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REVIEWED BY
FEB 23 2001
GRIEVANCE COORDINATOR

In The Matter of the Arbitration between:

State of Ohio
Warren Correctional Institution
Department of Rehabilitation and Correction

and

Ohio Civil Services Employees Association
AFSCME, Local 11, AFL-CIO

Opinion and Award
Richard A. Parks Matter

Arbitrator
John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE UNION:

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Also Present:

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July 99 - December 99

Richard A. Parks
Grievant

FOR THE STATE:

1st, 2nd and 3rd Hearing Days

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Also Present:

Michael Duco
Manager of Dispute Resolution
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Meredith Lobritz
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Shawn Monogioudis
Correctional Officer
Warren Correctional Institution

Dr. Richard J. Jent
School Administrator
Warren Correctional Institution

Major Carl Mockabee
Chief of Security
Warren Correctional Institution

Pam Davidson
Correctional Program Specialist

Mitch Walrath
Correctional Officer
Warren Correctional Institution

Anthony Brigano
Warden
Warren Correctional Institution

FACTUAL BACKGROUND:

This matter concerns the Warren Correctional Institution and one of its Correctional Officers, Richard A. Parks. The Institution is a close security facility, housing adult offenders. The inmates are housed in a series of two story buildings shaped in two triangles called "pods."

The incident that caused this arbitration occurred on April 29, 1999, in the building that houses pods #2C and #2D. The incident occurred in the inmate housing pod unit 2D that holds approximately 128 inmates in 64 cells.

The incident, described in detail in the body of this analysis, was investigated by Major Carl Mockabee, the chief of security--an office that oversees the personnel of the institution including correctional officers. The Grievant, Richard Parks, was given a notice on May 18, 1999 of a predisciplinary hearing which was held on May 24, 1999. The hearing officer issued the predisciplinary conference report on May 26, 1999, concluding that there was just cause for discipline under rules 3G and 12 of the Standards of Employee Conduct of the Ohio Department of Rehabilitation and Correction. Consistent with the practice at the Institution, the conference report did not recommend a particular sanction.

The next step that occurred in this skein of events was the recommendation by the Institution to the Department of Rehabilitation and Correction that the Grievant be "removed" from

his position; in other words, discharged. In addition to this recommendation by the Institution to the Department, the Institution placed the Grievant on administrative leave with pay, and barred him from "coming onto" Institution grounds without specific authorization of the warden or two other supervisors.

There then followed on May 29, 1999 the first of two grievances filed by the Union on behalf of the Grievant. This grievance, numbered 27-29-990603-0970-01-03 challenged the fairness of the investigation and predisciplinary hearing. It is composed of three pages with each line in the three pages completed by a typewritten statement of complaints. The parties referred to this Grievance throughout the arbitration hearing as "the Issue Grievance" or, simply, "Grievance 970."

There then followed the issuance of a "Notice of Disciplinary Action" by the Department of Rehabilitation and Correction to the Grievant dated and effective on June 17, 1999. The Notice advised the Grievant that "you are being removed from the position of Correction Officer effective 17-June-1999."

The critical element of the Notice was the statement of the reasons for the removal of the Grievant. The reasons were as follows:

> You are to be removed for the following infractions:
>
> #3G - Leaving the work area without permission of a supervisor
> #12 - Making obscene gestures or statements or false or abusive statements toward or concerning another employee, supervisor, or member of the general public.

> On 29 April 1999 you were assigned to the Education post and you left that post without the knowledge and authorization of your immediate supervisor. (#3G) You went to Unit 2D where you confronted another staff member and began cursing him and berating him in front of staff and a large group of inmates. #12)

The Notice was signed by the warden of the Warren Correctional Institution and his signature was dated May 27, 1999--the date at which the Institution recommended removal to the Department. The Notice was also signed by the Director of the Department and dated on June 11, 1999.

There then followed the second grievance filed by the Union on behalf of the Grievant. This grievance was numbered 27-26-(990701)-0977-01-03, and was dated June 29, 1999. During the course of the hearing of this arbitration, the parties referred to this grievance as the "Removal Grievance," or, simply "Grievance 977."

THE ARBITRATION HEARING AND
THE STRUCTURE OF THIS ANALYSIS

During five days of arbitration hearings, the parties raised several issues. In the first day of hearing, two procedural issues were raised. The Union questioned the compliance by the State with its duty to provide information to the Union under Section 25.08 of the contract. The Union claimed a right to the discovery of certain information prior to the arbitration hearing--a right that had been violated by the State. This discovery matter was resolved by an interim order--that is, an order by the arbitrator issued during the hearing of the matter.

The State also raised a procedural issue during the first day of hearing under Sections 25.02 and 25.05 of the contract. Generally, the State questioned whether the Union had appealed the Removal Grievance to Step 4. The position of the State was that this grievance was not appealed to Step 4, and, therefore, should be treated as having been withdrawn. Consequently, the Removal Grievance was not arbitrable, and the Arbitrator did not have any authority under the contract to hear this grievance.

The initial two hearing days were devoted to the evidentiary cases of the parties on both of these procedural matters--the discovery question raised by the Union, and the arbitrability raised by the State. At the conclusion of the second day of hearing, the State agreed to go forward on the merits of both grievances without, of course, waiving its challenge to the arbitrability of the removal grievance. In addition, the parties agreed that the State would go forward first with its case on the merits on both grievances, and the Union would not claim that Grievance 970 (the Issue Grievance) was a discipline case from the mere fact that the State was proceeding first. In addition, the Union agreed that it would not claim that the burden of proof on the Grievance 970--the Issue Grievance--was on the State from the fact that the State was proceeding first. Lastly, the parties agreed that the condition of the State's going forward first on the Grievance 970 matter was precedent setting. Finally, the last three days of arbitration hearing were devoted to the merits of

both grievances. The dispute on the merits involved several subissues.

The following analysis respects the multiplicity of issues raised by the parties in this arbitration case. The analysis is divided into sections, each of which reflect the major divisions between the parties.

The Discovery Matter

1) Background

The first day of arbitration hearing was scheduled to occur on May 18, 2000. On May 10, 2000, the Union made a written request for information from the State under Section 25.08 of the contract between the parties. The request was for the production of documents related to 17 listed topics. On May 12, the State responded in writing with some documents, and a request for documents from the Union in 4 topical areas.

