ARBITRATION DECISION NO.:
586

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

EMPLOYER:
Warren Correctional Institution,
Lebanon, Ohio

DATE OF ARBITRATION:
May 2, 1995

DATE OF DECISION:
September 11, 1995

GRIEVANT:
Anthony C. Lawson

OCB GRIEVANCE NO.:
27-26-(94-10-04)-0504-01-03

ARBITRATOR:
Charles F. Ipavec

FOR THE UNION:
Donald M. Sargent, Field Staff Representative
Michael A. Hill, Field Staff Representative

FOR THE EMPLOYER:
Richard A. Jesko, Administrative Assistant
Colleen Wise, Second Chair

KEY WORDS:
Removal
Disparate Treatment
Fighting
Discrimination
Just Cause
Mitigating Circumstances

ARTICLES:
Article 2 - Non-Discrimination
    §2.01 - Non-Discrimination
Article 24 - Discipline
    §24.01 - Standard
    §24.02 - Progressive Discipline
    §24.03 - Supervisory Intimidation
    §24.04 - Pre-Discipline
    §24.05 - Imposition of Discipline

Article 25 - Grievance Procedure
§25.07 - Other Grievance Resolution Methods

FACTS:

The grievant was employed as a Corrections Officer at Warren Correctional Institution and was removed for striking another Corrections Officer. The injured officer suffered from headaches as a result of the fight and also had a bump on the back of his head.

In addition, the Department brought criminal charges of assault against the grievant for his attack on the officer. The grievant was also charged administratively with violating Agency Rules #13, 20, 21, and 41, which pertain to making false, or abusive statements toward or concerning another employee, threatening, intimidating, or coercing another employee, fighting with another employee and acting in such a way as to discredit the employer.

MANAGEMENT'S POSITION:

Management stated that the grievant violated Agency Rules #13, 20, 21, and 41 and, as such, was rightfully removed from his position. Management also contended that the grievant did not have to be progressively disciplined pursuant to Rule 13 because of the severity of the offense he committed.

UNION'S POSITION:

The Union claimed that management wrongfully added the Rule 41 violation after the pre-disciplinary conference was held and the grievant was double-charged as a result of the Agency filing criminal charges in addition to removing the grievant from employment. The Union also contended that management did not have just cause to discipline the grievant and that the discipline was not commensurate with the violation.

The Union also raised a claim of reverse discrimination based on the fact that some African-American officers who had engaged in similar misconduct only had received ten to fifteen day suspensions, while the grievant, who is white, was removed. Therefore, according to the union, the discipline that was imposed was punitive instead of corrective and since the grievant had no prior discipline, the removal of the grievant was too harsh. The Union also contended that there was no Rule 21 violation because the grievant did not engage in fighting.

As a remedy, the Union requested that the grievant be reinstated to his position as a Corrections Officer with full seniority rights and benefits plus backpay.

ARBITRATOR'S OPINION:

The arbitrator held that a fight did, in fact, occur in violation of Rule 21 based on the grievant's violation of Rule 21 and that the grievant did strike the other officer across the face. In addition, the arbitrator held that the Union's contention that the grievant was subject to reverse discrimination was without merit because the Union had no documentation to support its claim and the incident involving the African-American officers was not similar enough to the incident at hand.

Although the grievant had no prior discipline, the arbitrator believed that based on the seriousness of the incident, removal was proper and, therefore, the Agency had just cause to do so.

As far as the Union's procedural claims under Article 24.05 were concerned, the arbitrator held that although more than 45 days had elapsed between the conclusion of the pre-disciplinary meeting and the date of the imposition of the penalty, Section 24.05 also gives management discretion to go beyond the 45-day limit where a criminal investigation may occur. In this case a criminal investigation was made. Therefore, the employer was bound by the agreement between the parties and should have waited until after the disposition of criminal charges, which occurred after the 45-day limit. The grievant was entitled to be paid for earnings lost between the date of the imposition of the penalty and the resolution of the criminal charges because the grievant should have been actively employed or on administrative leave with pay until the criminal investigation was concluded.

The arbitrator also pointed out that removal would have been appropriate but for mitigating circumstances. In particular, the grievant was told on his performance reviews that he was meeting all

expectations of his position, when in fact, the expectations were very low. The arbitrator believed that if the grievant had been rated low all along, it was probable that his conduct would have improved to the point that the incident with the other officer would not have happened.

