

#820

REVIEWED BY
CL-2-13-03
FEB 13 2003

STATE OF OHIO
VOLUNTARY RIGHTS ARBITRATION

GRIEVANCE COORDINATOR

In The Matter of Arbitration Between:

THE STATE OF OHIO, DEPARTMENT OF REHABILITATION
AND CORRECTION,

EMPLOYER,

and

THE OHIO CIVIL SERVICE EMPLOYEES' ASSOCIATION,

UNION.

GRIEVANT: JAMES DICKENS (TERMINATION)
CASE NO. 27-05-20020807-0989-01-03

Arbitrator's Opinion and Award
Arbitrator: Dr. David M. Pincus
Date: February 10, 2003

Appearances

For the Employer

Ray Mussio
Richard Corbin
Jon C. Fausnaugh
Bert K. Carter
Dan Justice
Jacquelyne Foster

Position

OCB - 2nd Chair
OCB - Advocate
Investigator - CRC
Correctional Captain - ORW
Correctional Captain
TWL Correctional Captain

For the Union

Dave Justice
Sherrie A. Patrick
Dan Alvarado
James Dickens
Jeremy Tuttle

Staff Representative
Chief Steward
Chapter President
Grievant
Witness

I. Stipulated Issue

The parties have stipulated to the following issue: Was the grievant removed for just cause, if not, what shall the remedy be?

II. Other Stipulations

In the arbitration regarding the removal of James Dickens from the ODRC, the advocates agree to the following stipulations:

1. The written reports and statements attributed to R. N. Woodgeard shall be accepted into the record without requiring his appearance at the hearing.
2. The Union will not be required to have Officer Robert Turjanica appear. The State will stipulate that his testimony will bolster and mirror the testimony of Dickens and Tuttle regarding procedures used by officers in the Segregation Unit.

III. Introduction

This is a proceeding under the grievance procedure of an agreement between the State of Ohio, Department of Rehabilitation and Correction (the Employer) and the Ohio Civil Service Employees' Association (the Union). The arbitration hearing in this matter was held on November 20, 2002. The parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses, and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit

post-hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

IV. Pertinent Contract Language and Work Rules

A. Contract Provisions

Article 24.01 - Discipline

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The employer has the burden of proof to establish just cause for any disciplinary action.

24.02 - Progressive Discipline

The employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall be initiated as soon as reasonably possible, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the employer's decision to begin the disciplinary process.

B. Work Rules

Performance - Based Standards Track

Disciplinary Grid

| | | Offense | | | | |
|----|---|---------|-----|-----|-----|-----|
| | | 1st | 2nd | 3rd | 4th | 5th |
| 7. | Failure to follow post orders, administrative | OR or 2 | 5 | R | | |

| | | Offense | | | | |
|-----|--|---------|--------|-----|-----|-----|
| | | 1st | 2nd | 3rd | 4th | 5th |
| | regulations, policies or directives. | | | | | |
| 22. | Falsifying, altering, or removing any official document. | 2 or R | 5 or R | R | | |
| 24. | Interfering with, failing to cooperate in, or lying in an official investigation or inquiry. | 2 or R | 5 or R | R | | |
| 25. | Failure to immediately report a violation of any work rule, law, or regulation. | WR or 2 | 5 | R | | |
| | | * | * | * | * | * |

RESPONSIVENESS

Failure to appropriately respond to situations jeopardizes the safety and security of the institution or office as well as the lives of other staff members and inmates. It is mandatory and expected that all employees will follow local policies, procedures, and work rules which dictate when response is necessary. For purposes of this document, "institution" means any facility or office operated by the Ohio Department of Rehabilitation and Correction where inmates, releasees or offenders under supervision of the APA, are housed, supervised, or report; or any location wherein those under the supervision of the Department are carrying out work assignments.

Inattention to duty in a correctional environment can result in escapes, assaults and other incidents. Employees are expected to remain fully alert and attentive at all times while on duty and to follow all orders and directives given by supervisors. Promptly responding to such orders is imperative to the safety and security of the institution.

Post Orders

VI. Procedures

A. General Duties

2. All inmates in Segregation shall receive appropriate supervision at all times. There are to be no unauthorized inmates in this area.
3. Never leave your post unless properly relieved or without permission of your supervisor.

* * *

23. All logs and forms will be kept current and completed accurately, noting the appropriate signatures, time in and out, names and numbers of inmates, consumption of meals, exercise, etc. This log will be permanent, and the information passed to the following shift. The Desk Officer is responsible for the permanent log. The following information must be noted on individual inmate's files: time of mail delivery, time of meals, changes in inmate's behavior, unusual incidents, staff visits, etc.

B. Attention to Duty

All Correction Officers are required to remain fully alert at all

times and permit nothing to distract them from the proper performance of their duties. Therefore, reading (other than work-related material), or sleeping while on duty is strictly prohibited.