The Union made two written responses to the State on May 17. The first was a response to the State's for documents in four areas. The second was a reiteration of the Union's demand for the production of documents in four of the 17 topical areas that had been requested by the Union on May 10. The Union stated its position that it planned to present at the first day of arbitration hearing on May 18.

> I will be making the claim that the employer's contractual violation relating to the refusal to provide discovery in accordance with Article 25.08 request, adversely impacts the merits of the employer's case and warrants modification of the disciplinary action imposed against the Grievant.

2) Issue

Whether the State violated its duty under Section 25.08 of the contract to produce documents requested by the Union? If so, what should the remedy be?

3) Relevant Contract Provision

25.08 - Relevant Witnesses and Information

> The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

4) Positions of the Parties

The Union presented evidence showing that it received information in "bits and pieces" on a few of the four topics that had been listed with other topics in the May 10 request by the Union and the May 17 reiteration of that request. Information on the four topics that was presented to the Union did not arrive until the night before or the morning of the first day of the arbitration hearing. Consequently, the Union had not had an opportunity to review the documents in four topical areas requested from the State, and these four topical areas are "part of the core issue in this case."

Finally, the Union requested alternative remedies from the arbitrator for the violation by the State of its duty under Section 25.08 of the contract. The arbitrator should modify the disciplinary action imposed against the Grievant. In the alternative, the arbitrator should continue this case to a later hearing date at the cost of the State.

The State claimed that it had made a good faith effort to comply with the requests made by the Union, and that, in the language of Section 25.08, the Union's request was not "unreasonably denied." As part of its argument, the State concentrated on one of the Union's requests:

> Any and all documents, including but not limited to disciplinary record, incident reports, and investigatory notes and reports regarding the physical and threatening acts of the Bradley Boy, Augustine Little, and Anthony Lawson.

The State questioned the meaning of the phrase "any and all documents." It also questioned who the three named people were, and why the Union needed this information. Lastly, the State concluded that other topical areas demanded by the Union were nothing more than a "fishing expedition."

5) Opinion

This discovery matter was resolved by an interim order shaped by the arbitrator with the recommendations and clarifications supplied by the parties. The parties also announced their decision to adopt the interim order as an agreement by the parties. The order stated as follows:

> (1) The record is insufficient to interpret Section 25.08 on the issues raised by both advocates regarding the breach or compliance by the State with its duty under Section 25.08.
>
> (2) The record is sufficient to make the following order:
>
> > a) By agreement of the parties, the Union Advocate assisted by personnel from the Union of her own selection will have full access permitted by the Institution to the four items enumerated in the Union's letter dated May 17, 2000.

b) This access is permitted for the purpose of copying documents deemed by the Union advocate to be relevant to the Union's case.

c) All of the above is to be accomplished by 48 hours prior to the start of the second day of arbitration hearing scheduled for June 30, 2000.

Arbitrability Matter

1.) Factual Background

The Union filed two grievances concerning the State's treatment of the Grievant. The first grievance was filed on May 29, 1999 which challenged the fairness of the State's investigation of the incident concerning the Grievant that occurred in Pod #2D on April 29, 1999. This is the "Issue Grievance," or "Grievance 970." This grievance proceeded through the first two steps of the grievance process, and the Step 3 meeting occurred on August 19, 1999. The State issued the Step 3 response on September 8, 1999.

The contract sets forth the procedure by which a grievance not resolved at Step 3 may be appealed to Step 4 (mediation) "[T]he Union may appeal the grievance to mediation by filing a written appeal and a legible copy of the grievance form to the Deputy Director of the Office of Collective Bargaining . . ." (Article 25.02, Step Four). The State and the Union agreed to use a Union document with a heading, "APPEAL AND PREPARATION SHEET" as the document by which the Union makes the appeal to mediation.

On September 23, 1999, the Union sent this document with the grievance number that correctly stated the number associated with

the Issue Grievance. In addition, the Union included a typewritten, legible copy of the grievance form used in the Issue Grievance (Grievance 970).[1/] The mediation was held on January 18, 2000, and the Union filed a timely appeal to Step 5, or arbitration, on January 25, 2000. Again, this appeal letter recited the grievance number that was associated with the Issue Grievance, or Grievance 970.

The second grievance was filed on June 29, 1999 and challenged the removal of the Grievant from his position as Correction Officer effective June 17, 1999. This grievance, called the Removal Grievance or Grievance 977, was filed at the Step 3 level. This grievance was heard on August 19, 1999 before a Step 3 Hearing Officer who heard this grievance and the Issue Grievance at the same time. The Step 3 response by the Hearing Officer on the Removal Grievance was issued on September 7, 1999, one day before the Officer issued the Step 3 response to the Issue Grievance.

[1/] The Opinion that follows notes that the Union did include a third document--the Step 3 response by the Employer to the Removal Grievance, or Grievance 977. The significance of the Union's inclusion of this third document in the course of the appeal of the pre-disciplinary process grievance is discussed in the Opinion. It is sufficient at this point, however, to note the two documents submitted by the Union as part of this appeal did comply with what the contract required for the appeal of the Issue Grievance.

Following the failure to resolve the Removal Grievance, the Union filed one document concerning this grievance with the Office of Collective Bargaining. It appears that the Union filed the Step 3 response to the Removal Grievance at the same time that the Union filed a copy of the Issue Grievance and the appeal and preparation sheet reciting the number associated with the Issue Grievance.

2.) Issue.

Whether the Union failed to appeal the Removal Grievance to Steps 4 (mediation) and 5 (arbitration) with the consequence that this grievance should be deemed withdrawn under Section 25.05 of the contract?

3.) Relevant Contract Provisions.

ARTICLE 24 - DISCIPLINE

24.01 - Standard

> Disciplinary action should 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.
> . . .

ARTICLE 25 - GRIEVANCE PROCEDURE

. . .

25.02 - Grievance Steps

. . .

Step Four (4) - Mediation/Office of Collective Bargaining

. . .

> If the grievance is not resolved at Step Three (3), or if the Agency is untimely with its response to the grievance at Step Three (3), absent any mutually agreed to time extension, the Union may appeal the grievance to mediation by filing a written appeal and legible copy of the grievance form to the

Deputy Director of the Office of Collective Bargaining within fifteen (15) days of the receipt of the answer at Step Three (3) . . .

