ARBITRATION DECISION NO.:
015

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Ohio Department of Rehabilitation and Correction
Mansfield Reformatory

DATE OF ARBITRATION:

DATE OF DECISION:
March 31, 1987

GRIEVANT:
Charles Armstrong Jr.

OCB GRIEVANCE NO.
G-86-0581

ARBITRATOR:
Nicholas Duda, Jr.

FOR THE UNION:
John Porter, Attorney, Advocate
Daniel S. Smith, General Counsel

FOR THE EMPLOYER:
Gregory Trout, Attorney, Advocate

KEY WORDS:
Just Cause
Polgraph Tests

ARTICLES:
Article 24 – Discipline

FACTS:

Grievant was employed as a Corrections Officer 2 at the Ohio State Reformatory in Mansfield for approximately eighteen (18) years. Grievant was removed on September 30, 1986 for "Threatening or coercing an inmate for personal satisfaction, and engaging in an unauthorized relationship with an inmate."

EMPLOYER'S POSITION:

It is the position of the employer that the discipline was imposed within the forty-five (45) day period required by the contract. Moreover, this issue had not been properly grieved, but was raised

for the first time at the arbitration hearing, and as such, it should not be before the Arbitrator. Secondly, the polygraph examinations of the inmate witnesses to the incident should be admitted into the record for consideration by the Arbitrator. Finally, the Grievant was disciplined for just cause, since he abused a person in the custody of the State. The contract mandates that the penalty for this type of behavior be upheld.

UNION'S POSITION:

It is the position of the Union that the State has failed to carry its burden to show that the Grievant was disciplined for just cause. The State has not followed the necessary contractual procedures to discipline the Grievant. In addition, the State has not proved by any standard of proof that the Grievant is guilty of the charges for which he was removed. Aside from the procedural difficulties with the State's case against the Grievant, the outcome of the case turns on the credibility of the witnesses. The inmates' witness statements should be given no credence. The Union objects to the use of the lie detector tests. The results of the inmates' lie detector test should not even be admissible in an arbitration hearing. Should the Arbitrator decide to admit the result of the lie detector test, these results should be given the least possible credibility.

ARBITRATOR'S OPINION:

It is the conclusion of the Arbitrator that the Grievant was terminated for just cause. The Arbitrator reviewed the direct testimony and cross-examination of the inmate witness' at arbitration, statements written by inmate witnesses, the results of the polygraph tests taken by inmate witnesses, testimony by a polygraph examiner, testimony of the Grievant, records of several related investigations, and an on site examination of the ward in which the incident occurred.

The Arbitrator chose to apply an arbitral standard to clear and convincing evidence with a higher degree of certainty that that required in cases which do not involve the potential convictions for a crime.

The testimony of the witnesses was consistent and clear. In contrast to the testimony of the inmate witnesses, the Grievant was not credible in the opinion of the Arbitrator. The grievant's conduct was improper and there was just cause for the Grievant's termination.

COMMENTS:

The Arbitrator noted that the contract does not prohibit polygraph tests generally, although it limits its use. The Arbitrator concluded that the credibility of a witness may be tested through many methods available to an Arbitrator. There is no reason to exclude a tool which admittedly has a high degree of validity and reliability on the issue of credibility. For those reasons the Arbitrator admitted the results of the inmate's polygraph tests. * * *

IN THE MATTER OF ARBITRATION
UNDER THE 1986 CONTRACT

Between:)
)
The State of Ohio Department of Rehabilitation)
and Correction)

(Ohio State Reformatory – Mansfield, Ohio)	)	
THE EMPLOYER	)	
-and-	)	OCB G86-0581
	)	OSR-M-228
	)	ND 477
Ohio Civil Service Employees Association, Local 11 A.F.S.C.M.E., AFL-CIO	)	
THE UNION	)	

Before: NICHOLAS DUDA, JR., ARBITRATOR

OPINION AND AWARD

March 31, 1987
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CASE DATA

SUBJECT

Termination for allegedly "threatening or coercing an inmate for personal satisfaction, engaging in an unauthorized relationship with an inmate".

