ARBITRATION DECISION NO.:
292

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

EMPLOYER:
Department of Rehabilitation and
Corrections, Southern Ohio
Correctional Facility

DATE OF ARBITRATION:
June 26, 1990

DATE OF DECISION:
September 18, 1990

GRIEVANT:
Ronald Tawney

OCB GRIEVANCE NO.:
27-25-(90-02-06)-0092-01-03

ARBITRATOR:
Jonathan Dworkin

FOR THE UNION:
Donald M. Sargent

FOR THE EMPLOYER:
Thomas E. (Ted) Durkee

KEY WORDS:
Removal
Failure to Disclose Witness
and Documents
Inmate Abuse
Due Process
45 Day Limit
Timely Implementation
of Discipline
Use of Force Investigation

ARTICLES:
Article 24 - Discipline
§24.01-Standard
§24.02-Progressive
Discipline
§24.04-Pre-Discipline
§24.05-Imposition

of Discipline
Article 25 - Grievance Procedure
§25.03-Arbitration Procedures

FACTS:

The grievant was a Corrections Officer 2, employed by the Department of Rehabilitation and Corrections. He was assigned to the Southern Ohio Corrections Facility, a maximum security institution. Three inmates who had been transferred into the facility accused the grievant and others of beating them upon being locked into their cells the day of the transfer. No bruises were found on the inmates when they were strip-searched by the grievant and other COs upon entry into the facility. However, a subsequent medical examination found bruises on the inmates. An investigation was conducted and the grievant was found guilty and removed for inmate abuse.

EMPLOYER'S POSITION:

There was just cause for removal. The Agreement prohibits the arbitrator from reducing the penalty imposed by the employer if abuse is found. The inmate testified that the grievant beat him and medical evidence shows that the inmate was beaten. There were no bruises on the inmate when he entered the facility. Additionally, other inmates present heard sounds of the inmate pleading for the grievant to stop, and sounds consistent with a beating. Therefore, the grievant was guilty of inmate abuse

The employer did not violate any due process requirement of the Agreement. First, the investigation conducted was full and fair. The investigator's duties include protecting inmates' rights which requires aggressive investigation of charges. Second, the discipline was imposed within the time limits of section 24.02. The five months which passed between the incident and imposition of discipline were required in order to properly investigate the charges. Ohio law requires an internal investigation and then a Use of Force Committee must also be convened. The forty-five day time limit for imposing discipline was not violated. Third, the decision to remove the grievant was made forty-two days after the pre-disciplinary hearing. That the grievant was not notified until the forty-seventh day is not a violation of the Agreement. Third, the employer did disclose all witnesses and documents used to support discipline to the union. The fact that the union obtained some documents less than three days prior to the pre-disciplinary hearing was not prejudicial to the union. Fourth, the warden's initial prohibition against copying some material caused no harm due to the length, (from December 11th until the 20th), and other delays in completion of the pre-disciplinary hearing. Fifth, the employer retained the right to rely on inmate testimony to support discipline. The employer was not bound by its past policy of not relying on inmate testimony. Therefore, the employer committed no procedural errors violative of due process.

UNION'S POSITION:

There was no just cause for discipline of the grievant. There was no evidence that he abused the inmate. The employer relied on statements from criminals who were not to be believed. Although no bruises were found on the inmate when he was transferred to the facility, any bruises found later were self-inflicted in an attempt to obtain a transfer from the facility. Therefore, the grievant committed no abuse of the inmate.

Additionally, the employer committed many due process violations. First, the employer's Inspector was adversarial and not impartial. The inspector also coached inmates on what to say and threatened them in order to get them to testify against the grievant. Second, the employer violated section 24.02 by not imposing discipline in a timely manner. Five months passed from the time of the incident until the grievant was removed. Third, the employer violated section 24.05 of the Agreement. The grievant was not notified of his removal until forty-seven days after the pre-disciplinary hearing. The Agreement requires notification no longer than forty-five after the conclusion of the hearing. Fourth, the employer failed to disclose to the union all the witnesses and documents used to support discipline. Section 24.04 requires disclosure three days prior to the pre-disciplinary hearing. The union obtained the report of the Use of Force Committee only sixty-six hours prior to the hearing. The union was also prejudiced because the warden prohibited copying of the

report. Fifth, the employer is not permitted to rely solely on inmate testimony. The employer's policy has been not to rely on inmate testimony but to require corroboration. Therefore, the employer committed many procedural errors which violated the grievant's due process rights.

ARBITRATOR'S OPINION:

The union claimed many procedural errors which were addressed first by the arbitrator. First, the union's argument that the employer's Investigator was not impartial did not constitute a procedural violation. The Investigator's role was not neutral. Part of his job of protecting inmates' rights may place him in opposition to other employees. It was not shown that the Investigator coached the inmates on what to say or threatened them to testify against the grievant. Second, the fact that the grievant was removed five months after the incident did not violate the Agreement. State law requires layered scrutiny of prisoner abuse claims before charges can be brought. The employer was compelled to investigate then convene a Use of Force Committee to conduct hearings on the matter. The Committee issued its report on December 5th, and the pre-disciplinary hearing was begun on December 11th. Therefore, the process could not have been concluded sooner. Third, the Agreement requires the employer to decide on the discipline within forty-five days. The employer did decide to remove the grievant on the forty-second day. That the grievant was not notified until the forty-seventh day did not violate the Agreement. Fourth, the employer did not disclose all the documents used to support discipline to the union at least three days prior to the pre-disciplinary hearing. However, due to the delays and the length of the hearing, (from December 11th until completion on December 20th), the union was not prejudiced. On the facts of the case the employer substantially complied with disclosure rules. Fifth, the union's claim that the employer cannot rely on inmate testimony cannot be accepted. Requiring corroboration would allow inmate abuse so long as no others were present to witness the incident. Additionally, there was corroborating evidence in the form of medical findings of bruises on the inmates which were not present prior to the inmate's transfer.

The testimony on the incident by the grievant and by inmates is opposed to each other. The inmates, as criminals, were less credible. Inmates have harmed themselves to obtain transfer from the facility. The inmates' testimony was also inconsistent, because it contained factual exaggerations. The grievant, however, was much more credible. His explanation was consistent throughout and his demeanor was more respectful toward the arbitral process. Nevertheless, the independent medical evidence contradicts the grievant's testimony.

The only other evidence supports the inmates' claim that the grievant abused the inmate. The Nursing Supervisor was the most credible witness. There is evidence that the grievant abused the inmate as charged. The inmate was strip-searched upon his entry into the facility and no bruises were found. A medical examination several days later found fresh bruises on the inmate's back and buttocks. The bruises were noted to be unlikely to have been self-inflicted.