R. Moving a Reluctant or Hostile Inmate

1. When it becomes necessary to move a hostile or reluctant inmate from a cell. It is imperative that this be carried out in a manner which will allow the control of the inmate, provide for the safety of staff, and maintain the security of the institution. The Segregation Supervisor or Shift Commander will be notified.

V. Case History

The grievant, James Dickens, was hired as a corrections officer on March 13, 1995. He was removed on August 1, 2002, for failure to follow post orders, for falsifying a report, and for failure to cooperate in an investigation.

On February 13, 2002, the grievant was working as the Desk Officer in the Segregation Unit of the Corrections Reception Center, together with Officers Bryan Brown and Jeremy Tuttle. Inmates housed in the Segregation Unit are those who have demonstrated an inability to follow institutional rules. They are isolated from the remainder of the inmate population, and are subject to more stringent security measures in order to protect both staff and other inmates. Corrections Officers assigned to the area must be aware of strict security measures in place for segregation inmates.

During the afternoon of February 13, the grievant allegedly had been taunting one of the segregation pod inmates, Robert York, calling him a baby raper and a child molester. Apparently, based on these statements, other inmates in the Segregation Unit began criticizing York with similar statements, including statements encouraging the porters to urinate in York's food.

During the afternoon of February 13, when York's food arrived, York felt that it smelled of urine, so he dumped the food tray without eating it and set it on the cuffport of the door. At this point, he told one of the inmate porters to tell one of the officers that he was suicidal. York in fact was not suicidal, but was using the suicide claim as a ploy to get a supervisor to come and see him, so that he could complain about the grievant.

Officer Brown ultimately came to the cell door, and York informed him that he was suicidal and needed medical attention. Officer Brown answered York sarcastically, which angered York, and he slapped the food tray that was sitting in the cuffport, sending it flying out into the pod, and causing some of the food remnants to get on Brown's uniform. Brown then left the area and came back a few minutes later and told York to "cuff up," meaning that York was to put on handcuffs so that he could be escorted out of his cell. York complied and was taken from his cell.

Brown was accompanied by Officer Jeremy Tuttle. They escorted York handcuffed through the cuffport from his cell out of the disciplinary control pod. Brown, Tuttle and York exited the pod into the desk area where the grievant was stationed, and then into the outside basketball court, where the closed-circuit camera in the Segregation Area could not view their activity. At this time, York alleges that, in plain view of the grievant,

Officer Brown began kicking him approximately twelve to fourteen times all over his body. Brown then picked York up and sat him in a chair.

A few minutes after the alleged incident, the grievant telephoned the captain's office and asked Lieutenant Carter to come to Segregation. He told Carter that York had just thrown food on Brown. Carter told the grievant not to remove York from his cell, that Carter would be up to the Segregation Unit after count cleared. Lt. Carter's instruction was consistent with a recent roll call training tactic intended to ensure that officers limit contact with inmates who have just committed a hostile act toward them.

About the same time, the grievant also called Lt. Foster about the York incident. He asked her to come to the Segregation Unit. Upon her arrival in the Segregation Unit, Lt. Foster observed York seated in a chair, handcuffed and bleeding from a head wound. Inmate York told Lt. Foster that Brown had assaulted him.

Brown, Tuttle and the grievant gave varying accounts of what transpired after York was escorted in handcuffs from his cell. The grievant stated York struggled and fell forward with Brown falling on top of him. He claims that York and Brown struggled on the ground for fifteen to twenty seconds before Brown gained control and York was righted and seated in a chair.

Upon hearing the explanations of the officers, Lt. Foster contacted Captain Justice and reported the incident. After receiving the initial verbal reports and medical assessment of York, Justice contacted Warden Saunders and Investigator Jon C. Fausnaugh to notify them of the incident. Fausnaugh was assigned to do a thorough investigation of the incident.

Upon arriving at the Segregation Unit on the evening of February 13 at approximately 7:50 p.m., Fausnaugh obtained a 35 mm camera and took

a number of photographs of inmate York's injuries. On February 14, at approximately 12:30 p.m., Fausnaugh took another series of photographs of the same injuries.

Beginning on February 14, Fausnaugh and Trooper M. Maughmer interviewed various witnesses and examined documents and information. They submitted an investigative report on May 9, 2002 that outlined the following information below in significant part.

1. Medical Exam. A medical examination conducted by registered nurse, Les Woodgeard, at 5:25 p.m. on February 13, 2002 revealed the following injuries to inmate York:

- a. 1/2 inch laceration above the right elbow;
- b. 3 inch bump on the back of the head, right side;
- c. abrasion to the right rib cage, abdomen area;
- d. abrasion below the right knee;
- e. abrasion on back of right forearm;
- f. reddened area on upper left arm;
- g. large reddened abrasion to middle to upper left back, 6 - 8 inch in diameter;
- h. abrasion to right back;
- i. abrasion to right hand knuckle;
- j. bruising to left hip and thigh area.

