

ARBITRATION DECISION NO.:

643

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Administrative Services
Office of Collective Bargaining

DATE OF ARBITRATION:

June 18, 1997

DATE OF DECISION:

August 4, 1997

GRIEVANT:

John Malone

OCB GRIEVANCE NO.:

27 25 (96 07 10) 1097 01 03-T

ARBITRATOR:

Mollie H. Bowers

FOR THE UNION:

Don Sargent, Staff Representative
Bob Clagg, Vice President Local 7330, Correction Officer

FOR THE EMPLOYER:

Cynthia Sovell-Klein, Advocate
Wendy Clark, Second Chair

KEY WORDS:

Credibility of Witnesses
Just Cause
Removal

ARTICLES:

Article 24 – Discipline
 §24.01 - Standard
 §24.02 – Progressive Discipline

FACTS:

The grievant worked as a Correction Officer (CO) at the Southern Ohio Correctional Facility. The Employer removed him from his position on July 2, 1996, because he was allegedly involved in an altercation with another CO.

According to the alleged victim, the grievant assaulted him as he was passing through a gate at the

grievant's post. The victim claimed that the grievant knocked him to the floor, and beat him for approximately four minutes, and then called for assistance by stating an officer was down. The alleged victim also stated that the grievant told him that the beating was "payback" for a previous altercation between the alleged victim and the grievant's friend.

The grievant claimed that no assault ever occurred. When the alleged victim passed through the gate, he immediately dove to the floor and began yelling for help. The grievant claimed he never touched the alleged victim, and that he called for assistance because he thought the alleged victim had hurt himself.

EMPLOYER'S POSITION:

The Employer argued that there was just cause to remove the grievant because the victim's testimony was more credible than the grievant's testimony. Also, a lie detector test taken by the victim indicated that the victim was telling the truth. Moreover, the victim was not well liked at the institution, and the grievant was one of his enemies. Furthermore, the Union's witnesses were rehearsed, and their testimonies were not consistent with incident reports filled out by some of the Union's witnesses. Last, the grievant had been disciplined before for similar conduct which made him less credible.

UNION'S POSITION:

The Union argued that the grievant was not removed for just cause. First, the victim's testimony was not credible. The victim has a history of lying, and he was disciplined for making false claims before. Also, the victim's testimony is in contradiction with many of the factual circumstances surrounding the incident. For example, there were no bruises on the victim's body where he was allegedly beaten. Likewise, there was no evidence of an altercation in the hallway where the fight allegedly occurred.

The Union argued that the grievant was much more credible. The grievant's version of events is much more consistent with the factual circumstances. Moreover, the grievant had never used any kind of physical force or threat of violence before.

Last, the Union argued that the results of the victim's lie detector test were not dispositive. The victim was taking medication which could have altered the results of the test and made it inaccurate.

Arbitrator's Opinion:

The Arbitrator stated that credibility was the major factor in determining whether there was just cause for the removal. The Arbitrator concluded that the Employer did not present sufficient or credible evidence to prove that there was just cause to remove the grievant. The Arbitrator reached this conclusion for two reasons.

First, the testimony of the alleged victim was not credible. Some aspects of his testimony were inconsistent with the factual circumstances surrounding the incident. Still other parts of his testimony were inconsistent with earlier statement he had made. The victim had also been disciplined in an unrelated incident for making false statements.

Second, the Arbitrator found that the grievant's testimony was credible. Despite the claims of management, the grievant had not been previously disciplined for making false statements. Also, the grievant had never used any kind of physical force or threat of violence before.

AWARD:

-

The grievance was sustained. The grievant was reinstated to his former position with full backpay.

