

#816

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In the Matter of Arbitration \*  
Between \*  
\*  
STATE OF OHIO, \*  
DEPARTMENT OF REHABILITATION \* Anna DuVal Smith, Arbitrator  
AND CORRECTION \*  
\* Case 27-05-911202-0176-01-03  
and \*  
\*  
OHIO CIVIL SERVICE EMPLOYEES \* Removal  
ASSOCIATION, LOCAL 11, \*  
A.F.S.C.M.E., AFL/CIO \*  
\* \* \* \* \*

Appearances

For the State of Ohio:

David Burrus; Labor Relations Specialist, Southeastern  
Correctional Facility, Ohio Department of  
Rehabilitation and Correction; Advocate  
Rodney Sampson; Asst. Chief of Contract Compliance; Ohio  
Office of Collective Bargaining; Second Chair  
Nick Chibis; Employer Representative, Correctional Reception  
Center; Observer  
Timothy Johnson; Inmate; Witness  
Leroy Ritchie; Inmate; Witness  
Scott Roach; Inmate; Witness  
Richard Stuller; Former Inmate; Witness by subpoena  
Tpr. Phil Long; Investigator, Ohio State Patrol; Witness by  
subpoena  
Curt Shonkweiler; Investigator, London Correction Institute;  
Witness  
Jon Fausnaugh; Investigator, Correctional Reception Center;  
Witness  
Melody L. Turner; Warden, Correctional Reception Center;  
Witness

For OSCEA Local 11, AFSCME:

Patrick A. Mayer; Field Representative, OCSEA Local 11,  
AFSCME; Advocate  
Ronald Brown; Correction Officer; Second Chair  
Curtis M. Guard; Grievant  
James Sutton; Inmate; Witness by subpoena  
Rick Penwell; Former Inmate; Witness  
Rick Leeth; Former Correction Officer; Witness

### Hearing

Pursuant to the procedures of the parties a hearing was held at 10:00 a.m. on June 15, 1992, at the Southeastern Ohio Correctional Facility, Lancaster, Ohio and continued to 9:00 a.m., July 29, 1992, at the offices of the Ohio Office of Collective Bargaining, Columbus, Ohio, before Anna DuVal Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded. Post-hearing closing statements were exchanged through the Arbitrator on August 26, 1992, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

### Issue

The parties stipulated that the issue to be decided by the Arbitrator is:

Was the removal of Curtis Guard for just cause? If not, what should the remedy be?

No issue regarding arbitrability was presented. However, on the second day of hearing, the Union moved to dismiss on the basis of untimeliness of discipline. Said motion was denied.

### Joint Exhibits and Stipulations

1. 1989-91 Collective Bargaining Agreement
2. Stipulated Issue
3. Discipline Trail including entire Pre-discipline Packet
4. Grievance Trail
5. Standards of Employee Conduct with Grievant's Acknowledgement of Receipt
6. Ohio Highway Patrol Investigatory Report
7. Investigatory Interviews (also included in Joint Ex. 3)
8. Institutional Investigatory Report (also included in Joint Ex. 3)

9. Administrative Regulations 5120-9-01 and 5120-9-02 with Grievant's Acknowledgement of Receipt
10. Factual Stipulations
  - a. Grievant's seniority date is January 29, 1990.
  - b. He has no prior disciplinary actions on record.
  - c. He was placed on administrative leave September 13, 1991. The predisciplinary hearing was held on October 28, 1991. He was removed from pay status on October 29, 1991.
11. Incident Reports (also included in Joint Ex. 3)

#### Statement of the Case

The Grievant in this case was discharged for a variety of rule infractions flowing from three incidents of alleged inmate abuse and/or intimidation occurring at the Correctional Reception Center (CRC) in Orient, Ohio. The CRC is a maximum security intake facility of the Ohio Department of Rehabilitation and Correction. The mission of the Department includes providing a safe environment and humane treatment of those incarcerated at the Department's facilities. The function of the Correctional Reception Center is to evaluate, classify and orient inmates to the rules and regulations of the system before they are sent to other institutions. As the intake facility, it is often the inmate's first encounter with the adult correction system.

