ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 709

OCB GRIEVANCE NUMBER: 27-21-910605-0561-06-10

GRIEVANT NAME: MOOS, ALLEN

UNION: SCOPE/OEA

DEPARTMENT: REHABILITATION & CORRECTION

ARBITRATOR: RIVERA, RHONDA

MANAGEMENT ADVOCATE: SAMPSON, RODNEY

2ND CHAIR: PRICE, MERIL

UNION ADVOCATE: STEVENS, HENRY

ARBITRATION DATE: OCTOBER 24 AND NOVEMBER 8, 1991

DECISION DATE: DECEMBER 19, 1991

DECISION: MODIFIED

CONTRACT SECTIONS AND/OR ISSUES: THREE DAY SUSPENSION FOR BEING AWOL, DISOBEDIENCE OF A DIRECT ORDER AND MAKING ABUSIVE REMARKS TOWARDS ANOTHER EMPLOYEE. UNION ALSO MADE PROCEDURAL OBJECTIONS BECAUSE NO WITNESSES WERE IN ATTENDANCE AT THE PRE-D OR THE STEP 3 HEARINGS.

HOLDING: AS TO THE PROCEDURAL OBJECTIONS, THE ARBITRATOR CONFIRMS THAT NO WITNESSES ARE NECESSARY AT EITHER THE PRE-D OR THE STEP 3 AS MANDATED BY THE CONTRACT. ON THE MERITS, "THE ARBITRATOR HAS NO DOUBT BASED ON THE GRIEVANT'S OWN TESTIMONY THAT THE GRIEVANT CAREFULLY AND DELIBERATELY CALCULATED THE EFFECTS OF HIS WORDS, ACTS, OR NON-ACTS. AT THE HEARING THE GRIEVANT MAINTAINED HIS RIGHT TO REFUSE ORDERS BASED ON HIS SUBJECTIVE JUDGMENT OF THEIR PROPRIETY. BECAUSE OF PREJUDICIAL REMARKS MADE BY THE INVESTIGATING OFFICER, THE THREE DAY IS REDUCED TO A TWO DAY TO CLARIFY FOR THE EMPLOYER THE SERIOUS IMPORTANCE OF A FAIR AND OBJECTIVE INVESTIGATION.

COST: $787.50

In the Matter of the
Arbitration Between

#709

OEA/SCOPE

Union

and

State of Ohio

Employer.

Grievance No. 27-21-(91-06-05)
0561-06-10
Grievant (A. Moos)

Hearing Dates: October 24, 1991
November 8, 1991

Award Date: December 19, 1991

Arbitrator: R. Rivera

For the Employer: Rodney Sampson
Meril Price

For the Union: Henry Stevens

Present at the Hearing in addition to the Grievant and Advocates were Celestina Ogbuehi, School Facilitator (witness), Jim Swyers, Labor Relations Officer (witness), Joe McNeil, Deputy Warden (witness), Larry Green, Deputy Warden (witness), and Susie M. Cooley, OEA/SCOPE OCI Site 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 Exhibit

1. The 1989-1992 Contract.

Employer's Exhibits

1. Discipline and Grievance Trail

   a. Pre-Disciplinary notice dated May 16, 1991
   b. Notice of Suspension dated May 29, 1991
   c. Grievance dated June 4, 1991
   d. Step III Response
   e. Request for Arbitration dated June 18, 1991
   f. Step IV Review dated October 23, 1991

2. Position Description: Guidance Counselor (PDN 5006.0) Orient. Corr. Inst.

3. IOC from C.C. Ogbuehi dated April 9, 1991

4. Request for Leave of Grievant dated April 22, 1991

5. Incident Report by C. Ogbuehi dated April 23, 1991

6. Incident Report by L.L. Green dated April 23, 1991

7. Call-off Slip dated April 25, 1991 at 5:08 a.m.

8. Incident Report by L.L. Green dated April 26, 1991 (attachments are E-3 and E-7)

9. Request for Leave of Grievant dated April 29, 1991

10. Attendance Record (1991) of Grievant

11. IOC from L.L. Green to C.C. Ogbuehi dated May 6, 1991

12. Incident Report by L.L. Green dated May 3, 1991

13. Class Specification Guidance Counselor 1-4

14. IOC entitled "Investigation from J. McNeil to J. Littlefred, Warden dated May 10, 1991

15. Pre-disciplinary Management Witness/Document List
Under "Witness" the following list

5/10/91 - Investigation Report from J. McNeil to Warden
5/6/91 - IOC from C. Ogbuehi to L. Green
4/23/91 - Incident Report/C. Ogbuehi
4/23/91 - Incident Report L. Green to Warden
L. Green note (Action Taken)
4/26/91 - Incident Report/L. Green
4/25/91 - Call-Off slip (Grievant)
4/9/91 - IOC from C. Ogbuehi (to all concerned)
5/3/91 - Incident Report/Larry Green, T.I.E.
4/22/91 - Request for Leave form/Call off Slip of (4/25/91)
4/29/91 - Request for Leave form/Grievant
9/5/90 - Performance Evaluation (rater/Alvin P. Hall)
Position Description (C. Harris/3/20/85)
Position Description (9/2/87/Frank Wright) 2 pages

16. Verification of PDC Notification and Request for On Duty Employees dated January 8, 1991
The following documents are attached to E-17

a. Pre-Disciplinary Hearing dated January 16, 1991

Union Exhibits

1. Procedure 3301-35-02 Effective September 13, 1991

2. Arbitration Opinion by Arbitrator Dworkin of Case No. 35-06-(91-03-04)-0002-06-10 (Grievant W. White)

Issue

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

Relevant Contract Sections

Article 5 - GRIEVANCE PROCEDURE
5.01 - Purpose

The State of Ohio and the Association recognize that in the interest of harmonious relations, a procedure is necessary whereby employees can be assured of prompt, impartial and fair processing of their grievances. Such procedure shall be available to all employees and no reprisals of any kind shall be taken against any employee initiating or participating in the grievance procedure. The grievance procedure shall be the exclusive method of resolving both contractual and disciplinary grievances except where otherwise provided by this Agreement.

