**ARBITRATION DECISION NO.:**
323

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

**EMPLOYER:**
Department of Rehabilitation
and Corrections, Lebanon
Correctional Inst.

**DATE OF ARBITRATION:**
December 19, 1990 and
January 4, 1991

**DATE OF DECISION:**
February 10, 1991

**GRIEVANT:**
David A. Baker

**OCB GRIEVANCE NO.:**
27-11-(90-06-20)-0067-01-03

**ARBITRATOR:**
Patricia Thomas Bittel

**FOR THE UNION:**
Michael Temple,
Staff Representative
Penny Lewis, Second Chair

**FOR THE EMPLOYER:**
Lou Kitchen, Advocate
Nicholas A. Menedis, Chief,
Bureau of Labor Relations

**KEY WORDS:**
Removal
Drug Testing
Drug Use
Circumstantial Evidence
Institution of Work Rules
Reasonable Suspicion

**ARTICLES:**
Article24 - Discipline
§ 24.07 - Polygraph/
Drug Tests
§ 24.08 - Employee

Assistance Program
Article 43 - Miscellaneous
§ 43.03 - Work Rules

**FACTS:**

The grievant was a Corrections Officer (CO) employed by the Ohio Department of Rehabilitation and Corrections. The CO who relieved the grievant at the end of his shift smelled marijuana smoke in the tower to which they were assigned. in the course of cleaning up the tower the second CO found particles on the table which he believed to be marijuana. After calling the union steward on duty the CO called the Shift Commander and told him what he had found in the tower. Photographs were taken and the particles were tested and found to be marijuana. The grievant had left the facility and, therefore, was unavailable for a search that day. The grievant was requested to submit to a drug test which he initially refused but later took and he tested positive for marijuana use. The grievant was removed for drug use.

**EMPLOYER'S POSITION:**

There was just cause for removal of the grievant. Several of the persons who smelled marijuana smoke were familiar with the smell of marijuana through training or from past experience. The particles found in the tower after the grievant left were proven to be marijuana by using a Narcotest kit. management and union employees identified the Narcotest results as positive for marijuana. The grievant was soon thereafter requested to submit to a urinalysis based on a reasonable suspicion of drug use created by the evidence found in the tower. This did not constitute random drug testing. Urinalysis is considered merely another form of search pursuant to the fourth amendment. Therefore, urinalysis is covered by the Search Policy although not specifically stated. The need to prevent drugs from entering and being used in corrections facilities is serious due to security needs; 1) job demands on COs; 2) possible blackmail of COs by inmates who know of the COs' illegal drug use.

There is no basis to the argument that the bargaining unit members who notified the employer of the drug use and verified the Narcotest results were biased against the grievant. There is also no evidence that the urinalysis was done improperly. The chain of custody concerning the urine sample was not compromised and the machine used to perform the test was accurate. Therefore, there was just cause for removal of the grievant.

**UNION'S POSITION:**

The employer has failed to prove by clear and convincing evidence that the grievant violated the employers rules. All the evidence against the grievant is circumstantial. There is no merit to the claim that marijuana smoke was in the tower after the grievant left. open windows in the tower would have caused a complete change in the air before others were called to identify the odor alleged to be marijuana. Secondly, there is no nexus between the marijuana particles found in the tower and the grievant. Lastly, the union witnesses against the grievant were biased. The grievant was a primary advocate for pick-a-post assignments made according to seniority. The witnesses would stand to lose their posts under such a system. Therefore, no substantial evidence of drug use by the grievant exists.

The urinalysis performed on the grievant was not done properly. Urinalysis is not covered by the Search Policy and, therefore, must be negotiated prior to implementation. Additionally, the lab which performed the test was not certified and the machine used had not been certified for several months. The identification and labeling of the sample was not done properly. Lastly, the grievant admitted to using drugs off work. Thus the positive urinalysis was based on off duty drug use, not on duty drug use. Therefore the employer has failed to meet its burden of proof by clear and convincing evidence that the grievant violated the employer's rules.

**ARBITRATOR'S OPINION:**

It has been proven that the odor in the grievant's tower was marijuana. The evidence based on the sense of smell is not inferior to other types of "eyewitness" evidence. The witnesses here were qualified to identify the odor as marijuana. No bias has been proven to discredit the bargaining unit witnesses who identified the

odor. The particles found cannot be proven to have belonged to the grievant. The particles could have been left in grooves on the table for some time, therefore, no nexus to the grievant was proven.

The drug test performed on the grievant may not be random as the union argued. However, the test administered here was not based on a random selection. There was evidence identifying the grievant as a drug user. The test was ordered under the Search Policy adopted by the agency. The arbitrator's decision may only be based on the contract, therefore, the propriety of the search is not decided by looking to the Search Policy. The contract does not forbid drug tests based on reasonable suspicion. The setting of corrections facilities requires strict control of drug use and so the test here was reasonable. The contract in section 43.03, does require discussion and prior notification concerning any new work rules adopted by the employer. The Search Policy does not contain drug testing, therefore, institution of such a search would institute a new directive. The union and the employer were engaged in ongoing discussions which satisfy section 43.03.

The chain of custody over the grievant's urine sample was loose but not defective. The procedure employed was sufficiently secure to this arbitrator. While the test machine had not been calibrated for some time, it was running within acceptable limits. The machine's calibration was checked with each batch. Further, the union had the opportunity to test the grievants urine sample which had been split and saved for such purposes. The test proved not only the grievant's drug use but the other suspects, innocence. The circumstantial evidence presented may be sufficient to support discipline. Circumstantial evidence is not inherently bad. It can be strong when leading to a single conclusion as in this case.

