

STATE OF OHIO AND OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION LABOR
ARBITRATION PROCEEDING

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IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION AND
CORRECTION, OAKWOOD CORRECTIONAL FACILITY

-AND-

OHIO CIVIL SERVICE EMPLOYER ASSOCIATION,
LOCAL 11, AFSCME, AFL-CIO

GRIEVANT: ALEXANDER DIEHL
GRIEVANCE NO.: 27-28-(01-08-20)-0899-01-03

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GENERAL COORDINATOR

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
JULY 29, 2002

APPEARANCES

For the Employer

Natalie Edwards
Shirley Turrell
Janet Campbell
Gary Puglise
L.M. Pierce
Sherri Rodney-Kahle
Dean McCombs

Labor Relations Specialist
Labor Relations Specialist
PS/MR Supervisor
Nurse
Captain
Investigator
Advocate

For the Union

Alexander Diehl
William T. Lofz
Tony Haithcock
Arnold K. Shaffer
Clayton Ingran
Mike Hill

Grievant
Chief Stewart
Trainer
Correction Officer
PAC-Chapter President
Advocate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled
Arbitration Procedures and Arbitration Panel of the Agreement between the State of
Ohio, Ohio Department of Rehabilitation and Correction, hereinafter referred to as the

Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period March 1, 2000 through February 28, 2003 (Joint Exhibit 1).

The arbitration hearing was held on April 3, 2002 and May 16, 2002 at Oakwood Correctional Facility, Lima, Ohio. The parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post-hearing briefs. Both parties submitted briefs in accordance with guidelines agreed to at the arbitration hearing.

ISSUE

Did the Grievant engage in conduct resulting in abuse of a patient or another in the care or custody of the State of Ohio?

If abuse is not established, did the Employer have just cause to remove the Grievant? If not, what shall the remedy be?

JOINT STIPULATIONS

1. The Grievant worked as an Interim Correction Officer at OCF from July 1997 to January 2000. He became a bargaining unit member as a Psychiatric Attendant at OCF in January 2000.
2. The Grievant's employment was terminated on August 20, 2000.
3. Any reference to falsification charges made by the Employer, including documents, testimony, and arguments shall be disregarded by the Arbitrator. This particular charge was not a formal part of the removal order.

PERTINENT 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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(1).

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. working suspension;
- D. one or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB.
- E. one or more day(s) suspension(s);
- F. termination

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages or fines, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine or;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these

banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

(Joint Exhibit 1, Pg. 64-65)

CASE HISTORY

Alexander Diehl, the Grievant, has been employed as a Psychiatric Attendant since January 2000. He has performed these duties at Oakwood Correctional Facility (OCF); where the general population consists of severely mentally ill inmates supervised by a specialized staff.

The incident in dispute took place on January 1, 2001 at approximately 1720 hours. An Inmate Barker, housed on Unit E-1-B, had been locked in his cell during supper. The Grievant and a Correction Officer, Christopher Reynolds, observed Inmate Barker banging his back on the wall of his cell with his nose bleeding. It appears Inmate Barker had aggravated a previous injury causing his nose to bleed. They advised Inmate Barker to stop, and summoned Nurse Gary Puglise. Nurse Puglise arrived and tended to Inmate Barker's needs.

The Grievant and Reynolds then escorted Inmate Barker to the unit's dayroom; and directed the inmate to sit in his designated chair. Inmate Barker refused to sit in his chair and became highly uncooperative.

The Grievant, Reynolds and another Psychiatric Attendant, Steven Freed, escorted Inmate Barker from the dayroom to the "safe cell," cell #185. Inmate Barker continued his uncooperative state becoming hostile and threatening. Some force had to be used during the transfer from the dayroom to Cell #185, the "restraint cell."

Nurse Puglise allegedly viewed the entire disputed incident at the doorway of the cell. As Inmate Barker was brought in to be placed in restraints, he was struggling

somewhat with the three staff members. He continued to taunt the staff by calling them names and uttering that they were not hurting him. Reynolds held his legs, Freed held one side of Inmate Barker's shoulders and head, while the Grievant held the other side.