The parties intend that every effort shall be made to share all relevant and pertinent records, papers, data and names of witnesses to facilitate the resolution of grievances at the lowest possible level.

5.05 - Grievance Procedure (in part)

C. Step 3 - Employing Agency Director

Should the grievant not be satisfied with the written answer received at Step 2, within ten (10) days after receipt thereof, the grievant or the Association, if requested, may file the grievance with the employing agency. **Upon receipt of the grievance, the Director or designee shall hold a meeting within thirty (30) days to discuss the grievance. The grievant shall receive notification at least two (2) days prior to the meeting. An Association representative may attend the meeting and shall represent the employee if requested.**

The Director or designee shall render a decision in writing and return a copy to the grievant and the Association representative within fifteen (15) days after the conclusion of the meeting.

By mutual agreement, the parties may waive this meeting and the Director or designee shall render a written decision within fifteen (15) days of execution of the waiver.

Article 6 - ARBITRATION
6.04 - Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of provisions of this 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 the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

6.05 - Witnesses and Subpoenas

The arbitrator shall have authority to subpoena witnesses pursuant to Section 2711.06 of the Ohio Revised Code. Upon receiving a request to issue a subpoena(s), the arbitrator shall contact the other party and hear and consider any objections to the issuance of said subpoena(s). If the arbitrator sustains the objection to the issuance of the subpoena, the arbitrator shall inform the parties at least five (5) days prior to the hearing. The arbitrator shall not knowingly subpoena persons to offer repetitive testimony, nor shall he/she subpoena persons who do not have direct knowledge of the incident giving rise to the grievance or whose testimony is not relevant to the grievance.

When the arbitrator determines that so many employees from the same work facility have been subpoenaed that the number of subpoenaed employees would impede the ability of the Employer to carry out its mission or inhibit the Employer's ability to conduct an efficient operation, arrangements shall be made to take the testimony desired in such a manner to alleviate these concerns.

Five (5) days prior to the start of an arbitration hearing, the parties shall deliver the name of all witnesses to each other. Where either party will make an issue of "intent", that party will notify the other party ten (10) days prior to the hearing.

Where the intent of the Agreement is determined to be relevant, no more than one (1) member of either bargaining committee may be called as a witness by a party.

The Employer agrees to compensate at their base rate of pay employees subpoenaed as witnesses by the

Association. The Association shall assume all costs for transportation, meals and lodging for the grievant's witnesses called by the Association.

Article 13 - PROGRESSIVE DISCIPLINE

13.01 - Standard

Employees shall only be disciplined for just cause.

13.02 - Investigatory Meeting

An employee shall, upon request, have an Association representative present during a meeting with representatives of the employing agency held for the purpose of obtaining information which might reasonably lead to disciplinary action against that employee. The employee shall be required to respond to the allegations unless he/she is subject to criminal penalties. The right to representation does not extend to day-to-day communications which occur between an employee and the Employer, such as: performance evaluations, training, job audits, counseling sessions, work-related instructions, or to inform an employee of the disciplinary action.

13.03 - Pre-Suspension or Pre-Termination Conference

When the Employer plans to initiate a suspension, termination or demotion, a written notice of pre-disciplinary conference shall be given to the employee who is the subject of the pending discipline and to the designated Association representative. Written notice shall include a statement of the charges against the employee, contemplated disciplinary action, and the date, time and place of the conference. The conference will be held at a reasonably convenient location determined by the Employer and shall be scheduled no earlier than three (3) days following the notification to the employee.

At work facilities having no designated site representative, employees may request through their supervisor that a fellow employee accompany him/her to a scheduled pre-disciplinary conference.

The employee may request that a representative designated by the Association be present at the conference. The employee, or his/her representative,

may make a written request to the Employer for continuance of up to forty-eight (48) hours. A continuance beyond forty-eight (48) hours may be arranged by mutual agreement of the parties. Such continuance shall not be reasonably requested or denied.

Prior to the conference, the Employer may take temporary action to reassign the duties of the affected employee or place said employee on administrative leave until final disposition by the Employer. Such action may not be unreasonable in duration or result in loss of pay for the employee involved and shall not constitute discipline under this Article.

The pre-disciplinary conference will be conducted by a designee of the Appointing Authority who was not directly associated with the incident(s) which led to contemplated disciplinary action against the employee. At the conference, the employee will be provided with documents used to support the possible disciplinary action which are known of at that time and an opportunity to present the employee's side of the story. The employee may, but is not required to, respond to the allegations.

The Appointing Authority shall render a written decision within twenty (20) work days of the conclusion of the conference and transmit the written notification to the employee and the designated Association representative. "Work days" refers to Monday through Friday excluding legal holidays. Times shall be computed by excluding the first and including the last day.

The employee may waive this conference by written notification. Absent extenuating circumstances, failure of the affected employee to appear at the conference will result in a waiver of that employee's right to a conference.

13.04 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall include:

1. Verbal reprimand (with appropriate notation in the employee's official personnel file);
2. Written reprimand;
3. Suspension without pay;

4. Demotion or discharge.

Disciplinary action shall be commensurate with the offense.

