#1427

STATE OF OHIO AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, THE OHIO DEPARTMENT OF REHABILITATION AND CORRECTION (ORIENT CORRECTIONAL INSTITUTION)

-AND-

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME

GRIEVANT: RONALD CLIFFORD, JR.
GRIEVANCE NO.: 27-21 (10/27/98)-1638-01-03

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DR. DAVID M. PINCUS
DATE: March 10, 2000

APPEARANCES

For the Employer

William Blaney	Investigator
Jillian Fromin	Labor Relations Specialist
Ron Forrest	Deputy Warden
Ken Fry	Captain (Retired)
David C. Berry	Lieutenant
Michael Fonner	Lieutenant
Patricia Rice	Lieutenant
Brad Nielsen	Advocate

For the Union

Ronald Clifford, Jr.	Grievant
Neal Nolan	Local President
Jim Hanna	Registered Nurse
Terry D. Muncy	Corrections Officer
Victoria Luckenbach	Steward
Tim Purtee	Sergeant

INTRODUCTION

This is a proceeding under Article 25, Grievance Procedure, Section 25.02, Step 5 – Arbitration of the Agreement between the State of Ohio, the Ohio Department of

Rehabilitation and Correction, Orient Correctional Institution, hereinafter referred to as the "Employer," and the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL- CIO, hereinafter referred to as the "Union," for the period March 1, 1997 through February 29, 2000 (Joint Exhibit 1).

The arbitration hearing was held on December 17, 1999, at the Orient Correctional Institution. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties agreed not to submit briefs.

STIPULATED ISSUE

Was the Grievant, Ronald Clifton, Jr., suspended for ten (10) days for just cause? If not, what shall the remedy be?

JOINT STIPULATION

1) The Grievant's date of hire is 8/31/81.

2) Management's records of the Grievant's discipline is as follows:

1)	12/14/89	1B	VR
2)	5/2/90	1B	WR
3)	8/30/90	1B	1 day suspension
4)	7/20/90	3c	VR
5)	5/20/91	3d	WR
6)	5/29/91	3d	WR
7)	8/16/91	8	WR
8)	1/16/92	3c	WR
9)	5/21/92	3d	1 day suspension
10)	9/6/92	3f	WR
11)	10/27/92	3d	WR
12)	1/10/94	8	VR

13)	1/10/94	3k	VR
14)	1/10/94	3d	WR
15)	2/1/94	3j, 3k	WR
16)	6/1/94	3j, 3k	WR
17)	11/7/94	3d	WR
18)	12/14/94	3k	VR
19)	5/15/95	3d	WR
20)	7/12/95	3a, 3d	1 day suspension
21)	11/9/95	3a, 3d	3 day suspension
22)	5/17/96	3b	3 day suspension
23)	11/25/96	8	WR
24)	12/2/96	3b, 3h	5 day suspension

3) The Grievant works as a Correction Officer at the Orient Correctional Institution.

PERTINENT CONTRACT PROVISIONS

ARTICLE 24 – DISCIPLINE

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. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(1).

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 oral reprimand(s) (with appropriate notation in employee's file);

B. one or more written reprimand(s);

C. a fine in an amount not to exceed five (5) days pay; for any form of discipline; to be implemented only after approval from OCB;

D. one or more day(s) suspension(s);

E. 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 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.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

(Joint Exhibit 1, Pg. 81-82)

24.04 – Pre-Discipline

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

(Joint Exhibit 1, Pg. 84)

24.05 – Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent 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 employee 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 notify the agency head in writing of the name and address of the Union representative to receive such notice. 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.

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(Joint Exhibit 1, Pg. 84)

CASE HISTORY

Ronald Clifton, Jr., the Grievant has served as a Correction Officer since August 31, 1981. The incident in dispute took place on November 21, 1997. On the day in question, the Grievant was seating inmates in the dining room. An Inmate Bezak sat in the wrong place, and the Grievant assigned him to the proper location. The inmate

moved, but purportedly uttered some verbal threats while complying with the directive. The Grievant permitted Bezak to finish eating, and then told him that he was taking him to the Captain's Office.

