

ARBITRATION DECISION NO.:

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UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Rehabilitation and Corrections
Dayton Correctional Institution

DATE OF ARBITRATION:

DATE OF DECISION:

June 15, 1988

GRIEVANT:

Andre E. Ellis

OCB GRIEVANCE NO.:

G-87-2392

ARBITRATOR:

Nicholas Duda, Jr.

FOR THE UNION:

Patrick S. Mayer
John Porter

FOR THE EMPLOYER:

Gregory C. Trout

KEY WORDS:

Just Cause
Removal
Commensurate Discipline
Corrective vs. Punitive
Disparate Treatment

ARTICLES:

Article 24 – Discipline
§24.01 – Standard

FACTS:

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At issue was whether Grievant was removed for just cause, and if not, what should the remedy have been.

Grievant was one of two Corrections Officers assigned to drive jeeps on Perimeter Security

Patrol on the midnight shift. Beginning shortly after midnight Grievant failed to respond to three (3) fence alarms and approximately thirty (30) radio calls. Post Perimeter Security orders required that if it were necessary to leave the vehicle at any time, the Control Center was to be notified and the vehicle keys was to be removed. It was the responsibility of employees assigned to vehicle perimeter Security Patrol to maintain strict security.

Grievant was charged with failure to respond to three (3) alarms and numerous calls made to him from Central Control over a period of twenty-five minutes. Grievant was also charged with leaving his vehicle without notifying Central Control. Grievant's discipline history included two (2) three (3) day suspensions, both for failure to follow security orders.

A Step 3 grievance was held at which there was substantial discussion and investigations surrounding the charges against the Grievant. The grievance was denied at the Step 3 hearing and the Grievant's removal was held to be for just cause due to the Grievant's past disciplinary record and because of the clear and convincing evidence against the Grievant.

MANAGEMENT'S POSITION:

- It is Management's contention that there was just cause for removing the Grievant. Grievant was required to maintain radio contact with the Control Center. He failed to respond to the radio calls because he had prevented operation of his two (2) radios thereby breaching security and constituting just cause for removal. Grievant had turned one (1) radio off and had turned the volume so low on the other so as to render it ineffective. Grievant voluntarily prevented operation of his radios. Grievant also admitted for the first time that he sat and talked with another Corrections Officer during the period in question.

UNION'S POSITION:

- Management had no just cause for termination of the Grievant, and even should the Arbitrator find against the Grievant, the discipline imposed upon the Grievant was severe to the extreme, was not commensurate with the offense, and therefore punitive rather than corrective in nature. It was also the Union's contention that management's investigation of the incident was not thorough in that there could have been mechanical failures in the equipment and alarms involved. Although both Grievant and the other officer were removed, the Employer brought the other officer back after a suspension and a leave of absence. It is the Union's position that this was disparate treatment, and the penalty imposed on the Grievant should have been reduced.

ARBITRATOR'S DECISION:

- In as much as there was just cause for grievant's discharge, this grievance was denied. Grievant knew that his job was to patrol constantly and that he should not get out of his vehicle until after communication with the Control Center. Grievant knew or should have known that the security system depended largely on surveillance by the Patrol Officers, both visibly and attending the alarm board. He also knew that constant radio contact for instant communication was essential.

By his own admission Grievant took himself out of radio contact with the Control Center intentionally as to one radio and at least negligently as to the other. In addition for at least fifteen minutes the Grievant had neglected his duties while he was talking to another officer. Additionally he left his vehicle briefly without contacting the Control Center. Perhaps the later misconduct would have been relatively insignificant but for the fact that the Grievant had not turned on his walkie-talkie radio when he left the vehicle.

The misconduct recited above was a clear violation of the established perimeter patrol procedure. Grievant did not make one or a few small mistakes. He went as far as a Correction officer could go to abandon his security responsibilities without actually leaving the institution.

AWARD:

Grievance was denied.