The findings of the Unemployment Compensation Bureau are not based on the contract and must be discounted. The argument that the grievant manifested no signs of drug use is irrelevant. The discipline was based on possession and consumption, not acts of the grievant.

It has been proven that the grievant smoked marijuana in his assigned tower. Because of the responsibilities of COs' and the context of a corrections facility this is a very serious rule violation. Therefore, there was just cause for the discipline imposed upon the grievant.

**AWARD:**

The grievance was denied.

**TEXT OF THE OPINION:**

In the Matter of Arbitration
between

**The Ohio Department
of Rehabilitation
and Corrections**

and

**The Ohio Civil Service
Employees Association
Local 11 AFSCME AFL-CIO**

**Case No.:**
27-11-900620-0067-01-03

**APPEARANCES:**

**For the State:**
Lou Kitchen, Advocate

Nicholas A. Menedis, Chief,
Bureau of Labor Relations
William Dallman, Warden
Diane Thomas,
Corrections Officer
Karen Hartfied,
Corrections Officer
Gilbert Wyatt, Captain
Timothy S. Duerr,
Toxicologist
Richard K. Jones,
Senior Captain
Robert Flick, Sergeant,
Special Investigations Officer

**For the Union:**
Michael Temple,
Staff Representative
Penny Lewis,
Second Chair
David A. Baker, Grievant
Ernie F. Chaffin,
Toxicologist
Beverly Martin,
Chapter Secretary

**Arbitrator:**
Patricia Thomas Bittel

## FACTUAL BACKGROUND

This matter was heard on December 19, 1990 and January 4, 1991 before the Arbitrator, Patricia Thomas Bittel, mutually selected by the parties in accordance with Article 25, Section 25.04 of the Collective Bargaining Agreement. The case involves the discharge of a prison guard for smoking marijuana while on duty.

The first day of the hearing was on the premises of the Lebanon Correctional Institution, enabling the parties and Arbitrator to view Tower 5, the location involved in this case. The second day of the hearing was at the Ohio Office of Collective Bargaining.

The parties stipulated to the arbitrability of the case and to the issue: "Was the Grievant, David Baker, removed for just cause? If not, what shall the remedy be?" They further stipulated that Grievant was employed on April 30 of 1984, had no prior discipline and was assigned to first shift Tower 5 on April 8, 1990.

Second shift Corrections Officer James Zurface testified his shift runs from 2:20 to 10:20 p.m. He stated when he relieved Grievant in Tower 5 on April 9, 1990 at approximately 2:15 p.m. he noticed a strong odor of marijuana. He said he barely knew Grievant, having only met him during in-service training in 1989. He said he had no personal contact or relationship with him, and this was his first time to relieve him. He admitted he did not say anything to Grievant at the time and made no mention of any problem when he reported to Central Control that he had relieved Grievant.

Zurface explained the basis for his ability to identify the odor. He said he was a drug counselor while serving in the military and as part of his training a sample of marijuana was burned for smell recognition. He further stated that while in the army he was frequently in close quarters with people who used marijuana.

According to Zurface, Tower 5 was "trashed" with lots of potato chip wrappers, an unflushed toilet and the smell of marijuana pervading. Zurface said he began cleaning up the tower and as he wiped the table with a

wet paper towel, he noticed corn chips, sugar, salt, potato chip crumbs and several particles which appeared to be marijuana. He described the table as very old with a lot of carving and grooves.

He said he called second shift Union Steward Diane Thomas for advice. She advised him to call the Shift Commander, he said, so between 2:20 and 2:25 he called Captain Gilbert Wyatt and told him there was marijuana in the tower.

Zurface recalled that Wyatt arrived at the tower about five minutes later with Captain Richard K. Jones, a camera and a Narcotest kit. Zurface stated he did not touch the table from the time he found the marijuana until the captains arrived. They put the particles on a piece of white paper, took photographs, broke up the seed and put it into the Narcotest vial, he said. The vial liquid turned blue, identifying the substance as marijuana, stated Zurface, who recalled it was 2:40 by the time the Narcotest was complete.

At the request of Management, Zurface said he took a drug test three days later on April 11. He voluntarily gave his urine sample to a lab technician, he said, and was advised the test results were negative. The documented results were admitted into evidence and confirmed his testimony.

Captain Wyatt testified he has attended four different seminars on drugs. At one, only a month prior to the incident, samples of marijuana were burned for odor identification. He testified he spent a year in Vietnam around marijuana and dope and was familiar with the smell. He also said he has been specifically trained in use of the Narcotest kit.

According to Wyatt, when Zurface called, he took Jones, a camera, and the test kit over and arrived between 2:35 and 2:40 p.m.. He stated when he came to the top of the landing at Tower 5, he smelled marijuana smoke. According to Wyatt, the strength of the smoke indicated recent user. He said he observed an open window and noted the odor of marijuana was strongest in the area below the window.

Wyatt said three to four seeds and some leaves were found on the desk. After photographing the particles, he said he ran the Narcotest and noted the vial liquid turned blue, indicating marijuana. He said he then went to Tower 3 to show Thomas the photographs and test vial. At the request of Management she identified the vial color as blue, he said.

Captain Jones stated he had been trained in the use of Narcotest kits and had taught drug identification. He also claimed familiarity with the odor of marijuana from his military service. He said as he went up into Tower 5, he detected the odor of marijuana before reaching the platform, and described the odor as "thicker" and "very strong" at the top. He also confirmed the results of the Narcotest. He said the area outside the Tower was searched, though nothing was found.