AWARD:

The grievance was sustained and the grievant was entitled to be paid for lost time up to the date of the imposition of the penalty. In addition, the grievant was to be reinstated to his position one year after the imposition of the penalty, which is when the effect of the criminal penalties would cease. During the year while the penalty was in effect, the grievant would not be entitled to backpay.

TEXT OF THE OPINION:

UNITED STATES OF AMERICA

STATE OF OHIO

VOLUNTARY LABOR ARBITRATION

CHARLES F. IPAVEC
Arbitrator

CASE NO. 27-26-941-004-0504-01-03

In the Matter of the Arbitration between:

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

-and-

STATE OF OHIO,
WARREN CORRECTIONAL
INSTITUTION
LEBANON OHIO

OPINION AND AWARD
Grievance filed by
Anthony C. Lawson

The oral hearing for this case was conducted on May 2, 1995 in the conference room of the Warren Correctional Institute in Lebanon Ohio before Charles F. Ipavec, the arbitrator, to whom the within case was assigned.

Richard A. Jesko, Administrative Assistant, presented the case on behalf of the State, with Colleen Wise, sitting as Second Chair. Also in attendance were Patrick A. Mayer, Labor Relations Officer; Anthony J. Brigano, Warden; Carl Mockabee, Major, Chief of-Security; John Davis, Registered Nurse; and Correction Officers, George Holtzman, Kenneth Kaufman, and Elmer Brewer.

Donald M. Sargent, Field Staff Representative, presented the case on behalf of the Union and the grievant. Also in attendance were Michael A. Hill, Field Staff Representative; Charles Corbin, Chapter President; and Anthony C. Lawson, the Grievant.

There were no objections to arbitrability on substantive grounds or on procedural grounds; so that the decision and award of the arbitrator shall be final and binding on the parties pursuant to Article 25 of the Agreement between the parties. Both parties filed post hearing written closing statements. There was no stenographic record made of the proceedings at the hearing so that the official record for this case will consist of the documents submitted into evidence, the written closing statements of the parties and this opinion and award.

GRIEVANCE

On September 24, 1994, the grievant, Anthony C. Lawson, filed a grievance form in which the statement of facts was as follows:

"On 9-19-94 I was removed from my job as Corrections officer at Warren Correctional Institution for an incident that happened on 7-7-94. I do not feel that management proved 'just cause' for removal but that a small suspension was probably in order. On 7-18-94 during the Pre Disciplinary Investigatory Interview with Mr. Mockabee, investigator at W.C.I., I admitted to back-handing officer K. Kaufman once in the face. I told him I would 'kick his ass' and I called him 'a snitch' which he self admitted to snitching in his incident report. At the Pre-Disciplinary Conference (sic) I was charged with Standard of Employees Conduct rules # 13, 20, 21 and 10 in the packet I was given by Mr. Jesko, Labor relations officer, when I signed the 72 hour Notice for the Conference (sic). My union representative Charles Corbin was asked for any procedural objections which he said yes #1 Stacking of the charges to try and hit at least one. #2 We asked to review the rules I was charged with for justification a) #10 Felony commission of Conviction: We asked what felony had I been charged with or convicted of? Mr. Jesko said 'none and that rule would have to be dropped.' B) #21 - Fighting another employee during work hours on state property or in uniform: We asked who was I fighting? Mr. Jesko stated 'officer Kaufman," we then asked if Officer Kaufman was being charged with fighting. Mr. Jesko said 'No', so we asked if it was possible for just one person to fight? Mr. Jesko then stated 'We may have to drop that one to.' Which he did recommend to drop it in his Hearing Officer report. C) #20 - Threatening, intimidating or coercing another employee: Since I admitted that I told Officer Kaufman that I would kick his ass we didn't argue this rule. D) #13 - Making false, abusive or obscene statements toward or concerning another employee, a supervisor or a member of the general public: we asked what statement I made that fell under this rule? Mr. Jesko said that me calling Officer Kaufman a f..... bitch and a snitch fell under this rule. We then showed him in Officer Kaufmans report where he admitted to telling the Captain what I was doing was self-admitting to snitching and then we addressed the f..... bitch part. Showing where only 2 of the 5 people who wrote incident reports put that in their report and that those 2 reports were written 3 days apart which gave the people time to discuss what the 1st person wrote. Note that both are on 3rd shift. Mr. Jesko agreed with our point and said that he would consider it in his report. At this time we had been over the 4 rules I had allegedly (sic) violated and it appeared that 2 of them would be thrown out [(#10) + (#21) which were listed as 'not just cause for discipline' in the hearing officers report] and one of the other 2 could be thrown out (#13). That would leave only rule #20 to take disciplinary action on but then Mr. Jesko said that he was going to add rule #41 0 Any act that would bring discredit to the employer; he told us that this was added because of the press releases. We objected to adding this rule because - 1) We have no control of what Ohio State Patrol does. 2) Since we had very strong arguments (sic) against the rules I had been charged with. Management doesn't have the right to reload the 'shotgun' to try and hit me with new rules. 3) It is not standard practice to add rules at this point so due to past practice we objected. Mr. Jesko said he would not our objections but that he was going to add it anyway and give me another 72 hour notice to prevent management from regrouping and getting better arguments (sic). Due to the strength of our defense and managements lack of proof we feel that removal is much to harsh a punishment. The Department of Rehabilitation and Corrections has shown disparate treatment in my case based on an incident at Ohio State University Hospital in which a 1st shift Lt. took a 2nd shift correction officer into an office, closed and locked the door and proceeded (sic) to fight the Correction officer. The door to the office had to broken open to separate the 2 men. The Lt. who was armed during the incident with a holstered .38

