

ARBITRATION DECISION NO.:

229

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction
Northeast Pre-Release Center

DATE OF ARBITRATION:

December 20, 1989

DATE OF DECISION:

February 8, 1990

GRIEVANT:

Kenneth Bills

OCB GRIEVANCE NO.:

27-12-(89-04-08)-0020-01-03

ARBITRATOR:

Hyman Cohen

FOR THE UNION:

Steven Lieber

FOR THE EMPLOYER:

Thomas E. Durkee
Jim Miller

KEY WORDS:

Suspension
Improper Job Performance
Just Cause

ARTICLES:

Article 24-Discipline

FACTS:

The grievant is a Correction Officer II employed by the Ohio Department of Rehabilitation and Corrections. In the course of investigating an escape attempt the grievant was ordered to look for holes in the fence and conduct a "perimeter check". The grievant reported nothing unusual. State issued pants and a stocking cap were found caught in the fence by others. The grievant was

disciplined for conducting an improper perimeter check, thereby violating work rule 34, actions that could harm employees or the general public and rule 36, an act that is a threat to security of the institution. He received a fifteen day suspension.

EMPLOYER'S POSITION:

The grievant, aware of a missing inmate, should have been vigilant to anything suspicious during his perimeter check. The pants and stocking cap found on the fence by others at a distance should have been identified by the grievant. Therefore, the grievant improperly conducted a perimeter check, violating work rules 34 and 36, actions that could harm employees or the general public; acts that would be a threat to security.

UNION'S POSITION:

The grievant conducted a proper perimeter check in the course of investigating a possible escape. Other employees who discovered pants and a stocking cap on the fence arrived prior to the grievant. He was unable to identify some items found outside the fence and blood spots in the snow as he is color blind. Perimeter checks are not in the grievant's post orders and he has no formal training in conducting them. Disparate treatment was imposed when the grievant is compared to similarly situated employees.

ARBITRATOR'S OPINION:

The grievant did not conduct a proper perimeter check and so violated work rule 34, 36, actions that could harm employees or the general public; actions that could harm employees or the general; actions that would be a threat to security. The pants and stocking cap caught in the fence were easily observable and should have been identified by the grievant. The grievant has past experience as a Corrections Officer and is able to conduct a proper perimeter check. There is no disparate treatment as the cited example exhibited mitigating circumstances. There are no mitigating circumstances present in this case.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

**THE STATE OF OHIO, NORTHEAST
PRE-RELEASE CENTER**

-and-

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

**ARBITRATOR'S
OPINION**

Grievant:
Kenneth Bills

FOR THE STATE:
THOMAS E. DURKEE
JIM MILLER
Ohio Department of Rehabilitation
and Correction
1050 Freeway Drive-N
Columbus, Ohio 43081

FOR THE UNION:
STEVEN LIEBER
Staff Representative
Ohio Civil Service Employees Association
Local 11, AFSCME/AFL-CIO
77 N. Miller Road, Suite 204
Fairlawn, Ohio 44313

DATE OF THE HEARING:
December 20, 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 20, 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 10:00 a.m. and was concluded at 5:00 p.m.

On March 14, 1989 the **STATE OF OHIO, DEPARTMENT OF REHABILITATION AND**

CORRECTION, the "**State**", issued a notice of disciplinary action to **KENNETH BILLS**, the "**Grievant**" advising him that he was suspended for fifteen (15) days from the position of Correction Officer II. The notice also advised the Grievant that he was suspended for having violated the Standards of Employee Conduct Rules 34 and 36 which provide as follows:

"Rule 34 - "Other actions that could harm the employee, a fellow employee(s) or a member of the general public." * *

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

The notice of disciplinary action goes on to indicate the following:

"These infractions stem from the events of 1-1-89, during which time you secured the perimeter fence of the Northeast Pre-Release Center when in fact the fence had been breached".

The instant grievance protests the State's disciplinary suspension of the Grievant. The grievance arises out of an agreement between the State and the **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO**, the "**Union**".

