

IN THE MATTER OF ARBTRATION

BETWEEN

STATE OF OHIO
DEPARTMENT OF REHABILITATION AND CORRECTION
OHIO REFORMATORY FOR WOMEN

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11
AFSCME, AFL-CIO

#1149

Opinion

BEFORE: Arbitrator Sarah Cole

Grievant Evan Nephew: #DRC-2014-39519-3

Arbitration Hearing Dates: January 13, 2016 and March 16, 2016

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RECEIVED / REVIEWED
MAY - 6 2016
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Background

Evan Nephew was a correctional officer at the Ohio Reformatory for Women (ORW) from November 2007 until October 27, 2014. At the time of his removal, Nephew had an active one day working suspension on his record for a performance violation. His employer, the State of Ohio, removed him for several violations of the Standards of Employee Conduct, including, in pertinent part:

Rule 5F: Damage, loss, or misuse of state owned or leased computers, hardware/software, e-mail, internet access/usage. According to the Disciplinary Grid, a violation of this rule, when it is a second infraction, requires a two day working suspension.

Rule 20: Involvement in horseplay. A violation of this rule, when it is a second infraction, requires a two day working suspension.

Rule 24: Interfering with, failing to cooperate in, or lying in an official investigation or inquiry. A violation of this rule, when it is a second infraction, calls for a five day working suspension or removal.

Rule 30C: "While on duty . . .the (C) [u]nauthorized conveyance, distribution, misuse, or possession of other contraband." A violation of this rule, when it is a second infraction, calls for a five day working suspension or removal.

Rule 37: "Any act or failure to act that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee." A violation of this rule, when it is a second infraction, calls for a five day working suspension or removal.

Rule 38: "Any act, or failure to act, or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the

Department, or a member of the general public.” A violation of this rule, when it is a second infraction, calls for a five day working suspension or removal.

Rule 41 [added at second pre-disciplinary hearing]: “Unauthorized actions or a failure to act that could harm any individual under the supervision of the Department.” A violation of this rule, when it is a second infraction, calls for a two day working suspension or removal.

Rule 44: “Threatening, intimidating, coercing, or use of abusive language toward any individual under the supervision of the Department.” A violation of this rule, when it is a second infraction, calls for a five day working suspension or removal.

The Employer began investigating the Grievant on January 31, 2014, after inmates alleged that the Grievant encouraged inmate Amanda Hoops to attack another inmate, Amy Leedy, on January 28, 2014. Through this investigation, the Employer learned more about the circumstances surrounding the attack as well as the Grievant’s other actions during the relevant time period of the investigation. With respect to the attack, inmates Hoops and Branigan Long reported that the Grievant told Hoops to attack Leedy because Leedy was a snitch and needed to be taken care of. Following the assault on inmate Leedy, several inmates, including Barbara Bellamy (Jt. Ex. 7 at 139), Amber York (145), Natalie Sanders (149-50), Kathleen Earnest (155) and Amanda Benkalowycz (159), observed that the Grievant did not immediately place Hoops in handcuffs but, instead, allowed her to get her coat and have a cup of coffee while sitting on a bunk. Eventually, the Grievant escorted inmate Hoops to the “hole”. Over the course of the investigation into the fight and its aftermath, the Employer discovered that the Grievant had engaged in several other actions that it deemed rule violations. First, the Employer determined that the Grievant had utilized his state and personal e-mail accounts to exchange numerous personal e-mails with Officer Samantha McDonald from January to March 2014. The e-mail

exchanges occurred on multiple occasions while the Grievant was on duty. The Employer also discovered that the Grievant used his personal cellphone while he was on perimeter duty to correspond with Officer McDonald. During the course of the Employer's investigation, the Employer interviewed the Grievant, asking him questions about his cellphone use on the perimeter as well as whether he used either his state or personal e-mail accounts to send non-business related e-mails to Officer McDonald while on duty. The Grievant responded that he did not recall sending personal e-mails (later he stated that he might have sent such e-mails) nor using his phone while on perimeter duty. He also stated that he did not know whether he was permitted to use his cellphone while on duty. The Employer concluded that these answers were not truthful and, thus, a violation of the rules. While reviewing video of the Grievant related to the inmate on inmate fight, the Employer also discovered what it described as "horseplay" with inmate Kneiss, where the Grievant repeatedly pulled away a piece of paper and pen from inmate Kneiss as she tried to sign up for an activity at ORW. In addition, the Employer also found video of the Grievant poking his finger at inmate Batty and saying "bad inmate".

