

IN THE MATTER OF THE ARBITRATION
BETWEEN
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11 AFSCME, AFL-CIO
AND
THE STATE OF OHIO
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION
ROSS CORRECTIONAL INSTITUTION

Arbitration Date: April 16, 2009

GRIEVANT, SCOTT LEIST
CASE NO. 27-23- (2008-08-26)-0049-01-03

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Chris Lambert
Bureau of Labor Relations
Ohio Department of Rehabilitation and Correction
770 West Broad Street
Columbus, Ohio 43222

Advocate for the Union:

Dave Justice
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I. HEARING

The hearing was held at Ross Correctional Institution on April 16, 2009. The hearing commenced at 9:15 A.M. The joint issue before the arbitrator is “Was the grievant, Scott Leist, removed from his correction officer position at the Ross Correctional Institution for just cause? If not, what shall the remedy be?”

Testifying for Ross Correctional Institution (“The Employer”) were Warden Mike Sheets, Investigator Paul Shoemaker, and Inmate Keith Kelly.

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME (“The Union”) were Mal Corey, CO Sergeant, Robert Anderson, CO, David Tumbleson, CO and Scott Leist, the Grievant.

II. STATEMENT OF THE CASE

On April 30, 2008 an incident occurred at the “Employer’s) facility resulting in Grievant Scott Leist being removed for violation of Rule 40 “Use of excessive force toward any individual under the supervision of the Department or a member of the general public”.

The factual allegation is that the Grievant used excessive force on Inmate Keith Kelly. The Union timely filed a grievance and the case is properly before the arbitrator.

III. THE PROCEDURAL OBJECTION

The Union raised several procedural objections and the parties agreed to a resolution of these issues prior to the presentation of the Employer's Case.

The first procedural issue was the Employer's refusal to grant a continuance of the Pre-Disciplinary hearing. The Pre-Disciplinary hearing was first scheduled for July 15, 2008. This was evidenced by Exhibit Union 1, which was the Pre-Disciplinary Conference Notice. The Union then offered Exhibit Union 2, which was Chapter President, Mal Corey's request for a one week continuance due to the volume of material to be reviewed. The Employer denied this request.

The Pre-Disciplinary hearing was then moved to July 16, 2008 and Chapter President Mal Corey contacted the Employer and said he was scheduled for a meeting at the Union office in Columbus and asked to have the hearing moved back to July 15, 2008. The Union offered Exhibits Union 3 and 3A which is Article 24.05 of the Collective Bargaining Agreement.

The Union also offered Exhibit Union 6 which was a continuance of the hearing to August 4, 2008 due to a family emergency in the family of the hearing officer.

Mal Corey testified as to these requests and also testified that past practice was to have the Employer's agreement to a weeks' continuance in complicated cases.

The Employer argued that Article 24.05 only permits a continuance for 48 hours. Any longer period must be agreed to. The Employer also argued that the Grievant was on Administrative leave and there was no harm to the Grievant by moving the hearing to August. Further that the question was moot.

The Arbitrator found that the question was moot.

The Union's second procedural objection was for non-disclosure of documents from the

Employer. The Union filed a Request for Information and Documents based upon a list of evidence filed by Investigator Paul Shoemaker. The Employer claimed that it did not have a report from Trooper Maughmer of the Ohio Highway Patrol nor any statements from Inmates Ferris and Sellers.

The Arbitrator ruled that evidence should be taken concerning this issue prior to the Employer's case.

Mal Corey testified for the Union. He said he requested a copy of the Trooper's report prior to the Pre-Disciplinary hearing and was refused a copy by the Trooper. He also said that Ohio State Patrol reports are rarely used in Pre-Disciplinary hearings.

The issue per Article 24.05 is disclosure to the Union of "Witnesses and documentsused to support the possible disciplinary action". Warden Mike Sheets and Investigator Paul Shoemaker testified. Both witnesses said they had not seen a report from the Trooper and there were no written statements from the Inmates. Both said they never considered either in making their determination.

