

**ARBITRATION DECISION NO.:**

309

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Rehabilitation  
and Correction  
Lima Correctional Institute

**DATE OF ARBITRATION:**

November 8, 1990

**DATE OF DECISION:**

December 10, 1990

**GRIEVANT:**

Stephen Zink

**OCB GRIEVANCE NO.:**

27-12-(90-05-01)-0170-01-03

**ARBITRATOR:**

Rhonda R. Rivera

**FOR THE UNION:**

Robert Rowland

**FOR THE EMPLOYER:**

Ted Durkee (ODRC)  
Lou Kitchen (OCB)

**KEY WORDS:**

Removal  
Nexus  
Off-Duty Conduct  
Sexual Activity

**ARTICLES:**

Article 24-Discipline  
    §24.01-Standard  
    §24.02-Progressive Discipline  
    §24.08-Employee Assistance  
Program

**FACTS:**

On at least three separate occasions during the return trip from a project in Lima, female inmates from the Ohio Reformatory for Women (ORW) observed a male who drove next to the bus they were on and exposed himself to the occupants while masturbating. The first incident occurred about December 26, 1989

and while only one or two inmates saw the actual behavior, numerous inmates saw the car and some of the characteristics of the driver. Because the witnesses were inmates, the Correction Officer on the bus discounted the observations. On the second occasion, December 29, 1989, more inmates observed the behavior, the car, its occupant and additionally, the Correction Officer on the bus not only saw the car, she noted the license plate number and observed the driver wearing what appeared to be a Correction Officer's jacket. The car and driver were seen a third time by inmates from the rear of the bus.

The investigating officer polygraphed the two main witnesses, who were inmates, and found them to be truthful. The license plate was traced and found to belong to the grievant, a Correction Officer at Lima. The physical evidence was very strong. When comparing the facts and the number of people observing the facts, the Correction Officer found nearly all of the inmates observed a gray station wagon, the Correction Officer and one inmate saw the license plate number, and seven inmates identified the jacket as belonging to a Correction Officer. The grievant owns a grayish station wagon matching the license plate seen and is a Correction Officer. The investigating Officer could find no connection between the grievant and any of the inmates.

Finally, the Officer ascertained the inmates were honor inmates, close to release, and had nothing to gain if they were found to be lying but would lose their honor status if they did lie. At the pre-disciplinary hearing the Hearing Officer found just cause for discipline under Rule 12. On March 26, 1990, the grievant was removed.

#### **EMPLOYER'S POSITION:**

The State contends that while the grievant's behavior was off-duty, he was in uniform and chose a bus full of inmates as the victims of his exposure, therefore a clear nexus existed between the behavior and the grievant's job. The removal was justified because of the serious nature of the offense, because of its repetition, and because the state had no evidence that the grievant repented or was seeking help.

#### **UNION'S POSITION:**

The Union supports the grievant's testimony that he had submitted a doctor's excuse stating he had a urinary problem which causes frequent and somewhat unexpected urination. Therefore, grievant occasionally must use the urinal he carries in his car and unintentionally exposes himself in the process. The union further contends that one of the inmates wrote down the wrong license plate number after observing the car passing the bus.

#### **ARBITRATOR'S OPINION:**

The Arbitrator first dismissed the argument that one inmate wrote down the wrong license plate number as the same number was seen by two other persons. Additionally, the type of car and color matched the grievant's car. The Arbitrator found the grievant's testimony, and therefore the Union's arguments, unpersuasive. The Arbitrator found the evidence clear and convincing that the grievant intentionally exposed himself to these inmates. The Arbitrator stated that off-duty behavior is normally not the employer's business. To allow discipline, a clear nexus must exist between the behavior and the job. The Arbitrator found that nexus here. Further, the Arbitrator found that while removal is a harsh punishment, the factors weighed by the State were fair and reasonable and there were no mitigating factors on the part of the grievant.

#### **AWARD:**

Grievance denied.

#### **TEXT OF THE OPINION:**

**In the Matter of the  
Arbitration Between**

**OCSEA, Local 11  
AFSCME, AFL-CIO**

Union

and

**Ohio Department of  
Rehabilitation and Corrections**  
Employer.

**Grievance:**

27-12-90-05-01-170-01-03

**Grievant:**

(S. Zink)

**Hearing Date:**

November 8, 1990

**Award Date:**

December 10, 1990

**For the Employer:**

Ted Durkee (ODRC)

Lou Kitchen (OCB)

**For the Union:**

Robert Rowland

Present at the hearing in addition to the Grievant and the Advocates were the following persons: Harry Russell, Warden, Lima Correctional Institution (witness), Jerry Dunnigan, Labor Relations Officer, LCI, Charles Golliker, Sargeant, LCI (witness), Roberta Bible, Correctional Program Specialist, LCI (witness), Marilyn Kelly, Parole, ORW #21600 (witness), Dora Teeter, Inmate, ORW #17339 (witness), Charlotte Arrington, Inmate, ORW #22122 (witness), Mae Workman, Correction Officer 2, ORW (witness).