Following this investigation, the Employer charged the grievant with violations of rules 5F, 20, 24,30C, 37, 38 and 44. A pre-disciplinary hearing was held on September 2, 2014. Following that hearing, Kelly Storm, the hearing officer, concluded that there was just cause to find that the Grievant violated each of these rules. A second pre-disciplinary hearing was held on October 22, 2014. The Employer added an additional charge based on alleged violations of Rule 41. The second pre-disciplinary hearing focused on the Grievant's role in encouraging inmate Hoops to attack inmate Leedy and the fight's aftermath. Kelly Storm, again the hearing officer, concluded that there was just cause to support the conclusion that the Grievant violated

rule 41. Following this second hearing, on October 25, 2014, the Employer terminated the Grievant.

Procedural Objection

The Union levied a procedural objection against the bifurcation of the pre-disciplinary hearings, claiming that a new charge, the violation of rule 41, was added to the second pre-disciplinary hearing when that violation, and the accompanying documents and video evidence, should have been included in the first pre-disciplinary hearing because the evidence supporting these charges was well known to the Employer. Both the first and second pre-disciplinary hearings were held within the sixty day time frame prescribed by the contract for issuance of discipline. (Jt Ex. 1 at 5). No discipline was issued following the first pre-disciplinary hearing. It appears that the Employer intended to reconvene the pre-disciplinary hearing so that the video evidence of the inmate fight, which was not technologically capable of being seen or heard at the first hearing, could be used. While it would have been more in keeping with the spirit of the rule to provide all documentary and video evidence in good working order to the Grievant prior to the first pre-disciplinary hearing, I find that the Grievant had sufficient time to review all documentary and video evidence prior to the second pre-disciplinary hearing. Moreover, the Employer did not issue discipline until after the second pre-disciplinary hearing and both hearings took place within the contractual sixty-day time limit for issuance of discipline. Thus, I find that no procedural violation has occurred.

Opinion

The Employer alleges that the Grievant engaged in multiple rule violations that were discovered during the course of its investigation of the Grievant's role in inmate Hoops' January 28, 2014 attack on inmate Leedy. As more fully set forth below, I conclude that the Employer

has established that the Grievant committed some of the asserted violations, but has failed to establish others. I conclude, though, that the violations that the Employer has established justify the Grievant's termination.

Did the Grievant Violate Rules 5F, 24, 30C, 37, 38 and 44?

The Employer contends that the Grievant violated rules 5F, 24, 30C, 37, and 44 when: (1) he used his state and personal e-mail accounts to e-mail another officer while they were both on duty and, also, when the Grievant was not on duty or on administrative leave, (2) he possessed a cellphone while on duty in the facility and then used the cellphone to send non-business related text messages to the same officer while both were on duty, and (3) he was untruthful during an investigation of the violation of these rules, claiming he did not recall sending e-mail messages while on duty or using his cellphone while on perimeter duty.

The Employer contends that the Grievant used his state and personal e-mail accounts to send multiple e-mail messages to Officer Samantha McDonald between January and March 2014. This action violated Standard of Employee Conduct 5(f) as well as the State of Ohio's policy on internet, electronic mail and online services. (Jt. Ex. 11). Joint Exhibit 8 is replete with inappropriate e-mails, coming from both the Grievant's personal and state e-mail accounts. The Grievant was sending and receiving many e-mails, of a predominantly personal nature, during his work hours. A review of these e-mails establishes that the Grievant was using his state e-mail inappropriately as well as ignoring his work obligations by sending e-mails from his personal account. For example, on Tuesday, January 14, 2014, both the Grievant and McDonald were working on second shift. The record shows that the Grievant and McDonald sent multiple exchanges – approximately 31 e-mails sent and received, between 5:26 p.m. and 9:00 p.m. Similar patterns occurred on January 21, 23, 28, and February 2, 2014.

