ROBERT BROOKINS, J.D. ◆ PH. D.

PROFESSOR OF LAW ◆ LABOR ARBITRATOR ◆ LECTURER ◆ MEDIATOR

#1430

May 3, 2000

JamMs. Leslie Jenkins
Arbitrator Scheduler
Division of Human Resources
Office of Collective Bargaining
106 N. High Street, 7th Floor
Columbus, OH 43215-3009

Grievance:	Grievance No. 27-21(3/25/99) 1718-06-10
Grievant:	Mr. Thomas Bunsey
Union:	Ohio Education Association
Employer:	Orient Correctional Institute

Dear Ms. Jenkins:

I have enclosed two copies of my final, notarized opinion and award in the captioned as well as my invoice. One copy is for Mr. Henry Stevens, and the other for Mr. Bradley A. Nielsen. Thanks for allowing me to serve you.

Respectfully,

Robert Brookins

Robert Brookins

6518 GREENRIDGE DR., INDIANAPOLIS, IN 46278-2224

OFFICE 317/876-7392 ◆ FAX 317/876-1052 ◆ ROBROOKIN@IUPUI.EDU

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
The Ohio Department of Rehabilitation and Correction, Orient Correctional Institute
-AND-
State Council of Professional Educators, Ohio Education Association

APPEARANCES

For the State
Bradley A. Nielsen, Labor Relations Officer
Jillian Froment, Labor Relations Specialists/Office of Collective Bargaining
William Blaney, Investigator
David C. Larsen, Chief Custody Officer
Leesa Caudill, Registered Nurse, Acting HCA

For the Union
Henry Stevens, Labor Relations Consultant SCOPE/OEA/NEA
Vickie Miller, State Counsel for Professional Educators, SCOPE/OEA/NEA
Thomas Bunsey, Grievant, Education Specialist
Marianne, Huffman, Teacher and OCI/SCOPE Site Representative

Case-Specific Data
Hearing Held—January 25, 2000
Grievance No. 27-21(3/25/99) 1718-06-10
Subject: Twenty-Four-Hour Fine & Use of "Excessive" or "Deadly" Force/Exercise of Poor Judgement

Case Decided
April 27, 2000

Arbitrator
Robert Brookins, Professor of Law, J.D., Ph.D.

Table of Contents

I. Preliminary Statement

From their panel of grievance arbitrators, the Orient Correctional Institute (the Employer or OCI) and the Ohio Education Association (the Association)[1] selected Robert Brookins (the Undersigned or the Arbitrator) to hear this dispute. On January 25, 2000, the Undersigned held an arbitral hearing at OCI, during which the Parties had a full and fair opportunity to present their evidence and witnesses in support of their positions in this dispute. All evidence was fully available to valid objections from opponents, and all witnesses were fully available for cross-examination. At the conclusion of the hearing, the Parties elected to submit post-hearing briefs rather than to present closing arguments. On March 28, 2000, the Undersigned received the last post-hearing brief and officially closed the record in this dispute, with the understanding that the Undersigned's decision was due no later than 45 days after the hearing record was officially closed.

II. The Facts

The basic facts and circumstances that triggered this dispute are largely undisputed. OCI is a medium security prison with a staff of 600, an inmate population of approximately 2000, and a mission to protect the public as well as its staff and inmates. Mr. Thomas Bunsey (the Grievant) has worked for the Employer for approximately 13 years as an Educational Specialist, Employee Ability Assessor. The Association represents employees within the Grievant's job classification. When the instant dispute arose, the Grievant was a School Librarian 2, responsible for supervising operations and staff in the inmate library (the Library), located on the first floor of the Inmate Services Building. The Grievant's performance ratings as a Librarian 2 were generally above average.

In addition to a Librarian 2, the Library's staff includes a Correction Officer, and approximately 20 inmate-employees. With this type of assistance, the Grievant was never required to open the library alone. Nor did he ever file a grievance under the Employer's "work alone policy."

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[1] Collectively referred to as the Parties.

The Employer had given the Grievant several training sessions in self defense. The Grievant had, for example, received "Unarmed Self-Defense," in-service training on February 6, 1998 and on September 30, 1998.[2] Furthermore, on February 6, 1998, the Grievant received and passed training in various techniques, including the "Fight Breakup" Technique.[3]

The Library is open from 8-00 to 10:00 a.m. and from 12:30 to 3:00 p.m. At approximately 1:30 p.m., on October 28, 1998, a queue of inmates waited in the lobby of the library for it to open. Instead of opening the library at 12:30 p.m., the Grievant decided to wait for the Correction Officer and support staff.

The Grievant's problems began at approximately 1:45 p.m., shortly after he finally decided "to be a good soldier" and open the Library alone. After the Grievant announced that the Library was opened, the queue of inmates began to file through the front doors past him. As he walked past the Grievant, Inmate Long mimicked the Grievant's announcement that the library was opened. The Grievant heard this and immediately asked Inmate Long to leave the library. The Inmate denied that the comment was intended for the Grievant. Nevertheless, the Grievant insisted that Inmate Long vacate the library. As he left the Library, Inmate Long muttered the word, "Bitch."[4] Hearing that comment, the Grievant immediately demanded that the Inmate surrender his identification card; Inmate Long refused. The Grievant followed Inmate Long into the presence of other inmates in the open yard and again demanded the identification card. Once more Inmate Long refused and, this time, reminded the Grievant not to touch him. Nevertheless, the Grievant grabbed the back of Inmate Long's shirt collar, pulled on it, and used the "Fight Breakup" Technique to restrain him. Inmate Long offered no resistance. Then the Grievant set off his "man-down" alarm.

