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On October 2, 2000, the grievant twice described in writing his "use of force" on Inmate CS. In his first memorandum of that date to Security Manager Steven D. Franke the grievant stated:

"...At a fast speed, Inmate [CS] and Officer S. Perrine went down to the ground. I quickly reacted to assist Officer S. Perrine in containing Inmate [CS]. While attempting to subdue Inmate [CS], during the struggle, I gave him two focus blows on the face area. While Inmate [CS] was on the ground, I was holding him on the head area with my right hand and his chin with my left hand. My left knee was on the middle portion of his shoulder blade. Because I was holding his head down, in the process of him getting to his knee[s], [CS] scraped his forehead on the compound..." (Arbitrator's emphasis; Employer Exhibit 19)

In his second Memorandum of that same date to Security Manager Franke the grievant also stated:

"On October 2, 2000 at about 6:40 p.m. While Inmate [CS] was being admitted in Segregation Unit. He told Captain G. Beacham, 'When I get out, I'm gonna punch that officer in the face.' 'I know who he is, he knows who he is.' 'I'm not going to say his name or nothing.' 'I'm gonna cut his throat.' Inmate [CS] was referring to me due to the incident that occurred in the East Compound while I was trying to subdue him for running all over the compound. In the process of trying to subdue Inmate [CS], during the struggle, I gave him two focus blows on the face area." (Arbitrator's emphases; Employer Exhibit 20)

Moreover, during the arbitration hearing the union's expert witness on the use of force and "red zoning" -- Howard R. Webb of Hitman Training Systems -- demonstrated how he understood the grievant had twice hit Inmate CS in the side of the face with his right fist while the grievant had Inmate CS "in a head lock" (as

described by CO Paul Roe in Employer Exhibit 14).

Yet on the last day of the arbitration hearing the grievant expressly denied that he had ever hit Inmate CS with his fist on October 2, 2000. Instead, the grievant asserted that a short time after his October 30, 2000 discharge he had recalled for the first time that, while Inmate CS continued to struggle, he had taken his right hand from the top of Inmate CS's head and, with the flat of his palm, twice hit Inmate CS on the top of the head, pushing his face into the ground.

When questioned on cross examination about why he had changed his earlier written story about "two focus blows [to] the face area," the grievant said that he had only written down what CO Steve Perrine told him what he (the grievant) had done -- an action about which he had no recollection on October 2, 2000, and still had no recollection on March 21, 2001, the last day of the arbitration hearing.

ISSUES

At the start of the hearing, the parties agreed that the issues before the Arbitrator are:

Issue 1: Was the grievant, Dennis Albee, discharged for just cause?

Issue 2: If not, what would be an appropriate remedy?

THE PARTIES'S ARGUMENTS

The Employer's Position and Arguments

The employer contends it had just cause to discharge the grievant. In the Introduction to his closing brief, counsel succinctly summarized the arguments in support of the employer's position:

"This case is actually narrowly focused based on eyewitness reports of the grievant's conduct. This case is somewhat unique in that the grievant actually changed his story at the arbitration hearing. Other than this factor, the union did not challenge the sufficiency of the rule governing the use of force or that it applied to grievant's actions. Forewarning of the potential consequences [of his actions] and [of the grievant's] training [in the proper use of physical force] were not disputed. Nor did the union seriously challenge the eyewitness testimony of the punching [of the inmate by the grievant]. [Instead,] the union simply claimed justification [for the punching of the inmate].

"The one unique aspect [of this case] occurred when the grievant, repudiating what he had stated and written at the time of the incident and throughout the personnel review, gave a new version of events during his testimony at the hearing. At hearing [the grievant] specifically recalled that he never used closed-fist blows to the inmate's face. This new version was even at odds with both the union's opening statement where the justification claim was made, and the [union's] hired expert's claim that use of fists [by the grievant] was justified.

