

ARBITRATION DECISION NO.:

179

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction, Pickaway
Correctional Institution

DATE OF ARBITRATION:

May 4, 1989

DATE OF DECISION:

May 23, 1989

GRIEVANT:

Ralph Briggs

OCB GRIEVANCE NO.:

27-22-(880413)-0013-01-03

ARBITRATOR:

Harry Graham

FOR THE UNION:

Carol Bowshier

FOR THE EMPLOYER:

Thomas E. Durkee

KEY WORDS:

Just Cause
Theft
Burden Of Proof

ARTICLES:

Article 24 - Discipline
§24.01-Standard

FACTS:

The Grievant was employed as a Correctional Officer 2 at the Pickaway Correctional Institution in Orient, Ohio. During his employment, Grievant was assigned to work as a member of the yard crew. As a member of the yard crew, the Grievant had occasion to work outside the confines of the prison and did so quite often. One of the places where Grievant would travel was to the State

salvage warehouse in Columbus. A second place where the Grievant would travel was the federal commodity food warehouse, which is also located in Columbus. At these facilities the Grievant, along with inmates, would load their truck with various types of food and clothing to be used at the prison. After having completed loading their vehicle, the inmates would return to the prison where they would unload the goods they had received.

In October of 1987, prison officials received a telephone call from the mother and attorney of an inmate. These individuals notified prison officials that this inmate had been forced to participate in the theft of food and clothing from the above mentioned facilities. The inmate alleged that the Grievant forced him to assist in the theft of goods. An investigation was immediately conducted by prison officials. In the course of that investigation, a number of other people indicated to State officials that the allegations made by the inmate were true. As a result, the Grievant and another corrections employee were terminated. Another employee, who was also implicated in the theft, resigned as a result of the investigation.

EMPLOYER'S POSITION:

The evidence resulting from the investigation conducted by prison officials at the Pickaway Correctional Institution has established that the Grievant on numerous occasions stole food and clothing from state and federal facilities located in Columbus. In addition, the Grievant forced inmates at the correctional facility to participate in the theft. Therefore, the state had just cause to terminate the Grievant.

UNION'S POSITION:

The Union argued that there was no credible evidence to support the allegations of the inmate against the Grievant. The position of the Union was that all those who were interviewed by the state during its investigation were convicted felons whose testimony is unreliable. In addition, the Union stated that in a case which involves an allegation of moral turpitude, the employer must establish guilt beyond a reasonable doubt, rather than by the lower standard of a preponderance of the evidence. In conclusion, the Union argued that the state had failed to meet its burden of proof in this case.

ARBITRATOR'S DECISION:

The Arbitrator ruled that the standard of proof put forth by the Union was not to be applied in this arbitration. The arbitrator used a standard very similar to the preponderance of the evidence standard rather than the standard beyond a reasonable doubt. In applying this standard the arbitrator decided that it was more likely than not that the Grievant was guilty of theft and that the state had just cause to dismiss the Grievant from employment. In so doing, the Arbitrator felt that the testimony of the three inmates was more credible than that of the Grievant and ruled in favor of the state in upholding the grievant's removal.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

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

Case No.:

27-22-(4/13/88)-0013-01-03

Appearances:

For OCSEA/AFSCME Local 11:

Carol Bowshier
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For The State of Ohio:

Thomas E. Durkee
Labor Relations Officer
Department of Rehabilitation
and Correction
1050 Freeway Dr.
Columbus, OH. 43229

Introduction:

Pursuant to the procedures of the parties this dispute came to be heard in Columbus, OH. on May 4, 1989 before Harry Graham. At that hearing both parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were not filed in this dispute and the record was closed at the end of oral argument on May 4, 1989.

Issue:

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was the removal of Ralph Briggs on April 21, 1988 for just cause? If not, what shall the remedy be?

Background:

There is little agreement between the parties upon the facts that give rise to this controversy. The outline of events leading to this proceeding indicates that the Grievant, Ralph Briggs, was first employed as a Correctional Officer 2 at the Pickaway Correctional Institution in Orient, OH. on July

9, 1984. From the initial date of his employment to the time of the events under scrutiny in this proceeding he had experienced no disciplinary entries on his record. In January, 1987 he was appointed to yard crew duty at the Pickaway facility. Members of the yard crew work outside of the confines of the prison facility. On occasion they would go by truck to the State salvage warehouse and the Federal commodity food warehouse in Columbus, OH. At those facilities they would load the truck with various types of clothing and food for use at the prison. Upon their return the truck would be unloaded.

