

ARBITRATION DECISION NO.:

18

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction
Lima Correctional Institution

DATE OF ARBITRATION:

March 20, 1987

DATE OF DECISION:

April 20, 1987

GRIEVANT:

Dennis Key

OCB GRIEVANCE NO.:

G86-0585

ARBITRATOR:

Linda DiLeone Klein

FOR THE UNION:

John Porter
Assoc. Gen. Counsel

FOR THE EMPLOYER:

Gregory C. Trout
Attorney

KEY WORDS:

Removal
Weapon
Criminal Convictions

ARTICLES:

Article 24-Discipline
§24.01-Standard

FACTS:

The Grievant was a Corrections officer at Lima Correctional Institution. While he was on administrative leave, he pleaded guilty to drug abuse, a fourth degree felony. The Grievant was

given a two year probation period during which he was barred by Federal and State law from carrying a weapon. As a result of his guilty plea, the State of Ohio removed him from employment with the State.

EMPLOYER'S POSITION:

The employer's position was that a Corrections Officer with a felony conviction could not carry a weapon, would not be a good role model and that as an employee of the Department and a parolee under the supervision of the Department, there was a conflict of interest.

UNION'S POSITION:

The Union argued that the State failed to prove just cause and also that the State committed several procedural errors. The Grievant was not allowed to attend his Step 3 hearing by management and also his removal order referenced the Department's Code of Conduct which was not in effect at the time he was convicted. In addition, the Union demonstrated that not all Corrections Officers are required to carry weapons, and there are Corrections Officers employed by the State of Ohio who are not allowed to carry weapons because they have unexpunged felony records.

ARBITRATOR'S OPINION:

The arbitrator upheld the grievant's removal. Arbitrator Klein held that there were no procedural deficiencies because; (1) the grievant was not prejudiced by his not being allowed to attend his Step 3 hearing; and (2) the commission of a felony had been grounds for removal prior to the imposition of the Standards of Employee Conduct. The arbitrator did not look at the reasons why the grievant pleaded guilty to the felony; only the fact that the grievant had pleaded guilty.

AWARD:

Grievance Denied.

COMMENTS:

There are two lessons which can be generalized from this case. First, if a grievant is barred from a pre-disciplinary or a third step hearing, the steward or staff representative should raise an objection at the hearing itself.

Secondly, when a grievant allegedly commits an offense which is subject to criminal penalties as well as discipline, the grievant should consider the effect on his job before pleading guilty. Often the grievant will only be thinking of possible jail time when he or she plea bargains to an offense. But, even if the grievant receives a probated sentence, there is a good chance the employer will use the guilty plea in an attempt to get the employee removed.

TEXT OF THE OPINION:

ARBITRATION PROCEEDINGS

BEFORE

LINDA DILEONE KLEIN

In the Matter Between:

THE STATE OF OHIO

-and-

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, Local 11
AFSCME, AFL-CIO**

OPINION AND AWARD

Grievance No:

G86- 585

Removal of Dennis Key

Heard:

March 20, 1987

APPEARANCES

For the Employer

Gregory C. Trout, Attorney

For the Union

John Porter, Associate General Counsel

Dennis Key, Grievant

ISSUE

Was the removal of Dennis J. Key from his position as a Correction Officer at the Lima Correctional Institution for just cause?

FACTS AND CONTENTIONS

On September 19, 1986, the following Order of Removal was issued to the grievant:

"This will notify you that you are removed from the position of Correction Officer II effective September 24, 1986.

The reason for this action is that you have been guilty of violation of the Dept. of Rehabilitation and Correction Rule of Conduct #17a - Commission of a Felony - in the following particulars, to wit: that on or about July 2, 1986, you did tender a plea of guilty to the indictment of Drug Abuse, felony 4, R.C. 2925.11(A) and on August 14, 1986, you were sentenced to confinement in the Ohio Department of Rehabilitation and Corrections for a period of one year. That sentence was suspended and you were placed on probation for a period of two years (with conditions)."

On July 2, 1986, the grievant pled guilty to an indictment for drug abuse, a fourth degree felony; the court "accepted said plea of guilty" and the grievant was "convicted thereof". On August 14,

1986, the grievant was given a one year suspended sentence and he was placed on probation for a period of two years; he was thereby subject to the jurisdiction of the Ohio Department of Rehabilitation and Correction.

