

ARBITRATION DECISION NO.:

589

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Rehabilitation and Correction,
Ohio Reformatory For Women

DATE OF ARBITRATION:

August 29, 1995 and
September 7, 1995

DATE OF DECISION:

November 3, 1995

GRIEVANT:

Charles Hightower

OCB GRIEVANCE NO.:

27-19-(95-02-14)-0645-01-03

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Dave Justice, Advocate
Don Sargent, Staff Representative

FOR THE EMPLOYER:

David Burrus, Advocate
Pat Mogan, Second Chair

KEY WORDS:

Abuse and Removal of Inmate/Patient
Just Cause
Progressive Discipline
Termination
Verbal Abuse

ARTICLES:

Article 24 - Discipline
 §24.02 - Progressive Discipline
Article 25 - Grievance Procedure
 §25.03 - Arbitration Procedures
 §25.04 - Arbitration/Mediation Panels

FACTS:

The grievant served as a Corrections Officer at the Ohio Reformatory for Women (ORW) in Marysville,

Ohio. This is a maximum security facility which houses female offenders. The grievant was assigned to work in ARN 4, a segregation unit housing inmates who have shown they cannot function in the general population. While there, the grievant's Corrections Captain received a number of grievances regarding disrespectful and/or abusive comments made by the grievant towards inmates.

Based on these allegations, the Corrections Captain conducted an investigatory hearing where he determined the grievant violated the Ohio Department of Rehabilitation and Corrections Standards of Employee Conduct. A pre-disciplinary hearing was conducted and the, grievant was found to have used abusive language on numerous occasions towards inmates in the ARN area. As a result, the grievant was terminated.

EMPLOYEES POSITION:

The Employer argued that the employee was removed for just cause. The grievant admitted making the derogatory and abusive statements directed towards mentally ill inmates. In addition, his retaliatory tactics directed towards the inmates escalated an already difficult work environment.

The Union's mitigation theories were unpersuasive. The grievant's prior temporary experience in the work area should have put him on notice that it would not be an easy tour of duty. In addition, the grievant's prior human relations training should have sensitized him to proper conduct requirements. Finally, the grievant could have relieved his stress by asking his supervisor for assistance, a transfer or counseling intervention.

THE UNION'S POSITION:

The Union argued that the grievant was not removed for just cause. The grievant should be viewed as a victim rather than a willing participant. A search of an inmate's cell precipitated a rash of inmate grievances against the grievant. These unsubstantiated allegations were used to support the removal action.

The grievant attempted to justify making the statements. He had become agitated because the inmates usually abused him to the point where he had to retaliate. He attempted to resolve the problem by writing reports and informing his supervisors about his work related problems. In addition, the contents were simply "shop talk", common language used everyday to get the job done. Finally, the discipline was neither progressive nor commensurate with the offense.

ARBITRATOR'S OPINION:

The employer proved that the grievant violated management's rule by using threatening, intimidating, coercing and abusive language toward a number of inmates. The comments became even more egregious when uttered against inmates on psychotropic drugs who suffered a wide range of mental disorders. These statements clearly posed a threat to the security of the staff and inmates because of the strong potential for disruption.

There was no indication that the inmates attempted to "set up" the grievant. Not only did he admit making the statements but Union witnesses corroborated the inmates accusations. The "shop talk" argument was equally unconvincing because not one Union witness would qualify the statements as appropriate. Finally, the grievant failed to take any actions such as such as asking for a transfer or participating in the Employee Assistance Program.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION
PROCEEDING UNDER THE AUSPICES OF
THE STATE OF OHIO AND
THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO,
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION,
OHIO REFORMATORY FOR WOMEN

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 11, AFSCME, AFL-CIO
GRIEVANT: CHARLES HIGHTOWER
GRIEVANCE NO.: 27-19-(2-14-95) 645-01-03

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: November 3, 1995

Appearances

For the Employer

Pat Mogan, Second Chair
William McKinnon, LRO
Allison Linn-Mowery, Psychologist II
Christine Money, Warden
Terry Tibbals, Captain
David Burrus, Advocate

For the Union

Charles Hightower, Grievant
Roxanna Gootee, Correction Officer
Tonya Campbell, Correction Officer
Becky Gray, Correction Officer
Theresa Sadler, Correction Officer
Tim Roberts, Chief Steward
Don Sargent, Staff Representative
Dave Justice, Advocate

Introduction

This is a proceeding under Article 25-Grievance Procedure, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration/Mediation Panels of the Agreement between the State of Ohio, Ohio Department of Rehabilitation and Correction, Ohio Reformatory for Women., hereinafter referred to as the "Employer," and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the "Union," for the period of March 1, 1994 through February 28, 1997, (Joint Exhibit 1).

