

ARBITRATION DECISION NO.:

585

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Correction,
Orient Correctional Institution

DATE OF ARBITRATION:

DATE OF DECISION:

August 17, 1995

GRIEVANT:

Geraldine Winfield

OCB GRIEVANCE NO.:

27-21-(93-07-13)-0950-01-03

ARBITRATOR:

Harry Graham

FOR THE UNION:

Butch Wylie, Staff Representative

FOR THE EMPLOYER:

Pat Mogan, Office of Collective Bargaining

KEY WORDS:

Abuse of Inmate/Patient
Disparate Treatment
Removal
Notice

ARTICLES:

Article 24 - Discipline
 §24.01 - Standard
 §24.02 - Progressive Discipline

FACTS:

The grievant was employed as a Corrections Officer by the Department of Rehabilitation and Corrections at the Orient Correctional institution when two alleged infractions occurred. On April 14, 1993, the grievant was assigned to the Frazier Health Center, one of the installations at Orient. At about 8:00 p.m. the grievant observed one of the inmate patients, who was in the end stages of AIDS, in his normal condition: dirty, unkempt and his with bed unmade. The grievant allegedly pushed the patient towards his bed. Upon reaching the bed, the grievant pushed the patient onto the bed and then pushed the patient down flat on the bed as the patient tried to get up.

On April 18, 1993, the grievant allegedly became involved in an altercation with another officer. After a

shoving match, the grievant slapped the other officer. The grievant was then discharged for violating Rules 43 and 21, patient abuse and fighting.

EMPLOYER'S POSITION:

The employer argued that the grievant's reaction was entirely disproportionate to the situation. The patient, an end stage AIDS patient, was in an extremely weak physical and mental condition. Even though the patient attempted to comply with the grievant's directives, the grievant responded by threatening the patient. In the second incident, the grievant slapped another officer after an altercation.

The grievant had been a State employee for only a short length of time. During her service, the grievant served several suspensions and received several reprimands. Her probationary period was filled with entries in the "below expectations" column of her performance evaluation. Her acts on April 1993 provided the requisite just cause for the State to discharge her from employment.

POSITION OF THE UNION:

The Union argued that there is no written definition of what constitutes "abuse" of an inmate. If it is not definable, it cannot be said to have occurred in this situation. Without notice of what constitutes abuse, a grievant is not placed on notice of what acts are prohibited. The grievant's conduct does not rise to the level of abuse as defined in the Ohio Revised Code i.e. knowingly or recklessly causing physical harm to a patient.

The Union also argued that the grievant was merely acting in self defense when she struck the other officer. The resulting discipline constituted disparate treatment because other employees had merely received suspensions for fighting.

ARBITRATOR'S OPINION:

The Arbitrator stated that the inmate/patient suffered no signs of abuse. Therefore a charge of abuse is not supported by the evidence. In addition, the incident between the grievant and the other officer was insufficient to sustain a discharge.

The Arbitrator further stated that the record does not establish evidence of disparate treatment. The other employees were not situated in substantially the same fashion to the grievant with respect to seniority and disciplinary history. Even though disparate treatment was not proven, the discipline of removal meted out was too harsh in this case.

AWARD:

The grievance is sustained in part and denied in part. The grievant is to be restored to employment. She is to be paid all monies she would have earned but for the incident. In addition, the discharge is to be converted to a two week suspension.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department
of Rehabilitation and Correction

Case Number

27-21-930713-0950-01-03

Before: Harry Graham

Appearances:

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For OCSEA/AFSCME Local 11

Butch Wylie
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For Department of Rehabilitation and Correction

Pat Mogan
Office of Collective Bargaining
106 North High St.
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

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Issue: At the hearing the parties agreed upon the Issue in dispute between them. That issue is:

“Was the Grievant's removal for violation of Work Rule 43, Physical abuse of an inmate, furlougee, parolee, or probationer justified by her physical abuse of inmate Hawkins? If not, was her removal for violation of Work Rule 21, Fighting with another employee or employees during work hours, on state property, or in uniform for just cause? If not, what should the remedy be?”

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Background: Both parties to this dispute provided largely similar accounts of the events prompting this proceeding. It is the conclusion to be drawn from those events that brings the parties to this forum.

The Grievant, Geraldine Winfield, was employed as a Correction Officer by the Department of Rehabilitation and Correction. She worked at the Orient Correctional Institution in Pickaway County, OH. At the time of her removal she had been in the service of the State of Ohio for about two and one-half years.

Among the installations at Orient is the Frazier Health Center. It provides care for inmates from throughout the State. Among the inmates lodged at Frazier in the Spring of 1993 was one Hawkins. Hawkins was in the end stages of AIDS. By all accounts he was frail, could not walk well and was experiencing dementia from his disease. Hawkins died shortly after the events under review in this proceeding occurred.

