

VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION AND
CORRECTION

- AND -

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME

GRIEVANT: BUDDY TATUM

GRIEVANCE NO.: 27-27-(08-03-06)-0010-01-03

ARBITRATOR'S OPINION AND AWARD

ARBITRATOR: DAVID M. PINCUS

DATE: APRIL 13, 2009

Appearances

For The Employer

Jessica Butler
Julie Loomis
Buffy Andrews
Chris Lambert

Police Officer
Labor Relations Officer
Office of Collective Bargaining
Advocate

For The Union

Buddy Tatum
Bob Hausen
Eric Kusky
Denny Falcione
Russell A. Burkepile
Daniel Tawney
Charles T. Williams
George L. Yerkes

Grievant
President
Vice President/Chief Steward
Staff Representative
Juvenile Correction Officer
Correction Officer
Correction Officer
Advocate

#1025

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APR 17 2009

OCSEA-OFFICE OF
GENERAL COUNSEL

INTRODUCTION

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panel between the State of Ohio, Ohio Department of Rehabilitation and Correction, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period March 1, 2006 to February 28, 2009 (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing written closings. The parties submitted written closings in accordance with guidelines established at the hearing.

JOINT ISSUE

Was the Grievant, Buddy Tatum, removed from his Correction Officer position at the Trumbull Correctional Institution for just cause? If not, what shall the remedy be?

JOINT STIPULATIONS

1. Grievant was classified as a Correction Officer.
2. Date of hire: March 6, 2000.
3. Date of removal: March 6, 2008.
4. Grievant had no active discipline on his record at the time of removal.
5. Grievant signed for the Standards of Employee Conduct (SOEC) on October 14, 2004.
6. Grievant pled guilty to OMVI and menacing.

CASE HISTORY

The facts, for the most part, are not in dispute. Buddy Tatum the Grievant, worked as a Correction Officer at the Trumbull Correctional Institution until his removal on March 6, 2008. He had served in this capacity since March 6, 2000.

The incident which triggered the Grievant's removal took place on November 30, 2007 in the city of Mount Vernon, Ohio. At approximately 11:22 p.m., Jessica Butler, a Police Officer, observed the Grievant's vehicle weaving on the roadway. She initiated a traffic stop. While speaking to the Grievant, Butler could smell a strong alcohol odor coming from his breath. She asked him to exit his vehicle and noticed he was unsteady.

The Grievant stated he was just in town hunting and was leaving to return to his motel room. The Grievant advised Butler that she was "one of my fellow brothers and was a Correction Officer; and she should "show him some professional courtesy and let him go." (Joint Exhibit 3, pg. 12).

While attempting to conduct a portable breath test, the Grievant maintained he did not understand the instructions. Butler, faced with an uncooperative individual, placed him under arrest for operating a vehicle while impaired.

The Grievant became very belligerent and verbally abusive. He yelled he was going "to beat Butler's ass and she wasn't shit." The Grievant also stated, "You fucking bitch. You're going to cost me my job. I am going to hunt you down and kill you. I will chop your head off with a knife" (Joint Exhibit 3, pg. 12).

The Grievant continued his abusive behavior toward Butler and the jail staff upon being processed. He was restrained in a chair for the duration of his stay at the City of Mount Vernon's jail.

On December 3, 2007, Robbyn Ware, the Warden's Assistant, received a call from Anton Hepler, a reporter from the Mount Vernon News. Hepler inquired whether the Employer was aware the Grievant had been arrested. It appears the Grievant had neither reported his arrest nor jail time to anyone at the facility.

On December 5, 2007, a newspaper report regarding the incident was published in Mt. Vernon. The headline stated: "Correction Officer pleads not guilty to OVI" (Joint Exhibit 3, pg. 9).

On February 11, 2008, the Grievant received a Notice of Disciplinary Action. It stated, in pertinent part:

XXX

You are to be removed for the following infractions:

Rule 39 - Any act that would bring discredit to the Employer.
Rule 37 - Action that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee.

