

#720

REVIEWED BY  
C 5/17/00  
MAY 17 2000

VOLUNTARY LABOR ARBITRATION TRIBUNAL

GRIEVANCE COORDINATOR

\*\*\*\*\*

In the Matter of Arbitration \*  
Between \*  
OHIO CIVIL SERVICE \*  
EMPLOYEES ASSOCIATION \*  
LOCAL 11, AFSCME, AFL/CIO \*  
and \*

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No. 27-02- (981106)0566-01-03

OHIO DEPARTMENT OF \*  
REHABILITATION & \*  
CORRECTIONS \*

Elroy James, Grievant  
Removal

\*\*\*\*\*

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11, AFL-CIO:

Mike Hill, Staff Representative  
George L. Yerkes, Staff Representative  
Ohio Civil Service Employees Association/AFSCME Local 11, AFL-CIO

For the Ohio Department of Rehabilitation & Corrections:

Meredith A. Lobritz, Labor Relations Specialist  
Steve Little, Labor Relations Specialist  
Ohio Office of Collective Bargaining

## I. HEARING

A hearing on this matter was held at 11:05 a.m. on April 25, 2000, at the Allen Correctional Institution in Lima, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation & Corrections (the "State") were Dean McCombs (Labor Relations Officer), Michael Mouser (Industry Manager) and Correction Officers Robert Bice and Gretchen Henry. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11, AFL-CIO (the "Union") were Correction Officer Gary Smith and the Grievant, Elroy James. Also in attendance was Paul L. Kreher, Chapter President. A number of documents were entered into evidence: Joint Exhibits 1-5 and State Exhibits 1-4. The oral hearing was concluded at 2:00 p.m. whereupon the record was closed. This opinion and award is based solely on the record as described herein.

## II. STATEMENT OF THE CASE

At the time of his dismissal for giving an inmate a rock of cocaine, the Grievant was a correction officer at the Allen Correctional Institution in Lima, Ohio. During the 4½ years he had been similarly employed at Ohio correctional institutions in Allen County he had accumulated the following discipline record:

6-8-95	Written reprimand	Inattention to duty
12-26-95	Written reprimand	Following orders, policies, etc.
2-8-96	Verbal reprimand	Absenteeism
3-27-96	Written reprimand	Misuse of sick leave
3-27-96	Written reprimand	Following orders, policies, etc.
4-8-96	Written reprimand	Absenteeism
4-29-96	Suspension: 2 days	Carelessness/negligence; following orders, policies, etc.; poor judgment
12-30-96	Fine: 2 days	Absenteeism
2-8-97	Suspension: 3 days	Poor judgment

The incident that led to the Grievant's dismissal allegedly occurred on June 28, 1998, when he was working second shift as a rover outside the hospital. At approximately 4 o'clock that afternoon Correction Officer Robert Bice saw the Grievant and an inmate together in H-2-B. With his peripheral vision he saw the two of them exchange something. It could have been a handshake or a small package, but he did not actually see a package. The inmate was out of place because he is housed elsewhere, but Officer Bice took no action at the time. Later, however, the inmate approached him, asking him what he thought of dirty officers and if he, the inmate, could trust him. According to Bice, the inmate gave him a gum wrapper containing a substance which the Ohio Highway Patrol later found to be 0.205 grams of cocaine base (crack cocaine). The inmate told Bice he had been given this drug by the Grievant, and Bice believed him. Bice then turned the package over to Cpt. L.M. Pierce.

Captain Pierce reported the incident to Labor Relations Officer Dean McCombs who launched an investigation, interviewing the inmate and Officer Bice the next day. When the

Grievant was interviewed on August 19, he denied meeting with this inmate or passing anything to him on the day in question, and could not think of any reason the inmate would accuse him. In arbitration the Grievant admitted he was in H-2-B that day, "imagined" that he saw the inmate, but stated he is not a drug user himself, and is innocent of the charges.

Believing the statements of the inmate and Officer Bice to be true and the Grievant's to be false, McCombs turned the matter over to the warden. A predisciplinary package was prepared, but the State had difficulty serving it on the Grievant. McCombs was finally successful in reaching him by telephone on September 11, at which time the Grievant said he would attend the conference scheduled for 8 a.m. on September 15.

Union Steward Gary Smith testified he had to talk the Grievant into appearing for the predisciplinary conference because the Grievant was ill, but he did show up for it. However, before it was convened at around 9 a.m., the Grievant told Smith he felt too ill to stay and went home. Smith reported this to Michael Mouser, who was hearing officer, and Dean McCombs, who was presenting the State's case. Mouser deemed the Grievant as having waived his right to a predisciplinary hearing, so proceeded without him. Mouser testified Smith did not object; Smith testified he did; McCombs did not recall an objection. In any event, no written request to reschedule was made, nor did the Union make a written objection to proceeding in the absence of the Grievant because, according to Smith, he was assured his objection would make it into the hearing report. The hearing report, which was completed on September 17 with a finding of just cause for discipline, does not mention any such objection.

