

ARBITRATION DECISION NO.:

307

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction
Ohio Reformatory for Women

DATE OF ARBITRATION:

October 16, 1990

DATE OF DECISION:

November 15, 1990

GRIEVANT:

Cary R. Sexton

OCB GRIEVANCE NO.:

27-19-(90-05-03)-0153-01-03

ARBITRATOR:

Patricia Thomas Bittel

FOR THE UNION:

Dane Braddy
John Fisher

FOR THE EMPLOYER:

Mick Menedis
Lou Kitchen

KEY WORDS:

Removal
Sex with an Inmate
Polygraph
Failure to Timely Discipline
Grievant
45 Day Time Limit
Credibility
Remedy

ARTICLES:

Article 24-Discipline
§24.01-Standard
§24.05-Imposition of
Discipline

FACTS:

The grievant in this case was a second shift corrections officer at the Ohio Reformatory for Women who was hired in August of 1988. On September 3, 1989, an inmate reported to management that grievant had raped her. According to the inmate the grievant approached her and asked if she wanted to have fun. She testified that she said no and the grievant then told her he could make life hard for her and she could spend time in the hole.

The inmate stated that while the grievant was having sex with her something like a man-down alarm sounded. When it sounded, the inmate said the grievant ran to the intercom and told a Mr. Hardgrove to check with Control. Shortly after, grievant exited the bathroom he and the inmate were in and the inmate followed. The inmate claimed grievant told her not to tell anyone because no one would believe her. Both the inmate and grievant refused to take a polygraph test. Grievant's testimony maintained he did not know the inmate and had no relationship with her and further had never had intercourse with her. Grievant also stated his man-down alarm had not gone off on September 3.

After the alleged incident, the inmate showered and douched. Two days later the inmate then was given a physical exam which was inconclusive as to any trauma in the vaginal area.

Grievant was criminally charged and indicted over the alleged incident but on January 22, 1990 the prosecutor did not indict based on lack of evidence. A pre-disciplinary hearing was held on March 12, 1990 resulting in a determination that grievant had breached the employee conduct rules by engaging in sexual intercourse with the inmate. He was placed on administrative leave without pay on that date, though his status was later changed to administrative leave with pay retroactive to March 13. He continued working approximately eight months after the incident, but was transferred to a position in the Entrance Building where he had no inmate contact. Grievant was terminated from his job on May 2, 1990. A grievance was filed protesting his removal.

EMPLOYER'S POSITION:

The State admits its dilemma when faced with a case where the primary evidence is the word of a convicted felon against the word of an employee. It concedes it does not generally proceed with disciplinary action absent evidence to corroborate an inmate's charge. The State maintains the evidence in this case combined with the surrounding circumstances left no choice but to remove grievant. Also, it is argued that the criminal burden of proof is not necessary in a proceeding with disciplinary action. The State contends that the inmate's testimony must be credited over the grievant's as she has nothing to gain from making the rape allegations. In contrast, the grievant's testimony is self-serving because if he prevails he could also receive his job back and a substantial amount of backpay. The State claims important evidence was not available in this case because the inmate was specifically told she could not see a doctor for two days. Further, grievant's subsequent behavior demonstrated guilt.

UNION'S POSITION:

The Union argues that the delay in management's decision to terminate grievant constituted a denial of due process. Without rebuttal it stated the pre-disciplinary hearing was held 190 days after the alleged incident, and termination another 52 days later. The Union points to Article 24.05 and though admitting the provision does grant the employer the discretion to extend the limit pending criminal charges, it asserts the State's imposition of discipline remains procedurally defective. Absent new evidence or a mutual agreement, the Union argues eight months is clearly an unreasonable amount of time for management to render a decision. Further, the Union contends the State has not met its burden of proving just cause. It is claimed that the Warden's decision to terminate grievant was largely based on his refusal to take a polygraph test, a test which he cannot be required to take under the Agreement. The Union asks that he be reinstated with full back pay and expungement of his record.

