

Decision and Award in the Matter of Arbitration between:

**State of Ohio
Department of Rehabilitation
Ohio Reformatory for Women**

and

**Ohio Civil Service Employees Association
Local 11, AFL-CIO**

Grievance #: DRC - 2018- 02319-03

Grievant: Shavelle Little

Arbitrator: Jack Buettner

Date of Hearing: March 5, 2019

Date Briefs Received: April 5, 2019

Date Decision Issued: May 20, 2019

Advocate for the Employer:

James Adkins
Labor Relations Officer 2
Department of Rehabilitation and Correction
1479 Collin Avenue
Marysville, Ohio

Advocate for the Union:

Derek Urban

OCSEA, Local 11, AFSCME
390 Worthington Road, Suite A
Westerville, Ohio 43082

By Mutual agreement the Hearing was convened on March 5, 2019, at 9:00 AM. The Hearing was held at the Ohio Reformatory for Women in Marysville, Ohio. Jack Buettner was selected by the parties to arbitrate this matter as a member of the panel of permanent umpires pursuant to Article 25 of the Collective Bargaining Agreement which is effective from May 12, 2018 through February 28, 2021.

The parties each stipulated to the statement of the issue, a series of background facts, and the admission of joint exhibits. The parties have also agreed to the arbitration of this matter. No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is now properly before the arbitrator for a determination of the merits.

In attendance for the Employer:

James Adkins	LRO 2
Garland "Eddie" Wallace	LRO 3
Chris Haselberger	LRO 3 (OCB)
Ronette Burkes	Warden
Cynthia Bartlett	Records Supervisor
Shelby King	Lieutenant
Dawn Murray	Chief Medical Officer
Elaine Hannah	LPN
Jennifer Bowerman	Med. Ops Manager
Amanda Warner	LPN
Athena Brown (by phone)	LPN

In attendance for the Union:

Brett Gaines	Chief Union Steward
Derek Urban	Advocate
Shavelle Little	Grievant
Melissa Robins	
Scott Dye	Sergeant

The parties were asked to submit exhibits into the record.

The following were submitted as Joint Exhibits:

Joint Exhibit #1	Grievance Trail
Joint Exhibit #2	Discipline Trail
Joint Exhibit #3	Management Investigation
Joint Exhibit #4	Standards of Employee Conduct
Joint Exhibit #5	Collective Bargaining Agreement between the State of Ohio and the Civil Service Association May 12, 2018 - February 28, 2021

The following were submitted as Union Exhibits:

Union Exhibit #1	Ohio DAS: Grievance Information
Union Exhibit #2	Grievance Withdrawal Form (OCSEA)
Union Exhibit #3	Inter-Office Communication: Post Restriction
Union Exhibit #4	Inmate Statement- 2/28/2019
Union Exhibit #5	DRC Concealed Carry Handgun Notice and Acknowledgement

The following were submitted as Management Exhibits:

Management Exhibit #1 Notice of Disciplinary Action: 10/17/2017

Background:

The Grievant, Correction Officer (CO) Shavelle Little, was hired at the Ohio Reformatory for Women (ORW) on July 22, 2013. She had almost five (5) years of seniority at the time of her removal. The incident in question occurred on February 14, 2018, while the Grievant was working in the infirmary. A verbal altercation between the Grievant and Licensed Practical Nurse (LPN) Athena Brown ensued. As a result of this incident, the Grievant was removed from service on July 16, 2018.

Issue:

Was the Grievant removed from her position for just cause? If not, what shall the remedy be?

Employer Position:

The Employer contends that the Grievant was terminated for just cause based on an incident that occurred on February 14, 2018. The Grievant was working in the infirmary. LPN Brown needed assistance with an inmate who had head lice and asked the Grievant to call for an inmate to help. The Grievant became irritated with LPN Brown and a verbal altercation ensued. The Employer contends that the Grievant began swearing at the nurse and threatened her by saying, "Brown, I can tear this place up. You know what I am capable of." LPN Brown felt her safety was in jeopardy after this event. An investigation ensued and the Grievant was terminated for violating Rule 18 of the Standards of Employee Conduct Performance Track:

Threatening, intimidating or coercing the public, volunteers, contractors, any individual under the supervision of the Department of fellow employees.