Since the parties were unable to resolve the grievance at the various steps of the grievance procedure, the grievance was carried to arbitration.

FACTUAL DISCUSSION

The Grievant was hired by the State on August 8, 1988 and was employed as a Correction Officer II at the Northeast Pre-Release Center, Cleveland, Ohio.

The events giving rise to the instant grievance occurred on January 1, 1989 when Inmate Davis escaped from the Northeast Pre-Release Center. On January 1, 1989 the Grievant was assigned to the Control Center. It is undisputed that on that day, at 7:01 a.m. and 7:15 a.m. two (2) fence alarms went off, both of which were "cleared". In the investigatory interview of the Grievant which was conducted by Mary Beth Aufmuth, Administrative Assistant, on January 13, 1989, the Grievant indicated that he pressed the acknowledged code on the perimeter alarm system when the alarm went off at approximately 7:00 a.m. He then radioed the "roving officer", Correction Officer II T. Williams and informed him that the zone alarm had sounded behind buildings E and F of the Northeast Pre-Release Center. An officer who is assigned to check the perimeter fence is called a "rover" or "roving officer". The Grievant indicated that his "exact words to Correction Officer Williams were as follows: "Base to Unit Nine. Be advised that we have a zone alarm behind E and F Buildings, over". According to the Grievant, Correction Officer Williams replied: "Affirmative, 10-4" which the Grievant explained meant "Message understood". Approximately five (5) minutes thereafter the Grievant indicated that Correction Officer Williams cleared the alarm by stating: "Unit Nine to Base. Be advised that the area behind E and F is clear", to which the Grievant replied: "Base 10-4 clear". When the Grievant replied that "Base 10-4 was clear", he reset the alarm.

In the investigatory interview, the Grievant said that the same fence zone alarm went off again at approximately 7:10 a.m. The Grievant indicated that he pressed the acknowledged code and informed Correction Officer Williams again, by radio that the alarm sounded behind E and F Buildings. He then repeated the same process with Correction Officer Williams. After approximately twenty-five (25) minutes the Grievant said that Correction Officer Williams radioed and cleared E and F zones by indicating that they were "secure". The Grievant then replied, "Base 10-4 cleared" and he reset the alarm.

Shortly after the second alarm sounded, Ms. Robinson, the Food Service Supervisor, telephoned Lt. Paul R. Bond, the Shift Commander, and told him that an Inmate who was assigned to deliver food to the security cells had not returned. The Inmate that Ms. Robinson referred to was Inmate Davis. Lt. Bond contacted Correction Officer Simmons and requested him to look for Inmate Davis in the room to which he was assigned. Correction Officer Simmons indicated to Lt. Bond that he had checked on Inmate Davis previously to see if he was in his room, but he was not there. Lt. Bond asked him to check again and after doing so the Correction Officer told Lt. Bond that Inmate Davis was not in his room. Lt. Bond then ordered all of the inmates back to their housing units so that an accurate count could be taken of the inmates. After the count was taken Inmate Davis was still missing. There was a re-count and a third re-count taken which confirmed that Inmate Davis was missing from Unit F. The Grievant assisted in the re-count of F Unit.

Lt. Bond then proceeded to the Control Center where he directed the Grievant to do a perimeter security check. The Grievant indicated that while he was at F Building, Lt. Bond radioed him to report to the Administration Building where Lt. Bond directed him to "check for holes in the fence". --He added that Lt. Bond asked him to do "a perimeter check". The circumstances surrounding the perimeter check performed by the Grievant are in dispute and will be thoroughly discussed after the events are set forth which prompted the filing of the instant grievance.

