

ARBITRATION DECISION NO.:

223

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction
Ross Correctional Institution

DATE OF ARBITRATION:

December 8, 1989

DATE OF DECISION:

January 9, 1990

GRIEVANT:

James Warnock

OCB GRIEVANCE NO.:

29-23-(88-10-03)-0049-01-03

ARBITRATOR:

Hyman Cohen

FOR THE UNION:

Don Sargent

FOR THE EMPLOYER:

John Tornes

KEY WORDS:

Standards of Employee
Conduct
Suspension
Just Cause
Escape

ARTICLES:

Article 24-Discipline

FACTS:

The grievant, a Correction Officer 2 at the Ross Correctional Institution, faced an escape attempt. An inmate had managed to smuggle a .25 caliber pistol into the institution in the back of a television set. Using this weapon, the inmate took an officer hostage, stole the uniform off another

officer, and using the uniform he disguised himself as an injured officer. The inmate proceeded to one of the perimeter buildings with the hostage officer. The hostage officer radioed ahead that he was accompanying a wounded officer outside of the facility. The inmate and officer entered the perimeter building. The gun was not detected because the metal detector was not in operation, and they then encountered another officer. This officer was unable to take action against the inmate and all three of them exited the perimeter building, where they encountered the grievant. The grievant had observed the entry of the disguised inmate and hostage officer into the perimeter building, however the grievant had not been alarmed by the event as the inmate's disguise proved effective. The grievant was operating a Perimeter Vehicle that day and was therefore the last guard the inmate had to face in order to complete his escape from the institution. During the grievant's encounter with the inmate one of the officers was being held at gunpoint. The inmate ordered the grievant to give him his gun and to drive himself and the officer being held at gunpoint to a nearby hotel. The grievant complied with both demands. The state suspended the grievant from work without pay for 10 days for violating Rules 6c, 26, and 36 of the Standards of Employee Conduct.

EMPLOYER'S POSITION:

The grievant's acquiescence to the escaping inmate's demands amounts to a failure of responsibility as the last line of defense to make an attempt to stop the escape of an inmate. Further, the grievant did not actively intervene to stop the escape. The state contends that the grievant testified to clearly observing "an officer who did not look like an officer" accompanying one of the officers in the perimeter building, yet this caused him no alarm. Further, he did not move his vehicle, radio for assistance, or draw his weapon. Lastly, the grievant gave up his weapon without visually confirming that the inmate had a gun (the inmate had his gun hand enveloped in a towel).

The employer based its argument upon a transcript of an investigatory interview with the grievant. The interview took place 2 1/2 months after the incident. The grievant testified that the interview was stressful to him due to the alleged fact that the investigators "twisted" his statements.

UNION'S POSITION:

The grievant maintained that it was not until the inmate had exited the perimeter building with the two hostage officers that he became aware that an escape was underway. This was due to the fact that the grievant could not see very clearly inside the perimeter building. After the inmate and officers exited the building he was unable to take any action - the three of them were rapidly upon him, one of the officers told him that the inmate was armed, and the inmate's statements made it clear that he would use his pistol on one of the hostage officers if necessary. The grievant claims that on the date of the episode the escaping inmate "looked like an officer and not an inmate."

ARBITRATOR'S OPINION:

The state failed to satisfy its burden of proving by clear and convincing evidence that the grievant violated Rules 6c, 26, and 36 of the Employee Standards of Conduct.

The employer failed to present one of the hostage officer's testimony. This would have provided critical corroboration of the other hostage officer's testimony which was at odds with that of the grievant. The employer also failed in presenting in the escape. It allowed the pistol to enter the institution and the metal detector in the peripheral building was not being operated.

Two supervisory officers had recommended, on the basis of the investigatory interview with the grievant, that the grievant should not be disciplined.

The actions of all the other officers during the incident did nothing to arouse suspicion that an escape was taking place.

AWARD:

The grievance is sustained.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

**THE STATE OF OHIO,
ROSS CORRECTIONAL INSTITUTION**

-and-

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, AFSCME,
AFL-CIO**

**ARBITRATOR'S
OPINION**

Grievant:

James Warnock
29-23-(881003)-0049-01-03

FOR THE STATE:

JOHN TORNES
Ohio Department of Administrative
Services - Office of Collective Bargaining
65 East State Street
Columbus, Ohio 43215

FOR THE UNION:

DON SARGENT
Staff Representative
Ohio Civil Service Employees
Association, Local 11
8 Triangle Park
Cincinnati, Ohio 45246

DATES OF THE HEARING:

December 8, 1989

PLACE OF THE HEARING:

Ohio Department of Administrative Services
Office of Collective Bargaining
Columbus, Ohio

ARBITRATOR:

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295

The hearing was held on December 8, 1989, at Ohio Department of Administrative Services, Office of Collective Bargaining, Columbus Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:00 a.m. and was concluded at 6:40 p.m.

