

**ARBITRATION DECISION NO.:**

306

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Rehabilitation  
and Correction  
Correctional Reception Center

**DATE OF ARBITRATION:**

October 24 and 31, 1990

**DATE OF DECISION:**

November 16, 1990

**GRIEVANT:**

George Stover

**OCB GRIEVANCE NO.:**

27-12-(90-02-01)-0060-01-03

**ARBITRATOR:**

Harry Graham

**FOR THE UNION:**

Dennis Williams

**FOR THE EMPLOYER:**

Thomas E. Durkee

**KEY WORDS:**

Removal  
Inmate Abuse  
Credibility  
Procedural Defects  
Notification of Possible  
Discipline

**ARTICLES:**

Article 24-Discipline  
§24.01-Standard  
§24.04-Pre-Discipline

**FACTS**

The grievant was hired at the Correctional Reception Center on August 24, 1987 as a Correctional officer 2. On October 2, 1989 an inmate, who was placed in solitary confinement, abused himself in such a way to warrant being taken to the Ohio State University Hospital. The officers in charge of transporting the inmate were the grievant and another Correction Officer. Prior to departure for the hospital the inmate was

examined by a nurse at the Reception Center and the extent of his injuries noted. Upon his return he was once again examined and his injuries recorded. Upon his return to the Reception Center the inmate was returned to his cell by two officers other than those who had been involved in his transport to Columbus. The grievant and the other officer who had originally transferred the inmate stopped by the inmate's cell as they were leaving the facility that night and dropped off a jumpsuit for him. What happened next is in dispute. However, on October 3, 1989 the inmate contacted a Corrections Officer and informed him that he had been beaten. Upon examination, the nurse observed a bruise to his left rib, a contusion above his right eye and a contusion to his left side in the area of the kidney. That contusion was in the shape of a boot print in the nurse's opinion. On October 6, 1989 the inmate sent a letter to the prison official charged with dealing with prisoner complaints indicating he had been beaten by the grievant. On October 30, 1989 the inmate was beaten by another inmate. An investigation was commenced and the State concluded that the grievant was an active participant in the attack on the inmate on October 2, 1989. Grievant was subsequently discharged.

#### **EMPLOYER'S POSITION:**

The State insists the grievant's discharge is justified by the evidence and that no procedural defect of sufficient magnitude exists to prompt overturning the discharge. The State also contends that the other inmate's appearance at the pre-disciplinary hearing should not be held to fatally compromise grievant's discharge. The State denies that it erred in any way at the pre-disciplinary hearing. On the merits, the State insists the grievant's discharge was for just cause. It is maintained there was no reason for the two officers to go to the inmate's cell. His jumpsuit could have been left for him. Further, the nurse found injuries after he returned to the Center which had not been there before he had left. The State urges the grievance be denied in its entirety.

#### **UNION'S POSITION:**

The Union contends the grievant was informed of the charges against him but was not informed of the penalty contemplated by the State. Therefore the grievant was in the dark about the seriousness with which the State regarded his activity and the punishment it proposed to administer. In the Union's view, its ability to construct a defense was fatally compromised when the State denied the Union officials requests to interview various inmates. Further, the Union asserts that neither in the third step nor in the pre-disciplinary meeting did the State carry its burden of showing the requisite just cause to sustain discharge. On the merits, the Union asserts the inmate had a history of self-abuse and quite possibly had injured himself. The State cannot prove grievant hit or kicked the inmate or injured him in any way. Testimony received from the nurse indicates the inmate is a habitual liar. As the State has been unable to place the grievant in the inmate's cell or implicate him in the beating administered to the inmate in any fashion, the union urges it must be concluded the State has not borne its burden of proof in this situation.