The Grievant and Correctional Officer Terry Muncy initiated the transport without cuffing Bezak. The record indicates Bezak failed to initiate any trouble as he was escorted by the officers.

The record, however, becomes more muddied regarding the events at the Captain's Office. The Grievant alleged Bezak became suspicious, which caused him to initiate a strip search in a restroom near the vending machine area. Initially, Bezak refused to comply, but eventually relented. During the strip search process, Bezak allegedly swung at the Grievant. The Grievant purportedly responded with a defensive move. A struggle ensued causing both individuals to crash through the restroom's door into the hallway.

The Union remarked that the Grievant and Officer Muncy took the inmate to the floor. Subsequently, Lt. Berry and Sgt. Purtee arrived on the scene and helped restrain the inmate, Lt. Berry handcuffing the inmate. At the time of the altercation in the hallway, the Grievant was nude and urinated on himself. He was eventually transported to Frazer Health Center for a medical evaluation.

On or about December 2, 1997, a Use of Force Committee was convened to investigate the circumstances surrounding the November 21, 1997 incident. The Grievant and Muncy were under investigation regarding the incident. It should be noted Muncy contacted Captain Fry prior to the Use of Force Hearing and asked if he could

amend his initial statement. He was given an opportunity to submit an amended version at the hearing. The Grievant was offered a comparable option, but refused to do so.

On December 10, 1997, the Use of Force Committee offered the following recommendation:

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> Disciplinary action should be taken against Correctional Officer, R. Clifton and Correctional Officer T. Muncy for excessive force used on inmate Bezak and submitting falsified documents to Use of Force Committee and not following policy and procedure.

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(Joint Exhibit 2, Pg. 13)

On August 11, 1998, a Pre-disciplinary Conference was held to deal with potential discipline arising from the disputed matter. The Grievant was charged with violating the following Standards of Employee Conduct:

#8 – Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment.

#22 – Falsifying, altering or removing any official document.

#41 – Use of excessive force toward any individual under the supervision of the Department or a member of the general public.

On September 4, 1998, the Employer suspended the Grievant for ten (10) days for violating the above-mentioned infractions. He filed a grievance on October 23, 1998 claiming various violations in support of his position. These allegations include in pertinent part:

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> This grievance is being filed on behalf of Correctional Officer R. Clifton as a written appeal of a ten (10) day suspension issued to this employee for

an alleged violation of E.C.O.C. rules #8, #22, and #41. We are filing under 24.01 and 24.02 because management has failed to establish just cause for discipline nor is it progressive in nature! We are also filing under 24.03 because an employer representative shall not use knowledge of an event giving rise to the imposition of discipline to coerce an employee. This is based on the fact that Lt. Fonner was present during the incident and then sat on the Use of Force panel. We are filing under 24.04 because it states the employer will provide a list of witnesses and documents known of at that time used to support the possible disciplinary action.

Management did fail to produce documents pertaining (sic) to this incident at the Pre-Disciplinary hearing on August 11, 1998, nor did they produce them upon request of Union and employee.

The Union also cites 24.05 because disciplinary measure imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

In closing, the Union raises the same procedural error it raised during the pre-disciplinary conference. Timeliness and the highway patrol's request to delay for over a year and the handcuff policy or the issue of Lt. Fonner.

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(Joint Exhibit 3)

The parties were unable to resolve the disputed matter in subsequent portions of the grievance procedure. With no substantive nor procedural issues raised by the parties, the matter is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer posits that it had just cause to suspend the Grievant for the violations previously described. It further bolsters its claim by raising certain suspicions regarding the Grievant's credibility, while discounting the timeliness allegation raised by the Union.