On or about October 3, 1988, James Warnock filed a grievance with **THE STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION, ROSS CORRECTIONAL INSTITUTION**, the "State", in which he protested a disciplinary suspension of ten (10) days. The denial of the grievance was appealed to the various steps of the grievance procedure contained in the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO**, the "Union". Since the parties were unable to resolve their differences, the grievance was carried to arbitration.

FACTUAL DISCUSSION

The Grievant is a Correction Officer 2 who is employed at the Ross Correctional Institution located in Chillicothe, Ohio. He was employed at the correctional facility for roughly thirteen (13) months.

The events giving rise to the grievance occurred on May 22, 1986 when the Grievant was assigned to "Perimeter Vehicle I". In the early evening he parked the vehicle in front of Building A where he gave Sgt. Donald Malone a "jug" which was to be filled with "ice water". While the Grievant waited for Sgt. Malone to return with the "jug", Michael Day, an inmate had seized Lt. Gregory McCorkle as a hostage, with the purpose of escaping from the facility.

Inmate Day had been assigned to the office of Lt. McCorkle in D-2 Building as a clerk. At approximately 6:50 pm., and while it was still daylight, Inmate Day passed a note to Lt. McCorkle which indicated that he was in possession of a 25 caliber pistol. The note also indicated that if he was not out of the facility in twenty (20) minutes, an accomplice who was at McCorkle's residence had been instructed to kill his family. He showed Lt. McCorkle the weapon and instructed him to radio Correction Officer Delaney and have him report to the D-2 Building. When Delaney reported to Lt. McCorkle's office, "under gunpoint" he was ordered to remove his uniform, after which Inmate Day handcuffed him and placed him in a closet. Inmate Day put the uniform on. At gunpoint, Lt.

McCorkle was instructed to radio control center that an officer was injured, and that he was "coming up front with the injured officer" and was escorting him from the institution. Both Inmate Day and Lt. McCorkle left D-2 Building and got into a golf cart which supervisors use to travel around the compound. Inmate Day had a towel wrapped around his hand in which he held the 25 caliber pistol directed at Lt. McCorkle's side. The golf cart was driven to the door of the inside entrance of A-Building. In front of the entrance of A Building there is a "sallyport" which is a holding area between gates. Inmate Day told Lt. McCorkle to radio the control center and communicate that he was escorting an injured officer from the facility and that he wanted the door of A-Building opened. The Control Center Officer complied with Lt. McCorkle's request and the door opened. Both Inmate Day and Lt. McCorkle then entered into A-Building which is a large waiting area used for processing inmates. In the waiting area, they encountered Sgt. Malone who was getting ice water for the Grievant. I turn to Sgt. Malone's testimony which he provided at the hearing.

SGT. MALONE'S TESTIMONY

When Sgt. Malone went outside of A-Building to pick up the Grievant's jug he heard on his radio that Lt. McCorkle was proceeding to A-Building with an injured officer. Sgt. Malone went into A-Building because he wanted to see the officer who was injured. He was approximately ten (10) feet from the inside door of A-Building when he recognized Inmate Day. Sgt. Malone asked "what was going on?" and Lt. McCorkle said that "he has a weapon". According to Sgt. Malone, Inmate Day said, "C'mon Malone, you're in it now". His arm, according to Sgt. Malone was wrapped in a towel. Although Sgt. Malone did not see the weapon, he "took it for granted that he [Inmate Day] had a weapon". At the time, Sgt. Malone was in possession of a PR-24 (a "nightstick") and a radio. Inmate Day motioned Sgt. Malone towards the front door.