#### **ARBITRATOR'S OPINION:**

Initially, it is noted by the Arbitrator that Section 24.04 of the Agreement provides that the Employee and his or her representative will be informed in writing of the possible discipline being contemplated by the Employer prior to the pre-disciplinary meeting. Issuance of the disciplinary grid to employees, in this case several years prior to this discharge, does not meet the requirements of Section 24.04. However, this violation is not sufficient to warrant setting aside grievant's discharge. The Union's complaint that it was denied an opportunity to interview various inmates is also dismissed.

There is a great deal of circumstantial evidence that ties the grievant to the beating the inmate received. It must be concluded the inmate was indeed beaten as he claimed. The trip to the inmate's cell was made in the wee hours of the morning and no special reason existed for the officers to detour to the cell. The Arbitrator cannot accept the Union's request to accept the trip as one prompted by the spirit of good fellowship and kindness towards the inmate. The inmate's testimony cannot stand alone to constitute sufficient proof that grievant was responsible for the beating administered to the inmate. It does not stand alone, though, as the investigator's information placed grievant in the inmate's cell. It is beyond doubt the inmate was beaten on the night of October 2, 1989. The investigator's testimony places the other Correction Officer at the cell door and grievant inside the cell. This is consistent with the inmate's testimony even

though little weight can be given that testimony as indicated above. Based upon the language in the Agreement no authority is given to an arbitrator to modify penalties once abuse has been determined to have occurred. Consequently the discharge of the grievant is affirmed.

**AWARD:**

Grievance denied.

**TEXT OF THE OPINION:**

**In the Matter of Arbitration  
Between**

**OCSEA/AFSCME Local 11**

and

**The State of Ohio, Department of  
Rehabilitation and Correction**

**Case No:**

27-12-(90-02-01)-0060-01-03

**Before:**

Harry Graham

**Appearances:**

**For OCSEA/AFSCME Local 11:**

Dennis Williams  
Staff Representative  
OCSEA/AFSCME Local 11  
1680 Watermark Dr.  
Columbus, OH. 43215

**For Department of Rehabilitation and Correction:**

Thomas E. Durkee  
Labor Relations Officer  
Department of Rehabilitation and Correction  
1050 Freeway Dr. North, Suite 403  
Columbus, OH. 43229

**Introduction:**

Pursuant to the procedures of the parties a hearing was held in this matter on October 24 and 31, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument on October 31.

**Issue:**

The issue in this dispute is:

Did George Stover, Grievant, commit prisoner abuse?  
If not, what shall the remedy be?

**Background:**

The central event which prompts this proceeding is an allegation by the State that the Grievant abused Timothy Urdock, a prisoner in its custody. Putting that dispute to one side for the moment, the background of Mr. Stover's discharge from State service is agreed upon by the parties. The Grievant was hired at the Correctional Reception Center on August 24, 1987. He was employed as a Correctional Officer 2. In the course of his tenure at the Correctional Reception Center he was administered two oral reprimands and two written reprimands. These were for actions unrelated to the issue involved in this proceeding.

On October 2, 1989 Inmate Urdock was confined in the disciplinary control unit at the Correctional Reception Center. More explicitly, he was in solitary confinement. He was in four-way restraints which restrict his movement. On October 2, 1989 Inmate Urdock abused himself. In some fashion he injured his hand. Following accepted practice he was transported to Ohio State University Hospital in Columbus, OH. in order that the extent of his injury might be determined and appropriate medical attention secured. The officers in charge of transporting Urdock were the Grievant and another Correction Officer, Jerry Atwood. The trip to and from Columbus was without incident. Prior to departure for the hospital Urdock was examined by a nurse at the Reception Center and the extent of his injuries noted. Upon his return he was once again examined and his injuries recorded for the record. During the round trip to Columbus no additional injuries were experienced by the inmate according to the records made at the Reception Center.

