

Rec'd 1/23/2024
#1227

IN THE MATTER OF ARBITRATION)

BETWEEN)

OHIO DEPARTMENT OF)
REHABILITATION AND)
CORRECTIONS)

AND)

OCSEA AFSCME LOCAL 11, AFL-CIO)

GRIEVANCE ID: Joshua Hickman

Grievance No. Discharge

Grievance #DRC-2023-01424-03

BEFORE: ROBERT G. STEIN, NAA

ARBITRATOR

FOR THE UNION:

James Beverly, Jr. Staff Representative
OCSEA AFSCME LOCAL 11
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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, the Ohio Department of Rehabilitation and Correction (“Employer” “DRC”), and The Ohio Civil Service Employees Association, AFSCME Local 11 (“Union” or “OCSEA”). That Agreement was effective in February of 2021 and included the conduct which is the subject of this grievance. The Department of Rehabilitation and Corrections (“DRC”) in this matter. The parties mutually selected Robert G. Stein to arbitrate this matter impartially, pursuant to the Agreement. A hearing on this matter was conducted on November 6, 2023, and was held virtually. The parties mutually agreed to these 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 was not recorded via a written transcript and was closed upon the parties’ individual submissions of post-hearing briefs.

No procedural or jurisdictional arbitrability issues have been raised, and the parties have stipulated that the instant matter is properly before the arbitrator to determine the merits.

Joint Stipulations

Issue: Was the Grievant removed with Just Cause, and if not, what shall the remedy be?

Classification: Correction Officer

Length of service: --- years (DOH=11/26/2018 DOR=08/19/2019)

Termination Date: 5/25/2023

Discipline: No discipline at time of removal

Training:

(The Grievant was current with his training at the time of the incident)

Grievance filed: 5/30/2023.

VIOLATIONS OF RULES/STANDARDS OF EMPLOYEE CONDUCT FOUND BY THE EMPLOYER

(NUMBERED BY ARBITRATOR FOR PURPOSES OF ORGANIZATION ONLY)

The Grievant was removed on May 25, 2023, for violating several rules of the Standards of Employee Conduct (SOEC). The Grievant was found to have:

Rule 7. Failure to follow post orders, administrative regulations, policies, or written or verbal directives.

Rule 11. Inattention to duty

Rule 12 B. Uncooperative behavior and discourteous treatment of the public, volunteers, contractors, any individual under the supervision of the Department, or fellow employees

Rule 13. Improper conduct or acts of discrimination or harassment on the basis of race, color, sex, age, religion, national origin, disability, sexual orientation, gender identity or military status.

Rule 18. Threatening, intimidating, or coercing the public, volunteers, any individual under the supervision of the Department, or fellow employees

Rule 19. Striking, fighting or otherwise engaging in a physical altercation with the public, volunteers, contractors, or fellow employees

Rule 20A. Involvement in horseplay: with the public, volunteers, contractors, or fellow employees

(Pre-disciplinary Meeting Notice, p. 1, and 2 of 6 in the Employer Binder)

I. RELEVANT CONTRACT LANGUAGE

21.04, 21.06

(p. 1 in the Employer Binder)

BACKGROUND

The Grievant, in this matter, is Joshua Hickman (“Hickman” or “Grievant”); he was hired as a Corrections Officer with DRC on November 26, 2018, and was terminated from his position on May 25,

2023. At the time of his removal, Hickman had some 4+ years of service with the State of Ohio. According to the Employer, the Grievant was removed for violating the Standards of Employee Conduct (SOEC) Rules 7, 11, 12 (B), 13, 18, 19, 20(A). cited in greater detail above. Herein, the Employer's investigation shall be identified as "SI." The charges are related to the events of October 6, 2022, while Hickman was working 2nd shift (2 pm to 10 pm) along with Correction Officer Carol Braun ("Braun") in Control Center 2 ("Control 2" or "CC2"), of the Marion Correctional Institution ("MCI") in Marion, Ohio. The evidence indicates that Braun and Hickman were in CC 2 from 1:45 pm to 9:45 pm. One Correctional Officer normally staffed CC 2, but on October 6, 2022, Braun was to train/familiarize him with the operation of this post and its duties. Their staffing of the post involved Hickman and Braun sitting next to each other in this relatively small and isolated space. CC2 is a secure post, requiring employees to pass through two sallyports to gain entry. CC 2, where the events of October 6, 2022, occurred, is located at Marion Correctional Institution at the intersection of the south hallway and the institution's main east/west hallway. (SI 26) Braun, when interviewed, stated that verbal profanity, which was also labeled "vulgar language," was what occurred prior to and around what Braun identified as three (3) separate encounters of a physical nature. (SI Exec Summary, 22 SI 86, 100) For the record, Hickman is a white male, 5' 10 inches tall and weighing approximately 145 lbs. and was age 25 at the time of the incident. Braun, age 22 at the time of the incident, is a white female, 4', 11 inches tall and weighing about 120 lbs. (SI 26)

1st Encounter (Initial). During the shift and prior to the incidents leading to the Employer's investigation ("SI") findings, and subsequent action to terminate the Grievant, Hickman and Braun engaged in what Braun stated were three physical or physically related encounters. Hickman identified only two encounters. (SI 100) From the testimony regarding the first encounter, Braun and Hickman were physically "wrestling" with one another, which resulted in Braun being knocked off her feet, possibly due to a leg sweep technique employed by Hickman where Braun ended up lying on her back in the center of the Control Room floor. The end of this physical takedown was witnessed by Lt. Hana Mehok, who approached the Control Room window ("Mehok"). (SI 41, 57) According to the SI Braun stated that you can get bored working in the control room. (SI 42) Hickman and Braun both admitted that while on shift, they joked

around, making verbal remarks laced with profanity and unprofessional language. Braun characterized it as “roughhousing, horseplay and joking and Hickman characterized it as “messing around and having fun” (SI 13, 104). Neither Hickman nor Braun, after the encounter was over indicated to Mehok (who partially witnessed the encounter) that the situation was not what it looked like; there was any problem or concern over the physical engagement. (SI 41, 42) Braun characterized it as “roughhousing, horseplay and joking and Hickman characterized it as “messing around and having fun” (SI 13, 104). Mehok then went about her duties, making no further inquiry or acting regarding this matter. (SI 22) Beyond the brief observation made by Mehok, there were no witnesses other than Braun and Hickman to this encounter or the subsequent encounters. that occurred following it during and after the shift ended.

Subsequent Encounter(s) According to the Employer, Hickman, between the hours of 8:30 pm and 9:00 pm, some 6 1/2 to 7 hours into their shift targeted Braun in a “physically aggressive manner” (Employer Opening, p. 2) That alleged aggression was preceded by physical touching and verbal exchanges between Hickman and Braun at or around the time of the first encounter at 6 pm and prior to the subsequent physical encounters starting after 8:30 pm. (SI 41) For example, Braun was making an announcement over the public address system, which, according to her, made her nervous, and Hickman poked Braun once in an attempt to irritate her, which, according to Braun, did not concern her. (SI 34, 40, 46) Some time had passed, and according to Braun, Hickman became quiet. Braun also stated during the investigation that she poked Hickman with both index fingers multiple times in an alternating motion after she stated he became quiet and “anti-social.” (SI 45) At one point Braun asked Hickman “did your social battery run out.” (SI 40)

Following these exchanges and according to the Employer the following sequence of events occurred:

8:30 pm: The Grievant dragged Officer Braun around in her wheeled chair to the space in CC2 labeled N on the diagram located on Joint Exhibit, page 31. Once in this area, the Grievant forced his victim to the ground. He straddled her, pinning her to the floor. His victim told him repeatedly, “**NO**,” and pleaded with him to stop. She punched and pushed him to get him off of her. The Grievant told his victim he was stronger than her, but eventually let her up. The Grievant slapped his victim on the buttocks as she got up from the floor. She returned to her

workstation (labeled F on Joint Exhibit, p. 31) and attempted to continue her duties. This incident occurred out of the view of the window labeled as C on Joint Exhibit, page 31.

