OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between: THE STATE OF OHIO Department of Rehabilitation and Corrections -and- OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, OSCEA/AFSCME Local Union 11, State Unit 10	* * * * * * * * * * *	Case No 27-05(90-02-01)0062-01-03 Decision Issued: November 1, 1990

#510

APPEARANCES

FOR THE STATE

Thomas E. (Ted) Durkee	Labor Relations Officer
Bob Thornton	OCB Representative
Nick Chibis	Labor Relations Specialist
Ron Vogt	Corrections Specialist
Zelus Fields	Captain
Lynn Hott	Nurse
Rex Leeth	Corrections Officer
Steve Riffle	Corrections Officer
Timothy Urdock	Inmate

FOR THE UNION

Dennis Williams	OCSEA Staff Representative
Patrick Mayer	OCSEA Staff Representative
Ron Brown	Chapter Vice President
Jerry Atwood	Grievant
Darwood Gritton	Witness
Walter Gooldin	Witness
Jerry Raisden	Witness

ISSUE: §24.01: Removal For Alleged Inmate Abuse and Other Causes

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

The grievance protests the removal of a Corrections Officer assigned to the Reception Center at Orient Correctional Institution. Grievant had a relatively brief service record with the State; he was hired on March 9, 1987 and discharged on January 23, 1990. The removal centered on allegations that he committed and/or aided and abetted another in the commission of prisoner abuse. Two incidents were cited. The first occurred on October 3, 1989 shortly after Grievant and another Officer escorted an inmate back from the Ohio State University Medical Center in Columbus, Ohio. The prisoner was taken immediately to a segregated DC (Disciplinary Control) cell. He was stripped, searched, and left to shower. According to the Employer, Grievant and the other Officer who transported the inmate from Columbus entered the DC cell on pretense of returning the inmate's personal belongings. It is contended that they kicked, punched, and beat him repeatedly, causing superficial, but painful injuries.

The second incident was on October 30, 1989. The same victim who had been beaten on October 3 was assaulted in the yard by a prisoner, who punched him into unconsciousness. The State maintains that Grievant arranged and facilitated the attack, coercing the aggressor inmate to commit it.

The Agency (the Ohio Department of Corrections and Rehabilitation) lodged six separate charges against Grievant, all of which stemmed from or related to the alleged prisoner abuse. The charges were:

1. Excessive force and/or physical abuse towards an inmate;

2. Threatening, intimidating, and/or coercing an inmate for personal gain or satisfaction;

3. Failure to follow post orders, administrative regulations, written policies or procedures;

4. Failure to cooperate in an official investigation;

5. Failure to immediately report a violation of any work rule, law or regulation;

6. Commission of acts which threaten the security of the institution, its staff, or inmates.

Any of the charges, if proven, could justify the Employee's removal. However, the most damaging is that he abused a person in the custody of the State of Ohio. The parties' Collective Bargaining Agreement separates this form of misconduct from all others. In every other disciplinary dispute, an arbitrator is authorized to measure the offense against the penalty, add individual mitigating circumstances to the decisional factors, and craft an award upholding, overturning, or modifying the discipline. The Agreement licenses substantial arbitral intrusion into adverse employment action by making just cause the criterion for discipline and constraining State agencies to follow progressive-disciplinary patterns. Article 24 of the Agreement provides in pertinent part:

ARTICLE 24 - 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 include:

A. One or more verbal reprimand(s) (with appropriate notation in the employee's file);

B. One or more written reprimand(s);

C. One or more suspension(s);

D. Termination.

. . .

§24.05 - Imposition of Discipline

. . .

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

All of these employment safeguards are enforceable <u>except</u> in a case of proven prisoner/patient/client abuse. In those cases, an arbitrator cannot modify a removal no matter how unjustified or inequitable. The Agreement gives agencies practically limitless prerogative to remove employees for abuse, and the concluding

sentence of Article 24, §24.01 disestablishes arbitral power to interfere:

> 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.

If the State successfully carries its burden of proving that Grievant abused the prisoner, the Arbitrator will have no alternative but to deny the grievance. There are exceptions, however. Grievant continued to have rights. First, he was entitled to strict construction of the burden-of-proof clause. The Employer was obligated to prove its charges, and the Employee had a legitimate claim to favorable findings from evidentiary inconsistencies. Second, he had a right to expect the Employer's full adherence to procedural due-process requirements, especially those contained in the Agreement.

