

ARBITRATION DECISION NO.:

67

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction, Ohio
State Reformatory

DATE OF ARBITRATION:

November 2, 1987

DATE OF DECISION:

December 4, 1987

GRIEVANT:

Harold McNeal

OCB GRIEVANCE NO.:

G-87-0813

ARBITRATOR:

Thomas P. Michael

FOR THE UNION:

John T. Porter

FOR THE EMPLOYER:

Nicholas G. Menedis

KEY WORDS:

Discharge
Just Cause
Progressive Discipline

ARTICLES:

Article 5 - Management
Rights
Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline
 §24.05-Imposition
of Discipline

Article 25 - Grievance
Procedure
 §25.03-Arbitration
Procedures
 §25.04-Arbitration
Panel

FACTS:

The Grievant was employed as a Corrections Officer 2 at the Ohio State Reformatory for approximately six years. The Grievant was discharged for violations of ten specifically enumerated "Standards of Employee Conduct". In particular, the Grievant was charged with involvement in sexual activity with at least three inmates and with giving inmates whiskey and money.

ARBITRATOR'S OPINION:

The Arbitrator held that the Grievant was discharged for just cause. At no time during questioning did the Grievant deny that Grievant's voice was on a tape recording in which Grievant admitted to the allegations. This admission, coupled with the testimony of one of the victims, presented the Arbitrator with clear and convincing evidence that the Grievant committed the acts for which Grievant was removed.

In light of the stipulation of the parties that the charged conduct constituted just cause for termination, there was no need for the Arbitrator to consider the appropriateness of the penalty; however, the Arbitrator noted that the conduct of the Grievant constituted physical abuse of inmates. By the terms of the Contract (Section 24.01), the Arbitrator lacked authority to modify the termination of an employee committing such abuse.

As a result, the grievance was denied and dismissed.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

**OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION**

AND

**OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
LOCAL NO. 11, AFSCME AFL-CIO**

**GRIEVANT:
HAROLD McNEAL**

GRIEVANCE NO.:

**THOMAS P. MICHAEL,
ARBITRATOR
COLUMBUS, OHIO**

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Department of Rehabilitation and Correction, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter "Union").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was conducted at the Office of Collective Bargaining on November 2, 1987. This matter has been submitted to the Arbitrator on the testimony and exhibits offered at the hearing. The parties have stipulated that the grievance is properly before the Arbitrator for decision and have waived the thirty-day time limit for issuance of this award.

APPEARANCES:

For the Employer:

Nicholas G. Menedis
Ohio Department of
Rehabilitation and Correction

For the Union:

John T. Porter
OCSEA/AFSCME Local 11

ISSUE

The parties stipulated that the issue before the Arbitrator is:

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

PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS

Section 4117.08(C), Ohio Revised Code.

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

* * *

(2) Direct, supervise, evaluate. or hire employees:

* * *

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:

* * *

(8) Effectively manage the work force . . .

CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employee reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(A) numbers 1-9.

* * *

ARTICLE 24 - DISCIPLINE

§24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand;
- C. Suspension;
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in

writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situation which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

FACTUAL BACKGROUND

Harold McNeal, the Grievant, was employed as a Corrections Officer 2 at the Ohio State Reformatory in Mansfield, Ohio, from February 9, 1981, until December 12, 1986. By the terms of a Removal Order dated December 11, 1986, (Joint Exhibit 2), Mr. McNeal's employment was terminated for violations of ten specifically enumerated "Standards of Employee Conduct." The parties have stipulated that, if the charges against Grievant are true, then all ten of the cited standards have in fact been violated. They have further stipulated that any or six of those charged violations would constitute just cause for removal. Those six standards as related to this case are as follows:

- (1) Physical abuse of an inmate...;
- (2) Commission of a felony or any offense involving dishonesty or moral turpitude;
- (3) Offering a favor or anything of value to an inmate without departmental authorization;
- (4) Engaging in any unauthorized relationship with inmates;
- (5) Distribution of money or other contraband without authorization; and
- (6) Soliciting bribes in connection with official duties.

In particular, Grievant was charged in the Removal Order with involvement in sexual activity with at least three inmates and with giving inmates whiskey and money.

The grievance (Joint Exhibit 2) requests "(t)hat I be reinstated to my former position and made whole; that I receive all lost wages; that no record of this disciplinary action be contained in my personnel file."

POSITION OF THE EMPLOYER

Grievant was removed for just cause as a result of an investigation of a complaint of alleged sexual activity against an inmate by a family member of that inmate. Tape recorded admissions made by Grievant confirm his sexual involvement with three inmates as well as gifts of whiskey and money to one or more of those inmates by Grievant. As stipulated, those rules violations constitute just cause for removal.

POSITION OF THE UNION

The Employer must prove Grievant's guilt of the charges against him beyond a reasonable doubt since those alleged violations constitute criminal conduct. At a minimum the Employer is subject to a standard of proof by clear and convincing evidence. The prime witness presented by the Employer, a parolee and convicted felon, is not credible. Further, Grievant did not receive a

fair pre-disciplinary hearing since he was not contacted prior to that hearing for his version of the facts and the Employer had obviously prejudged the case prior to that hearing.

Grievant should be reinstated with full back pay and benefits.

OPINION

It is the clear and unequivocal opinion of this Arbitrator that the Grievant was discharged for just cause. In reaching this conclusion, this Arbitrator has considered only the testimony of parolee Raymond B. Jarvis and that of the Grievant in their totality. No weight has been accorded the written statements of Mark A. Hart and Michael H. Rusu, also allegedly victims of the Grievant, since they did not testify.

Quite simply, this Arbitrator found the Grievant to be totally lacking in credibility. Both on cross-examination and upon questioning by the Arbitrator the Grievant did not unequivocally deny that his voice was the voice on the tape recorded conversation with Raymond Jarvis. He admitted that the tape-recorded voice sounded like his voice admitting to sexual contact with inmates. Even in his closing remarks to the Arbitrator Mr. McNeal stated that the voice on the tape was not his voice "until proven otherwise". This hardly constitutes an unequivocal denial.

The fact is that the Grievant admitted to the alleged violations in a well-orchestrated taping of his conversation with former inmate Raymond Jarvis. When taken together with the testimony of Jarvis, which this Arbitrator found credible, there is at least clear and convincing evidence that Grievant committed the acts for which he was removed.

In light of the stipulation of the parties that the charged conduct constitutes just cause for termination, there is no need for the Arbitrator to consider the appropriateness of the penalty. However, the Arbitrator notes that the conduct of the Grievant constitutes physical abuse of inmates. By the terms of the Contract (§24.01), this Arbitrator lacks authority to modify the termination of an employee committing such abuse.

AWARD

The grievance is denied and dismissed.

Respectfully submitted,

Thomas P. Michael, Arbitrator

Rendered this Fourth day
of December, 1987, at
Columbus, Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was mailed to Eugene Brundige, Deputy Director, Ohio Department of Administrative Services, 375 S. High Street, 17th Floor, Columbus, Ohio 43266-0585, with copies of the foregoing opinion being served by United States Mail, postage prepaid, this 4th day of December, 1987, upon: Nicholas G. Menedis, Chief of Labor Relations, 1050 Freeway Drive, North, Columbus, Ohio 43229; and John T. Porter, OCSEA/AFSCME Local 11, 995 Goodale Boulevard, Columbus, Ohio 43212.

Thomas P. Michael