8:50 pm: The Grievant again dragged his victim around CC2 by the pocket of her hooded sweatshirt as she remained seated in her wheeled chair. He pulled her around the corner to the bathroom (labeled G on Joint Exhibit, p. 31). He pushed his victim into the bathroom. She attempted to slam the door closed to keep the Grievant away from her as he tried to keep it open. She was able to escape the confines of the bathroom and retreated to her workstation.

9:00 pm: The Grievant entered the bathroom and stayed there for the remainder of the shift.

9:15 pm: Officer Braun sent texts to off duty Correction Officer Brittany Thew indicating the Grievant was “acting weird,” was “trying to get me out of the view of people and do something.” (Joint Exhibit, pp. 81-83.)

9:40 pm: Officer Braun and the Grievant were relieved by 3rd shift officers and went to the entry building to wait with other officers to clock out.

10:00 pm: Officer Braun clocked out and left the institution.

10:10 pm: Officer Braun encountered Officer Caleb Steinmetz at a local gas station and relayed the abovementioned events. He urged her to return to the institution and report the events to supervisors. Officer Steinmetz’s incident report indicates he encountered Officer Braun at approximately 10:10 pm. (Joint Exhibit, p. 123.)

10:30 pm: Officer Braun returned to the institution and reported the events to Captain Kenneth Hoy. Her incident report was submitted at 11:04 pm on October 6, 2022. (Joint Exhibit, p. 122.) Captain Hoy’s incident report indicates Officers Braun and Steinmetz returned to the institution at approximately 10:30 pm. (Joint Exhibit, p. 126.)

According to the investigation of the consensual physical engagement Braun did not know what led up to it but did comment on the joking. The investigation states in part,

She wrote in her message to Brittnay Thew at the time of the second physical engagement that she had been “fucking with Hickman” like she has with Kinney and James which she defined as how she engages in rough housing, horseplay and joking. ...she acknowledged it was verbal comments that she described as “just running your mouth and stuff like that.” She stated this would have included profanity and what she described as “vulgar language” but didn’t really elaborate on any specifics. (SI 86, 87)

After the initial consensual physical encounter that took place at around 6:30 pm, 4.5 hours after the shift began, two additional physically related events occurred, the description of which vary from Braun’s perspective and that of the Grievant. Braun said they started at approximately 8:30 pm and occurred approximately 10 minutes apart. (SI 33) Braun described the encounters and Hickman’s and her opinion of his demeanor. She said he was no longer as playful as she

experienced in the initial incident and hours of the shift. He became silent and but as “forceful.” (SI 34) And, she said Hickman started to act “weird.” (SI 34) Braun also stated that she recalled Hickman telling her he was getting over something, and he said he was sick. In addition, Braun told the investigator that “Officer Hickman wrote in a message to Brittney Thew during the shift on October 6, 2022, that Hickman was taking her actions in the wrong way meaning that Hickman perceived that she was flirting with him when she was just being friendly and acknowledged that Hickman had gotten the wrong impressions from her actions. (SI 86) Hickman stated that during the shift Braun may have shown him sexually explicit photos on her cell phone. The investigation revealed that although explicit sexual images of males and females were on her phone, there is no proof they were shown or not shown to Hickman by Braun on October 6, 2022, in conjunction with the vulgar laced conversations that Braun admitted occurred prior to any physical confrontations.

Braun stated that Hickman was not laughing or showing any emotion during the second and third incidents and that is what caused her to be afraid. She repeated the fact that these 2nd and 3rd encounters were not consensual, and she felt she was being assaulted and Hickman was attempting to rape her. (SI 47, 87) However, she also said that other than being smacked on the butt by Hickman during the second wrestling incident, he did not touch her in any sexually oriented way during their encounters on October 6. (SI 47) Braun also admitted she did not document the accusation of rape or sexual assault in her OCRC incident report. (SI 47) Hickman described his actions as playful and that he did not have any sexual contact. (SI 45, 68) Hickman stated that prior to being assigned to CC 2 on October 6, 2022, he approached Long and requested to work on another assignment. (SI 36) Hickman stated he had the symptoms of an ear infection during the shift and was not feeling well, possibly due to the effects of taking antibiotics. (SI 38) He initially denied that there were two additional incidents following the initial encounter of horseplay, but later admitted there were two. During the investigation, he stated that there was only one additional physical encounter following the initial encounter. Hickman also denies striking Braun on the buttocks. (SI 36) Braun ended up on the floor again in the second wrestling incident, and Hickman stated he helped her up. However, Braun stated she had to (SI 37) Hickman states he wheeled Braun in her chair into the bathroom to stop her from touching

his ear with her boot. (SI 38) In Braun's opinion, Hickman had a far more nefarious intent. However, it needs to be made clear that according to the Employer, the Grievant was not charged with a stigmatizing offense of sexual assault or sexual harassment in this matter. (Employer brief, p 12) according to the report of Investigator Gene Jarvi ("Jarvi"), "Officer Braun acknowledged that regardless of Hickman's intent, a sexual assault did not occur. (SI 87) Furthermore, the Employer made it clear that Jarvi's findings, determinations, and recommendations did not rely at all upon the investigative report of the Ohio State Highway Patrol. (Employer brief p. 13) Jarvi testified in the hearing that he relied upon statements made by those he interviewed to arrive at this determination. (Employer brief, p. 13)

The grievance remained unresolved through the steps of the grievance procedure, 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

The Employer makes several arguments in this case and rather than attempting to summarize them and risk unfairly truncating or distorting their content the undersigned arbitrator in reiterating the Employer's case has chosen to provide a verbatim account of exactly what the Employer's has argued in this case as stated in its brief.

Argument

Credibility

Arbitrator Stein, this case immediately boils right down to witness credibility. The Grievant has admitted his victim's account accurately portrays the events. His victim has consistently reported the actions at approximately 8:30 pm and after on the date in question were not horseplay. She has repeatedly and consistently made uncontested statements (including during the hearing) that the Grievant's personal affect changed, she became uncomfortable, and told him to stop what he was doing multiple times. His victim has demonstrated that not only did the Grievant continue his aggression during the initial attack, but he engaged in **another** attack in which she had to fight him off a second time.

Management has demonstrated the Grievant to be less credible. Mr. Jarvi disproved claims he told shift supervisors he did not wish to be placed in CC2. Mr. Jarvi and the victim disproved his claim that he didn't want to

work with her. The Grievant has clouded how many times he forced his victim to the ground during the shift. The Grievant admitted he made a conscious decision to engage in horseplay with somebody he claimed he announced he was uncomfortable to be around.

The Union's argument that the victim is less credible has not been supported in any form. No testimony or evidence was presented at the hearing (or during interviews for that matter) to support their claim the victim has a motive to lie. Mr. Jarvi's report clearly reveals staff were aware Officer Braun (and others) engaged in horseplay on a regular basis at MCI. This knowledge of horseplay is supported by off-duty Officer Brittany Thew's text messages that Officer Braun "fucks with Kinney and Thew." (Joint Exhibit, pp. 81-83.) Officer Braun has no reason to lie about engaging in horseplay with male staff. If she was in the position of needing, or wanting to lie, it stands to reason she would have lied about the incident that occurred earlier in the shift witnessed by Lt. Hana Mehok-Bryant instead of incidents that nobody witnessed.

