

ARBITRATION DECISION NO.:

608

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Correction

Chillicothe Correctional Institution

DATE OF ARBITRATION:

May 10, 1996

DATE OF DECISION:

June 7, 1996

GRIEVANT:

Steven K. Heiss

OCB GRIEVANCE NO.:

27-03-(95-01-26)-0502-01-03

ARBITRATOR:

James M. Mancini

FOR THE UNION:

David Justice

FOR THE EMPLOYER:

Brian Walton

KEY WORDS:

Removal

Just Cause

Burden of Proof

Criminal Charges

Drug Trafficking

Off-Duty Conduct

Nexus

ARTICLES:

Article 24 - Discipline

§ 24.01 - Standard

FACTS:

The grievant was employed for approximately seven years at the Chillicothe Correctional Institute, which is a facility operating under the Department of Rehabilitation and Correction. For most of those seven years, the grievant was classified as a plumber; however, just a few days prior to the incidents that led to his removal, the grievant was classified as a Correction Officer.

On the evening of November 21, 1994, the grievant was driving with a passenger in the south end of

Chillicothe and was stopped by Officer Roger Moore of the Chillicothe Police Department for failing to come to a complete stop at a stop sign. After checking the grievant's driver's license, the officer discovered that the license had been revoked. While Officer Moore was preparing to arrest the grievant for driving without a license, another officer, also of the Chillicothe Police Department, arrived at the scene. She proceeded to the passenger side of the vehicle, where the door was open, and discovered a plastic bag lying in plain view. The bag allegedly contained an off-white substance, which was later determined to be cocaine. The passenger was arrested for felony drug abuse, and both he and the grievant were transported to the county jail.

In his initial statement to the police, the passenger denied that he was involved in any drug dealings; however, in a second statement, he admitted that the grievant had approached him in order to purchase a twenty dollar piece of crack cocaine. The grievant acknowledged that the passenger's statement was true and admitted that he asked if the passenger had a twenty dollar piece of crack. The grievant was charged with Aggravated Trafficking in Drugs.

Management at the Chillicothe Correctional Institute learned of the grievant's arrest, and the grievant was immediately placed on administrative leave pending an investigation into his conduct. A pre-disciplinary conference was held on November 28, 1994. On January 13, 1995, the grievant was removed for violations of the Standards of Employee Conduct. The Warden of the facility stated that he decided to terminate the grievant because he believed that the grievant's misconduct compromised his ability to supervise inmates. The Warden contended that the grievant lost the respect of the inmates and brought discredit to the correctional institution as a result of being charged with drug trafficking. The grievant alleged that he had been deceived by Officer Moore when signing the statement which confirmed that he had approached the passenger seeking a twenty dollar piece of crack. The grievant further denied having any knowledge of the passenger's drug activities or the presence of crack in the car.

In August, 1995, the criminal charges against the grievant were dismissed by Municipal Court Judge Nicholas Holmes, Jr. Judge Holmes determined that the contraband found in the grievant's car had been improperly seized by the police and that the statement given by the grievant was not freely and voluntarily given.

Another witness produced by the employer at the arbitration hearing was a detective working for the Ross County Sheriff's Department. The detective claimed to have seen the grievant entering known crack houses on the south side of Chillicothe in the past. He also indicated that the grievant had offered to purchase fifty dollars of crack from him during a phone conversation which occurred while the detective was working undercover. The grievant denied that he ever spoke to the detective about a purchase of crack and also denied that he ever visited crack houses in the south end of the city.