The Arbitrator then over-ruled this procedural objection. The Arbitrator also ruled that the Union could renew this objection at any time during the Employer's Case it thought was relevant. The Union may also raise this issue again in it's Closing Argument.

Both parties made their opening statement and then the parties and the Arbitrator went to 5A to view the scene.

The Employer then called Paul Shoemaker to the stand. Mr. Shoemaker said he has been with Corrections for sixteen years. He said he had done Investigations for eleven years and for the past five years has been with the Chief Inspector's Office. Mr. Shoemaker said there were no specific allegations against the Grievant.

Mr. Shoemaker was then referred to JX 2 Pages 40 - 41. This is the Use of Force Cover Sheet and the Grievants' Incident Report. He said he had viewed the video and had determined the Grievant had used excessive force by punching Inmate Kelly. Mr. Shoemaker said this was noted in JX 2 Pages 40 - 41.

Mr. Shoemaker testified he looked at the video evidence, especially the Sally Port. Review of video evidence is part of the packet. He said Lt. Price said he saw Grievant swing at the Inmate. Mr. Shoemaker said he slowed the video down and you could see Grievant hit Inmate Kelly. He said he interviewed th Grievant twice. He also interviewed Lt. Price and Inmate Kelly. He said he interviewed a total of about ten people.

The Employer then played the video and Mr. Shoemaker testified about the video as it was displayed. He was referred to JX 4 which is the list of Exhibits. The video is Exhibit 1 and Camera 56 recorded the video.

Mr. Shoemaker testified that the Grievant told him he had control of Inmate Kelly's left

side. The video shows Grievant arriving at the Sally Port. When Grievant arrived Inmate Kelly had his head down. Mr. Shoemaker said two Cos have Inmate Kelly secured.

Mr. Shoemaker said it appeared from the video that Grievant cocks his left leg and draws his arm back at a 45 degree angle. It then appears that Grievant's arm goes straight through. The view of Inmate Kelly and the two Cos is partially obscured by the frame of the interior Sally Port door. The Grievant told Mr. Shoemaker, CO Hewitt lost his grip on the Inmate. Mr. Shoemaker thinks the Grievant knocked the Inmate down.

The video then showed the arrival of Lt. Price. Lt. Price was within four to six feet of the incident. Mr. Shoemaker says that Inmate Kelly has now lost his forward momentum and is now going backwards.

Mr. Shoemaker said he went through the video with Grievant and asked him if there was a particular technique he was using and the Grievant couldn't answer him. He said the video shows Grievant delivering a punch.

Mr. Shoemaker then was referred to JX 2 Page 82. This is a question and answer interview with the Grievant. He said Grievant is not truthful and denies hitting the Inmate. He then reviewed JX 4 #2 which is the audio of the first interview with the Grievant. The Grievant says he had the Inmates left hand and was in control of the Inmate's left side going through the door.

In the second interview the Grievant said he did not have control of the left side of the

Inmate. Mr. Shoemaker then reviewed JX 4 #3 which is the audio of the second interview with

Grievant. Grievant said he did not punch or kick the Inmate. He said he showed the Grievant the video frame by frame and asked him to identify others in the video.

Mr. Shoemaker said the Grievant has no clue about what the swinging motion is. He said Grievant can't explain having his arm at a 45 degree angle or having his leg cocked. The video shows the Inmate bent down with Cos on both arms.

Mr. Shoemaker said he interviewed Lt. Albert Price. Lt. Price said he saw Grievant swing at Inmate Kelly. Lt. Price said he told Grievant to "knock that shit off" and that he did not report it because he had disciplined the Grievant. Mr. Shoemaker said he interviewed Inmate Kelly and his testimony was right on with other testimony and with the video. Mr. Shoemaker said Lt. Price is over 300 pounds and the Inmates call him Tiny.