had apparently planned the incident by asking the correction officer to come into the office. The punishment for this was a 20-day suspension for the Lt. and a 15-day suspension for the correction officer. My incident with officer Kaufman happened at 5:30 AM inside the institution. The incident at O.S.U. hospital happened at approximately 1500 hrs (3:00 pm) in a public hospital. I have been brought up on criminal charges in Warren County Court by Ohio State Police who investigated the incident but it appears that neither the Lt. or the correction Officer from C.M.C. were brought up on criminal charges by O.S.P. even though the .38 could have led to a felony charge. We are grieving this under Article 24 - Sections 24:01 - the burden of proof to establish just cause was not met on all allegations. 24:02 - 'Disciplinary action shall be commensurate (sic) with the offense. Based on the O.S.U. hospital incident and punishment, mine could not have been commensurate (sic). 24:03 - the number of people present during the meeting to notify me of my removal was an attempt to intimidate me and my union representative. (present for management: Acting Warden Richard Crain, Major Harold Carter and Labor relations Officer Richard Jesko.) 24:04 - The adding of rule #41 - at the Pre-Disciplinary conference. 24:05 Pre Disciplinary Conference was held on 8-1-94 and discipline was not imposed until 9-19-94 which is more that 45 days - shall be reasonable and commensurate (sic) and will not be imposed in the presence of other employees ....”

Remedy Sought: Reinstatement of job as correction officer with full seniority & benefits plus all back pay to include roll call, shift differential, and all overtime missed. Also all roll call, shift differential overtime missed during administrative leave, and update all sick, vacation, personal and compensatory time that I had and that would have been accrued (sic). Return retirement and deferred (sic) compensation to full level as 9-19-94 and to be made whole."

At Step 3 of the grievance procedure the following Response was given:

A grievance was filed by the above named in accordance with Article 25.07 of the collective bargaining agreement between the State of Ohio and OCSEA/AFSCME, Local 11. Therein, it .is alleged that Article(s) and Section(s) -
24.01 - Discipline Standard
24.02 - Progressive Discipline
24.03 - Supervisory Intimidation
24.04 - Pre-Disciplinary Conference
24.05 - Imposition of Discipline
2.01 - Non Discrimination

were violated. A Step 3 hearing was held at Warren Correctional Institution on October 20, 1994, and present wee Anthony Lawson, grievant; Charles Corbin, Local President; Patrick Mayer, Staff Rep., AFSCME; Charles R. Adams, Step 3 Hearing Officer.

To the question of procedural objection the Union had the following objections: 1) The Union contends that it is improper to add charges after the pre-disciplinary conference. It is their contention that Rule #41 was added after the State Patrol was notified. @) That the institution double charged the grievant by filing criminal charges and also by removing him from employment.

Facts
The grievant was charged with violation of Rules 13, 20, 21 & 41 of the Standards of Employee Conduct when, on 7/7/94, the employee (Lawson) approached Officer Kaufman and assaulted him. The grievant was removed from employment.

Union Contention
The grievant, through the Union, contends that:
A. Management failed to have just cause to discipline the grievant;

B. That the discipline was not progressive;
C. That the discipline was not commensurate with the infraction;
D. That the grievant was removed because he was a white employee after several black officers had been fired to equalize the treatment.

