

#1811

**STATE OF OHIO
VOLUNTARY RIGHTS ARBITRATION**

IN THE MATTER OF ARBITRATION BETWEEN:

**THE STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION AND
CORRECTION**

-AND-

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

**GRIEVANT: MARK NOVOSIELSKI
GRIEVANCE NO.: 27-09-(07-07-04)-1072-01-03**

**ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: MARCH 29, 2005**

APPEARANCES

For the Employer

David Burrus	Advocate
Joe Trejo	Labor Relations Specialist
Eddie Young	Investigator
Karen Maschmeier	Acting LRO
Joshua Dotson	Correction Officer
Kelly Rice	Correction Officer
Shelly Sopkovich	Healthcare Administrator

For the Union

Mark Novosielski	Grievant
Bobbie Peters	Union Steward
George Yerkes	Advocate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Rehabilitation and Correction, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-

CIO, hereinafter referred to as the Union for the period March 1, 2000 through February 28, 2003 (Joint Exhibit 1).

STIPLUATED ISSUE

Did the Grievant's actions of May 14, 2004, against inmate Blake Kavanaugh constitute a violation of Rule 43 of the standards of conduct - Abuse of an inmate/patient under the supervision of the Department? If not, was the Grievant removed for just cause and if not, what shall the remedy be?

JOINT STIPULATIONS

1. There are no procedural objections, and the issue is properly before the Arbitrator.
2. Grievant's hire date is September 21, 1998.
3. Grievant was working May 14, 2004 on first shift in the Yard Patrol 2 post.
4. Grievant was directed by the Captain's Office to report to the RTU B-8 on May 14, 2004.
5. Inmate Blake Kavanaugh, #A451-001
 - a. Specific RIB Record
 - b. February 7, 2004; Class II 8 and 14; Contraband and Disrespect; 8 days DC; Inmate Kavanaugh's Comments "Punk ass bitches... Suck his pink asshole... Wouldn't just hurt (CO's family), he'd kill them."
 - c. March 26, 2004; Class II 1 and 19, Refused direct order and Disrespect; 15 days DC; Inmate Kavanaugh's Comments; "(Nurse Gill) useless waste of sperm... slimy little bastard."
 - d. May 14, 2004; Class II 12 and 14, Threats and Disrespect, 15 days DC; Inmate.
 - e. Blake Kavanaugh, #A451-001 was released on July 14, 2004, then back in the system on August 20, 2004.
 - f. Inmate Blake Kavanaugh, #A451-001, was probated to the Oakwood Correctional Facility on September 3, 2004 where he is currently undergoing treatment.

- g. Inmate Blake Kavanaugh, #A451-001, is 6'6" in height, and weighs 260 lbs.
- h. Inmate Blake Kavanaugh, #A451-001, has a prosthetic leg which extends from below his knee approximately ____ inches.
- i. The Union has not had access to interview Inmate Blake Kavanaugh, #451-001.¹

PERTINENT CONTRACT PROVISIONS

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(1).

24.02 – Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. one or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. working suspension;
- D. one or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB.
- E. one or more day(s) suspension(s);
- F. termination

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator

(Joint Exhibit 1, Pgs. 64-65)

¹ This concern was remedied when the arbitration hearing was reconvened at the Allen Correctional Institution on January 28, 2005. The continuance took place to allow the Union an opportunity to interview Inmate Kavanaugh for the purpose of eliciting testimony. The Union, however, elected not to seek Inmate Kavanaugh's testimony.

arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages or fines, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine or;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

24.05 – Imposition of Discipline

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

(Joint Exhibit 1, Pg. 66)

CASE HISTORY

At the time of the disputed incident, Mark Novosielski, the Grievant, enjoyed approximately seven years of service as a Correction Officer at Grafton Correctional Institution. He was assigned to the Yard Control post.

On May 14, 2004, at approximately 8:20 a.m., the Grievant received a call from the Shift Supervisor's Office to respond to a problem at the Residential Treatment Unit (RTU). He was sent to this area to assist Officers Dotson and Rice.

The Grievant was advised that a razor was missing that had been assigned to Inmate Kavanaugh. Inmate Kavanaugh has a prosthetic leg from just below the knee. He, moreover, was receiving treatment for a Bipolar Disorder with prescribed medication for his condition.

As a Level Two inmate, Kavanaugh, was assigned a razor for twenty minutes once he presented an ID Badge. He was responsible for the razor and should have returned it to the Officer's desk. Kavanaugh notified officers that he could not find his razor.

Officers Dotson, Kelly and the Grievant were called to conduct a search. Inmate Kavanaugh was strip searched and the razor was not found. His cell was also searched, and still, the razor never surfaced. The officers confronted Inmate Kavanaugh again in his cell, and as he searched his pockets the razor fell to the floor.

