

ARBITRATION DECISION NO.:

640

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Rehabilitation Services Commission

DATE OF ARBITRATION:

May 12th and 19th, 1997

DATE OF DECISION:

July 12, 1997

GRIEVANT:

Michael Coates

OCB GRIEVANCE NO.:

29 01 (96 04 26) 0035 01 09

ARBITRATOR:

Nels E. Nelson

FOR THE UNION:

Robert Steele Sr., Advocate
Radewe Matheny, Second Chair

FOR THE EMPLOYER:

Darla Burns, Advocate
Shirley Turrell

KEY WORDS:

Commensurate Discipline
Criminal Charges
Disparate Treatment
Drug Trafficking
Drug Possession on State
Property
Just Cause
Progressive Discipline
Removal
Sign in/Sign out Policy
Timely Discipline

ARTICLES:

Article 24 – Discipline
 §24.01 --Standard
 §24.02 –Progressive Discipline
 §24.03 – Arbitration Procedures

§24.05 – Imposition of Discipline

FACTS:

The grievant worked for the Rehabilitation Services Commission (RSC) for over twenty years and as a Storekeeper 2 for nearly that entire period. On March 31, 1995, the highway patrol arrested the grievant in the parking lot at the RSC's Crosswinds office, and charged him with drug trafficking and possession of drugs and drug paraphernalia. The Employer placed the grievant on administrative leave on April 3, 1995. In February 1996, the grievant agreed to plead guilty to the possession of drug paraphernalia; the highway patrol dropped the other charges, and concluded its criminal investigation.

The Employer alleged that, in addition to the drug charges, the grievant failed to follow RSC sign in procedures. On April 24, 1996, the Employer terminated the grievant for gross neglect of duty and dishonesty, and on May 3, 1996, the grievant filed this grievance alleging the Employer treated him unfairly and disparately.

EMPLOYER'S POSITION:

The Employer argued that it had just cause to discharge the grievant, and that it initiated disciplinary action in a timely manner. The evidence clearly showed that the grievant possessed and sold drugs at the workplace, and that the Employer forewarned him of the possible consequences of his conduct. It pointed to the January 1992 Employee Handbook, which the grievant acknowledged receiving, that contained the Drug Free Workplace Policy, and a June 1992 amendment that specifically prohibited possession of drugs at the workplace.

The Employer presented evidence that it recommended the grievant's termination on February 28, 1996, and that his pre disciplinary meeting was on April 10, 1996. The Employer stressed that the final decision to terminate the grievant came on April 24, 1996. The Employer made the decision only 14 days after the predisciplinary meeting.

Additionally, the Employer claimed that the grievant's discharge was for just cause because the grievant failed to follow proper sign in procedures. Various witnesses testified that the grievant signed in at an earlier time than his actual arrival time on several occasions. The Employer argued that its rules regarding drugs at the workplace and signing in are reasonably related to orderly, efficient, and safe operations. The Employer also stated that it applied its rules, orders, and penalties even handedly and without discrimination, and that it made an effort to discover whether the grievant violated its rules before it terminated him. The Employer claimed that it did not have sufficient evidence to discipline other employees allegedly connected with drug activity at the workplace. Finally, the Employer claimed that the grievant's termination was reasonably related to the seriousness of his offense and his record.

UNION'S POSITION:

The Union argued that the Employer did not have just cause to remove the grievant. Although all of the witnesses testified that the grievant came and went at different times throughout the workday, the same witnesses indicated that they did not know what arrangement the grievant had with his supervisor. The Union also challenged the highway patrol's questioning of witnesses in an attempt to establish that the grievant was selling drugs at work. The witnesses testified that they were "scared, nervous, coerced, intimidated, or felt threatened," and were not read their rights. The Union also stated that the witnesses questioned some aspects of their statements to the highway patrol.

The Union contended that the Employer failed to discipline the grievant in a timely manner because the

Employer delayed taking action until well after it had full knowledge of the charges against the grievant. The Union maintained that there was no reason to delay taking action because RSC was not a witness nor a complainant in the criminal proceedings. The Union asserted that the Employer's claim that the highway patrol requested that the Employer take no action that might have jeopardized the criminal matter is a ploy to avoid the timeliness problem.

Finally, the Union argued that the grievant's termination was not justified under the Agreement. It charged that his termination was punitive rather than corrective as mandated by Section 24.05 and not commensurate with his offense as required by the CBA.