The phone records also establish that the Grievant used his cellphone while on duty on the perimeter. According to the Employer, when a correctional officer is policing the perimeter of ORW, he or she is the last line of defense for the facility. Should an inmate escape, the perimeter officer might be the last person who could stop the inmate from leaving the grounds and creating a danger to the public. On January 21, 2014, the Grievant was on duty in a perimeter vehicle. During his shift, the Grievant emailed Officer McDonald while she was on duty in the Rogers 2 housing unit. The Grievant's e-mail said, "hey...I'm on perimeter tonight...if you want to e-mail use my gmail account its easier...ebnephew@gmail.com thank you." (Jt Ex. 9 at 204). Email records show that Grievant sent and received numerous non-business related messages that night, including e-mails discussing a conversation Officer McDonald had with Unit Manager Anunike about Grievant calling inmates names and instructing inmates to stand with their noses on the wall; about Officer Lowry and other officers' awareness of their relationship; about how they want to make each other happy, etc. (Jt Ex. 9 at 205-09). The timekeeping report establishes that the Grievant was on duty from 2:06pm – 10:30pm and that Officer McDonald was on duty from 2:06 pm – 11:05pm. (Jt. Ex. 9 at 212, 214) Moreover, Verizon text records establish both that Grievant received text messages at 7:05 and 7:17 p.m. and that he sent a text message at 8:56 p.m. (Jt. Ex. at 217).

The Union first responds to these contentions by asserting that all employees use their cellphones inappropriately at times and send personal e-mails to each other as well as to loved ones. The Union offers examples such as employees participating in NASCAR and football pools. (Tr. 414). Yet the Union offered little specific evidence to support its speculation that other employees inappropriately use their e-mails. Moreover, even if other employees misuse e-mail, it is the Grievant's extensive misuse of his work and personal e-mail during work hours

that seems especially problematic here. The Grievant was sending and reading multiple e-mails on several occasions. Not only were these e-mails inappropriate, but the volume of the e-mails was so great that it is impossible to believe that these e-mail exchanges did not distract him from his duties.

With respect to the use of the cellphone while on perimeter duty, the Union argued that the primary purpose of the perimeter officer is to prevent contraband from being thrown over the fence. Thus, the Union contended, making the occasional cellphone call or sending the occasional text is not problematic. But, the Employer's rationale for prohibiting cellphone while on perimeter duty makes sense because, unquestionably, the perimeter officers are the last line of defense for the facility. Thus, the Employer's rule prohibiting use of a cellphone while on perimeter duty is appropriate.

In addition, the Grievant's possession of a cellphone while on facility grounds was a violation of Rule 30(C). Rule 30(C) states that, "[w]hile on duty [it is a violation of the rule to have] . . . [u]nauthorized conveyance, distribution, misuse, or possession of other contraband. The Union contends that the Grievant did not intend to convey his cellphone to anyone and that a cellphone is not contraband. As to the first, the rule clearly states that "possession" of contraband, just like conveyance of contraband, is a violation, whether or not there is intent to convey the contraband to anyone else. Here, there is no question that the Grievant possessed his cellphone while on the perimeter (the Grievant's more recent claim that his cellphone remained in his car during his shift is not credible). The only remaining question is whether a cellphone is contraband. The Grievant claims that he did not know whether a cellphone is contraband. According to the Employer, post orders for the perimeter state that employees may not possess their cellphones while on perimeter, which is part of the facility. (Storm Testimony at 176 and

178). I find that evidence to be credible, and conclude that a cellphone is contraband. Thus, possession of the cellphone, while on perimeter, is the possession of contraband and a violation of rule 30(C).

