#1842

IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/DRC

Before: Robert G. Stein

Grievant(s): Wade Davis
Case # 27-14-(10-1-04)-2342-01-03
Termination

Advocate(s) for the UNION:

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Advocate(s) for the EMPLOYER:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (herein "Agreement") between the State of Ohio, Department of Corrections (herein "Employer" or "Department") and the Ohio Civil Service Employees Association (herein "Union"). The Agreement is effective from March 1, 2003 through February 28, 2006 (See Joint Exhibit 1) and includes the conduct that is the subject of this grievance.

A hearing on this matter was held on June 7, 2005 and July 11, 2005. The parties mutually agreed to the hearing dates and location and were given a full opportunity to present both oral testimony and documentation supporting their respective positions. The parties each

subsequently submitted post-hearing briefs (closing arguments) in lieu of making oral closing arguments.

The parties have also agreed to the arbitration of this matter pursuant to Article 25 of the Agreement.

ISSUE

Did the Grievant's actions of June 24, 2004 against inmate Thomas Allen 434-136 constitute abuse? If not, did management have just cause to remove him? If not, what should the remedy be?

RELEVANT CONTRACT LANGUAGE
(As cited by the parties)

BACKGROUND

The grievance in this matter concerns the termination of the Grievant, Wade Davis, a twelve year Corrections Officer, formerly employed by the Ohio Department of Corrections at its Lorain Correctional facility location ("LORCI"). The Grievant was terminated on September 28, 2004, from his Corrections Officer position for violation of Rule 42: Physical abuse of any individual under the supervision of the Department. Officer Davis is accused of unjustly using excessive force on Inmate Thomas Allen on June 24, 2004. According to his Notice of Disciplinary Action contained in Joint Exhibit 1, Officer Davis *"used unnecessary force on inmate Allen #434-136, by wrestling him into the*

podium, throwing him to the ground, shoving his head into the concrete and striking him in the face." The Ohio Civil Service Association (herein "Union") asserts that the Employer failed to meet the standard of just cause required to sustain discharge against an employee.

SUMMARY OF EMPLOYER'S POSITION

The Employer asserts inmate Allen addressed the Grievant in a disrespectful manner on June 24, 2004 while the Grievant was on duty in pod 10B of LORCI. The Employer states that, after speaking with the Grievant, inmate Allen walked away from him while mumbling the words "asshole" and "fuck you." Upon hearing these comments the Grievant then properly called inmate Allen over to him to address his disrespectful remarks. When inmate Allen reported back to the Grievant, the Grievant grabbed him by the shirt, struck him in the face multiple times, then drove inmate Allen into the podium and onto the floor. Then while on top of inmate Allen, the Grievant again struck him in the face, which had the effect of bouncing his head off the floor.

The Employer's arguments are contained in its brief, and they are as follows:

> From Management's point of view this is a clear case of inmate abuse. The Employer's determination that the grievant's actions constituted abuse was established by evidence and testimony. The tangible evidence in this case includes the official medical examination report documenting injuries to inmate Allen (J1, p31); and the digitally recorded telephone call (M2) placing witness Boynton within feet of the abuse. Of particular importance to this case is the testimony of inmates/offenders who witnessed this abuse. Testimony of these individuals during the arbitration hearing was remarkably consistent in describing the events leading up to, and during the grievant's abuse of Allen. Consider the following:
>
> 1 Charles Johnson 200-671 testified that the grievant had told Allen to get away from the desk and then called him over to the pod door. The witness then testified that the grievant struck Allen in the head, grasped Allen's

neck, threw him to the ground and struck Allen again – bouncing his head off the floor. The witness testified that Allen said he was sorry while Davis had him on the ground.

2 Wayne Jackson 259-113 testified that the grievant told Allen not to go into the case manager's office; Allen then mumbled something under his breath. The witness testified that the grievant ordered Allen to the pod door where he grabbed him by the shirt, hit him a few times in the head, grabbed him by the neck, then threw him to the floor and hit him again. The witness testified that Allen said he was sorry while Davis was bouncing his head off the floor. The witness testified that Allen made no aggressive moves towards the grievant.