"Ultimately, neither the grievant nor his hired expert provided any evidence to alter the underlying facts nor deflect from their seriousness. The degree of physical force was both excessive and egregious based on the credible evidence. Grievant's actions seriously disregarded the use of force standard. Given the short duration of [the grievant's] employment, coupled with his inability to provide reliable information about his own behaviors, established that dismissal was consistent with just cause." (Arbitrator's emphases; page 1, EMPLOYER'S CLOSING BRIEF)

The Union's Position and Arguments

The union's position is two-fold:

First: The record conclusively shows that the grievant "did the right thing" in a life-threatening and highly dangerous situation on October 2, 2000 when -- in an effort to control Inmate CS, who was physically resisting every effort to subdue him -- the grievant struck this inmate.

Second: Even assuming the grievant was wrong when he struck Inmate CS, nevertheless it was a good faith error which fell far

short of providing just cause for his summary discharge.

In support of the union's position, its counsel argues:

One, according to the State of Oregon's "Position Description for Correctional Officers at EOCI" the grievant was required to be ready to:

"[Respond] to crisis and emergency situations, including but not limited to, ...controlling major, group disturbances by inmates; utilizing physical force to control inmate behavior ..." (Page 2, Employer Exhibit 2)

Moreover, in OAR 291-013-0010(11) the Oregon Department of Corrections has expressly defined the phrase "physical force" to include:

"The use of hands...to control, intimidate or to compel persons to act in a particular way, or to stop acting in a particular way." (Page 2, Employer Exhibit 3)

Furthermore, in OAR 291-013-0010(14) the Oregon DOC has expressly defined "reasonable force" as:

"The use of physical force to achieve a legitimate correctional objective, where the type and amount of force are consistent with the situation and the objective to be achieved; and where alternatives to physical force are unavailable or ineffective; and where the force used is the minimum necessary to control the situation." (Page 3, Employer's Exhibit 2)

Two, the written reports of both CO Steve Perrine and CO Paul Roe conclusively show that:

(A) When the grievant struck Inmate CS that inmate was physically resisting, with all his might, the effort of CO's Regie Horn, Jerald Mesteth, Steve Perrine, Robert Rabb, Paul Roe and the grievant to subdue him; and,

(B) It was the grievant's express order "to stop resisting," and his physical striking of Inmate CS, which caused that inmate to stop resisting, thus enabling CO's Horn and Rabb to place the

inmate in handcuffs, with his arms behind his back.

For example, in his original, October 2, 2000, report CO Perrine said:

"...The officers proceeded to go in the direction of where inmate [CS] was standing. Inmate [CS] then ran towards me. As he was running towards me, I grabbed inmate [CS] around the waist and shoulder, forcing him to the ground.

"While inmate [CS] was on the ground, I released my hold and took his right arm and placed it behind his back. Officer R. Horn, who was sitting on inmate [CS's] legs assisted Officer R. Rabb, who was standing to the left of inmate [CS], in placing inmate [CS's] left arm behind his back. Inmate [CS] continued to resist staff with placing him in wrist restraints. Officer D. Albee, who had control of inmate [CS's] head, with closed fists, struck inmate [CS] in the facial area approximately three times. I told Officer Albee to stop and I gave inmate [CS] a direct order to stop resisting. Inmate [CS] complied. OFFICERS R. Horn and R. Rabb placed inmate [CS] in wrist restraints. Officer D. Albee and myself then placed inmate [CS] in arm bar escort holds and escorted him to Segregation." (Emphasis supplied; Employer Exhibit 13)

Moreover, in his supplemental report of October 4, 2000 -- two days after the incident in question -- CO Perrine stated:

"...I told both Captain Beacham and Lieutenant Frye that I had observed Officer Albee strike inmate [CS] in the facial area approximately three times. I also told them, [that] in my professional opinion, that was uncalled for because the inmate was not resisting enough for the amount of force Officer Albee displayed." (Arbitrator's emphases; Employer Exhibit 30)

Furthermore, CO Paul Roe -- who was the officer most critical of the grievant and the only CO who claimed the grievant had struck Inmate CS on two separate occasions -- stated in his October 2, 2000 report:

"...When Officer S. Perrine and Officer J. Mesteth apprehended [Inmate CS] and they went to the ground the rest of the staff, including myself, took positions on top of the inmate. Myself and Officer R. Horn had his left arm and brought it back behind his back. Officer Albee had positioned himself over the inmate's head

getting him in a headlock. Officer Albee then threw three right handed closed fist punches to the face of the inmate. I then yelled loudly at Albee who was no further than 12 inches from me and said 'Albee, Albee, That's Enough.' Albee stopped at that point. I heard someone else say, 'Albee you need to calm down.'