Therefore, it was proven that the grievant engaged in misconduct and that misconduct constituted abuse. In this case the arbitrator was unable to reduce the penalty imposed since the grievant's behavior constituted above.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Rehabilitation

and Corrections
Southern Ohio Correctional Facility
Lucasville, Ohio

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, OCSEA/AFSCME
Local Union 11, State Unit 10

Jonathan Dworkin, Arbitrator

Case No.:
27-25(90-02-06)0092-01-03

Decision Issued:
September 18. 1990

APPEARANCES

FOR THE STATE
Thomas E. (Ted) Durkee,
Labor Relations Officer
Lou Kitchen, OCB Representative
T. Austin Stout, Attorney
Vic Crum, Labor Relations Officer
John Ison, Inspector
John A. Horn, Jr.,
Nursing Supervisor
Ronald Lewis, Inmate
Gary Bennett, Inmate
Danny Grimm, Inmate

FOR THE ASSOCIATION
Donald M. Sargent,
OCSEA Staff Representative
John Kimbler, Local President
David Justice, District Vice President
Elmer Justice, OCSEA Steward
Mike Crowell, Prison Chaplain
Ronald Tawney, Grievant
Brad Wedebrook, Witness
Paul Duke, Witness
Gerald Webb, Witness
Stanley Lane, Witness

ISSUE: §24.01: Removal For Alleged Inmate Abuse.

SUMMARY OF DISPUTE

The grievance protests a removal. Grievant was a Corrections officer at the Southern Ohio Corrections

Facility in Lucasville, Ohio (hereinafter designated, “Lucasville”). He was discharged from his employment on February 6, 1990 for allegedly beating three prisoners.

On September 14, 1989, Grievant and another Officer processed three transferees from Orient Correctional Institution. Orient is a minimum-medium security prison; the inmates were sent to the more restrictive environment of Lucasville (Ohio's only maximum security penitentiary) because several weeks earlier they had attempted to escape. The State contends that, after the inmates received haircuts, prison clothing, and several strip searches, Grievant and the other Officer escorted them one-by-one to cells on J-2 block. They took them into their cells handcuffed and, before removing the restraints, kicked, punched and clubbed them with the two-handled nightstick carried by Corrections Officers (PR 24's). The motivation for the attacks, according to the Employer's analysis, was to establish dominance and convince the new inmates that they were now "in a man's prison." The State's investigation revealed no other provocation; the evidence indicates that the inmates were quiet and obedient from the moment they walked into the Lucasville receiving area. They did and said nothing to challenge or offend the Corrections Officers.

The inmates complained to a Nurse who was distributing medication on the cellblock that evening. The complaints launched an extensive probe by prison officials -- investigations by medical personnel, the Inspector of Institutional Services (who serves as liaison for prisoners), and a three-member Use of Force Committee. All the investigatory findings were consistent with Grievant’s culpability, and the Lucasville Warden issued charges. The allegations were formal, alleging violations of several institutional rules, but the bottom line accusation was prisoner abuse.

At that point, a pre-disciplinary hearing was convened. The hearing was a contractual due-process requirement. Article 24, §24.04 of the governing Agreement provides in part:

§24.04 - Pre-Discipline

. . .

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. 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. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action.

Grievant's main defense from the time he read the charges against him, through the pre-disciplinary hearing, and in arbitration, has been unvarying. He maintains he is innocent. He insists that the accusations are spurious inventions of the inmates, designed to ensure transfers out of Lucasville. Indeed, they were subsequently moved to a medium security prison, probably the result of their charges and testimony against this Employee and the other Officer.

A significant discrepancy between Grievant's assertion of innocence and the proven facts is that the inmates did sustain injuries sometime after they were taken to their cells on September 13. Grievant believes they were self-inflicted, and there is historical precedent for his belief. Lucasville is regarded a most unpleasant place for a convict to do time, and there are numerous examples of inmates committing horrible mutilations of their bodies to obtain transfers.

In addition to Grievant's claim of innocence, the Union contends that the removal decision was clouded by procedural irregularities which denied the Employee fundamental entitlements to due process and invalidated the penalty. The Union contends that the Inspector of Institutional Services who spearheaded the investigation was predisposed towards proving Grievant's guilt, and his prejudice tainted everything he did and every report he submitted. His impropriety affected the proceedings of the Use of Force Committee, according to the Union, because his reports were reviewed before evidence was received. In the same vein, the Union alleges that the Inspector improperly influenced the pre-disciplinary hearing by intimidating a witness (an inmate) and compelling him to testify against Grievant.

The Union contends that other procedural defects occurred after the discharge was finalized -- that the Employer ignored con-tractual time lines and disclosure requirements relating to the pre-disciplinary

hearing. These violations, according to the Union, call for an award summarily granting the grievance regardless of the merits.

* * *

The dispute was submitted to arbitration and a hearing convened on June 26, 1990 at the Chillicothe Correctional Institution, Chillicothe, Ohio. It was adjourned after a full day of testimony. A follow-up hearing was held on Saturday, June 30, 1990 at the Lucasville facility. During the second hearing, the Arbitrator was provided a tour of the J-2 cellblock where the beatings allegedly took place.

At the outset, the Employer agreed that the grievance was timely, and the Representatives of the parties stipulated that the Arbitrator was authorized to issue a conclusive award on the merits of the grievance. Arbitral jurisdiction is more specifically defined and limited by the following language in Article 25, §25.03 of the Agreement:

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

When the hearings ended, the parties' Representatives obtained additional time to submit written closing statements.

THE ISSUE

Prior to arbitration, the parties executed the following agreed statement of the issue to be decided:

“Was the removal of [Grievant] on February 6, 1990 for just cause? If not, what should the remedy be?”

The statement is boiler plate for most discipline and discharge disputes. It is more confusing than helpful in this case, however, because Grievant is not entitled to have his removal measured by traditional elements of just cause. The term "just cause," in the contractual context, increases an arbitrator’s powers incrementally. It licenses him/her to breach the familiar stricture against basing decisions on individual concepts of fairness or justice, because justice is the root of just cause. And an arbitrator's concept of what is or is not just is his/her chief resource for deciding a discipline/discharge grievance. This power, bestowed by lack of a contractual definition of "just cause," is well illustrated by numerous arbitral decisions. It is common for discharges to be modified -- not because an aggrieved employee is found innocent of the charge against him/her, but because the penalty is, in one arbitrator's judgment, too harsh to comport with just cause.

