

ARBITRATION DECISION NO.:

530

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Correction

Lebanon Correctional Institution

DATE OF ARBITRATION:

November 24, 1993

DATE OF DECISION:

December 30, 1993

GRIEVANT:

Dru Roebuck

OCB GRIEVANCE NO.:

27-11-(92-09-16)-0185-01-03

ARBITRATOR:

Nels Nelson

FOR THE UNION:

Patrick Mayer, Staff Rep.

FOR THE EMPLOYER:

Colleen Wise, Advocate

Teri Decker, OCB 2nd Chair

KEY WORDS:

Suspension

Just Cause

Insubordination

Failure to Follow Post Orders

Failure to Cooperate with

Official Investigation

Disparate Treatment

ARTICLES:

Article 24 - Discipline

§ 24.01 - Standard

§ 24.02 - Progressive Discipline

§ 24.05 - Imposition of Discipline

FACTS:

The grievant was a Corrections Officer at the Lebanon Correctional Institution, working in the administrative control area where the most dangerous inmates are housed. Upon searching the cell of an

administrative control inmate who had taken a corrections officer hostage, several bullets were found. All corrections officers assigned to that area were then reassigned and investigated to determine the origin of the bullets. During the investigation, the grievant took two voluntary polygraph tests, the results of which indicated he had lied. After his second polygraph test, corrections officers allegedly saw the grievant exchanging hand signals with the same inmate while the grievant was speaking with another officer. The grievant was interviewed by the State Patrol and placed on administrative leave the next day. The inmate later told an investigative committee that another corrections officer, not the grievant, had given him the bullets, and that officer then confessed. After being cleared of involvement with the bullets, the grievant was accused of four other violations of the standards of employee conduct and given a ten-day suspension. The grievant admitted lying during the first polygraph test, but claimed that he was singled out during the investigation and that the ten-day suspension violated his rights under Article 24 of the Agreement. Just cause for the discipline and its severity were at issue.

EMPLOYER'S POSITION:

The removal of the grievant was for just cause and the ten-day suspension should be upheld. The grievant was expressly told by the unit manager not to deal with the specific inmate on a personal level. The grievant admitted doing so in non-professional conversations, and thus was insubordinate in violation of rule 7 of the standards of employee conduct. The State then charged the grievant with failing to follow post orders by bringing contraband into the institution for an inmate, a rule 8 violation. The grievant's lies to the investigative committee and on his polygraph test violated rule 26 as a failure to cooperate with an official investigation. Finally, the State charged the grievant with giving preferential treatment to an inmate by bringing him candy bars and magazines, a violation of rule 45. The grievant admitted to all of these charges.

The State maintained its justification for the penalty, as two of the four rules allowed for first offense removal. The State disputed the grievant's claim of disparate treatment and distinguished the case cited by the Union. The State concluded by disputing the Arbitrator's power to grant clemency without proof of an employer's abuse of discretion, as it would amount to a substitution for the employer's judgment.

UNION'S POSITION:

The Union asserted lack of just cause for such a severe penalty and requested that it be modified to reflect the reality of the offense. Disputing the State's charge of failure to cooperate with an official investigation, the Union emphasized the grievant's two voluntary polygraph tests and appearances before the investigative committee, where he answered all questions put to him. The Union claimed that the grievant failed the polygraphs due to vague questions about contraband which failed to distinguish between different types. The Union also noted the institution's failure to enforce the rule against bringing magazines inside. The existence of rules restricting the level of contact with the specific inmate was disputed, as was the grievant's alleged non-professional relationship with the inmate. The Union claimed that specific rules for the inmate were never written up and distributed, and that the considerable amount of time which officers spent with inmates in administrative control required some conversation between them.

The claim of disparate treatment was based on a comparison with other cases involving unauthorized relationships with inmates, which resulted in only five day suspensions for other employees. The Union asserted that a ten-day suspension for these violations was too severe. Noting that anything from an oral warning to a removal is permitted for a first offense of these rules, the Union argued that the grievant's excellent employment record justified a more lenient punishment.