APPEARANCES

FOR THE STATE

Gregory Trout, Attorney, Presenting the Case
Eric Dahlberg, Superintendent of Ohio State Reformatory, Witness
Richard Hall, Labor Representative for Ohio State Reformatory, Witness
Robert Riddle, Inspector of Institutional Services, Witness
Edward "S", Inmate of Mansfield Reformatory, Witness
Christopher "J", Inmate of Lebanon Reformatory, formerly of Mansfield, Witness
Paul Jones, Polygraph Examiner, Witness

FOR THE UNION

John Porter, Attorney, Presenting the Case
Daniel S. Smith, General Counsel, Assisting

Charles Armstrong, Jr., Grievant, Witness
Roosevelt Scott, Friend of Grievant, Witness
Brenda Butcher, Staff Representative, OCSEA
Michael Miller, President, AFSCME Local 7010

BACKGROUND

Grievant, a Correction Officer 2 at the Ohio State Reformatory at Mansfield for almost eighteen years, was given the following removal (termination) order on September 30, 198G.

This will notify you that you are hereby ___terminated_____ (2) from the position of __CORRECTION OFFICER 2_____ effective October 2, 1986_ (3) (4)

The reason for this action is that you have been guilty of __Threatening or coerce an inmate for personal satisfaction, engaging in an unauthorized relationship with an inmate.__ (5) in the following particulars, to wit: __There exists substantial evidence that you did coerce inmate _____ (6) into performing oral sex on yourself. In addition, evidence exists that you did coerce inmates, _____ and _____ into performing sex on each other while you watched. Further, evidence exists that you did threaten and coerce inmate _____in attempt to have him remain silent about witnessing thee sex acts. Such behavior on your part constitutes misconduct of the most serious nature and leaves me no choice but to remove you from your position as a Correction Officer 2.

On October 2, 1986 the subject grievance was filed in the third step:

STATEMENT OF GRIEVANCE:

LIST APPLICABLE VIOLATION: Sec. 24 I appeal and grieve my removal from OSR as illegal. There is no “just cause” to suggest allegations by inmates or to uphold my firing.

ADJUSTMENT REQUIRED: That I be reinstated to OSR with back wages and to be made whole upon return in all conditions of employment.

POSITIONS OF THE PARTIES

THE STATE'S POSITION

C. Discipline was imposed within the 45 day period required by Section 24.05 of the Contract; moreover, this issue had not been grieved, but was raised for the first time at the arbitration hearing, and therefore should not be before the Arbitrator.

II. The polygraph examinations of inmates "J" and "S", and the testimony of Paul Jones regarding their administration, should be admitted into the record for consideration by the Arbitrator, for the purpose of corroborating the witnesses credibility.

III. The Grievant was disciplined for just cause; since he abused a person in the custody of the state, section 24.01 of the contract mandates that the penalty of removal be upheld.

THE UNION'S POSITION

The State has failed to carry its burden to show that [Grievant] was disciplined for just cause. The State has not followed the necessary contractual procedures to discipline [Grievant] and in addition, the State has not proved by any standard of proof that [Grievant] is guilty of the charges for which he was removed.

Under the contract … discipline must be imposed on an employee within 45 days after the pre-disciplinary hearing is held …. This issue of timeliness was not raised by the Union until several days prior to the arbitration. The issue was raised as soon as the union became aware of it. [Grievant] was summoned … to a "PreDisciplinary conference""with Jerry Wente, the Deputy Superintendent of Custody, on July 25, 1986 ... Final disciplinary action ... was not made until September 30, 1986 ... 67 days after the pre-disciplinary conference with Mr. Wente [which] ... was a predisciplinary meeting....

Aside from the procedural difficulties with the State's case against [Grievant], the outcome of the case turns on the credibility of the witnesses. On the one side is [Grievant], an 18-year veteran of the guard force at the Ohio State Reformatory …. On the other side are two-witnesses, Inmate "J" and Inmate "S".

Inmate "S" is a convicted rapist with a documented history of psychological problems.

Inmate "S" is a three-time loser …. convicted of the vicious crime of sexual battery as well as attempted grand theft and the possession of criminal tools….

The credibility of Inmates "S" and "J" is extremely low. Both are convicted felons…. The conflicting statements of both "J" and ns", when taken as a whole, reveal that neither inmate is worthy of belief. "J" and "S" even disagreed as to the date of which the alleged sex act

occurred.

