#938

In the Matter of Arbitration	
Between	Case Numbers:
OCSEA/AFSCME Local 11	27-05-021492-200-01-03 27-05-062592-231-01-03
and	Before: Harry Graham
The State of Ohio, Department of Rehabilitation and Correction	

Appearances: For OCSEA/AFSCME Local 11:

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Staff Representative
OCSEA/AFSCME Local 11
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For Department of Rehabilitation and Correction:

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Introduction: Pursuant to the procedures of the parties two days of hearing were held in this matter before Harry Graham. At those hearings the parties were provided complete opportunity to present testimony and evidence. Post hearing statements were filed in this dispute. They were exchanged by the arbitrator on December 6, 1993 and the record in this dispute was closed.

Issue: There are two issues to be determined in this dispute. The parties agree upon the formulation of those issues. They

are:

> Was the State untimely in the discipline and if so, is the discipline invalid?
>
> The second issue is:
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> Were the suspensions of Mark Seward and Bert Carter for just cause? If not, what should the remedy be?

The parties agree that only if the first question is answered negatively will consideration be devoted to the second issue.

Background: The central element that prompted the State to discipline the Grievants is disputed between the parties. There are certain other events that are not in dispute. The Grievants, Mark Seward and Bert Carter, are both Correction Officers at the Correctional Reception Center in Orient, OH. On December 19, 1990 two Officers from the Ohio State Reformatory in Mansfield, OH. were transporting inmates to the Frazier Health Center which is located adjacent to the Correctional Reception Center. While at Frazier the Officers picked up another inmate who was to be transferred back to Mansfield. That inmate did not have orange coveralls which are used when inmates are being transferred. A stop was made at the Correctional Reception Center to get the necessary overalls. Upon arrival at the Admissions and Orientation area of the Correctional Reception Center a Corrections Officer from Mansfield, Dennis Minard and the inmate exited the vehicle to get the coveralls. Two inmates from Mansfield who

were being transported indicated they needed to use the restroom. They too, exited the van and all entered the Admissions and Orientation area of the Correctional Reception Center. Minard asked the Corrections Officers on duty in that area if the two inmates in his charge could use the restroom. He was answered affirmatively. Minard left with the third inmate to get the jumpsuit. At the same time the Mansfield inmates were directed to enter a cell with toilet facilities. They did so. Upon his return to the area Officer Minard was informed that there had developed a "problem" in his absence. At this point, the account of events proffered by Union and State witnesses differs. According to Officer Minard, Mark Seward had one of the inmates, Anthony Kirklin, pinned up against a wall. Kirklin was still restrained. Minard says he saw the other inmate, Christopher Montgomery, surrounded by Officers from the Correctional Reception Center. When they dispersed Minard saw that Montgomery's handcuffs had been removed and that his hands were at his sides. He also had a bloody nose. Upon inquiring as to whom had removed Montgomery's handcuffs no direct answer was received by Minard. He was told that Montgomery had rolled his eyes at the Correctional Reception Center officers. Minard recuffed Montgomery and all left for the return to Mansfield. In due course, he reported his version of the incident. Any involvement in such an incident is denied by the Grievants.

An investigation was commenced by the Department. At the same time the Ohio State Highway Patrol was also investigating this incident. It was informed about the Correctional Reception Center incident on December 21, 1990. On February 15, 1991 a report was submitted by the Rehabilitation and Corrections Investigator charged with looking into this matter. Ronald Burford, the Investigator, determined that "something took place in the holding cell but not to the extent that was told by inmate Montgomery." (Joint Exhibit 2, p. 2). On June 2, 1991 Warden Melody Turner referred the incident to the Use of Force Committee. On August 22, 1991 the Use of Force Committee submitted its report. It concluded that "no use of force took place." It also concluded that it "cannot support any further action concerning this incident." (Joint Exhibit 10, p. 1). That report was not accepted as the definitive resolution of this incident. Another investigation was assigned to Captain William Augustine. In his report Captain Augustine concluded that Inmates Montgomery and Kirklin were abused while in the restroom at the Admissions and Orientation area of the Correctional Reception Center. He recommended discipline for several people, including the Grievants in this case, Mark Seward and Bert Carter. On November 1, 1991 both were issued a notice of Pre- Disciplinary Conference. The Conferences occurred on November 15 and 19, 1991. On December 10, 1991

