ARBITRATION DECISION NO.:
334

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

EMPLOYER:
Department of Rehabilitation and Corrections
Hocking Correctional Facility

DATE OF ARBITRATION:
March 7, 1991

DATE OF DECISION:
April 2, 1991

GRIEVANT:
Denis Barber
Rebecca Cooper-Cullison

OCB GRIEVANCE NO.:
27-10-(90-10-23)-0067-01-03
27-10-(90-10-23)-0066-01-03

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Gene Ireland
Richard Sycks

FOR THE EMPLOYER:
Joseph B. Shaver
Roger A. Coe

KEY WORDS:
Removal
Possession of Drugs on State Property
Rules 29 and 30
Stacking Charges
Knowingly Bringing Drugs onto State Property

ARTICLES:
Article 24 - Discipline
- § 24.01 - Standard
- § 24.02 - Progressive Discipline
- § 24.04 - Pre-Discipline (in part)
- § 24.05 - Imposition on Discipline (in part)
- § 24.06 - Prior Disciplinary Actions

Article 25

§ 25.03 - Arbitration Procedures (in part)

FACTS:

The first Grievant had been employed as a Correctional Officer with the Ohio Department of Rehabilitation and Corrections for 3-1/2 years. The second Grievant was a corrections Officer also, but had been with ODRC for 7-1/2 years. On September 21, 1990, the Grievants were removed from their positions with the Department. Both Grievants were removed for alleged violations of Rules 29 and 31. Rule 29 forbids the possession on state property of weapons or other contraband without authorization. Rule 31 forbids the possession, consumption, or distribution of alcoholic beverages, drugs of abuse, etc. on state property.

On August 24, 1990, the Ohio State Highway Patrol arrived at Hocking Correctional Facility accompanied by drug sniffing dogs. The dogs allegedly targeted 3 employee cars in the parking lot. The Troopers asked and received permission to search the cars. In the car of the first Grievant, marijuana and other drug paraphernalia were found. In the second Grievant's car similar items were found. Both Grievants declined to give statements to the Troopers.

The second Grievant testified that he did not smoke marijuana and his wife testified that she had left the paraphernalia in his car. A friend of the first Grievant testified that he had used the Grievant's car and had left his paraphernalia in the car. The first Grievant testified she never smoked marijuana.

EMPLOYER'S POSITION:

The Employer argued that the Grievants were not denied representation during the search of their vehicles, relying on the contention that the search activity was conducted independently by the Highway Patrol. Further, there was no investigatory interview arranged and the Grievants were given an opportunity to deny, refute, or rebut the allegations against them at the pre-disciplinary meeting. The Employer finally argued that Grievants were aware of the drug policy of the institution and they had an obligation to assure that their vehicles were free of any illegal substances before bringing their vehicles onto state property.

UNION'S POSITION:

The Union argued that management should not have cited Rule 31 because Rule 29 speaks to possession. The Union contends that the Grievants were charged twice for possession and that management stacked charges against the Grievants. The Grievants do not dispute that drug paraphernalia was found in their vehicles, but in both cases, neither party was aware of these items being in their vehicles.

ARBITRATOR'S OPINION:

The Arbitrator agreed with the Union that the Employer was engaging in "stacking" of charges by charging violation of both Rule 29 and Rule 31. The proper rule to be cited was Rule 29.

The Arbitrator did not find either Grievant credible in their claim of being unaware of the drug paraphernalia in their cars. The Arbitrator concluded that both Grievants knowingly conveyed drugs onto State property adjacent to the prison.

The Arbitrator found that dismissal was not too harsh a punishment for this drug related offense. The Arbitrator was impressed that both Grievants unrealistically denied any connection with the drugs and showed no understanding of the danger of such drugs in the particular setting. The Arbitrator found no mitigating circumstances.

It is important to note that the arbitrator did not find that if the grievants had unknowingly transported drugs onto State property that they still would have been guilty of violating possession of drugs under Rule 29. Therefore, if you have a case where you can prove that the grievants didn't know that there were drugs in the vehicle the Union can argue that Rule 29 is not violated because the employees did not knowingly carry drugs onto State property.