EMPLOYER'S POSITION:

The employer contended that there was just cause to discharge the grievant from his position as a Correction Officer for engaging in serious off-duty misconduct. The grievant's actions allegedly violated Department Rule 38 because his reputation had been ruined to such an extent that he could no longer serve as a role model for convicted felons. Therefore, there was clearly a nexus established between the grievant's off-duty misconduct and his ability to carry-out his duties as a Correction Officer. The employer also contended that the criminal and administrative proceedings held in this case were separate and should be viewed as such. Furthermore, the conclusion reached by the court should not effect the consideration of the testimony and evidence produced by the employer. The employer emphasized that the Arbitrator has the duty to independently review the charges and evidence against the grievant. The evidence which was produced in this case clearly showed that the grievant was involved in drug trafficking and, as such, the grievant's discharge was appropriate.

UNION'S POSITION:

The Union argued that the employer did not conduct an independent investigation to show that the alleged misconduct actually occurred but relied solely on the grievant's arrest as a basis for his discharge. Discipline based only on an arrest does not meet the just cause standard. Moreover, because the court

dismissed the Aggravated Drug Trafficking charge that had been brought against the grievant, the arrest in this case did not in any way show that the grievant had engaged in any serious off-duty misconduct. In addition, the Union also argued that convictions, not arrests, are considered for initial employment at the Chillicothe Correctional Institute; therefore, convictions, not arrests, should be the standard for continued employment. Because there was no evidence of any wrongdoing, and because the criminal charges against the grievant had been dismissed, the Union maintained that the grievant had been removed without just cause and should be reinstated with full backpay and benefits.

ARBITRATOR'S OPINION:

The Arbitrator held that the court's ruling in dismissing the criminal charges against the grievant was not controlling in the removal dispute. According to the Collective Bargaining Agreement, the arbitrator is obligated to independently review all relevant evidence presented pertaining to the grievant's discharge and is not bound by the constitutional safeguards that govern criminal cases. Consequently, the court's dismissal was not controlling upon the arbitrator in this case.

The Arbitrator further stated that in cases such as these the employer has the burden of establishing by clear and convincing evidence that the grievant did engage in the alleged misconduct. Moreover, because the misconduct occurred away from the work place, the employer also had the burden of showing that there was a meaningful nexus between the misconduct and the grievant's employment.

Finally, the Arbitrator held that the statement of the passenger in the grievant's car, the statement of the grievant, and the testimony of the detective from the Ross County Sheriffs Department outweighed the grievant's later denial of his statement and accusation of police coercion. He determined that there was clear and convincing evidence which showed that the grievant had been involved in the alleged misconduct and also concluded that a reasonable nexus between the grievant's off-duty conduct and his job as a correction officer had been established. The Arbitrator, therefore, upheld the removal.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION
BETWEEN

**STATE OF OHIO, DEPARTMENT OF
REHABILITATION AND CORRECTION**

AND

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 11
AFL-CIO**

JAMES M. MANCINI, ARBITRATOR

GRIEVANT:

STEVEN K. HEISS

GRIEVANCE NO.:

27-03-950126-0502-01-03

OPINION AND AWARD

APPEARANCES:

FOR THE UNION:

David Justice
Steven K. Heiss
Barry Kellough

FOR THE EMPLOYER

Brian Walton
Michael P. Duco
Barbara Denton

SUBMISSION

This matter concerns a grievance filed on January 23, 1995 by Steven K. Heiss. The grievant alleged that he had been improperly discharged in violation of the Collective Bargaining Agreement between the State of Ohio (hereinafter referred to as the Employer) and the Ohio Civil Service Employees Association, AFSCME, Local 11 (hereinafter referred to as the Union). The arbitration hearing was held on May 10, 1996 in Chillicothe, Ohio. The parties stipulated that the grievance is properly before this arbitrator for his consideration. The parties submitted closing arguments at the hearing and waived their right to submit post-hearing briefs.

BACKGROUND

The grievant, Steven K. Heiss, was employed for approximately seven years at the Chillicothe Correctional Institution. For most of the seven years, the grievant was classified as a plumber. However just a few days prior to the incidents which led to his removal, the grievant had requested and was granted the position of a Correction officer.