XXX

(Joint Exhibit 2, pg. 3)

On March 6, 2008, the Grievant protested his removal. He maintained he was removed without just cause.

Neither party raised substantive nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined it had just cause to remove the Grievant. The Grievant's actions were egregious and not a singular display of poor judgment. His actions brought discredit to the Employer and could compromise or impair his ability to effectively carry out his duties as a state employee.

The focal point of the Grievant's misconduct rests on his behavior toward Officer Butler. He was verbally abusive, physically resistant and threatening. At one point during the episode, he threatened to kill her; a fellow law enforcement officer.

Officer Butler's recollections were fully supported by video and audio recordings (Joint Exhibit 4) from her patrol vehicle. These recordings indicate a spewing of sexually oriented utterances and threats of physical violence. The Grievant, moreover, named the Department as his employer.

Other remarks were not directly recorded, but Officer Butler testified to these utterances; none of which were rebutted by the Grievant. Once outside the patrol car, the Grievant threatened to cut her head off with his knife.

The Grievant's conduct did not change upon arrival at the county jail. He was uncooperative and physically resistant which caused the jailers to place him in a restraint chair. He again uttered he "wished to leave the chair so that he could kick Officer Butler's ass."

A clear nexus exists between the Grievant's misconduct and his ability to function as a Correction Officer. His misconduct harmed the reputation of the Employer within the law enforcement community. A newspaper report (Joint Exhibit 3, pg. 11) identified the Grievant and his employment location; detailed his actions and the charges against him.

The Employer's ability to function within the law enforcement community is hampered by this incident. It becomes difficult, from a credibility standpoint, when an employee is viewed as uncontrollable, aggressive and violent.

Similarly, the Employer cannot envision the Grievant supervising inmates. His poor decision-making skills and response to stressful situations make him a potential hazard in a correction environment.

Nothing in the record supports a mitigation argument. Mixing alcohol and drugs was a choice made by the Grievant and serves as aggravating circumstance. The Grievant maintained he was unaware that mixing an anti-depressant with alcohol with heavy drinking could increase the effects of alcohol; a ridiculous assertion which further reduces the Grievant's credibility.

Even though the Grievant admitted his guilt, the record fails to support his remorse. Failing to recall what took place during the course of the incident, and invoking his condition as a plausible defense nullifies this argument.

The Union's Position

The Union maintains the Employer did not have just cause to remove the Grievant. Pre-incident emotional problems, post-incident rehabilitative efforts, and inability to establish a sufficient level of proof to support removal were all raised as rebuttal arguments.

The Grievant knew he had an emotional problem prior to November 30, 2007 and sought treatment. An on-the-job injury led to the use of a prescription painkiller and he resumed drinking alcohol. His life took a turn for the worse with the death of several family members via cancer, a divorce and a OMVI incident in 2007.

In July of 2007, the Grievant visited his physician. The physician diagnosed an anxiety disorder and prescribed Paxil (Union Exhibit 5). The very drug that interacted with alcohol leading to the unfortunate incident on November 30, 2007. An interaction so severe that he could not recall what took place. He thought he had been involved in an accident where someone had died.

On December 7, 2007, the Grievant checked himself into an in-patient hospital ward for psychiatric treatment (Union Exhibit 8). While undergoing treatment, he became aware of the negative interactive effect of alcohol and anti-depression medication. He, moreover, determined he could never drink again.

On December 19, 2007, the Grievant entered an out-patient treatment program which he successfully completed. He has also completed an anger management course and has not imbibed since November 30, 2007.

The Union notes rule 26 was not cited as a formal charge in the removal order. This potential charge requires an employee to immediately report any personal arrest or criminal charge (Joint Exhibit 5). And yet, this charge is referenced in the removal order and the just cause analysis (Joint Exhibit 3) as an aggravating factor.

