

ARBITRATION DECISION NO.:

141

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Pauline Warfield Lewis Center

DATE OF ARBITRATION:

August 10, 1988

DATE OF DECISION:

August 17, 1988

GRIEVANT:

Anthony Nelson

OCB GRIEVANCE NO.:

23-13-(88-01-19)-0007-01-05

ARBITRATOR:

John E. Drotning

FOR THE UNION:

Mike Temple

FOR THE EMPLOYER:

John Rauch

KEY WORDS:

Just Cause

ARTICLES:

Article 24 - Discipline
§24.01-Standard

FACTS:

Grievant was employed with the Ohio Department of Mental Health as a Housekeeper at Pauline Warfield Lewis Center. Grievant was arrested and convicted of "trafficking in drugs" a criminal offense, while off duty. As a result of the conviction, Grievant was removed from his position with the Department of Mental Health, due to a fear that Grievant would be involved in the trafficking of drugs while on duty.

EMPLOYER'S POSITION:

The Employer contends that they followed all the procedural steps and that upon notification of the arrest and conviction of Grievant, Grievant was put on administrative leave. The Employer argues that there is a connection between the charge and the Grievant's behavior at work. The Employer also asserts that Grievant should not be returned to duty because he could be involved in drug dealing on the premises of the center.

UNION'S POSITION:

The Union contends that there must be a connection between Grievant's job duties and the offenses Grievant was convicted of. In this instance, there is no connection between the offense and Grievant's job duties. Grievant in this case cleans the units and he does not have close contact with patients. The Grievant's off duty conduct is not related to his duties while at work.

ARBITRATOR'S OPINION:

Both parties agreed that the question in issue is whether Grievant was removed for just cause. The Arbitrator found that Grievant was convicted of "trafficking in drugs", but Grievant was not convicted of selling or offering to sell a controlled substance. The major concern of the Employer is that Grievant could be involved in "trafficking of drugs", yet there is no evidence to support the allegation that Grievant was involved in drug trafficking while at work. There was no basis for finding the Grievant guilty of selling or offering to sell drugs at work.

The Arbitrator ruled that Grievant should be reinstated without backpay. Since the Employer should be allowed to expect reasonable behavior both on and off the job, the Arbitrator held that Grievant is not entitled to backpay.

AWARD:

The grievance is sustained and Grievant reinstated without backpay.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

**OHIO DEPARTMENT OF
MENTAL HEALTH**

AND

**OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION**

ARBITRATION AWARD

CASE NUMBER:

#23-13-(1/19/88)-007-01-05
(A. Nelson)

HEARING:
August 10, 1988

ARBITRATOR:
John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on August 10, 1988 at 65 E. State Street, Columbus, Ohio. Appearing for the Union were: Mr. Mike Temple and the grievant, Mr. Anthony Nelson. Appearing for the Employer were: Mr. John Rauch, Ms. Jennifer Dworkin, Mr. Terry Smith, Ms. Teri Decker, and Mr. Bryan Fort.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 8/10/88. The discussion and award are based solely on the record described above.

II. ISSUE

The parties jointly asked:

Was Mr. Nelson removed for just cause? If not, what shall be the remedy?

III. STIPULATIONS

The parties jointly filed the exhibits marked Joint Exhibits #1 through #8.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. EMPLOYER

1. TESTIMONY AND EVIDENCE

Mr. Terry Smith, Superintendent of the Pauline Warfield Lewis Center (hereafter called Lewis Center) testified that he had total responsibility for about 450 patients and they are in a therapeutic environment. Smith noted that his institution is a chronic care hospital and most of the patients have been in other institutions and most of them need extended care.

Smith described his prior background at Toledo Mental Health Center and as Director of Human Resources in Lima. He went on to note that the Lewis Center is a State hospital which was built in 1860 and was originally called the Longview Asylum for Imbeciles and that was changed to Longview State Hospital and now is known as the Lewis Center.

Smith said that all the patients are mentally ill and about 58 of them are also mentally retarded. He noted that 60% of the patients are male and 40% are female.

Smith testified that some of the patients have had drug dependencies; that is, they have been involved in substance abuse. He noted that the primary diagnosis is mentally ill but secondary and tertiary diagnosis could deal with substance abuse. Smith said that the patients can move about the institution freely, that is, at least 300 of the roughly 430 or so patients are capable of morning about. Smith noted that patients do have the ability to spend money at the institution.

Smith testified that he was aware of patients using drugs on the grounds; namely, marijuana, pills, and other illegal drugs.

Smith testified that there are twenty-two full time equivalents in the custodial department and that some of the custodial workers are assigned to units to clean, wax floors, and clean bathrooms, etc.

