

ARBITRATION DECISION NO.:

543

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Correction

Lebanon Correctional Institution

DATE OF ARBITRATION:

DATE OF DECISION:

May 24, 1994

GRIEVANT:

Kenneth Green

OCB GRIEVANCE NO.:

27-11-(93-12-16)-0235-01-03

ARBITRATOR:

Harry Graham

FOR THE UNION:

Pay Mayer

FOR THE EMPLOYER:

David Burris

KEY WORDS:

Removal

Just Cause

Unauthorized Relationship

with an Inmate

Disparate Treatment

Credibility

ARTICLES:

Article 24 - Discipline

§ 24.01 - Standard

FACTS:

The grievant was a Corrections Officer at the Lebanon Correctional Institution. He had worked at the institution approximately 18 months prior to his removal.

An Administrative Captain observed the grievant engaged in conversation with an inmate and the captain alleged that the grievant was engaged in dealing with an inmate. The inmate allegedly slipped the grievant a gold ring. When the captain asked the officer what he had in his hand, the grievant showed the captain the ring. The grievant was immediately relieved of duty.

When the inmate was questioned about the ring, he first stated that he had purchased the ring for ten

cartons of cigarettes. Then he indicated that he had found the ring on the shower floor.

EMPLOYER'S POSITION:

The State pointed out that the grievant clearly violated Rule 45 of the Standards of Employee Conduct. Rule 45 makes it improper for an employee to give preferential treatment to an inmate. A possible penalty for this violation is discharge.

The facts presented by the State are disputed by the union. However, testimony from the inmate in support of the grievant is worthless in the State's view, because the inmate was caught lying when relaying his version of events.

The State also claims that there was no element of disparate treatment. It does believe that the grievant was engaged in drug dealing in the prison, but he was not fired for this reason. The State believes that the grievant's removal should be sustained, because the act he committed was a serious offense and he was caught in the middle of the transaction by senior officers. In addition, the grievant did not have enough seniority to offset such a serious offense.

UNION'S POSITION:

The union claimed that the grievant's discharge for dealing with an inmate was "pretextual." The union asserted that the grievant was discharged for drug dealing, which did not occur according to the union, rather than for dealing with an inmate.

Testimony from the grievant and the inmate revealed that there was no "surreptitious transaction" going on between them. The grievant was holding the ring simply for the purpose of examination. Furthermore, the grievant and the inmate were probably aware of another officer entering the corridor. However, they did not attempt to conceal their actions.

The union viewed this incident as having resulted in disparate levels of discipline between the grievant and one of the grievant's co-workers. Both officers violated Rule 45, but the grievant's co-worker only received a suspension. The Union seeks modification of the grievant's discharge, because this specific type of discipline was too severe for the first instance of discipline on his record.

ARBITRATOR'S OPINION:

The Arbitrator stated that the initial concern in this proceeding was determining what actually happened between the grievant and the inmate. Due to the inconsistencies in the inmate's version of the events which occurred, the Arbitrator found the inmate's account to be worthless and, therefore, unusable to support the grievant's version of events. The Arbitrator based his decision on the events recounted by the senior officer who observed the interaction between the grievant and the inmate. The most significant element of this proceeding was that a prohibited transaction took place and the Arbitrator believed that such a transaction did take place. Any other hidden agenda of the State for disciplining the grievant must be disregarded.

The Arbitrator found the charge of disparate treatment to be unfounded, because the grievant's situation and his coworker's situation were not similar. The co-worker had more seniority than the grievant. Furthermore, the co-worker's violation was less serious than the grievant's. Therefore, the discipline imposed upon the grievant was not unreasonable.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

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

Case Number:

27-11-(12-16-93)-235-01-03

Before:

Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

Pat Mayer
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For Department of Rehabilitation and Correction:

David Burris
Department of Rehabilitation and Correction
1050 Freeway Drive, North
Columbus, OH. 43229

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue: The parties agree upon the issue in dispute between them. That issue is:

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

Background: There is a fundamental difference between the parties over the events that prompted the Employer to act as it did in this instance. The little upon which they agree may be succinctly presented. The Grievant, Kenneth Green, had been employed as a Corrections Officer for about 18 months prior to his discharge in December, 1993. While employed, he worked at the Lebanon Correctional Institution located in Lebanon, OH.

According to Ronald Campbell, III, an Administrative Captain at Lebanon, the Grievant engaged in dealing with an inmate on September 5, 1993. Captain Campbell reported that at about 2:35 p.m. on that date he was in the sallyport area of C block. He was waiting for the Officer with the key to the exit to arrive and let him out of the block. While waiting, he happened to look across the corridor to J block. He saw the Grievant and an inmate, Kevin Malone, engaged in conversation. During the course of their conversation Campbell saw them come in close proximity to each other. At that time Malone allegedly slipped Green an object. Upon being let out of C block Captain Campbell and his colleague, Major John H. Brown, crossed the corridor and ordered inmate Malone to stand against the wall. Captain Campbell asked Green what he

had in his hand. It was a gold ring with diamond chips. Captain Campbell was of the opinion that Inmate Malone had given his ring to Officer Green. The Grievant was immediately relieved of duty.

