

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio Department of Rehabilitation and Correction (Marion Correctional Institution)

-AND-

OCSEA/AFSCME Local 11

Appearing for MCI

Buffy Andrews, Labor Relations Specialist
David Burrus, Bureau Chief, Labor Relations
Jeffery A. Richmond, LRO
David H. Lambert, Correctional Officer
Randy Lee Fox, Major, MCI
James E. Pauley III, Correctional Officer
Peggy J. Reed, Lieutenant, MCI
Carrie Spradlin, Labor Relations Officer
Ivan A. Stithem, Correctional Officer

Appearing for OCSEA

Jacquelyn D. Davis, Grievant
Robert D. Davis, Correctional Officer
Bobbie Jo Heinlen, Chapter Chief Steward OCSEA
Michael A. Hill, OCSEA Staff Representative
Chris E. See, Correctional Officer
Michelle Turner, OCSEA Chapter President 5110

CASE-SPECIFIC DATA

Grievance No.

Grievance No. 27-16-(2007-01-19)-4044-01-03

Hearing Held

July 17, 2007

Case Decided

January 1, 2008

Subject

Inappropriate or Unwarranted Force/ Inappropriate Communication/Failure to Follow Policies and Procedures

Award

Grievance Sustained in Part and Denied in Part

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

Table of Contents

I. The Facts.....	3
II. The Issue.....	4
III. Relevant Contractual and Regulatory Provisions.....	5
IV. Summaries of Parties' Arguments.	6
A. Summary of Agency's Arguments.	6
B. Summary of Union's Arguments.....	7
V. Analysis and Discussion.	8
A. Evidentiary Considerations.....	8
B. Whether the Grievant Was the Aggressor.	8
C. Scope and Purpose of SOEC Rule No. 19.....	9
D. Whether the Grievant Violated SOEC Rule No. 37.	12
E. Nature of the Grievant's Established Misconduct.	12
VI. The Disciplinary Decision.	13
A. Mitigative Circumstances.....	14
B. Aggravative Circumstances.....	14
C. Balancing the Aggravative and Mitigative factors.....	14
VII. The Award.....	15

I. The Facts

The parties to this disciplinary dispute are the Department of Rehabilitation and Correction (“Agency” or “MCI”) and the Ohio Civil Service Employees Association, AFSCME Local 11 AFL-CIO (“Union”), representing Jacquelyn Davis (“Grievant”).¹ The Agency hired the Grievant as a Correctional Officer (“CO” or “Officer”) on or about September 6, 1994 and removed her on January 19, 2007 for violating two DRC Standards of Employee Conduct (“SOEC”). Specifically, the Agency accused the Grievant of SOEC Rule No. 19, “Striking, fighting or otherwise engaging in a physical altercation with another employee. . . .”² and SOEC Rule No. 37, “Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee.”³ Removal is one of the possible measures of discipline for a first offense under these rules.⁴ When she was removed, the Grievant had approximately fourteen years of tenure and one active performance-based disciplinary action.

The essential facts in the instant dispute are set forth below. Historically, Officer Tanner and the Grievant had a turbulent relationship before the event that triggered the instant dispute, which arose on November 29, 2006. That evening, the Grievant and Officer Rizert were working their normal second-shift assignments in the MCI gymnasium. Officer Tanner relieved Officer Rizert who had to report to the infirmary. Some time thereafter, the Grievant spoke to Officer Rizert on the radio and told him to hurry to the infirmary. Then Officer Tanner chimed in over the radio and said something like “poor baby” or “cry baby.”⁵ Hearing this, the Grievant responded, “Please hurry up before I start growing hair on my chin.” When Officer See relieved Officer Tanner, she walked past the Grievant and apparently expressed her elation at being relieved by saying something like, “Good, cause I don’t want to work with someone who doesn’t

¹ Hereinafter referenced collectively as “The Parties.”

² Joint Exhibit 4, at 65.

³ *Id.* at, 67.

⁴ *Id.* at 65, 67.

⁵ Officer Lambert testified that he heard “cry baby” rather than “poor baby.”

1 wash their ass!”⁶ The Grievant responded, “ That’s good cause I don’t want to work with someone with hair
2 on her chin.”⁷ Officer Tanner then turned around, charged the Grievant, slapped her in the face at least once
3 with sufficient force to knock off her glasses. In addition, the Grievant lost her Identification badge and radio
4 during the ensuing scuffle. Instead of hitting Officer Tanner, the Grievant grabbed her ponytail in an effort
5 to stop Officer Tanner from striking her.

