

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO
DEPARTMENT OF REHABILITATION & CORRECTION
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11
AFSCME. AFL-CIO

Arbitration Dates: September 23, 2011
October 5, 2011

Grievant Rodney Burchett: # 27-02-20110303-0023-01-03

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Allison Vaughn
Ohio Dept. Of Rehabilitation & Correction
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Columbus, Ohio 43215

Advocate for the Union:

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I. HEARING

The hearing was held at Allen Correctional Institution on September 23, 2011. The hearing commenced at 9:10 A.M. and was recessed at 4:35 P.M.

The hearing was reconvened at 10:50 P.M. October 5, 2011 and adjourned at 12:40 A.M.

The joint issue before the arbitrator is "Was the Grievant, Rodney Burchett, removed for just cause? If not, what should the remedy be?"

Testifying for the Ohio Department of Rehabilitation and Correction ("the Employer") were Dennis Sherrick, who has been employed at DR&C for sixteen (16) years; Steven Francis, Inmate four (4) years at the Institution; Allison Gibson, Investigator; John J. Coleman, Warden; Allison Vaughn, Labor Relations Officer and Gerald Gibson, Ohio State Highway Patrol Trooper.

Testifying for the Ohio Civil Service Employee's Association, Local 11 AFSCME ("the Union") were Paul Trame, Union Vice-President and Steward; Dennis K. Bowen, Retired Captain; Otis Pearson, Retired Lieutenant; John Alberts, Retired Captain; Steve Hall, Corrections Officer; William Larimore, Corrections Officer; and the Grievant Rodney Burchett.

II. STATEMENT OF THE CASE

On March 3, 2011 the Grievant, Rodney Burchett filed a Grievance. "On March 3, 2011 Management of the Allen Correctional Institution, unjustly and without cause removed Mr. Burchett from his position as Corrections Officer. The employer does not have the proof needed to support the alleged rule violations within the standards of employee conduct, specifically rule;

22, 24, 38 and 39. The employer's claim is that security rounds and formal counts were not properly completed as mandated, however, do not prove this theory with evidence provided. Mr. Burchett has no discipline on record, and OCSEA feels this extreme action by the employer shows malice without reason."

The remedy sought was to reinstate the Grievant with full pay, benefits, OPERS contributions, back leave accruals and expunge discipline.

The Notice of Disciplinary Action, dated February 14, 2011 said the Grievant was removed for violations of Rules 22, 24, 38 and 39.

The matter is properly before the Arbitrator.

III. THE EMPLOYER'S CASE

The hearing commenced with Opening Statements by the parties. The Parties then went to Unit H1B and viewed cell 220 and the general area of the Unit.

The Employer called its first witness at Cell 220. The witness was Dennis Sherrick. Mr. Sherrick has sixteen (16) years with DR&C. Mr. Sherrick was referred to Exhibit JX4a A40. He testified that he heard a disturbance as Inmate Stone had been discovered by another Inmate. Mr. Sherrick testified that he went up the stairs, saw Inmate Stone hanging and went back to get the cut down tool.

Mr. Sherrick testified that Inmate Stone was against the back wall as if he were sitting there with his head between the two bunks. Mr. Sherrick recreated the position that Inmate Stone was in when he saw him. Mr. Sherrick said he cut the sheet Inmate Stone used and then left at

7:45 A.M.

On Cross-Examination Mr. Sherrick testified that he couldn't say if there were towels hanging on the end of the bunk. He said they try to get Inmates not to do this but some do. Mr. Sherrick testified that Inmate Stone was alone in his cell. He said sun rise was at 7:30 A.M.

The Employer's next witness was Inmate Steven Francis. Mr. Francis has been at the Institution for four (4) years. In October 2010 Mr. Francis was in Unit 1B in the General Population. He testified that Unit H1B is in Sugar Creek.

Mr. Francis testified that on October 13, 2010 he saw Inmate Jason Stone at 9:00 P.M. Mr. Francis then testified that he was in cell 202 with Inmate Jose after lock down.

Mr. Francis testified that he had just moved into cell 202 and he was up until 3:30 A.M. fixing his cell. He then testified that at 9:50 P.M. he was eating in his cell when CO Fry did rounds and told him not to eat. He also testified that he was lying in bed watching TV. Mr. Francis testified that the officers look in with a light to see movement.

On Cross-Examination Mr. Francis was referred to Exhibit JX4A A98 which is the Inmate Information Sheet. He testified that he is in prison for Engaging in Corrupt Activity. Mr. Francis testified that he had received no promises to testify.

On Re-Direct Mr. Francis testified that his duties are Photographer and Visitation. He also testified that he goes to breakfast 6:00 A.M., lunch 11:30 A.M. to 12 noon and dinner from 4:30 P.M. to 5:00 P.M.. He said he usually goes to bed at 12:00 to 12:30 A.M.

On Re-Cross Examination Mr. Francis testified that the lights and the television are to be turned off after midnight and that he admitted breaking the rules.