Officer Duty opened the door of A-Building which led outside of the compound where the Grievant was waiting for Sgt. Malone to return with a jug of ice water. According to Sgt. Malone, the Grievant was in the vehicle and recognized Inmate Day when he came out of the door of A-Building. Sgt. Malone said that the Grievant repeated "Michael Day" several times. While repeating "Michael Day", Sgt. Malone said that the Grievant "froze". Sgt. Malone said, "Jim, let's go, he has a weapon". Inmate Day was directly behind Lt. McCorkle according to Sgt. Malone. As they came out the front door, Inmate Day and Lt. McCorkle walked by Sgt. Malone. By Sgt. Malone's account, he [Sgt. Malone] was "moving away to the right and away from the building". As they walked by him, Sgt. Malone said that he thought that he had a chance to pull his PR-24. As he was about to reach for the PR-24, Inmate Day said: "Do not do it or else I'll kill them ". Sgt. Malone estimated that approximately three (3) to five (5) seconds elapsed between the moment Inmate Day came out of the A-Building, and when he was at the Perimeter Vehicle.

Sgt. Malone went on to state that the Grievant "was at the driver's side. He indicated that the Grievant entered the vehicle and Inmate Day and Lt. McCorkle went around the vehicle which was parked with its "front end facing A -Building".

There is a loaded shotgun located in the perimeter vehicle which is fastened by a metal strap to the floor next to the driver's seat. The strap is elevated by pushing a bottom thus unfastening the shotgun. Sgt. Malone indicated that "somebody mentioned get in the vehicle" but he (Sgt. Malone) continued going to the right and did not enter the vehicle.

On cross-examination Sgt. Malone said that the perimeter vehicle was approximately fifteen (15) feet away from the A-Building door. Sgt. Malone did not know if the engine of the perimeter vehicle was running when he left the A-Building with Inmate Day and Lt. McCorkle. If the engine of the vehicle is not running, the shotgun cannot be released from its metal strap.

THE GRIEVANT'S TESTIMONY

The Grievant said that he parked the perimeter vehicle approximately six (6) to eight (8) feet from the front door of A-Building. He then "chatted" with Sgt. Malone for about "six (6) to eight (8) seconds" after which Sgt. Malone took the water jug inside the facility so that it could be filled. Meanwhile, the Grievant heard on the radio that Lt. McCorkle "was bringing a hurt officer out". According to the Grievant, approximately thirty (30) seconds later, Lt. McCorkle and the "hurt officer" walked rapidly through A-Building. Through the large windows of the waiting room of A-Building, the Grievant said that he could see the "injured officer" had his hat and head cocked down and a towel over his arm. When they came out of A-Building, the Grievant, who was sitting in the vehicle, indicated that he could not see the "injured officer". After exiting the building they came directly to the vehicle with the "injured officer" walking behind Lt. McCorkle. As Lt. McCorkle approached the vehicle, according to the Grievant, he said to him "Jim -- do what he says, at which time, the "injured officer" walking behind Lt. McCorkle "looked" to the side of Lt. McCorkle. At that instant, the Grievant recognized Inmate Day and said, "Michael Day". After Lt. McCorkle said that "he had a weapon", the Grievant who had recognized Inmate Day, said, "I see that * *." According to the Grievant, Inmate Day said to him [the Grievant]: "I do not want to kill you but I've nothing to lose-I've committed myself". The Grievant said, "I understand". He indicated that it took McCorkle and Inmate Day approximately three (3) to five (5) seconds to walk from the door of A-Building to the vehicle.

With the Grievant sitting in the vehicle, he indicated that Inmate Day pointed the gun within twelve (12) inches of his face (at the hearing the Grievant demonstrated the speed with which Inmate Day and Lt. McCorkle walked from the door of A-Building to the vehicle and how Inmate Day quickly approached the vehicle and pointed the gun at his face) and said, "give me your weapon". The Grievant got out of the vehicle and removed his holster and gun belt which he gave to Inmate Day while his gun was pointed at him. Meanwhile, Sgt. Malone was standing to the rear of Lt. McCorkle and Inmate Day. The Grievant did not see what Sgt. Malone did, but according to the Grievant, apparently he "made a move" because Inmate Day said to him, "Don't do it Malone or else I will kill him". The Grievant did not elaborate on the identity of "him".

After the Grievant handed Inmate Day his weapon, Inmate Day said that he wanted to go to Holiday Inn in Chillicothe. He told the Grievant that he "better know where it is at". Lt. McCorkle, according to the Grievant said that "I know where it is at--I'll show you". Inmate Day ordered the Grievant to get back into the vehicle and told the Grievant "you make any smart moves and I'll kill McCorkle". They proceeded to walk around the rear of the vehicle.

Both Lt. McCorkle and Inmate Day entered the vehicle from the passenger side. The Grievant drove the vehicle on Route 104 where Inmate Day threw the Grievant's weapon out of the vehicle and into a corn field.