The Union seeks as remedy:
A. That the officer be reinstated to his job as Correction Officer with full seniority rights and benefits, plus all back pay to include roll call, shift differential, and all overtime missed;
B. Also that on all roll call and overtime missed during administrative leave and update all sick, vacation, personal and compensatory time that the employee had and that would have been accrued;
C. Return retirement and deferred compensation to full level as of 9/19/94;
D. And to be made whole.

Discussion and Finding
Having reviewed the discipline, the grievance, and having heard Step 3 testimony, the following represents the findings of the Step 3 Hearing Officer.

It is necessary first to deal with the procedural objections offered by the Union. The Union contended that it was improper to add charges after the pre-disciplinary conference. The Hearing Officer responds that all of the charges made against the employee were in fact made at the time of the pre-disciplinary conference. The Rule 41 was added after the institution initiated the action with the State Highway Patrol, but it was added prior to the pre-disciplinary conference when the employee waived the right of the 72 hour notice for that rule charge. In the Hearing Officer's report and the pre-disciplinary conference, the Hearing Officer found no just cause for Rule 21 on the basis that it was his interpretation and impression that a fight involved the physical altercation of two people. In this instance, the blows struck against by the employee against another officer were considered an assault but also constituted fighting on the part of that officer. To the Hearing Officer's knowledge there were no charges added after the pre-disciplinary conference.

The Union also makes an objection that the institution double charged the grievant by filing criminal charges and removing the employee from employment. It is the Hearing Officer's understanding that the State Highway Patrol was called due to the fact that an assault occurred on state property and it is the decision of the State Highway Patrol to file criminal charges against the employee. The institution then proceeded with administrative action which resulted in the removal of the employee from employment. This does not constitute any kind of double charging.

The Union argues that management failed to have just cause to discipline the grievant on the basis of disparate treatment. The Union cites two examples form the Corrections Medical Center when Lt. Boyd and C.O. Sidney Hardgrow were involved in a fight at the Ohio State University when the lieutenant was armed with a loaded .38 and the door had to be kicked down by other employees to separate the two from that fight. This fight occurred on the 8th floor in the treatment area for inmates of DR&C at the Ohio State/University. It's the Union's information that the lieutenant received a 20 days suspension while the officer received a 15 days suspension. The Union also cites another altercation between C.O.P. Williams and a contract Food Service Employee Newland when the employee Newland sustained serious injuries. The Correction Officer received a 15 days suspension for Rule 21 - Fighting. The Union also cites that from London Correctional Institution that Terry Tolle was given a 10 day suspension for Rule 21.

It is the opinion of the Hearing officer that to argue disparate treatment one must have like circumstances in order for there to have been disparate treatment. In the instances cited by the Union, there was an altercation constituting physical contact between two employees and this is significantly different from that which occurred at the Warren Correctional Institution. The Officer charged assaulted the other officer and the other officer did not raise his hand or arms to defend himself against the tirade of the assaulting

employee.

The Union cites Article 2.01 - Non-Discrimination argument. It is their contention that in the instances cited for disparate treatment that the three officers were black males and only got ten to fifteen days suspension but as Warren Correctional Institution this is a white male who was removed. It is their contention that this is discrimination in reverse. The Union further contends that management is taking a position for that particular offense that the employee would have to be removed and would not take it back regardless of any explanations. It is their contention that this was management's attempt to use Lawson as the token white to be removed because a number of black officers had previously been fired from Warren Correctional Institution.

It is the opinion of the Hearing Officer that using Article 2.01 (Non-discrimination) as an argument in this situation is completely without merit. The Union has no documentation of management's intent in this area and cannot substantiate a claim of discrimination.

The Union argues that discipline is to be corrective and not punishment. It is their position that a removal was punitive. The employee admitted to striking the other officer and although that was bad enough it is the impression of the Union that this behavior was correctable and therefore the removal was not commensurate with the action.

It is the position of the Warden of Warren Correctional Institution that in a prison setting he cannot in any way shape or form accept or tolerate the assault of one officer upon another when the officer being assaulted was merely doing his job by reporting that the assaulting officer was not doing-his job properly. This is an assault for all the wrong reasons if there are any proper reasons for an assault.

The Union argued that the grievant has no existing discipline in his file and that he has had 5 1/2 years of prior service with no prior discipline in that file. It is the Union' impression that the department was making every effort to get rid of this employee regardless.

It is the opinion of the Hearing Officer that whether the grievant had prior discipline or not is irrelevant. The Warden of the Warren Correctional Institution felt so strongly regarding the assault that it had no relevance to any prior discipline whatsoever. This is the first instance of this assault of fighting with another employee when the other employee did not make any effort to defend himself and therefore it is the impression of the management that the officer required to be removed.