At the time of the incidents in January, 1991, the Grievant was a correction officer working the second shift on the R-2 unit. He had no prior discipline in the year he had been so-employed, and was informed on his employer's rules, including those on use of force (Joint Ex. 5, 9).

The incidents giving rise to the removal and subsequent grievance involve two inmates who were allegedly victimized by the

Grievant and others because the inmates were convicted of sex crimes against juveniles. The accusations of inmates are summarized from their testimony as follows:

(1) On January 25, 1991, Inmate Roach was taken to the strong cell on R-1, where he was made to stand in a search position for some time, to lie on the floor with his hands behind his back while reading a rule book. Officers Leeth and Guard showed him how to commit suicide by hanging. He was told to call them when he decided to go through with it because they wanted to watch. Inmate Ritchie was brought in and subjected to similar treatment with the exception of the suicide lesson.

(2) Later that evening a cadre inmate had Roach carry a chair around the pod by two of its legs while other inmates piled coats upon it to increase its weight. During the orientation speeches that followed, Roach was singled out and made to sit on the floor. Afterwards, Sgt. Hill pulled him to an office by his collar where he was made to do pushups, had a tray of food thrown at him, and ordered to eat the food as a dog would. Hill positioned a PR-24 baton upon himself like a penis, taunted Roach about his crime, and shoved the PR-24 into his mouth. He was rehearsed as to what to say when he got to his new unit, mildly struck several times with the PR-24 and sent to his new unit. Officer Guard was present and participated in this intimidation.

(3) On January 26, Inmate Ritchie was removed from his cell and taken to an office between the R-1 and R-2 units. While there he was made to strip and do pushups while nude and with his penis

in a cup of milk, simulating sexual intercourse. While he did this, a PR-24 baton was placed as if to sodomize him. Sgt. Hill pressed his genital area to Richie's face and made him fellate the baton. When he complained of being tired, his hands were kicked out from under him and milk was poured on him. During this episode, he was taunted about his crime. He was then sent to the showers, made to clean up the milk, and returned to his cell. The Grievant and Officers Leeth and Hadley were present and participated.

The Grievant and Leeth deny these allegations. Former Officer Leeth testified that a number of inmates had complained about Inmate Ritchie's body odor. What happened in the office on the evening of January 26 was that Sgt. Hill instructed Ritchie on personal hygiene and ordered him to take a shower. The Grievant says he was passing through the hallway from R-2 to R-1 when he was called upon by Sgt. Hill to see to it that Ritchie took the ordered shower. When he entered the office he accidentally kicked a container of milk, spilling some. Officer Leeth testified he cleaned up the milk. Both testified they knew nothing about the incidents alleged by Roach, and deny knowledge of any abuse of Ritchie. Hill and Hadley did not testify.

The day after the incident involving Inmate Ritchie, he told a relative he had been raped. This charge was relayed to the Ohio Highway Patrol and from there to the CRC. Both institutional and Highway Patrol investigations were launched. Tpr. Phil Long testified about the investigation he conducted into the Ritchie

allegations. Inmate Ritchie was interviewed twice on January 28 by two different troopers. Three other inmates and the three officers were interviewed by the end of February. (However, the Grievant testified he never talked to Tpr. Long or anyone from the Highway Patrol.) Between February and June Long worked on other cases while he waited for Ofc. Hadley, who gave indications he was holding back, to offer more information.

In the meantime, Ronald Burford handled the investigation for CRC. Records of the early stage of Burford's investigation are incomplete: a transcript of what purports to be a taped interview with Ritchie (Joint Ex. 3, #4) and a transcript of a February 10 interview with Inmate Roach (Joint Ex. 3, #6) are part of the pre-disciplinary package, as are two reports by Burford dated June 14 and June 24 (Joint Ex. 3, #7 and 8). Burford did not testify. Warden Turner said that when she took command of CRC in mid-April, the Ritchie statement was among the open cases she reviewed. The case was also brought up in a meeting with the Highway Patrol in May. Being dissatisfied with what she viewed as an incomplete investigation, she assigned the case to her deputies and later to Jon Fausnaugh, the latter of whom testified. In the ensuing months the Department and Highway Patrol investigators reinterviewed the alleged victims and the accused staff. Statements of inmate witnesses who had since been moved to other institutions were taken, polygraphs obtained, and reports written. In September, the guards were placed on administrative leave and Ofc. Hadley attempted to resign. The case was submitted to the Pickaway County

