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REVIEWED BY

VOLUNTARY LABOR ARBITRATION TRIBUNAL

MAY 19 2003
Cl. 5-19-03
GRIEVANCE COORDINATOR

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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. 27-28-020805-1389-01-03 |
| and | * | |
| | * | |
| OHIO DEPARTMENT OF | * | James Welch, Grievant |
| REHABILITATION & CORRECTION | * | Removal |
| | * | |

APPEARANCES

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

Michael A. Hill, Staff Representative
Clay Ingram, Second Chair
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Rehabilitation & Correction:

Dean McCombs, Warden's Assistant
Allen Correctional Institution
Ohio Department of Rehabilitation & Correction

Ray Mussio, Second Chair
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:00 a.m. on March 12, 2003, at the Oakwood Correctional Facility 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 excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation & Correction ("State") was Major Sheila McNamara. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO ("Union") was the Grievant, James Welch. Also in attendance were Mark Bishop, Labor Relations Officer and William Lotz, Chapter Representative. A number of documents were entered into evidence: Joint Exhibits 1-5, State Exhibits 1-3 and Union Exhibit 1. The oral hearing was concluded at 10:45 a.m.. Written closing statements were timely filed and exchanged by the Arbitrator on , whereupon the record was closed. This opinion and award are based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Oakwood Correctional Facility is a close, maximum security institution with the mission of providing a safe, secure environment conducive to the treatment of mentally ill adult felony offenders. The Grievant was hired as a Psychiatric Attendant on June 26, 2000. His disciplinary record at the time of his removal consisted of the following:

| <u>Date</u> | <u>Discipline</u> | <u>Rule</u> | <u>Offense</u> |
|---------------|-------------------|-------------|----------------------------------|
| July 15, 2001 | Written reprimand | 3-H | AWOL |
| Aug. 31, 2001 | Oral reprimand | 3-B | Call-off |
| Oct. 20, 2001 | 3-day fine | 10 | Sleeping on duty (2 in 1 month) |
| Dec. 22, 2001 | Written reprimand | 3-B | Call-off |
| Feb. 11, 2002 | Written reprimand | 3-A | Mandatory overtime |
| Apr. 5, 2002 | 5-day fine | 3-B | Call-off (grievance outstanding) |
| June 28, 2002 | 10-day fine | 3-B | Call-off (grievance outstanding) |

The incident that led to his removal occurred on April 19, 2002. The Grievant was working first shift (7 a.m.-3 p.m.) on W-2, a unit housing seriously mentally ill inmates. The Grievant was mandated over to second shift on W-1. At 7:45 p.m. an inmate on W-2 reported he was unable to flush his toilet. An inmate plumber was dispatched to clear the toilet where upon the cause of the blockage was discovered to be a set of personal (i.e., not institutional) keys including a KIA key. The keys were turned in to the shift supervisor, Lt. Simpson. About ten or fifteen minutes later the Grievant called the shift office and asked if anyone had turned in a set of car keys. According to Lt. Simpson's report, he told him "yes," and asked him when he realized they were missing. The Grievant replied he had just then noticed it. Lt. Simpson returned the keys to the Grievant and asked him to write an incident report.

An investigation was launched, ultimately leading to a pre-disciplinary conference on July 1, 2002, on alleged violations of Rule #7 - Failure to follow post orders, administrative regulation, policies or directives and Rule #28 - Loss of control of any instrument that could result in a breach of security or jeopardize the safety of others, to include but not limited to weapons, class "A" tools, keys, communication devices, etc. Documents admitted into evidence establish that the Grievant had received training on security procedures, key control and the Standards of Employment Conduct. At the interview and during the conference the Grievant admitted that keys should be kept secure and that it is the employee's responsibility to keep

control of his keys. The Hearing Officer found just cause for discipline. Major Sheila MacNamara testified that in making his disciplinary decision, the Warden considered the mission of the institution under its dual ACA/JCAHCO licensure. The overall performance of the Grievant and what a reasonable person would think appropriate. She testified many inmates at this facility are self-mutilators. Keys, she said, can be sharpened and used against oneself, other inmates or staff. They can be an ingredient in self-mutilation, in taking someone hostage or in an escape attempt. This was the Grievant's second performance offense and one for which the grid's range of discretion is 2 days or removal. There was conclusive proof of guilt and the Grievant had been evasive when asked three times what happened. She testified the Grievant would have been removed for the violation of Rule 28 alone.