On April 14, 1993 Winfield was assigned to Frazier Health Center. She observed that Hawkins was in what was for him his normal condition; dirty, unkempt, his bed unmade. At the time of the incident, about 8:00 p.m., Hawkins was away from his bed. He was near the television. By all accounts he was directed to return to his bed by the Grievant. He did not comply with alacrity. He was grabbed by Officer Winfield and propelled towards his bed. During the progression from the television area to the bed Hawkins expressed the wish to give Winfield a left hook. His physical condition made that impossible. Hawkins was pushed by Winfield to the point where observers felt he would fall. He did not. Upon reaching his bed Hawkins was pushed into it by the Grievant. When he tried to raise himself he was pushed down flat on the bed by Winfield. This occurred four times. The incident between Officer Winfield and inmate Hawkins came to be regarded as constituting physical abuse of an inmate.

Shortly thereafter, on April 18, 1993, the Grievant was involved with an altercation with another officer,

Cathy Black. They came to be involved in a shoving match. Winfield slapped Black. In due course Officer Winfield was discharged for violation of Rules 43, physical abuse, and 21, fighting. A grievance was filed protesting that action. It was not resolved in the machinery of the parties and they agree it is properly before the arbitrator for determination on its merits.

Position of the Employer: Turning initial attention to the incident involving inmate Hawkins the State points out that in April, 1993 he was near death. He died in May, 1993. No doubt exists that he was frail, that he walked with difficulty and that his comprehension was poor. It was this individual, who manifested no threat whatsoever to the Grievant, who was abused by her. He was grabbed and essentially dragged across the room at Frazier Health Center and made to lie down on his bed. While that was being done Ms. Winfield yelled at Hawkins, forcibly shoved him to the extent he almost lost his balance and then repeatedly pushed him down on his bed. Hawkins was not defying her orders. He was not resistant in any way. To the contrary, he was attempting to comply with her directives. Given his physical condition, that was very, very difficult for him to do. Her reaction was entirely disproportionate to the situation in the State's opinion. In the course of this incident Winfield told Hawkins that he had best comply with her directives or she would show him she was a "bad ass." In other words, she threatened him. That sort of behavior is inappropriate from a correction officer. In this case, it is particularly inappropriate given the physical and mental condition of inmate Hawkins.

Several days later, on April 18, 1993, Winfield was involved in an altercation with another Correction Officer, Cathy Black. They had words about inmates in the area and the alleged lack of supervision provided by Black. Thereupon Black wagged a finger several inches from Winfield's face. Winfield apparently then slapped Black's hand away from her.

Not only did Winfield have little service when these events transpired, her service was replete with discipline. In February, 1991 she had served a three day suspension. A five day suspension was served in January, 1993. Numerous verbal and written reprimands had been administered to her as well. In addition, Winfield had transferred to Ross Correctional Institution during her tenure at Orient. She had not passed her probationary period at Ross and been sent back to Orient. Her performance reviews were replete with entries in the "below" expectations column. In essence, the record compiled by the Grievant shows her to have been a poor employee. When she acted as she did in April, 1993, she provided the requisite just cause for the State to discharge her from employment. It urges the grievance be denied in its entirety.

Position of the Union: The Union points out that there exists no written definition of what constitutes "abuse" of an inmate. If it is not definable, it cannot be said to have occurred in this situation according to the Union.

There exists in the Ohio Revised Code a definition of abuse. Found at Sections 2903.33 (B)(1) and (B)(2) it divides abuse into "Gross Abuse" and "Abuse." Gross abuse refers to knowingly causing physical harm to a person. Abuse refers to knowingly causing physical harm or recklessly causing serious physical harm to a person. Though those definitions do not specifically refer to the Department of Rehabilitation and Correction, they are referenced by the Agreement and provide the standard that must be met by the Employer when administering discipline for physical abuse. In this situation, no abuse of Hawkins occurred. After the incident involving hire Winfield continued to work in the area and supervise him. The Ohio Highway Patrol was not called in to investigate the situation. From the start, the Employer acted in such fashion as to reveal it was doubtful over the merits of its case according to the Union.

The Union points to documentation compiled by the Employer in the course of its internal investigation to demonstrate that there was no abuse in this incident. There is included in Joint Exhibit 11 of this proceeding a medical report for Hawkins. It shows no evidence of abuse. Hawkins is noted as having no injuries or complaints. No physician was notified. In the absence of any evidence of abuse the State cannot meet what the Union asserts is its heavy evidentiary burden to sustain the discharge at issue in this proceeding.

Finally, the Union stresses that Hawkins was suffering from AIDS which would soon prove to be fatal for him. Winfield was understandably concerned for her own well-being. Hawkins was not in a vegetative state. He could comprehend directions and act upon them. He did not act expeditiously in this instance. Under these circumstances, the reaction of Officer Winfield was not inappropriate in the Union's view.

Turning to the incident of April 18, 1993 between Officers Winfield and Black the Union points out that the latter was held over for involuntary overtime on that date. Black was unhappy with that situation and made her feelings abundantly clear. At about 5:00 p.m. on April 18th Black became upset with inmate Chinn who was delivering food to inmates. No reason for Black to be upset existed in Winfield's mind. Food service was proceeding smoothly in her opinion. She told as much to Black who became belligerent. Black approached Winfield and jabbed her fingers towards Winfield's eyes. Winfield slapped Black's fingers away. She pushed Black away as well. Black reciprocated. Black then told Winfield she would report her. Winfield told her to go ahead and do so. She filed a report on the incident as did Black.