"The inmate was still laying face down with approximately 6 staff on top of him. Some of the staff were placing him in wrist restraints when Officer Albee threw two more closed fist right handed punches to the face of the inmate. While doing so, Albee said 'Quit Resisting.' I then said, 'Albee Knock It Off, That's Enough.'..." (Emphasis supplied; pages 1 and 2, Employer Exhibit 14)

In addition, Inspector Robert Hensel's October 13, 2000 report (Employer Exhibit 32) focused on "how many sets of times the inmate was hit [by the grievant] and whether the inmate was restrained at the time [the grievant hit him]."

According to Inspector Hensel:

-- CO Perrine recalled that "the inmate was resisting most of the time."

-- CO Mesteth could not recall whether the blows of the grievant were delivered before or after Inmate CS's arms were behind his back.

-- CO Roe believed the grievant delivered a second set of blows after Inmate CS was restrained, but Inspector Hensel did not discuss whether the grievant himself "believed" Inmate CS was fully restrained. (This is important because Officer Roe specifically stated in writing that he recalled hearing Officer Albee yell, "Quit Resisting," when a second set of blows was allegedly delivered.)

-- CO Horn, when interviewed by Inspector Hensel, "clarified" that Inmate CS was "not completely cuffed" when Office Albee struck him.

Clearly, therefore, when the grievant struck Inmate CS this inmate was resisting with all his might the efforts of a least six officers -- who had this inmate face down on the ground -- to subdue him, place him in wrist restraints and stop his deliberate trouble-making.

Hence, the grievant was entirely justified in striking Inmate CS when he did.

Three, Supt. Jean Hill conceded in her testimony that:

-- The grievant had to make a judgment call during the CS incident on October 2, 2000.

-- The grievant had a duty to restrain Inmate CS and that nothing in the DOC regulations prohibits the use of blows to restrain an inmate.

More importantly, Supt. Hill conceded in her testimony that Inmate CS was not restrained at the time the grievant struck him.

Four, accordingly the record conclusively demonstrates that:

(A) It was with a tremendous sense of urgency that the grievant approached the restraining of Inmate CS -- who was causing a disruption that could have, potentially, erupted into a far more widespread, deadly and disruptive inmate disturbance at EOCI; and

(B) Either the grievant acted in accordance with DOC regulations by striking Inmate CS to assist in the restraint of that inmate; OR the grievant "thought" he was striking Inmate CS to assist in the restraint of that inmate, when in fact Inmate CS had already been restrained.

Five, either way the employer did not have just cause to summarily discharge the grievant:

(A) DOC regulations permit the use of reasonable force to

restrain an inmate. Specifically, DOC regulations permit the use of one's hands to restrain an inmate. In fact, it is the duty of an EOCI Correctional Officer to restrain an inmate who is creating a disturbance and failure to fulfill this duty could, and probably would, lead to discipline, and even discharge.

(B) Each of the accounts by the officers involved in restraining Inmate CS confirms that the grievant hit Inmate CS:

- (1) While this inmate was resisting restraint; or,
- (2) While the grievant, correctly or incorrectly, reasonably believed this inmate was resisting restraint.

(C) There is no evidence in the record -- other than some written statements from a number of inmates (who are inherently not credible witnesses) -- that the grievant gratuitously or maliciously hit Inmate CS.

Six, in the end, the major thrust of the employer's case against the grievant appears to simply be that Dennis Albee lied, in an effort to cover up what he had done. Nothing could be further from the truth.

Admittedly, the grievant initially told Lt. Dennis Frye that he did not believe he had struck Inmate CS. But, as Lt. Frye testified -- and as the lieutenant had previously stated in writing -- he concluded that the grievant "had red-zoned" -- that is, in the situation in which the grievant found himself on October 2, 2000 it would be unlikely that he could clearly remember all the details of what happened that day.

But in no way does this mean that the grievant was lying when, from the beginning, he said he did not remember striking Inmate CS but he must have, since CO Steve Perrine said he had.

Nor does it mean that the grievant was lying when, after being told by CO Perrine that he struck Inmate CS, he repeatedly said he did not know how many times he struck this inmate.

