#914

In the Matter of Arbitration	*	
Between	*	Case Number:
OCSEA/AFSCME Local 11	*	27-23-20050310-1317-01-03
and	*	Before: Harry Graham
The State of Ohio	*	

APPEARANCES: For OCSEA/AFSCME Local 11:

David Justice
Staff Representative
OCSEA/AFSCME Local 11
390 Worthington Rd.
Westerville, OH 43082-8331

For State of Ohio:

David Burrus
Department of Rehabilitation and Correction
1050 Freeway Dr. North
Columbus, OH 43229

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on October 24, 2005 and the record was closed.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

> Was the Grievant's removal for just cause? If not, what shall the remedy be?

BACKGROUND: The Grievant, Samuel Howell, was employed at the Ross Correctional Institution in Chilicothe, OH. He was classified as a Correction Officer. To the events prompting his discharge he had an excellent work record, replete with commendations.

On December 7, 2004 the Grievant and a co-worker were on the second shift. Their worksite was H-3-B housing unit. In the ordinary course of business Officer Howell and his colleague were to conduct a count of inmates under their control at 4:00 p.m. They did so and reported a count of 120 inmates in the unit and 2 out of the unit, thus, the total was 122 people. This was incorrect and they were directed to recount. They did so and reported 119 inmates in the unit and 2 out, a total of 119 inmates. This too was incorrect and for a third time Officer Howell and his partner were directed to recount. This recount showed 120 inmates in the unit and 1 out. They called-in 121 which was correct. To verify this count, they were directed to make another count. The supervising officer, Lt. Price, was concerned over the various numbers reported by Officer Howell and his co-worker. In order to ensure the count was taken as directed he activated a camera in the unit. He observed Officer Howell and his partner standing at their desk for five minutes. They then called-in a count without actually taking it. In the

parlance of the industry, this is known as a paper count.

Some weeks later in early January, 2005 there occurred another incident involving Officer Howell. He filed a report dated January 12, 2005 detailing his discovery of two shanks. Made by inmates, they were 12" long, fashioned of black steel. They were edged and pointed. Officer Howell's report also showed that some weeks earlier he had found 16 pieces of blank steel identical to the two shanks. They were not sharpened or edged. Officer Howell had disposed of the unfinished shanks in a trash bin. No report was made prior to noting them in the report of January 12, 2005. Officer Howell was discharged. A grievance protesting that discharge was filed. It was processed through the grievance procedure and the parties agree it is properly before the Arbitrator for determination on its merits. The Union also asserts that in processing Officer Howell's discharge the State made procedural errors sufficiently serious as to warrant overturning the discharge on the basis of those alleged errors alone.

POSITION OF THE EMPLOYER: The State is well-aware the Union argues that a procedural defect occurred in the discharge of Officer Howell. On January 25, 2005 a pre-disciplinary hearing was held regarding his alleged violation of Rules 7, 8, and 11. That hearing was reconvened on February 15, 2005

and an alleged violation of Rule 38 was added to the specifications. Article 24 represents the grievance procedure of the parties. Section 24.04 provides that a hearing is to be held no earlier than three days notice to the employee. In both instances, the hearings of January 25 and February 15, 2005 the more than three day notice period was met.

At Section 25.05 the Agreement provides that no more than 45 days after the pre-disciplinary hearing a decision regarding discipline must be made. The decision in this instance was made on February 24, 2005. That date is within the 45 day period from the first and second pre-disciplinary hearings. The discipline was appended to the record made February 24, 2005 and was well within the mandatory notice period.

The February 15, 2005 hearing was very short, lasting about five minutes. It was for addition of the alleged Rule 38 violation. No matter what timeline is used, the State acted promptly and pursuant to the Agreement in this matter. No procedural violation occurred in these circumstances according to the Employer.

Turning to the merits of the dispute, as noted above, there are two incidents involved. In the first, according to the State the Grievant participated in calling-in a count of inmates without physically taking that count. It is

"generally" the practice for the supervisor to order a picture count (a match of inmate photographs with actual people) when there are two bad counts or when escape is suspected. In no event is it permissible for an officer not to physically count inmates. That is what occurred in this situation. Testimony was received from Lieutenant A. Price, supervisor on December 7, 2004. Lieutenant Price testified that he had activated the control room monitor and observed Officer Howell and his colleague remain at their desk for about five minutes and then call-in the inmate count. It is the case that a physical count was not conducted. It is impermissible for a Corrections Officer to fail to take a physical count. In this situation the Grievant and his co-worker did not make a physical count. They merely called-in a count. The failure to make a physical count represents a serious offense.