ARBITRATOR'S POSITION:

The Arbitrator found that all four charges against the grievant were legitimate. The grievant disobeyed the order of a supervisor, gave contraband to an inmate, failed to maintain a professional relationship with an inmate, and lied during an official investigation. The Arbitrator emphasized that these were serious violations requiring a serious penalty, and stated his reluctance to reduce penalties imposed by an employer. Despite the Arbitrator's reservations, however, he reduced the grievant's penalty. Figuring in his decision was the lack of consistent enforcement of the rules which the grievant violated. In addition, the Arbitrator considered

that every violation established was discovered through the grievant's own confessions during the investigation. Also weighing heavily was the grievant's suffering as a result of his suspension, including the suspicion of fellow employees and damage to his reputation. The Arbitrator did not try to repair damage done to the grievant's reputation, but did consider it a relevant factor in determining the appropriate penalty. The Arbitrator ruled that the grievant must take some time off, so as not to convey the message that his actions were acceptable, but that ten days were too severe.

AWARD:

The suspension was reduced from ten days to five days.

TEXT OF THE OPINION:

ARBITRATION DECISION

December 30, 1993

In the Matter of:

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

and

**Ohio Civil Service Employees Association,
AFSCME Local 11**

Case No. 27-11-920916-0185-01-03

Dru Roebuck, Grievant

Hearing Date: 11/15/93

APPEARANCES

For the State:

Colleen Wise, Office of Collective Bargaining, Advocate
Teri Decker, Office of Collective Bargaining, Assisting
Ron Hart, Labor Relations Officer, Lebanon Correctional Institution
Stephen Bowman, Unit Manager
William H. Dallman, Warden
Philip G. Snelling, Correction Officer
James Scott, Correction Officer
Joseph Shaver, Chief of Labor Relations,
Department of Rehabilitation and Correction

For the Union:

Patrick Mayer, Field Representative
Dru B. Roebuck, Grievant
Fred Land, President, Chapter 8310
Robert Jones, Chapter President, Dayton Correctional Institution
Joan Ridgeway, Correction Officer

Arbitrator:

Nels E. Nelson
BACKGROUND

The grievant is Dru Roebuck. He was hired by the Department of Rehabilitation and Correction in February 1986 as a correction officer at the Lebanon Correctional Institution. It is a close to maximum security facility having over 2200 inmates. Correction officers are represented by Ohio Civil Service Employees Association, AFSCME Local 11.

The grievant was assigned to an area of the facility know as administrative control. It houses inmates deemed to be a threat to employees of the institution and/or other inmates. Inmates in administrative control are subject to very tight security and close monitoring.

The events leading to the instant grievance began on March 23, 1992. On that date inmate Michael Lee Wood, who was housed in administrative control, appeared to take correction officer Philip Brown hostage. Wood had been involved in hostage taking and other problems at other institutions and for that reason had been moved to the Lebanon Correctional Institution and placed in administrative control.

Following the incident, Wood's cell was searched. The search revealed that Wood had a number of bullets in his cell. At that point the correction officers assigned to the area were reassigned and an investigative committee was created to learn how Wood obtained the bullets.

On April 2, 1992 the grievant volunteered to take a polygraph examination. In the examination the grievant denied giving bullets or any other contraband to Wood. The polygraph operator, however, reported that the polygraph indicated that the grievant was not telling the truth.

On April 14, 1992 the grievant volunteered to take a second polygraph examination. In the pre-test interview he admitted that he had lied on the first examination because he had given Wood contraband consisting of candy bars and magazines. The grievant also indicated that he had conversations with Wood. A series of questions regarding the grievant's statements were asked by the polygraph operator. He reported that the polygraph showed that the grievant was not telling the truth.

On May 20, 1992 an alleged incident occurred involving the grievant and Wood. Correction officer Philip Snelling, who was working as the desk officer in the administrative control area, indicated that he observed Wood, who was in the recreation cage, making what appeared to be hand signals to the grievant, who was standing by the door to the area. Correction officer James Scott stated that he saw the grievant staring at Wood and that the grievant appeared to be making hand signals. Both Snelling and Scott observed that the grievant was having a conversation with correction officer Joan Ridgeway, the interior keys officer.

