#1854

VOLUNTARY LABOR ARBITRATION TRIBUNAL

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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. 27-19-20050228-3914-01-03
and	*	
	*	
OHIO DEPARTMENT OF	*	Yolanda Russell, Grievant
REHABILITATION AND	*	Removal
CORRECTION	*	

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APPEARANCES

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

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

For the Ohio Department of Rehabilitation and Correction:

Roland Alvarez, Labor Relations Officer
David Burrus, Labor Relations Officer
Ohio Department of Rehabilitation and Corrections

Joe Trejo, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:00 a.m. on September 22, 2005, at the Ohio Reformatory for Women in Marysville, 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 Lisa Freeland, Cheryl M. Jones #47709, Bonnie Lee Bittner #48214, Tia Davis, C.O. Mary Miller and Charlotte Jackson #42914. Testifying for the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO (the "Union") were C.O. Gary Williams, C. O. Jeffrey Volbert, Training Officer Beverly McKinley, C.O. Mark A. Windle, and the Grievant, Yolanda Russell. Also in attendance was Chapter President Tim Roberts. A number of documents were entered into evidence: Joint Exhibits 1-15 and Union Exhibits 1-2. The oral hearing was concluded at 3:45 p.m. on September 22. Additional exhibits were submitted electronically on September 23. Written closing statements were timely filed and exchanged by the Arbitrator on October 19, 2005, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of her removal for neglect of duty, the Grievant was a corrections officer at the Ohio Reformatory for Women, a position she transferred into on June 27, 2004, following closure of the Lima Correctional Institution where she formerly worked. Her hire date with the Department was November 15, 1998, she was informed on the Department's standards of employee conduct, had no active discipline on her record, and met her employer's performance expectations.

On September 8, 2004, a fight broke out shortly before seven p.m. between two inmates in ARN II, a maximum security unit where the Grievant was on duty with fellow officer C.O. Mark A. Windle. Neither officer physically intervened. The victim took a beating that resulted in lacerations to lip and ear, edema and an abrasion. The aggressor suffered reddened knuckles. C.O. Windle triggered his man down alarm ("MDA") at 6:57. The Grievant testified she did too, but it did not register at the control center. Yard control officers responded, entering the unit at 6:58. By 7:10 both inmates were off the unit and being attended by medical staff.

On October 25 following an investigation that included interviews with staff and inmates and a review of documents, the investigator, Rufus Smith, Jr., concluded that the Grievant allowed the physical confrontation, deterred C.O. Windle from intervening, and was not candid in the investigation. A pre-disciplinary hearing was conducted January 7, 2005, on charges of Rule 24 (Interfering with, failing to cooperate in, or lying in an official investigation or inquiry) and Rule 29 (Any violation of Ohio Revised Code 124.34... neglect of duty). The hearing officer found just cause for the Rule 29 charge in that "C.O. Yolanda Russell could have done more to diffuse the situation."

The Grievant was notified of her removal on February 25, 2005. This action was timely grieved and fully processed to arbitration, free of procedural defect on the stipulated issue of: *Was the Grievant's removal for just cause? If not, what shall the remedy be?*

In arbitration, the victim, aggressor and a number of witnesses testified about the assault. The victim, Lisa Freeland (now a parolee), testified that at about 7 p.m. the aggressor tapped her on the shoulder and hit her in the back of the neck. She said she did not fight back. She held up her hands, looked right at the two officers at the console and said, "Look, I'm not fighting back," but they did nothing. She ran, stopping when she tripped on a table. She thought that during the five to six minutes the confrontation may have lasted she was kicked and punched about twenty times. Another of the approximately thirty to forty inmates around at the time intervened, laying herself over Freeland's body to stop the beating. About then the yard officers came in. Freeland

is sure she heard no officers saying to stop the fight or that either one left the console or tried to break it up.

Inmate Bittner #48214 admitted that she punched Freeland in the face "quite a few times," but said it took only one and one-half minutes. She heard someone say, "Stop," so she did. The Grievant was off the console, she said, but neither officer tried to restrain her. Other inmates urged her on because Freeland is a snitch. After she stopped, she went and got a cigaret, and then surrendered herself to yard officer C.O. Miller to be cuffed.

