

STATE OF OHIO AND OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION LABOR
ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION, SOUTHEASTERN
CORRECTIONAL INSTITUTION

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE: Michael Woodfork

OCB Case No.: 27-24-890703-033-01-03

ARBITRATOR'S OPINION AND AWARD

Arbitrator: David M. Pincus

Date: August 1, 1990

APPEARANCES

For the Employer

Benjamin G. Bower
David J. Burrus
David L. Ash
Mike Duco

Lou Kitchen●

Warden
Labor Relations Officer
Corrections Supervisor II
Assistant Chief of Contract
Compliance
Labor Relations Specialist

For the Union

Michael Woodfork
Jeff D. Addington
Michael A. Dennis
Maxine S. Hicks
John Fisher

Grievant
Corrections Officer 2
Corrections Officer 2
Staff Representative
Staff Representative

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Rehabilitation and Corrections, Southeastern Correctional Institution, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on June 12, 1990 at the Office of Collective Bargaining, Columbus, Ohio. 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. Both Parties indicated that they would not submit briefs.

STIPULATED ISSUE

Was the removal of Michael Woodfork on June 27, 1989, for just cause? If not, what should the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in the Ohio Revised Code, Section 4117.08 (C), Numbers 1-9.

(Joint Exhibit 1, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

Section 24.02 - Progressive Discipline

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

- A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evalua-

tion report without indicating the fact that disciplinary action was taken.

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.

(Joint Exhibit 1, Pgs. 37-38)

STIPULATED FACTS

1. The ten (10) day suspension grieved has been changed to a five (5) day suspension. It has been resolved by the Parties and is not at issue before the Arbitrator.
2. The matter of the removal of Michael Woodfork is properly before the Arbitrator, and there are no procedural issues.

CASE HISTORY

The Southeastern Correctional Institution, the Employer, is a medium security facility primarily housing first felony offenders. The facility presently houses 1600 inmates; with approximately 900 inmates under 21 years of age. These offenders are sent to this facility because of the training facilities and unique programming opportunities.

Michael Woodfork, the Grievant, was originally hired as a Corrections Office 2 approximately five years prior to his removal. Those assigned to this job classification serve as the backbone of the facility because they act as role models during

their contact with the inmates. In addition, they have tremendous security responsibilities, not only for the safety and welfare of the public, but other inmates and staff members.

On or about the time of the removal, the Grievant served as a Dining Hall Officer. His duties included the following activities: visual inspection while assuming his duty to secure the dining hall; general security of the dining hall involving the supervision of inmates; monitoring and issuing controlled tools; cleanliness of certain sections; and responsibility for the inmate count.

The three incidents which served as the triggering events for the Grievant's removal took place during April of 1989 and share a common dimension; the proper application of a dining hall post order dealing with inmate counts. The post order in question contains the following relevant particulars:

"...

CHANGE OF SHIFT OFFICER

- 1.) On relieving the on-duty officer (or coming on duty) you will call Control Center 1 & 2, and the Shift Commander, and notify the officer that you are on duty and in control of the Dining Hall.

COUNT

- 2.) You will at that time make an inventory of equipment in your charge. You will make a count of all inmates in all areas of the Dining Hall.

COUNT TIMES

- 3.) Official Count Times are as follows and will be called into your Senior Shift Supervisor (220). 7:00 AM; 4:00 PM; 9:45 PM; 11:00 PM; 3:00 AM and on Saturdays, Sundays, and Holidays 12:00 Noon.

When counting, all inmates must be seated and you must call in the count according to how many inmates from A-Dorm and on what floor. Using a wake up list or count board or log books is an unacceptable method of achieving your count. You must count the inmates sitting down. You will call your count into the Senior Shift Supervisor's Office (220). All count slips will be signed by the employee taking count and turned in to the Count Center for each group of inmates counted.

In all cases where a recount is required, an additional officer or supervisor will verify the count before the count is cleared.

VISUAL CHECKS

- 4.) Visual checks should be made of all areas of the dining hall. When making this check the officer will visually check the windows and doors. The results of these visual checks will be logged.

..."

(Employer Exhibit 1)

David L. Ash, a Corrections Supervisor 2, reviewed the purpose of institutional counts and the proper procedures which should be followed to effectuate the particulars specified above. Ash stated that a count in an institutional setting takes place at certain specified time periods. These counts involve visual verification that each inmate in custody is physically present at the institution, and that no escapes have taken place. Broken counts are counts which take place outside of the dormitory setting when an inmate is involved in other activities. During April of 1989, the Grievant was terminated because he failed to follow broken count procedures.