Correction officers Snelling and Scott reported what they saw to the investigative committee on May 21, 1992. That same day the grievant was interviewed by the highway patrol. At the conclusion of the interview, the grievant was placed on administrative leave.

On July 2, 1992 Wood was interviewed again by the investigative committee. He told the committee that it was correction officer Brown who brought him the bullets. When the committee confronted Brown, he admitted bringing ammunition into the institution and staging the hostage incident.

On July 29, 1992 a pre-disciplinary hearing was conducted with the grievant. He was accused of violating four rules of the standards of employee conduct. He was charged with disobedience of a direct order of a supervisor in violation of rule 7; failure to follow post orders, administrative regulations, and/or written policies or procedures in violation of rule 8; interfering with or failing, to cooperate in an official investigation or inquiry in violation of rule 26; and giving preferential treatment to an inmate, the offering, receiving, or giving of a favor or anything of value to an inmate, furlough, parolee, or probationer without expressed authorization of the department in violation of rule 45. The hearing officer found that there was just cause for discipline and on August 18, 1992 the director of the department approved a ten-day suspension for the grievant.

A grievance was filed by the grievant on September 14, 1992. The grievant acknowledges that he did not tell the truth on the first polygraph examination but complains that he had been singled out during the

investigation of the hostage situation and that his character was challenged. The grievant charges that the department violated Article 24, Sections 24.01, 24.02, and 24.05 of the collective bargaining agreement.

When the grievance was not resolved, it was appealed to arbitration. The hearing was held on November 24, 1993. Written closing statements were received on December 2, 1993 and the record was closed at that time.

ISSUE

The issue as agreed to by the parties is as follows:

Was the Grievant disciplined for just cause?
If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 24 - Discipline

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..

* * *

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 oral reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspensions(s),
- D. Termination..

* * *

24.05 - Imposition of Discipline

* * *

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

POSITION OF THE STATE

The state argues that there is just cause for the grievant's ten-day suspension. It states that he was insubordinate in violation of rule 7 of the standards of employee conduct. The state points out that Stephen Bowman, the unit manager who is responsible for the administrative control area, testified that he told all the correction officers including the grievant that Wood was very manipulative and instructed them not to deal with him on a personal level. It notes that despite this warning the grievant admitted having conversations with Wood that were more than professional. The state emphasizes that the grievant stated that at one point Wood asked him to contact a radio station on his behalf which made him angry because he realized that he had opened the door for Wood to ask for favors by listening to him.

The state charges that the grievant attempted to communicate with Wood on May 20, 1992 by the use of hand signals. It acknowledges that the grievant denies having done so and that Ridgeway testified that she did not observe the grievant communicating with Wood. The state observes, however, that the grievant

stated that he was off duty and had his coat and lunch box while he was talking to Ridgeway but she testified that he did not. It stresses that Ridgeway did not appear at the pre-disciplinary hearing or make any statement prior to the arbitration hearing.

The state charges that the grievant violated rule 8 of the standards of employee conduct by failing to follow post orders. It contends that the post orders regarding inmates in administrative control specifically prohibit bringing contraband into the institution for an inmate. The state indicates that the grievant testified that he gave candy bars, a magazine, and a sandwich to Wood.

The state claims that the grievant violated rule 26 by interfering with or failing to cooperate with an official investigation. It acknowledges that the grievant voluntarily took two polygraph examinations and did answer all of the questions. The state notes that the grievant admitted lying during the polygraph examination and to the investigative committee. It stresses that under no circumstances can lying be deemed to be cooperating.

The state argues that the grievant gave preferential treatment to Wood in violation of rule 45. It states out that the grievant gave candy bars, a magazine, and a sandwich to him. The state asserts that such was contrary to the policies and procedures for prisoners in administrative control and especially for Wood who is a "high profile" prisoner. It notes that the grievant's own testimony demonstrates that the grievant placed himself in the position of being manipulated and coerced.

The state claims that the grievant was afforded all contractual rights regarding the imposition of discipline. It points out that the grievant received a copy of the standards of employee conduct and the post orders. The state notes that other employees besides the grievant were polygraphed and interviewed after the hostage taking incident. It asserts that the investigation was conducted fairly and objectively. The state stresses that at the pre-disciplinary hearing the grievant admitted to all of the allegations.