The Grievant's testimony both at the investigatory interview and during the arbitration hearing with respect to his e-mail and cellphone use is not credible. The investigatory interview took place on February 24, 2015. (Jt. Ex. 6 at 123-A, B and C). The interview took place not long after the extended e-mailing with Officer McDonald and the use of a cellphone while on perimeter. Yet, during the interview, Grievant stated that he did not recall whether he ever used his state e-mail to send non-business related e-mail. (123-A). Later in the interview, he stated that he used his personal e-mail to e-mail Officer McDonald on her state account "a few times." (123-C). He also stated that he never used his personal cellphone while on duty or on the perimeter. (123-B). He further stated that he did not know whether he was allowed to use his cellphone while on perimeter. (123-B). Then, at the arbitration hearing, he testified that his shift supervisor had given him permission to go to his vehicle in the parking lot while he was working perimeter so that he could check his cellphone. (Tr. 413-14).

In his investigatory interviews and at the arbitration hearing, the Grievant grossly understated his use of his state and personal e-mail accounts while on duty. His understatement and, at times, denial that he engaged in e-mailing establish that he was not truthful during the Employer's investigation. In addition, the Employer established that he used his cellphone while on perimeter duty. Grievant was not credible when he claimed he could not remember whether he used the phone and when he contended he didn't know whether he could have a personal cellphone while on perimeter duty. Further, his claim that he didn't know that a cellphone is contraband also lacks credibility. Cellphones are contraband at every prison in the country – and

the Employer's rules and policies, which Grievant is familiar with—establish a prohibition against bringing cellphones into the facility. Finally, the Grievant's attempt at the hearing to explain his cellphone use, that he went to the parking lot to use the cellphone, is not believable and, even if true, still shows a problematic lack of attention to duty.

A review of the records and testimony in this case establishes violations of the rules identified above. The Grievant repeatedly used his work and personal e-mail accounts during work hours to send non-business related e-mails, he used his cellphone, a contraband item, while on perimeter, and then was untruthful during the investigation process.

Did the Grievant engage in horseplay in violation of rule 20?

The Employer also found that the Grievant violated rule 20, prohibiting horseplay while on the job. According to the Employer, the Grievant engaged in horseplay with inmate Kneiss on January 28, 2014. The Employer submitted video evidence supporting its contention. On that day, inmate Kneiss cut in line and attempted to sign up for an activity that would take place at the facility. When an inmate cuts in line, officers make that inmate wait until everyone else in the line has had an opportunity to sign up and, if there is still availability for the activity at that time, the waiting inmate is permitted to sign up. In the video, inmate Kneiss waits until the other inmates have had a chance to sign up. When that is done, she attempts to obtain the pen and paper from the Grievant. Over an extended period of time, the Grievant repeatedly grabs the paper and pen back from inmate Kneiss every time she tries to take the pen or paper to sign up for the activity. While "horseplay" might not be the most appropriate word to describe the Grievant's behavior in the video, he certainly acted unprofessionally by repeatedly teasing the inmate, who was simply trying to sign up for an activity. Even after watching the video at the

arbitration hearing, the Grievant continued to insist that he had done nothing wrong. This testimony further undermined his credibility related to this rule violation.

Did the Grievant engage in inmate intimidation in violation of rule 44?

Rule 44 prohibits threatening, intimidating, coercing, or use of abusive language toward any individual under the Department's supervision. The Employer, when reviewing video footage as part of its investigation of the Grievant, found video from January 28, 2014, in which the Grievant points his finger in inmate Batty's face and calls her "bad inmate". According to the Employer, the Grievant's actions were inappropriate and unnecessary. In response, the Union emphasized that the inmate, in her confidential statement, indicated that she did not feel intimidated by the Grievant's actions. (Jt Ex. 7 at 169-70) In light of the inmate's statement, it appears that the Grievant's actions fell more within the definition of horseplay or teasing, than in the realm of inmate intimidation. Thus, I do not find that there was just cause for the Employer's finding that rule 44 was violated.¹

Did the Grievant provoke or encourage an inmate fight and then, following the fight, take proper actions to secure the fighting inmate in violation of rules 38 and 41?²

The Employer claims that the Grievant violated rules 38 and 41, which state that "[a]ny act, or failure to act, or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public" and "[u]nauthorized actions or a failure to act that could harm any individual under the supervision of the Department [are impermissible]" when he

¹ The Employer also levied allegations against the Grievant that he forced inmates to face the wall and put their noses on it as a form of "discipline". The witness testimony supporting these allegations was vague and lacked elements of credibility. Therefore, I also find that the Employer did not have just cause for disciplining Grievant for using inappropriate forms of discipline with the inmate population.