The Employer called many witnesses to support their position. Warden Ronette Burke testified to the Department of Corrections' zero-tolerance policy on workplace violence which includes non-physical violence such as direct or indirect threat of physical harm. She also testified that she had met with CO Little on several occasions dating back to 2014 concerning her anger issues.

Workplace Violence Coordinator Cindy Bartlett investigated the case and interviewed several inmates who were present. Inmate Mansfield told her the grievant was the aggressor though she could not hear the threat. Inmate Mansfield also stated that the Grievant coerced other inmates to write statements. Inmates Preston, Gallagher, Robins, Schuster, and McSwain were present but too far away to hear. After the investigation, Ms. Bartlett concluded there was workplace violence and that the incident was a Level 2 on the Workplace Violence Grid. Ms. Bartlett also testified that she conducted a total of five (5) workplace violence investigations on the Grievant.

The next witness, Lieutenant Shelby King, testified that the Grievant worked for her and did a good job.

Dr. Dawn Murray was present at the time of the incident. She could not see the Grievant but could hear the exchange. She testified that LPN Brown was communicating in a normal tone of voice, asking the Grievant if there was something wrong. The Grievant shouted back about not wanting to get in the middle of things, used vulgarity, and ended by saying, "... Stop. I will fucking rip this place up and you know I will." Dr. Murray stated that LPN Brown entered her office and was shaken by the incident.

LPN Hannah testified that she, too, heard the Grievant shouting at LPN Brown in a similar vein as above. She also testified that Nurse Brown kept her distance from the Grievant and was visibly shaken by the incident.

Jennifer Bowerman, the Medical Operations Manager, testified that she checked on LPN Brown after being notified about the incident. She talked to Nurse Warner, Nurse Brown, and Dr. Murray and they all appeared upset. Ms. Bowerman asked them to write up incident reports.

LPN Amanda Warner testified that she overheard the altercation between LPN Brown and the Grievant. The Grievant stated, "You know me, Brown. I will tear this mother fucking infirmary up, blow this motherfucker with a bomb."

LPN Brown testified via phone. She confirmed what was in her written statement. She confirmed she asked the Grievant to call for inmate help for an inmate with lice. She did not realize that this was no longer done. She asked the Grievant if there was something

wrong. The conversation escalated with the Grievant getting angry and saying she would tear the place up. LPN Brown felt the Grievant's behavior was very threatening. The grievant was placed on post restrictions.

Five (5) different people felt threatened, intimidated or coerced by this incident and the Grievant's actions. The Employer felt justified in terminating the Grievant since the discipline issued follows progressive discipline as outlined in the Standards of Employee conduct. Management records this as the third offense for the Grievant which calls for Removal.

Union Position:

The Union contends that the Grievant was not terminated for just cause and should be reinstated to her position as CO. The incident in question started as a request from LPN Brown to the Grievant to call for assistance from an inmate porter to deal with a case of lice. The Grievant was informed that inmates could not perform that task and told LPN Brown that after she had completed her round. The Grievant stated that Nurse Brown seemed upset and agitated. The Grievant was asked to call the ARN-2 housing unit to see if they could send someone. The Grievant was told again that inmates could not perform that task. CO Little approached LPN Brown who was in Dr. Murray's office to tell her this.

After informing Nurse Brown that porters would not be coming to help her, LPN Brown started questioning the Grievant. She asked CO Little if something was wrong and if she had an issue with her (Brown). The Grievant stated she did not want to be "in the middle" of the situation, i.e. trying to get inmates to help remove lice, and the argument escalated. The Grievant walked away and told LPN Brown to "Stop." Testimony by multiple parties corroborates that the grievant asked Nurse Brown to stop several times. The Union further states that Brown reinitiated conversation with the Grievant, not vice versa.