The Union contends that Grievant did not commit prisoner abuse and, more to the point, that the State's evidence is insufficient to prove otherwise. It also maintains that the Employer breached its due-process obligations by concealing identities of key witnesses, blocking Union attempts to gather evidence in support of Grievant's defense, failing to timely notify the Employee or his Union representatives of the disciplinary penalty it intended to impose, and other "violations." These charges are tied mainly to

Article 24, §24.04 of the Agreement which erects a pre-disciplinary process and requires the Employer to comply with explicit rules. The Section provides in part:

> **§24.04 - Pre-Discipline**
>
> . . .
>
> An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The "Appointing Authority's designee shall conduct the meeting. The Union and/ or the employee shall be given the opportunity to ask questions, comment, refute or rebut. [Emphasis added.]

The Union views the disclosure requirements of §24.04 as indispensable elements of procedural due process, and claims that the Employer's disregard of them vitiated Grievant's discipline. The Arbitrator agrees with the Union's general theory. Section 24.04 does set forth due-process mandates which the Employer is not at liberty to ignore.

Assessing claims of due-process violations should be carried out case-by-case, with attention to the question of whether the employee and/or the Union was prejudiced by an omission. It is conceivable that an agency might substantially and successfully perform its §24.04 obligations even though it errs in overlooking some of the minutiae. This does not mean that §24.04 can be dismissed by the Employer or that its procedures are discretionary. They are contractual directives which, if not fulfilled, may well produce an arbitral award summarily overturning the most deserved discipline.

With these principles in mind, the first portion of this decision will concentrate on the due-process issues. The approach is fitting because if a substantive and consequential violation of Grievant's rights occurred, it could require the Arbitrator to sustain the grievance, and the justification for the removal would then become irrelevant.

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The dispute was presented to arbitration in Columbus, Ohio on September 18 and 19, 1990. At the outset, the Representatives of the parties agreed that it was arbitrable and that the Arbitrator had authority to issue a conclusive award on its merits. Arbitral jurisdiction is more specifically defined and limited by §24.01's prohibition against modifying removals for abuse, and by the following language in Article 25, §25.03 of the Agreement:

§25.03 - Arbitration Procedures

. . .

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

THE PROCEDURAL DUE-PROCESS ISSUES; FACTS, CONTENTIONS, AND FINDINGS

The Union opened the hearing with six items of purported due-process defects. Two of them protested the fact that the State did not bring witnesses to the arbitration whom the Union considered important to its case. One of the witnesses was an inmate, the others were the Warden and a medical officer. These contentions were voluntarily withdrawn by the Union Advocate or dismissed by the Arbitrator (the Arbitrator cannot remember which). The claims were inconsequential. If the Union desired witnesses, it had the right to subpoena them. It had no reasonable expectation of relying on the Employer to help make its case, and the Advocate's protestation that Management withheld witnesses "in bad faith" was unconvincing. It is true, however, that the Union had a right to demand that the Employer supply it with available witnesses and documents. Article 25, §25.08 provides:

§25.08 - Relevant Witnesses and Information

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

To resolve the problem, the Arbitrator offered to adjourn the hearing when necessary to afford the Union an opportunity to obtain the witness' attendance. The Advocate turned down the offer; similarly, the Arbitrator turned down the contention that the absence of the individuals from the hearing somehow rose to the level of a due-process issue.

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A more significant complaint was that the State withheld relevant documents from the Union and then submitted them into evidence at the hearing. There was truth to the allegation; the Employer candidly admitted it. The Union was clearly entitled to appropriate relief. The Agency's action (or omission) was a plain violation of disclosure requirements in §24.04.[1] To deal with it, the Arbitrator sustained the Union's objection and refused to admit the documents into evidence. That seemed to be a complete remedy; §24.04 requires the Employer to disclose documents which will be

[1] "When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee."

used to support discipline and, by excluding the protested material, the Arbitrator prevented the Agency from using it for support.

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Section 24.04 directs the Employer to give notice of the scheduling of a pre-disciplinary meeting and contemporaneously inform the affected employee and his/her representative "in writing of the reasons for the contemplated discipline and the possible form of discipline." Prior to the meeting, which took place on December 18 and 19, 1989, the Agency sent a timely notice. The notice contained the only written indication of the discipline contemplated, and it was a model of vagueness. It stated:

> **Any discipline stemming from a finding of just cause will be based on the Standards of Employee Conduct.**

The Standards of Employee Conduct is a list of regulations, infractions, and a disciplinary grid. It is well written, comprehensive and lengthy, consisting of twenty-one typed pages. Grievant was charged with breaking ten of the rules listed in the Standards, each of which carried a range of disciplinary possibilities. The alleged violations and the disciplinary potential for a first offense of each (according to the unilateral Standards) were as follows:

"6. Insubordination -

. . .