The incident which led to the grievant's discharge occurred on the evening of November 21, 1994. Officer Roger Moore of the Chillicothe Police Department testified that while he was performing his routine patrol, he first noticed a vehicle driven by the grievant in the south end of town which is a known high drug area. He subsequently saw the grievant's vehicle fail to come to a complete stop at a stop sign. Officer Moore proceeded to stop the vehicle which had two occupants, the grievant as well as a passenger, Jason Dyer. After checking the grievant's drivers license, Officer Moore discovered that the license had been revoked. He then placed the grievant under arrest for driving without a license. Officer Moore then decided to tow the grievant's vehicle and asked Mr. Dyer to exit the vehicle.

While Officer Moore was preparing to arrest the grievant, officer Twila Goble arrived on the scene. officer Goble testified that she proceeded to the passenger side of the vehicle which had the door open. She stated that she looked in the vehicle and discovered a plastic bag which was in plain view under the front passenger seat. The bag contained an off-white substance which was later determined to be cocaine. At that point, Mr. Dyer was arrested for felony drug abuse. Both the grievant and Mr. Dyer were then transported to the county jail.

Officer Moore stated that when he first took a statement from Mr. Dyer, he denied that he was involved in any drug dealings. However in a second statement provided by Mr. Dyer, he admitted that the grievant had approached him for a twenty dollar piece of crack cocaine. Mr. Dyer acknowledged that he was the person who threw the crack cocaine under the front passenger seat.

Officer Moore stated after acquiring an admission from Mr. Dyer, that he approached Mr. Heiss for a statement. The grievant acknowledged that Mr. Dyer's statement was true and then gave a written statement that concurred with Mr. Dyer. In his statement, the grievant admitted that he drove up to Mr. Dyer and asked

him if he had a twenty dollar piece of crack. After Mr. Dyer got into the grievant's car, Officer Moore stopped him and arrested the grievant for not having a proper driver operator's license. The grievant was charged with Aggravated Trafficking in Drugs.

Management at the Chillicothe Correctional Institute learned of the grievant's arrest and conducted a preliminary investigation. News of the grievant's arrest was also reported in the local newspaper. Warden Fred McAninch testified that when he learned that the grievant had been charged with Aggravated Trafficking in Drugs, he immediately placed the grievant on administrative leave pending an investigation into his conduct. A predisciplinary conference was held on November 28, 1994. On January 13, 1995, the grievant was removed for violations of the Standards of Employee Conduct.

Warden McAninch testified that he decided to terminate the grievant because he believed that the grievant's misconduct compromised his ability to supervise inmates. It was pointed out that many of the inmates are incarcerated for substance abuse problems. Warden McAninch stated that if a correction officer is charged with drug possession like the grievant was in this case, he loses all respect of the inmates and obviously could no longer serve as a positive role model for them. The Warden further indicated that the grievant had brought discredit to the correctional institution by becoming involved in drug trafficking.

The grievant testified that he never asked Mr. Dyer for a twenty dollar piece of crack cocaine. The grievant stated that he knew Mr. Dyer through an introduction by a co-worker and merely picked him up on the evening in question when he saw him standing on the side of the road. The grievant indicated that he did not know that Mr. Dyer was a drug dealer. The grievant also stated that he never saw the crack cocaine which was later found under the passenger seat in his car.

The grievant stated that he was deceived by Officer Moore into signing a statement indicating that he had asked Mr. Dyer for a twenty dollar piece of crack cocaine. The grievant stated that he had been in a holding cell for about two hours at the time that he signed the statement and he was willing to do anything to get out of jail. According to the grievant, Officer Moore showed him the second statement which he had obtained from Mr. Dyer who stated that the grievant had attempted to purchase a twenty dollar piece of crack cocaine from him. Officer Moore then told the grievant that if he signed the statement implicating Mr. Dyer, he would not be charged with selling drugs. The grievant chose to sign the statement which he gave police only with that understanding. He did not realize that he would subsequently be charged with trafficking in drugs.