2. Inmate York Interview. York stated that when his food tray arrived, he thought it smelled of urine, so he dumped the tray without eating it and set it in the cuffport of the door. He told one of the inmate porters to tell the officers he was suicidal. Officer Brown came to the cell door and the grievant informed him of his suicidal tendency. Officer

Brown's response angered the grievant and he slapped the food tray that was sitting in the cuffport, sending it flying out into the pod.

Officer Brown came back a few minutes later and told him to cuff up. Upon exiting the pod into the desk area, York stated that he was tripped and shoved to the floor by Officer Brown. Once on the floor, he was dragged by his feet out on the basketball court, where Officer Brown began kicking him at least twelve to fourteen times all over his body. Brown then picked him up and sat him in the chair.

3. Bryan Brown. Brown was interviewed on May 3, 2002. Brown's interview essentially mirrored his initial incident report, but when questioned about Brown's failure to mention York having thrown his food tray out of the cuffport, Brown could not provide a meaningful answer. Brown then later said that York had stuck his hands out in the cuffport and accidentally knocked the tray out of the cuffport.

In response to questions about why he moved York from the cell, Brown said it was common practice to remove an inmate who had made a suicidal statement from his cell and set the inmate on the chair so that he could be constantly observed until Mental Health could examine him.

Brown stated that as soon as he walked through the door with York, York started struggling with Brown and that they both fell to the floor. Brown stated that they were on the ground for a brief period of time and that he did not kick inmate York. He denies that they went outside into the recreation area. He offered no explanation about how inmate York received numerous injuries besides from the fall to the floor.

When confronted with the statements of Captain Justice, Lt. Carter, and Nurse Woodgeard, indicating that their observations of the injuries to

York appeared to be boot prints, Brown simply stated that they were all lying and that he did not kick the inmate.

Neither could Brown provide any explanation in response to York's statement that he was laying on the floor and Brown was kicking him repeatedly. York had passed a computerized voice stress analysis (CVSA) exam indicating that York was truthful about his statement about being kicked by Officer Brown. Officer Brown's only response was to deny York's statement and to also deny an opportunity to take a CVSA.

4. Jeremy Tuttle. Tuttle was interviewed on March 12, 2002. He stated that he did not recall exactly what he discussed with Brown before they released York out of the cell. Tuttle denied seeing Brown kick inmate York. He also denied ever entering the outside recreation area with York and Brown. Tuttle declined an offer to take a CVSA examination.

5. The Grievant. The grievant was interviewed on March 5, 2002. During this interview, the grievant was questioned about why he had stated in his initial report that he had just opened the door for Officers Brown and Tuttle to exit with inmate York. When confronted with the fact that the video surveillance tape did not show the grievant crossing either to or from the door, the grievant admitted that he did not unlock the door but that he had left it ajar. In addition, the grievant stated that after Brown and York went to the floor, he went to help Brown. He admitted that he did not move to assist Brown in controlling the inmate, even though he stated that Brown struggled with the inmate on the ground for fifteen to twenty seconds.

When questioned about who he notified of York's suicide threat, the grievant stated that he had made numerous calls to the D-1MH nurse, but only got voice mail, and then he called back and spoke with D-1 officers

trying to locate the MH nurse. The grievant was then confronted with the fact that the telephone system does not show any of his attempts to contact the MH nurse until after he contacted Lt. Carter and reported that inmate York had thrown food on Brown. Additionally, it was four minutes after that until he contacted Lt. Foster asking her to come to Segregation. This was a total of seven minutes after talking to Lt. Carter. D-1 was not called until sixteen minutes after the initial call to Lt. Carter. The grievant could not explain the discrepancies between his statements and the phone log.

When asked about the injuries sustained by York, the grievant stated that he could only believe that York had self inflicted the injuries and that they did not occur with the fall. When questioned about how York could have gotten a cut about the eye and a bump and abrasion on the back of his head out of the same incident, the grievant only speculated that when York fell, he hit his forehead on the floor and the back of his head on the outside recreation area door frame.

The grievant's statement is contrary to his written report, where he stated that Brown gained control of inmate York inside the doorway to the outside recreation area. The grievant restated that Brown struggled with York on the floor for approximately fifteen to twenty seconds, but could not offer any reason as to why he did not assist Brown in gaining control of York. Neither could he state where Officer Tuttle was at the time or what Tuttle was doing.

6. Lt. Bert Carter. Lt. Carter stated that shortly before 5:00 p.m., he received a telephone call from the grievant in Segregation, stating that York had just thrown food on Brown. Lt. Carter stated that he instructed the grievant not to remove York from his cell. Approximately twenty minutes after his conversation with the grievant, Lt. Carter learned that

York had been escorted to med-bay to be treated. After observing York's injuries, Carter stated that the injuries appeared to be boot prints.