"c. Failure to follow post orders, administrative regulations and/or written policies or procedures." The disciplinary range is a verbal reprimand to a three-day suspension.

"21. Willfully falsifying, altering, or removing any official document, arising out of employment with DR&C." Potential penalties for a first violation are a five-to-ten-day suspension to removal.

"22. Interfering with or failing to permit an official search of person or property or failing to cooperate in any official inquiry or investigation." The stated penalties for a first offense extend from a written reprimand to removal.

"23. Failure to immediately report a violation of any work rule, law or regulation that could jeopardize the security of the work place or affect job performance." Under the Standards, a first offense calls for a verbal reprimand to a one-day suspension.

"34. Other actions that could harm or potentially harm the employee, a fellow employee(s) or a member of the general public." Possible discipline -- written reprimand to removal.

"35. Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee." Possible discipline -- written reprimand to removal.

"36. Any act or commission not otherwise set forth herein which constitutes a threat to the security of the institution, its staff, or inmates." This is a vague, catchall regulation which understandably runs the spectrum of disciplinary impositions -- from a verbal reprimand to removal.

"37. Use of excessive force or physical abuse towards an inmate, furloughee, parolee, probationer or member of the public." Stated penalties range from written reprimand to removal.

"38. Threatening, intimidating, or coercing an inmate, furloughee, parolee, or probationer for personal gain or satisfaction." Under the Standards, a violation could result in discipline anywhere from a five-day suspension to removal.

"39. Giving preferential treatment to an inmate, the offering, receiving or giving of a favor or anything of value to an inmate, dealing with an inmate, furloughee, parolee, or probationer without expressed authorization of DR&C." Penalties -- five-to-ten-day suspension/removal.

The Union maintains that the State did not fulfill its responsibility to inform Grievant and his representative of "the possible form of discipline" within the contractually required time limit. Neither the Union nor Grievant learned that discharge was to be imposed until January 12, 1990 when the Removal Notice was issued. It is obvious today that the Agency was intent on that penalty from the beginning -- even before the pre-disciplinary meeting. Yet it did not say so, not in concrete terms. All it did was refer to the

Standards of Employee Conduct, thereby indicating that the Employee might expect anything from a verbal reprimand to dismissal. The information was so broad and vague as to convey nothing of substance. It gave no clue concerning the State's intent. In the Union's judgment, the Employer intentionally obscured its purpose (possibly to keep Grievant's defenses off balance) before, during, and after the pre-disciplinary meeting. Such conduct, according to the Union, violated an important, negotiated element of due process, denied Grievant fair procedure, and called for summary repudiation of the penalty.

The Agency contends that it carried out its §24.04 obligations and that the Union's protests are forged out of desperation. The tactic, according to the Employer, is obvious -- attempt to obstruct the disciplinary process and arbitral inquiry into just cause by interposing a flood of trivial technicalities. This nondisclosure claim is an example. In its third-step answer to the grievance, the Agency disposed of the claim as follows:

> The [Union's allegations of] procedural flaws are contrived and without merit. The predisciplinary conference notice referenced the Standards of Employee Conduct. The grievant was given a copy of those standards and acknowledged receipt. The standards contain a grid with a range of penalties and for the rules cited in this case suspension or possible removal was indicated. The penalties were contained in the predisciplinary conference notice by reference and grievant had adequate opportunity to prepare his defense based on a potential removal.

The Arbitrator agrees with the Employer's conclusion, although not with its reasoning. The contractual language in question requires Management to state possible penalties, in writing, prior to the pre-disciplinary meeting. It demands a specified performance; it does not license the Employer to dodge its obligation by referring to previously published rules. Stated another way, the Agency's distribution of the revised Standards three years ago (October 23, 1987) did not discharge its §24.04 obligation to notify charged employees, on a case-by-case basis, of the discipline contemplated for each. Technically, the Agency breached its responsibility to Grievant.

The reason the Arbitrator adopts the State's conclusion in spite of the breach is that the departure from strict observance of §24.04 was trivial, non-substantive, and clearly did not detract from Grievant's ability to defend himself. When the Union and the Employee saw the document setting forth the ten charges and were informed that prisoner abuse was included, they knew without doubt that Grievant was facing discharge. They could not have been mistaken. The discipline did not come as a surprise to either of them, and they would not have been any better informed by a written notice stating, "It is possible you will be discharged for these offenses." Therefore, such notice in this case would have been inconsequential, and failure to provide it was a technical flaw without real meaning.

