#957

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

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

Grievant: Charlie Hines

Case No. 27-14-200060224-2548-01-03

Date of Hearing: December 20, 2006

Place of Hearing: Lorain Correctional Institution

APPEARANCES:

For the Union:
Advocate: Michael Scheffer, OCSEA Staff Representative
Witnesses:
Grievant: Charlie Hines

For the Employer:
Advocate: Chris Lambert, Bureau of Labor Relations
2nd Chair: Rick Shutek, Labor Relations Officer
Witnesses:
Rita Kundrod, Correction Officer
Jeff Bertram, Institutional Investigator
John Basie

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: March 2, 2007

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2003 through February 28, 2006, between the State of Ohio Department of Rehabilitation and Corrections ("DR&C") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Charlie Hines ("Hines") for violating DR&C Standards of Employee Conduct, Rule 44, threatening, intimidating, coercing, or use of abusive language toward any individual under the supervision of the Department regarding conduct which occurred on November 12, 2005.

The removal of the Grievant occurred on or about February 23, 2006 and was appealed in accordance with Article 24 of the CBA. This matter was heard on December 20, 2006 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties on or about January 17, 2007.

BACKGROUND

The Grievant was employed as a Corrections Officer ("CO") with over fourteen (14) years of service at the time of his removal. CO's are expected to follow the written regulations of the DR&C and provide security services to inmates who resided at the Lorain Correctional Institution ("LORCI").

At issue in this case is the conduct of the Grievant on November 12th and 15th, 2005. The Grievant was working the third shift and was assigned to post 10A. On November 12, 2005, at approximately 5:30 a.m., his co-worker, CO Rita Kundrod ("Kundrod") unlocked the cell doors to enable inmates to proceed to their work stations in the cafeteria. About twenty inmates were released from their cells when according to the Employer, the Grievant yelled at inmate John

Basie ("Basie") and threatened to kick his a**, in a secluded area of the cell block. Basie purportedly replied that he would not hit anyone wearing a badge, whereupon the Grievant removed his badge and told CO Kundrod to hold his badge and keys so that he could kick Basie's a**. CO Kundrod testified that she heard the Grievant's entire conversation with Basie. However, Kundrod did not take the Grievant's keys and nothing else occurred on November 12th.

The Union on the other hand contends that inmate Basie was in his cell when the incident happened and he was the one who used threatening words, not the Grievant. According to inmate Lancia's investigatory statement, Basie stated that he was going to kick the Grievant's a**. The Union further points out that CO Kundrod was stationed at the podium, which was located across the room, and couldn't have heard the conversation between the Grievant and Basie.

The Grievant, Basie nor CO Kundrod prepared a written report on the events of November 12, 2005. The Grievant did not work on November 13th or 14th. On November 15, 2005 at the beginning of the Grievant's shift Basie acted out which required the Grievant to prepare a conduct report charging Basie with threatening behavior. The Grievant's co-worker on this shift was CO Orient. Basie was notified of the charges in the Grievant's conduct report on November 21, 2005. Upon notification of the Grievant's threat charge by Sgt. Martin Kilbane ("Kilbane"), Basie informs Sgt. Kilbane that he was threatened by the Grievant on November 12, 2005 and prepared a Notice of Grievance against CO Hines.

The Employer conducted an investigation led by Jeff Bertram ("Bertram"), Inspector of Institution Service. Bertram interviewed the Grievant, CO Kundrod, CO Orient and CO

Collins.[1] Bertram also reviewed the third shift schedule and the incident report prepared by Sgt. Martin Kilbane ("Kilbane"). Bertram issued an investigatory report on November 22, 2005 in which the investigatory findings concluded that CO Hines threatened to beat Inmate Basie's a** in the C-Section of the cell house and removed his badge and keys and told CO Kundrod to hold his equipment. (JX 3, p7). At the conclusion of the predisciplinary process the Employer removed CO Hines for violation of Rule 44. The parties stipulated that the only active discipline on record was a Rule 5 (careless acts) and Rule 8 (failure to carry out work assignments) violation which resulted in a two day fine. The Union contends that the penalty was excessive, the investigation was faulty and/or the application of discipline regarding similar conduct (is or was) disparate.

