ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 538

OCB GRIEVANCE NUMBER: 27-20-881118-0334-01-06

GRIEVANT NAME: NISWANDER, JERRY

UNION: OCSEA, AFSCME

DEPARTMENT: REHABILITATION & CORRECTIONS

ARBITRATOR: RIVERA, RHONDA

MANAGEMENT ADVOCATE: HALL, RICHARD

2ND CHAIR: JOHNSON, WILLIAM T.

UNION ADVOCATE: MAYER, PATRICK

ARBITRATION DATE: DECEMBER 5, 1990

DECISION DATE: JANUARY 7, 1991

DECISION: GRANTED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR ALLEGED AIDING INMATE ESCAPE

HOLDING: GRIEVANT WAS CHARGED WITH A FELONY AND DISCHARGED BEFORE HIS TRIAL. HE WAS ACQUITTED IN A COURT OF LAW. HIS DISCHARGE WAS FOUND TO BE WITHOUT JUST CAUSE. GRIEVANT IS TO BE IMMEDIATELY REINSTATED, PAID FULL BACK PAY, BENEFITS, ETC. TO BE MADE WHOLE.

ARB COST: $675.00

In the Matter of the
Arbitration Between

#538

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

Department of Rehabilitation and Correction

Employer.

Grievance 27-20
(88-11-18)-0331-01-06

Grievant (J. Niswander)

Hearing Date: December 5, 1990

Award Date: January 7, 1991

Arbitrator: Rivera

For the Employer: Richard Hall

For the Union: Patrick A. Mayer

Present at the hearing in addition to the Grievant and the Advocates named above were the following persons: Jerry Knight, OSHP Trooper (witness), Jerry Wente, Deputy Warden (witness), John Morrison, Major (witness), Joe Henderson, Maintenance Chief (witness), Phil Osborne, OSHP Sergeant (witness), Charles Propt, Parolee (witness), and Mike Duco, OCR Representative.

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer

granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

#1 Contract 1986-1989
#2 Grievance Trail
#3 Photos of Scene
#4 Discipline Trail
#5 Map(s) of Scene
#6 Past discipline history
#7 Grievant's acknowledgement of Receipt of ODRC Standards of Conduct

Employer Exhibits

#1 Opening statement
#2 Investigation Report of Escape
#3 Statement of Inmate J.B.
#4 Escape plans
#5 Statement of Inmate C.P.
#6 Standards of Conduct 9/1/86
#7 Revised Standards of Conduct 10/23/87
#8 Polygraph exam of Inmate J.B. (no objection raised by Union)

Union Exhibits

#1 Testimony of Terry Knight (for impeachment purposes)
#2 Elkouri on "The Lie Detector"
#3 70LA147 U.S. Steel and USWA

Joint Stipulations

None.

Issue

Was the Grievant discharged for just cause? If not, what shall the remedy be?

Contract Sections

§ 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.

§ 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 evaluation 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.

§ 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

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 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.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

§ 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employer and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

§ 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months. Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months. This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

Facts

On March 25, 1987, two inmates, J.B. and C.P., at Ohio State Reformatory (OSR), attempted to escape. OSR is a maximum security prison. The two prisoners were found to be missing at the 4 p.m. "formal-count." They had been present at the immediately prior "formal" count at 6:00 a.m. that morning. The inmates were found late that evening in a section of the basement of the Administration building. The only way to enter that portion of the Administration building basement is through a hole in the floor of the "heat exchanger" room which is only accessed through a panel found at the back of the "old engine room." Upon their capture, according to Deputy Warden Wente, the inmates were strip-searched, showered, photographed, redressed, and taken to the Clinic for a medical examination. Warden Wente said these procedures were standard.

Trooper Knight assumed direction of the investigation of the escape on March 27, 1987. On that day, inmate RWC told Trooper Knight in the company of Captain Morrison that an inmate friend N had told him (RWC) the following story:

1) Grievant showed the escapees blueprints of the tunnels and the best way to get out of OSR.

2) Inmate J.B. had smuggled $300 into OSR and paid off Grievant.

3) A drug dealer from Cleveland had come to Mansfield and paid Grievant a "big sum of money." In return, Grievant was to hide the inmates after their escape.

4) On 3/24/87, Grievant had used him (N) as a lookout for J.B., RWC, and inmate Red W. who were in the old engine room loosening a grate for the escape.

On March 30, 1987, inmate RWC recanted the whole story.