The state maintains that the discipline given to the grievant is in accord with the standards of employee conduct. It notes that Warden William H. Dallman testified that the grievant's violations were serious because the institution is safe only as long as employees do not enter into personal relationships with inmates. The state observes that the standards of employee conduct indicate that the penalty for the first offense under rules 26 and 45 includes removal.

The state argues that the union failed to establish that the grievant was subject to disparate treatment. It acknowledges that Robert Jones, the chapter president at the Dayton Correctional Institution, testified regarding Pamela Gartrell who was suspended for five days for an unauthorized relationship with an inmate. The state points out that Jones had no direct knowledge of the incident. It notes that Joseph Shaver, the department's chief of labor relations, testified that a number of factors distinguish the Gartrell case from the instant case. The state stresses that the charges in the two cases are different and that the Gartrell case arose eight months after the grievant's suspension.

The state rejects the union's argument that the discipline imposed on the grievant was not commensurate with the offense. It admits that candy bars and magazines are not on a par with weapons and bullets but emphasizes that the rule is that correction officers cannot give contraband of any type to inmates. The state cites the decision of Arbitrator Rhonda Rivera in State of Ohio, Department of Rehabilitation and Correction and the Ohio Civil Service Employees Association, Local 11, AFSCME, Grievance No G87-2389 where an employee bartered sunglasses for a carton of cigarettes. Arbitrator Rivera refused to reduce the penalty imposed by the superintendent because it would be substituting her judgment for that of the employer.

The state argues that the Arbitrator does not have the authority to grant clemency. It contends that such is the prerogative of the employer rather than the Arbitrator. The state maintains that an Arbitrator cannot substitute his judgment for that of the employer unless the evidence indicates that the employer abused its discretion but stresses that there was no showing in the instant case that it abused its discretion. It states that any clemency must come from management.

The state concludes that the penalty imposed on the grievant is justified. It points out that the grievant admits to violating four of the rules of the standards of employee conduct. The state notes that two of the rules that were violated provide for up to removal for a first offense. It claims that taking into account the seriousness of the violations, the grievant's work history, and the circumstances, a ten-day suspension is appropriate. The state asks the Arbitrator to deny the grievance in its entirety.

POSITION OF THE UNION

The union argues that the charge that the grievant interfered with an official investigation is absurd. It points out that the grievant, who was suspected of bringing bullets to Wood, appeared before the investigative committee numerous times and that he answered all of the questions put to him. The union emphasizes that he voluntarily took two polygraph examinations.

The union claims that the grievant failed the first polygraph examination because the examiner asked vague questions. It indicates that the purpose of the investigation was to find out who brought the bullets to Wood. The union observes that the examiner asked the grievant if he brought any contraband to Wood. It asserts that this created a problem because candy bars and magazines are also considered contraband. The union stresses that the problem was cleared up at the second polygraph examination.

The union questions the existence of the special rules which Bowman testified applied to Wood. It claims that the rules were never divulged at the hearing and that no witness testified that he discussed the rules with Bowman except Snelling who discussed them after the hostage incident and after the grievant was removed from the administrative control area. The union states that the alleged special rules were never reduced to writing.

The union asserts that Bowman's testimony contained some incredible revelations. It points out that he testified that it was his job to screen Wood's commissary requests and to deliver them to him. The union stresses that Bowman allowed Wood to get matches even though he did not smoke.

The union contends that the grievant did not violate any post order. It claims that there was no evidence offered to indicate that the grievant did not maintain a professional relationship with Wood. The union states that the grievant did not give anything of value to a relative, friend, or visitor of Wood.

The union indicates that the grievant admits that he allowed Wood to look at a magazine he brought to work. It points out, however, that Bowman acknowledged that the rule about bringing magazines into the institution is not enforced and that Fred Land, who has been a correction officer at the institution for 20 years and president of the local chapter three times, did not recall any employee ever being disciplined for bringing a magazine into the institution. The union claims that Bowman even read a home repair magazine that the grievant brought to work.

