#1698

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO DEPARTMENT OF CORRECTIONS/

ROSS CORRECTIONAL INSTITUTE

AND

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/

AFSCME LOCAL 11, AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT
CASE # 27-23-020415-1044-01-03
Donald Williams, Grievant

Advocate(s) for the UNION:
Allison Vaughn, Esq., Assoc. General Council
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Advocate(s) for the EMPLOYER:
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INTRODUCTION

A hearing on the above referenced matter was held in Chillicothe and Columbus, Ohio on November 19, 2002, January 21, 22, February 12, and March 7, 2003. The Employer raised the threshold issue of procedural arbitrability; however, the parties did not agree to bifurcate the issue from the merits of this case. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on procedural error and the merits. The parties submitted briefs in lieu of closing arguments. However, post hearing e-mails and discussions continued until the hearing was finally closed in mid-June, 2003.

ISSUE

The parties stipulated to the following definition of the issue:

> Did the Employer remove the Grievant for just cause based upon a violation of Rules 22, 40 and/or 42? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE
(Listed for reference, see Agreement for language)

Article 24, 25

BACKGROUND

The Grievant in this case is Donald Williams, a Corrections Officer at the Ross Correctional facility in Chillicothe, Ohio ("Employer"). Mr. Williams was removed from his position on April 8, 2002 for violation of the Employer's Rules 22, 40, and 42 (Jx 4a).

The Employer asserts that on November 7, 2001, while escorting Inmate Holcomb from Unit 6 A (where he was involved in a confrontation) to Segregation (Unit 9) the Grievant used excessive force on the inmate causing four of his front teeth to be knocked out. The incident allegedly took place in the holding cell located in Segregation.

The Employer raised the threshold issue of procedural Arbitrability. It claims the grievance was untimely filed at step 3 of the grievance procedure. The Union disagreed with this claim and asserted several procedural errors committed during the Employer's investigation of this case. As is customary, the Arbitrator will first address the Employer's claim of procedural Arbitrability. If found to be without foundation, the procedural issues raised by the Union will then be addressed, followed if necessary by the merits of the case.

EMPLOYER'S POSITION

The following is taken from the Employer's post hearing brief. It is as follows:

Admitted into evidence, Joint 4A, is Administrative Rule (AR) 5120-9-01, Use of Force. This AR states as follows:

"(A) As the legal custodians of a large number of inmates, some of whom are dangerous, prison officials and employees are confronted with situations in which it is necessary to use force to control inmates. This rule identifies the circumstances when force may be used lawfully."

The Employer contends that the Grievant not only used force on the inmate, he used unlawful force as defined in the AR. The force he used was excessive for the control of the inmate as defined by the AR. The force used by the Grievant rose to the level of Abuse as determined by the Warden, Pat Hurley.

The Employer again cites Article 24.01 – Standard. **"In cases involving termination, if the arbitrator finds that there has been abuse of a patient or another in the care and custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse."**

Clearly based on the evidence presented the Employer expects this arbitrator to find abuse in the case, as did the Warden of Ross Correctional Institution (RCI), and therefore you may not find if favor of the Grievant, and you must deny this grievance.

Procedural Objection – Untimely Filed Grievance

During day 1 of this arbitration the Employer raised a procedural objection to the arbitrator, indicating to you that the grievance was untimely filed at step 3 of the grievance procedure. The Employer continues with this objection and refers to joint exhibit J2. The Employer clearly put the Union on notice by a letter dated October 22, 2002 that it would be raising this objection at any subsequent arbitration. Additionally I would point the arbitrator to page to 2 of J2, the

removal letter. The effective date of the Grievant's removal is April 8, 2002. On the back of page 2, it clearly shows that the Grievant was notified on April 8, 2002 that he was being removed as noted by his signature acknowledging receipt. Additionally the Union was put on notice of the removal, again as noted by the Union President, Mal Corey's signature on the back of the removal letter, dated April 8, 2002.

Utilizing joint exhibit J1, the collective bargaining agreement (CBA), I would point the arbitrator to Article 25.02 – Grievance Steps, Layoff, Discipline and Other Advance-Step Grievances. **"A grievance involving a layoff or a discipline shall be initiated at Step Three (3) of the grievance procedure within fourteen days of notification of such action."**

I would now direct the arbitrator to Article 25.05 – Time Limits. **"Grievances may be withdrawn at any step of the grievance procedure. Grievances not appealed within designated time limits will be treated as withdrawn grievances."**

Utilizing J1, back cover calendar, year 2002, April 8, 2002 is a Monday. As the Union pointed out in their subsequent response to this argument, they pointed you to Article 25.01- Process, C. **"The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday."** As I recall the discussion from the Union they seemed to think that the 14th day fell on a Sunday, and therefore the Union had a Monday to include in the count toward a timely filed grievance. That is just not the case. Utilizing the 2002 calendar the 14th day from April 8, 2002, which was stipulated too, by the parties as the day notification of the removal occurred, is April 22, 2002. This is a Monday, not a Sunday, as pointed out by the Union. Utilizing J2 again, the last page of J2 is the certified mail envelope sent by the Union to the Employer to file this grievance. It has a very clear postmark of April 23, 2002. This is the 15th day. Again in Article 25.01D, it indicates, **"When different work locations are involved, transmittal of grievance appeals and responses shall be by U.S. mail. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period."** Clearly the Union did not file a timely appeal in this matter.

As discussed in Elkouri and Elkouri, How Arbitration Works, fourth edition, page 191 – Time Limitations, **"Promptness is one of the most important aspects of grievance settlement. Failure to settle grievances with dispatch is sure to lead to labor unrest."** Additionally on page 193 Elkouri states **"If the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested. Thus, the practical effect of late filing in many instances is that the merits of the dispute are never decided."**

In Article 25.05, the contract indicates, **"The time limits at any step may be extended by mutual agreement of the parties involved at that particular step. Such extension(s) shall be in writing."** There is no such extension having been granted by the Employer in this matter.

Elkouri further indicates **"If both parties have been lax as to observing time limits in the past, an arbitrator will hesitate to enforce them strictly until prior notice has been given by a party of intent to demand strict adherence to the contractual requirements."** The State has not been lax in its observance of the contractual time limits. The State has on numerous occasions raised the procedural objection of untimely filed grievances in numerous arbitration cases. The issue of untimely-filed grievances has been ruled on in the State's favor in denying those grievances.

Specifically, Arbitrator Thomas P. Michael denied a grievance on the untimely-filed appeal that was not filed with in the 14-day requirement of 25.02 (at that time 25.07). (See attached decision #126 MRDD and McKinley Tarrance OCSEA) Arbitrator Michael indicates in his award for the State **"The parties have agreed contractually that any employee with a grievance involving a suspension or a discharge must initiate the grievance within fourteen (14) days of the notification of such disciplinary action (25.07)." "Nonetheless, there are clearly numerous circumstances under which arbitrators have held that it would be unreasonable to require strict compliance with the time limits specified by the agreement. The most obvious example is when the parties have agreed, either orally or in writing, to an extension of the filling date. The parties have expressly recognized this exception by the terms of their contact (25.05). However, the Union has made no claim that the Employer ever was requested to extend the filing deadline for this particular grievance."**

During the Union's response to the procedural error, they did not address any concern other than that the grievance was timely filed at step 3 per the postmark. Please see Union opening concerning the alleged procedural errors.

Additionally, Arbitrators Smith, Rivera, Bowers, and Nelson have ruled in favor of the State on its position that the

grievance must be properly filed at step 3 in order for the merits of the case to be decided. (See attached)

Based on the above contractual violations by the Grievant and the Union by not timely filing this grievance, I respectfully request that the Arbitrator deny this grievance on the procedural error and not make a finding on the merits of this case.

Merits of Case

The Employer in this matter removed the Grievant from his position of Correctional Officer effective April 8, 2002, for violation of the Standards of Employee Conduct, Rule(s) 22, 40 and 42. Specifically the removal letter states as follows:

"On November 7, 2001, you were escorting Inmate Holcomb #384-349 to isolation. While in isolation, you used excessive force on Inmate Holcomb, resulting in physical abuse and injury. Inmate Holcomb sustained significant injury as a result of your actions, to include 4 broken or knocked out teeth. In your incident report, you state that the inmate was resisting and struggling, which caused him and the other Officers to go to the floor. Your incident report is inconsistent with the recording of the events. You further stated that the inmate fell face first into the holding cage and floor. The videotapeshows that Inmate Holcomb was slid into the holding cage and floor. While you were in the holding cage removing restraints from Inmate Holcomb, Officer Pernell observed you "step up" and then Officer Pernell said he heard a sound consistent with a smack. Officer Radcliff supports Officer Pernell's statement by saying he also heard a smack and a sound that he describes as being glass or teeth breaking. Officer Radcliff further stated that he knew Inmate Holcomb was not injured when he was placed into the holding cage. Officer Pernell testified that you came to his house to initiate an apology and stated to him that you did it but sometimes youdon't recall if you did and that you can't do no jail time."

As stated previously, the Grievant was in violation of Rule(s):

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

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

#42 – Physical abuse of any individual under the supervision of the Department.

Each rule violation calls for removal for the 1st offense under the Disciplinary Grid (Joint 3) utilized by the Department, which the Grievant signed for on November 1, 2001 as stipulated by the parties for this arbitration.

This case is about **Abuse**. The Grievant stepped on the head or kicked or stomped, an inmate's front teeth out. The Grievant used excessive force that is considered **Abuse** by the Department. The Grievant falsified his statements in an effort to hide his actions from his supervisors.

In the instant case, Management presented two (2) witnesses to this event. Additionally, Management presented a video recording of the events that verifies all but the actual action of the kick to the Inmate's head by the Grievant.

The Union has presented no credible witness to the event that can contradict the Employer's case, nor have they offered a credible explanation in the investigation, or the arbitration, as to how the inmate lost his 4 front teeth!

Roman Pernell

The 1st witness to the event, CO Roman Pernell did testify that after the handcuffs of the Inmate were removed, he began to leave the isolation cell. He did testify that he saw the Grievant **"step up"** and then he heard a smacking sound in the cell. He did testify that he did not see the Grievant actually step, stomp or kick the inmate's head. He did however, testify that the Grievant was the only CO in the cell at that time after Co Pernell left the cell himself and was the only person who could have caused the injuries to the inmate. Pernell was able to place Mr. Williams at the back wall of the strip cage, facing out with his back to the wall and Williams feet at the inmate's head.

Pernell also testified on direct examination that as the inmate was brought into the segregation unit that the inmate fell to the ground, that he, Pernell went to his knee, but did not fall to the floor. He also indicated that he and Officer Williams continued to slide the inmate at arms length, about at a 45-degree angle away from his body, into the cell.

(See CD recording of segregation unit) Pernell testified that the only injury he was aware of that the inmate sustained prior to entering the segregation unit was the slight cut above his eye that the inmate received while attempting to leave 6 house to go to segregation, while he and Williams escorted the inmate. This testimony is the same that he told the Use of Force Committee Chaired by Dr. Greg Buckholtz and is labeled as J4.

Additionally, CO Pernell did testify in this arbitration that the Grievant visited Mr. Pernell's home on November 16, 2002 and confessed to the allegations made by Management in this matter. Mr. Pernell reported this information to the Warden of the facility, Pat Hurley, as well as reported this information to Trooper Sherry Wells who was doing the criminal investigation of this matter.

