In the Matter of Arbitration Between THE STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION and OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL-CIO	OPINION and AWARD Anna D. Smith, Arbitrator Case No. 21-17-(89-04-03)-0018-01-03 Suspension of Ted Williams

I. Appearances

For the State of Ohio:

Thomas E. Durkee, Advocate, Ohio Department of Rehabilitation and Correction
Dean Millhone, Second Chair
Lt. Paul Bond, Northeast Pre-Release Center
Curtis Wingard, Deputy Warden, Lorain Correctional Institution

For OSCEA/AFSCME Local 11:

Steve Lieber, Staff Representative and Advocate
Ted Williams, Grievant
Barry A. Woods, Corrections Officer, Northeast Pre-Release Center
Richard A. Greene, Corrections Officer, Northeast Pre-Release Center

Observers:

Idris Abdurragib, Labor Relations Officer
Brenda Shelley, Labor Relations Officer
Michael Duco, Office of Collective Bargaining

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 9:45 a.m. on February 23, 1990 at the offices of the O.C.S.E.A. Local 11, A.F.S.C.M.E., 1680 Watermark Dr., Columbus, Ohio before Anna D. Smith, Arbitrator. The Parties were given a full opportun-

ity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. No post-hearing briefs were filed and the record was closed at the conclusion of oral argument, 3:00 p.m., February 23, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

> Was the 15-day suspension of Ted Williams of April 17, 1989, for just cause? If not, what should the remedy be?

IV. Stipulations of Facts

1) Ted Williams' employment history with the Department of Rehabilitation and Correction consists of the following:
   - 12/28/81 Appointed Full Time Permanent - Social Counselor 1 - Parole and Community Services
   - 1/18/87 Transferred - Social Counselor 1 - Ohio State Reformatory - Mansfield
   - 2/1/87 Reassigned - Correction Officer 2
   - 3/27/88 Transfer to Northeast Pre-Release Center.
2) Grievant has no prior discipline.
3) Grievant received the Standards of Employee Conduct on February 9, 1987, and August 26, 1988.
4) On January 1, 1989, Grievant was assigned to first shift as roving officer.
5) On January 1, 1989, three security alarms for Zone B-1 sounded in the Control Center at 7:01 a.m., 7:15 a.m., and 8:12 a.m.
6) Grievant was dispatched on January 1, 1989, to check the security alarm for Zone B-1 that sounded at 7:01 a.m. and 7:15 a.m.
7) Grievant reported the outer perimeter fence for Zone B-1 as clear.
8) On April 17, 1989, a 15-day suspension was imposed for allegedly violating the Standards of Employee Conduct.
   - Rule #34 Other actions that could potentially harm the employee, a fellow employee(s), or a member of the general public. First Offense: WR/R
   - Rule #36 Any act or commission not otherwise set forth herein which constitutes a threat to security of the institution, its staff, or inmates. First Offense: WR/R

9) There were no post orders for the institution.
10) The grievance is properly before the Arbitrator to make a determination on the merits.

The following documents were received as Joint Exhibits:

1) State of Ohio/OCSEA Local 11 Contract, 1986-89;
2) Disciplinary Trail;
3) Grievance Trail;
4) Drawing of Northeast Ohio Pre-Release Center;
5) Department of Rehabilitation and Correction Standards of Employee Conduct;
6) Computer Print-Out of Alarm System;
7) Twelve photographs;
8) Security Police Count Procedure

V. Relevant Contract Clauses

Article 24	Discipline
Article 25	Grievance Procedure

VI. Case History

The Northeast Pre-Release Center is a minimum security prison located in the inner city of a large metropolitan area. It employs a modern microwave and computer detection system at its perimeter in addition to physical barriers to escape. The physical barriers consist of an inner ring of the facility's buildings connected by 6-foot high "day fences" and an outer ring of a 12-foot high fence topped with razor ribbon. Lighting of the perimeter is provided by city street and highway lights and by lamps on buildings inside the compound. Breaches to the microwave system, which is located between the two fences, activate an alarm in the Control Center which identifies the zone of the breach. A roving officer is dispatched to inspect the area. When the rover clears the area as secure, the alarm is reset. Between the time Control Center acknowledges the alarm and resets it, it is in a neutral position, unable to detect further breaches.