3 Robert Johnson 200-692 testified that Allen came to the grievant at the pod door, the grievant then hit Allen in the face, threw him to the ground, put his knee in Allen's back and punched him again. The witness testified that Allen said he was sorry while the grievant was striking him. The witness related that Allen did not bump into the grievant.

4 Thomas Allen 434-136 testified that he was looking for his dog when the grievant told him not to go into the case manager's office. The witness testified that the grievant then directed him to the pod door where the grievant said "don't you fucking touch me." The witness testified that the grievant then grabbed him, threw him to the ground and punched him. He related that while on the ground he told the grievant he was sorry and had done so only because he wanted the grievant to stop beating him. The witness testified under the Union's cross-examination that he did not bump into the grievant.

5 Elgin Garrett 357-998 testified that he was on the top range in 10B, directly overhead of the grievant and Allen, and heard a "thud." He testified that he looked down and observed the grievant attempting to handcuff Allen and while doing so, the grievant had his hand on Allen's neck and was bouncing Allen's head off the floor. The witness testified that the grievant was telling Allen to "shut the fuck up" and that Allen said, "I'm sorry, I'm sorry, I'm sorry."

6 Andre Boynton (parolee) testified that he was on the phone with his fiancée when he observed the grievant and Allen having words. The witness testified that the grievant grabbed Allen by the neck, pushed Allen into the podium, forced him to the floor and struck Allen in the head three to five times. Boynton testified that he did not see Allen bump into the grievant.

Each of these six witnesses identified their respective inmate statements and use of force statements and attested to the accuracy of these statements. Each witness testified that the verbal statements to the use of force committee were truthful and accurate. (As stipulated, see Joint 1 pp54-75 and Joint 2 pp 1-12, 20-62). Of particular importance is the fact that the witnesses substantiated previous testimony that Allen did not bump into the grievant (Charles Johnson, J2 p40; Wayne Jackson, J2 p30; Robert Johnson J2 p48; Thomas Allen J2 p4; and Andre Boynton, J1 p71).

This case, to a large extent, is dependant upon the credibility of these witnesses. The testimonies of the witnesses were not only consistent in describing what occurred on June 24, 2004, but each witness's testimony was consistent with their previously offered statements and testimony. The consistency between testimony during this hearing and previously offered statements/testimony can lead to only one conclusion: the witnesses are credible.

Arbitrator Stein, as you consider the credibility of these witnesses, I ask that you consider a previous decision that you gave in the *Veronica Massey* case (27-14-001218-1209-01-03). In Massey, you listed eleven (11) factors for determining credibility:

1. The strength of the witness recollection
2. The position of the witness to observe what he testifies to
3. The experience of the witness
4. The consistency of testimony over time/with other statements
5. Any inconsistency, or self-contradiction
6. Evidence of bias or prejudice
7. Evidence of motivation(s) to misrepresent the known facts
8. The reasonableness and probability of the testimony with regard to all known evidence and testimony
9. Corroborating testimony
10. The demeanor of the witness
11. The character of the witness

By applying these factors to the testimony of each inmate/offender witness, their credibility becomes apparent. Nothing was established to indicate the witnesses were motivated to lie. Consider the testimony of inmate Boynton: the witness testified to observing the grievant "assault" Allen and that the "situation" was not handled properly. However, he testified that even though it was a mistake on the grievant's part; he felt the grievant deserved another chance. What motivation would he have to lie about what he observed and then make such a statement? This is very telling and establishes his credibility as a witness. He testified that he did not want to get involved but did testify to the use of force committee about what he observed. He then testified at this hearing that his previous statements were accurate and truthful and again described what he observed. His recollection of the events has not changed. Even though he obviously likes the grievant, he still maintains the grievant, in his own words, assaulted Allen. Consider the recorded telephone conversation between he and his fiancée. (M2). It is an unreasonable assertion that he would he make up a story to tell his fiancée while on the phone. Remember, Boynton did not offer the call up to Management, Investigator Gillis testified that she went searching for a phone call and she found it. If this call had been disingenuous, or part of some conspiracy against the grievant, Boynton would have been the first to say, "listen to my phone call, I saw it happen." Boynton understands how damning his testimony is to the grievant and that is why he pleaded for the grievant's job. It stretches the bounds of reasonableness that anyone would fabricate such a story, attest to it in front of a use of force committee, and then return to prison a year later to testify again that the fabricated story was true. Then, to top it off, tell the arbitrator that the grievant deserves another chance. His credibility, in terms of what he witnessed the grievant do, has been established and has not been impeached.