The State's neglect arguably enhanced Grievant's position rather than handicapping it. In the Arbitrator's opinion, there is

an underlying purpose to pre-disciplinary conferences which is undermined if an agency is forced to make a bottom-line decision on discipline before the meeting takes place. The meeting is designed to force an agency to expose its case before a disinterested hearing officer before the penalty is finalized.[2] It is a forum for challenge and reason. It may well provide the climate for settlement or managerial realization that support for discipline is too thin and the charge(s) ought to be withdrawn. These are promising possibilities which would be frustrated by pushing the Employer into a hasty disciplinary decision.

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The Union's final procedural complaint is that the Employer called a surprise witness into the pre-disciplinary meeting -- an individual who did not appear on the list of witnesses supplied to the Union.

To understand the gravity of the Union's protest, it is important to observe that Grievant was discharged for two instances of alleged prisoner abuse, not one. The first was on October 3, 1989 when an inmate purportedly was beaten by Grievant and another Corrections Officer. The second related to October 30 when the same inmate was battered by a prisoner. No one alleges that Griev-

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[2] The hearing officer is disinterested, but clearly not impartial. Article 24, §24.04 provides: "The Appointing Authority's designee shall conduct the meeting." This abrogates any possibility of true neutrality. But there is evidence that such designees do examine the Employer's evidence critically. Sometimes they dismiss charges. That occurred in Grievant's meeting. The findings which followed dismissed three of the ten charges.

ant or any other Corrections Officer laid a hand on the inmate on October 30. But the State does maintain that Grievant contrived and facilitated the battery, and enlisted the prisoner to carry it out.

The surprise witness whose name did not appear on the Employer's list was that prisoner. His assertions were indispensable to connect Grievant with the abuse. He stated that Grievant planned it and used a combination of force, threats, and promises to obtain cooperation. His testimony in the pre-disciplinary hearing corresponded with his written statement, which read like a Grade B movie script. He told how Grievant orchestrated the event and promised him special treatment for carrying it out:

> [Grievant] told me and my celly [cellmate] . . . to stay out . . . and [Grievant] said he would arrange for [the victim] to be at the end of the line and that there was no c/o [Corrections Officer] chaperon to escort us to the 7:30 med [medication] call which would give us a chance to get [the victim]. Just before 10 minutes before pill call I find out it's set up so I talk to [Grievant], he said he would not write us up and that no escort or witnesses would see or be there and when I asked him what would be done to whoever hit him he said that it would be "only" 7 days investigation, but stressed not to mention his name . . . also that he would see to it we got out of our cells on 2nd shift more . . .
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> . . .
>
> . . . I wasn't going to mess with it but upon entering the pill line, [Grievant] yelled and told [the victim] to stop jumping in line and get at the end for ditching, no sooner did he place him at the end he looked dead at me and yelled "You too, no ditching, back of the line for you too" and

placed me behind [the victim] and smiled the "It's all yours" look.[3]

Aside from that convict's story, there was scarce evidence to tie Grievant to the October 30 beating; that which did exist was of doubtful value. It consisted of the impressions of a prison Nurse who did not like Grievant and thought he was sadistic. She reported overhearing him say he was going to get the inmate and did not have to do it himself; he could get others to do it for him. Without the convict's direct testimony, the Nurse's allegations could not stand the test and were patently insufficient to pass the pre-disciplinary hearing officer's investigation of just cause.

In view of these factors, the Employer's neglect of its §24.04 responsibility to inform the Union of its witnesses cannot be lightly disregarded or excused as insignificant. It was a manifest violation of a contractual due-process protection of employment rights. In the Arbitrator's judgment, it revoked the Employer's privilege to use the October 30 incident as a basis for Grievant's removal. Accordingly, the accusation that Grievant "conspired and assured the execution of a serious or felonious assault on 10-30-89" is dismissed and will not be considered further.

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[3] The witness was a surprise in more ways than one. He appeared in the arbitration hearing and totally disavowed his earlier testimony. He explained that his conscience bothered him and he wanted to set things right. Then he proceeded to state that everything he said before was a lie, and everything he said in the arbitration was the truth. He was completely unbelievable.

The predominant issues remaining are: 1) Did Grievant abuse the victim-inmate on October 3, 1989? 2) Did Grievant violate known policies and procedures by mishandling secure documents? 3) Did Grievant violate his obligation to inform the Agency of prisoner abuse which he witnessed and/or perceived? 4) Did Grievant willfully impede and official investigation? If the answer to the first question is affirmative, there will be no need for the Arbitrator to proceed further. Under Article 24, §24.01, he will have no choice but to deny the grievance. If, on the other hand, the Employer's evidence does not prove Grievant committed prisoner abuse, but does establish his accountability for any or all of the lesser offenses, the determinant issues will be whether there was just cause for the Employee's removal and, if not, what remedy is warranted.