In August, 1995, the criminal charges against the grievant were dismissed by municipal Court Judge Nicholas Holmes, Jr. The court acted on a motion to suppress the evidence which had been filed by the grievant's attorney. In his ruling, Judge Holmes determined that the contraband found in the grievant's car had been improperly seized by the police. The court further held that the statements given by the grievant and Mr. Dyer were not freely and voluntarily given. The court stated that "both statements were obtained by improper inducement in a coercive atmosphere created by officer Moore."

Another witness produced by the Employer was Detective Randy Bliss of the Ross County Sheriff's Department. Detective Bliss stated that he has personally observed the grievant on numerous occasions going in and out of known crack houses in the south end of town. He also indicated that he has seen Mr. Heiss hanging out with individuals who are known drug users. Detective Bliss described one incident which occurred in 1993 when he was working undercover in investigating drug trafficking. He stated that he was accidentally paged from a pay phone by someone who wanted to purchase crack cocaine. He later identified the grievant as the one he spoke to on the phone who had offered to purchase fifty dollars of crack. The grievant was not arrested at the time because police moved in prior to an actual purchase being completed. The grievant acknowledged at the time of the incident that if he was charged with drug abuse his position at the correctional institution would be jeopardized. The grievant indicated that he would become an informant for the sheriff's office. The individual who was with the grievant on the night in question was a known cocaine drug dealer.

The grievant denied that he ever spoke to Detective Bliss about a purchase of crack cocaine. He also stated that he informed the officer who questioned him on the evening of the incident that he did not know what the other individual who was with him was doing. The grievant generally denied that he ever visited crack houses in the south end of the city.

Mr. Barry Kellough, a correction officer and union steward, testified that the mere fact that an individual is

arrested for off-duty misconduct has not been used as grounds for termination in the past. He stated that it was fairly common for employees who had arrest records to still be working as correction officers at the prison. Mr. Kellough cited four individuals with arrest records who are still employed at the Chillicothe Correctional Institution.

POSITIONS OF THE PARTIES

POSITION OF THE EMPLOYER

The Employer contends that it had just cause to discharge the grievant from his position as Correction Officer for engaging in serious off-duty misconduct. The evidence clearly showed that the grievant had been arrested and charged with Aggravated Trafficking in Drugs. Such misconduct impaired the ability of the grievant to carry-out his duties as a correction officer and as such his discharge was warranted.

The Employer refers to the incident on November 21, 1994 when the grievant was arrested and charged for trafficking in drugs. Specifically, the evidence showed that the grievant was charged for having attempted to purchase crack cocaine. Subsequently, the grievant knowingly admitted that he attempted to purchase a twenty dollar piece of crack cocaine from Mr. Dyer. Moreover, there was additional evidence from local law enforcement indicating that the grievant had been seen on numerous occasions in and around known drug houses in the south end of the city.

The grievant's drug related misconduct clearly violated various departmental work rules. It is apparent that his actions violated Rule 38 in that he would be impaired from carrying out his duties as a correction officer. The Department of Rehabilitation and Correction cannot be expected to permit a drug abuser to supervise inmates, many of whom are convicted drug offenders. The grievant's reputation has been ruined to such an extent that he could no longer serve as a role model for convicted felons. Thus there was clearly a nexus established between the grievant's off-duty misconduct and his ability to carry-out his duties as a correction officer.

The Employer disputes the Union's contention that the grievant was improperly discharged here because the criminal charges brought against the grievant were subsequently dismissed by the court. The Employer contends that the criminal and administrative proceedings held in this case are separate and should be viewed as such. The conclusion reached by the court should not effect the consideration of the testimony and evidence produced by the Employer in this case. Under the terms of the parties' agreement, the arbitrator has the duty to independently review the charges and evidence against the grievant which have been produced. That evidence which includes the testimony of several law enforcement officers clearly shows that the grievant was involved in drug trafficking and as such his discharge should be upheld.