7. Lt. Jacquelyne Foster. At approximately 5:00 p.m., Foster indicated she received a telephone call from the grievant requesting that she come to the Segregation Unit. Upon arriving at the Segregation Unit, Foster found York sitting in a chair near the officers' desk, bleeding from the head.

8. Captain Daniel Justice. Captain Justice stated that he was present in the captain's office on February 13 shortly before 5:00 p.m. and heard Lt. Carter's half of the telephone conversation with the grievant. He heard Carter tell the grievant that Officer Brown was to go to medical, to get cleaned up, and to leave the inmate in the cell.

9. Nurse Les Woodgeard. Woodgeard conducted a physical investigation of York following his incident, during which Woodgeard observed that several of the marks and abrasions on York appeared to be made with a shoe or boot.

10. Inmate Douglas Adams. Adams admitted that he saw Officer Brown standing over York lying on the floor outside of the recreation area and that Brown was kicking York who was on the ground. He stated he initially denied seeing anything because he did not want to get involved in the investigation.

11. April 10, 2002 CVSA Examination. The results of the CVSA examination of York was that he was truthful during the examination about being kicked by Brown.

12. Second Shift Roll Call Briefing Notes. The second shift daily log for January 23, 24, 25, 2002, all reflect instructions to the officers not to approach any inmate with whom they have had a confrontation. If there

was a use of force, they were to call for an escort. The second shift roster indicates that Brown and the grievant were on duty all three days when the announcement and instructions were made at roll call.

Conclusion

The initial assessment of this incident by the Shift Commander, Capt. Justice, led him to believe that this incident did not occur as described by Officers Brown, Dickens and Tuttle. The injuries sustained by the inmate were in too many locations on his body and were too severe to have been caused by the events described by the officers.

The discrepancies in how this incident was reported throws a questionable light upon the entire situation. The officers claim that they were bringing inmate York out of his cell due to his suicidal statements. However, when Ofc. Dickens initially reported the situation to Lt. Carter, he did not mention suicide. Instead, he just states that inmate York threw food on Ofc. Brown. The food-throwing incident occurred after inmate Ensley reported to them that inmate York was suicidal.

The videotape shows inmate Adams taking a chair to the area in front of the Outside Recreation area at 16:58:45 and Ofc. Brown coming into view at 16:58:59. Therefore, the incident was over by that time. However, they did not contact Lt. Foster for at least three minutes, and medical was not contacted until after Lt. Foster arrived, despite the obvious injury to inmate York's forehead.

The officers' description of where Ofc. Brown struggled with inmate York are in conflict with each other. Ofc. Brown states they struggled in the doorway to the Outside Recreation area, which Ofc. Dickens also states. However, Ofc. Tuttle states they never went into the Outside Recreation

area. When Ofc. Brown was interviewed concerning the incident he stated that during the struggle with York, they were on the floor in front of the door to the Outside Recreation area, but did not cross the threshold. This appears to be a conflict from his written report. Then, when this is compared to inmate York's and inmate Adams' statements, in which they both indicate that York was completely out in the Outside Recreation area with his head closest to the doorway. This further leads me to question the validity of the officers' reports.

Ofc. Dickens started his report with a false statement, claiming that he was returning to his desk after unlocking the DC-II door to let Officers Brown, Tuttle and inmate York out to the pod. This was not true. The door had been left unlocked, which is a violation of the post orders. Ofc. Dickens stated that he then moved to attempt to assist Ofc. Brown. However, he did not come into view on the videotape, even though by Ofc. Dickens description, Ofc. Brown struggled with inmate York for 15 - 20 seconds, yet he did not respond or assist. During the interview with Ofc. Dickens he admitted that the door from DCII was not locked, and he did not open it. He also admitted that he did not approach Ofc. Brown and York to assist in restraining the inmate. Therefore, Ofc. Dickens has admitted that the vast majority of his report is false, yet he contends that Ofc. Brown did not kick the inmate at anytime. Thus, I do not find Ofc. Dickens' statements to be creditable.

Ofc. Tuttle claims in his report that he was ten feet behind Ofc. Brown and inmate York as they exited the pod, and when he exited the pod, they were already on the floor. This is not true. The videotape shows that Ofc. Tuttle was within an arm's length of Ofc. Brown as they exited the pod, and therefore was in a position to observe everything that happened. He states

that he was proceeding to assist Ofc. Brown, when Brown gained control. Yet, inmate Adams states he observed Ofc. Tuttle standing inside, while Ofc. Brown and inmate York were outside on the recreation area.

The officers could not explain any of the numerous injuries sustained by the inmate, aside from to suggest that some of them were self-inflicted. Nor could they explain why the supervisors who observed the inmate in the minutes immediately following the incident described some of the injuries as boot marks.

