#1751

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 27-11-030508-1374-01-03
and	*	
	*	
OHIO DEPARTMENT OF	*	Mark Burks, Grievant
REHABILITATION AND	*	Removal
CORRECTION	*	

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Robert Jones, Staff Representative
Patty Rich
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Rehabilitation and Correction:

Patrick A. Mayer, Labor Relations Officer 2
David Burrus, Labor Relations Officer 3
Ohio Department of Rehabilitation and Correction

Marvin Phillips, Jr., Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:00 a.m. on November 24, 2003, and continued on December 22, 2003 at the Lebanon Correctional Institution in Lebanon, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation and Correction (the "State") were Correction Officers Peter Pablo and Laura B. Fairfax (the latter by subpoena), Tpr. Nelson Holden and Warden Anthony Brigano. Testifying for the Ohio Civil Service Employees Association/ AFSCME Local 11/AFL-CIO (the "Union") were Inmate Marshall Sprouse, Psychiatric Nurse 2 Nancy Tennenbaum, Carol Stephens, R.N., Personnel Officer 2 Edwin Sauer, Capt. Mitchell Turner, Lt. James C. Rice, and the Grievant, Mark D. Burks. Also in attendance were Ronald Campbell, III, Acting Labor Relations Officer, Ed Sauer, Acting Personnel Officer, and Keith Profitt, Chapter President. A number of documents were entered into evidence: Joint Exhibits 1-6, State Exhibits 1-2 and Union Exhibits 1. The oral hearing was concluded at 10:45 a.m. on December 22, 2003, following closing arguments. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of his removal for physically abusing an inmate and failing to cooperate in an investigation, the Grievant was a correction officer at the Lebanon Correctional Institution in Warren County, Ohio where he had been similarly employed since February 10, 1997. During his five years he accumulated ten disciplines before being terminated:

Date	Discipline	Infraction

12/21/97	10% fine	AWOL
06/07/98	30% fine	AWOL
01/17/99	Written reprimand	Purposeful or careless acts; Failure to follow post orders; Actions that could harm
01/07/00	Verbal reprimand	Promotion of gambling
02/13/00	30% fine	Leaving work area without permission; Failure to carry out an assignment
07/24/00	Verbal reprimand	Shift tardiness
08/13/00	30% fine	Purposeful or careless acts; Failing to cooperate in an investigation
09/10/00	10% fine	Unauthorized actions that could harm
05/05/02	5-day fine	Horseplay
07/28/02	5-day fine	Call-off; AWOL

Despite this record, at least two commanding officers, Capt. Mitchell Turner and Lt. James Rice considered him a good officer.

The events that led to the Grievant's removal occurred on November 14, 2002. The Grievant and C.O. Laura Fairfax were working their normal assignments in the H-Block on first shift. Near the end of the shift, Inmate Marshall Sprouse tried to exit the block for school on what appeared to the Grievant to be a fake pass. The Grievant sent him back to his cell. When he and Officer Fairfax were relieved some time around 2:00 p.m., the Grievant handcuffed the inmate and the two officers escorted him out of the block, Officer Fairfax following some feet behind the two men. At about the K-Block, the Grievant called out to C.O. Peter Pablo, who was coming on as a relief officer, to watch the inmate while he made a phone call. The Grievant says this call was to the captain's office to report that he was bringing the inmate in. Meanwhile, Officer Fairfax proceeded to exit the institution. When the Grievant returned, the two officers continued to escort the inmate down the hall. When they got to M-Block, the Grievant stepped inside, taking the inmate with him. Officer Pablo followed, but quickly turned around and stepped outside because, he said, there was inmate movement in the hall.

Approximately twenty seconds later (according to Officer Pablo) or a maximum of 4½ minutes later (according to the inmate) the Grievant and inmate returned to the hall and all three proceeded to the captain's office.

What occurred while the Grievant was alone with the inmate in M-Block is what is in dispute. The inmate claims the Grievant grabbed him by the neck, choking him, and threw him against the wall. The Grievant says he merely took him into the M-Block clerk's office to get him away from other inmates. There he counseled him to be quiet because he had been verbally abusive, escalating into aggression when he saw inmates he knew in the hall. The inmate admits he raised his voice to the Grievant, but denies that he yelled and says he was cooperative. Officers Pablo and Fairfax testified the inmate was not happy when he was cuffed, but not obnoxious. He was a "little mouthy," trying to state his case about the pass. Hallway traffic, they said, was normal for that hour, not particularly heavy. The Grievant said there was "mass movement" as does Officer Pablo's December 18 statement.