ARBITRATOR'S OPINION:

Initially, the Arbitrator found that because the Department took longer than 45 days to determine whether or not to discipline the grievant, after the decision was made not to criminally indict the grievant, the State

was in technical violation of Article 24.05. The fact that the inmate was not allowed to identify the sheets on which the rape occurred that she was advised she could not see a doctor for several days, and that there was a failure to interview grievant for five weeks strongly indicates a conscious attempt by the guards to protect each other. The inmate's credibility is bolstered by the fact she has nothing to gain by pursuing this matter and has no reason to go after grievant. However, the fact remains that the only arguable substantiation of her story is her roommate's description of the inmate crying in her room after the incident. An important discrepancy is that in her statement she failed to mention grievant's man-down alarm went off while grievant was having sexual intercourse with the inmate. Also of significance is the fact that the hospital recorded the inmate's statement that she had taken a shower, but made no mention of any douche. It is highly unlikely a fact of such importance would be left out of the hospital record by trained medical personnel. Grievant's story also suffered from inconsistencies. The most significant inconsistency was grievant's year later recollection of his man-down alarm going off on September 3. It is not clear or convincing from the evidence that grievant had sex with the inmate. Though the proofs were not sufficient to establish the requisite just cause for terminating grievant, they are more than adequate to precipitate an interest in barring grievant from inmate contact.

AWARD:

Grievance granted. Grievant reinstated to second-shift position at the Entrance Building with back pay exclusive of overtime. He shall be deemed unqualified for placement into any direct contact position for a period of five years.

TEXT OF THE OPINION:

November 15, 1990

**In the Matter of Arbitration
between**

**The State of Ohio, Department of
Rehabilitation and Correction**

and

OCSEA, Local 11 AFSCME, AFL-CIO

27-19-(90-05-03)-0153-01-03

and

0155-01-03

APPEARANCES

For the Union:

Dane Braddy, Staff Representative
John Fisher, Staff Representative
Marilyn Putnam, Chapter President
Cary R. Sexton, Grievant
Janice S. Maniaci, Chief Steward
Matthew D. Scott, Correctional Counselor
Tim Hardgrove, Guard
Loria Thompson, Correctional Counselor

Jan Tripp, Personnel Officer

For the State:

Mick Menedis, Advocate, Bureau Chief,
DR&C

Harry Morris, Warden
Lou Kitchen, Advocate
Tracy Foster, Witness
Lou Clark, Observer
Curtis Jones, Observer

Arbitrator:

Patricia Thomas Bittel

BACKGROUND

This matter was heard on October 16, 1990 at the Office of Collective Bargaining before the impartial permanent arbitrator Patricia Thomas Bittel, mutually selected by the parties in accordance with Article 25.04 of the Collective Bargaining Agreement.

The Grievant in this case was a second shift guard at the Ohio Reformatory for Women in Marysville, Ohio, having been hired in August of 1988. On Sunday, September 3, 1989 inmate Tracy Foster reported to management that Grievant had raped her. Grievant was criminally charged and indicted over the alleged incident but on January 22 of 1990 the prosecution issued a nolle prosequi based on lack of evidence.

A pre-disciplinary hearing was held on March 12, 1990 resulting in a determination that Grievant had breached the employee conduct rules by engaging in sexual intercourse with inmate Foster. He was placed on administrative leave without pay on that date, though his status was later changed to administrative leave with pay retroactive to March 13. He continued working approximately eight months after the incident, but was transferred to a position in the Entrance Building where he had no inmate contact.

Grievant was terminated from his job on May 2, 1990. A grievance was filed protesting the removal, which was fully processed culminating in the instant arbitration proceeding. The parties have stipulated the matter is properly before the Arbitrator and there are no issues of arbitrability.

In the interim between September of 1989 and May of 1990 Grievant was disciplined for two rule violations. A second removal order was processed regarding these violations, resulting in a second grievance. This second removal order was withdrawn at hearing.

JOINT SUBMISSIONS

The parties jointly submitted a number of exhibits including statements taken during the investigation of the incident. The following are pertinent excerpts from these statements.

A. Note of Tracy Foster dated September 3, 1989 (quoted verbatim).

"Jan:

Mr. Sexton the CO was working with me tonight raped me he told me if I didn't do as he says he would see to it that I got locked up. he kept telling me I had a nice ass and a great looking body. he stayed out here with me as much as he could. he comed on the sheets in the store room. he said if I tell anyone that they wouldn't believe me, now Im scared and I don't know what to do."

B. Statement of Clarence A. Sheldon dated September 3, 1989:

"At or about 8:00 pm on 9-3-89 I, Officer Sheldon was stopped by Inmate Jan Bruce. At this time Inmate Bruce . . . told me that her room mate Inmate Tracy Foster #22503 informed her that Officer Sexton had

raped her sometime during the shift. Capt. office was informed of this.”