Prosecutor and later to the City Law Director, who declined to prosecute. Tpr. Long closed the case on October 21, 1991. Nevertheless, believing the investigations had developed a preponderance of evidence that the Grievant was guilty of various rule infractions diminishing the security of the CRC, Warden Turner instituted disciplinary proceedings against him. A pre-disciplinary notice was issued October 22, 1991, and the conference conducted on October 28. The Grievant was removed from pay status October 29, and a removal order signed November 26, effective November 27. Infractions cited on the order are of Rule 8 (failure to follow post orders, administrative regulations and/or written policies or procedures), 26 (interfering with or failing to cooperate in an official investigation or inquiry), 43 (physical abuse of an inmate, furloughee, parolee, or probationer), and 44 (threatening, intimidating, coercing, or use of abusive language toward an inmate, furloughee, parolee, or probationer) (Joint Ex. 3 and 5).

This action was grieved on December 2, 1991, at Step 3. The grievance alleged violation of Article 24 (Discipline) and raised issues of burden of proof, timeliness, and an increase in discipline from suspension to removal (Joint Ex. 4). The Grievant's removal from pay status prior to discharge was corrected by the Employer. The issues on the merits and timeliness being unresolved, the grievance came to arbitration, where it resides for final and binding decision.

## Arguments of the Parties

### The Employer

The Employer accepts the premise that inmates should not be believed over staff when the inmate statements contain inconsistencies. Nevertheless, it argues that the inmates here are more credible than staff for several reasons. First, the employees' statements contain discrepancies which ought not to exist, particularly since the Ritchie incident occurred in a small room. Inconsistencies undermining the employees' credibility are different versions of abusive language use, whether and amount of milk spilled, who cleaned up the milk, Ritchie's response when told to shower, Sgt. Hill's involvement in orientation, and how he came to be on the unit. A second reason the inmates are more credible is the consistency of the statements--like different views of the same auto accident--which were obtained in such a manner as to preserve their independence (separation, lack of forewarning, lack of explanation, etc.). A final reason to believe the inmates' accusations is the lack of personal interest of the porter witness, who is no longer under the control of the Department, took time off from work to testify, and said he did so because (though he thought little of Ritchie) no one should be made to undergo what Ritchie did. Weighing the inconsistencies of the staff assertions against the motivation and consistencies of the inmates' statements, Management finds the inmates credible and urges this conclusion on the Arbitrator.



In response to the Union's timeliness argument, the Employer points out that Article 24.04 of the Contract permits it to postpone prediscipline until disposition of criminal charges. Tpr. Long explained that the delay in closing the case was the result of lack of witness cooperation, the need to obtain polygraphs, and other constraints. Besides the delay in the collateral investigation, the Employer's effort was affected by a change in wardens. It further states there is no valid comparison between the instant case and the bench decision cited by the Union in its motion to dismiss (Parties' Case No. 27-05-911230-0186-01-06, Arbitrator Bowers re Carter). The Employer concludes by saying the delay was justified and reasonable. It asks that the grievance be denied in its entirety.

#### The Union

The Union argues that the Grievant is innocent of wrongdoing and that he was disciplined without just cause by an Employer predisposed to remove him.