At the Holiday Inn, Inmate Day told Lt. McCorkle to handcuff the Grievant to the steering wheel. After Lt. McCorkle did so, they left, and entered the hotel. Afterwards, Lt. McCorkle came out of the Hotel and unlocked the handcuffs that were on the Grievant. The State Patrol was immediately notified, and the area was then "secured".

The Grievant indicated that from his vehicle, he did not see "clearly" into A-Building. There is a four (4) or five (5) foot overhang" which creates a shadow over the windows of the waiting room of A-Building. He added that the windows are tinted.

On cross-examination, the Grievant testified that while walking behind Lt. McCorkle, after he left A-Building, Inmate Day's head was tilted to the side. Before Inmate Day "turned around" behind Lt. McCorkle when they approached the vehicle, the Grievant was able to see only the towel over Inmate Day's arm and the "hurt officer". The Grievant recalled saying "Michael Day" several times

at the moment that he recognized him.

DISCUSSION

The State suspended the Grievant from work without pay for ten (10) days because he violated Rules 6c, 26 and 36 of the Standards of Employee Conduct. These Rules provide as follows:

Rule 6c

"6. Insubordination - **

c. Failure to follow post orders, administrative regulations and/or written policies and procedures."

Rule 26

"26. Loss of control of any instrument that could result in a breach of security and/or jeopardize the safety of others, e.g., to include, but not limited to class "A" tools, keys, communication devices, etc."

Rule 36

"36. Any act or commission not otherwise set forth herein which constitutes a threat to the security of the institution, its staff or inmates"

In the State's Notice of Disciplinary Action" dated September 26, 1988, the State set forth the basis for its conclusion that the Grievant violated Rules 6c, 26 and 36:

"* * You failed in your responsibility as the last line of defense to make an attempt to stop the escape of Inmate Day. You made no attempt to move the vehicle, radio for assistance or draw or weapon.

Further you obeyed the orders of an inmate and gave up your weapons without visually confirming the inmate had a gun. You also gave up the escape vehicle on the orders of an inmate and made no attempt to verbally challenge Inmate Day's orders.* **"

The State contends that the Grievant clearly observed Lt. McCorkle with "an officer who did not look like an officer" at the metal detector located in the waiting room of A-Building. In the State's view, this should have caused alarm and concern along with cautious defensive action by the Grievant who was located outside of the building. The Grievant indicated at the hearing that he did not see clearly into A-Building. The State's contention is based upon an investigatory interview of the Grievant which was conducted by Lt. M. E. Payne and Major R. I. Pence on July 27, 1988. The written statement of the investigatory interview is as follows:

"I heard Lt. McCorkle on the radio say 'Open the door fast, I have an officer hurt'. Sgt. Malone was getting me some ice water. Malone went inside A-Building. I was at the vehicle when Lt. McCorkle and an officer, who didn't look like an officer, walking past the metal detector in A-Building. As Door [sic] I opened, I saw Lt. McCorkle and an officer with his head down and a towel around his arm. I sat in front of A-Building to see who the injured officer was. There was only about 5 to 10 seconds between the time I saw Lt. McCorkle at the metal detector and then Lt. McCorkle was out

of A-Building and came to my vehicle. I was seated in my vehicle when Lt. McCorkle got to my vehicle. At this time, I recognized Inmate Day. Lt. McCorkle said, 'Get out of the vehicle and give him your weapon. My children are at stake.' I got out of the vehicle, took my holster off and handed it to Day. McCorkle said, 'Do as he says, he has a weapon.' We got into the vehicle and headed down 104. As we left, Day told Sgt. Malone, 'If we hear anything on the radio, I will kill both of them.'

I did not see the weapon Day had until after I had surrendered my weapon. Lt. McCorkle told me that Day had a weapon. Day pointed his weapon at me and ordered me into the vehicle. I did not attempt to stop Day at A-Building because Lt. McCorkle told me Day had a weapon. McCorkle was between me and Day. Day was right behind McCorkle at this time, I felt I was now a hostage. Day stated 'Warnock, I don't want to kill you. I have committed myself, I have nothing to lose.' At this time, I handed Day my weapon".

Major Pence said that he and Lt. Payne took notes in answers to questions directed at the Grievant during the investigatory interview. He did "not take the Grievant's statement down word for word"; he said that "we wrote down as much as we could--we compared answers after the interview". Major Pence confirmed that the Grievant said that he did not see Inmate Day's weapon until he surrendered his weapon; he added that Inmate Day's gun was not pointed at the Grievant until he handed over his gun. Major Pence indicated that on July 27, 1988, he and Lt. Payne "read back" the notes which they wrote down. The Grievant was then asked, in effect, if what they read to him is what he stated, and according to Major Pence he said, "yes".