When the three men got to the captain's office, the inmate said nothing about what had occurred and no one noticed any injury or redness on his neck. The two officers were sent off to the school where they learned the inmate was supposed to be in school. Meanwhile, the inmate, who had said nothing so far about being mistreated, was put in the hall and then released from the captain's office to go to school after the officers reported what they had learned. By now the shift was over, so the Grievant left the institution and Officer Pablo went to his post.

At the school, the inmate told the administrator, Beverly Baker, that the Grievant had grabbed him around his throat. Baker did not testify, but according to her statement, she, too, saw no red marks. The inmate used a 2:15 pass to the mental health office where he told the nurse, Nancy Tennenbaum, that he wanted to report an officer for choking him. Nurse Tennenbaum testified she saw a little redness on the Grievant's neck at this time and so took him back to the captain's office where he could report his allegation. There Lt. Rice also saw "a little bit" of a red mark on the inmate's neck, but Capt. Turner did not. Turner nevertheless sent him to the infirmary as a precaution.

Carol A. Stephens, R.N., examined him in the infirmary at 2:27 p.m. She found 3 small, light red marks on his neck, but no other problems such as hoarseness, swollen throat or breathing problems. No treatment was required. She testified that these marks were not consistent with choking. As to the inmate's demeanor, she stated he was agitated and yelling loudly, saying he was "going to get Burks." She did not mention this to her superiors, but did say the marks did not look right and did not jibe with what the inmate said the Grievant had done. She also told the officers they had better get pictures because the marks looked like they were going to fade fast. The pictures that were then taken confirm that the appearance of the marks were as Nurse Stephens said.

Officer Pablo and Lt. Rice wrote incident reports that afternoon and both internal and external investigations were launched. Tpr. Nelson Holden of the Ohio State Highway Patrol interviewed and took statements from the inmate, the

Grievant, Officer Pablo and Capt. Turner. The inmate and Grievant were offered and agreed to polygraph tests, which were scheduled for January. The inmate's went forward as planned on January 13, but the Grievant backed out. When the institution's Use of Force Committee met, it considered the inmate's polygraph, which showed no deception, but concluded no force was used against him. Meanwhile, Tpr. Holden consulted with the Lebanon Municipal Court Prosecutor's Office with the result that he filed charges against the Grievant for assault and dereliction of duty. Sometime after this, Warden Anthony Brigano met with the Grievant and Tpr. Holden. The result of this meeting was that the Grievant agreed to undergo a polygraph. If he passed, the charges would be dropped and he would get his job back. If he failed, he would plead guilty and probably not get his job back. Further, he agreed that the polygraph results would be admissible in court. The Grievant and his attorney signed this Stipulated Agreement after the attorney redacted the plea-on-failure consequence.

On March 3, before the prosecutor saw the amended Stipulated Agreement, the polygraph examination of the Grievant was conducted. The Grievant testified he was upset about the polygraph and became more so as the procedure progressed. He thought it was not professionally done, in part because he was asked personal questions (about family members, e.g.). This made him feel violated. He was told he could quit at any time, but he thought it was a trick question because it sounded to him as if quitting were an admission of guilt. The examiner did not ask him if he was on medication, he stated, and it took hours longer than the 1½ hours his

attorney told him it would take. At the end, he said, the examiner called him a liar and he (the Grievant) had wasted his time. As stipulated by the parties after both viewed the videotape of the examination, the tape shows the Grievant was told how the examination would be conducted and was asked about medications he was on. Further stipulations were: the personal questions were a normal part of compiling background for the examination; the polygraphist was totally professional in his behavior and told the Grievant more than six times that he was free to leave without prejudice; the entire procedure took 3¾ hours with breaks.

