

ARBITRATION DECISION NO.:

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UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Rehabilitation and Correction
Ohio State Reformatory (Mansfield)

DATE OF ARBITRATION:

June 30, 1988

DATE OF DECISION:

September 23, 1988

GRIEVANT:

Randy Ramy

OCB GRIEVANCE NO.:

G-87-2258

ARBITRATOR:

David Pincus

FOR THE UNION:

Dan Smith

FOR THE EMPLOYER:

Nicholas G. Menedis

KEY WORDS:

Felony Conviction

Removal

Just Cause

ARTICLES:

Article 24 – Discipline

§24.01 – Standard

§24.02 – Progressive Discipline

§24.04 – Pre-Discipline

§24.05 – Imposition of Discipline

FACTS:

Grievant was employed by the Ohio Department of Rehabilitation and Corrections as a Corrections officer for approximately six (6) years. He was removed by the Employer on October 14, 1987 for allegedly engaging in off-duty misconduct.

The events which led to Grievant's removal are not in dispute. On Tuesday, October 28, 1986, the Grievant entered a bar in an intoxicated state and engaged in an altercation with a paraplegic customer. Grievant pulled a knife on the customer, inflicted a wound under the customer's right bicep, and attempted to cut the customer's throat.

Shortly after the attack, Grievant was convicted of an aggravated felony of the second degree by knowingly causing or attempting to cause physical harm to another by means of a deadly weapon. (O.R.C. Section 2903.11(A)(2))

The Employer became aware of the above-mentioned conviction when the Probation department notified the facility that a pre-sentencing investigation was being conducted. The Employer then held a pre-disciplinary conference in which a removal recommendation was made based on a violation of Rule 17-A of the Standards of Employee Conduct of the Department of Rehabilitation and Correction. In response to the above managerial action, Grievant filed this grievance.

EMPLOYER'S POSITION:

It is the position of the Employer that it had just cause to remove Grievant for engaging in off-duty misconduct. This offense violated Rule 17a which deals with the "Commission of a felony or any offense involving dishonesty or moral turpitude". Grievant was given forewarning of the possible or probable consequences associated with off-duty misconduct via receipt of the Standards Employee Conduct which was distributed to all employees.

Grievant's conduct had a direct impact on the facility. First, the public's trust and interest would be violated if a known convicted felon was returned to work at the facility. Second, if the Grievant was returned to work, he would not be able to engage in normal correction activities because the facility would be forced to restructure his daily activities by reducing Grievant's direct contact with inmates. Third, a corrections officer's work environment is laden with a great deal of stress and the Grievant's conduct raises questions concerning his ability to deal constructively with stress. Lastly, there is an inherent conflict of interest associated with the reinstatement of a convicted felon in a penal institution. Convicted felons, such as Grievant, who have not completed elements of their rehabilitation program, cannot realistically fulfill their rehabilitation responsibilities, and thus, perpetuate the facility's goals and objectives.

UNION'S POSITION:

It is the position of the Union that the Employer did not have just cause to remove the Grievant for engaging in off-duty misconduct. The Employer did not apply its rules and penalties even-handedly and without discrimination. This disparate treatment occurred when Employer failed to consider certain factors which it normally evaluates when reviewing the applications of new employees with felony convictions.

The Employer had a policy of hiring individuals on parole yet the Employer failed to provide any evidence supporting the notion that it could not properly supervise the Grievant's parole. Further, the Grievant's conviction does not engender any greater liability than those of other employees with felony convictions.

Finally, the Grievant's action were aggravated by his alcoholism condition. He has, however, successfully completed an alcoholism treatment program which suggests that a similar incident will not take place if the Grievant is returned to work. Therefore, Grievant should not have been removed from

his position as a Corrections Officer.

ARBITRATOR'S OPINION:

Employer had just cause to remove Grievant for off-duty misconduct. The Union did not provide any evidence indicating that other employees engaging in off-duty felonious misconduct have been given different penalties. The comparison of Grievant's situation with that of convicted felons, hired by the Employer is fallacious. When the Employer hires convicted felons they have completed a rehabilitation period and have paid their societal dues. Grievant does not fall within this category.

The Grievant's conduct had a harmful impact on the Employer's reputation or product. First, there was a huge potential for adverse publicity to the facility. Second, reinstating Grievant would disrupt rather than enhance the facility's goal of rehabilitating and integrating convicts by changing existing behavioral patterns. And third, even if Grievant was reinstated, he would be subject to manipulation and harassment from other inmates as a consequence of his known felony conviction.

AWARD:

Grievance denied and dismissed.

TEXT OF THE OPINION:

* * *

STATE OF OHIO AND OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION LABOR
ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION, THE OHIO STATE
REFORMATORY (Mansfield, Ohio)

-and-

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

GRIEVANCE: Randy Ramey (Discharge)

CASE NUMBER: G-87-2258 (OJR-87-206)

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: September 23, 1988

APPEARANCES

For the Employer

- Freddie Sharp

Observer

Tim Bossenbrook

Observer

Jay Denton

Deputy Superintendent of the Probation
Development Section

Richard Hall

Director of Employee Relations, OSR
Chief of Labor Relations

Nicholas G. Menedis

For the Union

- Randy A. Ramey

Grievant

Brenda Persinger

Staff Representative

Dan Smith

General Counsel

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INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Rehabilitation and Correction, the Ohio State Reformatory, Mansfield, Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 July 1, 1989 (Joint Exhibit #1).