The Grievant in this case, Ted Williams, was hired by the Department of Rehabilitation and Correction in 1981. He has been employed at the Northeast Pre-Release Center since March 27, 1988, where his classification is Correction Officer 2. He has no prior discipline record. On March 28, 1989, he was notified that he was suspended for 15 days effective April 17, 1989 for infractions of Rules 34 and 36 (see stipulation #8 above), allegedly committed on January 1, 1989. On this date an inmate escaped from the Northeast Pre-Release center by climbing over a section of the fence that the Grievant cleared as secure following two alarms.

The specific events that led to the suspension and subsequent grievance are these: On January 1, 1989, the Grievant was working as a rover on the 6:00 a.m. - 2:00 p.m. shift. At 7:01 a.m. the B-1 zone alarm behind units E and F went off. Mr. Williams was dispatched to investigate. He testified that when he received this order he was, to the best of his recollection, outside the cafeteria (C Building). In his written report and investigatory interview transcript (Joint Exhibit #2) he states that he inspected the B-1 zone from the rear first, proceeding through the gate by D-Building. He also notes that unlocking and relocking the gate can be time consuming. After checking the rear, he inspected from the front. Finding nothing unusual, he reported the area secure and left, although he does not recall where he was when he reported. At 7:10 a.m. the alarm was reset after Williams' report.

At 7:15 a.m. the same alarm went off. Williams was again dispatched to investigate. He stated in his testimony and report

that he does not remember where he was when he received this second call. However, he inspected the front of the E-F building area first, and then the rear. In the investigatory interview he affirms that he "went from the front of E down to the day fence between E and F to the front of F, to the day fence between F and G, and then...circled back over to the gate at D building...and then through the back gate there and into the back area" (Joint Exhibit #2, p. 22). On cross-examination he indicated that he was within two feet of the day fences when he checked them, and he stated that he went up to the back door of Unit F both times he checked the area. Again finding nothing unusual, he reported the area secure and left. Again he does not recall where he was when he cleared the area.

While Williams was investigating the B-1 zone alarm the food service supervisor called Lt. Bond, the shift commander, at 7:20 a.m. and informed him that an inmate had not returned from delivering food trays. Lt. Bond called the inmate's unit (F) to see if he was in his room. The inmate could not be located in unit F. Lt. Bond ordered an emergency count. At 7:40 a.m. the B-1 zone alarm was reset after Williams reported the area secure. Bond then instructed Williams to assist in the count. A total of three counts confirmed that the inmate was missing. Officers were sent back out to check the perimeter a little after 8 o'clock. Lt. Bond and Duty Officer Curtis Wingard took a van and drove slowly around the compound on the outside of the fence. At about 8:20 a.m. they found a pair of inmate's pants and a cap caught in the fence line

behind Unit F, in the zone where the alarm had earlier sounded twice. The pants were clearly visible from 100-150 yards away. Also found were footprints, droplets of blood, personal letters and a "kite" on the snow-covered ground, and blood on the fence. The footprints were on both sides of the fence. Lt. Bond stayed at the site to preserve the evidence while Mr. Wingard returned to the institution to initiate the escape plan. By events which are irrelevant to the instant case, the inmate was subsequently located and returned to custody. Bond, Wingard and Williams filed reports of the incident which are included in Joint Exhibit #2. At his employer's request, Mr. Williams filed a second report, more detailed than his original one. The investigation of the escape showed that the inmate made two approaches to the outside perimeter fence from Building E, over the day fence between E and F, and to the outside fence behind Building F. The record discloses that he injured himself on his first attempt but was nevertheless successful on his second.

On January 11, the Grievant was notified that he was scheduled for an interview to investigate the events of January 1, 1989 and the escape of the inmate. The notice says in part,

> Since the outcome/results of this interview could result in disciplinary action, you have the right to the presence of a union representative as an observer at this interview. This is <u>not</u> a disciplinary conference, but an investigation into the matter.
>
> Joint Exhibit #2, p. 8

On January 13, said interview was conducted by Mary Beth Aufmuth, Administrative Assistant to the Superintendent. In attendance in addition to the Grievant was Steve Lieber, Staff Representative

with O.C.S.E.A. Mr. Lieber protested his role as only an observer. Ms. Aufmuth stated that the meeting was not a pre-disciplinary hearing, but an investigatory interview. The interview proceeded following Mr. Lieber's restatement of his objection.