Clearly, the Grievant violated Rule #8, by failing to carry out a work assignment or the exercise of poor judgment. Several facets of the Grievant's conduct support this premise. If the Grievant needed to escort the inmate to the Captain's Office, on the basis of a prior threat, then he should have handcuffed the Grievant prior to the escort. A policy exists regarding this matter to prevent potential problems. He should have realized the importance of this procedure considering the inmate's prior hostile actions. The Grievant, moreover, should not have escorted the inmate. He exercised poor judgment when he engaged in the escort; someone else should have undertaken this task. Again, he violated an existing policy when he escorted the inmate. The Grievant had already engaged in a verbal confrontation with the inmate. As such, he should have known escorting the inmate could lead to an eventual altercation. For similar and related reasons, the Grievant should not have conducted the strip search. Even if he had valid justifications in support of this undertaking, the circumstances did not warrant his direct involvement. Other officers should have conducted the strip search. They were in close proximity, and their assistance was readily available. Clearly, this entire episode could have been avoided if the Grievant had used good judgement and followed well-known policies and procedures.

The Grievant's own admission supports the falsification charge. Even though he had an opportunity to amend or clarify his initial statement given to the State Highway Patrol, he never did so. The initial statement failed to disclose the strip search. Rather, it emphasizes that the inmate swung at him as they arrived at the hallway outside of the Captain's office. Neither the Use of Force Committee nor the State Highway Patrol had an initial accurate version of the Grievant's actions. It appears that at some later date,

probably during the pre-disciplinary hearing, the Grievant recanted his initial version and described the "true" circumstances surrounding the altercation in the restroom and the hallway.

But for the Grievant's prior transgressions, any use of force could have been avoided. His poor judgments necessitated the unnecessary use of force, which caused the force used to be deemed excessive.

The Employer views the Grievant's admission regarding the falsification claim as a strong inference in support of the excessive use of force charge. By falsifying an official document, the Grievant exposed his true motivation. Obviously, if he had done nothing wrong, there was no need to falsify the report. As such, one is left with an undeniable conclusion. The Grievant had to falsify the report because he had, indeed, used excessive force inside the restroom.

Excessive force, moreover, can be readily inferred by looking at a series of judgmental errors engaged in by the Grievant. If the Grievant had not escorted the inmate after the altercation in the cafeteria, and had someone else conducted the strip search, the probability of any excessive force would have been drastically minimized. Under these circumstances, use of force must be viewed as excessive and unnecessary.

The Grievant's testimony appears unreliable and lacks veracity. On a number of occasions, his testimony was inconsistent and lacked credibility. At the Step 3 hearing, the Grievant remarked the inmate had to be strip searched because he appeared high. At the arbitration hearing, however, the Grievant noted the inmate acted suspicious and appeared to be hiding contraband. Some inconsistent testimony regarding what took

place during the escort raises further questions dealing with the Grievant's conduct. The Grievant initially explained the inmate was uncooperative during the escort and took a swing at him. At the hearing, however, he stated nothing of any import took place during the escort.

The Employer did not violate Article 24.04 when it delayed the Grievant's pre-disciplinary meeting. It properly delayed the investigation and subsequent discipline pending the outcome of a criminal investigation. This course of action was followed when the facility was verbally requested by the State Highway Patrol to hold any administrative disciplinary process in abeyance. The disputed delay was merely a consequence of this request.

The imposed discipline was not excessive nor arbitrary – any of these charges, if properly supported, could have resulted in the Grievant's removal. As such, the ten-(10) day suspension properly reflects the guidelines specified in the Standards of Employee Conduct (Joint Exhibit 5).

The Union's Position

The Union posits that the Employer did not have just cause to suspend the Grievant. It challenges the legitimacy of the various charges based on proof deficiencies and several procedural objections. The level of discipline imposed is also viewed as excessive and punitive.

The Rule #8 violation is not properly supported by the record. Testimony at the hearing never supported contentions regarding handcuffing, escorting and strip search policies. The Employer, moreover, never produced written policies, which established the Grievant exercised poor judgment in carrying out his assignment.