Procedural History

On May 16, 1991, the Grievant was notified of a pre-disciplinary conference to be held May 23, 1991 by Hearing Officer James Swyers, Labor Relations Officer. That notice alleged the violation of the following Standards of Employee Conduct Rule(s):

> S.E.C. rule #3a: Being absent without proper authorization (AWOL). 1st: OR/WR thru 5th: R. #7: Insubordination. 1st: disobedience of a direct order of a supervisor. 1st: 1-3 thru 3rd: R. #9: Failure to carry out a work assignment. 1st: WR/R thru 4th: R. rule #13: Making abusive statements towards another employee. 1st: WR/R thru 4th: R.
>
> 3a: On April 22, 1991 you were denied leave for April 25, 1991, and called in sick.
>
> #7: On April 9, 1991 you received written communication that you were to test inmates starting 4/25/91. You did not test (that date) and continue the past conduct of refusing to test orientation inmates.
>
> #9: You were ordered to test inmates, which is a part of your job description, on 4/25/91
>
> #13: On 4/23/91 you were hostile towards Ms. Ogbuehi and Mr. Green

(See Employer's Exhibit E-1)

At that conference, a packet of documents were presented to the Employee and his representative, Ms. Cooley. The list of those documents is found on the front page of Employer's Exhibit 15. Among those documents was an IOC dated May 10, 1991 entitled

"Investigation - "Grievant's name" from J. McNeil - Deputy Warden/Programs to John F. Littlefield - Warden. In that IOC, McNeil stated that he had conducted an investigatory conference with the Grievant and his union representative, Sue Cooley, on May 7, 1991. In his IOC, McNeil referred to the IOC from Ms. Ogbuehi and dated it April 19, 1991. In the packet was a copy of that IOC dated April 9, 1991.

On May 29, 1991, the Grievant was suspended for three (3) days by the warden. The reason for the discipline was stated as follows:

> Rule 7: Insubordination - Disobedience of a direct order of a Supervisor.
>
> Rule 9: Failure to carry out a work assignment.
>
> On April 19, 1991 you were issued a directive by your supervisor Ms. Ogbuehi that testing and orientation would begin April 25, 1991. On April 22 you submitted a request for vacation for April 25, 1991; this was denied due to the testing on April 25, 1991. On April 25 you called off sick.

Employer's Exhibit 1

On June 4, 1991, the suspension was grieved (Employer's Exhibit 1). A Step 3 response was made by Idris Abdurragib, Hearing Officer but is undated. In that document, the IOC from Ms. Ogbuehi was referred to 7 times as dated April 9, 1991. The Step 3 response stated that the Grievant had no prior discipline since August 31, 1987, his hire date at Orient Correctional Institution (Employer's Exhibit 1). On June 18, 1991, OEA appealed the Grievance to the Director of OCB.

On October 23, 1991, a Step 4 Grievance Review was done by Michael Duco. In that Grievance Review, the April 9, 1991 IOC was referred to three (3) times by the April 9th date (Employer's Exhibit 1). On July 2, 1991, OEA requested Arbitration (Employer's Exhibit 1). The Arbitration Hearing was held in two parts. Day one was October 24, 1991. The hearing was adjourned to November 8, 1991 to allow the Employer to bring L.L. Green to testify and to accommodate Mr. Steven's schedule on the afternoon of the 24th.

Procedural Objections

The Union objected to two (2) Employer exhibits: E-15 and E-17. The Union indicated that documents were included in E-15 at the Arbitration Hearing that were not included in the packet at the Pre-Disciplinary Conference. This objection was sustained by the Arbitrator, and only the documents listed on the fact of E-15 were retained. The Union objected to Employer's Exhibit E-17 which included a prior investigative report by J. McNeil on the same Grievant. The Union objected because no discipline resulted and, therefore, the document was prejudicial. The Arbitrator took this objection under advisement but concludes herein that the objection is well taken. The position taken by management is that no prior discipline existed. (See Step 3 response Employer's Exhibit 1). Therefore, Employer's Exhibit 17 is struck from the record.

The Employer objected to Union Exhibit 1 (a procedure implemented effective September 13, 1991) on the grounds of relevancy, given the procedure's effective date, i.e., 4 months after the incident at hand. The Arbitrator finds this objection well-taken and strikes Union Exhibit 1 from the record.

Lastly, the Union objected to the whole proceeding based on lack of proper notice to the Grievant because the suspended ordered referred to the direct order (IOC) date as April 19th and not April 9th. Mr. McNeil testified that April 19th versus April 9th was a typo in his report which was apparently picked up and repeated in the Suspension order. The Arbitrator finds that no due process notice requirement was violated by this error. At the pre-disciplinary conference, the packet contained the IOC in question, clearly dated April 9, 1991 and every other official document after the suspension order contained the correct date, April 9, 1991 repetitively. The Grievant was clearly on notice, and the typo created no prejudice.

Facts

The Grievant is a Guidance Counselor. He has been a DR&C employe since September 29, 1979 and has been stationed at Orient since August 31, 1987. His PCN is 5006.0. In his position description 25% of his job duties are described as follows:

> **Conducts on-going testing, i.e. schedules tests.** Provides equipment and/or readers for handicapped & dyslexic or foreign-speaking inmates. **Monitors scores and interprets test results.** Responsible for the development, update and maintenance of all school transcripts, records, tests, and files. Prepares

summary reports, monthly, and/or reports of a special nature.

(See Employer's Exhibit 2) His Classification Specification is Class No. 69761-69764 Guidance Counselor 1-4. Job Duties are listed in order of importance. The first rank of duties for that specification is as follows:

> **Selects, administers, scores & interprets educational & vocational assessment tests (e.g., California Locator Test California Achievement Test, Woodcock, Keymaths, General Aptitude Test Battery)** & determines appropriate placement of inmates or residents in educational programs &/or identifies realistic career options.

