**OCB AWARD NUMBER: 2208**

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| **SUBJECT:** | **ARB SUMMARY # 2208** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **27-25-20121004-0110-01-03** |
| **DEPARTMENT:** | **Ohio Department of Rehabilitation and Correction** |
| **UNION:** | **OCSEA** |
| **ARBITRATOR:** | **Thomas J. Nowel** |
| **GRIEVANT NAME:** | **Shannon Bear** |
| **MANAGEMENT ADVOCATE:** | **Garland Wallace** |
| **UNION ADVOCATE:** | **Dave Justice** |
| **ARBITRATION DATE:** | **3-27-2013** |
| **DECISION DATE:** | **5-16-2013** |
| **DECISION:** | **MODIFIED**  |
| **CONTRACT SECTIONS:** | **Article 24.01-Standard Article 24.02- Progressive Discipline Article 24.06- Imposition of Discipline**  |
| **OCB RESEARCH CODES:** | **Burden of Proof 118.315- Dishonesty in General 118.6481- Excessive Use of Force 118.6496**  |

**HOLDING: Grievance MODIFIED. The Arbitrator found that under Article 24 of the CBA, the grievance should be modified from a termination to a five day disciplinary suspension. There was not clear and convincing evidence that the Grievant used excessive force on an inmate. Therefore, the Grievant did not violate Rule 40 of the Standards of Employee Conduct. However, the Arbitrator concluded that the Grievant violated Rule 24 by failing to describe the incident in his report.**

Grievant was employed as a Sergeant/Correctional Counselor at the Southern Ohio Correctional Facility. This facility is a maximum security prison. The situation in question involved an inmate named Nagle. Nagle punched a Correctional Officer through the bars of his cell. Subsequently, the inmate was placed in handcuffs and moved to another location. As Inmate Nagle was walked to another location, it is alleged that the inmate resisted. During this alleged resistance, the Grievant delivered three strikes with his boot to the inmate’s head and shoulders. The inmate was restrained. One nurse reported that the inmate suffered no injuries while another nurse reported observable injuries. At a later time, the Grievant made a brief statement which did not include his use of force. After viewing a video of the incident, the Grievant wrote an amended incident report which included a description of his actions. The Grievant was placed on administrative leave later that day and terminated from employment on October 3, 2012.

The Employer argued that their termination of the Grievant was for just cause. The Employer contended that the Grievant acted outside of policy and exerted his own brand of punishment by striking an inmate with the heel of his boot three times to the shoulder and face. Additionally, the Employer asserted that the Grievant’s reports regarding this incident were neither forthcoming nor truthful. The first report did not describe the force that the Grievant used. The Employer claimed that the force used by the Grievant was excessive and in violation of Rule 40. Furthermore, such actions by the Grievant were egregious violations. The Employer contended that the inmate did not act in a manner which would justify the Grievant’s force. Therefore, the Employer argued that this grievance should be denied as the Grievant was terminated from employment for just cause.

The Union contended that the Employer’s termination of the Grievant was without just cause. The Union argued that the Grievant had been employed for nearly seventeen years and has no record of discipline. The Union asserted that the Grievant allowed the Inmate Nagle time to comply with verbal orders before striking the inmate. Furthermore, the Union claimed that the Grievant did not stomp the inmate. Instead, the Grievant was trying to move the inmate’s face away from another CO, as the inmate was trying to bite that CO. Additionally, the inmate did not suffer significant injury or harm. The Grievant only used the kicking motion because he was standing at the top of the stairwell above the inmate and CO. Therefore, the Union argued that the termination of the Grievant was not for just cause and the grievance should be granted.

The Arbitrator noted that the video is not clear. The evidence cannot determine whether the Grievant was attacking with excessive force or stopping the inmate from biting another CO. Additionally, the Arbitrator stated that the video shows no indication of serious injury to the inmate’s face. Furthermore, the testimony of one of the nurses indicated that the Grievant did not cause any injury to the inmate. The Arbitrator declared that another nurse examined the inmate later in the day and noticed injuries. However, those injuries could not undeniably be attributed to the Grievant. Based on the lack of conclusive evidence from the video and no witnesses to support the Employer’s contentions, the Arbitrator found that there is no clear and convincing evidence to sustain the charge of excessive force and a violation of Rule 40. However, the Arbitrator noted that the Grievant admitted to violating Rule 24 by failing to describe the take down of the inmate and the actions used. Therefore, the Arbitrator found that the termination should be modified to a five day disciplinary suspension.