While in the doorway, Nurse Puglise clearly heard Inmate Barker spit on the Grievant. Although unable to directly view Inmate Barker's face, Nurse Puglise saw the Grievant standing over Inmate Barker while making three punching motions in close proximity of Inmate Barker's facial area.

Shortly thereafter, Inmate Barker ceased his taunting tactics and began uttering remarks concerning filing police reports, lawsuits and that he was struck. The Grievant purportedly was the first individual to leave the cell prior to having restraints applied totally. He left to wash his face, and eventually received treatment from Nurse Puglise for an injury to his right ring finger, top of the knuckle, realized during the altercation with Inmate Barker.

It appears Nurse Puglise got the restraints and that Freed and Reynolds applied them. Inmate Barker complied with the restraint process once the Grievant left the cell.

Inmate Barker's physical condition was then determined. The following injuries were noted and documented:

- Superficial scratch on the left side of nose; scant bleeding.
- Redness and minor swelling around left cheekbone.
- Small cut on left upper lip with small amount of blood, no active bleeding.
- Redness with no broken skin in (sic) Barker's back, in the middle of his shoulder blades.
- Barker had hit his own back on the cell wall, causing his nose to bleed. Blood was cleaned from his face and no active bleeding was noted. No further first-

aid was given and Tylenol was provided to him. Ice packs were to be provided when he calmed down.

Shortly after the incident, the Grievant left the facility for treatment at Lima Memorial Hospital Center for Occupational Health. Review of the Center's documents and discussions with staff indicated the Grievant was being treated for an injury inflicted by an inmate's teeth or some sort of bite. What was, therefore, described was a direct exposure to bodily fluids or a contaminated source rather than a simple saliva exposure. Because the Grievant had never reported the nature of his exposure, no screening had been undertaken until the situation was clarified by Lima Memorial Hospital personnel.

On or about February 14, 2001, the Grievant was serving a 10-day jail sentence at the Allen County Jail. A Staff Sergeant, who was monitoring inmate phone conversations, discovered several conversations which appeared to be conspiratorial.

The facility subpoenaed, and obtained, all inmate phone records and taped conversations relating to the Grievant. Some of these conversations dealt with strategies to be used dealing with the presently disputed matter. The Grievant was specifically advised how to falsify testimony regarding his injury and the medical evidence.

On July 18, 2001, a Notice of Disciplinary Action was issued removing the Grievant from the position of Psychiatric Attendant effective August 20, 2001. It states in pertinent part:

You are being removed for violating the Standards of Employee Conduct Rules:

- #7 failure to follow post orders, administrative regulations, policies, procedures, or directives;
- #24 interfering with or failing to cooperate in an official investigation or inquiry;

- #43 physical abuse of any individual under the supervision of the department;

These rule infractions occurred on Sunday, January 1, 2001.

Pursuant to the OCSEA contract, Article 25, you may choose to grieve this disciplinary action. You must file a grievance through your union representative within fourteen (14) calendar days of notification of this action.

(Joint Exhibit 8)

A formal grievance protesting the removal was filed by the Grievant. The matter, moreover, was processed through the various stages of the grievance procedure without resolution. Neither party raised procedural nor substantive arbitrability claims. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined it had just cause to remove the Grievant for several egregious violations of The Employer Conduct Rules (Joint Exhibit 4). Rule #7 deals with failure to follow post orders, administrative regulations, policies, procedures, or directives. This rule was violated by the Grievant's failure to follow the Restraint/Seclusion Procedural Guidelines (Employer Exhibit 1), report a direct blood exposure and accurately report the manner he sustained the injury. Rule #24 deals with interfering with or failing to cooperate in an official investigation or inquiry. Here, the Grievant did not fully cooperate with the investigation involving his removal. Rule #43 consists of physical abuse of any individual under the supervision of the department. The blows inflicted on Inmate Barker by the Grievant and resultant physical harm serve as the focus for this charge.