In October, 1987 the mother and the attorney of an inmate at Pickaway, Ronald Keil, telephoned prison officials to report that Keil had been required to participate in theft of clothing and food from the Columbus facilities. Keil alleged that the Grievant, among others, forced him to assist in the theft. An investigation was conducted by prison officials. In the course of that investigation a number of other people indicated to State officials that the allegations lodged by Keil were true. Accordingly, the Grievant and another corrections official, Donald Wehrs, were terminated. David Harris, also implicated in this incident, resigned.

A grievance protesting Briggs' removal was filed. It was processed through the procedures of the parties without resolution. They agree that it is properly before the Arbitrator for determination on its merits.

Position of the Employer:

The State points to testimony provided in the course of its investigation and at the hearing to support Ralph Briggs discharge. Two inmates of Pickaway, Ron Keil, and Nick Kellison, testified that as members of the yard crew they were required to participate in theft from the State and Federal facilities in Columbus. Keil indicated that he refused to engage in theft as he was concerned over discovery and the possibility that he would remain incarcerated for additional time. He testified that Briggs asked him to steal from the Columbus facilities but that he declined. Both indicated that there was at one time or another a case of hamburger patties, 5 gallon cans of cherries and blue hooded zipper close sweatshirts on the truck. Upon return to Pickaway items destined for the prison were unloaded from the truck with the exception of the food and sweatshirts. The food was unloaded at the yard shack. It was taken off by Donald Wehrs and Ralph Briggs and placed in their cars. In addition, testimony was received that the sweatshirts were given to various corrections officers by Briggs and Harris. Briggs kept a sweatshirt for his own use. Briggs and Harris appropriated the sweatshirts without authorization according to testimony received at the hearing.

Testimony was received from State witnesses that Briggs was involved in theft of electrical wire from Pickaway. A construction project involving camera installation was underway in the Fall of 1987. Surplus electrical cable was moved to the yard shack and loaded by Harris and Briggs. While unable to testify with precision as to whether or not the wire actually left the Pickaway facility, it was not seen again by the prisoners. The logical inference to be drawn is that it was taken without authorization by the Corrections Officers according to the State. This was the inference drawn by the inmates.

Testimony from witnesses on behalf of the State indicated that Briggs was involved in the theft of items other than the food, sweatshirts and wire. On four or five different occasions according to State witnesses he stole clothing. Stored in duffle bags at the State salvage warehouse, the items consisted of flight jackets, army boots and camouflage outerwear. None of these items are used at Pickaway. The clothing was brought back to the prison on the truck and dropped off at the yard shack. From there it was taken to another building on the property, the onion shed. According to State witnesses, Briggs then took it. On one occasion, a Commodore computer was taken from

the State salvage facility without authorization. It, too, was unloaded at the yard shack where it remained for some time. Ultimately it was taken home by Briggs. It was not in operable condition and he spent some time looking for the necessary parts to make it workable.

From time to time other items were stolen. These included trifold holders for writing pads, batteries, underwear, tennis shoes and shampoo. Testimony was received from one of the inmates that Briggs gave him some of those items. It was regarded as an attempt to buy silence. Similarly, an inmate found cigarettes and sardines in his locker. He was told by Briggs to take some. The implication is clear in the State's opinion: it was an attempt to secure participation, or at least silence, in the theft operation.

Unlikely as it may seem, the State indicates that it was easy for theft to occur in this situation. At the State salvage warehouse goods were picked up on the honor system. That is, those involved in taking materials from the facility were told to take what they needed. No supervision other than that performed by staff from Pickaway was done. As this was the case, it was a simple matter for Briggs and his cohorts to help themselves to whatever struck their fancy. Similarly, it was easy to get items into or out of Pickaway. The Grievant's wife, Pamela Briggs, is a Corrections Officer at the facility. She was assigned to duty at the sallyport. When she examined the truck she saw the illicit items and disregarded them.

One of the three Corrections Officers involved in this alleged theft, David Harris, testified in this proceeding. He had been implicated in the theft and resigned. In fact, he was prosecuted for his role in this incident. He pled guilty and received a sentence of 30 days in jail and a term of three years probation. At an earlier stage of the investigation according to Harris he was threatened with death if he implicated Wehrs. According to Harris, Wehrs told him that if he lost his job in this incident he would kill him. This was a serious threat according to Harris. Wehrs is a skilled marksman and was a member of the prison SWAT team. According to Harris, Wehrs indicated he, Harris, could be killed from a mile away and no one would know who did it. Harris saw the food, computer and duffle bags taken at one time or another. Some of the stolen items, were taken from the prison and stored at his father's house. In addition to the items stolen from the facilities in Columbus a dolly was taken from Pickaway. It was stolen by people involved in the theft ring and stored at his father's residence. Both Briggs and Wehrs were involved in theft according to Harris.