The Employer's next witness was Allison Gibson. Ms. Gibson has been an Investigator at Allen Correctional Institution for over five (5) years. Prior to that she was at Oakwood and Marysville. She has been with DR&C for seventeen (17) years.

Ms. Gibson testified that she was assigned to the case by Mr. Coleman. She testified that this was an Administrative Investigation and not a Criminal Investigation. Ms. Gibson was to determine if Policies and Post Orders were followed.

Ms. Gibson was referred to Exhibit JX4A A4 and testified that this was her Investigation Report. She was then referred to Exhibit JX4A A1a and testified that she interviewed Inmates and Staff and viewed pictures and videos.

Ms. Gibson testified that she concluded the Grievant did not follow Policies and Post Orders. She said she based this on interviews, logs and the Coroner's Report. Ms. Gibson was referred to Exhibit JX4A A19 to A 24 and testified the Grievant did not complete rounds and used improper Count Procedures.

Ms. Gibson testified that on Rounds the Inmates were to be checked as well as the area. She also testified that a Count required a visual check of all Inmates on the Unit. Ms. Gibson then identified Exhibit JX4A A219 as the initial Coroner's Report. This report showed Inmate Stone died by hanging, but the report had no time of death.

Ms. Gibson then was referred to Exhibit JX4A A285 and A286. This is a letter requested by Ms. Gibson as to the time of death. This Exhibit says Inmate Stone had been deceased at least eight (8) hours when he was found. The time of death would have been 11:45 P.M. and Inmate

Stone was found at 7:45 A.M.. when the medical alert was called. Ms. Gibson testified that the time of death was needed to see when Inmate Stone was in his cell.

A video was then shown which shows the medical team with Inmate Stone. Ms. Gibson testified that the body appeared stiff, with vomit around the mouth.

Ms. Gibson testified that there have been two (2) more suicides at the Institution since that of Inmate Stone. She testified that there was no discipline in the second suicide. Ms. Gibson testified that the suicide just happened and the Officer was doing Rounds.

Ms. Gibson reviewed Exhibit JX4A A62 and 63. This is the Unit Log Book. She testified she reviewed this to see if Rounds and Counts were done. The Grievant had documented a security check every half hour. Ms. Gibson further testified that there were four (4) Counts, 10:05 P.M., 12:00 midnight, 2:00 A.M. and 4:00 A.M. She also testified the Grievant logged receiving equipment and receiving Post Orders. The Log Book showed a Common Area search at 10:16 P.M.

Ms. Gibson read Exhibit JX4A A63 and testified it showed Count Clear at 2:15 A.M. Ms. Gibson then read JX4A A162 and testified that this Outlines Policy for Officers. She then reviewed JX4A A201 paragraph 8 and said these are Duties for all Posts. Ms. Gibson then read Exhibit JX4A A202 and testified that visual inspections of Inmates and Staff were required and there was to be no pattern to the Inspections. She further testified the Grievant did not do checks at irregular intervals. A video was then shown showing the window in the back of Inmate Stone's cell and the sheet. This was taken in daylight. The next photo showed the cell at night so Ms. Gibson could see the cell lighting. Ms. Gibson testified there was a sheet hanging on a bar by the

window.

Ms. Gibson was then asked to review the Daily Count Sheet. She testified that Exhibit JX4a A107 was the Daily Count Sheet showing at 10:00 P.M. Grievant's Count showed 61. Exhibit JX4A A116 is Grievant's 12:00 A.M. Count and it shows 61. Exhibit JX4A A125 is Grievant's 2:00 A.M. Count showing 61. Exhibit JX4A A134 is Grievant's 4:00 A.M. Count showing 61.

Ms. Gibson then read Exhibit JX4A A149 and identified this as the Post Orders. She then read Exhibit JX4A A150 and testified that Inmate Stone was developmentally delayed and was Silver Level I. Ms. Gibson read JX4A A153 and testified that it required staggered Rounds. She then testified that Grievant did not make Rounds in accord with the Post Orders. Ms. Gibson then read Exhibit JX4A A167 Count Information, paragraph (L) and testified that Officers are to see flesh and that Grievant did not follow this instruction.

Ms. Gibson testified that Exhibit JX4A A4 is the Investigation Report. Exhibit JX4A A27 is her Interview with Grievant. The Grievant said he did Rounds. Ms. Gibson testified that if the Rounds were done right the Grievant would have seen Inmate Stone. She further testified that if the Grievant had looked for a living body he would have seen Inmate Stone.

Ms. Gibson read Exhibit JX4A A167(l) and testified the Officer is to Count a living, breathing person. She then read Exhibit JX4A A27 and testified the Grievant signed off on his Investigatory Interview.

Ms. Gibson then read Exhibit 4A A28 Question 6 and testified it showed there was no other Officer working and Question 11 where Grievant said "Yes" to staggered intervals. She

then read Exhibit JX4A A29 Question 12 and testified Grievant said he used a flash light. Question 16 Grievant said he made rounds and Question 17 where Grievant said he made Log Book Entries.

