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IN THE MATTER OF ARBITRATION

BETWEEN

GRIEVANCE COORDINATOR

THE OHIO DEPARTMENT OF CORRECTIONS

AND

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 27-32(99-02-18) 0176-01-03
27-32-(99-02-18) 0177-01-03

Shawn Rogan, Grievant
Mike McKee, Grievant

Advocate(s) for the UNION:

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INTRODUCTION

A hearing on the above referenced matter was held on April 21, 2000 , April May 12, July 20, 21 and August 9, 2000, in Caldwell, Ohio. The parties first argued a matter of procedure. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted briefs in lieu of closing arguments. The hearing was closed on September 12, 2000. The Arbitrator's decision, by mutual agreement of the parties, is to be issued no later than the week of Noveber 13, 2000.

ISSUE

Were the Greivants, Shawn Rogan and Michael McKee, removed for just cause? If not, what should the remedy be?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, See CBA for language)

Article 24 DISCIPLINE

BACKGROUND

The Grievants in this matter are Shawn Rogan and Michael McKee, former Correction Officers with the Ohio Department of Corrections, Noble Correctional Institution, Caldwell, Ohio. Both employees were hired

on January 1, 1994 and were terminated from employment on February 18, 1999. This case concerns the excessive use of force with Inmate White.

The Grievants were first assigned to Chillicothe Correctional Institution and the Belmont Correctional Institution before they were transferred to the Noble Correctional Institution on August 4, 1996.

On June 8, 1998, an incident occurred involving use of force on Inmate Sammy White. The use of force occurred when Correction Officer's Rogan and McKee attempted to move Inmate White to an adjacent cell in the Segregation Unit. He was being moved from cell 170 to cell 169 (a double cell), occupied by inmate Hendrick, an African-American male. Inmate White is a Caucasian male. Officer Bart Brown was also working in the Segregation Unit but in the control panel area and not in the cell blocks.

Ohio Administrative Rule 5120-9-02, Use of Force Report and Investigation requires any DRC employees who struggle with or use physical restraint or control on an inmate to file a use of force report prior to the conclusion of the work shift. The rule also requires any employee who witnesses a use of force by another employee to file a use of force report. Both Officers Rogan and McKee filed a use of force report.

A three person Use of Force Committee was convened to investigate the June 18, 1998 incident involving Inmate White. The committee interviewed Inmate White and Officers Rogan and McKee. On

July 6, 1998, the committee determined that the use of force by Officers Rogan and McKee was justified, according to Ohio Administrative Code 5120-9-01 (See JX 3, 9).

In mid to late August of 1998, The FBI and the State Highway Patrol were actively conducting inmate civil rights violation investigations at Noble Correctional Institution. No less than 13 FBI agents were involved in investigating alleged civil rights violations at Noble. The Noble prison population has always been roughly a 50-50 mix of white and minorities inmates (See Warden Haskin's testimony). The Warden testified that Noble had been under scrutiny by the Department of Corrections due to the nature of its rural based location and its largely Caucasian workforce. In addition, numerous Correction Officers were placed on administrative leave during this period as a result of ongoing investigations.

A second Use of Force Committee was convened to once again look into the June 18, 1998 incident involving Inmate White during the period of the FBI and Highway Patrol mass investigative efforts. It was convened at the request of Warden Haskins following a conversation he had had with the FBI, who were actively investigating the Inmate Todd use of force incident. The FBI did not offer Warden Haskins any specific information; however, they suggested that there may be additional evidence regarding the use of force used against Inmate White in June.

The second Use of Force Committee was intentionally comprised of

experienced Department employees outside of Nobel, in order to remove any perception of a bias stemming from the findings of the first Use of Force Committee. It began its investigation in September of 1998 and interviewed several inmates and employees. After these interviews were conducted, it concluded:

"...Officers Rogan and McKee had violated institutional and departmental policy by unnecessarily entering cell # 170, without proper authorization, after inmate White clearly indicated his refusal to be handcuffed and to be moved from the cell."

The Committee also concluded that Officer Rogan abused inmate White by striking him and that Officer McKee took no action to protect inmate White. In addition, the Committee concluded that the Grievants endangered the safety of inmate White when they put him in a cell handcuffed with inmate Kendrick who remained not handcuffed.