Additionally, when Ofc. Brown wrote his report concerning this incident, he completely omitted the fact that inmate York had thrown his food tray out on the range and that food had splattered on him. He only stated that he was getting the inmate out of the cell due to the suicidal statements. Just three weeks before this incident, January 23rd, 24th, and 25th, the shift was admonished not to approach inmates who have demonstrated hostile behavior towards them. The officers were instructed to contact a supervisor and to de-escalate the situation. Both Ofc. Brown and Ofc. Dickens were on duty when these instructions were given to the shift at roll call. Yet, Ofc. Brown removed the inmate from his cell who, just moments before, had thrown a food tray out of his cell, splashing food on him. His actions were a direct contradiction to the directives given on January 23rd - 25th.

Normally, in investigations, staff members are deemed to be more credible than inmates. However, in this case, the reverse is true. Both Ofc. Dickens and Ofc. Tuttle start their reports with false statements, which has the end result of casting a shadow upon their entire statement, and add to that the numerous injuries, which can only be explained by inmate York's version of the incident. This is then corroborated by another inmate,

Adams, with whom York did not have an opportunity to contrive a common story. Taking the entire situation into consideration, I find no other option than to believe the inmates' versions of the incident.

It is my determination that Ofc. Brown was upset about inmate York throwing food on him and seized an opportunity to inflict physical retribution upon inmate York. Using the ploy of bringing the inmate out to the desk area to be observed until Mental Health could evaluate him, Ofc. Brown handcuffed the inmate and moved him to an area not covered by the surveillance cameras, where he tripped or shoved the inmate to the ground, dragged him out onto the Outside Recreation area, and proceeded to kick the inmate numerous times, causing the injuries noted on the medical exam and documented in the photographs.

Neither Ofc. Tuttle or Ofc. Dickens intervened in this matter and allowed the unjustified use of force upon an inmate who was handcuffed, down on the ground, and virtually defenseless. Then in concert, the three officers conspired together to cover up this incident, fabricating the story that while struggling with inmate York, Ofc. Brown fell on the inmate.

Therefore, I am requesting disciplinary action be taken against Ofc. Bryan Brown, Ofc. James Dickens, and Ofc. Jeremy Tuttle. End of statement.

After Fausnaugh's report was issued, a pre-disciplinary hearing was held with the grievant on July 16, 2002. The following are excerpts from that hearing:

Finding of Fact: The union raised no procedural objection to the Pre-disciplinary meeting. The charges were read to the employee, and he stated he understood the charges and related discipline.

From the facts presented at the meetings, the door to DC 2 was open, because a porter was in the process of serving chow. The door to the outside recreation area was also open for fresh air (note this incident happened on February 13, 2002). Officer Dickens was sitting at his desk. Inmate York, 411-864, made statements that he was going to kill himself. Officer Brown and Officer Tuttle opened the cell door to remove Inmate York from his cell and place him in a chair opposite the officer's desk for observation because of his suicide statements. Lt. Carter gave an order NOT to remove Inmate York from the cell because he was a discipline problem. Somewhere in the desk area, Inmate York and Officer Brown went to the floor. Officer Dickens states this lasted approximately 20 seconds. Officer Dickens did not assist in the attempt to regain control of the inmate. Had he responded, he would have crossed through the line of the video camera in the desk Area. Officer Dickens did observe the beating Inmate York received, and did not report it and states to this day there is not abuse to report. Inmate York received substantial injuries as shown in the provided pictures from Officer Brown.

Mitigating/Aggravating Circumstances: None.

Decision: Officer Dickens did falsify his first incident report, only changing it after confronted with the videotape. He did not assist a fellow officer in an incident with an inmate that he states lasted 20 seconds. He witnessed a physical abuse to an inmate and did not report it. He still does not provide the truth of the chain of events.

There is just cause for discipline for violation of Rule(s):
Rules 7, 22, 24, and 25.

As a result of the pre-disciplinary hearing, and all of the evidence presented, the grievant was notified of his removal on July 26, 2002:

July 26, 2002

Dear James Dickens:

Pursuant to the authority granted in the collective bargaining agreement between the State of Ohio and OCSEA/AFSCME, this

letter is to advise you that you are being **REMOVED** from your position of Correction Officer.

Effective:

You are being removed for the following infraction(s): Rule #7- Failure to follow post orders, administrative regulations, policies, procedures or directives; rule #22 - falsifying, altering or removing any official document, rule #24 - Interfering with or failing to cooperate in an official investigation or inquiry; and rule #25 - failure to immediately report a violation of a work rule, law or regulation. This is supported by the fact that on February 13, 2002, you witnessed another employee remove an inmate from his cell in DC 2 when ordered not to remove him by Lt. Bert Carter, watched this employee physically abuse the inmate and did not report this to your supervisor. During the investigation process, you were not truthful and did not answer questions honestly until confronted with a videotape.

Pursuant to the OCSEA/AFSCME contract, Article 25, you may choose to grieve this disciplinary action. You must file a grievance through your union representative within fourteen (14) calendar days of notification of this action.