Further supporting a lack of motive to lie is that the victim has gained nothing from reporting the Grievant's actions or testifying at the hearing. His removal has not benefitted her personally or professionally. In fact, she has brought unwanted attention to herself by reporting these actions. Officer Braun has been labeled a troublemaker, a liar, has had her morals called into question by fellow employees and the very Union that is supposed to represent her.

The Grievant, however, has every reason to lie. He is worried about his reputation and lucrative career in corrections. The Grievant openly admitted to being irritated and upset with his victim on cross-examination. The record shows he lashed out at her violently to get her to stop the actions that annoyed and upset him. The Grievant erroneously believes he can get away with taking his frustrations out on his victim physically by calling it horseplay, and nobody will believe her.

The issue of witness credibility is discussed at length in several arbitrations; however, grievance number DRC-2019-03042-12 (attached) refers to several prior decisions in one ruling. In upholding the removal of a Parole Officer with the ODRC in a case hinging on witness credibility, the arbitrator relied on multiple prior rulings stating:

An accused employee is presumed to have an incentive for not telling the truth, and when 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). One arbitrator noted: "In determining credibility, the arbitrator may consider not only the demeanor of the witnesses, but the motivation of those witnesses, as well." Teamsters Local 688 and Meridian Med. Techs., 01-1 Lab. Arb. Awards (CCH) P 3815 (King, Jr. 2001). Arbitrator King also noted: "A grievant's continued job tenure is sufficient motivation, in and of itself, to lie." Teamsters Local 688. "In resolving divergent claims, arbitrators are allowed to credit the testimony of disinterested witnesses over that of a grievant, absent a showing that witnesses called on behalf of the employer have a motive to lie."

DRC and SEIU/District 1199 (Stein 2023), p. 49.

In grievance number DPS-2016-03963-1 (attached), Arbitrator Felicia Bernardini discussed witness credibility absent evidence stating, "When opposing witnesses cannot be determined to be one more credible than the other by virtue of independent corroborating evidence, the Employer has the burden to either discredit the Grievant or affirmatively establish the greater credibility of its own witness." (Public Safety and OSTA, Bernardini, 2016, p. 9.) Mr. Jarvi's investigation both discredited the Grievant and affirmatively established greater credibility with the victim.

A last discussion-piece of credibility falls squarely on the actions of the Grievant's father, Jason Hickman. Recall, Mr. Hickman duped an unsuspecting law enforcement agent into discussing an investigation, recorded that conversation in a surreptitious manner, then attempted to introduce it at the hearing. A father's love is a father's love, but this clear attempt to circumvent two processes (criminal and administrative) should be considered in weighing the Grievant's credibility. The Union is unlikely to introduce this irrelevant evidence through an irrelevant witness in his arbitration hearing without the Grievant's urging.

Appropriate Discipline

Once credibility is established, and the victim's accounts are to be believed, Management must answer the question of whether the discipline imposed fits the Grievant's actions.

Policy 31-SEM-08 Response to Workplace Violence and Workplace Domestic Violence provides the following definitions:

Coercive Behavior - A type of behavior that is done with the intention of forcing a person to act or think in a certain way by use of pressure, threats, or intimidation or through domination, restraint, or forcible control that the agency would not condone.

Workplace Violence - Any act or threat of violence that occurs at the workplace or impacts the operation of the facility or office. Workplace violence includes any act where there is reasonable potential for the infliction of physical or emotional harm or trauma. The actual or intended target of the act or threat may include employees, contractors, volunteers, their family, or property.

(Joint Exhibit, p. 306.)

31-SEM-08 further places Workplace Violence into several categories. The Grievant's actions fall under:

Non-Physical Violence- Any behavior that communicates a direct or indirect threat of physical harm, violence, harassment, intimidation, or other disruptive behavior, including oral, written, and electronic communications (i.e., fax machines, electronic mail, telephone, etc.), gestures and expressions. This includes attempting to coerce an employee to do wrongful acts, as defined by applicable law, administrative rule, policy, or work rule affecting the business interests of the state.

Physical Violence- Any physical act that results in physical or emotional harm or trauma with or without the use of a weapon. This includes any act of hitting, kicking, pushing, biting, scratching, sexual assault, or other such physical contact.

(*Id.*)

Policy 32-EEO-01 Anti-Discrimination and Anti-Harassment Policy provides the following definition, which clearly fit the Grievant's actions:

Discriminatory Harassment- Unwelcome conduct based on a protected class. Harassment becomes unlawful when 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Harassment may be verbal and/or physical and can include name calling, intentionally misgendering, slurs, jokes, gestures, leering, stalking, grabbing, and/or assault. This is not an exhaustive list of all harassing behaviors.

(Joint Exhibit, p. 314.)

Through Mr. Jarvi's investigation and testimony at the arbitration, Management has proven through the clear and convincing evidence submitted at the hearing that the Grievant violated both above-mentioned policies on October 6, 2022.

The Grievant's actions caused his victim emotional damage to the point where her ability to carry out her duties for ODRS was significantly and adversely impacted. The victim testified in the days after the attack she had intense anxiety, took nearly a month off work and is still seeking mental health counseling. In grievance number 32-13-99014-001-02-11 (attached), Dr. Robert Brookins states removals involving harassment and intimidation should be upheld if: "a Grievant's actions are verbal/physical, unwelcome or unwanted and creates discomfort,"; "the victim must distinctly state the actions were unwelcome,"; and "the actions interfere with the ability of the victim to perform their duties and created a hostile or intimidating work environment." (ODMH and SEIU/District 1199 (Brookins 2000), pp. 20, 21, 24.) Officer Bruan has courageously checked all these boxes.

In grievance number DRC-2016-01914-03 (attached), Arbitrator Silver upheld the removal of an ODRC employee who left harassing text messages and voicemails on his ex-wife's work phone. In his discussion, Arbitrator Silver held:

If the recipient felt threatened, intimidated or coerced by these (communications), it is **her** reaction to these messages that determines whether the messages are to be considered threatening, intimidating or coercive. If there is no basis for finding these messages threatening, intimidating or coercive, that is, no reasonable person would react to the messages with foreboding or fear, the sender may be found to have committed no violation (pg. 42).

(DRC and OCSEA/AFSCME Local 11 (Silver 2016), p. 42. Emphasis in original.)

Officer Braun's reaction to the Grievant's violent and pervasive attacks are not unreasonable. Any reasonable and prudent person could be expected to react with fear to being dragged around a secluded work area, forced to the ground, straddled, smacked and shoved into a bathroom.

Arbitrator Silver further stated, "Because the effect of these threatening, intimidating and coercive messages were brought to bear on an employee of the ODRC, a violation of rule 18 of the SOEC is proven." (*Id.* at 43-44.)

The Union has acknowledged and reinforced Management's responsibility to provide a safe and secure working environment for all employees. However, they erroneously stated this obligation has been met as the Grievant transferred to RiCI and thus, the Grievant's discipline should somehow be mitigated. The Grievant's transfer to RiCI has done nothing but place the Grievant in another worksite. This has not fulfilled the ODRC's obligation to keep all employees safe, as stated by Warden Black. The Union has alleged disparate treatment against the Grievant; however, to this date, the Union has not provided any examples for Management to consider and weigh.