CO Pernell notified Management of the following:

"After CO Williams had a meeting with the Troopers, he came to CO Pernell's house. They met in the Grievant's car. The Grievant apologized for putting CO Pernell's family and himself through this incident. When asked what CO Pernell wanted the Grievant to do, CO Pernell indicated that he just wanted the Grievant to tell the truth. Upon that the Grievant said "I did it, but sometimes I can't remember if I did it or not. He was kind of talking erratic. He kept saying that he was sorry to me, I said Donnie Look, I said...from what I'm hearing across the compound you kicked this man in the face or his head...and you don't have the balls enough to stand up and accept responsibility. And he looked me square in the eyes and said I'm going to take care of it. I said, there is a lot of other people involved in this... that you've gotout because of this. He said, I know...I'm sorry, basically that's what he kept saying was I'm sorry. And, um...he told me that he could... that he said he came out... that he couldn't do no jail time." (J4-I)

During the testimony of the Mr. Pernell, he was asked if he knew Mr. Williams, and he indicated he did. He was asked, if they were friends and he indicated there were not friends, but that they were co-workers. He indicated he had no reason to dislike the Grievant and could not explain the Grievant's behavior in this matter.

Greg Radcliff

The 2nd witness to the event, CO Greg Radcliff, did tell you that he was at the isolation cell door during the event. He did tell you he saw the Grievant take the handcuffs off of the inmate. He did tell you that he saw CO Pernell exit the cell, and then he did tell you he heard what "sounded like glass or teeth breaking." He did tell you that the Grievant was the only person in the cell at that time. This is what he testified to in the arbitration and this is what he told Dr. Buckholtz and the Use of Force Committee. (See J4-J)

Management has shown you the video and has shown you the pictures taken of the inmate after this event. Management was able to tell you that the inmate's teeth were found in and around the isolation cell where he threw them. (Pictures are Joint 6) Current Dental Records clearly show that the inmate had his teeth up until the day he was injured. (See J14) The Union has made no allegation that he was injured before this day.

Donald Williams

The Grievant's only explanation during his testimony of the injury to the inmate is that the inmate fell face first into the cell and that the inmate broke his fall with his face. The video contradicted this explanation. The witnesses, Pernell and Radcliff contradicted this explanation. The Grievant's visit to Officer Pernell's home and subsequent confession contradicted this explanation. The Grievant to this day has never denied making his confession to CO Pernell in any forum that Management has allowed Mr. Williams an opportunity to do so, except in this arbitration. The Grievant's explanation was self-serving and unbelievable with all of the evidence that Management has presented in this arbitration.

Additionally, the Grievant during direct testimony was asked if CO Pernell injured the inmate, and CO Williams indicated that he did not.

If the Grievant did not injure the inmate and CO Pernell did not injure the inmate, and the inmate was not injured until after he was placed into the strip cell, whom could have done it?

Warden Pat Hurley

During the initial testimony presented by the State through Warden Hurley, the State was able to outline for you what Use of Force was, as described by AR 5120-9-01 (J4-A), and under what circumstances use of force was permitted in

the AR. They are as follows:
(J4-A pg89)
"C. There are six general situations in which a staff member may legally use force against an inmate:
(1) **Self Defense from an assault by an inmate;**
(2) **Defense of third persons, such as other employees, inmates, or visitors, from assault by an inmate;**
(3) **Controlling or subduing an inmate who refuses to obey prison rules and regulations;**
(4) **Prevention of crime, such as malicious destruction of State property or prison riot;**
(5) **Prevention of escape; and**
(6) **Controlling an inmate to prevent self-inflicted harm."**

Warden Hurley further elaborated by citing **"D Force or physical harm to persons shall not be used as prison punishment."**

In the instant case the Warden testified that what happened to the inmate was not legal force as defined in the AR. The Warden testified that this injury to the inmate was considered excessive use of force as defined by the AR under, **"B (1). "Excessive force" means an application of force which, either by the type of force employed, or to the extent to which such force is employed, exceeds that force which is reasonably necessary under all the circumstances surrounding the incident."**

The Warden pointed out that the investigation showed that the inmate was under control. He was cuffed from behind. He had CO's surrounding him as he was placed into the isolation cage, and other than ordinary struggling, the inmate had no need to be further restrained other than to place him into the cage and the door shut. Yet inexplicably CO Williams stepped, stomped or kicked the inmate on the back of the head and his teeth were broken out of his mouth. He would characterize this use of force as illegal and considered it excessive as defined in the AR. Additionally the Warden indicated that the injuries sustained by the inmate had also risen to the level of **Abuse.** The Warden testified further that the Department did not have a standard for ascertaining abuse. However, he further indicated that is his decision alone to determine abuse in this matter and he did make that determination based on the investigation of the Use of Force Committee. The Warden said that he felt that his long tenure with the Department and the many positions that he held in the Department during his career certainly qualified him to make that determination and that he felt that this issue certainly rose to that level. In either case, CO Williams used excessive physical force on the inmate and that illegal force was also in fact considered abuse.

Additionally, the Warden was asked on direct what actions constituted a violation of Rule 22? His answer indicated that the Grievant's written incident report was not accurate, nor did he give the truth to the Use of Force Committee as determined by the Committee and their investigation.

Each charge called for removal in this case.

Union's Position

The following position of the Union is taken from its post hearing brief:

Understandably the Union has chosen to take the offensive in this case and cry foul. The Union has attacked the following individuals, all of them alleged Management stooges and/or incompetents: Dr. Greg Buckholtz, Committee Chair of the Use of Force Committee. Dr. Buckholtz is also from the Chief Inspectors Office of the Department and it is his normal job to investigate alleged wrong doing on the part of staff. Additionally the Union has attacked Stacha Doty, Administrative Assistant to the Regional Director, Office of Prisons and Dave Johnson, Security Administrator for the Department.

The Union alleges that Dr. Buckholtz and the Committee have it in for the Grievant. That he threatened and coerced each bargaining unit witness in an attempt to make a case against the Grievant. The Union further alleges that Dr. Buckholtz doctored the tapes used to record the interviews with bargaining unit staff in order to wrongfully discharge the Grievant. However the Union never answered the question of why? Why would Dr. Buckholtz and Stacha Doty and Dave Johnson, sign their names to an official document and jeopardize <u>their</u> careers, that they has so diligently cultivated to reach the positions of importance in the Department that they have attained? Oh yeah, The Union alleges it was a conspiracy to save the Department from a massive lawsuit this inmate would have for losing his front 4 teeth due to an UN-named CO knocking them out. Warden Hurley indicated in testimony that the Department is always sued. Dr. Buckholtz testified that inmates sue the Department. That is what inmate's do. They sue. Sometimes, with

legitimacy, and sometimes frivolously. I think it usually depends on whether or not the Department took steps to protect the inmates from the CO who takes it upon himself to step, stomp or kick an inmate's front 4 teeth out of his head.

Additionally, the Union alleges a violation of the Grievant's *Weingarten Rights*. The Union alleges that Management at RCI prohibited the Union Steward of choice by the Grievant to attend an investigatory interview. Additionally the Union alleges that they required the Grievant to be represented by another steward, of the Employer's choosing, who was on duty at the time of the investigatory meeting with the Use of Force Committee.

Management at RCI did not violate this Grievant's *Weingarten Rights* in this matter. Yes, they did not allow the Union President into the institution during scheduled off-hours to represent the Grievant. However they did allow the Union Vice-president, who was on duty to represent. This has been a long standing past practice at RCI to allow only on duty staff into the institution for representation issues.

Article 24.04 – Pre-Discipline indicates **"An employee shall be entitled to the presence of a union steward at an investigatory interview upon request..."** However the contract does not indicate that the employee is entitled to the Union steward of his choice. Arbitrator Harry Graham in award #208 ODOT and OCSEA, said, **"Section 24.04 of the agreement specifies that an employee is entitled to the presence of "a" Union steward at a pre-disciplinary meeting. There is no doubt that the person from the Muskingum County ODOT facility received the attentions of "a" Union steward...." "However, the Agreement is specific and indicates that all that is required is the presence of "a" steward. As that Requirement was met, it must be concluded that the State did not violate the Agreement in this situation."** I submit that the Grievant received the representation of "a" steward and Management at RCI did not violate the contractual rights the parties have agreed to. Further the Grievant's case has not been prejudiced by requiring an on duty steward to represent.

Other Union Contentions

The Union has made numerous procedural objections at the beginning of this arbitration, yet inexplicably they did not elaborate any further about the alleged violations. This Advocate can only surmise that the Union apparently thought better of it during the course of the arbitration and has not pursued the issues because they were not important. Let me say however, the Department denies any wrong doing, that it did not deny the Union any documents requested, that the Department supplied all documentation requested as soon as it was available. The Department did not doctor tapes or coerces witnesses to testify against the Grievant.

The Department only asked that the Union go through established procedures the parties have agreed to over many years as it relates to requests for documentation. Namely that requests go through the identified Advocates and no one else.

Conclusion

The facts of the case are only in dispute as to who stepped on, or stomped or kicked the teeth of the inmate out of his head. The Union does not deny that the inmate was injured during this incident. They just claim it was not the Grievant. However all evidence supplied by Management in this case points to the Grievant as the CO who did cause the injuries of the inmate. This action by the Grievant was determined to be excessive force as defined by AR 5120-9-01 and is considered Abuse by the Warden of this institution. It is his determination that matters most, because he is the Warden put in charge to make this decision. He knows Abuse when he sees it. I believe that this Arbitrator knows it as well.

I point this Arbitrator to one of his own cases, recently determined by him just before this arbitration commenced. In the case of Ronnie Walker, case #1632, you indicated **"When a Corrections Officer uses his position of power and authority to physically abuse inmates he has stepped well over the line of professional conduct that separates those who need to be controlled from those responsible for maintaining control."** CO Williams stepped over the line when **HE STEPPED; STOMPED OR KICKED THE TEETH** out of the inmate's mouth. He was the only CO in position to do so. He was observed to be in a position to do so. Witnesses heard what sounded like a "smack" or "teeth or glass breaking". They later knew he was the Grievant stepping on or stomping on or kicking the back of the inmates head which resulted in the ABUSE alleged by the Employer. Under Article 24 you must uphold the discipline. You do not have the authority to modify it.

However, if you find that abuse did not occur, I submit that you must find excessive physical force was committed by the Grievant and again uphold the removal because the incident rises to being progressive and commensurate with the

offence as required under Article 24.02.

I respectfully request that you uphold this removal and deny the grievance in its entirety based on the merits of the case. Additionally, I request you uphold the Employer's procedural objections in this matter and determine the grievance not arbitrable.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The following is taken from the Union's post hearing brief. It is as follows:

The instant case is before this Arbitrator to determine whether or not Donald Williams violated three provisions of the Department of Rehabilitation and Corrections' Standards of Employee Conduct, resulting in injury to an inmate previously housed at Ross Correctional Institution, or to determine whether Mr. Williams, the Grievant was removed from his position at Ross Correctional Institution for just cause.

II. PROCEDURAL ARGUMENTS

The procedural issues in this case are so egregious that irrespective of the substantive merit of the removal, the instant grievances must be sustained. The parties negotiated a contract in good faith. Part of the contract contains provisions, which require the Employer to provide a union representative during the course of an investigatory interview or an interview that may lead to discipline, see Article 24. The State Employment Relations Board ("SERB") has previously issued a probable cause finding that an unfair labor practice occurred in a previous case, *OCSEA/AFSCME Local 11 v. Belmont Correctional Institution*, Case No. 01-ULP-04-0203, where the Warden unilaterally replaced a steward chosen by the employee and who was available for the hearing. (See Attachment A, copy of Probable Cause Finding).