From the perspective of the Hearing Officer, management has conducted itself properly in the presentation of this discipline. The Union has offered a number of procedural objections and contractual objections as well as the claim that the grievant was given unemployment compensation on the basis that management failed to have just cause to remove the employee. The Union needs to understand that the unemployment compensation has an entirely different standard for the determination of just cause as to whether an employee is removed or not. They do little or no investigation but base their findings upon the word of an employee coming in disputing the claim of removal.

In the opinion of the Hearing Officer that management must be supported in its finding of just cause, that the discipline was progressive and commensurate with the infraction and on that basis, the grievance must be denied."

ISSUE

The parties stipulated that the following issue was being presented to the arbitrator: Was the removal of the grievant for Just Cause? If so, what will the remedy be?

DECISION

On July 7, 1994, an incident occurred in which the agency ,alleged that the grievant Anthony C. Lawson was the aggressor and that Corrections Officer Kenneth Kaufman was the victim. C.O. Kaufman made an incident report which stated as follows:

"On the above date and while sitting in a chair in Medical Health Officer A. Lawson approached me. Officer A. Lawson began by _____ to this officer about 'snitching' on him. I replied to him 'paybacks are hell aren't they Tony.' It was at this time to the best of my memory that Officer A. Lawson stepped up to me approximately 2 inches from my face and again yelled at me about ‘snitching’ on him. Then he took a step back and slapped the left side of my face with his open right hand. He then moved back to within in 2 inches of my face yelling at me then stepped back and back handed me on the right side of my face with his open right hand. This happened a total of 5 to 6 times. (At no time did I make a move to hit him, push him or in any way touch him). I guess it was because of this that he then grabbed me with both hands on the front of my shirt and partially lifted me up out of the chair and then slammed me down causing (sic) my head to hit the corner of the wall ®L (I can't remember how many times this happened.) Then after the urging of Off. Brewer, Off Holtzman and Nurse J. Davis Officer A. Lawson backed off and picked p his lunch box and started to leave. It was then that he turned to me and pointed his finger and said 'If you ever drop a dime on me again or any other officer I'll kill you." He then turned and left medical health. This action was witnessed by Nurse J. Davis, Off. G. Holtzman, Off. E. Brewer, Off. Tim Johnson, Officer O'Neil and other 1st shift officers standing outside waiting for roll call to start.

On July 8, 1994 I went to my family doctor and got checked out. I had a bump on the right side of the back of my head as well as a bruise and I was suffering from headaches. My doctor Keith Clark examined me and had 6 x-rays taken of the entire skull.

The events leading up to the incident should be noted at this time. On Tuesday night I was assigned to vehicle patrol as well as Off. A. Lawson. On the night he was intentionally setting off zones #8 and #9. He would then drive to where I was sitting in my vehicle and pull across the road and block it so I couldn't pass and then would close zones #8 and #9 from zone 13 and 14. Also on this night he would try to play ‘chicken' with his vehicle against mine. He would come right at me and swerve at the last minute. This action made me angry. So on Wednesday night when I was N. Utility as I was entering the programs building at approx. 0350 hrs. I saw Off. A. Lawson doing a front building check using the Medical Cart. I asked Lt. J. Thompson what was going on out there she replied 'I don't know’. I then said you might want to look. As she got up to go look I said 'what was the last radio traffic?" she replied, 'Front Building Check." I walked out as she went to look. She then called for Capt. Sears who went to look and told Officer A. Lawson that he needs to park the cart while doing a Front building Check. It was shortly after this that Officer A. Lawson approached me and said 'Thanks for snitching me out.’ Lt. J. Thompson had gone to 3CD for a security check and I went there to escort inmates. I asked her while there if she was the one who had told Officer A. Lawson that I had 'snitched' him out'. She replied 'Why yes!’ This was at approx. 4 or 4:30 A.M. This is what led up to the assault by Officer A. Lawson on me at approx. 0530 hrs.”