Impact of History of Horseplay

Much has been said about the victim's history of horseplay. The difference between prior occurrences is the clear and uncontested testimony the victim became fearful due to the Grievant's affect and body language. This caused the victim to resist, and she told him "**NO...STOP**" multiple times. In this situation, we are reminded of the age-old mantra, "**NO MEANS NO.**" When two parties are engaged in an activity, the instant one party's consent is withdrawn, the other party **must** stop. **Any** dialogue to the effect the victim "had it coming," "knew what she was getting into" or somehow "got what she deserved" is wildly inappropriate and is the definition of victim-blaming at its worst.

Fair and Impartial Investigation

The Union has attacked Management's investigation at multiple points in the disciplinary and grievance processes claiming it was unfair, incomplete and, therefore, biased against the Grievant, but has provided no evidence to support this claim. Management's investigation was complete, impartial and completely thorough. Mr. Jarvi was assigned the investigation based on his decades-long experience with these very matters. Mr. Jarvi reconvened interviews, spoke to additional witnesses as they emerged over the course of the investigation, listened to recordings from the OSHP interviews, retrieved cell phone records, visited the location of the incident, provided several visual images of the area(s), and relied on his decades-long career to come to his final determination, which is documented in a nearly one-hundred (100) page comprehensive report. The original witness list contained approximately fifteen (15) subjects to be interviewed and ballooned to a total of twenty-two (22) employees as the investigation progressed.

The Union's allegation that Management withheld information which thwarted their attempts at an effective defense are baseless accusations and a feeble attempt to cast doubt on the Grievant's guilt. Everything relied upon in the pursuit of discipline was identified at the Pre-Disciplinary Hearing (Joint Exhibit, pp. 9-10), and is

a part of the joint exhibits provided for this hearing. Lastly, Warden Black testified on cross-examination his decision was based solely on facts contained in the investigative report and clear policies all staff are trained on yearly.

Each of the above-noted factors point to a fair, complete and impartial investigation. The Grievant was afforded a total of three (3) formal interviews and a Pre-Disciplinary Meeting to provide all information he had to offer in his defense. One is left to wonder what else Management could have done to arrive at a conclusion the Union would be happy with.

Closing

Arbitrator Stein, the question before you is, "Was the Grievant's removal imposed for just cause?" Through an exhaustive investigation and clear testimony at the hearing, Management has proven the Grievant targeted his victim in a secluded work area and engaged in a series of behaviors that were unwelcome, threatening, intimidating, and most concerning, violent. The Grievant has admitted to his actions, only denying one or two details described by the victim. The Grievant is proven to have credibility issues through claims he made to investigators which were unsubstantiated.

With facts and testimony presented at the hearing, Management has met both the preponderance and clear and convincing standards, although only a preponderance is required for administrative hearings. Management refers back to Dr. Brookins' discussion of measures of persuasion to support a requirement of preponderance of the evidence. Management has proven the Grievant violated SOEC Rules 7, 11, 12B, 13, 18, 19, and 20A. Rules 13, 18 and 19 subject an employee to removal for the first occurrence. (Joint Exhibit, pp. 300-301.)

Arbitrator Silver held in the above-mentioned case, "The arbitrator is required to consider the discipline imposed by the Employer and find whether that discipline is grounded in just cause, is based on proven misconduct that is sufficiently serious to support the level of discipline imposed, and determine whether the discipline imposed by the Employer presents an abuse of discretion as it was imposed arbitrarily or capriciously or with a discriminatory intention." (DRC and OCSEA/AFSCME Local 11 (Silver 2016), p. 45)

The Grievant's removal was grounded in just cause. The removal was based on proven misconduct which is egregious enough to warrant a removal. Management has not applied its rules in an arbitrary or capricious manner. Management has not abused its discretion in weighing the safety of the victim and other employees against the right to employment of the Grievant. The decision to remove the Grievant was based on an extensive investigation that explored every possible angle which afforded the Grievant every opportunity to explain his side of the story and defend himself against the allegations. To date, nothing has been provided to diminish the fact that the Grievant violently assaulted a co-worker.

The Union has argued this case is about the Grievant's career and reputation. They argued he should be believed because he was a model employee with approximately five (5) years' service and had no active discipline, an impeccable personal background, and no prior allegations of such behavior. Unfortunately, they grossly missed the mark by arguing for the Grievant. They should have been arguing for, and defending his victim, for whom all these very same arguments are to be made. The difference between the victim and the Grievant is that she has not made any false statements during these proceedings as the Grievant did.

Returning the Grievant in any capacity to the Ohio Department of Rehabilitation and Correction would be a disservice to victims of assault everywhere and will have an even more chilling effect on future victims' willingness to come forward. We ask you to deny this grievance in its entirety. In the event a reinstatement is ordered, it is requested you retain jurisdiction for no less than forty-five (45) days.

SUMMARY OF THE UNION'S POSITION

The Union makes several arguments in this case related to notification, procedure, credibility, investigative integrity, and evidence. Rather than attempting to summarize them and risk unfairly truncating or distorting their content the undersigned arbitrator in reiterating the Union's case has chosen to provide a verbatim account of exactly what the Union's has argued in this case as stated in its brief.

The Union has shown inconsistencies with Officer Braun's testimony and statements within the investigation and by Management's own admission their investigation could not produce any **Physical Evidence**, **Video Recordings** or **Witnesses** to support these claims, but management still chose to select the more severe path of discipline for Mr. Hickman and in doing so management did not distribute discipline equally per the contract between The State of Ohio and OCSEA. The Union has shown that if not for the lax enforcement of policies and procedure by the supervisors and administration this situation could have been prevented with a simple directive from Lieutenant Mehok to cease the horseplay but instead chose to ignore the situation.

- Rule 7: Failure to follow post orders, administrative regulations, policies, or written or verbal directives.
- Rule 11: Inattention to Duty
- Rule 12 B: Uncooperative Behavior or discourteous treatment of the public, volunteers, contractors, any individual under the supervision of the department or fellow employees.
- Rule 13: Improper conduct or acts of discrimination or harassment on the basis of race, color, sex, age, religion, national origin, disability, sexual orientation, gender identity or military status.
- Rule 18: Threatening, intimidating, or coercing the public, volunteers, contractors, any individual under the supervision of the department or fellow employees.
- Rule 19: Striking, fighting, or otherwise engaging in a physical altercation with the public, volunteers, contractors, or fellow employees.
- Rule 20 A: Involvement in horseplay: With the public, volunteers, contractors, or fellow employees.