Upon his return to Reception Center Inmate Urdock was returned to his cell. This was done by two officers other than those who had been involved in his transport to Columbus. Officers Stover and Atwood worked overtime on the night of October 2, 1989. At the conclusion of their workday, at about 1:00 AM on the morning of October 3, 1989 they made a stop at the area where Inmate Urdock was confined. At that time Urdock was on suicide watch. He was naked. His prison jumpsuit had been taken from him upon his return from Columbus. As they left the facility Officers Stover and Atwood made a short detour from their path. They went to Urdock's cell and left his jumpsuit for him. At that time something happened. Later on October 3, 1989 Urdock contacted a Corrections Officer and informed him that he had been beaten. Upon examination of Inmate Urdock Nurse Lynn Hott observed injuries. He had sustained a bruise to his left rib, a contusion or abrasion above his right eye and a contusion to his left side in the area of the kidney. That contusion was in the shape of a boot print in Nurse Hott's opinion.

Considerable confusion ensued in the effort to determine what exactly had occurred to Inmate Urdock on October 2, 1989. On October 6, 1989 he sent a letter (a "kite" in the terminology of the prison community) to the prison official charged with dealing with prisoner complaints. That letter indicated he had been beaten by Officer Stover. Subsequently he recanted the contents of that letter, then reaffirmed them. At the arbitration hearing he testified that Stover had beaten him.

On October 30, 1989 Inmate Urdock was beaten by another inmate, Inmate Baisden. There was confusion by administration of the Correctional Reception Center over the two incidents. In the course of investigating the attack on Urdock by Baisden it became clear that two attacks had occurred. One was on October 2, 1989. The other took place on October 30, 1989.

In order to determine if he had been beaten on October 2, 1989 and if so, who was responsible, the Employer commenced an investigation. The results of that investigation prompted the State to conclude that the Grievant was an active participant in the attack on Inmate Urdock which had occurred on October 2, 1989. Consequently he was discharged. A grievance protesting that discharge was promptly filed. It was processed through the procedures of the parties without resolution. As will be set forth more fully below, the Union is challenging Officer Stover's discharge on two grounds. It asserts that the discharge is so tainted with procedural defects that it must be reversed. It also claims that the discharge should be overturned on its merits if the State is found to have complied with various procedural requirements of the Labor Agreement.

**Position of the Employer:**

The State insists that Officer Stover's discharge is justified by the evidence and that no procedural defect of sufficient magnitude exists to prompt overturning of Mr. Stover's discharge. With respect to procedural irregularities alleged by the Union, the State insists that it comes to the arbitration forum with clean hands. It

points out that when the Grievant was informed that a pre-disciplinary conference was to be held he was aware of the range of penalties that could be imposed. In view of the fact that this event involved an allegation of prisoner abuse Mr. Stover could have been under no illusion that his job was not at stake. Included in the Standards of employee conduct furnished to Corrections Officers is clear indication that prisoner abuse will be met with discharge. Mr. Stover was provided with a copy of those Standards. He knew them. That the pre-disciplinary notice might not have explicitly informed him that he could be discharged should not be held against the State in these circumstances it urges.

As is set forth further below, the Union also alleged that the witness list provided prior to the pre-disciplinary conference was defective. In the Union's opinion, it did not set out all potential witnesses. That is technically correct. Inmate Baisden appeared at the pre-disciplinary conference and was not itemized on the witness list furnished to the Union. This is not a big item according to the State. Other inmates of the Reception Center, including Urdock, had been transferred. Baisden knew some of the facts surrounding this incident. His appearance at the pre-disciplinary hearing should not be held to fatally compromise Stover's discharge in light of the serious offense with which he is charged.

In fact, the pre-disciplinary conference lasted two days. Stover was present throughout. His rights were not compromised in any way. During the processing of this dispute the Union was well aware of all the participants and had an opportunity to interview them. Neither the Grievant nor the Union may plausibly complain that a procedural defect taints the discharge under review in this proceeding.

The Union indicated that at the pre-disciplinary hearing and at the third step meeting in the grievance procedure the Employer did not make the initial presentation to the hearing officer. In the Union's view, that constitutes sufficient ground to dismiss the proceeding against Officer Stover and direct that he be reinstated without further inquiry. That view is hotly disputed by the State which denies that it erred in any way at the pre-disciplinary hearing. It again points out that the hearing lasted two full days. Testimony was received from twelve employees. The record scarcely supports the claim of substantial procedural defects according to the State.