For the most part, the Agreement regulating this controversy follows the usual pattern. It makes just cause the yardstick for discipline without defining the concept or expressly circumscribing arbitral authority, except in one circumstance. Arbitrators are contractually directed that they cannot modify removals of employees found to have abused individuals in State custody. This prohibition is unqualifiedly expressed in Article 24, §24.01 of the Agreement, as follows:

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 an employee committing such abuse. [Emphasis added.]

Section 24.01 significantly impairs Grievant's chances for reinstatement because it abolishes many, perhaps most of the fundamental precepts of just cause. If Grievant committed abuse and there was just

cause for any discipline at all, neither his record of service, length of employment, nor any other factors which might ordinarily impel an arbitrator to be compassionate, would have relevancy. His discharge would stand; §24.01 would mandate that result.

The Union had only two possible avenues for prevailing in this controversy, and it explored both of them fully. The first was Grievant's main defense -- that there was no just cause for his removal or any other penalty because he was innocent of the accusations lodged against him by the inmates. In this regard, there are arbitral decisions which carefully define "abuse" and distinguish it from lesser forms of misconduct. There is no need for the Arbitrator to explore such refinements here. The accusations against Grievant reveal startling brutality which was so inconsistent with his job responsibilities, Ohio law, and fundamental human values that it exemplified abuse. In this case, the question of whether or not the beatings rose to the level of the offense specified in §24.01 is not even debatable.

The second Union defense is more complicated. It is that Grievant is entitled to an award granting the grievance regardless of his guilt or innocence because the Employer violated standards of due process.

Both arguments are substantial. If Grievant did not abuse the inmates in his custody, the lack of cause for his removal becomes axiomatic. But even if the penalty was founded on cause, the Employer could not legitimately impose it without following the prerequisites, whatever the prerequisites were. While the Agree-ment eliminates just cause to a large extent in abuse cases, it does not dispose of it entirely. Employees still have entitlements under the standard, and an agency that ignores them does so at its peril. If Grievant was denied contractual or elemental due process, his claim for reinstatement and monetary relief will be granted whether or not he abused prisoners.

In sum, the issues to be decided are:

1. Did Grievant commit prisoner abuse?
2. Was Grievant accorded the substantive procedural rights and protections he was entitled to receive?

The grievance will be denied only if the evidence establishes that the answers to both questions are in the affirmative. If the response to either question is found to be "No," the grievance will be sustained.

THE UNION'S DUE-PROCESS ARGUMENTS;
FACTS, CONTENTIONS, AND CONCLUSION

The Union's presentation on Grievant's behalf reflected extraordinarily painstaking groundwork which included analysis of every procedural step taken by the Employer in the removal. The result was the Union's introduction of a profusion of due-process objections, attacking the Employer's operations at each level, the original investigation, the Inspector's report, the proceedings of the Use of Force Committee, and the pre-disciplinary hearing.

The Union disparaged the quality of the evidence against Grievant (consisting mainly inmates' testimony) and the Agency's reliance on it. It charged that the passage of five months from the time the beatings allegedly occurred to the time the discharge was finalized violated the contractual requirement that discipline be expeditious (Article 24, §24.02); also that the Agency exceeded the contractual time lines for issuing its decision. The extent to which the Union challenged procedure, and the Employer's defenses to the challenges, were accurately summarized in the Agency's Step 3 Response to the grievance:

The Union raised five (5) procedural objections, which will be individually addressed:

1. Materials not timely submitted to union: The union argues that on 12/05/89 the notice of pre-disciplinary hearing was received; however, only two documents were attached - the Standards of Employee Conduct and the Request for Discipline form. On December 8, 1989 the union acknowledges receiving additional documents; however, it is argued that the documents could not be copied for distribution and the hearing was scheduled to begin on Monday December 11, 1989. The Institution Inspector's report (or the use of Force Report) is the document to which the union refers. The union was given this document and two (2) hours for review during the pre-disciplinary hearing. Management contends the union was given ample

time to review the entire contents of the Use of Force report, consisting of approximately 13 sheets of 8 1/2 x 11 paper, with four of them being diagrams.[1]

2. The union objected to the use of tape recorder during the pre-disciplinary hearing: . . . The union requested the tapes of the hearing. [The Hearing Officer] informed the union that they could have copies of the tapes if they became part of the evidence record. [The Hearing Officer], however, used the tapes only as memory aides [sic]. The tapes did not become part of the evidence record; therefore, the union did not receive copies.

3. The union objected to the use of inmates as witnesses. Management contends that the circumstances of events lent themselves to a rational and justified use of the inmates as witnesses. In fact, not only were the statements of the inmates considered, but the anatomical figure diagrams of each inmate's bruises and abrasions were considered as evidence. It should be noted that these anatomical diagrams, and the comments which accompanied them, were prepared by registered nurses and physicians. The use of the inmates as witnesses in no way precluded the grievant from the exercise of his rights under the contract or during the pre-disciplinary hearing.

4. The union stated that . . . the Institutional Inspector . . . coerced inmate G---- to testify. G----, during the pre-disciplinary hearing and while under oath testified that he had no statement to give. The union, however, argues that [the Inspector], who was present at the hearing, subsequently approached inmate G---- outside the hearing room and said, "let's get back in there and burn these guys." Two other C.O.'s . . . gave statements to the Warden recounting what they recalled of the conversation between [the Inspector] and inmate G----. Also stated by these two C.O. witnesses was that inmate G---- said to [the Inspector], “man, I'm afraid that these guys are going to wip (sic) my ass if I say what you want me to say".

These statements were contained in an IOC to [the] Warden . . . dated December 12, 1989. The fear expressed by inmate G---- in December 1989, is similar in expression, to the fear he expressed in his September 13, 1989 Report of Unusual Incident. Instead of coercion, [the Inspector] seemed to be spurring inmate *G*---- on to do the right thing.

5. The union argues that the discipline was untimely imposed. This issue focuses on the time elapsed between the pre-disciplinary hearing and the actual final decision on the recommended discipline. The pre-disciplinary hearing was held on December 11-20, 1989; the Director signed the removal (order) on January 31, 1990, 42 days after the pre-disciplinary hearing. Therefore, the requirements of Article 24.05 were met by management. The final decision on the recommended discipline was done within 45 days as specified by [§]24.05.