Step Five (5) - Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Deputy Director of the Office of Collective Bargaining within sixty (60) days of the mediation meeting or the postmarked date of the mediation waiver.

25.03 - Arbitration Procedures

. . .

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.

25.05 - Time Limits

Grievances may be withdrawn at any step of the grievance procedure. Grievances not appealed within the designated time limits will be treated as withdrawn grievances.

The time limits at any step may be extended by mutual agreement of the parties involved at that particular step. Such extension(s) shall be in writing.

. . .

4.) Positions of the Parties.

a) State Position

The Employer argued that the Union had breached its contractual obligation to process properly the Removal Grievance to Step 4 (mediation) and Step 5 (arbitration). Consequently, the arbitrator is barred by the contract from hearing or ruling on the merits of the Grievant's removal.

While it was "evident that (the Issue Grievance) Grievance 970 was properly before the arbitrator" (State post-hearing brief at 1), the Union failed to proceed beyond Step 3 in the processing of the Removal Grievance. The Union received the State's response to Step 3 on the Removal Grievance September 7, 2000. "At this point there exists in the record no further evidence that the Union at any step in the grievance process handled this grievance" (the Removal Grievance). Both grievances were initiated at different times. While both grievances were heard at the same time by the hearing officer at Step 3, the hearing officer responded to each grievance separately and on different dates. The State did not receive a legible copy of the Removal Grievance or written appeal for this grievance following the Step 3 response.

It also true that at the Step 4 mediation meeting, the State's participant at this meeting did discuss with the Union the Removal Grievance. There was, however, no agreement to merge both grievances for purposes of Step 4 and Step 5. If there had been such an agreement to merge the grievances, it should have been reduced to writing. There was no such agreement and the Union participant at the mediation was adamant in his testimony before the arbitrator of the absence of any agreement to merge the grievances.

Finally, even assuming an agreement to merge the grievances, the Union had a duty to comply with the contract in filing of a legible copy of the Removal Grievance with an appeal under Article

25.02 of the contract. While the Union did so with respect to the Issue Grievance, the Union did not comply with this duty to properly appeal the Removal Grievance or Grievance 977. Therefore, the Removal Grievance is not properly before the arbitrator.

b.) Union Position

The Union claimed that the State never raised this arbitrability issue until late in April--just before the arbitration case. The Union denied that the State representative at the mediation on January 18, 2000 noted the absence of any appeal of the Removal Grievance.

The Union claimed that the record shows the intent by the Union to appeal the removal of the Grievant. "An error was made (by the Union) involving one digit on the appeal and preparation form" (Union post-hearing brief at p. 24). Neither party was prejudiced by this clerical error. The State was on notice of the issue to be mediated and arbitrated--and, that was the removal of the Grievant.

From the inception of both grievances, both grievances were discussed jointly and simultaneously. The issues contained in both grievances concerned the process leading up to, and finally, the removal of the Grievant. These issues overlapped, and the case became a concentration on the final step of the State's treatment of the Grievant--his removal. The manner by which the parties treated this case through Step 3 caused the grievances to be merged.

Lastly, the parties treated Grievance 970 as if it were the Removal Grievance. This is evident by the conversations between the State and Union representatives prior to Step 4 as well as ambiguities in the documents presented on September 23, 1999 as the appeal to mediation. It is also evidenced by what happened at the mediation meeting itself.

5.) Opinion.

There is no question that the Union intended to move the Removal Grievance from Step 3 to Step 4 (mediation), and, then, appeal the Removal Grievance to arbitration. There is also no question, as candidly admitted by a Union representative, that the grievances numbers associated with the Issue Grievance instead of the Removal Grievance were on the appeal documents. It also appears that the Union mistakenly included in the appeal documents a copy of the Issue Grievance instead of a copy of the Removal Grievance.

There is fault by the Union in that it obviously had responsibility for the accuracy of the information set forth in the appeal process. The Union also sets the list of cases for mediation and the case listed for mediation on January 18 used the grievance number of the Issue Grievance. Finally, as the State argued, the fact that the Union officer with responsibility of moving the case from Step 3 to Step 4 was unpaid does not mitigate the fact of the mistake.

The fault of the Union in making this mistake is only part of the story. The complete story of what happened at the mediation on January 18 and the appeal to arbitration on January 25, 2000 is a mutual mistake shared by both parties on the identity of the case that was to be mediated and then subsequently appealed to arbitration. Both parties were mutually mistaken by assuming that the removal case had been appealed to mediation. Both parties engaged in mediation of the removal case, and the Union then appealed the removal case to arbitration on January 25.

The Union representative at the mediation and the State representative both testified about prior discussions immediately before the mediation. The discussions concerned the use by the Union of tape recordings at the mediation, and both assumed that the impending mediation concerned the removal of the Grievant, while both were working with an erroneous grievance number. The discussion at the mediation concentrated on the removal of the Grievant.

The key evidence, however, that supports the inference of a mutual mistake by the parties on the nature of the case appealed to mediation, and mediated, and appealed to arbitration centers on the documents of appeal, and what the State's representative knew about this case prior to the mediation.

The State's representative testified that she reviewed the file on the case for mediation "a few minutes before the mediation." That file contained the APPEAL AND PREPARATION SHEET

completed by the Union incident to the appeal process under the contract to move a case from Step 3 to Step 4 (mediation). The Union had entered the grievance number of the Issue Grievance which does not, in and of itself, indicate the nature of the case. The form then contains three entries that are separately listed on different lines: Removal--Suspension--Issue. There is associated with each entry a box to indicate the nature of the case on appeal. The box connected to "Removal" contained an X, whereas the boxes associated with the other two entries were blank.

The file also included the three page grievance form of the Issue Grievance and a third document. The third document was the Step 3 response by the State to the Removal Grievance issued by the State's Step 3 Hearing Officer on September 7, 1999.

The question at this point is not what documents were required by the contract to appeal the case to Step 4; the question is what did these documents lead the State to conclude was the nature of the case that was to be mediated. The Step 3 response by the State is not a document listed in the contract required to be submitted by the Union in the appeal process. On the other hand, the file that the State representative consulted just a few minutes before the mediation contained the State's response at Step 3 to the Removal Grievance, <u>not</u> the State's response to the Issue Grievance. As the State representative testified, it is the practice of the State--while not required by the contract--to review the State's Step 3 response prior to the mediation.