TEST OF THE OPINION:

* * *

IN THE MATTER OF ARBITRATION BETWEEN:

*

**STATE OF OHIO, DEPARTMENT OF
ADMINISTRATIVE SERVICES/OFFICE OF
COLLECTIVE BARGAINING (OCB)**

*

Grievance Number:

*

27-25-960710-1097-01-03-T

AND

*

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION (OCSEA/AFSCM E), LOCAL 11**

*

Grievant: John Malone

ARBITRATOR:
Mollie H. Bowers

APPEARANCES:

For the State:

Cynthia Sovell Klein, Advocate
Wendy Clark, Second Chair
David Burris, Management Representative
Jerrold Frazier, Correction Officer
Trooper Robert Patterson, Ohio State Highway Patrol

For the Union:

Don Sargent, Staff Representative
Bob Clagg Vice President Local 7330, Correction Officer
Brad Wedebrook, Former Correction Officer
Sharon Kay Hatfield, LPN
James Campbell, Correction Officer
Phillip Reed, Correction Officer
Margaret Baker, RN
Lt. Ron Arnett, Supervisor
Brady Womack, Correction Officer
Jerome Ostrowski, Former Identification Officer

The Ohio Civil Service Employees Association (OCSEA/AFSCME) Local 11 (hereinafter, the "Union") brought this case to arbitration for adjudication of its claim that the termination of John Malone (hereinafter, the "Grievant") by the State (hereinafter, the "Management") violated

****1****

the negotiated agreement (hereinafter, the "Agreement") between the parties. The Hearing was on June 18, 1997 at 9:00 a. m. in the Conference Room, Ohio Department of Transportation facility near Lucasville, Ohio. Both parties were represented and stipulated that this case is properly before the Arbitrator. They had a full and fair opportunity to present evidence and testimony for their case and to cross examine that presented by the opposing party. At the conclusion of the Hearing, the parties requested the opportunity to submit post Hearing briefs. These briefs were received timely by the Arbitrator. The record of this case was considered carefully and thoroughly in reaching a decision.

ISSUE

Was the Grievant, John Malone, removed for just cause?
If not, what should the remedy be?

EXHIBITS

JX 1 Collective Bargaining Agreement March 1, 1994 through February 28, 1997.
JX 2 Discipline trail.
JX 3 Grievance trail.
JX 4 Standards of Employee Conduct.
JX - 5 Interoffice Communication, dated February 16, 1996.
J X - 6 Third Shift Assignment Roster, dated February 16, 1996

UX 1 Article on lowering high_blood pressure.
UX 2 Excerpt, U.S. Code, Title 29 Labor, Ch.. 22, Employee Polygraph Protection.
UX - 3 Xerox of photos of Grievant's hands.
UX 4 Bench Decision and Award, dated November t4, 1995, Grievance Form, dated July 18, 1995, Notice of Disciplinary Action, dated July 7, 1995, and Personnel Action Form, dated July '31 1995.
UX - 5 Unusual Incident Report, dated February 20, 1996.
UX 6 Employee Interview Form, C. O. Malone, dated February 20, 1996.
UX 7 Employee Performance Review of Grievant, July 23, 1991 to July 23, 1992.

MX – 1 Southern Ohio Medical Center Emergency Room Report, dated February 20, 1996.

****2****

MX 2 Incident Report, dated February 20, 1996.
MX 3 Employee Interview Form, J. Frazier, dated February 20, 1996.
MX 4 Xerox of photos of C.O. Frazier, dated February 20, 1996.
MX 5 Letter from J. Mullins, M.D. re: Frazier, dated March 26, 1996.

- MX 6 Notice of Disciplinary Action to J. Frazier, dated July 7, 1995.
- MX 7 Report on Polygraph Examination, dated April 15, 1996.
- MX - 8 Incident Report by Lt. Arnett, dated February 20, 1996
- MX 9 Incident Report by Phillip Reed, dated February 20, 1996.
- MX 10 Incident Report by J. Campbell, dated February 20, 1996.
- MX 11 Employee Interview Form, K. Hatfield, dated February 20, 1996.
- MX 12 Notice of Disciplinary Action to B. Womack, dated March 9, 1995.
- MX 13 Notice of Disciplinary Action to J. Malone, dated December 16, 1994.

PERTINENT CONTRACT LANGUAGE AND CITED LAW

-
Article 24 DISCIPLINE

Sections 24.01 Standard

Discipline shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action....

Section 24.02 Progressive Discipline

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

Ohio Department of Rehabilitation and Correction, Standards of Employee Conduct, Rule 19, Violation

Striking, fighting or otherwise engaging in a physical altercation with another employee or member of the general public.