Ms. Gibson read Exhibit JX4A A30 Question 22 and testified the Grievant said "Yes" to a visual check. She then read Exhibit JX4A A36 Question 24 and testified the Grievant said he looked for skin. Ms. Gibson then read Exhibit JX4A A32 Question 32 and said Officer Hall was on duty too.

Ms. Gibson then read Exhibit JX4A A34 and 35. This is the Investigatory Interview with Officer Steve Hall. She testified Officer Hall stayed on the Unit most of the night. Officer Hall worked Relief Transport, Unit H1B and all are required to sign in.

Ms. Gibson then read Exhibit JX4A A87 and testified that this is the Employee Visit Record. This is to be signed by any Staff that enter the area. She further testified that Officer Hall did not sign in but that he should have. Ms. Gibson read Exhibit JX4A A52 and testified the Grievant never said Hall was there. Ms. Gibson read Exhibit JX4A A27 to 32 and testified the Grievant never says Officer Hall on the Unit all the time. The Grievant said Officer Hall was there at 5:30 A.M.

Ms. Gibson then testified that she reviewed the Ohio State Highway Patrol Report. She said the Patrol usually starts before an Administrative Investigation. Ms. Gibson then read Exhibit JX4A A244 and 245. This is the statement the Ohio State Highway Patrol took from Inmate Francis. Ms. Gibson testified that the Inmate's statement shows that the Grievant didn't make Rounds. She also testified she didn't give much weight to Officer Hall.

On Cross-Examination Ms. Gibson was asked "Did you do a Q and A of Officer Hall?" She said "Yes". Ms. Gibson was then referred to Exhibit JX4A A34 which is Officer Hall's Investigatory Interview. She testified that in Question 8 Officer Hall says he stayed on the Unit all night but the Grievant said 5:30 A.M. Ms. Gibson said the Union may sometimes ask Questions. She testified that in Question 13 Officer Hall says he was on the Unit at 12, 2 and 4. Question 16 Officer Hall says the Grievant looked in all cells with a flash light. Ms. Gibson testified that Officer Hall would take a voice stress test. She then testified that there was no mandate from the Warden to get the Grievant.

Ms. Gibson testified that Officer Hall was not assigned to the Unit and he never signed the Log Book or Visitor's Book. She was then shown Exhibit JX4A A79 and testified that Officer Hall signing doesn't mean he was there. This Exhibit is the position Officer Hall signed up for. Ms. Gibson testified that no Inmates escaped and no dummies were found.

Ms. Gibson was referred to Exhibit JX4A A107 and was asked "Could the Count have started a little before 12, 2 and 4?" She answered "Possible". Ms. Gibson testified Inmate Stone was in shorts and a short sleeve shirt. She further testified that Relief reads the Post Orders and the Post Information every day.

Ms. Gibson was asked if she reviewed the Pre-Disciplinary Officers Report. She said, "No, I was finished first".

On Re-Direct Ms. Gibson testified that Officer Hall did not verify Count or use Log Book. She testified that Counts are to be sure Inmates are alive. She also testified that Inmates on the Unit are prone to harm themselves and others.

On Re Cross Examination Ms. Gibson was referred to Exhibit JX4A A62 and 63 and testified Supervisors write some information on the Log Book. She testified she can't tell which Supervisor signed. Ms. Gibson testified the Lieutenant made Rounds prior to the Inmates death at 10:16 P.M.

On Re Direct Examination Ms. Gibson testified that Lieutenants and Captains usually just check with the Officers and are not required to do Count.

The Employer's next witness was Warden John J. Coleman. Mr. Coleman has been Warden at Allen Correctional Institution for about a year. Prior to that he was Deputy Warden for about seven (7) years at North Central. Mr. Coleman has about twenty-one (21) years with DR&C. He has also served as a CO, Case Manager, Unit Manager, Major, and a Deputy Warden for Special Services.

Mr. Coleman requested an Administrative Investigation into Inmate Stone's death. He testified that in his career he has seen deaths and suicides.

Mr. Coleman testified that he had recommended Removal of the Grievant. He testified that Inmate Stone had been dead for eight (8) hours and the Grievant could not have been making Rounds or Counts. Mr. Coleman testified that Rounds goes around and checks Inmates and grounds and ensures that Staff are O.K. He further testified that during Counts Staff is to be sure all Inmates are there and alive. The Counts are to be about two (2) hours apart and Rounds are to be staggered every thirty (30) minutes. Mr. Coleman testified that you don't want the Inmates to know you're coming back..

Mr. Coleman testified that Inmate Stone was on Sugar Creek Unit which is for MRDD

Inmates. He said there are a few General Population Inmates on the Unit. Some of these Inmates need some help themselves and some help other Inmates. Mr. Coleman testified that these Inmates are screened by Staff. Mr. Coleman also testified that Inmate Stone was MRDD and had a Mental Illness. He said there have been incidents on the Sugar Creek Unit which are usually self inflicted injuries.

