#138

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio

Employer.

Grievance No. 27-25-910531-0215-01-03

Grievant D. Cox

Hearing Dates: December 17 and December 18, 1991

Award Date: February 19, 1992

Arbitrator: Rivera

For the Employer: Roger Coe
Valerie Butler

For the Union: Don Sargent

Present at the Hearing in addition to the Grievant and Advocates were James Hieneman, Administrative Assistant (witness), Timothy Osborne (witness), Timothy Williams, C.O. (witness), Dr. Locsey, Dentist (witness), Vic Jordan, LRO, Vincent Shearer, Inmate (witness), James Burchett, Retired C.O. (witness), Major Roger Crabtree, (witness), Paul Blair, Unit Manager (witness), Troy Holbrook, Corr. Off. (witness), Roseanne Welty, R.N. (witness), Dwayne Shelton, C.O. (witness), Virgil Eichenlaub, Lt. (witness), Charles Williamson, C.O. (witness), Robert Turner, Inmate (witness).

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. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

1. Contract 1989-1991

2. Grievance Trail
   a) Grievance dated May 30, 1991
   b) Step 3 Response dated July 2, 1991

3. Discipline Trail
   a) Removal dated May 29, 1991
   b) Pre-disciplinary Conference Report dated March 29, 1991
   c) Pre-disciplinary Conference Management Witnesses/Document List

4. Report of Inspector of Institutional Services (John Ison) to Arthur Tate Jr., Warden, dated January 29, 1991

5. Post Orders J-2 Cellblock Security and Disciplinary Control

6. DRC 5120-9-02 Use of Force Report and Investigation

7. DRC Standards of Employee Conduct Effective June 17, 1990

8. Full Report of Institutional Inspector to Warden with all Exhibits

Employer Exhibits

1. Interview of C/O T. Osborne #185 dated January 14, 1991 (15 pages)

2. Interview of C/O T. Osborne #185 dated January 17, 1991 (15 pages)

3. Procedural Exhibits
   a) IOC dated February 5, 1991 from Arthur Tate Jr., Warden, to Major Ralph Crabtree Subject Use of Force Committee

b) IOC dated February 13, 1991 from Arthur Tate Jr., Warden, to Jack Bendolph, Administrative Assistant re: Committee Assignment

c) OAR 5120-9-02 Use of Force Report

Union Exhibits

1. Interview Schedule of Inspector Ison for January 1991
2. Award of Arbitrator Dworkin on G87-2358
3. Pro-Offer Signed Statement of Inmate Turner #157-758 OBJECTED TO BY STATE; OBJECTION SUSTAINED BY ARBITRATOR
4. Offense Record Inmate Shearer #R-128-097
5. IOC dated January 8, 1991 from Paul Blair, Unit 8 manager, to Major Crabtree re: Inmate Shearer
6. Use of Force: Investigating Committee Report re: Inmate Shearer #R128-097 dated March 1, 1991 (9 pages)
7. Pre-Disciplinary Conference Hearing Officer's Report by Susan Kenworthy dated April 4, 1991
8. Employee Performance Review of Grievant dated April 20, 1990 for period March 2, 1990 to March 2, 1991
9. Award of Arbitrator Dworkin G27-25(90-02-06)0092-01-03

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.

ARTICLE 25 - GRIEVANCE PROCEDURE

§ 25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. Written reprimands shall be grievable through Step Three. If a verbal or written reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merit of the verbal or written reprimand.

H. All settlement agreements that require payment or other compensation shall be initiated for payment within two payroll periods following the date the settlement agreement is fully executed.

§ 25.02 - Grievance Steps
Step 2 - Intermediate Administrator

In the event the grievance is not resolved at Step One a legible copy of the grievance form shall be present in writing by the Union to the intermediate administrator or his/her designee within five (5) days of the receipt of the answer or the date such answer was due, whichever is earlier. The written grievance shall contain a statement of the grievant's complaint, the section(s) of the Agreement allegedly violated, if applicable, the date of the alleged violation and the relief sought. The form shall be signed and dated by the grievant. Within seven (7) days after the grievance is presented at Step Two, the intermediate administrator shall discuss the grievance with the Union and the grievant. The intermediate administrator shall render a written answer to the grievance within eight (8) days after such a discussion is held and provide a copy of such answer and return a legible copy of the grievance form to the grievant and a copy to one representative designated by the Union.