The Grievant conducted the perimeter check and in effect reported that "nothing was unusual". Lt. Bond and Curtis E. Wingard, Deputy Warden of Lorain Correctional Institution who on January 1, 1989 was Duty Officer and Unit Manager of the Northeast Pre-Release Center then proceeded in a State vehicle to check the area immediately surrounding the facility. As Deputy Warden Wingard stated, he and Lt. Bond drove around the outside of the Institution looking at the fence for something which was "out of character". While proceeding left on East 34th Street, they noticed a pair of State issued pants dangling from the razor ribbon located on top of the fence surrounding the facility. There was also a wool stocking cap which was caught on the razor ribbon and Lt. Bond and Deputy Warden Wingard noticed some blood on the fence. The pants were blood stained and entangled in the razor ribbon. In the snow on the ground, they noticed letters, envelopes and pieces of paper in the area close to the pair of pants. Deputy Warden Wingard radioed the Institution to keep the inmates locked down and he told Lt. Bond that he was to stay "with the evidence".

Deputy Warden Wingard returned to the Message Center and "implemented the escape plan". He called Administrative Assistant Aufmuth, the Acting Superintendent. The appropriate authorities were notified of the escape of Inmate Davis and photos were thereafter taken of the area of the perimeter fence where the escape had taken place. At approximately 1:30 p.m., Inmate Davis' girlfriend telephoned the Institution and indicated that Inmate Davis wanted to turn himself in. Inmate Davis was met by the Police and the representatives of the Correctional Institution at a designated location where he was then taken to the hospital suffering from serious injuries caused by his effort to unravel himself from the razor ribbon behind Units E and F.

THE GRIEVANT'S TESTIMONY

As I have already indicated, the Grievant testified that Lt. Bond directed the Grievant "to check for holes in the fence" -- and "he asked him to do a perimeter check". According to the Grievant, he left to perform the perimeter check from A Building. He went on to say that at the time he left A Building, Lt. Bond and Deputy Warden Wingard were also leaving out of A Building with a State vehicle. In conducting his perimeter check the Grievant said that he saw "debris in the fence line"; in other words, in the razor ribbon. The Grievant testified that Lt. Bond and Deputy Warden Wingard arrived at the zone where the escape occurred before he did. He indicated that there

was a lot of snow on the ground while he conducted the perimeter check. He also said that there was a lot of trash and debris on the razor ribbon. The period of time it took for the Grievant to get to the zone where the escape occurred took him six (6) minutes. The Grievant said that he saw the state vehicle in which Lt. Bond and Deputy Warden Wingard were riding, proceed towards the direction of the zone in question and he saw them return in the vehicle to the Institution.

The Grievant indicated that he is color blind and cannot see shades of color. In other words, he cannot distinguish one color from another. He stated that being color blind made it difficult for him to distinguish the trash and debris on the fence. He was unable to see the spots of blood in the snow behind F Building.

On cross-examination the Grievant said he walked around the interior of the facility and checked the door of F Building and went up to the day fence which is located inside the facility. He also checked the door of E Building. He said that he saw trash in the razor ribbon and debris in the fence line. He did not see pants dangling in the razor ribbon. He said that he saw papers on the ground but he did not see blood. He further stated that there were "a lot of footprints that day" in the rear of Zone B-1 where the escape took place. The Grievant acknowledges that he "did not report any observation on B-1". Furthermore he did not see Lt. Bond standing outside of the Institution close to the location where the State issued blood stained pants were dangling from the razor ribbon.

DISCUSSION

The Grievant was suspended for fifteen (15) days because he "secured" the perimeter fence on January 1, 1989, when, in fact, the fence had been "breached". Thus the factual dispute between the parties is over the circumstances surrounding the perimeter check and the manner in which the Grievant conducted the check. I turn to consider the Grievant's testimony in light of the full evidentiary record.

The Grievant was aware or should have been aware of the purpose in conducting a perimeter fence check. It was not limited to "checking holes in the fence". It is true that when he conducted the perimeter fence check he did not know that Inmate Davis had escaped. However, he acknowledged that he heard the two (2) alarms go off behind Buildings E and F between 7:00 a.m. and 7:15 a.m., while he was assigned to the Control Center. Moreover, he participated in a special count of inmates in Building F. Thus, he should have been vigilant to any suspicious circumstances or circumstances that were out of the ordinary during his perimeter check, especially behind Buildings E and F. In any event, as the Grievant acknowledged, Lt. Bond instructed him "to do a perimeter check", and not merely look for holes in the fence.

