

#2092

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANT: ANDRE BATTLE
CASE NO.: 27-20-20100225-0095-01-03

THE STATE OF OHIO, DEPARTMENT :
OF REHABILITATION AND :
CORRECTION :

The Employer :

and :

OPINION AND AWARD

THE OHIO CIVIL SERVICE :
EMPLOYEES ASSOCIATION, :
AFSCME LOCAL 11, AFL-CIO :

The Union :

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APPEARANCES

For the Employer:

Allison Vaughn, Advocate
Ashley Hughes, Second Chair
Joe Trejo, Second Chair
Buffy Andrews, Observer
Janet Tobin, Mansfield LRO
Antwan Booker, Intern
Derek Lathan, Witness (Inmate)
Marc Barclay, Witness (Inmate)
Hazel Kinsel, Witness (Correction Officer)
Lt. D. Minard, Witness
Michelle Moritz, Use of Force Committee Chair
Charles Bradley, Deputy Warden of Operations

For the Union:

Donald Conley, Operations Director
Butch Wylie, Staff Representative
Doug Mosier, Local Chapter President
Andre Battle, Grievant
Jim Beverly, Sr., Staff Representative
Carl VanBibber, Steward
Jade Wojciechowski, Witness
Matt Johnson, Witness
Dan Clevenger, Witness
Jason Butler, Witness
Jeannie Berry, Witness

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having been unable to resolve this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on June 10 and July 19 and July 20, 2010, at the conference facility of the Mansfield State Reformatory in Mansfield, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and sequestered; and that post hearing briefs would be filed. It was upon the evidence and argument that this matter was heard and submitted and that this Opinion and Award was thereafter rendered.

II. VIEWING THE PREMISES

The entire entourage of people present went into the pod in which the incident involved in this particular matter took place. That group of people involved the grievant, his representative, the State of Ohio and their advocates as well as the undersigned. The complainant was also present as were others who testified in the matter including several corrections officers and the complaining party. Both parties agreed that this view of the premises should take place and it was with the consent of the arbitrator that it did. There was no complaint made by anybody concerning this particular activity.

III. CHANGE OF ADVOCATES

During the course of the first day of hearing (June 10, 2010), the chief advocate for the grievant suffered a medical problem causing the hearing to be continued from that date, i.e. on June 10, 2010. The parties thereafter along with the arbitrator suggested several dates and finally it was agreed upon that July 19 and July 20, 2010 would be the continuation dates of hearing. At hearing, the grievant was questioned as to whether or not he felt comfortable with his new advocate and whether or not he felt any of his due process rights were violated. The grievant agreed that the matter should go forward; that he was satisfied with his new advocate; and that he received, in his mind, full due process.

IV. STATEMENT OF FACTS

By the grievant's own admission he was a corrections officer for a period of ten years, having transferred from the Lorain jail to the Mansfield State Reformatory. At the time he entered the service at Mansfield State Reformatory and on a sign-off of January 12, 1998, the grievant received training. Among that training was the block of instruction concerning searches of cell blocks and housing units with directions on how to accomplish that. The lesson plan concerning the basic pre-service training at Mansfield had a section in it entitled Searches of Cells Blocks or Housing Units. It is noted in that lesson plan and presentation guide that the following is stated:

“E. Searches of Cell Blocks or Housing Units:

1. A search of a housing unit is primarily designed to:
 - a. Uncover contraband
 - b. Prevent escape
 - c. Maintain sanitary standards
 - d. Eliminate fire and safety hazards

2. When conducting a cell or dormitory search the following procedures should be followed:
 - a. When conducting a cell search, the inmate should always be removed from the cell. Search the inmate thoroughly, and place under supervision while the cell is being searched.” (emphasis ours)

The current contract of collective bargaining under which this matter arose contained at Article 24 the following language:

“ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by ORC Section 3770.02(1).”

It might be noted that the contract of collective bargaining at Section 24.02, entitled

Progressive Discipline, contains language which is pertinent to the matter at hand. That paragraph in full states the following:

“24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- d. One (1) or more oral reprimand(s) (with appropriate notation in employee’s file);
- e. One (1) or more written reprimand(s);
- f. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.

- g. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer.

