ARBITRATION DECISION NO.:
185

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Rehabilitation and Corrections, Ross Correctional Institution

DATE OF ARBITRATION:
April 14, 1989

DATE OF DECISION:
June 14, 1989

GRIEVANT:
Rodney Valentine

OCB GRIEVANCE NO.:
27-23-(88-08-01)-0043-01-03

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Donald M. Sargent, Advocate

FOR THE EMPLOYER:
Nicholas Menedis, Advocate

KEY WORDS:
Inciting Inmates
EAP
Progressive Discipline
Last Chance

ARTICLES:
Article 5 - Management Rights
Article 24 - Discipline
    §24.01-Standard
    §24.02-Progressive
Discipline
    §24.04-Pre-Discipline
    §24.05-Imposition

of Discipline
§24.08-Employee Assistance Program
Article 25 - Grievance Procedure
§25.03-Arbitration Procedures
§25.04-Arbitration Panel

FACTS:

Grievant was employed as a Correction Officer II at the Ross Correctional Institution for approximately seventeen months before his removal. Grievant has been previously attacked and injured by an inmate. Grievant, after he received a speeding ticket, explained to his supervisors that he was under an inordinate amount of stress. In this meeting grievant admitted that he had a practice of "flipping off" inmates. Grievant's supervisor counseled him and decided to withhold discipline since grievant was going to attend the Employee Assistance Program (EAP). Several appointments at a local mental health facility were made by the EAP coordinator for grievant, but grievant never attended.

Grievant continued to work for the institution and one day observed two inmates running in the recreational area and brought them into the officer's secure room. Grievant questioned the inmates and then took one of the inmates out into the corridor. The reasons why the grievant removed the inmate are in dispute. A co-worker's testimony points out that grievant provoked the inmate by pointing a finger at the inmate, calling the inmate "boy" and "punk", and trying to antagonize the inmate to swing first. In the co-worker's view, the inmate made no threatening gestures. Grievant testified that the two inmates were arguing and he was trying to diffuse the situation by separating the inmates. The co-worker wrote an Incident Report and the inmate submitted a formal grievance about the incident. The Warden removed the grievant. Grievant is asking for the removal to be expunged and that he be reinstated with full back pay.

EMPLOYER'S POSITION:

There was corroboration of grievant's misconduct by both the inmate and the co-worker. EAP attendance should not be considered a mitigating factor since the grievant only attended the EAP program when he knew that his removal was pending. Employer also pointed out that grievant's past practice of "flipping off" inmates may have led to this incident. A small number of employees must monitor thirteen-hundred-and-fifty inmates. To avoid a dangerous situation employees must refrain from inciting inmates to violence. In antagonizing the inmate in the corridor, where other inmates could observe the altercation, grievant could have provoked a riot. The employer had counseled grievant on the potential dangers of his conduct and warned him of future discipline if he continued to violate the rules of the institution. There is no evidence of disparate treatment. Other employee witnesses that the union presented were guilty of excessive force, not intimidation and coercion. Grievant will never be able to continue working in a prison environment. Grievant's violation of incitement and coercion along with his past record of discipline is just cause for removal.

UNION'S POSITION:

The employer never proved that grievant committed the violations claimed and the employer did not follow the principles of progressive discipline. The employer also never clearly defined the

rules dealing with intimidation and coercion violations. Grievant separated two inmates who were arguing with each other; the inmate who the grievant took out into the corridor was acting in a highly threatening manner. Grievant had no previous discipline records in his personnel file and the verbal counseling sessions were not included in the file.

In related situations the employer has imposed less severe discipline for more severe violations. Employees who had used excessive force which is a more severe violation under the rules received only three and ten day suspensions. Several employee witnesses believed that intimidation is a less severe offense than excessive force. Grievant was singled out for the excessive discipline of removal.

There are also several mitigating factors in this case. Grievant was previously assaulted in the institution by an inmate and any alleged overreaction may be in part due to this factor. Second, grievant applied to the Employee Assistance Program (EAP).