6 Officers J. Pauley, Lambert, and Stithem separated the Grievant and Officer Tanner.⁸ Officer Pauley then
7 physically escorted Officer Tanner down the corridor and out of the area. During that time, however, Officer
8 Tanner and the Grievant continued exchanging verbal barbs.⁹ At one point, Officer Tanner tried to break
9 free of Officer Pauley to go after the Grievant again. Between the time that Officer Tanner attacked the
10 Grievant and the time they were separated, the Grievant pulled out some of Officer Tanner’s hair.¹⁰

11 The struggle occurred outside of the gymnasium in plain view of a handful of inmates. However, inside
12 the gymnasium were numerous inmates, some of whom also might have witnessed the struggle.¹¹ Lieutenant
13 Reed testified that she heard Officer Tanner say “Shut the hell up, you fucking bitch” and that an inmate told
14 her, “You better get down there, ma’am there’s two females down at 4 and 5 dorm about to fight. . . ” Your
15 two C.O.’s are about to fight....what kind of folks are you hiring to watch us.”

16 Shortly before the physical attack, Officer Reed testified that shortly before the physical conflict, she
17 heard Officer Tanner say “Shut the hell up you fucking bitch.” At some point after the conflict, Officer Reed
18 took Officer Tanner to the Captain’s Office where Officer Tanner was sobbing hysterically and
19 spontaneously exclaimed that it was “‘all her fault. . . . [The Grievant] had her backed in a corner and she

⁶ Although the Agency contends that Officer Tanner said, “‘Good’ because I do not want to work with someone that does not wash” (Agency’s opening statement, at 2), the Grievant offered the foregoing version of that statement in arbitral testimony that was neither rebutted nor challenged. Obviously the Grievant’s version is more provocative than the Agency’s.

⁷ Agency’s opening statement, at 1.

⁸ Officer Stithem testified that while trying to separate the women, he asked the Grievant two-three times to release Officer Tanner’s hair. However, his written statement is silent on that point. (Joint Exhibit 3, at 48).

⁹ Joint Exhibit 3, at 40.

¹⁰ *Id.* at 38.

¹¹ See statement and testimony of Lieutenant Peggy Reed, Joint Exhibit 3, at 36.

1 couldn't take it any more; and, she snapped and was sorry.'"¹²

2 The Union challenged the Grievant's removal with Grievance No. 27-16-(2007-01-19)-4044-01-03,
3 claiming, among other things, that the Grievant was removed for other than just cause. The Parties reached
4 impasse in the dispute, the Union demanded arbitration, and the Undersigned was selected to hear and resolve
5 the matter. The Undersigned heard the matter on July 17, 2007. The Parties agreed that the dispute was free
6 of procedural errors and properly before the Undersigned. All parties relevant to the resolution of the dispute
7 attended the arbitral hearing. Throughout the hearing, the Undersigned afforded the Parties a full and fair
8 opportunity to present admissible evidence and arguments supporting their positions. Specifically, the parties
9 made opening statements and submitted admissible documentary and testimonial evidence. The latter were
10 subject to relevant objections and cross-examination. At the close of the hearing, the Parties agreed to submit
11 Post-hearing Briefs instead of oral arguments. The Parties submitted their Post-hearing Briefs in timely
12 fashion, and the Undersigned closed the record.

13 I. The Issue

14 Was the Grievant, Jacquelyn Davis, removed from employment for just cause? If not, what shall the
15 remedy be?

16 II. Relevant Contractual and Regulatory Provisions

17 ARTICLE 24-DISCIPLINE

18 24.01 -Standard

19 Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the
20 burden of proof to establish just cause for any disciplinary action.

21 24.02- Progressive Discipline

22 The Employer will follow the principals of progressive discipline. Disciplinary action will be
23 commensurate with the offense.

24 24.06 -Imposition of Discipline

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

27 PERSONAL CONDUCT

28 They Ohio Department of Rehabilitation and Correction has a reasonable expectation that all employees
29 will conduct themselves in such a manner that their activities both on and off duty will not adversely affect
30 their ability to perform their duties as public employees for the Department.¹³

¹² Officer Reed's Incident Report (Joint Exhibit 3, at 36).