The Grievant said that he did not see the bloodied pair of State issued pants dangling from the razor ribbon on top of the fence behind Buildings E and F. What he saw during the perimeter fence check was debris all along the razor ribbon which he referred to as the "fence line".

The Grievant was more elaborate on what he observed during his perimeter check in the investigatory interview which took place on January 13, 1989. It should be pointed out that I have given great weight to the answers by the Grievant in response to the questions asked by Administrative Assistant Aufmuth at the investigatory interview. The investigatory interview took place slightly less than two (2) weeks after the escape of Inmate Davis. Furthermore, the investigatory interview took place before the Grievant was suspended. By contrast, the arbitration hearing took place almost one (1) year after the events of January 1, 1989 and the hearing was the culmination of a process which became operative as a result of the filing of the grievance protesting the disciplinary suspension imposed by the State.

Thus, in the investigatory interview, the Grievant said that he "was looking for holes in the fence"; he then added that he "saw various amounts of debris, cardboard, different types of rags

and things in the fence -- bottles and everything, plastics and everything in the fence line. Along the whole walk". The Grievant went on to state that behind F Building he "saw an unidentified cloth, I did not identify it as pants. It looked like another rag or something in the fence". He did not "investigate it any further" because, as he stated, he "was looking for an inmate back there and not for anything else". In the investigatory interview, the Grievant added that he did not examine the "unidentified cloth" closely because Lt. Bond told us to hurry up and * * check the fence zone". He checked the fence zone "with speed", because he did not want to stay with one object for a long period of time. He reasoned that if the missing inmate was still in the compound, he would have a better chance of apprehending him than if he had climbed over the fence and was outside the facility.

Administrative Assistant Aufmuth testified that she arrived at the Northeast Pre-Release Center at 8:45, at which time she was informed that Lt. Bond was in the "back area" where the escape occurred. He was videotaping the area because a camera was not available. Administrative Assistant Aufmuth proceeded to the "back area" where she took photographs of the area where the escape occurred.

A series of enlarged color photographs submitted by the State were made part of the evidentiary record. An enlarged color photograph shows bloodied torn pants and wool stocking cap entangled in the razor ribbon extending towards the inside of the top of the fence. The razor ribbon appears to have been stretched so that Inmate Davis could climb over that part of the fence located behind Building F. Other photographs show spots of blood in the snow, as well as envelopes and a "kite" which were left by Inmate Davis. These items were lying in the snow within and outside the compound, around the area of the fence from where Inmate Davis escaped. A "kite" is a "type of written document" used by inmates to communicate with the staff. Administrative Aufmuth indicated that the photo showing the "kite", along with spots of blood, were approximately fifteen (15) feet from E Building.

In light of the evidentiary record, I have concluded that during his perimeter fence check the Grievant should have observed the "unidentified cloth" in the "fence line" as a blood stained pair of State issued pants that belonged to an inmate who apparently had escaped. In light of the circumstances which existed at the facility before the Grievant was instructed to do a perimeter check, he should have observed the blood stained pants and wool stocking cap that were entangled in the razor ribbon located behind F Building. It was highly improper and negligent for the Grievant to look for an inmate or holes in the fence, without taking into account that an inmate might have escaped from the facility and left evidence, especially as observable as a pair of blood stained State issued pants entangled in the razor ribbon, behind the very area where the two (2) alarms went off between 7:00 a.m. and 7:15 am. Given the circumstances on January 1, the Grievant failed to exercise due care in not identifying what he characterized as the "unidentified cloth" entangled in the razor ribbon behind Unit F where he had previously assisted in a count of the inmates. Indeed, he should have identified the "unidentified cloth".