Officer Dotson cuffed Inmate Kavanaugh and asked him to sit by the Officer's desk. Officer Dotson called the Captain's office and advised them about the circumstances. Inmate Kavanaugh became quite perturbed when told he was going to segregation.

While sitting in the chair, and still handcuffed, Inmate Kavanaugh kicked off his prosthetic leg. He began to walk, while handcuffed, on his stump and knee toward his cell, but was redirected by the Grievant and the other officers toward the strip cell. The Grievant admitted that he cursed at Inmate Kavanaugh as he directed him toward the strip cell.

The strip cell, itself, is quite small and Inmate Kavanaugh paused at the cage's entrance and did not totally cooperate with the officers. A critical incident under review took place at this location. A dispute exists regarding the nature of the force used by the Grievant to cause Inmate Kavanaugh's eventual arrival in the strip cage.

On May 20, 2004, Eddie Young, Investigator, received a kite from Inmate Kavanaugh who claimed he was assaulted. An investigation ensued, which led to the Grievant's removal.

On June 22, 2004, the Grievant was provided with a Notice of Disciplinary Action. It states in pertinent part:

With these actions you are in violation of the Standards of Employee Conduct, #25...Failure to immediately report a violation of any work rule, law, or regulation, 1st offense Wr or 2. #43...Abuse of any inmate/patient under the supervision of the Department, 1st offense, Removal. #44...Threatening, intimidating, coercing, or use of abusive language toward an individual under the supervision of the Department, 1st offense, 2 or Removal.

(Joint Exhibit 2)

The Grievant disputed the Disciplinary Action. On July 7, 2004, the Union filed a grievance on his behalf. The Statement of Facts contains the following allegations:

Statement of Facts (Who, What, Where, When?):

On July 7, 2004 the grievant was removed from DR & C employment. The grievant and union feel that this was excessive and punitive, and that he was made an example of. There was no intent of harm, nor was the grievant malicious in any way. The grievant feels that the term 'abuse' was over-exaggerated, and that due to recent events, that he was made an example of. An exercise of poor judgment or failure to follow post orders would have been

more appropriate. The grievant has an excellent work record and no discipline on file. The alleged rules violated were: 25, 43 & 44.

(Joint Exhibit 2)

The parties were unable to settle the disputed matter during subsequent stages of the grievance procedure. Neither party raised substantive nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

REGARDING INMATE ABUSE²

The Employer's Position

The Employer opines that the Grievant abused Inmate Kavanaugh and should, therefore, be removed. Inmate abuse was perpetrated at the strip cage when he kned the inmate in the back and kicked him the buttocks.

Evidence and testimony support the abuse allegation. Officers Dotson and Rice testified regarding the disputed incident, and basically reviewed evidence contained in their written statements and investigatory interviews. Officer Dotson verified Inmate Kavanaugh's version and so did Officer Rice, but to a lesser extent. The Grievant, himself, during the course of the arbitration hearing supplied testimony which surfaced certain admissions regarding potential abuse.

Health Care Administrator S. Sopkovich, provided medical confirmation concerning the abuse of Inmate Kavanaugh. She examined the inmate on May

² The threshold issue in this disputed matter consists of an inmate abuse allegation. As such, Article 24.01 requires an evidentiary determination on whether "an abuse of a patient or another in the care or custody of the State of Ohio has taken place." This finding will determine whether a just cause justification for removal is necessary.

18, 2004, and provided physical findings and assessments which were documented in her Medical Report Exam. Sopkovich reported bruising of approximately 35mm in diameter on the inmate's left hip/buttock that was purple in color and fading. She could not, however, state with any forensic certainty when the injury creating the bruise took place.

Any attempt by the Union to argue that the bruise was self-inflicted or pre-existing should be discounted. All three officers admitted at the hearing that a Use of Force report should have been filed shortly after the incident. Since the matter was not properly reported in a timely fashion, the Employer was denied the opportunity to conduct a timely medical examination. The Employer, therefore, had to rely on eyewitness testimony and the physical injury as it existed on May 15, 2004

The Union's Position

It is the Union's position that the Grievant never engaged in any abusive activity. The Employer does not have the evidence to sustain the removal.

The Grievant has consistently denied that he kicked the inmate. Rather, he has admitted to using his leg as leverage to guide the inmate into the strip cage. Officer Rice corroborated the Grievant's recollection throughout the various investigation stages and at the arbitration hearing.

Officer Dotson provided the sole non-conforming version of the events. His testimony, however, should be minimized for a number of reasons. Officer Dotson was intimidated prior to writing his incident report. He was initially contacted at his home by Investigator Young, who inquired about the incident

and whether a “kick” had taken place. Shortly thereafter, Officer Dotson received a phone call from the State Trooper assigned to the case and was asked similar questions. These calls easily manipulated Officer Dotson, which led to the inaccurate incident report. Officer Dotson probably confused the Grievant’s placing of his leg against the inmate for leverage as a “kick.”