Based upon these findings Officer Rogan was found to have violated the following departmental rules 7, 8, 42, and 43 (See JX 4). Officer McKee was found to have violated department rules 7, 8, and 42. He was not charged with violation of rule 43 because there were no findings that he physically abused inmate White. The Grievants were terminated from their employment on February 18, 1999. The Grievants immediately filed grievances claiming they were fired without just cause.

SUMMARY OF EMPLOYER'S POSITION

Motion to dismiss

The Employer argues that the Union's motion is barred based upon the previous ruling in the Bart Brown case (See closing statement and record for details for full text of the argument).

Merits

The Employer's argument is straightforward. The Grievants have violated rules of the department that were so elementary that any corrections officer would have understood what needed to be done. The Grievant used excessive force in a situation that should have never occurred (See record for the full text of the argument).

SUMMARY OF UNION'S POSITION

Motion to dismiss]

The Union argues that the case should be dismissed pursuant to the Ohio Administrative Code and the principles of Res Judicata and Collateral Estoppel (See full text of argument in the record and in the closing brief).

Merits

The Union argues that the Employer failed to conduct a fair and timely investigation in violation of Article 24 of the Collective Bargaining Agreement. Furthermore, the Union contends that the Employer failed to

prove that the Grievants committed any rule violations in this matter and were victims of a biased and repugnant attempt to persecute them (See full text of argument in the record and in the closing brief).

DISCUSSION

Motion to Dismiss

The Bart Brown grievance essentially dealt with the same fact pattern that is present in these cases. The Union failed to make a motion to dismiss in that case pursuant to the Ohio Administrative Code and in accordance with the principles of Res Judicata and Collateral Estoppel. These are very interesting arguments and they were skillful presented. However, I agree with the Employer that this line of argument comes too late. The previous ruling rendered by the undersigned Arbitrator, which dealt with the same incident and essentially the same documentation, effectively bars this argument from being forwarded in the case of Officers Rogan and McKee.

Merits

The case will be analyzed on the basis of each charge levied against the Grievants:

Charge 1: Rule 7 Violations

Handcuffing Inmate White in Cell 170. The evidence and testimony do not support this charge. The Employer failed to show that Officers McKee and Rogan failed to handcuff inmate White prior to transporting him to cell 169. The Grievants insist they handcuffed White in cell 170 prior to moving him. Inmate Kendrick only saw inmate White handcuffed (MX 6,p. 16). Inmate Hems only saw inmate White handcuffed in the hallway (MX 7, p. 2). Inmate Malone stated that the Grievants handcuffed inmate White in his cell, but with the door unlocked (MX 11, p. 2). Inmate Knowledge White testified that he said "I think they had to come back and get the cuffs" (MX 12, p. 7). Inmate Marshall stated inmate White was not cuffed when he was dragged from his cell (MX 13, p. 4). Testimony regarding whether inmate White was properly handcuffed is at best contradictory. It is not clear when and exactly where inmate White was handcuffed.

Failing to activate their man down alarm. The Union insists that the altercation between inmate White and the Grievants lasted approximately one (1) minute. From the evidence and testimony of the witnesses and both inmates and employees, it appears that the incident was over very quickly. The Employer failed to demonstrate that an employee in this type of situation is procedurally required to activate his/her man down alarm.

Violation of the Infectious Disease Policy. The policy was enacted on October 27, 1997, some nine (9) months prior to the incident of June 18, 1998. The Employer failed to prove that the Grievants were trained on this policy or that it had reached a stage of implementation at Noble in June of 1998. Nurse Terry Darby, who most likely would be aware of such a policy, stated in the hearing, *"I don't know when they started that at Noble. I don't whether there was a bio hazard team in June, but I knew we had one in November."* The Employer failed to provided convincing evidence that the Grievants knew or should have known about a policy that may or may not have been in effect at Noble in June of 1998.

Charge 2: Rule # 42 Violations

The selection of inmate Clabaugh as a porter. The testimony of Captain Windom undermined the Employer's contention regarding this line of accusation. She testified that Officers McKee and Rogan were able to select a porter without her permission being secured in advance. In addition, the fact that Inmate Clabaugh remained a porter after June 18, 1998 negates the Employer's argument that the selection of inmate Clabaugh was a rule violation that could be used to support the termination of the Grievants.