Three of the other inmates who were present at the time gave evidence. Inmate Jones #42914 who saw the fight from the upper level thought the assault may have lasted one to two or three to four minutes. She said the inmates were yelling, trying to stop it and asking for help. The Grievant, she said, sat at the console the whole time and she could not recall her saying to stop the fight. C.O. Windle started to intervene, but the Grievant stopped him. She did not see the Grievant activate her MDA, and could not recall seeing Windle do so. However, she did see the aggressor offer herself to the Grievant for cuffing and the Grievant do nothing but tell her to sit down. Inmate Jackson #42914 testified the total fight including the chase lasted about five minutes. Inmates were yelling for them to stop and calling the officers for help. C.O. Windle started to get off the console but the Grievant stopped him by holding out her arm. She did not see the Grievant hit her MDA, but admits its possible she did so. The aggressor surrendered to be cuffed but the Grievant did not restrain her. Then the aggressor went back and tried to beat the victim some more, but she was stopped by the other inmates. Then yard came. Parolee Davis testified the fight lasted a good three to five minutes during which time the victim was hit about twenty times. This occurred three to five feet from the console where the Grievant and C.O. Windle were sitting. Windle stood up, but the Grievant put her arm out and he sat down again. Inmate Jackson and another jumped in front of the victim to protect her. The aggressor presented herself to be cuffed, but neither of the cottage officers cuffed her.

In arbitration the Grievant testified she responded as trained, hitting her MDA when the fight broke out and ordering them to stop. She does not know why her alarm did not register since it tested fine at the start of the shift and was not emitting its low battery signal during the shift. The fight lasted less than a minute, she said, from the time she turned around and saw it until the yard officers arrived. Knowing they were on their way and seeing that the fight was over, she yelled to the inmate to get to their rooms, but they disregarded her. So she just waited and told C.O. Windle to wait, too. The aggressor never surrendered herself for cuffing and she never saw the victim on the floor until "probably right before yard came in." When they did, she and Windle assisted in putting the inmates back in their cells.

Officer Windle testified that when the fight broke out, he stood up, thought, "Oh, shit," and hit his MDA. In his opinion, the whole cottage of 97 inmates was out there. The Grievant, he said, assisted in breaking up the fight by yelling at them repeatedly to "knock it off." She did not try to stop him from breaking up the fight but told him they should wait for the yard officers because there were so many inmates there. In his opinion she was right because they were taught never to put themselves in harm's way and always to have a way out. But he also admitted that officers have an obligation to act when they see an inmate being attacked. He, too, testified the aggressor never offered herself for cuffing and that they had the situation under control when yard arrived.

IV. ARGUMENTS OF THE PARTIES

Argument of the State

The State's position is that it had just cause to remove the Grievant. At the time of her removal she had six years of correctional service with training in unarmed self defense and fight break-up technique in each of those years. She was aware of her duty to protect inmates as well as staff. In this case, her actions made a bad situation worse. Consistent inmate testimony establishes that the incident lasted several minutes without the Grievant's intervention. Freeland's testimony shows that the Grievant was aware early on what was happening and C.O.

Volbert's testimony about the MDAs confirms that only Windle triggered his. The Grievant, herself, admitted for the first time in arbitration that she told C.O. Windle not to intervene but to wait for the yard officers. She is thus more culpable than Windle because not only did she do nothing to stop the attack, but she allowed it to continue with her direction to the other officer. Windle did not explain how intervening would have put him or the Grievant in harm's way given that he saw only two inmates fighting, one of which was not fighting back. The fact that both officers were still at the console when Miller entered shows that she had to take control of the situation. The State concludes that there was no justification for the Grievant's failure to protect the victim and other inmates in the unit and asks that the grievance be denied in its entirety.

Argument of the Union

The Union argues that the State did not have just cause to remove the Grievant. The Grievant performed as she should. Two inmates, Bittner and Jones, confirmed her testimony that she ordered Bittner to stop, and Jackson testified she saw her hit her MDA. C.O. Windle also testified that she yelled to the inmates. He also disputed inmate testimony that she tried to stop him from intervening. The control center officer testified that correction officers have no way of knowing if the battery in their MDA is dead and that if two are hit at the same time, the first one's signal displays and the second one flashes. Moreover, there is no directive that both officers have to signal. Training Officer McKinley testified that officers must use their best judgment and that the Grievant acted appropriately which is to protect oneself, activate one's MDA, order the inmate to stop, control the other inmates, then break up the fight or wait for additional help. Yard officers have testified the situation was under control when they arrived.

The Union further contends that the removal was punitive, not commensurate, and not progressive. The State just went to the high end of the grid.

Additionally, the discipline is procedurally flawed in several ways, contends the Union. The investigation was deficient in that the investigator did not collect signed statements from witnesses, and no one knew what was in the investigative packet until the Union prepared its

case for arbitration. Furthermore, the disciplinary process was untimely initiated, the Grievant, not being interviewed until October 20 (more than a month after the September 8 incident) and the pre-disciplinary conference not occurring until January 7.

The Union seeks reinstatement of the Grievant to her former position at the Ohio Reformatory for Women, full back pay, seniority, leave balances, missed holidays and overtime opportunities, reimbursement for medical expenses, and removal of the discipline from EHOC and personnel files.

