

ARBITRATION DECISION NO.:

075

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Correction

DATE OF ARBITRATION:

DATE OF DECISION:

December 16, 1987

GRIEVANT'S:

Lloyd Tate
Charles Petty
Andre Craig

OCB GRIEVANCE NO'S.:

G-87-0795, 0796, and 0696

ARBITRATOR:

Frank A. Keenan

FOR THE UNION:

John Porter, Esq., Asst. General Counsel

FOR THE EMPLOYER:

Deborah Piperni O'Neill, Asst. Attorney General

KEY WORDS:

Union discovery rights
Criminal investigation
Documents held by different State Agency

ARTICLES:

Article 25 -
§ 25.08

FACTS:

Grievants were employed by the State of Ohio at the Ohio State Reformatory. Grievants' position at the Reformatory called for contact and interaction with inmates. Suspicions that Reformatory personnel were selling drugs to inmates led to an undercover drug-buy operation conducted by the Ohio State Highway Patrol. Certain volunteer inmates were outfitted with radio transmitters and microcassette tape recorders and sent out into the institution. The State Trooper in charge of the undercover operation testified that he heard, through a radio receiver receiving transmissions from the inmates transmitters, conversations between the inmates and the Grievants. During these conversations, the inmates purported to solicit marijuana from the Grievants for certain sums of money and the Grievants agreed to

Ohio Civil Service Employee Association,
Local 11, A.F.S.C.M.E., AFL-CIO

ARBITRATOR'S RESPONSE TO MOTION TO QUASH SUBPOENAS
DUCES TECUM

Appearances:

For the State of Ohio:

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For the Union:

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OCSEA/AFSCME Local 11
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Before: Frank A. Keenan
Panel Arbitrator

* * *

The State of Ohio, the Employer of Grievants Tate, Petty, and Craig, who were employed at the Ohio State Reformatory at Mansfield, Ohio, has entered into a multi-bargaining unit collective bargaining agreement with O.C.S.E.A., Local 11, AFSCME, AFL-CIO, herein the Union, and pursuant to the grievance and arbitration terms, said Grievants seek to reverse their dismissal by the Department. Separate Arbitration hearings have been held and adjourned sine die, pending the outcome of the Union's request for certain audio tapes in the possession of the Ohio State Highway Patrol.

In this regard each of the Grievants was employed in positions at the Ohio State Reformatory which called for contract and interaction with inmates. Suspicions that Reformatory personnel were selling drugs to inmates led to an undercover drug-buy operation conducted under the aegis of the Ohio State Highway Patrol. Certain volunteer inmates were outfitted with radio transmitters and micro-cassette tape recorders and sent out into the institution. The State Trooper in charge of this undercover operation testified in the arbitration hearings of the above named Grievants, that he heard through a radio receiver receiving transmissions from the inmates' transmitter, conversations between said inmates and the grievants (at various and distinct times and places within the Reformatory) in which the inmates purportedly solicited marijuana from the Grievants for certain sums of monies and the grievants agreed to obtain marijuana for the inmates.

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The Union requested the undersigned to execute a subpoena duces tecum commanding Captain Richard Wilcox of the Ohio Highway Patrol, as custodian of the tapes from the inmates' recorders which, simultaneous with the radio transmissions, transcribed the inmates' alleged drug-dealing conversations with the Grievants, asserting that such tapes were "another witness" to the alleged drug dealings for the

Grievants, which the Union was in effect entitled to call and testify in order to test the accuracy of the Trooper's testified-to-recollections of what he heard over the inmates' transmitter's receiver, and in order to itself tape said tapes for the purpose of establishing its contention through voice identification techniques, that the drug dealers alleged to be one or another of the Grievants, was not in fact one or another of the Grievants, but other inmates. Ms. O'Neill, as a representative of the Ohio Attorney General's Office, and on behalf of the Ohio State Highway Patrol, has moved to quash said subpoena duces tecum and has filed a memorandum in support of said motion, on the following grounds:

"Ohio Rule of Civil Procedure 26(B) provides in part as follows:

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

1. In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in (Emphasis added).

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Under this Rule, matters which are privileged are generally not discoverable.