That offense does not stand alone. On January 12, 2005 Officer Howell found two black metal shanks. They were pointed and had a cutting edge. Officer Howell properly secured and documented his finding. Some weeks earlier the Grievant found sixteen pieces of black steel secreted in a ceiling. They were not fashioned with a point or edge. To all appearances but for the finishing, they were identical with the two finished metal shanks. He did not report that

finding. He disposed of the unfinished shanks in secured trash receptacle used for disposition of "hot trash." Officer Howell is a very experienced officer. In fact, he has numerous commendations for finding contraband. He is well aware of the potential for violence in the setting of Ross Correctional Institution and the responsibility of officers to remain vigilant against contraband.

In these situations the Grievant chose to operate on his own. He disregarded the prescribed method for conducting a count of inmates. Given the population of the Institution it is essential to keep accurate track of inmates. By disregarding the method for counting Officer Howell showed his disregard for accepted procedure. Should knowledge of an escape be delayed as a result, serious harm can occur.

As an experienced officer, the Grievant was well-aware that the sixteen pieces of steel he found were to be considered contraband. They were not trash. As the Grievant had found two fully-fashioned shanks several weeks earlier he knew, or certainly should have known, as much. Further, Officer Howell has many commendations on his record for finding contraband. He certainly knew what constituted contraband rather than trash.

At arbitration the Grievant was asked whether or not he had ignored a tattoo gun in possession of an inmate. He

responded negatively. That was shown to be untrue. That he lied under oath is indicative of the fact that the Grievant has forfeited the trust of the Employer. Such trust is particularly important in the environment of a correctional institution. Thus, the grievance should be denied in its entirety the State contends.

POSITION OF THE UNION: As noted above, the Union asserts there is a procedural flaw in this matter sufficient to warrant reinstatement of Officer Howell. A second pre-disciplinary hearing was held on February 15, 2005. A second charge was added to those cited at the initial pre-disciplinary meeting on January 25, 2005. In the Union's view, a second hearing was necessary because discharge could not be substantiated at the initial hearing. No new information was raised. The hearing was cursory, lasting about five minutes. No consideration should be given to any allegation Officer Howell violated Rule 38.

When Officer Howell and his colleague were directed to take an additional inmate count, they did so. In the ordinary course of events normal procedure calls for sending additional staff and/or supervisors to the area to conduct a picture count. That did not occur in this instance. Officer Howell and his co-worker, Officer Yingling, were left on their own. Officer Yingling called-in the results of the

third count as directed by supervision. When directed to recount yet again, they did so, called-in the count and the counting procedure ended. Bad counts occur often. Discipline has not been administered when they occur. It should not be sustained in this instance the Union urges.

Upon discovery of the two finished shanks the Grievant acted properly. He described the circumstances in which he found them as well as the shanks themselves. He also wrote that he had found the sixteen unsharpened black steel pieces. He continued to indicate he had disposed of them in the trash receptacle about a month prior. He included the sixteen unfinished shanks out of concern for the welfare of the institution.

The Grievant has received a multitude of accolades while at Ross Correctional. Error might have been made in disposition of the unfinished shanks. However, there is no specific policy concerning disposal of so called "hot-trash."

Officer Howell was discharged in part for violation of Rules 8 and 38. More specifically he was cited for failing to comply with the policy on disposal of contraband. Rule 7 specifies the non-compliance with policy is a violation. The Hearing Officer found no rule 7 violation and it is not shown in the discharge notice. Further, Rule 38 references a violation of "any act or commission not otherwise set forth

herein...." Use of Rule 7 might foreclose use of Rule 38 in the opinion of the Union.

The Union seeks an award on behalf of the Grievant restoring him to employment with all benefits and removal of this incident from Officer Howell's personnel records. (EHOC).

