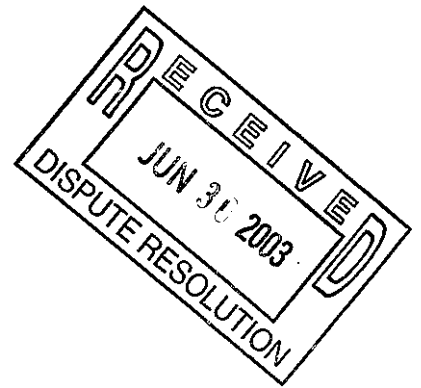


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IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/DRC

Before: Robert G. Stein

**Grievant(s): Steven West
Case # 27-32-020717-0512-01-03
Termination**

Advocate(s) for the UNION:

**Jamie Kuhner, Staff Representative
OCSEA LOCAL 11, AFSCME AFL-CIO
Westerville OH 43215**

Advocate for the EMPLOYER:

**David Burrus, DRC Labor Rel.
OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS
1050 Freeway Dr. North
Columbus OH 43229**

INTRODUCTION

A hearing on the above referenced matter was held on April 8, 2003 in Noble County, Ohio. The parties agreed that the issue is properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. The parties submitted written closing arguments in lieu of oral closings. Briefs were received on May 12, 2003 and the hearing was closed. A decision is to be postmarked by June 26, 2003.

ISSUE

Was the grievant, Steven West discharged for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference, see Agreement for language)

ARTICLES 24

BACKGROUND

The Grievant is Steven West ("Grievant", "CO West"), a corrections officer at Noble Correctional Institution ("NCI"). His employer was the Ohio Department of Corrections ("DRC", "Employer" "Department"). CO

West began his employment on February 10, 1997 and was terminated on July 17, 2002. He was charged with violating:

- Rule #24: interfering with, failing to cooperate in, or lying in an official investigation
- Rule #40: use of excessive force toward any individual under the Supervision of the Department or a member of the general public.

At the time of the Grievant's termination he had no discipline on his record.

The incident that led to the Grievant's termination occurred on April 10, 2002. On that day, CO West reported to the dining hall to check for contraband. Inmates sometimes steal food from the cafeteria and conceal it in their coats. Upon entering the kitchen area, which is located at the rear of the building, inmates are supposed to store their coats in the locked coat cage located in the front of the dining hall area. CO West was conducting a routine search of the kitchen and found a coat tucked in the grease trap area. According to the testimony of the Grievant, this is a common area where inmates hide their coats.

The Grievant found the coat of inmate Proctor. According to the Employer, the Grievant got the coat and dragged it across the floor as he exited the kitchen area. While following the Grievant, inmate Proctor was reportedly upset about his coat being dragged across the floor (See Atkinson, Gerdau, Rothwell testimony) and started yelling and arguing with the Grievant.

According to the Employer, inmate Proctor followed the Grievant through the kitchen and the crash gate (See Rothwell). The Grievant then ordered him to stand against the wall outside of the crash gate area. Inmate Proctor readily complied with this order and the Grievant handcuffed him. Inmate Proctor then turned around from the wall and again started to argue with the Grievant in a face-to-face posture. According to the Employer's investigation, the Grievant then forcefully turned the handcuffed inmate around and slammed, pushed ("pretty hard"), or shoved inmate Proctor into the wall, while admonishing him for getting into the Grievant's face (See Atkinson, Gerdau, Rothwell testimony). According to the Employer and the Union, inmate Proctor showed no signs of resisting the Grievant's directives or physical prompting. The Union claims that no shoving of inmate Proctor occurred, and that the Grievant was simply using his hands to escort him out of the food service area.

Lt. Frizzell came onto the scene and received complaints from inmate Proctor that the handcuffs were causing injury to his wrists. Lt. Frizzell released inmate Proctor to the custody of CO Smithberger and then questioned CO West as to what had occurred. According to the Employer, the Grievant told him about the incident, but did not relay any details about pushing or shoving the Grievant into a wall. Lt. Frizzell told the Grievant that if force was not used, he should fill out an inmate

conduct report, not a use of force report.

According to the Employer, the Grievant lied to Lt. Frizzell, an investigator and to the Use of Force Committee by omitting facts about his conduct in this matter. According to the Union, inmate Proctor stated to Lt. Frizzell there was no use of force. The Employer chose to believe its investigation of the facts and terminated the Grievant. He grieved his termination leading to the case being brought to arbitration.

