OPINION AND AWARD
Case No. 27-14-2006-022-2545-01-03
The Evelyn Benner Matter

#945

In the Matter of the Arbitration

- between -

OCSEA/AFSCME, Local 11

- and -

State of Ohio
Department of Rehabilitation
and Correction
Lorain Correctional Institution

Arbitrator: John J. Murphy
Cincinnati, Ohio

For the Department:

Richard B. Shuteck
Lorain Correctional Institution
2075 S. Avon-Beldon Road
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Department of Rehabilitation
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Also Present: Bennie Kelly
Warden: Lorain Correctional Institution

Kim Hall
Corrections Lieutenant

Willie Leach
Inmate No. 493663

For the Union:

Michael Scheffer
Staff Representative
OCSEA
390 Worthington Road, Suite A
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Chris Mabe, 2nd Chair
Local President
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Also Present: Evelyn Benner
Grievant

Bud Anderson
Chief Steward

BACKGROUND:

This case concerns the removal of a correction officer with slightly more than five years of service. The removal was based upon an incident that occurred on January 9, 2006 at the central floor of a pod at the Correctional Institution.

The incident involved a verbal altercation between the Grievant and one inmate. The notice of disciplinary action was issued to the Grievant by the warden on January 30, 2006 declaring the Grievant's removal effective February 14, 2006 for the violation of three Employee Conduct Rules. The Notice set forth the following allegations as the factual basis for the removal.

> On January 9, 2006, while working 3A you were involved in a verbal altercation with an inmate in which you conducted yourself in an unprofessional manner and attempted to provoke the inmate into physical altercation instead of trying to diffuse the incident. Your use of abusive and provoking language in referring to the inmate as a "crack head" after being threatened by this inmate, your stating "make the first move you little bitch" was unwarranted and serious compromise of your, and the entire institution's security. In addition, the manner in which you refer to yourself as a "ho" compromised your ability to and authority to carry out your assigned duties as a Correction Officer. Furthermore, during your investigatory interview, you were untruthful in your testimony detailing these events.

The removal led to a timely grievance filed by the Union on behalf of the Grievant. It stated:

> E. Benner is grieved over the removal she received 2-14-06. The discipline given was not commensurate to the offense, solely as a disciplinary measure not as a corrective measure. The discipline was also disparate in nature as similar disciplines were given to other employees with the same circumstances. The removal was also a retaliatory measure of management due to the current lawsuit that E. Benner has filed against management representatives of Lorain Correctional and the State of Ohio.

The dispute was joined between the parties at the third step answer by the Employer which denied the grievance. The Employer's response stated:

> An inquiry determined the grievant, while assigned to a housing unit, addressed an inmate as a "crack head" and attempted to provoke the inmate by stating "make your first move you little bitch." Additionally, the inquiry determined the grievant referred to herself when confronting the inmate as a "ho." The grievant's inexplicable behavior not only rises to the level of removal, but is in no way comparable to that of the examples cited by the Union. The grievant's termination was appropriate and commensurate with the proven misconduct. The Contract was not violated.

STIPULATED ISSUE:

Did Management have just cause to remove Evelyn Benner? If not, what should the remedy be?

APPLICABLE EMPLOYEE CONDUCT RULES:

Disciplinary Grid
PERFORMANCE TRACK

		OFFENSE			
		1st	2nd	3rd	4th
24.	Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.	2 or R	5 or R	R	

	OFFENSE 1st	2nd	3rd	4th
38. Any act or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public.	2 or R	5 or R	R	
44. Threatening, intimidating, coercing, or use of abusive language toward any individual under the supervision of the Department.	2 or R	5 or R	R	

POSITIONS OF THE PARTIES:

A) Union Position

First, the Union asserted that the Employer did not meet its burden of showing that it had just cause to discipline the Grievant under the three Employee Conduct Rules. The inmate displayed that he was "less than truthful" during his testimony about what transpired at the verbal altercation with the Grievant. The investigation by the Employer was incomplete and unfair. Lastly, the Employer attempted to build its factual case "on an audio disc that was not even in existence at the time of the termination, and in fact, their investigator testified to never having heard (the disc) until a couple of days before the arbitration." (Union post-hearing brief at 2.)

With respect to the discipline of removal in this case, the Union noted that the Grievant had no prior discipline under the performance track of the disciplinary grid. Moreover, in other similar cases, the Employer did not terminate other employees. Finally, this removal is in retaliation for the Grievant's lawsuit against the institution.