ARBITRATOR'S OPINION:

Although there was just cause for discipline, the removal was too severe. Grievant did engage in dangerous activity of provoking an inmate. Grievant's actions were also suspicious because he could not recall important incidents and his memory seemed selective. The EAP attendance is viewed as an attempt to escape discipline, not an effort to receive help. Even though grievant did intimidate an inmate grievant, he still must be given proper notice. There are only three exceptions to this notification that comply with the system of progressive discipline:

1) the employer has established a formal warnings only system,
2) where the employee has not responded to prior reprimands and counseling and the employer has made every effort to rehabilitate, and
3) if the employee engages in an act which is in itself inherently wrong, "malum in se." This case does not fall within any of the three exceptions and therefore grievant's lack of notice violates the principles of progressive discipline. The grievant never was given a formal disciplinary warning, but the procedural defect of improper progressive discipline do not eliminate the possibility of an extensive conditional suspension.

AWARD:

The grievance is sustained in part and denied in part. Grievant will be reinstated under a last chance agreement which will include grievant enrolling in an Employee Assistance Program. Any similar misconduct by grievant will result in summary dismissal.

TEXT OF THE OPINION:

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

IN THE MATTER OF THE
ARBITRATION BETWEEN

**THE STATE OF OHIO,
OHIO DEPARTMENT OF
REHABILITATION AND CORRECTIONS,
ROSS CORRECTIONAL INSTITUTION**

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO

GRIEVANCE:
Rodney Valentine (Discharge)

CASE NUMBERS:
27-23(8-01-88)43-01-03

ARBITRATOR'S OPINION AND AWARD

Arbitrator:
David M. Pincus

Date:
June 14, 1989

APPEARANCES

For the Employer
Gary C. Mohr,
Appointing Authority
Richard Ivan Pence, Major
Diane Ross,
Corrections Officer II
Sandy Price, Observer
Larry Brown,
Labor Relations Officer
Charles R. Adams, Specialist
Nicholas Menedis, Advocate

For the Union
Rodney Valentine, Grievant
Frank Reisinger, Witness
Rodney Anderson, Witness
John Porter,
Associate General Counsel
Donald M. Sargent, Advocate

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Rehabilitation and Correction, Ross Correctional Institution, hereinafter referred to as the

Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on April 14, 1989 at the office of The Ohio Department of Rehabilitation and Corrections, 1050 Freeway Drive North, Columbus, Ohio. The Parties bad selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

STIPULATED ISSUE

Was the Rodney Valentine, the Grievant, terminated for just cause? If not, what shall the remedy be?

JOINT STIPULATIONS OF FACT

1. Rodney Valentine was a 17 month employee.
2. Rodney Valentine had no prior disciplines.
3. Rodney Valentine was attacked by an inmate in the summer of 1987. He was hit by a pool cue and knocked unconscious. He admitted that he had been "flipping off" the inmates.
4. The grievance is properly before the Arbitrator.
5. There are no procedural matters still at issue.
6. The Union and Management agree that the files and or documents presented to the Arbitrator, involving Correctional Officer Richard Cowell of Marion, Raymond McGraw, Correctional Officer and Lt. Roger Hall, both of the Ross Correctional Institution are authentic documents from these institutions.

Don Sargent
Union

Nick Menedis
Management

(Joint Exhibit 4)

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."

(Joint Exhibit 1)

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

"Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse."

Section 24.02 - Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

. . .

Section 24.04 - Pre-Discipline

"An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

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

. . .

Section 24.05 - Imposition of Discipline

"The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal

investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment."

Section 24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will give serious consideration to modifying the contemplated disciplinary action.

(Joint Exhibit 1, Pgs. 34-37)

CASE HISTORY

Rodney Valentine, the Grievant, was originally hired by the Ohio Department of Rehabilitation and Correction, the Employer, on March 23, 1987 as a Correctional Officer II. Thus, he was employed for approximately seventeen months prior to his removal on August 1, 1988 from his position at the Ross Correctional Institution. This facility houses approximately fourteen hundred convicted felons when it reaches full capacity. Since the inmate employee ratio clearly favors the inmate population, serious breaches in security can only be avoided if sound policies and procedures are followed by employees, and inmates are treated with respect.

