

**ARBITRATION DECISION NO.:**

124

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Rehabilitation  
and Corrections, Southeastern  
Correctional Institution

**DATE OF ARBITRATION:**

February 29, 1988

March 1, 1988

**DATE OF DECISION:**

May 4, 1998

**GRIEVANT:**

James W. Griffin

**OCB GRIEVANCE NO.:**

G-87-1768

**ARBITRATOR:**

Thomas P. Michael

**FOR THE UNION:**

Daniel S. Smith

**FOR THE EMPLOYER:**

Nicholas G. Menedis

**KEY WORDS:**

Just Cause

Polygraph Test -

Weight as Evidence

Removal

**ARTICLES:**

Article 5 - Management Rights

Article 24 - Discipline

§24.01-Standard

§24.02-Progressive

Discipline

§24.04-Pre-Discipline

§24.05-Imposition  
of Discipline  
§24.06-Prior  
Disciplinary Actions  
Article 25 - Grievance  
Procedure  
§25.01-Process  
§25.08-Relevant  
Witnesses and  
Information  
Article 43 - Duration  
§43.01-First Agreement

**FACTS:**

Grievant was a Corrections Officer at the Southeastern Correctional Institute Lancaster, Ohio from 1981 until June 17, 1987, the date of his removal. On June 17, 1987, Grievant was served with an order of removal alleging that he had violated Standard of Employee Conduct 20b. Specifically, Grievant was alleged to have abused an inmate (“complainant”) by forcing complainant to perform fellatio on Grievant on or about December 20, 1986.

**EMPLOYER’S POSITION:**

Grievant was removed for just cause. Complainant's testimony was corroborated by a written statement of an inmate, by a polygraph examination of the inmate, and by an Ohio State Highway Patrol investigation. Any procedural errors that may have occurred were not so prejudicial to Grievant as to vitiate just cause for his removal.

**UNION’S POSITION:**

Grievant was not removed for just cause. Employer failed to meet burden of proof on the substantive issue of guilt. Grievant was more credible than complainant. Complainant had retaliatory motives against Grievant. Complainant gave inconsistent, false testimony.

Further, employer engaged in numerous procedural due process violations. Grievant was removed in June of 1987 for an alleged illegality that occurred in December, 1986, employer's investigation was unfair because it failed to consider exculpatory statements by other inmates, inadequate notice (2 days) was given for the pre-disciplinary conference, and employer refused to provide relevant documents requested by the Union.

**ARBITRATOR’S OPINION:**

Because the Arbitrator found that the employer failed to meet its burden of proving Grievant engaged in illegal acts against complainant, he did not focus on the procedural issues of the case. The Arbitrator found complainant's testimony nonpersuasive because of numerous inconsistencies, and the Arbitrator was not willing to abdicate his responsibility for determining the credibility of complainant to the polygrapher. The Grievant testified in a straightforward and credible manner and no eyewitness testimony was introduced against Grievant. Finally, the employer made no attempt to rebut testimony of other Corrections Officers concerning inmate statements allegedly reporting that complainant had admitted falsely accusing Grievant.

**AWARD:**

No just cause for removal. Reinstate Grievant with full backpay.

**COMMENTS:**

The Arbitrator rejected the State's use of polygraph tests to determine witness credibility. He ruled that to accept the conclusions of a polygrapher would be a dereliction of his duty as the Arbitrator. This decision should be used to discourage Management from taking disciplinary action where the only evidence against an employee is the results of a polygraph test.

**TEXT OF THE OPINION:****IN THE MATTER OF ARBITRATION  
BETWEEN****OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION****AND****OHIO CIVIL SERVICE  
EMPLOYEES ASSOCIATION  
LOCAL NO. 11, AFSCME AFL-CIO****JAMES W. GRIFFIN, GRIEVANT****THOMAS P. MICHAEL, ARBITRATOR  
COLUMBUS, OHIO**

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Department of Rehabilitation and Correction, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter "Union").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was conducted at the Office of Collective Bargaining commencing February 29, into the early morning hours of March 1, 1988. This matter has been submitted to the Arbitrator on the testimony and exhibits offered at the hearing. The parties have stipulated that the grievance is properly before the Arbitrator for decision and have waived the thirty-day time limit-for issuance of this award. They agreed to allow the Arbitrator to tape record the proceedings and granted permission for publication of this Opinion and Award.

**APPEARANCES:****For the Employer:**

Nicholas G. Menedis,  
Chief of Labor Relations  
Thomas E. Durkee,  
Ohio Department of  
Rehabilitation and Correction

**For the Union:**

Daniel S. Smith, General Counsel  
Ken Bolliner, Staff Representative  
OCSEA/AFSCME Local 11

## ISSUE

The parties stipulated that the substantive issue before the Arbitrator is:

Was Grievant removed for just cause?  
If not, what shall the remedy be?

## PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS

Section 4117.08(C), Ohio Revised Code.