The Grievant was removed from his employment effective October 27, 1998. A grievance protesting this action with a claim of no just cause was filed the following day and

processed through the grievance procedure without resolution, finally coming to arbitration where it presently stands, free of procedural defect, for final and binding decision.

### III. STIPULATED ISSUE

Was the grievant, Elroy James, removed for just cause?  
If not, what shall the remedy be?

### IV. PERTINENT PROVISIONS OF THE CONTRACT

#### ARTICLE 24 - DISCIPLINE

##### 24.04 - Pre-Discipline

\*\*\*

An employee has the right to a meeting prior to the imposition of a suspension, a fine or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. An employee who is charged, or his/her representative, may make a written request for a continuance of up to 48 hours.... The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut....

### V. ARGUMENTS OF THE PARTIES

#### Argument of the State

The State submits that it had sufficient proof of wrongdoing to take disciplinary action. Two witnesses saw the Grievant on H-2-B though the Grievant testified he did not meet the inmate there. An experienced correction officer saw an exchange between the Grievant and an inmate, and received a packet the inmate said he got from the Grievant. This packet was later determined by the Ohio Highway Patrol to contain cocaine. This correction officer believed the inmate, their stories corroborated each other, and neither had a reason to come forward against the Grievant as even the Grievant admitted.

The State denies it was deficient in affording the Grievant his due process rights under the Contract. The Grievant came in for the predisciplinary hearing but went home ill after talking with his union steward. Section 24.04 states that “failure to appear at the meeting will result in a waiver.” No written request for a continuance as called for by the same section of the Contract was submitted and no objection was raised at the time as supported by the hearing officer’s detailed written report.

The State argues that distribution of drugs cannot be tolerated in the prison environment. Therefore, the removal should be sustained and the grievance denied in its entirety.

#### Argument of the Union

The Union argues the State is totally lacking in credible evidence and has denied the Union and Grievant the fundamental due process right of a predisciplinary hearing.

With respect to the procedural issue, the Union points out that Section 24.04 gives the Union *or* the employee the right to ask questions, comment, rebut, etc. The evidence shows that the hearing officer denied the Union steward this right in the mistaken belief that the Grievant had to be present.

With respect to the charges, the only witness brought by the State was the correction officer who impeached the inmate’s out-of-court statements and corroborated the Grievant’s testimony, saying that he did not see the Grievant give rock cocaine to the inmate. The State did not bring any other witnesses despite there being a roomful of them on June 28.

The Union asks that the grievance be sustained and the Grievant put back to work with all back pay including wages, roll call, shift differential, holiday premium pay and missed

overtime opportunities, and that he be made whole. The Union further seeks from the State dues lost to it because of the Grievant's unjust removal.

## VI. OPINION OF THE ARBITRATOR


Taking up first the Union's procedural argument, the parties have presented two radically different versions of what occurred the morning of the predisciplinary conference. According to the Union, the steward orally requested a continuance, which was denied, and was then told his objection would be written into the record. No written request for a continuance or written objection to management's denial was made, nor were any notes of the meeting or corroborating witness testimony offered by the Union. On the other hand, the hearing officer testified no continuance was requested and no objection was lodged to the State's conclusion that the Grievant had waived his rights by his failure to appear. His testimony is corroborated by the labor relations officer present at the time and by the written report of the conference. The Arbitrator realizes the parties are accustomed to oral agreements, but in a case like this where important due process rights are involved, the better practice for the Union is to memorialize a denied request by presenting the request in writing. As it stands, the Arbitrator is uncertain whether the Grievant even authorized the Union to proceed without him. In short, the better evidence for what transpired on the day of the predisciplinary conference is the State's.

Turning to the merits, the charge of giving cocaine to an inmate is also unproven. The only evidence brought by the State is circumstantial or hearsay. Officer Bice saw an exchange, but obviously has no idea whether a package changed hands or, if it did, what it

contained. Only later did the inmate approach Bice with what he said he got from the Grievant. The package he turned in could have been what he got from the Grievant if, indeed, he got anything like a package from him, or it could have come from someplace else. The Arbitrator, like the Union, has no way of testing the inmate's accusation or his motive, for he did not testify. As such, his taped and transcribed investigatory interview can be given weight only insofar as it tends to corroborate independently established facts, none of which convincingly prove that the Grievant carried drugs into the institution. In sum, the State did not have just cause to terminate the Grievant.

#### VII. AWARD

The grievance is sustained. The Grievant will be reinstated to his former position forthwith and his record expunged of the unjust termination. He is to receive all back pay, seniority and benefits as requested except overtime (of which there is no record indicative of his history), less normal deductions including union dues which will be paid to the Union. The State may also deduct earnings the Grievant may have had in the interim on account of his unjust dismissal and require him to supply reasonable evidence thereof. The Arbitrator retains jurisdiction for a period of sixty (60) days to resolve any dispute which may arise in the implementation of this award.

  
\_\_\_\_\_  
Anna DuVal Smith, Ph.D.  
Arbitrator

Cuyahoga County, Ohio  
May 16, 2000