Officer Reynolds and the Grievant triggered the restraint incident by agreeing to place Inmate Barker in four-way restraints. They, however, initiated this protocol in direct violation of policies and procedures. Inmate Barker was never aggressively out of control, a threat to self and/or others. The situation, moreover, was not an emergency. Without any of these necessary conditions, the seclusion/restraint option should not have been implemented; rather, alternative means should have been applied.

Once the decision to apply restraints had been taken, other related protocols were not followed resulting in additional procedural defects. Psychiatric Attendant Post Orders (Employer 4) require individuals to notify the security officer and nursing supervisor's office for additional assistance, and when time permits to utilize a video camera. None of these additional elements were adhered to prior to placing Inmate Barker in four-way restraints.

Nurse Puglise did not agree to place Inmate Barker in four-way restraints. Both Nurse Puglise (Joint Exhibit K-16) and Psychiatric Attendant, Steven Freed (Joint Exhibit J-20), stated Nurse Puglise was just coming into the hallway when the Grievant and Reynolds were either escorting or already had Inmate Barker in the "restraint" cell.

The record describes accurately the lack of notification defect. Neither the Grievant nor any other participant contacted the security office and/or the nursing supervisor. The Grievant was obliged to provide proper notice since he was the one that triggered the restraint decision.

Nurse Puglise was not the one obliged to notify these individuals. RN's do not supervise Correction Officers and Psychiatric Attendants. Rather, Correction Officers

report to various Shift Commanders, while Psychiatric Attendants are supervised by Nurse Supervisors.

Time permitted the Grievant to obtain a video camera. Neither the Grievant nor any other relevant participant stated this task could not be accomplished. They were able to wait for a video camera prior to placing Inmate Barker in seclusion restraints. At the hearing, the Grievant acknowledged he could have solicited the help of another Psychiatric Attendant.

The Grievant did not properly report a direct blood exposure when he cut his finger on Inmate Barker's tooth. He only affirmed this condition at the hearing, but was less than forthcoming during the episode in question. Documents submitted to the Employer suggested the injury was the result of a laceration bite that occurred "somewhere in the struggle" of restraining Inmate Barker. He, however, provided a more detailed and accurate version to Lima Memorial Hospital's staff. The Grievant noted that he had, in fact, cut his hand on an inmate's tooth. Only after a substantial period of time did the Hospital, as a consequence of the Employer's investigation, indicate how the injury actually occurred. This deception can be easily explained since the Grievant expected some abuse charge based on his actions.

The Grievant also failed to fully cooperate with the authorities during the ensuing investigation. If anything, he helped thwart the process by engaging in activities which directly deceived and misled the investigatory process. This deception concerning his injury supported this claim. It was further bolstered by taped conversations the Grievant had with another employee, Aaron Shaffer, while incarcerated in the Allen County Jail.

He and Shaffer developed deceptive strategies in anticipation of claims to be raised by the Employer in developing its case.

Inmate Barker was clearly physically abused by the Grievant. He struck the inmate approximately three times prior to having restraints administered. Even though Nurse Puglise never saw the actual punch land, he witnessed several quick and distinct movements of the Grievant's right arm in proximity of Inmate Barker's face.

Nurse Puglise, moreover, had initially treated Inmate Barker for a self-inflicted nosebleed prior to the restraint incident. As such, he was intimately aware of certain pre-existing physical injuries. After Inmate Barker was actually restrained, Nurse Puglise initiated a physical evaluation. He identified certain new injuries that could not have been self-inflicted.

The Grievant's blows should not be viewed as defensive techniques used to thwart Inmate Barker's alleged attack. A technique #9, as demonstrated by the Grievant, could not have resulted in the deep cut realized to the outside of his right finger. Also, most of the witnesses and other related statements do not evidence knowledge of any defensive techniques or "swings" taken by Inmate Barker toward the Grievant.