The Grievant's employment was accordingly terminated effective July 31, 2002, three days after his 10-day suspension ended and his promotion to Food Service Coordinator. This action was grieved on August 3 and subsequently fully processed to arbitration where it presently resides, free of procedural defect, for final and binding decision on the sole issue of:

Was the Grievant, James Welch, removed from employment as a Food Service Coordinator for just cause? If not, what shall the remedy be?

III. ARGUMENTS OF THE PARTIES

Argument of the State

The State submits it established the Grievant lost control of his personal keys inside the institution and did not report it until five hours later after they had been found. The timing of his report is suspiciously coincidental. The State contends the Grievant's behavior and comments show he knew or should have known his keys were lost, yet failed to report this fact. Losing

control of keys is a very serious offense because of this institution's particular setting, aggravated by the keys having been lost on a unit of the seriously mentally ill. The Grievant was trained on key control and fully understood his responsibility to report the loss immediately. He is a short-term employee with an extensive discipline record. This is his second performance violation, which is enough to justify removal. Although Management has discretion, removal was necessary because his failure to respond to lesser discipline shows he is unlikely to reform.

Argument of the Union

The Union contends there was no violation of Rule 7. Neither Lt. Simpson, Fact-Finder Becky Hauserman, nor the pre-disciplinary hearing officer mention in their reports that the Grievant failed to immediately report when he became aware his keys were lost. Management relies on one answer given by the Grievant during his investigatory interview, saying it shows confusion about when he noticed his keys were missing. The Grievant is not confused. His credible and un rebutted testimony was that he noticed his keys were missing at 8 p.m. Then he promptly reported it.

The Union further contends there was no just cause for discipline on Rule 28 either. The Grievant always admitted he lost his keys, but they were personal keys, not State keys or other instruments that could enable an escape. Management carefully monitors what inmates have, so the inmates could have nothing with which to sharpen the Grievant's keys into a weapon. What the Grievant did was to take his jacket off, leaving his personal keys in the pocket. In the Union's opinion, this amounts to no more than Rule 8, using poor judgment, or Rule 11, inattention to duty. If Management had used either of these instead of Rule 8, the Grievant would have gotten no more than a five-day fine or suspension.

The Union concludes that there was no just cause for discharge on Rules 7 or 28. It asks that the grievance be granted and that the Grievant be reinstated and made whole.

IV. OPINION OF THE ARBITRATOR

The sole factual issue separating the parties in this matter is whether the Grievant promptly reported the loss of his keys once he knew they were missing. While I agree that the timing of his report is suspicious, that is all it is, even with his “6 or 8—it was around 8” response in the fact-finding interview. In the absence of stronger proof, the Grievant must be, and is, found innocent of a Rule 7 violation.

There is no such factual issue with respect to Rule 28 as there is no question the Grievant lost control of his keys. The only real issue is whether removal is too harsh a penalty. The Union urges the Arbitrator to reduce the removal by holding the Grievant to a different rule. The Grievant certainly did use poor judgment and was inattentive when he left his keys unattended, but the proper rule to apply here is the more specific one, loss of control of any instrument that could result in a breach of security or jeopardize the safety of others. Even unsharpened, non-institutional keys can be used as weapons, singly or in a heavy bunch.

Since a violation of this rule as a second performance-based offense permits removal, it only remains to decide whether mitigation is warranted. The Arbitrator does not have the Grievant’s performance evaluations before her. She does, however, have the Grievant’s disciplinary record, which cannot be said to be exemplary, consisting of five attendance-related violations in the months preceding the incident and one action for sleeping on duty (two occurrences) six months prior to the incident. Under the circumstances, I am unable to find that

the State abused its discretion when it terminated the Grievant instead of imposing a lesser penalty.

V. AWARD

The Grievant, James Welch, was removed from employment as a Food Service Coordinator for just cause. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
May 19, 2003