He described a meeting where Grievant was ordered to take a drug test and refused. Jones said Union President John Dixon was present and took the position that the order for Grievant to take a drug test violated the Agreement. He said Management advised Grievant it had reasonable suspicion and was ordering him to take the test. Jones described the meeting as hostile and said there were three or four chances for Grievant to change his mind. At the end of the meeting, Grievant was escorted out and told he could not reenter until seen by the Warden.

Jones stated he did not suspect Zurface of smoking marijuana because he reported the incident immediately. He further said Grievant punched out at 2:30, leaving no opportunity to search him after identification of the substance. Jones admitted that the next day, April 9, Grievant worked all day and was not approached regarding the incident. He said management did not want to falsely accuse him of so serious a violation.

Jones explained there is no reason for anyone other than assigned correction officers to enter a tower. if anyone else does enter a tower, the Shift Commander should be notified, he said.

Corrections Officer Diane Thomas stated she was the second shift guard in Tower 3 on the day in question. She said Zurface called her between 2:20 and 2:30 p.m., stating he had just relieved Grievant and found what he thought was marijuana residue. She said Zurface asked her what he should do. Her reply, she said, was to report the matter to Captain Wyatt.

She said between 3:15 and 3:30 p.m., Captain Jones called her down from Tower 3. He stated he had just come from Tower 5 and wanted to verify the color of the liquid in the Narcotest and show her some pictures. She said he showed her a vial containing a blue liquid. She said she served as Second Shift Steward for approximately one year and Dixon brought charges against her stemming from the incident

which were subsequently dropped.

She said on one occasion she had a discussion with Grievant about drug testing and he told her he was concerned about it. When she asked why, Grievant said he used marijuana, said Thomas, who then advised him he should stop.

She stated that since the April 9 incident she has received harassing phone calls advising her not to come to work or there would be trouble. She claimed to have had three different phone numbers and to have overheard first shift officers talking about coming to get her. She stated her daughter was also threatened.

Corrections Officer Karen Hartfield (previously known as Cook) testified that Grievant relieved her in Tower 5 at approximately 6:15 a.m. on April 8. She said at the time, Tower 5 was in order and had been cleaned up. She said she did not notice anything on the table during that shift. She stated she wipes off the table if she eats in the tower, but did not remember whether or not she ate that day.

She said she was asked to submit to a drug test and was voluntarily taken to Dayton. She said the test results were negative. At the time she was a probationary employee, she said, and was not entitled to Union representation.

William Dallman testified to service as Warden of Lebanon Correctional Institution since 1972. He described it as a high security facility with close as well as maximum security units, one of which is the highest maximum security in the state for psychiatric cases.

Dallman referred to the Standards of Employee Conduct which state: "The use, possession, conveyance or unauthorized distribution of illegal drugs, narcotics, or controlled substances is strictly prohibited at any time." He said there is also a law prohibiting possession of illicit substances on the grounds of a prison without authorization.

Dallman claimed that over 90 per cent of the prisoners have drug histories, and more than 50 per cent of prison violence is drug related. He explained corrections officers serve in many capacities, one of which is as a role model for the prisoners. He insisted that if an employee's drug use becomes known, that employee's ability to do his or her job is compromised. "That person is owned by prisoners, not by us," he said, claiming such an employee is vulnerable to blackmail and is a security risk.

He said Grievant, as tower guard, served as the last barrier to preventing an escape. The tower guard is responsible for surveillance inside the yard, explained Dallman; his instructions are to fire no warning shots, but to threaten then use deadly force. This could mean firing into the compound where both employees and inmates work, he said.

He asserted he had reasonable suspicion for demanding the three drug tests: three different officers (two being trustworthy senior officers) with experience in smelling marijuana had detected the odor, and the standard field test confirmed the presence of marijuana particles. Dallman claimed the prison does not perform random testing and maintained the testing in this case was based on reasonable suspicion.

He described the meeting with Dixon and Grievant about the required drug testing. The Union argued there should be no test and Grievant expressed concerns about passing it, claiming he had been around others who used marijuana. Dallman said he spoke with Grievant about his options and explained if he passed the test no discipline would be taken, but if he refused to take it, he jeopardized his job. He said he told Grievant he had nothing to lose by taking the test.

In his view, urine analysis is another form of search pursuant to the Fourth Amendment. He stated there is no expectation of privacy when an individual comes to work in a prison, and asserted Management's right to conduct searches when there is reasonable suspicion.

He referenced the Search Policy and admitted it makes no specific reference to urine testing. The Search Policy expresses a purpose of preventing the introduction of contraband into correctional facilities, and makes it the institution's responsibility to manage and prevent this possibility. It provides authority to search employees and their property on the premises, and gives guidelines for conducting the searches.

He stated most comparable experiences at the facility were with alcohol. He distinguished marijuana because it is illegal. He explained the blackmail value of drugs is higher than alcohol, and claimed illicit drugs have a higher value among prisoners than alcohol. He stated drugs have acquisition problems because they trace back to organized crime. Illegal drugs are purchased from persons who are connected to

the prisoners, he said, and it is easy for prisoners to find out when an employee is purchasing drugs.

He stated correction officers such as Zurface have an obligation to report the commission of a crime in the facility. Failure to do so would be grounds for removal, he said. He stated he was not interested in prosecuting Grievant and did not want to do more than he had to.

According to Dallman, the facility's policy regarding post assignment (known as "pick-a-post") has been a matter of some controversy. He explained Thomas put together a petition on the issue and said a lot of employees did not seem to know Dixon had dumped the idea of pick-a-post. From his perspective, employees had varying opinions on the subject and were not well informed.