B) Employer Position

The Employer had just cause to find violations of its rules by the Grievant. Based upon a complaint by the inmate, a supervisor commenced an investigation during which the Grievant denied her involvement. On the following day, audio recordings of two inmate telephone calls were recovered which captured portions of the incident in the background. These recorded inmate telephone calls were placed on a disc and considered during the course of the investigation and supplied to the Union. The disc "undeniably documents the Grievant in the background verbally abusing and provoking (the inmate)." (Employer post-hearing brief at 2.) The evidence not only demonstrates in real time the depth and severity of the Grievant's misconduct, but also that she had lied to the investigating officials.

With respect to the Union's affirmative defense of disparate treatment, the Union failed to meet its burden of

proof. Several factors exist in the cases of discipline of other employees that show the other employees were not similarly situated to the Grievant. Lastly, the lawsuit filed by the Grievant had no bearing on the disciplinary sanctions imposed in this case.

OPINION:

This opinion is divided into a discussion of the three major points of contention between the parties: 1) Whether the Employer sufficiently established that it had just cause to discipline the Grievant; 2) Whether the Union sustained its burden of proving the two affirmative defenses it raised. The first Union defense claimed that the removal constituted disparate treatment of the Grievant when compared to other similar cases of discipline of other employees. The second defense was that the punishment of the Grievant in this case was in retaliation for her filing a lawsuit against a member of management at the institution.

A.) Just Cause

1.) The Record

We begin with the question of what constitutes the record upon which to assess evidence submitted by the Employer as a basis for its decision to discipline. As part of the Employer's investigation, and its presentation at the disciplinary hearing,

the Employer produced an audio disc of two inmate telephone calls made while the verbal confrontation was occurring in the background. This disc was introduced in the arbitration record as a joint exhibit, and the Union did not claim that consideration of this disc in the record would be unfair.

The parties parted company, however, on whether it would be fair to consider a second disc of the same two telephone conversations. The second disc constituted an enhanced portion of the first disc. The enhancement was done by the Ohio State Highway Patrol for the purpose of increasing the gain of the secondary conversation involved in the confrontation between the Grievant and the inmate while reducing the primary conversation by the two inmates with their families. While there was no evidence that substantive changes were made in the second, or enhanced, disc from that of the first disc, the Union vigorously denied the fairness of considering the second disc.

The Union is correct and the record cannot include the second, or enhanced, disc in determining whether the Employer met its burden of establishing just cause or punishment in this case. The investigator agreed that this second disc was not in existence during the time of this investigation, and the investigator noted that he did not hear the tape until a few days prior to the arbitration hearing. Finally, the parties

stipulated that the second tape was not generated until after the removal letter had been issued to the Grievant. Consequently, it would be unfair to consider the second tape on the question of whether the Employer had established just cause.

The Employer recognized the problem inherent in the submission of the second disc in this record. The Employer argued that the second disc contained "nothing more or nothing less" than was contained in the first disc generated during the Employer's investigation. (Employer post-hearing brief at 4.)

There is no need to test the Employer's assertion of harmless error in submission of the second disc. Because the second disc did not exist prior to the decision to remove the Grievant, it would be unfair for the arbitrator to consider the second disc in the record on the issue of just cause.

The record, therefore, consists of what the investigator of the incident produced and what was presented at the pre-disciplinary hearing. This consisted of: 1) the interview of the Grievant and the other correction officer assigned to the pod; 2) interviews of the two inmates whose telephone conversations were recorded as occurring during the course of the verbal confrontation between the Grievant and the inmate; and 3) the audio disc of the recorded telephone conversations.

In addition, the investigator reviewed the Grievant's conduct report of the incident prior to the end of the investigation.

The Union claims unfairness in the investigation because the investigation did not pursue the question of who initiated the verbal confrontation--the inmate or the Grievant. Indeed, the investigator was asked in cross examination whether the Grievant initiated the verbal confrontation, and he answered "I don't know."

Both the inmate and the Grievant testified as to their version of who was the initiator of the confrontation. This question, however, was not within the basis for the Employer's decision to discipline. The key consideration is the fact that both the Union and the Employer agreed that a verbal confrontation occurred. Therefore, what transpired during this confrontation answers the question of whether the Employer had just cause to discipline.