During the summer of 1987, the Grievant was involved in an altercation when an inmate struck the Grievant with a pool cue and knocked him unconscious. An initial meeting was held after the Grievant returned to work. Major Pence, the Grievant, and Warden Mohr interviewed the Grievant because at this juncture the Grievant had been the only employee attacked by an inmate. Major Pence reviewed the possible circumstances which might lead to an attack and the proper decorum which any correctional office must abide by in such a potentially hazardous setting. It should be noted that the Grievant never raised the spectre of his involvement in inciting the pool cue incident.

The Employer's representatives had a subsequent meeting with the Grievant. This second meeting was initiated by the Grievant after he received a speeding ticket from the Ohio State Highway Patrol. Pence and Mohr testified that the Grievant seemed extremely upset. During the conversation, the Grievant explained that he was under an inordinate amount of stress perpetuated by work related conditions, problems at home, and financial difficulties. The Grievant, moreover, clarified the potential circumstances surrounding the pool cue incident. He admitted, more specifically, that he had a practice of "flipping off" inmates. Major Pence counseled the Grievant against engaging in these behaviors because they can escalate into a potentially dangerous situation. Pence and Mohr expressed their concerns regarding this matter and emphasized that

the prior incident could have been engendered by the Grievant's immature actions.'

Mohr testified that the above discussion forced him to consider disciplinary action against the Grievant. He declined to exercise the disciplinary option and instead recognized the need for the Grievant's involvement in the Employee Assistance Program (EAP). As a consequence, Mohr contacted Larry Brown, a Labor Relations Officer and EAP coordinator, regarding the need for potential assistance. Brown testified that the Grievant came to his office and that he and John Dick made an appointment for the Grievant with a local mental health facility. Brown, moreover, emphasized that the referral was based upon certain stress related issues. Although several appointments were made on the Grievant's behalf, he did not meet his appointment obligations.

On June 14, 1988, Diane Ross, a Corrections Officer ll, was working with the Grievant in Unit 3 of the facility. The Grievant observed two inmates, McNeil and Newland, running in the recreational area. Ross testified that the Grievant brought the two inmates into the officers' secure room in C-area; she was in this room when an alleged confrontation ensued.

Ross testified that the following pertinent particulars took place at approximately 11:10 p.m. The Grievant had both inmates sit in chairs as he preceded to question them. He made a reference to horse-playing and McNeil remarked that be was not involved in this activity. The Grievant allegedly replied, "Don't lie to me boy, you were horse-playing." McNeil got upset and responded, "Don't call me boy, I've got a name." The Grievant left Newland with Ross and took McNeil out into an adjoining corridor. Ross noted that she could hear what was taking place because the door was left ajar, and she could view the situation through a window.

The confrontation purportedly continued out in the corridor. McNeil was leaning up against a table as the Grievant was “getting in his face" and pointing his finger. The Grievant also directed a series of statements toward McNeil. He purportedly stated, "Go ahead and take a swing you punk, what would you do if I pushed this man-down and then slapped your face? They would be down here to take you out of here because you swung first." As this altercation took place, McNeil was trying to back away and he placed his arms in a non-threatening posture. The grievant allegedly continued his tirade by stating, "Do you know what I think of you? I think you are a punk."

Ross eventually entered the corridor because she was concerned about a further escalation of emotions and additional problems. Upon her entrance the Grievant remarked, "Go ahead McNeil, act like a bad ass in front of the lady officer, she's in here now." Ross attempted to diffuse the situation by exclaiming, "Let's just forget about it." Both inmates were subsequently excused and returned to their cells.

Upon returning to the office the Grievant engaged Ross in a discussion concerning the incident. He supposedly bemoaned writing up Newland for horse-playing because be was not “right” and was a "homey." Ross, however, noted that if they were horse-playing, both inmates should be written up. The Grievant, moreover, asked Ross whether she overheard his conversation with McNeil. Even though she did in fact witness the altercation, she remarked that she had not, hoping to confirm her previous observations. The Grievant freely reviewed the altercation and indeed confirmed her previous observations.

Based on the above circumstances Ross authored an Incident Report (Joint Exhibit 3) which she submitted to her supervisor. McNeil, moreover, also submitted a formal grievance against the Grievant.