SUMMARY OF EMPLOYER'S POSITION

The Employer argues that the evidence and testimony of several eye witnesses demonstrate that the Grievant used force against inmate Proctor and then engaged in an attempt to cover up his conduct by lying about shoving inmate Proctor into a wall. The Employer also contends that the Grievant exacerbated the situation by dragging inmate Proctor's coat along the kitchen floor. The Employer argues that the Union's witnesses do not support its case because they did not observe the Grievant's conduct. The Employer also points out that the Grievant did not testify on his own behalf. The Employer argues that the Grievant's use of force "*while excessive...was not particularly egregious,*" and under the Standards of Employee Conduct it would not have necessarily resulted in discharge. However, the Grievant compounded his error when he lied about the incident and misled investigators and the Use of Force Committee.

Based upon the above, the Employer requests the grievance be denied.

SUMMARY OF UNION'S POSITION

The Union argues that the Employer did not have just cause to remove the Grievant. It contends the Grievant did not lie about his conduct and that the Employer could produce only one witness (Atkinson) to validate its claims.

The Union asserts that Lt. Frizzell stated to the Grievant that if no use of force was used, then a use of force report was not necessary and only an inmate conduct report was needed. The Union also argues that CO McConnell, who was stationed in the Tool Room, stated to the Employer's investigator and to the Use of Force Committee that he did not hear a noise that would have occurred if inmate Proctor was shoved or slammed into the wall which is opposite the inside wall of the Tool Room. The Union also points out that the testimony of Employer witnesses Rothwell and Gerdau is suspect, given the fact that neither one offered the Grievant any assistance during the Grievant's confrontation with inmate Proctor. The Union also contends that inmate Proctor was sent for medical treatment not because of use of force but due to complaints about his wrists.

Based upon the above, the Union urges the Arbitrator to sustain the grievance.

DISCUSSION

This case boils down to a matter of credibility. I find the testimony of Employer witnesses (Atkinson, Gerdau, and Rothwell) to be credible and rich in detail. They were clearly in a position to observe what they stated occurred, and I found their testimony to be consistent with the facts, their previous statements/testimony, inmate Proctor's statement (Jx 2), and each other's statements. They clearly observed the Grievant shoving a physically compliant inmate, who was handcuffed with his hands behind his back, into a wall. I find a lack of credibility in the Grievant's claims that he did not push the Grievant into a wall.

I do not agree that CO McConnell contradicts their testimony. The Tool Room is somewhat isolated and the kitchen/dining hall is a noisy place. Having personally stood in the Tool Room, this Arbitrator is not convinced that CO McConnell would necessarily be aware of whether inmate Proctor was or was not shoved into a wall on or near the opposite side of the Tool Room. Moreover, in his statement before the Use of Force Committee, Co McConnell stated when asked about hearing sounds relative to the incident, *"No-you can't differentiate sounds when you're in there"* (p. 39, Jx 2).

I concur with the Employer's contention that the Grievant gave conflicting accounts of his actions in his statements and his inmate

conduct report. The inconsistency involves the timing of his handcuffing of the inmate (e.g. p. 71 of Jx 2, versus p. 25, 26). It is also important to note the incident-provoking conduct of the Grievant regarding his treatment of inmate clothing. At least two witnesses plus inmate Proctor stated they observed the Grievant dragging or throwing inmate Proctor's coat on or across the floor (See Atkinson, Gerdau testimony). In his statement to investigator Williams, the Grievant validated inmate Proctor's protest over his coat being thrown on the floor (p. 66 of Jx 2). On 5/25/02, when asked about CO West's past conduct regarding inmate clothing, witness Atkinson stated to the Use of Force Committee, "*I have seen him [West] drag clothing across floor & throw them across the floor after finding them above the hood and other places*"

The evidence and testimony in this matter support the charge of the Grievant using excessive force, not reporting it, and lying about using it in a subsequent inquiry by the Use of Force Committee and in an official investigation conducted by the Employer. Although the Grievant is not a long-term employee, he has completed five (5) years of service. It is unfortunate that he would risk even this period of service by lying during official inquiries. Correctional Officers have challenging jobs and can readily get themselves into difficulty when dealing with a criminal population. However, this reinforces the reason that compliance with directives is necessary in order to maintain order in a correctional

institution. Moreover, it is why Correction Officers must display conduct that is above reproach. At the heart of such conduct is honesty and trustworthiness.

The Grievant's conduct on April 10, 2002 was an excessive use of force in violation of Rule # 40. However, the nature of this use of force by itself was not of an egregious nature and would not have supported a termination. However, what is egregious is the act of lying during the conduct of official inquires, particularly regarding conduct that matters greatly to the security of a correctional facility. The use of force against inmates is a cardinal principle for which correctional officers receive extensive training. When a Correctional Officer chooses to be dishonest and deceptive about this important matter, he places his employment at great peril.

AWARD

The grievance is denied.

Respectfully submitted to the parties this ____ day of _____, 2003.

Robert G. Stein, Arbitrator