Shortly thereafter, correction officers arrived at the scene, handcuffed, and escorted Inmate Long

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[2] Joint Exhibit No. 2, at 8.

[3] Joint Exhibit No. 2, at 6-8.

[4] The Grievant testified that "bitch" means homosexual and could have reduced his ability to supervise the library.

to the Infirmary, where a nurse observed and treated him for superficial scratches and abrasions on the back and side of his neck.[5] According to the medical report, Inmate Long was released approximately two minutes after he entered the infirmary.[6]

On October 29, 1998, Deputy Warden Ronald E. Forrest submitted the foregoing incident to OCI's Use of Force Committee (the Committee) for investigation and recommendations. The Committee investigated the incident by interviewing the Grievant, Inmate Long and others (inmates and corrections officers) who either observed the actual incident or arrived immediately thereafter. On November 12, 1998, the Use of Force Committee concluded that the Grievant "held Inmate Long by shirt and neck inappropriate per photos and medical reports. . . . Disciplinary action should be taken against . . . [the Grievant] for excessive force."[7] Nevertheless, the Grievant insists that the circumstances compelled him either to take the physical action against Inmate Long or to sacrifice some of his ability to maintain order in the library. However, at the arbitral hearing, the Grievant testified, that an Inmate's refusal to surrender his identification card did not warrant use of "deadly force."

On November 18, 1998, Warden Alan J. Lazaroff officially adopted the Committee's findings and recommendations[8] and, on March 11, 1999, imposed a twenty-four-hour fine against the Grievant for violating Rule 8 ("Failure to carry out a work assignment or the exercise of poor judgement in carrying out an assignment") and Rule 41 ("Use of excessive force toward any individual under the supervision of the

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5 *See* Joint Exhibit No. 2, at 33, stating ("[Four] areas approx 1½ in. 'Superficial scratches' . . . [right] side of back of neck. A red superficial braised area . . . [left] side of front of neck & . . . [left] side of neck").

6 Joint Exhibit No. 2, at 33. In addition to the photocopies of the photographs of Inmate Long's neck depicted in Joint Exhibit No. 2, at 34-35, the parties submitted the actual photographs from which those photocopies were made. Because the quality of the actual photographs is far superior to that of the photocopies, the Arbitrator clearly observed the superficial scratches and abrasions mentioned in the nurses report, in Joint Exhibit No. 2, at 33.

7 Joint Exhibit No. 2, at 31.

8 Joint Exhibit No. 2, at 32.

Department or a member of the general public"). Both rules appear in the 1998 Standard of Employee Conduct.[9] The Association responded to the disciplinary fine with a multifaceted, just-cause defense.[10]

III. The Issue

Did the Employer impose a twenty-four-hour fine on the Grievant for just cause, if not, what shall be the remedy.[11]

IV. Summary of the Parties' Arguments

A. The Association's Arguments

1. The twenty-four-hour fine was without just cause because:
   a. Fines are generally reserved for tardiness and absenteeism, therefore, the fine in the instant case constitutes an inappropriate mode of discipline.
   b. Fines were not listed in the 1966 Standard of Employee Conduct.
   c. The Employer failed to properly promulgate the 1998 standard of Employee conduct.
   d. Before imposing the fine, the Employer failed to obtain approval from either the Central Office or the Office of Collective Bargaining.
2. The Employer violated its own Work Alone Policy by allowing the Grievant to work alone in the library.
3. The Grievant did not use "excessive force" against the inmate.
4. The fine violated contractual principles of progressive discipline.

B. The Employer's Arguments

1. By grabbing Inmate Long's shirt collar, the Grievant used excessive, "deadly force," thereby exercising poor judgement.
2. The "Fight Breakup" Technique was not the proper approach under the circumstances.
3. The twenty-four-hour fine was commensurate with the offense.

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[9] Joint Exhibit No. 2, at 1.

[10] *See* Joint Exhibit No. 3., Grievance No. 27-21 (3/25/99) 1718-06-10.

[11] Although the Association offered a more detailed issue, the issue adopted contains language that is sufficiently broad to encompass the Association's concerns. Specifically, the Association articulate the issue as:

> Did the Employer/Management at the Orient Correctional Institution/Department of Rehabilitation and Correction violate, misinterpret, or misapply the 1997-2000 Agreement between the State Council of Professional Educators and the State of Ohio when they fined Mr. Thomas Bunsey, a thirteen (13) year School Librarian, for twenty-four (24) hours? If so, what shall be the appropriate remedy?