Mr. Coleman testified that he reviewed the Investigator's Report, watched videos, read the Q and A's, read the Log Books, Sign-in Sheets and the Coroner's Reports. Mr. Coleman testified that he had concluded the Grievant did not do Rounds or Counts correctly. Mr. Coleman said the Grievant would have counted the dead body three (3) times.

Mr. Coleman was referred to Exhibit JX4A A62 which is the Log Book. He testified that the Log Book documents Unit Activity. The Book shows Rounds every half hour on the hour. Mr. Coleman testified that Supervisors should do a spot check on the cells and look for problems.

Mr. Coleman then read Exhibit JX2 2A which is the Removal Notice.

Mr. Coleman testified that the Grievant violated the standards of Employee Conduct. He violated Rule 22 Falsified Counts and Rounds, Rule 24 Lying about Rounds and Counts, Rule 38 not making Rounds and Rule 39, as the incident was all over the Lima and Newark news. He also said there is no rule as to when Inmates are to go to sleep.

On Cross-Examination Mr. Coleman was referred to Exhibit JX2D Pages 14 to 22. He testified that one person was to speak to the Press. Mr. Coleman then read Exhibit JX2 Page 17 and said Mr. McCombs does press releases. He testified that the press contacts us for

information. Mr. Coleman also testified there were no escapes, no dummies, and no fights. He also said no officer was harmed. Mr. Coleman also testified that this was not human error, it was dereliction of duty.

Mr. Coleman then read Exhibit JX4A A79 and said Officer Hall could be anywhere. He then read Exhibit JX4A A34 and 35 Question 8 and testified that Officer Hall says he was on the Unit most of the night. He read Question 13 and testified Officer Hall says he was there for the Counts at 12, 2 and 4. The Grievant was looking into the cells with a flash light.

Mr. Coleman testified that he was a CO. He said the Officers are to write in the time after they finish Rounds. Mr. Coleman also said Officers may have different practices.

Mr. Coleman testified that the information is that Grievant did not do Rounds correctly. He was asked; "Do you take the word of an Inmate over two (2) Officers?" He replied; "Look at every thing combined".

Mr. Coleman testified he was called to the Unit at 10:50 A.M. He said he stayed at the front desk and that he could see cell 220 clearly. Mr. Coleman was referred to Exhibit JX2 and said it was the only Notice of Discipline that he sent. He then read Exhibit JX4A A73 and testified there was no notice to the Officers of Inmate Stone's father dying.

On Re Direct Examination Mr. Coleman read Exhibit JX4A A34 which is Officer Hall's Investigatory Interview and testified that Officer Hall says the Grievant was in the area with a flashlight. He then read Exhibit JX4A A35 and said Officer Hall did not go around with Officer Burchett.

Mr. Coleman then read Exhibit JS2 Page 11 and said it was the Death Notice of an

Inmates Family. Inmate Stone's father died October 1, 2010. The funeral was October 5, 2010.

Mr. Coleman said he became Warden one (1) week later.

On Re Cross Examination Mr. Coleman was asked; "Is the Death Notice to be reviewed by medical personnel?" He said "As a routine the Chaplain gives Notice to the Inmate."

IV. UNION'S CASE

The Union's first witness was Paul Trame. Mr. Trame is a CO at Allen Correctional Institution. He has twenty-eight (28) years with the State. Mr. Trame worked at Lima Correctional Institution and has been here seven (7) years. Mr. Trame is a Union Vice-President and Steward. He has been a Steward for twenty (20) years and said the Steward protects the Member's rights. Mr. Trame testified that he processed this grievance.

Mr. Trame read Exhibit JX2B and said it was the Grievance. He read Exhibit JX2C and said it was the Step 3 response. Mr. Trame read JX2A the Notice of Removal and testified it has more charges than Step 3. Mr. Trame testified the Union proceeded on Rules 38 and 39.

Mr. Trame testified that he reviewed the Work Rules and Standards of Employee Conduct. He read Exhibit JX5 Rules 38 and 39.

Mr. Trame testified that he reviewed the Work Rules and Standards of Employee Conduct. He read Exhibit JX5 Rules 38 and 39. Mr. Trame testified the Grievant had no discipline ever. He testified that a first offense for Rule 39 is a Written Reprimand and for Rule 38 it is two (2) days to Removal. Rule 22 is a Written Reprimand or one (1) day and Rule 24 is two (2) days to Removal. Mr. Trame testified you are to start Discipline at the lowest level.

Mr. Trame read Exhibit JX4A A27 the Grievant's Q and A. Question 13 shows 12, 2 and

4. He testified that Rounds are logged at structured Count Times. Mr. Trame testified that Officers are told to use 10, 12, 2 and 4. He said Discharge cases go straight to Step 3.

Mr. Trame testified he interviewed Sherrick and Steve Hall. He testified that Inmates on the Unit have disabilities and there have been other suicides here. Mr. Trame said the Press is not always brought in. Mr. Trame said he did read the news articles.

