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. 27-03-20050824-1501-01-06
and	*	
	*	
OHIO DEPARTMENT OF	*	Gregory Nesser, Grievant
REHABILITATION AND	*	Removal
CORRECTION	*	

APPEARANCES

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

Thomas Cochrane, Associate General Counsel
Dave Justice, Staff Representative
Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO

For the Ohio Department of Rehabilitation and Correction:

Bobby L. Johnson, Labor Relations Officer
David Burrus, Labor Relations Officer 3
Ohio Department of Rehabilitation and Correction

Joe Trejo, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:10 a.m. on April 11, 2006, at the Chillicothe Correctional Institution in Chillicothe, 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 Nurse Alison Smith, Investigator Arville Duty, Tpr. Sherri Wells, Tommie Haddox, Jr. 267-639, and Ronald White 476-842. Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO (the "Union") were Chapter President David Park, Maintenance Superintendent Dalyn Burton and the Grievant, Gregory Nesser. Joint Exhibits 1-5 were admitted into evidence. The oral hearing was concluded at 1:45 p.m. on April 11, 2006. Written closing statements were timely filed and exchanged by the Arbitrator on May 15, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Grievant was hired as a correction officer on March 11, 1996. He served in that capacity with satisfactory performance evaluations at a number of the State's correctional facilities until May 2, 2004, when he took a voluntary demotion to Maintenance Repair Worker 3 in order to get more time with his family. While serving at the Chillicothe Correctional Institution he was promoted to Plumber 2 on October 3, 2004, from which position he was removed on August 18, 2005, while he had only a 2-day fine on his record (for failure to follow post orders, administrative regulations, policies or directions).

The incident leading to the Grievant's removal occurred on June 17, 2005, in the maintenance department yard outside the plumbing shop. Inmates were seated at a picnic table

and a bench in the yard. The Grievant was standing a few feet from the bench, alternately turning to his right to keep an eye on an inmate working in the shop and then to his left to keep an eye on the open gate. He was also playing with the gate lock which he held in his hand, tossing it into the air. Whether he deliberately threw or accidentally lost control of the lock is a matter of contention, but there is no question the lock struck Inmate Tommie Haddox Jr. 267-639 in the area of his groin while he was seated on the bench.

The inmate reported to the infirmary the next day complaining of pain. Two small scabbed areas were noted on the inmate's genitals. The nurse who examined him reported that the inmate accused the Grievant of throwing a lock at him. Haddox provided a written statement that day to Capt. McKee and another one to the assigned investigator (Arville Duty) on June 29. In these, and at arbitration, he reported that the Grievant threw the lock at him after he (the inmate) warned the other inmates in the area not "to get Nesser [the Grievant] going." He also said the Grievant yelled at him to throw the lock back at him "because he needed 6 months off." (Joint Ex. 3, p. 9, 12) The Grievant then fired him. Later that evening, according to Haddox and the statement of Inmate Schrock (who did not testify), Schrock brought the injured inmate his work I.D. badge back and told him he was to report back to work on Monday and an apology would be waiting for him.

The Department's Investigator Arville Duty and the Ohio State Patrol's Trooper Sherri Wells began interviewing and collecting written statements on June 20. Several inmates in the area at the time supported one or more elements of the inmate's story. The Grievant at first denied throwing a lock and said he did not think he even had one in his hand. But two days later he admitted he did have a lock and was tossing it in the air when it flew out of his hand and struck Haddox in the abdomen. In arbitration he testified he had provided misinformation at first because he had been advised that since the burden of proof was on the State it was best for him to say nothing. He also admitted he had fired the Haddox, but said he asked him if he needed paperwork to go to the infirmary. Haddox told him he did not. This was why he did not report

the incident. Investigator Duty concluded that the Grievant hit the inmate in his testicles with a lock, failed to report the incident and to send the inmate for a medical examination and then attempted to cover up his misconduct.

A pre-disciplinary conference was duly held on July 18 on charges of physical abuse (Rule 42 which carries a penalty of removal on a first offense) and failure to report the incident (Rule 25). The hearing officer found just cause for discipline on both charges. The Grievant was accordingly removed on August 18, 2005. Grievance 27-03-20050824-1501-01-06 protesting this action was timely filed and fully processed to arbitration where it presently resides for final and binding decision on the issue of: *Was the Grievant removed for just cause and, if not, what is the remedy?*

III. ARGUMENTS OF THE PARTIES

Argument of the State

The State contends that the record clearly supports its claim that the Grievant became enraged over something the inmate said and threw a large master lock at him, striking him in his genitals and physically injuring him. The Grievant's version – that the lock flew out of his hands while he was playing with it – does not stand scrutiny. Two inmates testified the Grievant was angry with the inmate and the Grievant himself admitted he fired the inmate immediately after the incident. But why would he fire the best inmate plumber in the institution for an accident he, himself, caused? And why, if it was an accident, would he not immediately report it and seek medical attention for the inmate? Finally, the Grievant himself admitted he lied several times about the incident, both to the institutional investigator and to Ohio Highway Patrol investigator. The State argues the incident constitutes physical abuse and so Section 24.01's language respecting this offense should be applied. The State accordingly asks that the Grievant be denied in its entirety.