Upon learning that the grievant had been convicted of a felony, the Employer reviewed the record pertaining to his arrest, his indictment and his plea of guilty. The Employer then concluded that removal was warranted for his "failure of good behavior". The State asserts that: 1) A correction officer who has been convicted of a felony is an inappropriate role model for inmates; 2) His continuing employment would create a "conflict of interest" in that, as a convicted felon on probation, he would be subject to the jurisdiction and supervision of the same agency with which he seeks reinstatement; and 3) His "weapons disability" prevents him from carrying a weapon, and the ability to legally carry a firearm is an essential aspect of the correction officer's job. The State submits that there was just cause for the grievant's removal and requests that the grievance be denied.

The Union, however, takes the position that the State failed to establish that just cause existed for the grievant's removal.

Aside from violating the just cause standard, the State committed two procedural errors which constitute grounds for nullification of the removal action, says the Union. A serious procedural deficiency occurred when the grievant was not permitted to attend his Step 3 hearing. While it is true that a grievant does not always attend the Step 3 meeting, the fact is that in this instance, Dennis Key wanted to be present, but the request was denied by two Management Officials at the Lima Correctional Institution. Under these circumstances, it should be held that the grievant was not given adequate opportunity to defend himself against Management's charges. The contract does not specifically require that the grievant be allowed to be present at a Step 3 hearing, however, contractual reference is made to the parties meeting in an attempt to resolve the grievance, to the granting of reasonable time to a grievant to process the grievance, and to allowing time off for a witness with relevant testimony to attend a hearing. Taken together, these provisions indicate that a grievant, the primary witness, should be allowed to attend a Step 3 hearing if he so chooses. The Union submits that "the denial of the right of a grievant to attend a Step 3 hearing is a violation of the contract and is a sufficiently egregious error to overturn Key's removal."

The other error in procedure occurred when the Order of Removal was written and the grievant was charged therein with violating the Department of Rehabilitation and Correction Code of Conduct. The Union asserts that the Code of Conduct became effective on September 1, 1986, however, the incident giving rise to the removal occurred on the Spring of 1986 and the sentencing took place in August 1986. It is improper to discharge an employee on the basis of a rule which was not in effect.

The Union maintains that there was no specific language in effect prior to September 1, 1986 advising employees that the commission of a felony was a prohibited act which would result in termination; there was no language stating that the conviction of a felony constituted just cause for removal, adds the Union.

The Union acknowledges that the grievant would be unable to carry a weapon unless his record is expunged or his weapons disability is removed, however, the Union submits that the grievant could perform the essential duties of the correction officer position without being able to carry a gun. The Union asserts that there are convicted felons employed as correction officers at the Lima Correctional Institution whose records have not been expunged; also, claims the Union, these employees have not obtained relief from their weapons disabilities through the prescribed legal process. It is unfair to deny similar consideration to the grievant. The Union contends that it is possible for the grievant to be returned to his position in areas of the institution which do not

require him to carry a weapon.

The Union also contends that the removal at issue is part of a pattern of harassment of the grievant. In mid 1985, the grievant was experiencing severe personal problems, and the State misconstrued certain statements which were made at work to mean that there might be some doubt as to whether the grievant was competent to perform the duties of a correction officer. The grievant was removed from his position in late 1985, however, it was agreed by the parties that he would submit to an examination by a psychologist to determine his competency to perform his duties. On July 15, 1986, the psychologist who performed the examination found the grievant to be fit to return to work, but the Employer would not reinstate him, says the Union. What transpired here supports the position that the State was intent upon denying the grievant the opportunity to return to his employment.

The Union argues that the State failed to demonstrate that just cause existed for the grievant's removal. The Union argues further that the basis for the plea of guilty to the charge of drug abuse was to keep the grievant from being incarcerated in the Ohio prison system where, as a correction officer, he could be subject to physical abuse by inmates.

The Union requests that the grievant be reinstated and that he be made whole for all his losses.

OPINION

The Arbitrator finds from the evidence that there are no procedural deficiencies in this matter.

As it relates to the Step 3 hearing, there was no evidence to show that the Superintendent of the Lima Correctional Institution or the Hearing Officer refused to allow the grievant to be present. Neither member of Management had been made aware that the grievant wanted to attend or that any previous requests had been made and denied. The Hearing Officer testified that he would have allowed the grievant to be present had he been asked, but the issue was not even mentioned at the Step 3 meeting. There was also evidence to establish that it is not unusual for a grievant to be absent from these proceedings. Furthermore, the grievant's position here was not prejudiced by his absence for the reason that the removal was based solely on the public record reflecting his plea of guilty to a charge of drug abuse.

