

#721

In The Matter of the Arbitration

-between-

The State of Ohio

-and-

The Ohio Civil Services Employees  
Association, AFSCME Local 11

OPINION AND AWARD  
The Samuel Carter Matter

REVIEWED BY  
ce 5/23/00  
MAY 23 2000

GRIEVANCE COORDINATOR

27-21(990205)1695-01-03

ARBITRATOR: John J. Murphy  
Cincinnati, Ohio

HEARING: April 18, 2000

AWARD DATE: May 17, 2000

APPEARANCES:

FOR THE UNION: Don Sargent  
Staff Representative  
OCSEA, AFSCME Local 11  
1680 Watermark Drive  
Columbus, Ohio 43215

Also present: Samuel Carter  
Grievant  
  
Neil Nolan  
President, Chapter 6540

Christine Hosley  
Mike Hagans  
John Mathews  
Shelly King  
Robert Cutshall  
Vaughn George  
Witnesses

FOR THE EMPLOYER: Bradley A. Nielsen  
Labor Relations Officer  
Orient Correctional Institution  
11781 State Route 762  
Orient, Ohio 43146

Also present: Rhonda Bell  
Office of Collective Bargaining, 2nd Chair

Alan Lazaroff  
Warden

Lt. Patricia Rice  
Correctional Lieutenant

Sam Beeler  
George Burton  
Bill Blaney  
Witnesses

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REMOVAL OF GRIEVANT

The Grievant, a fifteen year employee, was a Correctional Sergeant Counselor at the Orient Correctional Institution in Ohio. The institution is a medium security prison housing 2,000 inmates with 600 in staff. The Grievant was assigned to a housing area, 3E, as the Dorm Sergeant over an area housing 175 inmates.

The Grievant was removed from his employment effective January 21, 1999 by letter from the warden of the Orient Correctional Institution and the Director of the Department of Rehabilitation and Correction for the State of Ohio.

The letter set forth the factual basis for the removal, and cited an incident that occurred on November 3, 1998 between the Grievant, a sergeant, and another employee, Patricia Rice, a

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neglect of duty, violation of such sections or the rules of the director of administrative service or the commission or any other failure of good behavior or any other acts of misfeasance, malfeasance, or nonfeasance in office.

#12 - Making obscene gestures or statements or false or abusive statements toward or concerning another employee, supervisor, or member of the general public.

#19 - Striking, fighting, or otherwise engaging in a physical altercation with another employee or member of the general public.

#37 - Actions that could harm or potentially harm the employee, fellow employees, or a member of the general public.

#40 - Any act that would bring discredit to the employer.

STIPULATED ISSUE

Was the Grievant, Sergeant Samuel Carter, removed for just cause? If not, what shall the remedy be?

POSITIONS OF THE PARTIES

A) Department Position

The department argued that the evidence showed the Grievant brought an inmate to Lt. Rice in the area near the chow line--an inmate whom Rice had previously ordered to return to his dorm area. When the Grievant and the inmate reached Rice, Rice twice ordered the inmate back to the dorm area using her finger to point to the inmate and the direction of the dorm. The Grievant then stepped between the inmate and Rice, and yelled, "crazy woman, get your finger out of my face." He then struck Rice on the arm twice with a chopping blow. He then turned to S. Beeler, called him a "racist" and asked if he would "write the truth or stay with your own kind."

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The department further argued that another corrections officer had been assigned to the dining hall and saw the complete episode and fully corroborated Rice's testimony. Rice's testimony is further corroborated by the written physical examinations that Rice had on November 3 and November 4. The Union's witnesses concerning this incident either did not see the incident or their testimony is not inconsistent with that of Beeler and Rice.

With respect to the propriety of removal, the department notes that the Grievant had twenty-seven active disciplinary matters on his record. This episode constitutes the sixth time that the Grievant had been charged with making abusive statements toward fellow employees. Lastly, while Lieutenant Rice was given a 10-day suspension by the department for allowing a verbal exchange, the removal of the Grievant is justified under the disciplinary grid, particularly since he struck a superior officer twice.

