

**ARBITRATION DECISION NO.:**

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**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Rehabilitation  
and Correction  
Chillicothe Correctional Institute

**DATE OF ARBITRATION:**

January 21, 1987

**DATE OF DECISION:**

February 5, 1987

**GRIEVANT:**

Alfred M. Bond, Jr.

**OCB GRIEVANCE NO.:**

G86-0259

**ARBITRATOR:**

Harry Graham

**FOR THE UNION:**

Daniel S. Smith, Esq.

**FOR THE EMPLOYER:**

Greg Trout, Esq.

**KEY WORDS:**

Progressive Discipline  
Removal

**ARTICLES:**

Article 24-Discipline  
§24.01-Standard

**FACTS:**

Grievant was employed at the Chillicothe Correctional Institute as a Corrections Officer for approximately nineteen (19) years. Grievant was removed on September 8, 1986, for refusing an assignment.

The facts of this situation are not in dispute. During the 19 years that Grievant has been a corrections officer with the Chillicothe Correctional Institute, he has spent much of that time working

at a post known as the Armory Tower. He had expressed a preference for that assignment, and has normally worked that post. In November of 1984 Grievant was reassigned to the dormitory post. Grievant refused to report to duty and as a result received a two (2) day suspension. Again, in August of 1985 Grievant was requested to report to the dormitory and refused to report for duty. As a result, he was administered a five (5) day suspension. A year later in August, 1986, Grievant was assigned to the dormitory post after reporting to work. Grievant took sick leave and left for the day rather than take duty at the dormitory post. As a result of the 1986 incident, Grievant was dismissed, effective September 8, 1986.

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

It is the contention of the Employer that the removal was constituted by the third instance in the past two years in which the Grievant failed to carry out a work assignment, and that in the two prior instances discipline was administered. Management asserts that it is essential for Corrections Officers to display the requisite degree of physical fitness for their tasks, and it is the policy of the Department to rotate post assignments every six months. Once the officer reports to work, there is a presumption that he is fit and able to perform all tasks associated with his position. Management's position is that progressive discipline was effected in this instance, and the discharge was justified in the Employer's view.

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

It is the position of the Union that the discharge of a twenty (20) year employee under the instant circumstances is inappropriate. The Union indicates that from the inception of his employment with the state the Grievant has experienced physical problems. Grievant was concerned that, due to a prior injury, Grievant would be unable to perform the walking up and down stairs associated with the post. Grievant is able to perform the duties associated with the assignment to the Armory Towers, since continuous stair climbing was not required. The Union stresses that Grievant has almost twenty (20) years of continuous service and imposition of a discharge penalty on an employee with such a long-term of service, for such a minimal infraction, is inappropriate.

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

It is the opinion of the Arbitrator, based upon the Collective Bargaining Agreement between the parties, article 24, Section 24.01, that the "just cause" requirement was not met by the employer. Given the Grievant's employment record, of almost 20 years of service, a very high standard of "just cause" must be met by the employer. It is clear from the record that the Grievant considered assignment to the Armory Tower post to be "his" regular position. The record indicates that this expectation was reasonable considering the regularity with which Grievant was assigned to the position in his service at Chillicothe.

The Arbitrator tempered the above observation with the acknowledgment that the grievant's behavior was unacceptable as well. There are no guarantees to any Corrections Officer he will secure the post that he desires is normally assigned to each day they report for duty. The Employer has a legitimate expectation that employees will be in good enough physical condition so that they can perform the normal duties associated with their positions. Grievant refused to carry out a legitimate order of a superior.

#### **AWARD:**

In light of all considerations the Arbitrator sustained the grievance in part. The discharge was reduced to a two (2) week suspension without pay. The Grievant is to be reinstated to the position of Corrections Officer 2 at Chillicothe, and receive all pay and benefits grievant would have earned but for the wrongful discharge, less any interim earnings and the two (2) week suspension without

pay.

**TEXT OF THE OPINION:**

**In the Matter of Arbitration**

**Between**

**Ohio Civil Service Employees Association  
AFSCME, Local 11**

and

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

**Appearances:**

**For Ohio Civil Service Employees Association:**

Daniel S. Smith, Esq.  
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**For Department of Rehabilitation and Correction:**

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**Introduction:**

Pursuant to the procedures of the parties a hearing was held in this matter on January 21, 1987 before Harry Graham of Beachwood, OH. At that hearing both parties were provided complete opportunity to present evidence and testimony. No post-hearing briefs were filed in this dispute and the record was declared closed on January 21, 1987.

**Issue:**

At the hearing the parties were able to agree upon the issue in dispute between them. That issue is:

Was Alfred M. Bond, Jr. Removed from his position as Corrections Officer II for just cause under the Collective Bargaining Agreement? If not, what shall the remedy be?