The union implied that the respective character of each inmate somehow makes them collectively less credible. This is a tactic of advocacy style as opposed to substance and it is misguided. The Union's case was absent substantive reason as to why any of the witnesses would lie about the grievant. The burden is squarely on the shoulders of the Union to demonstrate a) every witness individually had an axe to grind with the grievant and independently came up with the same story or b) that collectively, they all conspired to lie about the grievant. The Union attempted to meet this burden by presenting testimony relating that Allen had previously assaulted a police officer and that Rob Johnson had a previous disagreement with the grievant. This does not prove anything because there is no logical nexus between these things and the instant offense. Even if you were to dismiss Allen's testimony as self-serving, given the Union's assertion that he provoked the abuse, there is sufficient testimony from other witnesses to establish the State's asserted fact pattern. Nothing in the record substantiates a conspiracy on the part of these witnesses. It is one thing to assert a conspiracy and quite another to prove it.

What motivations would the other inmates have to lie? The Union was unable to establish that collusion existed on the part of the State's inmate witnesses. Consider the lengths inmate Jackson went to in drawing a diagram of the incident area on the date the abuse occurred (Jackson testimony & Joint 1 pp 58-59). Nothing in the record contradicts the testimony that he wrote his initial statement and drew the diagram because he felt that what he observed was wrong and telling what he saw was the right thing to do.

In the *Massey* decision you opined, *"The testimony of inmates is often tainted by problems of character and reputation. However, it would be a mistake to dismiss such testimony when it is strongly supported by other testimony and other facts of the case."* Certainly, I cannot reasonably assert that the inmate/offender witnesses are choirboys. However, nothing exists in the record to establish that the reputations and characters of these witnesses tainted their statements and testimony. Individual testimony was substantiated by the testimony of others and supported by evidence. In this case, the most persuasive evidence is in the form of the phone call (Management #2), which serves to not only establish a timeframe for the events but definitively places Boynton in the area of the abuse.

Given the credibility of the witnesses, the only reasonable conclusion is that grievant Davis did, with out provocation, throw inmate Allen to the ground, strike Allen multiple times in the head, and either directly with his hands, or as a result of strikes to the head, bounce Allen's head off the floor.

The Union may point to the testimony of Garrett as supportive of its position because Garrett testified that he did not observe the grievant strike Allen. I disagree with such an assessment. The testimony of Garrett was entirely consistent with the State's position. Garrett testified that by the time he observed the grievant and Allen, Allen was lying on the floor and the grievant was on top of him. Garrett could not have observed the initial strikes to Allen because he did not observe the event until Allen was on the floor. Garrett testified that he observed the grievant with his hand on Allen's neck and that he was bouncing his head of the floor and was trying to handcuff him. This testimony was entirely consistent with the testimony he provided to the use of force committee, which he acknowledged as being accurate and truthful. As established by the testimony from the other witnesses, Allen's head was bouncing off the floor. A not unexpected variation in perception explains the difference in witness testimony recollecting that either the grievant struck Allen or that the grievant had his hand on Allen's neck. Either way, Allen's head was bouncing off the floor. It is entirely plausible that the grievant was handcuffing the inmate while simultaneously bouncing Allen's head off the floor. But the need to handcuff does not give an employee a green light to bounce an inmate's head off the floor.