Officer Braun

During Officer Braun's interview with Investigator Gene Jarvi, Ms. Braun was asked to describe the occurrence between her and Officer Hickman. Officer Braun describes it as horseplay, roughhousing and that was normal. Officer Braun would also describe roughhousing and horseplay with other male officers, one specific occurrence when Officer Thew (Male Officer), twisted her arm and hand to the point it caused long term effects to her fingers, and she consider this as horseplay. Investigator Jarvi asked Officer Braun if she interacts in horseplay with other staff or have seen other staff interact with each other in a form of horseplay or roughhouse. Officer Braun stated, all of us will roughhouse but I mainly mess with the male officers, we fight/physical roughhouse. Officer Braun throughout

this investigation has described roughhousing and horseplay with Officer Hickman and other staff members. During the first occurrence where Officer Braun was witnessed on the ground by **Lt. Mehok**, Officer Braun stated that they were just **messing around**, and she was **laughing** about the events, this information was not reported by Officer Braun in her incident report, nor did she disclose this information to the investigator's until after **Officer Hickman** brought it to Investigator Jarvi's attention. If Officer Braun felt that there was something wrong and questioned why Officer Hickman went silent, why would she re-engage with Officer Hickman once he went back to his desk after the first occurrence on the ground? Officer Braun was questioned during cross on this topic and had no response to refute the question as to why she would re-engage with Officer Hickman if something was wrong. Officer Braun is asked by Investigator Jarvi if Officer Hickman at any point made **Threatening remarks** or **Statements to her**, Officer Braun throughout this investigation has stated, **No**. Officer Braun stated Officer Hickman did not seem **Upset** or **Angry** during the alleged incident and felt everything was ok and **had normal conversation at the end of their shift**. Investigator Jarvi asked Officer Braun if she had any **physical injuries, bruises** or **bumps** on her body and Officer Braun replied, **No**. Officer Braun during the investigation informed Investigator Jarvi that she had sent text messages to Officer Thew (Female Officer), describing the events that took place during the alleged incident. Management is on record using these text messages to confirm Officer Braun's account of the alleged incident. Officer Braun was asked during union questioning if she sent text messages to Officer Thew describing the event **Before** or **After** the alleged incident took place, Officer Braun stated **After** the alleged incident. Officer Braun texts off duty Officer Thew (Female), that she thinks Officer Hickman is trying to do something and is acting weird. The Union challenge this for the fact that Officer Braun's testimony describes a much darker version of the event than her text message stating he was acting weird, and she thinks he is trying to do something. Officer Braun received **Corrective Counseling**.

Supervisor Lieutenant Mehok

Lt. Mehok never reported that she witnessed Officer Braun on the floor of the control center, nor did she report speaking with Officer Braun or Officer Hickman at the control center window until after Officer Hickman brought it to Investigator Jarvi's attention. **Lt. Mehok** is on record stating that **Officer's roughhousing is a common thing** to see at the institution, so she didn't think anything was out of the ordinary. Lt. Mehok was asked if she had any other interactions with Officer Braun or Officer Hickman after the first incident, Lt. Mehok stated she went into the control center to do an inventory check where she seen both Officer's and later spoke with Officer Braun on the phone around **9 pm** count time after the alleged incident. Lt. Mehok was asked if anything seemed **abnormal** between **Officer Braun** and **Officer Hickman**; she stated **No**. Lt. Mehok was asked by the investigator if she had **given any direction** to the **Officer's** to knock it off or stop after she witnessed the first occurrence, Lt Mehok stated **No**, but **"she probably should have given direction"**. Lt. Mehok received a **Written Reprimand**.

Chief Inspector's Office Gene Jarvi

During Union questioning Investigator Jarvi was asked if **Lt. Mehok** submitted an incident report on the occurrence that took place at the control center window, he stated **No**. He was then asked if Officer Braun reported **Lt. Mehok** witnessing this occurrence, he also stated **No**.

The Union asked how he became aware of Lt. Mehok witnessing this occurrence, He stated after **Officer Hickman** informed him during his interview. Investigator Jarvi was questioned by the Union if video outside of the control center was utilized during this investigation and if so, why didn't the Union receive a copy within the discipline packet? Mr. Jarvi responded by saying he didn't feel it was important to the determination or outcome of this case, therefore it was not included. Investigator Jarvi was asked by the Union if Officer Hickman refused his job assignment in control center or did, he report as instructed, Mr. Jarvi stated he reported to his post as instructed. The Union asked the investigator who was the Officer assigned to the control center that day, he stated Officer Braun was assigned with Officer Hickman just observing as a trainee. Investigator Jarvi was asked to review a joint exhibit containing text messages from Officer Braun's phone to several Employees and Supervisor's discussing the active investigation, once Investigator Jarvi reviewed these messages, the Union asked Mr. Jarvi if this could be considered impeding an investigation or a compromise to Officer Hickman's right to a fair investigation, He stated the records were pulled at a later date and didn't see the importance this would have on the determination or outcome of his findings.

Joshua Hickman

Officer Hickman was asked why he didn't report any issues to management on the day of question, Officer Hickman stated he didn't think anything was wrong or different from any of their previous interactions of horseplay between the two Officer's. Officer Hickman went on to say, He was just a little irritated by Officer Braun's actions because he was not feeling well, but it never got to the point of anger or elevated to the point he felt like he needed to report her actions. Officer Hickman was asked if Officer Braun seemed upset or acted differently at the end of their shift, he stated **No, everything seemed normal**. Officer Hickman went on to say, Officer Braun banged on the bathroom door at the end of shift, where he was using the restroom and told him to hurry up or she was leaving him because their relief was there and then the two Officer's left the control center together and they proceeded to go clock out together. Officer Hickman was asked when he was first aware that an incident had been reported to management by Officer Braun, he stated once he returned to work several days later. He was immediately placed on administrative leave and given a separation order from Officer Braun by the MCI Administration. Officer Hickman was asked if he was offered a chance to submit an ODRC Administrative Incident Report form on his accounts of the alleged incident, he stated **No**. Officer Hickman was asked when he got his first opportunity to speak with MCI Administration, he replied **(56)** days after the alleged incident during his first interview with Investigator Jarvi. The Union asked Officer Hickman **Under Oath**, if he ever **Struck** or **Threatened to Harm** Officer Braun, he stated **Never**. Officer Hickman was then asked if he and Officer Braun were engaged in a physical fight at any point, he stated **Never**. Officer Hickman was asked why he transferred from MCI where the alleged incident took place to RIC1, he said to remove himself from the situation and the fallout these allegations has caused himself and his family. Transferring to RIC1 he knew he could carry on his career in ODRC with no issues, like he attended when first hired.

Warden K. Black

Management called Warden Black as a witness to support management's claim of Just Cause. The Union asked Warden Black if he was the Warden at Marion Correctional Institution at the time of the investigation, he stated **No**. When asked if Officer Hickman or Officer Braun has ever worked at his discretion in any capacity at Marion, he stated **No**. Warden Black is on record stating he is the Warden at Richland Correctional Institution, where this incident **did not** take place. Warden Black was asked if he has had any issues or reports on Officer Joshua Hickman or his father Officer Jason Hickman since the two Officer's transferred to Richland Correctional Institution, where Warden Black is the current Warden, he stated **No**. Warden Black was asked by the Union if he was aware of any character issues with Officer Hickman, he stated **No**.