AWARD:

Grievances denied. Removals upheld.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

Department of Rehabilitation
and Corrections
Office of Collective
Bargaining

Employer

Grievance Nos.:
27-10-(10-23-90)-0067-01-03
Grievant (Denis Barber)
27-10-(10-23-90)-0066-01-03
Grievant (Rebecca Cooper-Cullison)

Hearing Date: March 7, 1991
Award Date: April 2, 1991
Arbitrator: Rivera

For the Employer:
Joseph B. Shaver
Roger A. Coe

For the Union:
Gene Ireland
Richard Sycks

In addition to the Grievants and the Advocates (named above), the following persons attended the hearing: Jon A. Arnold, Instructor (witness), Sam McDonald (witness), Raymond E. Davis (witness), Michael F. Looney, Chapter President (witness), Patricia Rae Barber (witness), Willard Aeh, Correctional Officer II (witness), George Cullison, Chief Steward (witness), Fred Collins (witness), Trooper Ivan Teets, Highway Patrol (witness), Jerry Tolson, Inspector-HCF (witness), Ron Forrest, Labor Officer (witness), Carole Shiplevy, Warden (witness), Trooper Fred Summers, Highway Patrol (witness), Cheryl Dexter, Correctional Officer (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.

Joint Exhibits

1. 1989-1991 Contract
2. Grievant Trails
   A. 66-01-03
   B. 67-01-03
3. Discipline Trail
   A. 66-01-03
   B. 67-01-03
4. Revised Standards of Employee Conduct
   A. Acknowledgment of Receipt Grievant (66-01-03)
   B. Acknowledgment of receipt Grievant (67-01-03
5. Prior Discipline
   Grievant 66-01-03

Union Exhibits

1. Opening Statement
2. Certificate Witness Davis
3. Certificate Witness Davis
4. Report of Highway Patrol dated 8/30/90

Employer Exhibits

1. Opening Statement
2. IOC dated 7/26/90
3. Investigation Reports by Tolson

A. 66-01-03
   B. 67-01-03

Issue(s)

With respect to 66-01-03:

Was the Grievant removed for just cause, and, if not, what should the remedy be?

With respect to 67-01-03:

Was the Grievant removed for just cause, and, if not, what should the remedy be?

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.

§ 24.04 - Pre-Discipline (in part)

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

§ 24.05 - Imposition of Discipline (in part)

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

§ 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months. Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months. This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

§ 25.03 - Arbitration Procedures (in part)

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

Facts

On September 21, 1990, Grievant RCC was removed from the position of Correctional Office I. The

Grievant RCC has been with ODRC for 3-1/2 years. Prior to the discipline at issue, she had one prior discipline properly in her record, a Written reprimand issued on 2/10/90 for violation of Rules 6b and 6c (Insubordination: Failure to follow written procedures). On September 21, 1990, Grievant DB was removed from the position of Correctional Officer I. The Grievant DB has been with ODRC for 7-1/2 years and had no prior discipline. Both Grievants were removed for alleged violation of Rule 29 and Rule 31.

Rule 29 of the Revised Standards of Employee Conduct reads as follows:

	Offenses				
	1st	2nd	3rd	4th	5th
29. Possession, misuse, conveyance onto state property, or display of weapons, batons, restraints mace, or other contraband without authorization or failure to report knowledge of same	5-10/R	R			

Rule 31 of the Revised Standards of Employee Conduct reads as follows:

	Offenses				
	1st	2nd	3rd	4th	5th
31. Distribution, possession or consumption of alcoholic beverages, drugs of abuse, weapons, explosives, or money while on duty or on state property	R				

Both Grievants acknowledged in writing receipt of these work rules on 6/21/90.

On August 24, 1990, the Ohio State Highway Patrol arrived at Hocking Correctional Facility. The troopers were accompanied by drug sniffing dogs. The Troopers took the dogs through the Employee parking lot on the grounds of the facility and into some of the prison buildings. In the parking lot, the dogs were directed and did search (by sniffing) the outer surfaces of 8 or 9 cars. The dogs "alerted" on 3 cars. The Troopers entered the facility and asked the owners of the 3 cars (employees) for permission to search the cars. Grievant RCC said she wished to talk to her lawyer before responding. She called her lawyer and subsequently gave permission. Grievant DB also gave permission, albeit reluctantly according to his testimony. Grievant DB asked the Trooper to consult his Union representative, and the Trooper told him that this event was a criminal investigation and not a Union matter. The Trooper apparently also received permission from the third employee because all three cars were searched.