POSITION OF THE UNION

The Union contends that there was no just cause for the discharge imposed on the grievant. The evidence showed that the Employer relied solely on the grievant's arrest as a basis for his discharge. However discipline based on an arrest only does not meet the just cause standard.

The Union maintains that the Employer used the grievant's arrest and his subsequent statements provided to police as the sole basis for his discharge. However, the court ruled that the statements obtained by Police Officer Moore were not freely given and further that the contraband found in the grievant's vehicle was improperly seized. As a result, the court dismissed the Aggravated Drug Trafficking charge which had been brought against the grievant. Thus the grievant's mere arrest in this case did not in any way show as claimed by the Employer that he had engaged in serious off-duty misconduct which warranted his discharge.

The Union points out that the Employer did not conduct an independent investigation to show that the misconduct alleged actually occurred. Again, the Employer relied solely on the grievant's arrest. The Union established that convictions, not arrests, are a consideration for initial employment at the Chillicothe Corrections Institution. Therefore convictions, not arrests, should also be the standard for continued employment. The grievant simply was not guilty of violating the rules of conduct as charged by the Employer. The Union requests that the grievant be reinstated to work as a correction officer with all lost wages and seniority.

ISSUE

Was the discharge of Steven K. Heiss for just cause, if not, what shall the remedy be?

OPINION

The first issue which must be addressed is what effect does the court's dismissal of the drug trafficking charge brought against the grievant have in the instant matter. The court did hold that the crack cocaine found in the grievant's vehicle had been improperly seized by the police and the grievant's incriminating statement had not been voluntarily given. The Union argues that since the evidence obtained by the police against the grievant regarding drug trafficking has been suppressed by the court, this arbitrator should likewise be guided by the court's ruling in assessing the evidence presented by the Employer. Moreover, the Union submits that a discharge on the basis of an arrest standing alone is clearly improper.

After carefully reviewing the arguments of the parties, this arbitrator has determined that the court's ruling in dismissing the criminal charges against the grievant is not controlling in the instant matter. Pursuant to the parties' Collective Bargaining Agreement, this arbitrator is obligated to independently review all relevant evidence presented pertaining to the grievant's discharge. There are obvious distinctions between a labor arbitration proceeding and one involving a criminal prosecution. Because of the clear distinctions, an arbitrator is not generally bound by the constitutional safeguards that govern criminal cases. As such, the court's dismissal of the criminal proceeding against the grievant is not controlling upon this arbitrator in the instant dispute. The conclusion of the court does not in any way preclude this arbitrator from considering the testimony and evidence presented by the Employer in the instant proceeding.

The grievant was discharged based on allegations that he was guilty of trafficking in drugs. In a case such as this, the Employer has the burden of establishing by clear and convincing evidence that the grievant did engage in the alleged misconduct. Moreover because the misconduct occurred away from the work place, the Employer also had the burden of showing that there was a meaningful nexus between the misconduct and the grievant's employment as a correctional officer.

This arbitrator finds from the record before him that there is clear evidence that the grievant engaged in serious off-duty misconduct on the evening of November 21, 1994. The evidence convincingly demonstrates that the grievant attempted to purchase crack cocaine from a local drug dealer at that time. As attested to by Officers Moore and Goble, a plastic bag containing crack cocaine was discovered under the front passenger seat of the grievant's vehicle. Significantly, Jason Dyer, the passenger, later confessed in a written statement to police that the grievant had asked him for a "twenty piece of crack cocaine..." Although Mr. Dyer did not testify at the arbitration hearing, his statement regarding the grievant's attempted drug purchase is considered reliable by this arbitrator. Officer Moore testified that he advised Mr. Dyer of his rights, including the right to remain silent, prior to taking a statement from him. It should be noted that Mr. Dyer initially denied any drug deal but when shown twenty dollar bills which had been found on his person along with a beeper commonly used by drug dealers, he agreed to give his statement which implicated the grievant. Moreover in his statement, Mr. Dyer acknowledged that he was waiving his rights and willingly submitting his statement.