ISSUE

Was the Grievant disciplined for just cause? If not, what shall the remedy be?

RELEVANT PROVISIONS OF THE CBA AND DR&C WORK RULES

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(i).

[1] The investigation file was absent of any written statement and/or questions and answers from potential witnesses CO Orient and CO Collins. Also, it appears between 10-20 inmates were firsthand witnesses of what occurred on November 12, 2005 and only inmate Lancia was interviewed by Bertram.

STANDARDS OF EMPLOYEE CONDUCT

RULE 44

	1st	2nd	3rd
Threatening, intimidating, coercing or use of abusive language toward any individual under the supervision of the Department.	2 or R	5 or R	R

POSITION OF THE PARTIES

THE EMPLOYER'S POSITION

With ten minutes remaining to complete his shift on November 12, 2005, the Grievant believed he heard Inmate Basie yelling across the pod. The Grievant directed the inmate to stop yelling, or he would "kick his a**." The inmate was out of his cell with approximately twenty other inmates/workers who were on their way to the cafeteria. Inmate Basie's cellmate was Lancia who apparently was the closest inmate to hear what was occurring.

Inmate Basie told the Greivant that he would not hit anyone with a badge on. CO Hines removed his badge from his uniform, unsecured his keys and yelled to CO Kundrod to hold his equipment, "so I can take the inmate to C-section and kick his a**." CO Kundrod did not take his badge and keys, which prevented the threat from being acted upon. CO Kundrod did not prepare an incident report, but as part of the investigatory process met with Bertram on November 22 and verified CO Hines' behavior. (JX 3, p13). CO Kundrod failed to report CO Hines' action because she had previously been the informant on another CO who had violated certain rules, and she didn't want to be labeled a stoolie by her peers. In support of CO Kundrod's recollection are the inmate statements of Basie and Lancia (JX 3, p12, 25). Both

Basie and Lancia's investigatory statements agreed on at least two (2) points, that the Grievant threatened to kick a** and asked CO Kundrod to hold his equipment. (JX 3, p12, 25).

CO Hines denied but largely could not recall what occurred on November 12, 2005. This creates a significant credibility concern. CO Hines' statements provided to the Employer either deny anything happened (JX 3, p18-19) or question if CO Kundrod was positioned properly to enable her to hear what Inmate Basie said. The Employer points to the hearing testimony of CO Kundrod and Basie as more credible and consistent with their investigatory written statements.

CO Hines' non-work days were November 13th and 14th, 2005. On November 15th, the Grievant wrote a conduct report concerning Basie. Unit 10-A Sgt. Kilbane informed Basie that CO Hines had charged him with threatening behavior. Basie, then informed Sgt. Kilbane that CO Hines had threatened him on November 12, 2005 which commenced the investigation herein.

Despite the plethora of mitigating reasons offered by the Union, the most reliable evidence indicates that CO Hines threatened Basie with physical violence using abusive language. (Employer Post-Hearing Statement, p3).

The Employer submits that the Grievant's testimony was not credible and is confusing. The Grievant's recollection of Basie's alleged escalated bad behavior on November 15th are the identical events which occurred on November 12th. However, the aggressors are switched. The Employer submits that CO Hines was confused as to what occurred on either the 12th or 15th of November between himself and inmate Basie and his sworn testimony reflects his confusion. The Grievant testified that he never threatened or used abusive language toward Basie, but was only verbalizing back to Basie the exact language that Basie was using towards him. At best the Grievant's testimony is self-serving and untruthful.

Regarding the Union's affirmative defense of disparate treatment, the Union offered Jerry Largent ("Largent") and David Dunnigan ("Dunnigan") as similarly situated employees who had comparable conduct but were treated differently. Largent's misconduct involved the use of abusive language only and varies greatly from Grievant's in that Largent did not provoke or threaten an inmate with physical violence as the Grievant did. (Employer Post-Hearing Statement, p9).