TEXT OF THE OPINION:

* * *

IN THE MATTER OF ARBITRATION
UNDER THE 1986-1989 CONTRACT

Between:		
STATE OF OHIO		
(DAYTON CORRECTIONAL INSTITUTION)		GRIEVANCE NO. DCI-87-D-021
THE EMPLOYER		
-and-		OCB GRIEVANCE NO. G-87-2392
THE OHIO CIVIL SERVICE		ND 590
EMPLOYEES ASSOCIATION		
		GRIEVANT: ANDRE E. ELLIS
LOCAL NO. 11, AFSCME		
AFL-CIO		
THE UNION		

Before: NICHOLAS DUDA, JR., ARBITRATOR

OPINION AND AWARD:

June 15, 1988

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CASE DATA

SUBJECT

Removal (discharge) for alleged violation of the Standards of Conduct Rules 3b and 28 by improperly performing Perimeter Security (Vehicle Patrol).

APPEARANCES

FOR THE EMPLOYER

Gregory C. Trout, Attorney, Presenting the Case
Reginald A. Wilkinson, Superintendent, Dayton Correctional Institution
King W. Small, Supervisor III, Pickaway County Institution
James Eichenlaub, Major, Dayton Correctional Institution

FOR THE UNION

Patrick A. Mayar, OCSEA Field Staff, Presenting the Case
Andre E. Ellis, Grievant, Former Correction Officer II
John Porter, Associate General Counsel
Ronald L. Bolds, Witness
Mrs. Patricia Ellis, Mother of Grievant

BACKGROUND

On July 21, 1987 the Director of Ohio's Department of Rehabilitation and Correction gave Grievant written notice that he was discharged for the reason:

... that you have been guilty of violation of the Department of Rehabilitation and Correction Rule of Conduct rule 3b - Failure to follow post orders i.e., Perimeter in the following particulars, to wit:

Rule 3b - Failure to follow post orders i.e., Perimeter Security

SECTION IV B. 4: If it is necessary to leave the vehicle at any time, the Control Center must be notified and the vehicle keys must be taken.

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SECTION V B. 5: Any unusual activities or abnormal conditions observed while patrolling the outside perimeter roads, fence, and parking lots should be reported to the Central Control.

SECTION VI Perimeter Security Responsibility: It is the responsibility of employees assigned to Vehicle Perimeter Security Patrol to maintain strict security, assure the safety of the institution, fellow employees, the general public, and the inmate population, and to be aware of the contents of this and other relevant post orders and of the pertinent Administrative Regulations, particularly Administrative Regulation 5120-9-01 Use of Force.

Rule 28 - Any act not otherwise set forth herein which constitutes a threat to the security of the

institution, its staff or inmates.

Rule 3b and Rule 28:

On or about May 2, 1987 you were working perimeter patrol. At approximately 12:02 three alarm zones were activated in the Control Center. You failed to respond to Central Control to clear these alarms. You also failed to respond to numerous attempts by Central Control to contact you via radio, over a period of approximately 25 minutes. You also left your vehicle without notifying Central Control.

ON AUGUST 2, 1987 THE UNION PROTESTED GRIEVANT'S REMOVAL IN WRITING

This grievance is an appeal to the decision to remove [Grievant] for unjust & unreasonable causes.

As remedy, the grievance requested: "Reinstatement. Make whole remedy."

After a hearing the Employer issued a Step 3 response which included the following:

A Step 3 grievance hearing was held . . . at which . . . there was substantial discussion and investigation surrounding the charges against you. . . .

. . . Rule 28 in the Standards of Employee Conduct is not unreasonable. . . . Your disciplinary history includes two three-day suspensions, both served for your failure to follow security orders. This latest incident shows a continued disregard for the importance of attention to your duty.