The State's representative also had two other documents that were given to her just prior to her departing her office to proceed to the location of the mediation at the Warren Correctional Institution on January 18, 1999. Again, the two documents were Union generated because it is the Union that selects cases for mediation. One of these documents contained the name of the Grievant with the grievance number of the Issue Grievance. That same list specifies the key contract article that is the subject of the grievance and the type of the grievance. The entry under the type of the grievance associated with Richard A. Parks--the Grievant in this case--was "R" or, Removal.

What is more important, however, is the contract provision that was cited as the key article in the contract that governs the resolution of the dispute raised by the grievance. The citation was to Section 24.01--the lead provision in the contract dealing with discipline. This is the article that establishes "just cause" as the standard upon which all disciplinary action, including removals, must be based.

Again, the question is whether these additional documents consulted by the State representative just prior to the mediation, caused the State representative to share with the Union representative the mistaken assumption that the Removal Grievance was appealed to mediation. The record creates the strong inference that both parties shared this assumption. Both parties in fact mediated the Removal Grievance on January 18, and the Union

appealed to arbitration this matter with erroneous grievance numbers just a few weeks after the completion of this mediation.

There is also another logical conclusion that arises from the record in this case. It appears that the State discovered after the mediation and the appeal to arbitration of the Grievant's removal that the State may have a technical argument that could be made. It appears that the State discovered about two months after the mediation that the appeal file to mediation did not contain a "legible copy" of the Removal Grievance (Article 25.02, Step 4). This discovery was recorded in a communication by the State representative at the mediation dated March 17, 2000.

> Richard Parks was terminated from WCI effective June 17, 1999. As a result of this, he filed two grievances. #27-26-19990701-0977-01-03 is the number of the termination case, and #27-26-19990603-0970-01-03 is an issue case about the investigation and pre-disciplinary meeting leading up to the termination. The two cases were never combined, because two separate Step 3s exist.
>
> On September 23, 1999, the following documents were appealed to OCB: the appeal and prep sheet for #0970 (issue), the grievance form for #0970 (issue) and the Step three for #0977 (discipline). At mediation, we discussed the merits of the termination case and never discussed the issue. <u>However, the termination case was never technically appealed to our office.</u> To this date, I have not seen a copy of the grievance form for the termination case. (Emphasis added to text).

Contract provisions are not mere technical requirements. They must be applied by both the parties and the arbitrator. On the other hand, oftentimes the behavior of the parties in applying the contract becomes quite relevant such as in cases where a state or union waives time requirements in a grievance process. Waivers are

based upon the behavior of the parties as they apply the contract in a particular set of circumstances. So too in this case. Here, the parties mutually shared an understanding that the Removal Grievance was appealed to mediation, and it was in fact mediated and appealed to arbitration. The arbitrability matter should be, therefore, decided on the basis of the understanding, mutually shared by the parties.

The State expressed its concern that State discussion of unscheduled cases at Step 4 could be read by an arbitrator to nullify the Union's duty to comply with the contract to appeal cases to Step 4. This is a legitimate concern for inhibiting the free flow of discussions at mediation to settle cases--even of cases not on the list prepared by the Union. This would have penalized the State for encouraging free flow of discussion of cases at Step 4.

This decision, however, is quite limited. It concerns a mutual mistake by both parties as to the case appealed to mediation. Both parties assumed that the removal case was appealed, and as a result, the removal case was mediated. It is a case where the State discovered after the mediation of the removal of the case and appealed to arbitration that the State did not have a copy of the Removal Grievance in its appeal papers.

In this case, the State discussed the case in mediation that it and the Union thought had been appealed to mediation. As such, the facts in this case do not reflect the State's exercise of its

policy to discuss unscheduled cases. This is not a case of the free flow of discussion of cases at mediation to encourage settlement--even of cases not on the list for scheduled mediation.

Merits

1.) Factual Background

On April 29, 1999, the Grievant was assigned to a post in the Education Department administered by Dr. R. Jent. While this was not the Grievant's regular post assignment, he had performed duties as a Corrections Officer in the education post several times in the past.

Sometime in the early afternoon, Jent learned that an inmate, housed in the inmate housing pod Unit 2D, had received a pass to leave his unit and attend counseling in the Education Department. Since the inmate had not appeared in the Education Department, Jent asked the Grievant to get the inmate from 2D. There is a conflict in the record as to whether Jent gave the Grievant a direct order to proceed to 2D or to follow the standard procedure to remain at his post, call 2D to locate the inmate, and notify the shift supervisor if the inmate cannot be located. The record also has a conflict in testimony as to whether the Grievant told Jent that he was proceeding to 2D before the Grievant departed.

The record is clear, however, the Grievant called 2D and spoke by telephone three times with Shawn Monogioudis, one of two correctional officers on duty at the 2D pod. While Parks and Monogioudis worked at the same institution they had never worked

together before and did not know each other. The first telephone conversation simply established the fact that the Grievant needed to have an inmate located. A few minutes later, the Grievant called again asking for the inmate. They started arguing; Monogioudis said "fuck" during the conversation, and hung up. In still a third conversation, both continued their argument.

The Grievant then left the Education Department and walked 136 yards[2/] to the entrance to Unit 2D.

There then occurred the incident that caused this arbitration. The incident occurred in the day room on the floor level of 2D that is composed of cells in a triangle on two ranges. The incident occurred while none of the inmates were locked down. The incident further occurred in the midst of a large number of inmates sitting and standing around the day room estimated to number from a low of 20 to a high of 40. Finally, the participants in the incident were the Grievant and Monogioudis.

Four persons testified about the incident--the two participants and two witnesses, one was Correctional Officer M. P. Walrath, who was standing on the balcony of the second range observing the incident in the day room below. The participants' testimony as to what transpired during the incident differed

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[2/] The arbitrator in the company of the parties toured the Education Department and walked from the department to pod 2D for a view of this inmate cell triangle. This exact measurement was obtained as a result of this tour.

considerably. The Grievant, however, did testify that as he was departing at the close of the incident he stated to Monogioudis: "Don't fuck with me. I'm not the one." The fourth witness was P. Davidson, a Correctional Program Specialist, who entered the pod immediately after the Grievant, observed part of the incident, turned her back and went to the Unit Supervisor's office to report the incident. Finally, the inmates witnessed the incident, but none testified.