The Union brought CO Fuhrman to the stand to testify that he did not see anything. The witnessed testified to that superbly. During our tour of 10B, guided by this witness under oath, he stated there were fans on, as it was summer, implying it was difficult to hear. I find it quite reasonable that the witness would not hear the punching sound of flesh on flesh if the fans were operating in the area as he described. He also established where he was seated - only feet away. The witness testified that although Allen was being an "asshole" he did not observe his actions when the grievant called him to the door. I find it difficult to believe, given the confrontational behavior of the inmate at the time, that an experienced officer would not pay attention to him. But his testimony is what it is and as a result, lends nothing to the defense of the grievant. He did not hear anything, did not see the grievant strike Allen, and only observed the grievant and Allen on the floor.

The Union raised in defense of the grievant the fact that the Lorain County prosecutor did not pursue the criminal case. Testimony was introduced through State Trooper Calhoun establishing the court's security concerns related to bringing convicted felons into court and how those concerns affected the disposition of criminal charges. Regardless of testimony, I will not burden an

arbitrator, who is well aware of the differences in the threshold of proof needed in criminal prosecution versus labor arbitration, with an argument as to why the dismissal is irrelevant to this case.

Testimony was entered into the record establishing that the grievant commented about "pummeling," "piecing up" and "fucking up" inmate Allen on June 24, 2004. Officer Benner testified that her incident report was truthful and accurate. (Joint 4). The witness testified that she heard the grievant tell a coworker that he had "pieced up" Allen five times. The witness testified that the term "piece up" refers to hitting someone. Her testimony was un-rebutted by the Union. Case manager Vanhorn testified that while in her 10B unit office on June 24, 2004 she heard the grievant talk about how he had "fucked up" and "pummeled and pounded" Allen. The witness related that she had worked with the grievant in 10B since January 2004 and certainly recognized his voice. The Union attempted to impugn the witness's credibility by alleging the witness was aware that she had previously been under investigation. However, this tactic failed as none of the witnesses the Union examined could establish that Vanhorn was aware of being under investigation. If she were unaware of being under investigation, what motivation would she have to be less than honest about what she heard? The Union cannot provide an answer to that question

The grievant's boasting only serves to substantiate his misconduct. Why would a reasonable person brag about defending himself against attack in such a manner? The answer is a reasonable person would not. A reasonable person may express pride in being able to ward off an attack, but it defies common sense that one would describe defending themselves with such aggressive verbiage. The only logical conclusion is that the grievant was describing his attack of Allen, not his defense from him.

GRIEVANT TESTIMONY

The grievant testified that he had talked to inmate Garrett on June 24, 2004 following the event in question. He testified further that he was truthful in his testimony in front of the use of force committee. When the State asked the grievant to look at his testimony from the use of force hearing transcripts (Joint 2, p 134), regarding whether or not he had spoken to Garrett, and to explain the apparent discrepancy in testimony, his response was quite telling: **"I don't know why I lied, I did not lie for any particular reason."** In that response, the grievant gave perhaps his most honest testimony. The question is who are we to believe? The testimony of six inmates whose credibility has been established, or the grievant that just admitted to lying? The grievant's testimony that inmate Allen provoked him by bumping into him cannot be viewed as credible. I urge you to consider the entirety of the grievant's testimony in the light of his admission to lying.

An inescapable problem for the grievant in this case is that of the letter from the grievant's psychologist submitted at the pre-disciplinary conference. (Joint 1, p101). What are we to make of it? The grievant identified the document and related that the psychologist's diagnosis of him possessing an explosive temper, impulsivity, and a sleep disorder leading to poor judgment and explosive episodes was correct. The Union has avoided acknowledgement of why it was entered into the record at the pre-disciplinary conference. The obvious inference is that it was entered into the record, as mitigation to the grievant's misconduct, to refute and rebut the charge against him as the Contract allows (Joint stipulation, p 73). The problem for the Union is in deciding which defense to argue: a defense that the grievant's use of force was justified; or a defense that he over-reacted to Allen because of his psychological conditions and medications. The Union cannot have it both ways. I would urge you to consider the fact that they entered the psychologist's letter into the record at the pre-d and at least at that time had intended to use it to some end. The logical conclusion is that it would be used in defense of the grievant's actions, that his response to Allen's comments and poor attitude was aggravated by his temper, impulsivity and proclivity to violent outbursts. Such a defense requires an admission that his response was inappropriate. However, during this arbitration the Union presented a defense predicated on a justifiable use of force. Again, the Union cannot have it both ways. This inconsistency is very telling and indicative of a strategy for defending actions that cannot be defended.