On February 10, Mr. Williams was notified of a predisciplinary hearing and, on February 14, provided with 25 documents to be presented by the Employer at that hearing (Joint Exhibit #2, p. 6-7). Also on that date, Mr. Williams requested eight items from Ms. Aufmuth for his own investigation (Union Exhibit #2). Two additional documents were supplied by the Employer by a supplementary list (Joint Exhibit #2, p. 5). The pre-disciplinary hearing was held on February 24, the result of which was the suspension of Mr. Williams. On April 3, the suspension was grieved. On April 13, Ms. Aufmuth wrote a response to the Grievant's request for documents (Union Exhibit #1), and the Grievant clarified his request on May 15. A third-step hearing was held on June 20, 1989 as a result of which the grievance was denied. Thereafter it was appealed to arbitration where it presently rests.

On January 29, 1990, Thomas Durkee of the Department of Rehabilitation and Correction met with the Grievant and Mr. Lieber to discuss the case. At that time he offered the log books for review in an attempt to resolve the Union's procedural objection. This offer was refused. Mr. Durkee also asked for a readable copy of Mr. Williams' request for documents. Such copy not being received by the week of the arbitration hearing, Mr. Durkee advised Ms. Aufmuth to issue a memo to Williams indicating that the log

books were still available for his review. Nevertheless, the Union continues its procedural arguments in this proceeding.

VII. Positions of the Parties

Position of the Employer

The Employer's main argument is that the Grievant's security check of the area from which the inmate escaped was so negligent that it was worthless. During the time of his inspection an inmate could not be located and a special count was underway. The Grievant was aware of the possibility of escape, yet he walked through the zone without noticing or reporting the items left by the escapee or his trail. His lax inspection gave the inmate additional time to distance himself from the institution. Grievant's actions therefore threatened the public and the security of the institution. The State cites Arbitrator Duda's observation that effective use of a sophisticated security system depends on functioning of equipment and personnel (Dayton Correctional Institution v. O.C.S.E.A. G-87-2392 (Ellis)).

It is true, the State goes on, that there were no specific post orders on how to conduct a zone or perimeter check, but the Grievant is an eight-year employee of the department, specifically trained in security. There is no excuse for his failure to notice obvious signs of escape which even a casual observer would have noticed. Indeed, the shift commander was able to see the items from 100 yards away. In support of its contention that no post orders are necessary, the State again cites the Ellis case wherein Arbitrator Duda held that employees may be disciplined for gross

misconduct, even though such conduct is not expressly forbidden in writing. In that case, as in this, the Grievant should have known his responsibility. Also cited are Arbitrator Cohen, who upheld a 15-day suspension even though post orders did not exist (Northeast Pre-Release Center v. O.C.S.E.A. (Bills), and Arbitrator Rivera, who found that by not properly checking the perimeter and securing it, the Grievant made a false report warranting discipline under Rule 36 (O.C.S.E.A. v. Department of Rehabilitation and Correction, 27-13-(8-8-88)-36-01-03 (Williams)).

Regarding the Union's procedural objections, the Employer argues as follows:

1. The State's investigation was thorough and speedy, rather than arbitrary and hasty. §24.02 of the Contract requires the Arbitrator to consider the timeliness of the Employer's decision to begin the disciplinary process. A speedy investigation does not mean a superficial one.

2. §24.04 of the Contract states in part that "An employee shall be entitled to the presence of a union steward" (emphasis added). Mr. Lieber was present at the investigatory interview. At the conclusion he was asked if he wanted to add anything. This shows he was active, although maybe not as much as he would have liked. Even though he was not allowed to play a more active role, there was no violation of the Contract, except perhaps de minimis, and no prejudice to the Grievant.

3. The Grievant received prior notification of the consequences of his conduct. The record shows that he received the

Standards of Employee Conduct, which includes Rules 34 and 36 and the potential penalties for their infraction. He also received the facts of the charge. From this he should have reasonably known he was subject to a 15-day suspension. Even if the Arbitrator finds that there has been a technical violation of §24.04, the Grievant was not prejudiced by the Employer's failure to more specifically inform him and the defect is not substantial enough to warrant overturning the suspension.

4. Finally, §25.08 states that "The union may request specific documents, books, papers or witnesses reasonably available from the employer and relevant to the grievance under consideration." The Grievant's requests here were either too broad or not reasonably available. The Employer would have supplied copies of specific dates from the log books, but the Grievant insisted on seeing entire volumes and, on January 29, 1990, when they were made available, refused to review them. Even in his testimony, the Grievant continues vague requests for documents.

The State rebuts the Union argument that it has disparately treated black and white employees by contending that the case cited by the Union can be distinguished by the fact that the white Grievant's penalty was mitigated by the State's inability to pursue discipline in a timely fashion.

