the pretense of acquiring a squeegee, Grievant and Officer Ahart both admitted that the stated purpose of his visit as expressed to them, was inmate business. Inmate Hamilton met no other inmates other than Inmate Davis and Inmate Fisher, both of whom should also have been in their cells for dayroom closure. Grievant and Officer Ahart failed to comply with the dayroom closure procedure to facilitate this inmate's business in violation of Rule 7, 8, and 39.

Grievant and Case Manager Ervin walk past Inmate Hamilton at the Officer's Desk on their way to the supply room in C-section. Officer Ahart

remained at the desk. At 10:08:16 am, Inmate Fisher escorted Inmate Hamilton to the second range to Cell 265. Officer Ahart then leaves his desk to go back to the supply room in C-Section at 10:04:24 am. Officer Ahart, who knew there were three gang leaders out of place and in a vacant cell on the second range, knowingly left the Officer's desk to go to the supply room. It is undisputed that an individual cannot hear or see any activity in the unit while in the supply room and the unit staff for 4A was all present in the supply room. Grievant attempts to exculpate himself, stating when he left to go with Case Manager Ervin to the supply room Inmate Hamilton was at the Officer's Desk. The Arbitrator credits the testimony of Case Manager Ervin when she states that the officers were whispering. When she inquired about their conversation, Officer Ahart responded that it was nothing she needed to know. Grievant reveals in his audio statement with OSP investigation that when Inmate Davis and Inmate Hamilton requested to go to the Captain's Office a day or so later, Grievant and Officer Ahart told them they permitted them to talk on April 4th. Further, the video depicts:

- 10:12:16 Inmate Fisher proceeds to C-Section.
- 10:12:43 Officer Tanner can be seen reappearing on the Unit with Inmate Fisher and going to the Control Panel at the Officer's Desk.
- 10:12:51 Officer Tanner can be seen at the Control Panel unlocking and opening cell 265 as indicated by the light on the door changing from green to red.
- 10:13:12 Inmate Fisher can be seen entering cell 265.
- 10:14:07 Inmate Fisher and Hamilton can be seen exiting cell 265 and going downstairs. Inmate Fisher goes to the supply and announces that he needs a cell opened.

Grievant knew that Inmates Davis and Hamilton were in Cell 265. Moreover, Grievant observed Inmate Hamilton at the Officer's Desk wearing a hoodie and wrapped hand when he first entered the unit. After the fight, Grievant observed Inmate Hamilton descending the stairwell to leave Unit 4A. Grievant did not make any inquiries of Inmate Hamilton, and simply allowed

him to exit. Post orders require that the "unit officer releasing inmates from the unit shall remain at the door to ensure inmates are properly dressed, and the inmate has his ID clipped on his shirt or outerwear, i.e. coat, jacket, etc."

The video depicts Inmate Hamilton wiping his face twice after exiting the cell. According to the audio statement of Officer Bonham, he observed a knot on Inmate Hamilton's face on that date and jokingly questioned if he was in a fight; Inmate Hamilton replied no, it happened in rec. However, Inmate Franklin, the porter, cleaned the cell after the fight observing blood in the sink. According to the audio statement of Inmate Franklin, both Grievant and Officer Ahart observed the blood in the sink, which they denied. Had Grievant complied with the post orders, he would have observed these injuries to Inmate Hamilton, as noted above. The incident then should have been reported and the inmate taken to medical.

Grievant is responsible for the security checks on Range 2, and Officer Ahart is responsible for security checks on range one. Unit Manager reviewed the video against the log book at the hearing. The evidence established that the log book was falsified. More importantly, Dayroom closure occurred at 10:00 am, but Inmate Davis was not located in his cell on range one but was captured on video entering Cell 265 at 9:56:13. It is noted that the cell door remained opened and unsecured.

Later, the video depicts:

- 10:16:35 Inmate Davis exits cell 265 with no shirt on and a white towel covering his head.
- 10:16:58 Inmate Fisher exits cell 265 and shuts the door. The light indicator turns green.
- 10:17:00 Inmate Davis can be seen going down the stairs on his way back to his cell, passing right in front of the Officer's Desk, where both Officers Tanner and Ahart can be seen.

Inmate Hamilton left Unit 4A at 10:14:25 am. If there had been only verbal discussions between these inmates, one would expect them to leave simultaneously and dressed in the same manner as when they entered. They did not. Neither officer makes any inquiry of Inmate Davis, who is out of place by rule. The officers did not check on the medical status of Inmate Davis, who later complained of a mild concussion, bruises, black eyes, and vomiting. Case Manager Ervin confirmed that Inmate Davis wore sunglasses on the unit for several days thereafter. In his audio statement, Inmate Franklin confirmed the swollen eyes of Inmate Davis.

Officer Ahart testified that upon returning to the Officer's Desk after leaving C-Section, he directed Inmate Franklin to clean Cell 265. He further testified that he and Grievant went to Cell 265 to make sure that the cell was cleaned. The audio statement of Inmate Franklin corroborates that both officers came to observe the cell. Whether they saw the blood in the sink is disputed. The video depicts that:

- 10:30:40 Inmate Franklin is seen approaching Cell 265. He appears to call down to the Officers because the door is locked. The door indication is green.
- 10:32 Officers Tanner and Ahart approach cell 265, unlock the door manually and look in.
- 10:32:25 Inmate Franklin enters Cell 265.
- 10:32:32 Officer Tanner and Ahart walk away from the cell.
- 10:33 Inmate Franklin appears to be cleaning the sink and toilet.
- 10:34 Inmate Franklin exits cell 265.
- 12:40 The cell door is later placed back on lock-out status prior to the release of offenders for the lunchtime meal, as evidenced by the light indicator – staying green and the door not opening upon the group unlock.¹

There are a lot of pieces in play culminating to this fight and its aftermath.