Inasmuch as no medical examination was ordered and no physical evidence obtained, the case against the Grievant depends on the inmates. Their selective memory (recalling staff, but not inmates' names, e.g.), the method of interrogation and versions told when not coerced, suggests that their recollection 8-9 months after the event were what they were told to recall. All inmates said they were interviewed in January by Burford and wrote statements saying they knew nothing. These statements have mysteriously disappeared. Now three say they changed their story because of Management and

peer pressure. They also disagree on a number of points such as who got Ritchie from his cell and whether he was paraded around the pod while nude. The Union finds discrepancies in their statements about the Roach incident and points out that none implicate the Grievant in this alleged humiliation. As to the chief accuser, Ritchie lied about being raped and even Management's first investigator, Burford, doubted his story. Compared to the credibility problems of the inmates, the staff discrepancies are inconsequential, the Union goes on. Given the unreliability of the inmates' statements, the notable absence of physical evidence and several witnesses such as Ofc. Hadley, the fact that inmates support the Grievant when they are not coerced, the impeccable record and essentially consistent stories of the officers, the Grievant's denial of wrongdoing must be credited, contends the Union.

The Union also takes the position that the State's investigation was circumspect at best, a mockery of the Collective Bargaining Agreement at worst. The Highway Patrol completed its investigation in February and communicated this to the institution, but did not close the case for months, after no one came forward to shed more light on the matter and the criminal justice system declined to prosecute. Internally, Burford conducted a thorough investigation, concluding the Grievant was innocent in his June report. Nevertheless, the Warden reopened the case. When her deputies, too, absolved the Grievant, she gave the case to a third investigator. This investigator's conclusion is in sharp contrast

to the previous ones and rests on unreliable evidence. The Warden, asserts the Union, was playing a game of "gotcha." Her refusal to accept investigations clearing the Grievant, her exaggeration of the truth about Ritchie's physical condition, and her removal of the Grievant from pay status shows a vindictive attitude towards him.

The Union contends the length of the investigation is a procedural flaw, violating Article 24.02. Ten months is too long under any circumstances, even with a criminal statute of limitations of seven years and Article 24.04. In any event, Long said he finished his investigation in February and communicated this to the institution. It is also reasonable to believe he so informed the Warden in May.

Finally, the Union reviews the rules the Grievant is charged with violating and reviews the evidence on each. It claims that on each charge either the State has failed to prove its claim or the Union has successfully rebutted. On Rule 8 (failure to follow orders), the State did not show how the Grievant violated the use of force regulations. On Rule 26 (failing to cooperate in an investigation), the Grievant attended all interviews and answered all questions put to him. Management cannot discipline him simply because it did not like his answers. On Rule 43 (physical abuse of an inmate), Management did not produce any evidence of abuse. On Rule 44 (threats and intimidation), the statements of three correction officers and a sergeant with impeccable records must be

credited against those of Ritchie, Roach and the contradictory statements of other inmates.

In conclusion, the Union asks that the grievance be sustained and that the Grievant be returned to his former position and awarded full back pay, benefits and seniority.

#### Opinion of the Arbitrator

The record of this case is more voluminous than that of most removals as it includes two days of testimony and records of several investigations spanning nine months conducted by two different State agencies. Despite the physical size of the record, the case boils down to really only two issues, timeliness and credibility.

Basic notions of fairness and Article 24.02 of the Contract dictate that "timeliness of the Employer's decision to begin the disciplinary process" be considered in the just-cause determination. Ordinarily, the Arbitrator would take a dim view of the nine months elapsing from the time the incidents were reported until the predisciplinary notice was served. However, an on-going criminal investigation could justify postponement of discipline. Indeed, Article 24.04 of the Contract expressly grants the Employer the right to delay the predisciplinary meeting in such cases:

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.

Here, the predisciplinary notice was issued reasonably promptly on October 22, within two weeks after the County declined to prosecute

and one day after the City similarly decided and the Highway Patrol closed its case. Such does not constitute an abuse of discretion.