By failing to examine Inmate Kavanaugh, the Arbitrator should infer that the tenor of his testimony would have been unfavorable to the Employer’s case. The only evidence introduced by the Employer relating specifically to the inmate’s version rests with his original kite. This document, however, is replete with inconsistencies and falsehoods, which cast doubt on the statement’s credibility.

Sopkovich’s testimony fails to support the Employer’s contention. She reported no bruise to the back or “ass cheek.” The bruise to the left hip area was minor in size. Officer’s Dotson and Rice, moreover, demonstrated that the Grievant could not have been kicked in the “ass cheek.” The inmate’s hands were cuffed behind his back making a “kick” a virtual impossibility.

THE ARBITRATOR’S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, a complete review of the record, pertinent contract provisions, briefs and related documents, it is this Arbitrator’s opinion that the Grievant abused Inmate Kavanaugh, and thus, the removal decision was properly imposed. The Grievant, more specifically, abused “a patient or another in the care or custody of the State of Ohio.” As such, this Arbitrator, in accordance with Article 24.01 “does not have

the authority to modify the termination of an employee committing such abuse.” Under this mutually agreed to prohibition, an arbitrator is precluded from considering any mitigating circumstances such as years of service, prior performance, and the mental state and demeanor of an alleged victim. Once an abuse finding is declared, all other related charges, whether well-founded or justified, are rendered moot for consideration purposes.

The Grievant’s actions at the strip cage’s entrance were clearly abusive. Any reasonable person reviewing the record would arrive at the same conclusion.

Granted, Inmate Kavanaugh was not a model inmate. He was highly combative the day of the incident, and did not cooperate at all. Still, all Correction Officers should act professionally and not mistreat or de-humanize these forensic inmates even under the most dire of circumstances.

Whether other abusive conduct transpired during the incident, or whether other officers should have been disciplined more severely for their conduct are matters presently outside the scope of this Arbitrator’s authority. And yet, it becomes quite difficult to discount the vision of a mentally handicapped inmate, handcuffed behind his back, trudging on his stump and knee while being escorted by three Correction Officers. This situation is especially troubling when all acknowledged the inmate asked for a wheelchair and none were available. No one searched for another wheelchair nor were alternate procedures considered.

For the most part testimony provided at the hearing comport with versions acquired during the course of investigatory interviews and written statements provided by the witnesses. There is no denial the Grievant engaged in excessive force while trying to get Inmate Kavanaugh into the strip cage. He used his leg to prod and either subsequently kicked the inmate to force him through the strip cage entrance or used his leg as leverage.

All individuals directly involved in the incident, including the Grievant, acknowledged a Use of Force Report should have been filed. After the fact admissions by seasoned and experienced officers, who know and understand these necessary protections, support the view that an uneventful breach of protocol had indeed transpired, and that the Grievant served as perpetrator.

This Arbitrator is convinced the Grievant physically abused the inmate at the strip cage entrance. Officer Dotson remarked the Grievant used his knee to push the inmate in the back toward the entrance, and at the threshold kicked the inmate in the buttocks (Joint Exhibit 3, Pg. 89). Officer Rice admitted the Grievant "nudged" the inmate with his leg to redirect him, and used his foot, knee or leg on the inmate's legs or buttocks to get him through the entrance (Joint Exhibit 3, Pg. 57-58). The Grievant, himself, acknowledged some contact, and thus, helped document the physical abuse. He remarked he used his leg for leverage while pushing the inmate up into the strip cage (Joint Exhibit 3, Pg. 19-20).

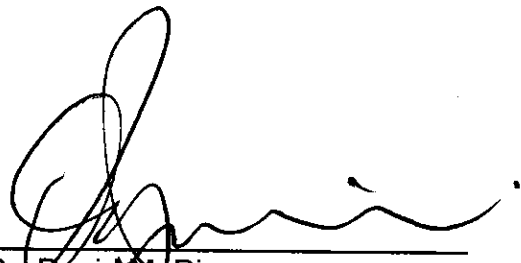
What took place was more than a nudge. Using one's leg to prod, direct, leverage or kick a mentally disturbed and handicapped inmate is abusive. In my

opinion, whether the Grievant used his leg to leverage or kick the inmate is an unpersuasive distinction. Either action supports the claim of abuse. Here, the Grievant's own admission serves as the linchpin for his removal.

AWARD

The grievance is denied.

March 29, 2005
Moreland Hills, Ohio



Dr. David M. Pincus
Arbitrator