(Employer's Exhibit 13)

The Grievant had no discipline at the time of the incident. His most recent evaluation given September 5, 1990 by Alvin P. Hall listed him "below" expectations in all categories (Employer's Exhibit 15). Deputy Warden for Training, L.L. Green testified. He said he was the direct supervisor of Ms. Ogbuehi who was Facilitator (Principal) of the Institution's School (Kirk School). The Grievant was supervised by Facilitator Ogbuehi. Warden Green said that the Grievant had made his objection known to "testing" for a long time. Warden Green said that in 1989 Grievant had a regular testing schedule worked out with then School Facilitator Mr. Bott. When Mr. Bott retired and was replaced by Ms. Ogbuehi, the Grievant, beginning in March 1990, refused to test maintaining that "testing wasn't his job."

Warden Green said that he had checked out the Grievant's contentions with Mr. Hall, the Regional Education Administrator,

and who informed him that all other guidance counselors were testing new inmates and that he, Mr. Hall, indicated that testing new inmates was proper for the Grievant. Warden Green testified that he had personally counseled the Grievant, going over the position description and the class specification with him. Warden Green said that after the counseling with the Grievant, he had directed Ms. Ogbuehi, the School Facilitator, to give the Grievant a direct order to test. The order was embodied in the April 9, IOC.

On April 23, 1991, Warden Green said he received a call from Facilitator Ogbuehi. As a consequence of that call, he and Facilitator Ogbuehi went to the Grievant's office. Warden Green testified that upon arriving at the office, the Grievant reiterated inter alia "that testing was not his job" and "that rather than test he would take emergency personal leave on the days he was required to test." Warden Green responded that "he (the Grievant) was to test every Thursday at orientation; he was to keep testing materials available at all times, and that he (the Grievant) would be regarded as AWOL if he failed to show at the prescheduled testing assignment." Warden Green said that he reiterated to the Grievant that Facilitator Ogbuehi was his supervisor and that he (the Grievant) had been previously counseled on the testing issue. Warden Green said that he made a Incident Report on the conversation with the Grievant to the Warden. (See Employer's Exhibit 6)

On cross-examination, Deputy Warden Green said that he did not attend the pre-disciplinary meeting as he was out of town; nor did he attend the Step 3 meeting as he was unavailable. He said doctor's notes are only requested of employees who have a pattern which suggests sick leave abuse. Green said he saw no need to ask for a doctor's note from the Grievant since the Grievant had threatened to take leave that day.

Facilitator Ogbuehi testified. She described her job duties as the equivalent of a principal. She said testing of new inmates at orientation was necessary because not all inmates were tested at the reception center. Inmates could not be properly placed in educational programs without testing. Ms. Ogbuehi said that almost from her arrival at Orient, the Grievant had been refusing to test at her direction. She discussed this situation with Deputy Warden Green who directed her to order the Grievant to perform the testing. As a consequence of that discussion, she issued the IOC of April 9, 1991 which read as follows.

> TO: All Concerned DATE: 4/9/91
> FROM: C.C. Ogbuehi, School Facilitator
> SUBJECT: Education Department Orientation Schedule
>
> Please be advised that effective April 25, 1991 the Education Staff will be conducting a weekly orientation for newly admitted inmates on every Thursday. **The orientation is mandatory and participation is required.**
>
> The following schedule will be adopted for the purpose of the orientation.
>
> <u>Thursday</u>
> 7:15 a.m. - 7:30 a.m. C.C. Ogbuehi/J. Beatty
> Brief Overview of the
> School Programs and tour
> of the School building.

7:30 a.m. - 8:00 a.m. Personal Interview	C.C. Ogbuehi/J. Beatty
8:00 a.m. - 10:30 a.m. Testing (CTABE & GATB)	**Grievant's Name**
1:00 p.m. - 3:00 p.m. Testing Continued	**Grievant's Name**
3:00 p.m. - 3:35 p.m. Tour of the Library	C. Mason

cc: Mr. L.L. Green, T.I.E. Deputy Warden
Mr. Joe McNeil, Programs Deputy Warden
Major Bucy
Stephanie Walker
file

(See Employer's Exhibit 3)

On April 22, 1991, the Grievant requested Leave for Thursday, April 25th for Vacation. Facilitator Ogbuehi disapproved the leave and forwarded the RFL to the Warden who also disapproved. In the remark's section are these words "The Grievant has been scheduled to test new inmates on April 25, 1991" (See Employer's Exhibit 4).

On April 23, 1991, Facilitator Ogbuehi went to the Grievant's office. Subsequently, she called Deputy Green and accompanied Deputy Green to the Grievant's office. She witnessed the conversation in which the Grievant was told to test by the Warden and heard the Grievant say he would take emergency leave on the day in question. She said that she believed this conversation took place after the Grievant received the disapproval of his April 22, 1991 request for leave. On April 25, 1991, the Grievant called "off" sick at 5:08 a.m. (See

Employer's Exhibit 7). On April 26, 1991, Deputy Warden Green filed an incident report saying that the Grievant "refused to test inmates on Thursday, April 25, 1991 (See Employer's Exhibit 8). On April 29, 1991, the Grievant filed a RFL for sick leave on April 25, 1991. The Warden disapproved this leave (See Employer's Exhibits 9 and 10). Under cross-examination, Ms. Ogbuehi indicated that she did not attend either the pre-disciplinary meeting nor the Step 3; she was not requested to attend. She said that she had not requested a doctor's note from the Grievant for the April 25, 1991 absence. On re-direct examination, Facilitator Ogbuehi indicated that the tests which the Grievant was to administer on April 25, 1991 are the same tests listed in the class specification (see Employer's Exhibit 13).