By the time the substance was confirmed as marijuana, Grievant had gone home, said Dallman, precluding a strip search. He admitted Grievant worked on April 9 and part of April 10 without disruption. He explained he was unable to address Grievant's situation until then due to two attempted escapes.

The Union objected to testimony about Grievant's past discipline, arguing it had been automatically removed from his file due to negotiated time restrictions. Dallman admitted Grievant had received good performance evaluations and described him as "bright" and "capable" with "good potential".

He defended the decision to involve Thomas, stating he tries to call Union personnel in to let them know what is going on. He stated he had used stewards as material witnesses before, though it was probably prior to certification of the current representative.

In the Warden's opinion, it would take a few minutes for visible marijuana smoke to dissipate, but a couple of hours for the smell to go away. He concluded Grievant is the only one who could have used marijuana in the tower for two reasons: he was the only one who flunked the drug test and he was the only one in the area prior to the time the smoke was detected. He said there is no allegation Grievant was impaired on the job; rather, Management's position is that he compromised his ability to be a security officer.

Timothy S. Duerr of the Miami Regional Crime Laboratory testified his lab conducted the testing of all three employees' samples. He stated samples are capped and sealed until the test is run. According to Duerr, samples are stored in a secured refrigerator which is locked and has restricted access.

He testified the first two samples, Zurface and Cook, were run immediately after collection. Grievant's was taken at the end of the work day, put in the refrigerator and run the next morning, he said. Duerr explained Grievant's sample was received by a lab employee who sealed it and gave it to Duerr. Duerr said he placed it in the refrigerator and when he retrieved it the next morning, the envelope was still sealed. He said the leftover sample is frozen for retesting while the empty urine tube is sealed and returned.

The initial screening, known as immunoassay, showed Grievant's sample to test positive for marijuana, he said, explaining the result was confirmed by Gas Chromotography Mass Spectrometry (GCMS). He stated the threshold was 25 nanigrams with a maximum readout of 200. Grievant's readout was greater than 200, he said, indicating recent use of an amount not obtainable from passive inhalation.

The GCMS printout indicated the test was run on April 10 of 1990. It showed a breakout of the molecular composition of the sample which was then compared to a library of substances in search of a match. The test of Grievant's sample showed a match with THC, that is, marijuana.

The printout shows the instrument was last calibrated on November 22, 1988. However, according to Duerr, as long as the machine was running within acceptable limits, there is no indication recalibration was warranted. The calibration of the instrument is checked with each run, stated Duerr. As long as the printout shows calibration between 90 and 100, it meets standard and does not need to be redone, he said, explaining the calibration read out at 92.32 and therefore ran within acceptable limits.

Marijuana does not deteriorate in a sample for 18 months, he stated, claiming Grievant's urine remained frozen at the time of hearing and was available for retesting though no request for its removal was made.

Grievant testified he worked as a Corrections Officer for four years and in prison food service for the two years prior to that. He said he spent three years as a steward, then served as Chief Steward and member of the Executive Committee.

Grievant flatly denied smoking marijuana on the day in question. He said he had a brief conversation with Zurface when he was relieved from duty. Zurface called no one while he was there, he said, nor did he indicate Grievant should not leave. He stated he has the same rank as Zurface and could not leave the tower until Zurface found everything in order. Zurface had the key in his hand and authority over him until he

relieved him, said Grievant. He also claimed that if a post is not in order, the corrections officer is not to assume it.

According to Grievant, Dixon asked Thomas for an account of April 8 events on several occasions and she refused to give it to him based on Management's instruction to keep the information confidential pending investigation. Thomas was brought up before the Union on charges of misfeasance, malfeasance and nonfeasance, which were ultimately dropped, he said.

He said the tower doors and windows were open, making it impossible for a smell to linger for twenty minutes. He submitted a copy of the weather report for that day from the American Meteorological Society which showed a wind of 8 knots in Dayton at 1:50 slowing to 7 knots at 2:50 p.m. from a direction of 24-25 degrees. The report also showed a wind of 4 knots, increasing to 7 knots between 1:50 and 2:50 from a direction of 20-21 degrees at the Greater Cincinnati Airport. (Maps indicate Lebanon is approximately 12 miles northeast from Cincinnati and is at least 30 miles south of Dayton.)

Grievant calculated the volume of air in the room times the size of the opening and the speed of the wind entering the tower. He claimed his calculations were guided by a heating firm as well as the University of Dayton Environmental Sciences Department, though he admitted he did not have them done or verified by an expert in the field. He also admitted his calculations assumed the air outside was colder and would displace warm air, and that there was dead air space in the room.

He said they showed that in less than a minute there would be a complete exchange of air in the guard tower. He then concluded that testimony of marijuana odor twenty-five minutes after he had left the room was simply incredible.

In Grievant's words, the alleged marijuana odor in Tower 5 was "quite possibly" a set-up based on the pick-a-post issue. He explained the Union put together a committee on pick-a-post with employees from every shift being represented in a mix of both high and low seniority. He said he had been involved in the pick-a-post committee since the spring of 1989 and spoke with Thomas regarding pick-a-post frequently.

According to Grievant, second shift employees tended to have low seniority and Thomas was concerned they would be bumped in the event pick-a-post was adopted. Grievant admitted Zurface had never said anything directly to him regarding pick-a-post.

He claimed Wyatt and several other officers were present when he clocked out on April 8. Statements from a number of these employees indicated no recollection of seeing Grievant clock out or nothing unusual being noted about Grievant when he clocked out.

Grievant asserted he understood that if he did not submit to the urine test, he would be fired for insubordination and failure to submit to a search. He stated he was afraid to take the test because he had heard horror stories and because he considered it random in that it was 72 hours after the fact. He said he thought if he failed the test he would possibly only get a ten-day suspension.