CONCLUSION

Deputy Warden, Neil Turner, testified that he had chaired the use of force committee on the grievant. The witness identified Joint #1 as the committee's report of their investigation. The witness related the committee's findings: that the grievant was not justified in using force in the first place. He further related that the finding was based, primarily, on the evidence that demonstrated inmate Allen had not bumped into, or in any way provoked a force response from the grievant. The witness further related that the committee considered the consistency of testimony between multiple inmates, all of whom related remarkably similar observations of what occurred. He further related that the telephone call made by inmate Boynton was important because it lent credibility to the inmate's testimony and established a timeline of events.

Warden Benny Kelly testified that he reviewed the findings of the use of force committee and the pre-disciplinary conference hearing officer. The witness testified that his recommendation for the removal of the grievant was based on the pre-disciplinary hearing officer's determination of just cause for discipline for violating rule 42 - abuse of an inmate. The Warden testified that the only appropriate level of discipline for abuse is removal from employment. He related that he was aware that the use of force committee determined the grievant was not justified in using force on inmate Allen and that based on the committee's findings, even if the grievant had been bumped by Allen, his response of striking him in the head would have been excessive.

The Grievant had choices when faced with a potentially disruptive inmate. He could have chosen to seek assistance from either the sergeant or his fellow officer who were both just feet away prior to initiating an intervention for the purpose of correcting the behavior of an obviously upset inmate. He could have chosen, based on twelve-plus years of experience handling inmates, not to escalate an obviously tense and explosive situation. Unfortunately for us all, and most of all Thomas Allen, what the Grievant chose to do was to assault inmate Allen.

There simply can be no justification for what the grievant did to inmate Allen. The evidence is clear and convincing that the grievant did what he is accused of and his actions constitute abuse. Even if you determine the grievant's actions were not abusive, the grievant was not justified in responding as he did. As the testimony of Warden Kelly and Deputy Warden Turner established, even

if inmate Allen had bumped into the grievant, his action of striking the inmate in the head, throwing him into the podium and then to the ground, and banging his head off the floor would have been an excessive use of force. The state respectfully requests that you find the grievant Davis's actions against inmate Allen as abusive and deny the grievance in accordance with Article 24.01 of the Contract. In the event you do not find that the grievant's actions constitute abuse, the State respectfully requests that you uphold the finding of just cause and deny the grievance in its entirety.

Based upon the above, the Employer urges the Arbitrator to deny the grievance.

SUMMARY OF UNION'S POSITION

The Union asserts the Employer failed to meet the just cause standard contained in Article 24 of the Agreement when it terminated the Grievant. It argues that most of the Employer's witnesses were not credible and that many of their statements appeared to be collectively contrived and did not represent an independent recollection. The Union further argued that in many cases the Employer's witnesses had something to gain by being untruthful.

The Union's arguments are contained in its brief and they are as follows:

The Union would assert that the State did not prove that abuse occurred. We would further state that it was proved that management witnesses were offered personal gains for testimony in the instant case. It was testified to that paroles and reclassifications did happen in the performance of several inmates' testimony and statements. Management's action in this case are reprehensible. The evidence and testimony shows management sent two correctional officers on a course of action to correct a problem that was going on in unit 10 B. You heard testimony in this case from both management witness' and Union witnesses that are in direct conflict as to what took place. Most of the management witnesses had something to gain, but none of the Union witnesses had anything to gain. Let us start with management witnesses.