On June 30, 1988 Major Pence conducted an Investigatory Interview with the Grievant. After reviewing a series of witness statements and interviewing the Grievant, Pence concluded that disciplinary action should be taken.

On Tuesday, July 12, 1988, Mohr conducted a Pre-disciplinary Conference. He also determined that there was just cause for discipline because: the Standards of Conduct Rules 34, 36, and 38 were violated; the Grievant gave no assurance that this aggressive behavior was under

control; and the Grievant had been previously counseled for inappropriate actions toward inmates as well as staff (Joint Exhibit 3).

On July 19, 1988, Mohr authored a formal Removal Order which resulted in the Grievant's discharge from the position of Correction Officer (Joint Exhibit 3). On August 1, 1988 the Grievant contested the removal decision by filing the following grievance:

"...
Statement of Facts (for example, who? what? when? where? etc.):

On 8/1/88, C.O. Rodney Valentine recieved (sic) a notice of Removal for alleged violations of the Dept. Rules of Conduct 34, 36, 38. The Rules of Conduct state for violation of Rule 34 First offense WR/R, 36-WR/R, 38 5/10/R. This is a violation of 24.02 progressive Discipline. C.O. Valentine enrolled in EAP. After the disciplinary conference, this action to correct his personel (sic) problems did not sway management. Management should also consider that C.O. Valentine was attacked in the past by an inmate. Also one of the orders of removal is not signed by the Director.

Names of Witnesses:

P.O. Sandy Price, Maj Pence, C.O. Ross C.O. Rodney Anderson, Capt. D. Danvers.

Remedy Sought:

That the removal be expunged, that the grievant be reinstated with full pay. Including Roll call pay. That C.O. Valentine be made whole. That the second removal notice be thrown out due to not having a signature of the director. Ref EAP.
..."

(Joint Exhibit 2)

On September 28, 1988, Charles R. Adams, the Step 3 Hearing Officer, concurred with the prior managerial decisions. Adams alleged that there were no violations of the Agreement (Joint Exhibit 1), no procedural errors, and that discipline was appropriate.

The Parties were unable to resolve the above grievance. No objection being raised by the Parties as to arbitrability, either on procedural or substantive grounds, the matter is before the Arbitrator for a final and binding decision.

The Position of the Employer

It is the position of the Employer that it did have just cause to remove the Grievant because he violated several specific offenses enumerated in the Standards of Employee Conduct (Employer Exhibit 2). The Grievant's conduct, moreover, indicated to the Employer that he was unable to co-exist in a prison environment.

The Employer maintained that it obtained substantial evidence of proof that the Grievant was guilty as charged. The specific charges dealt with uttering derogatory remarks toward McNeil; attempting to coerce, intimidate, and provoke McNeil to strike him in an attempt to induce physical harm; and engaging in behavior which potentially placed the Grievant, inmates, and other personnel in a perilous and dangerous situation.

The charges were allegedly corroborated via a number of independent sources. First, Pence

testified that during the course of an investigatory conference held on June 28, 1988 the Grievant partially admitted to the above violations. He, more specifically, admitted to the derogatory remarks but denied that he engaged in coercive tactics aimed at provoking a physical response. Second, Ross submitted an unsolicited incident report (Joint Exhibit 3) which documented the circumstances surrounding the altercation. She, moreover, verified the particulars by eliciting a review of the incident by the Grievant shortly after the altercation. Third, Ross' version of the events was supported by independent statements authored by McNeil and Newland. Fourth, correspondence sent to Mohr by Representative Wylie (Union Exhibit 1) and Dr. Cutler (Union Exhibit 2) confirmed the inmates' accusations and Ross' assertions.

Mohr asserted that the removal decision was warranted based upon a number of aggravating considerations. The incident presented a direct threat to the safety of the staff and to the overall institutional operation. But for McNeil's demeanor and restraint a major incident could have taken place resulting in a number of injuries to the inmate population and staff. Mohr based this conclusion on the timing of the incident and the staff inmate ratio in existence during the altercation. Mohr maintained that twenty-seven employees were responsible for the monitoring of thirteen-hundred-and-fifty inmates inside the entire facility and one-hundred-and-seventy inmates housed in the area where the incident took place. The location of the altercation, that is the corridor, also evidenced bad judgment on the Grievant's part. By "fronting" McNeil in the corridor other inmates had ready access to the dialogue which took place. Such close proximity invited a riot if McNeil had responded by physically attacking the Grievant.