On the first hearing day, he claimed he had been around people smoking marijuana and that legal representatives told him he should not submit to the test. On the second day of hearing Grievant admitted having used marijuana and stated he smoked it on April 9 at a party celebrating opening day for the Reds. He admitted he smokes marijuana in a mild recreational manner approximately 10 times a year.

Grievant stated he did not believe the Warden could just make a rule regarding reasonable suspicion drug testing because it would violate the contract. He referred to Section 43.03 which states as follows:

"Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement."

Grievant also referenced Article 24, Section 24.07 of the Collective Bargaining Agreement, which states:

"Polygraph/Drug Tests:

No employee shall be required to take a polygraph, voice stress or psychological stress examination as a condition of retaining employment, nor shall an employee be subject to discipline for the refusal to take such a test.

Unless mandated by federal funds/grants, there will be no random drug testing of employees covered by this Agreement."

Grievant stated in order for a rule to be reasonable, it has to be published. He said he was not advised the testing was based on reasonable suspicion until after the meeting.

He identified a letter to Governor Celeste from the Inspector General making recommendations on behalf of a task force on drugs in prisons. One of the recommendations was for Management to initiate training and policies to facilitate for cause testing of inmates and staff. Grievant states the Union asked for copies of drug testing policies during the processing of his case and was told there were none. Management objected to the letter because there was no showing the Ohio Department of Rehabilitation and Corrections had ever received a copy or been advised to follow the recommendations. The objection is well-taken and the letter is accorded relatively little weight.

Grievant identified correspondence from himself to the Director of the Department of Rehabilitation and Corrections which cited a number of deficiencies in the handling of his case, most of which were covered in his testimony. He complained that the "hearing officer" at his pre-disciplinary meeting admitted to discrepancies in the record, did not seem interested in the evidence, and refused to allow Grievant to present all the witnesses he needed.

Grievant said the Unemployment Compensation Bureau credited his claim for benefits and found Management had not followed its own disciplinary rules because he had not received a reprimand and/or suspension.

According to Grievant, Management never offered an EAP (Employee Assistance Plan) program to him, nor did he request discipline be withheld pending an EAP. Joint exhibits show he was referred by the Union to EAP, but the assessment did not support a diagnosis of cannabis dependency.

Beverly Martin, Chapter Secretary for three years, Steward and Executive Board Member, testified about the pick-a-post discussions. She stated the primary representative of corrections officers was Grievant. She claimed the chapter felt seniority should be the basis of pick-a-post although second shift, including Zurface and Thomas, was opposed to this approach. Zurface had service of approximately two years and Thomas had even less, she said.

According to Martin, Thomas was vocally opposed to pick-a-post at a Union meeting and circulated a petition against it, advocating removal of Dixon as President and Grievant as Chief Steward. Martin also testified that the Union's ability to represent Grievant was hampered by making Thomas a witness against him, though Martin admitted Thomas would not have been the proper steward to represent Grievant.

Toxicologist Ernie Chaffin from Doctors' Clinical Laboratory testified that his laboratory is CAP certified in forensic urine drug testing. He identified the CAP certification as coming from the College of American Pathologists, a professional organization. He pointed out that a laboratory is required to be certified to do Federal employee testing, and stated the industry is becoming more attuned to the need for laboratory certification. In his opinion, the Federal guidelines for drug testing should be followed by all laboratories, and the process of proficiency testing required for certification helps insure accuracy in laboratory work. He admitted that when a lab is not accredited there is no indication of incompetence.

Chaffin faulted the chain of custody form utilized by Miami Regional Crime Lab because it only asked who the sample was received from and did not identify the sample donor as such. He also criticized the form for failure to specify what the sample was being tested for. He further pointed out there was no evidence of an internal chain of custody, only an external one; the form did not separately indicate who sealed the sample after it was taken, who opened the sealed sample, how much urine was taken out for testing, how much was left in for retesting or what happened to each, he said. He further noted the GCMS printout stated the data

was run prior to the time the sample was even acquired.

"There was THC," stated Chaffin. In his view the machine should be recalibrated after every batch, at least once a month. To withhold calibration for a period of two years was impossible, he said, because reagents do not hold that long. He admitted it was possible that Miami lab checked the calibration as they ran the test. He also admitted the calibration could be changed without the date noting it and said he was not familiar with Miami's internal processes.

Where there is failure to run a control, he said, there is no guarantee the calibration is sufficient to pick a threshold. He stated each lab usually establishes its own limits, typically 10 per cent or less, and running within the control sample is an adequate check on calibration.

## ARGUMENTS OF MANAGEMENT

Management maintains those individuals identifying the odor of marijuana were trained and qualified to do so. It points out Zurface reported the presence of marijuana at considerable risk to himself because he risked the anger of his fellow employees and subjected himself to suspicion -not only for his motives but also for illegal activity. Management asserts the Union failed to establish any motive for Zurface's report other than proper performance of his job. It maintains the Union could attribute no direct statements or actions to Zurface indicating he was upset by the pick-a-post controversy. Further, he hardly knew Grievant, argues Management, maintaining Zurface's testimony should be credited.

Officer Cook testified there was no marijuana in Tower 5 when Grievant relieved her at the end of her shift. Management contends the Union's attempt to establish that she was upset with Union officers was pure speculation. There was no indication on the record that Cook was upset about the pick-a-post issue, it argues.