Tpr. J. V. Slusher, Jr., A.C.P., who conducted the polygraph, concluded that the Grievant was deceptive in his answers to the pertinent questions, but the Grievant held to his claim that he did not assault the inmate. Some time after learning of this, the Warden sent the original Use of Force Committee report back to the committee, asking them to reconsider in light of new facts. Then, on April 21, the Grievant pled "no contest" to misdemeanor assault, was found guilty on the facts as presented by Tpr. Holden, and received a suspended sentence and fine. The charge of dereliction of duty was dropped in exchange for his plea on assault. The Grievant testified he accepted this plea bargain because he could not afford the additional $2,000 his attorney was going to charge him to defend a "not guilty" plea. He said he was told the "no contest" plea was not an admission to any of the facts.

When the Use of Force Committee learned this on April 22, it revised its conclusions and found that the Grievant had not cooperated in its investigation and had failed to file the required Use of Force Report. It then later amended its report

to incorporate the results of the polygraph (which the report states the committee received on May 8, 2003), finding the Grievant had used force "up to and including excessive force" (Joint Ex. 3, p. 40).

Meanwhile, a pre-disciplinary conference was held on April 28 on charges that the Grievant had failed to cooperate in an investigation and had physically abused the inmate. The hearing officer found just cause for discipline on both charges as well as aggravating circumstances of his disciplinary record. The Grievant was subsequently removed on May 8, 2003.

A grievance protesting this action was filed on May 14 and fully processed to arbitration where it presently resides on the sole issue of: *Was the Grievant discharged for just cause? If not, what is the remedy?*

In preparing for arbitration, the Union interviewed the inmate. During the course of his interview he signed a statement prepared by the Union withdrawing his allegations against the Grievant, but disavowing nothing in particular or asserting what happened instead of assault in M-Block. Then, in arbitration he testified that all his original claims are true. The reason he signed the statement, he said, was that he thinks the Grievant has learned his lesson. He just wants all this to be over because it is causing him problems such as being transferred to a prison away from his home.

III. ARGUMENTS OF THE PARTIES

Argument of the State

The State admits that the evidence in this case is mostly circumstantial, but

urges that its version of events is the more likely one and is supported by the physical evidence that does exist. To begin with, the inmate's testimony should be credited. He never said that the assault did not occur. He only wanted to withdraw his allegations because he wanted it over and done with. He gave the same story in arbitration that he did when interviewed by the institutional investigators and the Ohio Highway Patrol, and his story is the same as the Grievant's except for what happened while inside M-Block. He was never interviewed or prepared by the State's advocate, and he was upset at how he was handled by the Union. On the other hand, the Grievant's testimony is disputed by the testimony of several witnesses including Officers Fairfax and Pablo who dispute what the Grievant said about the inmate's behavior and conditions in the hall. With respect to the marks on the inmate's neck, Nurse Stephen's opinion about their source should be given no credit because she is no expert and never reported her opinion until arbitration. They may not be consistent with choking, but the State never claimed the Grievant choked the inmate, only that he picked him up by the neck and threw him over a desk and against a wall. The Union offered no theory or evidence about how these marks got on his neck.

The State answers the Union's question about why the inmate did not report the assault while he was in the captain's office by saying that the inmate would not have done so while the person who had just assaulted him was still there. Then, when he was put in the hall while the officers were off verifying his pass, he could not just get up and enter the office without being called in. Additionally, this was

the time of shift change and a lot was going on there. However, Tennenbaum testified that the inmate did report it immediately to her when he went to the mental health office, and she saw the marks.

Turning to the Grievant's testimony, the State points out that he lacked memory of important details and his general demeanor indicated deception. His explanations for going into K-Block and M-Block while en route to the captain's office lack veracity. Why would he wait to call the captain's office until he was on the way? Indeed, no one from the office said he called. The State opines that what he was really doing was calling M-Block to clear the clerk's office so no one would be there when he took the inmate in. What is more, the reasons he gave for taking the inmate into M-Block are not supported by the evidence of others and his proximity to the captain's office. In fact, why would he not just call the education office in the first place to ask if the pass was legitimate?