Mr. Trame then read Exhibit JX2D Pages 14 to 22 and said these were the news stories. He testified that Mr. McCombs talks to the Press and no one else is supposed to. Mr. Trame testified he knows the Grievant personally and he has never been a problem. Mr. Trame then read Exhibit Union 1 and testified that it is Page 8 of the Pick A Post Agreement. He testified there is one (1) CO funded for Grievant's Post.

On Cross-Examination Mr. Trame read Exhibit JX4A A27 the Grievant's Investigatory Interview. He testified that the Union gives Steward's training before representing a Grievant.

Mr. Trame was given Management 1 and said it was a Notice of Written Reprimand to the Grievant. He testified that a Written Reprimand is Discipline. Mr. Trame was referred to Exhibit JX2A Notice of Discipline and said there were four (4) charges. He then read Exhibit JX2B which is the Grievance. Mr. Trame then read Exhibit JX2C the Step 3 response and said he was at the Step 3 hearing. He testified that Rules 23, 24, 38 and 39 were involved. Mr. Trame then read Exhibit JX2C where the Grievance was denied. He testified there was no dismissal of any charges.

On Re-Direct Examination Mr. Trame testified the Grievance was filed on Rules 22, 24, 38 and 39. Step 3 showed Rules 38 and 39 only.

The Union's next witness was Dennis K. Bowen. Mr. Bowen is retired from the Institution and is now at the Ohio State University Rhodes Campus. Mr. Bowen was shown Exhibit JX4B Pages 106 and 107. He retired June 1, 2009 and sent a letter to the prison in support of the Grievant. Mr. Bowen testified he started in 1974 and Knows Unit H1B. H1B was a two (2) man post.

Mr. Bowen read Exhibit JX4B 86 to 100 and testified the Grievant does good Rounds and accurate Counts. He testified that he has supervised the Grievant and that he did his Rounds and made his Counts.

On Cross-Examination Mr. Bowen testified that in 2008 he was the third shift Captain. He said the Grievant always followed Policies and Procedures. Mr. Bowen was given Exhibit Management 2 and testified it was Corrective Counseling to the Grievant for failure to stagger his watch times.

The next witness for the Union was Otis Pearson. Mr. Pearson is retired from the Institution as of February 1, 2011. Mr. Pearson was the third shift Lieutenant in charge of H1B Officers.

Mr. Pearson was given Exhibit JX4B 91 and said he was the Rater. He testified that the Grievant has a good approach. Mr. Pearson read Exhibit JX4B 98 and testified that the Grievant is a good officer. Mr. Pearson then read Exhibit JX4B 86 to 100 and testified the Grievant makes good Rounds and accurate Counts. He was then shown Exhibit Union 2 and testified the Grievant makes Rounds more than required.

On Cross-Examination Mr. Pearson testified that he supervised the twenty (20) some

Officers on third shift. He said the number of Officers varied. Mr. Pearson testified that the lights are out on third shift. Every cell is to be checked every half hour. Mr. Pearson was shown Exhibit JX4A A79 which is the Shift Roster. He testified he was in Return to Work status.

On Re-Direct Mr. Pearson testified he would not interrupt an Officer writing a report. He testified the Grievant went with the Lieutenant on Counts and Rounds and that there were always problems with the outside lights going out.

On Re-Cross Examination Mr. Pearson said he could not say if the lights were out on October 13, 2010.

On Re-Direct Mr. Pearson testified that if you see skin the Inmate is there. If you see a problem follow Protocol. Mr. Pearson testified that Inmates sleep on the floor and by the door. They don't always sleep on the bed.

On Re-Cross Examination Mr. Pearson was asked: "How many incidents of Inmates hanging themselves?" He replied "3 or 4".

The Union's next witness was John Alberts. Mr. Alberts was a Captain here for six (6) years and retired May 1, 2011. He was a Captain for fifteen (15) years altogether and was Captain over the Grievant.

Mr. Alberts reviewed Exhibit JX4A A73 which is the Shift Captain's Report for October 13, 2010. He testified that there was no word about Inmate Stone. If there had been it would have been on the Captain's report. Mr. Alberts testified that if it had been on the report the Cos would check the Inmates more closely and carefully. He testified that Cos rely on seeing flesh inside the cell. It takes two (2) Cos to open a cell door. He said CO Hall was assigned to Unit H1B. Mr.

Alberts read Exhibit JX4A A79 and testified that Relief is not required to sign the Shift Log.

The Union's next witness was Steve Hall. Mr. Hall has been a CO for 27 years and 9 months. Mr. Hall read Exhibit JX4A A79 and said he was Relief. His duties were to fill in and do fence checks. Other than that he was to stay at Unit H1B. Mr. Hall testified he got to Unit H1B at midnight.

Mr. Hall read Exhibit JX4A A27 and A34 and testified he left at 5:30 A.M. He said he took an Inmate for insulin.

Mr. Hall testified he was sitting at the desk and saw the Grievant take a flash light and go to every door to look in. He saw the Grievant look in Cell 220.