¹ The video depicts, and Unit Manager Spencer confirmed that at 6:28 am, there was a group release for a mass movement for morning breakfast. Cell 265 was locked out as indicated by the light and did not open with the other cells.

Union skillfully puts forth an alternate theory of events based on customs, practices, and assertions of coincidences but ultimately fails to persuade this Arbitrator of these defenses. This Arbitrator echoes the findings of the Chief Inspector's Office that there was insufficient evidence that SGT Coordinator Graves authorized this fight at the arbitration hearing. Grievant denies knowing anything about the fight; he was simply following the directives of the regular duty officer and performing his responsibilities on this relief work assignment. Grievant cannot blindly follow orders when his post orders require him to act in unison with the other unit correction officer. Officer Ahart testified that he had no contact with SGT Coordinator Graves about a fight. Notwithstanding, there was no evidence that these officers prearranged this fight prior to April 4, 2020. The quantum of proof on the Employer is not beyond a reasonable doubt to these defenses but it is clear and convincing where the truth of the allegation is highly probable. This Arbitrator finds that a fight occurred, and Grievant and Officer Ahart facilitated the fight on April 4, 2022.

The Employer has convinced this Arbitrator of the Grievant's misconduct. The weight of all the evidence, testimony, and video, regarding the incident clearly establishes the rule violations of Rule 7, 8, 38, 39, and 50. It is apparent that the Grievant's failures on the day of April 4, 2020, were a significant dereliction of duty that violated the major rules set out in the removal letter.

The Union argues that the Employer did not conduct a fair investigation. The elements of a fair and objective investigation require the Department to make an effort to discover whether or not a violation of rule, policy, or directive did occur before administering discipline. The Warden was unaware of the alleged involvement of SGT Coordinator Graves until the incident report of Officer Skaggs was given to him on April 29, 2020. When the Warden learned of the suspected involvement of Graves, the internal

investigation ceased, and the matter was turned over to external investigation with the Ohio State Highway Patrol and the Chief Inspector's Office to avoid any impropriety and conflict of interest. Further, Grievant received notice of the interview and, when interviewed, was represented by his union representative. At this point, any irregularity in the internal investigation is de minimus.

The Employer terminated Grievant and Officer Ahart. An employer has significant discretion to decide what measure of discipline should be imposed against an employee who fails in the most fundamental of their duties, so long as it meets all of its labor relations responsibilities. Exhibit 9 indicates that Grievant acknowledged receipt of the Employees Code of Conduct on September 6, 2019. Grievant was employed for approximately 3.5 years at the time of removal and had no discipline on his record. Due to the serious nature of this misconduct, the Employer has complied with its disciplinary grid and performance track policy when assessing the termination. There were no performance evaluations introduced.

It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner. All employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment. Here, Grievant and Officer Ahart acted with a clear intent to facilitate this fight. Each of their misconducts could not have occurred without the acquiesce and consent of the other, as each was required to address the misdeed of the other per the post order. Each of their actions complemented the misdeed of the other such as the penalty for each is the same.

Other staff may have been negligent in performing their duties, but the evidence shows that their negligence was not purposeful in facilitating the fight. The actions of the Grievant and Officer Ahart were clearly

purposeful to that end. In the audio statement of Officer May, Officer May admitted that he saw the knot on Inmate Hamilton's head, did not report it, and did not seek medical attention for him. Case Manager Ervin acknowledged that she saw Inmate Davis wearing sunglasses for several days after the incident, but she failed to report it formally. In addition, in the audio statement of Officer May, Officer May admits that he lost track of Inmate Hamilton's whereabouts once he permitted Inmate Hamilton to obtain the squeegee from Unit A. Inmate Hamilton slipped back into Unit B when the trash porters were cleaning the rugs. The door is left ajar to deep clean the large area rugs outdoors. Such negligence does not rise to the same level as the malice of intentionally facilitating a fight. The misconduct of these officers is not similar to and not of the same culpability of Grievant and Officer Ahart. Further, their negligence did not culminate in facilitating or permitting one inmate to physically injure another.

Inmates are entitled to a safe living space as they serve their penance, and part of the responsibility of the Department of Correction is to strive to provide that space. A correction officer must prevent rather than facilitate a fight. Further, enabling a bare-knuckles fight between gang leaders to avoid mass riots or gang wars is more of a capitulation to the violence rather than a prevention of it. His responsibility as a correction officer is "to anticipate issues and incidents in advance and take action to prevent those situations and advises unit team, so a comprehensive approach can be made to manage the unit and inmates." A breach of this fundamental responsibility of a correction officer to facilitate an inmate fight is not excusable. Such actions undermine the trust of his Employer, coworkers who are now placed at risk, and the inmates' confidence in fair treatment. There can be no doubt that the misconduct of the Grievant is a serious matter. This Arbitrator finds that the Employer had just cause to terminate the Grievant.

CONCLUSION AND AWARD

The Arbitrator has considered the testimony and evidence presented during the hearings, and the positions and arguments presented in the post submissions to reach a decision addressing the issue before the Arbitrator. This Arbitrator concludes that the Employer had just cause to discipline the Grievant and did so in accordance with the collective bargaining agreement. The Employer's decision to discharge the Grievant was within its managerial authority and commensurate with the offense. Accordingly, the grievance is denied.

June 28, 2022

/s/ *Meeta A. Bass*
Arbitrator Meeta A. Bass
Reynoldsburg, Ohio

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing Opinion and Award was served upon the following individuals via electronic mail this 28th day of June 2022:

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