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In summary, there is clear and convincing evidence that you were out of touch with the institution for at least 20 minutes on the morning of May 2, 1987. During that time you failed to respond to three fence alarms thereby breaching the security of the institution. There is no evidence to suggest the notion that this incident occurred because of technical circumstances beyond your control. Relative to the degree of penalty imposed, I find that the magnitude of the security breach was such that removal is commensurate. Finally, there appears to be no merit to the allegation of disparate treatment. For these reasons, I find the discipline imposed to be for just cause. Your grievance is denied.

At the Arbitrator's request the Parties jointly determined the distance of the perimeter road around the facility. After the bearing they notified the Arbitrator that the distance is .8 of a mile for one circuit.

POSITIONS OF THE PARTIES

EMPLOYER'S POSITION

Grievant was one of the two Correction Officers assigned to drive jeeps on Perimeter Security

Patrol on the road around the Dayton facility on the shift which began at 10:15 P.M. May 1 and ended at 6:15 A.M. May 2, 1987.

Beginning shortly after midnight Grievant failed to respond to three fence alarms and to approximately 30 radio calls. Captain Small went to the road to find Grievant. Grievant had been talking with the other Correction Officer. Grievant's conduct constituted a serious breach of security and constituted just cause for discharge. Grievant had been disciplined twice before for similar negligence and improper performance of duties. Accordingly removal was not excessive or unreasonable.

Whether the alarm system was properly functioning or properly "read" is not the significant factor. What is significant is that numerous attempts were made to contact Grievant by radio; admittedly he failed to respond although he knows how to operate the radio. Using a radio does not require a post order.

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Rule 28, which the Union characterizes as a the "Catch All" rule is reasonable and necessary because Management cannot anticipate every possible means by which a Correction Officer could cause a security breach.

The conspiracy argument made at arbitration by the Union had not been raised prior to arbitration. In this hearing Grievant admitted for the first time that he sat and talked with Correction Officer Smith. He variously estimated the time of that conversation to be five, ten or fifteen minutes. Grievant was required to maintain radio contact with Control Center. He failed to respond to the radio calls because he prevented operation of his two radios thereby breaching security and constituting just cause for removal.

UNION'S POSITION

... the Department of Rehabilitation and Corrections had no just cause for the termination of the grievant. The State cannot show that the grievant was guilty of violating the Rules of Conduct cited in the removal order.

... even should [the Arbitrator] find against the grievant, ...the discipline imposed upon the grievant was severe to the extreme, was not commensurate with the offense, and therefore punitive rather than corrective in nature.

... the grievant was in fact awake and alert on his post up until the time in question and we shall show that there may have been mitigating circumstances as to why the grievant failed to respond to the radio calls. ... the fence alarms have been known to malfunction,

... there could have been a mechanical failure on the data in question, which would explain the grievant's failure to respond.

... the grievant has had a good work record since transferring to the Dayton Correctional

Institution from Hocking.

The investigating officer did not perform a thorough investigation of the incident in that he did not question all relevant witnesses to the case. In particular, the Employer did not show that the security light in grievant's vehicle was on when Captain Small stopped him. Thus it is possible that the alarm boards in the two Jeeps may have malfunctioned. . . . Grievant says

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he was driving at 5 M.P.H. so it would take him about 12 minutes to drive a mile. That was close to the 15 minutes Grievant estimated he drove between his "midnight" call and when he stopped to talk with Officer Smith. Grievant had not been provided with a copy of the post orders. No one witnessed seeing Grievant outside his vehicle.

In the Union's opinion, no discipline was appropriate because there was not just cause. However, even if the Arbitrator finds there was some cause for discipline, discharge was excessive.

Grievant should merely have been given corrective discipline.

There was a conspiracy by the Shift Captain to rid himself of four correction officers, including Grievant, who were considered problem employees.

Although the Union acknowledges that Grievant did not respond to various radio calls, the Union believes that mitigating circumstances warrant consideration. The Grievant should be reinstated to his job with full back pay and benefits.

Although both Grievant and Officer Smith were removed, the Employer brought Officer Smith back after a suspension and leave of absence. It was disparate treatment not to reduce the penalty imposed on Grievant.