The union argues that the grievant did not violate any direct work order. It maintains that the only order that Bowman gave the grievant was not to have lengthy conversations with Wood. It observes that some conversation is necessary because of the time that the grievant was required to be in Wood's presence. The union observes that neither Wood nor Fugate, the grievant's partner, were called to testify regarding conversations that the grievant may have had with Wood.

The union charges that the policies and procedures in dealing with Wood were carried out in a cavalier fashion by the state. It complains that the specific rules relating to Wood were not written up and distributed to the staff. The union further states that there was confusion in the chain of command between Bowman and Captain Carnes where Bowman wanted things done one way and Carnes wanted them done another way.

The union argues that the grievant received disparate treatment. It claims that it offered testimony and documentary evidence of an employee who was found to have had an unauthorized relationship with an inmate on two occasions but received only a five-day suspension. The union acknowledges that different rule violations were involved in the case but stresses that both cases involved inmate offenses.

The union charges that a ten-day suspension is a major punishment and is too severe in the instant case. It notes that the rules which the grievant is charged with violating do not require a ten-day suspension but call for an oral warning to removal for a first violation. The union points out that the grievant is a long term employee and claims that Dallman testified that he is an exceptional employee. It states that the grievant's only prior discipline is for tardiness.

The union asserts that it cannot show the reality of the situation. It points out that the grievant was the prime suspect for bringing bullets into the institution putting the lives of every officer at risk. The union states that the result was that the grievant was reviled, harassed, and ultimately put out of the institution. It emphasizes that when Brown admitted that he brought the bullets to Wood, no one apologized to the

grievant but instead he was suspended for the revelations that he had made.

The union asks the Arbitrator to clear the grievant's name, give him back his respect, and modify the penalty to reflect the reality of the offense.

ANALYSIS

The grievant is charged with violating four rules of the standards of employee conduct. First, he is accused of disobeying the direct order of a supervisor in violation of rule 7. Bowman testified that he instructed the grievant to maintain a professional relationship with Wood. There is no dispute that the grievant did not follow Bowman's directions. He admitted that he gave candy, a sandwich, and magazines to Wood. The grievant also conceded that he "listened to" Wood at length. Most importantly, he stated that he realized his mistake when Wood asked him to call a radio station on his behalf about his treatment.

The grievant's contention that Bowman did not tell him to maintain a professional relationship with Wood is not credible. Bowman testified that he talked to all of the correction officers in the administrative control area about Wood except perhaps the third shift. He stated that he specifically remembered warning the grievant that Wood was very manipulative and dangerous.

Second, the state claims that the grievant violated rule 8 by failing to carry out post orders, administrative regulations, and/or written policies and procedures. Post Order 21 dated August 11, 1991 sets out the directions for security and control in L-Block where the administrative control unit is located. Appendix 1, item 2(c) requires correction officers to maintain a professional relationship with inmates. Item 3 states that employees can take only standard issued equipment to their job assignments and specifically indicates that magazines cannot be taken to a job assignment.

Although there is no doubt that the grievant failed to maintain a professional relationship with Wood and that his failure to do so was a serious matter, it is not clear what significance can be attached to the fact that he brought a magazine into the administrative control area. Land testified that it is common practice for employees to bring magazines into the institution and that no one has ever been disciplined for doing so. Furthermore, even Bowman acknowledged this practice and did not rebut the grievant's testimony that he looked at a home repair magazine that the grievant brought to work.

Third, the state charged the grievant with interfering with or failing to cooperate in an official investigation or inquiry in violation of rule 26. There is no question that the grievant did lie during an investigation. While it could be argued that giving candy bars, a sandwich, and a magazine to an inmate is not a serious matter, the investigation involved what appeared to be a hostage taking situation which is an extremely serious matter. Lying in such an investigation, even about what in another circumstance might appear to be a minor matter, cannot be taken lightly.

Fourth, the grievant is alleged to have given preferential treatment or a favor or something of value to Wood. As indicated above, the grievant admits that he gave Wood candy bars, a sandwich, and magazines. Although the Arbitrator suspects that such conduct may be common in the institution, it did not occur in ordinary circumstances. Wood was housed in the administrative control area which houses the most dangerous inmates. The grievant should have known the hazards of getting too close to inmates such as Wood. In fact, the grievant now admits that he made a mistake in listening to Wood which led to Wood making demands of him.