ARBITRATOR'S OPINION:

The Arbitrator found that the grievant possessed marijuana at the workplace. The highway patrol concluded that the grievant told marijuana at the workplace after receiving statements from the grievant's co-workers. One co worker testified that the grievant sold marijuana at the workplace "as long as he could remember," and that he bought marijuana from him as recently as three weeks earlier. Another testified that she purchased marijuana from the grievant on 12 occasions during the previous year. Although at least one of these witnesses stated that he/she was scared or felt intimidated when questioned by the highway patrol, none reported that there were any untruths in the respective statements.

The testimony and evidence offered by the State regarding the charge of violating the RSC sign in/sign-out policy, however, fell short of meeting the just cause standard for discipline. No specific dates were offered when the grievant was alleged to have signed in and out improperly. Furthermore, it appeared that the grievant's conduct was condoned by his supervisor. The grievant was entitled to a warning that the sign in/sign out policy was going to be enforced before he was disciplined.

AWARD:

The Arbitrator denied the grievance, and upheld the State's Removal Order.

TEXT OF THE OPINION:

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In the Matter of

State of Ohio
Rehabilitation Services Commission
Case No. 29 01 04 26 96 35 01 09
Michael Coates, Grievant

Ohio Civil Service Employees Association,
AFSCME Local 11

and

APPEARANCES

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For the State:

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Darla J. Burns, Advocate
Shirley Turrell, Second Chair
Bruce Mrofka, Manager of Labor Relations
Robert Johnson, Sergeant, Ohio Highway Patrol
Charles Taylor, Manager of Human Resources
George Smith, Storekeeper
James Gaskill, Claims Adjudicator
Renee McIntosh, Clerk 2
Marc Protsman, Team Leader, Administrative Support

For the Union

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Robert W. Steele Sr., Advocate
Radewe Matheny, Second Chair
Melissa Middleton, President
Michael Coates, Grievant
Beverly Lynn Preston, Account Clerk 2
Tina Moody, Disability Hearing Officer

Arbitrator :

Nels E. Nelson
* * *

BACKGROUND

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The grievant, Michael Coates, was hired by the Rehabilitation Services Commission on July 29, 1974 as a Storekeeper 2. The grievant remained in that classification for his entire employment except for a short time when he was a Storekeeper 1. The grievant's job involved delivering supplies throughout the 142,000 square foot Crosswinds office.

In February 1995 the Ohio Highway Patrol received an anonymous complaint that the grievant was selling drugs at work. The highway patrol notified Charles Taylor, the Manager of Human Resources, that it would be conducting an investigation.

The highway patrol placed the grievant under surveillance during February 1995 and March 1995. Sergeant Robert Johnson reported that during this time the grievant was observed engaging in what appeared to be drug transactions and was found to be away from work for long periods. The latter observation led to the issuance of an arrest warrant for theft in office.

The grievant was arrested on March 31, 1995 in the parking lot at the Crosswinds office. When he was searched, he was found to have 4 grams of marijuana and \$2400 in cash in his pockets. His car yielded ten packages of marijuana weighing a total of 74 grams and seven additional grams of marijuana. The grievant was then charged with possession of drugs, trafficking, and possession of drug paraphernalia.

After the grievant's arrest the employer requested information about the investigation from the highway patrol. It refused to provide any help explaining that it did not want to jeopardize the criminal case against the

grievant. In view of the seriousness of the charges against the grievant, the state placed him on paid administrative leave effective April 3), 1995.

In February 1996 the criminal proceeding was concluded when the grievant agreed to plead guilty to the possession of drug paraphernalia and the other charges against him were dropped. The highway patrol then furnished the state with the statements it had

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taken from the grievant's co-workers and its investigative reports. On February 23, 1996 Marc Protsman, the Acting Team Leader of the Administrative Support Team, notified the grievant that he was recommending his termination for dishonesty and neglect of duty.

The grievant's sentencing in Common Pleas Court took place on March 21, 1996. He was given a 30-day jail sentence and two years of probation. The grievant was granted a work release so that he could continue his employment.