The witness statements of the other inmates should be given no credence whatsoever by the arbitrator …. since those individuals were not produced at the hearing for cross-examination…

The Union objects to the use of lie detector tests. Numerous studies have shown how fraught with error they are. Errors can creep in as a result of poor question formulation, examination error, and the physical and mental impairments of the person being polygraphed. This is why Section 24.07 of the contract … prohibits requiring employees to take lie detectors or allowing an employee to be disciplined as a result of his or her refusal to take a lie detector test.

The results of the inmates' lie detector tests should not even be admissible in an arbitration hearing. Should the arbitrator decide to admit the results of the lie detector test, these results should be given the least possible credibility. First, lie detector tests are not admissible in courts of the State of Ohio without the agreement of both parties. In the instant case, the Union has not agreed…

An excellent analysis of the use of the lie detector in arbitration cases can be found in Kisco Company, Inc. 75 LA 574…. The decision of Arbitrator Stix analyzed the exact situation present in the instance case, namely the use of a polygraph examination to bolster the credibility of witnesses [and] concluded that the testimony of a polygraph examiner should only be admitted if (1) both parties agree to the testimony and (2) the adverse party has advance notice, the entire polygraph examination is tape recorded, the polygrapher is qualified, and the opposing party has access before and during the arbitration hearing to the chart and tape of the polygraph test and the interview.

The appropriate standard for the arbitrator to apply in this case is proof beyond a reasonable doubt…. To allow [Grievant's] future job prospects and reputation to be besmirched on a preponderance of the evidence standard is cruel and unfair. At the very least an intermediate standard of clear and convincing evidence should be applied….

[Grievant] was treated unfairly in the handling of his case by the State. The alleged offenses originally occurred in March or April, 1986 … yet [Grievant] was left hanging until late September, 1986 before he was removed, a period of more than 6 months…. **5**

ISSUES

C. Was the final decision to terminate Grievant made within the period specified in Section 24.05 of the Agreement, and if not, must the decision be overturned?

C. Was the period between the alleged cause and the termination unreasonable and unfair, requiring the discipline to be overturned?

C. Which, if any, of the written statements offered by the state are admissible?

C. Should the polygraph test results be admitted and considered by the arbitrator?

C. What standard of proof should be applied?

C. Was there just cause for the termination of Grievant, and if not what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 24 – DISCIPLINE

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of any employee committing such abuse.

24.01 – Pre-Discipine

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that

time used to support the possible disciplinary action.… The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

24.05 – Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a

decision on the discipline until after disposition of the criminal charges….

24.07 – Polygraph Tests

No employee shall be required to take a polygraph, voice stress or psychological stress examination as a condition of retaining employment, nor shall an employee be subject to discipline for the refusal to take such a test.

ANALYSIS

ISSUES I AND II ON THE UNION'S CLAIMS OF UNTIMELY ACTION BY THE STATE

C. Findings of Fact

On or about April 18, 1986, allegations of misconduct by Grievant, who was assigned to the Protective Custody unit, were brought to supervision's attention. Robert Riddle, the Inspector of Institutional Services, was assigned to investigate. Recognizing the serious nature of the charges and the potential adverse consequences to Grievant, Inspector Riddle conducted a careful, thorough series of interviews of at least 10 persons. Most of them were inmates housed in the Protective Custody unit. As the interviews progressed, Riddle obtained a number of statements, in some cases more than one statement from the same person. Riddle also studied records of past discipline and investigations which came up during his interviews.

During the investigation Mr. Riddle told Grievant about the charges. Grievant made a flat denial but no written statement.

On May 14, 1986 Inspector Riddle presented a report totaling over nineteen pages to his supervisor, Deputy Superintendent Wente who was in charge of custody. Based on his analysis of the witnesses' statements, particularly those by "S" and "J", whom Riddle believed to be truthful, Riddle concluded that Grievant had been guilty of misconduct. However, because the charges were made by inmates against a Correction Officer who had "had relatively few problems", Riddle suggested that several inmates be given polygraph examinations.

Mr. Wente approved the recommendation and arrangements were made for a certified polygrapher to come to the Reformatory on June 4, 1986 to test "S" and "J". He gave Mr. Wente an eight page written report on June 13, 1986 that opined that "J" and "S" had been truthful in their statements' describing Grievant's misconduct. The polygrapher's report was forwarded to Inspector Riddle who returned the report on June 30, 1986 to Wente saying, "with the advent of this report I recommend that appropriate discipinary measures be instituted."