¹³ Joint Exhibit 4, at 55.

DRC Use of Force^{\14}

II Purpose

The purpose of this policy is to provide guidance to institutional staff who must utilize force when responding to inmate resistance and those staff that investigate incidents of force.

High Interest Use of Force Incident a use of force where, either due to the notoriety of the inmate(s) involved, the location of the force incident, type of force used, apparent level of injury to either inmate or staff, or other factors, the incident may cause a higher level of interest from both internal and external stakeholders.^{\15}

Reactive force

A use of force employed as an immediate response to a specific act.^{\16}

VI. Procedures

A.

3. Safety and Effectiveness— as employees of the Department we have a duty to protect inmates, staff and third persons, but there is no requirement to needlessly sacrifice one's own personal safety in doing so.^{\17}
 - a. An employee must balance his or her ability to be effective against the risk to personal safety. . . .^{\18}

III. Summary of the Parties' Arguments

A. Summary of the Agency's Arguments

1. Several reasons demonstrate that the Grievant was removed for just cause.
 - a. First, the Grievant was the aggressor in this case because she provoked Officer Tanner to strike her. The severity and unacceptability of the Grievant's conduct is clear and undisputed.
 - b. Second, fighting among staff, especially in the clear view of inmates, is manifestly unacceptable.
 - c. The Grievant's verbal assault provoked a reasonable person into a physical confrontation. The record clearly established that the Grievant provoked Officer Tanner into a physical confrontation and the Grievant's violent behavior was injurious.
 - (1) Contrary to the Union's position, the Grievant was not the innocent victim. Officer Tanner was out of line, and was held accountable for her actions, as was the Grievant. But Officer Tanner's fault hardly absolves the Grievant of responsibility and fault. She provoked the attack and then responded inappropriately. Self defense or responding when hit is one matter. It is, however, quite another matter to respond to a situation that one created by ripping out the attacker's hair, especially where, as here, the Grievant provoked the confrontation in the first instance.
 - (2) The Grievant has demonstrated a capacity to provoke a fellow employee into a fight, inflict pain and suffering on that employee within clear view of inmates. Such conduct compromises her ability to safely and securely manage dangerous felons, thereby rendering her reinstatement wholly inappropriate.
2. The Agency properly investigated the incident.
 - a. Major Fox fully investigated the Grievant's conduct and generated an investigative report establishing the Grievant's culpability based on eye-witnesses, physical evidence and the Grievant's

^{\14} Joint Exhibit 5, at 72.

^{\15} *Id.* at 73.

^{\16} *Id.* at 73.

^{\17} *Id.* at 74.