Turning next to the procedural issues raised by the Union, the State points out that regulations allow a warden to reopen a use-of-force committee when there is new information with impact on the case. The polygraph and conviction justified reopening the committee before a pre-disciplinary hearing. Second, the videotape of the polygraph shows the examination of the Grievant was not at all irregular. Third, the odds of both polygraphs being invalid is low and polygraph results can be used to determine the truth of allegations, if not of guilt. Fourth, the State entered into the Stipulated Polygraph Agreement in good faith. It was offered as a way for the Grievant to clear his name regardless of other evidence, including the inmate's

polygraph. The Grievant, however, broke his agreement to plead guilty if he failed the examination. Fifth, the Grievant pled "no contest," admitting to the facts as alleged by the Ohio Highway Patrol, that he assaulted the handcuffed inmate. The State, it says, needs nothing else to prevail in arbitration.

As to the penalty, the Grievant's prior record warrants removal if violation of any rule is proved. In the instant case, the Grievant committed a criminal offense in a state facility putting the State in fiscal jeopardy. What he committed was abuse, which the State defines as use of force where no force is justified. The State concludes that it proved its case by a preponderance of the evidence. Thus, the grievance should be denied in its entirety.

Argument of the Union

The Union takes the position that the State did not have just cause to remove the Grievant. The State's evidence does not support the charges. No one witnessed the alleged incident and the Grievant was never alone with the inmate for more than twenty seconds. Officer Pablo saw no marks and the inmate did not look roughed up to him. He also said the Grievant did not appear to be mad or upset with the inmate. The inmate never mentioned the alleged assault to anyone in the captain's office even when the Grievant was nowhere around. The lieutenant and captain testified they saw no marks and they agree that the Grievant is a good officer and has never been known to abuse his position. Nurse Stephens testified that the marks she saw did not match what the inmate said had happened to him. They looked as if he had been rubbed. No treatment was necessary. In addition, the inmate talked

only about getting even with the Grievant. The Union submits that the red marks were self-inflicted or put on the inmate by another in order to set up the Grievant as revenge for having removed the inmate as a porter. Even in arbitration the inmate argued with the Grievant and changed his story again. The State said it would settle the case if the inmate recanted, but when the Union got such a statement, the State refused to settle and then moved the inmate, further angering him. The Grievant on the other hand, has maintained his innocence from the beginning. He only failed the polygraph examination because he was upset by the questions asked and he pled "no contest" only on the advice of his attorney.

The Union submits that the Grievant did not get a fair investigation. The State was more concerned with the external process than the internal one. The first use-of-force committee report, which found no force at all, was sent back with instructions to look at the case again. In reconsidering the case, the committee did not recall the Grievant after it got new information. It did not know what questions he was asked and failed in the polygraph or that he was acting on the advice of his attorney. It just acted on secondhand information it got from the internal investigator. Then, in arbitration, it did not use the internal investigation at all.

The Union asks that the grievance be granted, the Grievant reinstated and that he be made whole.

IV. OPINION OF THE ARBITRATOR

The Grievant here is charged with misconduct of a criminal nature. In such cases the employer has the burden to prove clearly and convincingly that the

employee is guilty as charged. The arbitrator does not have to be completely convinced. There may be some reasonable doubt. But because of the stigma of this sort of conduct, the arbitrator must be pretty certain that the grievant is guilty, not merely more persuaded than not.

There being no eyewitnesses to the alleged assault, the case against the Grievant consists of his word against an inmate's, his plea and conviction in municipal court, the polygraph results, the physical evidence of the marks on the inmate's neck, and circumstantial evidence.

The State asserts that it needs nothing but the plea and conviction to prevail here, so that is the place to begin. The problem with this argument is that the critical "facts" were the two sets of polygraph results produced by a procedure which, even in the hands of highly skilled professionals, is unreliable. This arbitrator accepts that polygraphs are a tool widely accepted and used by law enforcement agencies and she does admit and give weight to their results when they corroborate direct evidence of innocence. Here, the inmate's is offered to support his claim that the Grievant assaulted him, but the only direct evidence of an assault is the redness on the inmate's neck which could have been self-inflicted or made by a confederate. The inmate had motive, means and opportunity. His withdrawal of his allegations and subsequent withdrawal of that withdrawal would cast suspicion on his veracity, but the document he signed at the request of the Union has no statement about what the inmate was then willing to say about what actually happened in M-Block. It is thus not useful in resolving the credibility issue. As for

the Grievant's polygraph, it shows either a liar or a person too scared, upset, nervous and/or angry to be cool on the critical questions. In short, the plea and conviction, being based on the "facts" of the polygraphs, were built on a house of cards. The Grievant's removal must accordingly stand or fall on the persuasiveness of the other evidence, not on his polygraph results and plea bargain.