While none of the Union's contentions are trivial, some do not have enough significance in relation to Grievant's rights to war-rant consideration as due-process violations. Indeed, the Union seemed to have recognized as much during the arbitration hearing when it withdrew its argument that it was not given copies of the Pre-Disciplinary Hearing Officer's tape recordings. Portions of the Union's procedural objections are more material than others and should be examined.

*** * ***

1. The Conduct of the Inspector of Institutional Services. Basically, the Union protests that the Inspector, the first to investigate, acted more as Grievant’s adversary than an impartial gatherer of facts.

According to a Union witness, the Site Representative who assisted Grievant in the early stages, the Inspector's bias was apparent when Grievant was interviewed. His demeanor was rude and accusatory. His apparent strategy was to break the Employee's defense and induce a confession. His desire to learn the truth seemed secondary to his desire to ensnare Grievant.

The Union maintains that the Inspector demonstrated even greater duplicity in the pre-disciplinary

hearing. When one of the inmates declined to testify against Grievant, the Inspector obtained a recess and took the witness into the hall outside the hearing room. The Corrections Officer assigned to escort the prisoner to and from the hearing listened to the Inspector's conversation. Appearing in the arbitration, he stated that the Inspector rebuked the inmate for his recalcitrance, telling him, "You go back in there and say what I told you so I can burn these two officers [Grievant and the other Corrections Officer charged with abuse]." The inmate expressed misgivings, claiming he was afraid to testify against his jailer. But the Inspector told him not to worry, that he would check on his welfare every day and protect him. The Union contends that the inspector's action amounted to witness tampering, obtaining coerced testimony, and/or promising undue rewards for testifying against Grievant. It maintains that, as a result, the pre-disciplinary hearing was corrupted and unfair to the point that it did not meet contractual requirements.

The Inspector defended against the Union's allegations, vigorously denying the charge that he tailored evidence for the pre-disciplinary hearing. He admitted conferring with the inmate in the hall, his version of the conversation is markedly different from the Union's. He conceded questioning the inmate's refusal to testify. The inmate's answer, according to the Inspector, was that he feared for himself and his family on the outside. The Inspector assured him that they would be protected, and asked if he wanted to reconsider. The inmate answered affirmatively and went back into the hearing room where he told a story of being viciously beaten by two Corrections Officers, one of whom was Grievant. It is noteworthy that the inmate's account of the conversation coincided with the Inspector's.

The Pre-Disciplinary Hearing Officer, an Agency Staff Attorney, took measures to protect the record from precisely the kind of defect which the Union urges took place. When the inmate and the Inspector returned from their conference, he declined to hear testimony until he conducted a yoir dire examination on the possibility of coercion. He permitted the hearing to continue only after he was convinced that no untoward witness tampering had occurred.

The Union's evidence on the subject did not provide a basis for the Arbitrator to second-guess the Hearing Officer's conclusion. Despite differences in tone, the Union's version of the conversation and the Inspector’s are nearly identical in substance. Neither reveals the slightest indication that the witness was intimidated. According to both accounts, the inmate feared for his and his family’s safety. All the Inspector did was guarantee that no harm would come from his testimony. There is not even a hint that the Inspector offered rewards or made threats to force the inmate to accuse Grievant in the pre-disciplinary hearing.

The Union's complaint about the Inspector, in a nutshell, is that he was not impartial. The charge that he acted more as an advocate than a neutral investigator is probably true. The record contains substantial evidence that he believed the inmates' stories of abuse and made a point of seeking discipline for the Corrections Officers he felt were guilty of severe misconduct. If the Inspector was suppose to as an arbitrator or an impartial hearing officer, his posture would have been reprehensible and probably would have justified an award overturning the discharge. But there is absolutely no evidence that he was in a neutral role. It seems that one of his functions was to be an in-house protector of prisoner rights. Certainly that part of his job was likely to bring him into positions adverse to the interests of employees from time to time. Furthermore, he was a Management employee and, as such, his expected role in the pre-disciplinary hearing was to give evidence supporting the view of the Lucasville Administration that Grievant had committed misconduct justifying discipline.

Nothing in the Agreement requires a Management officer, who is gathering evidence against a Bargaining Unit member, to be wholly impartial. The most the Agreement demands is relative fairness, that the affected employee be given an opportunity to know the charges and evidence against him/her and an adequate chance to present his/her defenses. There might be cause to criticize the Inspector’s zeal in his pursuit of Grievant, but finds no basis for a determination that the Inspector's actions deprived the Employee of due process.

2. Timeliness of Discipline. Article 24, §24.02 of the Agreement states in part:

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness

of the Employer's decision to begin the disciplinary process.
The inmates purportedly were beaten on September 13, 1989. The discharge was imposed on February 6, 1990, almost five months afterwards. The Union argues that the discipline was time-barred by then, and its imposition violated a contractually specified right of due process. If §24.02 embodies any meaningful negotiating intent at all, according to the Union, it requires overturning Grievant's removal.

On first examination, the Union's contention seems to have merit. Five months is a long time between misconduct and discipline; it does seem to fly in the face of the intent behind §24.02. While the provision does not specify a permissible number of days or months that can separate misconduct and discipline, it does require the Employer to act with as much dispatch "as reasonably possible."

Closer analysis of the evidence reveals that Management did act as quickly as statutory procedures allowed and, if anything, Grievant's cause was aided by the delay, not hampered by it. Ohio law provides for layered scrutiny of prisoner abuse claims before charges can be brought against an employee. The law acknowledges that force is sometimes necessary in a prison setting. Ohio Administrative Code, §5120-9-01 establishes the basis for allowing force and distinguishes between uses which are legitimate and those which are not:

5120-9-01 Use of force

(A) As the legal custodians of a large number of inmates, some of whom are dangerous, prison officials and employees are confronted with situations in which it is necessary to use force to control inmates. This rule identifies the circumstances when force may be used lawfully.

(B) As used in this rule and rule 5120-9-02 of the Administrative Code:

(1) "Excessive force" means an application of force which, either by the type of force employed, or the extent to which such force is employed, exceeds that force which is reasonably necessary under all the circumstances surrounding the incident.

The Statute then proceeds to delineate situations in which force is permitted:

(C) There are six general situations in which a staff member may legally use force against an inmate:

(1) Self-defense from an assault by an inmate;
(2) Defense of third persons, such as other employees, inmates, or visitors, from an assault by an inmate;
(3) Controlling or subduing an inmate who refuses to obey prison rules and regulations;
(4) Prevention of a crime, such as malicious destruction of state property or prison riot;
(5) Prevention of escape; and
(6) Controlling an inmate to prevent self-inflicted harm.