In the instant case, the Union filed an unfair labor practice ("ULP") against the State of Ohio, Ross Correctional Institution on February 27, 2002. OCSEA included several charges, specifically two charges dealing with the same procedural issues before this Arbitrator; specifically, RCI's refusal to allow Mal Corey to represent the Grievant and tampering with tape recordings. The Employer asserted in its reply to the Union's initial Procedural Argument on day one of the instant arbitration that SERB dismissed the ULP for lack of probable cause that the Employer committed an unfair labor practice. Attached as Attachment B is a copy of the Investigator's Memorandum and Findings Upon Investigation, wherein the investigator *specifically* finds that the with respect to paragraphs one through eight, they were all untimely. Therefore, she **never** reached the merits of the charges.

Although the investigator's analysis is redacted, she does find in paragraph 11 that the "transcripts reveal that the Employer's committee conducted tough, intimidating interrogations. Threats of convictions were used." Interestingly, and importantly, she also includes in her findings, in paragraph 14, "[t]he hearing officer repeatedly relied on the *videotape* in the area that the inmate was harmed to substantiate the recommendations." (Emphasis added).

The most logical inference that one could deduce from this statement is that the investigator was under the misimpression that the videotape, which was never provided to the hearing officer by either side,[1] was the only evidence relied upon by the predisciplinary hearing officer for purposes of discipline. One can infer from this being included in the investigator's findings that the neither the Union nor the grievant were harmed by the tapes because they were not relied upon for purposes of discipline.

It is important to note that at the time the Union filed the ULP regarding the tampering with of the tapes, it believed that the statement from Mr. Buckholtz stated a predetermination for finding discipline. The arbitration later revealed that this comment was taped over part of inmate Holcomb's testimony and was actually a statement made to his secretary that may have been related to another case.

Furthermore, the SERB investigator noted as part of her findings from the Employer that the tapes were sent out to an outside company, see paragraph 13. At the time of this SERB investigation, the Union did not have the luxury of cross-examining Mr. Buckholtz, who conveniently did not remember the "outside agency." Nor did it have the luxury of Ms. Martins' initial testimony to the contrary. Importantly, the SERB findings do not indicate the name of the "outside company," just that this is what the Employer purported happened.

The Union still maintains its procedural argument based upon the Employer's mishandling of the tapes. The evidence presented in this case shows, unequivocally, that Mr. Buckholtz damaged at least one tape. The Union maintains that it was harmed by the Employer's mishandling, whether intentional or non-intentional, of these tapes. The portion of the inmate's tape, which was erased, may have made reference to how he received his injuries. It is undisputed that three RCI employees in took him down 6-House. It is also undisputed that all three were injured. It is

further undisputed that during the course of the inmate's resistance, he swung at Officer Pernell.

Based upon the level of his resistance in 6-House, his attempted assault on Officer Pernell, the officer who was key in the Employer's decision to remove the Grievant, the officer who was threatened by the inmate, and the only other officer who could be subject to criminal assault charges against the inmate, what inmate Holcomb had to say about the events in 6-House are extremely relevant. It does not matter how the evidence was destroyed, but that it was. Since the Employer, in its infinite wisdom, chose not to preserve the tape of 6-House, even though it had the ability to do so and knew of the use of force, we are left to guess and surmise.

The Employer cannot seriously argue that this tape is not important to the Union. What the inmate told the use of force committee about what happened in 6-House may include evidence that he was injured in 6-House, whether intentionally or in the course of the attempts to restrain him.

What is most disturbing is the Employer's attempt to misrepresent how the integrity of the tape was destroyed. It is more than apparent that the Mr. Buckholtz's secretary, Ms. Martins, gave inconsistent testimonies. During her first testimony, which was unexpected and unrehearsed, she testified, under oath, of how she copied the micro-cassettes. She testified that when she realized that she inadvertently messed up the first of the micro-cassette tapes, she changed the wires, and continued copying the remaining tapes. She further testified that she never sent the tapes "out" to have them professionally copied, nor did she recall Mr. Buckholtz indicating that he would do so.

However, during the Employer's "rebuttal" case, Ms. Martins testified again in order to *rebut* her prior spontaneous, unrehearsed testimony. This time she rode to the hearing in the car with her supervisor, Mr. Buckholtz, whose head we could see outside the door as she testified. This time her testimony mirrored what he had testified to. More importantly, this time what she testified to was improbable.

The Union presented the rebuttal testimony of Jimmy Rea, owner of Jimmy Rea Electronics. Mr. Rea testified to his extensive experience in electronics, his extensive experience and business professionally copying audiotapes, including micro-cassette tapes. Mr. Rea testified, unrebutted, that Ms. Martins' re-accounting of the events was ***impossible***. He testified that the only way the original could have been recorded over was if the person pushed RECORD on the original micro-cassette recording device; mere mixing of the wires would not produce such a result.

Union Representation:

Although the Employer has attempted to argue that its blatant violation of Article 24 and O.R.C. 4117.11[2] was justified due to its belief that it might violate the Fair Labor Standards Act ("FLSA"), this argument too is without merit. And this violation alone should result in this grievance being granted in its entirety.

O.R.C. 4117.11(A)(1) and (2)[3] provide in pertinent part,

> It is an unfair labor practice for a public employer, its agents, or representatives to: (1) Interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code *or an employee organization in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances;* (Emphasis added).
>
> (2) Initiate, create, dominate, *or interfere* with the formation *or administration* of any employee organization. . . . (Emphasis added).

In the instant case, the Employer violated both provisions of O.R.C. 4117.11, when it refused to allow the Union's representative, Mal Corey, to represent the Grievant at his Use of Force Hearing. The Employer proposes a two fold argument, which is that because the Hearing was scheduled during second shift, the Union's selected representative could not provide representation because he would have been off shift, which in turn would have created overtime. This argument is without merit for the following reasons. First, as per the un-rebutted testimony of Pat Hammel, OCSEA Education Representative, the position of Union Steward is a **voluntary** position. Because the very nature of the position, typical duties associated with this position does not automatically trigger FLSA.

The FLSA requires an employer to pay the specified minimum wage for each hour worked and overtime compensation for work in excess of forty hours in a workweek. 29 U.S.C. §§206 and 207[4]. Because the FLSA does not define "work," the United States Supreme Court has defined the term to include any time "*controlled or required* by the employer *and* pursued *necessarily and primarily for the benefit of the employer and his business.*" Tennessee C., I. & R. Co. v. Muscoda, 321 U.S. 590, 598 (1994).[5] (Emphasis added).

Here, volunteer work for an employee's labor union is not compensable "work" under the FLSA. If this were the case, then all work, including time spent after hours on grievances would trigger overtime. Mal Corey, current RCI Chapter President testified that he has never been paid overtime for work he spent after shift processing grievances. Nor was he paid overtime when he appeared on behalf of OCSEA and the Grievant at the Grievant's Mediation Hearing in the instant case. He testified that he was on his "good day" when Mr. William's Mediation took place.

The State and the Union specifically negotiated union leave time because both parties recognized the need to allow some time to administer the contract, which benefits the Employer as well as the Union. However, not all time spent on administering the contract or on union related issues are subject to the union leave provisions in the contract, e.g. chapter meetings. It is a well-known fact that how much is too much and how much is not enough is a point of contention between the parties.

III. JUST CAUSE STANDARD

violated. In that case as in the instant case, the State failed to adequately investigate.

In the instant case, it is easier to enumerate what the Employer, via its Use of Force Committee, *did not* do as opposed to what it did do. But first, the Union will summarize what it did do, according to the documents introduced into evidence and the testimony of two Use of Force Committee ("Committee") members, Greg Buckholtz ("Buckholtz") and Stacha Doty ("Doty").

We can summarize that the Committee did (1) view video tape of inmate Holcomb being brought into isolation; (2) reviewed a medical report submitted by Nurse Hopkins; (3) reviewed a dental report submitted by a technician; (4) reviewed incident reports submitted by the officers in both 6-House and isolation; (5) interviewed the officers and supervisors who were in the isolation area; (6) interviewed the inmate; (7) interviewed the inmate stewards; and (8) may or may not have interviewed OPI Supervisor Scott Price (but did review a *Supplemental* report submitted by Mr. Price)[10].

With this particular use of force incident, it is crucial to note that use of force occurred in another area ***and there is a conflict in the testimony of the two Use of Force Committee members who testified.*** Buckholtz testified that the Committee also investigated the use of force in 6-House. Contrary to his testimony, Ms. Doty unequivocally testified that she was told, in the presence of the other two Committee members, i.e., Buckholtz and David Johnson, that the Committee was to investigate the use of force in 9-House (or Isolation). She maintained throughout her testimony that the Committee ***never*** investigated the use of force in 6-House. Her testimony is consistent with the evidence relied upon by the Committee and by the Employer to remove the Grievant.

Since there was no videotape directed at the isolation cages, several issues arise as to whether or not the inmate's injuries occurred during and as a result of his own resistance or whether they occurred as a result of an intentional assault or an excessive use of force. The only reliable answer to this question lies in the thoroughness and adequacy of the Committee's investigation because much depends on the credibility and character of the witnesses. Hence is why what the Committee **did not do** is so relevant and vital here.

The Committee **did not** (1) view the videotape of the use of force in 6-House; (2) review the personnel files of the officers involved; (3) review the inmate's history and file; (4) interview Nurse Hopkins; (5) interview the dentist who examined the inmate (6) review the complete medical file of the inmate; (7) did not reconcile the inconsistencies of the injuries on November 7, 2001 with the injuries reported on November 8, 2001; (8) interview Officer Harness; (9) record the initial interview of Scott Price; (10) preserve the integrity of the evidence obtained; (11) obtain a medical opinion to determine whether injuries were consistent with inmate's version of what occurred and the physical injuries; and (12) follow the hearing procedures as outlined in O.A.C. 5120-9-01.

What the Employer did not do is crucial. Had the Employer preserved the incident in 6-House, the Committee may have been able to determine if the injuries suffered by the inmate occurred as a result of his resistance there. It is undisputed that all three RCI employees, two officers and one supervisor, were injured as a result of that takedown. Had the Committee requested and reviewed the inmate's file, it would have seen that the inmate had (1) a history of mental illness, (2) a history of drug abuse, (3) a history of aggressive behavior towards staff, and (4) a history of violence, which resulted in his transfer from Noble Correctional Institution to RCI. With this information, the Committee may have come to a different conclusion when the inmate stated "I might have just knocked them out myself, and blacked my own eye." (See inmate statement p. 22).

Had the Committee interviewed Nurse Hopkins it may have been able to determine whether the inmate's injuries were more consistent with a fall or with being stomped on the back of the head into concrete. The Committee could have asked her to explain why, if the inmate was stomped on with a boot and enough force to break three teeth, he had no injuries to the back of his head, or other collateral injuries to his face. The Committee may also have been able to determine, why with the "extent" of his injuries, a doctor did not see him. The Committee may also have been able to determine why the nurse did not note a black eye when she examined him.

Had the Committee interviewed the dentist who examined the inmate on November 7, 2001, it may have been able to determine why the inmate had three broken teeth that day, but did not have four and why the Dentist did not note a fourth tooth as being loose in his/her report on November 7, 2001. The Committee may also have been able to determine, through the dentist whether the inmate's injuries were more or less likely to have been the result of a fall as opposed to being stomped on the back of the head. And whether the teeth could have been cracked with the takedown in 6-House and then broke completely when the inmate fell into the isolation cage. The Committee could also have determined, through the dentist, whether there is a "sound" of teeth cracking that is audible to anyone other than the person whose teeth are cracking. And if so, whether it sounds like "glass breaking."

Since the Committee did not interview any medical personnel, i.e., Nurse Hopkins, Technician Carla Comer, or the dentist who examined the inmate, it should have pulled and reviewed his entire medical file, which if it had, then the Committee would have seen that the injuries reported by Nurse Hopkins apparently were not substantial enough to the Institution to warrant a visit to an actual medical doctor. It would also have been apparent that the dental exam did not note that the inmate had a fourth tooth loose, which begs the question, "how did the inmate get a fourth took knocked completely out ***after*** the incident?" The Grievant did not have access to the inmate after the nurse examined him or after his dental exam.