^{\18} *Id.*

own admissions.¹⁹

B. Summary of the Union's Arguments

1. Article 24 of the Collective Bargaining Agreement places the burden of proof in discipline cases squarely on Management, who, in this case, failed to satisfy that burden.
 - a. Several witnesses corroborated Officer Tanner's conduct shortly before she assaulted the Grievant. For example, Officer See testified that when he relieved Officer Tanner at the gym Officer Tanner threw the keys at him and was obviously upset about something and she stormed out of the gym. Officer Lambert testified that before Officer See relieved Tanner Officer, she commented to the Grievant on the radio and that when Officer Tanner was relieved, she stormed out of the gym and said. "It's about fucking time, she didn't want to work with somebody who didn't take a bath." However, Officer J. Davis' recollection of that statement was that Officer Tanner said, she "didn't want to work with someone who didn't wash her ass."
 - b. Throughout the incident, Officer Tanner was clearly the provoker.
 - c. The Grievant did not violate SOEC Rule No. 19 – Striking, fighting or otherwise engaging in an altercation with another employee.
 - (1) Officer Tanner assaulted the Grievant and then actually admitted that the whole incident was "all her fault."
 - (2) Officers Stithem, Lambert, and Robert Davis testified that Officer Tanner assaulted the Grievant, who defended herself by holding Officer Tanner's hair.
 - (3) Because she had no reason to expect that Officer Tanner would attack her, the Grievant lacked a reasonable opportunity to evade Officer Tanner before she actually struck the Grievant. Officer Lambert's report corroborates this point by noting that when Officer Tanner charged the Grievant, he (Officer Lambert) thought the Grievant and Officer Tanner would simply argue.
 - d. The Grievant did not violate SOEC Rule No. 37 – Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee."
 - (1) Blaming the Grievant who was the victim of Officer Tanner's assault is analogous to blaming a rape victim for being raped. The Grievant merely sought to protect herself from the attack.
2. Management never thoroughly investigated the incident.
 - a. First, Major Fox's investigation is incomplete.
 - (1) Major Fox only summarized his investigatory interviews on November 30, 2006, and the Agency never adduced an accurate record of any investigatory interview in this case.
 - (2) Major Fox's investigatory report falsely claimed that the Grievant admitted that she intentionally pulled Officer Tanner's hair out. That contention contravenes the Grievant's statement and the statements of eyewitness. The Grievant testified that Officer Tanner lost some hair during the scuffle when other officers were trying to separate her and Officer Tanner.
 - (3) Major Fox also erroneously suggests hundreds of inmates observed and heard the incident, but documentary and testimonial evidence in the arbitral record rebuts that contention.
 - (4) Major Fox's report also falsely claimed that "An officer had to be sent to the hospital for further checks." In stark contrast, Lieutenant Reed's incident report flatly states, "Both officers were afforded the opportunity to seek outside medical attention and declined." The Lieutenant's arbitral testimony tracked her incident report in this respect.
 - b. Lieutenant Reed questioned the Grievant about the facts in the case but informed the Grievant that the questioning was not an investigatory interview. Still, information from that interview found its

¹⁹

Joint Exhibit 3, at 35.

way into the Agency's disciplinary decision-making process in this case. Furthermore, Lieutenant Reed neither compiled a record of her interview of the Grievant nor even mentioned the interview in her incident report.

3. The Grievant is a long-term employee with good performance evaluations and only one active disciplinary episode.
4. The grievance should be sustained. Specifically, the Grievant should be:
 - a. Reinstated with full backpay, roll-call pay, shift differential, holiday premium pay and missed overtime pay.
 - b. Reimbursed for all medical expenses incurred during her removal, which would include dental and optical expenses as well as leave balances she accumulated while removed, and they should be restored at no cost to the Grievant.
 - c. Granted all seniority and reinstated to her shift, good days, and post that she held before her removal.

IV. Analysis and Discussion

A. Evidentiary Considerations

Because this is a disciplinary dispute, the Agency has the burden of proof or persuasion regarding its charges against the Grievant. To establish those charges, the Agency must adduce *preponderant* evidence in the arbitral record as a whole, showing that *more likely than not* the Grievant engaged in the alleged misconduct. Also, because the Agency has the burden of persuasion, doubts about the existence of any alleged misconduct shall be resolved against the Agency. If the Agency fails adequately to establish the alleged misconduct in the first instance, it cannot prevail, *irrespective* of the strength or weakness of the Union's defenses. Similarly, the Union has the burden of persuasion (preponderant evidence) regarding its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

B. Whether the Grievant Was the Aggressor

Here the issue is whether the Grievant or Officer Tanner was the aggressor in the sense of initiating or causing the conflict in the first instance. The Agency argues that the Grievant was the aggressor in the physical altercation that triggered the instant dispute. Here, the Agency contends that the Grievant's verbal barbs toward Officer Tanner provoked her thereby triggering the dispute and casting the Grievant as the aggressor. The Agency specifically contends that the Grievant's statements about Officer Tanner's hairy chin provoked her physical attack on the Grievant. In contrast, the Union argues that it was Officer Tanner's comment of "poor baby" or "cry baby" that triggered a response from the Grievant about the hair growing

1 out of Officer Tanner's chin.

2 Preponderant evidence in the record establishes that Officer Tanner's *initial* comment of "Poor baby"
3 or "Cry baby" likely triggered the Grievant's comments about Officer Tanner's hairy chin. And it is
4 uncertain how or the extent to which Officer Tanner's comments affected the Grievant, since the record is
5 not clear regarding the level of turbulence or venom that characterizes their relationship. Nor is it clear what
6 impact Officer Tanner's comments were intended to have on the Grievant. However, given the strange
7 history between these two employees, one could reasonably deduce that Officer Tanner's comments were
8 hardly intended either to sooth or to placate the Grievant; indeed they did not. In short, preponderant
9 evidence in the arbitral record does not establish the Grievant as the aggressor. In fact, since Officer Tanner
10 initiated the verbal exchange, the Arbitrator finds that more likely than not Officer Tanner's comments set
11 off the Grievant who responded in kind, and, given their history, the matter quickly escalated into violence.
12 It is unlikely that the Grievant would have mentioned Officer Tanner's chin hair. Accordingly, the Arbitrator
13 holds that more likely than not Officer Tanner was the aggressor in the events leading up to the struggle
14 between her and the Grievant.