With respect to the Rule #22 charge, the Employer failed to establish that the Grievant falsified or altered a report. The Grievant admitted that he did not tell the entire story on an incident report dated November 21, 1997. Yet one should not equate this oversight with an intentional falsification of an official report.

In a similar manner, the record fails to support the Employer's excessive use of force theory. None of the witnesses that testified at the hearing admitted seeing the Grievant engage in any excessive force activity. Even if the Grievant failed to follow proper procedure, poor judgments of this sort cannot be equated with excessive use of force. Registered Nurse Jim Hanna, examined the inmate after the incident. In his medical opinion, the inmate did not evidence any excessive force symptoms.

Several procedural and due process violations were raised by the Union. Other individuals participated in the disputed altercation, and were not charged with using excessive force. Of particular impart is the manner the Employer dealt with Muncy's participation. Even though the Use of Force Committee determined he had used excessive force and recommended some form of disciplinary action, discipline for excessive used of force was never administered nor imposed. This unequal outcome clearly establishes some form of unequal treatment animus.

Several procedural claims were also raised by the Union. Section 24.02 was violated because the Employer failed to proceed with discipline in a timely fashion. A pre-disciplinary conference was convened approximately 263 days after the incident on August 11, 1998, while the final notice of discipline was approved approximately 307 days after the incident.

The Employer's reliance on Article 24.05 to justify the above mentioned delay seems incredible. Here, criminal charges were never pursued. The Employer was placed on notice as early as April of 1998 that the Prosecutor of Pickaway County was not going to pursue misdemeanor charges of assault against the Grievant.

Progressive discipline principles were not adhered to in accordance with contractual requirements. Article 24.01, 24.02, and 24.05 specify the Employer will follow the principles of progressive discipline, and that the imposed discipline shall be reasonable and commensurate with the offense. None of the requirements were followed when the discipline in dispute was issued.

The Grievant was a veteran officer with approximately sixteen years of service. None of the active disciplines in his file reflected occurrences similar to those most immediately imposed. As such, the discipline imposed was not commensurate with the offense. The Standards of Employee Conduct do not specify a ten- (10) day suspension for a first offense of any of the charges articulated.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record, including pertinent contract provisions, it is the Arbitrator's opinion that the Employer had just cause to discipline the Grievant, but that the imposed penalty was excessive and not supported by the record. Notice, proof, and procedural defects caused the Arbitrator to modify the ten-day suspension.

Rule #41 – Use of Excessive Force was not properly supported by the record. The Employer asks the Arbitrator to conclude excessive force was used based on a series of proposed inferences, none of which establish a sufficient circumstantial net.

The first inference suggests that since the Grievant admitted that he lied, then he had to have used excessive force in the restroom, and attempted to cover up his misdeed by falsifying his statement. Otherwise, the Grievant had no established need to falsify the circumstances surrounding the disrupted event.

Circumstantial evidence may, at times, be more useful than direct evidence when attempting to prove the matter asserted. This axiom was inappropriately applied in this instance. Here, not one available witness characterized the Grievant's actions as excessive; medical evidence was not introduced to support the allegation. Rather, the Union provided credible testimony refuting the notion by introducing documentation and testimony reviewed by the Registered Nurse who treated the inmate. It does not appear, moreover, that any formal statement was ever given by the inmate prior to or during the course of the investigation. Other than the inmate's documented general displeasure, concrete and unrefuted allegations dealing with excessive force never surfaced.

Reliance on the Use of Force Committee's deliberations and outcomes as supportive collateral evidence did not further the Employer's case in chief. The deliberations discussed are somewhat equivocal. Virtually all of the witnesses at the arbitration hearing were also interviewed by the committee. It is hard to determine whether differing testimony was provided at both proceedings; a transcript was never taken at the hearing. A thought-out rationale, with particulars in support of the conclusion, was not a necessary outcome considered by the Committee. It becomes quite impossible to use a collateral outcome in support of an administrative ruling, when the collateral proceeding's process and outcome are so uniquely unstructured.