In the car of Grievant RCC, the following items were found:

1. marijuana roaches in a glass ashtray
2. alligator roach clip in console
3. a baggie of marijuana stuffed inside a cigarette pack in the driver's door pocket
4. in the Grievant's purse, which was left in the car, were a package of cigarette papers.

In Grievant DB's car, the following items were found:

1. marijuana roaches in ashtray
2. a pair of hemostats in the glove compartment.

In the third car, nothing was found relevant to this Grievance. After the Troopers found the items, Grievants were both asked to wait in the Administrative Building. Both Grievants declined to give statements to the Troopers. Mr. Ron Forrest of ODRC asked both Grievants if they wished to take a urine test. Both declined. He informed both Grievants that they were placed on administrative leave. Subsequently, tests confirmed that the items were indeed marijuana.

At the Arbitration Hearing, Mr. Forrest testified that he saw both Grievants arrive in their cars, park the cars, and go into the institution.

Grievant DB testified that he did not smoke marijuana, had never smoked marijuana, and that he had not known that the marijuana was in the car. DB's wife testified that the night before the raid, she had taken the Grievant's car to a concert, smoked marijuana, left the roaches and the hemostats in the car without her husband's knowledge. Grievant DB testified that he did not know that his wife smoked marijuana.

A friend of Grievant RCC testified that on the night in question he met Grievant RCC at a social club and asked to borrow her car to show his nephew around town "a few places." His truck he said was not reliable. Grievant RCC lent him her car and while in the car the friend said that he and the nephew smoked marijuana. He said he picked up an empty cigarette pack from the floor, stuffed his extra marijuana in the empty pack, and put it in the car door. When he left the car, he left the baggie of marijuana, his alligator roach clip, and his cigarette papers. Grievant RCC testified that in the morning she noticed the cigarette papers on the seat of the car and inadvertently stuffed them in her purse. Grievant RCC testified she had not smoked the marijuana in question and that she had never smoked marijuana.

Union's Position

These two employees were removed from employment at the Hocking Correctional Facility because of circumstances that occurred on August 24, 1990 on the Facility grounds. They were both charged with violations of Rule #29 and Rule #31, of the Revised Standards of employee conduct from the Department of Rehabilitations and Corrections.

Rule #29 states that; Possession, misuse, conveyance onto state property, or display of weapons, batons, restraints, mace or other contraband without authorization or failure to report knowledge of same, carries a suggested penalty of 5-10 days suspension or removal for the lst offense.

Rule #31, Distribution, possession or consumption of alcoholic beverages, drugs of abuse, weapons, explosives, or money while on duty, or on state property, suggests removal for ,the lst offense.

The Union contends that Rule #29 may apply, but Rule #31 does not.

Rule #29 speaks to possession, and conveyance onto state property. Rule #31 also speaks to possession, which is the only reference to Rule #31 to the charges that may apply.

The Union argues that management should not have cited Rule #31, because Rule #29 speaks to possession. The Union contends that the Grievants were charged twice for possession and that management stacked charges on the Grievants. No other part of Rule #31 was charged or brought up at any level of the procedure.

The Grievants do not dispute that the items in question (marijuana and drug paraphernalia) were found in their vehicles, but in both cases, neither party was aware of these items being in their vehicles.

The Union challenges the State to show just cause for the actions taken against the Grievants, citing Article 24.01 and 24.02 of the AFSCME-OCSEA Union contract. The Union also cites other articles and sections of the Union contract that were violated and are listed as follows:

Article 2.02 agreement rights, Article 24.02 Progressive discipline, 24.04 Pre-Discipline, 24.07 Polygraph-Drug Test, 24.05 Imposition of Discipline, 13.06 Report-in-Locating, 36.06 Roll-call pay, and 29.04 Sick Leave policy.

The reasons for these contract violations are stated on the documents from the Step III grievance hearing.

The Union contends that the discipline imposed upon the Grievants was too severe for the offense.