Cited Law

-
U.S.C., Title 29, Labor, Chapter 22, Employee Polygraph Protection, Section 2007 b (1) (D)

... the examiner does not conduct the test if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the actual testing phase.

BACKGROUND

-
The Grievant was employed by the Ohio Department of Rehabilitation and Corrections as a Correction Officer at the Southern Ohio Correctional Facility (SOCF). He worked in this

3

capacity from 1990, until July 2, 1997, at which time he was removed from his position for aviolation of Work Rule 19 of the Department's Standards of Employee Conduct. In December of 1994, the Grievant received a one day suspension for violation of Work Rules 7¹ and 13². He testified this discipline was not grieved because he engaged in the misconduct charged. During his tenure at SOCF, the Grievant volunteered for and was selected by the Disturbance Control Team, upon which he served during a serious riot approximately three years ago.

The incident which gave rise to the Grievant's termination took place at 3:26 a.m. on the morning of February 20, 1996, when an altercation allegedly occurred between Correction Officer, Jerrold Frazier and

the Grievant. There were no witnesses to this altercation. After an investigation, Management concluded the Grievant was the aggressor in the altercation and removed him from his position.

Certain facts of this case are undisputed. Correction Officer Jerrold Frazier had been employed at SOCF for fifteen years at the time of the incident in question. In July of 1995, he received a five day suspension for violation of Work Rule 13. The Notice of Disciplinary Action described the infraction as follows:

On March 3, 1995, the Institutional Investigator was assigned to investigate allegations that you were spreading rumors accusing staff members of being involved in criminal conduct and in violation of the Standards of Employee Conduct. The investigation reflected you were telling other employees that two staff members were dealing drugs and three other staff members had sexual relations in the facility, and you had pictures of these acts. These allegations

' Failure to follow post orders, administrative regulations, policies, procedures or

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

4

were investigated by the Ohio Highway Patrol. No evidence/facts were presented by you to substantiate your allegations. The Institution Investigator's investigation concluded that you made also statements to other employees about these staff members.

This discipline was grieved and, ultimately, was presented to Arbitrator Craig A. Allen, for a Bench Decision and Award, issued on November 14, 1995. In that award, Arbitrator Allen reduced the discipline to a two day suspension, reasoning that:

... The Grievant started out correctly by reporting the inmates information to his Captain. He erred by confiding in Warren and also by telling C.O. Ginn. The fact that the OSP found no evidence did not mean that Grievant was wrong in reporting it to start with. The error was in telling others who had no need to know....

In light of Grievant's excellent performance evaluations and his having no discipline in his file, I find 2 days commensurate with the offense.

On the morning of February 20, 1996, Frazier was assigned to station L 3 and had been relieved from his post there for the purpose of obtaining a new I.D. In order to get the I.D., Frazier had to walk to another location which required him to leave the L Corridor and to enter the C Corridor. It was necessary for him to pass through a gate which separated the L and C Corridors, and which had to be unlocked manually (because of construction in the area) by another Officer before Officer Frazier could cross over to C Corridor. The Officer who opened the gate was the Grievant. Frazier and the Grievant gave widely divergent accounts of what transpired.

According to Frazier, there was "bad blood" between him and the Grievant. It was Frazier's testimony that the Grievant was holding onto the gate bars and staring at him as he

5

approached the gate, but then disappeared from sight. When he passed through the gate, Frazier said he was attacked from behind by the Grievant, put in a choke hold with one arm, lifted "totally off the floor, and hit in the head by the Grievant's fist . Frazier testified he went limp and fell to the floor, but the Grievant continued the assault, kicking him in the chest and abdomen "at will". According to Frazier, the beating continued for approximately four minutes before the Grievant radioed there was an Officer down and in need of assistance at CC 3. Frazier indicated in his report of the incident that the Grievant said "this is for Brady" and it is "payback time".

In December, 1994, there had been an altercation between Correction Officer Brady Wormack and Frazier.³ Wormack admitted in his testimony that he received a seven day suspension for that incident. He also testified he believed Frazier was "a continuous liar. When he talks he lies", and acknowledged he was a friend of the Grievant.