The Grievant's involvement in two prior incidents also played a significant role in the ultimate discipline that was assessed. The first incident dealt with a hysterical outburst by the Grievant in the personnel office when his check was not immediately made available. The other incident dealt with his direct involvement in the pool cue incident and his emotional condition during the meeting when he admitted to his participation.

The Employer emphasized that the grievant was provided with progressive discipline. When each of the above incidents were brought to the Employer's attention the Grievant was provided with disciplinary counseling. His actions were more specifically reviewed and the potential dangers involved, if he continued to behave in a similar fashion, were summarized. The Grievant's unwillingness to follow through with his Employee Assistance Program commitments also negatively impacted his chance for continued employment. Appointments were made by the Employer yet the Grievant balked and failed to take advantage of these counseling opportunities. The Employer also considered the Grievant's attempt to gain assistance at the Scioto Paint Valley Mental Health Center as self-serving and suspect. Even though this attempt was self-initiated, the Grievant went to the facility on Saturday, July 9, 1988, a few days prior to the pre-disciplinary conference (Union Exhibit 3).

Mohr explained that the grievant's problems were not identified during an earlier phase of his employment history because of unique conditions surrounding the facility's start-up phase. When the Grievant was provided with his initial probationary evaluation the facility housed approximately one hundred inmates. At the time of the final probationary evaluation the facility only housed five hundred to six hundred inmates which was far below full capacity. Also, a certain segment of the probationary period was spent at another facility. Thus, the Grievant's supervisors never had a full opportunity to observe the Grievant's performance, and the Grievant never had an opportunity to experience the full range of work related responsibilities.

Mohr also vehemently denied that his removal decision was impacted or influenced by the correspondence he received from Wylie (Union Exhibit 1) and Cutler (Union Exhibit 2). He stressed that he did view the contents contained in the correspondence for corroboration purposes; but that the removal decision was in no way biased as a consequence of inquiries

raised on McNeil's behalf.

The Union's unequal treatment theory was also refuted by the Employer. The Employer maintained that the examples (Joint Exhibit 6) introduced at the hearing were defective because these employees were not similarly situated. Some of the examples occurred in other facilities, while others dealt with incidents engaged in by members of the supervisory bargaining unit. The Employer, moreover, maintained that some of the examples discussed by the Union were also distinguishable because they dealt with the use of excessive force rather than intimidation and coercion. Mohr distinguished these incidents based upon circumstantial differences. He claimed that even though these individuals did engage in excessive force violations, unlike the Grievant, they did not initiate the altercations but responded in an excessive fashion after the inmates precipitated the incidents.

The Position of the Union

The Union argued that the Employer did not have just cause to remove the Grievant. The Union maintained that the Employer failed to establish just cause because of substantive proof differences and progressive discipline principle violations.

The Union maintained that lack of notice concerning the Employer's policies and procedures caused the removal decision to be defective. The Employer, more specifically, failed to properly forewarn the Grievant about the possible consequences associated with his conduct. The Employer's rules were viewed as too broad and ill defined.

With respect to the particulars surrounding the incident, the Grievant alleged that he was merely following and enforcing the rules and regulations dealing with horseplay. He, moreover, maintained that the "chewing out" that McNeil received was not unusual and was often done by bargaining unit and management representatives. The Grievant asserted that his response was also a function of McNeil's demeanor and provocation in the officers' security room. The Grievant claimed that he had to separate McNeil and Newland because they accused each other of lying; which could have resulted in a major confrontation between the inmates. McNeil's actions were also viewed by the Grievant as highly threatening. McNeil purportedly moved toward the Grievant by raising himself off the table and pointing at the Grievant prior to the corridor confrontation.