When force is used or alleged, an internal investigation is performed and the institution head advised of the findings. In this instance, the Inspector Institutional Services and Head of Nursing performed the investigation. The next step was to convene a Use of Force Committee. Administrative Code §5120-09-02 requires use-of-force reports, and establishes the Use of Force Committee, authorizing it to conduct hearings and “interview all available staff members and inmates directly involved in the incident, plus as many witnesses as are necessary or expedient." The Committee is a panel of three -- a Corrections Officer, a Treatment Specialist, and a Custody Supervisor. They review written statements, hear testimony, and arrive at a conclusion of whether there was no force, slight force, justified force, or abuse.

The Committee has final authority to the extent that a matter ends if it determines there no force, slight force, or justified force. In Grievant’s case, the Committee concluded that there was significant, unjustified force and recommended appropriate discipline. The report was issued to the Lucasville Warden on December 5, 1989. The pre-disciplinary hearing was scheduled for December 11, six days later. There was no unreasonable delay: in fact, from the Union's perspective, more time should have been allowed. The

Union did not obtain the Use of Force Committee transcript until late afternoon on Friday, December 8. When the pre-disciplinary hearing began, it requested (and was denied) a three-day adjournment to review that document along with the Inspector's report it received just that morning.

The Arbitrator fails to see how the process could have been abbreviated without seriously jeopardizing Grievant's statutory protections. It appears more probably than not that there was no undue or prejudicial delay between the cause for discipline and the determination of the Pre-Disciplinary Hearing Officer, which was issued on January 9, 1990, after a five-day hearing. The Hearing officer found there was just cause discipline Grievant. The Agency did not act on the finding until February 6, 1990. The substantive impact of that delay on Grievant's rights, if any, will be discussed in the following section.

3. Did the Agency Head Exceed the Time Limits of Article 24, §24.05? Section 24.05 of the Agreement establishes compulsory time lines for issuing discipline. It states in part:

§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.

By using the word "'shall" in the second line of the provision, the negotiators made their purpose clear. The forty-five day time limit was not to be a recommendation on how Management should control its discretion; it was an edict which the Employer was compelled to obey except in one circumstance (criminal investigation) which has no relevancy to this dispute.

The Union contends that Management violated the time rule. It bases its contention on the fact that Grievant did not receive his Notice of Removal until the forty-seventh day after the pre-disciplinary hearing. It is forced to concede, however, that the decision was finalized on the forty-second day. The extra five days were absorbed in intra-departmental communications. It took that long for the Department Head's decision to be sent and received by the Lucasville Warden, and for the Notice to be sent to Grievant.

The Union's position rests on the theory that §24.05 requires that a disciplinary notice be received by the affected employee no more than forty-five days after the pre-disciplinary hearing. The Arbitrator disagrees. While the language of the provision is restrictive of Management Rights and clearly imperative, it would be a mistake to add restrictions which go beyond what the Section actually says. It states that the "final decision on the recommended disciplinary action" shall be made "no more than forty-five (45) days after the conclusion of the pre-discipline meeting." That is the requirement. Undoubtedly, the Employer has additional obligations. It assuredly is compelled to notify an employee of his/her discipline without undue delay. But nothing in the Section states that the forty-five day limitation extends to such notice and it would be a misapplication of the Arbitrator's authority to read such requirement into the Agreement. Presumably, the negotiators meant what they said.

Since the final disciplinary decision was made and reduced to writing within the forty-five day period, and Grievant (and the Union) received copies just two days after the period ended, the forty-seven days between the pre-disciplinary hearing and Grievant's receipt of the discharge notice did not violate Article 24, §24.05 or the Employee's due-process protections.

4. Late or Withheld Disclosure. Article 24, §24.04 contains language requiring the Employer to make prompt disclosure of the witnesses and documents it intends to use to support a discipline proposal in the pre-disciplinary meeting. The provision states in part:

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. 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. When the pre-disciplinary

notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. [Emphasis added.]

A "document" which played a critical role in the pre-disciplinary proceedings was the report of the Use of Force Committee. It contained a thorough recital of all the evidence against Grievant, including transcribed testimony of inmates and employees. The report was reluctantly turned over to the Union Representatives on December 8, 1989 at 4:00 pm. The pre-disciplinary hearing was to convene at 10:00 am on December 11, just sixty-six hours later. The Union urges that the three days referred to in §24.04 means seventy-two hours, not sixty-six hours. Moreover, the Union was permitted to look at, but not copy, the Committee report. The restriction was imposed by the Warden when the Agency legal officers were away from the Institution and unavailable to give better advice. The Warden's hesitation to release it for copying was reasonable in the abstract. The report contained sensitive materi-al which was germane to a collateral criminal action pending against Grievant. Moreover, it was feared that releasing it indiscriminately might lead to retaliation. But the restriction on copying was clearly extra-contractual; it, was rescinded later, but not until a day after the hearing started.

A similar irregularity centered on the Inspector's report, consisting of medical records and transcribed interviews of inmates. It was not given to the Union until December 11 when the hearing began. The Union Representative asked for a three-day adjournment to give him time to review the document. The Hearing Officer (a Management employee) allowed a recess of only two hours for that purpose. Subsequently, the hearing was postponed twenty-four hours -- to accommodate the Employer, not the Union.

The Union urges that the Agency's actions with respect to the reports and the Officer's refusal to grant a needed recess abrogated Grievant's fundamental right to competent, informed representation, and violated §24-04 as well.

The Employer does not disagree with the Union's assertion that the Inspector's report was withheld until the day of the pre-disciplinary meeting. It notes, however, that the document contained nothing that was not already in the Use of Force Committee report which had been given to the Union three days earlier.[2] The main thrust of the Employer's position concedes that the Union's arguments might have had merit if the hearing had started and ended on December 11. But such was not the case. The first hearing day was postponed to December 12, and the proceedings continued through that week and into the next, all the way to December 20. The Employer maintains that the Union was given ample time -- more than required by the Agreement -- to study the reports.

The Union's position is sound from the perspectives of practices followed by the parties and fair performance of grievance responsibilities. But it is not precisely supported by the language of Article 24, §24.04. The provision requires Management to provide the Union with a "list" of witnesses and documents contemporaneous to notice of hearing. Does that mean the actual documents have to be provided, or just a list of them? Fair interpretation seems to prescribe that the Union is to be provided with the actual documents. This conclusion is supported by a later clause in the provision regarding documentary evidence and/or witnesses discovered after the pre-disciplinary meeting ends:

If the Employer becomes aware of additional witnesses o documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. [Emphasis added.]