The Committee never submitted any report or recommendation with an analysis explaining how the inmate's injuries were consistent with an intentional assault. The Committee never reconciled the lack collateral injuries to the

Article 24.01 of the parties' CBA specifically incorporates the standard of "just cause" into any disciplinary action taken by the Employer. This article also requires that the Employer carry the burden of proof to establish that "just cause" existed for any disciplinary action. The Union maintains that the Employer did not and cannot meet its burden of proof in establishing the existence of "just cause" for the removal of Donald Williams.

In In re Franklin County [Ohio] Sheriff's Office and FOP, Capital City Lodge, 114 LA 958 (May2000)[6], Arbitrator Thomas Skulina, poignantly pointed out that "what is 'just cause' is not a simple formula. Events must be weighed and underlying the review of the facts in evidence, the premise remains that the discipline must be equitable." However, encompassed in the many components of "just cause" are the principles of "fundamental fairness" and "due process." The concept of due process and discipline is also discussed in Elkouri/ Elkouri in How Arbitration Works, BNA books, Inc., 5th Edition, 1997, at pages 918 to 920.

Typically, Arbitrators will refuse to uphold discipline imposed by the employer where the employer has failed to comply with the minimal due process standards imbedded in the "just cause" standard, specifically when the employer has failed to follow the procedural requirements outlined in the parties' contract. As discussed in the Section II of the Union's brief, in its procedural arguments, Management's intentional and bad faith interference with the Union's representation is a serious due process violation.

When RCI denied Chapter 7130's request to have Union Steward Corey represent the Grievant at his Use of Force Hearing, it violated the law and the parties' contract. The Chapter advised RCI of its intent to have Steward Corey represent Mr. Williams the morning of hearing, which according to testimony was not scheduled until 7:00 p.m. that evening. *If* RCI truly believed the FLSA was a concern, it had all day to contact central office DR&C and/or the Office of Collective Bargaining, (OCB) or even the Attorney General's office to determine whether or not its position was legally sound. RCI presented no evidence to establish that it had a good faith basis to deny the Union's representative. It is clear based upon the law, and the *joint* training between the State and the Union, which Pat Hammel testified to, that union activity is a *volunteer* activity, emphasis on the volunteer, which means that it does not subject the Employer to pay for activities designed to benefit the Union.

Elkouri/ Elkouri also discusses the concept of "harm" when determining whether to reject discipline on a violation of due process basis. In the instant case, determining actual harm to the Grievant is difficult. On one hand if we assume that the investigation by the Use of Force Committee was fair, impartial and unbiased, then of course we can establish harm to the Grievant because he was denied the Steward, who conducted the Union's investigation into the allegations prior to the Grievant's hearing. The Grievant testified that he felt harmed by not having Steward Corey present because Steward Corey had already investigated these alleged incidents in 6-House and isolation, knew of the facts, knew of the weaknesses, and could have provided more effectual representation at his hearing.

And he was allowed *representation* not a mere witness, pursuant to O.A. C. 5120-9-01[7] and In re City of Cleveland, SERB 97-017 (11-21-97)[8]. In re City of Cleveland,*supra*, provides that a union representative is entitled to provide "assistance" and "counsel" during an investigatory interview, and that the employer must at a *minimum* allow the representative to (1) ask questions and (2) register objections to questions without directing the employee not to answer.

Therefore, *representation* encompasses more than mere witnessing. Thus, if we assume a fair, unbiased and impartial investigation by the Committee, then the Grievant was harmed by not having a representative who had knowledge of the incidents, the steward may have been able to ask pertinent questions to the employee to clarify issues, register objections to questions, and perhaps changed the outcome of the Committee's determination.

On the other hand, if we assume that the investigation was biased, unfair and partial to begin with, then RCI's interference with the Union's selection would not have changed the outcome of this case because the outcome would have been predetermined to begin with.

In Professor Carroll R. Daugherty's *Enterprise Wire Co.*, 46 LA 359 (1966), adopted in Elkouri/ Elkouri, *supra*, he espouses a seven test criteria for determining "just cause."

(1) Was the employee given advance warning of the possibility of discipline? **YES.**
(2) Was the rule or order reasonably related to the efficient and safe operation of the business? **YES.**
(3) Before administering discipline, did the employer make an effort to discover whether the employee did, in fact, violate the rule? **NO.**
(4) Was the employer's investigation conducted fairly and objectively? **NO.**
(5) Did the investigation produce substantial evidence or proof that the employee was guilty as charged? **NO.**
(6) Had the company applied its rules, orders, and penalties without discrimination? **UNKNOWN.**
(7) Was the degree of discipline administered in the particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the employee's record of company service? **NO. and NO.**

A. <u>The Employer Failed to Conduct a Fair, Objective and Adequate Investigation:</u>

In In the Matter of the Arbitration Between: The State of Ohio, Ohio Veterans Home and OCSEA/AFSCME, Local 11, AFL-CIO, [9]Decision No. 657 (January 1998), Arbitrator David M. Pincus, found that the State had not met its burden of proving "just cause" for discipline because he found that the Grievant's due process rights had been

inmates face, the lack of bruising or abrasions on the back of the inmate's head or why no other injuries consistent with being kicked around the body were evident in the medical report.

More importantly, the Committee never reconciled whether the injuries were as a result of the incident in 6-House or isolation. When reviewing the inmate's statement, that which has been left intact, it is evident that the inmate refers to being "assaulted" in 6-House. On the bottom of page four, in response to a question by Buckholtz, Holcomb responds, in pertinent part, " First of all they be having cameras inside the block. You know, if they cameras work, all they have to do is look at that. So, yeah, so I went towards the dayroom floor, Officer Pernell rushed me, then yeah. . . . I was think, what was he doing? What's he doin' rushin' me? What's he doin' putting his hands on me?"

Inmate Holcomb goes on to state at the top of page five, "I don't know if I swung on him or not. I know that I tried to *defend* myself once *they* had me on the ground. But it was to no avail, cause you know. You know, cause I ain't understanding where all this is coming from for one. I ain't never had no problems since I've been down. Let alone for you all to be physically jumping on me."

Based upon what can be discerned from the remaining unspoiled statement of the inmate, it appears as if he is describing two "attacks," by the officers, one in 6-House and one in isolation.

Furthermore, based on the description given by inmate Holcomb on how he was positioned when in the cell, it is highly improbable that he could have sustained the injuries he did in the way he described. If he were on his stomach, with his head facing the wall, (as we all saw in the walk through, two sides of the cage are wire mesh, with the remaining side being the back wall), it would be virtually impossible for the Grievant or any other officer to have been able to inflict the type of injuries the inmate suffered. The Committee never reconciled this logistical problem.

Page 20 of the inmate's statement shows a litany of questions from the Committee to the inmate indicating an acknowledgement of the improbability of the inmate's version of events with the injuries suffered. However, the Committee never sought to even try to sort out the considerable inconsistencies and improbabilities in the inmate's statement. Nor did it include in its investigation the copy of the drawing that the inmate references on page twenty-three (23) of his statement, wherein he draws the positioning of the officers and himself in the cage. And indicates that the officer close to his head was the same officer who had his knee in his back, which according to prior testimony was Officer Pernell.

B. The Employer Failed to Meet Its Burden to Prove that the Grievant Violated the Employee Standards of Conduct Rule 22:

Rule 22 – Falsifying, altering or removing any official document:

The Employer produced Warden Pat Hurley along with Joint Exhibit 4 to support its discipline based upon the Grievant's alleged violation of Rule 22. However, the Employer failed to meet any burden of proof establishing said violation. The Warden could not provide any testimony outside of the Grievant's Incident Report to establish how he "falsified" an official document.

The Warden testified that the Grievant's Incident Report did not coincide with the videotape. However, the tactic "if we keep saying it shows he was slid in and they did not fall, then it will be so," is absurd. Everyone in the room saw what that videotape showed, it speaks for itself. And it shows the officers, specifically Officer Williams, described as the officer on the right side of the inmate, fall and/or lose his balance while they were going around the corner to the isolation cell. The videotape also shows the inmate going into the isolation cell, but there is no way to discern a distinction between "falling in" and being "slid in." It is a difference without a distinction. Regardless, the videotape definitely **does not** show the officers "throwing" the inmate into the isolation cell. As a matter of fact, the video shows very little, but for three blurry figures rounding a corner then a cluster of figures blocking the view to the cage door.

Based upon the Pre-Disciplinary Conference Report, page 4 of Jt. Ex. 4, Management relied on, which is internally inconsistent see page 5 under Findings of Fact and Discussion, "Before turning the corner to proceed to the holding cage, the inmate goes to the floor. . . . Officer Williams' incident report is inconsistent with the recording of the events as he stated that the inmate was resisting and struggling-which caused him and the officers (sic) to go to the floor." Unless "going to the floor" means something different in Employer speak, the Union is at a loss as to how Officer Williams' incident report is inconsistent with the video.

Nevertheless, this particular charge is unsupported by the evidence and in clear violation of the principles embodied in the "just cause" standard. A Rule 22 infraction is inappropriate, because the Employer cannot show that the Incident Report was "falsified," "altered," or "removed." The Employer cannot meet the "preponderance of evidence standard of proof," i.e. that it had more evidence for than against that the Grievant "falsified," "altered," or "removed" an official document. Since the Employer cannot meet the "preponderance of the evidence" standard, it certainly cannot meet the "clear and convincing" standard, which requires it to show that its evidence results "in reasonable certainty of the truth of the ultimate fact in controversy. Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing proof will be shown where the truth of the facts asserted is highly probable.[1]

Moreover, it seems absurd to find that the Grievant violated Rule 22 without violating Rule 24, especially considering that his testimony before the Committee is consistent with his Incident Report.

This violation cannot be upheld based upon the evidence presented.

C. **The Employer Failed to Meet Its Burden that the Grievant Violated the Employee Standards of**

Conduct Rule 40:

Again, back to the Warden's testimony, on cross-examination, the Warden was asked to explain what constituted excessive force. He explained that "excessive force" was more force used than was necessary to control the situation. In the instant case, the Employer cannot prove by the preponderance of the evidence presented at arbitration that Mr. Williams used more force than was reasonably necessary to control the situation.

Not one of the Employer's witnesses actually observed what was going on in the isolation cell. Even the inmate provides conflicting testimony as to who was where, and who did what, and indicated several times that he could not see because his face was towards the wall. Nevertheless, the Employer removed Mr. Williams on a Rule 40 violation based on absolutely no physical evidence.

More importantly, the Employer is, once again, inconsistent in its rationale. It charges Mr. Williams with excessive force and abuse of an inmate. This begs the question, what is the difference? If there is a difference, why charge him with both? If there is not a difference, then why does the Employee Standards of Conduct have a different rule for the same conduct, with different remedies? The logic here is absurd.

Regardless, the Employer cannot show that Mr. Williams used more force than necessary to control the situation because the Employer cannot show that the inmate's injuries were not a result of (a) the use of force in 6-House, (b) the inmate's own resistance, (c) the inmate's own actions, i.e. self-inflicted, or (d) another RCI employee, who had access to the inmate *after* his exam by Nurse Hopkins and his dental exam.