V. Relevant Work Rules and Contractual Provisions	
ARTICLES	**PROVISIONS**
Article 7.01— Health and Safety: General Duty	The Employer and the Association agree that the health and safety of employees is a matter of great importance.
7.16— Working Alone	In the Institution of the Department of Rehabilitation and Correction and Department of Youth Services, working alone shall be governed by the Agency Policy. A periodic check on the safety of employees who work alone in potentially hazardous areas shall be made.
Article 8.01— Performance Evaluation	The Employer and the Association recognize the importance and value of a procedure for assisting and evaluating the performance, progress and success of employees. The evaluation serves as a structured means of communications between the supervisor and employee and provides the supervisor with an increased awareness of the employee's working conditions, job efficiency, and productivity. The evaluation will provide the employee an opportunity to correct specific performance problems and give the supervisor an opportunity to commend satisfactory and/or outstanding work performance.
Article 9.01—Classroom Climate—Educational Climate	The Employer recognizes the responsibility to provide reasonable support and assistance to teachers and teaching coordinators with respect to the maintenance of control and discipline in the educational setting. The Employer, the Association, and employees also recognize the special needs exhibited by the varied populations served at the work facilities.
Article 13— Progressive Discipline	Employees shall only be disciplined for just cause.
Article 13.02 —Investigatory Meeting	An employee shall, upon request, have an Association representative present during a meeting with representatives of the employing agency held for the purpose of obtaining information which might reasonably lead to disciplinary action against that employee. The employee shall be required to respond to the allegations unless he/she is subject to criminal penalties. The right to representation does not extend to day-to-day communications which occur between an employee and the Employer, such as performance evaluations, training, job audits, counseling sessions, work-related instructions, or to inform an employee of the disciplinary action.
Article 13.03—Pre-Suspension or Pre-Termination Conference	The pre-disciplinary conference will be conducted by a designee of the Appointing Authority who was not directly associated with the incident(s) which led to contemplated disciplinary action against the employee. At the conference, the employee will be provided with documents used to support the possible disciplinary action, which are known of and available at that time.
Article 13.04— Progressive Discipline	The Employer shall follow the principles of progressive discipline. Disciplinary action shall include: (1) Oral reprimand (with appropriate notation in the employee's official personnel file), (2) Written reprimand, (3) A fine in an amount not to exceed five (5) days pay to be implemented only after approval from OCB, (4) Suspension without pay, (5) Demotion or discharge. Disciplinary action shall be commensurate with the offense. The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages.

V. Relevant Work Rules and Contractual Provisions	
Article 14.01—Work Rules	Work rules shall be all those written policies, regulations, procedures, and directives, which regulate conduct of employees in the performance of the Employer's services and programs. Work rules shall not conflict with any provision of the Agreement. The Association will be furnished with a copy of the work rules in advance of their effective date. The Association shall designate an address for receipt of this communication. Work rules shall be made available to affected employees prior to their effective date. In emergency situations, as defined by the Employer or the employing agency, the provisions of this Section may not apply. The Association and affected employees will be notified promptly of such declared emergencies and their duration. Work rules shall be all those written policies, regulations, procedures, and directives, which regulate conduct of employees in the performance of the Employer's services and programs. Work rules shall not conflict with any provision of the Agreement. The Association will be furnished with a copy of the work rules in advance of their effective date. The Association shall designate an address for receipt of this communication. Work rules shall be made available to affected employees prior to their effective date.
Article 14.02 —Uniformity	It is the intent of the Employer that work rules shall be interpreted and applied uniformly to all affected employees.
Work Alone Policy	IV. Definitions Working Alone.- An employee may be considered working alone when he/she is working with an inmate or group of inmates in an area where no other employee may observe or hear them from their usual work area, without the aid of mechanical devices. [12] V. Policy It is the policy of the Ohio Department of Rehabilitation and Correction to eliminate those situations where institution program services staff will involuntarily be working alone with inmates. VI. Procedures No Program Services employee represented by District 1199/SEIU shall be required, against their wishes, to work alone as defined in Section 11. As such, Program Services employees represented by 1199/SEIU who are asked, against their wishes, to work alone in such a situation shall have the right to refuse such work without fear of retribution. The Department and 1199/SEIU may, at their discretion, develop a process to implement this policy through regional bodies on a statewide basis.
Library Services Policy	The institution library shall be open, accessible, and staffed by a librarian or library assistant with a correctional officer assigned to the library, or within the appropriate vicinity during hours of operation. If no officer is assigned to the library, then civilian library staff shall work concurrently. Library services shall be available daily, including evenings and weekends when feasible.

[12] Association Exhibit No. 3.

VI. Discussion

The Association's objection to the twenty-four-hour fine comprises several substantive and procedural issues, all of which are respectively discussed below.

A. Substantive Issues

1. Causal Analysis

A threshold issue is whether the Grievant's actions, on October 28, 1998, caused the scratches and abrasions that the nurse observed on Inmate Long's neck on October 28, 1998.[13] The Association argues that there is no proof that these marks resulted from the Grievant's actions, thereby suggesting that another culprit could have injured Inmate Long's neck.

Four difficulties thwart this argument. First, grabbing Inmate Long's shirt collar necessarily involved either direct or indirect physical contact with the Inmate's neck and, standing alone, that contact could very well account for the documented scratches and abrasions. Although the Grievant testified that he did not touch Inmate Long's neck, reason suggests that to bruise or scratch another person's neck, one need not come into direct contact with that area. Pulling hard on a shirt collar could very well suffice.