Finally, the Employer argues that a 15-day suspension is appropriate given the seriousness of the situation and urges the Arbitrator not to disturb it. In support of its plea it offers O.C.S.E.A. v. Southern Ohio Correctional Facility, 27-25-(89-02-

10)-05-01-03 (Stulley), in which Arbitrator Graham states, "As long as discipline is within the boundary of reasonableness when considering the offense an arbitrator should be reluctant to disturb it."

Position of the Union

The Union maintains that the Employer did not have just cause to discipline the Grievant. To begin with, it questions the time the escape occurred and claims that the Grievant cleared the area before the inmate scaled the fence and escaped. Prior to his escape he could have been hiding any place and the Grievant unable to find him. Second, it claims that the charges brought against the Grievant are broad and general. In fact, the Grievant did exactly as instructed. There were no post orders for conducting a zone check until after the incident, the Grievant did not receive training for this specific function, nor was he supplied with a flashlight. Management's omissions contributed to the situation, as did the darkness of the hour, poor artificial light, and the repeated malfunctioning of the elaborate security system. Under these circumstances, the Grievant did all he could. Management, it is claimed, has no substantial proof of guilt.

The Union also makes some procedural arguments. First, the Employer did not conduct a fair and objective investigation. Instead, it was arbitrary and hasty, aimed at making the Grievant the scapegoat for management's failures. Second, the Grievant was denied union representation at the January 13 investigatory interview in direct violation of §24.04 of the Collective Bargaining

Agreement. The hearing officer's third-step report acknowledges management's error in restricting the staff representative's role to that of observer. In the Bills case cited by Management, Arbitrator Cohen placed great weight on the investigatory interview. The Grievant in that case waived his right to union representation. Not so here. Grievant Williams was denied his right under the Contract. Third, the Grievant did not receive adequate warning of the consequences of his conduct. The pre-disciplinary notice is generic, stating only "discipline," and not its degree of severity. The Grievant had no reason to believe a heavy suspension would be imposed because the Standards of Conduct indicate anything from a written reprimand to removal for a first offense. Fourth, documents needed for the Grievant's defense and requested by him were denied him in violation of §25.08. The request was not vague, as alleged by the Employer, and they were sought more than once. The Union cites Arbitrator Rivera in Bambino (O.C.S.E.A. v. Ohio Department of Transportation, G-87-205) that discoverability of documents is not a management decision. Here, the Employer just did not want to reply to the Grievant's request until January 29, 1990 when it made a half-hearted attempt. This may be only a slight violation of the Contract, but a denial is a denial.

Finally, the Union protests the form of discipline. §24.02 and the Employer's Standards of Conduct call for progressive discipline. A 15-day suspension for a first offense is not progressive. It is also not commensurate with the offense or the Grievant's record of eight unblemished years of service. Moreover,

the Employer has acted with discrimination against the Grievant, who is black, because it previously gave preferential treatment to another correction officer, Timothy Morgan--who is white, under similar circumstances even though he was on probation at the time.

The Union asks that for these reasons, the grievance be sustained, the Grievant made whole, and awarded back pay, and his record be expunged.

VIII. Opinion

The Arbitrator has spend no little effort attempting to reconstruct the movements of the Grievant in relation to the path and probable times of the escapee's assaults on the fence, as well as to the other events of the morning. The record did not permit a definitive determination. There was no witness to the Grievant's movements, he did not keep a log, his memory is incomplete, and many of his statements are vague. In this respect, the Arbitrator sympathizes with the Employer's attempts to determine the facts of the breach in its security system. Nevertheless, while the Employee must cooperate in the Employer's investigation of escape attempts, it is not his responsibility to establish his innocence in arbitration unless the Employer first proves him guilty. In the opinion of the Arbitrator, the Employer has not met its burden.

In addition to the issue of the Grievant's movements, the record leaves the time of the escapee's assaults on the perimeter unresolved. Several witnesses--management and union--testified that the alarm could be activated by debris, animals or humans. False alarms were commonplace, according to Witness Greene. The

conclusions of the State Patrol's investigation were, in the main, not presented in the arbitration hearing, although two witnesses testified that the actual escape was determined by the State Patrol to have occurred between 7:15 and 7:40 a.m. Thus, according to the evidence provided, either alarm may have been set off by an escape attempt or by any number of other things. Several things, however, are clear:

1. There were two breaches to the security system in an area subsequently cleared by the Grievant;
2. An inmate escaped before 8:20 a.m. when his clothing and other evidence was discovered by Lt. Bond and Mr. Wingard;
3. It was daylight when Bond and Wingard found the items, but dark when Mr. Williams claims to have first searched the area, and near dawn when he cleared the area the second time;
4. Grievant did not carry a flashlight;
5. False alarms had been a common occurrence and the Grievant did not know at the time of either investigation that an inmate had been reported missing since Ms. Jackson's report was made at 7:20, five minutes after Williams was dispatched the second time. Against this is the reasonable assumption that Grievant knew or should have known that escape is always a possibility from a correctional facility where inmates do not have sign-out privileges.