THE MERITS -- FACTS AND CONTENTIONS

The inmate whom Grievant allegedly abused was a diagnosed psychopath and a severe danger to himself. He had a history of numerous suicide attempts and self-inflicted injuries. On October 2, 1989, he heard voices and began acting out. He was given a psychiatric interview during which he lost control entirely. He banged his hand against the table so hard that it was likely he injured himself. He was placed in four-way restraints[4] and later

[4] A method commonly used to discipline and settle out-of-control prisoners. An individual in four-way is stripped, placed on a bed in a prone position, and shackled hand and foot so that s/he has no mobility and movement is almost completely restricted.

taken for examination and X-Rays to the Ohio State University Hospital in Columbus.

Grievant and another officer escorted him. They returned to the Reception Center at approximately 1:00 a.m. The Officers on duty relieved Grievant and his partner of their charge, stripped and searched the inmate, and placed him in a maximum-security DC cell. Then, for a reason which remains unclear, Grievant and the other Officer went to the DC cell area and "visited." They had no job duties requiring them to go into the area; their responsibilities for the prisoner had been transferred to the third-shift Officers. Moreover, DC cells were restricted. Everyone, including Corrections Officers, (except those on duty who are responsible for the residents) were required to have authorization before entering. The mere fact that he went to the DC cell, allegedly without authorization, is one of the Employer's reasons for disciplining Grievant. The nature of the charge is clarified by the following finding of the pre-discipline hearing officer in a companion case:

> Also present in that housing area were officers S----- and [Grievant]. This was a restricted area and these officers were there without authorization. . . . Officer S----- stated that he came to the area because he had to "get with" [the inmate].

In the arbitration hearing, Grievant testified that he and the other Corrections Officer did have authorization to go to the area, and they went there for a good reason. The inmate had fouled his

jumpsuit on the trip from Columbus. He had left clean clothing in the medical unit, and they retrieved it for him to put on after his shower. Grievant maintains that he received permission from the watch officers. His assertion was supported by a joint written statement of the third shift Officer and Sergeant who were interviewed during the State's investigation. The statement contains the following:

> ONE OF THE QUESTIONS YOU ASK[ED] ME OVER THE PHONE WAS: DID I GIVE [GRIEVANT] AND OFFICER S------ PERMISSION TO GO INTO D.C.? AFTER TALKING WITH [THE SERGEANT] ABOUT THIS INCIDENT THIS IS TO THE BEST OF OUR RECOLLECTION OF WHAT HAPPENED; [THE SERGEANT] WAS IN THE MED BAY AREA WITH ANOTHER INMATE. I . . . HAD TOLD THE THIRD SHIFT YARD OFFICERS . . . TO ESCORT [THE INMATE] BACK TO D.C. WHEN THEY WENT BY THE CAPT'S OFFICE WITH THE INMATE ON THEIR WAY TO D.C. I STOPPED THEM AND ASK[ED] THE INMATE HOW HIS HAND WAS AND IF IT WERE BROKEN OR NOT? I ASKED HIM IF HE WAS OKAY NOW AND IF HE WAS GOING TO BEHAVE HIMSELF. HE SAID HE WAS ALRIGHT NOW AND WOULD BE OKAY. (I WAS REFERRING TO WHAT SECOND SHIFT HAD TOLD US ABOUT HIM BEING IN FOUR-WAYS) AFTER A FEW MINUTES [GRIEVANT] AND S----- CAME BY THE CAPT. OFFICE WITH [THE INMATE'S] PACKUP AND SAID THEY WERE GOING TO DROP IT OFF IN D.C. I TOLD THEM THEY COULD LEAVE IT LAY AND WE WOULD TAKE CARE OF IT LATER. THEY SAID THATS OKAY WE'LL JUST DROP IT OFF. I RESPONDED WITH "THAT WILL BE FINE". [Emphasis added.]

The inmate was battered and severely bruised in his cell that night. How it happened and who did it are the pivotal questions in this controversy. According to statements of an Officer who was approximately fifty feet away from the inmate's cell, Grievant stood outside blocking sight lines while Officer S----- was inside. He allegedly heard a thump, and heard the inmate cry out from the DC

area, "Why are you doing this to me!" He observed the inmate after the incident and saw what looked like a fresh red mark in the region of his kidneys. His statement and the inmate's written complaints were the primary factors leading to the investigation and dismissal of Grievant.