The Union also claimed that the investigation was unfair because no other inmate was interviewed. The record shows that there were approximately thirty unrestrained inmates on the floor of the pod and several beds. None of the other inmates (other than the two engaged in the recorded telephone conversation) were interviewed by the investigator as to what they heard or saw during the confrontation. The Employer,

however, decided to rely on the audio disc of the recorded conversations that included the verbal aspects of the confrontation as secondary conversation. As the investigator testified, "after hearing the recording, I had enough facts to make my findings."

The investigator's decision was not unreasonable. He heard voices and could identify the voices in "real time" in the sense that no person was asked to recollect what he or she said or what others said. The loss to the Employer by failing to interview eye witnesses to the conversations is the absence in this record of third party testimony as to the position of the Grievant and the inmate during the conversation. The record includes only the Grievant's and the inmate's testimony on positioning.[1/]

2.) What Transpired During the Verbal Confrontation?

After reviewing the testimony of the Grievant, inmate, and listening to the audiotape of the inmate telephone conversations obtained by the investigator on the day after the confrontation, the following transpired during the verbal confrontation between the Grievant and the inmate:

[1/] The record shows that the other correction officer assigned to the pod was on the range conducting a search in a cell during the time of the confrontation in question in this case.

Grievant (from the desk): Bring your crack head ass here.

Inmate (at his bed): You talking to me?

Grievant: repeated above.

Inmate: You called me a mother fucking crack head.

Grievant: I call them as I see them.

Inmate (at Grievant's desk): I'll slap shit out of you.

Grievant: I'm right here.

Grievant: Make the first move, you little mother fucking bitch. I'm right here.

Inmate called Grievant a "ho."

Grievant: I'll be a ho, you know what I'm saying, mother fucker. I'll be a ho.

One of the most interesting aspects of the record in making the above finding was the startlingly grudging concessions by the Grievant after listening to the audiotape at the arbitration hearing during which her words were plainly heard. The Grievant testified that the inmate was, initially, about ten steps away from her desk. The inmate was small of stature and build. The concessions were as follows:

1.) The Grievant acknowledged that the inmate called her a "ho" and that she responded by saying "I'll be that." The Grievant then added to her testimony about this incident the following: "I heard the tape."

2.) The Grievant also testified that "I could have said make the first move."

3.) The Grievant also testified "I don't recall calling him a crack head. It's possible I could have."

All of these concessions were made by the Grievant during direct examination and she was not subjected to cross examination.

3.) The Rule Violations

a.) Rule 24

Rule 24 makes "lying in an official investigation or inquiry" a violation for which the penalty for first offense a 2-day fine, suspension or working suspension, or a Removal. The supervisor was ordered by a Major to conduct the investigation, and the supervisor questioned the Grievant within hours of the verbal confrontation on January 9, 2006. The written transcript of the interview signed by the Grievant and the supervisor includes the following:

Q: Did you call inmate Leach a crack head prior to, during or after this incident?

A: No.

Q: Did you use any abusive language at all towards inmate Leach prior to, during, or after this incident?

A: All I did was call him over to the desk, that's when he continued to curse at me, threaten me, and that's when I gave him the direct order after he had gotten into my face.

The Grievant also initialed all of her answers on the written transcript of the interview including her answers quoted above.

That the Grievant lied during the official inquiry is obvious; however, the significant aspect of this rule violation is not simply the lie. The Grievant continued to stonewall on what transpired on the floor of the pod and what she and the inmate said. Even at the arbitration hearing, the Grievant exhibited no remorse or even acknowledgment of what transpired during the confrontation. The Grievant made grudging concessions, but as she noted during her direct examination, her concessions were only made after the audiotape of the telephone conversations had been played at the arbitration hearing for all to hear, including the Grievant.

The conclusion is that the Employer had not only just cause to discipline the Grievant under Rule 24, but the egregiousness involved in her denial of the verbal confrontation weighs in the choice of discipline under this Rule.

b.) Rule 38

Rule 38 forbids any act that "constitutes a threat to the security of the facility, staff (or) any individual under the supervision of the Department." It contains a similar range of potential discipline for the first offense similar to that in Rule 24. The Grievant's role in this verbal confrontation clearly resulted in a threat to the security of the facility, the staff (the other correction officer present in this pod), and the inmate. The verbal confrontation occurred on the floor in the pod where approximately thirty unrestrained inmates were located. The record shows that approximately 120 to 140 inmates were in the entire residential building. It also shows that only one other correction officer was present, and he was currently occupied performing a search of a cell elsewhere in the pod.