The Union also raises the issue of timeliness with regard to the investigation. Article 24.04 is specific on predisciplinary meeting delays but silent on investigation delays. It thus confers no Management right to postpone or lengthen the investigation. The just cause standard demands that discipline investigations be both full and fair. This means that the Employer may neither shoot from the hip nor sit on its hands. The Union contends that Management knew the Highway Patrol had completed its investigation in February, suggesting Management sat on its hands until a new warden reopened the case and pursued it in some sort of a vendetta. The record does not support this claim, for Tpr. Long testified that although he had conducted initial interviews by the end of February, he awaited cooperation from a witness he thought had information crucial to the case. This is a reasonable basis for keeping an investigation open for at least some time, as is the change in wardens that occurred in April. That the case was expedited thereafter, with additional witnesses being interviewed in their parent institutions and polygraphs taken, goes more to the fullness of the investigation than to its vindictiveness. No motivation for Warden Turner's alleged prejudice was even suggested. I thus reject the Union's argument that a ten-month discipline process is unwarranted under any circumstances. Perceived lack of witness cooperation, on-going criminal

investigation, and change in wardens justified the delay in this case. However, although I do not invalidate this discipline on the basis of an unduly delayed or prolonged discipline process, I must point out that an employer who does not conduct its investigation promptly does so at its own peril. Even if the Grievant's case is not prejudiced by the Union's inability to collect timely evidence or influenced by events occurring after the incident, the employer's own case may be weakened by witnesses' compromised memories of events in the distant past. In this particular instance, it made the Arbitrator's factual determination more difficult.

Lacking any evidence but the statements and testimony of inmates and the accused guards, this case presents extraordinary problems of credibility. Further complicating the matter are the number of witnesses to the incidents, the number of statements taken, the delay in taking some of these statements, and the number of investigations involved. If this were a case of a single inmate accusing a correction officer of forbidden acts allegedly committed in private, the Arbitrator's job would be easier. As it stands, the case required and received careful scrutiny of the many written statements, interview transcripts, and oral testimony.

A result of this examination is the conclusion that the inmates' version of the orientation on January 25 is truthful, the officers' self-serving. No real doubt exists that this is so, at least as far as the events that occurred up to and including Roach being taken by Sgt. Hill from the pod to the office. I reach this

result from several directions. First, Ritchie's and Roach's accounts could be self-serving since they both claim to be victims of more egregious acts. Nevertheless, their versions are consistent with one another and it is hard to see how they might have conspired together, since Roach was removed from the unit immediately following the incident. Corroboration of their story was looked for next. Inmate Johnson changed his account and admits to being pressed. Former inmate Penwell also changed his story, but to favor the Grievant. He also claims investigator pressure and fear of inmates. The testimony of these witnesses were troublesome for other reasons as well. Johnson's account of the Ritchie event is confused on several points and Penwell was the only person of the many witnesses who ever claimed one cadre warned the other when the correction officers were coming onto the pod. The assertions of these witnesses were set aside as unreliable. Inmate Sutton did not remember this incident. Other inmate statements came into the record through the discipline trail and Highway Patrol investigative report, and investigators' testimony, but as the inmates did not testify themselves, their statements are hearsay and cannot be credited. Former inmate Stuller, who is no longer under the Department's supervision, did testify, however, and I found him credible after carefully scrutinizing his statements on the incidents and testimony he gave before me. His testimony is reviewed in some detail below.

Next examined were the interviews and testimony of the correction officers, who deny knowledge of any inmate being singled

out in such a way at orientation. However, their different descriptions of the orientation procedure give one pause: the Grievant says he and Leeth share orientation (equally, by his description) when possible; Leeth minimized Guard's role, maintaining that he liked to do it himself to get it right (Joint Ex. 3, #38 & #39). Although one can believe their inability to recall an orientation that occurred nine months previously, it is unlikely they would differ so much about a recurring procedure unless one of them is prevaricating. This inconsistency in the officers' statements about the conduct of orientation undermines the credibility of their other assertions. Other problems with their stories causing grave doubt as to their veracity are with regard to their versions of the Ritchie incident. These are discussed below. In conclusion, I am convinced that the Grievant knew of and permitted the cadre's intimidation of Inmate Roach during the orientation session. I am less certain of the extent of his other involvement. What occurred after Sgt. Hill took the inmate to the office cannot be determined from the record of this arbitration.

As to the events that occurred in the strong cell earlier that day, I founder in a hopeless sea of uncertainty created by the absence of any corroboration to inmates' accusations and differences in what they said were their positions in the room.