The Union raised a number of progressive discipline issues which allegedly biased the disciplinary outcome. The removal decision was viewed as excessive because the Grievant had no prior disciplines in his personnel file nor any record of verbal counseling. The charges used by the Employer to justify the removal were viewed as deficient because the Employer stacked the charges. It was emphasized by the Union that the removal decision was extremely excessive because the most serious offense, the Rule 38 violation, allows for a penalty ranging from a five day suspension to removal. With this amount of documented leeway for the most serious offense, a lesser penalty would have been more reasonable under the circumstances.

The correspondence (Union Exhibits 1 and 2) received by Mohr was considered to be a biasing factor rather than a corroborative influence. The Union strongly asserted that they aggravated the situation because the Employer's judgment was unduly swayed by their introduction into the decision making process. Thus, the Union claimed that the removal decision was based upon arbitrary and capricious considerations.

One of the major theories proposed by the Union dealt with an unequal treatment claim. The Union provided several examples (Joint Exhibit 6) where similarly situated employees received less severe disciplinary penalties. In one particular instance, an employee received a written reprimand for calling an inmate "lame" and a "son of a bitch." Also, in related yet more severe situations the Employer has imposed less severe penalties. Special emphasis was placed on

these examples because they dealt with the use of excessive force; a more serious infraction as specified under Rule 37. Yet, two examples clearly indicated that two employees received a seven and three day suspension for their excessive force activities. Two Union witnesses, moreover, expressed the opinion that excessive force occurrences are much more heinous than instances of intimidation, and thus, should be dealt with more severely than other related forms of misconduct. If this interpretation was applied to the present matter, the Grievant should have never been removed by the Employer.

Several mitigating circumstances should have been considered by the Employer which should have resulted in a less severe penalty. First, the attack on the Grievant during the pool cue incident sensitized the Grievant to interactions with unruly inmates. Even if the Grievant reacted in a heightened manner, part of his response, or overreaction, was a consequence of the previously perilous experience. Second, the Grievant did in fact independently apply to an Employee Assistance Program at Scioto Paint Valley Mental Health Center (Union Exhibit 3 and Union Exhibit 4). His involvement, moreover, was initiated prior to the removal decision which reinforced the Grievant's commitment to the rehabilitative process.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing it is this Arbitrator's opinion that the Employer had just cause to discipline the Grievant; the removal action, however, was too severe in this instance.

The evidence and testimony clearly indicate that the Grievant did indeed engage in some very serious and potentially dangerous activities. There is no need to review the particulars surrounding the incident; the evidence and testimony overwhelmingly support the Employer's assertions. Ross' testimony and the supporting documents (Joint Exhibit 3) provided highly credible and consistent versions regarding the circumstances surrounding the incident. The Grievant's testimony, however, was laden with bouts of selective perception which dramatically reduced his credibility. An in-depth review of the record indicates that the Grievant was extremely vague and alleged a faulty memory when asked a particular question regarding the altercation. He was, however, quite ready to recall other pertinent particulars when they furthered his defense.

A few examples should reinforce this point. The Grievant seemed to recall all of the particulars dealing with the confrontation and discussion which took place in the office. He, however, realized severe memory deprivation when questioned about the corridor incident. Under cross examination the Grievant initially indicated that he did not remember "getting up into his face" but he remembered standing in front of McNeil and pointing at him. He, moreover, could not remember whether he backed the Grievant up against the table. The Grievant also waffled when he was asked whether he called McNeil "boy." He admitted that he denied uttering this statement when initially interviewed by Pence because he could not remember. At the hearing, however, the Grievant noted that, "I can see myself doing that, I really can because that's just the way we talk where I live." Further questioning, however, failed to clarify this issue. The Grievant remarked, "I just told you I can see myself saying it. I didn't say that I said it."