Deputy Warden Wente gave Trooper Knight a written statement made by inmate K.B. who said that inmate RWC told him where the escapees were hiding.

On March 30, 1987 at 11:45 a.m., Trooper Knight, with Deputy Warden Wente, interviewed inmate J.B. J.B. had been in the clinic since the night of the escape March 25. The inmate reported to them that "he had fallen from his bunk and struck his head" which was then causing him dizziness and nausea. At that meeting, inmate J.B. told Knight and Wente that inmate C.P. -- the other escapee -- told him (J.B.) that "someone" had told him (C.P.) about a way out of the institution, i.e., the vent in the old engine room. J.B.'s dizziness kept him from giving further details.

On March 27, 1987, inmate N was interviewed, and N said he had no knowledge of the details of the escape.

On April 24, 1987, inmate J.B. was interviewed a second time by Trooper Knight. At this interview, J.B. told Knight that he would reveal all the names of those involved, included an employee, on two (2) conditions: (1) that he be moved, because at OSR, he would be seen as a "snitch" and (2) that the parole board be told of his cooperation. On April 28, 1987, inmate C.P. was interviewed by Knight, and he said "if there was anyone else involved in helping them he knew nothing about it." C.P. claimed J.B. made all of the arrangements. On April 29, 1987, both C.P. and J.B. were interviewed together. In front of J.B., C.P. said

again that he did not know anything about third party involvement. In his written report dated 4/30/87, Trooper Knight made the following comment "He (C.P.) had obviously said that (no one else was involved) to let J.B. know that he was not going to tell what he knew about (Grievant)." On May 1, 1987, J.B. was again interviewed. On May 1st, J.B. said "he was down in the old engine room at OSR with his boss (the Grievant) one day, and the Grievant told him that if he ever wanted to escape that "this" was the way out and pointed to a door in the bottom of the ventilation duct. A few days later, B.P. asked Grievant if he would like to make $50,000, and he told Grievant all he (the Grievant) had to do was let him look around in the old engine room some more and then unlock a few doors for him when he got ready to escape. According to J.B., Grievant agreed to do it. On the day of the escape, according to J.B., he and C.P. were in the Southeast part of the compound yard when Grievant came by with a work crew of inmates and went into the satellite plumbing area. B.P. stopped Grievant and informed him that they were going to escape that day. B.P. motioned C.P. to follow him, and they followed Grievant who let them into the satellite plumbing area and who then proceeded to unlock two more doors and let them into the old engine room. In that location, B.P. told Grievant "later on", and Grievant left. B.P. said C.P. had money waiting on the outside from his (C.P.'s) last drug store robbery to pay the Grievant.

On the same day when B.P. specifically implicated Grievant, Grievant was called to Deputy Wente's office. He said he had heard someone was trying to involve him, and "he didn't want anything to do with it." He said he had no more to say and left. B.P. was polygraphed by the Highway Patrol and found by that means "to be truthful."

On May 7, 1987, the prosecutor told Trooper Knight that B.P.'s testimony alone was insufficient to convict Grievant and that he (Knight) should contact C.P. and see if he would be cooperative if the charges "were negotiated" in exchange. May 8, 1987, C.P. refused to deal. On November 3, 1987 C.P. was indicted for escape.

On August 2, 1988, Trooper Knight was told that C.P. was now willing to cooperate. According to Knight's testimony at the arbitration hearing, C.P. had been granted parole on his original charge but "had a detainer" on him for the escape indictment. On August 3, 1988, C.P. told Trooper Knight that J.B. had told him (C.P.) that he had offered Grievant $50,000 to help them escape. C.P. said that on the day of the escape Grievant had unlocked three doors so they could get into the basement and then Grievant left. C.P. was polygraphed and according to that test was found "to be truthful."

On August 4, 1988, the indictment against C.P. was dismissed. (The material found in these facts are taken from the testimony of Trooper Knight and Employer's Exhibit 2 from which Trooper Knight refreshed his memory.)

On November 10, 1988, Grievant was indicted.

In addition to describing the events found in his investigative report (Employer's Exhibit #2), former Trooper Knight was cross-examined as to what formed his investigation in addition to his interviews of various inmates.