Employer's Position

Grievant RCC had been employed as a Corrections Officer at the Hocking Correctional Facility since

January 5, 1987, and Grievant DB was employed at the same facility in the same capacity since May 16, 1983. The facility is an adult correctional facility of the Ohio Department of Rehabilitation and Correction. Both of these individuals were removed from their positions on October 10, 1990 for violations of the employer's work rules or standards of employee conduct, as just cause was determined for violation of Rule 29 - possession, misuse, conveyance onto state property, or display of weapons, batons, restraints, mace, or other contraband without authorization or failure to report knowledge of same; and Rule 31 - distribution, possession or consumption of alcoholic beverages, drugs of abuse, weapons, explosives, or money while on duty or on state property. The former violation allows for a range of penalty within the standards of conduct of from 5 to 10 days suspension to removal, and the latter indicates a penalty of removal for a first violation.

During the past several months, the employer has experienced a great deal of negative publicity concerning the issue of drugs and prisons. Drug use by inmates and employees has been alleged to be is rampant, and both the previous, as well as the current gubernatorial administrations, have vowed to step up measures that would serve to minimize the presence of drugs at correctional facilities. One such measure frequently considered was the use of drug-sniffing dogs that are highly trained to detect an illegal substance. Such measures have, in fact, been used at various facilities of the employer. With this result in mind, the administration of the Hocking Correctional Facility invited the Ohio Highway Patrol to bring their dogs onto the property on August 24, 1990 and conduct such a search of both the facility itself as well as the cars in the parking lot. This search activity proved fruitful with regard to the two Grievants in that quantities of marijuana were found in both of their vehicles.

Found in Grievant DB's vehicle were some roaches in the ashtray and a hemostat, an implement used for smoking marijuana, in the glove compartment. The vehicle of Grievant RCC revealed a small bag of marijuana hidden in a cigarette pack tucked in the driver's side door, marijuana roaches found in a glass ashtray, and a roach clip found in the console. Additionally, Grievant RCC had some papers in her purse that are used for making marijuana cigarettes. At the pre-disciplinary conference the Grievants admitted that this evidence was found in their vehicles, but they disavowed any knowledge of its being there when they came to work on the morning of the 24th. They both alleged that others had used their vehicle on the preceding night, and that this use must have been the manner in which the .marijuana was left in the vehicles. Such contention strikes one as being remarkably coincidental. The Grievants were asked to identify these individuals during the pre-disciplinary conference, and they refused to do so. The individuals' identity was not learned until the court proceeding. This delay certainly gave the Grievants a much greater opportunity at contrivance.

A primary element raised by the Union throughout this Grievance is the issue of whether or not the Grievants were denied proper representation during the search of their vehicles. The Employer contends that, although the Highway Patrol was present at the facility at the invitation of the Employer, the search activity was conducted independently by the Highway Patrol. Indeed, a representative was present on the parking lot of the facility while the search was being carried out; however, this representative was positioned away from the vehicles when they were searched and did not take part in any interrogation of the Grievants. The Employer did later consult with the Highway Patrol to determine that the substance had tested positive for marijuana. In as much as the evidence was considered prima facie, ODRC determined that no need existed for an investigatory interview, and the Grievants were scheduled for a pre-disciplinary conference to be given an opportunity to deny, to refute, or to rebut the allegations against them.

A second contention of the Union is that the Grievants were charged criminally in regard to this incident, and those charges were later dismissed, thus they claim that there is no just cause for-the discipline. The burden of-proof differs in a criminal versus an administrative proceeding. The Employer is not held to a standard of beyond a reasonable doubt but must present clear and convincing evidence that the Grievants did in fact transport a controlled substance onto state property.

The mission of the Department of Rehabilitation and Correction, as it involves the care and custody of adult offenders, demands that we have a paramount responsibility not only in the area of drugs in prisons but also that our employees be held to a higher standard as it pertains to the possession and/or use of controlled substances. Employees cannot claim that they are unaware of these requirements in as much as they are expressed in the standards of employee conduct, and the publicity surrounding this issue has been the point

of much discussion both within the institutions as well as in the public forum. If the coincidence that the substance belonged to others could be found credible, these employees has an obligation to assure that their vehicles were free of any such substance before bringing their vehicles onto state property. Foreknowledge of the seriousness of such a violation cannot be argued.