2.) Issue

Whether the removal of the Grievant was for just cause; and if not, what should the remedy be?

3.) Relevant Standards of Employee Conduct and One Contract Section

STANDARDS OF EMPLOYEE CONDUCT

RULE VIOLATIONS AND PENALTIES

Steps in Progressive Discipline:

- OR - Oral Reprimand
- WR - Written Reprimand

. . .

- 1-3 - 1- to 3-day suspension
- 3-5 - 3- to 5-day suspension
- 5-10 - 5- to 10-day suspension
- R - Removal

	Offenses				
	1st	2nd	3rd	4th	5th
. . .					
1. Any violation of ORC 124.34 - . . . and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.	OR/R	WR-3/R	5-10/R	R	
3. Absenteeism					
. . .					
g. Leaving the work area without permission of a supervisor	WR/1	1-3	3-5	5-10	R
. . .					
12. Making obscene gestures or statements or false or abusive statements toward or concerning another employee, supervisor, or member of the general public	WR/R	3-5/R	5-10/R	R	

CONTRACT

24.06 - Prior Disciplinary Action

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

> The retention period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave.

4.) Positions of the Parties:

The most significant difference between the parties centered on what in fact transpired during the incident at 2D pod between the Grievant and Monogioudis. While the parties shared the same record and the same evidence, they differed considerably on the factual findings that should emanate from the evidence. According to the Union, the Grievant was discharged for using "one singular derogatory word"--and that word was "fuck." "Officer Monogioudis abruptly disconnected multiple consecutive calls from Mr. Parks and used excessive hostile and derogatory language towards Mr. Parks during the final telephone conversation and in person. Mr. Parks responded to Officer Monogioudis's agitation in a non-violent but persuasive tone using one singular derogatory word." (Union post-hearing brief at 1-2).

The Union urged that the central reason for the removal of the Grievant was for a violation of Work Rule 12--"Making obscene gestures or statements or false or abusive statements concerning another staff member." The only fact that is supported by the evidence in this record that could be conceivably covered by the scope of Rule 12 was the use the word "fuck" directed to Monogioudis by the Grievant during the incident at 2D pod.

> Simply put, Mr. Parks was removed from his position for a violation of Work Rule 12. Applying this Work Rule to the facts at hand, Mr. Parks was removed for stating, "Don't fuck

with me. I am not the one." (Union post-hearing brief at 16).

The State viewed the same evidence as the Union did, but came to considerably different conclusions as to the facts supported by that evidence. According to the State, the Grievant engaged in a deliberate, non-spontaneous aggressive verbal attack against Monogioudis in the midst of inmates who were aroused by the site of one officer pursuing the other. The abusive language and aggression of the Grievant forced Monogioudis to retreat some distance, and Monogioudis displayed no aggression to the Grievant. With his aggressive, abusive language toward Monogioudis, the Grievant attempted to intimidate his fellow correctional officer in front of a large group of inmates.

This fundamental difference on what transpired during the incident on April 29, 1999 between the Grievant and his fellow correctional officer permeated all of the other arguments made by the parties. The Union claimed that the investigation of the incident and the disciplinary process was biased and unfair. The Union also claimed that the sanction of removal of the Grievant constituted disparate treatment of the Grievant by the State when compared to similar transgressions by other correctional officers. Also, removal was not progressive or appropriate and was racially motivated. The State either denied these claims or asserted that these Union claims were not supported in the evidence in the record.

5.) Opinion:

A.) What Happened on April 29, 1999 in 2D Pod?

What happened during this incident in 2D pod is a critical finding in this case. This finding becomes the basis for determining whether the sanction of removal was appropriate and progressive. It also decides whether the Grievant was the victim of disparate treatment by the State. The finding of what happened on April 29, 1999 can then be compared with facts of other cases of discipline to see if the removal of the Grievant is unfair and disparate treatment of the Grievant by the State.

The conclusion in this opinion is that the Grievant's statements to his fellow correctional officer were abusive under Article 12. The characteristics of the abuse are grounded in these following factual findings. First, the Grievant came to 2D pod for the purpose of confronting his fellow correctional officer. His action in this inmate's cell block was deliberate and intentional. Second, the Grievant aggressively berated his fellow correctional officer for 2 to 3 minutes, advancing against the person of his fellow correctional officer and backing him up 10 to 15 feet. Third, Monogioudis never made a threatening gesture to the Grievant during the incident in 2D pod, but retreated with his hands in the air by his ears. Monogioudis's hands were open with palms forward toward the Grievant.

Fourth, all of this took place in the midst of approximately thirty inmates who began to cheer and make wolf calls at the site

of the display of aggressive berating language against Monogioudis by the Grievant. Fifth, and finally, when the Grievant left unit 2D, Monogioudis was "visibly shaken," and another corrections officer who viewed the incident "didn't really want to see stuff like that" . . . "in front of inmates."

1.) The Grievant's Intent to Confront His Fellow Correction Officer

The background to the incident at 2D pod includes three telephone calls by the Grievant to Monogioudis, and an effort by the School Administrator, Dr. Jent, to locate an inmate housed in 2D pod who missed a counseling session. Jent asked the Grievant to locate the inmate, and expected the Grievant to use the standard procedure of telephoning the 2D pod, rather than leaving his post and proceeding to the pod. The Grievant testified that he had a direct order from Jent to proceed to the pod.

It is found that the Grievant did not have a direct order to leave his post. This was a violation of Rule 3 g., but this violation based upon the listed sanctions of offenses of this rule did not warrant removal.

The key evidence to show that the Grievant on his own decided to leave his post and proceed to pod 2D is the testimony by both the Grievant and Jent on what the Grievant said to Jent when he returned to the education center--a 136 yards away from 2D pod. Jent testified that the Grievant, at this point, told Jent "I had to check an officer who got smart about the inmate." The Grievant testified about the same contact with Jent on his return to the

education center. The Grievant testified that he said, "I had to go to 2D to check an officer that got smart with me on the phone when I called him about the inmate you asked about."

In view of the all the conflicts in testimony in this record, these two versions of the Grievant's statement to Jent on return to the education center are happily harmonious. This statement by the Grievant shows that he had to explain his absence to Jent. The need for this explanation is totally inconsistent with the Grievant's assertions that Jent had given him a direct order to go to 2D.