The Grievant offers a quite different version of the February 20, incident. According to the Grievant, as Frazier passed through the gate the two of them were "right shoulder to right shoulder", facing opposite directions, and Frazier said to him, "I'm not through with you yet, bitch", "dove" to the floor, and began yelling for help. The Grievant testified he immediately radioed there was an officer down and in need of assistance, then went to open other gates to enable arriving personnel to get to the scene. He estimated that in "5 to 6 seconds, there was people on the scene"., The Grievant denied attacking Frazier, and added that the time on his incident report made it impossible for him to have beaten Frazier for several minutes. He stated that he was wearing Rockport shoes, not heavy or steel toed boots, and that there was dust on the floor from the remodeling being done in the area. It was also the Grievant's testimony that when

³ Wormack kicked a food tray out of Frazier's hands.

6

Identification Officer Jerome Ostrowski came to photograph the scene, he asked Ostrowski to photograph his hands. The Union complained that it had never seen these photographs. Management acknowledged that no one knew where they were.

Lt. Ronald Arnett was the first supervisor on the scene on February 20. He testified that "Malone looked like he normally did", but that Frazier was lying on the floor, had a "swollen place on one of his cheeks", and started "hollering that C.O. Malone had attacked him".

Correction Officer Phillip Reed has been at SOCF for twenty eight years and was working in K Corridor at the time of the incident. He said Correction Officer James Campbell and he were the first to arrive on the scene. Reed testified that the Grievant is right handed, that Frazier was lying on his left side, and questioned how Frazier could have been hit as he described. He stated that there was no dust on Frazier's uniform and "and there would have been if he had been kicked the way he alleged". According to Reed, he did not know either Frazier or the Grievant personally.

Correction Officer James Campbell had almost ten years' service and was in K Corridor at the time in question. He said he was speaking to Reed when the "Man down at CC3" call came on the radio. Campbell testified that they proceeded to the gate area, Frazier was on the floor, and asked if it

was his heart. According to Campbell, Frazier replied "No", that he had been hit from behind by the Grievant and said "You can't trust your fellow officer". Campbell said Frazier's statement made him "sick" and, since he saw Lt. Arnett and the Nurses coming, he left the area. At approximately 5:00 a.m., Campbell testified that he wheeled Frazier to the infirmary in A Building and saw no injuries at that time.⁴ It was also Campbell's testimony that sometime

⁴ He testified he prepared his incident report before he wheeled Frazier to the infirmary.

7

after the incident, he and others were called to a meeting with Deputy Warden James Hienemari and other members of Management, that he was waiting in the hall, alone with Frazier, and Frazier asked him "Did you see Rick [the Grievant] was flustered", his shirt tails were out and he was sweating. Campbell testified that he made no such observation. He also said that he had not heard any "tall tales" told by Frazier and that he had not worked much with either Frazier or the Grievant, although he had worked some more recently with the Grievant.

Margaret Baker is an RN and arrived on the scene shortly after the "Man down" call had been made. She testified that Frazier was on the floor, that he said "he was all right, just give him a baton so he can take care of business". Baker said, when she examined Frazier, his shirt and T shirt were tucked in and were clean, although there "was a lot of dust on the floor, he had a "moderate pink area across his left breast",⁵ and a superficial abrasion / swollen area under his left eye. It was also Baker's testimony that she: (1) checked Frazier's knees for injuries, because he had fallen forward, and there were none, (2) checked his naval and there was no discoloration or sign of recent injury, although Frazier "complained of pain" and (3) checked whether he had any discomfort (which usually accompanies an abdominal injury) raising and lowering his leg and he had none. Baker stated there was "no active bleeding", although Frazier had a "skinned place below his night elbow". According to Baker, she sent Frazier to the emergency room at the Southern Ohio Medical Center because she knew about his heart problem and did not want any adverse repercussions to him or to the institution as a result of the 'incident. Baker further testified that the Grievant was "under control" and "neat in appearance" at the time of the

⁵Baker said the pinkness of the skin was "from pressure, about the size of the palm of his hand, which he had been lying on". **8**

incident.