Step 3 - Agency Head or Designee

If the grievance is still unresolved, a legible copy of the grievance form shall be presented by the Union to the Agency Head or designee in writing within ten (10) days after receipt of the Step Two response or after the date such response was due, whichever is earlier. Within fifteen (15) days after the receipt of the written grievance, the parties shall meet in an attempt to resolve the grievance unless the parties mutually agree otherwise. In the Ohio Department of Transportation Step 3 meetings will normally be held at the worksite of the grievant. If the meeting is held at the district headquarters the chief steward will be permitted to represent.

The Agency Head or designee shall process grievances in the following manner:

A. Disciplinary grievances (suspension and removal)

The Step 3 grievance response shall be prepared by the Agency Head or designee and reviewed by the Office of Collective bargaining. The response will be issued by the Agency Head or designee within thirty-five (35) days of the meeting. The response shall be forwarded to the grievant and a copy to one representative designated by the Local Chapter Officer. Additionally, a copy of the answer will be forwarded to the Union's Central Office. This response shall be accompanied by a legible copy of the grievance form.

If the grievance is not resolved at Step 3, the Union may appeal the grievance to arbitration by providing written notice and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given whichever is earlier.

B. All other grievances

The Agency Head or designee shall give his/her written response and return a legible copy of the grievance form within fifteen (15) days following the meeting. The Agency shall forward the response to the grievant and a copy to one representative designated by the Local Chapter Officer.

Step 4 - Office of Collective Bargaining Review

If the grievance is not settled at Step Three, pursuant to Step 3 (B), the Union may appeal the grievance in writing to the Director of The Office of Collective Bargaining by sending written notice, and a legible copy of the grievance form to the Employer, within ten (10) days after the receipt of the Step Three answer, or after such answer was due, whichever is earlier.

The Director of the Office of Collective Bargaining of his/her designee shall issue a full response to the Union and the grievant within twenty-one (21) days of the appeal. The response will include a description of the events giving rise to the grievance and the rationale upon which the decision was rendered. The Director of the Office of Collective Bargaining may reverse, modify or uphold the answer at the previous step or request a meeting to discuss resolution of the grievance.

A request to discuss the resolution of the grievance shall not extend the thirty (30) days in which the Union has to appeal to arbitration as set forth in Step Five.

Step 5 - Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Director of The Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given, in Step Four.

§ 25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination

cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

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.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

§ 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.

Issues

Issue (1): Is the grievance properly before the Arbitrator?

Issue (2): Was the discipline imposed on the Grievant, removal, for just cause? If not, what shall the remedy be?

Union's Position on Arbitrability

The alleged incident occurred on January 4, 1991. The investigation was conducted by the Institution Inspector from January 8, 1991 to January 28, 1991.

In a letter to the Arthur Tate, dated January 29, 1991, John Ison, Inspector of Institutional Services, requested that a pre-disciplinary hearing be set up. The Warden was also informed of the seriousness of the charges in the letter, by the Inspector who inserted that "this could result in removal for a first offense." The Grievant was charged with inmate abuse.

The disciplinary hearing was held on April 15, 1991. This was ninety-nine days after the alleged incident. The Grievant worked up until his removal date of May 29, 1991. The removal was one hundred and forty-three days from the date of the incident. From Inspector Ison's recommendation of a pre-disciplinary after the investigation to the actual disciplinary hearing was seventy-five days.

This amount of time violates the spirit of the contract in Article 24.02, which states in part: "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.

The Union objects that seventy-five days was not reasonable, and the disciplinary action was not initiated as soon as reasonably possible.

The Union cites Arbitrator Jonathan Dworkin, in arbitration G 87-2358, where he states Article 24, section 24.02 obligates the employer to discipline without unreasonable delay. The negotiators made the requirement unmistakably clear. Not only did they state in mandatory terms that discipline shall be initiated as soon as reasonably possible. They underscored their purpose by instructing arbitrators to consider the employer's timing when deciding grievances over discipline, to the point that timeliness of discipline was made an indispensable ingredient of just cause itself.

Arbitrator Jonathan Dworkin also stated "reading sections 24.02 and 24.05 together leads to the conclusion forty-five days is an absolute maximum. It supplements, but does not entirely supercede the employer's responsibility to react to a disciplinary even 'as soon as possible.'"

The Union urges the Arbitrator to uphold the grievance in its entirety on this grievous due process violation and grant the grievance in its entirety due to Management's not having just cause under 24.01 and 24.02 after an unreasonable amount of time to take disciplinary action. Almost five months to take disciplinary action is not reasonable.