- h. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer’s decision to begin the disciplinary process.

The deduction of fines from an employee’s wages shall not require the employee’s authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

- 1. Actually having the employee serve the designated number of days

- suspended without pay;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.”

Also pertinent to the matter at hand are Rules 38 and 40 found in the Standard of Employee Conduct effective November 1, 2009. Rules 38 and 40 are revealed as follows:

- “38. Any act, or failure to act, or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public.
40. Use of excessive force toward any individual under the supervision of the Department or a member of the general public.”

It is noted in each of the disciplinary grid rules that removal is available to management on the first event of a violation of either of the rules. It is noted that the rules were unilaterally promulgated by the employer.

Evidence in this particular matter revealed that the grievant caused a shakedown of the cell of an inmate with whom he had had some prior history. As a result of that activity, this grievant received his termination notice from management which revealed the following:

“NOTICE OF DISCIPLINARY ACTION

February 9, 2010

Andre Battle
200 Cleveland Ave.
Mansfield, OH 44902

Dear Andre Battle:

Pursuant to the authority granted in the Collective Bargaining Agreement between the State of Ohio and AFSMCE/OSCEA contract, this letter is to advise you that you are **REMOVED** from your position of Correction Officer.

Effective:

You are to be removed for the following infraction(s):

On or about 9/20/2009 you were scheduled as relief and assigned as the Area Control Officer in 3C. You were involved in a physical altercation with Inmate Lathan. You stated the following regarding the incident: you entered Inmate Lathan's cell to conduct a shakedown; the inmate grabbed the bed and cabinet and refused to allow you to shakedown the cell; you issued several orders to the inmate to move and he refused; after several direct orders you pushed the inmate backward; the inmate then "charged" at you and you placed him in a "headlock". Per policy staff confronted with a situation must consider in part whether the situation can wait for other staff before responding. You had the opportunity to have the inmate leave the cell prior to your entering, you did not. Officer Kinsel stated that Inmate Barclay saw you enter Lathan's cell. Officer Kinsel had Inmate Barclay "open the door of that cell so I could see in." At the point that you knew the inmate was not complying with your orders, you had the opportunity to step out of the cell, secure the door and request assistance from other staff, rather than engage the inmate in a use of force.

The Response to Resistance Continuum states that staff shall choose the necessary response to gain control of the situation based on policy, their physical capabilities, perception, training and experience. You are trained and experienced with unarmed self defense techniques and use of force

policies. Inmate Lathan is approximately 5'4" and 162 lbs. compared to your approximate 6'2" and 240 lbs. During the Pre-disciplinary Conference you stated that you "thought it was funny because the inmate was short and being very bold." The resistance you described was that the inmate grabbed the bed and cabinet and when he jumped off the bed to take this stance he "collided" with you. This "resistance" by the inmate does not necessitate the level of force used therefore; the force you used was excessive and unjustified.

Your actions constituted a threat to the security of the facility, staff and individuals under the supervision of the Department. The excessive and unjustified force was observed by a Correction Officer and at least two inmates. The inmates and the Officer were yelling for you to stop. This incident could have escalated had the inmate observers initiated actions to assist inmate Lathan.

This is clearly a violation of **Rule 38 and 40** of the Standards of Employee Conduct. Pursuant to the AFSCME/OCSEA contract, Article 25.07, you may choose to grieve this disciplinary action. You must file a grievance through your union representative within fourteen (14) calendar days of notification of this action.

<u>/s/ Keith Smith</u>	<u>2-10-2010</u>
Keith Smith	Date
Warden	

<u>/s/ Khelleh Konteh</u>	<u>2/19/10</u>
Khelleh Konteh, North Regional Director	Date

Erine L. Moore/KK	2/19/10"
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To that a grievance was filed. That grievance stated the following:

"Contract article(s) allegedly violated:

§ 24.01, 24.05, and all other pertinent(sic) sections of the OCSEA Local 11 contract

Dispar Treatment

Statement of facts (who, what, where, when?): The grievant/union hereby grieves the attached removal imposed on grievant, effective 2/25/10. The discipline imposed is (✓) without just cause; (✓) not progressive; (✓) not commensurate to the offense; (✓) excessive; (✓) disparate by comparison with other disciplines involving other employees in similar situations; (✓) imposed without taking extenuating or mitigating circumstances into consideration; () imposed solely for punishment; () imposed more than forty-five days after the predisciplinary conference; and thus in violation of the negotiated collective bargaining agreement between the state of Ohio and the Ohio Civil Service Employees Association Local 11, AFSCME AFL-CIO.