Rule 45(D) of the Ohio Rules of Civil Procedure provides in part that:

(1) When the attendance of a witness before an official authorized to take depositions is required, the subpoena shall be issued by such person and shall command the person to whom it is directed to attend and give testimony at a time and place specified therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(B), but in that event the subpoena will be subject to the provisions of Rule 26(C) and subdivision (B) of this rule. (Emphasis added).

Thus, a party may not obtain privileged documents by a subpoena duces tecum.

The OSHP (Ohio State Highway Patrol) asserts that this subpoena commands the production of privileged information. Section 149.43(B), Ohio Revised Code. Therefore, this Arbitrator should quash this subpoena pursuant to Ohio Rules of Civil Procedure 45(B) and Section 149.43(D), Ohio Revised Code, and issue a protective order to prevent disclosure of this information pursuant to Ohio Rules of Civil Procedure 26(c).11

Ms. O'Neill cites to the Arbitrator Kolt v. Perini, 283 F. Supp. 1 (N.D. Ohio, W.D., 1968); United States v. Mackey, 36 F.R.D. 431 (D.C. 1965), Russ v. Ratliff, 68 F.R.D. 691

(E.D. Ark. 1975) in support of her contention to the effect that investigating files of law enforcement agencies, such as the Ohio State Highway Patrol, which is charged with the duty to enforce the State's criminal laws, including perforce the

laws prescribing the sale of marijuana, on all state property, including perforce the grounds and buildings of the Ohio State Reformatory, is privileged.

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Mr. Porter, as Counsel of record for the Union was accorded by the undersigned an opportunity to respond to the Motion to Quash and Mr. Porter did so in a "Memorandum Contra Motion to Quash Subpoena Duces Tecum." In the Union's Memorandum it asserts that the Patrol's claim of privilege is clearly unfounded," and in support thereof makes the following salient points:

"First, section 25.08 of the contract between OCSEA/AFSCME Local 11 and the State of Ohio, when read in conjunction with section 43.01 of the contract and ORC section 4117.10 (A) make it abundantly clear that the audio tapes of the alleged drug transaction are clearly discoverable items. Secondly, even if section 149.43 of The Ohio Revised Code is applicable to the instant case, the State has not met its burden of showing that producing the audio tapes would create a high probability of disclosure of any of the following:

(a) (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose his identity;

(c) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

Thirdly, in other arbitration cases involving the State Highway Patrol's gathering of information through the use of covert audio taping, the State has made available the tapes for listening by the Union, even without a subpoena. Fourth, the State Highway Patrol's selective allowance in making audio tapes available paradoxically gives more rights to a person who has been criminally indicted than an individual who has not been criminally indicted. Finally, it is frivolous for the State to base its claim of privilege for not releasing the tapes on the fact that there is a pending criminal prosecution for Grievants Tate, Petty, and Craig when Trooper Terry Knight has testified that there were no further plans to bring criminal indictments against the above named grievants. **4**

By way of elaboration the Union asserts that

“. . . section 25.08 of the contract supersedes state law regarding the confidentiality of certain public records. Section 25.08 of the contract provides that "The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied." The audio tapes of alleged drug transaction between the grievants and inmates are clearly relevant because the conversations which were taped from the basis for the State's decision to remove the grievants for drug dealing. The audio tapes are reasonably available because the Ohio State Highway Patrol has custody and control of the audio tapes and there is no physical reason why they cannot be made available. The third requirement of section 25.08 is that union may request the information from the employer. The employer in the instant case is the State of Ohio. The State Highway Patrol is an agency of the employer and thus is subject to the discovery provisions of section 25.08 of the contract."

Moreover, asserts the Union, pointing to prior arbitration awards under the contract, namely, State of

Ohio Department of Mental Health, Dayton Mental Health Center, GR #G86-0431 (Linda DiLeone Klein, August 18, 1987) and Ohio Department of Transportation, GR #G-87-0205 (Rhonda R. Rivera, October 8, 1987) ". . . the range of information which can be discovered under section 25.08 of the contract . . . (is) extremely wide."