Nurse Puglise's testimony should be viewed more credibly than the Grievant's version of events. The Union failed to raise any animus defense attempting to rationalize Nurse Puglise's conduct. As such, it becomes extremely difficult to discredit Nurse Puglise; whose testimony was clear, convincing and consistent with prior statements written by other employees.

The Union's Position

The Union asserted the Grievant did not abuse Inmate Barker, nor was removal justified under the circumstances. None of the charges were supported with the level of proof necessary to establish just cause.

Rule #7 was not violated by the Grievant. This particular charge was ambiguous at best. The Union was never advised which particular post orders, administrative regulations, policies, procedures or directives were violated by the Grievant. A circumstance like this imposes an impossible burden on any union. It makes it virtually impossible to develop and prepare a plausible defense. The Notice of Disciplinary Action (Joint Exhibit 8) supports this premise. It fails to enumerate any particulars regarding this charge.

The body fluid issue should not play a role in the Grievant's removal. Throughout the investigation, and at the arbitration hearing, the Grievant maintained he somehow cut his finger on the Grievant's tooth, but was not completely sure of the cut's genesis. As such, there was no obvious conflict, in terms of content, contained in various documents and his reported justification to the hospital. The Grievant did report that Inmate Barker spit in his face. He reported this fact verbally and in writing on the day of the incident.

Other Rule #7 violations were not properly supported by the record. Granted, the Grievant failed to hit his man-down alarm, but was never charged with loss of control of equipment. Employees, via practice and custom, trade radios during the shift, and sometimes leave the radio on the desk. Within this context, failure "to carry" the radio seems ingenuous.

On a related manner, the Grievant's failure to use a man-down alarm also seems misplaced. All of the attending staff possessed man-down alarms, and none of them set their alarms off. None of them were disciplined. The policy, itself, is permissive based on the staff's impressions regarding any situation. Those that testified at the hearing did not characterize the disputed matter as an emergency. Thus, situational demands minimized the need for any man-down alarm.

The video camera charge is equally surprising. Puglise, Reynolds, Freed and the Grievant participated in the dispute. All of those in attendance have the authority to get the video camera "if time permits." The non-nursing personnel were busy attempting to restrain Inmate Barker. Nurse Puglise, however, was not directly involved with the restraint attempt, and thus, had time to get the video camera. He did not attempt to complete this task and was never disciplined.

The Grievant never violated the restraint policy. Per the existing policy, Nurse Puglise should have been initially contacted regarding the possibility of using restraints. He was in fact involved in the decision, but was not disciplined.

Rule #24 deals with interfering with or failing to cooperate in an official investigation or inquiry. The Grievant never lied about discussing the disputed matter with Aaron Shaffer. The Grievant's account of the incident never changed and was consistent. He never followed Shaffer's advice regarding his proposed devious strategy. As such, a conspiracy to interfere with a proper investigation never materialized as evidenced by the record.

Rule #43 deals with abuse; again the record fails to support the charge in question. The physical evidence relied on does not establish abuse. Nurse Puglise's

report (Joint Exhibit 2 (A)) only characterizes Inmate Barker's left cheek as "slightly swollen" rather than "swollen." The fact that Inmate Barker's nose was bleeding had nothing to do with the Grievant's actions. The bleeding was caused by a pre-existing self-inflicted injury realized prior to the disputed incident. The cut, however, on Inmate Barker's lip was not bleeding. Any additional injury realized by Inmate Barker was slight, and reasonably anticipated since the proper amount of force was used.

The Grievant never maintained that his hand never came in contact with Inmate Barker's face. He was merely utilizing a self-defense technique taught by the Employer. Training Officer Tony Haithcock, testified at the hearing regarding the propriety of the Grievant's response. He remarked that it was possible for the Grievant's hand to come into contact with Inmate Barker's face. Also, every application is not flawless during an actual situation, but accidental contact should not be equated with abuse of an inmate.