THE ISSUE

Was there just cause for the discharge of Grievant? If not, what is the appropriate remedy?

RELEVANT LABOR AGREEMENT PROVISIONS

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. . .

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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

RELEVANT PROVISIONS OF STANDARDS OF EMPLOYEE CONDUCT

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

If the accumulative total of penalty points is . . . 10 points . . . the penalty is . . . Removal.

Rule No.	Rule	Penalty Points for Each Offense			
		<u>1st</u>	<u>2nd</u>	<u>3rd</u>	<u>4th</u>
3b	Failure to follow post orders, administrative regulations, or other written procedures. Any act not otherwise set forth herein which constitutes a threat to the security of the institution, its staff or inmates.	WR	3	5	Removal
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ANALYSIS

FINDINGS OF FACT

The new Dayton Correctional Facility, which utilizes the latest security technology, cost many millions of dollars. Effective use of the facility depends on proper functioning of the equipment and proper attention and performance by the Correctional Officers.

The Dayton Correction Facility is a medium security institution designed to provide full security by a new perimeter system instead of the old "fortress" style of walls with guard towers, etc. The perimeter system utilizes the following security measures:

1. A double fence embedded in concrete completely surrounding the institution and opening at the front and at the rear of the institution.
2. Regular perimeter surveillance provided by armed patrols.
3. Strict control over all pedestrian and vehicular traffic through the front and rear entrances.

Thorough surveillance of areas adjacent to the perimeter is supposed to be maintained at all times. In that connection the perimeter patrols are supposed to be in constant radio contact with Control Central and with each other.

The perimeter fences are electronically equipped to transmit an alarm when a foreign object, which can be as small as a piece of paper, comes in contact with the fence. The system can pinpoint with close tolerance the specific contact point at the fence. The specific location of the "alarm" is transmitted simultaneously to a receiving unit in the Control Center and to screens in each of two vehicles which patrol the outside perimeter road, which is .8 mile in length.

Each vehicle is manned by a Correction Officer. When the alarm sounds the Correction Officers are to proceed immediately to the point of the alarm.

Each patrolling Correction Officer is to maintain constant radio communication with the Control Center. A Correction Officer has a radio in his vehicle which is supposed to be on and he also has a "walkie-talkie" radio which he is to wear at all times. If he leaves the vehicle for any purpose he is supposed to remain in contact by his "portable" radio with the Control **8**

Center and also with the other guard. "Standard Practice" according to the Grievant is that at least one of the two vehicles should be moving around the perimeter fence at all times.

A written post procedure for Perimeter Security (Vehicle Patrol) was established effective March 4, 1987.

1. When going on duty, the security patrol officer will make a visual check of all equipment. The relieving officer will sign a checklist, stating that all equipment has been found to be present and in good order, and noting any exceptions. Any missing, damaged, or inoperative equipment must be reported to the Shift Supervisor immediately.

The security patrol officer will notify the Control Center upon assuming duty. Security call-ins will be made every 30 minutes on the hour and half-hour between 6:30 PM and

6:00 MI.

3. Any inmate observed making an escape must be pursued, either by vehicle or on foot. . . .
4. If it is necessary to leave the vehicle at any time, the Control Center must be notified and the vehicle keys must be taken.
5. Any unusual activities or abnormal conditions observed while patrolling the outside perimeter roads, fence, and parking lots should be reported to the Control Center.
6. During recreation and other outside activities, the perimeter fence must be under continuous and concentrated surveillance. . . .
11. In the event of a disturbance, fire, or other emergency, the Shift Supervisor or higher authority may have special instructions for the security patrol.