The Grievant acknowledged that the statements contained in the written investigatory interview were the statements that he furnished to Major Pence and Lt. Payne on July 27, 1988. He indicated that on July 27, when he was subjected to the investigatory interview which was two and one-half (2 1/2) months after the episode, the "injured officer" behind Lt. McCorkle, did not look like an officer. However, on May 22, 1988, the date of the episode, he "looked for an officer and not an inmate".

The Grievant testified that on July 27, 1988 when the interview took place, he was "upset"; he told Major Pence and Lt. Payne that he would not answer any more questions because they "twisted" his statements. The Grievant indicated that he was unable to see "clearly" into the waiting room of A Building because of the "overhang" over the windows, which are "tinted".

INVESTIGATORY INTERVIEW OF THE GRIEVANT

The State focuses on the discrepancies between the Grievant's testimony at the hearing and his previous statements provided during the investigatory interview. I turn first to consider the Grievant's statement on July 27 that the "injured officer did not look like an officer". I have concluded that the Grievant provided a reasonable explanation for his statement. On May 22, the date of the incident, the Grievant was waiting for Sgt. Malone to bring him a jug of ice water; he was also looking for a "hurt officer" to be with Lt. McCorkle. On July 27, 1987, he indicated that the officer behind Lt. McCorkle "did not look like an officer". I find the Grievant's statements consistent with human experience and common sense. During the May 22 episode, the Grievant said that he feared for his life. I believe him. After the event occurred, I find it unreasonable to believe that he could blot it out of his memory. As a result, especially given the nature of this frightening experience, the Grievant's recollection is influenced by the events that occurred, which is different than his perceptions at the moment that the event takes place. Thus, it is said that "in retrospect, we are so much wiser". In reconstructing a past experience, it is reasonable for the Grievant to be influenced by the experience. After an experience has had a serious impact on us, we go through

the agonizing reappraisal of the events filled with self guilt on what "could have," "would have", or "should have happened." This is done because we have experienced the event and are so much wiser because of it. Thus, the Grievant said on July 27, that the officer behind Lt. McCorkle did not "look like an officer". However, I believe the Grievant's version of the "injured officer" that he saw on May 22 before he recognized him as he approached the vehicle. The "injured officer" walking behind Lt. McCorkle had an officer's hat on his head and he cocked his head downwards and to the side with his chin close to or resting on his chest. A towel was draped over his arm and the Grievant did not see Inmate Day until he moved his face to the side of Lt. McCorkle's head after Lt. McCorkle told the Grievant that he "has a gun--do what he says".

Furthermore, I have concluded that in light of the events of May 22, the Grievant had no reason to believe at the time, that the "injured officer" was anyone else other than an officer. He heard over the radio that Lt. McCorkle was "bringing a hurt officer out" of the facility; the door of Building A was opened by Officer Duty, the hurt officer was dressed in an officer's uniform, he walked behind Lt. McCorkle and the officer's injury was evidenced by the towel over his arm.

The State also relies on his statement during the investigatory interview that he did not see Inmate Day's weapon until he (the Grievant) had surrendered his weapon. The Grievant testified that he gave Inmate Day his weapon after he pointed the weapon at his face and directed him to do so.

Although the Grievant's testimony is at variance with his investigatory interview, I am willing to assume the truth of his admission during the investigatory interview. In doing so, I cannot ignore the testimony of Sgt. Malone and the Grievant as to the statements preceding the Grievant's surrender of his weapon to Inmate Day. Sgt. Malone said that he told the Grievant that Inmate Day had a weapon. He was told by Lt. McCorkle that he had a weapon. Moreover, Sgt. Malone told the Grievant "Jim, let's go, he has a weapon". The Grievant said that Lt. McCorkle told him that Inmate Day had a weapon and that he was to "do as he says".

I find the Grievant's act of giving his weapon to Inmate Day reasonable and not in violation of Rules 6c, 26 and 36. The same considerations that led Lt. McCorkle and Sgt. Malone to submit to Inmate Day are the same considerations that caused the Grievant to surrender his weapon. The scene which the Grievant unexpectedly confronted consisted of Lt. McCorkle being held hostage and walking hurriedly in front of Inmate Day while Inmate Day had a gun aimed at his back. Sgt. Malone complied with Inmate Day's order to walk with them outside of Building A. Sgt. Malone acknowledged that he did not see Inmate Day's weapon. He said, however, that he "took it for granted that he did have a weapon". As a result, he reached for his PR-24 but was told by Inmate Day "do not do it or else I'll kill em".