This Arbitrator, however, does not support the Union's view that the Use of Force Committee's outcome was inherently biased. Lieutenant Fonner's participation did not bias the process not withstanding my prior critique. The record indicates he was in the area of the altercation, but was never directly involved. In fact, he merely observed the tail end of the altercation.

Another attempted inference focused on a series of poor judgments engaged in by the Grievant in carrying out his work assignment. Here, the Employer suggests a link between Rule #8 and Rule #41 allegations. The Employer, more specifically, argues that any force used by the Grievant should be deemed excessive since a series of unnecessary poor judgments placed him in a situation where he had to use unnecessary force. The Employer failed to establish the requested inference because the poor judgment allegation was extremely weak. Much was made at the hearing surrounding escort, cuffing and strip search policies. Policies of this sort, although reasonable on their face, are not so obvious that any reasonable Correction Officer should know about them without some form of written notice. Neither written nor properly established verbal notice regarding these matters was established at the hearing. Varying versions and applications were testified to by witnesses without a consistent and coherent understanding of existing policies. If supervisors are unclear about proper and consistent policy applications, why should bargaining unit members be held to a higher standard?

Clearly, the prior analysis supports the Union's argument regarding the poor judgment charge. The Grievant did not, in my opinion, violate Rule #8.

The record, however, supports the falsification charge. An omission of an important fact or circumstance during the course of an investigation, which is eventually recanted, is a bold and blatant attempt to falsify. Here, the record indicates the Grievant intentionally misled the Employer about two critical circumstances. Initially, he maintained the inmate took a swing at him while being escorted. He also never mentioned the strip search in the restroom. At the hearing, however, he said the "swinging" episode never took place, while elaborating on the strip search situation.

This lack of honesty is viewed quite critically by the Arbitrator. This Arbitrator, moreover, does not view the Grievant's falsification activity as equivalent to actions engaged in by Muncy. Both had an opportunity prior to the Use of Force Committee hearing to modify their original presentations. Only Muncy took advantage of this opportunity, while the Grievant continued about his perilous route.

In this Arbitrator's opinion, the Employer failed to provide any significant justification for the disputed delay in the imposition of discipline. Documentation introduced at the hearing strongly suggests that Articles 24.04 and 24.05 exceptions were improperly applied. The Employer asserts that it was verbally asked to delay its administrative process pending the disposition of criminal charges. An Ohio State Highway Patrol Report of Investigation (Union Exhibit 2) clearly indicates that the Employer knew, or should have known that the Pickaway County Prosecutor was not going to pursue misdemeanor charges of assault. This finding was communicated to a Trooper Seitz as early as April/May of 1998. Nothing in the record was introduced to rebut this timing argument. Mere reliance on some verbal request to delay does not absolve the Employer's responsibility to follow-up on the status of an investigation. To

overlook a contractual breach of this sort would cause a modification of terms and conditions negotiated by the parties as specified in Articles 24.02 and 24.05.

The Employer had just cause to suspend the Grievant for falsification, but not for the other charges specified in the suspension order. The falsification charge, however, is quite severe under the circumstances. The Grievant's prior disciplinary record, moreover, suggests that some form of serious penalty should be imposed; progressive discipline requires such an outcome. At the same time, the Employer's procedural and related due process breaches play a role in the penalty specified in the Award which follows.

AWARD

The grievance is upheld in part and denied in part. The ten-(10) day suspension shall be modified to a four-(4) day suspension. The Grievant shall, therefore, receive a back-pay award for six (6) days. Any other benefits and seniority lost as a consequence of the Employer's improper imposition shall also be rectified as a consequence of this ruling.

Moreland Hills, Ohio
March 10, 2000

Dr. David M. Pincus
Arbitrator