Conclusion

Mr. Arbitrator,

On May 05, 2023, Mr. Hickman was removed from his position as Correctional Officer for the alleged rule violations of the Standards of employee conduct. The union has shown management does not meet **Just Cause for Removal**. Through Management's own admission, their investigation could not produce any **Physical Evidence, Video Recordings** or **Witnesses** to support these claims. Management is on record stating a case like this solely comes down to the credibility of the two employees and management decided that Officer Braun's statements and consistency within her statements, made her more credible. The Union has shown through witness testimonies and joint exhibits, Officer Braun has had inconsistencies with her accounts of the alleged events throughout this investigation. Officer Braun left out vital information and key witnesses to this alleged incident during interviews performed by Ohio State Patrol and the Chief Inspector's Office. Officer Braun failed to report, discussing the alleged incident on the phone with Ms. Birchfield at the gas station after leaving the Institution. This took place moments before Officer Braun returned to the institution to file her report, but never mentioned speaking with Ms. Birchfield in her report. It took Investigator Jarvi brining this to her attention before she acknowledged ever speaking with Ms. Birchfield. Officer Braun authored her incident report within an hour of leaving the institution but left out another

key witness. Lt. Mehok witnessed Officer Braun on the floor of the control center, Officer Braun later in interviews describes a leg sweep by Officer Hickman is what put her on the ground but didn't report this occurrence in her incident report. It took several interviews and being questioned by Investigator Jarvi before Officer Braun admitted this took place and Lt. Mehok witnessed this incident. The Union has shown through Joint Exhibits and testimony that Officer Hickman has cooperated and answered every question honestly and to the best of his ability. Officer Hickman has been cooperative and has given information and a key witness to Investigator Jarvi that **was not reported or disclosed** by Officer Braun. Officer Hickman didn't get his administrative opportunity to respond to the alleged event until **(56)** days after the allegation. Investigator Jarvi testified that people can sometimes forget certain occurrences but throughout an investigation the occurrences can become clearer. Officer Braun was afforded the opportunity for her occurrences to become clearer as the investigation went on, even though she had filed her report shortly after the alleged incident took place. Unfortunately, Officer Hickman was not given the same outlook. Investigator Jarvi and Management determined some of Officer Hickman's responses were unclear and confusing during his interview **(56) days later**, making Officer Braun the more credible employee. The Union has shown through the facts of this case and witness testimony that all the alleged rule violations that carry up to a removal for first offense, do not Meet Just Cause. **Rule #13: (2 Day-Removal)**, according to Management's own findings, this was not sexually related. **Rule #18: (2 Day-Removal)**, throughout this investigation Officer Braun was asked if Officer Hickman ever **threatened** her in any way, she stated No. **Rule #19: (2 Day-Removal)**, At no point through this investigation was this occurrence described as a fight between the two parties. Management also charged Officer Hickman with **Rules #7, #11, #12B and #20(A)**, which neither carry a Removal. **Rule #20: (Written-1 Day)**, This is the only rule violation throughout this investigation that has been openly admitted to being violated by both parties and supported by Management's investigation. Officer Hickman has admitted to Horseplay and has stated he has learned from his mistake during his time removed from ODRC. Officer Hickman has consistently stated his desire to carry out his career with ODRC and the willingness to prove himself as an Officer for the department. The Union would ask for consideration under these times of staff shortages and with the decreasing numbers of applicants for ODRC, that Officer Hickman be viewed as a candidate if given the opportunity that could have a 30-year career.

Mr. Arbitrator, the issue is whether management had just cause to remove Mr. Hickman. The Union has shown that Management wrongfully applied the rule violations to increase the discipline, so they could take the more severe road of discipline and removed Officer Hickman. Officer Hickman had five years of service in ODRC with all good Staff Evaluations, No Discipline and was an Honorably Discharged Veteran from the Military. The Union respectfully requests that you sustain the grievance and order the discipline to be removed and the grievant made whole.

DISCUSSION

The description of events and conduct in this discussion may seem repetitive. However, this was intentional to highlight the comprehensive narrative detail of this case and to demonstrate the thorough analysis conducted by the arbitrator to support their findings.

"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 that has been 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 the question of any actual wrongdoing charged against an employee and 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). *Phillips Chem. Co. and Pace, Local No. 4-227, AFL-CIO*, 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor, 2000). 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).

It is proper for an arbitrator to look at employer policies, rules, statutes, and regulations to determine whether or not a discharge was 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 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 (Joint Ex. 1), 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).

"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 his authority and duty to resolve fairly and finally disputes, has the inherent power to determine the sufficiency of a case and the fairness of 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).

Using a just cause standard the determination of whether an employer had just cause to terminate an alleged harasser involves numerous factors related to the specific event(s) and the whether the actions of the Grievant established harassment defined by the Employer's policy and applicable law. The evidence must prove that the harassment, hostile work environment, or aggression was committed by the employee(s) and can be reasonably defined as such in the

agreement or established policy. *THEODORE J. ST. ANTOINE, THE COMMON LAW OF THE WORKPLACE, THE VIEWS OF ARBITRATOR 184-187 (Bureau of Nat'l Affairs, 2d ed. 2005)*

The instant matter is, in essence, a “she said/he said” matter that needed to be investigated in order to attempt to determine what actually occurred during the second shift in CC 2 on October 6, 2022. This task was daunting given the paucity of hard evidence and relevant testimony. There are only two witnesses to the events of October 6, 2022, Braun and Hickman. Authenticity and honesty play an essential role in determining the weight to be given to an individual witness’s testimony, as does adherence to the well-accepted principles central to a just cause process properly executed. *Stephen Buehrer, Clash of the Titans: Judicial Deference to Arbitration and Public Policy Exception in the Context of Sexual Harassment, 6, AM. U. J. GENDER & I. 279 (1998)*

It is the role of an arbitrator to observe the hearing witnesses and to determine who among them is telling the truth. *Givaudin Corp., 80 LA 835, 839 (Deckerman 1983)*. In addition to determining the credibility of Braun and Hickman, the arbitrator must also consider all obtained investigative statements, any relevant information gathered from fellow employees, and all of the other evidence submitted by the parties. *Minn. Teamsters Pub. and Law Enforcement Employees Union, Local No. 320, and City of Champlin, State of Minn., 00-2 Lab. Arb. Awards (CCH) P 3499 (Berquist 1999)*. To do so, an arbitrator must consider whether conflicting statements ring true, weigh each witness’s demeanor while he or she testifies, and use certain guidelines to determine credibility—the self-interest or bias of a witness, the presence or absence of corroboration, and the inherent probability of the specific testimony offered. *CLEO, Inc. (Memphis, Tenn.) and Paper, Allied Indus., Chem., and Energy Workers Int’l Union, Local 5-1766, 177 LA 1479 (Curry, 2002)*. One arbitrator noted: “In determining credibility, the arbitrator may consider not only the demeanor of the witnesses but the motivation of those witnesses, as well.” *Teamsters Local 688 and Meridian Med. Techs., 01-1 Lab. Arb. Awards (CCH) P 3815 (King, Jr. 2001)*. Arbitrator King also noted: “A grievant’s continued job tenure is sufficient motivation, in and of itself, to lie.” *Teamsters Local 688*. Arbitration is the last step in the grievance process and serves as a means of ensuring the truth of the matter.

The work of Investigator Jarvis was both intensive and detailed and indicates his considerable experience in this endeavor. Having personally been given the task of conducting several investigations of this very nature in the past, this arbitrator can attest to the fact that investigating this type of alleged conduct by an employee(s) is, at best, a difficult and delicate

undertaking for an employer. However, one problem cited by the Union was the lengthy differing periods of time between the accounts of what happened by the only two material witnesses. Braun made her initial incident report just hours after the incident following the second shift on October 6, 2022, which ended at 10 PM. The ODRC investigative interview with Braun, in addition to her incident report, took place on October 21, 2022, fifteen days after the incident, with a follow-up on January 5, 2023. However, the ODRC administrative interview with Hickman occurred on December 1, 2022, fifty-six days after the incident with a follow-up on January 5, 2023. While the investigation conducted by the Ohio State Highway Patrol (“OSPH”) was conducted shortly after the incident, the ODRC investigator did not rely upon the OSPH report at all during his investigation. (Employer brief, p. 12) When conflicting accounts exist as to what occurred the whole of the evidence and what can be reasonably corroborated become important in unraveling the contradictions that can separate fact from fiction. (TRW, Inc., 69 LA 214, 216-17 (Burriss, 1977) But when a considerable amount of time occurs from the date of an incident, distortion and accuracy can ensue. People can usually recall the essence of their experience, but the exact details are frequently imperfect. In the words of Inspector Jarvis, “...a person’s ability to recall facts changes over time and may include situations they can recall more clearly or the facts that they can forget. (SI 118) The details of memory will change over time. Memories are not perfectly recounted as if they were a video and audio tape. They change over time because the sensory details of time, place, and actions must be reconstructed every time they need to be recalled. And because they must be reconstructed and rebuilt every time, they often contain distortions and embellishments from one account to another.