Within this setting, the Grievant demeaned the inmate in front of all of the other inmates, calling him a mother fucking crack head. Challenged by the inmate, she then defiantly insisted she was correct saying she "calls them as she sees them."

When the inmate came to the Grievant's desk as she had insisted, the inmate threatened to assault the Grievant. Instead of diffusing the mater, she invited the inmate to

assault her. "Make the first move, you little mother fucking bitch. I'm right here." This created a potentially explosive event in the pod over and above threatening the security of this particular inmate.

Lastly, the Grievant abandoned her role as a correction officer in the presence of the inmate and debased on her role to a status below even that of the inmate. Called a "ho" by the inmate, she responded by saying that she will be one.

The Grievant suggestion that her provocative challenge to this inmate in the presence of all of the other inmates was simply a laughing matter is not consistent with the reaction of the inmates who were engaged in telephone conversations to their families while the confrontation was occurring. The disc that was part of the investigation includes pauses by the inmates during their primary conversations with their families. One inmate concluded a pause by saying "a C.O. and this dude are into it." During the same conversation, a second pause occurred and the inmate can be heard to say, "This is some crazy shit going on here."

This evidence shows that the inmate who was observing the provocative challenge to another inmate by a correction officer did not consider this a joyous, laughing matter. It was obviously an abnormal and exceptional event within the pod.

There is no question that the record shows just cause for discipline under Rule 38. However, what was involved in this transaction is more than simply a threat to the security of the inmate. There was a demeaning, offensive challenge to an inmate before the other inmates; there was a threatened assault on the corrections officer; there then followed a provocative challenge to the inmate for a fight as well as debasement of her own authority by the correction officer. All of the latter elements of this rule violation are relevant to the choice of discipline under this rule.

c.) Rule 44

Rule 44 prohibits threatening or intimidating an inmate or "use of abusive language toward an inmate." Violation of this rule results in the same range of punishment as in Rules 24 and 38. While the provocative challenge to physical fighting constituted the threat to the security of the facility and the inmate under Rule 38, the same facts display the prohibited threat and the use of abusive language directly to the inmate under Rule 44. While the record does not include any third party witness statements or testimony about the positioning of the Grievant and the inmate, both the Grievant and the inmate testified that at one point during the confrontation, the inmate

was positioned near the desk of the Grievant. Therefore, they were positioned in close proximity to each other.

The Grievant grudgingly conceded that she might have said to the inmate standing by her desk "make the first move." Within the broader context of the totality of their verbal confrontation, this does constitute a situation where the inmate could be said to reasonably apprehend immediate bodily injury. At a minimum, this is a threat to the inmate under Rule 44.

The inmate testified that the Grievant came from behind her desk and "got in my face." The Grievant then said, "make your move," obviously provoking the Grievant to engage in a fight.

Lastly, abusive language toward an inmate is also prohibited under Rule 44. The Grievant grudgingly acknowledged that she might have called the inmate a "crack head," but she claimed that this was simply shop talk and such language was common toward inmates. Other than the Grievant's opinion, there is no other information in the record about whether such language constitutes abusive language. There is, however, in the record a discipline of a correction officer who was overheard by supervisors telling an inmate to "get on the mother-fucking wall and shut his fucking mouth." This led to imposition of discipline of the correction officer under Rule

44, albeit a discipline on the lightest level of range of disciplines permitted in Rule 44.

In a parallel manner to the analysis above under Rules 24 and 38, the Employer did have just cause to discipline the Grievant under Rule 44. The Grievant did use abusive language toward the inmate; however, the significant element of the analysis of the facts under Rule 44 is the body movement and threat by the Grievant towards to the inmate. Here, it is not simply the security of the inmate which was threatened (as under Rule 38); it was the body of the inmate that was threatened by the Grievant's open provocative challenge to the inmate to engage in a fight.

B.) Disparate Treatment

The Union claimed that the punishment of removal in this case was unfair because other employees in similar situations were punished with disciplines less than removal. Two received 2-day fines and one was reinstated by a Last Chance Agreement. The defense of disparate treatment is a matter upon which the Union bore the burden of proof.

We begin the analysis with the observation that the disciplinary grid set forth an extraordinarily broad range of potential penalties that could occur for the violation of each one of the three rules for which the Employer had just cause to

discipline. The discipline could range between a 2-day fine, suspension, or working suspension up to the removal which was administered in this case. With this broad range of possible penalties for each of the rules involved in this case, it is obvious that the choice of penalty should turn on the circumstances of the case that may mitigate or aggravate a penalty. The Employer's Standards of Employee Conduct so states: "All offenses allow the appointing authority to consider circumstances, which may mitigate or aggravate a penalty."