At 12:45 p.m. on October 3, nearly twelve hours after his alleged beating, the inmate told a first-shift Corrections Officer of the abuse. The Officer wrote a concise Incident Report addressed to the Warden, and referred the inmate for a medical examination. The Report stated:

> Sir. On the above date and time I . . . was doing a range check in D.C.[1] area. At this time, [the inmate] stated to I . . . that staff members came into his cell on 10-2-89 and beat him up.
>
> This took place after [the inmate] . . . came back from a round trip from OSU!
>
> ACTION TAKEN: Wrote Report/Sent to Med Bay for Medical check

The medical examination was revealing. Before he was sent to the Ohio State University Hospital the previous day, the inmate had damaged himself. The prison medical unit had examined him, charting his bruises and abrasions. The notes described friction burns and swelling on both wrists and a red sore in the corner of his mouth. There was no mention of dorsal injury. The subsequent examination on October 3 disclosed clear evidence that the inmate had been assaulted. He was found to have a contusion/abrasion in the vicinity

of his right eye, contusions on his left ribs and right thigh, and a large multiple abrasion on his low back surrounding the area of his left kidney. One nurse saw the back injury as resembling the sole of a boot. Another recorded it on the chart "Superficial Red lines running length of back appr. 6' scattered contusion. C/o [complaints of] pain."

On October 6, the inmate composed a letter ("kite") to the Administration. It was the first of several contradictory statements he would later write. Whether or not it reached its intended destination is unclear, but somehow the Agency obtained it. A copy was submitted into evidence by the Employer. It stated:

> To whom it my concern Oct.-6-89
> On 10-2-89 I was Beat up By Four of your officers I went to OSU for punchin the wall Officer S----- took me when I got back to CRC officer S----- [Grievant] and 2 other officers took me in my cell officer S----- told me to put my hands on the wall when I did He punched me in my side Then [Grievant] Hit me in the leg with His night-stick Thay puched me so Hard I Fell Down Then A nother officer kicked me in the Back. S----- Hit me alot He smacked me in the face. He told me to put my hands Back on the wall I truned to ask them to leave me alone then S----- puched me in the Eye After About A Half Hour thay stopped Hitting on me and left. Thay wounld not let me see the nurse. So The next Day I Told The nurse what Happen And she took A Report of All The marks on my Body.
>
> I would like some thing to Be Done About it.
>
> P.S. I Fear For my life![5]

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[5] The inmate is barely literate. To the extent feasible, the Arbitrator has tried to reproduce this and other statements with a view towards reflecting the originals. Misspellings, punctuation

The inmate's complaint and the statement of the Officer who observed Grievant at the door of the cell when the beating probably took place are the underpinnings of the Employer's case. It is significant that the inmate changed his story several times and wrote two or more subsequent statements exonerating Grievant. But the inmate testified that his later statements were coerced and untrue. He said that Grievant and other Corrections Officers threatened him repeatedly -- told him they were going to tie his hands and hang him if said anything to jeopardize their positions. They also implied that he would be sent to Lucasville, Ohio's maximum-security prison.

While these allegations are unsupported by evidence outside of the inmate's charges, there is independent evidence that Grievant had an abnormal relationship with the inmate and broke a critical rule in his behalf. He breached security by opening the inmate's file and sharing it with him. This event, which Grievant does not deny, forms the substance of one of the charges for which he was disciplined. It is exhibited by the following investigative statement of the Case Manager:

> On the above date [October 31, 1989], at approximately 6:45PM, I . . . did interview [Grievant] concerning allegations of physical abuse and threats charged against him by [the inmate].

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errors, etc. are the inmate's.

> [Grievant] stated that he had done nothing of a threatening nature towards [the inmate], and had in fact done everything within his power to reassure the inmate that he held no plans of taking adverse action of any kind against him. Even to the point of bringing the inmate into the Sgt.'s office and going over the contents of the pod file and showing the same to [the inmate]. [Emphasis added.]
>
> This statement was made by [Grievant] to myself while we were in the Sgt.'s Office and I was personally reviewing [the inmate's] pod file.[6]

* * *

The State's position is composed of this evidence. There can be no reasonable doubt that the inmate suffered traumatic injury in the early morning of October 3. He was locked in a segregated cell on suicide watch. That meant that the lights were left on and he was monitored throughout the night. The only persons who had casual access to him were Grievant and Officer S-----. They were alone in the cell with the inmate; at least Officer S----- was while Grievant stood immediately outside. A thump was heard and a plea, "Why are you doing this to me." When Grievant and his partner left, a new red welt was observed on the inmate's back. In the State's judgment, the circumstances are strong and compelling. They lead to but one rational conclusion -- that the inmate was maliciously beaten by the two Officers.

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[6] The Union made a point of establishing that the pod file did not contain the most sensitive information on the inmate. There were other files which were far more delicate. The distinction is lost on the Arbitrator. What Grievant readily admitted doing was an astonishing breach of security.