The State indicates that no person who testified in this proceeding received either a promise of benefit or threat of reprisal in exchange for testimony. With the exception of very minor discrepancies all State witnesses testified to the same effect. Three State witnesses testified in the same fashion concerning the Commodore computer and the duffle bags. Two State witnesses indicate that Briggs took a sweatshirt for his personal use. In addition, consistent testimony was received to the effect that food was loaded in Briggs' car without authorization. Both inmates indicated they received commissary items, e.g. shampoo, in an effort to secure their silence. Consistent testimony indicated that Mrs. Briggs was aware of the movement of items through the sallyport. She saw it but let it pass. In the course of its investigation the State interrogated its witnesses separately. They did not concoct a story for some obscure reason. To the contrary, they testified truthfully to events as they knew them to be. As the charges lodged against the Grievant are true, the State insists that the discharge be sustained.

Position of the Union:

According to the Union the testimony relied upon by the State to support the discharge in question in this proceeding should be disregarded. The State's principal witnesses are all convicted felons. Keil and Kellison were serving time when this alleged incident occurred.

Kellison violated the terms of his parole and is now back at Pickaway. Testimony from such unreliable witnesses is insufficient to sustain a discharge action in the Union's view. In fact, as this case involves an allegation of moral turpitude the Employer should be held to a high standard of proof to sustain its claim. If the State is required to demonstrate "beyond all reasonable doubt" that Briggs committed the offenses with which he is charged its case must fail in the Union's view. Given what it regards as the unreliable testimony from Harris, Keil and Kellison, the Union urges the State has not met the appropriate standard of proof and that the discharge be overturned.

The Union points out that Briggs' former colleague, Harris, is motivated by a desire for revenge. He lost his job in this incident. He was convicted for his role in the alleged theft. Obviously he is bitter. His bitterness has poisoned his testimony and it should not be credited according to the Union. In fact, criminal charges were brought against the Grievant in connection with his role in this matter. They were dismissed. Harris was convicted. Briggs was not. Under those circumstances the Union views the discharge as being inappropriate.

In addition to what it regards as the unreliable nature of Harris' testimony, the Union points to Kellison as being unworthy of belief. In an effort to encourage him to testify, prison officials at Pickaway placed him in the "hole" immediately prior to his release on parole. A person placed in such surroundings has every incentive to say whatever prison officials want him to say in the Union's view. Similarly, Captain John Madden who interviewed Kellison has a well deserved reputation for excessive use of force when dealing with inmates. He has been written up for use of excessive force. According to the Union he is known around the prison as a person who delights in exercising force towards prisoners. Given Kellison's incarceration in the hole and his interrogation by Madden it is no wonder he testified Briggs was involved in theft. The wonder would be any testimony to the contrary. Furthermore, Kellison is now back at Pickaway. If he did not continue to testify that Briggs was a participant in the alleged theft ring, Madden would take reprisals on him. Kellison must be disregarded according to the Union.

Briggs has consistently denied all involvement with the alleged theft of items from the State and Federal facilities in Columbus. He and Keil came to dislike each other. Keil was lazy in Briggs's view. As a result, he supervised Keil closely and pressured him to work hard. While at work on one occasion Keil fell from some scaffolding. Litigation resulted. Keil is bitter about Briggs' role in his accident. Consequently his testimony should be disregarded according to the Union.

It is correct that Briggs put sugar and fruit in his car. He often used his personal vehicle to move about the Pickaway facility. The sugar and fruit was being discarded and he took it to the dumpster. He opened the bags of sugar and dumped the contents into the dumpster. This was to contaminate the sugar so it could not be used to make "hooch" or illicit liquor.

Testimony from Briggs indicates that he was the "Tunnel Officer" from time to time. That is, he was to enter the subterranean tunnel system to inspect it. This is a disagreeable job for which he used his own clothing. He brought it to Pickaway in a duffle bag. In addition, Wehrs brought his personal clothing to the prison in a duffle bag and left it at the yard shack. As he was a member of the SWAT team he had camouflage items in his duffle bag. Taken together, that explains the presence of duffle bags in the yard shack according to the Union.

It is inconceivable Harris would steal a case of hamburger meat in the Union's view. It would spoil before he could get it home. According to Harris he never took a Commodore computer. He simply denies any knowledge of it. Similarly, he never gave inmates any shampoo or toiletry items. That never occurred according to Briggs. In the final analysis the Union is of the view that the testimony of State witnesses is subject to rebuttal. It has been rebutted. As that is the case and the State must be held to a high standard of proof given the nature of this dispute, the Union urges that the grievance be sustained.