On the other hand, the same Standards state that the purpose of the rules "is to provide a measure of consistency and application and progression of disciplinary action." The question becomes, therefore, whether the Union was able to show other cases that presented similar factual situations to the situation presented in this case, and that lesser penalties than removal were applied. This burden was not met and the punishment in this case cannot be rejected as disparate.

One case presented by the Union involved a Rule 44 charge against a correction officer for telling an inmate to "get on the fucking wall and shut his fucking mouth." This was found to be obscene language and a 2-day fine applied to the correction officer.

As noted above, this Grievant did engage in obscene language to the inmate, but the considerable difference between what this Grievant said and did is set forth above. Apart from the facts that show the Grievant violated two other rules, the Grievant's misconduct was far more than simply the use of abusive language under Rule 44. The facts show that she threatened the inmate and provocatively challenged him to a fight.

The next case involved a correctional officer who threw a roll of toilet paper which hit an inmate. He was charged with lying during the official investigation under Rule 24, and with violating Rule 44 by hitting the inmate with the roll of toilet paper.[2/] The key concern of the Union was the fact that this correction officer received a 2-day fine for a case that involved a lie in an official inquiry by comparison to the fate of the Grievant in this case under Rule 24.

Putting aside the egregious conduct of the Grievant in this case when measured by Rules 38 and 44, the facts of this case concerning the lie in the official inquiry are quite dissimilar

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[2/] The correction officer in this case was also charged with Rule 7 in that he failed to report the throwing of the roll of toilet paper as a "use of force."

from the facts of the case tendered by the Union. In the case tendered by the Union, the correction officer was asked whether he threatened the inmate in an investigatory interview which occurred on September 15, 2005. His answer was "I threatened to lock his ass up."

The record on this other case cited by the Union includes a memorandum dated September 22, 2005 to the investigating officer who conducted the investigatory interview on September 15. The memorandum states:

> Today, 9-22-05 Officer Dunnigan stop by and saw me (and) told me that he was scared of being fired for a recent incident. Officer Dunnigan said that he didn't tell everything that happened with the incident. I told him that I couldn't talk about the investigation but would he write an incident report about everything that happened He said yes. I later told him to write an incident report and forward to Lt. Cantoni (the investigatory supervisor).

Officer Dunnigan wrote that incident report on September 26, 2005, and stated that he said to the inmate "I'm going to beat your ass." The notice of disciplinary action signed by the warden observed: "Furthermore, during your investigatory interview, you denied making threats towards this inmate; yet days later you offered a second incident report in which you self admitted to making threats by stating to this inmate that you would "beat his ass."

By contrast, this Grievant continued to stonewall her threatening the inmate in this case even after listening to the tape that included her voice as secondary conversation of taped telephone call by a different inmate. The best she could state at the arbitration was that she could have said "make the first move."

This second case cited by the Union is clearly distinguishable from this case in arbitration not only because of the absence of any Rule 38 violation but also the substantial difference between the facts concerning the lie in an official inquiry.

It is unnecessary to discuss in detail the third case cited by the Union on the disparate treatment question. This case involved the imposition of the discipline of a correction officer several months after the punishment challenged in this case. Moreover, the discipline of the correction officer in this third case was removal for the violation of Rules 38 and 44--identical to the case in this arbitration. The only difference is that the correction officer was reinstated under a Last Chance Agreement which held in abeyance for two years the Removal Order. A Last Chance Agreement is an agreement among the Grievant, the Union, and the Employer. It is a consensual arrangement among these three parties, and it is certainly

beyond the authority of this arbitrator to conclude that the parties should have considered and entered into a Last Chance Agreement in this case.

C.) The Retaliation Issue

There was testimony in the record that the Grievant and two other females filed a sexual harassment case against the institution. The Union argued that this removal was in retaliation for the filing of the lawsuit. However, there is a total absence of any evidence that connects the filing of the lawsuit to any person who participated in the investigation or the decision to discipline the Grievant in this case. The warden was not charged with any liability under the lawsuit, and there is no evidence of any connection by the investigating superior in this case with the lawsuit. Lastly, the evidence of egregious conduct by the Grievant under the three rules--24, 38, and 44--stands alone as a basis for the justification for the removal in this case.

AWARD:

The grievance is denied.

Date: October 14, 2006

John J. Murphy
Arbitrator