On March 29, 1996 the state ordered the grievant back from administrative leave. Taylor testified that the grievant was directed to return to work because he did not know whether the grievant had a work release and felt that it was inappropriate for an employee who is incarcerated to be on paid leave. He also stated that he wished to give the grievant the notice of his pre-disciplinary hearing and his pre-termination packet. When the grievant reported as scheduled and the employer learned that he had a work release, he was given the notice of his pre-disciplinary hearing and his pre-termination packet and was put back on administrative leave.

The grievant's pre-disciplinary hearing took place on April 10, 1996. The report of Hearing Officer Darla Burns, a staff attorney, is dated April 15, 1996. It reviews the facts and discusses the positions of the employer and the union at length. The report concludes that there was just cause for discipline.

On April 24, 1996 the grievant was terminated by Robert Rabe, the Administrator of the Rehabilitation Services Commission. He stated the reasons for the discharge as follows:

On March 31, 1995, at the work site, you had in your possession a substance later identified by the Department of Highway Safety/Highway Patrol as approximately 75 grams of marijuana; additionally, it was determined that you have sold marijuana at the work site. Possession, sale, transfer and/or consumption of controlled substances while on duty and/or on state property is strictly prohibited. These actions constitute gross neglect of duty. Furthermore, you developed a practice of consistently arriving at the work site past your scheduled start time, and knowingly falsified the sign-in sheet by

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recording an arrival time of 7:00 a.m. (your scheduled starting time), this behavior constitutes dishonesty and neglect of duty.

On May 3, 1996 a grievance was filed on behalf of the grievant. It alleged that the grievant had been treated "unfairly and disparately." The grievance charged that the state's action violated

Article 24, Sections 24.01, 24.02, 24.03, 24.04, and 24.05 of the collective bargaining agreement.

When the grievance was not resolved, it was appealed to arbitration. The hearing was held on May 12 and 19, 1997. Written closing statements were received on June 11, 1997.

ISSUE

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

Did just cause exist to discipline the grievant? If not, what is the proper remedy?

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. a fine in an 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

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Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the employer's decision to begin the disciplinary process.

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24.03 Supervisory Intimidation An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

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24.04 Pre Discipline

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At the discretion of the Employer, in cases where a criminal investigation may occur, the pre discipline meeting may be delayed until after disposition of the criminal charges.

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24.05 Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty five (45) days after the conclusion of the pre disciplinary meeting. At the discretion of the Employer, the forty –five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

* * *

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

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An employee may be placed on administrative leave or reassigned while an investigation is being conducted except that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment.

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STATE POSITION

The state rejects the union's contention that its decision to discipline the grievant was untimely. It points out that the grievant was arrested on Friday, March 31, 1995 and placed on administrative leave on Monday, April 3, 1995. The state indicates that during the pendency of the criminal charges against the grievant the highway patrol refused to supply any information and asked it not to interfere with the criminal case

The state maintains that it met the requirements of Article 24, Section 24.02 which requires "disciplinary action ... be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article." It observes that Section 24.04 states that "at the discretion of the employer, in cases where a criminal investigation may occur, the pre disciplinary meeting may be delayed until after disposition of the criminal charges." The state stresses that in the instant case it opted to delay the grievant's predisciplinary meeting until the criminal proceeding was complete.

The state claims that it complied with Article 24, Section 24.05 which states that the it "shall make a final decision on the recommended disciplinary action as soon as reasonably possible, but no more than forty five days after the conclusion of the predisciplinary meeting." It reports that the grievant's termination was recommended on February 28, 1996 and his pre disciplinary meeting was on April 10, 1996. The state stresses that the final decision to terminate the grievant came on April 24, 1996 only 14 days after the pre disciplinary meeting.

The state argues that the instant case can be distinguished from OCSEA v. Rehabilitation & Correction, case no. 27 25 020212 0195 01 03 where Arbitrator Ray found that its investigation and discipline were not timely. It points out that in the case before Arbitrator Ray management had conducted three investigations which accounted for the delay while in the instant case the criminal proceeding was the cause of the delay. The state further notes that in the case before Arbitrator Ray the highway patrol's investigation did not lead to criminal charges and was not the basis for the discipline. It **5**

observes that in the instant case the highway patrol's investigation resulted in criminal charges against the grievant and disciplinary action.