"The Union's allegation of conspiracy to frame [Grievant] is just that, an unsupported allegation. No evidence linked any activity of Officer Cook and/or Zurface and Thomas., No testimony or evidence established that they even shared a common opinion about the grievant or his pick-a-post activity." (Employer's Brief, p. 3)

In Management's view, Cook's testimony that there was no odor of marijuana or particles of marijuana on the counter when Grievant relieved her, coupled with Zurface's testimony regarding conditions when he arrived, establishes that possession and use of the illegal drug occurred while Grievant was alone in the tower.

No evidence was presented which indicated anyone visited the tower during Grievant's shift, Management points out. It further notes the tower allows full view of anyone who is approaching, while precluding outsiders from seeing what an officer is doing when seated inside. It describes this as a perfect setting for conducting activities not allowed by the rules.

The test results confirmed Grievant's use of marijuana, argues Management. His admission at arbitration that he smokes marijuana lends credibility to Management's charges that he and he alone possessed and smoked marijuana in Tower 5 on April 8, it asserts. Management points to a decision by Arbitrator Jonathan Dworkin in Jerry Atwood vs. the Department of Rehabilitation and Corrections wherein Dworkin explained that strong circumstantial evidence can support discharge under the just cause principle.

Management discounts the Union's attack on the laboratory which conducted the urine analysis. It remarks that at no time was Management in possession of Grievant's sample. It also points out the Union was offered repeated opportunities to have Grievant's frozen urine removed from Miami Lab for retesting at a laboratory of the Union's choosing, but declined to take advantage of this opportunity.

In Management's view Duerr's testimony established that the procedures used in sample collection, chain of custody, screening test, confirming test, and calibration of test equipment were either unrebutted or confirmed as standard practices and procedures by the Union's expert witness. it further points out that Duerr's testimony -- that the high level of Grievant's test indicates recent active ingestion -- is unrebutted.

"The Union's claim that Management's case is purely circumstantial ignores the facts. There is no other

explanation for the presence of the smell of marijuana and the presence of marijuana in Tower 5 other than it occurred during the grievant's watch. Clear and convincing evidence of his acts exists." (Management Brief, p. 17)

Grievant is claimed to have violated Rule 27 (Possession or consumption of alcoholic beverages or illegal drugs while on duty), Rule 34 (Other actions that could harm or potentially harm the employee, a fellow employees) or a member of the general public), and Rule 35 (Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duty as a public employee). Management points out Grievant, as Chief Steward, had represented various members of the bargaining unit in disciplinary matters, a role which would entail high familiarity with the Rules of Conduct. It denies any rule could be in violation of Article 43, Section 43.03 of the contract, as the reasonableness of a rule prohibiting use and possession of illegal drugs in a prison setting should be beyond question.

Management denies a new work rule was adopted. Dallman testified the order to submit to a drug test was issued as part of the institution's search procedures. Section 24.07 of the Collective Bargaining Agreement does not prohibit all drug tests, just random testing, argues Management, claiming Grievant's test was based on reasonable suspicion.

The Union's claim that Grievant was not offered an EAP is without merit, argues the Employer. It argues the deferral of discipline is permissive, as provided in Section 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."

It further points out that Grievant denied using marijuana all through the disciplinary and grievance procedure, waiting until the arbitration hearing to admit use. Furthermore, the assessment of Grievant's condition did not enough support a diagnosis of cannabis dependency. Given these facts, there is no identifiable problem warranting EAP, argues Management.

Management maintains its high standards of conduct were well known to Grievant. It claims a corrections officer who has compromised himself is easy prey for inmates and constitutes a security risk to the Institution. Management maintains the charges in this case are extremely serious, even after consideration is given to Grievant's length of service and work record. It argues the penalty of removal is commensurate with the offense., It quotes from this Arbitrator's opinion in a case involving the Ohio State Highway Patrol which focuses on an arbitrator's function in deciding whether an employer had just and sufficient reason for the discipline selected.

## ARGUMENTS OF THE UNION

The Union maintains Management's case is wholly based on circumstantial evidence not supported by the facts. It argues Management failed to meet its burden of producing clear and convincing evidence.

The Union attacks the credibility of Officer Zurface, pointing out he had no explanation for failing to call report the odor of marijuana when Grievant left. Thomas did not receive her call until approximately 2:20 p.m., notes the Union, arguing Zurface did not mention the odor of marijuana to her. Captain Wyatt did not receive a call until approximately 2:30, states the Union, claiming Zurface had no explanation for calling Thomas while delaying the call to Wyatt.

It argues the allegations of marijuana odor lack merit and there is no nexus between the marijuana particles found on the desk and the Grievant. According to the Union, Wyatt testified he arrived at the Tower at 2:40 p.m., approximately twenty-five minutes after Grievant had left. Given the fact that both windows and catwalk door were open, the Union finds Management's evidence of marijuana smell neither clear nor convincing, and argues demonstrated natural air displacement would clear the air of any possible smell. Furthermore, Management had the opportunity and authority to strip search Grievant on April 8, 9, or 10 yet did not exercise this authority, states the Union.

The Union argued Zurface and Thomas knew they could lose their pick-a-post benefits because of their low seniority, and also knew Grievant was the primary advocate for seniority rights in pick-a-post. Both had a vested interest in disrupting the Union's agenda on seniority rights, states the Union.

The Union argues there was no drug testing policy in place and the Warden's reliance on the Search Policy was ill-founded. It contends the Union and Management must negotiate any drug testing policy before it can be implemented. In the Union's view, the Warden engaged in random drug testing because his order for Grievant to take a test was given two days after the alleged event. It points out the test does not pinpoint when marijuana was consumed and argues the test results do not support the allegation that Grievant smoked marijuana in Tower 5.