That there might have been debris and trash on the fence cannot be doubted. Accordingly, Deputy Warden Wingard said that while he and Lt. Bond drove around the outside of the facility, he saw debris and trash bags -- about four (4) to six (6) items on the fence on East 30 Street. He described the various items as "little bitty trash" which did not cause him or Lt. Bond to stop the vehicle to inspect the items. However, upon turning left on East 34 Street, Deputy Warden Wingard and Lt. Bond noticed the pants dangling or "sticking on the fence". He saw the pants from approximately 100 yards away as soon as the vehicle turned on East 34 Street. The evidence warrants the conclusion that the blood stained pants would have been observed if the Grievant had conducted even the most rudimentary perimeter fence check.

There were also envelopes and a "kite" left by Inmate Davis in the snow around the area of

departure of Inmate Davis which the Grievant did not observe; or if he did observe such items, he dismissed the items as "debris" or "trash". Furthermore, there were blood stains left in the snow in and around the fence, apparently from Inmate Davis' wounds caused by his attempt to negotiate the razor ribbon. The Grievant failed to see the blood spots in the snow, because he was color blind".

He indicated that he was "color blind" which prevents him from distinguishing colors. The Grievant acknowledged that the application for employment as a correction officer, calls for any condition of the applicant which may impair his ability to perform the job to which he answered "none". However, the failure to identify the blood spots, envelopes and "kite" left by Inmate Davis if they were due to the Grievant's color blindness, impaired his ability to perform a proper perimeter fence check. Furthermore, the Grievant's color blindness could not have prevented him from identifying the State issued pants and wool stocking cap caught in the razor ribbon; although it might have prevented him from identifying the color of the two (2) items.

The Grievant said that he left on foot to conduct the perimeter check. He added that both Deputy Wingard and Lt. Bond were in a state vehicle and leaving from A Building at the same time that he left from Building A. The Grievant testified that Deputy Warden and Lt. Bond arrived at the zone where Inmate Davis' escape occurred before he arrived at the zone. However, he did not mention that he saw Lt. Bond, who was told by Deputy Wingard to "remain with the evidence" at the fence behind Building F. Neither the Grievant nor Lt. Bond saw each other at or near the fence where the blood stained pants hung from the razor ribbon. I have no reason to doubt the credibility of Lt. Bond. Accordingly, I have inferred that the Grievant arrived at the area in question before Lt. Bond and Deputy Warden Wingard.

The Grievant said that he did not have any "formal training" in perimeter fence checks". However, in the investigatory interview that was conducted on January 13, 1989, the Grievant told Administrative Assistant Aufmuth the tasks that he performs when he is dispatched to a zone. He stated:

"Well, first I would check the fence line to see if the fence was assaulted -- any holes or any signs of anyone assaulting the fence. Then I would check the surrounding area for any personnel - anything - anyone in the area. If the area appears secure, I would call immediately to the base station and let them know the condition of that area". At page 8.

He added in his investigatory interview that he proceeds "immediately, immediately" between the two (2) fences and checks out the area. He checks "the fence and then all the adjacent area, every corner, every door". While performing these activities, he "looks on the ground". The Grievant said that Sgt. Shewalter trained him on these procedures. During the investigatory interview, he volunteered that "I used to work the yard a lot at my other institution and I was already literate about that". Prior to joining the State as a Correction Officer, the Grievant had worked as a Correction Officer at a facility administered by the Virginia Department of Corrections in Chesapeake, Virginia. In light of the Grievant's responses at the investigatory interview, the Grievant had experience and was knowledgeable in performing perimeter fence checks in a proper manner.

Furthermore, I am persuaded by Lt. Bond's testimony that he trained the Grievant in performing perimeter checks. I have also concluded that consistent with Lt. Bond's testimony, the Grievant performed perimeter checks between August and December, 1988 when he was assigned at various times as the roving officer.