Second, application of the "Fight Breakup" Technique required the Grievant to place is hands on Inmate Long's face and chin and both of these areas are quite close to the Inmate's neck and throat. The proximity of the Grievant's hands to the Inmate's throat precludes one from dismissing the proposition that, during the application of the "Fight Breakup" Technique, the Grievant's hands might have forcibly contacted Inmate Long's neck.

Third, photographs taken immediately after the Grievant restrained the Inmate depict several abrasions and/or scratches on Inmate Long's neck,[14] suggesting that force was applied (probably recently) to the Inmate's neck. The photographs together with proof that the Grievant used physical force on or

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[13] Joint Exhibit No. 2, at 33.

[14] *See supra* note 6, discussing actual photographs of the Grievant's injuries.

around the area of Inmate Long's neck support a strong inferential nexus between the marks on Inmate Long's neck and the Grievant's forcible restraint of the Inmate on October 28, 1998.

Fourth, there is no evidence to support the Association's contention that Inmate Long somehow obtained these marks elsewhere. Finally, since the Association raised this point, it has the burden of proving (overcoming contrary evidence in the record) that someone or something else caused the marks. However, the record lacks such evidence.

Ultimately, then, a preponderance of circumstantial evidence in the arbitral record establishes that the Grievant actually contacted Inmate Long's neck by grabbing the back of his shirt collar and that the Grievant very well could have contacted the Inmate's neck while applying the "Fight Breakup" Technique. Restated, preponderant evidence in the arbitral record establishes that more likely than not the Grievant's physical action against Inmate Long, on October 28, 1998, caused the aforementioned scratches and abrasions.

2. Whether the Grievant Was Authorized to Use Any Force

Another issue in this dispute is whether the Grievant was entitled to use physical force against Inmate Long in the first instance. Although the Employer never explicitly argues that the Grievant lacked authority to use some quantum of physical force against Inmate Long, an argument in the Employer's opening statement implies as much: "The Grievant could have attempted interpersonal skills such as repeating the command toward the inmate . . . [radioing] the Captains Office or . . . [seeking assistance from] the Yard Officer. . . ."[15] Because it lists the six situations in which staff members may use some quantum of force, albeit less than "deadly force," against inmates, Section 5120-9-01(C) provides a frame of reference for assessing the persuasiveness of the Employer's argument. Section 5120-9-01(C)(2) permits staff to use force for among, inter alia, . . . *"Controlling or subduing an inmate who refuses to obey prison rules and*

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[15] Employer's opening statement, at 3.

regulations. . . ."[16]

Because he violated OCI's rules, Inmate Long's conduct falls squarely within the ambit of Section 5120-9-01(C)(2), thereby entitling the Grievant to use some quantum of force to subdue or control Inmate Long in order to identify him. The Inmate mimicked the Grievant, disobeyed a legitimate order to surrender his identification card, and called the Grievant a "bitch." Thus, Inmate Long not only violated regulations by ignoring a direct order, but also behaved in a manner that very well might have eroded the Grievant's ability to operate and control the library. Finally, if the Grievant had allowed Inmate Long to leave the area, it is quite possible if not likely that the Grievant would have lost (or at least reduced) his chances of subsequently identifying the Inmate.

3. Quantum of Force Used

Inasmuch as the Grievant was entitled to (and did) use some magnitude of force against Inmate Long, the issue now becomes whether the Grievant used "excessive force." The Employer argues that because the Grievant applied force to Inmate Long's neck, the force may be fairly characterized as "deadly." Moreover, the Employer urges (or at least implies) that "deadly force" was unwarranted where an Inmate merely refused to submit his identification card. In contrast, the Association maintains that the Grievant used neither "deadly nor "excessive" force against Inmate Long, On October 28, 1998.

The analytical stage is, therefore, set. The first issue is whether the Grievant used "deadly force." If he did, then the issue of "excessive force" can be resolved by determining whether the Grievant was entitled to use "deadly force." If, on the other hand, the Grievant used less than "deadly force," the issue becomes whether the amount of force used was, nevertheless, excessive under the circumstances.

a. Whether the Grievant Used "Deadly Force"

Section (B)(3) is the point of departure. That Section not only defines "deadly force," but also lists the circumstances under which such force may be used. "Deadly Force" is defined as: "[A]ny force which

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[16] Joint Exhibit No. 5.

carries a *substantial risk* that it will *proximately* result in the *death* of any person."[17] On its face, this definition includes not only forces that actually result in death but also forces which in the nature of things pose a "substantial risk" of death. "Substantial risk" is reasonably interpreted, here, as meaning "under the right circumstances." Therefore, this definition includes forces which, under the right circumstances, will naturally cause death.

Section (B)(3)(c) supports this interpretation by specifically including, within its list of "deadly forces," actions that involve the application of "*force* or weight to the *throat* or *neck* of another."[18] By focusing on the specific body part to which a quantum of force is applied, Section (B)(3)(c) further refines the definition of "deadly force," as defined in Section (B)(3). Commonsense teaches that a measure of force which would not reasonably be considered "deadly" if applied to one's elbow might justifiably be considered deadly if applied to one's neck. In short, an otherwise nonlethal force can become lethal when applied to a vital body part. Taken together Sections (B)(3) and (B)(3)(c)manifest an intent to define "deadly force" as any force which by either its sheer magnitude or its magnitude and point of focus on the body "carries a substantial risk" of "death."