C. Statement of Timothy Hardgrove dated September 3, 1989:

"At 7:00 pm Mr. Sexton had to use the restroom. He had to go for the past 1/2 hour or so but didn't have the time. When he went back there he asked what time did Ms. Foster go back. I said as long as she was done with her work, anytime after 7:00. At about 7:10 I called back to tell Ms Foster ARN III did not have any of our sheets. She said she had been told by first shift they had been sent over. At approx 7:15 Mr. Sexton returned. That was the only time I noticed he had been back there alone in the same area as inmate Foster. As soon Mr. Sexton came out of the restroom, he called me over the intercom and asked me to call control and find out if his alarm sounded there because it went off while he was sitting on the toilet. I called Officer Haynes in Control Center and he advised me it had not sounded. I told Mr. Sexton over the intercom it had not sounded. That was when he returned.”

D. Statement of Tracy Foster dated 9-5-89 (quoted verbatim):

“While working at ARN4 on 9/3/89 after Shirley left wich was around 5:30 or 6 pm, Mr Sexton came out to where I was and started talking about when he do a favor for other imates they allways run their mouths. then he started telling me I had a nice body and I looked good. he said he know I would tell everything I know allso. I told him I don't tell everything I know. So he then went to the window to see where MR Hardgrove was at then he came back and went into the storage room and told me to come here. I went and then he felt my right breast when I tried to walk pass him, he stoped me with his body and then he told me to take off my panties I then said if we get caught doing something like that we'll be in alot of trouble. he said knowbody's comming back here. I said I can't do this. he said you do as I say or I'll make things very hard on you. and I'll see to it your locked up back there. by him being a CO and me a lmate I got scared and I took off my panties he took my panties and layed them on the shelf then he undid his pants and raised up my skirt and had sex with me. after he was done, he let himself go on the sheets wich were on the floor. then he told me if I told anyone, they wouldn't believe me. so when he went back to DC side I sat down and wrot my roommat a letter telling her wat happen. When I got back to the dorm I gave her the letter and went straight to my room. Jan came to our room and told me Id better tell someone so I did.”

E. Statement of Jan Bruce, #2577, dated October 6, 1989:

"Tracy Foster had come in from work She handed me a note.... I told her I was going to finish playing cards and I'd get back to her later. She said “Once you read it I'm sure you'll come up to the room right away." It aroused my curiosity. So I read the first part of it. Then I went upstairs and saw Tracy standing at the end of the bed crying. * * * I told her I couldn't picture Sexton putting himself in this position but she had to tell. I then went downstairs looking for Mr. Johnson the CO on duty. I didn't see him so I told Mr. Sheldon He said he'd get back to me. Never hearing any more I returned inside the cottage, seen Mr. Johnson sitting at the desk and told him.”

F. Interview of Grievant on October 18, 1989:

"Did you leave the ARN-4 area around 6:00 - 7:00 p.m.?"

A - Yes

Did you go to the restroom?

A - Yes

* * *

Do you know Inmate Tracy Foster, #22503?

A - Don't know her. She was in the kitchen and I sent her back to cottage.

Describe your relationship with her.

A - No relationship.

How long were you gone from the Arn-4 area?

A - Two to three minutes.

Did you have intercourse with Inmate Foster?

A - No.

* * *

Did your man down alarm go off on September 3rd?

A - Not that I can recall."

The investigation also included a laboratory report on Foster's underwear, some clothing and sheets which failed to indicate the presence of semen. Under 'history' the emergency room report states Foster told the physician she had vaginal penetration, denied oral or anal intercourse and said she took a shower prior to evaluation in the emergency room. Under 'physical examination' the report states:

"There is no external sign of trauma. Pelvic exam; she has no vaginal discharge. There is a very small amount of vaginal bleeding from the cervix. The external genitalia demonstrates no evidence of trauma. There are no vaginal tears. * * * No obvious semen is noted. ... mild right adnexal tenderness without palpable mass. It is an essentially unremarkable pelvic examination."

The Parties also jointly submitted the Revised Standards of Employee Conduct. Applicable portions are quoted below:

"It is essential to the orderly operation of a correctional system that employees conduct themselves in a professional manner. Below are several types of behavior that cannot be tolerated within a correctional environment.

2. Employees shall not without authorization from the Appointing Authority, allow themselves to show partiality toward or become emotionally, physically, or financially involved with inmates . . . , or establish a pattern of social fraternization with same.

a. An employee shall not offer to give to an inmate . . . any article, favor, or service which is not authorized in the performance of the employee's duties and which conflicts or appears to conflict with the employee's duties. Neither shall an employee accept any gift, personal service or favor from an inmate . . . , which is not authorized in the performance of the employee's duties and which conflicts or appears to conflict with the employee's duties.