Andre Boynton #320-176
Inmate Boynton testified that he saw the altercation but he was on the phone. Boynton stated he saw C.O. Davis strike Inmate Allen but not until Allen was on the floor. Boynton then testified that Sergeant Rios picked Allen up from the floor. You heard testimony from many witnesses that C.O. Furman picked the inmate (Allen) up from the floor.

Mr. Arbitrator you also heard Inmate Boynton that he was promised a parole if he testified and you also heard the exchange between Boynton and Mr. Lambert about the cost of gas for Boynton to get back home. Clearly Boynton was on parole and his parole was being predicated on his testimony in this case.

Brandi Gillis, Institutional Investigator
Ms. Gillis was called twice to testify. On the first occasion she was asked to play a recording of Boynton's phone call. Arbitrator Stein, you listened to the recording and nothing that was audible suggest that anything was out of the ordinary was going on. Everyone in the hearing listened numerous time to this recording, with nothing being heard.

The second time Ms. Gillis testified she corroborated the Union assertions that C.O. Davis and C. O. Furman were in that unit to help in the ongoing investigation of Luann Van Horn in which both Johnson brothers were implicated.

Now let's look at the Johnson brothers and their testimony and statements. They are almost word of word in both instances. Keep in mind Mr. Arbitrator that Rob Johnson got a reclass to a lower status to a minimum medium institution by Ms. Van Horn.

Mr. Arbitrator keeping in mind that Inmate Wayne Jackson and all of the above were on the other side of the officer's podium, most who were sitting on a bench and could not have possibly saw what happened. This brings us to Inmate Garrett.

Inmate Garrett 357-998
Inmate Garrett testified that he saw no punches thrown and no slamming of Inmate Allen's head into the floor. Inmate Garrett stated and exhibited the actions that took place. Inmate Garrett was the only person who was in full view of what took place, and his account matches that of C. O. Davis. One thing to keep in mind that Inmate Garrett got nothing from his testimony.

R.N. Drwal
R.N. Drwal testified that as a trauma nurse for 32 years that the injuries to Inmate Allen were consistent to that of C. O. Davis account of what happened and with her report (Joint Exhibit I page 31). Mr. Arbitrator you must remember the state did not refute this as she was a State witness.

Inmate Allen #434-136
Mr. Arbitrator you heard this witness testify that C.O. Davis hit him with (Haymakers) referring to punches being thrown prior to how being placed on the floor. This is in direct contradiction of nurse Drwal's testimony. Arbitrator Stein you saw this inmate's demeanor and his aggressive behavior while being questions as well as his elusiveness to answering to his convictions of assault on a peace officer.

Mr. Arbitrator you heard the testimony of C.O. Furman and C.O. Davis as well as the testimony of Inmate Garrett and RN Drwal and they are consistent to what took place. Inmate Allen did in fact cause a confrontation which led to his being taken to the floor and placed in cuffs. Every other person in this case had something to gain by telling a different version, keeping in mind by looking at the dates of the statements and the use of force hearings. Those opposing C.O. Davis had at a minimum of 4 days to collaborate their stories.

Arbitrator Stein for the above reasons the Union seeks to have Wade Davis returned to his position as C.O. at Lorain Correctional Institution and to be made whole to include lost wages, lost overtime opportunities, any medical expense's, any and all leave balances, and all Union Dues to be paid.

Based upon the above, the Union urges the Arbitrator to grant the grievance.

DISCUSSION

Generally in an employee termination case, an arbitrator must determine whether an employer has proved clearly and convincingly that a discharged employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 102 LA 555 (Bergist 1994). If an employer does not meet this burden, then an arbitrator must decide

whether the amount of discipline is reasonable. In making this determination, the arbitrator may consider among other circumstances, the nature of the Grievant's offense, the Grievant's previous work record, and whether the employer has acted consistently with respect to similar previous offenses. *Presource Distrib. Servs., Inc. and Teamsters Local 284*, FMCS No. 96-01624 (1997). Generally, an arbitrator will not substitute his own judgment for that of an employer unless the challenged penalty imposed is deemed to be excessive, given any mitigating circumstances. *Verizon Wireless and CWQ, Local 2236*, 117 LA 589 (Dichler 2002).