Nurse Puglise's testimony failed to properly support the abuse charge. He admitted he heard Inmate Barker spit on the Grievant, and yet he did not hear the blows allegedly inflicted by the Grievant. Nurse Puglise testified he saw the Grievant's arm move as if he was striking the inmate. But, he did not see where Inmate Barker was hit or whether the Grievant's hand was open or closed. Under cross-examination, moreover, his observations regarding the incident were less than consistent. Obviously, the Employer failed to establish the level of proof necessary to support the abuse allegation.

THE ARBITRATOR'S OPINION AND AWARD

The Grievant was charged with a Rule #43 violation, which deals with physical abuse of any individual under the supervision of the department. As such, the Arbitrator

is governed by Section 24.01, which limits the scope of an Arbitrator's authority regarding abuse related matters. This provision prohibits any arbitrator from modifying the termination of an employee committing such abuse. Thus, the threshold analysis must focus on whether abuse has been committed. Other just cause or due process considerations are held in abeyance pending the abuse finding. If something other than abuse is determined than traditional principles, normally considered as mitigating factors, as well as any additional charges and related rebuttals become fair game.

Based on the evidence and testimony adduced at the hearing, an extensive review of the record, including pertinent contract provisions and joint exhibits, it is this Arbitrator's opinion that the Grievant violated Rule #43 by physically abusing Inmate Barker. Thus, based on the contractual prohibitions previously described there is no present need to address the other rule violations contained in the removal order.

Much of the Employer's case was based on circumstantial evidence, which should not be minimized. Often times, especially when dealing with abuse related conduct, circumstantial evidence may be as important as direct evidence. Here, the circumstantial evidence is especially strong leading to one rational conclusion. The Grievant was engaged in an egregious act of physical abuse.

The Grievant's self defense claim is critical to the analysis. Without a viable claim, it becomes quite difficult to establish that the cut on his right ring finger came about when he initiated a Technique 6 or a Technique 9 after Inmate Barker swung at him. By failing to establish this critical feature of the case, it becomes quite likely or probable that the Grievant realized this wound when he struck Inmate Barker as testified to by Puglise.

Neither Puglise, Reynolds nor Freed, the other participants in the altercation, acknowledged the Grievant initiated one of these techniques in self-defense. Those individuals that testified at the hearing failed to corroborate this assertion. Incident Reports authored by Reynolds (Joint Exhibit A10 and A11), Freed (Joint Exhibit A-13) and Puglise (Joint Exhibits A-16 and A-17), do not reflect any use of a self-defense technique by the Grievant.

Transcripts taken during the Investigatory Interview support the prior conclusion. Reynolds provided the following responses when asked how Inmate Barker got in the bed:

SRK: How did he swing?

CR: Roundhouse – basic. We took him down to the bed because he swung.

SRK: So you took him to bed?

CR: Correct

SRK: How?

CR: We just took him down. He fell on the bed. I had his legs and held on while he was kicking and fighting until the 4-way restraints got there.

SRK: What did Diehl do when the inmate swung at him? How did he respond to the swing?

CR: I don't know. We just took him to the bed.

(Joint Exhibits I10-I11)

Freed, moreover, responded in a similar manner:

SRK: Did you see Diehl do any part of a technique?

SF: No. They were already entangled.

(Joint Exhibit J-12)

These three individuals had the opportunity to observe the situation. Their views were not obstructed and they were present during the course of the altercation. And yet, none observed a defensive takedown; neither a Technique 6, 9, nor any other.

Even if we believed that the Grievant did apply a defensive technique to thwart Inmate Barker, the technique, itself, would not have inflicted the gash on the knuckle. Mike Pierce, an Unarmed Self-Defense Instructor, testified that neither Technique 6 nor 9 place the hand in the vicinity of the mouth.

