

#759

REVIEWED BY

JUN 19 2001

cl 6/19/01
GRIEVANCE COORDINATOR

In The Matter of the Arbitration

-between-

Ohio Civil Services Employees Association,
AFSCME Local 11

-and-

State of Ohio,
Department of Rehabilitation and Corrections,
Mansfield Correctional Institution

27-20-(00-06-26)-4546-01-03

OPINION AND AWARD
Dennis Gast Matter

John J. Murphy, Arbitrator

Hearing: May 1, 2001

Opinion and Award Issued: June 5, 2001

APPEARANCES:

FOR THE STATE:

Tina Krueger
Legal Counsel
Department of Rehabilitation
and Corrections
1050 Freeway Drive, N.
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Ginny Lamneck
Department of Rehabilitation
and Corrections
2nd Chair

Patrick Mogan
Office of Collective Bargaining
State of Ohio
2nd Chair

Also Present:
(All by subpoena)

D. Majors
Correctional Officer

D. Groff
Correctional Officer

A. Hunsinger
Case Manager

M. Dewitt
R.N.

Dr. K. Isgro
Psychologist

T. Sherer
Sergeant, Correctional Officer

Dr. J. Bechner
Psychologist

T. Israel
Deputy Warden

FOR THE UNION:

James McElvain
Business Representative
OCSEA/AFSCME, Local 11
1108 Woodville Road
Mansfield, Ohio 44907

Mick Brashaw
Chief Steward
2nd Chair

Also Present:

B. Kilgore
Licensed Practical Nurse

Dennis Gast
Grievant

G. Parrigan
Correctional Officer

D. Burson
R.N.

FACTUAL BACKGROUND:

The Grievant was placed on administrative leave with pay on April 6, 2000 as a result of an incident that occurred at approximately 1:30 p.m. on April 5, 2000 in Cell 112 of Residential Unit 4-C. A Use of Force hearing was conducted over a four day period with statements taken from eleven staff members in the unit at the time of the incident. Further investigation was recommended and a pre-disciplinary hearing was conducted on May 25, 2000.

As a result of this investigation, the Grievant was terminated from his position of Correctional Sergeant effective June 22, 2000. The termination was based upon a finding that the Grievant violated Rules 41, 43, and 44 of the Standards of Employee Conduct, and the notice of termination contained the following factual foundation for the finding of the rule violations:

You are being terminated for the following infractions: On May 5, 2000, inmate Rosenbeck, 180-731, did strike C.O. Anthony Cline in the face with his fist. C.O. Cline went to the pod table and sat down. C.O. Parrigan responded to the cell and attempted to restrain inmate Rosenbeck, who continued to resist. Upon seeing this, you entered the cell and sprayed pepper spray on inmate Rosenbeck, and unintentionally, C.O. Parrigan. C.O. Parrigan left the cell due to the reaction of the pepper spray. You then began yelling at inmate Rosenbeck words to the effect of, "You hit one of my officers," and "I'll teach you not to do this or fuck with us." You then began to stomp, with your foot, on inmate Rosenbeck's head and back. During this time, the inmate was not resisting, but was lying facedown on the cell floor between the wall and the bed. You continued to stomp on inmate Rosenbeck's head, shoulders, and back several times.

A timely grievance was filed, and the parties agreed that the matter was properly brought to arbitration.

STIPULATED ISSUE:

Was the Grievant removed for just cause; if not, what shall the remedy be?

STANDARDS OF EMPLOYEE CONDUCT

RULE VIOLATIONS AND PENALTIES:

Steps in Progressive Discipline:

- OR - Oral Reprimand
- WR - Written Reprimand
- FINES - IN AN AMOUNT NOT TO EXCEED FIVE (5) DAYS PAY FOR ANY FORM OF DISCIPLINE UP TO A FIVE (5) DAY SUSPENSION; TO BE IMPLEMENTED ONLY AFTER APPROVAL FROM CENTRAL OFFICE LABOR RELATIONS AND OCB
- 1-3 - 1- to 3-day suspension
- 3-5 - 3- to 5-day suspension
- 5-10 - 5- to 10-day suspension
- R - Removal

* DENOTES RULE VIOLATION FOR ON OR OFF DUTY CONDUCT. OFF DUTY CONDUCT REQUIRES JOB NEXUS.