> Discharge from one's employment is management's most extreme penalty against an employer. Given its seriousness and finality, the burden of proof generally is held to be on the employer to prove guilt of a wrongdoing in a disciplinary discharge or to justify or show "good cause" for terminating an employee. This is especially true in cases, like this one, where the parties have agreed that the collective bargaining agreement requires "just cause" for disciplinary action, including discharge.

Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for "just cause" but does not define what does constitute "just cause," it is proper for an arbitrator to look at employer polices, rules, and regulations to determine whether or not a discharge was actually warranted. *Eastern Associated Coal Corp. and United Mine Workers of*

America, Dist. 17, 139 Lab. Arb. Awards (CCH) P 10,604 (1998). The existence of "just cause" is generally recognized as encompassing two basic elements. First, the Board bears the burden of proof to show that the Grievant committed an offense or engaged in misconduct that warranted some form of disciplinary action. The second prong of "just cause" is to determine whether the severity of the responsive action taken by the employer was commensurate with the degree of seriousness of the established offense. *City of Oklahoma City, Oklahoma and Am. Fed'n of State, County and Mun. Employees, Local 2406,* 02-1 Lab. Arb. Awards (CCH) P 3104 (Eisenmenger 2001). The proof must satisfy both the question of any actual wrongdoing charged against an employee and the appropriateness of the punishment assessed. "Just cause" requires that employer policies and rules be fair and reasonable and that they be equally, even-handedly, and consistently applied to all employees. *Int'l Assoc. of Machinists and Aerospace Workers Union.*

The arbitrator supports the school of arbitral thought that the prime purpose of workplace discipline is not to inflict punishment for wrongdoing, but to correct individual faults and behavior and to prevent further infractions. *Keystone Steel & Wire Co. and Indep. Steel Workers Alliance,* 114 Lab. Arb. 1466 (2000); *Ashland Petroleum Co.,* (90 Lab. Arb. 681 (1988). The arbitrator also acknowledges that the general public has a high degree of respect and confidence in the law enforcement

community, and expects those employed in it to provide protection and safety in a professional and reliable manner. In a correctional facility the contact with the general public is limited; nevertheless, correctional officers are an integral component of the law enforcement community. As such, employees in the capacity of a correction officer have considerable responsibility and an obligation to preserve the image, reputation, and respect of their profession and of the Department. Most importantly they are charged with the custody of inmates. Any conduct that unnecessarily undermines the safety and security of the employees and inmates of an institution places everyone at risk.

In the instant matter, many of the basic facts are not in dispute. It appears reasonably clear that on the morning of June 24, 2004, inmate Allen was agitated and verbally argumentative. Supposedly his discontent centered around his storing his arts and craft supplies and about the whereabouts of the dog. After questioning Sergeant Alvis Rios, who was at the officer's desk along with officer Fuhrman and the Grievant, inmate Allen was told to move away from the desk. Apparently still agitated, inmate Allen returned one more time to the Officer's desk area and made an inquiry about his dog. He was told by the Grievant that his dog was all right and, in a more resolute manner, was again told to move away from the Officer's desk. Upon leaving the second time, inmate Allen apparently mumbled the words "asshole" and "fuck you".

In response to Inmate Allen's inappropriate and disrespectful remarks, he was then told by the Grievant to come around the Officer's desk and the podium to the entranceway in front of the pod door. It was in this location where the Grievant and inmate Allen had a confrontation. The justifications for the Grievant's actions while confronting inmate Allen are at the heart of this dispute. However, there is no disagreement that the confrontation resulted in the Grievant and inmate Allen engaging in a scuffle where they both ended up on the floor. After realizing what had happened, Officer Fuhrman came around the podium and took control of the situation by restraining inmate Allen with handcuffs.