15 **C. Scope and Purpose of SOEC Rule No. 19**

16 The Issue here is whether the Grievant violated Rule No. 19 by struggling with Officer Tanner and
17 ultimately pulling out some of her hair. Resolution of this issue involves a probing analysis of the letter and
18 purpose of Rule No. 19. That Rule explicitly prohibits "striking, fighting, or otherwise engaging in a
19 physical altercation. . . ."

20 On its face, Rule No. 19 is wholly unobjectionable, since it is axiomatic that employers may prohibit
21 fighting as well as any other type of physical attack on their premises. And this is especially true where, as
22 in the instant case, the employer is a state correctional facility. Furthermore, given the nature and missions
23 of correctional facilities, one can reasonably hold correctional officers to higher standards of conduct relative
24 to other employees. As the Undersigned has repeatedly stated in his arbitral decisions, correctional officers

1 must be held to higher standards of conduct because, like it or not, they serve as role models for the inmates
2 who they supervise. Thus, MCI is well within its rights to publish Rule No. 19.¹²⁰

3 That said, the facts and circumstances in the instant case nevertheless test Rule No. 19, requiring closer
4 scrutiny thereof because a major issue here is whether the Grievant merely defended herself. Thus, the first
5 question is whether Rule No. 19 contemplates or, more specifically, tolerates, self-defense as a recognized
6 exception.

7 Despite the justifiably higher standard of conduct for correctional officers, they retain the right to defend
8 their lives and limbs while on duty. To deny correctional officers this fundamental right is unreasonable and,
9 as far as the Undersigned can determine, not countenanced by arbitral, judicial, or administrative authority.
10 A work rule that denied the right of self-defense would be per se unreasonable and, hence, unlikely to win
11 arbitral support. Consequently, in the instant case, one may reasonably conclude that, despite its explicit,
12 across-the-board prohibition of fighting, etc., Rule No. 19 was not intended to deprive the Grievant or other
13 correction officers of the right to defend themselves, other matters equal, against a physical attack from a
14 fellow staff member. In short, then, for Rule No. 19 to remain within the realm of reasonableness, it must
15 embrace an inherent exception that recognizes the Grievant's basic right to defend herself against Officer
16 Tanner's physical attack.

17 Having held that Rule 19 inherently embraces self-defense, the task now is to determine whether the
18 Grievant's conduct falls within the legitimate scope of self-defense or crosses those boundaries into
19 retaliation. The Agency suggests that the Grievant exceeded the bounds of self-defense because she refused
20 to release Officer Tanner's hair when Officer Stithem allegedly asked her to do so. In addition, the Agency
21 contends that pulling out Officer Tanner's hair exceeded the realm of self-defense and constituted retaliation,

¹²⁰

Although they are not repeated, the same analysis and conclusions apply to Rule No. 37 discussed below.

1 which in effect converts the Grievant from the victim to the aggressor.¹²¹ Conversely, the Union argues that
2 the Grievant was the victim because she never hit Officer Tanner. Instead, she merely held the Officer's
3 ponytail in self-defense.

4 The arbitral record shows that when she was attacked by Officer Tanner, the Grievant grabbed and held
5 Officer Tanner's ponytail until fellow correctional officers separated her and Officer Tanner. Nothing in the
6 record suggests that the Grievant took any other physical action against Officer Tanner. Merely holding
7 Officer Tanner's ponytail after she struck the Grievant in the face hardly constitutes the type of affirmative,
8 aggressive act that would deprive the Grievant of her self-defensive shield. And it is not unreasonable to
9 conclude that having been physically attacked by Officer Tanner, the Grievant was somewhat reluctant to
10 release Officer Tanner's hair until the Grievant was assured that Officer Tanner was completely restrained.
11 Manifestly, Officer Tanner did not consider the matter closed. She was not finished with the Grievant as
12 evidenced by her efforts to break away from her restrainer as she was being escorted down the hall. Given
13 this type of continually aggressive conduct by Officer Tanner, one readily understands why the Grievant did
14 not immediately release Officer Tanner's hair when asked to do so. In light of the foregoing facts and
15 circumstances, the Arbitrator finds that the Grievant acted in self defense when she grabbed and held on to
16 Officer Tanner's hair until Officer Tanner was clearly and fully restrained. The Arbitrator believes that any
17 reasonable person would have acted similarly.