Mark H. Saunders, Warden (s/s)

Ultimately, as a result of this incident, Officer Bryan Brown resigned and will not be rehired. Officer Tuttle was laid off prior to the completion of the investigation and will be removed if he is ever recalled from lay-off. The grievant's removal was the final action in the incident.

VI. The Merits of the Case

The Employer's Position

1. The grievant was terminated for just cause.

2. The grievant violated Work Rule 7 by his failure to follow Lt. Carter's order. Lt. Carter told the grievant not to remove inmate York from his cell and to have Officer Brown get cleaned up and report to Med Bay to get checked. The instruction provided by Carter followed recent roll call training tactics intended to ensure that officers limit contact with inmates who have just committed a hostile act toward them. Instead of following Carter's instruction, the grievant allowed Officers Brown and Tuttle to remove inmate York from his cell and eventually resulted in inmate York receiving multiple injuries by Brown.

3. The grievant violated Rule 22 regarding falsifying, altering or removing any official document because his incident report is the most disjointed and illogical of the three officers. The grievant claims he unlocked the DC-II range door to allow the three men to exit the facility, but yet York is not seen passing through the camera view to or from the DC-II range door. He testified that he thought he opened the door but then later recanted that statement under oath and directly to the Arbitrator and his explanation regarding the locking and unlocking of the door did not make sense.

4. The grievant's incident report also indicates that he attempted to help Brown gain control of York. The grievant then admitted that he arose from his chair and watched Brown roll around on the floor with York for fifteen or twenty seconds without going to Brown's aid.

5. York was injured while in the custody of Officer Dickens. To accomplish the assault on York, he would had to have witnessed it and allowed it to happen.

6. The grievant engaged in a conspiracy that led to the assault on York. His claim that he did not remember Lt. Carter's instruction to leave

York in his cell after the tray incident is false. The grievant did not just forget nor hear the instruction, he and his co-workers had another plan of action.

7. The telephone log refutes the grievant's claim that he made several phone calls to mental health in advance of York exiting his cell. The grievant did open the door DC-II to allow the officers and York to exit. After multiple force reports and false statements, the grievant admits his testimony concerning the door makes no sense. The door had been left ajar in violation of post orders and Rule 7. The grievant also knew why Officers Brown and Tuttle and inmate York were on their way out of the range. The grievant was caught in a lie once again when he stated in his report that he went to assist Brown during his alleged struggle with York.

8. The grievant did not exact physical violence against inmate York, but he is a proven conspirator in the cover-up. Exacting street or instructional justice against prisoners happens and it is not unique to have a "code of silence" among corrections officers.

9. Removal is the only appropriate level of discipline to impose based on the proven facts. The message that such behavior will not be tolerated is mandatory to curb the continued institutionalization of the shop floor justice system and its enable the code of silence. Substitution of a lesser penalty in this case would simply send the message that if all else fails, the industrial justice system will act as the reserve parachute and provide the soft landing expected by the grievant.

10. Officer Bryan resigned and will not be rehired. Officer Tuttle was laid off prior to the completion of the investigation and will be removed if recalled from the lay-off. The final and appropriate action to end the conspiracy is the grievant's removal.

The Union's Position

1. The grievant was not terminated for just cause.
2. The Employer failed to prove a violation of Rule 7, Failure to Follow Post Orders, Administrative Regulations, Policies or Directives. The Employer alleged through Lt. Carter's statement and testimony that the grievant failed to follow a directive given to keep York locked down and send Brown to get a medical and get cleaned up. The grievant made statements during the investigation and gave testimony that he did not hear Lt. Carter give those instructions. Lt. Carter testified that he could not recall the grievant acknowledge having received those instructions. The grievant was given an above expectation rating by Lt. Carter in communications during his performance review, with the comment, "communicates very well with supervisors." Thus, the Employer offered no proof that the grievant received the orders and willfully ignored them.
3. The grievant did not violate Rule 7 by not following administrative regulations or policies. The Union established through cross-examination of Fausnaugh that no policy exists for the handling of inmates that threaten suicide while in a Disciplinary Control Unit. The Union established through the testimony of the grievant and Officer Tuttle, that it was the practice for second shift officers to bring inmates who threaten suicide into the officer's area for observation and then to call the Mental Health nurse for evaluation. This fact is further confirmed by inmate York's statements to Mr. Woodgeard.
4. The Employer's allegations that the grievant violated Rule 7 by violating post orders when the door to DCII was not secured is unfounded. The Union established in the testimony of the grievant and Officer Tuttle

that it was the practice of the second shift to open and leave the DCII door ajar while chow was being served and allowed per post orders.

5. The Employer failed to prove a violation of Rule 22, Falsifying, Altering or Removing Any Official Document. The grievant had nothing to conceal when he wrote that he opened the DCII door for Officer Brown because DCII was allowed, by post orders, to be left ajar during the feeding process. The grievant acknowledged that he had erred in his recollection of opening the door, but this is not the same as falsifying a report.