Technically, the Employer violated its contractual duties. There is no indication, however, that the Union or Grievant suffered harm as a result. The delay of the first hearing day and the fact that pre-disciplinary proceedings encompassed ten days cured any substantive impact of the Warden's failure to follow the Agreement strictly. The Arbitrator finds that in this case, there was substantial compliance with disclosure rules and Grievant was not denied due process.

5. Reliance on Inmate Testimony. In the past, Agencies of the Ohio Department of Rehabilitation and Correction have declined to impose discipline based solely on testimony of inmates. Management recognizes that such testimony tends to be unreliable, and routinely requires corroboration. In this case, the

primary evidence against Grievant consisted of inmate accusations, and the Union objects to what it views as a sudden change of policy. The Employer's response is that it is not bound by its prior policy, and that the circumstances warranted believing the inmates.

The Arbitrator emphatically disagrees with the Union's position. Extending it to its logical conclusion leads to an absurd, untenable result. It would allow Corrections Officers to brutalize inmates so long as they did it in private, without outside witnesses. Such a state of affairs would violate the most fundamental principals of human rights and would lead the Employer into a disgraceful breach of its basic obligations to those in its custody. Moreover, as will be discussed, there was corroboration of the inmates' charges. It was not supplied by eyewitnesses, but it as meaningful corroboration just the same. The medical findings -- physical injuries on the bodies of the inmates -- were eloquent evidence that they had suffered trauma. It was sufficient to comply with the corroboration standard.

*** * ***

Before leaving the threshold issues, it is appropriate to briefly address one of the State's contentions. In its written closing statement, the Employer cited the United States Supreme Court decision of Cleveland Board of Education vs Loudermill, 470 US 532 (1985) in which due process for public sector employees was defined as notice of charges, explanation of the employer's evidence, and opportunity to present rebuttal. The State quotes the following excerpt from the decision and urges the Arbitrator to heed it:

"To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."

The folly of the Employer's suggestion that the Arbitrator should apply court-defined civil service entitlements and ignore the more generous requirements of the Collective Bargaining Agreement is too obvious for lengthy discussion. The Agreement controls this case; Loudermill is irrelevant. Nevertheless, the Arbitrator determines that Grievant's contractual rights were p substantially preserved and his due process entitlements honored. The controversy will receive full review on its merits.

THE MERITS

BACKGROUND

The events leading to Grievant's discharge from his job at Lucasville actually started miles away at the Orient Correctional Institution. As stated, Orient is a minimum-medium security prison. The inmates in question had been sentenced there for crimes ranging from robbery to homicide. On August 8, 1989, they attempted to escape by a circuitous route which required them to jump from a building. They were almost successful, avoiding apprehension until they actually began cutting through the wire barriers surrounding the facility. After the capture, each inmate had eighteen months added to his sentence, and preparations were undertaken to transfer all three to the maximum-security environment of Lucasville.

The transfers took place on September 13 in the late afternoon. The inmates were shackled, handcuffed and transported to Lucasville. All were familiar with the Ohio prison system; each had heard horror stories about Lucasville, and some of them were not apocryphal. An accurately descriptive portrayal of the facility was furnished by the Union in its opening remarks:

"S.O.C.F. [Southern Ohio Correctional Facility] is a maximum security institution, located eleven miles North of Portsmouth, Ohio which lies next to the Ohio River in Scioto County. It is the only maximum security state facility, being built in 1971 to replace the old Ohio Penitentiary in Columbus, Ohio. The electric chair was placed at S.O.C.F. and remains there.

S.O.C.F is notorious in the State Penal System as the roughest place in the system to do time. This is due partly to the fortress like appearance. Brick and concrete structure under one roof and double wire fence with razor wire on that fencing. This being surrounded by eight gun towers and those towers are backed up

by two perimeter vehicles in which armed officers patrol. But of more concern to the inmates or convicts is the type of neighborhood they have moved into. In an institution built for one thousand six hundred and fifty inmates therein reside two thousand and three hundred of the worst most incorrigible convicts in the State of Ohio and possibly the Nation, thus also including the criminally ill. S.O.C.F. is the home for approximately one hundred convicts awaiting the death chair. To say the least it is not the most pleasant place for three inmates from a minimum medium security institution."

Upon arriving, the inmates were given prison clothing and haircuts. They were strip searched repeatedly; no bruises or signs of injury were observed on their bodies. Then they were escorted to J-2 Block, an extremely high security area of eighty cells. The first part of the block they entered was the middle, a cage enclosed on all sides where Corrections Officers stand guard. Extending out perpendicular to the middle on each side are two ele-vated tiers containing forty cells each. They are referred to as the "open end" and the "slammer end." The console which controls outer entries to the blocks is located on the open end.

The inmates were strip searched one last time in a cage outside the middle, and then escorted singly to cells 34, 35, and 36 on the slammer side. The Union's opening statement describes the cells:

"The cells contain a steel bed made of angle iron, a sink and commode. The whole of the cell is concrete except for the steel vent in the back wall of the cell and the front which is sheet steel with a sliding steel door with a food hatch approximately four inches by ten inches. Behind the sliding door is a steel mesh screen door which is controlled by a key and lock system."

The inmates appeared in the arbitration hearing. Each testified that he was taken to his cell by Grievant and another Corrections Officer; that the doors were open and no one was at the console. The Officers purportedly took each into his cell and beat him repeatedly with fists, shoes, and clubs. One of the inmates stated he pleaded with them to stop and asked why they were treating him so. The response was that he was now in a "man's" prison. Regulations oblige guards to take inmates into their cells handcuffed, close the door, then require them to stick their hands through the food slot so the restraints can be removed. One inmate said that the Officers pulled at his hands and arms, cutting them severely before taking off the handcuffs. Another inmate sustained a bruised kidney in addition to surface cuts and bruises. In an interview with the Inspector on September 16, an alleged victims gave the following account which was generally applicable to the experiences of all of them:

"Well, I was brung in the side door of J-2 Block, I guess it is. And we shook down. We went through the process of getting shook down. They gave us our coveralls and they looked at all of **us** and said, you know you got a haircut coming. We said, we guessed. So, they took us upstairs after they got us all dressed out. Put us in the barber chair and gave us all a haircut. We ate. They escorted me and [another inmate] first of all to the cage to shake us down and put us is in the cellblock, I guess. They shook **us** down again - put our handcuffs back on us - took us back upstairs to our cell - one at a time, I was the first. We got up to the room, and the door was already open. They shoved me in and started beating me.