	Offenses				
	1st	2nd	3rd	4th	5th
...					
41. Use of excessive force toward any individual under the supervision of the Department or a member of the general public			3-5/R	5-10/R	R
...					
43. Physical abuse of any individual under the supervision of the Department					R
44. Threatening, intimidating, coercing, or use of abusive language toward any individual under the supervision of the Department		WR-3/R	3-5/R	5-10/R	R

OPINION:

A) The Incident that Brought the Grievant
to Cell 112

1) The Scene

Cell 112 is in the mental health residential unit of the institution. Inmates qualify for this unit after an evaluation to determine whether they suffer from a serious mental illness. The department uses the following definition to make this determination.

Serious Mental Illness: A substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality or cope with the ordinary demands of life within the prison environment and which is manifested by substantial pain or disability. Serious mental illness requires a mental health diagnosis, prognosis and treatment, as appropriate, by mental health staff.

Staffing is also rather unique in this unit. The inmates in Unit 4-C are under the supervision of Correctional Officers and mental health professionals.

Unit 4-C is composed in a triangle of two ranges of cells around a common area. The inmate involved in this case occupied Cell 112, a ground floor cell across the common area from the entrance to the unit. The cell was eight feet by ten feet with a twelve foot ceiling. The floor was concrete and walls, cinder block. To the left of the entrance were a metal toilet and wash basin permanently fixed to the floor and wall. To the right of the entrance was a metal platform about six to eight inches off the floor, but bolted to the floor. The purpose of the platform was to hold a mattress when the inmate was allowed one. The parties

stipulated that the distance from the metal platform to the right wall of the cell was from eighteen to twenty inches.

The inmate who occupied Cell 112 was delusional, paranoid, and had a history of aggression at the institution. He was unstable but not suicidal, and he had no history of self-injury. He was psychotic, impulsive and unpredictable.

Five Correctional Officers were present in the unit. Two were on a suicide watch. Officer Groff was sitting outside Cell 104 on the ground level in an alcove observing the inmate through the window in the door. At the time of the incident, the Grievant was nearby Groff. Officer Majors was on suicide watch outside of Cell 109. Officer Parrigan was in charge of the common area, called the "floor officer." Officer Cline was sitting at the control desk adjacent to the entrance which is locked from both the inside and outside.

The fifth Correctional Officer, Sherer, was in the treatment room--an office near the entrance to the unit. He and three mental health professionals were preparing to conduct an evaluation of the inmate in Cell 112 to determine whether he should be transferred to a special correctional institution that houses inmates with very severe mental conditions. Two psychologists, Dr. Isgro and Dr. Bechner, as well as a psychiatric nurse, M. Dewitt, were present in the treatment room with Officer Sherer.

The last participant in this incident was a new employee who was still on probation. A. Hunsinger, a case manager, was sitting at her desk in her office located next to the treatment room. She

had a view of the common area through a window in the door to her office.

2) The Incident

Officer Parrigan, as the floor officer, was preparing to take the inmate from Cell 112 for his evaluation, and instructed the inmate to put on his suicide vest--a garment that goes from neck to knees. The inmate, a man of 120 pounds in weight, had difficulty with the vest, and Parrigan asked for the assistance of Officer Cline. As Cline stood outside of Cell 112, Parrigan "popped" the door to let the inmate out to the common area. The inmate came out of his cell a few steps, and hit Cline in the mouth with his fist. Cline went to a picnic table in the common area and sat down, bleeding profusely.

Parrigan grabbed the inmate around his shoulders outside Cell 112 and pushed the inmate into the cell. Both fell to the floor to the right side of the metal platform--an area of eighteen to twenty inches in width. When they fell, the "man down" alarm on Parrigan began to emit a shrieking noise.