VI. Responsibility:

It is the responsibility of employees assigned to Vehicle Perimeter Security Patrol to maintain strict security, assure the safety of the institution, fellow employees, the general public, and the inmate population, and to be aware of the contents of this and other relevant post orders

Grievant had been employed as a Correction Officer for almost two years at the time of the incidents involved in this case. He transferred to Dayton from Hocking Institution in January 1987. At that time Dayton had not yet begun operation; prison inmates were riot yet present. The newly assigned

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Correction Officers, including Grievant, trained in "mock crews". Such training was conducted for about two months. The first inmates arrived in the middle of March.

Grievant testified at arbitration that he did not remember reading the written procedure for "Perimeter Security vehicle Patrol" but admitted knowing the provisions. He acknowledged that he had been trained on the mock crew assignment, and had also worked at various times on Perimeter Security Patrol after the inmates arrived and knew the specific duties to use security procedures "appropriate to prevent escape from or unauthorized access to the institution and to provide surveillance of the institution, its grounds, and the adjacent area." He also knew that an officer assigned to Vehicle Perimeter Patrol is responsible to maintain strict security" and that "the primary duty of the perimeter security officer is to prevent escape by inmates."

On the workshift which began at 10:15 PM May 1, 1987 the two Correction Officers assigned to Perimeter Security Patrol were Grievant and Correction Officer Smith. Each was assigned a separate vehicle.

According to his testimony at arbitration Grievant made his half-hour call at 11:58 PM. At or about the same time he turned the volume of his vehicle radio down so far that he could not hear it. Earlier he had turned off the walkie-talkie attached to this belt. Grievant's next "checking in" call was due on or about 12:30 AM.

Grievant testified that after making his call he started driving his vehicle on a circuit of the road at about 5 miles per hour. After proceeding about a quarter of the perimeter he noticed a paper against the fence. He stopped his vehicle and got out to get the paper. He did not turn on his walkie-talkie, nor did he remove the car keys. Grievant testified he returned to the vehicle after only a minute or so. After reentering the vehicle he

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proceeded less than half of a circuit and then pulled off the road to park alongside the vehicle of Officer Smith. There is evidence that at least one of them left his/her vehicle for a time, but the evidence is insufficient to determine the officer's identity nor is that fact critical to deciding this case. Grievant says that he talked with Officer Smith for anywhere from 5 to 15 minutes. He is not sure exactly how long. Then he resumed his patrol. Almost immediately he saw Captain Small walking toward him.

Shortly after Grievant made his 11:58 PM call, three electronic alarms had registered in the Control Center. If the equipment was functioning in the patrol jeeps the alarms should also have been shown in those vehicles. When no communication was received from either vehicle the Control Center began to call both of them on the radio but there was no acknowledgement from either patrol. In addition there was at least one other radio call to the parked vehicle from another source who could see the parked vehicle. Calls were continuously repeated by the express order of Captain Small who was alerted to the lack of radio response from the two perimeter patrols. With two other officers Captain Small walked down the road about a quarter of the circuit before encountering Grievant, whom he ordered to stop.

When Grievant stopped at Captain Small's order it was approximately 12:25 AM. Thus 27 minutes had passed since Grievant's last check in. During that period, according to Grievant, he had driven three quarters of the .8 mile road (that is .6 mile), stopped once for a piece of paper and talked with Officer Smith. At the rate of speed he claimed the .6 mile would have been covered in no more than ten minutes driving time, even if the vehicle moved at slightly less than five miles per hour. He probably was with Correction Officer Smith for at least 15 minutes and possibly longer during which time neither vehicle was patrolling.

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In discussions with Captain Small Grievant and Officer Smith each claimed he/she had not heard any of the radio calls and had not been aware of any of the three electronic alarms. Captain Small relieved both Grievant and Officer Smith. Their replacements operated their radios without any problem for the rest of the work shift. Neither was any problem recorded in connection with the electronic alarm system in either vehicle.

EVALUATION

Grievant knew that his job was to patrol constantly and that he should not get out of his vehicle until after communication with the Control Center. Grievant knew or should have known that the security system depended largely on surveillance by the Patrol officers, both visually and attending the alarm board. He also knew that constant radio contact for instant communication was essential.