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

\* \* \*

(2) Direct, supervise, evaluate, or hire employees:

\* \* \*

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:

\* \* \*

(8) Effectively manage the work force . . .

## CONTRACT PROVISIONS

### **ARTICLE 5 - MANAGEMENT RIGHTS**

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employee reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(A) numbers 1-9.

\* \* \*

### **ARTICLE 24 - DISCIPLINE**

#### **§24.01 - Standard**

Disciplinary action 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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

## **§24.02 - Progressive Discipline**

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

- A. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand;
- C. Suspension;
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

## **§24.04 - Pre-Discipline**

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action.. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

## **§24.05 - Imposition of Discipline**

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.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

#### **§24.06 - Prior Disciplinary Actions**

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

### **ARTICLE 25 - GRIEVANCE PROCEDURE**

#### **§25.01 - Process**

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievants). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

Those employees in their initial probationary period as of the effective date of this Agreement shall retain their current rights of review by the State Personnel Board of Review for the duration of their initial probationary period.

C. The word "day" as used in this article means calendar day and days shall be counted by

excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. If a verbal reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal reprimand.

#### **§25.08 - Relevant Witnesses and Information**

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.

### **ARTICLE 43 - DURATION**

#### **§43.01 - First Agreement**

The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives 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.

### **FACTUAL BACKGROUND**

Grievant was employed as a Corrections Officer 2 at the Southeastern Correctional Institution, Lancaster, Ohio, at the time of his removal, effective June 17, 1987. He had commenced employment with the Department of Rehabilitation and Correction as a Corrections Officer 1 in 1981. On June 17, 1987, Grievant was served with an order of removal alleging that he had violated Standard of Employee Conduct 20b.-engaging in an unauthorized relationship with inmates (Employer's Exhibit 20). Specifically, Grievant Griffin was alleged to have forced an inmate to perform fellatio on Griffin on or about December 20, 1986. The parties have stipulated that if the facts alleged are true they constitute a removable offense.

The grievance (Joint Exhibit 2) requests reinstatement of the Grievant "with all benefits restored and to be made whole".

### **POSITION OF THE EMPLOYER**

Grievant was removed for just cause for the deliberate abuse of an inmate. Should the Arbitrator determine that the charges against Grievant are true, the removal should be upheld. The testimony of inmate Williams is corroborated by the written statement of inmate Whitt, by a polygraph examination, and by the investigation of the Ohio State Highway Patrol.

The procedural arguments urged by the Union are not well founded. Even if some procedural errors are present in that disciplinary and grievance procedures, that error is not so prejudicial to the Grievant as to vitiate just cause for his removal. Further, the pre-disciplinary conference is not intended by contract to be a quasi-judicial proceeding as the Union's arguments would suggest.

The Employer has established that Grievant committed abuse of an inmate by forcing him to engage in sexual activity with the Grievant. The admitted voluntary homosexual activities of inmate Williams do not give the Grievant the right to sexually abuse that inmate. Since Grievant has been disciplined for just cause for abuse of a person in the custody of the State, §24.01 of the Contract requires that the termination be upheld and the grievance denied.

### **POSITION OF THE UNION**

The Employer has failed to meet its burden of proving that Grievant was removed for just cause. With regard to the substantive issue of whether or not Grievant committed the acts charged against him, Grievant is a more credible witness than inmate Williams. That inmate is an admitted, known homosexual seeking to retaliate against Grievant for a disciplinary action taken against inmate Williams by Grievant. Further, inmate Williams lied repeatedly during his testimony at the arbitration hearing regarding his sexual activities and also gave testimony regarding his divorce proceedings which was contrary to the testimony he previously gave to the Institution's Rules Infraction Board. Based-strictly on the substantive issue of whether or not Grievant is guilty of the acts charged, the Employer has failed in its burden of proof and the grievance must be allowed.

However, this case is also fraught with procedural due process violations by the Employer. First, Grievant was removed on June 17, 1987, for an alleged sex act occurring in December 1986. The passage of time alone prejudices his case because of the difficulty in identifying specifics after that lengthy delay. The excessive delay is in violation of §24.02 of the Contract.

Secondly, the Employer's disciplinary investigation of the incident- was unfair. The Employer did not consider or investigate exculpatory statements from other inmates who alleged that inmate Williams admitted lying about the Grievant. Nor was Grievant interviewed during the investigation prior to the pre-disciplinary conference.

Inadequate notice (2 days) was given for the pre-disciplinary conference and the Union was denied the right to call certain inmates as witnesses. Additionally, the Employer improperly refused to grant a requested continuance of that conference.

Also, the results of the lie detector test on inmate Williams should not be admitted into evidence. The Contract does not provide for the use of polygraph tests in arbitrations without consent of the Union.

Finally, the Employer has violated §25.08 of the Contract by refusing to provide relevant, reasonably available investigatory documents requested by the Union. The testimony establishes that witness statements were taken from several inmates and requested by the Union. (Union Exhibit A). Nevertheless, these exculpatory statements have not been furnished to the Union.