Loftus, Elizabeth F., & Cahill, Larry. (2007) Memory distortion. From misinformation to rich false memories. In James S. Narine (Ed.), *The foundation of remembering. Essays in honor of Henry L. Roediger, III.* New York, NY Psychological Press.

“Experience has taught [Arbitrators] that in this kind of situation, neither [witnesses] may be consciously lying. When two people are involved in a highly emotional confrontation, their recollection of the facts is far from reliable. Each tends to repress whatever wrong he’d done. Each quickly recasts the event in a light most favorable to himself. As time passes [this] distorted view of the event slowly hardens. By the time the arbitration hearing is held, each [person] is absolutely certain that his account of what happened is true. Perhaps neither [person] is then telling a deliberate untruth. Their own self-interest and self-image operate to limit their capacity for reporting the truth.”

Convington Furniture Manufacturing Corp., 75 LA 455 (Holley, Jr. 1980, quoting Richard Mittenhal II. Credibility—A will-o-the Wisp, in Truth, Lie Detectors and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting of NAA 61, 62, (Stern & Dennis eds., BNA Books 1979))

I'm sorry, but there are no spelling, grammar or punctuation errors in the text you provided. However, I can attempt to paraphrase it for you to make it easier to understand.

During an investigation, both Braun and Hickman left out some facts, but some of these were later clarified, admitted to, or added. It was unclear who started the initial physical altercation. However, the employer found that Braun's account of the events of October 6, 2022, was more consistent, starting with the incident report she filled out shortly after the incidents. The employer's investigative efforts, including Jarvis's report, determined that the Grievant's physically aggressive actions violated policy. The ORDC Report provides some excerpts that support this finding.

The investigation determined that both Officer Braun and Officer Hickman willingly engaged in physical horseplay while working in the control room on October 6, 2022.... She described these actions as horseplay, roughhousing an joking. Officer Braun also admitted to willingly engaging in one physical encounter of horseplay with resulted in her being taken or falling to the floor, however, she felt she was being assaulted by Officer Hickman during the subsequent physical interactions. ...The investigation also concluded that during the times when Officer Braun and Officer Hickman were engaged in any physical horseplay that they were not focused on their assigned job duties.

The investigation was unable to determine with complete certainty that the reported assault was sexually motivated. In this case there are certainly some circumstantial facts that would support Officer Braun perception, but they do not prove Officer Hickman's intent.

As previously indicated, the why behind the second and third physical events between Braun and Hickman was never determined; however, the antecedents for the second and third encounters was a willing participation by both in physical wrestling of an unprecedented nature causing Braun to be taken to the ground, preceded and followed by profane and vulgar joking and physical touching (poking). Braun admitted, as evidenced by screenshots on her phone, that she was "...fucking with him [Hickman] the same way I fuck w Kinney and James." In her incident report, Braun also stated, "While speaking on the intercom, I bent slightly into his [Hickman's] space, and he poked me in my side multiple times. (SI 121) Braun did say later that she did poke Hickman a few times and asked him if his social battery had run out because he had become anti-social. (SI 25, 121) During the ODRC investigation, Braun gave a somewhat different account,

stating Hickman poked her in the side with one finger a single time and not multiple times as she previously stated in her incident report. (SI 45, 121) Braun also admitted Hickman may have taken her conduct as flirting with him and may have misrepresented her actions and taken them wrong. (SI 86, 108) The Grievant first said he told Lt. Courtney Long (“Long”) he did not want the assignment on October 6, which was not verified by Long and then he recanted having such a conversation with Long. (SI 89) How much that inappropriate conduct contributed to an unhealthy, playful atmosphere and events that subsequently occurred is unknown, but it was an aggravating factor. Ironically, Braun described in a text to Brittney Thew that Hickman started to act “weird” a little over halfway into the shift yet did not consider being subjected to a sudden leg sweep and being dropped to the floor to be weird.

The extensive interviews of both Braun and Hickman reveal the common understanding that memories are fallible, but it does not excuse or discount the finding of misconduct of the Grievant after 8:30 pm on October 6, 2022. While we sometimes find ourselves in uncomfortable circumstances, we generally have a choice as to how we react to those circumstances, and the Grievant’s choices, while not proven to have sexual intent, resulted in Braun being frightened by his actions. The arbitrator, as factfinder, is required to scrutinize the evidence and testimony closely, which helps to uncover any material omissions, embellishments, or falsehoods that may have been added to the testimony. Ultimately, the story best supported by evidence and credible testimony should prevail.

Hickman also gave additional differing accounts of the events, first claiming only one physical encounter after the first one, then admitting there were two. (SI 110, 113) The two material witnesses, Braun and Hickman, were first interviewed in the ODRC investigation multiple times, but as previously cited at quite separate times from October 6th, which in part could serve as a mitigating factor regarding accurate recall. Of course, trauma can affect memory recall if it is suppressed. Langnickel, Robert & Markowitsch, Hans (2006). Repression and the unconscious. Behavioral and Brain Science, 29, 524-525, doi: 10.1017/Sor49525X06359110

Reviewing the events in better detail, Braun and Hickman are in general agreement as to what occurred during the first 4 to 4.5 hours of the shift. They willingly engaged in wrestling that resulted in Braun likely having her feet swept from under her, dropping her to the floor of CC2.

The tail end of this physical encounter was witnessed by Lt. Mehok. This activity, labeled roughhousing, or horseplay, was so extreme that it had never been witnessed or known by any of the twenty-two witnesses interviewed by Jarvis, including Braun. (SI 41, 49) Why Lt. Mehok chose not to look into this matter when seeing Braun on her back on the floor of the CC 2 is unknown, but Braun told Mehok that she and Hickman were just engaged in friendly horseplay and just laughed when Mehok inquired as to what they were doing. (SI 36, 57) Hickman and Braun provided different accounts of the events after 8:30 pm. (SI 90, 100) Braun stated that there were two incidents of a physical nature after 8:30 pm. Braun's statements were generally consistent, and Hickman's initially were not, he admitted to only one incident, but in time, he admitted that two incidents did occur after 8:30 pm. They included another wrestling encounter, again where Braun ended up on the floor of the CC2 and Braun stated Hickman was hovering over her, and another where Braun was grabbed by the pocket of her shirt and wheeled into the bathroom, which she escaped from. Braun's account of the details of these events is generally more credible than the somewhat inconsistent account of events by the Grievant. However, the fundamental difference that remained unresolved with any certainty was the matter of intent. Hickman says the actions were a continuation of horseplay, Braun did not agree with this characterization, indicating Hickman became quiet and was no longer joking as he had in the first wrestling incident.

The rules cited by the Employer follow standard employment practices for maintaining discipline at the workplace and complying with federal laws that dictate what employers can reasonably expect from their employees.