Employer's Position on Arbitrability

The Employer initiated as soon as reasonably possible, consistent with other requirements of Article 24, the discipline in this case. This case involved an apparently unreported use of

force; hence, no use of force report triggered the discipline. Rather, the Warden had to first request a report from the Institutional Inspector as to whether an improper use of force occurred. Then a Use of Force Committee had to be convened. The report of the Use of Force Committee had to be reviewed by the Warden. A pre-disciplinary conference then had to be convened. The Warden chose to utilize a hearing officer from outside the institution because of the sensitivity of charges, i.e., abuse of an inmate by correction officers coupled with racism. All these steps were for the officer's protection and just cause, as well as for the fair investigation of the alleged abuse.

The imposition of discipline itself was within the forty-five (45) days required from the conclusion of the pre-disciplinary meeting (§ 24.05). The time period between the report of the incident and pre-disciplinary conference while lengthy was necessitated by two investigations, the necessity of an external hearing officer, and slowed unfortunately for a short period by the vacation of the Warden. This time was reasonable under the circumstances and did not violate the express words of the contract nor its spirit.

Facts Relevant To The Issue Of Arbitrability

The alleged incident took place in the afternoon of January 4, 1991 (Friday). On January 8, 1991 (Tuesday), Dennis Baker, Deputy Warden, advised John Ison, Inspector of Institutional Services, that Paul Blair, J-Complex Unit Manager, had informed Mr.

Baker of the possible abuse of an inmate (Shearer R128-097) (See Union Exhibit #5).

Inspector Ison carried on an investigation from Tuesday, January 8, 1991 through Monday, January 28, 1991 (See Union Exhibit #1). On Monday, January 28, 1991, Inspector Ison reported to Warden Tate on that investigation. Warden Tate testified that under the Ohio Administrative Rules, he then was required to appoint a Use of Force Committee (See Employer's Exhibit #3C). On February 5, 1991 (Tuesday), he appointed Major R. Crabtree and 2 others (See Employer's Exhibit #3a). However, shortly thereafter, Major Crabtree was hospitalized. On February 13, 1991 (Wednesday), Warden Tate substituted Jack Bendolph for Major Crabtree as the Chair (Employer's Exhibit #3b). The Use of Force Committee filed its report on March 1, 1991 (Friday) (Union Exhibit #6). The Warden received the report on March 4, 1991 (Monday), when he returned from vacation. At that time, the Warden decided that because of the extreme sensitivity of the matter in that the Institutional Inspector concluded that a "mass cover up" had occurred that the Pre-disciplinary Conference should be conducted by a person external to the prison. The Warden testified that the period between March 5, 1991 (Tuesday) and March 29, 1991 (Friday) was consumed arranging a time for the hearing based on the schedule of Ms. Kenworthy, the Hearing Officer.

The pre-disciplinary notice was sent March 29, 1991 (Joint Exhibit #3b) together with a complete list of witnesses and documents (Joint Exhibit #3c). The pre-disciplinary meeting was

held April 15 and 16, 1991 (Monday and Tuesday) (Union Exhibit #7) and the Pre-Disciplinary Report was issued April 24, 1991 (Wednesday). The Warden initiated discipline on May 1, 1991 (Wednesday), the Director approved on May 20, 1991 (Monday), and the discipline was effective May 29, 1991 (Wednesday).

According to § 25.01(C) of the Contract :The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday."

Using this standard, from January 8, 1991 (Tuesday), the day the investigation was begun until the pre-disciplinary conference notice was 80 days. Between the notice and the hearing were 16 days. The time from the conclusion of the Pre-Disciplinary Conference, i.e., April 15, 1991, until the decision on the final disciplinary action was 44 days. In total from January 8, 1991 until May 29, 1991, the time elapsed was 140 days.

Discussion

The relevant contract language is found two places in Article 24. Section 24.02 states that "[d]isciplinary 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." (Emphasis added). Section 24.05 says that "[t]he Agency

Head . . . shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more that forty-five (45) days after the conclusion of the pre-discipline meeting."

The Union makes three claims in essence: 1) The length of time taken to arrive at discipline violated the terms of the contract reading § 24.02 and § 24.05 together. 2) The length of time taken to arrive at the discipline violated the spirit of the contract in that the disciplinary action was not "initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article." 3) The permissible time limit for the whole process is only 45 days. (The Union alleges that this interpretation of the Contract is the interpretation of Arbitrator Dworkin in G87-2358.)