Mr. Wente sent Grievant a notice on July 22, 1986 that "You are scheduled to attend a pre-disciplinary conference in my office Friday, 7-25-86, at 5:30 a.m." No other information was stated on that inter-office communication.

At their meeting Mr. Wente summarized to Grievant the Inmates' allegations, the general nature

of which had been told him earlier by Riddle but Wente added that several inmates had been polygraphed and the results indicated that they had told the truth. Wente invited Grievant to take a polygraph "to show his innocence". Grievant said he wanted to consult his attorney before replying.

On August 21 Grievant sent Mr. Wente the following statement on an inter-office communication. "SUBJECT: Polygraph Test – I will not be taking a polygraph test".

On September 2, 1986 Mr. Wente used a form entitled "Recommendation for Disciplinary Action" to submit to the Superintendent the information summarized above. He attached all the evidence which he had received from Riddle and concluded:

> … Due to the seriousness of the allegations I am recommending that you take appropriate disciplinary action for the following:
>
> Threatening, intimidating or coercing an inmate for personal gain or satisfaction.
>
> Engaging in any unauthorized relationship with inmates.

After considering the matter, Superintendent Dahlberg sent Grievant a letter on September 10, 1986 saying:

> You have been referred to this office by Deputy Superintendent Wente for consideration of disciplinary action. The attached document(s) explain the reason for the referral. [The documents were the file of witness statements developed by Riddle, a copy of Grievant's 8/21/86 memo declining the polygraph test, and Wente's letter quoted above.]
>
> A disciplinary conference to consider testimony and evidence in this matter is scheduled in Mr. Richard Hall's office on 9-16-86 at 5:00 a.m. You are instructed to report to that office on that date and time.
>
> You may, if you wish, be accompanied by a representative of your choice. If you elect to be represented by an O.S.R. employee who is scheduled for work on that date and time, please notify this office in advance so that we can arrange for him or her to be present. Should you elect to be represented by an employee not scheduled for work on that date and time, or to be represented by a non-employee, you are responsible for making any necessary arrangements.
>
> Upon consideration of the evidence and testimony submitted during the conference, the person conducting the hearing may choose to recommend that disciplinary action be taken against you. Such action could result in a suspension of one or more days from duty, up to and including removal from your position.…

The hearing was held as scheduled. On the same day Mr. Hall prepared a "Disciplinary Summary/Recommendation Sheet" which recited the following:

CHARGED RULE(S) VIOLATION: Threatening, Intimidating or Coercing an Inmate for Personal Satisfaction, Engaging in an Unauthorized Relationship with an Inmate.

FINDING OF FACT:

There exists substantial evidence that [Grievant] did coerce inmate "J" into performing oral sex on himself. In addition, substantial evidence exists that [Grievant] did coerce inmates "J" and "H" into performing sex on each other while he watched. Further, substantial evidence exists that [Grievant) did threaten and attempt to coerce inmate "S" into remaining silent about his witnessing the events.

[Grievant] flatly denies the charges. Polygraph tests conducted on inmates "J" and "S" add validity to their allegations and substantiate their statements. MITIGATING FACTORS: 18 years of institutional service without discipline…. THE FOLLOWING PENALTY IS SUGGESTED:
Removal…

Richard Hall/s 9-16-86
ADMINISTRATIVE HEARING OFFICER DATE

In the space at the bottom of the form for "Appointing Authority's Comments", the Superintendent wrote "Recommend Removal" and signed his name on September 17, 1986. On September 30, 1986 the Director removed Grievant.

B. The 45 day period in Section 24.05

Section 24.04, "Pre-Discipline", of the Labor Agreement considers two types of procedure before imposition of discipline. The first is an investigatory interview. At the Employer's option, an employee may be required to participate in an investigatory interview. If so required, the employee is entitled to the presence of a Union steward provided:

C. The employee requests the steward's presence, and

B. The employee has reasonable grounds to believe that the interview may be used to support disciplinary action against him.

Inspector Riddle conducted such an interview of Grievant.

The second type of action considered in 24.04 is a "meeting prior to the imposition of a suspension or termination". When the State contemplates discipline it has a duty to hold such a meeting. After the conclusion of the Pre-Discipline Meeting the Appointing Authority's Designee may make a recommendation of disciplinary action. Section 24.05 establishes certain requirements for the final decision on the recommendation.