Ash stated that a series of steps had to be taken when conducting a broken count at the dining hall. First, during morning count the inmates are collected and escorted over by a

third shift Yard Officer. These Officers know how many inmates per dormitory they are supposed to have as a consequence of a previous count conducted by a Dormitory Officer. Upon arrival at the dining hall, the Yard Officer calls control central by radio and states that he/she has X number of inmates secure at the dining hall. Second, a broken count is subsequently conducted at the dining hall. Prior to the count, the Dining Hall Officer is required to secure the dining hall by verifying that all inmates are present and segregated by dormitory and floor designation. Third, the Officer then takes a blank broken count sheet and precedes to conduct a "flesh" count by using an institutional identification card. He/she collects information dealing with inmates' names, identification, and lock numbers. Fourth, once this survey is completed, various totals are computed and a copy of the broken count sheet is given to the Yard Officer who submits the document to the institution's Count Officer. Last, the Count Officer gathers all the submitted data and conducts a cross-checking procedure. If some discrepancy surfaces, a re-count order may be given to various locals within the institution.

The first contested incident took place on April 8, 1989 (Joint Exhibit 3). The Grievant conducted a broken count in the dining hall at approximately 12:00 p.m.; this count was subsequently called in at 12:30 p.m. In both instances, the Grievant listed Inmate Zuban as present in the dining hall. Ash, who was acting as Count Officer, subsequently concluded that Zuban was,

in fact, found in H-2 Dormitory. Ash then contacted the Grievant and asked for a recount. Upon further review, the Grievant contacted Ash and admitted that Zuban was not present in the dining hall. Ash testified that he asked the Grievant whether Zuban was ever present in the dining hall. He, allegedly, remarked that he did not know.

Ash further maintained that after the count had cleared he telephoned the Grievant and asked him to come by the Shift Captain's office before he left the institution. The Grievant met with Ash and they discussed the error that had occurred earlier in the day, and how the error could be eliminated by using the proper count procedure. The relevant post orders (Employer Exhibit 1) were also reviewed by these individuals. During the course of this discussion, the Grievant purportedly admitted that he failed to conduct an actual "flesh" body count. Rather, the Grievant relied on inmate recognition and a wake-up list supplied by the dining hall Food Coordinator. At the conclusion of the procedure the Grievant remarked that he understood the broken count procedure.

A second incident took place on April 15, 1989 (Joint Exhibit 3). Once again there appeared to be certain post order violations. Ash testified that the Grievant submitted the broken count at approximately 6:55 a.m. Ash testified that the count was faulty because the Grievant made a number of designation and computational errors. The Grievant, moreover, failed to list Inmate Brown on his broken count list. This deficiency forced a

recount and also caused Ash to send over additional personnel to help in the recount process. A search was initiated but Brown was still not found. Shortly thereafter, Brown appeared from the dish room; an area previously searched by the Grievant.

The third and final incident took place on April 28, 1989 (Employer Exhibit 3). Ash claimed that several infractions took place which closely mirrored those identified on April 15, 1989. Once again the Grievant incorrectly recorded an inmate's dormitory location when completing a broken count sheet. He also listed Inmate Johnson as present at a dorm which also proved to be incorrect. The Dormitory Officer informed Ash that an error had surfaced. The Grievant was informed which precipitated another recount; several officers were assigned to help with this effort. The recount indicated that Inmate Johnson had, indeed, been present in the dining hall. Upon being confronted with the inconsistent finding the Grievant purportedly stated, "I didn't know he was in the dining hall."

On May 17, 1989, a Predisciplinary Conference was held to review the circumstances surrounding the three incidents (Joint Exhibit 3). It was alleged that the Grievant violated the Standards of Employee Conduct Rule No. 6(c) which deals with failure to follow post orders, administrative regulations and/or written policies or procedures (Joint Exhibit 4).

On June 13, 1989, the Employer issued a Removal Order. It contained the following relevant particulars:

"...

You are to be removed for the following infractions: Standard of Employee Conduct Rule #6c, Failure to follow post orders, administrative regulations and/or written policies or procedures.