Mr. Shoemaker said the Inmate couldn't identify the Grievant but said he was getting worked over at the door. Mr. Shoemaker reviewed JX 2 Pages 63 - 75 which are the medical reports on Inmate Kelly. He said Page 68 shows the injury. He also said Page 72 of this Exhibit shows different injuries from the Chillicothe Correctional Institution than those shown on the Ross Correctional Institution report. Mr. Shoemaker said he talked to Inmate Kelly two weeks after the incident and he still looked like the photographs. He then reviewed JX Pages 10 - 27 and said it was the report of the Use of Force Committee. He also said JX 2 Pages 27 - 58 are the Use of Force packet. Mr. Shoemaker then said JX 2 from page 58 forward are the documents he collected.

On Cross-Examination Mr. Shoemaker was asked if Inmate Kelly made any specific

allegations against the Grievant and he answered "NO". He was asked if the video showed the Grievant making contact with the Inmate and he replied "NO". He was also asked if Lt. Price said he saw Grievant make contact with the Inmate. He said "NO" .

Mr. Shoemaker said the Grievant, Lt. Price and Officers Hewitt and Tombleson were there. He was asked if any officers said they saw Grievant hit the Inmate. His answer was "NO". He was then asked if he could tell from the video if the Inmate was struggling. He replied that he couldn't tell for sure from the video but in his opinion he thought the Inmate was struggling.

Mr. Shoemaker said there are several techniques that are "reach in" but the Grievant never identified a technique. He was then referred to JX 2 Page 63, the photographs of the Inmate and said the photographs were taken about a week after the incident.

Mr. Shoemaker was then referred to JX 2 Page 13 which shows Investigator Sorrell made a report. He said he thinks he read this report but it is not an Exhibit for the hearing.

He then read JX 2 Page 51 which is a medical exam of the Inmate dated April 30, 2008, the same as the incident. This report is for the first exam after the incident. Inmate Kelly was taken straight to medical after the incident and remained in a cell there for three to five days. When the nurse was shown the medical report from Chillicothe Correctional Institution she said the Inmate did not look that bad at Ross Correctional Institution. Mr. Shoemaker then read JX 2 Page 72 which is the medical report from Chillicothe Correctional Institution. This report shows bruising on the lower left side. He was asked if the video shows the Inmate bent over would it not

have been difficult for the Grievant to have hit him there. He said there was no evidence that

Grievant hit the Inmate in the kidney area.

Mr. Shoemaker then reviewed JX 2 Page 23 which is an interview with Nurse Jewell. Nurse Jewell said the Inmate was there for four days and never complained of being hit or punched by the staff. He was then referred to JX 2 Page 44. This is Inmate Kelly's statement. The Inmate said he did not wish to make a statement. He then read JX 2 Page 29, Lt. Price's Incident Report. Lt. Price made no reference to the Grievant hitting the Inmate.

Mr. Shoemaker then read JX 2 Pages 16 and 17 a summary of Lt. Price's statement. In this summary Lt. Price said the Grievant swung at the Inmate but Mr. Shoemaker said he couldn't verify this with any other Cos.

On Re-Direct Mr. Shoemaker read JX 2 Page 64. This is an Informal Complaint. This is the form Inmates can use to complain of force. The Inmate says Lt. Price beat him. He then read JX 2 Page 12 which is Lt. Price's statement that he gave Grievant Corrective Counseling but did not write up a report.

On Re-Cross Examination Mr. Shoemaker read JX 2 Page 643 which is Inmate Kelly's Complaint. He said there was no Complaint against the Grievant. The only Complaint was against Lt. Price.

The next witness was Warden Mike Sheets. Mr. Sheets said he had been the Warden at Ross Correctional Institution for three and a half years. Prior to that he had been a CO, Sergeant , Lieutenant, Captain, Major and Deputy Warden of Operations.

Mr. Sheets then read JX 2 Page 1 which is the Notice of Removal. Mr. Sheets said he had

viewed the video, and it showed Grievant hit the Inmate who was under control. He said the Inmate was handcuffed with his hands behind his back. Mr. Sheets also said he thought the Grievant was untruthful in some of his answers.

