OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA

ISSUED
DEC - 6 2007
OK MERIT PROTECTION COMM.
BY

BRAD SUTER, Appellant	)	
vs.	)	
DEPARTMENT OF CORRECTIONS, Appellee	)	CASE NO. MPC 08-001
and	)	
TAMMY SHAW, Appellant	)	
vs.	)	CASE NO. MPC 08-007
DEPARTMENT OF CORRECTIONS, Appellee	)	

FINAL ORDER

Hearing on these consolidated matters was held before the undersigned duly appointed Administrative Law Judge on November 7 and 8, 2007 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant Brad Suter appeared in person and was represented by Daniel Gamino, Esq. Appellant Tammy Shaw appeared in person and was represented by Melinda Alizadeh-Fard, Esq. Appellee, Department of Corrections (hereinafter referred to as "DOC"), appeared by and through its Counsel Gary Elliott, Assistant General Counsel, and agency representative Marty Sirmons, Warden of the Oklahoma State Penitentiary (hereinafter referred to as "OSP") in McAlester, Oklahoma. These two cases were consolidated for purposes of the hearing by order of the undersigned and by agreement of the parties.

Appellants, correctional officers at Oklahoma State Penitentiary in McAlester, Oklahoma, filed appeals with the Oklahoma Merit Protection Commission following

termination of their employment for allegedly failing to prevent an assault upon an inmate by two other inmates and failing to report the assault or the injuries inflicted or to take action to seek medical attention for the injured inmate, all in violation of Merit Rules, DOC Operating Procedures and OSP Field Memoranda. Appellants both deny any knowledge or involvement in the beating and claim that their terminations were without just cause.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellants was presented, along with Exhibits, which were admitted and are incorporated herein and made a part hereof. Accordingly, after careful consideration of all evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

It is an undisputed fact that sometime between late afternoon on December 23, 2006 and 3:00 a.m. on December 24, 2006 inmate Dewon Asberry was severely beaten in his cell on 4 Quad of A Unit. It is further undisputed that inmate Asberry lay unconscious, without receiving medical attention, for some period of time before he was taken to a hospital. As a result of the beating, inmate Asberry remained in a coma for days, was hospitalized for over three weeks, spent nine and a half months recovering in the OSP medical unit and nearly 12 months later still suffers paralysis to his left side, impaired and slurred speech, and possibly reduced cognitive ability.

The evidence indicates that prior to 2:30 p.m. on the afternoon of December 23, 2006 inmate Asberry was allowed out of his cell to make a phone call. While out of his

cell, Asberry took a detour to cell 18, which is almost directly across the quad from his current cell (cell 26). Until two or three weeks earlier, Asberry had been assigned to cell 18 with inmate Mario Dillard. But, Asberry did not get along with inmate Dillard, and requested to be moved. He and inmate Johnson switched cells earlier in the month and now Johnson and Dillard were cellmates in cell 18, while Asberry was in cell 26 with inmate Donald Barksdale. Dillard was an inmate orderly and had certain privileges, including an open cell door much of the time, which allowed him access on the quad. At the time Asberry stopped by cell 18 on December 23, Dillard was not on the quad, but his cell door was open. Asberry had gotten into a verbal altercation with Johnson earlier in the day and went to cell 18 to continue the fight. But the fight ended when Johnson wounded Asberry in the chest with a home-made shank. Not seriously injured, Asberry went back to his cell and told his cellmate, inmate Barksdale, that "I've got me one", meaning that he was going to have to fight someone.

Inmate Dillard had left 4 Quad for visitation around noon on December 23, returning with four other inmates at 3:15 p.m., escorted by Lt. Tammy Shaw. (Joint Ex. 35, 36, 40) After returning to the quad, inmate Dillard visited Asberry's locked cell several times and threatened to get inside and get him. Dinner was served between 4:35 p.m. and 5:20 p.m.. (Joint Ex. 36) Sometime between 3:15 p.m. and the end of dinner, inmates Dillard and Johnson appeared outside Asberry's cell. Asberry's cellmate, inmate Barksdale, testified that he saw Dillard look toward the control room, heard the door click unlocked, and Dillard opened the door.