The Employer concedes that there is a weakness in its case against Grievant. None of the reliable statements placed him inside the cell when the beating occurred. Nevertheless, the Employer holds him culpable. Its theory is that he stood outside the cell blocking the view while Officer S----- carried out the actual battery. The entire incident, according to the State, was a conspiracy. Grievant knew what was going on and willfully concealed it. He was an aider and abetter from the Agency's perspective, equal in guilt to the individual who performed the actual abuse.

The Union's case was premised on testimony of Grievant and others that nothing happened. Unquestionably, the inmate suffered minor injuries -- there is no denying the physical evidence -- but Grievant steadfastly maintains that neither he nor Officer S----- had any part in it. As likely as not, according to the Union, the inmate did it to himself and then made up a wild story to implicate his jailers. It is not even appropriate to ask why the inmate would do such a thing, since he was a psychopath, frequently out of control, and inclined to abusing himself.

The inmate's version of the incident changed over and over again, even as late as the arbitration hearing. It was singularly unbelievable. Until the day of the hearing, the State had relied on his information that Officer S----- was the first to strike him inside the cell. Then he was called upon to testify, and he turned his whole statement upside-down. He said that Grievant came into the cell and hit him while Officer S----- was elsewhere.

Unlike the inmate, Grievant was consistent. He denied every allegation (except for his admission that he showed the inmate the pod file). He denied that an assault occurred and said that if there was an incident, he was not even in the vicinity of the inmate's cell when it took place.

The Union reminds the Arbitrator that it did not have the initial evidentiary responsibility. It was the State's contractual obligation to prove that Grievant committed the charged violations, not the Union's to establish his innocence. The State's evidence, according to the Union, was dramatically short of the mark. It was internally contradictory and, as it turned out, the charges against Grievant were grounded on opinions and speculations with no demonstrable support. In its closing statement, the Union Representative commented:

> Based on these instances, we believe that the evidence against the Grievant is very flimsy and circumstantial. No one can place [Grievant] in [the inmate's] cell. No one observed [Grievant] strike [the inmate], even [the inmate] is not sure. No one testified that [Grievant] at any time coerced the inmate into writing any statements. At no time did anyone testify as to how the grievant failed to cooperate with the official investigation. At no time was any evidence introduced to show that the Grievant removed any official document from state property. No evidence was produced to show that the Grievant did not have permission from a supervisor to enter the DC Unit, as is policy.
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> . . .
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> It is the position of the Union that the State has not met its burden of proof on any of the charges levied against the Grievant and that the grievance should be upheld and

the Grievant restored to his former position with all back pay, benefits and seniority.

OPINION

The inmate's testimony was worthless. It was a labyrinth of convolutions and tortured contradictions. Some of the inconsistent statements may well have been coerced, but that does not explain the remarkable difference between his testimony at the hearing and his first version of the beating. In his first story, he identified Officer S----- as the main perpetrator. The letter containing that allegation was quoted earlier in this decision. His testimony was almost a verbatim recitation of the letter, except that it substituted Grievant for Officer S-----. Undoubtedly, the inmate can be excused for his confusion. His mind is sick and he is on a daily diet of psychotropic medications. Moreover, his reputation is that of a consummate liar. His staunchest supporter was a Nurse who testified that she believed him and knew Grievant was sadistic in his dealings with prisoners. But even she had to admit that the inmate was not creditable. She testified, "You can't believe a thing [he] says; he is a thirteen-year-old mentality (sic) patient in an adult body."

In discarding the inmate's testimony, the Arbitrator exercised discretion common to arbitrators, judges, and juries. While testimony given under oath may be entitled to a presumption of accuracy, it does not have to be believed. Triers of fact are free to believe all, some, or none of what they hear. They are expected to weigh

testimony with intelligence and experience. They are not compelled to uncritically and naively accept everything witnesses tell them.

The Arbitrator weighed Grievant's testimony as well, and found it about as reliable as the inmate's. He is convinced that the Employee stonewalled from the witness chair, fabricating unyielding denials to protect himself and/or others. It is unqualifiedly apparent that the inmate was beaten. The beating was administered after he was stripsearched and before Grievant and Officer S----- left his cell. He could have caused some of his own injuries; he had a history of self abuse. But it is not reasonable to assume that he put a large contusion/abrasion on his own lower back, especially while in a segregated cell under suicide watch. It is more probable than not that Grievant and/or Officer S----- caused that injury. Under these circumstances, Grievant's denials that the beating occurred or that he knew anything about it are rejected the same as the inmate's assertions are rejected.