Dunnigan, also charged with a Rule 44 violation, did not attempt to provoke an inmate into a physical confrontation. Dunnigan's misconduct involved the throwing of a roll of toilet paper that hit an inmate in the head and threatened to beat his (inmate's) a**. Even if Dunnigan's behavior was similarly situated to the Grievant there are other factors such as different appointing authorities and prior discipline history. DR&C argues that at best a superficial similarity may exist between the Grievant and CO Dunnigan's situations. Nevertheless, to successfully establish disparate treatment the Union is required to show more than one (1) example of disparate treatment. In other words, the Dunnigan example alone is insufficient to establish disparate treatment. Simply, the Union has failed to meet its burden of showing that CO Hines was treated disparately.

With respect to CO Kundrod's conduct on November 12, 2005 DR&C agrees that no discipline was issued for her failure to report but a rational explanation exists. The Employer argues that although uncomfortable with what she observed, CO Kundrod was not complicit in threatening Basie and intervened by not taking the Grievant's badge or keys. CO Kundrod's failure to prepare an incident report on November 12, 2005 does not abrogate CO Hines' conduct nor impact the just cause standard.

Finally, the removal was based upon just cause and a review of all factors makes rehabilitation remote. The penalty imposed was based upon a prior active two-day fine for violation of Rule 8 (failure to carry out work assignment) and Rule 5 (purposeful or careless act(s) which result(s) ... loss damage) which progressed the penalty level to the second tier of the Rule 44 disciplinary grid which allow for removal.

POSITION OF THE UNION

CO Hines, a fourteen (14) year employee was removed without cause, for allegedly violating Rule 44.

On November 12, 2005 inmate Basie became disruptive requiring CO Hines to give several verbal orders to quiet down. Basie talked back to the Grievant and made several threats, i.e., "F*** you; I don't have to go to bed; I'll kick your a**." According to CO Hines' testimony all of the conversations on November 12th occurred at cell 113 while Basie and his cellmate (Lancia) were inside the cell.[2] CO Kundrod was at the opposite end of the unit approximately 150 feet away, standing at the podium.

CO Hines testified that he did not threaten Basie but was repeating out loud the exact threats made by Basie to him, and CO Kundrod heard his responses not understanding what was occurring. Hines further testified, Basie pointed to C-Section and told the Grievant if he would lock the middle door to keep the other officers out, he would kick CO Hines' a**. The Grievant did not write an incident or conduct report on November 12, 2005.

On November 15, 2005 early in the work shift, inmate Basie started acting out again at which time CO Hines reported this conduct to his immediate supervisor, Sgt. Kilbane. On

[2] On where the discussion occurred a careful reading of Basie and Lancia's statements indicate that the Grievant was in the cell door when according to Lancia when the argument was over, the Grievant closed the cell door and told Basie to go to bed. (JX 3, p25). Basie indicated that the Grievant told him to get his a** in the bed whereupon Basie stated he wasn't sleepy.

November 15, 2005, CO Orient was working on shift with the Grievant. The Grievant prepared a conduct report on November 15, 2005, and charged inmate Basie with disobedience of a direct order, threatening bodily harm and creating a disturbance (JX3, p24).

On November 18, 2005 Sgt. Kilbane met with Basie and read the charges against him alleged by the Grievant. Basie while facing institutional punishment, now recalls that he was threatened six days ago by the Grievant. Despite numerous shift changes, and two office meetings on November 16th and November 17th with Sgt. Kilbane, Basie did not inform him or any other CO that the Grievant had threatened him. (JX3, p21). The reaction by Basie is not indicative of a person who was threatened. Why wait until charges are brought against you to declare your alleged fear almost one week later?

CO Kundrod similarly to CO Hines did not report the alleged November 12, 2005 matter until questioned by Bertram on November 21, 2005. No dispute exists that all COs are required by DR&C rules to immediately report anything unusual affecting the security of the institution. Therefore, her failure to report the incident merits more than a cursory response by the DR&C. CO Kundrod's conduct was not reprimanded which further questions the severity of the discipline to the Grievant.