Smith said that Nelson was hired to work in Unit A which contains about forty-six males, most of whom have been in the institution from one to three years. Nelson, said Smith, was employed between January of 1986 and October of 1987 and that he worked the first shift. He also noted that if Nelson were required to work on weekends, he might not be assigned to Unit A and he could be called upon to work overtime. Smith went on to say that Nelson had access to all patients in Unit A and he could interact with patients in units other than A.

Smith testified that he became aware of Nelson's arrest and conviction as a result of Joint Exhibit #8. Following this decision as noted on Joint Exhibit #8, said Smith, he put Nelson on administrative leave, held a pre-disciplinary conference as noted on Joint Exhibit #3, and Nelson was discharged.

Smith testified that it would be improper to return Nelson to the Lewis Center because it would create a poor public image and he noted that the hospital does not benefit by employing Nelson who was subject to a drug trafficking charge. Smith said that Nelson's return would set a poor image and it could be bothersome to the community, co-workers, as well as patients.

The Employer did not cross examine either of the witnesses called by the Union; namely, Officer Bryan Fort and the grievant, Anthony Nelson.

2. ARGUMENT

The Employer argues that there was no disparate treatment of Anthony Nelson relative to other employees.

The Employer also argues that it disagrees with Union Exhibit #1, the note from Attorney Hal R. Arenstein, with respect to the charges against Anthony Nelson.

The Employer argues that it followed all the procedural steps and that upon notification of the arrest and conviction of Anthony Nelson, he was put on administrative leave.

The Employer argues that there is a connection between the charge and behavior and that Nelson should not be returned to duty because he could be involved in drug dealing.

For these reasons, the Employer asks that the grievance be denied.

B. UNION

1. TESTIMONY AND EVIDENCE

The Union called as its first witness Officer Bryan Fort who testified that he was informed by the Cincinnati Park Police of Nelson's indictment and the Cincinnati Park Police wanted to check on Nelson's employment. Fort went on to say that the Cincinnati Park Police said that Nelson was arrested on two counts and that he had a prior conviction. Fort said that the first count was for drug trafficking and he went on to say that Nelson had over four pounds of marijuana and \$3000 of cash on him when he was apprehended.

The Cincinnati Park Police, said Fort, did not tell him about another individual involved.

Fort said that the Lewis Center has not hired convicted felons in the past and if he learned of any felons who had been hired, they would have been removed.

Fort said that he relied on Joint Exhibit #6. He went on to say that the statement on Joint Exhibit #8 which indicates that Nelson is to be monitored for drugs/support means that he is

placed on a monitoring program for drug abuse. Fort noted that if Nelson were found to be using drugs, his parole would be violated and the Judge could require him to serve time in jail; that is, the initial sentence.

Mr. Anthony Earl Nelson testified that he was on Unit A as a Housekeeper. He said that patients were permitted to move about and employees could get passes to leave the grounds. Nelson also noted that there were public welfare workers also employed on Unit A.

Nelson testified that he knew of two convicted felons working on the premises; namely, one who had been involved in bank robbery and the other had been cited for extortion.

Nelson said that he was never told that his outside activities could affect his employment.

Nelson said that he did not have \$3000 on him when he was apprehended by the Cincinnati Park Police, rather, he had \$1800 which were winnings from Scioto Downs and he had a receipt for that amount of money.

Nelson said that there was another individual involved and as the Cincinnati Park Police approached, that individual ran from his car and the Park Police did not apprehend him.

Nelson testified that there were four pounds of marijuana in the car owned by the individual who ran away. Nelson said that his task was to drive that individual to Columbus.

Nelson testified that he reported to the probation officer every two weeks and he is subject to a urine test for drugs. He went on to say that he is on probation for five years and if he is caught using marijuana, his probation will be violated and he'll have to go before the Judge for additional sentencing.

Nelson testified that his attorney wrote the Union Exhibit #1 because he needed it to show the specific nature of the charges and, continued Nelson, he wanted it to be known that he was not involved in trafficking in drugs; rather, he was charged with possession of drugs.

Nelson testified that he did receive a letter of commendation from his boss while employed (see Union Exhibit #2).

The Union also cross examined Mr. Smith who testified that he did not know if his institution hired convicted felons, but that would not concern him if the individual was qualified. Smith went on to say that he believes in rehabilitation and if someone paid for their crime, they should get a chance at another job.

Smith said that he did not check or review general relief workers and he went on to say that most employees are involved in the first shift. He noted that the first shift utilizes RN's, LPN'S, supervisors, unit managers, and custodial workers, etc.

Smith testified that he was aware that Nelson was given ten days off to serve time in jail.