As for alleged discrepancies in the grievant's stories (between what he said at the pre-dismissal hearing, the unemployment hearing or the arbitration hearing), a careful inspection of the grievant's various statements cannot lead a reasonable person to conclude that there is evidence of the grievant covering-up or lying.

Above all, the various accounts of the other CO's -- which the union has cited as the best accounts of what happened that day in view of the grievant's obvious "red zoning" -- directly lead to one conclusion: Either the grievant struck Inmate CS when that inmate was, in fact, not restrained or when the grievant reasonably believed that inmate was not restrained.

Accordingly, the employer's summary discharge of the grievant, Dennis Albee, was without just cause and the Arbitrator should order his reinstatement, with full restoration of seniority, pay and fringe benefits.

THE ARBITRATOR'S DISCUSSION

The Heart of the Matter

In the eyes of the Arbitrator, the grievant's last-minute repudiation of his two October 2, 2000 written admissions that:

"While attempting to subdue Inmate [CS], during the struggle, I gave him two focus blows on the face area..."
(Arbitrator's emphasis; Employer Exhibits 19 and 20)

completely destroyed the grievant's credibility.

Hence, the Arbitrator finds, as a specific finding of fact, that, as stated by CO Steve Perrine (on page 2 of Employer Exhibit

13):

"[On October 2, 2000] Officer D. Albee, who had control of inmate [CS's] head, with closed fists, struck inmate [CS] in the facial area approximately three times." (Arbitrator's emphasis)

Accordingly, the two questions at the heart of the matter are:

First: Under all of the circumstances, did the grievant's striking of Inmate CS "with closed fists in the facial area" constitute the use of excessive force?

Second: If so, again under all of the circumstances, did the grievant's use of excessive force against Inmate CS on October 2, 2000 give the employer just cause to summarily discharge him?

The Arbitrator's Analysis and Reasoning

The undisputed and crucial facts in this case are two:

One: When the grievant hit Inmate CS in the face with his fist, that inmate was no longer "running around the compound." He was face down on the ground, surrounded by seven correctional officers. One of them had brought him to the ground by tackling him and was on the ground with him; another was sitting on his legs; three officers were struggling to pin his arms behind his back and handcuff him. Lt. Dennis Frye was standing over him, telling him to stop resisting; the grievant was on the ground at the inmate's head (with his left knee on the inmate's right shoulder blade and his hands holding the inmate's head).

Accordingly, the Arbitrator has no choice but to find, as a specific finding of fact, and to rule that under all of the circumstances, the grievant's striking of Inmate CS "with closed fists in the facial area" on October 2, 2000 did constitute the use of excessive force.

Two: The grievant's use of excessive force on October 2, 2000 was not only observed, and reported to management by, Correctional Officers Steve Perrine and Paul Roe, but also by a number of inmates who happened to be in the area at the time.

Accordingly, the Arbitrator likewise finds, as a specific finding of fact, and rules that under all of the circumstances the grievant's excessive use of force constituted "egregious misconduct" and, therefore, gave the employer just cause (as that phrase is used in the second sentence of Section 1 of Article 50, Discipline and Discharge, of the parties' 1999-2001 contract; page 54, Joint Exhibit 1) to summarily discharge the grievant on October 30, 2000.

CONCLUSION

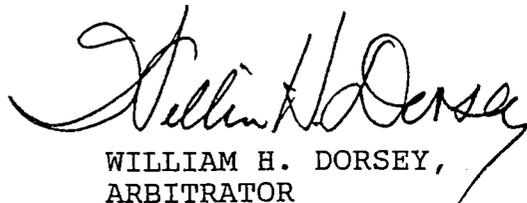
Accordingly, the Arbitrator's answers to the issues must be:

Answer to Issue 1: YES, the grievant, Dennis Albee, was discharged for "just cause."

Answer to Issue 2: This issue has been disposed of by the Arbitrator's answer to Issue 1.

AWARD

The November 3, 2000 grievance of AFSCME Local 3361 (Employer Exhibit 36) on behalf of the grievant, Dennis Albee, is denied.


WILLIAM H. DORSEY,
ARBITRATOR

May 25, 2001

WHD:jk