Mr. Sheets was then asked why the Grievant was removed and not given a two day suspension. He replied that his decision was based on the extent of the Inmate's injuries. He also said he can't trust an employee who isn't truthful.

On Cross-Examination Mr. Sheets was asked if Rule 40 was the sole ground for removal and he said "Yes". Mr. Sheets was referred to JX 2 Page 24 which indicated Rule 24 was alleged. Mr. Sheets said Rule 40, excessive force was the only Rule used for Removal. Mr. Sheets then viewed JX 2 Page 63, which are the photographs of Inmate Kelly. He said he doesn't know who is responsible for what injuries.

The last witness for the Employer was Inmate Keith Kelly. Inmate Kelly said he had met Mr. Chris Lambert, the Management Advocate at Warren Correctional Institution and that he had received no promises for his testimony. Inmate Kelly is still an Inmate at Warren Correctional. He said he was given no indication about which employee his testimony would concern. Inmate Kelly said he was serving a fifteen year term for aggravated burglary and abduction.

Inmate Kelly said he was in Unit 5A and that he had flooded his cell. He said staff used force on him in his cell. He said staff tried to force his head into the toilet. Inmate Kelly said Lt. Price and CO Hewitt hit him in the head and called him names. He said he was thrown to the floor and a restraint cord put around his neck. He was then drug out of his cell.

Inmate Kelly said in the Sally Port his head was slammed against the wall and he was hit. He said he spit blood on the floor. Lt. Price was talking about the cameras. Inmate Kelly said he did not know who hit him in the Sally Port. He said the beatings began again at the infirmary. Inmate Kelly said he went to 9 House until May 5. He said he never went back to 5A.

Inmate Kelly was referred to JX 2 Page 64 which is his Informal Complaint. He was then asked about JX 2 Page 44 which was his Inmate Voluntary Statement. He said he still had mace in his eyes. He said Lt. Price had beaten him. He said Lt. Price said he had to have a statement so he said he didn't care to make one.

Inmate Kelly was shown JX 2 Page 63 which are photographs of his injuries. He denied doing any self inflicted injuries. He said he gave a recorded statement to Investigator Shoemaker and that it was truthful.

On Cross-Examination Inmate Kelly said Officer Warren tried to force his head into the commode. He said he didn't struggle in the Sally Port and that his eyes were closed a lot because of the mace. He said he was walking sideways because CO Hewitt was pulling the cord around his neck. He said he was punched and kicked in the Sally Port.

Inmate Kelly said the Nurse at Ross Correctional Institution did not do a thorough exam.

Inmate Kelly then read JX 2 Page 64, his Informal Complaint. He said he was beat, hit and choked. He said he was punched on the right side and kicked in the center of the torso.

On Re-Direct Inmate Kelly was asked if he knew when he was outside the Sally Port. He said he could tell because of the clicking noise the door made when it opened.

On Re-Cross he was shown the video. He said he hadn't seen it before. Inmate Kelly said as they rushed me out I was being beaten. Lt. Tiny was there as per video. Lt. Tiny is Lt. Price's nick-name. He said he doesn't recall Lt. Price being at the Sally Port and he didn't hear Lt. Price say anything.

On Re-Direct Inmate Kelly was again shown the video. He said he was hit twice in his ribs.

V. THE UNION'S CASE

The Union's first witness was Robert Anderson. Mr. Anderson is a CO assigned to the North Yard. He works second shift and has been a CO for ten years.

Mr. Anderson says he recalls the incident and that he was working as a Cage Officer. This incident happened during Employee Week and employees were taking part in various events. He said Sharon Lewis came to relieve him but he had not signed up to participate in Employee Week. The Grievant had signed up to participate and he left.

Mr. Anderson said Lt. Price saw the cell window covered. Lt. Price went to the cell but could get no response. Lt. Price went into the call with other staff. Inmate Kelly charged Officer Warren. The other Inmate jumped Mr. Anderson. CO Warren and CO Hewitt came in response to a call for help.