6. The Employer also failed to prove a violation of Rule 22 regarding the grievant's having helped Brown take control of York. The Employer has not offered any proof that the grievant did not do exactly as he said. They've only cast aspersions that he is lying because he did not come into camera view. No testimony or evidence was presented to show that the grievant did not do as he described in his incident report.

7. The Employer also failed to prove a violation of Rule 24 regarding interfering with or failing to cooperate in an official investigation or inquiry. The Employer failed to show or demonstrate how or what the grievant did that constituted interference or failure to cooperate. Along these same lines, the Employer's attempt to identify Rule 25 as a violated rule is not within the scope of the allegations.

8. The Union believes the Employer failed to prove that the grievant willfully submitted a false incident report, that he violated post orders, administrative regulations, policies or directives or that he interfered with or failed to cooperate in an investigation.

VII. The Arbitrator's Opinion and Award
Regarding the Merits of the Grievance

From the evidence and testimony introduced at the hearing, and a complete and impartial review of the record, including pertinent contract provisions and department rules, the parties' briefs, and the transcript of the hearing, it is this Arbitrator's opinion that the grievant was terminated for just cause. This Arbitrator believes that the Employer met its burden of proof on the issues.

Facts are to a large extent determined by the weight and credibility accorded to the testimony of the witnesses and to the documents and evidence. In arriving at the truth when conflicting evidence exists, this Arbitrator must consider whether conflicting statements ring true or false; he will note the witnesses' demeanor while on the stand; and this Arbitrator will credit or discredit testimony according to his impressions of the witnesses veracity.

Arbitrator Claire V. Duff has offered some considerations relevant in evaluating conflicting testimony:

INTEREST. While having an interest or stake in the outcome does not disqualify a witness, it renders his testimony subject to most careful scrutiny. Few witnesses will deliberately falsify but there is a common tendency to put your best foot forward. This tendency, either consciously or subconsciously, leads many witnesses to remember and express testimony in a way favorable to the result which they hope the hearing will produce.

PERCEPTION. Frequently the initial observation is faulty or incomplete because the observer has no prior knowledge that a dispute will develop concerning what he has seen or heard and his casual sensory perception is not sharp and keen.

MEMORY. Remembrance of an event weeks or months after it occurred is frequently dim and inaccurate and a witness may be confused as to the facts which initially he correctly perceived. While lapse of time, precise details may elude his memory.

COMMUNICATION. The manner in which a witness expresses what he saw and heard may fail to communicate exactly his initial perception of the occurrence, so that after listening to the testimony in the cross-examination of the witnesses, the fact-finder may not have had transmitted to him a completely accurate impression of the facts, even though they were initially observed carefully and well remembered by the witness.

South Penn Oil Co., 29 LA 718, 720 (Duff, 1957).

Stated simply, most arbitrators use the following checklist: 1.) The demeanor of the witness; 2.) the character of the testimony; and 3.) the self interest of the witness. This Arbitrator has borrowed these principles upon examining the record here.

Upon analyzing this case, in the context of the work rules, this Arbitrator asked himself two questions: 1. Was inmate York injured as claimed? 2. If inmate York was injured as claimed, what role did the grievant have in the injury?

After a careful review of the record, this Arbitrator is convinced that inmate York was injured on the grievant's watch and that the grievant was a co-conspirator in inmate York's assault and injuries. This evidence is important because the grievant's termination is based on essentially his looking the other way when an inmate was being assaulted. In this Arbitrator's view, this allowed the Employer to accelerate the discipline under all of the work rules that were cited.

Officers Brown and Tuttle undeniably escorted York handcuffed through the cuffport from his cell out of the disciplinary control pod into the desk area where the grievant was stationed, and then into the area outside the basketball court. This Arbitrator primarily credits the testimony of Investigator, Jon C. Fausnaugh. Fausnaugh's investigation of the entire incident went into excruciating detail wherein Fausnaugh compared the statements given by each witness to the oral recollections they gave subsequently during Fausnaugh's investigation. This was highly credible evidence.

Also, during the hearing, Fausnaugh was confident and corroborated everything in his investigation. Based on Fausnaugh's testimony, he established: 1) The first line of the grievant's written incident report indicates that he opened the DC-II for Brown and walked back to his desk and was getting seated when he heard York screaming and looked up. The videotape does not show the grievant moving to or from the door in relation to Brown exiting the DC-II area with inmate York; 2) After confronting the grievant with the he videotape, the grievant acknowledged that he did not open the DC-II door, that the door had been left ajar, and that the grievant did not access it as he indicated in his written report; 3) Fausnaugh also confronted the grievant regarding his claim that he went to help Officer Brown gain control of York. The grievant conceded that he did not physically get over to assist Officer Brown but that he had risen out of his chair to go over but the incident occurred before he could get there; the videotape made it very clear that the grievant did not do anything to assist Officer Brown; the grievant's report alleges that the incident between Brown and York took place inside the door of the recreation area. Fausnaugh's

investigation, and the views on the videotape, indicated that inmate York was not inside the door of the recreation area;