The Union casts doubt on the reliability of the test results because Miami Lab was not certified. It argues there were three critical errors in the testing of Grievant's sample: identification and handling of the sample, the manner of separation of the urine from its original container, and the indicated failure to calibrate the machine. "The Grievant's admission that he smoked marijuana on 4/9/90 at an opening day (baseball) party further destroys any link between the test and the events of 4/8/90." (Union's brief, p. 7)

It claims Management must offer more than circumstantial evidence to meet its burden of proof and cites United States Boray and Chemical Corp. ARB 8090 (Richmond, 1984) in support of clear and convincing evidence as the appropriate standard of proof. It also cites Douglas and Lomason Company 86-1 ARB 8027 (Nicholas, 1985) and Texas Utility Generating Company 82 LA 6, 12 (EDES, 1983). The Arbitrator in Douglas and Lomason held a foreman's sense of smell was insufficient proof for substantiation of a drug charge, claims the Union. It concludes Management failed to meet its burden of proof and removed Grievant without just cause.

## DISCUSSION

A. How Strong Is the Evidence of the Marijuana Odor?

While there is a natural tendency to prefer eyewitnesses, testimony regarding the five other senses is no less probative. A definitive perception is no less so merely because it is through the sense of smell. Indeed, the Arbitrator in Douglas and Lomason Co. discredited eyewitness testimony because it could not establish what was being smoked. Furthermore, the case does not discount “smell" testimony but only cites an unpublished decision where "smell" testimony was discounted because the witness was not shown to have the requisite background in drug identification.

In this case, three separate witnesses independently detected the odor of marijuana in Tower 5 at the time in question. Each was well-qualified to do so, having previously been exposed to the smell, both in specific drug identification training and in the military.

None of these witnesses was shown to have any motive whatsoever for making inaccurate reports. The fact that Zurface worked second shift and had low seniority does not establish opposition to pick-a-post, much less animosity toward Grievant as an individual. Zurface testified without rebuttal that he did not know Grievant. It is difficult for the Arbitrator to attribute to Zurface an animosity strong enough to motivate him to ruin Grievant's career when he hardly knew the man. Even if Zurface were motivated to set up the Grievant, neither Wyatt nor Jones has been shown to have any such motivation. Their joint detection of the same marijuana smell clearly establishes that marijuana was smoked in Tower 5 on the afternoon of April 8, 1990.

The Arbitrator believes Zurface was simply doing his job when he reported his findings to the shift commander. The Union argues his failure to immediately report the smell of marijuana when he took over his shift is telling. However, in this Arbitrator's view, hesitancy is natural in a shocking or surprising situation. It is quite natural for a person in Zurface's position to take a moment to think through his actions and to mentally verify that he is doing the right thing. While arguably Zurface should have thought to keep Grievant from leaving, thereby providing an opportunity to strip search Grievant, his failure to do so is attributable to uncertainty in dealing with an unexpected circumstance. The existence of this uncertainty is demonstrated by his call to Thomas for advice.

Tower 5 is an eight-sided structure with doors facing west and east. According to the weather report, the wind was coming from the north/northeast on the day in question. Grievant admitted on cross examination

that his air displacement calculations gave no consideration to room barriers or furniture. During the tour of the tower, the Arbitrator noted shelving, a toilet, a sink, a control center with desk, guns, a cabinet and a chair in the room, and when the trap door was open, it also created a barrier to air flow. A wind velocity of approximately seven knots is a light breeze. All of the tower windows are installed four feet up from the floor. Hence, while open windows and doors would create circulation across the window level in the tower, air movement is relatively restricted in the lower level under the windows.

Grievant's calculations were unconfirmed and were based on invalid assumptions. This tenuous attack on the testimony of three credible witnesses fails to discredit their reports of marijuana smoke in Tower 5.

B. How Strong is the Evidence of Marijuana Particles?

The particles found on the desk in Tower 5 were clearly identified as marijuana. Thomas' testimony identifying the Narcotest vial as blue was cumulative on this point, as the color of the vial had already been confirmed by Wyatt, Jones and Zurface. Hence her views on pick-a-post are of no consequence.

Though access to the tower is severely restricted, different officers have been assigned there over the weeks and months preceding this case. Testimony about how often and under what circumstances the desk was cleaned off was vague. The Arbitrator observed deep grooves and cracks in the wood of the desk which could harbor various particles even after a desk is wiped clean. For these reasons the evidence regarding the particles of marijuana must be deemed inconclusive.

C. How Strong is the Evidence of the Drug Test Results?

1. DID THE WARDEN ORDER GRIEVANT TO SUBMIT TO RANDOM TESTING?

The Union properly argues that if the Warden ordered Grievant to submit to random testing, the order would be in violation of the Agreement. In this event, the test results would not properly be given weight by the Arbitrator.

The Union's focuses on delay of the test administration until two days after the alleged incident. A urine test is designed only to determine whether identifiable metabolites are present in the urine. The test is incapable of indicating when or how the metabolites came to be there. Clearly then, the value of any urine test as evidence is limited. Even if Grievant had submitted to the test at the end of shift on April 8, he could still argue the presence of THC metabolites was due to some prior off-duty consumption.

Random testing is generally understood to refer to the manner of selection of an employee for testing. When employees are selected without rhyme or reason, the testing is random. Grievant's selection was based on evidence identifying him as a prime suspect for drug use. As such, he was not ordered to submit to random testing.

2. WAS THE TEST ORDERED IN VIOLATION OF SECTION 43.03?

The Union argues violation of Section 43.03 in two ways: administration of a random test and implementation of a new directive without preliminary discussions with the Union. These will be separately addressed.