He said that he did not do the following things:

a) investigate the two other possible methods to enter the old engine room,

b) investigate and interview Grievant's work crew of March 25, 1987,

c) investigate and seek to trace the location of inmate C.P. from the 6:00 a.m. count until his attempted escape,

d) ascertain if the Grievant had picked up his normal keys on March 25, 1987 (which contained an "0" master),

e) ascertain if the Grievant had an Adams Folger key on March 25, 1990 (necessary to open one of the three doors if it had been properly locked),

f) investigate whether the bank accounts or assets of the Grievant contained unaccounted for sums (Trooper Knight said the prosecutor said this item was unnecessary),

g) investigate whether outside contractors were at work in the old engine room on March 25, 1987,

h) interview inmate R.W. who J.B. alleged was with himself and C.P. when Grievant was allegedly showing them escape routes,

i) investigate Grievant's access to blueprints (Trooper Knight said this investigation was unnecessary because RWC said he was lying),

j) investigate which civilians "on the outside" were involved (Trooper Knight said he could not do this because no names were provided.),

k) investigate C.P.'s or J.B.'s family re: being the "outsiders,"

l) ascertain how many "0" master keys existed and who had access to them on March 27, 1987,

m) ascertain how many Adams Folger keys existed and who have access to them on March 27, 1987,

n) ascertain the background of C.P. and J.B. to see if they had skills to pick or manipulate locks (Trooper Knight said this information was unnecessary since these locks were not the type that could be easily picked.).

The Trooper said he did investigate the alleged $50,000 from either J.B.'s or C.P.'s previous crimes and found that it did not exist.

The Trooper was asked "Did you not think it was odd that the Grievant would trust inmates to pay $50,000 after the fact?" The Trooper replied: "he's done some other odd things." The Arbitrator asked the Trooper to clarify that remark. The Trooper said that "as he understood it, the Grievant had brought a radio in to the institution for an inmate sometime prior to the escape."

Deputy Warden testified at the arbitration hearing and said that between the 6:00 a.m. formal count and the 4:00 p.m. count, no way existed to absolutely locate every inmate. During the period from 6:00 a.m. to 4:00 p.m., two informal counts are held after breakfast and after lunch. While inmates are working, their supervisors are to watch them, control their tools, periodically count them if the group is large and constantly supervise them. He also testified that he "could never trust the Grievant again." Deputy Wente said that Rule 17A found in the Standards of Employee Conduct (Employer's Exhibit 6) was the same

as Rule 7 in the Revised Standards (Employer's Exhibit 7). Under old standards, the penalty was 10 pts which constituted removal, and under Revised standards, the penalty was Removal. He said that after 3/27/87 when inmate RWC implicated the Grievant (RWC recanted 2 days later) that "we watched the Grievant" until he was dismissed in December, 1988. Wente could not recall whether any outside contractors were in the prison on the escape day.

Captain Morrison, OSR Chief Security Officer responsible for all security, testified. He said all the doors through all 3 possible entrances had Best padlocks opened by "0" masters. He said Best padlocks cannot be picked because they have 6 or 7 tumblers. He said that one of the doors unlocked, supposedly by the Grievant, required an Adams Folger key. He said that the proper practice was to always secure all doors behind one even when working in an area. On cross examination, he said he believed the Grievant was guilty because he had the opportunity, had a motive, namely "the money," and had been involved in previous incidents which involved "favoring inmates."

Joe Henderson, Grievant's Supervisor, testified that on the day in question, around 9 a.m., he saw the Grievant and J.B. descending the stairs to the basement, and J.B. waved at him. He said that their appearance was normal. He did not see anyone with them.

Sergeant Osborne of the Highway Patrol testified that he, an experienced and trained polygrapher, polygraphed both J.B. and

C.P. and concluded that with regard to the escape and Grievant's role, they were truthful.

Ex-inmate C.P. testified. He indicated that he was still on parole. He reiterated his statement that the Grievant had helped him to escape. On cross-examination, he said inmate J.B. had told him (C.P.) that he (J.B.) had offered the Grievant $50,000 to escape. He maintained that he had never known or conversed with Grievant before the Grievant aided them. He testified that the police beat up J.B. when he was captured.

The Grievant testified that on 3/25/87 he came in at 7:00 a.m., drew his keys which included an "0" master but no Adams Folger key. He said on the day in question he, 3 inmates, and J.B. went down in the basement first thing and stayed until 9:30 a.m.. They all left and that he (Grievant) secured all the doors behind them. He said Belleville Electric was down in the basement area working that same day after noon. At 9:30 a.m., Grievant said he took J.B. back to Plumbing and Electric Shop and left J.B. with other inmates under the supervision of Quay Thomas. He then took two more experienced inmate electricians to the kitchens to work on an electrical problem there.