() See also, attached page(s).”

The remedy sought by the union and grievant revealed the following:

“**Remedy sought:** Expunge/reduce removal; pay grievant appropriate backpay to include regular pay, lost overtime, holiday pay, etc.; post leave accruals grievant would have accrued; remove discipline from personnel file; and otherwise make grievant and union whole.”

There was a Step 3 response by the employer and it revealed the following:

“www.drc.state.oh.us

STEP 3 RESPONSE

Grievance # 27-20-20100225-0095-01-03

Andre Battle

April 6, 2010

A grievance was filed by the above-named in accordance with Article 25 of the Collective Bargaining Agreement between the State of Ohio and OCSEA/AFSCME, Local 11. Therein, it is alleged that Articles 2, 24.01 and 24.05 were violated.

A Step 3 Hearing was held on March 11, 2010 at Mansfield Correctional Institution (ManCI). Doug Mosier, Chapter President and Jim McElvain were present on behalf of the Union. Janet Tobin was present on behalf of Management.

To the question of procedural objections, the Union/Management had none and the hearing was considered properly constituted.

Facts: The Grievant was removed from his position of correction officer on or about February 25, 2010 for violation of SOEC Rules 38 and 40.

Union Contention: The Union contends that the discipline was issued without just cause, not progressive, not commensurate to the offense, excessive, disparate, and imposed without taking mitigating circumstances into consideration. The Union contends that there were many procedural errors throughout the process which were grieved separately but include: having a different steward when he signed his invest from when he was interviewed, and having different case numbers referenced in the use of force report. The Union contends that other staff, the Grievant's partner, failed to assist him per policy but was not disciplined. The Union contends that the Grievant's partner was not doing her job, but allowed an inmate to do it; she had the inmate open the cell door, which she should have done. The Union contends that she ran away when she left the area to go unlock the inner door which could be accessed through Control Center 1. The Union contends that the Grievant only used enough force necessary to control the situation. The Union contends that the inmate whose cell the Grievant was trying to search was subsequently found with a cell phone in his possession. The Union contends that the Grievant was not treated the same as other similarly situation officers, specifically Officer Gray, who only received a two day working suspension.

The Union seeks as remedy: Expunge/reduce removal; pay grievant appropriate backpay to include regular pay, lost overtime, holiday pay, etc.; post leave accruals grievant would have accrued; remove discipline from personnel file; and otherwise make grievant and union whole.

Discussion and Findings: Having reviewed the grievance and having heard Step 3 testimony, the following represents the findings of the Step 3 Meeting Officer. With respect to the procedural issues raised by the Union, the different case numbers referenced in the UOF report was a typographical error, having a different steward when signing an investigatory interview is not prejudicial-the Grievant had the ability to

review and/or amend his invest. Given the totality of the circumstances, non-disciplinary action was not inappropriate for the Grievant's partner. Finally, with respect to disparate treatment, the Union failed to identify individuals who were similarly situated to the Grievant; Officer Gray was not similarly situated. The discipline was issued for just cause and commensurate with the offense. There is no contract violation. This grievant is denied at Step 3.

Signed,

/s/ Allison Vaughn
Allison Vaughn
Labor Relations Officer

For the Director,

/s/ Alan Lazaroff/RA
Alan Lazaroff, Chief
Bureau of Labor Relations

CC: OCB, LRO, Union, File"

The use of force statement that triggered all of this activity and executed by the complainant, inmate Lathan, revealed the following:

