

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 662 EX

OCB GRIEVANCE NUMBER: 1) 27-12-900501-0171-01-03
2) 27-12-900703-0190-01-03
GRIEVANT NAME: 1) MEARS, MICHAEL D. 2) SMICKLAS, KEVIN

UNION: OCSEA/AFSCME

DEPARTMENT: REHABILITATION & CORRECTION

ARBITRATOR: LOVE, ANDREW

MANAGEMENT ADVOCATE: 1) DURKEE, TED 2) ANDREWS, JOE

2ND CHAIR: DURKEE, TED

UNION ADVOCATE: ROWLAND, ROBERT

ARBITRATION DATE: AUGUST 30, 1991

DECISION DATE: AUGUST 30, 1991

DECISION: 1) MODIFIED 2) GRANTED

CONTRACT SECTIONS

AND/OR ISSUES: 1) ONE DAY SUSPENSION FOR NELIGENCE
2) FIVE DAY SUSPENSION FOR FAILURE TO FOLLOW
POST ORDERS AND ACTIONS THAT COULD RESULT IN HARM

HOLDING: 1) REDUCED TO A WRITTEN REPRIMAND
2) EMPLOYER'S EVIDENCE WAS HEARSAY AND NOT GIVEN
MUCH WEIGHT. GRIEVANT AWARDED BACK PAY AND LOST
BENEFITS.

COST: \$300.00 (\$150 EA)

6624

August 30, 1991

In re Grievance of Michael D. Mears

Grievance # 27-12-(90-05-01)-0171-01-03

Grievance is denied, because the grievant was not as thorough with ^{the} search of ^{the} inmate cameraman.

However, the written statement of Officer McClintock (inmate cameramen on several occasions are not strip searched) and grievant's testimony that other correction officers advised grievant that strip searches of ~~for~~ inmate cameramen are done only periodically is persuasive in mitigating the 1 day suspension imposed.

Accordingly, the grievance is DENIED, due to the grievant's negligence in conducting the search of the inmate, but the discipline ~~is~~ commensurate with the offense is a WRITTEN REPRIMAND. Back pay of 1 day's pay and benefits are restored.

Andrew J. Love
ARBITRATOR

8/30/91

ARBITRATION

IN THE MATTER OF:

KEVIN SMICKLAS, Grievant

GRIEVANCE NO. 27-12-(7-3-90)-190-01-03

For Lima Correctional Institution: Joseph Andrews

For Grievant: Bob Rowland

DECISION AND AWARD

This matter came on before the arbitrator on August 30, 1991, wherein the grievant received a five-day suspension effective June 21, 1990. The parties have stipulated several joint exhibits. The parties have also agreed that this matter is properly before the arbitrator.

Specifically, the management of the Lima Correctional Institution (LiCI) contends that the Grievant violated Rules 6C (failure to follow post orders) and Rule 24 (other actions that could harm or potentially harm the employee, a fellow employee(s), or a member of the general public) of the Ohio Department of Rehabilitation and Correction's Standards of Employee Conduct, effective October 23, 1987. The Grievant has denied that he violated these rules.

The incident giving rise to the grievance occurred on February 13, 1990, at approximately 6:20 a.m. At that time, a Correction Officer, Deb Nuesmeyer delivered a moped to the rear sallyport area of LiCI for repairs to be done at the Vocational Education Building. While she was parking her truck to get assistance in removing the moped, she was approached by the Grievant, who,

according to Officer Nuesmeyer, removed his revolver and pointed it at her, stating, "I was going to shoot you." The Grievant began to laugh and replaced his weapon in his holster. Officer Nuesmeyer allegedly reacted in a frightened manner and made certain excited utterances.

The following facts are not in dispute: (1) Orders were posted around the rear sallyport area of LiCI admonishing correction officers not to draw their weapons unless an immediate danger was present; and (2) that drawing such weapons constitutes an action that could harm or potentially harm the employee, a fellow employee, or a member of the general public.

Jerry Hunt, First Captain at LiCI, described the institution as a medium security institution, with 450 employees and approximately 1,100 prisoners. Of the 450 employees, 260 of them are correction officers. He identified the various rules contained in the Standards of Employee Conduct, specifically Rules 6(c) and 34.

The witness testified that he knows the Grievant and Officer Nuesmeyer. He stated that she is no longer employed at LiCI.