The Parties agree that the Pre-Discipline Meeting was held; they disagree as to when, where, who participated, etc. The Union contends that Mr. Wente's "conference" on July 25, 1986 was the meeting prior to the imposition of a suspension or termination" so that the removal on September 30, 1986 was imposed more than forty-five days thereafter, in violation of Section 24.05. The State argues that Mr. Hall conducted the Pre-Discipline Meeting on September 16, 1986.

Article 24 of the Labor Agreement has several very specific requirements which are pertinent to the determination of whether Wente of Hall conducted the Pre-Disciplinary Meeting:

C. The Employer must inform the Employee in writing:

C. of the reasons for the contemplated discipline,

C. and the possible form of discipline.

2. The Employer must provide, no later than at the meting:

C. "a list of witnesses…

C. and documents known of at that time used to support the possible disciplinary action."

3. The Appointing Authority's designee shall conduct the meeting.

Clearly Mr. Wente conducted at least an investigatory interview of Grievant on July 25, 1986. To the Union, Wente conducted on that day the PreDisciplinary Meeting simultaneously with or instead of an investigatory interview. Nothing in Section 24 requires the Employer to subject an employee to an investigatory interview. If the Employer does elect to interview the employee, it may be conducted in a Pre-discipline Meeting. However, the facts are clear that Mr. Wente was not initiating the Pre-Discipline Meeting contemplated by Section 24.04.

First, it is well known that the "Appointing Authority" for purposes of invoking discipline, is the Superintendent, not the Deputy Superintendent for Custody.

Second, Wente's July 22, 1986 written communication consisted of one sentence: "You are scheduled to attend a pre-disciplinary conference in my office on Friday, 7-25-86, at 5:30 a.m." None of the critical information required by Section 24.04 summarized in I and 2 above were stated. In contrast, those items were covered in detail in Superintendent Dahlberg's notice dated September 10, 1986. Mr. Dahlberg stated the reasons and possible form of discipline, provided the names of the witnesses against Grievant and the documents used to support the possible disciplinary action.

Although Wente way have mentioned to Grievant on July 25th the names of witnesses he did not given or even offer the supporting documents. His "conference" on July 25th was simply.an additional investigatory interview. After repeating the information given by Riddle earlier, Wente invited Grievant to take the polygraph test.

Superindentent. Dahlberg, the appointing authority for Pre-Discipline meetings, did not designate Mr. Wente to conduct the Pre-Discipline Meeting contemplated by Section 24.04. responsibility in writing. Mr. Hall was formally given that

The Superintendent's form says it is the "formal notice of hearing" and also recites various employee rights in connection with Union and/or employee opportunity to comment, refute or rebut.

The Labor Agreement contemplates that the designee shall make a specific recommendation for a specific discipline. On September 2, Wente recommended generally that the Superintendent "take disciplinary action", without mentioning any specific discipline. In other words he advised the Superintendent to initiate the procedures for discipline, which are specified in Section 24.04 rather than dropping the matter. In Wente's opinion there was enough evidence to make a charge in contemplation of some discipline. Superintendent Dahlberg followed Mr. Wente's recommendation and initiated pre-discipline steps. After the hearing, Superintendent's Designee Hall recommended a specific discipline – removal – on September 16, 1986. The removal came on September 30th, fourteen days later, well within the time period in Section 24.05.

For the foregoing reasons, the Arbitrator finds that Mr. Wente's conference was not intended as, nor did it have the form or substance of the Pre-Discipline Meeting required by the second paragraph of Section 24.04.

Assuming for the sake of further analysis that it had been such a meeting, it did not conclude on July 25th . At Grievant's request the "conference" was recessed until he replied on the invitation to take the polygraph test after counsel with his attorney. He did not answer until August 22nd. Mr. Wente did not make any recommendation to Dahlberg until September 2, 1986. However, even if the "clock" had begun to run from the time the conference ended on August 21st , only 40 days elapsed from that date until Grievant was terminated. Thus even if Wente's conference was intended as the required meeting, the removal occurred within 45 days.

Furthermore if the forty-five day period had been exceeded the facts necessary to consider timeliness under 24.05 were all known to grievant and should have been known to the Union when it processed the grievance for several months before the arbitration. Failure to assert before arbitration the protest about the forty-five day requirement of 24.05 constitutes a waiver.