Sharon Kay Hatfield, LPN, also was among those first on the scene on February 20, 1996. It was her testimony that Frazier was on the floor, "hollering obscenities", and that the Grievant had "kicked, stomped, etc" him. She said Frazier was lying on his left side and on one arm. Hatfield's testimony about Frazier's injuries, or lack thereof; corroborated that provided by Baker. With respect to Frazier's naval, Hatfield added that this "definitely was an old umbilical hernia".

Ostrowski was the Identification Officer on duty when the February 20, incident occurred. He affirmed that

he had been asked to take a new I.D. photo for Frazier.

Sometime between 3:00 and 5:00 a.m. Ostrowski testified that he was sent to CC3 to take pictures of the incident scene. He testified "If there was an altercation; you would see something" and that there was "no dust" in the area. Among other things, Ostrowski said he photographed the Grievant's hands and observed there was no damage at all to them.

Brad Wedebrook is a former Correction Officer, who testified that he "kept close ties with a few officers", including the Grievant, after he left SOCF. According to Wedebrook, Frazier called him "eight to ten times to discuss" the assault. Wedebrook said he took notes about the conversations.⁶ Among the allegations Wedebrook remembered Frazier making were the following: (1) the Grievant beat him for four minutes; (2) he was carried from the scene on a back board covered in blood; (3) Wormack was following him; (4) the room was bugged in a recent meeting he had with a "woman", and (5) he had a book buried in his backyard with evidence that could be used to indict President Bush. Wedebrook further testified that Frazier asked him to tell

⁶ These notes were not provided for the record.

****9****

the Grievant that he wanted to fight him, and said he had brass knuckles for the fight. According to Wedebrook, he had seen Frazier's stomach four or five years ago and it looked the same as it did in the photographs taken in relation to the incident. He said Frazier told him at the time that he had been "born that way".

The incident was investigated by John Ison the Institution Investigator, who interviewed both Frazier and the Grievant. Frazier also submitted to a polygraph administered by State Trooper Robert Patterson, who concluded from the test that Frazier was substantially telling the truth. At the Hearing, Patterson was asked whether beta blockers used in controlling blood pressure could influence the results of a polygraph test. Patterson's response was, to his knowledge, "they wouldn't cause any problem as long as the person had been taking them for sometime".

Ison concluded, based upon his interviews, the physical evidence, and the polygraph test, that Frazier's statement of the incident was more believable and that it was consistent with his injuries. He recommended that the Grievant be disciplined. A predisciplinary conference was held on July 2, 1996, after which the Grievant was removed from the position of Correction Officer for violation of Work Rule 19 of the Employee Standards of Conduct. The Grievant filed a grievance on July 2. At each Step of the Grievance Procedure, the grievance has been denied by Management. The Union has brought the matter to this arbitration for decision.

MANAGEMENT POSITION

Management contends that the Grievant's discipline was for just cause and should be sustained. In support of this contention, Management argues that Frazier's version of the incident

****10****

is accurate and that this accuracy was confirmed by the polygraph examination administered by Trooper Patterson. It portrays Frazier as a person who made many enemies, including the Grievant, by reporting to his Superiors, and to others, allegations of drug sales and of money laundering at SOCF. Management stresses that Frazier's suspension in connection with that incident resulted from his telling other employees about the allegations, not because he was a prevaricator of the truth, as the Union sought to show. According to Management, the Grievant assaulted Frazier in retaliation for those allegations, generally, and for the difficulty they caused his friend Wormack, in particular.

It is also Management's position that Patterson's conclusion that the polygraph showed Frazier told the truth confirms the veracity of Frazier's version of what transpired in the incident between the Grievant and him. Management places great weight on the credentials and expertise of Patterson, and on his testimony concerning drugs that would alter the results of the polygraph test. It maintains that none of the drugs mentioned by Patterson were being taken by Frazier, thus undermining the Union's attempt to discredit the polygraph results on the basis of Frazier's use of blood pressure medication.

According to Management, the photographs of Frazier (MX 4) clearly show that he had been beaten. It argues that those injuries could not be explained by "falling on the floor" and emphasizes that the Union gave no reasonable explanation of how Frazier sustained the injuries if he was not assaulted by the Grievant.