The Arbitration hearing was held on August 29, 1995 and September 7, 1995 at the Ohio Reformatory for Women, Marysville, Ohio. The parties had selected David M. Pincus as the Arbitrator. At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both parties indicated they would not submit briefs.

JOINT STIPULATIONS

1. Was the removal of Charles Hightower for just cause? If not, what shall the remedy be?
2. The grievant's date of hire was 3/9/92.
3. The grievant's date of removal was 2/6/95.
4. The grievant had no active discipline on record at the time of his removal.
5. The grievant acknowledged receipt of the Standards of Employee Conduct.
6. Management stipulates to the Union's copy of the grievant (sic) investigatory interview. The Union stipulates to management's copy of the grievant's investigatory interview. Both parties agree to enter these copies as joint exhibits.
7. The grievant's bid to work in ARN 4 was effective 8/21/94. The grievant was pulled from the post on 10/24/94.
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PERTINENT 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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care custody of the State Of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

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. a fine in the amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
- D. one or more day(s) suspension(s);
- E. 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 (sic) performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonable possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a disciplinary grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for

withholding of fines.

(Joint Exhibit 1, Pg. 68-69)

CASE HISTORY

The Ohio Reformatory for Women (ORW) is located in Marysville, Ohio. It is a maximum security facility, and only one of three facilities in the state which incorporates female offenders. This multi-level institution provides a number of security functions, which include in pertinent part: long term isolation, administrative and local control, the housing of severely mentally ill inmates and those on psychotropic medications and in-patient residential treatment. Charles Hightower, the Grievant, served as a Correction Officer for approximately three (3) years prior to his removal.

The series of incidents in dispute took place while the Grievant was assigned to work in ARN 4; an assignment he had successfully bid on or about August 21, 1994. (Joint Exhibit 17). ARN 4 serves as a segregation unit housing inmates who have shown they cannot function in the general population. They require extensive supervision and continuous care to ensure their own safety and the safety of other inmates. These inmates are housed in this unit for a variety of reasons, some of which include: assaultive behaviors toward others; inability to comply with rules and regulations and related mental health deficiencies, such as suicidal ideation and self mutilation for attention purposes.

Terry Tibbals, Correction Captain, testified to the events which resulted in the Grievant's removal. As a duty officer in ARN 4 he received a number of kites and grievances authored 'by inmates in the area regarding disrespectful and/or abusive comments made by the Grievant toward inmates. Based on these allegations and subsequent statements gathered during the investigation, Tibbal felt an investigatory hearing seemed in order.

the Grievant regarding the contested allegations. The Grievant admitted using abusive language toward inmates on numerous occasion, even though he stated his comments were a consequence of continuous disrespect and harassment. Tibbal concluded the Grievant had engaged in a series of violations contained in the Ohio Department of Rehabilitation and Correction Standard of Employee Conduct (Joint Exhibit 2).

As a consequence of Tibbal's investigation, a Pre-Disciplinary Hearing was held on January 6, 1995. The hearing dealt with potential violations of the following Standards of Employee Conduct:

Rule #40: Any act or commission not otherwise set forth herein which constitutes a threat to the security of the institution, its staff or inmates.

Rule #44: Threatening, intimidating, coercing, or use of abusive language toward an inmate, furlougee, parolee, or probationer.

The Grievant's admissions, the nature of the ARN 4 area and the types of inmates housed there led the Hearing Officer to recommend discipline (Joint Exhibit 2).

On January 13, 1995, the Grievant was terminated. The Notice of Disciplinary Action contained the following relevant particulars:

XXX

"Pursuant to the authority granted in the Collective Bargaining Agreement between the State of Ohio and AFSCME this letter is to advise you that you are to be Terminated from the position of Correction Officer effective:

You are to be Terminated for the following infractions: violation of Standard of Employee Conduct Rules #40, any act or commission not otherwise set forth herein which constitutes a threat to the security of the institution, its staff, or inmates, and #44, Threatening, intimidating, coercing, or use of abusive language

toward an inmate, furlougee, parolee or probationer.

C.O. Hightower used abusive language, on numerous occasions, towards inmates in the ARN 4 area.

C.O. Hightower used abusive language, on numerous occasions, towards inmates in the ARN 4 area.”

XXX (Joint Exhibit 2)

On February 6, 1995, the Grievant filed a grievance protesting the imposed discipline. He claimed the Employer removed him without just cause (Joint Exhibit 3).

A Step 3 hearing was held on March 9, 1995. The Employer denied the grievance based on the Grievant's admissions and refused to give the Grievant's various mitigation theories any considerable weight (Joint Exhibit 2).