Furthermore asserts the Union,

" . . . Once it has been determined that section 25.08 of the contract requires the release of the tapes, the next focus of the inquiry is section 43.01 of the contract. Section 43.01 in pertinent part states, 'To the extent that this Agreement addresses matters convened by conflicting State statutes, administrative rules, regulations or directives in effect at the time of signing of this Agreement, except for ORC Chapter 4117, **5**

this Agreement shall take precedent and supersede all conflicting State laws.' The state's claim of privilege . . . is based on ORC Section 149.43 (B). Section 149.43 of the ORC was promulgated in 1985, a year before the effective date of the contract. Since 149.43 of the (ORC) was in existence prior to the contract's July 1, 1986 effective date . . . Section 43.01 clearly provides that the contract was intended to take precedence over State Statutes already in existence. The only exception to Section 43.01 of the contract occurs when a matter is subject to Section 4117 of the Ohio Revised Code . . . (and) Section 4117.10(A) spells out the matters which the Collective Bargaining Agreement cannot modify."

As the Union points out none of the matters which 4117.10 (A) designates as not being subject to modification by the Collective Bargaining Agreement such as civil rights, etc., are involved in this case. And, asserts the Union, since Section 4117.10 (A) does not state that Section 149.43 of the ORC cannot be overridden by a collective bargaining agreement, by implication it can. And since Section 25.08 of the contract does provide for broad discovery and since the contract was enacted after the effective date of ORC Section 149.43, pursuant to contract Section 43.01, the contractual provisions override ORC 149.43. Therefore a claim of privilege made by the State pursuant to Section 149.43 is clearly barred by the contract. The Union additionally asserts that ORC 149.43 "requires not only that the record be a confidential law enforcement investigation record, but also that release of the record would disclose the identity of a suspect, or an information source or witness to whom confidentiality has been promised, or that confidential investigation techniques would be

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disclosed, or that life or physical safety of law enforcement personnel, a crime victim, a witness or confidential information source would be threatened." But contends the Union, "even if it is agreed that Section 1149.43 of the ORC is applicable, the State has not made the requisite showing under the Statute that release of the tape would create a high probability of disclosure of the class statutorily protected, as noted above. Furthermore, asserts the Union, at least with respect to Tate and Petty, the Trooper testifying "has fully testified to the identity of the inmate who taped the conversation, the information which the inmate gave, and the techniques which were used to record the conversation . . . thus . . . the compelling reason cited by the Statute (ORC 149.43) for prohibiting the release of the tape has (not) been met."

The Union also asserts that in yet another case of alleged correction officer misconduct (sexual

abuse of an inmate) involving a corrections officer at the Ohio State Reformatory, the Highway Patrol did provide the Union with an opportunity to listen to a covert audio recording between an inmate and a covert audio recording between an inmate and a correction officer, thereby indicating that "the State Highway Patrol has no blanket policy against playing audio tapes for the. Union."

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The Union additionally asserts that in the above alleged sexual abuse case, the Highway Patrol's rationale for making the tape available was that the tape had already been made available to the Grievant in that case through the criminal discovery process, with the consequence that the Patrol's posture in the instant cases "provides an employee who has been charged with a criminal offense more rights than an employee who has not been so charged."

In summary, therefore, the Union contends that the Highway Patrol's "claim of privilege is clearly unfounded." Following the filing of the Union's Memorandum Contra Motion to Quash, the Highway Patrol filed a Reply Memorandum in further support of its Motion to Quash. In it the Patrol contends as follows:

"First, (the Patrol) is not a member of the collective bargaining contract in issue; therefore, the Arbitrator is without the jurisdiction to compel the production of the tapes. Ohio Revised Code Section 4117.10(A) is inapplicable and unenforceable against a non-party.

Second, the Employer, Ohio Department of Rehabilitation and Correction, did not have access to the audio tapes as such tapes are the property of the (Patrol) and solely within OSHP custody for criminal prosecution. The tapes were not utilized in the assessment of discipline; therefore, the tapes are irrelevant to these proceedings.

Third, the audio tape recordings in some cases contain the identities of other possible suspects which have not been charged. During the course of the transactions between the informants and the grievants, the names of other suspects and details of some of their operations involving drugs were discussed. This information must not be disclosed as it contains identities of suspects still under investigation and, therefore, prohibited from disclosure under Section 149.43, Ohio Revised Code.