"Officer Battle came in keyed the door open & told me "You switched for the last time. I was standing next to the bed. Battle came in. He gave me no direct orders. He grabbed me by my neck with his right hand. I call for Inmate Barclay to get Officer Kinsel. Battle put me in a headlock & threw me around. He was leaning on me. He said "This aint over, this is going to the sheet." Kinsel was there and kept telling Ofr. Battle to stop. I tried to lean back to hold myself against the bed so I wouldnt end up on the ground & Officer Battle slammed me against the lockbox. Officer Minard told Battle to stop several times. Officer Butler was about to come in to spray me. Officer Kinsel instructed Butler not to spray me "Don't spray Lathan - Get Battle" & Lt. Minard instructed Officer Battle to get out. Ofc. Battle let go & began looking around the room. I asked Lt. Minard to get my legal work. Battle took all my legal work & the litigation I have against him. Lt. Menard retrieved it. When I was being taken out I saw inmate Barclay telling Officer Clevinger (in the shack) "They are killing him."

The investigation summary prepared by the employer revealed the following:

“RE: Employee: Andre Battle

Date of Infraction: 9/20/09

Summary of Allegation: An incident report was generated from officer Kinsel stating that officer Battle suddenly put inmate Latham 372-672 in a headlock and then by the throat during a routine shakedown of his cell. It was also indicated through a Use of Force Committee Report that the force used was not justified and inappropriate or excessive.

Facts of Investigation:

Officer Battle was involved in a physical altercation in which officer Kinsel and other inmates witnessed Officer Battle grab the inmate by the throat unnecessarily. Officer Battle stated in his Incident Report that the inmate tried to block him from shaking his cell down and that he gave the Offender several direct orders to move before contact was made. Although, during the audio taped interview, he did not state that any direct orders were given and that the Inmate had collided into him before force was used. These two facts are contradictory but Battle contends that both statements are true.

CONCLUSION OF SUPERVISOR/INVESTIGATOR:

NO Further Action Recommended

Further Action Required”

Also part of this record is a write-up by Officer Kinsel. Correction Officer Kinsel had been working in the pod and the grievant had been assigned with her in the pod also on the date in question. The following is a summary statement of Officer Kinsel who testified. Her testimony echoed the summary statement revealed herein:

“Officer H. Kinsel stated I arrived at the pod. C/O Battle had gone to the upper range where he shook down cells. I did a round in the lower range. I saw Lathan laying in the top bunk watching football. He waved. Barclay told me Battle is going into Lathan’s cell. I asked Barclay to go open the door. Lathan was yelling Ms. Kinsel you gotta come here. I went to the cell. I heard no verbal interchange. Inmate Lathan was standing facing out with one hand on the bed frame and one hand on the dresser. C/O Battle was standing in front of him, facing him. Inmate Lathan said Battle was not to be near him or his property. Inmate Lathan dropped his hands and stepped towards his bed. His back was toward Battle. C/O Battle put him in a headlock. He took his left arm and put it around Lathan’s head. The inmates yelled for Battle to stop. I yelled for Lathan to stop struggling. I pushed my man down. I ran and unlocked the main door. Lathan was by the door frame grabbing for the door. I told Lathan to stop and I tried to grab him. Battle still had a hold of him. C/O Butler and Clevenger came in. Butler had OC. Lt. Minard came in. Lathan said I comply, I comply. Officers took Lathan. The Lt. told me he needed an incident report. He told me to calm down. C/O Battle had Lathan’s paperwork in a mesh bag. Lt. Minard took it. I filled the incident report out right away. Note-Officer Kinsel’s Incident Report states “C/O Battle suddenly grabbed I/M Lathan and put him in a head lock and then moved his hand to Lathan’s throat. Inmate Lathan was struggling to get away.”

Evidence further revealed that a lawsuit had been filed prior against Officer Battle who is the grievant in this particular case by the complainant, namely Derek Lathan. The lawsuit was filed in the United States District Court, Northern District of Ohio several months prior in time to the incident herein. Another fact in this matter is that the grievant weighs 240 pounds and is 6' 2". The complainant, Lathan, is 162 pounds and 5' 4".

Further facts revealed that the corrections officer, Kinsel, testified that she actually saw the complainant being lifted up with the grievant’s hand around his neck. The grievant contested the accuracy of Kinsel’s statement but did not deny that he didn’t follow the written procedures for

searching a cell which is revealed in the procedures that he was given at the time he started employment at Mansfield State Reformatory. The grievant stated that he had no animosity toward Lathan; that he did not in any way injure Lathan; that his activity was not meant to inflict any punishment of a physical nature upon Lathan; and that when he, the grievant, entered the cell he was pounced upon by Lathan even though he had given Lathan some orders of moving toward the back of the cell. The grievant at no time was asked to remove himself from the cell as the regulation demands.