In passing the arbitrator notes that "at the discretion of the employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur…". In this case, there was such a criminal investigation so that State had the option to delay beyond forty-five days after the recommended disciplinary action.

C. The period used by State before Grievant's Termination

The Union charges that Grievant

was treated unfairly in the handling of his case [because] the alleged offenses originally occurred in March or April, 1986 … yet [Grievant] was left hanging until late September 1986 before he was removed, a period of more than six months.

The State became aware of allegations against Grievant on about April 18, 1986, and terminated him on September 30, 1986)a period of IG5 days.

As stated above, Inspector Riddle made his interim report after extensive investigation May 14, 1986. He had proceeded expeditiously.

The purpose of the polygraph tests was to check the truthfulness of the statements by "J" and "S". A month passed while the polygraph tests were arranged, administered, analyzed and reported to the Employer. Given the tasks involved, that amount of time does not appear to be unreasonable.

As sent to Mr. Wente, the polygrapher's report stated that the witnesses had been truthful. Presumably Mr. Wente forwarded the report to Mr. Riddle because the latter transmitted it to Wente on June 30th recognizing the corroboration and recommending "that appropriate disciplinary measures be

instituted". That recommendation had been pending while the Employer awaited the polygraph results. Yet when the results finally arrived, another two weeks were used to pass them between Messrs. Wente and Riddle. In the absence of explanation, that amount of time for so little action appears questionable.

For the period July 1 through September 2, 1986 – 64 days – the matter was in Deputy Superintendent Wente's hands. In that period he interviewed Grievant, waited for his answer and then submitted a page and a half summary to the Superintendent with the same recommendation given earlier by Mr. Riddle

Mr. Wente cannot be held accountable for the twenty-seven days that he was waiting for Grievant's answer about the polygraph. However, Mr. Wente did require thirty-seven days for the limited duties he performed in connection with processing the matter at this stage. Superintendent Dahlberg testified that Wente was on vacation for part of that period. Mr. Dahlberg also pointed out that the Parties began their first Labor Contract on July 1, 1986 and were not familiar and practiced in the procedures of the Agreement.

From the time Mr. Wente's recommendation was sent to the Superintendent until the removal, matters proceeded with relative dispatch.

In this Arbitrator's opinion, there is a substantial basis to find that action was unnecessarily delayed for several weeks of the 165 day period. If Mr. Wente had to be away for a substantial period, someone else should have been delegated to handle the claims against Grievant.

Although it is true that the new Labor Contract took effect July 1, 1986, there is no explanation for how the new provisions caused Mr. Wente a delay of several weeks before inviting Grievant to

take a polygraph or making his final recommendation to the Superintendent. (The only confusion noted by the Arbitrator stemmed from use of the term “Disciplinary conference” in respect to the separate meetings called by Messrs. Wente and Dahlberg.)

On balance however, several weeks of unnecessary delay were only a minor portion of the total time; the majority of the time appears to have been required. Even more important the slight extra time did not redound to Grievant’s disadvantage. He knew from Mr. Riddle and Mr. Wente what the allegations were, and who had made them. Thereafter Grievant delayed the proceedings for four weeks to consult his attorney. Both parties contributed to the delay and there was no prejudice to Grievant. To the extent delay prejudiced a party, the employer may have been disadvantaged because the availability of its witnesses was reduced by the passage of time. Under these circumstances fairness does not require that the Employer’s action be overturned.

Although for this case the delay will be ignored, the Employer is warned for the future that due process requires reasonably prompt action under the circumstances of a given case and the absence of prejudice to a Grievant will not automatically excuse an unreasonable delay.

ISSUE III ON THE ADMISSIBILITY OF THE WRITTEN STATEMENTS BY INMATES

At arbitration the Employer sought to enter a number of written statements by inmates and former inmates of the Mansfield Reformatory. Two of the inmates testified at the arbitration. The Union objected to admission of any of the statements on the basis that they were hearsay and were not subject to oath and cross examination. In addition, the Union argued that the statements of the two inmates who testified should not be admitted for that reason.

The Arbitrator agrees with respect to the statements of the inmates who did not testify. Their statements are not accepted as evidence in this case.