Dillard ordered Barksdale out of the cell and then Johnson and Dillard entered the cell and closed the door. Standing outside the cell door, Barksdale looked toward

the control room and saw Appellant Shaw standing over the controls looking toward him. He motioned to Appellant Shaw to open the door, and grabbed the door handle. She did not open the door and stepped away from the controls. Outside the cell, Barksdale saw inmates Dillard and Johnson repeatedly punching and kicking inmate Asberry. Barksdale ran toward the control room, where he found Appellants Shaw and Suter, and asked that they open his cell door. He looked back toward his cell and saw a hand waving from the food slot (bean hole) in his cell. Appellant Suter hit the control button to open the cell door and Dillard and Johnson came out.

Barksdale expressed his concern to Appellants that Asberry would think he was involved with his beating, and wanted Asberry moved to a different cell. Appellant Shaw looked at the unit roster and said the only available cell was in 1 Quad. Appellant Suter said that inmate Asberry wouldn't think Barksdale was involved, but if he tried anything, he would move him.

When Barksdale went back to his cell, Asberry was lying face-down on the floor, wet with blood and water used by Dillard and Johnson to try to revive him. He was unconscious, with a swollen eye and swollen, split lip. Inmate Dillard and Appellant Shaw ca.m.e back to the cell to observe Asberry. Barksdale noted that Asberry needed medical attention and asked Appellant Shaw if she was going to get some help for him. Appellant Shaw told Barksdale to take care of him. Barksdale and several other inmates picked up Shaw and placed him on the bottom bunk. Soon thereafter Appellant Suter ca.m.e to the cell door and observed Asberry. Inmate Barksdale again asked him about medical attention for Asberry. None was forthcoming.

Appellant Shaw left the unit at 7:00 p.m. to attend to other duties at OSP. (Joint Ex. 36) Appellant Suter was on the quad and observed Appellant at least two more times before his shift ended at 10:00 p.m. (Joint Ex. 38; testimony of inmate Barksdale and Correctional Officer Loal Inmon). Inmate Asberry's condition did not improve. He lay unconscious and unattended, except by his cellmate Barksdale, until about 3:15 a.m. on December 24, 2006, when inmate Barksdale called Asberry's condition to the attention of Correctional Officer Shana Ballard during her 3:00 a.m. count. As a result, Asberry finally received medical attention and was transported to the hospital. (Joint Ex. 25, 113; testimony of inmate Barksdale and Correctional Officer Shana Lee Ballard)

Following an investigation of this matter by the Office of Internal Affairs, Appellee advised Appellants that they were being considered for termination of their employment for their alleged role in the beating of inmate Asberry and subsequent failure to report the beating or get him medical attention. Pre-termination hearings were held for each Appellant which resulted in the discharge of both. These appeals followed.

DISCUSSION

Appellants argue that they knew nothing about the beating of inmate Asberry and were not involved in any way. Appellant Shaw alleges that the injuries were inflicted on the 6:00 a.m. to 2:00 p.m. shift, prior to Appellants' arrival on the unit. (Joint Ex. 9). Appellant Suter opines that the injuries must have occurred after their 2:00 p.m. to 10:00 p.m. shift because Asberry was fine when Suter conducted his counts at 4:30

p.m. and 6:00 p.m. and was not found injured until the 3:00 a.m. count on December 24. (Joint Ex. 38, 39, 25) [1]

Appellants argue that perhaps inmate Barksdale, Asberry's cellmate, actually caused the injuries, as it is not uncommon for cellmates to fight, beat, and even kill each other. On the other hand, why, they argue, would career correctional officers jeopardize their careers, their jobs, their pensions over a fight between inmates? And should not the word of a correctional officer such as Appellant Suter, with commendations and a spotless record, be taken over that of a convicted murderer such as inmate Barksdale?

However, the preponderance of evidence does not support Appellants' allegations and suppositions. There is no evidence of any bad blood between cellmates Barksdale and Asberry which would motivate Barksdale to attack and beat Asberry; and no reason why Asberry would cover for Barksdale if he had attacked him. There is, however, evidence of bad blood between Asberry and Dillard (causing Asberry to request a reassignment to a cellmate other than Dillard) and Asberry and Johnson (note the altercations earlier in the day that led to Johnson inflicting the shank wound to Asberry's chest).