Looking first at the marks, the Grievant had time in the twenty seconds Officer Pablo said the pair was out of sight to grab the inmate by the neck, throw him against the wall and then tell him to hold his tongue. The problem with this is that no one saw the marks or observed any behavior of the Grievant or inmate indicating an assault was about to occur or had occurred until the inmate reported to the school and then to the mental health department where faint red marks were seen and the inmate was heard loudly accusing the Grievant. However, it was shift change and much was happening. There was inmate movement in the hall. The officers in the captain's office were busy. Thus, if there were marks on the inmate at the time and they were not obvious ones, it is possible they would not have been noticed unless someone had a reason to look for them. No one did because the inmate kept quiet about the alleged assault until he got to school and the Grievant had gone. Without something more, the Arbitrator is unable to say with any assurance how or when the inmate came by the marks or by whose hand.

If this were all the evidence against the Grievant, the case would end here. But it is not all because there are quite different versions of what was going on in the hall just before the Grievant and inmate went into M-Block that bear on the

credibility of the only two people who were present when the alleged assault occurred. Officer Pablo, whose testimony that he did not notice anything different about the two men when they came out of M-Block and that the Grievant seemed like his usual self, also stated that he did not think the inmate was particularly unruly, just mouthing off a little bit, and that he did not know why they went into M-Block. Thus, while his testimony about how they came out of M-Block supports the Grievant's version, it also undermines the Grievant's testimony that the inmate became "very aggressive" when he saw inmates he knew and that this is why he had to be taken into the block to be counseled. Pablo has no reason to lie and he has been very consistent on this point.

Another problem with the Grievant's story is his explanation for why he went into K-Block. He says it was to call the captain's office to say he was bringing in an inmate, but he cannot remember who he talked to and no one mentioned in any written statement, interview or testimony that they received such a call. Additionally, his explanation for why he had to call from K instead of from his block or J (which he had to pass to get to K and the shift commander's office) is a stretch.

Far more troubling is the Grievant's testimony about what happened at the polygraph examination. As stipulated by the parties, the videotape does show him to be truthful about the preliminary questions he was asked. Without having seen the tape, the Arbitrator does not know whether he was told the purpose of these questions or whether he exhibited behavioral signs that they upset him, but she gives him the benefit of the doubt and accepts that he was upset because he did not

understand the purpose of these personal questions. However, there is no doubt that he was untruthful about other aspects of the procedure: its length (3¾ hours v. 4 hours, 6 minutes), whether he was asked about medications (he was), whether the examiner had a professional attitude (he did), and whether he was made to believe quitting was an admission of guilt (he was told otherwise six times). Since the Grievant did not appear at the second day of hearing and thus provided no explanation for why his characterization of the examination is so different from what the videotape shows, the Arbitrator can only conclude that he was not telling the truth. This prevarication fatally undermines his uncorroborated testimony on other points where the Arbitrator would otherwise have given him the benefit of the doubt. The Arbitrator thus finds that the Grievant had some other reason to enter K and M-Blocks than what he said. Further, that his description of what happened in M-Block between him and the inmate is unreliable. In the face of the inmate's testimony in arbitration (which was consistent with his early statements), the absence of any other reasonable explanation for the Grievant's movements, the corroborating marks on the inmate/s body, and other witnesses' testimony about the inmate's demeanor and conditions in the hallway, the Arbitrator is convinced the State's theory is sound. This has not been an easy decision to come to because of the centrality of the credibility determination and paucity of direct evidence. But in the final analysis, the Arbitrator could not overcome the Grievant's own testimony.

Finally, there is the matter of the investigation. First, a use-of-force committee is entitled to reconsider in the face of new information. Second, while the

Union points to problems in the basis of the Committee's conclusions, it fails to show how the Grievant was prejudiced in arbitration by those flaws. The Arbitrator did not rely on the Committee's conclusions or on the internal investigator's documents, but made her own decision based on the evidence the parties themselves chose to place before her, which evidence included most of the witnesses to the pertinent events and the statements they wrote at the time.

V. AWARD

The Grievant was discharged for just cause. The grievance is denied in its entirety.

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Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
March 4, 2004

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