This background to the incident at 2D between the Grievant and M. is significant for a much more important reason. The Grievant and M. had three telephone conversations initiated by the Grievant that became heated. It appears that Monogioudis was in the midst of a shift change, and was not responding to the Grievant's request to locate the inmate as rapidly as the Grievant wished. Monogioudis hung up the telephone in the last two telephone conversations, and used the word "fuck" in at least one of the conversations to the Grievant.

The evidence shows that the Grievant left his post at the education center for the purpose of retaliating and intimidating at unit 2D, and not for the purpose of locating the inmate. Both Jent and the Grievant testified that the Grievant told Jent that he had gone to unit 2D "to check an officer that got smart with me on the phone . . .".

The Grievant crossed the 136 yards to the entrance to the 2D pod. At the main door hallway, he passed Pam Davidson, the Correctional Program Specialist for pods 2C and 2D. She stepped aside to let the Grievant pass, and the Grievant did not say anything to her about the missing inmate. This evidence is, again, consistent with the main purpose of the Grievant--to seek out Monogioudis and intimidate him.

2.) The Grievant: The Only Aggressor

The Grievant testified that he entered 2D pod and "walked up to M. and introduced himself, 'I'm Officer Parks.'" The Grievant further testified that Monogioudis responded by saying "get the fuck out of my face" which "shocked" the Grievant. Thereafter, all of his actions "were defensive," but the Grievant did agree that he said on departing, "don't fuck with me, I'm not the one."

The Grievant's story is totally inconsistent with the credible testimony of one correctional officer who observed the entire scene, and Pam Davidson who went to the 2D pod immediately after the Grievant. Ms. Davidson testified that the Grievant "charged into 2D, up to Monogioudis." The Grievant was "very angry," shouting "don't fuck with me" in a loud and angry voice. The Grievant had his finger pointed at Monogioudis, who did not answer or react to the Grievant. Monogioudis attempted to back away from the situation. Ms. Davidson turned away from the incident while it was still occurring, and went to report the matter to the assistant unit supervisor.

The other correctional officer, who had worked with the Grievant, provided more details about the incident because of his better vantage point. Mitch Walrath was standing on the second cell tier looking down upon the day room. The incident started when the Grievant entered the day room and charged up to Monogioudis by the table in the center of the day room. The Grievant had his finger pointed at Monogioudis's face and the Grievant "was backing him (Monogioudis) up in a threatening manner." Monogioudis "never made a threatening gesture to Parks." "Monogioudis had his arms in the air by his ears while he was backing up. His palms were forward toward the Grievant, and he kept backing up until the Grievant left." Walrath testified that he saw the entire incident and there was no obstruction to his view.

Walrath's testimony is entirely consistent with that of Monogioudis. The only additional fact that was supplied by Monogioudis was his response to the verbal berating that he received from the Grievant. Walrath testified that he could not hear what the Grievant or Monogioudis said to each other because of the loud noise of the inmates who were observing the incident. Ms. Davidson also testified that she could not hear the verbal response from Monogioudis.

Monogioudis testified that as the Grievant advanced against him, shouting and pointing his finger, Monogioudis backed away and retreated from ten to fifteen feet near a table where inmates were

playing cards. Consistent with the observations of Walrath, Monogioudis testified that he had both hands raised to his ears with his palms open to the advancing Grievant. He also testified that he kept repeating to the Grievant "we're not going to do this." He meant engage in a fight.

3.) Potential Loss of Control of Inmates

The abuse of the statements made by the Grievant to Monogioudis must be measured by the context in which statements were made. The statements were made as the Grievant advanced at Monogioudis who was retreating with his hands held up to his ears and palms open to the advancing, angry Grievant. The abusive statements by the Grievant were also made in the midst of approximately thirty inmates in the day room. Walrath testified that the inmates got louder as the altercation proceeded, and the inmates were watching the altercation as it unfolded. Ms. Davidson testified that the inmates were cheering and making "wolf calls." In her opinion, there was a threat to security in that "the inmates could join in to favor one correctional officer over the other."

4.) Negative Impact on Staff

One of the most fascinating consequences of the abusive statements by the Grievant to Monogioudis was the negative reaction to Walrath, another corrections officer who viewed the entire scene. He was one of two corrections officers (the other being Monogioudis) supervising approximately thirty inmates, none of whom were locked down. His reaction ranged from disbelief to

apprehension. "I never saw officers fight like that before, I didn't know what they would do." Asked was it like horseplay, he answered "No, nothing like that. This was backing up an officer right in front of inmates."

He made similar comments about his reaction in other portions of his testimony. "I really didn't want to see stuff like this. I don't like to see that between officers in front of inmates."

The Grievant's statements were abusive. They were directed in a threatening manner and tone to a fellow correctional officer. They were not spontaneous; rather, they were the result of a decision by Parks to confront the correctional officer. Parks was the only aggressor advancing against the correctional officer who was retreating with his hands in the air by his ears and his palms open to the Grievant. All of this was done with a negative impact on other staff and with a potential for a security problem arising from the approximately thirty inmates within whose midst the incident occurred. The Grievant testified that "I did not consider the impression (of the incident) on the inmates." This cavalier attitude is to be contrasted to that of the correctional officer who watched the scene from the second range of cells, and the other correctional officer who followed Parks into the day room of 2D pod.

B.) Progressive Discipline

The contract and the Departmental Rules frame the parameters for the system of progressive discipline. In Article 24.06 there

is a forgiveness clause that removes disciplinary action after twenty-four months of the effective date of the discipline "if there has been no other discipline imposed during the past twenty-four (24) months." The forgiveness clause is for twelve months in the case of reprimands.

The second parameter for progressive discipline comes from the Departmental Rules. The Rules clearly set forth the proposition that progression of sanctions must be based upon multiplicity of offenses for the violation of the same rule. For example, it is clear from Rule 3 g., quoted above, that removal for "leaving the work area without permission of the supervisor" could not occur until the fifth offense involving the breach of this rule. The sanction for the first offense is limited to a written reprimand or one day of suspension. By contrast, Rule 12 "making obscene gestures or statements or false or abusive statements toward . . . another employee, supervisor" carries the option of removal as a sanction for the first, second and third offense. This rule makes removal the sole sanction for the fourth offense.