The parties were unable to resolve the disputed matter. Neither party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer posits the removal was, indeed, for just cause. Evidence and testimony introduced at the hearing clearly support the alleged Rule #40 and Rule #44 violations. As such, the discipline imposed was proper and commensurate with the articulated offenses.

In terms of proofs, the Grievant's own admissions at the various stages of the grievance procedure and the arbitration hearing support the removal. The Grievant's statements were directed toward mentally ill inmates who were segregated for safety and security reasons. The comments, themselves, were derogatory and abusive in violation of Rule #40. Rule #44 was violated as a consequence of the Grievant's conduct. His retaliatory tactics escalated an already difficult work environment which caused a threat to the security of the institution, its staff and inmates.

conduct deemed appropriate by the Employer. He knew, or should have known, an assignment in ARN 4 would not be an easy tour of duty. Prior to his successful bid, he was temporarily assigned to ARN 4. And yet, with full knowledge of the mental condition of those incarcerated in ARN 4, he bid into the area even though he had a number of available assignment alternatives.

Neither the Grievant nor the Union properly rebutted the Grievant's prior human relations training which should have sensitized him to proper conduct requirements. A training log (Joint Exhibit 16) introduced by the parties indicates the Grievant was trained in the following areas: inappropriate supervision, cross-gender supervision, cultural sensitivity, mental health and stress management. As such, the Grievant disregarded the training he received and engaged in behavior which the Employer would not condone nor perpetuate.

The mitigation theories proposed by the Union were viewed as unpersuasive. Stress is a constant circumstance within a corrections environment and must be managed. Obviously, retaliating to disparaging remarks uttered by mentally ill inmates is an improper stress management option. If, in fact, the Grievant was experiencing problems managing the inmates in ARN 4, he could have engaged in other positive options. He never went to his supervisor asking for assistance, a transfer or any counseling intervention. Instead, he engaged in self help and only sought stress related counseling after his eventual removal. As such, the medical documentation, (Union Exhibits 4(A) and (B)) provided at the hearing is viewed as a pretext used to veil the unwarranted behavior.

The Union's Position

The Union opines that the Grievant was not removed for just cause. It questions whether

The Union's Position:

The Union opines that the Grievant was not removed for just cause. It questions whether substantive

proof was provided supporting the removal. Also, the propriety of the imposed discipline without any thought of progressive discipline was viewed as a substantial procedural defect.

The Grievant should be viewed as a victim rather than a willing participant in the events leading to his removal. In the Union's opinion, a search of inmate Davis' cell on August 21, 1994 precipitated the rash of inmate grievances against the Grievant. The Grievant authored a number of conduct reports which identified Davis as disrespectful during the course of the search. She, in turn, initiated a number of complains dealing with the Grievant's conduct. She, moreover, encouraged other ARN 4 inmates to write reports containing statements dealing with the Grievant's alleged inappropriate conduct. These allegations, although unsubstantiated, were used to support the removal action even though they were clearly authored in and attempt to set up the Grievant.

The Grievant admitted to malting some of the alleged statements but several justifications were offered. The Grievant became aggravated because the inmates verbally abused him to the point he had to retaliate, as a consequence of the stress. He did attempt to address the problem in a constructive fashion by writing conduct reports and informing his supervisors about the problems he was having in ARN 4. None of these efforts, however, caused his situation to change. Much of the language attributed to the Grievant might seem harsh, unwarranted and abusive outside a corrections facility. The comments admitted by the Grievant, however, should be viewed as "shop talk," common language used everyday within the workplace to get the job done.

To support the stress theory, the Union presented evidence and testimony regarding the Grievant's medical condition. The Grievant provided doctors' statements (Union Exhibits 4(A) and (B)) documenting his counseling efforts.

The Employer violated Section 24.02 because discipline was not progressive and commensurate with the offense. Progressive discipline should have been applied because corrective measures did not appear to be futile. The Grievant had no prior history of imposed discipline, a reasonable work performance history and acknowledged his mistakes regarding his misconduct. Within this set of circumstances, progressive discipline principles were, indeed, violated.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a complete review of the record including pertinent contract provisions, it is this Arbitrator's opinion that the Employer had just cause to remove the Grievant. The Grievant's actions, and own admissions, clearly support the removal based on violations dealing with Rule #40 and Rule #44.

The Employer proved, regardless of the standard employed, that the Grievant violated Rule #44 by using threatening, intimidating, coercing and abusive language toward a number of inmates. A sample of the utterances admitted by the Grievant, gathered during the course of the investigation and discussed at the hearing, clearly supports the nature of the actions engaged in. These statements include in pertinent part:

"Miss Gannon, your herpes are flaring up;"

To inmate Barringer, who had a noose in her hand, "go ahead and do it, so I could see if you really intended on doing it;"

That inmate Gannon should clean out her nasty underwear that were in the sink; To inmate Kitchen, "your father thought you were" after she said, "I'm not a play toy."