When the Grievant, who was outside of Cell 104 in an alcove from the common room, heard the man down, he rushed to the area and first noticed Officer Cline slumped over the picnic table, bleeding. The Grievant asked Cline what happened, and Cline told him that an inmate had hit him. The Grievant then looked at Cell 112 and saw that Parrigan was lying on top of the inmate in the narrow area to the right of the metal platform, and saw that the inmate was struggling.

Parrigan was on top of the inmate looking at the left side of the inmate's face. He was pushing the left side of the inmate's face under his chin to keep the inmate from facing him to avoid a spit or a bite. Parrigan heard someone enter the cell and stand on the metal platform with one foot, and positioned the other foot against the wall. Parrigan heard the Grievant's voice. At that point, the Grievant maced the struggling inmate, and the chemical enveloped Parrigan's face. Parrigan then backed out of the cell with his eyes burning, unable to breathe and sick to his stomach.

What happened in Cell 112 after Officer Parrigan left is the core of this case.

B) Ultimate Finding of Physical Abuse
of Inmate by the Grievant

An evaluation of this record leads to the conclusion that the Grievant did inflict physical abuse upon the inmate by stomping him several times in the upper back and neck area, and the right side of his face. The physical force was not used to control the inmate or to enforce a rule or in unjustifiable self-defense. The inmate was not resisting and he was lying with his right side of his body exposed to the Grievant who was standing above him on the metal platform in Cell 112.

This was an extraordinarily difficult and painful matter for all of the staff who were at the scene. The record shows the pain suffered by the staff when faced with an incident of physical abuse of an inmate by a fellow staff member. The reactions of the staff at this scene ranged from an attempt to avoid any involvement in the incident to expressions of horror and helplessness.

The key testimony was that of Dr. Isgro, a psychologist who saw the Grievant stomping the non-resisting inmate who was lying in the 18- to 20-inch space between the metal platform and the wall of his cell. Other witnesses corroborated the key points of Dr. Isgro's testimony: (1) her position a few feet from the cell; (2) her expressions of horror and helplessness at what she saw; (3) the stomping of the inmate; (4) the absence of any resistance by the inmate and the injury to the inmate. It is also undisputed in this record that an effort was made to intimidate her and prevent her from relating her observations. Quite obviously, the effort was unsuccessful.

C) The Observations of Dr. Isgro

Dr. Isgro testified that she heard the man-down alarm and she and Dr. Bechner left the treatment room and saw Officer Cline sitting by the picnic table with his head down and blood dropping onto the floor. While she was near the picnic table with Bechner, Dr. Isgro heard a commotion at Cell 112. She approached the cell and stood a few feet away from the inmate's feet as he lay, not moving in the area between the metal platform and the wall. The door to the cell was open and the Grievant was jumping down on the upper back and neck area of the inmate.

Dr. Isgro turned back to Bechner, who was behind her by the picnic table, and said "We have to do something. The inmate is getting pummeled."

She went back to the cell a second time and the stomping was still going on. Again she turned back to Bechner and said, "I can't stand for this to happen. We can't let this happen."

For a third time, she approached the cell but the door was closed. Dr. Isgro testified she could still see the Grievant's head through the window and his head was going up and down. Overall, she testified that she saw the Grievant's foot kick the inmate from eight to ten times during the two occasions when she looked into the cell through the open door.

The Grievant came out of the cell yelling, "get that crazy mother fucker out of here." Dr. Isgro saw the inmate under restraints. She observed a large red marking on his upper back and abrasions on both of his temples.

D) The Corroboration of Dr. Isgro's Testimony

1) Her Position

The Grievant testified that he could not remember seeing Dr. Isgro at the cell. Furthermore, when he left the cell, he saw Dr. Isgro and Dr. Bechner, but they were attending to Officer Cline at the picnic table. By contrast, the testimony of Officers Groff, Majors, and Dr. Bechner positioned the Grievant just outside of the cell observing the activities in the cell. Officer Groff, alerted by the man-down alarm went to Cell 112, and recalled seeing the doctors nearby. The record includes an incident report in Groff's handwriting which recited, "I saw Sgt. Gast (the Grievant) raise his leg and strike inmate--in the head with his foot one time. At

this exact moment, I turned my head away from the cell and saw Dr. Isgro . . . standing a short distance away observing."