The only "evidence" the Employer has is an unreliable and self-serving statement from Officer Pernell.[12]

And though the Union maintains that the Employer is obligated to prove its case in a removal with *clear and convincing* evidence, in this case it does not matter because the Employer cannot meet the lesser standard of *preponderance of the evidence.*

D. The Employer Failed to Meet Its Burden that the Grievant Violated the Employee Standards of Conduct Rule 42:

Likewise, the Employer cannot meet its burden to prove that the Grievant abused an inmate. The Warden could not even articulate a difference between what he defined as "excessive force" and abuse of an inmate. If the Warden cannot articulate a difference, how then are the Union and/or an employee?

The Employer's case boils down to witness credibility. It has none.

IV. WITNESS CREDIBILITY

In In the Matter of Arbitration between the Ohio Department of Corrections and the Ohio Civil Service Employees Association/ AFSCME-AFL-CIO,[13] Arb. No. 778, this Arbitrator set forth eleven criteria for determining witness credibility:

(1) The strength of the witness recollection;
(2) The position of the witnesses to observe what he/she testifies to;
(3) The experience of the witness;
(4) The consistency of testimony over time/with other statements;
(5) Any inconsistency, or self-contradiction;
(6) Evidence of bias or prejudice;
(7) Evidence of motivation (s) to misrepresent the known facts;
(8) The reasonableness and probability of the testimony with regard to all known evidence and testimony;
(9) Corroborating testimony;
(10) The demeanor of the witness;
(11) The character of the witness;

A. The Warden:

1. The Warden had fairly good witness recollection. For instance, he had excellent recollection on why he requested an outside Use of Force Committee, i.e. (1) involvement of a lot of staff; (2) extent of the inmate's injuries, and (3) possibility of a lawsuit by the inmate.

The Warden also had excellent recollection of his first meeting with the Use of Force Committee members; he recollected "implying" to them his concerns about the inmate suing.

The Warden also recollected the commendation letters he gave to Mr. Williams shortly before his removal.

The Warden recollected calling Mr. Williams into his office to advise him that he was being placed on paid administrative leave, and then watching Mr. Williams being escorted out of the institution in handcuffs by the State Highway Patrol.

The Warden recollected that Mr. Williams had been on numerous prestigious institutional teams, whose selection to was discretionary to the Warden.

The Warden also recollected receiving a letter from Mr. William's attorney, prior to starting any disciplinary proceedings against him, advising the Warden that the Grand Jury had refused to indict Mr. Williams on felony assault charges against the inmate.

The Warden also recollected that RCI challenged Mr. Williams' unemployment compensation, three times and lost three times.

The Warden also recollected the Union requesting to have Mal Corey represent Mr. Williams at his Use of Force Hearing and denying such request.

2. The Warden did not testify to seeing the actual "alleged" incident because he was not in a position to see any of the incidents, either at 6-House or in the isolation cell, but nevertheless testified to "what" the videotape showed, which in actuality is not what it shows. The Warden further acknowledged that he relied on the thoroughness, fairness, and impartiality of the Committee in imposing discipline on Mr. Williams.

3. The Warden has experience in use of force incidents.

4. The Warden never gave any statements that the Union is aware of, prior to the arbitration.

5. The Warden testified that despite his letters of commendation to Mr. Williams, he had to give a "corrective counseling" over a vague incident, which is disputed by Mr. Williams, and which the Warden could not produce anything in writing or determine whether it was related to the same incident (shakedown) in which he gave Mr. Williams a commendation for.

6. The Warden has a bias in that he testified that he was familiar with the doctrine of "detour and frolic" i.e., that an Employer's liability for the acts of an employee can be eliminated if it is established that the employee acted intentionally, or outside the scope of his/her duties. The Warden acknowledged, during cross, that he knew that if it were determined that Mr. Williams violated either Rule 40 or 42, that the Attorney General's office would not have to represent him in the event of a lawsuit filed by inmate Holcomb and it could argue that the State is not liable for the injuries suffered by the inmate as a result of the Mr. Williams' intentional acts.

7. This same rationale ties in with the Warden's motivation to misrepresent facts. Specifically, that he had to "corrective counsel" Mr. Williams, an eleven year RCI veteran, with no prior discipline, who was on numerous prestigious teams appointed by the Warden, who had exemplary evaluations, numerous commendations by this Warden and previous Wardens, in order to blemish his character. Moreover, it would also account for why the Warden would misrepresent the obvious, what the videotape shows. Despite everyone viewing the same videotape, he maintained that it showed something that it could not show, that the inmate was "slid" in the cage as opposed to "falling in" and that the inmate was not "struggling" and that they did not "fall down" like Mr. Williams indicated.

As everyone in that room saw, the videotape that was introduced into evidence was not top-notch quality and the Warden testified that he did not view a different video. As such, it is pathetically obvious that the videotape's clarity does not allow for specific acts. Therefore, Mr. Williams' account of the events cannot be affirmed or disaffirmed due to the poor quality of the tape. However, overt acts, such as the following forward can be seen in blurry form.

But in his haste to redirect liability, the Warden wants misrepresent the obvious and stick to it.

8. Part of the Warden's testimony is reasonable and probable with respect to all the known evidence and testimony. For instance, the Warden's testimony about his motives for convening an outside Use of Force Committee and meeting with them to discuss his concerns is consistent with the evidence presented (or lack thereof and specifically the shoddy investigation following therein).

9. There were no corroborating witnesses presented to bolster the Warden's testimony.

10. The Warden's demeanor appeared to be forthright and unwavering, although he at times faltered when presented with direct evidence, like the videotape and could not explain why he saw what he said he saw but it was not on the tape.

11. The Union has no reason to call into question the Warden's character but for the fact that he was not monitoring or questioning the Committee's investigation into the use of force incident, and apparently was not aware of which incident(s) they were to investigate.

B. Greg Buckholtz:

1. Buckholtz did not have strong or coherent recollection on anything that cast doubt to his investigation. He did not recollect the meeting with the Warden to discuss the Warden's concerns. He did not recollect threatening the officers. He did not recollect sharing information with the Highway Patrol. He could not recollect specifics of how the tape of inmate Holcomb's testimony became compromised. He could not recollect the name of the "outside company" he purported to send the remaining hearing tapes to in order to have them copied and transcribed.

2. Like the Warden, Buckholtz was not in a position to observe the alleged incident of excessive force and/or abuse of an inmate. He was only able to observe the videotape and the techniques he used in the use of force hearings and the documents he attached to his report.

3. Buckholtz has very little experience in conducting use of force hearings. According to his testimony this was his fifth hearing. And it shows. As the self-appointed "chair" of the committee, he failed to do a basic investigation. When witness credibility is key, he failed to request the personnel files of the officers involved in order to better ascertain their credibility. He failed to request the inmate's file, interview the Nurse or dental technician, request the inmate's medical exam, request the videotape for 6-House (though he maintains that he was there to investigate that incident), and bring any type of resolution to the inconsistencies in the inmate's testimony and injuries the inmate sustained. This type of shoddy investigation is the very reason many states are calling for a moratorium on

the death penalty!

4. Buckholtz's testimony is not consistent with the testimony of the other witnesses, including the witnesses that the Employer called. For instance, Buckholtz initially testified on cross that he never met with Warden Hurley prior to beginning the use of force hearings. Upon being confronted with Warden Hurley's testimony, he backtracked and then "recalled" having an "introductory" meeting with Warden, but did not "recall" discussions with the Warden about his concerns. Buckholtz testified that the Committee was apprised of and convened to investigate the use of force in 6-House and isolation. This is in direct contradiction to what Doty testified to; she testified that they never investigated the 6-House incident, which is why there is not recorded testimony of Daniel Harness, Scott Price, or videotape of 6-House. Buckholtz testified that he did not exhibit inappropriate behavior towards the officers. Officer Pernell, Officer Radcliff and Mr. Williams testified that he did, that he acted unprofessional, used profanity and made threats. He also gave conflicting testimony about copying the tapes. Initially, he stated that his secretary attempted to copy the micro-cassette tape onto a regular tape, realized that she had "messed" up and he then, fearing the same with the remaining tapes, sent them to an "outside company" to have them professionally copied. On day three of the arbitration, the Union called, via telephone, Buckholtz's secretary, who contradicted what he testified to. She testified, initially, under oath, that she did in fact have the wires mixed up, and had recorded onto the copy she and Buckholtz talking along with her radio in the background. But when she realized she had the wires mixed up, she pulled out the manual, corrected it, and continued to copy all of the remaining micro-cassette tapes onto other micro-cassette tapes. She testified that Mr. Buckholtz did not take the tapes from her and send them to an outside company.[14] Another inconsistency with Buckholtz's testimony and Doty's is his denial that the Committee shared information with Trooper Wells and Doty's affirmation that they did.

5. Buckholtz gave several self-contradictory statements. One regarding the meeting with the Warden, discussed above. He gave another regarding the copying of the tapes. He testified on cross that he did not rely on the inmate's testimony because he was "unreliable," but that he based his inappropriate recommendation on Mr. Williams' "confession" as reported by Officer Pernell, Officer Radcliff's third statement and the videotape. However, this is contrary to Jt. Ex. 4, page 4, paragraph four "In regards to violation of Rule 40-excessive use of force, Mr. Bucholtz (sic) stated that the ***testimony*** of inmate Holcomb . . . ." Therefore, he did rely on the inmate's testimony in reaching his conclusion.

6. There is no evidence that Buckholtz held any specific bias against Mr. Williams or was prejudiced for any particular reason, but it does strongly suggest a predisposition to find a scapegoat for the Employer.

7. There is no direct evidence that Buckholtz had a motive to misrepresent the facts; but the evidence shows that he did. Because there is no evidence of bias, one can only speculate as to why Buckholtz misrepresented the facts. He may have been attempting to alleviate the Warden's "concerns." He may have been covering up his inexperience and mistakes. Or he could have misrepresented the facts because he could.

8. Buckholtz's testimony, with regard to all the known evidence and testimony is not reasonable or probable. Based upon the lack of a thorough, fair, and unbiased investigation, none of the Committee's recommendations are reliable. One new example is the Committee's recommendation to discipline certain officers, but not others, when all of the officers' statements were fairly consistent with each other. For instance, Officer (now Lieutenant) LeMaster did not "see" anything, and even offered his version of what probably happened to cause at least one of the inmate's injuries, i.e., the officer that was "swung on" probably is the one who blacked the inmate's eye, because that is what he would have done. (See LeMaster statement pages 4, 6, 14); Buckholtz did not recommend discipline for Officer LeMaster.[15] It appears that his, as "chair" of the Committee and Employer "presenter" for purposes at the pre-disciplinary hearings,[16] recommendations were random and apparently arbitrary, probably depending on who was less intimidated by his tactics in the hearings. Furthermore, Buckholtz's insistence that the videotape substantiated his and the Committee's findings is impossible and improbable; the videotape speaks for itself, and if anything support's Mr. Williams' version of what happened in isolation.

9. Initially, the Employer could offer no additional evidence to corroborate Buckholtz's testimony.[17] To the contrary, as previously discussed Doty's testimony, in many areas, directly contradicted Buckholtz, as did the Warden's.

10. Buckholtz's demeanor showed more arrogance than anything else. He appeared to be oblivious to the inadequacies of the Committee's investigation, and faltered when confronted with evidence that contradicted his testimony, relying on new, vague "recollections" of conversations or events.

11. Based upon Buckholtz's conflicting testimony, both internally inconsistent testimony and externally conflicting, i.e. with the Warden, Doty, Radcliff, Pernell, and Williams, Buckholtz's character is not that of an honest, forthcoming person.

C. **Officer Roman Pernell:**

1. Officer Pernell did not have a strong recollection of the events. He indicated that he was on several medications for depression and anxiety as a result of this incident. He did, however, recollect that he felt intimidated by Buckholtz during his use of force hearing, that he was threatened with jail time and loss of his job.