"Don't talk to her (inmate R. Davis) she wants to be a man," to Nurse Houseman about inmate R. Davis, because Davis was picking on the nurse. He also continued on to say that Davis was "confused," a "dyke," and told male jokes in front of inmate Davis.

"Your mama's husband was a pimp," to inmate Veley.

"You (inmate C. Dickerson) need to douche and take a bath," for "safety and hygiene reasons."

"You're a flea on a dog's ass," to inmate C. Adkins because she wouldn't be quiet and was talking about staff.

"When I say something about your mama, don't be writing me up" to inmates after they disrespected him.

Calling inmates E. Wells and S. Watson "Amazon fullbacks" because "they are Amazon fullbacks, big, gigantic women."

(Joint Exhibit 3)

Such comments would be viewed as totally inappropriate if uttered at members of the general population. They become even more egregious when uttered against a specialized segment of the population housed in ARN 4 consisting of inmates on psychotropic drugs and suffering a wide range of mental disorders. The on-going disturbances that the Grievant's retaliatory comments engendered clearly posed a threat to the security of ARN 4 staff and its inmates. I am convinced that the incident dealing with the search of Davis' cell on October 12, 1994 serves as a prime example of the negative impact engendered in ARN 4's environment caused by the Grievant's repugnant interactive style. Correction Officer Theresa Sadler testified that the Grievant's manner in dealing with inmates caused "a problem for her" because "he stirred up the area after one of his tours." Becky Gray, another Correction Officer, also testified that she had witnessed the Grievant "go over the line" on a number of occasions. He had, moreover, said things that "she would not say." As such, the inmates' statements are viewed by me as substantiated and not contrived for retaliation purposes.

As a consequence of the above review, any reasonable person would not view the allegations raised by the inmates as an attempt to "set-up" the Grievant. Notwithstanding the Grievant's strained justifications for these utterances, he admitted making these statements. His general actions, moreover, were supported by the Union's own witnesses. Also, the Union attempted to pin the October 12, 1994 incident as the triggering event for the series of allegations raised by the inmates. The record, however, fails to support this conclusion. Many of the complaints used to support the removal took place prior to October 12, 1994.

The "stop talk" argument proposed by the Union is viewed as equally unconvincing. Not one witness, regardless of their managements or Union affiliation, viewed these utterances or comments as proper methods of interactive style when uttered toward any inmate; let alone one that is mentally ill or experiencing behavioral difficulties. Roxann Gootee's testimony underscored this point she stated she had never heard other staff use profanity when addressing inmates in ARN 4.

Within this context the Union's "perpetrator as victim" theory appears totally unwarranted. The Grievant was temporarily assigned to ARN 4 prior to accepting a formal assignment. As such, he was well aware of the working conditions and the nature of the inmate population. Rather than diffuse the situation he doused an existing flame knowing the predicable outcomes his actions would engender. Nothing can justify the dehumanizing harm he inflicted on these inmates. No taunt, vile comment, utterance or continued inappropriate inmate behavior justifies the actions engaged in by the Grievant.

The Grievant could have engaged in alternative actions if he felt the conditions in ARN 4 became overwhelming. He had previously filed conduct reports (Joint Exhibits 6-9) on the inmates involved in the present dispute, and could have continued to do so in accordance with policy and practice (Joint Exhibits 10 and 11). The Grievant could have asked for a transfer out of ARN 4 which the Collective Bargaining Agreement (Joint Exhibit 1) provides. The Grievant, moreover, could have elected to participate in the Employer Assistance Program contained in Article 9 (Joint Exhibit 1). He did none of these things and now wishes this Arbitrator to give credence to a stress related theory as a form of justified mitigation. In this instance, I am unwilling to mitigate the imposed penalty based on the evidence and testimony presented at the hearing. The medical documentation (Union Exhibits 4(A) and (B)) provided is viewed as defective and

lacking sufficient specificity to support the urging of the Union. The Grievant's credibility and "last minute" shallow recanting of his conduct further preclude any potential modification of the imposed penalty.

Section 24.02 was not violated by the Employer. The circumstances surrounding the removal, especially the inmates involved and the incarceration area, indicate the Grievant engaged in **malum in se** types of misconduct. Here, in my judgment, corrective measures appear to be futile, and thus, a suspension component prior to removal does not appear justified by the record. The Grievant's lack of "actual" remorse as evidenced by his testimony and demeanor at the hearing indicate he is unfit to fill the role of Correction Officer within the State's prison system.

AWARD

The grievance is denied.

Dr. David M. Pincus - Arbitrator
November 3, 1995