Mr. Anderson said the outside door to the Sally Port was open. He said the Inmate was belligerent and the Cos and the Inmate were rushing through the door. He said he stopped Lt.

Price about blood spill and relief and then he left. Mr. Anderson said Lt. Price never spoke to the officers in the Sally Port. He said Inmate Kelly was bleeding from his nose and mouth when he came out of his cell.

Mr. Anderson was shown JX 2 Page 32 which is his witness statement., and said his statement is true. He said he was interviewed by a State Trooper and the Use of Force Committee and that nothing had happened to him. Mr. Anderson was then shown JX 2 Page 61. He said it is the 5A Log Book Bottom Range.

On Cross-Examination Mr. Anderson said he was turning around when Lt. Price went into the Sally Port.

On Re-Direct Mr. Anderson said Inmate Kelly was still resisting when he went into the Sally Port. He said he was spitting everywhere. He did not see a cord around the Inmates neck.

The next witness was David Tumbleson. He has been a CO for nine years. Mr. Tumbleson said Employee Week was going on. He said he responded to a call from 5A. Mr. Tumbleson said he got Inmate Kelly at the front door and escorted the Inmate to Inmate Health Services. He said he was with Yard Dog CO Hewitt.

Mr. Tumbleson said he was in the Sally Port and got control of Inmate Kelly but he doesn't recall from whom he got control. Mr. Tumbleson said Inmate Kelly was struggling and trying to fight and spitting blood at staff. He doesn't recall seeing Grievant in the Sally Port and he doesn't recall Lt. Price being there.

Mr. Tumbleson said no one hit, kicked or punched Inmate Kelly. He said he was never shown the video of the incident.

Mr. Tumbleson reviewed JX 2 Page 36 which is his incident report and said it is true. He said he was placed on administrative leave but received no discipline. He also said he was interviewed by the Ohio Highway Patrol but no charges were filed.

The next witness was the Grievant Scott Leist. Mr. Leist said he was a CO in 5A and had been in 5A a week or two. He said he arrived at 1:45 and relieved the downstairs officer. Grievant said he had signed up for golf and basketball for Employee Week.

Grievant said he left 5A to participate in Employee Week and CO Tumbleson also came to Employee Week. Grievant said he heard the call for assistance over the radio and CO Tumbleson got there ahead of him. Grievant had the outside door to the Sally Port and CO Tumbleson had the inside door.

Grievant said he reached for Inmate Kelly's hand and missed. He then got the Inmate in a modified three. Grievant said he got the Inmate on the ground and CO Hewitt told Grievant to go back to the Unit.

Grievant said he went to medical and then to the Captain's office to do a report.

Grievant said CO Hewitt was inside the Unit and CO Tumbleson had the Inmate's right arm. CO Hewitt had the Inmate's left side using an arm bar. Grievant said this is the usual technique. Grievant said he used a Modified Technique 3, which is twisting the hand in a rotary manner. This puts the Inmate on the ground. Grievant said there is no technique for "reach in" and that he tried to explain this to Mr. Shoemaker.

Grievant was shown JX 3 Page 2 which is the Pre Disciplinary Hearing Officer's Report.

Grievant denies telling Mr. Shoemaker he couldn't show him anything and says he demonstrated his technique.

Grievant said Lt. Price didn't yell at him and he didn't know he was there until later. He said CO Hewitt is the Senior CO and CO Hewitt told Grievant to return to the Unit.

The Grievant was then shown Union 9 which are still photographs made from the video. The Grievant said he tried to reach across Inmate Kelly to get his hand and tat he never punched or kicked him.

Grievant said he was behind Inmate Kelly when the Inmate left the Sally Port. The Inmate was then taken to the ground.

Grievant was then shown JX 2 Page 41 which is his incident report. He said his report is true. Grievant also said CO Hewitt and CO Tumbleson were not disciplined.

On Cross-Examination the video of Grievant's second investigatory interview was played. Grievant said he was on the left side of Inmate Kelly. Grievant said "I guess I had hold of his hands". Grievant also said he was not doing any technique that he knows of.