Turning to the merits of the dispute, the State insists that the Grievant's discharge was for just cause. When Officer Stover and his colleague, Officer Atwood, finished their work day on October 2, 1989 they had worked overtime. Nonetheless they went out of their way to take Inmate Urdock's clothing to him as they left the facility. No reason exists for them to have done so. In order to reach his cell they had to go out of their way. Urdock's jumpsuit could have been left at the entrance to the cell area that housed Urdock. It could also have been left at the post in front of the corridor leading to Urdock's cell. Stover and his colleague did not do that. They went to Urdock's cell. The State insists this was not done to wish him good evening. Rather it was done for the express purpose of inflicting a beating on him according to the State.

While Atwood and Stover were in the area of Urdock's cell suspicious sounds were heard. Urdock was heard to say "why are you doing this to me?" There was the sound of a thump. These were not innocent sounds, devoid of import according to the State. Urdock was asking why he had been singled out for beating. The thump was the sound of a blow being administered to him. That Urdock was subject to abuse cannot be contested. Nurse Hott observed him and found marks on his body that had not been there prior to his trip to and from Ohio State University Hospital. While in his cell on the evening of October 2, 1989 Inmate Urdock was naked and restrained. He could not have injured himself to the extent and in the places he experienced injury. He was abused without doubt according to the State.

Testimony was received from other officers to the effect that Stover and Atwood went to Urdock's cell. Officers Gritton and Riffle indicated this to be the case. Urdock testified that Stover struck him. At the arbitration hearing Officer Riffle testified that he saw Atwood standing at the doorway to Urdock's cell. He did not see Stover according to his testimony. Riffle had been told by Stover and Atwood that they "had to get with Urdock." This was not a benign statement of fraternal affection from them. To the contrary, it represented their clear intent to harm Urdock. As Atwood was in the cell door, Stover must have been inside according to the State. At the arbitration hearing Officer Riffle testified that he does not know that Officer Stover was inside the cell with Urdock. His testimony is directly contradictory to his statement to the investigating officers on November 13, 1989. In speaking with members of the investigating team he indicated that he had seen Stover enter Urdock's cell. The record is not subject to dispute that Urdock was

beaten. Riffle placed Stover in Urdock's cell during the investigation. The State urges that his testimony at that time be credited by the Arbitrator and that his ignorance of Stover's whereabouts manifested at the arbitration hearing be disregarded.

The State points out that Officer Stover did not cooperate without reservation in this situation. He removed from the premises of the Correctional Reception Center a written statement concerning these events. Employer Exhibit 8, one of the several statements made by Inmate Urdock in the course of this affair, was taken home by the Grievant. It is dated October 23. (Presumably 1989 though this is not reflected on the document). The State did not learn of its existence until October 31, 1989. The State asserts that Stover took a statement from Urdock off of the grounds is indicative of the cover-up that occurred in this situation. Stover was part of that cover-up and it should be concluded that he actually abused Urdock due to Riffle's testimony at the investigation stage of this proceeding. Consequently the State urges that Officer Stover's grievance be denied in its entirety.

### **Position of the Union:**

Prior to presenting its case on the merits of this dispute the Union urges that the Grievant be restored to employment due to procedural errors committed by the State during the course of the investigation. The Union points out that the grievant was informed of the charges against him but was not informed of the penalty contemplated by the State. This left the Union and the Grievant in the dark about the seriousness with which the State regarded his activity and the punishment it proposed to administer. The State should have informed Officer Stover of the exact punishment it had in mind for his role in this affair. Its ability to prepare a defense for him was compromised by the uncertainty which surrounded the penalty he was to receive according to the Union.

In the course of the discipline and grievance procedures Union officials requested the opportunity to interview various inmates. These requests were denied by the State. In the Union's view, this fatally compromised its ability to construct a defense.