The statement concerning the incident made by the grievant was as follows:

"When I entered medical I told officer Ken Kaufman thanks-for snitching on me about the building check. Ken then said 'Life’s a bitch’. I said no I'm looking at one. I told him I was trying to help Greg Taylor get the building check done because his leg was hurting and they hadn't been done yet. His comment again was life’s a bitch isn't it. I went up to Kaufman (sic) face and told him not to snitch on me or anyone again or I would kick his ass. I step (sic) back from Ken. He raised up out of his chair and said pay backs are hell, I stepped forward then and back handed him (which was more a push-no force behind it). He then said I wont

fight you on grounds. I told him name the place and I'll kick your ass. I then grabbed Ken Kaufman up out (sic) chair slightly and told him again that if he snitched on me or anyone again I kicked his ass. I then let him go and left before it got worse or wound up in a fight. At control I told Lt. J. Thompson what had happened."

The evidence presented at the hearing indicated, in the opinion of the arbitrator, that the version of the incident as reported by C.O. Kaufman was closer to being correct, and as corroborated by other witnesses, than the version of the incident as reported by the grievant.

The Agency has published and promulgated certain Standards of Employee Conduct and the grievant was charged with having violated Rules 13, 20, 21 and 41.

Rule Number 13 provides as follows:

"Making false, abusive, or obscene statements toward or concerning another employee, a supervisor or a member of the general public."

Said Rule Number 13 provides for a four step progressive discipline with the provision that at each of the four steps removal could be a penalty depending upon the severity of the infraction.

Rule Number 29 provides as follows:

"Threatening, intimidating or coercing another employee."

The disciplinary penalty for violation of Rule 20 starts on the first offense with a penalty of a disciplinary suspension, up to removal, and continues on for a three step progressive discipline and, again, for each offense the penalty could be accelerated to that of removal depending on the severity of the conduct which caused the violation.

Rule Number 21 provides as follows:

"Fighting with another employee or employees during work hours, on state property, or in uniform."

The disciplinary penalty for violation of Rule 21 begins with a disciplinary suspension of three to five days and progresses in three steps to removal; with the further provision that the disciplinary penalty could be accelerated to removal at each offense depending upon the severity of the conduct which is alleged violates Rule 21.

Rule Number 41 provides as follows:

"Any act that would bring discredit to the employer."

The disciplinary conduct begins with a written reprimand and progresses through two steps of disciplinary suspensions with the fourth offense being that of removal with the additional provision that at each offense removal could be an appropriate discipline depending upon the severity of the conduct which is alleged as having violated Rule 41.

The language used and the actions taken by the grievant, in the opinion of the arbitrator, clearly showed a violation of Rule Number 13 and Rule Number 20 in that the grievant was abusive; and, even in the toned down report as submitted by the grievant, the statements were abusive; further, the grievant threatened and attempted to intimidate C.O. Kaufman in that the grievant stated that he would inflict bodily harm upon C.O. Kaufman if C.O. Kaufman "snitched" on him or on any other employee at the Correctional Institution.

The Union has alleged that Rule 21 could not have been violated because Rule 21 prohibits fighting with

another employee; and, in the incident that was reported, there was no fight because C.O. Kaufman did not take any aggressive action, and did not participate. When the incident is looked upon, in the opinion of the arbitrator, it is inconceivable that any reasonable person could say that a fight did not occur. Fighting means that an attempt is made to overcome a person by blows and any incident which involves a hostile encounter is in fact a fight. In the opinion of the arbitrator, the grievant did attempt to overcome C.O. Kaufman by blows as evidenced by the fact that the grievant struck C.O. Kaufman across the face and picked him up out of his chair and then pushed him back into his chair so that the back of his head struck the wall. In addition, anyone who would witness such an incident, including those employees who actually did witness and presented their version of the incident, would describe the incident as a hostile encounter. The foregoing leads but to one conclusion and that is that the grievant violated Rule 21.

When the grievant was charged with a crime and found guilty in the Lebanon Municipal Court, such fact, standing alone, brought discredit to the State since the grievant was a State employee who is entrusted to care for other individuals who have been found guilty of crimes and are incarcerated. Even if there had been no publicity concerning the criminal charge, the fact that the grievant was charged criminally, brought discredit to the State; however, in this case, there was also some publicity concerning the incident. The publicity is not the controlling factor. The controlling factor in this case, concerning discredit, is the fact that the grievant was found guilty of committing a crime and that such information is found in a public record.

In the opinion of the arbitrator, the Agency had just cause to impose discipline upon the grievant for violation of Rules 13, 20, 21 and 41.

The grievant alleged that the grievant had been subjected to disparate treatment in that there were other employees who had engaged in similar conduct and who were disciplined in a much more lenient manner with disciplinary suspensions rather than by removal. The arbitrator has reviewed the evidence concerning other incidents which the Union presented and finds that none of them present a fact pattern that is the same or even remotely similar to the fact pattern in this case.