18 The next issue is whether the Grievant exceeded the reasonable bounds of self-defense by pulling out
19 Officer Tanner's hair. The Agency stoutly contends that by tearing out Officer Tanner's hair, the Grievant's
20 conduct clearly crossed the line from self-defense to retaliation or aggression. The Union maintains that the
21 Grievant did not intend to remove Officer Tanner's hair and that circumstance was an unfortunate result of
22 the struggle.

¹²¹

Observe that the Agency argues at the outset that the Grievant was the aggressor, an argument that the Arbitrator declined to accept. However, even if the Grievant was not the victim initially, she could become the aggressor by using excessive force against Officer Tanner.

D. Whether the Grievant Violated SOEC Rule No. 37

Here the issue is whether the Grievant's actions compromise or impair . . . [her] ability . . .to effectively carry out . . . her duties as a public employee [in this case a correctional officer]."²² For the reasons discussed below, the Arbitrator holds that nothing in this case demonstrates that the Grievant's ability to perform her duties as a correctional officer was somehow compromised or impaired. Again, reasonableness and commonsense factor prominently in any discussion of this issue. First, as previously held, the Grievant has the right to defend herself and, as also previously held, she acted within the reasonable parameters of that self-defensive right. Consequently, it would seem unreasonable and/or nonsensical to conclude that the proper execution of her self-defensive right either would or could either compromise or impair her ability to serve as a Correctional Officer in MCI. If that were the case, the self-defensive right would be largely eviscerated. To put it another way, if, by applying this rule to the Grievant in this case, the Agency suggests that by defending herself the Grievant somehow lost the inmate's respect, then that position is untenable in light of the dire or worst consequences that could befall correctional officers stripped of the right to reasonably defend themselves. In addition, it strains credulity to argue that the purpose or spirit of Rule No. 37 was to deprive correctional officers of the right to protect themselves against attacks from coworkers, however remote or infrequent such attacks may be. It is more likely that Rule No. 37 was intended to prohibit *misconduct*, but, as the Undersigned has already held, the Grievant's conduct in holding Officer Tanner's ponytail has not been shown to be unreasonable otherwise within the realm of misconduct. Based upon this discussion, the Arbitrator holds preponderant evidence in the record as a whole does not establish that the Grievant violated Rule No. 37.

E. Nature of the Grievant's Misconduct

The Arbitrator has held that the Agency has failed to prove that the Grievant violated either Rule No. 19 or Rule No. 37 or that the Grievant was the aggressor in the circumstances leading to her struggle with Officer

²² Joint Exhibit 4, at 67.

1 Tanner. Those holdings, however, do not absolve the Grievant of blame in this dispute. Preponderant
2 evidence in their arbitral record establishes that the Grievant responded in kind to Officer Tanner's caustic
3 remarks. Furthermore, even after the struggle the Grievant and Officer Tanner continued behaving like
4 juveniles by exchanging verbal barbs. This, in the Arbitrator's view, is unacceptable and need not be
5 tolerated by the Agency. The Grievant's verbal exchange with Officer Tanner is the kind of misconduct that
6 undermines the Grievant's position as a role model for the inmates. Ideally, instead of exchanging verbal
7 insults with Officer Tanner, the Grievant might well have simply ignored her and/or reported her to a
8 superior, since Management would likely frown on Officer Tanner's comments about the hygiene, or lack
9 thereof, among her coworkers. The failure to pursue this path constitutes the Grievant's vice or misconduct
10 in this case. The Agency should not and does not have to tolerate that type of juvenile conduct among its
11 correctional officers. Finally, the Agency contends that the struggle and circumstances surrounding that
12 struggle occurred in the presence of hundreds of inmates. However, on reputed testimony in the arbitral
13 record states that the vast majority of inmates were inside the gymnasium, but the altercation and verbal barbs
14 took place outside of the gymnasium, where only a handful of inmates were present.