The Grievant indicated that he did not have any post orders on carrying out a perimeter fence check. However, there is nothing complex or arcane about a perimeter fence check. The Grievant

knew enough about the check to look for holes in the fence or for the missing inmate. In any event, he explained during the investigatory interview the type of check that was to be carried out. The failure to have a perimeter fence check contained in the Grievant's post orders is of no weight and in light of the Grievant's knowledge of the circumstances preceding the perimeter fence check, the conclusion is warranted that the assignment by Lt. Bond to the Grievant to conduct a perimeter fence check was reasonable.

The Grievant said that he did not recall the procedures used before January 1, 1989 when a zone alarm is sounded. However, in the investigatory interview the Grievant set forth in detail the procedures used when a zone alarm goes off.

The Grievant said that he never secured zone B-1 which is the zone containing the area of the facility where the bloodied pants of Inmate Davis hung from the razor ribbon. However, the Grievant's testimony is at variance with the evidentiary record. A security alarm system which has been installed at the facility, contains a series of microwave detectors located along the inside of the fence surrounding the compound which is behind all of the housing units. The system is designed to be activated when an object or person breaks the path of the area inside the fence. The breaking of the path activates an alarm located in the Control Center. The alarm causes both an "audio and visual" response which is recorded on a computer print out. The computer print out sets forth the zone in which the path is broken, and the time when the microwave detector is activated. The print out also records the re-set of the detector which is performed by a person in the Control Center. This occurs when the zone is cleared by the roving officer who radios that message to the Control Center. Thus, for example, the computer print out indicates that the alarm sounded at 7:01 am. in Zone B-1 on January 1, 1989 and was re-set at 7:10 a.m. During the investigatory interview, the Grievant explained the process when an alarm is activated in one of the zones.

The computer print out for January 1, 1989, indicates what I have concluded is the path taken by the Grievant in conducting the perimeter fence check. The first alarm which was shown to have been activated at 8:06 am. on January 1, 1989 indicates that the Grievant was at Zone C-4 close to the Control Center. The entire zone system around the interior perimeter of the facility was the path taken by the Grievant in conducting the perimeter fence check. This conclusion is based upon the computer printout of January 1, 1989. The print out further indicates that the alarm in Zone B-1 was activated at 8:12 am. and re-set at 8:13 a.m. Based upon the computer print out I have inferred that the Grievant conducted the perimeter check between 8:06 am. and 8:17 am., and activated zone B-1 at 8:12 am. and called into the Control Office that the zone was clear which caused the person at the Control Office to re-set the detector in zone B-1 at 8:13 am.. Clearly, the computer print out does not support the Grievant's testimony that he did not clear zone B-1.

In light of the aforementioned considerations, I have concluded that the perimeter fence check conducted by the Grievant was highly improper.

INVESTIGATORY INTERVIEW

As I have already indicated, I have placed great weight on the investigatory interview of the Grievant which took place less than a few weeks after the events giving rise to the instant dispute and before any discipline was imposed by the State. However, a few issues still remain to be resolved in connection with the investigatory interview.

The Grievant testified that immediately prior to recording the investigatory interview, Administrative Assistant Aufmuth told him that he probably would not need a Union Steward because the investigatory interview was not a disciplinary hearing. He said that she told him that he "would not have anything to worry about, but Officer Williams would have something to worry

about". The Grievant said that he "did not know what she was talking about".

It is enough to state that the transcription of the taped investigatory interview on January 13, 1989, discloses that the Grievant acknowledged that he was informed that he had the right to representation by a Union member but he declined to exercise his right to do so.

The Grievant went on to state that after the investigatory interview Administrative Assistant Aufmuth told him that if he would receive one (1) or three (3) days suspension, she would "allow" him "to work as much overtime as it took to make up the difference". Administrative Assistant Aufmuth denied that such a discussion took place. She indicated that the scheduling of overtime is governed by contract on the basis of seniority. Furthermore, overtime "is offered to officers with the least overtime worked".