First and foremost, the Contract requires that the arbitrator must consider the timeliness of the Employer's decision "to begin the disciplinary process." What standard does the Contract impose? The express words of § 24.05 require that "[t]he 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." Express words control. The Agency has a 45 day limit from the conclusion of the pre-disciplinary meeting. In this case, the conclusion of the pre-disciplinary meeting was April 16, 1991. Using the contract definition of days (§ 25.01(C)), the 45 day period would expire May 30, 1991. By that day, a final decision must have been made by the

Agency Head. According to the records, Warden Tate recommended on May 1, 1991, Wilkenson signed off on May 20, 1991, and the Grievant was notified on May 29, 1991. Regardless of what date is the "final decision," the Employer did not violate the 45 day mandate. In the Tabol Award (G87-2358), Arbitrator Dworkin began his discussion of timelíness as follows:

> Article 24, § 24.02 obligates the Employer to discipline without unreasonable delay. The negotiators made the requirement unmistakably clear. Not only did they state in mandatory terms that discipline "shall be initiated as soon as reasonably possible," they underscored their purpose by instructing arbitrators to consider the Employer's timing when deciding grievances over discipline. It is apparent that the parties meant to place the strongest emphasis on this aspect of the Employer's duties; to the point that timeliness of discipline was made an indispensable ingredient of just cause itself.
>
> The language in § 24.02 on timeliness does not stand alone. The negotiators returned to the subject and clarified their meaning three Sections later in § 24.05. There they set a deadline of forty-five days after the pre-discipline meeting (provided for in § 24.04) for an Agency Head to finalize discipline.
>
> Reading §§ 24.02 and 24.05 together leads to the conclusion that the forty-five days is an absolute maximum. It supplements, but does not entirely supersede the Employer's responsibility to react to a disciplinary event "as soon as reasonably possible." The maxim, "justice delayed is justice denied" is an integral part of the contractual relationship between these parties.

This Arbitrator supports the tenor of Arbitrator Dworkin's award; however, she does not agree with his apparent conclusion that 45 days is an absolute maximum from incident to discipline. Two reasons exist for this Arbitrator's difference: First, the

Contract is susceptible of two meanings. Arbitrator Dworkin reads § 24.05 as clarifying and limiting § 24.02. Yet, surely a fair reading could also be that a 45 day limit was set only for a period of time between two specific deadlines -- conclusion of the pre-disciplinary hearing and the final discipline decision. Taken in that light, § 24.02 states the policy that the total time shall be "reasonably consistent" with the express time. Secondly, the type of investigation involved in the Tabol case and this case and the various "decision dates" were so very different as to make fair analogy impossible.

If the Arbitrator were to take the Tabol decision as definitive of Arbitrator Dworkin's final conclusion as to the 45 day limit, the award in Tawney (27-25-(90-02-06)-0092-01-03) would be inexplicable. Tawney is analogous to this (Cox) case. In Tawney, Arbitrator Dworkin was examining a case where the incident alleged was September 13, 1989, and the discipline was February 6, 1990, or more than 150 days later. The Union argued that the discipline was time barred by § 24.02. Arbitrator Dworkin rejected that argument in these words:

> On first examination, the Union's contention seems to have merit. Five months is a long time between misconduct and discipline; it does seem to fly in the face of the intent behind § 24.02. While the provision does not specify a permissible number of days or months that can separate misconduct and discipline, it does require the Employer to act with as much dispatch "as reasonably possible."
>
> Closer analysis of the evidence reveals that Management did act as quickly as statutory procedures allowed and, if anything, Grievant's cause was aided by the delay, not hampered by it. Ohio law provides for layered scrutiny of prisoner

abuse claims before charges can be brought against an employee. The law acknowledges that force is sometimes necessary in a prison setting. Ohio Administrative Code, § 5120-9-01 establishes the basis for allowing force and distinguishes between uses which are legitimate and those which are not.

When force is used or alleged, an internal investigation is performed and the institution head advised of the findings. In this instance, the Inspector of Institutional Services and Head of Nursing performed the investigation. The next step was to convene a Use of Force Committee. Administrative Code § 5120-09-02 requires use-of-force reports, and establishes the Use of Force Committee, authorizing it to conduct hearings and "interview all available staff members and inmates directly involved in the incident, plus as many witnesses as are necessary or expedient." The Committee is a panel of three -- a Corrections Officer, a Treatment Specialist, and a Custody Supervisor. They review written statements, hear testimony, and arrive at a conclusion of whether there was no force, slight force, justified force, or abuse.