The accusations about the treatment of Ritchie the next evening, however, are supported by the testimony of Stuller. To be sure, Stuller did not see what occurred in the office, but what he



did see, smell and hear--the wet, nude inmate in the office, the amount of milk on the floor and its odor, loud talking and laughing, and the nude inmate walking through the pod--are consistent with Ritchie's version of events and in conflict with the officers' accounts. His story also fits Ritchie's statement that he did not know how the mop and bucket came to be in the room. It is true that he is not certain about the identity of the third correction officer in the room (now known to be Hadley) and where Ritchie went after the shower. But he was never sure about these things and may not have been paying very close attention to the entire episode anyway since he was watching television during part of it. He may also never have seen former Ofc. Hadley again and so never learned his name until late in the investigation. Stuller's most noteworthy departure from Ritchie's story is about who got Ritchie from his cell. In September, he said "some COs," at arbitration he was positive they were Guard and Leeth. Ritchie and Johnson say it was Leeth alone, as do the officers themselves. Penwell, on the other hand, did not see who got Ritchie out, says it was one person, and in the next sentence thinks it was Guard. Penwell really does not know and Stuller is mistaken on this point. Despite his claim to be positive, he is probably filling in a memory gap. This error does no real damage to his credibility, for some mistakes and inconsistencies are to be expected even in a truthful recollection, and this is a minor one. In sum, Stuller corroborates important features of Ritchie's account which are at

variance with the officers', his lapses are few and minor, and no motive for dishonesty is apparent.

By contrast, the officers' stories have many problems. For example, the Grievant says he never talked to Tpr. Long. Long, on the other hand, testified he did interview him and his investigation report documents an interview with an officer on February 19 who told an account of the January 26 evening that matches the Grievant's and no one else's. Leeth claims the purpose of the meeting was to get Ritchie to shower after a complaint was received. This may, in fact, be true, but why did not Leeth, himself, order Ritchie to shower instead of calling the sergeant onto the unit to do it for him? Additionally, if the staff did deal with Ritchie's personal hygiene that evening (for example by telling him he stank and ordering him to shower), it may have been in addition to, rather than instead of, what Ritchie says they did to him. Several witness statements suggest this may be the case. It is also far-fetched that Sgt. Hill would get a correction officer assigned to the adjoining unit who just happened to be passing by to escort Ritchie to the shower, when he had two other officers already at hand. Equally mysterious are the different statements about the spilling of the milk and who cleaned it up. These and other discrepancies were brought forth in arbitration and no attempt was made to explain them. Furthermore, the investigatory interview transcripts portray evasion, equivocation and cover-up.

Penwell and Sutton, who testified in the Grievant's behalf, offer poor comfort. Sutton testified he saw Ritchie leave the office naked while the Grievant says he was clothed. Penwell admits to changing his story twice, but expects to be believed on this, the third version. I conclude that the officers' statements about the incident are, like those about the orientation incident, self-serving. When weighed against Inmate Ritchie's statements, which are consistent, nonevasive and supported by credible corroboration, they come up short.

Finally, I come to what the State has proved through the testimony of Ritchie and Stuller. I do not find evidence of physical abuse and cannot even state exactly what happened in the office on R-2 that evening. Because Ritchie's testimony is more credible than the Grievant's does not make all of it true. Some may be exaggerated or completely fabricated. But Stuller provides circumstantial evidence from which inferences can be drawn: certain noises emanated from the room, a quantity of milk was on the floor, Ritchie was dripping with it and naked, the four staff were present. From this I am convinced that the Grievant participated in a pattern of harassment calculated to humiliate and intimidate this inmate using methods incapable of detection without eyewitnesses. Moreover, his statements during the investigation cause me to conclude that he participated in a cover-up to protect himself and the other staff. Although his conduct on January 25 and 26 collectively constitute a first offense, Management had just cause to remove him as a threat to the institution's security.

Award

The grievance is denied in its entirety.



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Anna DuVal Smith, Ph.D.  
Arbitrator

October 6, 1992  
Shaker Heights, Ohio

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