The Union contends that testimony by LPN Hannah, which Management used to support their contention of threatened violence, is uncorroborated. While she stated she heard the argument, she also stated she saw CO Little follow LPN Brown. Video evidence does not show LPN Hannah at the scene. The Union also questioned LPN Warner's statement. She was the only witness to have heard CO Little say anything

about a bomb. The medical staff, by their own admission, had the opportunity to discuss the events among themselves. Further, statements about the investigation were not taken until 3/6/18, almost three (3) weeks later. The Union believes their testimonies are biased in support of the medical staff and that corroboration took place.

The summary statement from Cynthia Bartlett, the investigator, supports the Union's position that CO Little did not present a high level of threat. Ms. Bartlett, using the workplace violence grid (Joint Exhibit 1, Appendix B) identified the situation as a Level 2 which is classified as "Low" threat level.

Further, the Union contends that the actions taken as a result of the incident were not consistent with what the medical staff stated was a dangerous and threatening environment. No Employee used their "man-down" device which is an alarm used when someone's safety is threatened. No one emerged from their office to investigate or de-escalate the situation. The inmates seem undisturbed by the incident as seen on the video. The only reaction taking immediately by Management was to put the Grievant on post restriction in the Control Center. The Grievant was not put on administrative leave during the investigation. The investigation concluded on 3/7/18 and the Grievant was put back on her relief post beginning 3/16/18. Two months later a pre-disciplinary process was initiated, and she was removed from duty 7/16/18, five months after the incident. If CO Little was truly a threat, she would have been immediately removed.

The contract calls for different levels of suspensions prior to termination. The union believes that termination is uncalled for in this case and that just cause has not been shown.

DISCUSSION AND DECISION:

In reviewing the termination of CO Little, I have analyzed the testimony and all evidence put forth by both sides. The job of an Arbitrator, in a disciplinary case, is to evaluate the evidence and determine if "just cause" exists to support the action taken by Management. An Arbitrator generally must determine whether an employer has clearly proven that an employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstance. [*Hy-Vee Food Stores, Inc. and Int'l Brotherhood of Teamsters, Warehousemen, and Helpers of America, 102 LA 55 (Bergist 1994)*]. If an employer does meet this burden, then the Arbitrator must decide whether the level of discipline is reasonable. While it is not an Arbitrator's intention to second-guess management's actions, we do have an obligation to make

certain that the actions are reasonably fair. [*Ohio Univ. and Am. Fed'n of State, County and Municipal Employees, Ohio Council 8, Local 1699, 92 LA 1167 (1989)*].

This case presented conflicting evidence. As to what exactly the Grievant stated during the argument, there are differing accounts. Seven (7) inmates testified that they did not hear the Grievant say she would "...tear/rip up the place" or "...blow it up with a bomb." Four of the medical staff and one (1) inmate did testify that that was what the Grievant said. Management argued that the inmates who gave written testimony were coerced and coached by CO Little into writing their statements. The Union argued that Management had time in between the incident and the time the statements were taken to discuss what happened and to make a unified statement. Testimony from Employer witnesses was not consistent although the consensus was that there was a disagreement and some degree of threat. While there is video evidence of the incident, there is no sound. This presents an inconclusive "he said/she said" situation.

"Threatening a co-worker may be grounds for discipline or discharge if the person threatened has reason to fear for their safety". [Olin Corp., 103 LA 981 (Fowler, 1994)] Most agreed that profanity was used. Foul language is not necessarily abusive, however, and abusive language need not be foul. One must consider not only the content but the way the words were used and the circumstances existing at the time. [AirTran Airways, 131LA254 (Goldstrin, 2012)] At the least, the language used was unprofessional. The Standards of Employee Conduct states that, "The department will not tolerate the use of obscene or abusive language by any employee toward inmates, releases, or offenders ... or families of same." (Joint Exhibit #5, p. 26) The expectation would be that this would apply to co-workers. Additionally, this incident took place in front of inmates thereby exposing them to said language.

The video evidence, while without audio, does show the incident and brings out some details that help in analyzing this incident. It does show a verbal exchange between the Grievant and LPN Brown. It shows CO Little walking away from LPN Brown and going back to her desk. Her hands are up in such a way that *may* signify "stop" or "back off". It shows LPN Brown coming back out of the office to continue the exchange. That could be interpreted in different ways. It could be interpreted as the Grievant trying to de-escalate the situation by walking away to her desk and LPN Brown escalating the situation by following her and continuing the dialogue. It could also be interpreted that LPN Brown was coming out to resolve the situation. It then appears CO Little goes back to her duties and no other action is taken by either party. The video showed that there was no physical violence. Proximity can often times signify threat but it appears that the

two Parties kept a distance between themselves. Additionally, it seemed that the inmates who were in the area were not visibly reactive to what was going on.