Smith said that he did not talk to Paul Blackwell (the assistant superintendent who wrote up the disciplinary hearing noted on Joint Exhibit #3) about the third paragraph of Joint Exhibit #3. Smith also said that he did not give Director Pamela S. Hide a copy of the note from Hal R. Arenstein which was identified as Union Exhibit #1.

Joint Exhibit #8, said Smith, does indicate that Nelson is on a program to be drug free. He went on to say that there is an employee assistance program on the campus and he believes that there are substance abusers involved in that program.

2. ARGUMENT

The Union argues that there must be a connection between job duties and the use of marijuana. The Union notes that Nelson is on a five year probation program and if he does anything wrong, he is out of work and may be incarcerated.

The Union cites two prior awards; namely, by Arbitrator Pincus and another by Arbitrator Drotning. In the former, the arbitrator noted that the employee situation did not put the employer in

jeopardy since there were no news releases and, therefore, there was no negative public information produced with respect to that individual. The Union notes that the grievant in this case cleans the units and he does not have close contact between the employees.

The Union also argues that there is no connection between the offense and Nelson's ability to deal drugs in the Lewis Center. The State, itself, argues the Union, hires felons and the conviction has to be related to job duties. This employee's off-duty conduct is not related to his cleaning duties. For all these reasons, the Union asks that Nelson be reinstated with full back pay.

V. DISCUSSION AND AWARD

The parties agreed that the question is whether Nelson was removed for just cause?

Joint Exhibit #3, a composite document, contains the write-up of Nelson by Assistant Superintendent Blackwell and in the last paragraph, Blackwell asserted that:

Mr. Nelson is guilty of failure of good behavior. I recommend removal.

The question is whether Nelson's conviction is the basis for termination. He was convicted of trafficking 2925.03A(a)(6) Revised Code (count 2) while the count one was dismissed. The defendant pled guilty to the above noted count #2 which was to:

...possess a controlled substance in an amount equal to or exceeding three times the bulk amount..

In short, Nelson was convicted of having on his person about four pounds of marijuana. Nelson was then sentenced to two years in prison and subject to a mandatory fine of \$3000 and costs and the court reduced that term to ten days and he was placed on probation for five years and is to be monitored for drug support. Thus, his conviction is as noted in Arenstein's letter, identified as Union Exhibit #1, for a possessory offense. The section under which Nelson was convicted does fall under the heading of "Trafficking in Drugs", but in this case, Arenstein notes that Nelson was not convicted of selling or offering to sell a controlled substance and that allegation, although contested by the Employer, is consistent with the document from the County Court of Common Pleas as noted on Joint Exhibit #8.

The major concern of the Employer is that Nelson could be involved in the trafficking of drugs; yet, there is no evidence in this case to support the allegation that he was involved in drug trafficking on the premises. The only possible concern is that Nelson was, as he indicated, the driver of an individual who apparently had four pounds of marijuana and he was to drive that unidentified person from somewhere in Hamilton County to Columbus. However, that is not the basis for this arbitrator to find the grievant guilty of drug trafficking.

Moreover, in this case, Terry Smith, the Superintendent of the Lewis Center, testified on cross examination that he would employ convicted felons if they were qualified and if they have paid for their crime. In this case, the grievant, Anthony Nelson, has been put on probation, apparently has to pay a mandatory fine of \$3000 and costs, and served ten days of his two year sentence in jail. Moreover, the evidence indicates that Nelson is being monitored for drug support and there is no question but that if he is found to be utilizing or injecting a substance into his body that he will be fired and have to go before the judge for resentencing. It is true that he has not completed his sentence and, in that sense, it could be argued that he is in a different category than one who has, in Terry Smith's words, "paid for his crime". However, grievant Nelson is paying for his crime and Smith's willingness to employ felons should also include Nelson.

The Employer argues that there is a connection between Nelson's conviction and his job duties

and the Union argues the obverse. The latter is persuasive. Nelson may have been a user, but there is no evidence to support the allegation that he trafficked in drugs. Secondly, his apparent use of marijuana or other drugs is not connected to his job cleaning duties in the sense argued by the Employer. The Employer, in effect, is saying that he traffics in drugs and, therefore, in his job duties, he may very well be buying and selling drugs with the inmates or coworkers. That allegation simply is not proven and, therefore, there is no basis for that nexus argument of the Employer.

Given the above rationale, this Arbitrator rules Anthony Nelson be reinstated without back pay. The reason for no back pay is obvious. Nelson was convicted of a crime and the Employer learned of it, put him on administrative leave, and eventually decided to terminate him. That effort by the Employer, while not sustained by this Arbitrator, is not an act which is egregious in any sense. The Employer can expect reasonable behavior on or off the job and for that reason, no back pay is awarded.

John E. Drotning
Arbitrator

August 17, 1988