By his own admission Grievant was out of radio contact despite having two radios because he intentionally turned one off and "accidentally" turned the other one down so far that it also was effectively off. Based on that admission, this Arbitrator concludes that Grievant took himself out of radio contact with the Control Center intentionally as to one radio and at least negligently as to the other. In addition for at least 15 minutes his vehicle was parked while he talked to the other Correction Officer, another clear failure to attend to his duties of patrol and surveillance. Additionally he left his vehicle briefly without communicating with other officers. Perhaps the latter misconduct would be relatively insignificant but for the fact that he had not turned on his walkie-talkie radio when he left the vehicle.

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The misconduct recited above was a clear violation of the perimeter patrol procedure. As an experienced Correction Officer Grievant was familiar with post orders generally. He showed in arbitration that he also knew the specific post order involved here even though he doesn't remember whether or when he had read it. Accordingly he violated Rule 3b (Failure to follow post orders).

Terminating his radio communication was Grievant's major failing. Had he handled his radio properly the other events would not have occurred. Because he did not maintain radio contact Grievant was totally ineffective as a Security Patrol for approximately 25 minutes, thereby breaching the Institution's security. If the three alarms that occurred during the period had been valid there could have been a very serious incident. Without considering any of his other action, Grievant's mishandling of his radios constituted failure to perform his security job.

Grievant did not make one or a few small mistakes. He went about as far as a Correction Officer could go to abandon his security responsibilities without actually leaving the institution.

Instead of performing his important job he turned off his radios and drove to meet and chat with a friend in the parking area. By his actions the security of the institution was breached' for almost a half an hour. It is true that the Department's "Standards of Employee Conduct" do not expressly enumerate in general terms that an employee must do his job, etc. Nor do the rules expressly cover every other specific thing which Grievant did not properly perform. For example the requirement to maintain radio contact, a duty key to security in the new system, is not covered expressly in a post order. However, it is axiomatic and implicit in the corrections employment situation, that an employee is accountable and may be disciplined for obvious, major, unjustified misfeasance and malfeasance of basic job requirements which

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jeopardize the security of the institution, even though the gross misconduct was not expressly prohibited in writing. For such basic, obvious misconduct, a written edict is unnecessary. Accordingly there was just cause to discipline Grievant, pursuant to the general warning in Rule 28.

Less than four months before the incident in question Grievant had been suspended three days for various misconduct which violated security regulations and threatened security. In addition a year earlier to the very day he had violated security orders and procedures by allowing vital security equipment to be left unsecured in the presence of and accessible to inmates; as a result his "man down" alarm was accidentally activated thereby initiating the security alert team and disrupting the orderly operation of the facility. In addition during his short tenure of approximately two years Grievant has also been disciplined for other misconduct. Under these circumstances the Employer's decision to remove cannot be found to be arbitrary or unreasonable.

Grievant stated at arbitration that his discharge was unreasonable and unfair because Officer Smith was only suspended. Actually Officer Smith was also removed. As a result of an agreement between the Parties a grievance protesting that removal was recently settled; the removal was changed to a one month suspension plus a nine month leave of absence without pay. The Arbitrator notes that the written Agreement which resolved the Smith grievance provided "that this agreement is in no way precedent setting. This document shall not be utilized in any subsequent arbitration . . . Thus the arbitrator cannot be influenced by the treatment accorded Smith.

It is true that the Union had requested that the State agree to settle Grievant's grievance on the terms given to Smith. The Smith settlement recorded as a reason for the discipline modification that Correction officer Smith "has had no previous discipline as an employee of the CDRC, and as a new

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employee may not have fully appreciated the seriousness of the security breach she occasioned." The situation of Grievant is considerably different. He had been given extensive previous discipline, including several for security violations; his conduct had not improved despite the progressive discipline.

AWARD

Inasmuch as there was just cause for Grievant's discharge, his grievance is denied.

Nicholas Duda, Jr., Arbitrator