Mr. Joseph McNeil, Deputy Warden for Programs, also testified. He said that he conducted the investigatory conference ad directed by the Warden. He said the Grievant was accompanied by is Union Representative, Ms. Cooley. Mr. McNeil said that he first reviewed the documents with the Grievant which included the April 9, 1991 IOC, the incident reports of Ms. Ogbuehi and Mr. Green, the call off slips, the Requests for Leave, and the job description. Mr. McNeil said, after reviewing the documents, he offered the Grievant a chance to state his side of the story. The Grievant said, according to Mr. McNeil, that it was not his job to test new inmates because that function belonged to the reception centers. On cross-examination, Mr.

McNeil said he had talked to the Grievant in January about the same issue and was aware of the Grievant's stated position then. He said he did not attend either the Step 3 nor the pre-disciplinary conference because it was not his practice nor was his presence requested. He said that the April 19th date used in his investigation report was a typographical error for which he was responsible. He said his conclusion was that the Grievant's day off was a protest action. Mr. McNeil was also called by the Employer on rebuttal. McNeil was asked then by the Employer's Advocate: "What, if anything, did the Grievant indicate on May 10, 1991 about his intentions as to future testing?" McNeil said that "his position continued to be that testing was not part of his job." Mr. McNeil was asked by the Union Advocate "Did you tell the Grievant that he was a pain in the butt and if you had the decision you would kick him out?" McNeil said "I said that if he (the Grievant) had worked for me, I would not have been so tolerant so long." When subsequently asked, Mr. McNeil said that the purpose of the investigatory interview was to review the evidence and make a recommendation on discipline to the appointing authority.

Mr. Swyers, Labor Relations Officer, also testified for the Employer. Mr. Swyers said that he conducted the pre-disciplinary conference. He said he attended, the Grievant together with his Steward Ms Cooley and the Union Advocate Mr. Stevens. The Union made no procedural objections, requested no witnesses, requested no other documents nor requested a postponement. Mr. Swyers said

that he read the charges, and then they discussed the documents one by one. Mr. Swyers testified that during the course of this discussion that the Grievant admitted that he had received an order and that he did not carry it out. He said that as the pre-disciplinary officer that he had not found just cause on two charges and had found just cause on violation of Rules #7 and #9. Mr. Swyers said that other than the hearing officer he was the only management person at the Step 3 because Deputy Green was detained elsewhere. At Step 3, Mr. Swyers said he read the documents for the Employer. Mr. Swyers was asked if he had said to Mr. Stevens "Henry, you talk too much, you often talk when you should be listening." Mr. Swyers said that yes, he had said exactly that. He said that the Grievant had a chance to refute the charges at Step 3. Mr. Swyers said that the basis for his own decision at the pre-disciplinary conference had been the Grievant's own admission that he had received an order and failed to carry it out, "apparently deliberately."

Ms. Cooley, a teacher and SCOPE site representative, testified that she attended the investigatory conference, the pre-disciplinary meeting and the Step 3. She said that at the Pre-disciplinary meeting the Grievant did <u>not</u> admit disobeying a direct order. She stated that at the Step 3 the Grievant did not admit disobeying a direct order. Ms. Cooley said that she was familiar with the April 9th IOC because she found it in her mailbox on a morning that the Grievant was not in that building. She said that sometime later she spoke to the Grievant about it.

She was asked if he (the Grievant) knew about the testing prior to the 25th of April. She said "yes."

The Grievant testified. He said that on April 25, 1991 he stayed at home because he had a cold and a sore throat. He said he did not seek a doctor's advice. He was asked by his Advocate "Do you feel that testing is part of your responsibility?" He replied "it should be at the reception center." "What are your personal feelings" he was asked. "I prefer not to do it." He said he had done such testing "before" but only with the understanding "it was not his job." He said it was physically impossible to administer simultaneously the tests listed on the IOC of April 9th.

He was asked if he had any contact with Mr. McNeil prior to the investigatory conference. He said "he could not remember." He said he received "no direct order" either from Facilitator Ogbuehi or Warden Green. He said he was aware of the April 9th memo because Ms. Cooley gave it to him. He could not remember when . . . "sometime later in the month."

The Employer's Advocate asked the Grievant "because you feel testing is not your job, do you have the right to refuse an order?" He replied "maybe a right because if I do it, it looks like I'm agreeing with it." "Is it then your decision not to test?" He replied "it depends upon the circumstance -- if it is absolutely physically impossible and endangers me, I have the decision." The Employer's Advocate asked "Did you ask anyone for clarification?" "Like Ms. Ogbuehi?" "No, because I felt it was

a collective bargaining matter." "Why were you upset on April 23rd?" "Because I had asked for leave for the 25th for a prior long standing engagement I had an obligation to be someplace else." "Why didn't you put in for leave much earlier than the 22nd?" "I was told not to put in leave in advance." Question: "Did you tell anyone in advance?" "No, because I didn't know about the coming testing." Question: "Didn't you know prior to the 22nd about the testing?" "Yes."

On re-direct, the Grievant testified that at the investigatory conference Mr. McNeil said "I was a pain in the ass and he would have kicked me out a long time ago." The Employer's Advocate asked "Did you raise this issue of Mr. McNeil at the Pre-Disciplinary conference or at Step 3?" "No." "File a grievance about it?" "No." The Grievant then interjected that he had mentioned Mr. McNeil's lack of objectivity at the pre-disciplinary conference. The Union recalled Ms. Cooley to the stand who corroborated that the Grievant's memory of Mr. McNeil's statement.