The state argues that it met the six tests of just cause. First, it asserts that the grievant was forewarned of the possible disciplinary consequences of his conduct. It points out that the January 1992 Employee

Handbook, which the grievant acknowledged receiving, contained the Drug Free Workplace Policy. The policy indicates:

Any state employee who, in any way, uses, gives, or transfers to another person a controlled substance or who sells or manufactures a controlled substance while at his or her place of employment or at any place where State of Ohio business is or would be conducted will be subject to discipline, up to and including termination. The state notes that an amendment to the policy in June 1992 specifically prohibited the possession of drugs at the workplace. It observes that the amendment was included in employees' June 26, 1992 pay envelopes. The state acknowledges that the union suggested that the grievant may not have received it but notes that the union presented no evidence in support of its assertion.

The state contends that the evidence is clear that the grievant possessed and sold drugs at the work site. It claims that the testimony of Trooper Johnson, Taylor, and the grievant himself establishes that he was in possession of marijuana on March 31, 1995. The state further observes that the statements of three of the grievant's co workers to the highway patrol reveal that he sold drugs at the workplace. It indicated that George Smith stated that he purchased marijuana from the grievant at the work site, that Evelyn Toney stated that she bought marijuana from the grievant at work, and that James Gaskill stated that he purchased marijuana from the grievant in the hallway or parking lot.

The state maintains that the grievant was aware that he was required to sign in at his scheduled starting time or his actual arrival time, whichever was later. It reports that this requirement is set forth in the employee handbook. The state notes that the handbook

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provides that the failure to follow written policies, procedures, and instructions are grounds for discipline up to and including termination.

The state charges that the grievant failed to follow the sign in procedure. It notes that the testimony of Protsman and Taylor indicates that the grievant signed in at an earlier time than his actual arrival time. The state acknowledges that the grievant claimed that Stephen Andrews, his supervisor, allowed him to make up the time at the end of the week. It stresses, however, that the issue is not whether the grievant made up time but the fact that he reported to work after his scheduled start time and recorded a time different from his actual arrival time.

Second, the state contends that its rules regarding drugs at the workplace and signing in are reasonably related to orderly, efficient, and safe operations. It maintains that the use of drugs may impair the well being of co workers and could result in damage to governmental property. The state indicates that it has a responsibility to maintain a drugfree work environment and as a consequence has adopted its Drug Free Workplace Policy to insure that its offices operate in a safe and efficient manner.

The state asserts that orderly and efficient operations also require employees to accurately record their arrival and departure times. It reports that sign in sheets are used to confirm hours worked, leave usage, and overtime. The state notes that the sheets assist it in managing the workplace and disciplining employees who do not comply with the rules governing attendance and leaves.

Third, the state argues that it made an effort to discover whether the grievant violated its rules before it

terminated him. It points out that the testimony of Trooper Johnson, Protsman, and Taylor prove that the grievant possessed and sold marijuana on the work site. The state claims that when Taylor interviewed employees who had given statements to the highway patrol they did not wish to alter their statements.

The state contends that it investigated whether the grievant signed in earlier than his actual arrival time. It indicates that it conducted investigatory interviews regarding this **7**

issue in August 1995. The state maintains that documentation and testimony by Taylor and the grievant's co workers show that the grievant arrived later than the times he recorded on the sign in sheet.

Fourth, the state asserts that its investigation was conducted fairly and objectively. It rejects the union's charge that its investigation was untimely. The state points out that the highway patrol was engaged in a criminal investigation and asked it not to do anything that might jeopardize the criminal investigation. It states that when the criminal proceedings were completed in February 1996, it received the information from the highway patrol investigation and acted promptly. The state reports that the criminal charges were settled in February 1996 and the grievant was notified by Protsman on February 23, 1996 that he was recommending his termination. It notes that on March 27, 1996 the grievant was told about his April 10, 1996 pre disciplinary meeting and on April 24, 1996 he was informed of his termination.

The state characterizes that the union's allegation that employees who gave statements to the highway patrol were coerced and threatened as self serving. It maintains that the employees were simply nervous and anxious while being questioned. The state stresses that Smith, Gaskill, and Renee McIntosh, another of the grievant's co worker, testified that their statements, save for union wording changes, were correct and that they read their statements before they signed them.

The state asserts that its investigation of the grievant's sign in activities was proper. It observes that the investigatory interviews were conducted in August 1995 when it learned that the grievant's failure to work his assigned hours was no longer an issue in the criminal proceedings. The state notes that the union never alleged that this part of the investigation was not fair or objective.