The Union also urges the arbitrator to review whether or not the Employer has acted disparately in issuing discipline. Union Exhibits 2, 3 are examples of CO Largent and CO Dunnigan who were also charged with Rule 44 violations but received two (2) days of discipline for similar conduct. CO Dunnigan was disciplined twice for a Rule 44 violation as well as a use of force charge but was not removed. (UN EX2). Considering that this was CO Hines' first Rule 44 violation, the Employer acted arbitrarily under the circumstances.

DISCUSSIONS AND CONCLUSIONS

Based upon the sworn testimony at the hearing, exhibits of both parties and the post hearing statements, the grievance is granted in part and denied in part. My reasons are as follows:

DR&C relied primarily on CO Kundrod and Basie to establish that Rule 44 was violated by the Grievant threatening Basie on November 12, 2005. The recollection by CO Kundrod and Basie although not identical[3] is similar and overall consistent in the following manner:

CO Kundrod and Basie, heard the Grievant state that he would kick/beat Basie's a**, and he would take Basie into the C-Section and beat his a**. Also, CO Kundrod and/or Basie observed the Grievant remove his badge and keys in preparation to fight Basie. Supportive of the foregoing is the statement provided by inmate Lancia, who was Basie's cellmate. Lancia indicates that both the Grievant and Basie were arguing by threatening to whip each other's a** (JX3, p25). Lancia's statement adds that "the CO took off his badge and told the other CO to come get it . . ." (JX 3, p25). Therefore, despite the denial of the Grievant at each stage of these proceedings that nothing occurred, the evidence indicates the opposite. CO Kundrod, Basie and Lancia's statements coupled with the testimony of CO Kundrod and Basie supplied the evidentiary weight of reliable evidence to resolve the credibility issues and convince this Arbitrator the Grievant used abusive language and threatened Basie on November 12th.

Somewhat at odds with my decision that substantial evidence existed to support a Rule 44 violation was the obvious lack of thoroughness regarding this investigation. The Union correctly points out that none of the other twenty inmates who were in the immediate area were

[3] Basie provided two (2) written statements. On November 18, 2005 (JX3, p22) the threat is confirmed, but no mention of the badge or keys occurred. On November 21, 2005 (JX3, p12) the threat is confirmed as well as the C-Section and the badge issue are raised in the statement. CO Kundrod provided one (1) statement dated November 22, 2005. CO Kundrod's statement confirms the threat, removal of badge and keys and the C-Section referenced.

interviewed. Also, CO Orient who was working with the Greivant on November 15, 2005 was interviewed by Bertram; but no written statement was obtained as part of the investigatory file.[4] Also disconcerting was the testimony of Bertram that he interviewed inmate Lancia on November 21, 2005 but did not obtain a written statement until December 2, 2005. Considering that the seminal event took place on November 12th, and DR&C became aware of it on November 18th, the lack of urgency to preserve and obtain all of the known evidence is simply troublesome.

Another indication of a less than thorough investigation is the incident report of Sgt. Kilbane. (JX3, p21). On November 18th inmate Basie is read the conduct report prepared by the Grievant by Sgt. Kilbane. However, Sgt. Kilbane's incident report states that on November 16th and November 17th Basie was in his office for supplies and Basie did not mention the threat incident. No evidence indicates that either Sgt. Kilbane or Bertram asked Basie why he failed to report the Grievant's conduct until November 18.

Clearly something happened on November 12th between the Grievant and Basie and given the higher standard of conduct required of COs, the provoking of a prisoner at the urgence of a CO to engage into a physical battle is unacceptable. The position of the Grievant during the investigation and at the hearing is a total denial of his misconduct. The Grievant's lack of contrition confounds the Arbitrator. Furthermore, I find that the Grievant's testimony and his recollection was less than stellar at the hearing.