3. No employee shall show favoritism or give preferential treatment to one or more inmates . . .

4. Brutality, physical violence or intimidation of inmates . . . by employees will not be permitted, nor will force be used beyond that necessary to subdue him/her."

Finally the parties jointly admitted a video tape recording of the Geraldo-Show on which Ms. Foster appeared, along with three other past inmates from the Marysville prison. All four women described incidences of rape which allegedly occurred at Marysville during their incarceration. At the time of the Geraldo Show, all four women were plaintiffs in what was described as a multi-million dollar lawsuit against

the State.

CONTENTIONS OF THE DEPARTMENT

Evidence

Ms. Foster testified she was an inmate at Marysville while serving an 18-month sentence for stealing a television set. She attributed the crime to a drug problem and said she served only 12 months of the 18-month sentence.

On the night in question she was working as a porter in a building referred to as ARN-4 where Grievant was on guard. She said the responsibilities of the porter were to pass out linen, toothpaste, and food. She said the evening of September 3 was the first time she spoke with Grievant, though she had seen him around.

According to Foster, after the other porter was sent to her cottage, Grievant came into the kitchen and asked if she wanted to have fun. She testified she said no, that she would-be going home soon. She said he told her he could make life hard for her and she could spend time in the hole.

As she described it, he went to the window and checked to see where the other guard was, then told her to come into the storage room. She said he advised her to take off her panties and lie down and she complied. She said he unzipped his pants but did not take them off. She described it as happening very quickly.

During the time he was having sex with her she said something went off while he was on top of her. She identified the noise as a man-down alarm. When it sounded, she said Grievant ran to the intercom, told Hardgrove his alarm had gone off while he was using the restroom and asked Hardgrove to check with Control. She said she saw him go to the button to talk to Control. She then said he came on some sheets on the floor of the storage room.

Afterwards, Grievant went to the bathroom and Foster went to the kitchen and sat at a table, she said. When he came out of the bathroom, she went in and used it, she said. She then wrote a letter to her roommate describing the incident. She claimed Grievant told her not to tell anyone because she would not be believed.

Foster said she went back to her cottage, gave her roommate the note and was advised to tell. Foster said she told C. O. Johnston who asked them both not to say anything and stated he had to report the incident. He allegedly told her it would be Tuesday before she could be seen. According to Foster's un rebutted testimony, Johnson stated this to her twice.

She said she then showered and douched, after which authorities came to speak with her and take her to a hospital for evaluation. When she returned, she said she was locked up in the hole. She stated at no time did the authorities allow her to point out the sheets Grievant had allegedly ejaculated upon.

Foster said she had no reason to 'go after' Grievant; she had never grieved or complained about him. She had nothing to gain as she would be released in a couple of months. She stated her sole reason for pursuing the matter was to see that it did not happen to anyone else.

She said she was unaware of any other rape allegations at Marysville prior to September 3. She denied being a plaintiff in a multi-million dollar lawsuit, stating she had been, but her lawyer dismissed her because she lacked transportation to attend meetings.

Timothy Hardgrove had worked at the facility as a guard for a year and a half at the time of the hearing. He stated he had escorted Foster quite a bit and described her as upset because inmates were trying to 'set her up' and 'get her in trouble'. He claimed Foster did not get along with the inmates in ARN-4.

As to the night in question, his testimony essentially tracked his statement. He said he called on the intercom and spoke with Foster at approximately 7:15 about sheets (his statement said this occurred at 7:10).

Hardgrove testified Grievant had mentioned to him earlier that he needed to go to the restroom for a bowel movement but had not had time. He stated he heard the restroom door close at 7:10 and again at 7:15.

He said it is possible to tell which door is closing by the sound, and admitted he did not see Grievant, but only heard the sound of the bathroom door. Hardgrove said the bathroom door closes by itself. He stated all the intercoms are marked as to location and Grievant used the one located right outside the bathroom door to call about his man-down alarm. There was no mention of hearing doors close in his statement.

Warden Harrison Morris testified it is a breach of security to be involved with an inmate because this allows the inmate to control the officer. He asserted the general policy is to prefer collaborating evidence for inmate testimony. He stated in the past polygraphs have been relied upon on a voluntary basis but neither party took a polygraph in this case.

In his opinion management blew this case in terms of hard evidence because it failed to locate and identify the sheets, and because it allowed the victim to shower and douche before her exam. He said the reason he went forward with the termination was not only Foster's credibility but also a series of things pertaining to Grievant's attitude and refusal of mandatory overtime.