**Preliminary Matters**

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

**Stipulated Facts**

1. Grievant was hired December 9, 1983 as a Correction Officer 2 at Lima State Hospital.
2. Grievant transferred to Lima Correctional Institution on January 22, 1984 and was removed April 18, 1990.
3. Grievant received the standards of employee conduct on October 23, 1987.
4. No procedural issues are raised.
5. No prior discipline exists.

6. Grievant's personal vehicle license number is 900 NPA.

### **Issue**

Was the removal of Stephen Zink on April 18, 1990 for just cause?  
If not, what should the remedy be?

### **Joint Exhibits**

1. Contract
2. Discipline Trail
3. Grievance Trail
4. Standards of Employee Conduct effective October 23, 1987
5. Journal Entry of May 4, 1990
6. Physician's statement of February 5, 1990
7. Ohio State map showing Routes 117 and 196 Lima, Waynesfield, and Roundhand

### **Relevant Contract Sections**

#### **§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. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- 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.

#### **§24.08 - Employee Assistance Program**

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program.

Upon successful completion of the program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action.

## **Facts**

Female inmates from ORW (Ohio Reformatory for Women) who are honor inmates work in Lima at a Rehabilitation Project. These inmates travel daily from ORW to the Project on a prison bus. An honor inmate has a minimum security status, a good discipline record, has been interviewed to determine her attitude, and must be within 24 months of parole. To return to ORW from their daily work, the inmates in their bus travel State Route 117. On at least three separate occasions on the return trip at approximately 3:40-3:50 p.m., several inmates observed a male who drove next to the bus and exposed himself to the occupants while masturbating. While more than three incidents of this behavior were referred to, the hearing focused on three specific times. The first of these on or about December 26, 1989, a grayish station wagon drew up behind the prison bus and then slowly passed the bus. The driver exposed himself, masturbated, and appeared to direct his activity toward the occupants. On this day, only one or two inmates saw the actual behavior, while numerous inmates saw the car and some of the characteristics of the driver. On that day, the Correction Officer on the bus saw the car but did not see the behavior. Because the reporters were the inmates, she discounted the observations. On the second occasion, December 29, 1989, more inmates observed the behavior, the car, and its occupant. On this occasion, the driver misjudged his passing time and had to abruptly swerve in front of the bus to avoid hitting an on-coming car. On this day, the Correction Officer on the bus not only saw the car, but she noted the license plate as 900 NPA Ohio Auglaize County. Moreover, she observed that the driver was wearing what appeared to be a Correction Officer's jacket. The car and driver were seen a third time by inmates from the rear of the bus, but the car pulled off the road and did not pass. These incidents were reported to ODRC authorities who began an investigation. The investigating officer, Charles Golliker, testified at the hearing. He interviewed all the inmates and the Correction Officer from the bus. The two main witnesses, who were inmates, were polygraphed and found to be truthful.

The license plate was traced and found to belong to the Grievant, a Correction Officer at Lima. The Officer's car was a grayish station wagon very similar in description to the car at issue. Officer Golliker testified that he started the investigation with a presumption in favor of the employee and with skepticism of the inmates.. He determined that the Grievant left his job around 3:00-3:10 each of the days and that the normal route to Grievant's home would have put him on Route 117 for a period of time. Sargeant Golliker made a chart of the various facts alleged about the car and the driver and checked to see how many persons reported these facts. (Joint Exhibit 10.) He found that the Correction Officer and 12 inmates saw a station wagon, the Correction Officer and 11 inmates said it was grayish, the Correction Officer and 4 inmates saw a CB antenna, the Correction Officer and 4 inmates said the driver was heavy set, 5 inmates said he had dark hair, the Correction Officer and 8 inmates said he was a white male. Seven inmates saw the masturbating, while 4 actually saw his penis. The Correction Officer saw the license plate number as did one inmate. Last, the Correction Officer and 7 inmates identified the jacket as belonging to a Correction Officer. Since the Grievant is a heavy set white male with dark hair who owns a grayish station wagon with license plate 900 NPA Auglaize County and is a Correction Officer, the physical evidence was strong. Officer Golliker testified that he sought to ascertain if any of the inmates had a grudge against the Grievant so that the report was a set-up. The Officer could find no connection between the Grievant and any of the inmates. Next, he sought to find any gain that could accrue to these inmates. Since all these inmates were honor inmates, close to release, they had nothing to gain and if they were found to be lying, they had their honor status to lose.