15 **V. The Disciplinary Decision**

16 A preponderance of evidence in the record indicates that the Grievant's fault or misconduct in this dispute
17 was her voluntary participation in verbal exchanges with Officer Tanner that led to a physical struggle
18 between the Grievant and that Officer. But for the Grievant's participation in that exchange, it is unclear
19 whether Officer Tanner would have attacked the Grievant.¹²³ Consequently, the Agency has established that
20 the Grievant engaged in misconduct, thereby warranting some measure of discipline. Assessment of the
21 proper quantum of discipline involves an evaluation of the mitigative and aggravative factors in this dispute
22 and ultimately a determination of whether removal is in bad faith, constitutes an abuse of discretion, or is

¹²³

This is not to say that the Grievant's statements to Officer Tanner constituted provocation. For it is unclear, under the facts of this case, whether the Grievant's statement about Officer Tanner's chin hair would have provoked a reasonable person to launch a physical attack. Surely, Officer Tanner's insults about the Grievant's body hygiene or lack thereof did not provoke the Grievant to attack Officer Tanner. And on the surface neither insult seems substantially more grating than the other.

otherwise unreasonable, arbitrary, capricious, or discriminatory under the circumstances of this case.

A. Mitigative Circumstances

The strongest mitigative factors for the Grievant are her approximately fourteen years of service with the Agency, her satisfactory record of job performance, and the Agency's failure to establish that the Grievant violated either Rule No. 19 or Rule No. 37. Furthermore, the Agency failed to prove that the Grievant was the aggressor before, during, or after her physical encounter with Officer Tanner.

B. Aggravative Circumstances

The sole aggravative factor is that the Grievant voluntarily participated in an ongoing verbal exchange that led to a struggle between her and Officer Tanner. That type of juvenile conduct is unbecoming of correctional officers and warrants some deterrent or disciplinary action. Finally, the Grievant had one active episode of discipline when she was removed.

C. Balancing the Aggravative and Mitigative Factors

An assessment of the foregoing aggravating and mitigating factors indicates that the Grievant's removal was clearly *unreasonable*. The Arbitrator is not convinced that a heavy measure of discipline is warranted to rehabilitate the Grievant.

In light of these considerations, the Arbitrator holds that the Grievant was not removed for just cause. The Agency should not terminate a fourteen-year employee for self-defensive conduct or for engaging in juvenile quips with a coworker, even though the latter is clearly unacceptable. Accordingly, some measure of discipline is clearly warranted to notify the Grievant and other correctional officers that verbal barbs have no place in the Agency and will not be tolerated.

Under these circumstances, a ***three-month suspension without pay*** (January 19, 2007 through April 19, 2007) should sufficiently deter the Grievant and others from embracing such conduct. Accordingly, the Agency is hereby ordered to **reinstate** the Grievant with her ***seniority undisturbed*** and ***intact*** as if the Agency never removed her from the position of Correctional Officer. In addition the Agency shall reinstate the

Grievant with the following benefits:^{\24}

1. Backpay from April 19, 2007 until she is reinstated pursuant to this opinion and award, *less any wages or income she could have earned by exercising due diligence* in seeking and obtaining gainful employment during her separation from the Agency.
2. Roll-call pay, shift differential, holiday and premium pay
3. Pay for any overtime that the *Grievant can specifically establish by preponderant evidence* that she *would have* worked *but for* her wrongful discharge.
4. Reimbursement for all medical, dental, or optical expenses the Grievant incurred during her wrongful removal that the Agency would have covered, less the three month suspension and less any medical reimbursements from other employment the Grievant actually secured during her wrongful removal.
5. Reinstatement of any leave balances the Grievant would have accumulated during the period of her wrongful removal, all of which are to be restored without cost to the Grievant.
6. Reinstatement to her shift, reinstatement of her good days, and reinstatement to the post that she held before her wrongful removal.

VI. The Award

For all of the following reasons, the grievance is hereby **Denied in Part and Sustained in Part.**

Respectfully,



Robert Brookins, Professor of Law, Labor Arbitrator, J.D., Ph.D.

^{\24}

The object here is to make the Grievant whole without granting her any kind of windfall.