On Cross Examination Mr. Hall read Exhibit JX4A A35 Question 8 and testified he was on the Unit most of the night. At 5:30 A.M. he took an Inmate to get insulin. Mr. Hall was asked: "Did you see the Grievant check cell 220?" He answered "Presume he did."

On Re-Direct Mr. Hall testified he arrived at midnight and stayed until morning.

On Re-Cross Examination Mr. Hall read JX4A A35.

The next witness for the Union was William Larimore. Mr. Larimore is a CO on the third shift. Mr. Larimore has been with the State twenty-four (24) years. Mr. Larimore read Exhibit JX2D Pages 7 and 8. Mr. Larimore wrote this after Trooper Gibson and the Prosecutor came in to the Institution.

Mr. Larimore testified that Trooper Gibson had the door closed. He used a big flash light to look in. Mr. Larimore testified he was asked about Rounds and Counts. He said Inmates do not lay in bed. They lie on the floor etc. Mr. Larimore testified he was assigned to Unit H1B. He said

the Inmates there are mentally retarded and have physiological problems. Mr. Larimore testified he knows Grievant and the Grievant is a good officer. They have worked side by side.

On Cross Examination Mr. Larimore said he was not there on October 13, 2010. He was off all week.

On Re-Direct Examination he said Inmates hang things on bunk and cells. He said he carries his own flashlight.

The Union's last witness was the Grievant Rodney Burchett. Mr. Burchett is a CO. He testified that his job is to maintain a safe environment. Mr. Burchett testified he is a third shift Relief Officer and has been with the State 16 ½ years. He has not had a written reprimand within two (2) years.

Mr. Burchett testified that when he got to Unit H1B he got the keys, did a Count and reviewed the Post Orders. He said this is a one man post.

Mr. Burchett testified that Officer Hall came at 12. Officer Hall was there 12, 2 and 4. Mr. Burchett testified the Count times are 12, 2 and 4 and he starts his Count before that. He testified he does Rounds every ½ hour.

Mr. Burchett read Exhibit JX4A A62 which is the Log Book. He logged every ½ hour. He testified times in the Log Books are guidelines to go by. Mr. Burchett testified that the times in the Log Book are just when he put it in the Log Book. He testified he did Rounds on a staggered basis. Lt. Ludwig came in at 1:20.

Mr. Burchett read Exhibit JX4A A27 Question 34 and testified Officer Hall was there until at least 5:30 A.M. Mr. Burchett testified he did the Count and saw nothing unusual. He

couldn't prevent Inmate Stone's suicide. Mr. Burchett said "I did my Rounds and Counts and saw nothing out of the ordinary.

On Cross Examination Mr. Burchett read Exhibit JX4A A62 and testified there are Log Books for every shift. He testified the Log Book shows Rounds every 30 minutes but not staggered. Mr. Burchett testified he filled out the third shift Log. Mr. Burchett was given Exhibit JX4A A107 which showed the Count at 61 at 10 o'clock. Exhibit JX4A A116 shows a Count at 61 at 12 o'clock. Exhibit JX4A A125 which shows a Count of 61 at 2:00 A.M. Exhibit JX4A A134 shows a Count of 61 at 4:00 A.M..

Mr. Burchett then read Exhibit JX4A A32 Question 34 and testified he knew he was looking at Discipline when he answered questions.

On Re-Direct Examination Mr. Burchett read Exhibit JX4A A28 Question 6 and testified it didn't mean CO Hall wasn't there. He then read Exhibit JX4A A32 and testified he wanted them to know CO Hall was there.

THE EMPLOYER'S REBUTTAL

The hearing was reconvened at 10:50 P.M. October 5, 2011 and adjourned at 12:40 A.M.

The Employer's first witness was Allison Vaughn. Ms. Vaughn has been a Labor Relations Officer 3 since 2004. She is the Step 3 Designee at six (6) institutions including Allen Correctional Institute.

Ms. Vaughn has Step 3 hearings monthly and has forty (40) to fifty (50) each month. Ms. Vaughn testified that she was the Step 3 hearing officer on this grievance. She testified she was

consulted about the termination of the Grievant by Labor Relations Officer Greg Schrader. Mr. Schrader called her and wanted advice on the charges. Ms. Vaughn testified that she told Mr. Schrader to use Rules 22, 24, 38 and 39.

Ms. Vaughn was referred to Joint Exhibit 2A which is the Removal Notice. The Removal Notice refers to all four Rules 22, 24, 38 and 39. Ms. Vaughn was then referred to Joint Exhibit 2B which is the grievance. She testified that the grievance form refers to Rules 22, 24, 38 and 39. Ms. Vaughn said the grievance said the Employer does not have proof of a violation and that it was signed by Paul E. Trame, Jr. She said Mr. Trame had previously testified .

Ms. Vaughn testified that removal hearings start at Step 3 per page ninety (90) of the Collective Bargaining Agreement. Ms. Vaughn testified she was the only Step 3 Designee to hear this case.

Ms. Vaughn then read Joint Exhibit 2 which is her Step 3 response. She testified that her conclusion was there was no contract violation and that the discipline was appropriate. Ms. Vaughn testified that she had heard all the Union information.

