

Voluntary Labor Arbitration Proceeding

In the matter of Arbitration between:

The State of Ohio, Department of Rehabilitation and Correction

-And-

The Ohio Civil Service Employees Association, Local 11, AFSCME

Grievant: John Geiger

Grievance No.: 27-30-20091022-0150-01-03

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
August 26, 2010

Appearances

For the Employer

Edward T. Sheldon
Roy C. Haynes
Ed Bernardo
Brian K. Ash
Curtis E. Alexander
Venita S. White
Boyd Taggart
Ron Pawlus
Ashley Hughes
Buffy Andrews

Warden
Captain
Lieutenant
Lieutenant
Lieutenant
LRD III
Inspector
LRD
Second Chair
Advocate

For the Union

John Geiger
Thomas Ludwig
Lynnie Birdsong
Christina Sopher
Alisha Kyser
Thomas Cochrane

Grievant
President
Observer
Observer
Registered Nurse
Advocate

Introduction

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/ Mediation Panel between the State of Ohio, Department of Rehabilitation and Correction, hereinafter referred to as the

Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period of April 15, 2009 to February 29, 2012 (Joint Exhibit 1).

At the Arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing the parties were asked by the Arbitrator if they planned to submit post-hearing written closings. The parties submitted written closings in accordance with guidelines established at the hearing.

Joint Issue

Did the Grievant, John Geiger, commit physical abuse? If no, was there just cause for removal?

Joint Stipulations

1. The grievance is properly before the Arbitrator
2. There are no procedural objections
3. Grievant was hired on 09-11-2000 at the State of Ohio, Department of Rehabilitation and Correction
4. Grievant has no active discipline

Case History

John Geiger, the Grievant, was employed at the North Central Correctional Institution (NCCI) on September 11, 2000.

The incident in dispute took place on September 14, 2009. On or about 2:30 PM the Grievant was patrolling the yard when he noticed a group of inmates congregating. He approached the group and ordered them to disperse and produce their identification cards.

All of the inmates complied except for Inmate Brown, who began to curse at the Grievant and refused to show his identification. The Grievant handcuffed

Inmate Brown and began to escort him toward the supervisors' office for disciplinary reasons.

During the escort of the inmate, the Grievant and inmate engaged in a verbal exchange. The Grievant alleged that as they were about to enter a building, the inmate spit in his face, the Grievant continued to escort the Grievant through the double doors. He again alleged that the inmate spit at him as they were about to enter the supervisors' office entrance.

As the protagonists entered the office they continued their abusive verbal exchange. Four supervisors were in attendance and performing their duties: Captain Roy C. Haynes, Lieutenant Ed Bernardo, Lieutenant Brian K. Ash, and Lieutenant Curtis E. Alexander. It appears the Grievant pushed Inmate Brown toward Captain Hayes' desk and the inmate, while still cuffed from behind, fell back onto the desk. The Grievant stated he would beat the inmate's ass as he held the inmate down on the desk.

Lieutenant Bernardo and Lieutenant Alexander intervened by stepping between the Grievant and Inmate Brown. The Grievant continued to try to get at the inmate and was told to calm down. The Grievant began to remove his equipment and yelled at the officers to remove the inmate's cuffs. Lieutenant Alexander held the Grievant's arm; the Grievant then pulled away and told Lieutenant Alexander to, "Get the fuck off of me." The Grievant still made attempts to get to the inmate. Lieutenant Bernardo attempted to restrain him by placing his hands on the Grievant's right arm. As both Lieutenants attempted to remove the Grievant from the shift office, the Grievant refused to relent as he

held onto the desk. He was finally removed from the area by the Lieutenants as each held an arm.

On October 19, 2009, the Grievant was issued a Notice of Disciplinary Action. It contained in pertinent part the following charges:

XXX

You violated the standards of Employee Conduct Rules:

Rule #42: Physical abuse of any individual under the supervision of the department

Rule #44: Threatening, intimidating, coercing, or use of abusive language toward any individual under the supervision of the Department.

XXX

(Joint Exhibit 3)

On October 21, 2009, the Grievant contested his removal by filing a grievance (Joint Exhibit 2). It stated the Employer abused its authority.

Neither party raised procedural nor substantive arbitrability arguments. As such, the grievance is properly before the Arbitrator.