The State disciplined the Grievant because, among other things, he surrendered his weapon without seeing Inmate Day's weapon. I find that the Grievant acted in a reasonable manner. Either Sgt. Malone and/or Lt. McCorkle told the Grievant that Inmate Day had a weapon and he was to "do as he says". It is significant that on the basis of the investigatory interview, Major Pence and Lt. Payne concluded that Lt. McCorkle's statement to the Grievant "was factual enough to [the Grievant] to believe the situation was beyond his stopping * *." As a result, he and Lt. Payne recommended "no disciplinary action".

Except for the correction officer who is assigned to the perimeter vehicle, the officers were unarmed. Moreover, the assignment of the Grievant to the perimeter vehicle was the "last line of defense". It is true that the Grievant was an excellent marksman and skillful with firearms. However, the scenario suggested by the State is unreasonable. In the State's view, in lieu of disarming himself, the Grievant should have shot it out with Inmate Day or refused his order to disarm himself. It seems to be irrelevant that Inmate Day, who was desperate, and, in possession of a gun which, it is reasonable to assume is loaded, might have seriously injured or killed Lt.

McCorkle, Malone and the Grievant. In the State's scenario, despite the fact that Lt. McCorkle was in front of Inmate Day and despite the Grievant sitting in the vehicle and stunned by the rapid moving events, the Grievant, with deadly and unerring accuracy could have shot Inmate Day. In the State's scenario, there is no margin for error. There is no mention of deadly force being used by Inmate Day, who is desperate and given his actions in escaping from the correctional facility. As he stated, he had committed himself -- in other words, since he had gone so far, his actions were without any limitation.

It is significant that Lt. McCorkle was not a witness at the hearing. His actions throughout the escape were reasonable. His motivation for submitting to the control of Inmate Day, whether to save his family and/or himself cannot be doubted. Among the Grievant's Perimeter Security Patrol Post Orders is the provision that "orders received from a hostage regardless of rank are not valid when given under duress". The statements by Sgt. Malone and/or Lt. McCorkle, were not orders. They were in Major Pence's terms "factual enough", or factual statements, in light of the circumstances. As Major Pence and Lt. Payne concluded, by the time the Grievant realized that an escape was taking place, the "situation was beyond his stopping".

POST ORDERS

The Post Orders for Perimeter Security Patrol in relevant part, are as follows:

"If an inmate group should approach your location with an Officer or other person as hostage, it must be remembered that your first consideration is the security of the institution and prevention of escapes.

* * *

It is to be noted that the perimeter vehicle post is the last line of defense in preventing escapes and the officer on this post should be ready to take any steps necessary including deadly force to maintain the security of the institution.* **"

In light of the findings of fact, I have concluded that before the Grievant was "ready to take any steps including deadly force to maintain the security of the institution", the "situation" in Major Pence's terms, "was beyond his stopping" -- in other words, before he was able to "take any steps", the Grievant, like Lt. McCorkle and to an extent Sgt. Malone, was hostage to a deadly weapon held by a dangerous and desperate inmate.

The Post Orders do not require the use of deadly force no matter what the circumstances exist at the time. Lt. McCorkle was a hostage when he left Building A and was walking in front of Inmate Day. When Sgt. Malone walked out of Building A, he was also a hostage. When the Grievant recognized Inmate Day I believe it was too late for him "to take any steps necessary including deadly force * *." To do so, in light of the circumstances would have been unreasonable. To paraphrase a noted jurist, "bravery is not required of a police officer in the face of an uplifted knife"; nor, it might be added, in the face of a loaded weapon.

SGT. MALONE

In several aspects, the testimony of the Grievant was at variance with the testimony of Sgt. Malone. In this connection, it should be underscored that Lt. McCorkle was not present at the hearing. He was a vital participant in the events that took place on May 22, 1987. He was not only

a hostage but his location outside of Building A and in front of both Inmate Day and the Grievant is crucial in resolving several issues which have emerged from the variations in testimony between Sgt. Malone and the Grievant. It was incumbent upon the State to produce Lt. McCorkle as a witness at the hearing. By failing to do so, I am inclined to give the Grievant's testimony great weight.

