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VOLUNTARY LABOR ARBITRATION TRIBUNAL

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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. 27-22-020530-0663-01-03
and	*	
	*	
OHIO DEPARTMENT OF	*	Donavon Smith, Grievant
REHABILITATION & CORRECTION	*	Removal
	*	

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APPEARANCES

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

Lynn Belcher, Staff Representative
Patricia Howell, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Rehabilitation & Correction:

George Engle, Labor Relations Officer
Ohio Dept. of Rehabilitation & Correction

Kaye Carnein, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:30 a.m. on December 11, 2002, and continued on January 10, 2003 at the Pickaway 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 to argue their respective positions. Testifying for the Ohio Department of Rehabilitation & Correction (the "State") were Capt. John Jenkins, Labor Relations Officer Chris Lambert, Capt. James McSavaney, and Personnel Officer 3 Elizabeth Thompson. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Chief Steward Terry Hollon, Sgt. Charles Shannon (by subpoena), and the Grievant, Donavon Smith. Also present were Chapter President Kevin Birchfield and Steward Scott O'Day. A number of documents were entered into evidence: Joint Exhibits 1-19, State Exhibits 1-10 and Union Exhibits 1-3. The oral hearing was concluded at 3:45 p.m. on January 10. Written closing statements were timely filed and exchanged by the Arbitrator on January 28, 2003, whereupon the record was closed. This opinion and award are based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of his removal the Grievant was a correction officer at the Pickaway Correctional Institution ("PCI"), a minimum security facility housing approximately 2,000 inmates. The Grievant had been continuously employed by the State since August of 1990.

Since his probationary period ended he met or exceeded his employer's expectations through 1999. No performance evaluations for years after that are in his file. He was informed on the Standards of Employee Conduct and had no active discipline.

The incidents leading to his removal occurred in 2002 when the Grievant was working third shift at the PCI honor camp (E-Unit). In January a confidential informant (Inmate Matney) reported through Sgt. Charles Shannon that officers on the third shift in the E-Unit were playing cards and gambling with inmates. Then-Investigator Chris Lambert sought and obtained permission to place a covert video surveillance camera in the area where this activity was thought to be occurring. The camera began operation on January 16. When the tape covering the third shift of the night of January 16-17 was viewed on January 18, it showed an individual later confirmed to be the Grievant unplugging the camera, then turning it back on about 2½ hours later. No forbidden activity was recorded. On January 28 the camera was removed and destroyed by an inmate. While the State sought and obtained permission to install a second camera, reports of card playing continued. The second camera was installed in a different place in the same area on March 14. When reviewed, the tape of the third shift on March 20-21 showed two officers playing cards with four inmates. Reports indicated other officers were involved and that there was gambling, so the State continued its surveillance. The tape of March 28-29 shows one officer playing cards with an inmate. The camera was turned off on April 1 because the State had received information the camera had been discovered. Investigator Lambert then proceeded with investigatory interviews.

Inmate Ransom, who was about to be released, refused to give a statement. Inmate Bush stated he played spades with officers and other inmates but denied they gambled. They kept

score to see who won, he said. The officers he named were C.O. Paul Kapteina and the Grievant. Inmate Mustard also stated he played spades with other inmates and the Grievant, but said they did not gamble. They kept score, however, to see who won. He also admitted he had plundered the first video camera to harvest a part for his television. Inmate Matney, the informant, said the inmates and officers gambled for food, soft drinks, magazines, cigarettes and chewing tobacco. He named the Grievant and Officer Kapteina and said he had heard of others.

In his interview, Officer Kapteina admitted to playing spades with inmates, but denied gambling and bringing anything into the institution for inmates. They did keep score to see who won, he said. He stated the inmates he played with were not under his supervision. No one supervised his inmates during the games but he would take a break and check on them periodically. Officer Kapteina was later charged with violations of Rule 7 and 37, but was disability separated before his pre-disciplinary hearing. Personnel Officer Elizabeth Thompson testified the State tried to get him back for a pre-disciplinary hearing but ultimately did not pursue it because of the officer's mental state. At the time, Kapteina had a 5-day suspension on his record for bringing ammunition onto PCI property.

The two officers who were responsible for the card-playing inmates did not know they were out of their bays the nights the camera showed card playing. Officer Brown also denied knowing about officers playing cards with inmates and was not charged with any rule infraction. Officer Helsel, who said he knew about the card playing but did not report it, was charged with Rule 25–Failure to immediately report a violation of any work rule, law or regulation, and received a 2-day fine.