The Merits of the Case¹

The Employer's Position

The Employer opined the Grievant physically abused Inmate Brown. As such, the Arbitrator is precluded, in accordance with Section 24.01, from modifying the imposed termination decision.

¹ The abuse portion of the record and resultant determination will be dealt with initially based on Section 24.01 requirements

The record clearly establishes that the Grievant physically abused Inmate Brown. The Employer defined physical abuse as:

Abuse involving contact intended to cause feelings of intimidation or other physical suffering or harm to include: hitting, slapping, pushing, kicking, misuse of medical/ clinical restraint or inappropriate sanctions; or type of maltreatment that refers to physical acts that caused or could have caused physical injury.

Here, the Grievant intended to cause physical harm by shoving a cuffed inmate onto a desk and holding him down until two Lieutenants got the grievant off the inmate.

Inmate Brown, moreover, was injured as a consequence of the altercation. Medical evidence (Joint Exhibit 3, Pg. 50) and testimony. provided by Registered Nurse Alisha Kyser support this conclusion. Inmate Brown injured his right shoulder when he fell on his cuffed arms. After being evaluated, he was given 400mg of Ibuprofen. He was also advised to take two Ibuprofen tablets three times per day for 5 days. Even though the inmate was not seriously injured, physical abuse did take place. The Grievant's actions were intended to cause physical harm.

Warden Sheldon testified that the Grievant was charged with abuse since he used force outside the guidelines of the Use of Force Policy. AR 5120-0-01 (C)(2) states that:

XXX

(2) Less-than-deadly force. There are six general circumstances in which a staff member may use force against an inmate or third person. A staff member may use less-than-deadly force against an inmate in the following circumstances.

- (a) Self-defense from physical attack or threat of physical harm
- (b) Defense of another from physical attack or threat of physical attack
- (c) When necessary to control or subdue an inmate who refuses to obey prison rules, regulations or orders.

- (d) When necessary to stop an inmate from destroying property or engaging in a riot or other disturbance.
- (e) Prevention of an escape or apprehension of an escapee; or
- (f) Controlling or subduing an inmate in order to stop or prevent self-inflicted harm.

XXX
(Employer Exhibit 2)

Here, less-than-deadly force was not required since none of the articulated circumstances were deemed applicable. The force used was totally unnecessary because the inmate was cuffed with four supervisors in the vicinity. All of the supervisors testified the inmate was not a threat and viewed the Grievant's actions as abusive.

The Employer is not convinced the various defenses raised by the Union are credible. The Grievant justified his actions primarily on allegations surrounding the inmate's spitting activity. Upon entry to the shift office, the Grievant initially spoke to Lieutenant Ash and told him he brought the inmate in because he did not have his ID on and told him to "fuck off." The Grievant only raised the spitting allegation after the incident.

The technique 9 claim is viewed as equally defective. There was no need for this technique since the inmate was cuffed, and cannot be properly applied under these circumstances. Also, having alleged two prior spitting attempts, it makes little sense for the Grievant to have placed his hands on the inmates face while applying a technique 9.

The Grievant's entire version of the contested episode is riddled with inconsistencies. The Grievant provided different and conflicting viewpoints when one compares testimony made during the arbitration hearing; the Grievant's

incident report (Joint Exhibit 3, Pg. 25); his investigatory interview (Joint Exhibit 3, Pg. 17) and the Grievant's pre-disciplinary meeting (Joint Exhibit 3, Pg. 7). These various discrepancies lessen the Grievant's credibility regarding the entire disputed incident.

The Union's Position

The Union opines that the Grievant's conduct did not amount to physical abuse because he did not injure Inmate Brown. The Union defined physical abuse as specified in O.R.C. Section 29.03.33, even though it deals with residential care. It states in O.R.C. Section 2903.33(B):

XXX

Abuse means knowingly causing physical harm or recklessly causing serious harm to a person by physical contact with the person nor by the inappropriate use of physical or clinical restraint, medication, or isolation on the person.

XXX

This definition, by inference, has been accepted by the parties and referred to by arbitrators in their interpretation of Rule 42; the rule allegedly violated by the Grievant. Rule 42 violations, moreover, do not consider situations where inmates could have been injured, but did not realize any injury. Such situations fall under Rule 41 violations.

