**OCB AWARD NUMBER: 2143**

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| **SUBJECT:** | **ARB SUMMARY # 2143** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **27-35-20101029-0352-01-03** |
| **DEPARTMENT:** | Rehabilitation and Correction |
| **UNION:** | OCSEA |
| **ARBITRATOR:** | Susan Grody Ruben |
| **GRIEVANT NAME:** | Rock Nissen |
| **MANAGEMENT ADVOCATE:** | Allison Vaughn |
| **2ND CHAIR:** | Jackie Milsom  |
| **UNION ADVOCATE:** | James Hauenstein  |
| **ARBITRATION DATE:** | June 7, 2011 |
| **DECISION DATE:** | September 21, 2011 |
| **DECISION:** | Grievance is Modified |
| **CONTRACT SECTIONS:** | Article 24—Discipline |
| **OCB RESEARCH CODES:** | 118.301—Progressive Discipline; 118.6896—Excessive Force; 118.01—Discipline-In General  |
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**HOLDING: Grievance is MODIFIED. The Arbitrator reduced the removal to a two day suspension with full back pay minus the two day suspension. This ruling was based on the fact that there was no conclusive evidence that the Grievant and the inmate had fully disengaged when the Grievant struck the inmate while the inmate was being subdued by other Correction Officers. Also, there was no prior discipline and the discipline grid provides for a two day suspension on a first offense.**

The Grievant was hired on October 16, 2000, and was removed on October 29, 2010. At the time of his removal, the Grievant had no active discipline.

On April 7, 2010, the Grievant was working first shift and stopped Inmate W on the way to early chow, because Inmate W did not have an early chow badge. After warning Inmate W to not proceed, The Grievant placed the back of his hand on Inmate’s W shoulder and Inmate W turned suddenly and punched the Grievant in the face. The Grievant punched Inmate W in response and more punches were thrown before two other Correction Officers broke up the incident. As Inmate W was on the ground and was being handcuffed, the Grievant punched Inmate W in the face. The Grievant was placed on paid administrative leave the same day. The Grievant was removed for violating Rule 40: Use of Excessive Force.

The Employer arguedthat removal was appropriate rather than a two-day suspension, because the Grievant had disengaged and then reengaged when he knelt down and punched the prone Inmate W in the face. The Grievant was removed due to his conscious decision to reengage and administer the last punch. Disengaging and reengaging is more serious than applying extra force as a result of an adrenaline rush or of frustration. The Grievant’s anger is not a mitigating circumstance.

The Union arguedthe Grievant’s actions during the incident were part of a use of force authorized by Ohio law. Also, Inmate W was not fully subdued when the Grievant struck him on the floor. The Union believes the Grievant’s judgment was impaired due to having been punched by Inmate W. There was no just cause for the removal, and the Grievant should be reinstated and made whole.

The Arbitrator foundthat the Employer had just cause to discipline the Grievant for Use of Excessive Force when he punched Inmate W while the inmate was being cuffed by another Correction Officer. Without a videotape, however, it is impossible to completely and accurately reconstruct exactly what took place during the incident. A two-day suspension is appropriate given the lack of certainty as to whether the Grievant actually disengaged then reengaged the Inmate. Also, the Grievant did not have active discipline on his record at the time of the incident.

The discipline grid calls for a two day suspension up to removal for this offense. The discipline was modified to a two-day suspension with full back pay minus the 2 day suspension and reinstatement of all other benefits to which the Grievant is entitled.