Fifth, the state argues that it applied its rules, orders, and penalties even handedly and without discrimination. It rejects the union's contention of disparate treatment with respect to the application of discipline for violating the policy against selling, purchasing, **8**

transferring, or possessing drugs at the workplace. The state notes that in OCSEA, Local 11, AFSCME, AFL CIO and Ohio Department of Mental Health, case no. G23 06 (8911 13)-01 21 01 03 Arbitrator Rhonda Rivera held that once an employer has shown just cause, the employer is entitled to a presumption of regularity which must be rebutted with particularity by the union.

The state contends that the union failed to establish that the grievant was treated differently than similarly situated employees. It acknowledges that Smith submitted a statement to the highway patrol where he admitted that he had purchased drugs from the grievant but points out that Tina Moody, a union steward, testified that Smith claimed at the investigatory interview that he purchased the marijuana away from the work site and that he testified at the arbitration hearing that he never purchased marijuana at work. The

state notes that the substance that was found in Smith's car was never tested to establish whether it was marijuana and that the highway patrol never told it that it suspected that Smith had marijuana in his car.

The state maintains that Gaskill was not similarly situated as the grievant. It admits that he testified that he contacted the grievant in the hallway and parking lot to purchase marijuana but emphasizes that he claimed that he did not purchase or possess marijuana at the work site. The state notes that Moody's notes from his investigatory interview reveal that he made the same claim at that time. It states that it concluded that it did not have enough evidence to discipline Gaskill.

The state contends that there was no basis to discipline Donna Calloway, another of the grievant's co workers. It points out that her statement to the highway patrol does not indicate that she purchased, sold, possessed, or transferred marijuana at the workplace. The state notes that Moody's notes indicate that Calloway claimed at her investigatory interview that she bought marijuana from the grievant at her home.

The state argues that the union's claim of disparate treatment with respect to Toney must also fall. It acknowledges that her statement to the highway patrol indicates

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that she bought marijuana from the grievant at work and that he delivered it to her by leaving it in her desk. The state stresses, however, that as a result of her admission a recommendation was made to terminate her but she resigned prior to her pre disciplinary meeting.

The state maintains that the union's allegation of disparate treatment did not include the sign in issue. It observes that with respect to this issue the union argued that Andrews allowed the grievant to come and go as he pleased and to make up the time. The state points out, however, that the grievant was not charged with a violation of the makeup policy but with signing in at a time earlier than his actual arrival time. It stresses that no evidence was submitted by the union that other employees recorded an arrival time earlier than their actual time.

Sixth, the state argues that the grievant's termination was reasonably related to the seriousness of his offense and his record. It points out that the evidence is undisputed that on March 31, 1995 the grievant was found to be in possession of marijuana at the workplace. The state notes that although the union claimed that he had only a small amount of marijuana, the total weight of marijuana was 85.580 grams. It further maintains that Smith and Toney's testimony indicates that the grievant sold marijuana at the workplace.

The state asserts that the grievant's record also justifies his termination. It reports that in 1978 the grievant was convicted of trafficking in marijuana. The state notes that Trooper Johnson testified that in 1986 the grievant was the target of an investigation where he was alleged to have been involved in illegal drug activities at work but that the investigation was halted when the undercover agent's identity became known. It further observes that the grievant was treated for chemical dependency in 1990. The state emphasizes that despite his criminal record and his treatment for drug abuse, the grievant continued to sell and possess drugs at the workplace.

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The state rejects the union's argument that pursuant to Appendix M of the collective bargaining

agreement the grievant should have had the opportunity to seek treatment rather than being disciplined. It asserts that Appendix M applies to employees who face discipline for drug abuse or for being under the influence of drugs or alcohol while the grievant was disciplined for the possession and sale of drugs at work. The state maintains Appendix M comes into play when an employee tests positive for drugs or alcohol but the grievant was never tested. It claims that Appendix M is a reasonable suspicion testing procedure.

The state contends there was nothing improper about its placing the grievant on administrative leave. It reports that he was placed on leave on April 3, 1995 and continued to receive full pay and benefits until March 29, 1996 when he was notified that he was to report to work. The state indicates that when he arrived at work he was given notice of his pre disciplinary meeting and immediately placed back on administrative leave where he remained until his termination on April 24, 1996.