DISCUSSION: There is no procedural error in this matter. The Employer reconvened the pre-disciplinary hearing. That is not prohibited by the Agreement. Nor is it the case that the State breached the time limits for imposition of discipline. Discipline was imposed in timely fashion. Assuming **arguendo** that a procedural error occurred, it was at most minor in nature, insufficient to prevent reaching this dispute on its merits. This is unlike the dispute before Arbitrator Robert Stein in Case No. 06-02-990519-001-01-14. In that dispute Arbitrator Stein found a breach of the negotiated time lines was committed by the Employer. He also found the parties take the time limits in the grievance procedure seriously. He enforced the limits by sustaining the grievance due to the procedural error committed by the State. Any error in this situation, if error there be, (and none is found) was of such minimal nature as to not compromise the rights of the Grievant or the Union. The grievance is reachable on its merits.

At arbitration testimony was received from the Grievant, Officer Howell. He testified that he was unaware that the recount in question was to be made. That testimony is consistent with the account he provided at his investigatory conference. (Jt. Ex. 2). He testified that he was not ordered to conduct a count by Lieutenant Price. To the contrary, Lieutenant Price testified that he directed a recount be made. Officer Yingling did not testify at arbitration. We are left with different versions of the event. The State claims the Grievant was ordered to conduct the recount. The Grievant asserts no such order was received by him. The person who might resolve the conflict, Officer Yingling, was not called either by the Employer or the Union. It is the case that the Employer bears the burden in a discharge dispute. With respect to the recount incident, it has not borne it successfully. It is not proven that Officer Howell disregarded an order to conduct a recount of inmates in his charge.

The Grievant is an experienced officer. He is skilled in detection of contraband. This is attested to by the numerous commendations on his record for such detection as well as testimony received at arbitration. The argument of the State is that given his knowledge of how to deal with contraband, Officer Howell should have reported discovery of the sixteen

metal blanks. Another view is that given his experience with contraband, Officer Howell made a judgement. He considered the blanks to be trash, to be disposed of in the hot trash receptacle. Material placed in that receptacle cannot be accessed by inmates. In the glare of hindsight it may be that Officer Howell's decision was erroneous. However, there are no precise definitions of hot trash versus contraband. Further, it is the case that hot trash includes potential weapons that cannot be directly linked to inmates. Such was the testimony of Mal Corey, a veteran of 17 years service and a Union official. It is the case that the metal blanks discovered by Officer Howell had the potential to become weapons. That he chose to dispose of the blanks as trash, rather than make a report reflects judgement formed from experience, not found wanting to this incident. As ambiguity exists concerning the treatment of contraband found by Officers discharge for disposing of the metal blanks rather than reporting them is inappropriate.

The third incident involving Officer Howell transpired at the hearing. He was asked by the advocate for the State if he had ever overlooked contraband. He replied that he had not. That was untrue as the Employer urges the record be read. In fact, as set forth above, Officer Howell did ignore possession of a tattoo gun by an inmate. The question is, did

he lie on the witness stand? Close examination of the contention of the Employer must be made. At arbitration on redirect examination Officer Howell acknowledged taking a new officer to a unit in order to see a tattoo gun in possession of an inmate. Further, in an investigatory interview on February 16, 2005 the Grievant fully acknowledged taking that officer, Officer Matthew, to the unit to see the tattoo gun. The definition of contraband is imprecise. The Grievant acknowledged showing the tattoo gun in possession of an inmate in February, 2005. (Er. Ex. 2). Under these circumstances it is questionable that Officer Howell's testimony at arbitration rises to a "lie" sufficient to prompt his discharge.

AWARD: The grievance is sustained in part and denied in part. The discharge of the Grievant, Samuel Howell, is to be reduced to a written warning for failure to report contraband. All reference to his discharge is to be stricken from his personnel record. (EHOC). Back pay is to be made at the straight time rate. Upon request by the Employer the Grievant is to supply a record of interim wage earnings, including any payments from Unemployment Compensation. Such earnings may be used by the Employer to offset its obligation to the Grievant. Jurisdiction is retained for 60 calendar days from the date of this award to resolve any disputes over

remedy.

Signed and dated this 14th day of November, 2005 at Solon, OH.

Harry Graham

Harry Graham
Arbitrator