Ms. Vaughn testified that the Step 3 response said the Grievant was removed for violations of Rules 38 and 39, but this was a typo and that all four (4) Rules were used. She testified that there was no Union challenge to this. She could have granted the Grievance.

Ms. Vaughn testified that she could grant a grievance, deny it, or grant it in part. She reviewed the Collective Bargaining Agreement, Page 92 at the first full paragraph, third sentence and testified that it said the agency may grant, deny, or modify the Union remedy.

Ms. Vaughn read Joint Exhibit 2C where the Grievance was denied at Step 3. Ms.

Vaughn testified she had no intention to dismiss any charges. If she meant to do so she would have said so.

Ms. Vaughn then testified that she has modified the remedy. Ms. Vaughn was given Management Exhibit 3 and said this was her Step 3 response at Hocking Correctional and she had modified the remedy.

Ms. Vaughn then read Management Exhibit 4 which is a Step 2 response to an OEA grievance. She testified that this is the same as a Step 3 response. She granted this Grievance in part.

Ms. Vaughn testified that the first day of this Arbitration was when she became aware that the Union claimed Rules 22 and 24 were dismissed. She testified she was not told this before.

On Cross-Examination Ms. Vaughn was asked that at the stipulation meeting the Union asked about the Rule 22 and Rule 24 charges. The Union says she said if the Grievant got Notice of only Rules 38 and 39 she would only proceed on those charges. Ms. Vaughn said she didn't remember saying that.

Ms. Vaughn was then asked if she knew the rule that a document is construed against the person that drafted it. She said "No".

The Employer's next witness was Gerald Gibson. Mr. Gibson is a Trooper for the Ohio State Highway Patrol and is a plain clothes investigator. Mr. Gibson has been assigned to Allen Correctional Institution since 2003. Mr. Gibson works for the Department Of Public Safety and has offices at Allen Correctional Institution and at Oakwood.

On October 14, 2010 after 8 A.M. he began his investigation. Mr. Gibson was given Joint Exhibit 4A A272 and testified that this is his report of his investigative action. He testified that his report shows the investigation started at 8:09 A.M. and that the report has a chronological report of his activities.

Mr. Gibson testified that he came to the scene and took photographs. He testified that he searched the cell and then sealed it. Mr. Gibson said he interviewed Staff and Inmates. Mr. Gibson then testified that there was crime scene tape over the cell. He said there were no sheets on the bed. There were a pillow, trousers and a blue coat on the floor.

A video was then shown of the crime scene.

Mr. Gibson testified that he came back the next day and took photographs through the cell window and that he could see into the cell without a flashlight.

The parties and the Arbitrator then went to Cell 220.

Mr. Gibson then testified at cell 220. Mr. Gibson testified that he got a two (2) cell flashlight from the CO's desk in the Unit. He testified that the light from the flashlight was dim and he went to the cell and took a photograph of the cell through the glass. Mr. Gibson testified that he could see into the cell without the light.

Mr. Gibson then testified that he brought Prosecutor Hurst out to the Institution. Mr. Gibson read Joint Exhibit 4B 5 and testified it is the Report of the Prosecutor's visit. He said there were Inmates in the Cell and he had them removed. Mr. Gibson testified that he put clothes on the bed so the Prosecutor could see how it was.

On Cross Examination Mr. Gibson said there were bags of material outside the cell. He

said he got there in the morning of the 14th.

Mr. Gibson testified he doesn't know how many people were in the cell before he got there.

On Re-Direct Mr. Gibson was asked: "Would a shirt on the bed block his view?" He answered "No".

On Re-Cross Examination he testified he tried to interview all who were there. Mr. Gibson testified that if a coat is hung on the bed you could still see the window.

Mr. Gibson testified the exterior light was on on October 13th.

The parties and the Arbitrator then returned to the hearing room.

The Union requested the maintenance records for the exterior lights. The Union is to receive those records and a Conference Call was scheduled for the parties and the Arbitrator for October 17, 2011 at 17:00 A.M.

The parties and the Arbitrator had the Conference Call October 17, 2011 at 11:00 A.M. The Union indicated it had received the maintenance records it requested and did not desire to offer any further evidence. The Arbitrator ruled that the evidentiary part of the hearing was concluded. The parties agreed to submit post hearing briefs by the close of business October 31, 2011.

V. OPINION AND AWARD

This case has been very well presented and the Advocates for both sides have left no stone unturned in presenting their evidence.

The undisputable fact is that Inmate Stone had hung himself in his cell and eight hours elapsed before he was discovered. Dennis Sherrick re-created Inmate Stone's physical position. Inmate Stone was against the wall opposite the cell door in a sitting or squatting position.

There was considerable argument over the lighting both in the cell and outside the cell, particularly that of the outside yard lights. However, it was apparent from a view of the cell at night and from the testimony of witnesses that there was enough available light to see into the cell without a flashlight.