**Facts:**

There is a good deal of agreement between the parties concerning the facts that give rise to this dispute. The Grievant, Alfred M. Bond, Jr., was employed at the Chillicothe Correctional Institute as a Corrections Officer II from March 12, 1967 to the date of his removal, September 3, 1986. For much of that time he worked at a post known as the Armory Tower. From time to time he was assigned to other positions within the institution. He had expressed a preference for assignment to the Armory Tower some time in the early 1970's. There is no dispute that the Grievant normally worked at the Armory Tower post.

On November 2, 1984 the administration of Chillicothe Correctional Institute (CCI) became aware the Grievant was not weapons qualified for his post in the Armory Tower. He was reassigned to a position in the dormitory. He refused to report for duty as assigned to the dormitory. He left the premises. As a result he received a two day suspension for refusing an assignment.

Less than one year later, on August 23, 1985 a similar incident occurred. When the Grievant reported to the work he was informed that he was being assigned to the dormitory for the day. He again refused to report for duty at the dormitory. For this refusal he was administered a five day suspension.

On August 8, 1986 the Grievant reported for work shortly after 1:00 PM, well ahead of his scheduled starting time of 2:00 PM. He was given his duty assignment for that day by Lieutenant (now Major) Donald Harrington. It placed him at post 13-2 in A dormitory. Upon learning of this assignment Bond indicated "I ain't gonna work there. I'll go home sick." Bond then requested a meeting with higher authority at CCI. A meeting was then held with Major Hatfield, third in command at Chillicothe. No change was made in Bond's job assignment for the day. Reference was made to the fact that the Grievant could go home and fill out a form requesting sick leave. No indication was provided that it would either be approved or disapproved. In the course of discussion with Harrington and Hatfield the Grievant indicated he could not perform the duties associated with assignment to A dormitory. He indicated that he was experiencing difficulty with his ankle that restricted his mobility somewhat. He further indicated that this was not a great problem when he was assigned to the Armory Tower as he ascended at the start of his shift and descended at the end of the work day. In contrast, assignment to A dormitory involved continual movement up and down stairs. This explanation for his refusal to report for duty to A dormitory was not accepted by the Grievant's supervisors. He then completed a request for sick leave form and left for the day.

After review of this incident on September 4, 1986 the Superintendent of the Chillicothe Correctional Institute and the Director of the Ohio Department of Rehabilitation and Correction determined to remove (discharge) the Grievant effective September 8, 1986.

A grievance protesting the discharge of the Grievant was promptly filed. It was processed through the procedure of the parties. No resolution was had and the parties agree the grievance is properly before the Arbitrator for resolution on its merits.

### **Position of the Employer:**

The State points to the fact that this is the third instance in the past two years in which the Grievant has refused to carry out a work assignment. In the two prior instances discipline was administered. The second time the Grievant failed to report to A dormitory duty he received a five day suspension. This followed a two day suspension approximately one year earlier. Progressive discipline has occurred in this instance. It has failed to produce the desired result. Consequently, discharge is justified in the Employer's view.

The job description for Corrections Officer II indicates in relevant part that officers patrol facilities and escort residents. No reference is made to accommodating officers with physical infirmities. Characteristics required for the position include "physical fitness and dexterity." It is essential for corrections officers to display the requisite degree of physical fitness for their tasks. Furthermore, it is the policy of the Department to rotate post assignments every six months. Officers must have the physical capacity to serve in all posts. If the Grievant was unable to perform the duties associated with Corrections Officer it was incumbent upon him to inform the administration of Chillicothe Correctional Institute and request sick leave. He did not do so. Thus, there must be a presumption that when the Grievant reported for duty on August 8, 1986 he was fit and able to perform the tasks associated with his position. It was only upon being informed of his assignment to A dormitory that the Grievant indicated he had physical infirmities that prevented him from reporting to his assigned post.

The Employer points out that it has been involved in continuing Affirmative Action efforts to equalize employment opportunities for male and female Correction Officers. The Grievant has not been sympathetic to these efforts. This is manifested by the fact that he has filed an affirmative action complaint alleging he was not assigned to the Armory Tower post in September, 1985 due to an alleged preference for female Collections Officers. This complaint was dismissed. Other discrimination complaints filed by the Grievant were also dismissed. They referred to alleged discrimination due to handicap. (Employer Exhibits 4 and 5). It was the consistent position of the Employer that there is no provision for light duty for Corrections Officers. They must perform all aspects of the position in order to facilitate deployment of Corrections Officers, male and female, throughout the facility. If Bond was unable to meet the physical requirements of assignment to Dormitory A in August, 1986, he should have requested sick leave. As he did not do until after reporting to work on August 8, 1986 the Employer was justified in assigning him to duty in A dormitory. When he failed to report there as instructed, termination was justified in light of Mr. Bond's previous work history in the opinion of the State.