On the other hand, DR&C key witness, CO Kundrod did not come to this matter with clean hands. Her conduct in not reporting what she observed on November 12th is also unacceptable to this Arbitrator. The Employer justifies her failure to disclose due to her fear of

[4] Although a handwritten entry on JX3, p15 indicates that CO Orient was doing a pack up and did not hear the Grievant threaten inmate Basie, additional investigative facts could have been explored with CO Orient, i.e., was the Grievant inside the cell of Basie? Who was Basie's cellie on November 15th? Was Basie yelling across the pod?

being labeled a snitch by her peers. In other words, CO Kundrod now determines whether conduct is reportable or not. DR&C attached the Jackson decision in support of the position that the COs in Jackson were passive participants in the conduct, as opposed to CO Kundrod who did intervene by refusing to accept the Grievant's badge and keys. According to DR&C, CO Kundrod's conduct indicates a noncomplicity with the Grievant's actions. I concur that CO Kundrod did not assist the Grievant in the Rule 44 violations; on the other hand, CO Kundrod had an absolute obligation to comply with Rules 8 (failure to carry out or exercise of poor judgment) and 25 (failure to immediately report a violation . . .). No justification is present to warrant an exception to CO Kundrod. The impact of her conduct is profound, because this incident which serves as the basis for CO Hines' removal, may have never been uncovered if the Grievant did not file a conduct report on Basie. CO Kunrod's reasons articulated by DR&C for not reporting this incident are not persuasive considering the alternative.

Prior to his removal, the parties stipulated the disciplinary record was as follows:

February 4, 2004	Rule 8 – failure to carry out work assignment Rule 5 – purposeful or careless act(s) (2 day fine)

As stated earlier, the Employer has shown just cause existed regarding the Grievant's discipline. Since, the Union asserted the allegation of disparate treatment, the burden of proof shifts to the Union. The Union presented two (2) examples of other employees in a similar situation that were treated differently than the Grievant. The Union contends that COs Largent and Dunnigan were treated differently than the Greivant, destroying the notion of just cause, since all employees guilty of a similar offense were treated differently.

As stated by Arbitrator Rivera, in Jennings[5] the initial determination is to assess whether a "similar situation" existed among the Grievant and the comparables. Factors that must be established by the Union include the following:

1. COs Largent/Dunnigan committed the same or similar offenses, but received different discipline.

2. If evidence indicates that COs Largent/Dunnigan committed the same or similar offenses to the Grievant, do other relevant factors exist (aggravating or mitigating) to explain the different treatment?

Variations in penalties do not automatically indicate improper action by an employer, when ". . . variations in discipline [is] reasonably appropriate to variations in circumstances." Alan Wood Steel Co., 21 LA 843, 849 (Short, 1954). Aggravating and/or mitigating factors could include prior discipline record and degree of fault. In other words, a reasonable basis must exist, in fact, for variations in penalties to withstand a charge of disparate treatment. Elkouri & Elkouri, How Arbitration Works, 6th Ed., pp. 995-999 (2004).

CO Largent received a two day fine for violating Rule 44 when he used abusive language towards an inmate. CO Largent told an inmate to get on the mother f***ing wall and shut his f***ing mouth. Moreover, CO Dunnigan received a two day fine for violating Rules 44, 7 (failure to follow post orders ...) and 24 (interfering with or failing to cooperate in ... an official investigation) when he threw a roll of toilet paper striking an inmate in the head and also threatened to beat the inmate's a**. (UN EX 2). DR&C argues that the disparate treatment analysis is not applicable for the following reasons: (1) the Grievant's conduct, in removing his badge/keys, was more onerous than either COs Largent and Dunnigan; (2) CO Largent's discipline was administered by different appointing authority; and (3) CO Dunnigan was not intended to provoke the inmate into a fight. The employer further points out that a disparate

[5] Attached to the Employer's post-hearing statement is OCSEA-Jennings Arbitration and OCB, Grievance No. G-23-06(89-11-13)-01-21-01-03, October 5, 1990.

treatment analysis only applies if the conduct as alleged did occur. Since the Grievant has denied his involvement with inmate Basie, it is disingenuous to proffer this affirmative defense.