The Committee has final authority to the extent that a matter ends if it determines there was no force, slight force, or justified force. In Grievant's case, the Committee concluded that there was significant, unjustified force and recommended appropriate discipline. The report was issued to the Lucasville Warden on December 5, 1989. The pre-disciplinary hearing was scheduled for December 11, six days later. There was no unreasonable delay; in fact, from the Union's perspective, more time should have been allowed. The Union did not obtain the Use of Force Committee transcript until late afternoon on Friday, December 8. When the pre-disciplinary hearing began, it requested (and was denied) a three-day adjournment to review that document along with the Inspector's report it received just that morning.

The Arbitrator fails to see how the process could have been abbreviated without seriously jeopardizing Grievant's statutory protections. ...

This case required for fairness and by rule and statute both an Institutional report and a Use of Force Committee. These investigations legitimately took from January 8, 1991 to March 4, 1991. The delay in obtaining a pre-disciplinary hearing officer, while somewhat excessive, was for the very legitimate and fair reason of securing an external reviewer. This delay was not prejudicial. Subsequently, the 45 day time period was clearly met, satisfying § 24.05. To again quote Arbitrator Dworkin in Tabol:

> It is inconceivable that the Union would view the contractual language on timing as calling for knee-jerk disciplinary responses to mere suspicions. Summary discipline, without thorough investigation and sober consideration, would violate just cause in many, if not all circumstances.

The Arbitrator finds no prejudicial violation of the Contract with regard to timeliness. The Grievance is properly before the Arbitrator.

Substantive Facts

The Venue

Southern Ohio Correctional Facility, commonly referred to as S.O.C.F., is a maximum security institution, located eleven miles North of Portsmouth, Ohio, which is located next to the Ohio River in Scioto County. It is a maximum security state prison, being built in 1972 to replace the old Ohio Penitentiary in Columbus, Ohio. S.O.C.F. is notorious in the state penal system as the roughest place in the system to do time. This reputation is due partly to its fortress like appearance. Brick and concrete

structure under one roof and double wire fence with razor wire on that fencing, with microwave fence alarms attached. This structure is then surrounded by eight manned gun towers, and those towers are backed up by a perimeter patrol in vehicles. Escape is nearly impossible for the inmates.

The Grievant

The Grievant was a Correctional Officer II at S.O.C.F. until his removal on May 29, 1991. The Grievant was hired at S.O.C.F. as a Correctional Officer II on March 2, 1987 and had no prior discipline at the time of the incident. The Grievant worked a little over four years in this capacity as a Correctional Officer II.

The Grievant's last evaluation (March 2, 1990 to March 2, 1991) indicates that he received (1) above average ratings in Timeliness, Team Effort and Cooperation, Directing/Coordinating Behavior of Others and In Dealing With Demanding Situations, (2) Meets Expectations in Quantity, Quality, Adherence to Procedure and Communicating. He had no "below" ratings (Union Exhibit #8). The parties stipulated that the Grievant was on notice of ODRC Standards of Employee Conduct (Joint Exhibit #7) which includes Rule 43 and the potential penalty:

Inmate Related Offenses:

43.	Physical abuse of an inmate, furloughee, parolee, or probationer	1st Offense: Removal

The Inmate

The inmate who was allegedly abused was Vincent Shearer, R-128-097. Mr. Shearer had served over 13 years at the time of this incident. His offense record (Union Exhibit #4) shows that between February 15, 1984 and October 14, 1990, he received 45 separate penalties for various rules violations including lying in at least 8 instances, creating a disturbance and fighting in at least 6 instances. The inmate is a slight effeminate black man (Arbitrator's witness).

Procedural Events

See facts on pages 13-15 for various procedural dates other than the following. The Grievant was removed as of May 29, 1991. The official charge read as follows:

> On or about January 4, 1991, while assigned to J-2, you were involved in physical abusing an inmate without provocation. As a result, the inmate sustained injuries that warranted medical attention. You failed to report the incident and/or complete proper reports and/or forms as prescribed in Administrative Regulation 5120-9-02 and SOCF post orders (J-2 Cellblock security and disciplinary control). Further, upon an investigation, you denied being involved and denied observing or having knowledge that any abusive physical force was imposed on the inmate during your tour of duty on you assigned shift. Your actions are a violation of the following Standards of Employee Conduct Rules effective June 17, 1990: Rule 8, Rule 26, Rule 43. (Joint Exhibit #3a)

A Grievance was filed on May 30, 1991 alleging violation of §§ 24.01, 24.02, 24.03, 24.04 and 24.05 (Joint Exhibit #2a). On June 6, 1991, a Step 3 hearing was held, and the Step 3 Response

was issued July 2, 1991 (Joint Exhibit #2(b)). The Grievance came to arbitration on December 17 and 18, 1991.