What evidence is left as the basis for a decision? Only Grievant's admission that he opened a file to the inmate, the statement of the Officer who saw Grievant immediately outside the cell when the battery was taking place, and what the Union disparages as "circumstantial evidence." Contrary to a common supposition circumstantial evidence is not necessarily bad, weak, or unacceptable. It consists of circumstances to which reason must be applied to reach a conclusion. It is strong when it leads to only one rational conclusion -- less valuable when it yields to contradictory conclusions all of which are reasonable. Strong circumstantial evidence

can support a criminal conviction; it can also support a discharge under the just-cause principle.

Having considered the evidence, both circumstantial and direct, the Arbitrator has arrived at findings of probabilities. He has not determined "truths" because, whenever testimony of one party contradicts that of another, an arbitrator (lacking providential insight) can never know truth with absolute certainty. More often than not, disputes of this kind are decided on the basis of logical probabilities. The contractually imposed "burden of proof" requires nothing more.

The findings are:

1. The inmate was abused, and Grievant may well have been a knowing participant. In fact, the Arbitrator suspects he was. But personal suspicions of an arbitrator do not rise to the level of requisite proof. The circumstances under which the misconduct occurred are equally consistent with the State's and the Union's theories. They support finding that Grievant did not enter the cell and strike the prisoner, and had no foreknowledge that abuse was going to occur. They also support finding that he committed the abuse either directly or as an aider and abetter. The Employer did not meet its burden on this question. Accordingly, the allegations of prisoner abuse will be dismissed.

2. Grievant was outside the inmate's cell when the abuse took place. He had to know what was going on, yet he did nothing to intervene or protect the inmate. His indifference was severe because it sanctioned a violation of both Department regulations and Ohio law. The regulations and law also require persons aware of abuse (or any use of force) to file incident reports immediately. Grievant deliberately violated his responsibilities in this regard.

Had he done otherwise and complied with his obligations, he would have had to abandon his main defense that nothing happened.

3. Grievant did interfere with an official investigation by lying to the investigation team, refusing to disclose what he knew of the October 3 inmate beating. It is uncertain whether he assumed that stance on his own or as a participant in a "conspiracy of silence." In either event, he violated known rules and reasonable standards of conduct.

4. Grievant gave a prisoner access to his pod file. This was a shocking violation of his office and trust. The Union's excuse that pod files are not as sensitive as institutional files does little to alleviate the severity of the misconduct.

Because the primary reason for Grievant's removal was the charge of prisoner abuse -- a charge which the Employer did not prove to a sufficient probability -- Grievant will be reinstated. It is not at all certain that the same result would have transpired if the charges which were proven had been the substance of the removal action. The misconduct was extremely severe; Grievant was a short-term employee with only two and one-half years' service to the Department; his posture revealed no remorse, correction, or even correctability.

The Union suggests that the most discipline Grievant should have received was a thirty-day suspension; that anything more would constitute disparate treatment. It notes that another Officer, the one whose statement placed Grievant at the scene of the beating, was

suspended thirty days for similar misconduct. In its closing argument, the Union referred to disparate treatment:

> . . . the Union argues that the grievant is a victim of disparate treatment in as much as Officer R----- was charged with the same rule violations as the grievant, with the exception of the abuse charge, and that the two were similarly situated with respect to seniority and prior disciplines, yet R----- only received a 30 day suspension while the grievant was terminated.

In the Arbitrator's judgment, the Union Advocate's argument oversimplifies the issue. It is accurate to state that disparate treatment is prohibited by just cause. It is also true that claims of disparate treatment are measured, in part, by the factors the Union mentions -- similarity of offenses, seniority, and disciplinary records. But those are not all the factors. The most important question to be answered in any discipline case involving just cause is this: What amount of discipline is likely to correct the employee's behavior and restore him to an acceptable level of performance? It is in this respect that significant differences between Grievant and the other employee become evident. The other employee ultimately cooperated in the investigation and thereby demonstrated a measure of rehabilitation. Grievant, on the other hand, continues to this day to exhibit his lack of contrition by his refusal to cooperate with Supervision, and his stubborn insistence that nothing happened.

Given these circumstances, the Arbitrator must award Grievant employment restoration with full seniority. He finds no compelling

reason, however, to award him back pay or lost benefits. The offenses he committed were sufficiently severe to withhold those remedies even though the result will be a suspension of nearly a year.

AWARD

The grievance is sustained to the extent that Grievant shall be restored to his employment with full seniority. In all other respects, it is denied. The Employer shall not be liable to Grievant for back wages or lost benefits resulting from his removal.

Decision Issued at Lorain County, Ohio, November 1, 1990.

Jonathan Dworkin, Arbitrator