In addition to the offenses discussed above, the grievant was charged with attempting to communicate with Wood on May 20, 1993 through the use of hand signals. This allegation is based upon the statements and testimony of Snelling and Scott.

The Arbitrator does not believe that the testimony and evidence establish that the grievant was engaged in communication with Wood. First, Snelling and Scott's testimony focused primarily on the actions of Wood. While he may have been trying to signal the grievant, it was not established that the grievant responded or even that he was aware of Wood's apparent signals. It is possible that Wood was trying to make it appear that he was communicating with the grievant. Second, the grievant had a reasonable explanation for being by the door to the administrative control area -- as was indicated by Snelling and Scott, he was engaged in a conversation with Ridgeway who is the interior key person. Third, it is unlikely that the grievant could have

carried on a conversation with Ridgeway and at the same time signaled Wood without Ridgeway realizing what was going on. She testified that the grievant simply was engaged in a conversation with her.

The above analysis indicates that the grievant did violate the standards of employee conduct. First, he did not maintain a professional relationship with Wood. He gave candy bars, a sandwich, and magazines to him. He also engaged in conversations with Wood that he acknowledged led to Wood making inappropriate demands of him. This conduct violates rules 7, 8, and 46. Second, the grievant did not cooperate in the investigation of the hostage taking incident. He admitted that he lied to the investigative committee and on the first polygraph examination. Lying cannot be characterized as cooperating in an investigation. This conduct violates rule 26. Clearly, the grievant is guilty of serious misconduct for which there should be a significant penalty.

The union argued, however, that a ten-day suspension is too severe. First, it asserted that the grievant was the object of disparate treatment because a correction officer at Dayton Correctional Institution who was involved in an unauthorized relationship with an inmate received only a five day suspension. The Arbitrator must reject this argument. First, he does not know all of the facts in the other case so he is in no position to judge the reasonableness of the penalty imposed. Second, the inmate in the other case was not an inmate in administrative control with a history of violence and manipulation of correction officers. Third, the charges against the grievant are different than the charges against the correction officer at the Dayton Correctional Institution so one would expect that the penalty might be different.

Second, the union argued that the penalty is too harsh considering the grievant's seniority and work record. It stated that the grievant is a long service employee and has only been disciplined for tardiness. The union also indicated that Dallman testified that the grievant was an exceptional employee.

The Arbitrator is reluctant to reduce a penalty imposed by an employer based upon the factors cited by the union. It is widely understood that in arbitration the degree of the penalty should be left to the employer unless it can be shown that the employer was arbitrary, capricious, discriminatory, or unreasonable. Arbitrators are concerned that if they freely substitute their judgment for that of the employer with regard to the proper penalty, the result will be a lack of uniformity and penalties reflecting the Arbitrator who hears the case rather than the seriousness of the offense.

Despite this fact, the Arbitrator believes that the penalty imposed in the instant case must be reduced. First, a ten-day suspension is a severe penalty considering the fact that some of the grievant's misconduct involves rules that are not strictly enforced if they are enforced at all. Second, the rule violations that have been established are all based upon admissions the grievant made in the course of the investigation of the hostage taking incident. Most important, the grievant appears to have suffered well beyond the ten-day suspension imposed on him. He was the object of suspicion at the institution in the hostage taking situation. He spent considerable time on administrative leave and feels that his reputation was been damaged. Although the Arbitrator cannot repair the damage that may have been done by the suspicion that the grievant was the one who brought the bullets to Wood, it is a factor that should be considered in considering the proper remedy to be imposed.

Despite the above points, the Arbitrator believes that the grievant must be given some time off. He feels that to do otherwise would appear to condone actions that are potentially very dangerous especially in the administrative control area. The Arbitrator, therefore, will order the suspension to be reduced from ten days to five days.

AWARD

The grievant is to be suspended for five days for violation of the standards of employee conduct. He is to be made whole for any time he lost for his misconduct beyond the five-day suspension.

NELS E. NELSON
Arbitrator

December 30, 1993)
Russell Township
Geauga County, Ohio