The evidence revealed that the complainant, Lathan, was in fear of his life because of the grievant and his activity at the time complained of. The record is replete with allegations of excessive force, those allegations being made by the complainant, by another inmate who was at the scene and by Kinsel. All of this was denied by the grievant in this matter.

It was upon this multitude of facts that this matter rose to arbitration for Opinion and Award.

V. OPINION AND DISCUSSION

The grievant in this matter was employed as a corrections officer. He has access to prisoners and their cells during the course of his duty. He may on occasion search the cell and pad down the prisoner. There appears to be a certain procedure that is followed and the grievant did not follow it. The procedure was set out to the grievant as early as his first day of duty at the Mansfield State Reformatory and he said at hearing that he never heard of it. The fact of the matter is that a sign-off sheet by the instructor and the activity instructed was made part of the record, and, as such, it was

stated herein as being very important. In that regard, the grievant's credibility is highly suspect in his denial of ever receiving any training concerning the proper procedure in searching a cell.

Another important part of this particular situation is that the size of the participants in the altercation in the complainant's cell. The grievant was 80 pounds or thereabouts heavier than the complainant and about 7 inches taller. The allegation by Corrections Officer Kinsel that the grievant lifted the complainant up by the neck is not out of the realm of reality given the size of the parties. It appears that there was a confrontation between the grievant and the complainant when the grievant entered the cell. There is no doubt that the grievant, because of his size, was the easy victor between the parties. The grievant said he was physically confronted. That statement is hard to believe given the size of the parties and the small quarters in which the altercation took place. Simply put, the grievant did not follow the procedures of patting down a cell and, as such, found himself in an altercation which triggered his termination of seniority at the facility.

There is no doubt in this writer's mind that the grievant was involved in the use of severe excessive force, an activity which is ruled against in the rules circumscribing the conduct of a corrections officer employee. It is noted that the rule book under which this matter took place is unilaterally promulgated but the union made no claim and offered no evidence that the rules were unpublished, unreasonable or not uniformly applied. From all of that I must conclude that the rules of 38 and 40 which form the basis for removal in this case were considered published, reasonable and uniformly applied. As such, the grievant was in clear violation of those rules in that he exhibited severe excessive force contrary to the rules.

It might be noted that the contract as well as the rules promote progressive discipline. However, when the activity of the grievant is such that the activity is grossly substandard, progressive discipline does not apply. In this case there was a possibility of serious injury occurring because of the severe excessive force that was described in this particular matter. The grievant denied that excessive force but as I indicated earlier his credibility is highly suspect.

The progressive discipline indicated in the contract cannot overcome the activity of the grievant. Progressive discipline does not apply in a grossly severe dangerous activity and it is one of those grossly substandard conduct acts that caused the removal in this matter.

The writer herein has reviewed all of the exhibits in the file. Also reviewed were the notes concerning the testimony of the witnesses. Also reviewed were the briefs of the parties.

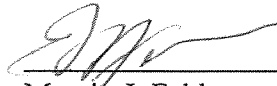
Witnesses testified as to the correct procedure involved in searching a cell and inmate. The grievant not only did it improperly, the grievant did not tell the truth as to whether or not he was instructed to do the procedure in a particular way. Witnesses testified that they knew of the proper procedures and that they used them. There is good and sufficient evidence in the file to cause me to believe that the grievant inappropriately attacked a prisoner as the evidence candidly reveals.

The testimony is what it is. Some of the people testified that they didn't see anything. Others testified that they saw the grievant mistreating the complainant. Others testified that there had been hard feelings between the complainant and grievant. Others argued that the corrections officer was

a bully. It depends who you listen to and who you believe. In this particular case, it is my belief that the grievant was involved in severe excessive force towards an inmate, and, as such, does not belong on the payroll of this employer.

VI. AWARD

Grievance denied.



Marvin J. Feldman, Arbitrator

Made and entered
this 6th day
of September 2010.