Officer Seward was administered a 30 day suspension. On December 24, 1991 Officer Carter received a 15 day suspension. Other employees were disciplined in connection with their alleged role in this incident as well.

Grievances protesting the suspension of Seward and Carter were filed. They were processed through the procedure of the parties and now are before the Arbitrator for determination. Consideration will first be devoted to the question of the timeliness of the Employer's imposition of discipline on Messrs. Seward and Carter. If it is determined that the State acted in timely fashion when it imposed the suspensions under review in this situation attention will then turn to whether or not just cause existed for the State to act as it did in this instance.

Position of the Employer: The State points out that there is no specific timetable in the Agreement within which it must determine to administer discipline. In this situation the initial report submitted to Warden Turner was dated February 15, 1991. That report was unsatisfactory to Warden Turner. As she is authorized to do, she directed further investigation of this incident occur. A Use of Force Committee was constituted. The operations of such a committee are complex. Schedules of the members must be coordinated. Time is consumed in conducting and subsequently transcribing interviews. More time is consumed with deliberations. The

Committee acted expeditiously. It submitted its report to the Warden on August 22, 1991. Given the magnitude of its task, it cannot be concluded that it acted in dilatory fashion. The contrary is the case. The Warden was dissatisfied with the report of the Use of Force Committee. She authorized further investigation. While these investigations were being conducted by employees of the Department of Rehabilitation and Correction the Highway Patrol was conducting its own investigation. That investigation was not completed until December 24, 1991.

Pursuant to the directive of Warden Turner Captain Augustine commenced his investigation. That investigation was completed on October 16, 1991. Notice of the pending Pre-Disciplinary Conference was issued on November 1, 1991 and the Conferences occured on November 15 and 19, 1991. The record in this situation indicates that the State never permitted the investigations to lapse. They continued during 1991 to the date of Captain Augustine's report. When apprised of his findings, the State acted expeditiously. No undue delay attended upon the action of the State in this situation it asserts.

The State must be careful not to rush to judgement in matters involving discipline. This was the view of Arbitrator Anna Smith in another dispute involving the Department of Rehabilitation and Correction. (Case No. 27-05-911202-0176-

01-03). It was the view of Arbitrator Smith that in cases involving discipline the investigation must be both full and fair. In her view "This means that the Employer may neither shoot from the hip nor sit on its hands." In this case, the employer neither shot from the hip nor sat on its hands. When it had evidence to support discipline it acted.

Section 24.05 of the Agreement permits the State to delay imposition of discipline during the pendency of a criminal investigation. While the Department was conducting its investigation the Highway Patrol was conducting a parallel investigation. It was criminal in nature. Under such circumstances the State is not required to impose discipline. It may await the outcome of the criminal investigation. Given the pendency of three investigations plus the continuing investigation being conducted by the Highway Patrol, the State asserts it acted in timely fashion in this instance. Hence, it urges that consideration be devoted to this dispute on its merits.

Position of the Union: The Union notes that eleven months elapsed from the date of the alleged incident to the date of the pre-disciplinary conferences. Approximately one year passed before discipline was imposed. This is excessive in the Union's view. It points to Section 24.02 of the Agreement in support of this view. The final paragraph of that Section reads as follows:

> 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 action to begin the disciplinary process.