2. Officer Pernell was in a position in both 6-House and isolation to observe whether or not any excessive force and/or abuse of an inmate occurred. However, he maintains that he did not observe any assault against inmate Holcomb. He stated that he did her a "smack" sound, while in isolation, but it sound like a hand smacking against the

concrete wall.

3. Officer Pernell, at the time of his testimony, had been a correctional officer for 15 years. He had much experience in restraining inmates and placing them in isolation.

4. Officer Pernell's statements were not consistent. He gave three inconsistent statements to the use of force committee, and his testimony changed at arbitration.

5. With each statement Officer Pernell gave the use of force committee, he deflected blame from himself, until he ultimately redirected all blame to Mr. Williams via a manufactured "confession." None of Officer Pernell's statements can be given any weight, except for his first statement because all of the subsequent statements were given in a vain attempt at self-preservation and an attempt to appease the Committee.

6. The most evident "evidence" of bias or prejudice against Officer Pernell is the fact that he needed to deflect blame away from him. Mr. Williams told him that Trooper Wells said that it was either him or Mr. Williams who assaulted that inmate and one of them would be charged with a felony. The following day, Officer Pernell decided that it would be Mr. Williams, and gave a false confession to Warden Hurley in order to protect himself.

7. Officer Pernell's motivation to lie about a purported "confession" by Mr. Williams was his desire to avoid a felony charge, possible jail time and the loss of his job.

8. Officer Pernell's testimony is not reasonable or probable with regard to all known evidence and testimony. The only "evidence" that implicates Mr. Williams is his so called "confession" to Officer Pernell. Mr. Williams testified that he never assaulted the inmate and never falsely confessed to Officer Pernell. It appears that Officer Pernell was in a struggle to save himself, but not hurt Mr. Williams too bad. He put in his statement and testimony that Mr. Williams appeared to be "out of it," suicidal even. Officer Pernell testified that he "wouldn't have been surprised" if Mr. Williams was hanging with a note from his toe the day following his "confession." Because that's just how out of it he was. Based upon this testimony, it appears that Officer Pernell is attempting to set up an "out" for Mr. Williams, because the confession is not consistent with the physical evidence. A brutal assault as described by the inmate and assumed by the Employer, would necessarily involve Officer Pernell. He would have had to have heard or seen something, which would have meant that he was an accessory or worse a participant. Moreover, the other officers would have heard the beating, if it had occurred, but no indicated that they heard anything, and stated that the both officers left the cell fairly quickly, immediately upon removing the inmate's handcuffs. Remember, not every officer, who gave this type of statement was disciplined, and the ones that were disciplined were disciplined for reasons not related to lying, i.e., failure to follow a post order, or such. Thus, with the type of injuries sustained, the length of time in the cell, the combativeness of the inmate, the mental history of the inmate, the prior restraint in 6-House, the lack of real medical attention, Officer Pernell's proffer of this "confession" is an attempt at self preservation and carries no weight.

9. He has no corroborating testimony. The Employer could offer no witness to corroborate either the "confession" or the "smack sound."

10. Officer Pernell's demeanor was dissident. He appeared to have been beaten down and reciting what was expected, and intimidated by the Employer's advocate.

11. The Union does not believe Officer Pernell is a "bad" person, but that he lied only out of fear, intimidation and self-preservation.

D. <u>Officer Radcliff:</u>

1. Officer Radcliff, like Officer Pernell did not have a strong recollection of the events.

2. He was in a position to observe what happened in isolation because the videotape puts him in front of the cell.

3. He had, at the time of the incident, enough experience as a correction officer (seven years) to be able to recognize excessive force and/or abuse of an inmate.

4. Officer Radcliff, like Officer Pernell, gave several statements, all of which were inconsistent, to the Committee. Officer Radcliff, like Officer Pernell was on medication at the time of two of interviews with the Committee. Officer Radcliff, like Officer Pernell suffered physically as a result of the harassment and intimidation by the Employer and its agents. He testified to and showed us the physical manifestation of his stress and anxiety over this incident. He testified the "rashes" were a result of this ordeal.

5. Officer Radcliff, like Officer Pernell contradicted himself as he gave more and more statements. During his first interview with the Committee, he stated that he did not see or hear anything [reference page no.], but by the time of his last interview with the Committee, he conceded defeat and told them something to get them off his back, stating the improbable, that he heard something like the sound of "glass" breaking. During the arbitration, he also explained on cross, the statement he made regarding knowing that Mr. Williams "did it." He testified that he knew of the arrest and that Buckholtz told him that Mr. Williams did it. He explained that he had no personal knowledge of him intentionally harming the inmate; which was implicit in his statement.

6. Again, like Officer Pernell, Officer Radcliff's "bias" or "prejudice" towards Mr. Williams was nothing personal, only an innate desire at self-preservation. He too was threatened by the Committee with felony charges[18] and loss of his livelihood. Most importantly, however, is the fact that Officer Radcliff witnessed Mr. Williams being arrested on grounds on November 19, 2001, a few days prior to his last statement to the Committee, wherein he indicated that he did hear something like "glass" breaking. At this point he had a very real fear that their threats might

hold true, since the Institution, in collusion with the Highway Patrol, orchestrated Mr. Williams arrest on grounds, in order to further intimidate those who had folded.

7. See aforementioned.

8. Again, as with Officer Pernell's testimony, Officer Radcliff's testimony at arbitration is more consistent and probable with evidence. Officer Radcliff explained at arbitration the sound he previously described as "glass breaking," was more probable than not the sound of the handcuff keys. This is more consistent with the evidence, because we know several keys were exchanged in order to get the cuffs off the inmate, and even without medical testimony, common sense tells us that a tooth breaking does not sound like glass breaking.

9. Like with Officer Pernell, the Employer could not offer any corroborating testimony to Officer Radcliff's testimony; even Officer Pernell's testimony differed. More importantly, the Employer could not intimidate the remaining witnesses to change their stories.

10. Officer Radcliff's demeanor was not as subdued as Officer Pernell's, though he was being intimidated by the Employer's advocate to the point that the Union's advocate had to voice an objection, which was sustained. It was more than apparent that Officer Radcliff was under stress, but he nevertheless appeared to be cooperative and forthcoming.

11. The Union has no reason to call into question Officer Radcliff's character. As with Officer Pernell, it is more than apparent by the evidence presented that these men were intimidated, threatened, coerced, and beat down to the point of being mentally manipulated by the Employer's agent. Both men were lied to by Buckholtz on key facts, such as being told they would be prosecuted and fired and that the Committee already had evidence of Mr. Williams' guilt, which resulted in both these men making statements in an attempt to appease the Committee and also save themselves, and the lies made it more palatable to them because they told that Mr. Williams was guilty.

E. <u>Stacha Doty:</u>

1. Stacha Doty had virtually no witness recollection. It was as if she were not even present at the hearings. However, what little she did remember contradicted the State's key witness, Buckholtz.

2. Doty should have been in a position to observe the Committee hearings, but nevertheless, she could not remember much of what went on.

3. She testified that she had a lot of experience, much more than Buckholtz in conducting use of force hearing, but conceded that her experience, outside of the instant case, was limited to institutional hearings, which is typical of use of force hearings.

4. Doty's testimony, on the whole, was inconsistent with Buckholtz's testimony. Specifically and in these important respects, (1) investigating 6-House use of force and (2) sharing information with the Highway Patrol.

5. Since much her testimony comprised of "I don't recall," she did not have much opportunity to self-contradict.

6. As with her counterpart, any evidence of bias or prejudice is innate with her desire to protect herself, her position, her Employer and her Committee's findings.

7. Likewise, protecting herself, her position, her Employer's position and her Committee's findings would be her key motivation to "not recall" key issues.

8. In actuality, Doty's testimony, in contrast to Buckholtz's is reasonable and probable given all the evidence and testimony, i.e., that it is most reasonable and probable that the Committee shared information with the Highway Patrol and coordinated efforts at intimidating and harassing perceived "weak" employees until they broke. The Patrol's room was in close physical proximity to the Committee's hearing, based upon testimony by Buckholtz and Doty. And they appeared to "tag" team the officers by relentlessly interviewing them on the same issues, and when one couldn't get the information it wanted, then it would send them to the other. In addition, the lack of any investigation into the 6-House incident is evident and consistent with Doty's testimony that they did not investigate 6-House, to wit: lack of videotape or interviews with Officer Harness.

9. There was no testimony presented to corroborate or rebut Doty's testimony.

10. Doty had a hostile demeanor.

11. The Union has no evidence of Doty's character, other than her hostile demeanor and lack of memory.

F. Karen Martins:

1. Ms. Martin's initial testimony, on day three of the arbitration appeared to be strong and specific. She testified under oath, with no memory problems, as to how she copied the micro-cassette tapes, inadvertently mixed up the wires, but upon remedying the mix-up resumed her copying. She testified that neither she, nor Buckholtz, to her knowledge sent to tapes to an outside company to have them professionally copied.

2. She was in a key position to "observe" what she testified to because she was the person charged with making the copies of the tapes.

3. Martin appeared to be an experienced secretary and upon reading the tape manual knew how to copy tapes.

4. Her statement changed. The Employer recalled her in its rebuttal case, to "rebut" her prior testimony. During her rebuttal of herself, Martin's testimony mirrored that of her supervisor's, Buckholtz.

5. In her initial testimony, she had no inconsistencies or self-contradictory statements, other than the

fact that this testimony was inconsistent with what her supervisor had previously testified to.

6. No evidence of bias or prejudice towards the Union or the Grievant.

7. Her obvious motivation to "misrepresent" the known facts, i.e., her previous testimony, lies in self-preservation. She, like Officers Radcliff and Pernell, was probably subjected to Buckholtz's "interrogation techniques" upon his discovering her truthful testimony. As noted previously, her supervisor brought her to the last arbitration hearing, and hovered, visibly, outside the hearing room door while she testified.

8. With respect to her first testimony, it sounded like a reasonable explanation of how the copy was contaminated. And it is consistent with a copy being contaminated but not the original. Upon the Union's request for the *real* original micro-cassette tapes,[19] Martin was recalled, this time by the Employer, to change her story, which them became *improbable*. It is improbable, even without the testimony of Jimmy Rhea, electronics expert, that Martin would have contaminated the original micro-cassette tape, merely by mixing up the wires. It is impossible to record over the original tape without pushing the **record** button. The **record** button on the copy tape machine recorded the outside sounds but not the original tape because Martin did not have the wires in the correct places. But it technologically impossible to record over the original without pushing the record button and Martin **NEVER ONCE**, either in her initial testimony or her rebuttal of herself, testify that she pushed the record button of the original tape machine.

9. The Employer did not produce any further witnesses to "corroborate" Martin's testimony, nor has the Union ever received what should have been marked as a joint exhibit, which is supposed to be the receipt that Martins claimed she had from the salvage company, since she conveniently "salvaged" the recording device(s), which were used to the make the original copies referenced in her initial testimony.

10. Martin was not forthcoming or cooperative.

11. Her character speaks for itself. She more likely changed her testimony out of fear of reprisal from her Employer than any mean spirited effort against the Union or the Grievant.

G. Jimmy Rea:

1. Mr. Rea was presented as an expert witness in electronics, specifically audio recording and copying. He has no association with either party. His testimony was purely offered to rebut Martin's "rebuttal" testimony of herself.

2. Mr. Rea, as an expert witness, was not able to observe Martin's copying. Instead, he was only able to offer an expert opinion on the improbability of her second account of how the tape purported to be the "original" could not have been recorded over.

3. Mr. Rea had vast technical experience in his field and had been utilized as an expert witness in electronics in countless court cases.