Within these parameters, the parties stipulated that the Grievant had the following "active" disciplinary record. The word "active" refers to the forgiveness clause found in Article 24.06 of the contract.

> Richard Parks had prior instances of active discipline as follows:

Date	Violation	Discipline Imposed
01-04-97	Rules 3b, 3e, 6 and 12	10 day suspension
01-13-98	Rule 3b	5 day suspension
03-23-98	Rule 1	Written Reprimand
07-20-98	Rule 2b	Written Reprimand
12-02-98	Rule 2b	1 day fine
02-03-99	Rule 3b	5 day fine

In applying these parameters to the question of whether or not the removal of the Grievant respected the requirement of progressive discipline, we should first observe that the Grievant was charged in this case with violation of Rule 3 g. and 12. The Grievant could not be removed for the first violation of 3 g. As noted above, there are only four steps in the progressive discipline for violations of Rule 12 and removal is set forth as an option in the first three steps, and is the sole sanction for the fourth step or offense of Rule 12. Therefore, whether this removal respects progressive discipline depends upon an analysis of the prior violation of Rule 12 that occurred about two years prior to the incident in unit 2D, and that led to a 10-day suspension of the Grievant.

The record includes the incident reports by witnesses, statements and pre-hearing disciplinary report concerning two incidents that led to the 10-day suspension of the Grievant in January 1997. Both incidents show that same pattern of intentional (non-spontaneous), abusive, confrontational and belligerent statements--on these occasions, to staff and a deputy warden. The first incident started with a request by the Grievant for an opportunity to speak to the deputy warden about complaints of

inmates concerning the Grievant. The report by Deputy Mack of what transpired in his office with the Grievant shows the same style of aggressive confrontational and abusive statements that characterize the abuse of Monogioudis by the Grievant in this case. Deputy Mack stated:

> He stated that I didn't care about his family, and that "you mother fuckers don't want to do anything about it". I tried to calm him down and advised him that I would place inmate Hayes in segregation under investigation and look into the matter. By this time Officer Parks had become very aggressive, belligerent, and disruptive. When I could not do anything to satisfy him, he stood up, threw a report in my face, knocked things off my desk, and exited my office, all the while continuing to shout. I had followed him from my office, he turned to me and got in my face and continued to argue and told me to get out of his face. At this time Mr. Sheets stepped between us and Captain Bost began to walk Officer parks from the area. I then returned to my office and began picking up the things knocked from my desk, when I realized that Parks had reentered the area and continued shouting at me. Captain Bost did escort him outside the building at this time. This officer at no time during this discussion conducted himself in an appropriate manner. Almost from the moment he entered my office, he was loud, abusive, aggressive, and belligerent. Nothing said or done could calm or control this officer. I feel this was an issue that could have easily been handled in a more appropriate manner, had he been more level headed and willing to listen and compromise.

The second incident occurred the next day and was a follow-up to what had transpired at the deputy warden's office. The decision had been made to reassign the Grievant from the prisoner housing unit to a duty of driving a perimeter vehicle securing the area just outside of the prison. When the Grievant entered the entry building to the prison, he was told by the staff that the instructions from the captain included this reassignment. At this

point the Grievant stated, "the mother fucking captain should say this directly to me." The Grievant proceeded to the prisoner housing unit where the shift lieutenant told him he had already been reassigned. The Grievant responded "I will stay," but eventually left.

At the arbitration hearing the Grievant denied that he knocked books from the deputy warden's desk, and stated that his statements in the office were not directed to anyone in particular. The record does show, however, that the 10-day suspension of the Grievant was served andnot overturned.

The warden at this institution with the advice of an executive committee made the final decision of removal of the Grievant. He testified about his concerns about the confrontational abusive statements to staff by the Grievant as exhibited in the two incidents that triggered the 10-day suspension under Rule 12 in January of 1997. He testified, however, that he gave the Grievant a break in March of 1998--about a year after the 10-day suspension. In this incident the Grievant was not permitted to attend a PETE program (Personal Enrichment Through Education) because the institution was short by nine correctional officers. When a captain informed the Grievant of this fact, the Grievant said, "you can't keep me" and began to be belligerent and confrontational in his statements to the captain. While the warden believed that these facts could have constituted a second violation of Rule 12, the warden decided to give the Grievant a break and find a

violation of Rule 1 on March 23, 1998 leading to a written reprimand.

The facts in the case in this arbitration clearly establish that the warden was reasonable in exercising his discretion to use the removal sanction for this violation of Rule 12. In this case, the same confrontational abusive statements were used to a fellow correctional officer. They were intentional statements, and were accompanied by aggressively advancing against his fellow correctional officer who was retreating with an open display of non-aggression.

The critical element of the abuse visited upon his fellow correctional officer by the Grievant was the fact that these abusive statements were made in the presence of approximately thirty inmates in a prisoner cell unit while the thirty inmates were milling around the day room. The Grievant's abusive statements challenged the role of Monogioudis as a correctional officer within 2D pod, created a potential for a security threat, and had a negative effect upon other staff who viewed the incident.

Corrective action had been taken against the tendency of the Grievant to act in a confrontational manner accompanied by abusive statements. He suffered a 10-day suspension, but the corrective action did not work. When the Grievant's abusive statements are examined within the context in which he visited his abuse upon Monogioudis in this case, removal was a reasonable exercise of discretion by the institution.

C.) Disparate Treatment

There were two approaches by the Union on the proposition that the removal of the Grievant constituted disparate treatment when measured against sanctions suffered by other employees for similar offenses. The first approach was to introduce a long record of discipline of Bradley Boy, a correction officer, and to suggest that he was a favorite of the institution, and, by implication, the Grievant was targeted. The answer to this is that an examination of Boy's disciplinary record shows violation of rules covering the gamut of possible offenses. There are 36 rules, and some, such as tardiness or absenteeism, have up to 10 subrules. An important point, however, is that the progressive discipline required by the Rules is based upon multiple offenses of the same rule or subrule. This type of grid for discipline makes probable a file of an employee with a large number of active disciplines.