When the incident was over Winfield contacted the Captain on duty to report it. At no time did she attempt to conceal or minimize her activity. In essence, what occurred was a spontaneous reaction, akin to self-defense in this instance.

Other employees Keasha Brown and Rhonda Gibson, received suspensions for fighting. Winfield was discharged. This is a case of disparate treatment according to the Union. The Grievant is the recipient of more severe discipline than her co-workers for the same offense in its view. This sort of situation is improper it asserts.

The Union urges the grievance be sustained. At the time of her discharge Ms. Winfield had pending a transfer to Columbus Medical Center. In addition to the normal make whole type of remedy, the Union desires that transfer be awarded to Ms. Winfield as well.

Discussion: The statutory definitions of abuse are helpful guides to resolution of this dispute. While they are not directly applicable, they contain the concept of "physical harm" being perpetrated upon a person in the care of the State. In this instance, there is no evidence of any harm occurring to inmate Hawkins. Joint Exhibit 11 in this proceeding contains the "Special Incident/and or Use of Force Report" of the incident. That document details the medical condition of Hawkins after experiencing the alleged abuse at the hands of Winfield. He denied injury or any complaint. "No injuries" were found on him. All vital signs checked were normal. The person who examined Hawkins noted "no injuries." A physician was not notified of the incident. The documentation that would support a claim of abuse is not present in this situation. This is in contrast to the situation in the George Stover discharge dispute. (Case No. 27-12-900201-0060-01-03, Nov. 16, 1990, Graham, Arb.). In that situation the inmate, one Urdock, complained of being beaten by the Grievant. Physical evidence in the form of a boot print on his back supported that allegation. In this case no complaint about Winfield's conduct was made by Hawkins. Nor did the contemporaneous physical examination of his body show any evidence of mistreatment. A charge of abuse is not supported by -the evidence.

At the hearing testimony was received from three people who witnessed the events between Winfield and Hawkins. These were Pamela Montgomery, a nurse on duty, Martin Brooks, a hospital aid at the time and also on duty and Victoria Cline, a corrections officer who happened to be in the area. The testimony of all three witnesses is consistent. All report that there was some pushing of Hawkins by Winfield, that Winfield was guiding or propelling Hawkins to his bed, that Hawkins fell but righted himself before reaching the floor and that Winfield pushed him onto his bed each time he attempted to rise from it. The testimony evidences that Winfield was angry with Hawkins and that she forcefully expressed her displeasure. It does not show evidence of abuse. Winfield's behavior on April 14, 1993 according to the accounts of Montgomery, Brooks and Cline was out of the ordinary. Given Hawkins' physical condition it was inappropriate. Based on the evidence, it was not abusive.

The incident between Winfield and Black is insufficient sustain a discharge. Clearly they had an altercation. It was mutual. Neither Winfield nor Black was a passive bystander in the dispute between them. That Winfield did not turn the other cheek in the circumstances cannot serve to prompt her discharge. That penalty is excessive for her participation in the fracas between the two officers. This is especially true when considering that Winfield made no attempt to conceal the event. She reported it in detail. She acknowledged from the first that she had slapped Black's hands away from her. Her account of the incident between them on April 18, 1993 is unchallenged.

Contrary to the Union's assertion, the record in this case does not establish evidence of disparate

treatment of the Grievant vis-a-vis Brown and Gibson. Their work records and seniority were not placed on the record in this proceeding. Those factors are vital to any showing of disparate treatment. A grievant must be situated in substantially the same fashion with respect to seniority and disciplinary history as other employees before a claim of disparate treatment may be successfully lodged.

Prior to the events under review in this proceeding the Grievant had compiled a poor record in State service. It is replete with oral and written warnings as well as two suspensions. Given the circumstances surrounding the events of April 14, 1993 discipline is appropriate. That discipline must be short of discharge as no abuse of inmate Hawkins was found to have occurred.

Award: The grievance is sustained in part and denied in part. The Grievant is to be restored to employment. She is to be paid all monies she would have earned but for this incident. The financial obligation of the State to the Grievant is to be offset by any funds she may have received from Unemployment Compensation and any interim earnings she may have had. The Grievant is to promptly supply to the Employer such evidence of interim earnings as it may require. Included in the obligation of the State is restoration to the account of the Grievant of all seniority credit that would have been earned and payment for all medical expenses that would have been paid by the health insurance plan in which the Grievant was enrolled. As the Grievant had been awarded a transfer to the Columbus Medical Center prior to her discharge that transfer is to be effected as part of the remedy.

Given the finding that the Grievant engaged in improper conduct towards inmate Hawkins on April 14, 1993 and her prior disciplinary record the discharge at issue in this proceeding is to be converted to a two work week suspension.

Signed and dated this 17 day of August, 1995 at Solon, OH.

Harry Graham
Arbitrator