There are two distinguishing factors in this case which set the incident in a class by itself. The first factor is that the grievant was very aggressive while C.O. Kaufman was passive so that whatever burden being aggressive imposes in this case, is a burden entirely on the grievant because C.O. Kaufman was not aggressive and in fact was very passive. The other distinguishing factor is that the grievant was charged with, and found guilty of, having committed a crime which means that the Judge who presided over the court proceedings in which the grievant participated found, beyond a reasonable doubt, that the grievant had committed an assault; and when the arbitrator reviews the evidence presented at the arbitration hearing, it is also the opinion of the arbitrator that the grievant has violated the Standards of Employee Conduct, and such fact is proven beyond a reasonable doubt, which is a burden of proof far in excess of what is required in the civil proceeding of an arbitration.

The arbitrator has studied the employee performance reviews and finds that the grievant has consistently met the expectations of his job performance. Some of the comments made by the rating officer do not indicate, in the opinion of the arbitrator, that the grievant met all expectations within the various performance dimensions; however, since the rating officer indicated that the grievant met the expectations, the arbitrator must accept such a rating and give it weight when the question of a mitigation of the penalty is considered.

This case involves a procedural matter, which has been raised by the grievant in that it is alleged the Agency did not follow the dictates of the agreement between the parties as contained in Article 24 - Discipline, Section 24.05, which provides as follows:

“The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.”

*** * * * ***

In this case, the pre-disciplinary hearing was held on August 1, 1994, and the disciplinary penalty was imposed-upon the grievant on September 19, 1994. Clearly, a review of the calendar shows that more then forty-five (45) days had lapsed between the conclusion of the pre-disciplinary meeting and the date of the imposition of the penalty. Section 24.05 gives the employer the discretion to go beyond the forty-five (45) day period where a criminal investigation may occur. In this case, a criminal investigation did occur and was in process during the time prior to the imposition of the disciplinary penalty; however, it is the opinion of the arbitrator, that whenever the employer opts to use the discretion of going beyond the forty-five (45) day requirement then the employer is bound not to make a decision on the discipline until after the disposition of the criminal charges. In the criminal matter the journal entry concluding such proceedings is dated October 6, 1994 so that the employer, since they opted to go beyond the forty-five (45) day requirement, is then bound by the Agreement between the parties to wait until after the disposition of the criminal charges which occurred on October 6, 1994; accordingly then, the grievant is entitled to be paid for the earnings lost between the date of the imposition of the penalty through October 6, 1994, because, in fact, he should have been actively employed or on administrative leave with pay.

At the pre-disciplinary meeting the Agency stated that an additional rule violation was to be added to those previously alleged; specifically, that the grievant was in violation of Rule Number 41. Whenever such an additional charge is to be added to the alleged rule violations, the employee is to be given a 72 hour notice before the commencement of any pre-disciplinary conference. The Agency has alleged that when the additional charge was proposed, the grievant and the Chapter President, were asked to give a waiver of such 72 hour notice and such a waiver was given as evidenced by the signatures of both the grievant and the Chapter President. The Union then alleged that such waiver was given because the grievant and the Union did not wish to .postpone the pre-disciplinary meeting and wanted it to take place on that date, and that such waiver was given only for such purpose and not as agreeing to the addition of the Rule 41 violation.

The arbitrator agrees that the grievant and the Union had the right to a 72 hour notice prior to a pre-disciplinary meeting wherein Rule 41 would also be included as an alleged violation; however, by virtue of the fact that a waiver was given, such right to a 72 hour notice was relinquished. A waiver involves the intentional relinquishing or abandoning of a known right. The grievant and the Union knew they were entitled to the 72 hour notice and could have postponed the pre-disciplinary meeting until such 72 hours had lapsed. Instead, the grievant and the Union chose to give a waiver of the 72 hour notice requirement and they cannot now come forward and say that the waiver should not be given effect and that the discipline concerning the violation of Rule Number 41 must be eliminated.

The grievant, in his comments to C.O. Kaufman indicated that he was displeased with C.O. Kaufman because certain rule violations of the grievant were brought to the attention of supervision by C.O. Kaufman, or as the grievant stated it C.O. Kaufman "snitched" on him. The concept of not snitching has been created throughout history by rule violators who do not wish to be brought to task for their rule violations. It is a concept that probably all of the inmates at the Correctional Institution agree with because they are rule violators and have been incarcerated for such rule violations. The arbitrator uses the term rule to include all laws under which the inmates may have been convicted.