The Arbitrator heard nearly 1-1/2 days of testimony on the substance of this Grievance. In addition, she received voluminous and complete documentation (See Exhibit lists). Since that time, this Arbitrator has reviewed both her notes and the recordings; she has also read every document at least twice. Her conclusion based on this evidence is that the inmate was not injured prior to his receipt on Jail Block 2 and was injured when Nurse Welty first saw him. Upon review of the documents, this Arbitrator found the summary of Joyce Gilbert, Dissenting Member of the Use of Force committee, to be an accurate statement of the events which lead to the conclusion of an injury during that time period. The statements in her summary were confirmed by the record developed at the de novo arbitration hearing. Therefore, the Arbitrator adopts these facts (Union Exhibit #6):

> SUPPORTING EVIDENCE
>
> On January 15, 1991, C/O Kayser #678, L-2 block officer, was interviewed by the Institutional Inspectors office. At this time he gave his statement surrounding the events prior to Shearer being removed from L-2 Unit #2. In his statement, C/O Kayser indicated while working L-2 on January 4, 1991 inmate Shearer had received a conduct report for trying to force his way out of the dayroom to talk to Unit Staff. In the process of doing so, Officer Kayser stated his left foot was injured when Shearer pushed the door open. At 1:15 p.m. on 01/04/91 Officer Kayser was checked by medical staff and a report was filed. When asked if there was any indication that Shearer may have possibly been injured in the dayroom before he left the block, C/O Kayser stated "no". The facts are supported by C/O Kayser's statement, the conduct report written by

C/O Kayser and the medical report filed on C/O Kayser.

On January 9, 1991 Lt. Eichenlaub was interviewed by the Institutional Inspectors Office. In his statement he indicated that when he entered L-2 Officer Kayser was in the union office complaining to Sgt. Porter about his leg. At that time Lt. Eichenlaub stated that he informed C/O Kayser that his injury should be checked by the hospital staff. Lt. Eichenlaub further stated that he asked C/O Kayser and Sgt. Porter if any force had been used on inmate Shearer involved in this incident. Both C/O Kayser and Sgt. Porter said that no force was used. Lt. Eichenlaub stated that Shearer was still in the dayroom when Sgt. Porter told Shearer to step out he did comply. At this time Shearer was shook down and handcuffed by Officer Sparks. Lt. Eichenlaub indicated that Shearer did not appear to have any injuries at that time. (See Lt. Eichenlaub's statement).

On 01/10/91 C/O Sparks #443 was interviewed by the Institutional Inspectors office. In his statement C/O Sparks indicated that he and Lt. Eichenlaub entered L-2 cellblock area where he (C/O Sparks) placed cuffs on inmate Shearer and patted him down. Officer Sparks stated that at that time inmate Shearer did not appear to be injured. C/O Sparks further indicated in his statement that Shearer did not complain of any injuries at that time. C/O Sparks stated that he and Lt. Eichenlaub escorted Shearer to J-Complex where Shearer was turned over to J-Corridor officer Williams #581. C/O Sparks stated he informed C/O Williams that Shearer had a conflict with an officer and the officer got his foot caught in the door.

Officer Williams, J-corridor Officer, was interviewed on 01/09/91 by the Institutional Inspectors office. C/O Williams indicated in his statement that when Shearer was brought back to J-Complex C/O Sparks had mentioned that Shearer had been involved in an incident with an officer in L-2, and the officer had been injured. C/O Williams further stated that while Shearer was being processed at his station he did not look like anything was wrong with him.

Mr. Blair, Unit Eight Manager/J-complex, was interviewed by the Institutional Inspectors office on 01/10/91. Mr. Blair indicated in his statement

that he overheard "someone in the corridor say that an inmate coming from L-2 had tried or was in a fight with an officer and broke his leg". Mr. Blair stated that 15 or 20 minutes went by and nobody came in. When Shearer was brought to J-Complex Mr. Blair stated he did not associate the two due to the fact that the officer bringing Shearer in were not forcing the inmate into J-block or anything. Mr. Blair also stated Shearer walked into J-Complex very nonchalantly and there did not appear to be anything other than routine processing.

Officer T. Osborne, J-2 Block Officer, was interviewed by the Use of Force Committee on 02/07/91. In his statement, which was recorded and transcribed and attached herewith. C/O Osborne indicated he heard something like a slap but that he did not see anything. C/O Osborne indicated that something did happen during the processing of inmate Shearer into J-2 but did not witness anything.