Hancuffing of inmate Kendrick before putting inmate White into cell 169. The judgment that Officers McKee and Rogan used in this matter was faulty and they could and should have avoided this entire situation

(to be addressed below). However, the physical resistance that was demonstrated by inmate White once he was heading toward cell 169 caused the Grievants to act hastily. Inmate Kendrick was order to his bunk and he immediately complied. Inmate White was quickly placed into cell #169 as a matter of gaining control over the situation. Officer McKee kept both inmates in constant observation that provided a measure of security for inmate White. It is also clear from the testimony and evidence that there was an attempt to remove inmate White's handcuffs. He had the option of having his cuffs removed, but chose not to exercise it (See MX 1, p. 3). Officers Rogan and McKee created a situation for which their judgment comes into serious question. However, I do not find that they had time to procedurally comply with the handcuffing of inmate Kendrick prior to confining inmate White in the nearest cell. Given the intensity of the situation, there was no convincing evidence or testimony to support an intentional placement of a handcuffed inmate in a cell with an inmate who was not similarly restrained. I agree with the Union that unhandcuffing inmate White when he was placed in cell 169 was not part of the original list of allegations levied against the Grievants and has no place in this analysis.

Moving a hostile inmate

Captain Windon's statement was definitive in this area. She provided unrefuted testimony that, ..."*there are no post orders regarding*

violence once an inmate is out of a cell, only to use minimal force as necessary."

Charge 3 Rule # 43 Violations

Inmate White was struck by Officer Rogan. This is a very serious charge that is not supported by clear and convincing evidence. The Grievants insist that they never intentionally struck inmate White. Inmate White provided a statement to the first Use of Force Committee in which he answered the question, "do you think your actions may have caused the incident?" In response he stated, "Yes to a certain extent." (JX 3). Inmate White stated that he was hit in the face by Officer Rogan. However, it is peculiar that he did not tell Captain Windon this after the incident occurred, nor did he file a kite. Inmate Kendrick stated he heard inmate White say, "The mother fuckers kicked me in my face" (MX 6). During the hearing Kendrick stated, "I seen Rogan kicking." Inmate Kearns stated, "Officer Rogan kicked him in the head"(MX 7). Inmate Newman stated, "I saw Rogan punch Whitey" (M 10). Inmate Malone stated that inmate White, "fell on the walkway and hit his head" (MX 11). Inmate Slade agreed with inmate Malone that inmate White was not punched or kicked (UX 1).

From all this conflicting testimony it is reasonable to assume that inmate White been hit in the face. The problem is that there is no definite way to discern whether this happened during the violent altercation

between inmate White and the Grievants or was an attack upon inmate White by Officer Rogan.

Charge 4: Rule #42 Violations

The Union successfully defended the Grievants against the first three charges. However, the weight of the evidence and testimony points to one inescapable conclusion reached by David J. Burrus in his Hearing Officer's Report. Why did the Grievants move an inmate who was so reluctant to be moved?

The Union points to the experience and knowledge of the Grievants and argues that the decision to move inmate White was a routine one related to the need to keep certain categories of prisoners separate from one another. I can accept this explanation as plausible. However, it is difficult to comprehend why trained and experienced Officers would continue to try to execute a routine move when it should have been obvious to experienced officers that they were helping to precipitate an incident. Clearly they exercised poor judgment in this matter and attempted to execute a move of an inmate that should have been stopped, and management should have been consulted. I do not find that excessive force was used by the Grievants. However, no force would have been necessary had they used better judgment and not moved inmate White when he initially resisted. By doing so they placed inmate

White in a position to be injured, even though he admits he is partly to blame for what occurred on June 18, 1998.

The Employer's argument is that the actions of the Grievants were intentional and were designed to either punish (or make uncomfortable) inmate White or cause him to come under the wrath of inmate Kendrick. Although well argued by the Employer's advocates, the body of evidence and testimony simply does not prove intent. The Employer did not demonstrate that the Grievants disliked or had a particular problem with inmate White which would serve as a motive for their actions.

AWARD

The Grievances are sustained in part.

1. Officer McKee and Officer Rogan are to be returned to duty following an appropriate period of refresher training required by the Department of Corrections. Their record of termination is to be converted to a ten (10) day suspension for violating Rule 7. All other rule violations related to this matter shall be removed from their personnel record.
2. They shall receive all back pay (including roll call pay) and benefits, less the ten (10) days of suspension and any W-2 income or unemployment compensation received during the period they have been absent. All other benefits and seniority shall be restored. Such payment shall be within two (2) full pay periods following the date the Grievant's submit proof of any W-2 income or unemployment compensation.

Respectfully submitted to the parties this 14th day of November,
2000.



Robert G. Stein, Arbitrator