B) The Union Position

The Union raised two major defenses and argued that the first, self-defense, was a complete defense. The second, provocation by Rice either partially or completely, mitigates against removal of the Grievant. The Union denied that the Grievant affirmatively struck Rice. Rather, Rice pressed her fingers into the Grievant's face, and the Grievant used his arms in a defensive posture. Further, the Union denied that the Grievant called Samuel Beeler a racist.

Rice's testimony is not credible. It is inconsistent with the eye witness testimony of witnesses presented by the Union, as well as the written statements supplied by inmates who observed the incident.

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Lastly, the Union centered upon the department's choice of removal as a sanction, assuming the department had cause to discipline the Grievant. The Union urges that removal of the Grievant is inconsistent with Section 24.02 of the contract in that the Grievant did not have a prior major suspension. Furthermore, no one had been discharged for fighting in the department; therefore, removal of the Grievant constitutes unequal treatment.

C) Relevant Contract Provisions

ARTICLE 24 - DISCIPLINE

24.01 - Standard

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

24.02 - Progressive Discipline

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

Disciplinary action shall include:

- A. one or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. a fine in an amount not to exceed five (5) days pay; for any form of discipline; to be implemented only after approval from OCB;
- D. one or more day(s) suspension(s);
- E. termination.

OPINION

Much depends on the factual findings from the testimony and documents in the record on the question of what happened at the incident involving Lt. Rice, the Grievant, Sergeant Carter, and Correctional Officer Samuel Beeler. The versions by Rice and the Grievant differ and the differences must be resolved within the rule that the department has the burden of proof to show facts that

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warrant removal of the Grievant under its Disciplinary Rules. By equal measure, the Union has the burden of showing facts that substantiate the two key defenses: (1) the Grievant was provoked by Rice; and/or (2) the Grievant was acting in self-defense.

A) What Happened on November 3

It appears undisputed that Rice was on duty in the chow area and ordered an inmate to return to the housing area, E3. The inmate approached the Grievant in the housing area and told him what happened and also told him that he had not had lunch. The Grievant locked down the housing area and told the inmate to accompany the Grievant back to the chow area to deal with Lt. Rice. The Grievant with the inmate in tow entered the chow area and approached Rice as Rice was departing. At this point the versions differ. The principal elements of Rice's version include the following. When the inmate and Carter came to Rice, the inmate was standing to one side of Carter and behind Carter. Rice pointed to the inmate and told him to return to the dorm. She did so a second time at which point Carter moved between Rice and the inmate. Again, Rice pointed to the inmate and gave a third order to return to the dorm. Rice claimed that she was speaking and pointing only to the inmate. At this point the Grievant struck Rice across her right arm with his hand. She was stunned by this and told the Grievant "don't put hands on me again," and she ordered the Grievant from the area.

Again, as she pointed to the inmate and told him that she would lock him up if he didn't return to the dorm, the Grievant struck her arm for the second time with a karate-like chop. The

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Grievant then turned to Beeler and said, "Mr. Racist, are you going to write the truth or stay with your own kind." At that point, Rice radioed for two captains to come to the area.

The Grievant testified that Rice did tell the inmate to go back to his dorm. Then the inmate jumped behind the Grievant. At that point he noticed Rice's finger coming at his face and he told Rice to keep her hands off him. Rice did it again and the Grievant said he raised his hand in a chop position, but never struck Rice. Rice struck the Grievant with her finger. "Her right arm contacted my arm, and that could have bruised her." The Grievant testified that he did turn to Beeler and say something. It was "are you going to write this up or are you going to stick with your own kind." He did not call Beeler a racist.

For the following reasons, the arbitrator finds that the Grievant was not provoked, was not acting in self-defense, and did in fact strike his superior officer twice on her right arm. A correctional officer, Beeler, saw the entire episode and substantiates Rice's testimony. The bruising of Rice's arm was documented by medical examinations on November 3 and 4, whereas, a similar examination of the Grievant on November 3 was negative on any injury or bruising. Lastly, the testimony of the Grievant's witnesses is not inconsistent with these findings.

1.) Correctional Officer Beeler

Two elements in this record point strongly in favor of the credibility of Beeler. First, Beeler and the Grievant had a positive relationship, and both so stated. The Grievant testified that he had never had trouble with Beeler, and that the Grievant

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had contributed to Beeler's little league fund. In equal measure, Beeler testified that he had a good relationship with the Grievant, that both had worked together on many occasions with the Grievant as the superior officer.