There was considerable argument between the Employer and the Union as to whether or not two (2) charges were dismissed by the Employer at the Step 3 hearing. The Union is correct in its contention that documents are construed against those that prepare them. However, there was unlimited opportunity for cross-examination and presentation of evidence.

The Arbitrator finds there is no evidence of a violation of Rule 22. Rule 22 is "Falsifying, altering or Removing any Document of Record."

The Employer's contention is that because the Grievant failed to see that Inmate Stone was deceased that he falsified the cell block records by including Inmate Stone in the Count. This is not what "falsifying" means to the Arbitrator in this case. Records are usually falsified in order to protect the Grievant by obscuring or destroying evidence. As the Warden testified the Grievant counted a deceased Inmate as if he were alive in several Rounds and Counts. However, this is not what falsification means in this context. If the Grievant had tried to falsify the record to cover himself it would be an entirely different story.

The Arbitrator finds there is no evidence of a violation of Rule 38. Rule 38 says "Any

Act, or Failure to Act, or Commission Not Otherwise Set Forth Herein which Constitutes a Threat to the Security of the Facility, Staff, any Individual Under the Supervision of the Department, or Member of the General Public.” There is no evidence that this occurred. There was no escape or attempted escape. Neither was there any assault or altercation with Staff or Inmates.

The Grievant is also charged with Rule 24 which is “Interfering with, Failing to Cooperate in, or Lying in an Official Investigation or Inquiry.” The Arbitrator finds the Grievant is guilty of a violation of this Rule. The Arbitrator does not find Inmate Francis a credible witness. While there is a considerable dispute about the facts, Inmate Francis’s testimony does not match with any other facts.

Investigator Gibson discounted the testimony of Officer Hall. The Arbitrator doesn’t agree with this. The Employer argues that since Officer Hall failed to sign in, he wasn’t there until 5:30 A.M. There is some evidence in the case that Relief Officers were not required to sign in. In any event, Officer Hall says he was there and Grievant made his Rounds and Counts. The evidence is that Grievant recorded Rounds and Counts without showing them as staggered. Grievant says he staggered them but did not record them that way.

The real issue here is did the Grievant make quality Rounds and Counts. The Arbitrator finds that he did not.

The Union argues that all that was necessary was to see skin. The Employer argues that the Grievant also had to see if the Inmates were breathing. The Employer is correct. The Arbitrator cannot believe the Grievant made quality Rounds and Counts when Inmate Stone had

a sheet around his neck and was in the same position for eight (8) hours.

The Grievant is also charged with Rule 39 - Any Act That Would Bring Discredit to the Employer. I find the Grievant guilty of violation of this rule. The Union argues that the Employer's Public Relations Officer could have handled this differently and deferred comment until after a full investigation. Perhaps, so. However, that isn't what happened. There is ample evidence of newspaper articles bringing discredit to the institution.

The Employer has removed the Grievant. The Arbitrator has considered all the evidence and does not find the discipline progressive or commensurate with the offense.

The Grievant has worked seventeen (17) years in a high stress environment with no discipline of record. The Employer introduced evidence of a Written Reprimand and Corrective Counseling to rebut the Union assertion that there had never been any discipline. However, the Written Reprimand was no longer in the Grievant's file as active discipline and corrective counseling is not discipline.

There is plenty of evidence in the record that the Grievant had good performance evaluations and the Lieutenant and Captain said he was a good Officer.

In addition the evidence is that the Officers were not notified by the Employer that Inmate Stone's father had died. The evidence is that Officers should be notified of this, as increased stress and emotional turmoil can cause Inmates to harm themselves or commit suicide.

The Union has cited several cases from other Arbitrators concerning, primarily, the remedy. The Arbitrator has read them all.

The Arbitrator agrees with Dr. Pincus's statement in Ohio Department Of Rehabilitations

and Corrections - Richard Moore, Grievant. Dr. Pincus said "The only way a cell block officer should be held accountable for termination on the first offense is if there is indisputable evidence that any reasonable person would conclusively established that the corrections officers had not and were not performing their duty at the time and their failure to do so at the time would create an immediate threat to the safety of the Officers and Inmates."

In this case there was a failure of the Grievant to do his duty but no immediate threat to the safety of Officers or Inmates.

Based upon the evidence and the Grievant's length of service and lack of prior discipline there is no Just Cause for Removal.

The grievance is granted in part and denied in part. The Grievant shall lose one month's pay, seniority and benefits.

1. The Grievant shall be returned to work with back pay, less applicable deductions, and less the one month referred to above.

2. The Grievant's benefits shall be restored, less one month's accrual.

3. The Grievant's seniority shall be restored, less one month's accrual.

4. The Grievant's good days shall be restored.

5. The Grievant's leave accruals, less one month, shall be restored.

6. The Grievant's PERS and Health Insurance benefits, less one month, shall be restored.

7. The Grievant's Union Dues shall be paid, less one month.

Entered at Ironton, Ohio this 9th day of November, 2011.

Craig Allen
Craig A. Allen
Arbitrator