In the course of conversation between Inmate Malone and Captain Campbell and Major Brown Malone allegedly stated that he had purchased the ring for ten cartons of cigarettes and that he had been showing the ring to Green to get an estimate of its value. He subsequently changed this statement and indicated that he had found the ring on the shower floor. A search of Malone revealed another ring in his shoe.

As will be set forth below, elements of this account are disputed by the Union.

In due course the Employer determined to impose discipline on Officer Green. He was discharged. A grievance protesting that discharge was properly filed and the parties agree that it is correctly before the Arbitrator for resolution on its merits.

Position of the Employer: The State points out that the Grievant was disciplined for violation of Offense 45 in the Departmental Rules. That Offense makes it improper for an employee to engage in:

“Giving preferential treatment to an inmate; the offering, receiving or giving of a favor or anything of value to an inmate; dealing with an inmate, furloughee, parolee or probationer without expressed authorization of DR&C.”

There is included a range of possible penalties extending from a 1 day suspension to removal for the first offense. The fourth offense carries with it removal.

In this situation Officer Green received a gold ring from Inmate Malone. He violated a clearly enunciated Departmental rule of which he was well aware. The disciplinary grid associated with the table of offenses indicates discharge is a possible penalty for a violation such as that committed by the Grievant. As that is the case, the State urges its action be upheld.

The Employer is well aware that the Union disputes the facts as presented by Captain Campbell and Major Brown. Both are employees of long service. The principal accuser of Officer Green, Captain Campbell, has 14 years of service at Lebanon. The Grievant had 18 months of service. Inmate Malone is a felon. He is doing a very long stretch of time in the custody of the State. Moreover, as the events under review in this proceeding unfolded, Malone was caught lying. He initially indicated that he had purchased the ring for ten cartons of cigarettes. Then he claimed to have found it in the shower. One version of events or the other or perhaps both is a lie. Testimony from Malone in support of Green is worthless in the State's view.

The Employer acknowledges that it views Green to be a bad officer. In its view he has been engaged in drug dealing with the confines of the prison. That said, Green was fired for dealing with an inmate, not drug dealing.

In December, 1993 the Department and the Union were involved in a grievance arbitration concerning discipline of another officer at Lebanon, Dru Roebuck. He received a ten day suspension for among other offenses, a violation of Offense 45. This was reduced by the arbitrator to a five day suspension. The Department is well aware that the Union will raise the disparate treatment offense in this situation. In the opinion of the State no disparate treatment has occurred. Acknowledging that Roebuck had prior discipline which is not the case with Green, the State points out that Roebuck carries a seniority date of 1986. In contrast, Officer Green has little seniority. The incidents involving the two officers are dissimilar and they did not work in the same area. Hence there is no element of disparate treatment involved in this situation according to the State.

As the Grievant committed a serious offense and was caught in the act by senior officers the penalty in this case, discharge, should be sustained the Employer urges.

Position of the Union: The Union views Officer Green's discharge for dealing with an inmate to be pretextual. The real reason he was discharged is that the Employer believes Green is involved in drug running in the prison. Testimony was received from the Warden to the effect that he regards Green to be a "dirty" officer. Complaints about the Grievant have been forwarded to prison administration. The discharge

for dealing is a smokescreen for the intent of the prison administration to rid itself of Officer Green as the result of its concern over his alleged drug dealing. The Union is strongly of the view that the discharge under review in this proceeding was for drug dealing, not merely dealing with a prisoner. No such dealing occurred according to the Union.

Testimony was received at the hearing from the Grievant and Inmate Malone denying that any surreptitious transaction took place between them. On the date in question Inmate Malone showed the Grievant the ring in question. He handed it to Green who then held it up for viewing. Malone was seeking Green's opinion on the value of the item. No attempt at concealment occurred. Had they wished to hide their actions they could have easily done so by moving to the rear of Block J. They did not do so. Rather, their actions took place at the front of the Block, in plain view of any person who might have happened to look into the Block. When the ring was exchanged between Malone and Green there was no expectation that Green would keep it. Rather, it was in his hand only for the purposes of examination according to the Union.

This account is bolstered by the timing of the incident. Captain Campbell was seeking to exit from Block C. When that occurs there is a red light that comes on in the corridor to indicate to the key person that an officer wishes the door be opened. That light was on at the instant Malone and Green exchanged the ring. They had to know that another officer would be in the corridor and that they would be in full view.