Similarly, no procedural deficiency can be found in the Order of Removal. The notice references the Department of Rehabilitation and Correction Rule of Conduct #17a, "commission of a felony"; these standards of conduct became effective on September 1, 1986, which was after the grievant had committed a felony and entered his plea of guilty. However, the notice also references the Ohio Revised Code provision which prohibits the conduct engaged in by the grievant. The Order of Removal further details the sentence imposed by the Court upon the grievant. There can be no doubt regarding the basis for his removal, and there can be no doubt that the act he committed was prohibited even prior to the effective date of the Rules of Conduct. Section 124.34 of the Revised Code provides for removal for "failure of good behavior" and "malfeasance". Clearly, the commission of a felony is, and has been considered by Management to be, encompassed by this provision. The Union position would have merit if the grievant had been discharged for committing an act which had never been considered to be a violation of any rule by the Employer. In this case, there was evidence to demonstrate that employees had been discharged for the commission of a felony prior to the implementation of the Standards of Conduct.

The question to be addressed here is whether the grievant's felony conviction constitutes just cause for removal.

There may have been certain events which persuaded the grievant to plead guilty, however, the Arbitrator can only rely on the fact that he was convicted by a court of competent jurisdiction.

After considering the evidence presented at the hearing, the Arbitrator finds that the grievant

was disciplined for just cause.

It should first be stated that the prior disciplinary action cited by the Union is not relevant to this case. On July 15, 1986, the psychologist found that the grievant was mentally competent to return to work as a correction officer, however, his conclusion only bears on the resolution of the question of the grievant's competency. Prior to the issuance of the findings by the psychologist, the grievant committed a felony and he entered a plea of guilty. The settlement which was to be based upon the psychologists findings was not implemented due to the intervening factor of the commission of a felony. There was no violation of the Settlement Order under these circumstances.

The grievant was convicted of a felony while he was employed by the State of Ohio. Correction Officer Carpenter testified that the State employs convicted felons, however, he also admitted that his conviction came prior to his employment with the State. This differentiates his situation from the grievant's. The grievant is a convicted felon who is currently under the jurisdiction and supervision of the Ohio Department of Rehabilitation and Correction, and a conflict of interest could occur if he were placed in the position of supervising other convicted felons. Being a convicted felon could adversely affect the grievant's position as a role model for inmates and as a symbol of authority in a job involving trustworthiness.

It is true that Correction Officer Carpenter has not had his weapons disability removed. However, Mr. Carpenter's situation can be further distinguished from the grievant's in that he had been employed at a mental health facility which was taken over by the Department of Rehabilitation and Correction, and as many employees as possible from the mental health facility were hired by the Department of Rehabilitation and Correction when it took over the site. As an employee of the State, Mr. Carpenter was, in effect, given preferential status when it came to hiring employees for the Lima Correctional Institution.

There is no dispute over the fact that the Department of Rehabilitation and Correction employs convicted felons, however, in the instances cited by the Union, the convictions preceded such employment, which is not the case here.

Because the grievant has been convicted of a felony, he cannot carry a firearm; having a weapon while under disability is a fourth degree felony. While there are certain posts which do not specifically require the carrying of a firearm, the fact remains that correction officers must be "capable of carrying and handling firearms" at a moment's notice if an emergency should arise. Also, there are numerous posts which automatically require the correction officer to carry a firearm.

The evidence establishes that the Department of Rehabilitation and Correction has a policy requiring persons convicted of a felony to obtain relief from the weapons disability prior to obtaining employment in a position where the use of a firearm may be required in the performance of the duties of the position. The Department also has requested to be notified if any of its employees have felony convictions. The existence of these procedures, viewed with the Ohio Revised Code reference to "failure of good behavior" and "malfeasance", suggests that the commission of a felony while in the employ of the State of Ohio is a serious offense warranting severe discipline.

Based upon the nature of the grievant's offense and its impact upon his position as a correction officer, the Arbitrator finds that there was just cause for the discipline imposed by Management.

AWARD

The grievance of Dennis Key is hereby denied.

LINDA DILEONE KLEIN

Dated this 20th day of April 1987, at Cleveland, Ohio.