Sgt. Malone indicated that "from the [Grievant's] position, he could see what was going on in the A Building". However, based upon Sgt. Malone's testimony and his investigatory interview, the Grievant's "position" during the critical events of May 22 are uncertain. In his investigatory interview, a few weeks after May 22, 1988, Sgt. Malone said that the Grievant "was in his vehicle or at his vehicle when we left the outside of A Building door * *". At the hearing Sgt. Malone said that the Grievant was in his vehicle when he recognized Inmate Day as he left A Building. He added that he "did not know when the Grievant got out of his vehicle". Sgt. Malone then indicated that when he left A Building, the Grievant was "positioning his shirt and pants". Sgt. Malone also stated that the Grievant entered his vehicle as Lt. McCorkle and Inmate Day went around the rear end of the vehicle. Based upon the evidence in the record, I have concluded that, as the Grievant testified, he was sitting in the driver's seat of the vehicle during the events in question. Moreover, I cannot give any credence to Sgt. Malone's testimony that from [the Grievant's] position, he could see what was going on in "A" Building. Sgt. Malone could not possibly know what the Grievant was looking at "from his position", while he [Sgt. Malone] was located outside of A Building.

Sgt. Malone testified that Inmate Day came out of A - Building, the Grievant "looked at him and said "Michael Day" several times. However, I am not persuaded that the Grievant recognized Inmate Day at the moment he left A - Building. In his investigatory interview, Sgt. Malone said that Lt. McCorkle "was almost completely in front of him [Inmate Day]. I mean they were walking in the same footprints. He was directly in front of him". Since Inmate Day was behind Lt. McCorkle as they quickly approached the vehicle, I am inclined to believe the Grievant who said that he was unable to identify the "hurt officer" until the "hurt officer" turned to the side of Lt. McCorkle who was in front of him. Before Inmate Day turned to the side of Lt. McCorkle, I have concluded that the Grievant was unable to identify the officer but assumed that the person behind Lt. McCorkle was the "hurt officer" that Lt. McCorkle referred to in his radio message. I believe that the Grievant recognized Inmate Day immediately after Lt. McCorkle cautioned him to "do as he [Inmate Day] says, because he has a weapon". At that moment, the Grievant "froze" or was stunned and repeated Inmate Day's name several times. He did so because the Grievant indicated that it was "unbelievable" that Inmate Day "was outside" the facility. By this time, it was too late for the Grievant to interfere with the escape. As Major Pence and Lt. Payne noted in their August 15, 1988 memorandum to Superintendent Mohr, the "situation was beyond his stopping".

Sgt. Malone indicated that he "was hoping that [the Grievant] would halt or freeze the situation -- or slow it down". He then added that "if he was aware of what was going on", the Grievant had the time and opportunity to "halt or slow it down". At some point in his testimony, Sgt. Malone said that he "was afraid for my life.", during the events of May 22, 1986. I have inferred that some of the same considerations which prompted Sgt. Malone not to use his PR-24, and Lt. McCorkle not to resist Inmate Day, are the same considerations which influenced the Grievant to surrender his weapon.

MAJOR PENCE

Major Pence indicated that the Grievant "could have" taken the following actions during the incident in question; a) thrown away the keys of the vehicle, b) backup the vehicle while Inmate Day and Lt. McCorkle walked in the rear of the vehicle; c) swung open the door of the vehicle and hit Inmate Day; or d) "bolted away" with the vehicle.

What the Grievant "could have" done in retrospect, is irrelevant; what he did or failed to do at the time the events took place is relevant. Based upon the evidentiary record, I have concluded that the Grievant acted in a reasonable manner. Indeed, Major Pence and Lt. Payne shared this view inasmuch as they recommended that no discipline should be imposed against the Grievant.

It is of great weight that the investigatory interview of the Grievant was relied upon by Major Pence and Lt. Payne to conclude that Lt. McCorkle's admonition to the Grievant to "do as he says" because "he [Inmate Day] has a weapon, is factual enough" for the Grievant "to believe the situation beyond his stopping". They added that the Grievant "was under duress and was now a hostage" and therefore recommended "no disciplinary action". The recommendation of Lt. Payne and Major Pence is borne out by the evidentiary record.

TRAINING

The Grievant completed training as a correctional officer. Included in his training is a provision authorizing the use of force including deadly force in "preventing or halting an escape being committed". The Grievant was also trained in "hostage situations". As part of the written lesson plan, he was instructed that "at no time should an inmate wear any portion" of a correctional officer's uniform. It should be pointed out that before he was able to recognize Inmate Day it was too late--he was directly under gunpoint and a hostage.