Did inmate Allen physically touch or bump the Grievant? Did the Grievant use his position to punish inmate Allen for his insolence? While I find the testimony and/or statements of Charles and Rob Johnson to be somewhat contrived and suspiciously similar, the same cannot be said for the testimony and statement of inmates Boynton and Jackson. Inmate Boynton was the closest to the incident, just feet away, and his testimony during the hearing was credible. Moreover, his testimony is consistent with his real-time recorded observations of the incident conveyed to his fiancé via a recorded telephone call. His testimony also corroborates the testimony of inmate Jackson. Inmate Jackson's testimony and statements contained remarkable detail that was supported and not discredited by the evidence or the testimony of other witnesses. I found the testimony of

inmate Allen to be somewhat less forthright, but much of what he stated in writing and in the hearing was corroborated by the more credible testimony of inmates Jackson and Boynton. Cases that involve an alleged excessive use of force often depend upon detailed evidence that is consistent with the overall account of what occurred. After careful consideration of all the evidence and testimony in this matter, I find there is insufficient evidence to overturn the findings of the Use of Force Committee that in this case the Grievant applied excessive force to a situation that did not demand it.

Correctional officers and other law enforcement officers have a very difficult job, and they are expected to respond to a variety of difficult and often dangerous situations. When reviewing a reaction to a situation, arbitrators traditionally consider a number of factors, e.g., What did the Grievant know at the time he reacted? *City of Reno, 94 LA 1, 19 LAIG 12-4200 (Knowlton 1989).* The evidence does not support the Grievant's somewhat inconsistent testimony/statements of being rushed and or bumped by inmate Allen. An experienced Officer should reasonably be expected to only initiate force when no other reasonable alternative is available. Unfortunately, in this case, the Grievant, in spite of having two other able Correctional Officers by his side, did not seek an alternative and less violent approach to addressing inmate Allen's belligerence.

Arbitrators faced with these type of matters often inquire as to whether the law enforcement officer been properly trained and informed of procedures. *Michigan Dept. of Corrections, 93 LA 339 (Knott 1989).* The Grievant is a twelve-year veteran, and there was no evidence or testimony to suggest he was not properly trained to handle a belligerent inmate displaying the type of behavior inmate Allen engaged in on June 24, 2004. Other questions considered by arbitrators include: Were employees disciplined in the same manner for similar mistakes? Also, were there mitigating factors on the day of the incident? Again, the evidence and testimony do not demonstrate that the Employer has been inconsistent in its approach to similar incidents involving other Correction Officers. Moreover, there was no demonstrable evidence of any particular mitigating circumstances that were occurring on the morning of June 24, 2004. The Union introduced evidence to demonstrate that the Grievant was not prosecuted criminally in this case. However, the standard applied by the courts is different than that which is used in arbitration. In a labor relations' context an employer must meet a just cause standard to justify discipline and termination.

Arbitrators in general expect police officers, correctional officers, and other members of law enforcement to exert a high degree of self-control and to employ measured responses to somewhat expected contrary behavior of inmates. The weight of the evidence establishes

that the Grievant used excessive force when he grabbed and pushed inmate Allen, absent any credible evidence that the inmate touched or physically threatened him. However, there was no evidence to demonstrate that the level of discord created by inmate Allen posed a threat. The lack of engagement and attention paid of inmate Allen's behavior by Officer Fuhrman and Sergeant Rios is one measure of the degree of threat posed by inmate Allen.

When the Grievant went beyond grabbing and subduing the inmate and began to repeatedly pummel with blows to the head, absent any demonstrable resistance by inmate Allen, his actions rose to a level of abuse. The fact that the Grievant was seemingly boastful of his actions following the incident, according to case manager, LuAnn Van Horn, lends further support to the Employer's decision to terminate the Grievant's employment.

On page 101 of Joint Exhibit 1 there is a letter from the Grievant's psychologist dated August 17, 2004, almost two months following the incident. It states in pertinent part that Mr. Davis is impulsive, has an explosive temper and continues to have explosive episodes. In her letter, Dr. Teitelbaum recommends that the Grievant be reassigned to a less stressful position. This letter, which describes the Grievant's behavioral tendencies, is consistent with the findings in this case.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 27th day of September 2005.

Robert G. Stein, Arbitrator