Accordingly, in determining whether the Grievant used "deadly force," one must consider not only the quantum of force used against Inmate Long, but also the body part that absorbed (and was likely to absorb) that force. Sections (B)(3) and (B)(3)(c) do not condemn and is not offended by the exertion of any force, however, slight, against an Inmate's neck. Thus, one does not offend these sections by merely touching an inmate's neck. In the instant case, however, the Grievant did not merely touch Inmate Long's neck. Instead, he applied sufficient force to abrade and scratch the Inmate's neck. The question is whether that quantum of force applied to one's neck "carries a sufficient risk" of causing death.

Having thoroughly considered this question, the Arbitrator is simply unpersuaded that a quantum

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[17] Joint Exhibit No. 5, at 1 (emphasis added).

[18] Joint Exhibit No. 5, at 1.

of force which causes only superficial abrasions and scratches to one's neck "carries a *substantial risk* that it will *proximately* result in the *death* of any person." Evidence in the record does not suggest that the Grievant used such a force against Inmate Long. There is, for example, no evidence that the Grievant's grip on Inmate Long's shirt collar was sufficient either to choke him or to break his neck. In all likelihood, had such force been applied, Inmate Long's injuries would have been more evident and extensive. Nor does evidence in the record state or even suggest that Inmate Long complained about having been subjected to a lethal force or even to a force capable of causing serious bodily injury. Consequently, the Arbitrator cannot agree that the Grievant used "deadly force" against Inmate Long on October 28, 1998.

b. Whether the Grievant Used "Excessive Force"

Deciding that the Grievant did not use "deadly force" does not address whether he, nevertheless, used "excessive force," which is the next issue for consideration. Section 5120-9-01(1) defines "excessive force" as "An application of force which, by either the *type* of force employed, or the *extent* to which such force is employed, exceeds that force which is *reasonably necessary under all the circumstances* surrounding the incident."[19] This section applies the reasonableness standard, thereby essentially asking whether a reasonable person under the same or similar circumstances as the Grievant would conclude that pulling on Inmate Long's shirt collar and using the "Fight Breakup" Technique was necessary to prevent the Inmate from leaving the area without presenting his identification card.

Although it applies primarily to "deadly force," Section 5120-9-01(F) also sheds some light on whether the type and quantum of force the Grievant used was "reasonably necessary." Section (F) provides in pertinent part, "The . . . staff member is authorized to use force . . . when and to the extent he reasonably believes that such force is the LEAST FORCE necessary . . . ."[20] In the Arbitrator's view two reasons

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[19] Joint Exhibit No. 5, at 1 (emphasis added).

[20] Joint Exhibit No. 5, at 3.

suggest using this standard to interpret the definition of "excessive force" under Section (B)(1).[21] First, using the "least force" is manifestly compatible with commonsense and is, therefore, not inapposite to the rule of reason, expressed as "reasonably necessary" under (B)(3). Second, when adopting "reasonably necessary" force, what other quantum of force could the drafters of (B)(3) have possibly had in mind other than the "least force necessary?" On its face, the "least force necessary" under a given set of circumstances is equivalent to the amount of force "reasonably necessary" under those conditions.

Consequently, the issue becomes whether the Grievant used the least amount of force that a reasonable person would have deemed necessary to restrain Inmate Long in order to obtain the Inmate's identification card, under the circumstances of this case. Implicit in the requirement to use the "least force" necessary is the query whether the Grievant could have achieved the same ends by using a lesser force, thereby avoiding bruising and scratching Inmate Long's neck.

The Arbitrator is persuaded that a lesser force could have been employed to restrain the Inmate. Nothing in the record explains why the Grievant had to use sufficient force to injure the Inmate Long by either pulling on the Inmate's shirt collar or using the "Fight Breakup" Technique. Nor is there any indication that the Grievant could not have achieved his goal by grabbing the Inmate's arm or some other less vital part of his body. This is particularly true since Inmate Long offered absolutely no physical resistance. As a result, grabbing Inmate Long's shirt collar and applying the "Fight Breakup" Technique with sufficient force to bruise and scratch the Inmate's neck was unnecessary and inconsistent with the standard of either applying the "least force" necessary or applying the "type" or "extent" of force "reasonably necessary" under those circumstances. The Arbitrator, therefore, holds that the Grievant used "excessive force" to restrain Inmate Long on October 28, 1998.

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[21] Joint Exhibit No. 5, at 3 (emphasis in original).

4. Proper Application of "Fight Breakup" Technique

The Employer contends that, in several respects, the Grievant applied the "Fight Breakup" Technique under the wrong circumstances. That is he applied the technique alone—without assistance from another employee—and with other inmates in the immediate vicinity. The Association does not deny that the Grievant applied the "Fight Breakup" Technique as described above. Instead, the Association simply insists that the Grievant was entitled to use force under the circumstances of this case and that he did not use "excessive force."