Further, many of the key facts of Barksdale's testimony are corroborated through other evidence. Asberry's recount of the events mirrors Barksdale's account of the earlier altercation between Johnson and Asberry, and of Dillard and Johnson entering their cell in the late afternoon and beating Asberry. Asberry was knocked unconscious

[1] Corrections Officer Shana Lee Ballard testified that when she conducted the 10:00 pm count and the 11:00 pm count inmate Asberry was lying on the top bunk in his cell. If he had been lying on the bottom bunk she believes she would have noticed because he always sleeps on the top bunk and to be on the bottom would have been unusual. This administrative law judge believes that CO Ballard did not notice where inmate Asberry was lying and believed him to be on the top because that is where he always sleeps. However, the weight of the evidence indicates that Asberry was never on the top bunk the night of December 23, 2006 as he was unable to climb there on his own and it would have been too difficult to lift him up to the top bunk.

with the first blow. Asberry and Barksdale had no opportunity to collaborate on their stories, as they never saw or spoke with each other until the day of the hearing in this matter, and then spoke only in passing.

Other key elements of Barksdale's account of the events include his reference that Appellant Shaw looked in on Asberry only once, immediately after the attack. This is consistent with facility records indicating that Appellant Shaw left the unit at 7:00 p.m. that evening. On the other hand, says Barksdale, Appellant Suter looked in on Asberry several times after the attack. Records indicate that Suter conducted the counts of the 4 Quad at 4:30 p.m. and 6:00 p.m. He would have looked in on Asberry at those times. Correctional Officer Loal Inmon testified that he remembered that Suter conducted these counts because in the nine months Inmon had worked on the unit this was the first time Appellant Suter had ever conducted counts. Additionally, Officer Inmon testified, around 7:00 p.m. Appellant Suter asked him to watch the control room while he went on the 4 Quad. He was on the quad only about three minutes, but Officer Inmon was busy in the control room and did not note where Appellant Suter went on the quad. Both the facility records and the testimony of Officer Inmon are consistent with inmate Barksdale's testimony.

Inmate Barksdale testified that when the attack occurred he went to the control room and found both Appellant Suter and Appellant Shaw there. Again this is consistent with facility records. When inmate Barksdale asked about transferring Asberry out of his cell, he testified that Appellant Shaw looked at the inmate assignment roster and told him the only empty cell was on 1 Quad. In the course of his investigation, Internal Affairs Investigator Tim Coppick reviewed the bunk chart for

December 23, 2006 and saw that it did reflect that the only empty cell on A-Unit was cell 5 located on 1 Quad. (Joint Ex. 113, page 3) This is information Barksdale would have no way of knowing other than through a corrections officer.

Officer Inmon also corroborated Barksdale's and Asberry's testimony of a relationship between Appellant Shaw and inmate Dillard. Officer Inmon testified that he had never heard any rumors about, and knew nothing about, Shaw's personal life, but he indicated that he had observed her interactions with inmate Dillard and never saw her interact with any other inmates in that manner. Officer Inmon testified that he observed Appellant Shaw and inmate Dillard together often, spending long periods of time together on and off the unit, and that they sometimes disappeared in the mop closet together for 30 to 40 minutes at a time. There have been occasions that Appellant Shaw disappeared with Dillard for so long that Officer Inmon became concerned and called her on her radio to check on her. He even asked Appellant Suter about her disappearances, and was assured by Suter that she was fine.

Inmate Dillard clearly had privileges not afforded the other inmates on 4 Quad. As an orderly, he was freer than were the other inmates to come and go from his cell. His cell door was often open and unlocked. Additionally, Appellant Shaw admitted that she allowed him to use the telephone in the case manager's office to make collect phone calls. (Joint Ex. 9) Most damning was the testimony of Officer Inmon that he often observed inmate Dillard at the control room window asking to have an inmate's cell door opened, and both Appellant Shaw and Appellant Suter have complied and opened an inmate's door from the control panel. (Testimony of Loal Inmon; Joint Ex. 22, 113, page 5)

All this leaves unanswered the question of why seemingly reasonable people would so unreasonably engage in behavior that would jeopardize their careers, their jobs, and their pensions over a fight between inmates. I cannot begin to presume to know or understand what was in the minds of Appellants. I do understand that the culture inside a maximum security prison is unlike the culture known to most people outside that institution. Violence is common; beatings, stabbings, murders, and other "incidents" are a recognized part of the prison culture, as testified by Appellant Suter in his cross examination. Appellant Shaw noted that the A-Unit is one of the most incident-prone units at OSP. (Joint Ex. 9) Appellant Asberry did not approve of the relationship between Appellant Shaw and inmate Dillard, and felt compelled to share his disapproval with Dillard, Johnson, and apparently anyone within earshot. It was certainly to the advantage of both Dillard and Johnson not to have their privileges curtailed by Asberry's vocalized disapprovals. And it would have been detrimental to Appellant Shaw's relationship with Dillard and to her career at DOC if such a relationship were investigated. It might be concluded that inmate Dillard told Appellant Shaw that he just wanted to teach Asberry a lesson -- to keep his mouth shut and mind his business; they would not kill him or use any weapons against him; he wouldn't be stabbed. It might further be concluded that they went farther in their beating of Asberry than either Appellant Shaw or Appellant Suter expected. They didn't expect Asberry to go into a coma and suffer such head trauma.