On 4/28/89 while working the Dining Hall you took a broken count of inmates, you put one inmate on the wrong dormitory floor, and you failed to count another inmate on your count sheet.

On 4/8/89 while working the Dining Hall, you took a broken count of inmates working in the dining hall, you counted an inmate as present who was not even there.

On 4/15/89 while working in the Dining Hall while taking count you failed to properly tally your count sheet, you also failed to count an inmate who was in the dining hall during count, and you showed an inmate as locking in G dorm when actually he locked in H3-S dorm.

The above violations caused a delay in clearing count, an delayed work production. These violations are a continuation of your disregard to following rules and regulations. Previous violations are as follows: 11/22/86 failure to follow post orders, written reprimand; 4/17/87 sleeping on duty, 5 day suspension; 10/26/87 falsifying records, 10 day suspension; 1/12/88 failure to follow post orders, written reprimand; 2/23/88 tardiness, written reprimand; 7/29/88 failure to follow post orders, 5 day suspension; 1/3/89 tardiness, unauthorized leave and job abandonment, 10 day suspension (pending).

..."

(Joint Exhibit 2)

The Grievant contested the removal by filing a grievance. In the Statement of Facts, the Union noted:

"...

The Union contends Officer Woodfork is still enrolled in the E.A.P. program.¹

..."

(Joint Exhibit 2)

¹It should be noted that the Grievant's E.A.P. participation was never raised at the Hearing.

On August 15, 1989, a Step 3 meeting was held. The Hearing Officer concluded that the removal was for just cause. This finding was not only based on the triggering events but on a number of previous violations dealing with other examples of Neglect of Duty (Joint Exhibit 2).

The Parties were unable to resolve the grievance. Since neither Party raised any objections regarding substantive nor procedural arbitrability, this grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to remove the Grievant for violating post orders dealing with dining hall count procedures. A direct violation of the Standards of Employee Conduct Rule No. 6(c) (Joint Exhibit 4).

The Employer contended that the Grievant was given adequate forewarning of the consequences associated with the misconduct in question. A document (Joint Exhibit 4) was introduced suggesting that the Grievant received and read the Standards of Employee Conduct (Joint Exhibit 4). With respect to the count procedure (Employer Exhibit 1), notice requirements were also established. The Grievant, more specifically, was given specific training regarding this procedure on more than one occasion. Specific emphasis was placed on the conference held on April 8, 1989 which

involved the Grievant and Ash. Ash emphasized that the procedural errors were reviewed as well as the correct procedures.

Rule No. 6(c) (Joint Exhibit 4) is viewed as extremely necessary from a business necessity standpoint. Various errors in the broken count procedure can generate delays in clearing the count. Benjamin Bower, the Warden, and Ash discussed a number of negative outcomes engendered by such circumstances. Delays in the count can result in subsequent release problems in terms of work assignment starting times, eating schedule and other program delays. When institutional delays take place, unrest amongst the inmates normally arises, which causes a threat to the security of the institution. Miscounts in terms of inmate attendance may delay an awareness of attempted escapes and prevent timely assistance if an inmate has been assaulted and in need of medical attention.

The Employer maintained that the evidence and testimony clearly established that the Grievant violated Rule No. 6(c) which prohibits failure to follow post orders (Joint Exhibit 4). The post orders (Employer Exhibit 1) in question were violated in a number of ways. First, the Grievant relied extensively on a wake-up list in achieving his counts. Second, the Grievant failed to obtain positive identifications because he used facial recognition procedures rather than a "flesh" body count. Third, he also failed to secure the dining hall prior to the count which prevented him from determining the whereabouts of all the inmates under his supervision. Last, the Grievant admitted that he

followed his own procedure because he felt that his duties were accomplished with less time involved in fulfilling the requirements.

It was strongly emphasized that a newer count procedure (Employer Exhibit 2), implemented after the disputed incidents, was not different from the procedure which gave rise to the present discipline. Rather, the procedures content was not modified but was re-packaged for other administrative reasons. The Employer did, however, acknowledge that it reduced the number of inmates involved in any broken count setting to fifteen inmates.

