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VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 27-21-19990802-1786-01-03
and	*	
	*	
OHIO DEPARTMENT OF	*	Morgan McBroom, Grievant
REHABILITATION &	*	Removal
CORRECTIONS	*	

APPEARANCES

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

Don Sargent, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Rehabilitation & Corrections:

Bradley A. Nielsen, Labor Relations Officer
Ohio Department of Rehabilitation & Corrections

Jeff Wilson, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:00 a.m. on December 13, 2000, at the Orient Correctional Institution in Orient, 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 excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation & Corrections (the "State") was William Blaney, OCI Institutional Investigator. Also testifying telephonically over the objection of the Union were Alan J. Lazaroff, Warden, and Tammy R. Bonner, Criminalist of the Ohio State Patrol. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were K. T. and the Grievant, Morgan McBroom. Also in attendance were Martin Ginn, Chief Steward, and Neal Nolan, Chapter 6540 President. A number of documents were entered into evidence: Joint Exhibits 1-4 and State Exhibits D-I. The oral hearing was concluded at 2:40 p.m. on December 13, 2000, 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 removal in July 1999 for possession of drugs in his personal vehicle on state property, the Grievant was a correction officer at the Orient Correctional Institution (OCI), a medium-security state facility housing approximately 2,000 inmates. Since he was hired on April 17, 1995, he met his employer's expectations, but the rater's comments in his most recent evaluation indicated several areas for growth. In addition, he had two active disciplinary actions on his record: a written reprimand in September of 1997 for insubordination and a two-day suspension in May of 1998 for fighting with a fellow officer. He also was required to supply physician's verification for use of sick leave because of excessive absenteeism and carrying a sick leave balance under 16 hours.

The events leading to the Grievant's removal occurred on May 18, 1999, when the Ohio State Highway Patrol, assisted by OCI Investigator William Blaney, conducted a routine monthly drug interdiction search which, on this day, included the employees' parking lot. When the dog alerted on the Grievant's car, the Grievant was called to the parking lot where he consented to a search of his vehicle. This search turned up what the Patrol thought to be 15-20 marijuana seeds mixed with ashes in the ashtray. The Patrol took possession of the seeds and ashtray, sending them to its crime lab for analysis. On May 25, Criminalist Tammy Bonner tested five of the eight seeds she received, finding them to be marijuana. 80% of the seeds were viable. The ash was non-scheduled material. Meanwhile, the Grievant, who claimed the seeds were not his but may have been deposited in his car by a friend who had borrowed it, was placed on administrative leave, but was not subjected to a drug test because Investigator Blaney saw no behavior that would warrant a probable cause test. A criminal case

was also not pursued. A pre-disciplinary conference was held on June 17, at which time the Grievant stated he did not know the seeds were in his car, that he had never seen them, and again said he had let a friend borrow his car about two weeks before the search. He offered an affidavit from the friend, K. T., which states only that the Grievant's vehicle was in his possession "prior to the occasion in question" and says nothing about marijuana. The Grievant told the hearing officer that he never asked K. T. about the seeds. Five days after the pre-disciplinary conference, the Grievant submitted a second affidavit from K. T. in which he states,

> I am completely responsible for putting the seeds in question in Mr. McBroom's car, I was in sole possession of his vehicle, he was not present and was unaware of my actions.

After this affidavit was submitted, Investigator Blaney interviewed the Grievant again, asking him how he could contact K. T., but the Grievant did not provide this information, saying only that K. T. lived with his girlfriend. On June 22, the hearing officer found just cause for discipline on Rule 30a despite the affidavit, but no just cause on Rule 38.

> 30a. While on duty or on state-owned or leased property, the conveyance, distribution, possession or consumption of alcoholic beverages and/or drugs of abuse.
>
> 38. Actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee. (Joint Ex. C)

Warden Alan J. Lazaroff subsequently recommended removal. He testified that he considered three factors in making this recommendation: 1) the severity of the offense, 2) OCI's chronic drug problem calling for vigorous enforcement of the rule and 3) the Grievant's own history of being a relatively short-term employee with other discipline on his record. On

cross examination, he would not agree that a two-day suspension is minor and named two employees terminated for possession under Rule 30a to support his claim that every employee at Orient found guilty of violating that rule has been removed. Both of these employees brought drugs into the institution.