The situation is different with respect to the statements of “J” and “S”, who testified. In the first place, “J” and “S” were each sworn and then gave detailed testimony which was subjected to extensive cross-examination by skilled counsel. The Union sought to impeach their testimony by attacking their character and truthfulness because of conviction of crimes, reputation for lack of veracity, and allegations of recent fabrication, improper influence or motive and by alleging the witnesses had made contradictory statements at about the same time. Where such efforts are made to impeach a witness, the witness’ prior consistent statements are admissible not only as rebuttal to the charges but also as substantive evidence. Accordingly, the statements of “S” and “J” were admitted and considered by the Arbitrator.

ISSUE IV CONCERNING THE POLYGRAPH TESTS

The state arranged to have “S” and “J” take polygraph tests. Each of them had made statements that they had been the victim of and witness to improper conduct by Grievant. The purpose of their polygraphs was not to be direct proof of the misconduct but rather to corroborate their credibility. “S” and “J” voluntarily submitted to polygraph tests which were described and evaluated by the polygrapher, an expert who had administered the tests.

The polygrapher gave his opinion as an expert, that “J” and “S” had spoken truthfully.

The Union objected to the use of polygraph tests and testimony by the Polygraph Examiner.

The admissibility of expert testimony in court and generally in arbitration is subject to several conditions. First the witness must by qualified as an expert. Evidence must be presented of the knowledge, skills, education, training or experience possessed by the witness and he must show familiarity with the particular problem on which he is to give an opinion. **17**

The polygraph examiner who testified was subjected to an extensive examination by the Union as well as by the Arbitrator concerning these matters. The Arbitrator finds that Mr. Jones does meet the standards of an expert in polygraphy, the first condition of an expert witness.

The second pre-requisite to the admissibility of expert testimony is that the subject matter of the expert testimony is one where the expertise of the witness will assist the tryer of fact to understand the evidence or determine a fact in issue. A field in which expert testimony is permitted is one in which the procedures or methodology involved in reaching conclusions have received general acceptance. Expert opinions are permitted in many areas where some scientific, business, literary, or other skills not possessed by the ordinary layman is required to reach an intelligent conclusion concerning the facts necessary to decide the case.

Expert testimony is not permitted where the state of knowledge in a field does not allow a person qualified in the field to give a reasonable opinion. Based on this principle most courts historically have not admitted polygraph tests offered to prove the truthfulness of a witness, despite the presence of a trained polygraph operator; the courts have not believed that the state of knowledge in the field of polygraphy have developed to, an expert in the field to give a reasonable opinion. Polygraphy may be “new” and not adaquately developed from the perspective of hundreds of years of
jurisprudence; but during the past 50 years it has been extensively studied
and developed.

The Union brief pointed out that “an excellent analysis of the use of the lie detector in arbitration cases can be found in Kisko Company, Inc., 75 LA 574”.

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The Arbitrator has read the Kisko case and a number of other decisions on this subject. The arbitrator in the Kisko case made an intensive study of the question of polygraph evidence. Most of his research was spent in an attempt to form an opinion “as to the validity of polygraph tests”. He said “My tentative conclusion on that question is that the tests dg have sufficient validity to warrant consideration by an arbitrator.” (Emphasis supplied)

Most experts and even the severest critics recognize that polygraph procedure (properly administered) has an accuracy rate of about 70-80% for a given subject. Supporters attribute an even higher accuracy rate, sometimes over 90%. In the case at hand, polygraph tests were submitted to two different persons, both testifying on some of the same subject matter. According

to the polygraph results both inmates had testified truthfully on those events.

In the Kisko case, although the arbitrator accepted that polygraphs have sufficient validity to warrant consideration by an arbitrator he did sustain the Union's objection to the polygraph evidence. His decision was based on his personal opinion that the evidence was "inappropriate in an arbitration unless offered in pursuant of the terms of the labor contract or otherwise acquiesed by the Parties." The Labor Agreement before that arbitrator did not have any provision for polygraph testing and he concluded that Labor Agreement prohibited such evidence. He also said:

> "if polygraph evidence were received it would typically have such weight that the polygrapher would displace the arbitrator as fact finder on the issue of credibility; this would be inconsistent with the Parties Labor Agreement, which makes no provision for resort to polygraph examiners in resolving credibility of issues." The contract in the case before this arbitrator does not prohibit polygraph tests generally although it does limit the use. ("No employee shall be required to take a polygraph … examination as a condition of obtaining employment … nor shall an y employee be subject to discipline for refusal to

take such a test.")