The evidentiary record does not support the Grievant's testimony that the Administrative Assistant told him that if he would accept one (1) or three (3) days suspension he would be "allowed to work as much overtime as it took to make up the difference". The Grievant did not receive "1 or 3 days suspensions"; he was suspended for fifteen (15) days. Moreover, it does not take much overtime to make up for "1 or 3 days suspension". The statement also does not make any sense. The benefit to the State does not outweigh the foreseeable risk that such an offer would seriously undermine the credibility of the supervisory staff. In addition, the Agreement provides for the procedure by which overtime is offered.

DISPARATE TREATMENT

The Union alleges that by suspending the Grievant for fifteen (15) days, the State imposed disparate treatment against him. The basis for the State's contention involves the suspension of Correction Officer Timothy Morgan for five (5) days effective April 15, 1989. The discipline was due to calling in a false count of inmates in a unit, clearing a fence alarm without actually going to the fence area to secure it and using abusive language toward inmates.

At the time that he was disciplined, Correction Officer Morgan was on probation and as Correction Officer Williams, who was Chief Steward, stated, he was white. It should be pointed out that the Grievant is a black person. Correction Officer Williams also indicated that the Grievant's work record "was not the best".

The clearance of the perimeter alarm by Correction Officer Morgan without physically doing so, took place on November 18, 1988. As Correction Officer Williams acknowledged, the pre-disciplinary hearing took place some three (3) months after the November episode. Due to the State's "inability to properly in a timely fashion pursue discipline" after it had been aware of the infraction, the hearing officer at the pre-disciplinary hearing recommended "a temperance of discipline" of Correction Officer Morgan. In light of this material factual distinction, I cannot conclude that the Grievant and Correction Officer Morgan were similarly situated. Accordingly, I cannot conclude that the State imposed disparate discipline against the Grievant.

CONCLUSION

On the basis of the evidence in the record, I have concluded that the Grievant violated Rules 34 and 36 of the Standards of Employee Conduct. Had the Grievant conducted the perimeter fence check diligently, properly and in a manner consistent with the standard of reasonableness, the Grievant should have at least observed the blood stained pants caught in the razor ribbon on the fence located behind Building F. The blood stained pants dangling from the sharp pieces of metal of the razor ribbon were easily observable, not only to a trained eye but one which was not experienced in the duties required of a Correction Officer. Inasmuch as the perimeter fence check was carried out by the Grievant, in the absence of any employee at the facility, the supervisory staff

must rely upon the good faith of the Grievant, not to mention the obvious trust that is placed in him. The failure to properly discharge that trust, could lead to harm not only to the Correction Officer, but to other employees or a member of the general public. Time is of the essence when an inmate escapes. The greater the lapse of time, the more difficult it becomes to apprehend the inmate who escapes and becomes integrated into society at large. Consequently, the inmate becomes a potential threat to society. Accordingly, the State proved by clear and convincing evidence that the Grievant violated Rule 34 of the Standards of Employee Conduct. Furthermore, by carrying out the perimeter fence check in an improper manner, the Grievant also created a situation "which constitutes a threat to the security of the Institution, its staff or inmates" as stated in Rule 36.

I do not find any circumstances in the evidentiary record to mitigate the penalty imposed by the State. The Grievant had been employed less than five (5) months before the events giving rise to the grievance occurred. Prior to joining the State's Department of Rehabilitation and Correction, he was a Correction Officer for sixteen (16) months at a facility maintained by Virginia's Department of Rehabilitation and Correction. As I have established a perimeter fence check is not a complex activity. The State issued pants dangling from the razor ribbon would have been observable to an untrained eye. In this case, the evidence demonstrates that the Grievant was trained, knowledgeable and experienced in conducting perimeter fence checks. I am persuaded that the penalty of fifteen (15) days suspension should not be disturbed.

AWARD

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

Dated: February 6, 1990
Cuyahoga County
Cleveland, Ohio

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