As pointed out above, the Union asserts that neither in the third step of the grievance procedure nor in the pre-disciplinary meeting did the State carry its burden of showing the requisite just cause to sustain discharge. As the Union presents the events of the third step and pre-disciplinary meetings, the State did not make the initial presentation of its case. This flaw should prompt an order restoring Mr. Stover to employment according to the Union.

Should the merits of the dispute be reached the Union asserts that the State has not proved that Mr. Stover was involved in any prisoner abuse in this situation. In its view, it is entirely possible that Inmate Urdock deliberately injured himself on the evening of October 2, 1989. He has a history of self-abuse. No unequivocal link was established by the State between the Grievant and the injuries experienced by Urdock. The State cannot prove that Stover hit or kicked Urdock or injured him in any way. Substantial questions exist as to whether or not the Grievant was ever in Urdock's cell on the evening of October 2, 1989. He denies it. Urdock has indicated that Stover was in his cell and beat him. He has recanted that testimony. Testimony was received from Nurse Hott that Urdock is a habitual liar. His recantation of his testimony is as plausible as his implication of Stover according to the Union. At the arbitration hearing Officer Riffle testified that he did not see the Grievant in Urdock's cell. He did hear a thump, but that could have resulted from any of a number of causes. In Riffle's testimony at the hearing Urdock's question of "why are you doing this to me?" was not given great weight. It was just a question. Nothing prejudicial should be imputed to that statement according to the Union. As the State has been unable to place the Grievant in Urdock's cell or implicate him in the beating administered to Urdock in any fashion, the Union urges that it must be concluded that the State has not borne its burden of proof in this situation. Consequently it urges that the Grievant be restored to employment and made whole.

### **Discussion:**

Attention must first be devoted to the procedural issues raised by the Union. The principle defect in the manner in which the Employer conducted the pre-disciplinary hearing according to the Union involves the fact that the discharge penalty was not clearly spelled out to the Grievant as the penalty being contemplated by the State for his role in this affair. At Section 24.04 the Agreement provides that the Employee and his or

her representative will be informed in writing of the possible discipline being contemplated by the Employee prior to the pre-disciplinary meeting. The Department contends that having furnished a disciplinary grid, replete with itemized offenses and a range of penalties associated with them to the Grievant that it has complied with the Agreement. Issuance of the disciplinary grid to employees, in this case several years prior to the discharge at issue in this proceeding, does not meet the requirements of Section 24.04. The Agreement mandates that the employee and his representative "shall" be informed in writing of the possible form of discipline. When that directive of the Agreement is not complied with as is the case in this instance, it is a clear-cut violation of its terms. That violation is not sufficient to warrant setting aside of Mr. Stover's discharge. The Union cannot plausibly argue that it was kept in the dark about the type of discipline the State proposed to administer to the Grievant. The Union and the Grievant both knew of the consequences for the continued employment of people accused of prisoner abuse. Section 24.01 of the Agreement specifies that in cases where a person in the custody of the State has been abused and an Arbitrator finds that has occurred, he has no authority to modify a discharge penalty. Furthermore, these parties have had numerous instances where employees have been discharged for abuse of people in the custody of the state. The Union knows full well that the penalty for such abuse is discharge. The point made by the Union is well taken in that there was a technical violation of the Agreement committed by the State in the manner in which the Union and the grievant were informed of the possibility Mr. Stover might be discharged. That did not affect Mr. Stover's rights under the Agreement or the ability of the Union to defend them.

The Union's complaint that it was denied an opportunity to interview various inmates is also dismissed. The Union specifically complained that it was denied access to Inmate Urdock during the course of the disciplinary process. As will be discussed more fully below, his testimony and the various written communications from him that are part of the record in this dispute are of minimal value in reaching a determination of this dispute. The State acknowledges that Urdock's mental state is such that any testimony or memo's that he might provide is entitled to little credibility.