V. OPINION OF THE ARBITRATOR

Correctional officers must walk a fine line between the need and responsibility to protect their own safety and their responsibility towards the inmates they supervise and the institution as a whole. As Training Officer McKinley testified, they must exercise good judgment because situations vary. This case is about whether the Grievant did that responsibly or whether she crossed the line, disregarding her duty towards the institution.

The State argues that the Grievant failed to meet her responsibility in three ways. First, she did nothing to summon assistance or break up the fight; second, she refused to restrain the aggressor when the latter presented herself; and third, she hindered her co-officer in performing his duty.

With respect to lack of intervention, it is difficult to say whether she failed to summon help. It is true that no signal from her MDA was received, but there is a possibility that its battery may have weakened from the time it was tested at the beginning of the shift. This seems unlikely, but there is no way to tell because the device was apparently not tested after the fact and witness testimony on whether she was observed to have triggered it is inconclusive. There is no question that the Grievant did intervene verbally, giving orders to stop the fight. The State is of the view that she should have done more, injecting herself physically in order to stop the fight. The circumstances do support this position inasmuch as it was a completely one-sided fight between only two inmates and the Grievant was not working alone. But it is also true that the

beating did not continue very long, perhaps only a minute or two after the chase ended near the console. The Union wants me to believe that the Grievant's orders to stop fighting were effective in ending it, but it seems to me that the real reason it stopped is that the aggressor was satisfied that she had inflicted enough damage. In any event, there are other ways in which the Grievant neglected her duty. There is no question that she persuaded her fellow officer from intervening. This is something both she and C.O. Windle admit to, although they say she only said for him to wait whereas inmates reported to the investigator and testified in arbitration that she put out her arm to stop him. The Grievant also has it that the reason she stopped him was because the fight had ended. If this is the case, why stop him and why wait for the yard officers? Why not start moving inmates into their rooms and cuff the assailant who claims to have been smoking a cigaret after she had accomplished her objective? Although the fight was over when the yard officers arrived, it is clear that neither cottage officer was actively dealing with the aftermath.

Finally, there is the question of whether the aggressor surrendered herself and the Grievant refused to cuff her. Witness accounts vary. Inmate Bittner testified she did not surrender, but just got a cigaret. But then her testimony became vague and she vacillated when presented with what she allegedly admitted to the investigator.[1] C.O. Windle testified he did not see Bittner approach the Grievant, but his testimony was unreliable in several respects (e.g. his repetitious assertion that all 97 inmates were present). On the other hand, three of the four inmate witnesses testified they saw this and the fourth stated she did not. The Union would have me disregard inmates when they support the State's view of things, but credit their statements when it supports the Union's case. This is not a proper basis for credibility determination. Inmate Jones, for instance, could not recall hearing the Grievant say to stop fighting, but when confronted with the investigator's report stated the report was probably more accurate than her recollection. She also testified she saw Bittner offer herself up and Russell refused, and this is

[1] "Bittner advised that she walked up to the console, and stated to C.O. Russell, 'I am here, cuff me.' Bittner advised that C.O. Russell replied, 'No, wait for the yard.'" (Joint Ex. 3 p. 12)

what the investigator reports that she told him. Jackson, the inmate who protected the victim, concurred as did Davis, who is now out on parole. I conclude that the Grievant abdicated first to the inmates in that she allowed by her own inaction and restraint of her fellow officer one inmate to beat another and a third to fill the role of protector. Then she abdicated to the yard officers by not actively dealing with the aftermath until after they arrived. In sum, the evidence persuades me that the Grievant did cross the line and neglect her duty.

The Union raises two procedural issues. With respect to the investigation, the lack of signed narrative or question/answer statements is risky to an employer's case but not in itself fatal. Here, for instance, witnesses affirmed or denied the truth of matters reported by the investigator or reconsidered their testimony based on what he reported. Other potential witnesses were not called (Lt. Sickles, e.g.) and reports of these interviews were given no weight. With respect to the timeliness of the decision to pursue discipline, it is true that it took a month and a half before the bulk of the investigatory interviews were conducted and then more than a month between the investigator's report and the pre-disciplinary notice. An employer who delays does so at peril to its own case as evidence can degrade or evaporate entirely over time. The Union's case can also be compromised by delay, but no such claim is raised here nor is there a claim of undue harm to the Grievant. If there is an error, then, it is a technical one.

Finally, there is the matter of penalty. The Grievant here has made a grave mistake. She is more culpable than her co-worker who still has his job, but her failure still amounts to bad judgment. Moreover, she has a good six year record and should be given an opportunity to learn from her mistake. Removal under these circumstances is too harsh. I therefore order her reinstatement but without back pay.

VI. AWARD

The Grievant's removal was not for just cause. She is to be returned to her former position with seniority but without back pay and other benefits. The request for medical expenses is also denied. Her record will also be adjusted to reflect an unpaid disciplinary suspension.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
December14, 2005

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