The level of threat is certainly at issue. Management viewed the situation at the highest level of threat and terminated the Grievant. Video analysis does not support this. Also, Ms. Bartlett, the investigator, did not find the situation to be at an “Imminent” or even “High” level of threat on the Workplace Violence Response Risk Chart in Appendix B of the Joint Exhibit entitled Response to Workplace Violence and Workplace Domestic Violence. In her investigation, Ms. Bartlett states that the statements made by CO Little “rise to a Level 2 on the workplace violence grid.” (Joint #4, p. 5) This was a non-physical violence case which at its highest level, claiming Harassment/Intimidation/Threat of Harm, puts it at a Severity Level 2, Low to Moderate threat. Threatening a coworker may be grounds for discipline or discharge if the person has fear for his safety. The alleged threat was not directed at any individual nor was physical harm to any person mentioned. The allegation was more of a global statement, one most likely not achievable.

Added to the level of threat comes the actions taken after the incident. In severe cases where employees fear for their safety, the responsible person would most likely be removed from the situation, sent home, suspended, or some action taken pending resolution of event. In this instant case such was not the case. The Grievant was never put on administrative leave but put on post restriction and put back on her relief post a month after the incident. She was not terminated until July, nearly five (5) months later.

Management contends that they had no choice but to terminate the Grievant based on Article 24—Discipline, Section 24.02—Progressive Discipline of the Collective Bargaining Agreement (CBA). The progressive discipline policy is outlined as one or more written reprimands, one or more working suspensions, one or more days of suspension, and then lastly termination. Management contends that this is the Grievant’s third offense therefore termination is mandated. The CBA states in Article 24.06 that, “Disciplinary Measures imposed shall be reasonable and commensurate with the offense ...” The Grievant’s Discipline History (Joint Exhibit #3) does show two (2) infractions for which CO Little received 2-day working suspensions. According to the Correction Standards of Employee Conduct (Joint Exhibit #6, p. 9), Penalties Within the Discipline Process, there were other progressive steps that Management could have taken before moving to removal.

All of these things taken into consideration, this Arbitrator concludes that there was an angry and argumentative exchange between LPN Brown and CO Little. The level of

threat, however, was not high. The incident was inappropriate and unprofessional and has been at issue before. Warden Burkes testified that she had spoken to the Grievant on prior occasions dating back to 2014 about anger issues. The Grievant did not deny these meetings or deny that she had an anger issue. The evidence of an actual threat must be supported by "clear and convincing evidence". [OCSEA and State of Ohio, Department of Mental Health 23-07-(94-09-13)-0109-01-04 (Rivera 1995)] This incident, however, does not sustain that there was just cause for removal.

Management did have just cause to issue discipline in this instant case. Past incidents involving this type of behavior, even though not testified to verbatim, show that the Grievant has had problems in interacting with others. The Corrections Standards of Employee Conduct (Joint Exhibit #6, p. 26) states that employees will conduct themselves in a "courteous and cooperative manner". CO Little did not.

AWARD:

For the reasons stated above, the grievance is sustained in part and denied in part. The termination will be vacated and modified to a 30-day time served suspension without pay. The Grievant will be returned to her former position and duties with no loss of seniority. CO Little will receive all lost wages less any interim earnings and appropriate deductions including union dues. The Grievant will receive all leave balances that would have accrued. Additionally, the Grievant will be required to complete an anger management class through the Ohio Employee Assistance Program.

This closes the arbitration.

Respectfully submitted this day of 20th day of May, 2019,

John F. Buettner

Arbitrator

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy each of the Arbitration report was delivered via email on the 20th day of May, 2019, to

Mr. James Adkins, Advocate for the Employer
and

Mr. Derek Urban, Advocate for the Grievant

Jack Buettner

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