A correction officer such as the grievant, is entrusted to make sure that rules and laws are not violated and they are very closely akin to a law enforcement officer. When the grievant took the attitude that he did not wish to be snitched upon, in the opinion of the arbitrator, he was placing himself along side the inmates of the Correctional Institution rather than along side the correctional officers of the institution.

There are two aspects of this case which must be given due consideration for the mitigation of the penalty of removal. The first aspect is the Employee Performance Reviews. The review dated July 27, 1991 shows a rating of meets expectations in performance dimensions of team effort/cooperation, dealing with demanding situations, and adhering to procedures; however, the comments made by the rating officer indicate that the expectations may have been-too low, because the comments would indicate that the grievant should have been rated as below expectations. Similarly, in the performance review dated June 16, 1992 shows meets expectations rating for directing/coordinating behavior of others, dealing with demanding situations, adhering to procedures, and communicating, however compared to the comments made by the rating officer, it would indicate that the expectations were very low, because the .grievant did not perform

well. The foregoing, in the opinion of .the arbitrator, indicates that had the grievant been rated as below expectations on some of his previous reviews in the areas pointed out by the arbitrator, it is very probable that his conduct would have improved to the point that the incident with which we are concerned with in this case would not have happened, however, the grievant, by being told he meets expectations, was being lead down the wrong path. Reviews should be frank in nature and not a pat on the back, even if performance is less than a reasonable standard.

The second aspect concerns Lt. Thompson in that she told C.O. Kaufman when he reported to her concerning some rule violations by the grievant, she told the grievant and that it was C.O. Kaufman who made the report. In the opinion of the arbitrator, a supervisor must remain neutral as between the employees under their supervision and not reveal any source of information concerning rule violations unless the employee who allegedly violated the rule is to be disciplined; then, of course, the person making the charge must be revealed so as to give the alleged erring employee an opportunity to challenge and face their accuser. In this instance, Lt. Thompson obviously sided with the grievant when she revealed to him that C.O. Kaufman related rule violations to her and such information given to the grievant by Lt. Thompson, angered the grievant and induced the grievant to confront and get involved in the incident with C. O. Kaufman.

When all of the circumstances of this case are reviewed it is clear and convincing, in the opinion of the arbitrator, that the conduct of the grievant gave the Agency just cause for severe discipline; and but for the mitigating factors pointed out herein the removal of the grievant would have been sustained. The

arbitrator does not wish to minimize, in any way, the severe conduct engaged in by the grievant.

The next matter which should be considered is when is the grievant to return to work. The grievant, as a corrections officer is entrusted to be a buffer between the criminal inmates of the correctional institution and the general public; and as such a buffer, his reputational status must be beyond reproach and not subject to any limiting, order or suspension of a jail term arising from the criminal charges which emanated from his conduct in the incident under review. Under the specific circumstances of this case, the grievant does not become a full fledged member of the general public until after he has been relieved of all conditions imposed upon him by the Lebanon Municipal Court, in that he is subject to serving the 30 day suspended jail term if such conditions are violated.

It is the understanding of the arbitrator that one year from October 6, 1994, the grievant will have no further obligations pursuant to the criminal charges which were brought against him in the Lebanon Municipal Court as a result of his conduct in this incident. Therefore, the grievant is to be returned to his position as corrections officer at a time which is reasonable for the Agency to schedule the grievant after October 6, 1995. From October 7, 1995 to the time the grievant is reinstated, and scheduled to work in his position of correction officer, he is to receive no back pay or benefits. Such reinstatement should take place with reasonable haste. For the period prior to and including October 6, 1994 that the grievant did not work the grievant is entitled to back pay at his regular hourly rate and all benefits which would result from such regular time employment had the grievant not been removed but not to include any premium or overtime wages or benefits which may result therefrom.

AWARD

The grievance as filed by Correction Officer Anthony C. Lawson is sustained to the extent that the grievant is to be paid for lost time up to and including October 6, 1994 at his regular hourly straight time rate plus all benefits which accrued therefrom and the grievant is to be returned to his position of Corrections Officer at a time after October 6, 1995 when the Agency can reasonably schedule the grievant for work.

As to the time between October 7, 1994 and the date upon which the grievant returns to work pursuant to this Award, the grievant is to receive no back pay or benefits and to that extent, the grievance is denied.

Charles F. Ipavec
Arbitrator

Dated September 11, 1995 and made effective at the Warren Correctional Institution in Lebanon, Warren County, Ohio.