Grievant must be reinstated with restoration of full benefits and back pay.

### **OPINION**

As has come to be almost standard in these proceedings, much of the testimony in this



arbitration centered on development of procedural issues. Because this Arbitrator finds that the employer has fallen short of meeting its burden of proving its charges that the Grievant engaged in illegal and morally reprehensible acts against inmate Williams, it will be unnecessary to determine most of the procedural issues presented by this case.

Twelve witnesses testified during the course of this lengthy hearing. However, the substantive issue revolves itself to a determination of the relative credibility of the two principals involved - James W. Griffin and Anthony D. Williams. Testimony of the remaining witnesses is relevant only to aid the Arbitrator in determination of that credibility issue and as that testimony bears on the procedural issues.

This Arbitrator received the testimony of inmate Williams as almost totally lacking in credibility. That judgment is not clouded by the admitted sexual preferences of the witness. Rather, this neutral's judgment is based upon the numerous inconsistencies between inmate Williams' testimony and other evidence of record regarding that inmate's sexual activities while institutionalized. The transcript of the Rules Infraction Board hearing (Employer's Exhibit 9) establishes to this Arbitrator's satisfaction that inmate Williams was untruthful when he testified that he had not engaged in sex acts in prison until early December, 1986. Contrary to his protestations at the arbitration hearing, Williams admitted to the Rules Infraction Board that he had committed sex acts with other inmates at least as early as October 1986. When combined with the substantial delay in raising these charges against Grievant, as well as the totality of his testimony, this Arbitrator is convinced that inmate Williams is not worthy of belief.

The Employer has presented polygraph evidence in an attempt to buttress the credibility of inmate Williams. The Contract is silent on the issue of admissibility of polygraph test results of witnesses. However, the maxim of construction "expressio unius exclusio alterius" would suggest that the parties did not intend to expressly bar the use of polygraph evidence. Otherwise, that matter could have been included in §24.07 of the Contract dealing with polygraph tests. (Compare Grievance G86-0581, Arbitrator Duda, for a similar holding).

Nonetheless, even accepting that the testimony of the polygrapher, Sergeant Phillip R. Osborne, is admissible, this Arbitrator is unwilling to assign the degree of weight to that testimony necessary to displace the subjective judgment that Anthony Williams has not been truthful in his charges against the Grievant. As the polygrapher readily admitted, polygraph testimony is not admissible in the courts of this state over objection of a party. While arbitration proceedings are not subject to courtroom evidentiary standards this Arbitrator recognizes, as do the courts, that polygraphs are only another tool to aid in assessing credibility and that their accuracy has not been established to a scientific degree sufficient to justify reliance on them in the most important of our everyday affairs. This Arbitrator is unwilling to abdicate his responsibility for determining credibility of inmate Williams to the polygrapher. This is especially so where, as here, the charges against the Grievant are based solely on the unverified assertion of a convicted felon. No weight has been assigned to the unsworn statement of inmate Whitt (Employer's Exhibit 18) since that inmate did not testify in these proceedings and therefore was not subject to cross-examination.

In contrast, the Grievant testified in a straightforward and credible manner. Absent any substantiating eyewitness testimony against Mr. Griffin it is impossible for this Arbitrator to believe the charges against him. Additionally, this neutral is greatly disturbed by the testimony of Correction Officers Mathias and Durst regarding witness statements taken from inmates who allegedly reported that Anthony Williams had admitted falsely accusing Grievant. The Employer failed to attempt to rebut those charges by calling Lieutenant Walker to dispute that testimony. However, the issue of violation of §25.08 of the Contract, as well as the remaining procedural claims, is subsumed in this case by the conclusion that the Employer has failed to prove (by any standard of proof) the substantive charges against the Grievant.

Based upon the foregoing discussions it is found that Grievant was not removed for just cause.

### **AWARD**

It is the Award of the Arbitrator that the Grievant, James W. Griffin, be reinstated to his position without loss of seniority or benefits. The reinstatement is to be made with full back wages, less any earnings or benefits he received subsequent to his termination.

Thomas P. Michael, Arbitrator

Rendered this Fourth day  
of May, 1988, at Columbus,  
Franklin County, Ohio

### **CERTIFICATE OF SERVICE**

I hereby certify that the original Opinion and Award was mailed to Eugene Brundige, Director, Ohio Department of Administrative Services, 65 E. State Street, 17th Floor, Columbus, Ohio 43215, with copies of the foregoing Opinion being served by United States Mail, postage prepaid, this 4th day of May, 1988, upon: Nicholas G. Menedis, Chief of Labor Relations, 1050 Freeway Drive, North, Columbus, Ohio 43229; and Daniel S. Smith, OCSEA/AFSCME Local 11, 995 Goodale Boulevard, Columbus, Ohio 43212.

Thomas P. Michael