There is also the self-incriminating statement which the grievant furnished to the police after his arrest. In his statement to police, the grievant admitted that he asked Mr. Dyer "if he had a twenty dollar piece of crack..." In effect, the grievant admitted to attempting to purchase crack cocaine from a known drug dealer. Again Officer Moore testified that he advised the grievant of his rights prior to obtaining a statement from him. The grievant like Mr. Dyer signed a waiver of his rights which indicated that he was willingly making his statement. Based on the credible testimony offered by Officer Moore, this arbitrator finds that the grievant's self-incriminating statement was freely given by the grievant and clearly shows that he attempted to make an illegal drug purchase on the evening of November 22, 1994.

During his testimony, the grievant denied that he attempted to purchase crack cocaine on the evening in question. The grievant claimed that he was not a drug abuser. He also stated that he was coerced into giving his statement to the police. However, this arbitrator cannot credit the grievant's testimony for several reasons. First, the grievant's testimony was completely contradicted by that of two reliable police officers as well as the incriminating statement provided to police by Mr. Dyer. The credible testimony of Officer Moore shows that neither Mr. Dyer nor the grievant were coerced into making their self-incriminating statements.

Officer Goble testified that she discovered cocaine in a plastic bag in plainview under the front passenger seat of the grievant's vehicle. The grievant's statement that he merely happened to run into Mr. Dyer on the evening in question simply lacks credibility. If the grievant barely knew Mr. Dyer, why would he stop to pick him up in an area of the city which was known for drug transactions. From all indications, the grievant knew Mr. Dyer was a known crack dealer and he asked to purchase crack cocaine from him on the evening in question.

Most significantly, this arbitrator cannot credit the grievant's claim that he has not abused drugs because of the testimony offered by Detective Bliss of the Ross County Sheriff's Department. Detective Bliss stated quite clearly that he has personally observed the grievant on numerous occasions going in and out of known crack houses in the south end of town. He described one incident in particular which occurred in 1993 when he was working undercover investigating drug trafficking. He stated that someone mistakenly contacted him on the phone in order to purchase fifty dollars of crack cocaine. The caller was identified as being the grievant. Without question, the evidence clearly indicates here that the grievant has been involved with drug trafficking in the past. For this reason, this arbitrator cannot credit the grievant's denial testimony in this case.

Thus the evidence presented clearly shows that the grievant engaged in serious off-duty misconduct by attempting to purchase crack cocaine from a known local drug dealer. It was also shown that there was a reasonable nexus between the grievant's misconduct and his job as correctional officer. As attested to by the Warden, the grievant's off-duty misconduct made it impossible for him to effectively carry-out his duties in supervising inmates. Many of the inmates are incarcerated for drug related offenses. It is obvious that someone like the grievant who likewise commits a serious drug offense cannot possibly serve as a role model for convicted felons. Moreover as attested to by Warden McAninch, the Employer has a duty to prevent the possibility of drugs being brought into the correctional institution. Considering this responsibility, it is apparent that the grievant's serious off-duty misconduct has effectively made him unfit to continue to hold the position of correction officer.

Therefore, this arbitrator has concluded that a reasonable nexus was established between the grievant's off-duty misconduct and his job as correction officer. The Employer demonstrated that the grievant's misconduct fell outside the range of acceptable behavior. His misconduct violated various departmental rules including Rule 39 by impairing his ability to carry-out his duties as a correction officer. The grievant's misconduct also violated Rule 41 in that it brought discredit to the Employer. Both of these rule violations allow for removal on the first offense. Thus this arbitrator must find that the serious off-duty misconduct engaged in by the grievant in this case certainly warranted his termination.

AWARD

The grievance is denied.

JAMES M. MANCINI, ARBITRATOR