The Employer failed to provide any coherent explanation regarding its definition of physical abuse. The definition provided at the arbitration hearing mirrored the definition contained in the Pre-Disciplinary Hearing Officer' Report (Joint Exhibit 3, Pg. 9). A definition derived from a number of obscure internet cites.

Warden Sheldon's view of physical abuse further modified the Employer's attempt to define physical abuse. He testified that physical abuse can take place even if an inmate is not injured as long as the circumstances do not dictate the use of less-than-deadly force.

The Union admitted the Grievant mistreated Inmate Brown, and some form of discipline should be imposed. Without a specific injury one cannot characterize the Grievant's actions as physically abusive.

Registered Nurse Kyser's testimony did not support the Employer's assertion. Granted the inmate complained of soreness in his shoulder but was able to exhibit a full range of motion. Nothing in the record established by a preponderance of the evidence that the inmate's sore shoulder could have been caused by the Grievant's actions. In fact, the inmate was involved in a fight (Joint Exhibit 3, Pg. 62) the night before the disputed incident, which could have reasonably caused the sore shoulder.

The Grievant's spitting allegations are credible. Lieutenant Ash's and Captain Haynes' testimonies did nothing to discount this assertion. Haynes was not paying attention to the Grievant's entrance, while Ash noted events failed to provide the Grievant with an opportunity to provide an explanation. Similarly, the Grievant was not inconsistent regarding his method of spit removal. He could have initially wiped the spit off by using his hands, and then after being removed from the office he could have washed his hands with soap and water.

Clearly, the Grievant should be disciplined for a Rule 44 violation. This particular rule, however, does provide for a corrective option rather than removal.

Such an option should be applied here since no injury can be attributed to the Grievant's actions.

The Arbitrator's Opinion and Award

The parties have negotiated certain restrictions on an Arbitrator's authority when adjudicating the abuse cases. Section 24.01 restraints are invoked when a termination case involves abuse of a patient or another in the care or custody of the State of Ohio. If a finding of abuse takes place, an arbitrator is precluded from modifying the imposed termination decision. At this stage of an analysis, therefore, a just cause determination is not appropriate. Rather, a finding of fact involving whether abuse has taken place is required. Mitigating and /or aggravating circumstances and matters regarding procedural due process only play a role if something other than abuse is determined by an arbitrator. As such, traditional just cause principles are held in abeyance pending a finding regarding the abuse allegation.

From the testimony and evidence adduced at the hearing, and a full and complete review of the record, the Arbitrator finds the Grievant's conduct violated Rule 42 of the Standards of Employee Conduct. He knowingly caused physical harm by physical contact with the inmate and his actions injured the inmate.

The facts surrounding the episode were not really in dispute. All of those involved acknowledged that the inmate was handcuffed from behind and was not a direct threat to the Grievant and other officers in the shift office. Granted, both the Grievant and the inmate were innately arguing upon their entrance into the shift

office. Arguments and abusive language exchanges took place throughout the incident.

Those individuals who observed the remaining portion of the incident acknowledged that the Grievant attacked the inmate by pushing him onto Captain Ash's desk. This misconduct is especially upsetting since the inmate was still handcuffed from behind when the shove took place. The Grievant then held the inmate down on the desk and continued his rant about beating his ass. After a few moments, Lieutenants Bernardo and Alexander had to separate the Grievant from the inmate because the Grievant refused to comply with an order to get off the inmate.

The inmate was indeed injured as a consequence of the Grievant's misconduct. Testimony provided by Nurse Kyser indicated the inmate's shoulder was injured requiring extended medication for pain. She, moreover, noted that the injury more than likely took place because the inmate was handcuffed from behind when he was pushed/shoved and pounced upon.

The type of proven misconduct discussed in this Opinion and Award cannot be tolerated by the parties. When bargaining unit members engage in acts similar to those engaged in by the incarcerated population order has to be restored. The fury and intolerance exhibited by the Grievant indicate he can no longer be trusted to engage in correction activities. To allow his return to work would jeopardize the mission of the Department of Rehabilitation and Correction, and the safety and health of fellow bargaining unit members and inmates.

Opinion

The grievance is denied.

August 27, 2010
Chargin Falls, Ohio

Dr. David M. Pincus
Arbitrator