The Employer did have just cause for the removal of the Grievants.

Discussion

The Highway Patrol found drugs in the cars of both Grievants. The search of their cars was by the consent of the Grievants. The cars were driven by the Grievants to work and parked on State property within the prison facility. These facts violate Rule 29 of the Revised Employee Rules of Conduct i.e., "Possession, misuse, conveyance onto state property, or display of . . . or other contraband without authorization or failure to report knowledge of the same."

Contraband is defined as

"any" article which is intended for the unauthorized use or possession of an inmate or which is prohibited by law or Department Policy from being carried onto the grounds of an institution or detention facility. Examples of contraband which could be intended for an inmate's unauthorized possession or use include letters, stamps, tools, paper, food, messages and money. Examples of contraband which are prohibited by law (ORC Section 2921.36) include firearms, knives, explosives, ammunition, drugs, and alcoholic beverages.

Thus, drugs were an "item prohibited by law from being carried onto the grounds of an institution." The possession of drugs on state property is also prohibited by Rule 31. The Grievants acknowledged receipt of the rules.

The Union objects to the application of these rules to Grievants on several grounds. The Union claims the Employer violated Article 24.04 because no Union steward was present at the investigatory interview. The Employer claims that they conducted no investigatory interview with ODRC personnel and the evidence supports that conclusion. The Union claims that the Highway Patrol represents the Employer and, hence, when the Trooper questioned the Grievants a Union steward need have been present. The Arbitrator need not address that claim because by both the Trooper's testimony and the Grievants' testimony no investigatory interview occurred. The Trooper apparently did little more than seek permission to search which was given, and the Grievants refused to discuss anything else with him. No prejudice has been shown.

The Union claims that charging violation of both Rule 29 and Rule 31 is stacking. The Arbitrator agrees; the same conduct is necessary to invoke (i.e., possession of drugs on state property) both Rules. Therefore, only one Rule violation is proper: Rule 29. The Grievants clearly "conveyed" contraband on to state property.

The Union next claims that the Grievants were unaware of the drugs and drug paraphernalia in their cars. Therefore, the Grievant's did not "knowingly" convey the drugs. The Arbitrator did not find either Grievant credible on this issue. For the Grievant DB to claim no knowledge when the marijuana roaches were in the ashtray and the hemostats were in the glove compartment is beyond belief. Moreover, while DB's wife was obviously loyal to her husband, a commendable trait, her testimony was inherently unbelievable. In the case of Grievant RCC, the testimony of the Grievant and her friend were inherently flawed and incredible. The Grievant said she knew nothing about the marijuana, did not roll her own cigarettes, and upon innocently finding the papers, dropped them in her bag; this story was not credible. The Arbitrator concludes that both Grievants knowingly conveyed drugs on to State property adjacent to the prison.

The Union argues that the discipline violates the principle of progressive discipline in Article _24.02. While progressive discipline is the general goal, the Union and Employer both know that certain offenses are so serious that progressive disciplineis unwarranted. Drug related offenses in the prison setting fit this criteria.

Lastly, the Union argues that the penalty of dismissal is too harsh, not commensurate, in light of the number of years worked by both Grievants and their lack of prior discipline. This last argument is the

strongest. Neither Grievant has a bad record, and both have worked at the facility for a decent amount of time.

The Grievants were clearly on notice that drug related violations could cause dismissal. The Union also claimed a lack of nexus between the jobs of the Grievants and the offense. Certainly, had these arrests been off state property and not in the parking lot of the prison, a nexus argument would be strong. However, drugs were thus readily available to the Grievants and thus readily available to the inmates. Grievants had a clear opportunity to transport drugs inside the, prison walls.

Termination is the "capital punishment" of labor relations. The Arbitrator was impressed that both Grievants unrealistically denied any connection with the drugs and showed no understanding of the danger of such drugs in the particular setting. The Employer apparently found no mitigating circumstances. Neither does the Arbitrator.

Award

Grievance denied.

Date: April 2, 1991
Rhonda R. Rivera
Arbitrator