4. Mr. Rea's testimony was not consistent with Martin's "rebuttal" testimony for reason stated above.

5. His testimony was not self-contradictory or internally inconsistent.

6. There was no evidence of bias or prejudice towards either party by Mr. Rea.

7. There was no motive to misrepresent how one copies audiotapes or how Martin's version of events was improbable from a technical standpoint.

8. As an expert in the field, Mr. Rea's testimony is consistent with what Martin initially testified to; that version was probable, but still did not account for the original micro-cassette tape, of which the Union has never been able to inspect.

9. There was no corroborating testimony necessary to bolster Mr. Rea, nor did the Employer present any additional testimony to rebut Mr. Rea's opinion.

10. Mr. Rea's demeanor was professional and knowledgeable.

11. There is no evidence in the record that calls into question Mr. Rea's character.

H. Michelle Ivey:

Ms. Ivey was called by the Employer to rebut the Union's assertion that the Employer violated the law and the contract by interfering with the Union's selected representative. Ms. Ivey testified to her opinion that by allowing Mal Corey in as a representative in Mr. William's use of force hearing, the Institution would be in violation of the FLSA. Her testimony was without merit. She offered no support, other than the Union's own Fact Sheet, which she attempted to misrepresent in her testimony. She cited no specific FLSA provisions, no opinions from OCB or the Attorney General's office, nothing to support her specious position.

The FLSA was a pretext to deny the Union's request to have Mal Corey represent its member. It was an intentional interference in the internal administrative processes of the Union and attempt to further harass, coerce and restrain Mr. Williams' in the exercise of his contractual and constitutional right to due process.

The eleven criteria test is not appropriate in Ms. Ivey's case because the purpose of her testimony was to address a procedural issue.

I. Pat Hammel:

Likewise, the witness credibility test will not be applied in dept to Ms. Hammel since the sole purpose of her testimony was to rebut Ms. Ivey's testimony. Nevertheless, some of the criteria do apply to both witnesses. One such factor is experience. Ms. Hammel's testimony demonstrated her superior knowledge and experience on the subject of

union representation and the FLSA. Because much of her testimony was discussed the Procedural Section, it will not be rehashed here. The only additional information that needs to be pointed out is the fact that Ms. Hammel's testimony regarding joint training and Union Exhibit N, remains unrebutted by the Employer.

J. **Mal Corey:**

Mr. Corey, like Ms. Ivey and Ms. Hammel, was presented at arbitration for purposes of specific rebuttal regarding the Employer's denial of the Chapter's request for him to represent Mr. Williams in his hearing. Mr. Corey testified that he made a timely request, which was denied close to the end of the business day. He further testified, as rebuttal to Ms. Ivey's position on FLSA that he frequently worked in the Union office, after hours, in Ms. Ivey's presence. He testified that she never confronted him regarding the time he spent after shift, never ordered him to leave, and never directed him to submit a request for overtime.

Moreover, he testified to a specific incident related to the instant case, wherein he confronted her with the absurdity of her position. Specifically, at Mr. William's mediation of the instant grievance, Mr. Corey appeared on behalf of the Union, on his "good day," and stated in the mediator's presence as well as the Employer's that he was on his "good day," and was not being paid overtime, nor was the mediation rescheduled in order to accommodate his work schedule. He testified that he attended several grievance related meetings on his own time and did receive overtime pay.

The Employer never recalled Ms. Ivey to rebut Mr. Corey's testimony.

K. **Donald Williams:**

The eleven criteria do apply to the Grievant, Mr. Donald Williams.

1. Unlike the Employer's witnesses, Mr. Williams had a succinct and clear recollection of the events of November 7, 2001, because he had nothing to hide. He recalled responding to a man-down call from 6-House and helping to cuff already restrained inmate, who was inmate Holcomb. Because of the position of the inmate, on his back, with his face to the floor, Mr. Williams could not observe his face to see if he already had sustained injuries. He never "spun" him around to check because he had no need to at the time and could not foresee the future "witch hunt."

Mr. Williams remembered escorting the inmate to the isolation cell without incident, but upon entering 9-House, the inmate began to struggle, resulting in the officers, (Mr. Williams and Officer Pernell), falling forward with the inmate; this can be seen on the videotape (the loss of balance).

Mr. Williams remembered regaining his balance and escorting the resisting inmate into the middle cage, where again he struggled and fell into the cage. Mr. Williams testified that the inmate never screamed out about being injured and at that point had ceased struggling. Whereupon, he called for handcuff keys to remove the handcuff's from the inmate. Mr. Williams testified that the cell was extremely small and difficult to maneuver, but he at no time, fell onto the inmate. He further stated that he was in the cell only long enough to secure the inmate and remove his cuffs, then Officer Pernell exited, then he exited. Whereupon, they received another man-down call for assistance from 6-House, which he and Officer Pernell responded to.

Mr. Williams was clear and unequivocal. He did not at any time intentionally or unintentionally injure inmate Holcomb. He never punched or kicked him or fell on him or tripped over him. Nor did he observe any other officer, including Pernell do the same.

Mr. Williams was very clear and unwavering regarding his experience with the investigation and the lowbrow techniques used. He clearly testified to being threatened by Buckholtz and Trooper Wells. He clearly recollected the specifics of his meeting with Officer Pernell, the evening he purportedly "confessed." In stark contrast to Officer Pernell's testimony, Mr. Williams confidently testified that he never made such a "confession." He testified that he wanted to advise Officer Pernell of what was going on, that Trooper Wells attempted to coerce him into pleading guilty to something he did not do by threatening to charge him with a felony.

He informed Officer Pernell of what she told him something to the effect of "either you or Pernell, one of you did it, so if you confess to a misdemeanor now you can avoid a felony charge." Mr. Williams went to Officer Pernell out of concern for his well being, not to confess to something that never happened. Based on the strength of his memory regarding all of the surrounding events, coupled with the physical evidence, it is abundantly clear that Mr. Williams' version is the most reliable, consistent and truthful testimony presented regarding what happened in that isolation cell.

2. Mr. Williams was in a position to observe any unnecessary or excessive force or abuse of inmate Holcomb at the time he placed him in the isolation cell. He was not, however, in a position to observe any inappropriate behavior by any other RCI employees towards inmate Holcomb after he left 9-House.

3. Mr. Williams has vast experience as a correction officer and in dealing with hostile inmates and delicate situations. As both he and the Warden testified to, he was on the Cell Extraction Team, the Disturbance Team, and the SRT team. These teams were special teams, which required skill and strength of character to be on. One had to be selected for the team, approved by one's supervisor and the Warden, undergo additional training and meets certain minimum qualifications. The Warden could remove one from the team, at will. Even at the time of the investigation, the Warden never removed Mr. Williams from any of the teams.

In addition to Mr. Williams experience at RCI, prior to his service there, he served in the United States Air Force, as a firefighter, where he was stationed in Honduras, outside the United States, an unfamiliar environment with customs native to the land. While there, he adapted so well that he received a commendation for assisting the

natives with humanitarian aid.

4. Mr. Williams, unlike Officer Pernell, Officer Radcliff and Ms. Martin, has remained consistent with his initial Incident Report and statement to the Committee and his testimony at arbitration. His statements and testimony, however, do contradict Officer Pernell's testimony with respect to whether he "confessed" to injuring inmate Holcomb, and with Buckholtz's regarding the tone at the use of force hearing.

5. Mr. Williams never gave any inconsistent or self-contradictory statements or testimony.

6. There is no evidence that he was biased towards inmate Holcomb. He did not know inmate Holcomb by face. He testified that as a Yard Officer, he sees hundreds of inmates, and he may have encountered him, he may have imposed the Institution's rules, in other words, he may have done his job, but he certainly did not target inmate Holcomb. As a matter of fact, he, unlike Officer Pernell, would have no reason to want to harm inmate Holcomb, the inmate did not injure him. The inmate did not threaten him after he placed him in isolation. The Employer presented no evidence of bias or prejudice to support a motive for Mr. Williams to want to intentionally harm inmate Holcomb.

7. The Employer never presented any evidence of Mr. Williams' motivation to misrepresent known or unknown facts. He had already been issued a "No Bill" on his felony indictment. By the time this arbitration came to fruition, the time to charge him with a misdemeanor had already expired.[20] He had a new job, working for Coca Cola, despite the defamation of character and stigma attached to his removal. The only "motive" he had was a desire to return to the job he loved doing, not out of necessity, but out of love of the job.

8. Mr. Williams' version of what happened November 7, 2001 in isolation is the version that is most consistent with the inmate's injuries. Any other version is simply physically impossible. The videotape has a time mechanism, with a two second delay. In order to intentionally inflict the type of harm that the inmate reported, both officers would most likely have taken more time. Coupled with the fact that they would have to have the complicity of six other officers and supervisors. Not to mention that if Mr. Williams kicked the inmate head on, the inmate would have been able to see who did it. If he stomped his head into the concrete floor, common sense dictates he would have had a broken nose. If he punched in the face, again the inmate would necessarily be able to see who did it. And again, the injuries would necessarily have to be severe enough to warrant treatment by a medical doctor, not merely an exam by the nurse.

The most likely scenario is that the inmate was injured in 6-House. When he was taken to the concrete ground there, he probably hit his mouth, chipping his teeth. When he was being escorted to isolation, the officers hit the doorframe in the sally port and the inmate's head also hit the door side. None of the testimony indicates that this was intentional, nor was either officer charged with this injury, wherein the inmate suffered a cut above his eye. Whether his black eye was a result of the doorframe, or the takedown in 6-House, it was not intentional or excessive. When the inmate fell into the isolation cage, he most likely cracked his teeth completely resulting in the three chipped teeth. The fourth tooth that came out is a mystery because it was not noted in the dental report of the dental exam taken shortly after the inmate's injuries were discovered.

Because the Employer failed to secure the scene, i.e., take pictures of the cell and the inmate immediately after the incident, the Union is at a disadvantage to further demonstrate that the physical evidence does not support the charges.

9. All of the officers' statements taken during the "investigation" support Mr. Williams' version of what happened except for the last self-serving statement of Officer Pernell.

10. Mr. Williams' demeanor was that of a forthcoming, honest person. He did not waiver, he did not have frequent, convenient "memory" lapses.

11. Mr. Williams' character is impeccable. During the course of his eleven years as a correction officer at RCI, he received exceptional, above par evaluations, numerous commendations, he served on several prestigious institutional teams. He received two commendations from the United States Air Force, and absolutely no discipline in his personnel file, not even a tardy.

DISCUSSION

"Parties to a contract are at liberty to decide exactly how their disagreements must be processed in order to gain entrance into the arbitration system described in their agreement. They control their own system of private administrative law...Resolution of challenges to procedural Arbitrability requires close attention to the contractual language by which parties bind themselves, and arbitrators apply the same standards of contract interpretation to these questions that they do in other contract interpretation cases." (Theodore J. St. Antoine, *"Common Law of the Workplace", (1998) p. 88-89)

The Employer raised the threshold issue of the procedural issue of the timely filing of the grievance. This is not a new issue, and the parties have considerable experience regarding the matter of timeliness. The parties' experience has come in the form of negotiations and grievance handling, just to name a few. Furthermore, several past arbitration decisions, including ones issued by this Arbitrator have addressed this threshold issue (e.g. See Arbitrator's Bowers decision 3-15-94).