Morris said Grievant became uncooperative after the incident and felt this was an indication of guilt. The Department admitted into evidence documentation regarding Grievant's uncooperative behavior after the incident.*
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These documents described the following incidents:

1. On December 16, 1989, Grievant refused retention to work overtime. When he was interviewed by Capt. Allen about the refusal, he said "You have no right in retaining me due to the only place I can work is the Entrance Building," then claimed Allen had said he could only work the Entrance Building. When Allen denied having ever made that statement, Grievant began calling him a liar, got up out of his chair and leaned over the desk. C.O. Putnam put her left hand on Grievant's chest and held him back.
2. On January 18, 1990 Grievant was interviewed by Capt. Seelig. He denied calling Capt. Allen a "liar," stating 'I didn't call him one, but when I told Captain, he told me I could only work the Entrance Building. Captain's reply was, 'Are you calling me a liar.' I stated, if that is what you are saying, then yes, I guess I am calling you that.'" Grievant denied getting out his chair, stating he only leaned forward, and did not recall whether Officer Putnam put her hand on his chest to hold him back. He admitted getting upset and raising his voice.
3. On February 24, 1990 Officer T. Gray had not arrived at the Entrance Building from B-CORR. Officer Keeran called Grievant to report building checks. Grievant stated he was off duty and refused to take the information from Keeran. A few minutes later Grievant called Lt. Merrill for the second time to ask where his relief was. Merrill told him Gray was coming from B-CORR. Grievant said he was refusing retention and was not staying. Merrill told him he would stay until his relief arrived. Grievant replied he had an outside telephone and would call 911 and get the Highway Patrol to come out. Merrill advised he would be subject to disciplinary action if he did, and told him to stay until his relief arrived. Grievant said he had a quarter and to get his relief out there in two minutes, then abruptly hung up. Merrill stated Grievant's "attitude and the inflection in his voice was both unprofessional and insubordinate."
4. On March 15, 1990 Capt. Graham interviewed Grievant who admitted refusing retention on Feb. 20 and 24. He said he was told his refusal would subject him to discipline. He admitted threatening to call 911 and said he did not know why he said that but that he was angry. He said he hung up the phone because he was finished talking.

The Department also submitted copies of undated newspaper articles about the lawsuit accusing prison workers of sex crimes. One of the articles was specifically about Foster and contained quotations from her. It stated Grievant was awaiting trial on two charges of sexual battery and contained the following quotes from her.

"'He asked me if I wanted to have some fun,' she said.

'I told him I only had a couple of months to go and didn't want to do anything that would get me in trouble,' she said.

She said Sexton threatened to make her remaining time rough and have her 'thrown in the hole,' or solitary confinement.

'I realized he was serious,' Foster said. 'He raped me twice.'"

Morris stated Foster was asked to take a polygraph test and consented. She was taken to the Highway Patrol post for this purpose but was met by her attorney who advised her not to take the test. She followed his advice. By contrast, Grievant was asked to take a polygraph test and refused, said Morris. He acknowledged the Parties' Agreement provides for an employee's right to refuse to take a polygraph test.

Morris stated he believed Foster was telling the truth. He admitted he did not interview Foster before making this determination. He said he knew of no reason for her to go after Grievant. Grievant had not written her up, nor had she previously complained about him. Morris could find no motivation for animosity.

He stated Grievant's discipline was not for refusal to take the polygraph, though his credibility was affected by his attitude and behavior in the non-contact post. Rather he found Foster's willingness to go to both the Highway Patrol and the hospital convincing indications of her truthfulness.

As to the delay in Grievant's final removal from his job, Morris indicated processing the case was delayed pending the results from the criminal matter.

Argument

The Department admits its dilemma when faced with a case where the primary evidence is the word of a convicted felon against the word of an employee. It argues failure to take action in such situations would leave the door wide open to potential abuse by other correction officers.

It concedes it does not generally proceed with disciplinary action absent evidence to corroborate an inmate's charge. However, it maintains such evidence existed in this case, and combined with the surrounding circumstances left was no choice but to remove Grievant.

The Department argues it is not bound by the criminal burden of proof in proceeding with disciplinary action. Rather, it claims it was well within its discretion in this case.

Foster's testimony must be credited over that of Grievant, it maintains. She has nothing to gain as she is not a plaintiff in the lawsuit and is now out of prison, asserts the Department. By contrast, it argues, Grievant's testimony is self-serving; if he prevails he would not only receive re-employment but could also receive a substantial amount of backpay.