4) Fausnaugh's unrebutted testimony established that it was contrary to policy to take a potentially suicidal inmate out of his cell for observation; 5) The grievant alleged that he had made numerous attempts to contact the mental health nurse but the telephone logs only demonstrate that the grievant made one attempt prior to the incident to contact the mental health nurse and the time appears to coincide exactly during the same general area when the physical event was occurring and that was three minutes after the grievant contacted the shift supervisor to report that York had thrown food on Brown; 6) The grievant alleged that he knew York had indicated that he was suicidal but yet the grievant did not tell Lt. Carter about York's potential suicidal issues when he first called Carter. The only thing that the grievant reported to Carter was that a food tray had been thrown at Brown;

7) The telephone log system in the time period during the incident did not indicate that any calls were made to the mental health area, contrary to the grievant's allegations; 8) Fausnaugh confirmed that Lt. Carter told the grievant not to remove the inmate from the cell and that the grievant disregarded that order; 9) Fausnaugh established that Carter specifically told the grievant not to remove York from the cell. The grievant denied receiving such an order and that Carter had ordered Brown to go back to the pod to get York out of the cell and bring him to the desk so that he could be monitored. This is directly against what Fausnaugh knew to be an order given by Lt. Carter and directly against all department policies and procedures;

10) In Fausnaugh's verbal interview with the grievant, he stated that during the struggle that Brown and inmate York had moved halfway through the door, through the threshold, into the recreation area. This was contrary to what the grievant had written and contrary to the description of Brown and Tuttle and the inmate's version of the incident; Fausnaugh established that inmate Adams confirmed that Brown had physically assaulted York in plain view of the grievant; 11) Officer Brown alleged that his spider alarm went on but the log system showed no activation for Officer Brown's system thus indicating that Brown had no reason to defend himself;

12) The results of the CVSA exams indicated that inmate York was telling the truth about his assault by Brown in the presence of the grievant; 13) Fausnaugh personally viewed the injuries sustained by York. These were multiple injuries that appeared to be done with boots and not from having rolled around in a struggle. Fausnaugh's conclusions are supported by an anatomical report by Nurse Woodgeard and by the testimony of Foster and Carter.

On cross-examination, the Union simply failed to shake Fausnaugh's testimony. Fausnaugh was confident and consistent in his answers. His answers corroborated the detailed facts of his investigation. As a result, this Arbitrator gives a great deal of credibility to Fausnaugh and the detailed findings of his investigation.

The grievant's testimony was shallow and evasive. For the brief period of time that he was on the stand, he essentially reiterated the half-truths of his prior written statements of the incident. During cross-examination, the grievant looked edgy and uncomfortable. He impressed this Arbitrator as a man struggling to find the correct version of the truth in his self-interest to save his job.

The answer to this Arbitrator's first question therefore is clear. Inmate York was injured by a shameless assault inflicted on him primarily by Officer Brown. The weight of the evidence establishes that York was handcuffed and tripped by Brown and placed in an area outside the camera surveillance so that he could be kicked repeatedly by Brown. Brown's assault resulted in numerous bruises and scrapes and an open cut that was bleeding at the top of his forehead. Credible evidence establishes that all of York's injuries were a direct result of boot kicks primarily by Officer Brown.

Given that York was injured as claimed, what role did the grievant have in York's injury? That answer is equally clear. The grievant was part of a conspiracy to exact industrial justice on York. On his watch, the grievant watched York helplessly get assaulted and beaten by his fellow officer and cooperated in a conspiracy to camouflage the motives and results. By doing so, the grievant failed to follow appropriate post orders and policies, falsified his report of the incident, interfered with the investigation of York's assault, and failed to immediately report a violation of the work rule regarding the appropriate and humane treatment of an inmate. All of this conduct violated Work Rules 7, 22, 24, and 25.

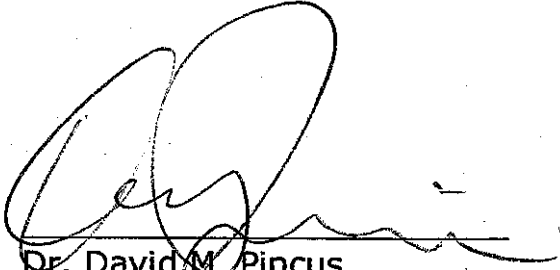
In addition, the grievant's conduct violated the work rule on responsiveness, regarding inattention to duty in a correctional environment that can result in assaults and other incidents. According to that rule, the grievant was expected to remain fully alert and attentive at all times while on duty and to properly respond to any incident.

All of these work rule violations, when taken together, and considering the aggravated circumstances of the brutal assault on York, are more than adequate grounds to terminate the grievant.

VIII. Award

The Union's grievance is denied.

Moreland Hills, Ohio
February 10, 2003



Dr. David M. Pincus