Discussion:

Over the years a great many arbitrators have had occasion to come to grips with the problem of "burden of proof." On the one hand some arbitrators have determined that as general rule when discharge involves an allegation of moral turpitude proof "beyond all reasonable doubt" is the appropriate evidentiary standard. (See for example Dockside Marine & Boilerworks, 55 LA 1221, Block, 1970). Other arbitrators urge that the appropriate standard be "clear and convincing." (See for example Day and Zimmermann, Inc. 63 LA 1289, Stratton, 1974). More recently, in an address at the 1980 meeting of the National Academy of Arbitrators, Arbitrator Edgar Jones indicated that the concept of "burden of proof" is often used by the parties and the arbitrator because "the relief supplied by invocation... is experienced because further painful attention to the dilemma of irresolution has thereby been obviated; the need to be concerned about analysis has thereby been removed." (Edgar Jones in Decisional Thinking of Arbitrators and Federal Judges as Triers of Fact, Unpublished report at the Thirty-third meeting of the National Academy of Arbitrators, Los Angeles, CA. 1980, pp. 164-165). Arbitrator Jones is correct. It is easy to say that this or that case should be decided because there remains a shred of doubt concerning the allegations against the grievant. Such doubt cannot be completely eliminated in many fact situations. What is required is a weighing of the probabilities. In the final analysis, testimony and evidence that convinces the arbitrator that one version of events is more likely to have occurred than another prompts the decision.

In this case three people, Harris, Keil, and Kellison, testified against the Grievant, Briggs. All are flawed. Obviously to be held against Keil and Kellison is their status as felons, incarcerated at Pickaway. Held against Harris is his conviction for his role in this affair and his expressed desire to get back at Briggs. That does not mean that their testimony must be automatically discredited. All indicated that they had not coordinated their testimony in advance. Nor had they received any promise of benefit or threat of reprisal in exchange for their testimony in this case. Testimony received from Briggs' former colleague, Harris, indicated he had pled guilty in his criminal proceeding. Why Harris would plead guilty and incur a felony conviction with its associated incarceration and probationary time unless he was, in fact, guilty, is a mystery. The record made at the arbitration proceeding indicates he consistently has implicated Briggs in these events. More to the point in this case, there is no history of animosity between Harris and Briggs prior to the events under scrutiny in this proceeding. Consequently, weight must attach to Harris' plea in the Court of Common Pleas and his testimony at the arbitration hearing.

Similarly, no motive was advanced for inmate Keil to fabricate his testimony. Keil was the person who called the thefts to the attention of authorities. Had he not reported the thefts to his mother and attorney it is conceivable that they never would have come to light. While Briggs testified that there existed animosity between himself and Keil, it is doubtful that the degree of dislike between them would prompt a felon to contact authorities with a story he knew would result in an investigation, with possible repercussions adverse to him, unless there were a kernel of truth in his allegations.

Kellison, the third principal witness relied upon by the State to support its action in this case did not volunteer. He was interrogated as a result of information secured by the State earlier in its investigation. He testified at arbitration that he did not coordinate his story with that of Keil. As did the other State witnesses, Kellison testified that Briggs was involved in theft. He indicated sugar was placed in Briggs' car. He also testified that he saw Briggs carry a can of peanut butter to his car while concealing it under his coat. Similarly, Kellison testified that he refinished a chair, property of the State, which Briggs then took home. Even discounting his testimony due to the fact he spent time in the hole, when taken together with the testimony of Harris and Keil a consistent

picture of theft perpetrated by the Grievant emerges which is impossible to dismiss.

The defense erected by the Union for the Grievant has about it an aura of plausibility. The placing of sugar in Briggs' car and its disposal in the dumpster could have occurred as claimed by the Grievant. The duffle bags could have contained his personal clothing and items belonging to Donald Wehrs. Even if that is credited, there remain numerous instances of theft in which the Grievant was alleged to be involved. Food, e.g. cherries, peanut butter, hamburger patties, the sweatshirts, the computer, all were not satisfactorily explained by the Grievant. In the face of the consistent testimony against him by the three principal witnesses of the State, the conclusion is reached that their testimony is more plausible than his. They indicated they were not coerced nor were they promised nor did they receive any benefit from their testimony. Taken together, their testimony is more credible than is that of the Grievant. When the Union pointed out that the witnesses against the Grievant all have motivation to be untruthful, it stopped short of indicating that such motivation applies to the Grievant as well. In this situation the Grievant has every incentive to tell the tale he wishes be believed. After all, his continued employment with the State is in the balance.

In the final analysis, stripped of all rhetoric, the task facing an employer in a discharge situation is twofold: it must convince the neutral that the events occurred as it asserts and if so, that the penalty is appropriate. In this situation the formidable testimony arrayed against Briggs does, indeed, convince the Arbitrator that he was involved in the theft which occurred in this situation. As that is the case, discharge is appropriate.

Award:

The grievance is DENIED.

Signed and dated this 23rd day of May, 1989 at South Russell, OH.

Harry Graham
Arbitrator