To test the credibility of the witness an arbitrator may use many tools. There is no reason in the eyes of this arbitrator to exclude a tool which admittedly has a high degree of validity and reliability on the issue of credibility. For that reason the arbitrator admits the results of the polygraph test and will accept them for the purpose of corroborating the testimony of the inmate witnesses.

The Grievant was offered the same opportunity to corroborate his testimony as was offered to "S" and "J" (see 84-2 LA 8541, Arbitrator Seidman). His declination does not diminish the contribution to their credibility made by the positive results of their polygraphs.

ISSUE V ON THE STANDARD OF PROOF

To this arbitrator the standard of proof in a discipline case is not the criminal standard of proof beyond a reasonable doubt. Nor is it the civil standard of preponderance of the evidence. Rather, this arbitrator applies the arbitral standard of clear and convincing evidence but with a higher degree of certainty than required in cases which do not involve conviction of a crime. This view is held by many arbitrators. (See for example, Marshall Seidman in the decision cited above.)

ISSUE VI ON JUST CAUSE

To determine the facts the arbitrator had the direct testimony and cross examination of "J" and "S" at arbitration, statements written by them in April 1986, results of the polygraph tests both witnesses took in June 1986, testimony of the Polygraph Examiner, testimony of Grievant, records of several indirectly related investigations that bore on credibility, log book of visitors to the Protective Custody unit and an on-site examination of the

Protective Custody ward at approximately 11:00 P.M. under conditions which the parties agreed had prevailed at the time the events in question occurred.

"S" and "J" have been in different reformatories and not in communication with each other for a number of months. Both inmates testified separately at arbitration in a very direct and credible manner. Their description of the incidents were clear and unhesitating in a degree appropriate to significant events affecting them a year ago. Their testimony was completely consistent with each other and. With the written statements they had made almost a year ago. In addition, their statements in the polygraph tests corroborated their statements of last year.

The examiner who conducted the interviews with inmates "J" and "S" appeared at the hearing and testified before the arbitrator and the parties. His training and experience were appropriate and considerable. In his opinion, both "J" and "S" had spoken truthfully on the essential matters. The Union had an opportunity to question the examiner. Despite extensive and ingenious questioning by the Union the examiner's testimony was not shaken.

Based on the arbitrator's on-site visit, he concluded that witnesses "J" and "S" had the opportunity to make the observations and witness the events just as they had claimed.

In contrast to the testimony of the inmate witnesses, the Grievant was not credible in the opinion of the arbitrator. Some of his testimony was contraditory, misleading or incomplete. For example as already noted his claim that "J" could not have seen some of the events he claimed was proved false during the on-site visit.

Grievant claimed that ranking custody officers came to the dormitory to take statements from the inmates on certain days. Those claims should have been reflected in the dormitory log which Grievant himself maintained. An examination of that log in the custody office failed to reveal any such

notation for the times indicated. This was another contradiction in Grievant's testimony.

Grievant attempted to deny some of the acts attributed to him by claiming that he is impotent. However he also admitted that, he had been implanted with a prosthesis which allows him to continue to have sex, and he admitted that he does have sex relations on occasion.

The Employer prohibits Employees from:

Threatening, intimidating or coercing an inmate …for personal gain or satisfaction or engaging in any unauthorized relationship with inmates.

The arbitrator finds clear and convincing evidence that Grievant engaged in sex acts with inmates "H" and "J", directed "H" and "J" to engage in sex with each other while he watched for his personal satisfaction and attempted to intimidate witness "S" with a trumped-up disciplinary charge in an attempt to have him remain silent after witnessing some of the sex acts. Grievant's

actions are certainly within the prohibitions cited above. Such conduct was improper even without a published rule.

Certain inmates are segregated in Protective Custody because they are especially vulnerable to sexual and other exploitation. Rather than protect them, Grievant abused them and then attempted to corrupt them to bear false witness against each other. For that reason, Grievant's violation of his duty was especially heinous.

There was just cause to terminate Grievant. Article 24.01 bars the Arbitrator from modifying this termination.

AWARD

The grievance is denied.

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Nicholas Duda, Jr. Arbitrator

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