Evidence in the record supports this contention. The Employer produced credible testimony that the Grievant was trained in use of the "Fight Breakup" Technique. Testimony also established that application of the "Fight Breakup" Technique is contraindicated where, as in the instant case, the staff member is alone and other inmates are in the area, especially behind the staff member. Because the Employer introduced credible evidence that the Grievant applied the "Fight Breakup" Technique under improper conditions and there is no evidence to rebut this position, the Arbitrator holds that the Grievant did in fact apply the "Fight Breakup" Technique under improper conditions.

In summary, by grabbing and pulling on Inmate Long's shirt collar and improperly applying the "Fight Breakup" Technique, the Grievant violated Rule 8. Furthermore, by using more force than was "reasonably necessary" to restrain Inmate Long, the Grievant violated Rule 41.

B. Procedural Issues

1. Violation of the "Work Alone" Policy

The Association claims that because the Grievant was working alone on October 28, 1998, the Employer violated the "Work Alone" policy. The "Work Alone" Policy provides in relevant part: "It is the policy of the Ohio Department of Rehabilitation and Correction to eliminate those situations where institution Program Services staff will *involuntarily* be working alone with inmates.[22] Also, the "Work

[22] Association Exhibit No. 3., V. Policy (emphasis added).

Alone" Policy states:

> No Program Services employee represented by District II99/SEIU *shall be required, against their wishes*, to work alone as defined in Section 11. As such, Program Services employees represented by 1199/SEIU who are asked, *against their wishes, to work alone in such a situation shall have the right to refuse such work without fear of retribution.*[23]

The essence of the "Work Alone" Policy is that no employee may be forced to work alone *involuntarily*.

Nothing in the record shows that the Employer ever coerced the Grievant to open the library alone. Instead, the Grievant worked alone, on October 28, 1998, because neither the correction officer assigned to the library nor any other member of the library staff reported to work on time. At the arbitral hearing, the Grievant testified that he opened the library alone on October 28, 1998 because he grew tired of waiting for his assistants and decided to open the library alone and because he wanted to be a "good soldier" or a team player. Consequently, the Arbitrator cannot sustain the Association's position that the Grievant's working alone on that date somehow violated the "Work Alone" Policy.

2. Effective Date of the 1998 Standard of Employee Conduct

The arbitral record contains a joint-exhibit copy of the 1998 Standard of Employee Conduct (including a disciplinary grid),[24] which lacks an effective date. Beyond this document, the Employer offered no evidence about the 1998 Standard of Employee Conduct. In contrast, the Association introduced an exhibit containing a copy of the 1998 Standard of Employee Conduct with an effective-date stamp of February 1, 1998.[25] In light of this evidence, the Arbitrator holds that the 1998 Standard of Employee Conduct, replaced the 1966 Standard of Employee Conduct on February 1, 1998.

3. Notification of the 1998 Standard of Employee Conduct

Although both parties agree that the Grievant received proper notice of the 1996 Standard of

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[23] *Id.* (VI. Procedures) (emphasis added).

[24] Joint Exhibit No. 4.

[25] *See* Association Exhibit No. 1, which contains a disciplinary grid for the 1998 Standard of Employee Conduct which is stamped with an effective-date of February 1, 1998.

Employee Conduct,[26] they stoutly disagree about the propriety of using fines for disciplinary purposes, under that Standard. Accordingly, the Association raises several procedural arguments and one substantive/procedural argument regarding the twenty-four-hour fine imposed on the Grievant in the instant dispute.

Among its allegations of procedural error, the Association contends that the Employer failed to notify the Grievant of either the existence of the 1998 Standard of Employee Conduct or the decision to expand the disciplinary role of fines under that Standard. According to the Association the 1966 Standard of Employee Conduct was silent regarding fines as disciplinary measures, and the Employer first began using fines for that purpose under the 1998 Standard of Employee Conduct. The latter allegation does not ring hollow. Independent support for that allegation is found in the Step-Three Hearing Officer's report, stating: "The language of fines was added to the standards at the revision of the standards effective 2/1/98."[27] The Step-Three hearing Officer's reference to "standards" is reasonably interpreted to mean the 1998 Standard of Employee Conduct and helps to establish the validity of the Association's allegation as to when fines assumed their expanded role.

Regarding the issue of notice, one finds that implicit in all Collective-Bargaining Agreements are fundamental rules of evidence and notions of industrial due process that are key to resolving these issues. "A fundamental component of *the just cause standard* is that employees must be told what kind of conduct will lead to discipline. . . ."[28] This quote rests on a cornerstone of industrial jurisprudence: Notice is inextricably bound up with fundamental notions of due process, which is the procedural component of just cause. Issues of notice are, thus, fundamental to assessments of just cause. Furthermore, notice itself

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[26] *See* Joint Exhibit No.6, at 1,(showing the Grievant's signature on a receipt, acknowledging that he received a copy of the 1966 Standard of Employee Conduct).

[27] Association Exhibit No. 3, at 3.

[28] *See, e.g.,* ADOLPH M. KOVEN & SUSAN L. SMITH, JUST CAUSE THE SEVEN TESTS28 (Donald F. Farwell, ed., 2d ed. 1992) (emphasis added).

comprehends at least two procedural duties: "The requirement of notice, as arbitrators have generally understood it, means that the employer must let employees know not only what kinds of conduct will lead to discipline, but *what discipline* is likely to result.[29] And so it is in the instant dispute.