Employer's Position

The Grievant received a direct order from his Supervisor, Ms. Ogbuehi, to test new inmates by the April 9, 1991 IOC. This order was repeated by Dr. Green on April 23, 1991. The Grievant clearly indicated on the 23rd to Ms. Ogbuehi and Mr. Green that he did not intend to test. He then clearly stated how he would not test, i.e., he would take emergency leave. Deputy Green

clearly warned him of the consequences. The Grievant then violated Rule 7 - insubordination. The Grievant also has failed consistently over time to fulfill his work assignment, i.e., to test. This function is crucial to the mission of the institution. The Union has argued that a three day suspension was not progressive. The Grievant has been repeatedly counseled on this issue by the Warden, Mr. Hall, the regional administrator, Deputy Warden Green, and Ms. Ogbuehi. The Grievant choose only to vaguely, if at all, remember these counselings. The Employer, while committed to progressive discipline, is not locked stepped into a rigid progressive. The discipline must also be commensurate. The Union has alleged procedural unfairness. The Contract does not require witnesses at the various steps. All documents were provided. The Grievant had an opportunity to refute, rebut, and question at every level. The grievant himself said "he preferred not to test"; he violated a cardinal principal of a Union/Employer relationship. He should have obeyed the order to test and grieved the order if he felt he was not bound to test. The Grievance should be denied.

Union Position

The Union reminds the Arbitrator that Management has the burden of proof that just cause exists. While Management claims this situation is crucial, Management choose not to come to either the pre-disciplinary conference or the Step 3 meeting. Moreover, the Grievant was improperly warned of the consequences

because the suspension notice dated the direct order as April 19th. The Employer now claims that April 19th is a typo. In addition, the Employer failed to prove that the employee received the Standards of Conduct. The Employer has also failed to prove that testing of new inmates is in the Grievant's duties. The investigation by Mr. McNeil was not objective nor fair because he was not a disinterested third party. McNeil's words verify his lack of objectivity. The Union draws the Arbitrator's attention to Arbitrator Dworkin's words in the White case (Union Exhibit 2) where Dworkin held that an inadequate investigation vitiated the discipline. The Grievant's due process rights were violated in this case.

On top of these procedural irregularities, Management has failed to prove that on April 25th the Grievant refused a direct order. The Grievant was not in the institution on April 25th; he was at home sick. Management did not ask for a doctor's certificate. A close look at the IOC of April 9 clearly reveals that it is not a direct order but a schedule. Insubordination is a serious charge and has not been proven here. The Association asks that the Grievance be sustained and the Grievant be made whole.

Discussion and Award

The Union has charged that Management's decision to discipline the Grievant is vitiated by procedural violations within the discipline process. This Arbitrator takes such

charges extremely seriously. The Arbitrator has already ruled on three of the Union objections. The Arbitrator has struck from the records those parts of Employer Exhibit 15 which were improperly attached and has struck completely Employer Exhibit 17. Moreover, during the hearing, the Arbitrator limited as best she could the Employer's testimony to the two legitimate charges (Rules 7 and 9); the record as produced by the Arbitrator is clean of any prior charges removed before the notice of suspension. The only facts considered by the Arbitrator were and are those facts relevant to the charges before her (Rules 7 and 9). Arbitrator finds that the objection of the Union to the April 19th reference in the suspension order was not well taken. The record is replete with information that the Union and the Grievant were clearly on notice that the April 9th IOC was the crucial document (in fact, no April 19th document existed).

The Union argues that the Employer failed to present certain management members at the Pre-Disciplinary Conference and at Step 3. However, the contract does not require those witnesses. Article 13.03, in terms of who must be present, requires only that the pre-disciplinary "will be conducted by a designee of the Appointing Authority who was not directly associated with the incident(s) which led to contemplated disciplinary action against the employee." Mr. Swyers conducted the Pre-disciplinary conference. No evidence was adduced that he had any association with the incident. The Contract also provides at Article 13.03 "At the conference, the employee will be provided with the

documents used to support the possible disciplinary action which are known of at that time ..." The Employer introduced the packet of documents (Employer's Exhibit 15) provided at the pre-disciplinary conference. The Arbitrator's review of the packet indicates that it contained all the documents properly introduced at the Arbitration Hearing. Article 13.03 further provides that the employee will be provided with "an opportunity to present the employee's side of the story." At the Pre-disciplinary meeting at issue, the employee clearly had an opportunity to present his side of the story; in fact, the designee removed 2 of the 4 original charges as a consequence of this meeting.

The Union raises similar issues with regard to the Step 3. Article 5.05(C) outlines the Step 3 meeting. Step 3 requires that "upon receipt of the Grievance, the Director or designee shall hold a meeting within thirty (30) days to discuss the grievance." The Contract apparently requires nothing more than that a designee of the Employer meet with the Grievant and his Association representative (if the Grievant so requests) to discuss the Grievance. The record reveals that such a meeting was held.

The most serious charge of the Union is the charge that the investigation was neither fair nor objective because of the Investigatory Meeting. Article 13.02 deals with the contractual requirements of that meeting. Article 13.02 provides "An employee shall, upon request, have an Association representative present during a meeting with representatives of the employing

agency held for the purpose of obtaining action against that employee." The Grievant had Ms. Cooley with him at the investigatory meeting. "The employee shall be required to respond to the allegations unless he/she is subject to criminal penalties." This section is not in dispute. The Contract says nothing more about the conference. However, a full and fair investigation has been long recognized as an essential element of just cause and thus is implicitly mandated by Article 13.01 (Just cause standard). The Union argued that Mr. McNeil was not a proper person to carry out the investigation because he had previously dealt with the Grievant on the same issue. Interestingly, only two pieces of evidence supported the Union's statement of Mr. McNeil's past involvement 1) his own testimony and 2) Employer's Exhibit 17 to which the Union objected and which the Arbitrator has excluded. However, Mr. McNeil freely stated in his testimony that the Grievant's position on testing was well known to him from prior interactions. Prior knowledge of this kind, standing alone, cannot remove an investigating officer. Quite often, even inevitably, a person designated by management will know of prior matters; in fact, the duty of the investigator is to investigate the context of any grievance. Moreover, repeat offenders, of necessity, will be investigated often by the same person.