In addition to the previously described broken count violations, the Employer also referenced pertinent portions of the Grievant's disciplinary record (Joint Exhibit 5) in support of the removal. Some of these violations dealt with: sleeping on duty; falsifying records; tardiness; disobeying a direct order; and unauthorized leave and job abandonment. Other violations consisted of direct violations of Rule No. 6(c) (Joint Exhibit 4). The Employer maintained that all of the above violations were still active and part of the Grievant's personnel file. The Employer also emphasized that the charges in dispute represent the fourth offense of a Rule No. 6(c) (Joint Exhibit 4). The Employer opined that it has exercised exceptional restraint and should not be penalized for providing the Grievant with an opportunity to modify his behavior. It was also maintained that

progressive discipline need not be triggered by the same type of event.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant for violating Rule No. 6(c) (Joint Exhibit 4). That is, the Grievant did not fail to comply with a post order dealing with broken counts (Employer Exhibit 1). The decision was contested based upon the ambiguity surrounding the count procedure (Employer Exhibit 1) and differing versions surrounding the incidents in question.

The Union maintained that the guidance and instructions contained in the post order (Employer Exhibit 1) are totally inadequate and misleading. Rather than specifying how a count needs to be conducted, it merely states which auxiliary material could not be used when conducting the count. Several Union witnesses, moreover, provided testimony which supported the ambiguity theory. They noted that numerous errors took place under the existing count system and that they developed individualized procedures which differed from the one described by the Employer. It was alleged that some of the difficulty surrounding the count procedure dealt with inaccuracies contained on the wake-up lists utilized for count purposes. These lists are completed by inmates and then forwarded to the dining hall. When inaccuracies do arise they can devastate the counts undertaken in the dining hall.

The Union contended that these difficulties led the Employer to promulgate a new post order (Employer Exhibit 2) dealing with count procedures. Under the old procedure (Employer Exhibit 1) up to seventy inmates were typically accounted for during a broken count. The new procedure (Employer Exhibit 2), limited the number of inmates, however, to fifteen during the week and ten on the weekends. This modification, more specifically, resulted in a considerable decrease in the number of documented errors and recounts.

Various circumstances were raised by the Union with respect to the incidents in dispute. The April 8, 1989 incident was veiled with a number of conditions which should have been critically analyzed by the Employer. First, the Grievant maintained that Inmate Zuban was in attendance but that a Food Coordinator released him prematurely which caused an inaccurate count. Second, although the Grievant admitted he used facial recognition as a method, the Employer never fully established that the Grievant failed to conduct an official body count. Third, the Grievant maintained that he, rather than Ash, initiated the discussion at the end of the shift. The Grievant, more specifically, solicited the help of management personnel and, as such, the discussion could not be viewed as a counseling session.

Similar justifications surrounding the April 15, 1989 incident were proposed by the Grievant. Inmate Brown's name was originally stricken from the roster because the Grievant felt he was reclassified. He only determined that Brown's presence in

the dining hall was indeed required when he was so notified by a Dormitory Officer from Dormitory C. The Grievant emphasized that he conducted a visual check prior to the count but that it failed to disclose an inmate sleeping in the dishroom. His failure to initially account for the inmate's presence was not viewed as a negligent act, but one arising from the numerous hiding places utilized by inmates to avoid disclosure. The difficulty of any attempted search was underscored by the failure of several management personnel to discover the inmate's location in the dishroom.

Another peculiarity was proposed by the Grievant as justification for the recount on April 28, 1989. The Grievant testified that he initiated a count and successfully completed one-quarter of the procedure when additional inmates were brought into the dining hall. He stated that he segregated those inmates he had already counted from the remaining group which included the new arrivals. Somehow, one of the new arrivals became mingled with the group already counted which caused the error. For all of the above-mentioned reasons, the Union alleged that the removal was in violation of Section 24.02 because it was not commensurate with the offense.

THE ARBITRATOR'S OPINION AND AWARD

Based upon the evidence and testimony introduced at the hearing, it is this Arbitrator's judgement that the Employer neither violated Section 24.01 nor Section 24.02. As such, the disciplinary action was imposed based upon just cause and was commensurate with the offense.

The record clearly indicates that the Grievant was fully aware of the post order (Employer Exhibit 2) and the related procedure. On September 23, 1987 the Grievant acknowledged that he received and read the Standards of Employee Conduct (Joint Exhibit 4). He admitted at the hearing that he knew and understood the broken count procedure because it was used throughout the facility. He also noted that he had previously substituted in the dining hall and had received prior instruction from a number of management personnel before the April, 1989 incidents. The discussion with Ash after the April 8, 1989 incident also provided additional unambiguous notice. Whether one views this conversation as a counseling session or an encounter initiated by the Grievant is immaterial from a notice perspective. Both Ash and the Grievant stated that the Grievant's errors were discussed and the post orders were reviewed during the meeting. Unfortunately, the same errors occurred on two subsequent occasions. Also, the Union's reliance on the Grievant's recent assignment to the dining hall on April 2, 1989 seems misplaced in light of the previously discussed notice history.