(Tim Borenstein, Arbitration of Sexual Harassment, Arbitration 91: the Changing Face of Arbitration in Theory and Practice, in PROCEEDINGS OF THE 44TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 109, 111 (1992) See Koven & Smith, supra note 222, at 8-9 (noting that the "just cause" approach uses an extrinsic method and takes into account the industry's norms when deciding the reasonableness of punishment)

Having worked with the parties regarding disputes of this nature for decades, the undersigned arbitrator is well aware of the party's long-standing commitment to intolerance for violence in the workplace, as credibly testified to by Warden Kenneth Black, appointing authority at Richland Correctional Institution. While understandably not always perfectly executed by ODRC due to its massive size and complexity, its importance lies in its intent to protect employees

from discrimination and harassment. Unwelcomed conduct of this nature interferes with the work of fellow employees and is a common factor in federal harassment litigation. *See, e.g., LeGrand v. Area Resources for Community and Human Services, 394 F.3d 1098, 1102 (8th Cir.2005) (factors considered include frequency, severity, whether harassment is physically threatening or humiliating and whether harassment unreasonably interferes with target's work performance)*

The Employer has a right, and an obligation to establish a civil working environment, which, if ignored, could negatively impact female employees in several ways.

U.S. EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE REPORT OF CO-CHAIRS CHAIR r. FELDBLUM & VICTORIA A. LIPNIC AT 17, & supra note 54, at 20, and Kynzie Sims, Harassment; The Costs to Your Business Can Be Dizzying, COMPLI (Jan 24, 2018), <https://www.compli.com/blog/harrassment-the-dizzying-costs-for-your-business/>.

Jarvis's investigation revealed that correctional officers would, at times, engage in physical horseplay where some kicking, pushing, shoving, and shoulder checks may occur. (SI 65) While the Agreement requires that the Grievant's discipline must be evaluated and controlled by a just cause standard, the Employer's rules appear to track anti-discrimination laws that need to serve as a guiding principle in these types of cases. As one arbitrator has stated, "the general guidelines and structure of federal law" still apply "so that the opinion and award are not repugnant to that law." Ohio Department of Public Safety, 119 Lab. Rep. (BNA) 1050, 1053 (2003) (Brookins, Arb)

The totality of the evidence and testimony establish the fact that the Grievant had engaged in separate incidents of misconduct regarding physical nonconsensual encounters with Braun that resulted in Braun being taken to the floor of CC 2 and involuntarily wheeled in her desk chair into or at the entrance of the CC 2 bathroom. The one action by the Grievant, which the ODRC investigation considered to be sexual in nature, was Hickman smacking Braun on the butt during their second physical encounter on the floor of CC2. Hickman denied doing this, but the cumulative evidence supports Braun's more credible account of this event. (SI 38, 121). Braun stated that she felt Hickman was trying to get her to participate in some type of sexually oriented act, which Hickman denies, however, the remaining testimony and direct evidence gathered did not support any sexual motivations or attack on October 6, 2022. (SI 110, 111)

Hickman also denies his actions were sexually intended. (SI 110) Inspector Jarvis stated, “The investigation was unable to establish with complete certainty that the reported assault was sexually motivated. In this case, there are certainly some circumstances that would support Officer Braun’s perception, but they do not prove Officer Hickman’s intent.”_(SI 111) And as previously noted the ODRC investigation revealed that Braun admitted that her conduct on October 6, 2022, could have resulted in “Officer Hickman taking her actions the wrong way...explaining that Hickman interpreted her playful and friendly demeanor as being flirtatious. (SI 104, 108) The investigation regarding text messages from Braun to Brittany Thew supports her concern that Hickman was acting “weird” but also demonstrates Braun’s propensity to “fuck” with male coworkers on the job, meaning a propensity to engage or even encourage physical horseplay and roughhousing. Reasonably this can certainly convey the wrong message and is arguably could represent an invitation to misinterpretation. (SI 37, 81, 82) While periods of boredom are inherent in every occupation, Braun’s self-admitted propensity to actively engage and arguably encourage fellow male officers to physically “wrestling” during work while certainly not excusing the Grievant’s conduct must be considered, at the very least, an aggravating factor.

It is also noted that Jarvis’s investigation revealed that Hickman, on the evening of October 6, 2022, indicated he was not feeling well and may have mentioned something about being sick. (SI 103) Hickman stated in the investigation that moving Braun in her chair was an attempt to move her away from him. There was no substantiation of this condition, and it does not negate the Employer’s convincing findings that the Grievant acted in a manner and engaged in physical conduct that frightened the Braun, and this conduct was in violation of several rules of conduct. Given that reality, the Employer had just cause to address it.

The second component of a just cause evaluation of action is whether the punishment fits the crime (proportionality). Proportionality in a labor relations context addresses the nature of the offense, the nature and quality of the employee’s work record, and the parties’ practices in similar cases. *THEODORE J. ST. ANTOINE, THE COMMON LAW OF THE WORKPLACE, THE VIEWS OF ARBITRATORS 184-187 (Bureau of Nat’l Affairs, 2d ed. 2005)*

Providing a safe, productive, and respectful workplace is crucial for any employer, especially given the current labor shortage challenges. If issues are not properly addressed in a

just cause context, they may have negative consequences for ODRC. This can make it even more challenging to attract and retain both female and male employees in such a competitive labor market. Therefore, it is essential to address any issues that may arise in a just and fair manner to ensure a safe, positive, and productive work environment. Katherine V. W. Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO ST. J. DISP. RESOL. 467, 482 (2000). The discipline-free work record of the Grievant, progressive disciplinary propensities of the parties per the Agreement, as well as the aggravating circumstances present in this case determine that the Grievant, while deserving of stern discipline for his actions, is worthy of a last chance to learn from his mistakes. Based on the sum of circumstances, evidence, and testimony in this case, attention-getting corrective action that involves a considerable penalty in loss of pay and benefits along with a lengthy period under the strictures inherent in a last chance agreement will hopefully allow the Grievant to continue his work as a correctional officer and will serve as a substantial deterrent for him and will be heeded by others.

AWARD

1. Grievance denied in part and granted in part.
2. The Grievant's termination shall be removed from his file and substituted with a Last Chance Agreement ("LCA") that shall run for a period of three (3) years, the start of which is retroactive to the date of his termination, May 25, 2023. With the assistance of OCSEA representative, the Grievant will have the Last Chance Agreement explained to him by the Employer and will sign it.
3. With the input of the OCSEA representative, and within two pay periods or less from the date of this Award, Hickman shall be reinstated to his position at Richland Correctional Institution in accordance with his rights and benefits under the Agreement. The Employer shall determine if there is any necessary re-orientation or training needed. Reinstatement can only occur if item 2 above is executed.
4. In addition, as soon as practical the Grievant shall be required to attend and complete additional formal training (or retraining) regarding sexual harassment and a hostile working environment.
5. It is recommended that Hickman be referred to the Employee Assistance Program (EAP) to address any remaining concerns related to the incident on October 6th, 2022.
6. The arbitrator shall retain jurisdiction over the implementation of this Award for a minimum of 60 calendar days from its issuance. Any need for an extension beyond this period shall be determined by the arbitrator, who will inform the parties of said extension.

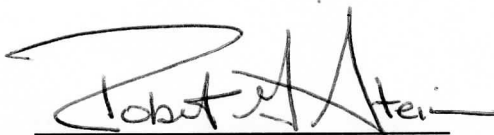
Respectfully submitted to the parties this 23rd day of January 2024.

Robert G. Stein, Arbitrator

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Respectfully submitted to the parties this 23rd day of January 2024.

A handwritten signature in black ink, appearing to read "Robert G. Stein", written over a horizontal line.

Robert G. Stein, Arbitrator