On March 2, 1990, Grievant was notified that a Pre-Disciplinary Hearing would be held on March 7, 1990. He was notified of the following charge:

"It is alleged you violated the Standards of Employee Conduct Rule 12 - Immoral or indecent conduct. Discipline may range from an oral reprimand to removal.

This allegation is supported by the following incident/facts: On December 29, 1989, January 2, 1990 and possibly on additional dates, you followed a transport bus carrying female inmates assigned to Project Rehab. While passing that bus, you did intentionally expose yourself and/or masturbate in view of those inmates." (Joint Exhibit 2.)

The Grievant and his advocate appeared and waived his right to a pre-disciplinary hearing. On March 26, 1990, after reviewing the evidence, the Hearing Officer found just cause for discipline under Rule 12. On March 26, 1990, the Defendant was removed. Warden Harry Russell testified at the Arbitration hearing. He said he considered that the Grievant was a seven year employee with no prior discipline. He also noted that this behavior was off-duty. He said that because the Grievant was in uniform and because he chose a bus full of inmates as the victims of his exposure, a clear nexus existed between the behavior and the Grievant's job. The Warden said he justified removal because of the serious nature of the offense, because of its repetition, and because he had no evidence that the Grievant repented or was seeking help.

The Grievant testified that he had submitted a doctor's excuse (Joint Exhibit #6). He said he had a urinary problem which causes frequent and somewhat unexpected urination. Therefore, he carried a urinal in his car. He said he had never intentionally exposed himself but supposed that on 1, maybe 2, occasions while passing the bus he might have been using the urinal and unintentionally exposed himself. He said that he was on Route 117 below the normal turn off toward his home because on one occasion he was going to look at a house for sale in that area. If more than one time, he said, it happened further north on Route 117 before his turnoff.

## **Discussion**

The investigation in this case was thorough and painstaking. The Officer in charge took great care to follow-up almost all leads. The Union Advocate attempted to discredit the story by noting that one of the inmates wrote that the license plate was "MPA" rather than "NPA" and that the ODRC did not trace the license MPA. The Arbitrator does not put much stock in this issue. First of all, the plate was seen by two other persons, one a Correction Officer. Secondly, the type of car and color matched the Grievant's car. Moreover, the Grievant, in essence, admitted his car was probably the car, and he only disputed the number of occasions and the nature of the behavior. The Arbitrator found the Grievant's testimony very unpersuasive. In essence, the Grievant claimed that on a 2 lane highway he was overcome by a sudden urge to urinate, that he attempted to pass a bus and simultaneously attempted to urinate in a urinal inadvertently exposing himself.

Assuming that Grievant needed to urinate, assuming the need was so urgent he could not proceed to a restroom, the Arbitrator finds it incredible that he would not pull off the road and even more incredible that he would attempt to pass a bus on a two lane highway. The Arbitrator finds the evidence clear and convincing that the Grievant intentionally exposed himself to these inmates.

This behavior occurred while the Grievant was off duty. The work rules warn employees that indecent behavior off duty could subject them to discipline. The Grievant was on notice. However, just because an employer notifies an employee that off duty behavior may affect his job status, does not mean that an Arbitrator will find just cause to discipline for off-duty behavior. Off-duty behavior is normally not the employer's business. To allow discipline, a clear nexus must exist between the behavior and the job. The Arbitrator finds that nexus here. The Grievant, a Correction Officer charged with the safe keeping of inmates deliberately chose, while in uniform, a group of female inmates as the victims of his indecent behavior. The end result would be that female inmates not knowing which male Correction Officer was involved could justifiably fear that the Officer in question might have power over them. Sexual abuse of prisoners by Correction Officers is not unknown. ODRC had the highest duty to find this perpetrator.

Under the grid, the Grievant could have received an oral reprimand to removal. The Warden testified how he chose removal. The Arbitrator is not unmindful of the harshness of removal. However, the factors weighed by the Warden were reasonable and fair. The Arbitrator, in seeking mitigating factors, looked for any remorse or any indication that the Grievant understood and was seeking help for his problem. She, like

the Warden, found none. The Arbitrator finds just cause for discipline under Rule 12. Moreover, removal is not arbitrary, whimsical, or capricious but a reasonable discipline in the context.

**Award**

Grievance denied.

Date: December 10, 1990  
Rhonda R. Rivera Arbitrator