When the Grievant was interviewed, he admitted to playing cards with inmates ten to twenty times since some time in December, but denied gambling with them. Keeping score was just to see who won. The inmates in the game the night of March 28-29 were Officers Brown's and Helsel's, not his, he said. He admitted no one was supervising his inmates while he played cards. He also said he had unplugged a power supply in the card room the night of January 16 and then plugged it back in later. While it was unplugged Inmate Adams gave Inmate Ransom a tattoo. In arbitration the Grievant again admitted to playing cards with inmates and letting Adams tattoo Ransom with a mushfake[1] tattoo gun. He testified he unplugged the power cord so Adams could plug the tattoo gun in. At the time he did not know he was unplugging a camera. He said he made a big mistake letting him do it. What he did was wrong and it won't happen again. He wants his job back, even without back pay, and to get on with his life. Investigator Lambert testified the tattoo raised medical issues such as infection and electrical shock. He did not know whether Ransom had been examined but said the State never did a shakedown for the gun, it being months before it learned of what went on while the camera was off. Based on what the Grievant said, however, Lambert concluded the Grievant knew Ransom was going to be tattooed and turned the camera off to conceal the illicit activity. Lambert requested corrective action for violations of Rule 37–Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee, Rule 41–Unauthorized actions that could harm any individual under the supervision of the Department, and Rule 7–Failure to follow post orders administrative regulations, policies or directives.

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[1] A "mushfake" is any item an inmate creates with whatever materials are available in order to have a prohibited item.

A pre-disciplinary hearing was subsequently held following which the hearing officer found just cause for discipline on all charges. From the conclusion of the investigatory interview until his removal, the Grievant was assigned to the main compound at the Union's request. He also wrote a letter to the warden expressing remorse. He was nevertheless removed on May 30, whereupon a grievance was filed and fully processed to arbitration where the issue before the Arbitrator is: *Did Management have just cause to terminate the Grievant, Donavon Smith?*

III. ARGUMENTS OF THE PARTIES

Argument of the State

The State argues it carried its burden to prove it had just cause to terminate the Grievant. Although he denied gambling, he admitted playing cards in an isolated area of the unit for 1½ hours while he shirked his basic responsibilities of attending to the security of his post. He thus placed himself, his co-workers and inmates at risk, violating Rules 7 and 37. The Grievant also admitted intentionally deactivating the security camera and allowing one inmate to tattoo another in disregard for the potential medical and liability risks. Knowingly allowing this activity and conspiring to cover it up is an unforgivable violation of the rules. The Grievant demonstrated a disregard for the rules and his duty to maintain at least the barest of security standards. He crossed the line from correction officer to friend and confidant, violating both Rule 7 and 41 and breaching the standard of trust that correction officers will do the right thing.

With respect to Union arguments, the State says first that the record shows the investigation was properly conducted. Any improprieties that may have existed would not have affected the outcome. Second, this was not a simple mistake of judgment. The activity continued for three months. The Grievant's conduct was a blatant and calculated violation of

known rules and procedures. As an eleven–year employee, he should have known better. That he did not makes him a poor role model for junior officers. Third, the State submits that the Grievant does not possess the good record necessary to warrant mitigation. For one, his performance has deteriorated since 1997. For another, the Grievant was implicated in a prior incident involving playing pool with inmates but escaped discipline. His actions in the instant case show he did not head the warning. Fourth, the State points out that disparate treatment is an affirmative defense and claims the Union failed to prove that this case is the same or similar to others. Compared to the officers in cases cited by the Union, the Grievant stands alone. All others involved single incidents and single rule violations whereas the instant case is of multiple incidents and multiple rules. With respect to the alleged violations the Union claims the State did not pursue, all that proves is that Management does not discipline on speculation or unproven allegations.

The State concludes that because the Grievant compromised his authority and breached the security of the institution, it had no choice but to remove him. It asks that the grievance be denied in its entirety.

Argument of the Union

The Union contends that the Grievant was truthful about the conduct that led to his removal. He admitted playing cards with inmates and told the investigator about the tattoo. However, he was not aware of the camera. The fact that he played cards in front of it shows he was innocent of deliberately compromising the surveillance. Management cannot believe the security of the cameras was compromised either because it left the camera in place after it was plugged back in.

The Union further contends that Management's action against the Grievant was punitive not corrective. It was aware of problems in the E-Unit before the cameras were installed yet did nothing to correct them. Sgt. Shannon testified he knew playing cards with inmates was prevalent, yet he failed to report it in writing as required by policy. There was no good reason for relying only on oral reports. Doing so impeded the Union's ability to defend the Grievant. In the eyes of the Union, Management was more interested in punishing the Grievant than in correcting the problem. The Union thinks a proactive investigation with supervisors learning of forbidden activities by direct observation would have eliminated the behavior.

With respect to Rule 7, the Union emphasizes that while the Grievant did play cards and allowed the tattooing, he was not off his post. Officers are responsible for all areas of E-Unit, not just one. The Union admits this does not give license to play cards, but points out that a first offense of Rule 7 calls for a written reprimand through a 2-day suspension or fine. Inattention to duty, with which Management chose not to charge the Grievant, calls for an oral reprimand through a 2-day suspension or fine.

The Union argues that when multiple offenses occur close together they should be viewed together as one because otherwise there is no opportunity to amend behavior through progressive discipline. Here, Management chose to delay rather than to correct. This inhibited the Union's ability to establish time frame by withholding the written documentation for covert surveillance until the day of the arbitration.