The second approach to the matter of disparate treatment by the Union was to assert that the sanction of removal of the Grievant in this case is grossly severe when compared with the sanctions received by other employees for offenses with similar facts. The difficulty for the Union on this approach stems from the difference between the parties on their respective view of the facts based upon the evidence set forth at the hearing. As noted earlier, the Union's view is that the Grievant was removed for using the word "fuck" and for leaving his post.

> The disparity of this removal is outstanding. Amazing how Mr. Parks can be removed for using the word "fuck" and for leaving his post but then: (there then follows

a short reference to approximately 29 others incidents of discipline of other employees).

What actually happened on July 29, 1999 in 2D pod was laboriously set forth above. It is the factual characteristics of the abusive statements by the Grievant on that day that must be compared with the facts of other cases of discipline to determine if the removal of the Grievant was unfair. The Grievant was not removed for merely using the word "fuck." As witnesses for the institution, including the warden noted, the use of this word is commonplace within the institution.

The disciplinary cases on this issue, that were noted and argued by the Union, concern cases where there was a factual display of belligerency in statement or in conduct to fellow officers. Two such cases occurred concerning Bradley Boy--one with Officer Laughlin, and another with Officer Little. Both instances involved a fight, but it occurred in the front of the entry building to the institution. No inmates were present. Prior discussion of what happened in 2D pod on April 29, 1999 makes the absence of inmates in these other cases a significant distinction.

D.) Other Issues

There were three additional issues raised in this case. First, the investigation conducted by the institution violated the due process rights of the Grievant. The second claim was similar but concentrated upon the pre-disciplinary process, particularly the hearing. Finally, the Union noted the five charges that the Grievant had filed with the EEOC concerning the warden, Major Carl Mockabee who conducted the investigation, and Patrick Mayer, the

Labor Relations Officer who presided at the pre-disciplinary hearing.

The claim concerning the investigation is based upon the fact that Major Mockabee had Monogidious and the two witnesses who observed the incident file incident reports on the same day that the incident occurred--April 29, 1999. He did not request an incident report from the Grievant. This failure shows an unfair concentration and focus upon the Grievant.

There are two difficulties with this claim. First, Mockabee's attention was drawn to the incident as a result of expression of concern by Pam Davidson that had been communicated to the unit supervisor. One must remember that the concern expressed by Davidson, Walrath and Monogodious, was the belligerent confrontational abusive statements by the Grievant in the midst of inmates within 2D pod.

The more important difficulty with this claim of unfair process is the fact that on the very next day--April 30, 1999--Mockabee ordered a Captain Bost to conduct a fact finding process over the incident that occurred on April 29, 1999. This resulted in investigatory interview reports taken from the Grievant and Walrath on the next day, May 1, 1999, with additional reports from Davidson on May 3 and Monogioudis on May 4.

It is clear that Mockabee determined that there was cause to believe an incident concerning the use of abuse statements in pod 2D had occurred. He made that determination on the day that it occurred as a result of information supplied by Davidson to the

unit supervisor, who in turn told Mockabee. Mockabee then initiated a fact finding process that involved an interview with the Grievant just two days after the incident occurred. The investigation did not fail to take into account the Grievant's view of what transpired on April 29, 1999 in pod 2D.

The second due process claim concerned the pre-disciplinary hearing held on May 24, 1999. The Union's claim centers on the refusal of the institution to have three witnesses present to be examined by the Union and/or the Grievant. The Union's claim is based upon a sentence found in Section 24.04 of the contract: "The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut." The Union also submitted the Fact-Finder's Report in 1991 by Arbitrator Harry Graham that rejected the State's proposal to eliminate this language.

The Union requested that Davidson, Monogioudis and Walrath be present at the pre-disciplinary conference in order to be examined. The request was rejected by the hearing officer, Patrick Mayer, in a handwritten note: "We do not do witnesses at Pre-D.'s. If you wish to submit statements from them, you may do so."

Arbitrator Graham's analysis in 1991 did not establish a right to have witnesses present for examination and cross-examination. The State made this proposal because of certain pre-disciplinary hearings that were converted into a mini arbitration forum, dragging on for hours. (In the Matter of Fact-Finding Between OCSEA, Local 11, and the State of Ohio (Graham, 1991 at p. 32)).

Arbitrator Graham recited the Union's position. "It (the Union) points that reduction of initial discipline has routinely occurred during the pre-disciplinary stage of the discipline procedure." (Id. at 31). Nothing in the recitation of the Union's position as presented by Arbitrator Graham centered on the use of witnesses at pre-disciplinary hearings as a right that emanates from the language "ask questions, comment, refute or rebut . . .". Indeed, Arbitrator Graham describes the proceeding that is envisioned by the present language in the contract. He calls the proceeding a "meeting," and not a "hearing."

> The present language in the Agreement is very specific. It provides for a meeting. The employee and/or the Union representative are to be given the opportunity to "ask questions, comment, refute or rebut." (Id. at 32).

Arbitrator Graham went further and described situations where such meetings had been conducted so as to constitute "mini-arbitrations." He considered these "sorts of horror stories" that did not justify the change in the current language in Section 24.04.

This record is insufficient to find the pre-disciplinary hearing conducted in this case to have violated the Grievant's due process rights in not presenting witnesses for examination. The Fact-Finding Report issued by Arbitrator Graham does not support the claim of a right to have witnesses present at this hearing. Indeed, the record establishes that the general procedure at this institution was followed in this particular case.

Lastly, we come to the claim that racial discrimination impelled the removal of the Grievant. The record shows that five

charges were filed with the EEOC against the institution, the warden, Mockabee and/or Mayer. Also in the record is evidence to support the claim that Mayer told the Grievant in the presence of a Union steward that the institution considered him a radical black.

The difficulty with this claim is that four of the EEOC charges were found wanting, and Mayer on the record denied making the statement attributed to him. There is nothing in this record that connects racial discrimination to the removal of the Grievant. The mosaic of the facts that occurred on April 29, 1999 at pod 2D impelled the removal of the Grievant, not racial discrimination. These facts constitute the basis for the proposition that the institution acted reasonably in choosing the sanction of removal of the Grievant for what transpired in pod 2D. Even assuming that this record (and it is not so found) could be said to show a prima facie case of racial discrimination, the institution had an independent, untainted basis on which to proceed with the removal of the Grievant.

AWARD:

The grievances are denied.

Dated: February 18, 2001

John J. Murphy
Arbitrator