The state maintains that its actions with respect to administrative leave did not violate the contract. It states that there was no breach of Article 24, Section 24.03 which prohibits it from using the knowledge of an event giving rise to the imposition of discipline to intimidate, harass, or coerce an employee when it put the grievant on paid leave. The state indicates that Section 24.05 of the contract specifically provides for placing an employee on administrative leave during a criminal investigation.

The state argues that the union's objection to the admission into evidence of the statement that Toney gave to the highway patrol has no merit. It points out that the union called Lynn Preston, a co worker, as its witness and did not request her to be declared a hostile witness. The state claims that the union's direct examination of Preston consisted of reviewing Toney's statement on a line by line basis. It asserts that when the union used Toney's statement in questioning its own witness, it waived its right to object to the submission of the statement.

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The state concludes that it initiated and completed the disciplinary process within a reasonable time after the conclusion of the criminal proceeding , that there was just cause for discipline; that the offenses were serious enough to warrant termination , and that the union did not meet its burden of establishing disparate treatment. It asks the Arbitrator to deny the grievance in its entirety

UNION POSITION

The union argues that the state failed to meet its burden of establishing that there was just cause to remove the grievant. It acknowledges that a number of witnesses testified that the grievant came and went at different times but points out that all of the witnesses indicated that they did not know what arrangement the grievant may have had with his supervisor. The union notes that Trooper Johnson admitted that he did not know if the grievant's time away from work was covered by a leave slip or approved by his supervisor. It stresses that the theft of time charge against the grievant was dropped.

The union challenges the highway patrol's questioning of witnesses in an attempt to establish that the grievant was selling drugs at work. It reports that all of the witnesses testified that they were "scared, nervous, coerced, intimidated, or felt threatened." (Union Brief, page 2). The union also complains that the witnesses were not read their rights.

The union contends that the witnesses questioned some aspects of their statements to the highway patrol. It points out that Smith testified that the highway patrol worded his statement the way they wanted it and that he did not recall stating that he bought drugs from the grievant at work. The union notes that Gaskill

stated that he felt that he had to answer the highway patrol's questions because his job was on the line. It observes that he indicated that he was not told that he could change anything in his statement before signing it. The union notes that McIntosh indicated that she did not remember saying that she smelled marijuana on the grievant every day or that she saw him buy or sell marijuana at work. **12**

The union questions the accuracy of Toney's statement to the highway patrol. It observes that her statement claims that Preston bought marijuana from the grievant at work and at a bar. The union notes, however, that Preston testified that even though she and Toney are good friends, Toney lied about her in her statement and that she has lied in the past.

The union contends that the state failed to discipline the grievant in a timely manner. It claims that the state had full knowledge of the charges against the grievant because Taylor attended the grievant's court appearances. The union maintains that since the agency was not a witness in the case or a complainant, there was no reason to delay taking action. The union asserts that the claim that the highway patrol requested that it not do anything that might jeopardize the criminal matter is a ploy to avoid the timeliness problem.

The union accuses the state of failing to conduct a proper and fair investigation. It claims that Taylor neglected to ask other employees about the grievant's alleged drug sales but instead relied on the statements taken by the highway patrol. The union also complains that he never asked the grievant's supervisor about his arrivals and departures.

The union charges that the state used the criminal charges against the grievant and his 30 day jail sentence to intimidate and harass him in violation of Article 24, Section 24.03. It claims that when the state believed that the grievant was sentenced to 30 days in jail, it directed him to return from administrative leave so that it could terminate him for failing to report. The union indicates that when the grievant reported for work and the state discovered that he had a work release, it immediately put him back on administrative leave.

The union concludes that the grievant's termination was not justified under the contract. It charges that his termination was punitive rather than corrective as mandated by Article 24, Section 24.05 and not commensurate with his offense as required by Article **13**

24, Section 24.02. The union asks the Arbitrator to correct the state's action with a reasonable modification of the discipline.

ANALYSIS

The issue before the Arbitrator is whether there is just cause to discharge the grievant. His termination is based on two alleged offenses. First, the grievant is charged with violating the Drug Free Workplace Policy. It prohibits employees from "manufacturing, distributing, dispensing, possessing or using alcohol or a controlled substance in the workplace." The state accused the grievant of both the possession and sale of marijuana at work.