With respect to Rule 37, the Union submits that reassigning the Grievant to work at the main compound at a higher level of security during the investigation and pre-disciplinary process shows Management did not believe the Grievant was impaired in his ability to carry out the

duties of a correction officer. The fact that he worked there for 28 days after the decision was made to remove him shows that even then he was not reviewed as a security risk.

Looking at Rule 41, the Union contends Management did not believe there was any danger the Grievant would act in a manner that could harm inmates. Tattooing was common at the institution and a procedure exists for providing medical treatment, but the investigator was unaware if such treatment was provided. Reassigning him to the main compound where he had inmate contact, too, betrays the claim that what the Grievant did was so serious as to warrant discharge and Management's belief that the Grievant could not amend his behavior.

The Union goes on to say that Management stacked the charges for the purpose of elevating the discipline. When available, a specific, narrow charge fitting the conduct should be chosen over general ones.

The Union further argues that the Grievant was treated in a disparate manner. Offering a number of cases, including some coming out of the same investigation leading to the Grievant's removal, the Union says no other correction officer has been terminated for the same offenses. Discipline has ranged from none taken to three days to a last chance agreement.

Finally, the Union argues that termination is too severe. Discipline should be mitigated by the Grievant's 11½ years of service, his good performance appraisals and the absence of active discipline. Under the Contract he is entitled to progressive discipline to correct his behavior. That he is remorseful shows he is amenable to corrective action. The Union asks that he be reinstated, granted back pay including roll call pay, made whole.

IV. OPINION OF THE ARBITRATOR

This case comes down to whether the Grievant's actions were so egregious as to justify removal, whether mitigation is warranted by the Grievant's record and amenability to correction, and whether he has been treated fairly compared to similarly situated others.

To begin with, the Grievant admitted playing cards with inmates during which time his security areas and inmates were not supervised. The State suggests he was gambling, but there is no credible evidence this is so. Nevertheless, he was not just inattentive to duty for he made himself a comrade of the inmates he played with. This tends to impair an officer's ability to carry out his duties. Second, he admitted watching an inmate give a tattoo, made no report of it and thus failed to get medical attention for the tattooed inmate. The State also claims he deliberately unplugged the camera before the tattooing to keep it secret, but there is no proof he even knew the camera was there. Indeed, the explanation he gave in his investigatory interview is plausible: that he unplugged the cord so the inmate could use the power source for his tattoo gun. So, while he is guilty of helping the inmates engage in prohibited behavior and of failing to take action to protect the tattooed inmate from medical complications, he is not guilty of intentionally interfering with an investigation. As I see it, we have essentially two incidents (grouping the card playing) in which three rules were broken: playing cards with inmates aggravated by leaving his own area unsupervised for a length of time (Rule 37 and 7) and permitting–even assisting–in a tattoo, aggravated by failure to get medical attention (Rule 37, 41 and 7). I cannot agree that the charges are stacked.

I also cannot agree that the consequences should be minor. What the Grievant did was more serious than what Helsel did, and Helsel received two days. Chinn's was a single act as well and did not involve playing with or helping inmates. On the other hand, Taylor committed

five separate acts including falsification of documents to misrepresent whether count had been taken and security checks made. For this he was removed. But Carroll, who let an inmate go outside and run around the compound was terminated and then reinstated. None of these or any of the other cases cited by the parties is similar enough to the Grievant's to be particularly useful. They are difficult to evaluate in comparison with each other and with the instant case.

But when all is said and done, the State's rationale for removing the Grievant is that he is unfit to be a correction officer because his actions made him untrustworthy and impaired his ability to supervise inmates. This, it argues, gave it no choice but to remove him. And yet, it left him in his job, supervising inmates but on a different post in a more secure area, i.e., the main compound, for two months while it decided what to do with him, an action which contradicts its claim of unfitness. Moreover, the Grievant is an eleven-year employee who readily admitted what he had done and is remorseful. The State tries to portray him as an inferior employee, but is short on proof. The Grievant had no evaluations after 1999, so one cannot say that his performance has deteriorated. For all I know, it has improved. As for the pool-playing incident the Grievant was allegedly part of, I again say, give me your proof and show me you took actions then to correct his behavior. If he was guilty then and management knew it but did not discipline or counsel him, then its tacit acceptance contributed to the problem.

To sum and conclude, the Grievant is guilty of actions warranting discipline significant enough to impress upon him the seriousness of his conduct. I am not persuaded that he is irredeemable or that his ability to perform his correction officer duties is fatally compromised. In light of his record, years of service and remorse, he is entitled to an opportunity to learn from his mistakes and amend his behavior. For this reason, I am reinstating him to a position of

Correction Officer without back pay, but he may not work a post in an honor camp until he has regained his employer's trust. His record is to reflect a suspension from the date of his removal to the date of this award.

V. AWARD

The grievance is granted in part, denied in part. Management did not have just cause to terminate the Grievant, but there was cause for other discipline. The Grievant is to be reinstated to a position as Correction Officer without back pay or benefits. He may not work a post in an honor camp until he has shown to his employer's satisfaction that such an assignment does not threaten the security of the institution. His record is to reflect a suspension from the date of his unjust removal to the date of this award.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
April 30, 2003