Argument of the Union

The Union argues in the first place that because the Grievant is charged with criminal misconduct the employer has a heavy burden of proof. As this Arbitrator has previously held, the definition of Rule 42's "physical abuse" is the statutory definition, "knowingly causing physical harm or recklessly causing serious physical harm" and the required weight of evidence is "clear and convincing" (Parties' Case No. 27-03-(90-10-19)-0059-01-03, Byron Turner, Grievant). The Union submits that this standard cannot be met because there is no credible evidence the Grievant injured the inmate or that he deliberately threw the lock at him.

The Union reminds the Arbitrator that inmate testimony must be carefully scrutinized because inmates level false charges against correction officers for any number of reasons. In this case, Haddox's accusations were uncorroborated even though at least four other inmates were present at the time of the incident. Although the State did call one inmate witness to support Haddox's claim, his testimony was anything but unequivocal. Furthermore, the first person to see Haddox after the incident, Maintenance Superintendent Daylon Burton, testified that when he was asked, Haddox denied there was anything wrong. The Union submits that the injury reported the following day could have been self-inflicted or caused by another inmate. The medical evidence is troubling as well, continues the Union. Lt. Griffin's report has it that there was "scaring [sic] and reddness [sic]," but any scarring would have been the result of previous injury, not a recent one. What is more, the photography shows a small mark on the scrotum and another at the base of the penis, not scarring or scabbing.

The Union continues that even if Haddox was injured by the lock, it cannot be shown that the Grievant deliberately threw it. The State has only the alleged victim's claim supported by that of another convicted felon. In the face of the Grievant's testimony that it was an accident, at best the State's case is a toss-up, not clear and convincing.

As for the Rule 25 charge, the Union argues the State lacks just cause for three reasons. First, the uncontroverted testimony of the Chapter President was that the practice at the

institution is not to file injury reports on minor injuries unless the person asks for it to be done. The Grievant asked Haddox if he wanted a report to be filed and Haddox declined. Second, even when a medical report should have been filed but was not, staff has been permitted to file after the fact. Inasmuch as the State did not allow it this time as it has in the past, discipline is unwarranted. Finally, it is not clear what conduct the State actually considers to be the violation of this rule. Rule 25 says nothing about reporting injuries and the State has not bothered to show what "work rule, law or regulation" violation he failed to report.

Finally, Union submits that the truthfulness of the Grievant is not the issue. He admitted he lied when first confronted, but he did so in the face of the trooper's lack of professionalism and his misunderstanding of the stewards' advice to admit to nothing. But even if everything he said was false the grievance still must be sustained because all the dispositive evidence comes from someone else.

The Union asks that the grievance be sustained and the Grievant be made whole by being returned to his job and made whole with full back pay, seniority and benefits.

IV. OPINION OF THE ARBITRATOR

As I have previously held, the weight of evidence required in physical abuse and other criminal conduct cases is clear and convincing and it is the employer who must carry this burden. Here there is no question that a heavy master lock left the Grievant's hand and struck Inmate Haddox in the groin area. There is also no dispute that this occurred in the context of an argument that culminated in the Grievant firing the inmate. Neither the Grievant, the inmate nor witnesses in the area at the time reported the incident that day. What is in contention is (1) whether this was an accident or a deliberate act and (2) the source and degree of the inmate's injuries.

The State contends the inmate received injuries to his genitals and that these were caused by a deliberate act of the Grievant. The State's case suffers in two respects. First, there are no reliable witnesses to the incident. The accusing inmate waited to report the incident for over 24

hours, thus giving time and opportunity to conspire with other inmates present at the time of the incident. This brings the statements and testimony of those witnesses into question. The accuser's reason for delaying (to put his account in writing) was not supported by any document or statement he made prior to arbitration. As for the medical evidence, the photographs do show two injuries to the inmate's genitals, one on his scrotum, the other at the base of his penis, but there is no proof they were caused by the lock, let alone by one thrown in anger 36 hours earlier. Indeed, the fact that they were small, localized abrasions (noted on June 21) with scabbing (noted on June 18) suggests a different source of injury. It is true that the Grievant admits he initially lied about the whole thing (telling Tpr. Wells only that he became upset with Haddox's interruptions and fired him) and that this admission calls his later version into question, too. But his initial false denial does nothing to improve the credibility of his accusers. The incident may have occurred as the inmate said or it may have happened as the Grievant said beginning with his June 23 interview and thereafter. I simply cannot tell. For this reason the State's case lacks the required quantum of proof on the physical abuse charge.

Turning to the Rule 25 charge, I am somewhat puzzled as to what specific conduct the State considers "failure to immediately report a violation of any work rules, law or regulation." Yet the Grievant did admit that he struck the inmate with the lock while playing with it and that he did not report this fact. This cannot be likened to failing to report a minor scratch an inmate sustained during the course of a repair job. If the Grievant's later version of events is true, he struck an inmate while engaged in horseplay, should have reported that and did not. While removal is not warranted since the abuse charge is unproven and the Grievant's record at the time had only a 2-day fine on it, he will receive a 5-day penalty for the Rule 25 violation.

V. AWARD

The Grievant was removed without just cause. He is to be reinstated forthwith with full seniority, benefits and back pay less five (5) days for the Rule 25 violation. The Rule 42 violation is to be removed from his record. The Arbitrator retains jurisdiction for sixty (60) days for the sole purpose of resolving any disputes over the implementation of this award.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
July 24, 2006

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