He said that in August 29, 1984, he was accused and disciplined for bringing in a package for an inmate but that he really did not do it. He said he believed that J.B. named him because J.B. was beaten to implicate someone and was not indicted when he named someone.

Trooper Knight was recalled and asked if it were possible that J.B. named the Grievant only after being beaten. The Trooper said, no that was not possible. He said that J.B. had some bruises when he was interviewed but that the inmate said he had fallen out of bed. On recall, Deputy Wente said that on the day after the escape J.B. had a cut on his cheek where he hit himself being pulled from the hole in the floor. Deputy Wente could not recall why J.B. was in the Clinic on the 26th and 27th of March. From March 25, 1987 until December 10, 1988, the Grievant worked at the institution. On November 10, 1988, Grievant was notified that he was to have a pre-disciplinary conference on November 17, 1988 for Violation of Rule #7. The support stated for the violation was that "on 11/8/88 you were indicted for the commission of a felony." (Joint Exhibit 4) On 11/17/88, a pre-disciplinary conference was held. The evidence consisted of inmate statements and the testimony of Trooper Knight that "in his professional judgment as an experienced police investigator that the Grievant had committed the felony for which he was charged and indicted." The Grievant stood mute on the advice of counsel.

Hearing Officer Hall concluded that just cause existed to discipline the Grievant "given that there is eyewitness testimony . . . and a clear path of supporting circumstantial evidence, **coupled with the fact that neither the Grievant nor his representative ever denied the charge. . . .**"

On 11/17/88, Superintendent Dahlberg recommended to Director Wilson that the Grievant be removed based on "the nature of the current offense and the total prior work and discipline record of this employee."

On November 17, 1988, the Grievant was removed effective December 10, 1988. The reason was stated as follows:

> There exists substantial evidence that on March 25, 1987 you aided two inmates in an escape attempt from this institution. At the conclusion of the criminal investigation you were indicted for a 4th degree felony on or about November 8, 1988. Your behavior in this matter constitutes a violation of Rule 7 of the Standards of Employee Conduct. In addition it is noted that on February 23, 1987 you received a 1 day suspension for using abusive language to your supervisor; August 19, 1987 a written reprimand for failure to submit a physician's slip; February 23, 1988 a 3 day suspension for preferential treatment of an inmate; June 29, 1988 a written reprimand for carelessness in work and on August 8, 1988 a 5 day suspension for abusive language to a supervisor.

At the time of his dismissal, the Grievant had been employed by the system since 9/24/79. Evidence introduced at Arbitration showed that at the time of the alleged violation of Rule 7, 3/25/87, the Grievant had only one discipline properly in his file: a 1 day suspension for abusive language to his supervisor. All the other discipline listed in the dismissal occurred after the alleged Rule #7 violation. (Joint Exhibit 6)

A Step 3 was held on 7/10/90. The report of that Step 3 was dated 10/19/90. In that response, the facts alleged "prior" discipline of 1 day, 3 days, 5 days, and 2 written reprimands, and the Hearing Officer specifically wrote "that the Grievant had a previous three day suspension for giving preferential treatment

to an inmate." In addition, when the Grievant protested his inability to cross examine the inmates whose written testimony formed the basis of the case against him, the Hearing Officer said that "the agencies . . . reserve that (cross-examination) to the arbitration which constitutes the full de novo hearing." (Joint Exhibit 2)

Discussion

A basic requisite of just cause is a fair investigation conducted by the employer prior to the imposition of the discipline. The Arbitrator concludes that in this case no investigation (as such) took place and that the so-called investigation was conducted unfairly. The Arbitrator recognizes that the employer turned the actual investigation over to a police officer, a reasonable action in a prison escape situation. However, such delegation does not relieve the Employer of a duty to review that investigation for accuracy and fairness.

The Arbitrator concludes that on the statements of an inmate an admitted liar, RWC -- who the trooper stated lied -- the Grievant was implicated. After that moment in time, the evidence does not reveal an investigation to determine how the escape occurred but rather a methodical course of action to prove the Grievant guilty by the use of inmate testimony. Trooper Knight was relentless in his goal to secure information from inmates J.B. and C.P. Had he been as relentless from 3/27/87 to investigate the crime scene, other persons, and other scenarios,