When the Union asserts that it was unable to rebut the testimony of other inmates in constructing a defense for Officer Stover it is attacking the proverbial straw man. No inmate other than Urdock testified at the arbitration. The Union had every opportunity to call other inmates. It made no effort to do so. Had the Union believed that inmates other than Urdock been able to rebut testimony and evidence from the State doubtless it would have called them. That no such effort was made indicates the frivolity of the Union claim that its defense was fatally compromised by the fact it was unable to examine other inmates.

The Union claim that the Employer must establish just cause for discharge in the pre-disciplinary conference is an exercise in circular reasoning. Obviously the Employer felt in this case that the requisite just cause for discharge existed. Just as obviously the Union disagreed. The Union and the Employer know full well that the determination of just cause is ultimately made by an arbitrator if the Union determines to contest a discharge to that stage of the grievance procedure. The Union also alleges that the Employer did not make the initial presentation of its case in the pre-discipline and third step grievance procedure meetings. That is disputed by the Employer. In any event the Union cannot seriously assert that Mr. Stover was denied one iota of due process rights. The record in this dispute indicates that extensive testimony was put on the record at the pre-disciplinary meeting. It extended over two days. The arbitration hearing also took two days. There is absolutely no basis for concluding that Mr. Stover was not provided a full and fair hearing at the various stages of the discipline procedure, the grievance procedure and at the arbitration hearing itself. The conclusion is inescapable that this dispute must be determined on its merits.

There is a great deal of circumstantial evidence that ties the Grievant to the beating that Urdock received. It must be concluded that Urdock was indeed beaten as he claimed. He had been examined by Nurse Hott prior to his transport to the hospital at Ohio State University in Columbus. His injuries had been carefully noted. When he was again examined by the nursing staff at the Reception Center on October 3, 1989 new injuries were found. These were injuries that had not been present the prior evening when he was sent to Ohio State. He had a boot-shaped contusion in the area of his left kidney. Testimony was received at the arbitration hearing from Nurse Hott to the effect that Urdock could not have inflicted an injury of that sort on himself. The conclusion is inescapable that he was beaten.

At the end of his work day on October 2-3, 1989 the Grievant and his colleague, Atwood, detoured from

their direct route out of the facility. They were taking Urdock's jumpsuit to him. The Union asks the Arbitrator to believe this was done as they were animated by the spirit of good fellowship and kindness towards him. This is a bit much to accept. It must be remembered that the visit to Urdock's cell occurred at the end of a work day in which Stover and Atwood worked overtime. They went to his cell in the wee hours of the morning. No special reason for them to have detoured to his cell existed. Urdock's clothing could have been taken to him by other corrections officers. Union Exhibit 1 is the report filed by Lieutenant Doggett and Sergeant Brinson who were on duty on October 2, 1989. In their statement they indicated that Stover and Atwood came to the Captain's office with Urdock's packup and that they told them it could be left there. They, Doggett and Brinson, told Stover and Atwood they would take care of it later. Stover and Atwood declined that offer. "They said that's okay we'll just drop it off. I respond (sic) with 'that will be fine.'" Stover and Atwood declined the explicit invitation of Doggett and Brinson to take care of Urdock's packup and let them go on their way. This sort of activity prompts questions about the true motive Stover and Atwood had in visiting Urdock that evening.

At the arbitration hearing Nurse Hott indicated that Inmate Urdock was a habitual liar. Her testimony, plus the record compiled by Urdock himself in this matter leads the Arbitrator to give little weight to Urdock's statements and testimony. He reported the incident. Then he recanted. Ultimately he asserted that Stover had in fact hit him. (Employer Exhibit 7). Certainly it is beyond dispute that Urdock was hit that night. Urdock claims that Stover did it. If Urdock's assertion stood alone it would not constitute sufficient proof that Stover was responsible for the beating administered to Urdock.