Regardless of the motivation or expectations of Appellants Shaw and Sutter, it is sufficient that a preponderance of the evidence supports the findings that both Appellant Shaw and Appellant Suter were complicit in allowing the beating of inmate Asberry by

inmates Dillard and Johnson, and in fact, both aided and abetted the commission of the assault by opening Asberry's cell door and allowing Dillard and Johnson access to him. Additionally, a preponderance of the evidence supports the findings that both Appellant Shaw and Appellant Suter were aware of inmate Asberry's injuries and failed and refused to report the assault or to seek medical attention for him. Under the circumstances presented, this administrative law judge finds that just cause exists for discipline of both Appellants, and further finds that the discipline of discharge was just.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.

2. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.

3. Merit Rule 455:10-11-14 states that a permanent classified employee may be discharged for misconduct, willful violation of the Oklahoma Personnel Act and Merit Rules, conduct unbecoming a public employee, and any other just cause.

4. Merit Rule 455:10-9-2(f)(1) states that the Appellee bears the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for adverse action and that the discipline imposed was just.

5. DOC Policy OP-110215, Section I A(1) *Rules Concerning the Individual Conduct of Employees*, requires employees to perform work with diligence, honesty, and impartiality.

6. DOC Policy OP-110215, Section I A(5). *Rules Concerning the Individual Conduct of Employees*, states that employees will avoid conduct, interest, or relationships which are in conflict with or detrimental to the proper and effective discharge of their duties.

7. DOC Policy OP-110215, Section I A(7) *Rules Concerning the Individual Conduct of Employees*, requires employees to conduct work in a manner that contributes to and supports a safe, healthful work environment.

8. DOC Policy OP-110215, Section I A(9) *Rules Concerning the Individual Conduct of Employees*, requires employees to engage in conduct that models the values, goals, and objectives of the DOC.

9. DOC Policy OP-050109 *Reporting of Incidents* and OSP Field Memorandum 050109-01 *Reporting of Incidents* require that any staff involved in or with knowledge of an incident involving an inmate must file an Incident/Staff Report with his or her shift supervisor prior to the end of the shift. The shift supervisor must indicate what action was taken and forward the report to the Chief of Security.

10. DOC Policy OP-110215 II A.1 *Duties and Responsibilities* requires employees to comply with all laws, rules, and regulations which apply to any aspect of their employment, and to comply with all department policies or procedures, operations, administrative or field memoranda, and all lawful orders of department supervisors and managers.

11. OSP Field Memorandum 040101-01 *Facility Security Standards* requires that the 4:30 p.m. counts for all units must be a stand-up count.

12. Appellee, Department of Corrections, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Appellant Brad Suter for his knowledge and complicity in the brutal assault of inmate Dewon Asberry and for his failure to get him needed medical attention after the assault.

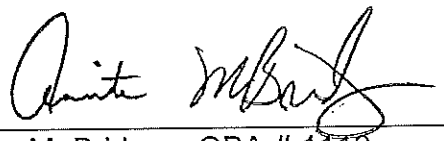
13. Appellee, Department of Corrections, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Appellant Ta.m.my Shaw for her knowledge and complicity in the brutal assault of inmate Dewon Asberry and for her failure to get him needed medical attention after the assault.

14. Appellee, Department of Corrections, has met its burden to prove, by a preponderance of the evidence, that the discipline imposed – termination of Appellant Suter's and Appellant Shaw's employment with DOC -- was just under the circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petitions of Appellants is hereby **DENIED**.

DATED: this 21st day of November, 2007.



Annita M. Bridges, OBA # 1119
Administrative Law Judge
OKLAHOMA MERIT
PROTECTION COMMISSION
3545 N.W. 58th Street, Suite 360
Oklahoma City, Oklahoma 73112
(405) 525-9144