The Grievant was terminated on July 20, 1999. On July 28, Union Steward John Mathews filed a grievance charging lack of just cause and nonprogressive discipline. The case was thereafter processed through the grievance procedure without resolution to arbitration, where it presently resides, for final and binding decision.

In arbitration, K. T. testified that he had borrowed the Grievant's car on May 18, two days before the search, and drove it to a park where he and some friends smoked marijuana. He did not see anyone put seeds into the ashtray, but one of his friends did go sit in the car and had a joint when he came out, so perhaps the friend had rolled it in the car. On redirect, K. T. stated that he is certain someone did roll a joint in the car. Both the Grievant and K. T. were insistent that they did not talk about the case between the drug search and the pre-disciplinary hearing, and the Grievant testified that he did not know about the seeds until the pre-disciplinary hearing, but he also testified that he knew about them at the time of his investigatory interview on June 4. Furthermore, he testified that he does not use marijuana, does not deal drugs, and did not knowingly convey drugs into OCI's grounds. In fact, he testified, neither he nor the investigator saw the seeds. In addition, the Grievant said that K. T. had borrowed his car two weeks before the search, as he had claimed in his investigatory interview and pre-disciplinary conference, as well as two days before as K. T. testified. As for his prior disciplinary record, the Grievant testified that the two-day suspension was a reduced

penalty in exchange for waiving his grievance rights. He was not guilty of the charges, but accepted the reduced penalty to save money. The insubordination that resulted in a verbal reprimand was over his refusal to take an inmate on round-trip that would have caused him to miss his ride home. As for the instant case, the Grievant asserts that there has been a grave injustice. He was not trying to convey drugs, the seeds were of no value, and he has continuously denied the charges.

III. STIPULATED ISSUE

Was the Grievant, Morgan McBroom, removed for just cause?
If not, what shall the remedy be?

IV. ARGUMENTS OF THE PARTIES

Argument of the State

The State submits that it did everything right in this case. The Grievant was on notice, yet he had illegal drugs in his car on state property. The investigator testified that he saw the seeds and the criminalist testified that they tested positive for marijuana. This is clearly a violation of Rule 30a, of which "knowingly" is not an element. The disciplinary grid calls for removal on a first offense, so the Grievant was removed. There were no mitigating circumstances. With four years of service, the Grievant was not a long-term employee. He had attendance issues and some discipline on his record, and comments on his performance evaluations reflect problems with authority and accepting responsibility. The Grievant's defense, here, is in the same vein. He is responsible for his own vehicle, but he points his finger at his friend of 20 years who cannot be responsible for the seeds because he did not

place them in the car nor see them put there and even admitted that they could have been in the car before he borrowed it.

The State contends that the testimonies of the Grievant and his friend are not credible. The Grievant was aware of the severity of the charge, yet never mentioned his friend until the pre-disciplinary hearing and even then his friend could not be reached. Moreover, the two friends claim that they never discussed the case. The State draws the Arbitrator's attention to discrepancies in the two men's testimonies: Was the car borrowed two days or two weeks before the search? Did the Grievant meet with management twice or three times? If the Grievant learned not to loan property for which he was responsible, why did he loan his car on the very day of the hearing to the same friend? The State submits that the Grievant said what he thought was necessary to keep from being fired and then to get his job back, and that he convinced his friend to play a role on his behalf.

In support of its conclusion that the grievance be denied, the State offers the parties' Case No. 27-10-102390-67-01-03/27-10-102390-66-01-03 (Barber and Cooper-Cullison, Grievants), which it says is the precedent case being similar in various respects to the instant case. By contrast, the cases offered by the Union are different in that they involve different departments, employees with longer years of service, or have an issue of guilt.

In conclusion, the State asks that the grievance be denied in its entirety.

Argument of the Union

The Union submits that the Grievant is, for the Department, a long-term employee with valuable training and experience who met his employer's expectations. By his own testimony and that of his friend, he had no knowledge of the seeds that were allegedly found in his car.