Mr. McNeil, in most aspects, did what was required here. He interviewed the two supervisory personnel involved, Ms. Ogbuehi and Mr. Green and reviewed the documents and then interviewed the

Grievant in the presence of his Union representative, Ms. Cooley. But the crux of the Union objection is that Mr. McNeil had already formed an opinion and that this fatal flaw was revealed by his remark to the Grievant. Mr. McNeil is alleged to have said to the Grievant near the end of the interview "you are a pain in the ass, and if I had control, you've have been fired long ago." Mr. McNeil admitted the essence of those remarks, albeit, in softer terms. Clearly, those remarks were inappropriate, injudicious, and intemperate. They indicated that, indeed, by that moment in the interview, Mr. McNeil had a strong opinion about the Grievant's situation. Although not dispositive of the issue, McNeil's words call into question the possible lack of objectivity of Mr. McNeil at the inception of his interview.

The Union advocate points to Arbitrator Dworkin's decision for the proposition that an unfair investigation vitiates any discipline entirely. That proposition is not borne out by a fair and thorough reading of Arbitrator Dworkin's words. (See pages 20-24.) In the White case, the Union argued that the "investigation preceding discipline was one-sided" (p. 20). Arbitrator Dworkin then reviewed (in pages 21 to 23) the words of other arbitrator's on the issue of unfairness in investigations. He summarized his review on page 21 by saying "There is a great deal of support for the Union's theory that an inadequate investigation by management vitiates discipline." He first reviews the McCarney arbitration (84 LA 799) which rested on a

failure of the grievant to be heard before the decision was made. Arbitrator Nelson said that just cause demands that certain minimal essentials of due process be observed ... one essential is that the accused have an opportunity to be heard. (84 LA 799 at 804) Arbitrator Dworkin also cites Hill and Sinicropi Remedies in Arbitration (at page 92) for the proposition that a grievant must be given an opportunity to be heard." In the White decision, Arbitrator Dworkin applies these quasi precedents and finds the investigation inadequate. The Arbitrator intimated that an investigation which was inadequate because the grievant had no opportunity to be heard could be corrected by a procedurally correct subsequent pre-disciplinary meeting. However, the flaw in the White investigation was not corrected by a pre-disciplinary meeting because the evidence revealed that prior to the pre-disciplinary meeting, the employer had already decided on discipline. The White decision does not directly speak to this case now before the Arbitrator for a number of reasons. The issue herein is not whether the Grievant had an inadequate opportunity to respond. Secondly, no evidence indicates a decision was made by the appointing authority in this case to issue discipline prior to the pre-disciplinary conference. In fact, the contrary is indicated. Mr. McNeil's words indicate that his advice on discipline had not been previously followed. Moreover, at the pre-disciplinary conference, 2 of 4 charges against this Grievant were dropped. Lastly, Arbitrator Dworkin never held that an inadequate

investigation vitiated discipline; his use of those words were a recitation of the Union position. In fact, in opposition to such an inflexible rule (at page 24) Arbitrator Dworkin says, "Nevertheless, the Arbitrator does not find that the imperfections in an employer's investigation necessarily annul discipline." He continues: "Just cause is an amalgam of many principles. It is a fluid abstraction, designed to permit arbitrators to weigh and balance its facets on a case-by-case basis. Hard and fast rules which "codify" just cause tend to draw away from this fundamental purpose. **It would be an incongruity if arbitrators uniformly ruled that a substandard managerial investigations mechanically invalidated discipline no matter how richly the discipline might have been deserved."** (emphasis added)

As previously indicated, this Arbitrator finds Mr. McNeil to have been less than objective in his conduct during the investigatory interview. Like Arbitrator Dworkin in the White case, this Arbitrator does not find the procedural irregularity to be automatically fatal to the discipline. In this Grievance, the subsequent pre-disciplinary conference gave the Grievant a full and fair chance before an impartial person to fully air his side of the situation with clear cut positive results for his position.

The Arbitrator now turns to the substantive question of whether the Employer has set its burden and shown just cause to discipline the Grievant for violation of Work Rule 7 -

Insubordination -- disobedience of a direct order of a supervisor and Work Rule 9 - Failure to carry out a work assignment.

By the overwhelming testimony of both parties, the Grievant has been conducting a running feud with his supervisor, Ms. Ogbuehi since her arrival and, less directly, a feud with Deputy Warden Green, Regional Administrator Hall, and the Institution. The ostensible basis for this feud is the Grievant's self-expressed "preference" that he not test new inmates upon their arrival at Orient and his equally clear conviction that such tests "ought" to be done at the reception centers. The Grievant's preferences and convictions have led him to the conclusion that testing newly arrived inmates is "not his job." He holds these beliefs firmly in spite of prima facie evidence to the contrary, embodied in the very documents which define his occupational existence, i.e., the Position Description for Guidance Counselor and the Class Specification for Guidance Counselors I-IV. However, the correctness of his conclusions is not the issue of this Grievance. Rather, the issue is his refusal to obey the directives of his superiors. The fact that issue first reaches arbitration after over two years of internecine warfare says much about managerial behavior at the Institution and little to commend it. In making this award, the Arbitrator will not decide the issue of whether ultimately the Grievant's job involves testing newly received inmates at Orient. The Union's attempt to debate this issue clouds the true issue and is not proper in the context. The question at the crux of

insubordination is whether the Grievant was issued an order? Was the order legitimate? Did the Grievant have any legitimate reason to refuse obedience? Was he warned of the consequences? Did he disobey the order?