Captain Hunt testified that he received an Incident Report prepared by Officer Nuesmeyer, which outlined the allegations that the Grievant drew his gun on her and frightened her.

The witness described the sallyport area, which takes in vehicles and, when applicable, enables employees to search vehicles and other property for contraband. The area contains metal detectors as well. Captain Hunt further stated that regulations regarding the handling of weapons are posted in this rear sallyport

area and on the arsenal door. These post orders state that there is to be no horseplay and that no weapons should be drawn, except for immediate danger to the employee. It is the grievant's responsibility to be aware of these regulations. Every officer is required to review these post orders on their post on a daily basis.

Elaine Mayberry, Personnel Officer III at LiCI, testified that she conducted a pre-disciplinary conference regarding the alleged violations by the Grievant.

This conference was attended by Captain Hunt and Officer Nuesmeyer, among others. At the conference, Officer Nuesmeyer testified that on February 13, 1990 at approximately 6:20 a.m. she brought her moped to the sallyport to drop it off so it could be worked on. She stated that she backed the truck up on the outside of the fence and got back into the truck to unload the moped. At that point she heard someone say something. She observed the Grievant walking out of the sallyport into the bullpen area through the side door. As he approached her, she began to unload the moped. She stated that the Grievant said words to the effect that his group did not have papers for an early morning delivery of a moped. When Officer Nuesmeyer turned around, the Grievant removed his weapon from his holster and pointed it at her. At this point, according to Officer Nuesmeyer, the Grievant was approximately five feet away from her. She then said "What the hell?". The Grievant said, "I was going to shoot you." He began to laugh and replaced his weapon into his holster. Officer Nuesmeyer stated that she was shaken over the ordeal.

Officer Nuesmeyer was not available for this hearing. She has moved out of state and has taken a position with another institution in North Carolina.


The Grievant testified that, on February 13, 1990, he was refueling a vehicle and filling out paperwork on said vehicle inside the sallyport area. He stated that Officer Hart, a correction officer on duty with the Grievant, noticed a truck pull up. Both the Grievant and Officer Hart recognized Officer Nuesmeyer as the person operating the truck. The Grievant testified that he advised Officer Hart that he would take care of it. He stated that, as he opened the door of the small office in the sallyport area, he began to hitch up his pants, which were loose on him. While grabbing the side of his pants, the Grievant stated that he inadvertently grabbed his gun out of his holster while he was pushing through the door leading from the office. This event was corroborated a written statement prepared by Officer Hart. The Grievant stated that Officer Nuesmeyer was at least 25 feet away from him when he was replacing the gun in his holster. The Grievant denies that he drew his gun on Officer Nuesmeyer. He went on to state that he was aware of the rules regarding use of weapons, but did not violate such rules.

In arriving at a decision on this grievance, this Arbitrator must characterize the written statement of Officer Nuesmeyer and her oral statements at the predisciplinary conference, as indicated by Elaine Mayberry, as hearsay evidence. The witness was not available at this proceeding, because she has relocated to another state. Nevertheless, the statements shall be admitted into

evidence, but they are admitted only "for it is worth." How Arbitration Works, Elkouri and Elkouri, p. 325. As a general matter, very little weight is given to hearsay evidence, and it is unlikely that an arbitrator will render a decision supported by hearsay evidence alone. How Arbitration Works, at p. 326; Air France, 71 LA 1113, 1116 (1978). Such hearsay evidence will be given little weight if contradicted by evidence which has been subjected to cross-examination. How Arbitration Works; Howell Ref. Co., 27 LA 486, 492 (Hale 1956).

In this grievance, this arbitrator must give little weight to the hearsay testimony of Officer Nuesmeyer, primarily because she was the only person besides the Grievant who was present when the alleged incident of drawing the gun occurred. Also, her allegation was denied by the Grievant, who was present and testified in his own behalf, at this arbitration. His testimony related a series of events that contradicted the written statement of Officer Nuesmeyer as well as the restatement of her testimony at the predisciplinary conference. Therefore, considering the line of arbitration decisions which indicate that arbitrators have historically given little weight to such hearsay evidence, this arbitrator must accept the testimony of the Grievant as having greater weight.

Accordingly, this arbitrator must find that the grievance shall be granted, and that the Grievant be awarded back pay and benefits lost by the five-day suspension. Grievance is upheld.


ARBITRATOR