The Arbitrator believes that there is no doubt that the grievant did possess marijuana at the workplace.

Trooper Johnson testified that when he was arrested in the parking lot of the Crosswinds office, he had what appeared to be marijuana on his person and in his car. The documents submitted by the state reveal that the material proved to be marijuana and that the grievant was carrying 4 grams in his pockets and had another 81 grams in his car. The union did not dispute the fact that the grievant did possess marijuana at the workplace.

The allegation that the grievant sold marijuana at the workplace is based on the statements a number of the grievant's co-workers gave to the highway patrol. Smith indicated the grievant had been selling marijuana at the workplace as long as could remember and that he had bought it from him as recently as three weeks earlier. Gaskill stated that he contacted the grievant in the hall or in the parking lot to buy marijuana but maintained that his last purchase was six months ago. Toney reported that she purchased marijuana from the grievant at work on 12 occasions during the previous year.

Two of these individuals testified at the arbitration hearing. Smith stated that he was scared and felt intimidated when he was questioned by the highway patrol and that he objected to "the way things were worded" but he said that nothing in his statement was

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untrue. Gaskill complained about feeling intimidated and anxious and denied buying marijuana at the workplace. However, he acknowledged signing the statement and admitted that he did not think that he would have signed it without reading it. On this basis the Arbitrator must conclude that the grievant was selling marijuana at the workplace.

The second charge against the grievant is that he violated the Sign In/Sign Out Policy. It requires employees to "sign in at their scheduled starting time or actual arrival time, whichever is later, and to sign out at their scheduled ending time or actual departure time, whichever is earlier." The state alleges that the grievant "developed a practice of consistently arriving at the work site past ... [his 7:00 A.M.] scheduled start time, and knowingly falsified the sign in sheet by recording an arrival time of 7:00 a.m."

The state offered the testimony of Protsman and Taylor in support of this allegation. Protsman stated that he became aware that the grievant was not signing in and out properly. Taylor testified in general terms about the sign in/sign out policy and the grievant's claim that he made up the time when he arrived late.

The testimony and evidence offered by the state falls short of meeting the just cause standard for discipline. No specific dates were offered when the grievant was alleged to have signed in improperly but only allegations that he did so frequently. Furthermore, it appears that the grievant's conduct was condoned by his supervisor. The grievant was entitled to a warning that the sign in/sign out policy was going to be enforced before he was disciplined.

The union challenged the discipline imposed on the grievant based on the delay between his alleged offenses and his termination. While it is true that the grievant was arrested on March 31, 1995 by the highway patrol and placed on administrative leave on April 3, 1995, this fact does not invalidate the state's action. The highway patrol had the evidence related to the grievant's alleged violation of the Drug Free Workplace Policy and refused to give it to the Rehabilitation Services Commission. It also requested the RSC to

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delay its investigation so as not to jeopardize the criminal action. Furthermore, the grievant was placed on administrative leave so that he received full pay and benefits during the delay.

The union charged that the grievant was the subject of disparate treatment because none of the employees who gave statements to the highway patrol indicating their own drug involvement were disciplined. The Arbitrator must disagree. First, while it is clear that some of the employees talked to the grievant at work about purchasing marijuana, it is not as clear that they purchased or possessed marijuana at the workplace except for Toney. Protsman recommended she be terminated but she resigned prior to her predisciplinary meeting. Second, the grievant was involved in selling marijuana at the workplace while none of the other employees were accused of such activity.

The union's charge that the state used its knowledge of the grievant's jail sentence to intimidate, harass, or coerce him has no merit. While it is true that the state directed the grievant to report to work on March 29, 1996 and may have planned to terminate him if he did not report, this does not constitute intimidation, harassment, or coercion. The state placed the grievant on paid leave pending the resolution of the criminal charges against him. When the matter was settled, it had the right to direct the grievant to return to work. Likewise, once the state learned that the grievant had a work release, it had the right to put the grievant back on paid leave until the disciplinary matter was resolved.

The Arbitrator must also reject the union's contention that the grievant's termination was not commensurate with his offense. On March 31, 1995 the grievant was apprehended at the workplace with 85 grams of marijuana. The record indicates that the grievant was involved in selling drugs at the workplace for a number of years. Such activities are very serious offenses for which termination is an appropriate penalty.

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AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

July 12, 1997
Russell Township
Geauga County, Ohio

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