Establishing the proof facet of just cause does not necessarily mean that a disciplinary action is totally proper and justified. Other considerations must also be evaluated in determining whether the administered discipline is proper. Typically, progressive discipline requires that at least one disciplinary suspension be imposed before discharge is justified. This majority position on suspension is based upon notice and rehabilitation factors. Proper notice is important because it demonstrates or affords a tangible indication to the employee that the employer will follow through with its warning.[1] With respect to the rehabilitation factor, Arbitrator Dworkin aptly characterized

this principle when he stated, "Discharge is warranted only in such cases where corrective measures appear to be futile."[2] Normally, futility can only be established when all other measures, including suspension, are logically applied in a progressive fashion.[3]

There are some exceptions to the above majority view. Progressive discipline may not necessarily require a suspension component under certain specific circumstances. First, where the Employer has established a formal "warnings only" penalty system.[4] Second, where the Employer has been patience personified and the employee has failed to respond to prior reprimands and counseling.[5] Third, where the employee has engaged in malum in se types of misconduct.[6]

In this particular instance, it is this Arbitrator's opinion that the present matter does not fall within the exception categories enumerated above and that progressive discipline principles were indeed violated. The Employer should be commended for the attempted counseling interventions; they do not serve as a substitute for formal corrective actions. The record indicates that Mohr and Pence had a number of conversations with the Grievant. Nothing in the record, however, indicates that these counseling sessions were bolstered by specific types of formal disciplinary warnings, which would have placed the Grievant on notice that continued misconduct would result in more severe corrective measures. This factor is of significant import based upon the progressive discipline language mutually agreed to by the Parties in Article 24.02. This defect is further exacerbated by the penalties promulgated by the Employer and documented in the Standards of Employee Conduct (Joint Exhibit 4). All of the offenses that the Grievant was charged with reflect a progressive discipline philosophy. Each offense, more specifically, has a range of potential disciplinary penalties.

This Arbitrator obviously does not condone the actions engaged in by the Grievant. The above procedural defect, moreover, does not eliminate the possibility of a severe disciplinary reprimand. For a number of reasons, it is this Arbitrator's judgment that an extensive conditional suspension is indeed proper and warranted. First, by engaging in intentional selective perception activities the Grievant's credibility is questioned by this Arbitrator and is viewed as an extremely aggravating circumstance. The Grievant's case would have been better served if he frankly admitted to the degree of his involvement. Second, the activities engaged in by the Grievant were quite serious and involved behaviors which were excessive. The Grievant not only intimated McNeil on more than one occasion, but did everything in his power to provoke a fight. But for McNeil's tolerance a riot could have easily been precipitated. Such an unfortunate outcome could have resulted in many injuries and destruction of the facility. Third, the Employer attempted to correct the Grievant's personal stress related problems by referring him to an Employee Assistance Program. Regardless of the justifications provided by the Grievant, he failed to take advantage of this corrective opportunity. His eventual participation in the Scioto Paint Valley Mental Health Center Program (Union Exhibit 3) is viewed as a last ditch deceptive tactic engaged in a few days prior to the initial disciplinary interview. One has to wonder why the Grievant failed to initially participate in a program recommended by the Employer, and yet, saw the light a few days prior to the meeting. This question begs an answer and is obviously self-explanatory.

AWARD

The grievance is upheld in part and denied in part. The Grievant is conditionally reinstated to his prior position with no back pay and loss of seniority. The Union and Employer are directed to formulate a last chance agreement which includes the following conditions. The Grievant should be

placed on notice that any further similar misconduct will result in summary dismissal. Also, the Grievant will enroll in an Employee Assistance Program to deal with his stress related problems. The conditions of the Grievant's participation, and any and all monitoring requirements, will be established by the Employer and will be specified as terms of the above mentioned agreement. Any violations of these terms will also result in summary dismissal.

David M. Pincus
Arbitrator

June 14, 1989

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[1] Ingalls Shipbuilding Corp., 39 LA 419 (Hebert, 1962).

[2] Babcock and Wilcox Co., 41 LA 862 (Dworkin, 1963).

[3] Rexall Drug Co., 65 LA 1101 (Cohen, 1975).

[4] General Electric Co., 78 LA 578 (Schor, 1980).

[5] Elizabeth Horton Memorial Hospital, 74-2 ARB par. 8588 (Sandler; 1974); American Cyanamid Co., 68-2 Arb par. 8674 (Stouffer, 1968).

[6] Harry M. Stevens, Inc., 51 LA 258 (Turkus, 1968); Inland Steel Products Co., 47 LA 966 (Gilden, 1966); Grier Reproducer Corp., 47 LA 966 (Cahn, 1966).