Considering my prior finding that the Grievant had in fact engaged in behavior to support a Rule 44 violation, a review of the Union's evidence to support a disparate treatment is appropriate. In examining CO Largent's conduct, although it was a Rule 44 violation, it fails to comply with the crucial element of "similarity." CO Largent was fined for using abusive language – only. A Rule 44 violation includes abusive language as an infraction, but the impactful charge against the Grievant involves the removal of equipment coupled with the provocation of threatening language. Based upon the facts regarding CO Largent's discipline, I agree with the employer that they were not similarly situated.

On the other hand, CO Dunnigan's conduct involved hitting the inmate with a thrown object as well as threatening to beat his a**. The employer submits that the facts are silent to indicate whether the act of hitting the inmate with the thrown object and the threat were connected. However, the element of disconnectedness is irrelevant because the record is undisputed that CO Dunnigan's conduct for throwing an object, using threatening language and failure to cooperate in an investigation resulted in a two day fine for a Rule 44 violation. The Grievant's removal of his equipment and threat to fight an inmate is analogous to CO Dunnigan's conduct in my opinion. Whether CO Dunnigan's threat occurred immediately after throwing the object or the next day, it was intended to provoke the inmate to react. Therefore, based upon the record I find that CO Dunnigan and the Grievant's behavior is closely aligned in all major respects.

The Employer on the other hand contends that the record fails to establish that CO Dunnigan was the aggressor or that his conduct was as severe as the Grievant's. In other words, the Grievant and CO Dunnigan's circumstances were significantly different. I disagree.

The arbitrator concludes that in one of the two cases, the Grievant and CO Dunnigan's situation was similar but CO Dunnigan received lesser discipline than the Grievant. A review of the record fails to establish that aggravating factors exist including that the Grievant's discipline record was significantly different to CO Dunnigan or that the Grievant's degree of involvement justified different discipline. Moreover, the employer did not proffer sufficient facts to explain the different treatment due to aggravating or mitigating circumstances.

Nonetheless, the Employer also points out that normally one instance of disparate treatment is not enough and cites the Jennings, supra, decision which reads in relevant part.

"One instance of disparate treatment on an employer's part (unless shown to have been an intentional act) will not suffice. The employer is not excused for unfair disparate treatment merely because no evidence of intention is available. Most cases where disparate treatment is alleged will, in all likelihood, cover more than one instance of disparate treatment and less than a clear cut pattern of disparate treatment." Jennings, pp. 14, 15 (emphasis added).

A careful reading of Jennings does not bar the application of the affirmative defense of disparate treatment by establishing only one instance of similar situation even in the absence of establishing the employer's intent. I concur with Jennings in that the preferable, but not the only method of comparisons would involve multiple examples of unequal treatment for violating the same rule. My finding embraces the holding in Jennings and allows under the appropriate facts the application of the affirmative defense of disparate treatment may be established by showing one instance of disparate treatment.

Therefore, the evidence establishes that the Grievant was treated differently, and that the Union met its burden by showing CO Dunnigan received less discipline for committing a similar offense and no reasonable explanation offered by the Employer was found to explain the difference.

What's the appropriate remedy? Due to the concerns contained herein involving the state of the record of both parties the remedy reflects that discipline was issued for good cause; however, the removal was excessive and the Grievant shall be reinstated. Therefore, the grievance is sustained in part.

AWARD

1. The Grievant shall enroll and successfully complete an EAP program associated with anger management. The Grievant shall enroll in an EAP program no later than thirty days from the date of this award. Failure to enroll or successfully complete the EAP program shall be grounds for removal.
2. The Grievant shall be reinstated with all applicable seniority rights within thirty days of this award.
3. The discipline for violating Rule 44 shall be a two day fine.
4. The Grievant shall receive no back pay or other economic benefit.
5. The Arbitrator retains jurisdiction for a period of sixty days to resolve any dispute that may arise in the implementation of this award.

Respectfully submitted this 2nd day of March, 2007.

Dwight A. Washington, Esq., Arbitrator