In the Department's view the opportunity existed for Grievant to sexually abuse Foster and the claim that he was in the restroom is a cover story. Important evidence was not available in this case, asserts the Department. It notes Foster was specifically told she could not see a doctor for two days, arguing the hope was probably that she would douche, shower or otherwise destroy evidence. Further, there was no opportunity for proper identification of the sheets onto which Grievant allegedly ejaculated. No reason was given why Inmate Foster was not allowed to identify these sheets, admits the Department; instead, an uninvolved person was sent to select some sheets for analysis.

In the Department's view, Grievant's subsequent behavior demonstrated guilt. His refusal of retention occurred less than two and a half weeks after his indictment came down, it asserted. His defiant attitude was further shown by his March 12 challenge that he would have to be "proven guilty".

The Department admits it knew this would be a difficult case to prove. Nevertheless, it contends the Arbitrator should credit Inmate Foster. It argues Grievant was removed for one of the most serious offenses known to the employer. It insists Grievant should not be put back into a situation where he could commit the same offense again.

CONTENTIONS OF THE UNION

Evidence

Grievant testified September 3, 1989 was his first day in ARN-4. He said he was aware of other sexual allegations at the prison, having overheard inmates talk about them.

He said sometime between 7:00 and 7:10, he went to the restroom. He said he overheard Hardgrove call Inmate Foster on the intercom about sheets in ARN-3. While in the restroom with his pants down, his alarm went off, he said, claiming to have exited the bathroom to use the intercom and ask Hardgrove whether his alarm had gone off at control. He said when he made this call to Hardgrove Inmate Foster was still standing near the intercom. He said he did not even go into the storage room that night.

He claimed Foster was lying because she was in for the money. He admitted refusing mandatory overtime and stated he refused overtime because he was irate over how he was being treated. He admitted having an attitude problem and claimed it was because he was falsely accused. He said he threatened to call 911 because he felt he was being forced to stay, that is, held captive. In his view Morris took his case personally because of the publicity received in the newspaper.

Correction Counselor Loria Thompson testified Foster was upset about being changed from third shift bakery to ARN-4. She said Foster threatened to do whatever it took to be removed from the area.

Correction Officer Janice Maniaci was Chief Steward at the time of the alleged rape. She confirmed the selfclosing doors at the facility close more loudly than other doors and, identified the bathroom door as the only self closing door in the area.

She stated employee James Geho was pulled out of his job in order for Grievant to be placed into his position at the Entrance Building. She said Grievant first replaced an employee on second shift but his mandatory overtime affected Geho's third shift position. She also stated Geho filed a grievance claiming a contract violation. She said Grievant was never placed back into the regular rotation he held prior to the alleged incident.

She also claimed the advocate for the Department stated the Union had 'a winner' and admitted it had no case against Grievant.

Through Matthew Scott, Grievant's representative, the Union admitted notes of a meeting on March 12, 1990. The notes recorded the following discussion:

"Mr. Morris - Mr. Sexton, this afternoon you had your hearing on the affair of having sex with an inmate. Well, quite frankly, I think you are guilty because of your attitude and failure to cooperate in this matter.

[Grievant]- But I have cooperated.

Mr. Morris - You never took a polygraph and your whole attitude.

[Grievant] - I did not have to prove my innocence, you had to prove me guilty."

During that meeting Grievant was placed on administrative leave without pay.

Argument

The Union argues the delay in management's decision to terminate Grievant constituted a denial of due process. Without rebuttal it stated the pre-disciplinary hearing came 190 days after the alleged incident, and termination yet another 52 days later. The prosecuting attorney entered a nolle prosequi on January 22, 1990, yet it was 92 days without any further additional evidence before the Department finally reached a decision regarding Grievant's termination.

The Union points to Article 24.05 which clearly states the Agency "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."

Though admitting the provision does grant the employer the discretion to extend the limit pending criminal charges, it asserts the Department's imposition of discipline remains egregiously procedurally defective.

It argues this case is analogous to the Jones decision written by this Arbitrator, claiming the denial of the Grievant's right to be timely advised of his status in Jones is analogous to the facts in this one. Eight months

is clearly an unreasonable amount of time for management to take in rendering a decision, argues the Union, particularly when there was no new evidence or mutual agreement to extend time guidelines.

The Union claims Grievant did not have sex with Tracy Foster. It contends the Department has not met its burden of proving just cause. In its view the institution had developed a philosophy or general policy that all inmate correspondence was truthful. As a result, it claimed, many inmates had the opportunity to take advantage of this. It also points out that at the time of the alleged rape Foster had the opportunity to become a plaintiff in a multi-million dollar lawsuit. Both parties agree Foster's allegations came towards the end of the chain of allegations of sexual misconduct at Marysville.