An eleven month lapse between the date of the incident prompting the State to discipline and the imposition of discipline is excessive according to the Union. The State commenced its first investigation in January, 1991. The report of Investigator Burford was made in mid-February, 1991. Nothing happened until June, 1991 when the matter was referred to a Use of Force Committee. The Committee reported on August 22, 1991. It found no grounds for proceeding with discipline against the grievants. That was unsatisfactory to the Department and Captain Augustine was directed to conduct a third investigation. This occurred on September 1, 1991. He reported on October 16, 1991. No discipline occurred until December, 1991. The record in this case manifests precisely the sort of delay in imposition of discipline that Section 24.02 was designed to avoid according to the Union. In its opinion this record shows that the Employer did not initiate discipline as soon as reasonably possible. It waited until it had a report satisfactory to it. Once that was in hand, it imposed discipline. That is not contemplated by Section 24.02 according to the Union.

There can be no defense by the State that it was waiting for the outcome of the Highway Patrol investigation prior to

imposing discipline. The Department did not rely upon the findings of the Patrol when it determined to discipline Seward and Carter. Its report was not completed until December 24, 19991, after discipline was imposed on the Grievants. Reliance on the fact that there was a continuing criminal investigation cannot be used to support the State's lack of action in this situation as it disciplined the Grievants before the Highway Patrol completed its investigation. In this situation, the State cannot meet the test of reasonableness set forth in Section 24.02. As that is the case in the opinion of the Union, it urges that these grievances not be considered on their merits. In the opinion of the Union both Grievants should have their suspensions expunged. They should be made whole. In this situation that would include pick-a-post rights conferred upon officers by the Agreement. The Union also urges that overtime hours the Grievants would have worked be paid to the Grievants.

Discussion: At Article 24.02 the parties have taken pains to ensure that discipline is administered in timely fashion. Cited above, the Agreement prescribes that discipline "shall be initiated as soon as reasonably possible ...." In this situation the events for which the Grievants received discipline occurred on December 19, 1990. The discipline was administered almost exactly one year later. In the interim investigations had been conducted. Two of them recommended

that no discipline be administered to Seward and Carter. After each of those investigations another investigation was ordered. Finally, in October, 1991 Captain Augustine recommended proceeding with discipline against Carter and Seward. Two more weeks elapsed before notice of the pre-disciplinary conferences were issued. Approximately one month after Captain Augustine's report there was conducted the contractually mandated pre-disciplinary conference. Several more weeks passed before the suspensions at issue in this proceeding were assessed against the Grievants. In the circumstances of this dispute, the passage of one full year between the event and the discipline does not meet the contractual standard of initiating discipline as soon as "reasonably possible." A lapse of a year is not reasonable.

Anna Smith was absolutely correct in stating that "the just cause standard demands that (a) discipline investigation be both full and fair. This means that the Employer may neither shoot from the hip nor sit on its hands." How is an investigatory process that lasts a year to be viewed? Two investigations were conducted that concluded that discipline was not to be levied against these Grievants. The second involved the creation of a Use of Force Committee. This group, composed of several people, concluded that discipline was improper. The deliberations of that body were rejected. Yet another investigation was commenced. At some point enough

is enough. The injunction of Arbitrator Smith is two-fold. The employer cannot act precipitiously. Neither can it engage in undue delay in determining to act. If the terminology of Section 24.02 is to have any life whatsoever it must be concluded that in the circumstances of these Grievants that the delay of one year in administration of discipline does not meet the contractual standard of imposing discipline "as soon as reasonably possible."

Award: The grievances are sustained. The suspensions administered to Mark Seward and Bert Carter are to be removed from their personnel records. They are to be paid all monies lost at the straight time rate. No overtime payments are to be made to the Grievants. No reason exists to deny to the Grievants pick-a-post rights under the Agreement. All such pick-a-post rights are to be provided to the Grievants. All seniority that would have accrued to the Grievants but for this action is to be credited to them. No opinion is expressed in this decision about the merits of the suspensions under review.

Signed and dated this 30th day of December, 1993 at South Russell, OH.

Harry Graham
Arbitrator