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Furthermore, the tapes contain information from sources whose identities have not and must not be disclosed at this juncture in the investigation. The tapes contain information, if disclosed, would reveal specific confidential investigatory techniques and locations that were used during the course of the investigation which have not been disclosed. If the tapes are produced and the techniques disclosed, the life and physical safety of the informants in future situations would be endangered.

Wherefore, for the foregoing reasons, the Petitioner urges this honorable Arbitrator to issue an Order quashing the Subpoena Duces Tecum in the above-captioned proceedings."

Discussion

First addressed is the Attorney General's contention that the OSHP is not a party or "member of the collective bargaining contract in issue (and) therefore (the) Arbitrator is without jurisdiction to compel production of the tapes. ORC 4117.10(A) is inapplicable and unenforceable against a non-party." Directly to the point, under the party's contract, the Employer-party is the State of Ohio, as expressly stated in the Preamble to the party's contract. Here, the specific agency of the State Employer who employed the Grievants was the State of Ohio Department of Rehabilitation and Corrections, which Department called in the Ohio State Highway Patrol, a law enforcement agency and another agency of the State, when it suspected that the laws of the State were being violated on the property of the Ohio State Reformatory by the sale of marijuana to inmates by Reformatory employees. Rather than conduct its own independent investigation to determine whether in fact its employees were selling drugs to inmates, an activity calling

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for discharge under extant policies, the Department of Rehabilitation clearly relied upon the OSHP's investigation, which investigation yielded evidence in the form of testimony from a Trooper concerning overhead alleged drug deals between employees and inmates, overheard, as indicated heretofore, from a receiver for a transmitter which transmitter was placed on the inmates in question by the Trooper. Taking the Trooper's testimonial evidence at face value, the Grievants were discharged. In my judgment these circumstances amply demonstrate that the Department of Rehabilitation and Correction has sanctioned, condoned, relied upon, and indeed adopted "the investigation" of the OSHP which includes the procurement of tapes of inmates alleged drug dealing conversations with employees such that the OSHP must be viewed as the Department's agent in the matter of the investigation of employee wrongdoing leading to the potential of adverse personnel actions in addition to its independent status as the agency responsible for the enforcement of the laws of the State of Ohio. Accordingly, for the purposes of this case, the tapes are deemed to be, in addition to evidence to perhaps be utilized in potential criminal prosecutions, Departmental evidence of employee wrongdoing, and it must therefore be

¶The fact that the Department has not relied on the tapes per se to establish or bolster its allegations against the Grievants, does not diminish the fact that they are part and parcel of and a product of the OSHP investigation, which investigation as noted, the Department has adopted.

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concluded that the Arbitrator has jurisdiction to call for their production if the contract indicates that they are indeed discoverable. Furthermore, the fact that the tapes are physically with the specific employing entity's agent, clearly does not place them beyond the jurisdiction of the Arbitrator.

As the Union points out, the tapes are in essence yet "another witness" to the alleged drug dealing events about which the Trooper testified and hence they are clearly relevant. Additionally, their relevance is further established by virtue of the Union's desire to evoke the "testimony" thereon, which the Union contends will demonstrate that the employees allegedly dealing drugs with inmates were not the Grievants. The tapes therefore, are clearly relevant to the matter of the Grievants' discharges. This being so, Article 25.08 of the parties' contract clearly comes into play and becomes applicable. By its plain terms it is clear that this Article, with some implied reservations.. provides for discovery of evidence "relevant" to any grievance.

As has been seen, however, the OSHP resists furnishing said tapes on the basis, inter alia, of ORC 149.43, which the Patrol correctly asserts makes said tapes privileged from disclosure/discovery in certain circumstances, circumstances alleged to exist here. The Union in turn points to Article 43.01 and points out that it provides that "to the extent that this Agreement addresses matters covered by conflicting State