Officer Majors also left his suicide post and went to Cell 112. He testified he saw Dr. Isgro standing to the left, "halfway to the picnic table." Finally, Dr. Bechner testified that he saw Dr. Isgro approach the cell door to Cell 112 and stand a few feet away "maybe twice."

The record overwhelmingly places Dr. Isgro outside of Cell 112 with the door open on two occasions, and a full view of the activities in the cell. On a third occasion, she was outside of the cell, looking through the opening in the door. She was clearly in a position to observe the activities in the cell while the Grievant was in the cell with the inmate.

2) Expressions of Horror and Helplessness

The record also shows that the observations by Isgro had an immediate impact upon her. She testified about the spontaneous reaction which she then verbalized to Dr. Bechner. While not repeating the same words that were included in Isgro's testimony, Dr. Bechner did testify that Isgro said to him, "We can't allow this to happen. We have to do something." The case manager, A. Hunsinger, recalled that she heard one of the two doctors say, "I can't stand here and watch what they are doing to him."

3) The Stomping

Dr. Isgro's direct detailed testimony of her observations of the Grievant stomping the non-resisting inmate was also corroborated by other witnesses. The case manager, A. Hunsinger,

was also attracted to the common area by the man-down alarm. She also joined others around Officer Cline who was bleeding at the picnic table. She testified that she turned around, "looked in the cell and saw an inmate on his stomach on the floor." She also stated, "Gast was over him, and I saw his leg go up and down on the inmate's body three or four times--on the inmate's body--the upper back to the head."

Both officers on suicide watch, Groff and Majors, were attracted to Cell 112 by the man-down alarm. Groff testified at the arbitration hearing that he saw Gast "step down" on the inmate's head. Officer Majors testified that he saw Gast raise his foot a few inches, but he did not see the foot hit the inmate. In an incident report in his handwriting requested by a deputy warden, Majors recited that, "I observed Sgt. Gast raise his right foot approx. three inches at which time I looked away into the pod (common area)." Finally, Dr. Bechner testified that Dr. Isgro called his attention to Cell 112, and "I took a step or two toward 112." He said he looked through the window of the door and saw Gast's head going up and down.

The testimony of Groff and Majors exhibits a painful, but honest effort to avoid any involvement in an incident of physical abuse of an inmate by a fellow officer. Their testimony, however, is consistent with the direct, detailed observations of the stomping of the inmate by the Grievant as observed by Hunsinger and Isgro. Groff's and Majors' testimony clearly contradicts the Grievant's testimony that he "did not use my foot to strike or

raise my foot to stomp." The record establishes that the Grievant did inflict physical abuse upon the inmate.

4) Absence of Resistance by Inmate

The Grievant testified that after Officer Parrigan left the Cell 112, the inmate continued to try to get off the floor. The inmate eventually calmed down as Officer Sherer entered the cell. By contrast, Officer Majors came to the open cell door. He testified, "I didn't see the inmate resisting." Majors' testimony of the absence of resistance by the inmate was reinforced by the observations of the case manager, A. Hunsinger. She stated she had a clear view of Gast in the cell. "Gast was out of control and angry." More importantly, she stated that the inmate was not resisting.

There is in this record no justification for the physical abuse by the Grievant on the inmate. There is no justification based upon self-defense; indeed, the record shows that the inmate was not resisting the Grievant when the Grievant was stomping him.

E) The Pain Suffered by the Staff

The record shows the pain suffered by the staff members when they became aware that one of their colleagues was physically abusing an inmate. The pain took the form of expressions of helplessness and horror by Dr. Isgro and efforts to dissociate from the unwanted sight of abuse of an inmate. This point is well illustrated by the difficulty Officer Groff experienced in dealing with this incident. In the summary of his statement at the use of force hearing, he said he did not go to Cell 112. "I ran around

the corner to the phone room. Then I turned around and went back to the suicide watch cell."