Officer J. Frazier #463, J-2 Second Shift Officer, was interviewed by the Institutional Inspectors office on January 14, 1991. C/O Frazier indicated in his statement that at approximately 1:58 p.m. an inmate out on walk informed him that the inmate in cell #50 needed to see a nurse. C/O Frazier stated that he informed the inmate it was shift change and as soon as he got his paperwork and everything together that he would get with him. C/O Frazier also indicated that within the next 5-10 minutes at most, a nurse came in the block to pass out medication at which time he informed Nurse Welty about the inmate in cell 50. C/O Frazier stated that Nurse Welty proceeded to pass out her medication and when she came to cell 50 she immediately came to the front of the block and said get him over to the hospital. C/O Frazier indicated that approximately 2:50 p.m. an escort officer took inmate Shearer to the hospital. C/O Frazier also stated prior to leaving J-2 cellblock area to be taken to the hospital he (Shearer) attempted to speak but it was garbled.

C/O Walls, J-2 Second Shift Officer, was interviewed by Institutional Inspectors office on 01/14/91. Officer Walls indicated in his statement that an inmate out on walk informed J-2 block officers that an inmate needed medical attention. Shortly after the officers were informed Nurse Welty entered J-2 cellblock area to pass out medication, at which time Nurse Welty requested that Shearer be

taken to the hospital. C/O Walls indicated that when Shearer was brought out of his cell in J-2-50 to be escorted to the hospital that Shearer appeared to have some swelling in the jaw area.

Nurse Welty was interviewed by the Institutional Inspectors office on 01/14/91. Nurse Welty indicated in her statement that upon examining Shearer in J-2 she referred him to the physician "stat". She indicated in her statement that Shearer complained of pain and had his left side of his jaw was noticeably swollen. When she asked Shearer how he had received the injury he indicated to her that he fell in the cell.

Dr. Locsey was interviewed by the Institutional Inspectors office on 01/17/91. Dr. Locsey indicated in his statement that while examining inmate Shearer he asked the inmate how he had sustained the injury to his jaw. Shearer told Dr. Locsey that he fell in his cell and hit the sink. Dr. Locsey indicated in his statement that it would be very unlikely to sustain that type of injury by falling into a sink or bed. He further indicated in his statement that the injury was more indicative of a blow, such as from a fist or something that hit the area. Dr. Locsey stated that there was not a lot of swelling which would indicate that the injury was fairly recent, within less than 10 hours. Dr. Locsey stated he examined Shearer around 3:30 p.m. It should be noted that Dr. Locsey indicated that during his observation of Shearer, that he appeared to be very scared of something or somebody.

On January 9, 1991 Officer D. Shelton, Transporting Officer to OSU, was interviewed by the Institutional Inspectors Office. Officer Shelton indicated in his statement that inmate Shearer was scared to leave on the medical round trip. C/O Shelton stated that Shearer seemed to be scared that someone was going to beat him up. C/O Shelton stated that he assured Shearer that nothing was going to happen to him. C/O Shelton further stated that while transporting Shearer to OSU he appeared to be in a lot of pain and that by the time they arrived at OSU the inmate was very stiff and sore. C/O Shelton also stated that Shearer complained of soreness in his left rib cage area and shoulders.

CONCLUSION

Inmate Shearer R128-097 did sustain an injury to his left jaw. According to Dr. Locsey the injury was not the type one would receive by falling; he further indicated that the injury was more indicative of a blow directed to the area.

Medical evidence indicated that the injury was recent, within less than 10 hours of the examination (Dr. Locsey's professional opinion). Shearer was examined at 3:30 p.m.

Based on the evidence surrounding this incident, evidence gathered both by the Institutional Inspectors Office and the Use of Force Committee, there appears to be no evidence to indicate that inmate Shearer R128-097 was injured prior to being turned over to the custody and care of the J-2 cellblock area.

Once the Arbitrator concluded that the inmate suffered an injury while in the custody of Officers Cox, Burchett, and Osborne, the next question was how that injury occurred.

Motive. Although stories have varied, the Arbitrator is convinced that when Inmate Shearer was delivered to J-2 he was clearly designated as an inmate accused of injuring an officer. Officer Burchett admitted as such in his testimony when he described his conversation with Unit Manager Blair as to which type of cell was proper for the inmate. Significant other testimony supports the conclusion that the J-2 officers were well aware of the charges against inmate Shearer.

Testimony of Officers

A. The Grievant. According to the Grievant, he noticed no injury at any time to the inmate, the processing of the inmate was completely routine, and he committed no abuse to the inmate. In

particulat, he claimed that he had no knowledge that the inmate was accused of injuring an officer: This latter testimony the Arbitrator finds incredible and discounts; this dishonesty taints the rest of his evidence.