. . .

Well, I don't know which one. I think it was (the other Officer) the biggest guy - shoved me in the cell. He commenced kicking me at first, then he started saying stuff like - Well, you're in a man's institution now - that you ain't going to run nothing down here, or something or whatever was supposed to be said, and he grabbed me by my handcuffs again - one grabbed me by my legs and the other by my handcuffs and threw me on the bed. The smaller guy . . . commenced to beat me with his fist in my ribs and stuff, and all over. And the bigger guy ... took his stick and beat me over my back with it. Then they got finished and stuff, and they hit me a couple of times on my jaw and said, Now if you say anything else we will be to see you again, and left."

When they were left alone in their concrete cubicles, the inmates were able to speak quietly with one another through rear vent screens. Grievant hypothesizes that was when they hatched a plan to injure themselves, claim Corrections Officers were responsible, and thereby engineer their transfers from

Lucasville. There is no doubt they were fearful of staying there. At any rate, the inmates did speak with the Nurse late that evening. She reported what they told her to the Nursing Supervisor who contacted the Inspector of Institutional Services. On Friday, September 15, two days after the alleged beatings, the Inspector interviewed one or two of the complainants in his office. The interviews were late in the day and perfunctory. But the Inspector returned the next day (his day off) to speak at length with all three inmates. Those interviews were taped and transcribed. A day earlier, he called the Nursing Supervisor and asked him to conduct examinations.

The Supervisor examined two of the inmates late on September 15. He noted that they were severely bruised and estimated that the bruises were two to three days old. Some of the marks could have been self-inflicted, but he also observed a peculiar kind of bruising which was likely to have been caused by an outside agency. On the inmates' backs and buttocks were elongated injuries caused by a rounded blunt instrument approximately an inch in diameter. The findings were in line with the inmates' statements that one of the Officers hit them on their backs with a PR 24.

The medical documentation and recorded interviews comprising the Inspector's report were sent to the Warden. He convened the Use of Force Committee and followed its recommendation for discipline. The pre-disciplinary hearing was scheduled and again discipline was recommended. The Warden sent the evidence and recommendations to the Agency Head who concurred and imposed the discharge.

ADDITIONAL FACTS AND CONTENTIONS

The Employer's presentation consisted essentially of the evidence accumulated by the Use of Force Committee. Nothing of consequence was added. Basically, the determinant question in this dispute is whether to believe the charges of three inmates or Grievant's denials.

The Union maintains that Grievant operated the console on the evening in question and never left his post; that he did not help escort the inmates to their cells and was not even in a position to commit abuse. It is the Union's firm conviction that the inmates successfully pursued a scheme to arrange transfers from Lucasville. They had reason to take extreme measures, including injuring themselves to get out of that prison. They were unnerved by the prospect of spending years at Lucasville. By their own admissions, they had heard accounts of atrocities committed there. The Union points out that they had the opportunity to inflict superficial injuries on themselves after they were locked in on J-2 Block. They could have generated their braises, cuts, and abrasions by falling against metal beds, sinks, or commodes. Convicts had been known to do worse to leave the Institution. There were instances of swallowing bedsprings, diving headfirst off beds onto concrete floors, self-amputations just to compel releases. The Union suggests that the inmates decided to beat themselves and accuse their guards when they spoke with one another through the cell vent system. They could have secured brooms and mops and used the handles to create some of the injuries.

There may be hard support for the Union's theory as concerns one of the inmates. On December 22, 1989, three and one-half months after coming to Lucasville, one of them was the subject of the following diagnosis of the Institution’s consulting psychiatrist:

“B____ is referred to us by the medical department. The reason is that he has stopped taking his Thorazine [a psychotic drug]. He tells us that he sees little glassy things floating around - some small things and some big things - and that they chatter and talk among each other and to him.

He also casually mentions that he wants to get out of the institution and may be building up a story good enough to get him out of here.

Giving him the benefit of the doubt, I'll change his medication to liquid Trilafon and Benadryl. The side effects of that combination should be minimal and therapeutic effects maximum. We'll see him routinely.” [Emphasis added.]

There was another witness who, while not presented in the Arbitration; gave testimony of significant influence before the Use of Force Committee. He was an inmate trustee who claimed to have been mopping floors just below the slammer area of J-2 cellblock when the alleged beatings took place. He told the Committee he heard an inmate scream, "Oh God, please stop!" He heard what he believed was a nightstick

land with sharp sounds when it struck floors and walls. Then he heard softer thuds, followed by groans and screams.

The Committee gave significant weight to that testimony. In order for the inmate to have heard so clearly, the block had to be relatively quiet. Some witnesses said it was; others said it was noisy. One of the inmates, the second to be taken to his cell, said he could not hear the screams sobs of the first because of the noise. The Officer who stayed in the middle -- a reasonably credible wiliness -- said he heard nothing. The discrepancy is important because sound travels exceptionally well in the J-2 block. The area seems to be a natural amplifier. This was demonstrated to the Arbitrator on his visit to Lucasviile. He stood in the middle while a Union Representative dropped a PR 24 at the far end of the slammer tier. The sound was loud -- more like a shot than a dropped club. As the Union argues, that sound certainly would have been heard even if the block had not been as quiet as many witnesses indicated. Why was it not heard by the inmate waiting to be escorted.

Another Union theory is that the inmates were hurt before they came to Lucasville, after their attempted escape from Orient. The inmates themselves admitted they were "roughed up a bit" by Orient guards who captured them, and one of the inmates did sprain a finger when he jumped from a building during the escape. But the supposition is unreasonable in view of the evidence. The escape had been five weeks earlier and the inmates' bruises, according to competent medical evidence, were no more than three days old. Moreover, everyone who strip searched the inmates, including Grievant, attested to the fact that there were no marks on their bodies. Be that as it may, the important thing for the Arbitrator to keep in mind is that it is not the Union’s obligation to explain how the inmates may have been hurt. The burden of proof is, and must remain, the Employer’s. It is for the State to establish by a significant preponderance that Grievant committed abuse. The Union's theories may be flawed, but does not reduce the Employer's evidentiary obligation.

The most compelling witness in Grievant's favor was the Officer who attended the middle when the inmates were taken to their cells. He testified cogently that Grievant stayed at the console throughout the period and could not have beaten the inmates in their cells. His statement was slightly equivocal; he did not see Grievant during the critical times, but he believes it highly unlikely that he left his post. When the Use of Force Committee heard this same testimony, it concluded that, despite his approximately thirty years of unblemished service, the Officer lied out of a misplaced sense of loyalty. The Committee's report contained the following:

“This Committee also believes that [the Officer in question] did not take part in this incident, but, he knowingly with-held [sic] information that was relevant to this incident because he did not want to be labeled "Snitch" among his fellow Officer’s [sic].”