The Warden based his order for drug testing on the Search Policy. The Search Policy, however, is not part of the collective bargaining agreement.' It is important to remember that the Arbitrator's authority is solely to determine whether the Agreement has been breached. Hence, at arbitration, the Warden's order must withstand scrutiny not in terms of the Search Policy, but solely in terms of the Agreement.

The contract, in specifically prohibiting random testing, leaves testing upon reasonable suspicion to Management's discretion. There is no discernible intent to preclude Management from ordering such testing; indeed, the parties bargained over a drug testing provision and intentionally elected to prohibit only random testing.

There is no basis whatsoever for expanding the meaning of this language to also prohibit testing on reasonable suspicion. To the contrary, such an interpretation would modify the language chosen by the parties in direct contravention of contractual restrictions on the Arbitrator's authority.

This interpretation accords with the long-standing and well-accepted prohibition against having any unauthorized drugs on the premises. The need for stringent enforcement of this prohibition is self-evident in a prison setting and was emphatically explained by the Warden. A well established principle of contract interpretation is to avoid absurd or unreasonable results. It would indeed be absurd to tie Management's hands in keeping drugs out of prisons, especially without a clearly expressed mutual intent to do so.

Section 43.03 requires prior notification and an opportunity for discussion whenever a new work rule is put into place. It defines such work rules as "agency work rules or institutional rules and directives."

The Union complains Management has failed to write a drug-testing policy, yet there is no requirement in the Agreement that Management do so. It follows that the mere lack of a written policy does not breach the Agreement.

The Search Policy makes no mention of drug testing as a search and does not appear to be intended to cover searches of body fluids such as blood or urine. The institution of such a search would therefore appear to be a new directive. This is particularly true as the Warden told Grievant his refusal to submit would result in discharge rather than the penalty for insubordination (suspension). It follows that Management is required under the Agreement to have discussions with the Union about drug testing.

It was indicated at hearing by the Union advocate that drug testing discussions were on-going between labor and management at the time of arbitration. Testimony did not clarify when these discussions began or whether they had started in April of 1990. For this reason, no breach of Article 43.03 was established.

3. ARE THE DRUG TEST RESULTS RELIABLE?

While there were no gaps in the external chain of custody, the procedures used internally by the Miami Lab regarding chain of custody were relatively loose. However, it is clear that Grievant's sample was sealed upon receipt, kept in a locked refrigerator with limited access and retrieved sealed when the test was run. The Arbitrator can find no opportunity for misplacement or tampering in this procedure.

The test calibrations appear to have been checked each time a batch was run, though the record indicates the laboratory was slack, both in keeping the machine dated and in recording recalibrations. Testimony was quite clear in establishing that the test ran well within the laboratory's standards for calibration of the machine.

While the laboratory's procedures could have been a little tidier, the Arbitrator finds no reason for concluding they were untrustworthy. Furthermore, it is quite clear that the test results conform with testimony from Grievant himself that he used marijuana on April 9.

Grievant's admission that he uses marijuana was significant. It constituted a change in posture, calling into question his reliability as a witness. The urine tests verified not only Grievant's admitted recent use but also the innocence of the only other suspects. Had either of them smoked marijuana on April 8, THC metabolites would have been present in their urine. The fact their urine was clean leaves only Grievant as the possible smoker.

The Union's decision not to submit Grievant's frozen urine for testing at a lab of its own choosing is consistent with an expectation that THC metabolites would likely be found. Grievant is the only employee under suspicion who is an admitted marijuana user. This is corroborative evidence of his guilt.

This Arbitrator agrees with Arbitrator Dworkin that circumstantial evidence, when strong, is sufficient to meet the burden of proof under a just cause standard. As Dworkin noted "Contrary to common supposition, circumstantial evidence is not necessarily bad, weak, or unacceptable. It consists of circumstances to which reason must be applied to reach a conclusion. It is strong when it leads to only one rational conclusion -- less valuable when it yields to contradictory conclusions all of which are reasonable."

The evidence in this case clearly leads to only one conclusion: Grievant smoked marijuana while on the job.

D. Does the Offense Warrant Discharge?

Grievant has argued the finding of the Unemployment Compensation Bureau indicates a lesser penalty is warranted for his offense. The Arbitrator has no knowledge of what evidence was presented to the Bureau.

More importantly, the decisions of the Bureau are not based on the parties' collective bargaining agreement but are made pursuant to extraneous statutory and administrative law and regulations. Such findings are not instructive in evaluating just cause and must therefore be discounted.

Grievant has argued there is no Management witness who can testify he was impaired. The statements by other corrections officers who failed to notice anything unusual when he clocked out only beg the question of whether he smoked marijuana in the tower. The offense of simple possession and consumption on the premises is what is at stake here, regardless of Grievant's physiological reaction.

Though Grievant was permitted to continue in his job pending review by the warden, this is no indication Management is willing to tolerate his offense. To the contrary, it indicates Management dealt carefully with his situation.

The Arbitrator is convinced that Grievant smoked marijuana in Tower 5. In so doing, he compromised his position as a prison guard as well as his ability to perform
his duties. The responsibility of a prison guard is to prevent escapes and safeguard lives as well as to build and exhibit respect for laws and regulations inside the prison.

The Warden effectively and without rebuttal explained why Management must view his offense with the utmost seriousness. The Arbitrator, acknowledging the uniqueness of a prison environment, recognizes the necessity to stringently enforce the rules against illegal drugs on the premises. For this reason, the discharge decision cannot be said to lack just cause.

**AWARD**

The Grievance is denied. The discharge of Grievant in this case was for just cause.

Respectfully Submitted,
Patricia Thomas Bittel
February 10, 1991