The Union points to an inconsistent account of this event given by Captain Campbell. In his initial Incident Report Campbell noted that Malone made no attempt to leave the scene. This was later changed to indicate that Malone moved down the corridor.

The Union views this incident as having resulted in disparate levels of discipline being imposed upon the Grievant and a co-worker at Lebanon, Dru Roebuck. It points to the decision of Arbitrator Nelson in the Roebuck case. In his decision Arbitrator Nelson reduced a ten day suspension to a five day suspension. It was his view that the penalty in that case was excessive. Officer Roebuck was charged with a number of offenses that prompted the State to impose discipline upon him. These included a violation of Rule 45. The worst case scenario involving Roebuck was a ten day suspension. In this instance Officer Green was discharged. Charges other than the violation of Rule 45 were levied against Roebuck. Only one charge is before the arbitrator in this case. Prior to receipt of the discipline before Arbitrator Nelson Officer Roebuck had other discipline on his record. Clearly there is an element of disparate treatment that must be considered in evaluating the penalty at issue in this situation according to the Union.

Should it be determined that discipline is warranted in this case the Union urges that the discharge of Officer Green be modified. It notes that this represents the first instance of discipline on his record. To move to discharge an employee with an unblemished record for the first infraction is excessive in the Union's view. The disciplinary grid utilized by the Employer (found among the documents included in Joint Exhibit 3 in this proceeding) indicates that the range of penalties for a first offense against Rule 45 ranges from a one to three day suspension to discharge. The discharge penalty is too severe for an employee with a good record if it is found that discipline is appropriate. Hence, in the absence of a make whole remedy, the Union seeks modification of Officer Green's discharge.

Discussion: The initial question in this proceeding must be concerned with an attempt to determine what actually occurred between Officer Green and Inmate Malone on September 5, 1993. The account of events given by Malone varied during the life of this proceeding. He initially claimed that he had purchased the ring for ten cartons of cigarettes. Then he asserted he had found it on the floor of the shower. Another ring was subsequently found concealed in his shoe. It was determined that ring belonged to another inmate. Malone was lying. His account is worthless and does not support the version of events preferred by the Grievant.

That Captain Campbell was seeking to exit C block and happened to observe the transaction between Malone and Green was coincidence. As the Union points out, Malone and Green could have acted at the rear of J block and reduced the possibility of observation. They might have seen the red lamp on over the J block doorway. That did not occur. Given the weaknesses in the account of events given by Malone, a person convicted of a serious offense against society and one doing a long stretch of time, it is believed by the Arbitrator that the events recounted by Captain Campbell occurred as testified.

That Campbell's report varied on the question over whether or not Malone remained at the site or walked away is given little weight. It is not a major element of this proceeding. What is significant is the claim of the Captain concerning a prohibited transaction between Malone and Green. That such a transaction took place is believed by the Arbitrator. It is a very serious breach of conduct in the setting of Lebanon Correction Institution which is populated by some of the worst offenders against civil society.

There is no element of disparate treatment in this situation. The Grievant in this case had 18 months of service with the State. Obviously he had little seniority. Officer Roebuck who was involved in the dispute before Arbitrator Nelson began his employment at Lebanon in February, 1986. No credible claim can be made that they were in identical, or even similar situations. The only other discipline imposed upon Roebuck in the course of his career with the State was for tardiness. Discipline for that offense does not rise to a serious infraction in the context of this dispute. Nor does the decision of Arbitrator Nelson indicate it played any role in the ten day suspension imposed upon Officer Roebuck.

The claim of the Union concerning the hidden agenda of the State in this situation is given serious attention. In the final analysis it must be disregarded. This dispute involves a discharge for dealing between the Grievant and an inmate. It rises or falls on that basis. No consideration is given to the notion that Officer Green was discharged for drug trafficking within the Lebanon facility. The only issue before the Arbitrator in this dispute is the dealing of the ring between Malone and Green.

The offense with which the Grievant is charged is a serious one in the context of his work site. His unblemished work history is balanced by his short service with the State. This transaction is qualitatively different from the transaction engaged in by Officer Roebuck. In that situation Roebuck gave candy, a sandwich and magazines to an inmate. Even coupled with other infractions only a ten day suspension was imposed. From its inception the State regarded Roebuck's conduct to be a less serious violation of prison rules than that of Green. It needs no belaboring to observe that the arbitrator is not to substitute his or her judgment of the appropriate penalty merely because he or she might have imposed a different one when confronted with the same situation. If the penalty is within the bounds of reasonableness, if it does not shock or offend the sensibilities of the proverbial reasonable person it should not be disturbed. In this situation it is determined that the Grievant acted as charged by the Employer. He has no reservoir of seniority to offset his serious offense. In such circumstances the discipline imposed upon the Grievant was not unreasonable.

Award: The grievance is denied.

Signed and dated this 24th day of May, 1994 at South Russell, OH.

HARRY GRAHAM
Arbitrator