From reviewing the instructional materials presented to the Grievant as part of his training there is a reference to a "gut feeling" which "is activated because the correctional employee observes or hears something out of the ordinary in their work assignment". I have concluded that the three (3) to five (5) seconds, which it took for Inmate Day and Lt. McCorkle to proceed from the door of A Building to the vehicle with Inmate Day walking behind Lt. McCorkle was too fast for the Grievant to "reasonably suspect" or have a "gut feeling" that the events of May 22 constituted an escape of an inmate from the facility.

The instructional materials also advise throwing away keys, destroying or breaking them. As I have indicated, when the Grievant discovered what was going on, it was too late for him to take these steps. Thus, to sum up, although the Grievant was trained on the steps to be taken in the event of an escape by an inmate who takes a hostage, the circumstances of an actual escape with a hostage dictate the exercise of a judgment. In light of the circumstances I cannot conclude that the Grievant's judgment was improper.

CONCLUSION

The State indicated that the Grievant could have stopped or prevented the escape by Inmate Day. However, he took no action; he handed his weapon to Inmate Day; he had adequate time to draw his weapon; and in light of his training he was able to fire at three (3) targets within four (4) seconds.

The State also indicates that when an officer is assigned to perimeter security patrol, it is the last line of defense. Furthermore, the responsibility of the Grievant is to maintain the security of the correctional facility. As Superintendent Mohr stated, every successful escape breeds other successful escapes. An escape, by an inmate Mohr pointed out, puts the outside community at risk.

Broad abstract goals on the objectives and goals of correctional institutions and the duties of correctional officers do not resolve the factual issues which were raised in this case. The State is required to satisfy its burden of proving by clear and convincing evidence that the Grievant violated Rules 6c, 26 and 36 of the Employee Standards of Conduct; on May 22, 1988. In arriving at this conclusion, I have given great weight to the following: a) the failure of the State to present Lt.

McCorkle as a witness to testify at the hearing (in fact, there was no evidence presented by the State that Lt. McCorkle was subjected to an investigatory interview or submitted a written statement on the events in question). b) The gun which Inmate Day used to make possible his escape entered the institution by being concealed in a television set. The fluoroscope machine which is used to detect weapons was inoperative prior to the escape of Inmate Day. Even if the television set was too large for the fluoroscope machine, the State did not inspect the rear of the television set where the weapon was concealed. c) The metal detector used in the waiting room of A Building was not operating on May 22, 1988. d) The recommendation by Lt. Payne and Major Pence that the Grievant should not be disciplined which was based upon the investigatory interview of the Grievant, which to a great extent was relied upon by the State to discipline the Grievant. e) The actions of the Staff personnel on May 22, 1988, including, a) Lt. McCorkle's radio message that he was escorting an injured officer outside of the facility; b) Officer Delaney whose uniform was worn by Inmate Day; c) The opening of a door to A Building by Officer Hall; d) The opening of the outside door by Officer Duty; e) The testimony of Sgt. Malone who was not in a position to determine what the Grievant saw in the waiting room and whether the Grievant was able to see Inmate Day who walked behind Lt. McCorkle when they were outside of A Building.

There was testimony by Superintendent Mohr that the radio message by Lt. McCorkle that he was escorting an injured officer outside of the facility, should have caused suspicion on the part of the Grievant. It is customary that injured officers are first taken to health services within the facility. This may have been an "unusual procedure", but apparently no other officers were aroused to suspect an escape. In light of the events which preceded the Grievant's encounter with Inmate Day at the vehicle I have concluded that the Grievant did not have a reasonable basis to suspect that something improper was going on.

The factual issues are close and thus not susceptible of an easy resolution. Since this is a case involving discipline, the State is required to satisfy the burden of proving just cause for its discipline of the Grievant on the basis of clear and convincing evidence. In my judgment, the State has not met the test.

Based upon the evidentiary record, I have concluded that the Grievant was facing the barrel of a loaded gun, and thus was a hostage before he could have taken any action to prevent, slow down or interrupt the escape from the Ross Correctional Institution on May 22, 1988. Thus, the Grievant did not violate Rules 6c, 26 and 36. The grievance is sustained.

AWARD

In light of the aforementioned considerations, the grievance is sustained.

Dated: January 9, 1990
Cuyahoga County
Cleveland, Ohio

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