Finally, Management asserts that the Union's witnesses were "well rehearsed and tainted". "The rehearsed testimonies were obvious, and none of the details were ever brought out prior to Arbitration." (MPHB) This is glaringly obvious, Management contends, by the differences in the **11**

contemporaneous incident reports prepared by several of the Union's witnesses, and the testimony they provided at this Hearing. Since demeanor is a factor considered by arbitrators, Management further argues that the Grievant's belligerent behavior at the Hearing underscores the soundness of its conclusion that he was the aggressor in the altercation which occurred on February 20, 1996. This conclusion is reinforced, Management asserts, by the fact that the incident in 1996, was not the first instance in which they Grievant has engaged in such behavior, as illustrated by the suspension he received, and did not grieve, in December of 1994.

UNION POSITION

The Union argues that Management has not met its burden of establishing just cause for the Grievant's removal. Alternatively, it claims that, even if Management had just cause for discipline, it nonetheless violated the Agreement by failing to adhere to the requirement that discipline be progressive and by imposing discipline that constitutes disparate treatment of the Grievant.

According to the Union, Frazier is simply not credible. It emphasizes his well known, long standing history of being a liar and of fabricating allegations against his fellow Correction Officers. One illustration noted by the Union is the fact that no substantiation whatsoever was found by the Institution Investigator for Frazier's 1994, allegations of drug use and money laundering by Correction Officers. Another, the Union maintains, is the credible testimony offered by

witnesses Baker, Hatfield, and Wedebrook that the Grievant either was born with an umbilical hernia or had had one for a long time prior to February 20, 1996, when he claimed this condition was caused by the Grievant beating him.

13

shoes is unrebutted, and his credibility is affirmed by the fact, that neither the xerox of the photographs of his hands nor Ostrowski indicate that there was any damage to the Grievant's hands consistent with having punched Frazier in the face several times.

The Union also argues that Frazier's story is inconsistent with the actual physical injuries. To support this contention the Union points to additional testimony. It notes Nurse Baker's testimony about what Frazier said when she came upon the scene, about her professional opinion that Frazier did not look like he had been beaten, about why she sent Frazier to the hospital, and about the Grievant as being under control and neat in appearance. The Union also reiterated the importance of Nurse Hatfield's testimony that Frazier's umbilical hernia was definitely an old injury and that his injuries could have been caused by falling on the floor and by lying on his hand while on the floor. In assigning weight to this testimony, the Union asks the Arbitrator to consider that these witnesses have nothing to gain from the outcome of this proceeding, that their testimony was not rebutted by Management, and that this testimony essentially comports with the report of findings from the hospital emergency room.

To further confirm that the physical injuries could not have occurred in the manner described by Frazier, the Union points to additional testimony by Correction Officers. It notes Reed's unrebutted testimony that the Grievant is right handed. Based upon Reed's observation, the Union questions how, if the Grievant had his left arm around Frazier's neck and was hitting him with his right hand on the right side of his face, as claimed, Frazier's left eye could have been bruised" Reed's testimony, the Union maintains, also raised questions about the veracity of Frazier's story because Frazier, by all accounts, was lying on his left side but, if he had been hit the way he described, Frazier should have been lying on his right side.

14

The Union further stressed the importance of the remodeling activity taking place in the area where the confrontation occurred as evidence in support of the Grievant. In particular, the Union asked that judicious note be made that not one single witness indicated that either Frazier's or the Grievant's clothes were dusty or unkempt, conditions which surely would have occurred if an altercation lasting four minutes occurred in an area where construction dust was prevalent. The Union further argues that Womack's testimony provided a motive for Frazier to have tried to "set up" the Grievant. It contends that Frazier wanted to get even with the Grievant because he would not go along with Frazier's witch hunt for contraband, for which Frazier was eventually disciplined.

Finally, in its post hearing brief, the Union raises additional objections to the manner in which Management has proceeded in this grievance. Specifically, the Union argues that the introduction by Management of John Ison's statement and of the Grievant's discipline record from December, 1994, was improper because Ison is deceased and could not be cross examined and because the Grievant's discipline record from December, 1994, was over two years old. The Union argues that, under the Agreement, this record should have been removed from his file after 24 months. It also asserts that Management violated the Agreement by the manner in which it handled the predisciplinary

hearing and by its failure to produce the original photographs taken after the incident.