B. Officer Burchett was a C/O since 1973. He has had discipline within the two years prior to this incident. His nickname is "Sticks" which he said referred to the stick used by correction officers. He retired early on April 30, 1991. He testified that his retirement was unrelated to a desire to avoid discipline. Officer Burchett clearly contradicted Unit Manager Blair and acknowledged that he and Cox knew that Inmate Shearer was accused of injuring a fellow officer. He also testified that the processing was totally routine, he saw no injury, and that he did not abuse the inmate. Officer Burchett's testimony was evasive, self-serving, and avoided direct answers whenever possible.

C. Officer Osborne. Officer Osborne was first interviewed by the Institutional Inspectors Office on January 14, 1991 at 10:00 a.m. (Employer's Exhibit #1). Essentially, he said three things:

1. He was in the bathroom when the inmate was brought into J-2.

2. He did not hit or abuse the inmate.

3. He did not see anyone hit or abuse the inmate.

However, even at this initial interview he said ". . . he (the inmate) didn't look hurt at all. I'm not saying that something couldn't have happened; it might have, but I didn't see it." (page 3) Inspector Hieneman asked (page 4) "Do you think the guy got

hit?" Osborne asked if his "thought" was relevant. Osborne then said "I'll say it's possible . . . regardless of what I think or don't think has any bearing." (sic) The Inspector asked if the inmate was crying when Osborne saw him. (Answer) "I'll say he was probably frightened or nervous." (page 5) Osborne was asked "never heard the inmate struck?" Answer: "Like, I said I heard some noise and commotion but what can I . . . what does a strike sound like? I'll say it's possible that the guy could have got hit. Did I see it? NO" (page 7) Further than this Osborne refused to go at that interview.

On January 17, 1991, Officer Osborne was again interviewed by the Institutional Inspectors. In this interview, Osborne now tells of hearing loud yelling between the inmate and Officers Cox and Burchett; he remembers the inmate asking him (Osborne) when he comes to take him (the inmate) to his cell whether Osborne was going to beat him. (page 2) Osborne said that "some sort of confrontation" had occurred. Osborne remembers "bragging" by Officer Cox about "knocking out" the inmate and "bragging" by Burchett as well (pages 3 and 4) In particular, Osborne then reported that someone said "that nigger will learn not try to hurt officers in here (sic)" (page 5) He admits to hearing a "commotion" (page 6), the inmate yelling (page 7) "maybe" hearing "flesh against flesh" a "punch" (page 13). He also indicated that what got his attention while he was in the restroom was the sound of a "chair sliding on the floor." (page 6)

Officer Osborne testified at the Arbitration Hearing. He was subpoenaed but refused to appear until he was physically sought out and driven to the hearing. He said that he was now employed as a truck driver, that after his testimony he was harassed by unknown individuals and that consequently prison administrators transferred him to another facility. However, he said that harassment continued in the new facility, and he could not take it so he quit. He testified that his truck was vandalized; he received anonymous death threats by phone at night and anonymous threatening notes. He admitted he had "betrayed" his fellow CO's by breaking "the Code of Silence." He said his first statement to the Institutional Inspector was in essence a "lie" and that he had "struggled with himself." He maintained he has lost "everything he owned" because of his lost job.

He said that while he was in the restroom he heard a "commotion," "the desk or chair slide," and Shearer say "I didn't do anything." He said that Cox had said "I got the nigger with one punch" or perhaps "nigger-faggot". Former Officer Osborne said "I betrayed my belief in fair and equal justice" - "if he was assaulted, he shouldn't have been." On cross examination, former Officer Osborne's testimony was unshaken. Officer Osborne's testimony was credible. He was clearly reluctant and frightened. However, once into his story he was clear, direct, and forthright.

The Grievant had the motive, the opportunity, and the means to abuse the inmate. The evidence shows that the inmate received an injury during the time period under the Grievant's care. The

Arbitrator discounts both the inmate's words "I fell in my cell" as patently a way to safeguard himself. Moreover, the Arbitrator discounts all the officers who now say they saw nothing, heard nothing, and knew nothing. The testimony of Officer Osborne made against his interest strongly corroborated both the inmate's testimony and the physical evidence. The Arbitrator finds by clear and convincing evidence that the Grievant did abuse an inmate. Removal is progressive, given the severity of the action. Removal is commensurate and not penal.

Award

Grievance is denied.

February 19, 1992
Date

Rhonda R Rivera
Arbitrator