Count procedures, and especially broken count procedures, are critical if an institution intends on monitoring and securing its institutional setting. This is especially true when inmates are transferred from one location to another during the course of any working day., Many negative consequences can occur during the transfer process; only diligent and consistent count processes can ensure that potential problems are promptly disclosed and dealt with.

This Arbitrator is convinced that the Grievant utilized a count procedure which short-circuited this necessary control mechanism. It is quite apparent that the Grievant failed to conduct a "flesh" body count on each of the dates in question. Testimony did, in fact, indicate that bargaining unit members did individualize some of the procedure. But, one common theme or practice was clearly understood by all participants except the Grievant. They never solely relied on the wake-up sheet in filling out the broken count sheet. Another verification method was always employed. They checked ID's, inmate identification numbers affixed to clothing, and asked additional questions to clarify the presence and standing of inmates. Unlike these precautionary measures, the Grievant merely copied the names provided on the wake-up list onto the broken count report. He would then proceed from table to table where he basically conducted a roll call without any attempt to validate the information.

The Grievant's use of facial recognition as a validation tool was also supported by the record; which further provided insight concerning the circumstances surrounding his error propensities. The Grievant confirmed that he used this approach. And yet, he admitted that he was recently assigned to this position and did not recognize all of the inmates. By relying on the wake-up list and facial recognition, the Grievant exposed himself to numerous error opportunities. The list was never intended as a primary counting device, errors could easily arise because other inmates typed these documents. One can readily envision errors arising if an employee takes this information at face value and then attempts to validate this information by recognizing inmates with limited, if any, prior exposure.

Several other circumstances raised certain credibility concerns regarding the Grievant's version. At the hearing, the Grievant alleged that Inmate Zuban could have been released by a Food Coordinator without his prior knowledge. This justification seems extremely contrived because the Grievant admitted that he never provided this information at the lower levels of the grievance procedure. Supporting evidence and testimony, moreover, was never provided by the Union. If the Union had provided direct testimony from the Food Coordinator, this argument could have attained valuable evidentiary standing.

The Grievant also had some difficulty explaining critical aspects of the April 28, 1989 incident. During one portion of his explanation the Grievant alleged that he initiated a total

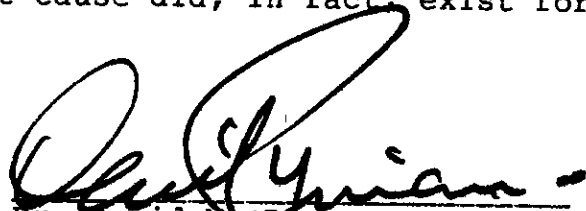
recount after the additional inmates arrived at the dining hall. He, later, emphasized that he segregated those inmates that he had initially counted from the new arrivals and those inmates from the original group that had to be counted. If the Grievant had properly secured the area and conducted a proper broken count of all the inmates at the dining hall, he could not have overlooked the inmate that had arrived with the new group.

The Grievant's prior disciplinary record (Joint Exhibit 5) further supports the removal decision. The record (Joint Exhibit 5) indicates that the Employer engaged in a valiant effort to salvage this employee. Unfortunately, the Grievant did not sufficiently modify his behavior to justify further leniency. Any of the three incidents could have served as the triggering event for removal because of the violations discussed above. The Grievant, moreover, had three prior Rule No. 6(c) (Joint Exhibit 4) violations. According to the disciplinary grid, the Employer could have removed the Grievant without further rehabilitative efforts. As such, the most recent series of incidents clearly supports the removal decision; these represent the fourth occurrence of an identical rule violation.

It appears to this Arbitrator that any additional attempts at progressive discipline would prove futile and highly non-productive. The Grievant had ample opportunity to change his attitude and his method of fulfilling his responsibilities to the institution, co-workers and inmates.

AWARD

The grievance is denied. Just cause did, in fact, exist for the removal decision.



Dr. David M. Pincus

August 1, 1990