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

The Union indicates that from the inception of his employment with the State the Grievant has experienced physical problems. A veteran of both World War II and Korea, he had surgery in 1951 for an injury incurred in service in the Korean conflict. He has also experienced a surgery for a hernia repair, cataracts and varicose veins. In 1962 he had a left upper lobectomy involving removal of a portion of his lung. He has arthritis of the spine and associated nerve difficulty. In May, 1986 he hurt an ankle for which he was undergoing treatment during the summer of 1986. With this medical history he refused assignment to A dormitory on August 8, 1986 for fear he would injure himself. He was also concerned that if he reported to A dormitory he would be unable to perform the walking up and down stairs associated with the post. In contrast, he was able to perform the duties associated with assignment to the Armory Tower as he climbed the stairs up at the start of the shift and descended at the end. He was fit enough for his normal duties but not the more strenuous activity associated with A dormitory.

The Union stresses that the Grievant has almost twenty (20) years of service. To impose a discharge penalty on an employee with such a term of service when any infraction was minimal at most is inappropriate the Union insists.

Regular performance evaluations provided to the Grievant were satisfactory. They indicated he was performing his tasks competently. The Grievant had no expectation his continued employment

was in jeopardy when he declined to report to A dormitory in August, 1986. To the contrary, Major Hatfield told him to complete a request for sick leave when he left the facility. He complied with that directive. To discharge a 20 year employee under those circumstances is inappropriate the Union insists.

### **Discussion:**

The Collective Bargaining Agreement between the parties at Article 24, Section 24.01 provides that discipline may not be imposed except for "just cause." In this instance the most severe form of industrial discipline, discharge, was administered to the Grievant. Given his record of almost twenty years of service with the State a very high standard of "just cause" must be met by the Employer for its action to withstand neutral scrutiny.

The Grievant had experienced two disciplinary suspensions in the two year period prior to discharge, both were for the same infraction that provided the impetus for termination. Notwithstanding this fact, it is clear from the record that the Grievant considered assignment to the Armory Tower post to be "his" regular position. The record indicates that this expectation was reasonable considering the regularity with which he was assigned to that position in his twenty years of service at Chillicothe. Given the infrequency with which he was assigned to other posts, there was tacit recognition by the Employer that the Armory Tower post was Bond's. This view of the Grievant's regular post is supported by reference to his performance evaluations. In the sections labeled as "Rater's Comments," "Reviewer's Comments" and Appointing Authority Action" on the 1986 form continual reference is made to his assignment in the Armory Tower. His regular assignment to that position also represented acknowledgment of Bond's physical difficulties. Despite these difficulties, the Grievant worked 13-2 in A dormitory in the past. In August, 1986 Bond's longstanding infirmities were compounded by the injury he was experiencing with his ankle. His failure to call in sick is readily explainable by his expectation that he would be assigned to his normal duties in the Armory Tower. The State surely does not desire to be in the position of urging employees to call in sick when they are able to perform the duties they perform on a regular basis. Bond expected to be assigned to the Armory Tower on August 8, 1986 and reported for duty as scheduled.

That Bond had a legitimate expectation to be assigned to the Armory Tower on August 8, 1986 is indicated by his performance reviews. (Union Exhibits 3 and 4). They make continual reference to his assignment in the Armory Tower. They also indicate as recently as March 28, 1986 that he "does an exceptionally good job as Armory Tower officer. He sets an example that others should follow in this post." Examination of the numerical ratings given to the Grievant indicate that he has consistently been ranked by supervision towards the top on each of the nine (9) factors set forth on the evaluation instrument. Given this work history of more than satisfactory performance, plus the twenty years of service possessed by the Grievant, it must be concluded that the penalty of discharge is too severe in this instance. It does not meet the standard of "just cause" set forth in the Agreement.

That observation must be tempered with the acknowledgment that Bond's behavior on August 8, 1986 was unacceptable as well. There is no guarantee to him or other Corrections Officers that they will secure the post they desire or are normally assigned to each day they report for duty. The Grievant had no authority to refuse his assignment in A dormitory. The Employer has a legitimate expectation that employees will be in good enough physical condition so that they can perform the normal duties associated with their position. Bond's position was Corrections Officer. He should have been at work ready to perform the duties of a Corrections Officer or he should have not

reported. By reporting and then failing to assume his duties in A dormitory the Grievant was guilty of insubordination. By his own actions he opened himself to discipline. Some discipline is certainly warranted. In the absence of a guarantee of assignment to a specific post, eg. the Armory Tower, the Grievant must report to duty prepared for assignment to any post in the facility. This Bond did not do. Furthermore, he did not heed the well accepted industrial maxim, "work now, grieve later." He refused to carry out a legitimate order of his superior. He cannot escape the consequences of that refusal.

**Award:**

The grievance is SUSTAINED in part. The discharge is to be reduced to a two week suspension without pay. The Grievant is to be reinstated to his position as Corrections Officer II at Chillicothe Correctional Institute. He is to be paid all pay and benefits he would have earned but for this wrongful discharge less any interim earnings and the two week suspension without pay. The Grievant shall supply the Employer with such evidence as it may require concerning income earned from the date of discharge to the date of reinstatement to employment.

Signed and dated this 5<sup>th</sup> day of February, 1987 at Beachwood, OH.

Harry Graham  
Arbitrator