6. Debris collects between the two fences and gets caught in the razor ribbon;

7. The lock on the D-Building gate was stubborn;

8. In the absence of post orders and specific training, Grievant was left to use his judgment on how to conduct a perimeter investigation;

9. He conducted an investigation according to his usual practice, checking both the front and rear of the area both times;

10. He saw nothing unusual--no pants, no knit cap, no kites and no footprints in the snow--and accordingly reported the area clear;

11. It took him nearly three times longer to clear the area the second time than the first.

From these facts I conclude that if evidence of an escape attempt existed when Williams made his first inspection, it would have been extremely difficult for him to see it without additional artificial lighting because it simply was too dark to distinguish normal debris and disturbances in the snow from that created by the escape attempt. Mr. Williams probably could have seen the inmate if he had been within his sight at the time, but nothing suggests that they were in the zone at the same time (Employer's Exhibit #1 shows that he retreated into Building E between attempts). It is more likely that Mr. Williams could have seen the trail of footprints, blood droplets and paper, and the blood and clothing on the fence on the second search for two reasons:

(1) it is more probable that the evidence, or at least more of it, was there for the second search, and (2) because it was closer to sunrise, there was more natural light, particularly when Williams searched the rear of the units. However, I cannot conclude with any reasonable degree of confidence that the trail and items were easily observable on the second search as Management argues. I agree they were after 8 o'clock when Officer Bills, Lt. Bond and Mr. Wingard investigated. But Mr. Williams did not have the advantage of daylight or knowledge of a probable escape to alert him. It is well within the bounds of reason to believe that by the time he got to the rear of the buildings, the inmate was already gone and that in the semi-darkness Williams confused any discernable items and footsteps left behind with the usual condition of the area. He went looking for something unusual, saw and heard nothing unusual, and reported the situation as he found it. The fact that it took him nearly three times as long to clear the area the second time is somewhat troublesome, but not enough to conclude that his search was negligent. Moreover, the men in the Message Center, including members of Management, were not sufficiently concerned to call him and ask why there was a delay.

The State argues that an effective security system depends on proper functioning of equipment and personnel. This Arbitrator agrees with Arbitrator Duda, but is obliged to point out that Grievant Ellis deliberately terminated his radio communication making himself ineffective as a security officer for approximately 25 minutes and "went about as far as a Corrections Officer could

go to abandon his security responsibilities without actually leaving the institution" (Dayton Correctional Institution v. O.C.S.E.A. G-87-2392, p. 13). In the instant case there is no evidence that the Grievant did anything other than what was accepted practice at Northeast Pre-Release Center at the time. The fact that he did not see what was easily discernable to Lt. Bond and Mr. Wingard and what C.O. Bills should have seen 40-100 minutes later does not make him per se negligent, particularly since the circumstances changed significantly during that time.

The State also cites the Rivera decision concerning James Williams in which she held that securing a fence alarm without visibly checking the site constitutes a false report threatening to the security of the institution. Again the facts differ significantly from those of the case at bar. There is no evidence that Ted Williams failed to check the area as ordered--only a conclusion drawn by Management that he must not have done so since Management could clearly see the pants in the fence 40-100 minutes later. Moreover, it may be pointed out that Arbitrator Rivera found the absence of post orders, less than rigorous training, and a clean discipline record sufficiently mitigating to reduce a suspension based on uncontroverted facts from 15 to 10 days. These are but some of the mitigating factors present in the instant case.

However, mitigating factors are beside the point here because the Employer lacks sufficient proof of wrongdoing on the part of the Grievant and, therefore, just cause for discipline. This finding makes the procedural issues moot. Having answered the

question put to her, the Arbitrator declines to rule on issues which are moot and for which there are no readily available remedies.

IX. Award

The grievance is sustained. Grievant is to be awarded full back pay, his record expunged, and made whole.

Anna D. Smith

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
March 10, 1990