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statutes . . . in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws." This provision clearly requires, asserts the Union, that the Arbitrator reject the OSHP's statutory privilege contention. I'm constrained to agree with the Union. The Arbitrator and his authority is peculiarly a creature of the Agreement/in which clear and unambiguous terms provides that where the Agreement and State law "conflict" with respect to matters addressed in the Agreement, the Agreement shall take precedence and supersede such conflicting State law "in effect at the time of the signing of (the) Agreement," which as the Union points out, is the case with respect to O.R.C. 149.43. In my judgment there can be no question but that Article 25.08 addresses the discoverability/disclosure of matters, here the relevant tapes in question, which just as clearly the terms of O.R.C. 149.43 make, on circumstances alleged to exist here, privileged and, not subject to discovery/disclosure. Hence, the Arbitrator is constrained to conclude that for purposes of this case, Article 25.08 of the collective bargaining agreement/conflicts with and supersedes O.R.C. 149.43, with the consequence that the OSHP's resistance to the production of the tapes on the basis of an alleged privilege grounded on O.R.C. 149.43 must be found to be without merit. This conclusion, brings one back to a careful consideration of just what Article 25.08 does require by way of discovery/disclosure. Significantly this ****12****

Article is not couched in absolute terms; it does not provide that the State-Employer shall or must make available all relevant evidence. Rather the parties were careful to expressly interject the concept of "reasonableness" (the Union may request (evidence) reasonably available from the Employer . . . [and] such requests shall not be unreasonably denied). The implication in the express provision that the Union's request if reasonably available and relevant "not be unreasonably denied," is that the parties contemplated that some such requests could reasonably be denied. By the use of this phrase the parties have made clear that the Union's right to relevant evidence reasonably available to the State - Employer is not absolute. But wherever rights are deemed not absolute (such as with the federal constitution's bill of rights) then a balancing process is contemplated.

Here, as has been seen, the OSHP resists the Union's request for certain audio tapes type evidence 2/ because inter alia, they contain: 1) the identity by name of other employee suspects and the details of their operations who and which are still under investigation; 2) the identity of informants not heretofore disclosed which, if disclosed would threaten the

2/ The Arbitrator recognizes that Article 25.08 does not specifically refer to audio tapes. However, in my judgement the term "document" encompasses audio tapes, since such tapes are readily transcribable and hence convertible into documentary form. Moreover in context it is clear that in Article 25.08 the parties intended "discovery" and the disclosure of "evidence," in whatever form, in the possession of the Employer. ****13****

life and physical safety of the informants; 3) information which would reveal the specific confidential investigating techniques utilized, which, if disclosed, threaten the life and physical safety of informants in future situations; and 4) information as to locations utilized during the course of the investigation not heretofore disclosed, which, if disclosed would threaten the life and physical safety of informants in future situations.

It can thus be seen that in broad terms the interests to be balanced here are those of the institution in maintaining an illicit drug-free environment and at the very least an environment wherein the employees are not responsible for introducing illicit drugs into the environment, since such drugs and their use by inmates pose a serious threat to good order and hence a serious threat to all bargaining unit employees' physical well being, against the rights of the individual employee to relevant information reasonably available to the employer which bears upon the reasons relied upon by the employer for discharge.

In striking the balance called for it is incumbent upon the employer at the outset to establish as a "fact" the assertions it makes to the effect that the tapes contain the identity of additional potential suspects, etc., as more fully noted above, which upon establishment, may well substantiate

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as "reasonable" a denial of certain portions or all of the tapes in question. To that end, the OSHP, as agent of the Department of Rehabilitation and Corrections, is directed to appear before the undersigned arbitrator with the tapes in question, along with the Trooper in charge of the investigations involved here and Counsel O'Neill at a time and place mutually agreed, along with the tapes in question and a tape recording device that indicates by footage the tape being played, at which time the OSHP will play for the undersigned Arbitrator, in camera, the tapes in question. At that time Counsel and the Trooper can identify those portions of the tape which the OSHP resists disclosing, and the specific reason for such resistance / and the footage involved shall be so noted.

Thereafter, the Arbitrator shall rule on the footage sought to not be disclosed and determine whether or not denial of the Union's request for said footage is "reasonable," within the intendment of Article 25.08, as more fully discussed above. All footage not deemed to be reasonably denied by the OSHP, shall be played in the presence of Counsel for the Patrol Counsel for the Union, the Grievants, and the undersigned Arbitrator, at a time and place mutually agreed to, on the same recording device utilized at the in camera session, at which time and place the Union may audio tape record those portions of the tapes in question then made available to it.

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In sum, the Motion to Quash is taken under advisement pending the in camera inspection herein directed.

Dated: December 16, 1987

Frank A. Keenan
Panel Arbitrator

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