The second element is that Beeler, while pressed in cross examination, testified that he "never looked away from this incident." It was obvious to the arbitrator that the observation of this incident gripped Beeler's attention. As he testified, he had never been called a racist before. In addition, "I thought striking (Rice) was a serious matter."

The principal elements of Beeler's testimony was that he saw and heard Rice order the inmate back to the dormitory, and heard Carter call Rice "crazy woman." He also saw Carter step between the inmate and Rice while Rice was pointing at the inmate. Without equivocation, he testified that the Grievant struck Rice twice on her arm. Finally, he testified that the Grievant turned to him and called him a racist.

Beeler had a positive relationship with the Grievant, and there is no basis to suggest any reason to lie about the Grievant. The absence of animus by Beeler is coupled with Beeler's riveted attention to the incident as it unfolded. Lastly, Beeler filed a written two page report of this incident on the day it occurred, which was made part of the record. The report tracks his oral testimony of his recollection of the incident as set forth above.



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2.) Medical Documents

Department policy requires all employees who are involved in a fight to submit to a medical examination at the prison's medical center. Since both Rice and the Grievant were claiming to have been injured by the other, both visited the department's paramedic shortly after the incident. The paramedic, who regularly performs medical examinations at the prison, testified at the hearing and produced his handwritten notes of two examinations of Lt. Rice and one examination of the Grievant.

Rice was first examined by the paramedic at 12:45 a.m., shortly after the incident that occurred during lunch at the chow area. According to the paramedic's notes, Rice complained of being struck in the arm twice by another employee, Sergeant Carter. The paramedic's notes of the results of the examination state:

Inside of right arm, red between elbow and midway to wrist. It has full ROM and equal grip.

A second examination of Rice was performed by the paramedic on November 4 in the morning. This examination revealed growing signs of bruising of the right arm. It stated:

On 11/3/98 area was reddened and appeared it would bruise. Today, inside right arm has dark nickel size bruise with lighter bruising about area, and it appears larger bruised area will appear. PT. (patient) also now has right elbow pain.

The Grievant also followed the department policy and consulted the department's paramedic at 1:20 p.m. on the day of the incident. Consistent with his version of what took place at the incident, the Grievant told the paramedic "he was struck in the nose by Lt.

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Rice's finger." After examination, the paramedic noted the following, "exam (was) negative for signs of injury."

These documentary examinations fully support the finding that the Grievant did strike Rice with a karate-type chop twice on her inside right arm as she was pointing at the inmate. It simply does not meet the simple test of common sense to suggest that this type of bruising could have occurred while, as the Grievant testified, Rice's arm came in contact with the Grievant's arm as he had his hands up to protect himself.

Also noteworthy in this analysis is the testimony of the Grievant during his case in chief that he teaches martial arts, and, has a 7th degree black belt. The Grievant, by his own testimony, had the capacity to deeply bruise Rice's right arm by striking her twice.

3.) The Grievant's Witnesses

There were inmate statements submitted in support of the Grievant's version of the incident. Two stated that Rice poked and shoved Carter, one stating that the poking occurred several times in Carter's chest and throat area. By contrast, Carter's own written statement of the incident made shortly after it occurred merely noted "Lt. Rice pointed her finger in my face and told me to shut the fuck up. I then pushed Lt. Rice's finger out of my face and told her to keep her finger out of my face. Lt. Rice then called for (the captains)." No shoving had been claimed by Carter and the inmates' statements are not given weight. Of the six witnesses presented by the Union, four were not present at the incident on November 3. Sergeant Michael Hagans testified, but his

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testimony is simply not inconsistent with that of Rice and Beeler. He testified that he could not hear what Rice and the Grievant were saying, and that he did not see Carter block Rice's hand, as Carter claimed. He also testified that he did not see Rice put her finger in Carter's face, as Carter claimed. As to where Rice was pointing, Hagans stated:

She (Rice) could have been pointing at the inmate or Carter. I'm not really sure.