The Union argues Warden Morris' decision to terminate Grievant was largely based on his refusal to take a polygraph test, a test which he is cannot be required to take under the Agreement. It argues this is a far cry from the required standard of just cause.

The Union further argues:

"After the investigation by the Agency, after the investigation by the Attorney General's office, and after the investigation of the Highway Patrol, and after the refusal by Union County's Prosecutor office to go forward on the criminal charges, and after being ordered ... to return Grievant to his regular job assignment, the Grievant still remained in his position which drastically altered his work schedule, as well as his requirement to work mandatory overtime, I can only attempt to imagine the emotional stress and anxieties felt by any human being having been subjected to such a demeaning, defaming and humiliating ordeal."

It refers to a decision by Chief of Labor Relations Nicholas Menedis that Grievant should be returned to his original position, and argues this decision was never implemented. Rather, Grievant was retained in his non-contact position with even more mandatory overtime.

The Union maintains one of Grievant's verbal reprimands was for calling his supervisor a liar when the record reflects his supervisor did lie. It further points out no one has ever been disciplined for using of explicatives in a grievance hearing. In the Union's view Grievant rebelled, demanding fair and equal treatment. Grievant maintains his innocence, argues the Union, and should be reinstated with full back pay and an expungement of record.

DISCUSSION

Due Process

While Article 25.05 requires final decision on disciplinary action as soon as possible, it also makes a very specific exception: "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 of the discipline until after disposition of the criminal charges."

This specific exception was intended to suspend the otherwise applicable time constraints when the results of a criminal investigation are unknown. By its terms, the exception is future oriented; when the criminal investigation is complete, it no longer "may occur" and the exception no longer applies.

Because the Department took longer than 45 days after issuance of the nolle prosequi in Grievant's case to render a final decision on his fate, it was in technical violation of this provision.

Analysis of the Evidence

An important factor in this case is the destruction or avoidance of concrete evidence by not allowing Foster to identify the sheets, by advising her she could not see a doctor for several days and by a failure to interview Grievant for five weeks. Even when Grievant was interviewed, he was asked very few questions and little information was gathered. These factors strongly indicate a conscious attempt by the guards to protect each other, and by supervision to avoid accumulating of incriminating evidence. The Department intimates this failure to gather and/or produce evidence circumstantially supports Foster's version of the facts.

Foster's story is reasonably detailed shows little variation. Her credibility is bolstered by the fact she has nothing to gain through pursuing this matter and has no reason to go after or bear animosity toward Grievant. The fact remains, however, that the only arguable substantiation of her story is her roommate's description of Foster crying in her room after the incident.

Certainly it is not to the Department's advantage that its key witness is a convicted felon. Further, some inconsistencies in her description of the incident have been noted.

In her statement, she failed to mention that Grievant's man-down alarm went off while he was on top of her, though she described this in detail at the hearing. This is an important discrepancy. The alarm would have signaled the possibility of his being caught in the act. It required an immediate response to Control. Foster said Grievant ran to the intercom, indicating it actually interrupted him. It was unclear whether he managed to ejaculate before running to the intercom or returned after the call to finish the act; either scenario presents questions of logistics.

More importantly, the man-down alarm is shrill and loud. At a time of extreme stress its unexpected sound would be quite startling and memorable. That Foster did not even mention it until after she was likely to have known of Hardgrove's statement is damaging to her credibility.

Also of significance is the fact that the hospital recorded Foster's statement that she had taken a shower, but made no mention of any douche. It is highly unlikely that a fact of such importance would be left out of the hospital record by trained medical personnel. More likely, Foster did not tell the hospital personnel about a douche. Foster's failure to mention the douche at the point in time of its greatest importance raises a question as to whether her claim of having douched was simply an afterthought concocted to explain the lack of medical findings.

There are several less important inconsistencies in her story. On the Geraldo show she said she laughed when asked if she wanted to have fun; all her other descriptions indicate a more serious response to the question. On the Geraldo show and during her testimony she made the statement she had someone waiting for her yet this is not mentioned on her written statement.

There is also a conflict between the newspaper account which quotes her as saying "Grievant raped her twice" and the testimony given in this case. Naturally the newspaper account is an unconfirmed source, hence the discrepancy may well be due to journalistic inadvertence.