The Grievant's self-defense strategy was used to discourage acceptance of Puglise's observations regarding abusive conduct. The same can be said for the varying versions offered regarding his cut knuckle. In my view, these divergent accounts reflect subtle attempts to camouflage the true reasons for the cut. He cut his knuckle when he struck Inmate Barker. On January 1, 2001, the Inmate and Staff Assault Report (Joint Exhibits A-1 and A-2) and the Accident or Illness Report (Joint Exhibits D-2 and D-3) reference as cause for the injury an attempt to secure a hostile inmate. The same justification appears on the Grievant's Occupational Injury Leave Benefits Report (Joint Exhibits D-9 to D-14). But, the Grievant gave a different justification for his injury to Lima Memorial Hospital personnel. The hospital's records indicate statements made regarding "a laceration due to teeth" or a "bite" or "right finger caught on inmate's tooth" (Joint Exhibit D15 and D21). Obviously, the more detailed and truthful versions were never given to the Employer. They would have raised unwarranted suspicion regarding the actual circumstances generating the injury.

These various circumstantial factors support Puglise's documented and testimonial accounts of the incident. His testimony is viewed as highly credible in light of his consistent and unwavering description of what took place. The Union never raised an animus argument regarding his relationship with the Grievant, which lends a great deal of credence to his account. Granted, he never observed the actual blows inflicted by the Grievant, but credibly explained the Grievant's arm movements, and Inmate Barker's demeanor and statements prior to and following the Grievant's misconduct. Inmate Barker uttered statements about being hit and wanting to initiate a lawsuit after Puglise observing the arm movements in question. Inmate Barker, moreover, calmed down once the Grievant left the cell.

One of the critical elements in this circumstantial net, is the taped telephone conversation between the Grievant and Matt Hall, a co-worker, while the Grievant was incarcerated at the Allen County Jail. The relevant portion of the transcript reflects the following relevant dialogue:

MH: I can't make a fist.

AD: A what?

MH: I beat the hella—hole outta a fuckin' nigger at Stormy's.

AD: Ya' did?

MH: yeah.

AD: (laughing)

MH: I can't make a fist, dude! My hand's mangled!

AD: It was like mine was the other—on that inmate a while ago?

(Joint Exhibit 3)

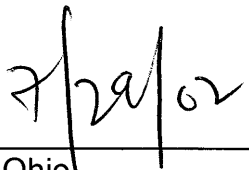
The Grievant was incarcerated several months after the disputed altercation. Nothing in the record, moreover, indicates any recent intervening altercations other than the one involving Inmate Barker. In my opinion, within the context described above, and the inferred reference to Inmate Barker, one can reasonably conclude the Grievant struck Inmate Barker on the day in question.

Puglise's observations are further supported by anatomical findings and Puglise's own testimony. After Inmate Barker was restrained, Puglise evaluated his condition. He noted several injuries following the altercation. Of impart, are the following particulars: superficial cut on the left side of nose; scant bleeding; redness and minor swelling around left cheekbone; small cut on left upper lip with small amount of blood; no active bleeding (Joint Exhibit A-18). Most of these injuries in my view, were a direct result of the Grievant's misconduct. The Union never attributed these anatomical results to prior injuries realized by Inmate Barker earlier during the day.

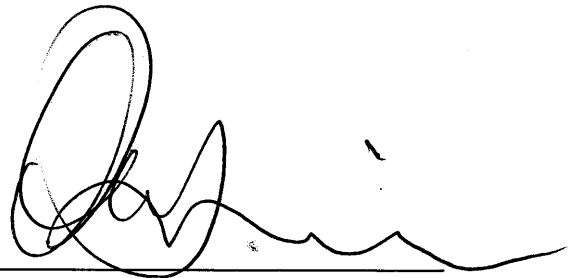
The totality of the circumstantial evidence leads to an unambiguous finding. The Grievant physically abused Inmate Barker on the day in question.

AWARD

The Grievance is denied. The Grievant violated Rule #43 by engaging in physical abuse.



Moreland Hills, Ohio



Dr. David M. Pincus
Arbitrator