We are left with the testimony of Christine Hosley. While Hosley testified that she did see Rice "with her hands in Carter's face," she also testified that she saw Carter move his arm in a chopping motion. A key part of her testimony is her statement that she never saw either Carter or Rice touch each other. This is consistent with her written report of the incident made immediately after it occurred. "At no time did I see or notice either one assaulted as far as I could tell."

Rice was assaulted and battered twice by Carter. Credible evidence and the medical examinations of Carter established that fact. Consequently, it appears that Hosley's vantage point in observing the incident impaired her testimony.

B) Propriety of Discharge

The department argues that the facts as found above constitute a violation of five Standards of Employee Conduct, and that each violation--in and of itself, would warrant removal. For the reasons stated below, it is necessary only to consider the facts in relation to Standard 12 (the making of abusive statements toward another employee), and 19 (striking another employee).

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The Grievant is a long-term employee of fifteen years of service in the department, but countervailing against this is the undisputed fact that his record contained twenty-seven active disciplinary actions prior to his removal.

We turn first to the facts in relation to Rule 12--making abusive statements to another employee. While the phrase "crazy woman" addressed to Lt. Rice could possibly pass as shop talk, the Grievant did make an abusive statement to Beeler when he called him a racist. Beeler testified as to his reaction. He had never been called this term before. Furthermore, it is a term that could not be tolerated under any defense as a term to be used by one correctional officer to another certainly in the presence of inmates in a prison. This finding that the Grievant used an abusive statement to Beeler constitutes a sixth occasion in which the Grievant was found to have violated Rule 12 among the active past disciplinary actions of the Grievant.

It may appear extreme to justify removal for this finding of a Rule 12 violation in this case. The Grievant had only received written reprimands and three different suspensions for violating this rule in the past. However, any doubt about the propriety of removal in this case is erased by consideration of the finding with respect to Rule 19.

Carter struck a superior officer twice in the presence of at least one inmate, and Carter had the personal capacity to injure the officer in light of his training as a martial arts expert. This is violence against a superior that certainly could not be

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tolerated. This is a clear violation of Rule 19 which envisions removal for a first offense.

The Union argues that there are two impairments on the department's decision to remove the Grievant, even if the department had cause to discipline the Grievant. The first centers upon Article 24.02 of the contract. This provision requires the department to "follow the principles of progressive discipline." It further states that "disciplinary action shall be commensurate with the offense." Finally, the provision sets forth a ladder of ascending injurious sanctions from oral reprimand to termination.

Article 24.02 does not constitute a straight jacket that must be adhered to by the department in a lock-step movement from light to severe discipline. This provision does not state that termination can occur only if a prior act of discipline constitutes a suspension. In addition, it does not state that the first sanction for a first offense must be the lighter sanction of an oral reprimand.

This provision refers to the principles of progressive discipline. It further makes explicit that a sanction chosen by the department "shall be commensurate with the offense." The Grievant's offense of twice striking and bruising a superior officer in front of an inmate is an offense for which removal is a commensurate sanction.

Lastly, the Union makes a claim that the Grievant was unfairly treated in that no other person had been removed by the department for fighting. The Union has the burden of showing dissimilar treatment as a defense, and this record is quite shallow on this

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point. The Union did, however, provide copies of prior arbitration awards, including Case No. 27-26-941-004-0504-01-03. This decision by Arbitrator Charles Ipavec in 1995 concerned a decision by the department to remove a correctional officer after hitting another correctional officer for snitching on him to superiors.

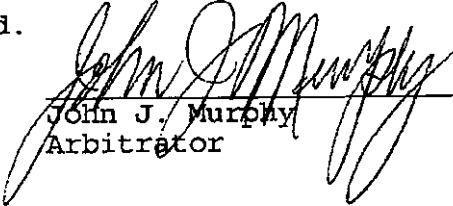
Arbitrator Ipavec not only observed that the department had removed the Grievant, but also noted that he would have sustained the removal but for certain mitigating factors, neither of which are present in this case.

This decision shows that the department had indeed removed a correctional officer for striking another correctional officer five years ago. It further shows that the arbitrator would have sustained a removal but for mitigatory elements not present in this case. This decision does not support the proposition that the department had never removed a correctional officer for striking another employee.

AWARD

The grievance is denied.

Date: May 17, 2000

  
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John J. Murphy  
Arbitrator