The Union recognizes, as does the Arbitrator, that credibility is the determinant factor of the dispute. It notes that Grievant has been a good employee whose trustworthiness has never before been in doubt. It is preposterous, in the Union's judgment, for the Employer to bestow a gloss of believability on the ravings of convicted felons and regard them as more plausible than testimony of its own trusted employees. Such confidence in inmates is uncommon in this or any other prison. In its closing statement, the Union made several pleas on the subject. It argued:

“The Union asks the Arbitrator, do we take only the word of convicted felons in dispensing out work-place capital punishment to correctional officers? These officers . . . have not committed crimes against society nor have they hurt other people. They go to work with the intent only of doing their job to the best of their ability.

*** * ***

The Union recognizes that credibility is at stake here, the credibility of law abiding citizens against the credibility of convicted felons.

*** * ***

The Union asks the Arbitrator to consider the repercussions to all employees at facilities throughout the State

if these convicts are allowed to con the Management personnel at these facilities. Three inmates could, at will,. have law abiding employees fired just by getting their stories halfway together. The grievant is credible, not [the] felons."

OPINION

Grievant and two other Corrections Officers testified under oath that no beatings occurred. The statements of the three convicts were supported by several residents of cellblock J-2 who told the Use of Force Committee they heard the "thuds" and accompanying outcries. The complainants may have schemed to obtain transfers from Lucasville, but there was little reason for others to verify their stories. The inmates who gave evidence confirming those stories had nothing obvious to gain, but they did have something to lose. As one of the Corrections Officers testified, it was possible to make their lives behind bars harder than they needed to be. Those witnesses appeared to be disinterested observers.

One fact is certain: the inmates sustained injuries after arriving at Lucasville. Orient Officers who took them there stated by affidavit that pre-transportation strip searches revealed no fresh marks, bruises, or signs of injury. Lucasville Officers who received them, including Grievant himself, made precisely the same observations. The injuries probably occurred the evening of September 13, given the fact that the Nursing Supervisor assessed them as no more than two to three days old.

Whom is the Arbitrator to believe, the convicts or the law abiding State employees? As individuals, the inmates had little in their favor. They were among the worst of society. They were a robber, a burglar, and a killer. At least one of them was a certified psychopath. Their testimony was filled with inaccuracies, inconsistencies, exaggerations, and outright lies. Their demeanor confirmed that they had virtually no respect for the arbitration process, their oaths to tell the truth, or the Collective Bargaining Agreement. One of them had the audacity to testify that he came forward not out of a desire for revenge, but out of concern for the welfare of other inmates. The absurdity of his assertion that some skewed social consciousness guided his actions is embarrassingly conspicuous. All the inmates exaggerated their injuries. One said he was hit ten to fifteen times; he had perhaps three bruises on his body. Another spoke about the attempted escape from Orient, stating that he jumped from a two-story building; it was a one-story building. The third, who was serving seven-to-twenty-five years for manslaughter, said the building was two and one-half stories high. He also told the Use of Force Committee that the Officers struck him five or six times. In the arbitration, he said, “that was bullshit: I was hit ten to fifteen times.”

The Inspector, a key witness for the Employer, indicated that he never believed everything the inmates told him. He said that he receives in the neighborhood of one hundred inmate complaints per month, and most are embellished if not totally false. Inmates often exaggerate to get attention. Yet the fact that these inmates were injured is no exaggeration. One had a number of red welts over his back and buttocks and abrasions to the left elbow. One had abrasions to his right middle and left index fingers, with bruises to his left shoulder and right elbow. The third had external and internal bruising in the area of his left kidney, and abrasions of the right shin three inches below the knee. Much of the bruising was consistent with the allegations that a PR 24 had been used to hit them.

In contrast to the inmates, Grievant was a nearly perfect witness on his own behalf. He is a clean-cut individual with military bearing and an attitude of respect for himself and his job. He was a relatively short-term employee, but his record was good; he had talent and aptitude for his chosen profession. His personal tragedy was that the accusations terminated his most profound ambition -- to become an Ohio State Trooper. Police work is his background and his life; but he lost the chance for admission to the Highway Patrol Academy because three felons accused him of abuse. He testified quite credibly that the charges were wholly false -- that he was the victim of inmate scheming.

Frankly, the Arbitrator would like to believe Grievant. But the only hard evidence submitted by either party, the medical findings, stands in stark contradiction of his testimony. The Nursing Supervisor’s examination of the inmates two days after the alleged assaults revealed double lateral abrasions which were caused by a hard cylindrical object approximately an inch in diameter. The blows had been administered to the inmates’ backs at a downward angle. One of them was just below the scapula. While it is remotely conceivable that the inmate could have done that to himself, it is practically impossible. The Nursing

Supervisor testified that he has seen self-administered harm to inmates, but it is commonly frontal; it is almost never to backs. Furthermore, the Union's supposition that they injured themselves with mop or broom handles is missing an important element. There is no evidence that they were supplied with those implements when locked in their cells. Surely, the Corrections Officers on duty in this extremely high security block would have been aware if new inmates sent to Lucasville for attempted escape and had been given items capable of causing injury to themselves or others.

In the Arbitrator's opinion, the Nursing Supervisor was the most credible witness of all. He was asked his opinion on the inmates' stories. He replied:

"I believe there were injuries these men did not inflict themselves. I also believe their stories are exaggerated."

As much as the Arbitrator would prefer to disagree, the proven facts are too compelling. They establish with sufficient certainty that Grievant committed the misconduct charges. Since the misconduct undeniably constituted abuse, Article 24, §24.01 prohibits arbitral modification of the penalty. Therefore, the grievance must be denied.

AWARD

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The grievance is denied.

Decision Issued:
September 18, 1990

Jonathan Dworkin, Arbitrator

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[1] The Employer's response confuses the Report of the Use of Force Committee with the Inspector's Report. The latter consisted of "13 sheets of 8 1/2 x 11 paper" and was given to the Union on the morning of the pre-disciplinary hearing. The Use of Force Report was made available to the Union three days earlier. It consisted of 100-200 pages.

[2] The Union disagreed. It found discrepancies in witness statements from one report to the other. The Arbitrator examined both. There were minor differences, but they were not remarkable or truly germane to the issues.