² There is some confusion in the record as to whether the fight and its aftermath violated rules 38 and 41 or just violated rule 41, since that is the rule violation added to the second pre-disciplinary hearing. My reading of the record is that the fight and its aftermath are potential violations of rules 38 and 41.

encouraged or provoked an inmate to fight another inmate and then, after the fight, did not follow proper procedures to secure the inmate who started the fight. Both parties agree that, on January 28, 2014, inmate Hoops attacked inmate Leedy in the bunk area. The Employer contends that the Grievant, who allegedly met with inmate Hoops in the recreation room by the microwaves several hours before the fight, encouraged Hoops to attack Leedy because, as Hoops testified, Leedy had snitched on the Grievant. According to Hoops, the Grievant said, “you know what snitches get.” Hoops perceived these statements as encouragement to fight inmate Leedy. Inmate Branigan Long, in a confidential statement, stated that she overheard this conversation between Grievant and Hoops at 4:15 p.m. on the day of the fight as she was waiting to “bio” her sheets. (Jt Ex. 7 at 133). Following the fight, multiple inmates, including inmate Hoops, reported in confidential statements that, instead of cuffing inmate Hoops, which is the appropriate procedure following a fight, Grievant instead let her get her coat and sit on her bunk, drinking a cup of coffee. (Jt Ex. 7 at 139, 145, 150, 155, and 159).

Although Hoops and Long both passed lie detector tests regarding Grievant’s encouragement of Hoops to fight Leedy, I am not considering this evidence in rendering my decision, as this kind of evidence is not reliable. Inmate Hoops changed her story more than once during the course of the investigation of this incident. Audio recording of her interview following the incident had her first claiming that she simply had a bad day and went after Leedy. (Tr. 136) Later, after leading questions from the investigator, she changed her story, stating that the Grievant had encouraged her to fight Leedy because Leedy was a snitch. (Tr. 137-38) The only corroborating evidence comes from inmate Long.³ (Jt Ex. 7 at 133-34). Yet, this evidence

³ The Employer submitted other inmate statements supporting the claim that the Grievant encouraged Hoops to fight Leedy. (Jt Ex. 7) Although many of the inmates stated that the Grievant told Hoops to attack Leedy, the statements did not indicate whether these inmates heard this information from the Grievant or from someone else. Thus, I discount these statements as hearsay.

is suspect because, at the time she claims to have overheard the conversation between the Grievant and inmate Hoops, she was at the correctional officers' desk while Hoops and the Grievant were in the recreation room by the microwaves. Thus, I find insufficient evidence to support the Employer's conclusion that Grievant enticed Hoops to fight Leedy in violation of rules 38 and 41.

However, sufficient evidence exists to support the Employer's contention that the Grievant acted improperly following the fight. Multiple inmates reported in confidential statements that the Grievant did not immediately cuff Hoops, in violation of ORW protocol. (Jt Ex. 7 at 139, 145, 150, 155, and 159). Instead, he allowed her to retrieve her coat and have a cup of coffee. The video evidence covering this time period does not suggest otherwise. According to the video, the assault took place between 21:24.29 and 21:25. At some point between 21:25 and 21:27, inmate Leedy arrived at the officers' desk, distraught and injured. At 21:27, the Grievant returned from conducting a round. Then, approximately five minutes later, Grievant took his cuffs out and appeared to move toward the bunk area to cuff inmate Hoops. This lapse in time between the fight and the cuffing of inmate Hoops is a violation of post-fight protocol and therefore a violation of rules 38 and 41. The Employer had just cause to discipline the Grievant for a violation of rules 38 and 41.

Because the Grievant had active discipline on his record, violation of the rules discussed above justifies the Employer's decision to terminate the Grievant. I find that there was just cause to support the Employer's decision to terminate the Grievant.

Date: May 5, 2016



Sarah R. Cole, Arbitrator