It is reasonable to surmise that the emphasis placed on timeliness of grievances is in large part due to the sheer size and complexity of the bargaining unit. It covers literally tens of thousands of employees and spans several separate administrative agencies, all of which have a different culture. It is simply a method of maintaining a modicum of order. The parties have elevated timelines beyond the idea of timely notification to the status of a statute of limitation. They have done this by including specific penalties for noncompliance and by doing so have removed a great deal of discretion from the arbitrators. There are certainly examples of parties to a collective bargaining agreement chronically failing to follow their own grievance guidelines. Under such conditions arbitrators routinely dismiss procedural objections where it can be shown the parties have been cavalier about making deadlines and following their own grievance procedures. However, there was no evidence presented to suggest that the Employer or the Union have been lax in enforcing deadlines. In fact, Article 24 and 25 contain several deadlines and from the personal experience of this arbitrator both parties routinely used the issue of timeliness in support of their positions (e.g. Article 24.02, 24.05, 25.02, and 25.05). In cases that involve a strict history of compliance with

timeliness arbitrators are obligated to enforce time limits (Freuhauf Corp., 92 LA 965 (Nicholas, 1989).

The parties use calendar days as measurements of time.

Article 25.01 states:

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

Secondly, and germane to the instant dispute is the fact that the parties have determined that discipline and discharge cases are to be handled in an expedited fashion and are to be initiated at Step Three (3) of the grievance procedure.

Article 25.02 states:

"A grievance involving a layoff or a discipline shall be initiated at Step Three (3) of the grievance procedure within fourteen (14) days of notification of such action."

As further reinforcement of the importance of a timely filing of discipline grievances, the OCSEA grievance form mirrors this language. Appearing at the bottom of the front page of the form it states:

"The Union submits grievances involving suspension/discharge at Step 3 within 14 calendar days of the date of notification. Send original, completed form to the Agency Head or Designee."

The OCSEA grievance form also contains explicit language under Step 3 (p. 2 of form) that specifically identifies "DISCIPLINE GRIEVANCE." It states:

The agency head or designee will respond in writing within 35 calendar days after the meeting. Union appeal of Step 3 response is made within 30 days of the answer, or the due date of the answer if no answer is given, whichever is earlier."

The notification to the Grievant, Donald Williams, that he was terminated from employment occurred on April 8, 2002. There is no dispute over this notification date. The Grievant and the current Local Union President, Mal Corey signed a statement acknowledging receipt of the Grievant's discharge notice (Jx 2, back page). Moreover, in the statement of facts section of the grievance the following wording appears:

> *"On April 8, 2002, Corrections Officer Donald Williams received a notice of his disciplinary action advising him he is to be removed from his position of Correction Officer effective: April 8, 2002."*

A grievance was signed April 15, 2002, seven (7) days after the Grievant was terminated, but within the fourteen (14) day guideline. However, instead of being filed at Step 3, it was mistakenly filed at Step 2 with the Labor Relations Officer, at the Ross Correctional Institution. Labor Relations Officer, Michelle L. Ivy, denied the grievance on the same day it was filed, April 15, 2002. The grievance, which was supposed to be directly appealed to step 3 of the grievance procedure, was not received in DRC Labor Relations until April 24, 2002. The grievance was sent by certified mail, to Chuck Adams, on April 23, 2002 (Jx 2). In accordance with the ways days are counted (i.e. not counting the first day, but counting the last day) under Article 25.01, the grievance was not received by Agency at the step 3 level within fourteen (14) days "*...of the date of notification.*" It was received two (2) days beyond the time limit. Although two (2) is near the time limit it must be emphasized that the parties have not created any flexibility in the Agreement for grievances that are late, and as pointed out above they have taken time lines seriously in their relationship. The negotiations history between the parties has resulted in the following language contained in Article 25.05 Time Limits:

> *"...Grievances not appealed within the designated time limits will be treated*

as withdrawn grievances. The time limits at any step may be extended by mutual agreement of the parties involved at that particular step. Such extensions shall be in writing."

It is significant that this language has existed for several years, has survived arbitrator's decisions and the negotiations of multiple contracts. The Union labels the Employer's assertion of a procedural violation based on timeliness as *"disingenuous"* and *"frivolous"* (See Union reply letter, 6/2/03). The Union contends that the current Union President, Mal Corey, filed the Grievant's grievance in a timely manner with Michelle L. Ivy, and she provided a step 2 answer. The Union argues that when Ms. Ivy responded to the grievance, she changed the time frames for filing and making an appeal of a discipline grievance, and she modified any practice the parties may have developed. The Union asserts it should not suffer because of Ms. Ivy's incompetence. Moreover, the Union asserts that an issue of timeliness must be raised prior to arbitration in order to be considered valid.

I respectfully disagree with the Union's use of the term *"practice"* to describe the processing of discipline or discharge grievance. The language of Article 25.02 speaks for itself. The initial wording of the language allows the parties *"by mutual agreement"* to have some flexibility to file non-layoff and non-discipline grievances at *"the appropriate advance step where the action giving rise to the grievance was initiated."* However, this portion of 25.02 is followed by the definitive statement, *"A grievance involving...discipline shall be initiated at Step Three (3) of the grievance procedure within fourteen (14) days of notification of such action."* As previously stated, the parties have not provided any flexibility here. However, they have agreed that an extension of

time is possible through a mutually agreed upon written extension to time limits (See Article 25.05). There was no evidence of a written extension of time provided in the instant matter.

I find when Ms. Ivy accepted the grievance from Mr. Corey she did not waive any time limits or procedural requirements. The parties obviously experienced this problem in the past and anticipated this type of issue being raised in the future. Key language in this regard is contained in Article 25.01 I. It states:

> *"The receipt of a grievance form or the numbering of a grievance does not constitute a waiver of a claim of a procedural defect."*

Ms. Ivy received the grievance and answered it on the same day it was submitted, April 15, 2002. The Union argues that this action in essence changed the timelines to file a grievance at step 3, and giving the Grievant ten (10 days following the step 2 answer). However, individual employees, be they management or labor, do not have the power to alter terms of a contract. Ms. Ivey did not possess the authority to change the timelines that apply to the Grievant's appeal to Step 3 of the grievance procedure.

By answering the grievance on the same day it was filed, April 15, 2002, Ms. Ivy did not put the Grievant or the Union at any disadvantage. If she had taken the full time she had to schedule a discussion (7 days) and provide her answer (8 days), the Union's argument that she contributed to inappropriate filing would have been more persuasive. The Union would have identified an equitable reason to excuse the untimeliness. This did not happen. Following April 15th, the Grievant had several more days to send a timely appeal to the 3rd step of the grievance procedure by certified mail. Instead, the

Grievant waited eight (8) more days and sent his appeal to the 3rd step on April 23, 2002, already one day past the fourteen (14) day contractual deadline. The grievance was filed at the wrong step, and it was up to the Grievant and the Union to correct their error prior to the deadline contained in Article 25.02.

I concur with the Union's argument that waiting to raise the issue of procedural arbitrability until the day of the hearing is an extremely risky strategy that often fails to be a convincing defense (See Patterson Steel Co., 38 LA 400, 402-403 (Autrey 1962). The characterization of a "disingenuous" claim is more applicable under this scenario. A union can have forcefully argued it was misled in preparation of arbitration if it is not informed of an issue regarding procedural arbitrability until the day of the hearing. Furthermore, this type of last minute tactic raises questions as to the validity of such a claim.

Although the Employer would have been far better off raising the issue earlier, I find it provided the Union with approximately one month of advance notice. The Employer avoided an attempt to conduct its defense by ambush by waiting until the day of the arbitration hearing to raise the issue of timeliness. In a letter to the Union dated October 22, 2002, the Employer notified the Union it would be raising the issue of timeliness in the arbitration hearing scheduled November 19, 2002 (Jx 2). The Union could have sought a delay in the start of the hearing. It should also be noted that the second and third day of hearing were not held until January 21st and 22nd of 2003, and there were other days scheduled after January. The Union could have provided additional information regarding the Employer's assertion of untimeliness at any time

during these additional hearing days.

It is clear that the fourteen (14) day time limit and the precise filing requirements as to where and when to file discipline and discharge grievances is a matter that the parties have negotiated. While arbitrators as a rule want to hear the merits of a case (For a discussion of this theory, see Interstate Metal Products, Inc., 38 LA 1072, 1073 (Howlett 1962)), they are bound by the express language of the contract and the rules by which the parties have decided "to play." Moreover, the parties have predetermined the penalties for not playing by the rules. Article 25.02 unequivocally states, *"Grievances not appealed within the designated time limits will be treated as withdrawn grievances."* To ignore this contractual requirement would be not only be irresponsible, it would be tantamount to subtracting from the expressed language of the Agreement which is specifically prohibited by Article 25.03.

Several factors prevented an issuance of a bench determination on procedural arbitrability. First and foremost, the parties did not agree to bifurcate this issue. Secondly, the Employer never raised the issue during steps of the grievance procedure nor did they raise it in mediation. It was raised in preparation for arbitration and introduced during the arbitration hearing. The inappropriate conduct of Ms. Ivey in accepting the grievance and answering it at second step had to be evaluated. Did she in effect nullify the Employer's position in this regard? Finally, the Union raised several procedural issues of its own, including the issue of a denial of representation. These factors had to be assessed in order to determine their impact upon the Employer's threshold argument.

Given the specific language of Article 25.01 I and the facts surrounding the filing of grievance, I find Management's actions of accepting the Grievant's form in step 2 did not relieve the Grievant from timely filing his grievance at step 3 in accordance with the specific contractual terms contained in Article 25.02 of the Collective Bargaining Agreement. It is also reasonable to assume that the Grievant and the current Local Union President (then steward) were well aware of the filing procedures for discipline and were even reminded of the procedures by the language of the grievance form (Jx 2).

AWARD

The grievance was untimely appealed to step 3 of the grievance process and therefore by operation of Article 25.05 is considered withdrawn. The Arbitrator is without jurisdiction to render a decision on the merits of this matter.

Respectfully submitted to the parties this _____ day of July, 2003.

_____
Robert G. Stein, Arbitrator

[1] The Union did not provide the videotape because it was not related to the charges filed in the ULP.
[2] As discussed in the previous section SERB dismissed this charge as untimely, not based upon its merits.
[3] Attachment C.
[4] Attachment D.
[5] Attachment E.
[6] Attachment F.
[7] See Jt. Ex. 4.
[8] Attachment G.
[9] Attachment H.
[10] Mr. Buckholtz testified initially that the Committee taped ***all*** interviews. However, there was no tape of the interview with Scott Price. Mr. Buckholtz then responded that the Committee did not tape Mr. Price's because it really didn't "interview" him. Of course this is internally inconsistent and the document speaks for itself, it is entitled "Supplemental" inferring that there was an initial document, plus the memo itself references previous questions by the Committee.
[11] Black's Law Dictionary, Abridged Sixth Edition, Centennial Edition (1891-1991). Attachment I.
[12] Witness Credibility will be discussed in a subsequent section.
[13] Attachment J.
[14] Ms. Martin is recalled by the Employer to rebut this testimony and her new testimony confirms precisely to what Mr. Buckholtz testified to.
[15] Officer LeMaster's statement is extremely important because he saw the officers bring the inmate into the 9-House. He was at the cell, observed them attempting un-cuff him. But he never witnessed or heard any inappropriate behavior by either officer and he was never disciplined.
[16] The Union also maintains that this "dual" role as Chair of the UFC, investigator, and Employer Representative at the pre-disciplinary hearings was in appropriate and procedurally flawed.
[17] The Employer eventually recalled Ms. Martin to rebut her previous testimony, which did not support Buckholtz.
[18] Both he and Officer Pernell were shuttled, in a "tag team" type way, from Committee to Highway Patrol, Committee to Highway Patrol, until they were broken down by the intimidation and coercive techniques. Although Officer Radcliff was told he could be charged with felony accessory charges, he was never given any specifics as to what actions he did would even constitute the charges.
[19] The Employer had represented at the first day of this arbitration that it was providing the "original" tapes of the hearing.
[20] O.R.C. 2945.71 (Attachment K).