The Union questions what was actually found during the search because while the investigator wrote 15-20 seeds on his report, the criminalist reported only eight. Moreover, in the Smith case (Case No. 27-19-990827-1778-01-03, Arbitrator Nelson), five seeds weighed .207 grams, while in the instant case, eight seeds weighed 1.080 grams. The Union points out that no other forms of contraband, such as roaches or clips, were found and that criminal charges were not pursued by the Warden. The State did not even test the Grievant, though it had probable cause to do so. This case is not like the others cited by the Warden where substantial amounts of drugs were involved. The Union suggests that the State had no interest in trying to salvage this employee and was just head-hunting.

While the employer has the right to enforce its work rules, those rules must be reasonable. The Ohio Revised Code states "no person shall *knowingly* convey..." (§ 2921.36). The Union submits that the State erred in deleting the word "knowingly" when it wrote its rules.

In support of its position that the grievance should be sustained, the Union submits a number of panel decisions. It draws the Arbitrator's attention in particular to the previously cited Smith case wherein Arbitrator Nelson held that five seeds and some leafy material did not constitute conveyance "as contemplated by the rule," but merely reflected scraps from the grievant's own use. The eight seeds involved here are, like beer cans on the floor of a car, merely reflective of prior use by someone.

The Union asks that the Grievant be reinstated and made whole, but if the Arbitrator finds cause for discipline, it asks that the Grievant be reinstated without loss of seniority.

V. OPINION OF THE ARBITRATOR

On most every point, the State is correct about this case: The Grievant was on notice, an illegal substance was found in his car on state property, and there were no procedural violations in the investigation, discipline or grievance process. While the Grievant's record is not exemplary, neither has he been the devil in disguise. Moreover, the history of his defense and the conflicts between his testimony and that of the witness who was intended to corroborate his story did not help his case. By the State's theory, the Grievant's claim that he was an unwitting conveyor of the residue of his friend's or his friend's friend's party is irrelevant anyway, for knowledge is not an element of the rule. This case, then, does not turn on the Grievant's guilt, for it is clear that his car, while parked on State property, did contain an illegal drug in the form of at least four viable marijuana seeds. Instead, it turns on the reasonableness of the rule and its associated penalty as applied in this case. That is, is it reasonable for the Department of Rehabilitation and Corrections to remove a correction officer whose only offense (on top of a minor discipline record) was that his car's ashtray contained a few viable marijuana seeds when it was parked in a correctional institution's parking lot? I think not.

As at least two other panel arbitrators have expressly stated and as implied in the opinions of others, the mere presence of a small amount of marijuana residue in the ashtray or on the floor of a vehicle only indicates prior use by someone. As such, it does not, by itself, constitute "conveyance, distribution, possession or consumption" as contemplated by the rule. Unless the State can convincingly show the correction officer was, himself, a user (thereby placing himself at risk of inmate blackmail), that he had such an amount that intent to distribute

could be inferred, brought drugs into areas where inmates could have access, or knowingly conveyed, or the State can show other means by which the institution's security was threatened, the violation is only a technical one. No such evidence was presented in this case. The Grievant's sole offense is that a small quantity of marijuana seeds was found in his car's ashtray and, when it became clear he was to be disciplined for it, he relied on a witness whose credibility only served to undermine his own. He did not bring a quantity of drugs or paraphernalia into the institution as the employees cited by the Warden did or as Grievant Carter did (*ODRC & OCSEA*, Arbitrator Murphy, October 23, 1999), there is no evidence to establish drug use as in the *Smith* case (Case No. 27-19-990827-1778-01-03, Arbitrator Nelson), and no inference of knowledge can be drawn from the surrounding facts (as in the *Barber/Cooper-Cullison* case), even taking witness credibility into account. At most, the Grievant was irresponsible in the loan of his vehicle which resulted in illegal drugs being brought onto the grounds of a correctional institution. This error constitutes a violation of Rule 38, for which he will receive discipline to impress upon him that he is ultimately responsible for the contents of his own vehicle. In light of his prior record and commensurate with the discipline grid, this will be a five-day suspension.

VI. AWARD

The grievance is sustained in part, denied in part. The Grievant was not removed for just cause. He will be reinstated to his former position forthwith and his record expunged of the unjust termination. His record will be further adjusted to reflect a 5-day suspension for violation of Rule 38. The Grievant will receive all back pay, benefits and seniority, less five

(5) days back pay and normal deductions. 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

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
January 22, 2001