The major difficulty for the Employer is that the record does not establish that OCI properly notified the Grievant in the respects alleged by the Association. Yet, in disciplinary disputes, it is axiomatic that employers bear the burden of proving that disciplinary actions were for just cause, they must prove that they afforded grievants proper notice. The Employer offers no evidence establishing whether the Grievant was notified of either the existence of the 1998 Standard of Employee Conduct or the extended role of fines as disciplinary measures thereunder. As a result, these issues are shrouded in uncertainty. However, as mentioned earlier, doubts about issues of notification are resolved against employers who bear the burden of persuasion on these issues. Applying these standards to the instant dispute, the Arbitrator holds that the Employer failed to carry its burden of proving that it properly notified the Grievant of either the existence of the 1998 Standard of Employee Conduct or the expanded role accorded to fines as disciplinary measures under that Standard.

4. Propriety of Disciplinary Fines Under 1998 Standard of Employee Conduct

In addition, the Association asserts that, during contractual negotiations, the parties agreed to limit the use of fines to attendance violations under the 1998 Standard of Employee Conduct.[30] The arbitral record lacks independent support for this proposition, thereby leaving the Arbitrator no choice but to rule against the Association on this issue.

5. Employer's Right to Impose Fines Under Article 13.04

The Association counters that Article 13.04 requires OCB's approval for fines to be levied as

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[29] *Id.* at 38 (emphasis added).

[30] During the arbitral hearing, the Association adduced persuasive evidence that, under the 1966 Standard of Employee Conduct, fines, as disciplinary measures, were limited to attendance-related misconduct.

discipline. Article 13.01(3) states: "[A] fine in an amount not to exceed five (5) days pay; to be implemented only after *approval from OCB*." On the other hand, the Employer insists that Article 13.04 of the Collective-Bargaining Agreement authorizes fines as disciplinary measures and offers two arguments regarding the issue of OCB approval for fines. First, during the arbitral hearing, the Employer pointed to the disciplinary grid in the 1998 Standard of Employee Conduct and argued that fines were an integral part of the range of penalties under that Standard. However, the Arbitrator has already held that the Employer failed to carry its burden of proving that it properly notified the Grievant of the existence of the 1998 Standard of Employee Conduct and of the role of fines therein. Thus, in the instant dispute, the disciplinary grid of the 1998 Standard of Employee Conduct does constitute proof of authorization to impose the twenty-four-hour fine on the Grievant.

In its second argument on this point, the Employer alleged, in its post-hearing brief, that it in fact obtained proper approval to impose the fine in the instant case. In addition, the Employer observed that the Association never contacted OCB or any other branch to verify whether proper approval was given for the twenty-four-hour fine. These arguments are also wide of the mark for two reasons. First, it is not the Union's burden to prove that the Employer's noncompliance with Article 13.04(3); it is the Employer's burden to prove compliance with that Article.

Second, the Employer proffered no evidence to establish its allegations. Although credible testimony can constitute proof, the Employer offered no testimony on this issue and did not establish its allegations during cross-examination of the Association's witnesses. As a result, the record contains mere allegations, which constitute neither evidence nor proof of compliance with Article 13.04(3). The Arbitrator is, therefore, obliged to hold that the Employer was neither entitled to ignore the strictures of Article 13.04 (3) nor complied with those strictures.

6. Propriety of the Employer's Investigation

Also, the Association argues that the Employer failed to conduct a proper investigation of the

circumstances surrounding the instant dispute.[31] This argument is puzzling for several reasons. First, the Employer submitted the case to the Use of Force Committee (the Committee), which investigated the matter and submitted a report of its findings and recommendations to Warden Lazaroff. Although the arbitral record does not clearly delineate every step of the Committee's investigation, nothing in the record indicates that the investigation was somehow inadequate or superficial. The Committee collected testimonies from persons who actually observed the incident, including the Grievant, Inmate Long, and other inmates. Furthermore, the Association points to no specific gaps in the Committee's investigation. For example, it mentions no omitted, outcome-determinative steps that reasonably would (or could) have prejudiced the Grievant's interests by, for example, triggering a different conclusion with respect to the charges of violating rules 41 and 8.

In support of its argument that the Employer's investigation was somehow adequate, the Association emphasizes the brevity of Inmate Long's physical examination directly following the October 28 incident. The nurse's report of that examination stated that it required approximately two minutes to examine and release Inmate Long.[32] On its face, two minutes clearly seem wholly insufficient to thoroughly examine even superficial abrasions and scratches, and the Arbitrator agrees that the brevity of the examination remains unexplained in the record.

Although on its face, the brevity of the examination raises a question about the adequacy of the Employer's investigation, it does not prove inadequacy. By relying on the brevity of the examination, the Association seems to presuppose that, in the instant case, the existence of an adequate investigation is mutually exclusive with the existence of a two-minute physical examination.

Again, to some extent, logic favors this position, at least on the surface, but there are difficulties. First, other factors—experience and thoroughness of the caregiver, nature and extent of the injuries, time

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[31] Association's Brief, at 14.

[32] *See supra* note 4.

pressures—also can strongly impact and explain the length of a physical examination. For example, a highly experienced caregiver might very well require only the briefest examination to ascertain the nature and extent of superficial injuries.