Three days later Groff wrote an incident report where he agreed that he did go to Cell 112. "I then went over to the cell and smelled mace. Parrigan was, I believe, just outside the cell coughing."

The incident report written by Groff then proceeds to state that he observed the Grievant "raise his leg and strike inmate in the head with his foot one time." The report then displays Groff's effort to dissociate himself from the painful spectacle of abuse of an inmate by a colleague. The report states "at this exact moment (the moment when he observed the Grievant raise his leg) I turned my head away from the cell . . ."

In a remarkably similar manner, Officer Majors sought to dissociate himself from the activities in Cell 112 when he observed physical abuse of the inmate. Majors testified at the arbitration hearing that he saw Gast raise his foot a few inches, but did not see the foot hit the inmate. This testimony is consistent with the incident report that Majors wrote at the insistence of a deputy warden. The incident report, however, explains why Majors did not see the raised foot of the Grievant make contact with the inmate. As Majors wrote in the incident report, he "looked away into the pod" when he observed Gast raise his right foot approximately three inches.

One of the staff members who suffered greatly from this event was the case manager, A. Hunsinger. She was a new employee on

probation. She testified that she did not want to get involved and that another colleague told her that she would write that she did not see anything. Hunsinger wrote an initial incident report that focused exclusively upon Cline and his injury in his efforts to help him at the picnic table. She omitted all reference to Cell 112. She testified that she explained her problem to her supervisor who told her to tell the truth. The result was an incident report that included her observations of Cell 112 and a full statement of her observations at the arbitration hearing.

F) An Evidentiary Matter

The State submitted as an exhibit documents from an Common Pleas Court in Ohio showing that the Grievant had entered a plea of no contest and was convicted of an assault--a misdemeanor of the first degree in connection with the facts of this case. The State sought to have this evidence admitted in order to show that the Grievant did engage in physical abuse of an inmate--the core question in this arbitration. The Union objected to the admissibility of these documents claiming that the plea of no contest cannot be used as evidence in a subsequent civil proceeding, and that this arbitration was encompassed in the phrase "civil proceeding."

Both parties argued their positions strenuously at the arbitration hearing, and both parties presented written arguments with citation to a authorities in support of their opposing positions.

It is unnecessary to resolve the issue. The evidence in this record that is set forth above in this opinion clearly establishes the ultimate finding that the Grievant inflicted physical abuse on a non-resisting inmate. It is unnecessary, therefore, in this case to determine whether the Grievant's no contest plea is or is not admissible in this arbitration.

G) The Sanction

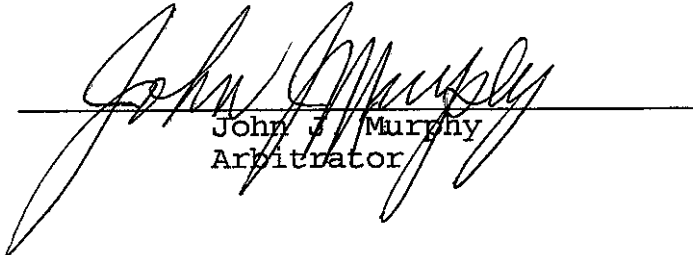
The Grievant clearly violated Rule 43 of the Department's Standards of Employee Conduct. The facts show that the Grievant did commit "physical abuse on any individual under the supervision of the Department." "Removal" is set out in the Standards as the one and only sanction that would flow from a first violation of this rule.

The contract between the parties also recognizes the special nature of a case involving physical abuse of persons whose custody has been entrusted to agencies of the State. Section 24.01 of the contract withdraws any discretion that an arbitrator may have over the sanction of removal where the arbitrator has found that physical abuse has occurred. Consequently, the removal of the Grievant in this case must stand.

AWARD:

The grievance is denied.

Date: June 7, 2001



John J. Murphy
Arbitrator