Foster's motivation to lie is articulated by the Union on two levels. Witness Thompson testified to Foster's desire to get out of ARN-4. The Union also claims Foster was motivated to join a lawsuit against the State. Foster's alleged rape appears to have occurred only a few months before the filing of the complaint in this lawsuit. Typically the months preceding the filing of a complaint are actively used by attorneys to interview witnesses, gather information and evaluate the case. This means it is entirely possible other inmates were speaking with the attorney about this lawsuit around the time of Foster's alleged rape.

Grievant's story has also suffered from inconsistencies. During his initial interview, he stated he was only gone two to three minutes. The context of the question indicates this was the period of time he was in the restroom. Both he and Hardgrove plainly contradicted this statement at hearing.

More significantly, when asked during the interview about whether his man-down alarm went off, he replied "Not that I can recall." A year later Grievant's recollection of the man-down alarm has improved to the point of being quite suspect.

The Union has defended Grievant's credibility in several respects. It points out the Warden essentially described his decision as a "gut feeling" and admitted he did not interview Foster but based his decision on Grievant's belligerence and failure to take a polygraph.

The negative publicity in the Columbus Dispatch clearly shows there was very natural pressure on the Warden to take affirmative action in dealing with the problem. In its view, Grievant's discharge was not prompted by facts but by embarrassment over publicity.

The Union also argues Grievant's belligerence was a purely natural reaction to the false accusation, insult and degradation leveled at him and cannot be seen as indicative of guilt. It also asserts refusal to take a polygraph test is a bargained-for right of employees which cannot be used against them.

Finally the Union asserts the Department's waffling in the case is indicative of its merit. The Department represented that Grievant was to be placed back on his regular rotation when this never occur red. It also

changed his leave status from "without pay" to "with pay" after the recommendation of removal came down. Management has even admitted to the Union its perception of the evidence as weak.

Hardgrove's testimony corroborates Grievant's denial and makes it virtually impossible for Grievant to have raped Foster. He places Grievant alone with Foster for 15 minutes. From 7 to 7:10 there was silence. But the time of the alleged rape has been keyed by Foster herself to the man-down alarm. At 7:10 Hardgrove says he heard the restroom door close then spoke to Foster over the intercom. At that point the only person who could have been in the restroom was Grievant, as the intercom was outside. Since the restroom door did not reopen until immediately before Grievant's call about the man-down alarm, Hardgrove's testimony places Grievant in the restroom at the point in time when the rape would have occurred.

There are several problems with Hardgrove's testimony. First, he is hardly immune from the demonstrated collusive effort by prison personnel to finesse the situation to Grievant's advantage. Also, his sudden, specific recollection of the number of times the restroom door closed after more than a year has passed -- is suspect. Whether or not Foster is lying, her testimony has been so precise and detailed that it appears unlikely she would leave out an innocuous conversation about ARN-3's sheets if it really occurred. Yet at no time has she mentioned this communication with Hardgrove.

The Warden appears to have given weight to Grievant's refusal to take a polygraph. This refusal was based in a bargained-for right, and is therefore without value in determining Grievant's credibility. Grievant's belligerence is as easily characterized as guilt as it is fury over perceived injustice. There is simply no rational basis for choosing one psychological explanation over the other.

The Arbitrator has scrutinized the facts of this case in detail. Each of the parties has presented a case which is simultaneously probative of its position yet flawed by inconsistencies. It is not clear from the evidence presented that Grievant had sex with Foster. Nor is it convincing. The deficiencies in the Department's case prevent a finding of just cause for the termination of Grievant.

While the Arbitrator has not been convinced that Foster was sexually abused, the evidence in support of such a conclusion was far from frivolous and cannot be summarily discounted. The Department has presented evidence which quite properly gives rise to a serious concern on its part for the protection and welfare of its inmates. Though the proofs were not sufficient to establish the requisite just cause for terminating Grievant, they are more than adequate to precipitate an interest in barring Grievant from inmate contact.

AWARD

Grievance 0153-01-03 is granted. Grievant shall be reinstated to his previously held second-shift position at the Entrance Building with back pay exclusive of overtime. Seniority and benefits shall be retroactively restored. He shall be deemed unqualified for placement into any direct contact position for a period of five years. If, through negotiated agreement between Parties or through decision of an arbitrator, Grievant's initial placement into the Entrance Building position is deemed a violation of the Collective Bargaining Agreement, Grievant shall then be handled under Article 18.

Respectfully Submitted,

Patricia Thomas Bittel

Dated: November 15, 1990

* These documents are not relevant as evidence of the just cause of Grievant's termination as the second letter of removal was withdrawn as an issue in the case. They are relevant, however, in determining the validity of the Warden's assertion that Grievant's post charge conduct was evidence of his guilt.