As a consequence of these factors, the Union asks that this grievance be sustained and a remedy awarded of reinstatement, with full backpay, and the Grievant be made whole in all respects.

15

ANALYSIS

The parties and the Arbitrator are acutely aware that credibility is a major factor in determining the award in this case. This is especially because there were no witnesses to the incident, and because the controversy involves the word of one Correction Officer versus another. After careful consideration of the record, the Arbitrator has determined that Management has not presented sufficient, credible evidence and testimony to sustain its burden of proving that the Grievant's discharge was for just cause.

Management chose to rely primarily upon the testimony of Frazier and of Patterson as a confirmation of Frazier's veracity concerning the subject incident. The Arbitrator is simply not persuaded by either of these sources. With respect to the polygraph examination, there is simply an inherent uncertainty that accompanies a polygraph test which accounts for the fact that such tests are widely inadmissible as probative evidence in the courts and in arbitration proceedings. This reality combined with the fact that there was no medical confirmation of Patterson's opinion that Frazier's medication would not affect the outcome, makes it impossible to use the polygraph results to confirm Frazier's story. In addition, the letter from Dr. Mullins (MX 5) speaks only to Frazier's medical stability for undergoing the examination; not to the question of medications and their possible influence on the results. The record also contains no medical evidence about whether Frazier's underlying medical condition or treatment thereof could, or would not, cause abnormal responses during the polygraph examination. The Arbitrator therefore rejects the test results as confirming the veracity of Frazier's version of the events which transpired on February 20, 1996.

Having placed no weight on the polygraph the Arbitrator then thoroughly reviewed the

16

record as it pertains to the credibility of Frazier's testimony. As a result, the Arbitrator concluded that Frazier's version of the incident is not sustained by the evidence. His interview with Ison contains statements which are very difficult to find credible. For example, having said that he got a forearm around his neck from behind, Ison inquired, "That would have been his right arm?" Frazier responded, "Uh, well the lumps on my head is on the left side so which side would he have been hitting with? He would have been hitting with his right, I think because it would have been his left arm under my neck. . ." (MX 3, p.3)⁷. As was pointed out by Union witness Reed, it is difficult to understand how a right handed individual, using his left arm around another's neck from behind, could then use his right fist to deliver blows to the left side of the victim's head. Frazier also indicated in that interview that he, at first, tried to resist and struggled to get loose, but in his testimony in this

proceeding, Frazier stated that he simply went limp, as he had been trained to do.

With regard to his injuries, Frazier claimed he was beaten and kicked repeatedly by the Grievant for about four minutes. In view of Nurse Baker's report and testimony, that description is at the very least a gross exaggeration. Significantly, Nurse Baker's evaluation was substantially confirmed outside of SOCF by the emergency room report. The plan of care reflected in that report prescribes Motrin, ice and rest. It is difficult to believe that a "beating" with hitting and repeated kicks to the chest and abdomen would not require more serious medical treatment. There is also unrebutted medical testimony from Nurse Hatfield that the hernia on Frazier's belly button was an old umbilical hernia; not a new injury caused by a beating inflicted by the Grievant on February 20, 1996. Despite Management's protestations that the testimony provided by Union

7 Nurse Hatfield testified that her examination of Frazier revealed no knots on his head.

17

witnesses was rehearsed and tainted, note was taken that Wedebrook confirmed the testimony provided by Hatfield, and that neither of these witnesses had anything to gain from the outcome of this proceeding. Thus, the xerox copies of photographs of Frazier's alleged wounds cannot be deemed as having the probative force ascribed to them by Management.

Another discrepancy in the record concerns the timing. Frazier testified that he was relieved by Correction Officer Moore around 3:15 a.m. or 3:20 a.m. The Grievant stated that Moore relieved Frazier at 3:24 a.m. The record does not contain any official log which would determine which of these versions is correct. The record does contain ample evidence, however, that the incident occurred prior to 3:26 a.m. Lt. Arnett's Incident Report clearly states that the Grievant radioed, at 3:26 a.m., that an officer was down and needed assistance. This means that the incident had to occur prior to 3:26 a.m. Once again, the answer turns upon the credibility of Frazier's and the Grievant's testimony. If Frazier is correct, then perhaps he could have arrived at the gate at a time that would afford the Grievant sufficient opportunity to beat him for four minutes before calling for help. On the other hand, if the Grievant is correct, then there simply would not have been time between 3:24 a.m. and 3:26 a.m. for the alleged beating to take place. Unfortunately, the record provides no evidence whatsoever to determine the actual timing. It does provide, however, significant evidence which argues in favor of the Grievant's credibility and against Frazier's.