Grievant said this question refers to his arm, not his hand. Grievant said he told Mr. Shoemaker on tape that he was doing a Modified Technique 3. Grievant was shown Union - 9 Photographs 2496 - 2499 and said he was trying for a "reach in" move on Inmate Kelly.

On Re-Direct Grievant was shown Union - 9 frames 2488 - 2503 and was asked how much time had elapsed. Grievant's answer was three seconds. Grievant also said he goes to self-defense training for four hours a year.

The hearing was adjourned at 4:55 P.M.

The parties are to file closing arguments by the close of business May 8, 2009.

VI. OPINION OF THE ARBITRATOR

The Procedural issues raised at the hearing were raised and argued again in the parties closing arguments.

The Union raised again the failure of the Employer to grant a one week continuance of the Pre-Disciplinary hearing. It appears that the ruling at the hearing that the issue was Moot is still correct.

The Union also raises again the issue of failure to provide Trooper Maughmer's report and the interview tapes of Inmates Fears and Sellers. The Arbitrator ruled at the hearing that these objections were over ruled but could be raised during the hearing or in Closing Arguments based upon the evidence offered.

The sworn testimony of Investigator Shoemaker and Warden Sheets is that neither relied upon this information. This testimony was un-rebutted. As the Employer points out the Contract only requires that information be given to the Union if it is relied upon.

The Union also objects to an incident report taken by Investigator Gary Sorrell that was not provided to the Union. The Union also points out that Investigator Sorrell took the photographs of Inmate Kelly.

The Arbitrator finds no evidence that Investigator Sorrell's incident report was relied upon

by the Employer and the Union was given the photographs.

I over rule the Procedural Objections.

The remaining issue is “was the Discipline for just cause”.

The Employer’s main evidence in support of its case is in two parts.

The Employer argues that the Grievant is untruthful. This argument is based upon two Use of Force Committee Interviews with the Grievant.

In the first interview the Grievant says he was trying to get the Inmates left hand. Grievant also said he did not strike Inmate Lelley nor see anyone strike him. Grievant also said he did not see Lt. Price.

In the second interview he was shown the video. Grievant was asked if he recognizes the image of Lt. Price and he said that he did. The Grievant was asked about his arm motion and said “I have no clue” but he also said “I’m grabbing his left hand. I’m on the left side with the hand. The only thing I can guess is that I have a hold of his hand”. The Grievant in both interviews says he was trying to get the Inmates left hand. Also in the second interview he was shown the video. When he saw Lt. Price in the video he identified him.

The Union argues that the only charge is Rule 40 - Use of Excessive Force, not Rule 24 - Lying. This position is correct.

The Arbitrator does not find the Grievant untruthful.

The Employer’s other contention is that the Grievant used excessive force on Inmate Kelly. The Employer argues that Inmate Kelly says “he was punched and kicked going through the Sally Port. The Union points out correctly that none of this shows on the Video.

Investigator Shoemaker says Inmate Kelly made no specific allegations against the Grievant and that the video shows no contact. He also said that neither Lt. Price nor any officers saw the Grievant hit Inmate Kelly. The conclusion of both Investigator Shoemaker and Warden Sheets seems to be based upon Grievant's stance in the video.

This stance is open to two interpretations, one of which is the Grievant's. The Employer's conclusion is not supported by any evidence. Neither the Inmate nor any officer says Grievant hit him. In fact the Inmate's Informal Complaint is against Lt. Price.

The Arbitrator finds the discipline is not for just cause. The grievance is granted in its entirety.

VII. AWARD

1. The Grievant, Scott Leist is to be made whole to include seniority, loss of pay, loss of vacation, personal leave and sick leave he would have accrued;
2. Reimbursement for medical expenses normally covered;
3. Reinstated to his post, shift and days off;
4. The discipline removed from his record.

Entered at Ironton, Ohio this 14th day of May 2009.

Craig A. Allen