he might have developed solid objective evidence of the actual culprit. The list of things Trooper Knight did not do which was elicited by the Union Advocate should embarrass him and should have been reviewed by the Employer. Moreover, the actions were colored by bias. Somehow Trooper Knight learned of an incident in 1984, 3 years before the escape, an incident no longer relevant in discipline, which apparently helped the Trooper, Deputy Wente, and Captain Morrison all conclude the Grievant's guilt long before any genuine evidence existed. Note that on April 30th, before J.B. had implicated the Grievant, Trooper Knight in his own report had already focused on Grievant as the guilty party. Moreover, at the Pre-Discipline hearing, the hearing officer weighed against the Grievant, his silence. The Grievant was charged with a crime; he had a constitutional right to silence; he exercised it wisely. Moreover, under the contract, the Employer has the burden of proving just cause. (Article 24.01) The Grievant need not prove their case for them. Again at Step Three, the official recited discipline which was not extant at the time of the alleged offense and also cited the 1984 incident which was not properly before him. (Article 24.06) Last, but hardly least in the removal notice, the discipline, most of which occurred after the event, was improperly added as a makeweight.

What was the essential evidence before the Employer at all stages: highly suspect inmate testimony. As this Arbitrator has said in other decisions, inmates are not inherently untruthful

and may be relied upon in circumstances where their testimony is credible. However, this Arbitrator finds little credible in the words of J.B. and C.P. At no time were their stories ever consistent. Take one aspect: the money. They differed consistently on who was to get it, where it was from, etc. The Arbitrator found it incredible that the Grievant, a reputable artisan in the community, a 27 year employee of a local business, a 10 year employee of the institution, would risk prison and his reputation for a future promise of any amount of money. Moreover, merely because in 1984 he brought something improper to a prisoner, does not lead to the conclusion that he would intentionally abet an escape. Many prison employees, moved by compassion, foolishly help prisoners at some time in their career. The smart ones learn that such compassion in the prison context is dangerous. Even a dumb employee knows the difference between helping a prisoner and aiding an escape.

Both J.B. and C.P. had excellent self-serving reasons to come up with the name of someone. In both cases, their "cooperation" paid off. J.B. received no extra time for his escape; C.P. was allowed to be paroled with his indictment for escape dismissed. Neither of these men produced consistent stories about the Grievant. A strong inference exists that J.B. brought forth his story after Knight's investigation had focused on the Grievant and perhaps after physical pressure. (No satisfactory explanation of J.B.'s clinic stay was given.) C.P. only came up with Grievant 17 months after the escape when he had

a parole which would have been vitiated by an escape conviction. How can these men be the credible source of the discipline in this case? No just cause existed to discipline the Grievant under Rule 7 (17A).

Since the Arbitrator has in essence upheld the Grievance, the discussion that follows is technically dicta. This Arbitrator concludes that two other issues must be raised which are interrelated: the charge "commission of a felony" and the timing of dismissal.

Commission of a felony involves a term of art: felony. Felony is a well-recognized criminal law term. A felony is a crime defined by state statute. If an employer has a proper rule that an employee will be dismissed if he had committed a felony -- the presumption is that he or she has been found "guilty" of a felony. In this case, the Grievant was dismissed before a felony was found. At the pre-disciplinary hearing, Trooper Knight testified that he believed that the Grievant was guilty of the commission of a felony. Trooper Knight has no standing to determine the actual guilt; he was not a jury or a judge. If the Employer wishes to use "commission of a felony" as a work standard for discipline and has substantial evidence that an employee did those acts which, if found to be true, would lead a jury to convict him or her of a felony, the better part of wisdom would suggest administrative leave as a temporary procedure. The Employer could have "aiding escape" as a disciplinary cause among its work rules and then discipline for that offense (assuming

just cause) without having to prove a "felony"! With regard to the interaction of employee conduct and criminal conduct, this Arbitrator believes more thoughtful and legally consistent rules may prove efficacious to legitimate employer needs and concerns.

Lastly, in its opening and closing arguments and in the testimony of the Deputy Warden, Employer advanced the proposition that the Grievant could never be trusted again in the prison system. Perhaps with over zealous advocacy, the Employer's advocate maintained that the Grievant, if returned to work, "would be treated like an inmate."

The Grievant is to be returned to work. His discharge has been found to be without just cause (not to mention he is also innocent in the eyes of the law). **He is to be treated as every other OSR employee.** He is not to be harassed which would include "overzealous supervision." Overzealous supervision could result in disparate treatment with regard to discipline. The Employer is to employ the Grievant as any other productive 10 year employee.

Award

Grievance is granted. Grievant is to be immediately reinstated, paid full back pay, benefits, etc. to be made whole.

January 7, 1991
Date

Rhonda R. Rivera
Arbitrator