Urdock's testimony does not stand alone. Employer Exhibit 2 is the transcript of an interview by the instigating team with Officer Steve Riffle in November, 1989. In the course of that interview he unreservedly placed Stover in Urdock's cell. According to Riffle:

"Fields and I just joined Gooldin there at the door and stood in the doorway. I saw Stover go into the cell, Officer Atwood remained at the door in the doorway. He was within eye shot. Fields and I and Gooldin moved out of the doorway with the door still cracked. At that time I heard, why are you doing this to me?"

Elsewhere in that interview Riffle indicates that he heard a thump while Stover was in the cell. When he entered the cell and looked at Urdock he observed a red mark on Urdock's left side, in the area of the kidney. Riffle's testimony during the investigation places Stover squarely in Urdock's cell. Atwood was in the doorway. No doubt exists that Urdock was injured that night. Riffle's interview testimony points directly towards Stover as the culprit.

At the arbitration hearing Riffle testified exactly as he had done to the investigating team with one significant change. According to Riffle, Atwood was at the cell door. Riffle heard Urdock say "why are you doing this to me?" He heard the thump and observed the red mark on Urdock's back. In stark contrast to his testimony of the prior year, he indicated he did not know where Stover was at the time all of this was occurring. That is the crucial difference. Every single bit of Riffle's testimony was the same before the investigating team and the Arbitrator with the exception of his ignorance of Stover's whereabouts. A judgement must be made. Was Riffle truthful in November, 1989 or October, 1990? It appears to the Arbitrator that it is more likely that Riffle was telling the truth in November, 1989 than in October 1990. In the earlier period he was facing discipline for his role in this affair. At the time of the arbitration hearing he had been disciplined. He could no longer protect himself from the consequences of his role in this affair but he could try to protect his colleague, Stover. Riffle's ignorance of Stover's whereabouts during his testimony of October 31, 1990 stands in stark contrast to his unfailing ability to remember all other details of the incident consistent with his testimony to the investigating team on November 13, 1989.

It is beyond doubt that Urdock was beaten on the night of October 2-3, 1989. Riffle's testimony places Atwood at the cell door and Stover inside the cell. This is consistent Urdock's testimony as well though little weight can be given to that testimony as indicated above.

At the hearing on October 24, 1990 the Union introduced testimony from Officer Jerry Atwood who was involved in this affair. Atwood's testimony places Stover at the cell door and stands in sharp contrast to the testimony of Riffle. Unlike Riffle, Atwood heard no thump. He did not hear Urdock remark "why are you



doing this to me?" Atwood's testimony is less credible than Riffle's. Atwood did not hear anything from the prisoner. He heard no thump. This in spite of the fact that he was at the doorway to the cell. In the face of Riffle's testimony that a thump was heard as well as an exclamation from Urdock, Riffle's testimony, rather than that of Atwood is believed by this Arbitrator.

A continuing issue in discharge proceedings is the level of proof that is required for an employer to sustain its action. A great deal of learned commentary on this issue has been written over the years. In the final analysis it is necessary that the employer convince the neutral that the grievant has done the deed attributed to him. In this case the evidence of abuse perpetrated upon Urdock is clear and cannot be refuted. Urdock and Riffle place Stover in the cell. No other person among the multitude involved in this proceeding was placed in the cell. When he was in the cell Urdock was heard to exclaim. A thump was heard. As this Arbitrator believes that Riffle's initial testimony of November, 1989 rather than his testimony at the hearing is correct, the conclusion must be reached that Officer Stover was responsible for abusing Inmate Urdock.

At Section 24.01 of the Agreement the parties have removed from an arbitrator any discretion in assessing penalties in instance when abuse is found. The Agreement provides that:

"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."

Based upon that language in the Agreement no authority is given to an arbitrator to modify penalties once abuse has been determined to have occurred. Consequently the discharge of the Grievant must be affirmed.

**Award:**

The grievance is denied.

Signed and dated this 16th day of November, 1990 at South Russell, OH.

Harry Graham  
Arbitrator