Facilitator Ogbuehi was the Grievant's supervisor. On April 9, 1991, at the direction of her supervisor, Deputy Warden Green, Ms. Ogbuehi issued the IOC of April 9, 1991. This IOC was directed to "All concerned" and was placed in mailboxes including the Grievant's. The memo directed that the "Education Staff" conduct a weekly orientation and stated that such orientation would be "mandatory" and participation "required." The Grievant's name was listed next to two testing segments. Neither Grievant nor his counsel has ever argued that this IOC was not understood by the Grievant to not apply to him even with the generic direction "to all concerned." While the Grievant's memory failed to recall exactly when first he saw this memo, he did admit that Ms. Cooley showed it to him, and they discussed its implications. He admitted likewise that he never sought clarification from Ms. Ogbuehi nor Deputy Warden Green. Then, on April 23, 1991, Deputy Warden Green made the order clear beyond any doubt. He told the Grievant that he was to do the testing at orientation. The Grievant's answer was clear; he refused the order and threatened to take emergency personal leave on the day at issue. Analysis for insubordination can cease at this point. Deputy Warden Green ordered the Grievant to test, the Grievant refused <u>at that point</u>. Insubordination by action need not exist

to be insubordination. Express statements can and do constitute insubordination. What the Grievant did or did not do on April 25th became, in the larger sense, irrelevant. On April 25th, the Grievant could have retracted the insubordination statement by testing, or he could have ratified his insubordination by refusing to test. When on the 23rd the Grievant refused, the Warden clearly warned the Grievant of the consequences; the Grievant could have retracted his words; he did not. In fact, he compounded his insubordination by threatening to abuse his leave. The Grievant claims that because he was not at work on April 25th, the day he should have tested, he is relieved of the charge. This argument fails for many reasons. First and foremost, his insubordination occurred on April 23rd. However, the Grievant also must be estopped to claim that his absence on the 25th made "insubordination" impossible. The Grievant claimed in his own words under oath to this Arbitrator that on April 25th he had had a "long standing obligation" which he was "obligated" to carry out. His request for leave on April 22, 1991 was not in response, he says, to the April 9, 1991 memo but rather because "someone" told him he could not request leave until that time. Then upon denial of that leave because he was obligated by his job on that day, he threatened the Deputy Warden that he would evade the testing by "emergency personal leave" on April 25th. Then, on April 25th he called off sick. The Union's Advocate would impose on the Employer the burden of proving the Grievant "not sick." The Grievant clearly bore the burden of proving, if

he could have, that he was sick. The Grievant's own actions, unreasonable and inconsistent, coupled with his threat, raised a reasonable presumption in the minds of management that he was evading testing! Why should they not believe so? The Grievant told Deputy Warden Green that is what he intended to do. The Employer took him at his word.

Was the order legitimate? The order was from legitimate supervisors and was reasonable. The order was reasonable because on the face of both the Position Description and the Class Specification list testing and the specific tests at issue respectively are described as part of Grievant's job duties.

Did a legitimate reason exist to excuse the Grievant? The BNA Grievance Guide (7th Edition) makes this general statement about Insubordination at page 29.

> One of the most firmly established principles in labor relations is management's right to direct the workforce. Insubordination, then, is a cardinal industrial offense since it violates this right. Arbitral decisions in discipline cases involving insubordination overwhelmingly are governed by the "obey now, grieve later" rule laid down many years ago. (Ford Motor Co., 3 LA 779) In that case, the arbiter declared that "an industrial plant is not a debating society." Rather, "its object is production," the arbiter stressed, and "when a controversy arises, production cannot wait." Therefore, when objecting to an order, a worker's proper course of action is to first comply with the directive and then file a protest. The principal exception to this standard, arbiters agree, is where carrying out the order would endanger workers' health or safety.

The Grievant would only be justified to refuse Deputy Green's order if carrying out the order would endanger his health

or safety. Absolutely no evidence was adduced to support that position.

The tragedy of this Grievance is clear. When the Grievant received his first order to test new inmates, all he had to do was obey and immediately file a grievance challenging the Employer to show that such testing was legitimately his responsibility. However, the Grievant did not choose that route.

Was the three (3) day suspension proper under the Contract? Was the discipline proper under progressive discipline? Was the discipline commensurate?

In the Employee's favor is his length of service and his lack of prior discipline. However, counterbalancing those factors are other factors. First, he had received rather strong and continuous counseling on this issue. That counseling factor is clouded by the Employer's failure to deal with this issue clearly and firmly at its inception. The Employer's temporizing and indecision could have lulled the Employee into a false sense of security about his ability to evade his responsibility. The Employer added to a lackluster management of this problem by the intemperate, injurious remarks of its investigating officer.

Counterpoint to the Employer's failings of management was the intentionality of the Grievant. The Arbitrator has no doubt based on the Grievant's own testimony that the Grievant carefully and deliberately calculated the effects of his words, acts, or non-acts, as the case may be. His testimony was often evasive and self-servingly vague; at times, the Grievant seemed

apparently to relish this unnecessary confrontation. The main purpose of progressive discipline is to correct. No evidence was adduced to indicate that the Grievant was amenable to correction on this issue. In fact, at the hearing, the Grievant maintained his right to refuse orders based on his subjective judgment of their propriety.

Given the flagrant nature of the insubordination[1] and the intentionality involved, a three day suspension is commensurate to the offense even without prior discipline. However, to clarify for the Employer the serious importance of a fair and objective investigation, the Arbitrator reduces the suspension to two (2) days.

Award

Grievance denied; discipline reduced to two (2) day suspension.

December 17, 1991
Date

Rhonda Rivera
Arbitrator

[1] The Arbitrator finds that failure to carry out a work assignment is a lesser offense included within Insubordination.