Second, one must consider the part that a physical examination plays in the overall quality of the particular investigation in question. For example, in the instant case, it is unclear that the length of the physical examination plays a major role in assessing the merits of the charges—use of "excessive force" and poor judgement. In other words, given the nature of the charges, the length of the physical examination, standing alone, does not form a basis for confidently inferring that the entire investigation was inadequate.

Third, however brief the examination, it shows that the Employer took the time to obtain photographs of Inmate Long's injuries as well as a nurse's report that adequately described those injuries. It is unclear whether a more extensive examination would have produced more useful information about the merits of the charges, a subject that the Association does not address. Given the foregoing discussion, the Arbitrator can find no basis for inferring that the length of the physical examination, albeit very short, establishes the inadequacy of the Employer's investigation in this case.

7. Nexus Between 1998 Standard and Efficiency/Safety of the Employer's Operations

The Association questions whether the Employer's rules were reasonably related to either safety or operational efficiency.[33] Then the Association seems to conclude that "This rule [presumably the Use of Force Policy] is reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee." The difficulty with this argument is that the Association never states which particular rule is not reasonably related to safety and operational efficiency or why any particular rule lacks that reasonable relationship. In short, this contention contains no grist for the Arbitrator's decisional "mill."

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[33] Association's Brief, at 9.

C. Propriety of the Imposed Penalty

As set forth above, the Employer established that the Grievant violated rules 8 and 41, and the Association established that, the Employer afforded the Grievant insufficient notice when deciding to discipline him by imposing a twenty-four-fine under the 1998 Standard of Employee Conduct. The issue thus becomes whether, given the procedural errors, any discipline is warranted and, if so, what measure of discipline is proper. Absent the procedural errors, one would not seriously question the propriety of some measure of correctional or progressive discipline.

Despite the Employer's procedural errors, several reasons suggest that the Grievant's established misconduct warrants some measure of discipline. Procedural errors are hierarchical in nature and can cause a range of adverse effects. For example, some procedural errors are merely technical and, thus, harmless in nature; but others can skew the outcomes of disputes by substantially interfering with an opponent's ability to fully and fairly present his side of the dispute or trigger the application of an inordinately heavy disciplinary hand. The ordinary arbitral response to unacceptable or harmful procedural errors is to recognize and sanction the error by moderating (but not eliminating) the Employer's discipline. This response serves a two-pronged, function. First, it encourages employers to comply with well-recognized procedures that either are explicitly stated in the Collective-Bargaining Agreement or implied therein as bastions of fundamental industrial due process. Second, because the Grievant is still disciplined, this approach preserves the general and specific message of deterrence that the employer doubtless intended to send. Finally, the decision to set aside the fine in this case, obviates the need to assess the Association's argument that the fine violated principles of progressive discipline. Accordingly, the Arbitrator shall moderate (rather than eliminate) the discipline in this case. Because fines have been held to be inappropriate as disciplinary instruments, in this *particular* case, some other type and measure of discipline must serve.[34]

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[34] In this case, the Employer was prohibited from imposing a twenty-four fine only because of the noted procedural violations. Correction of those violations will fully restore the Employer's authority to henceforth impose fines according to the language of the Collective-Bargaining

In selecting the type and measure of discipline, the Arbitrator considers both mitigating and aggravating factors. The major mitigating factor is the Grievant's tenure, performance record, and disciplinary record. The Grievant's thirteen years of tenure is a very positive factor, as is his fully satisfactory work record and blemish-free disciplinary record. Furthermore, the Arbitrator is not unmindful that the Grievant opened the library alone, on October 28, 1998, in an effort to serve the patrons and to perform his job as best he could under the circumstances. That attitude, standing alone, hardly deserves discipline.

The major aggravating factor is that the Grievant, nevertheless, violated rules 8 and 41, the latter of which reflects the obvious urgency of deterring employees from using "excessive force" against inmates. Thus, the rules reflecting this standard must be rigorously enforced if the Employer is to preserve operational efficiency and safety and avoid possibly crippling legal liability. Penalties for the first violation of rule 8 range from written reprimand to removal. Penalties for violation of rule 41 range from a three-five day suspension to removal. A proper balance of the aggravating and mitigating factors in light of the range of penalties suggests that a written reprimand and a relatively short probation will serve the purposes of general and specific deterrence in this case.

VII. The Award

Consequently, the Employer shall issue the Grievant a written reprimand and place him on three-months probation no later than one week after receiving this opinion and award. For all of the foregoing reasons, the Grievance is, therefore, **SUSTAINED IN PART AND DENIED IN PART.**

Agreement and any rule that does not violate that Agreement.

Notary Certificate

State of Indiana)

)SS:

County of MARION

Before me the undersigned, Notary Public for MARION **County, State of Indiana, personally appeared** Robert Brookins **, and acknowledged the execution of this instrument this** 8th **day of** May **, 1999**

Signature of Notary Public: Kimberly M. Mauldi

Printed Name of Notary Public: Kimberly M. Mauldi

My commission expires: 2/10/08

County of Residency: Hamilton

Robert Brookins

Robert Brookins, Labor Arbitrator