The Grievant's actions do not impair his ability to effectively carry-out his duties as a public employee. The Employer, more specifically, has failed to establish a "nexus" between the Grievant's conduct and his ability to perform his job. Several co-workers testified they would have no problem working with the Grievant; and that he would have no problem working with inmates.

The newspaper article (Joint Exhibit 3) failed to achieve the critical mass necessary to remove the Grievant. It was not widely distributed nor notorious.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, a complete and impartial review of the record including the parties' written closings, it is this Arbitrator's opinion that the Employer had just cause to remove the Grievant. The charges in question were fully supported by the record.

The Arbitrator is unwilling to give the Grievant a chance to establish that he is rehabilitated. Some conduct is so egregious that it warrants termination; especially when return to employment requires engaging in duties and responsibilities in a highly stressful correction facility.

The Rule 26 procedural argument raised by the Union is insufficient to alter the Arbitrator's decision. Having a charge identified as an aggravating circumstance on a just cause worksheet cannot be equated with a charge identified on a removal order. Aggravating or mitigating circumstances only come into play once a charge is supported by the record, and an arbitrator then determines whether an imposed penalty is proper under the circumstances.

The Grievant regretted his actions on November 30, 2007. Some action or misconduct are so egregious that they amount to malum in se acts. Acts which any reasonable person should know, if engaged in, will result in termination for a first offense. Progressive discipline principles do not apply in these situations and should not be expected. In fact, during the episode, the Grievant remarked Officer Butler's unwillingness to offer a professional courtesy would get him fired. Clearly, The Grievant was aware his conduct would result in termination.

Here, testimony by Officer Butler and the video and auditory recording (Joint Exhibit 4) are evidence of physically resistant, threatening and abusive misconduct. This misconduct was not singular but occurred at the initial scene, during the sobriety tests outside the vehicle and at the jail forcing the Grievant's eventual restraint in a chair. Much of the vulgar utterances and threatening misconduct were directed toward Officer Butler and were continuous throughout the episode. Most troubling were the physical threats of bodily harm uttered by the Grievant.

The Employer established nexus for the off-duty misconduct. His behavior harmed the reputation of the Employer. It is unrebutted that the Grievant attempted to sway Officer Butler by stating he was a Correction Officer working for a related law enforcement organization. The newspaper article (Joint Exhibit 3) further reduced the Employer's reputation regardless of the scope or range of coverage. It identified the Grievant by name, his place of employment and nature of his misconduct.

A correction facility is a harsh and stressful environment where the lives of fellow officers and inmates are continually in jeopardy. Inmates either directly or indirectly expose weaknesses and use them to their advantage. Supervising inmates who may find out about the charges and their circumstances would be difficult or impossible. This would potentially place other officers in jeopardy; an outcome the Arbitrator is unwilling to undertake.

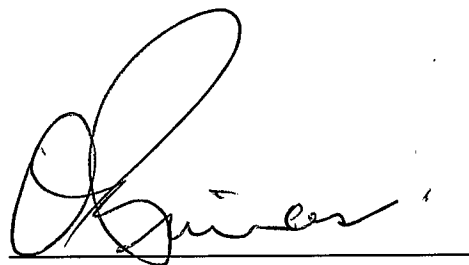
Remorse, at times, can be influential in reducing or modifying penalties. Here, it becomes impossible to assess whether the Grievant can correct his prior acts of misconduct. He could not recall any of his misconduct because he maintained that he blacked-out throughout the entire episode. A response which lacked credibility and unsupported by the record. The video/audio tape (Joint Exhibit 4) evidences responses to Officer Butler's queries. Also, he offered to apologize to Officer Butler during the course of the arbitration hearing. A truly remorseful person, confronted by his egregious misconduct, would have initiated an apology at some earlier date.

AWARD

The grievance is denied. The Employer had just cause to terminate the Grievant.

4/13/09

Chagrin Falls, Ohio



Dr. David M. Pincus, Arbitrator