Significantly, the events of December, 1994, shed light upon the credibility of testimony provided by Frazier, Wormack, and the Grievant. All three have been disciplined previously. Neither Wormack nor the Grievant filed a grievance because each admitted that he committed the offense charged. In both these cases, the violations had nothing to do with making false

18

statements. In Frazier's case, however, contrary to Management's contention in its

post Hearing brief, Frazier was disciplined for making false statements. Management has argued that he was disciplined simply because he told other employees about the allegations. It is true that the Notice of Disciplinary Action (MX 6) states that Frazier was telling other employees that two staff members were dealing drugs and three others were having sexual relations in the facility and that Frazier claimed to have pictures of these acts. Frazier's allegations were investigated. The Notice clearly and tellingly states that the Institution Investigator concluded that Frazier **"made false statements to other employees about these staff members"**. (emphasis added) While Frazier's original suspension was reduced from five to two days, there is nothing in the record to suggest that he did not make the false statements. On the record that has been presented, the Arbitrator would have to accord disproportionately greater weight to Frazier's credibility than to the credibility of the many witnesses who testified at the Hearing. Many of them stated or implied that Frazier is not truthful and legitimately questioned his version of the incident. If this testimony was all "well rehearsed and tainted", then Management had the opportunity to call rebuttal witnesses that would paint a different picture of Frazier's credibility. It did not. In view of Frazier's known previous mendacity, the Arbitrator simply cannot give that much weight to his version of the events of February 20.

This same kind of comparison is useful in crediting the Grievant's testimony. in the previous incident for which he was disciplined, the Grievant was charged with failure to follow orders and with rude/abrasive language. There is absolutely no indication that the Grievant used physical force in that incident or that he ever has been charged with use of excessive force in the six years he was employed at the SOCF, including during his involvement on the Disturbance **19**

Control Team and especially under the circumstances of a serious riot, prior to his termination. In contrast, while Frazier alleged that he had sustained a four minute beating from the Grievant, when Nurse Baker came immediately on the scene, she testified credibly that Frazier was asking for a baton "so he could take care of business", rather than complaining, as might reasonably be expected, about his assault and injuries if he really had been attacked.

Based upon the credible evidence and testimony of record, the Arbitrator has concluded that the injuries Frazier sustained on February 20, 1996, are more consistent with his falling, or diving to the floor to set the Grievant up for an assault charge than they are with his assertion that the Grievant not only attacked him, but also beat him for four minutes. The Arbitrator therefore rules that Management has failed to show just cause for the Grievant's discipline and, indeed, failed to provide sufficient, credible evidence to prove that he committed an offense for which discipline is warranted. As a result of this ruling, there is no need for the Arbitrator to reach a determination of the subsidiary issues raised by the Union.

20

AWARD

The grievance is sustained. Management has failed to show that the Grievant committed the offense charged and that just cause existed for his termination.

The Grievant shall be reinstated to his former position of Correction Officer, with full backpay, and shall be made whole in every respect for the period of his termination.

Date: August 4, 1997

Mollie H. Bowers, Arbitrator

21

[1](#) Failure to follow post orders, administrative regulations, policies, procedures or directives

[2](#) Making false, abusive, or obscene statements toward or concerning another employee, a supervisor or a member of the general public.

[3](#) Womack kicked a food tray out of Frazier's hands.

[4](#) He testifies he prepared his report before he wheeled Frazier to the infirmary.

[4](#)

[5](#) Baker said the pinkness of the skin was "from pressure, about the size of the palm of his hand, which he had been lying on".

[6](#) These notes were not provided for the record.

[7](#) Nurse Hatfield testified that her examination of Frazier revealed no knots on his head.

[7](#)