The arbitration hearing was held on June 30, 1988 at the office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the 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 hearing, the Parties were asked by the Arbitration if they planned to submit post hearing briefs. Both Parties indicated that they would submit briefs.

ISSUE

The stipulated issue in this grievance: Whether the Grievant, Randy Ramey, was removed for just cause? If not, what should the remedy be? **2**

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer 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."

(Joint Exhibit 11, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 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."

Section 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."

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Section 24.04 - Pre-Discipline

"An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges."

Section 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-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days 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. **4**

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations 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."

(Joint Exhibit 11, Pgs. 34-36)

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STIPULATIONS OF FACT

For the State

For the Union

s/s _____

s/s _____

Mr. Nick Menedis

Brenda Persinger

Labor Relations

Staff Representative

1. Mr. Ramey was employed by the Department of Corrections since November 2, 1981 to October 14, 1987 as a Corrections Officer 2 at the Ohio State Reformatory.
2. Mr. Ramey's only prior discipline consisted of a written reprimand for an unrelated offense and should not be a factor.
3. Mr. Ramey was a good and conscientious officer.
4. Mr. Ramey was removed for receiving a felony conviction.
5. The State does hire convicted felons who make the Department aware of their conviction prior to employment, a Correction Officers after consideration of circumstances surrounding conviction, and if they can be relieved of their weapons disability.
6. The issue is just cause and the grievance is properly before the Arbitrator.

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CASE HISTORY

The Ohio State Reformatory, the Employer, is located in Mansfield, Ohio. The Employer's mission consists of the housing and care of convicted felons. An integral portion of the Employer's mission involves the rehabilitation of these individuals prior to their eventual release into the community.

Randy A. Ramey, the Grievant, has been employed by the Ohio Department of Rehabilitation and Correction for approximately six (6) years. He was, originally hired as a Corrections Officer 2 on November 2, 1981, and enjoyed this job classification throughout his tenure. The Grievant, however, was removed by the Employer on October 14, 1987 for allegedly engaging in off-duty misconduct. As a Corrections Officer 2, the Grievant had the following critical job duties and responsibilities: maintains discipline, order and security, guards against escapes and supervises the daily activities of the inmates; may use firearms to maintain discipline, order and security both on and off institutional

grounds (Joint Exhibit 5).

The facts surrounding the Grievant's removal are not in dispute. On Tuesday, October 28, 1986, the Grievant entered a bar in an intoxicated state and engaged in an altercation with a paraplegic customer. The police report noted that the Grievant pulled a knife on the customer, and that he inflicted a knife wound under the arm of his right bicep. The customer's allegation concerning the Grievant's attempt to cut his throat was also partially confirmed. The attending officer observed an

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indentation on the right side of the victim's throat; the indentation was approximately one (1) inch long (Employer Exhibit 1).

Additional discussions with the victim and witnesses helped identify the Grievant. The officer was told that the Grievant was employed by the Ohio State Reformatory as a guard, which enabled him to determine the Grievant's residence (Employer Exhibit 1).

Police officers subsequently arrived at the Grievant's home where they found him asleep in a blue pickup truck. They awoke the Grievant and determined that he was indeed intoxicated. A search disclosed a knife in his right pant pocket and his shirt was also bloodied (Employer Exhibit 1).

On October 28, 1986, the Grievant was convicted of an aggravated felony of the second degree by knowingly causing or attempting to cause physical harm to another by means of a deadly weapon. The Court of Common Pleas deemed these actions to be in violation of Section 2903.11(A)(2) of the Ohio Revised Code. The Grievant received a suspended five (5)-to-fifteen (15)-year prison sentence, was placed on probation for three (3) years, and was required to serve a six (6)-month jail sentence in the county jail (Employer Exhibit 2). Judge Max K. Chilcote, moreover, authorized work release while the Grievant was incarcerated (Employer Exhibit 2), and granted a relief from disability under ORC 2923.14 as it related to the scope of his authority as a Corrections Officer (Joint Exhibit 3). It should be noted that on September 27, 1987 the Judge continued the

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previously mentioned Release From Disability because the Grievant appealed the sentencing upon the indictment to the Fifth District Court of Appeals (Union Exhibit 1).

The Employer became aware of the above mentioned conviction when the Probation Department notified the facility that it was conducting a pre-sentence investigation. This notification led the Employer to believe that the Grievant had violated the Ohio Department of Rehabilitation and Correction Standards of Employee Conduct (Joint Exhibit 4). A Predisciplinary Conference was held on July 23, 1987. Richard G. Hall, the Hearings Officer and Director of Employee Relations, testified that the Grievant admitted that he had been found guilty, explained that he was an alcoholic seeking treatment, and that final sentencing had not yet been determined by the Court of Common Pleas.

The Parties mutually agreed to a continuance of the Predisciplinary Conference (Joint Exhibit 2) pending the final sentencing determination by the Court. In the interim, the Employer placed the Grievant

in a special low-inmate contact post that did not require the use of firearms.

The Predisciplinary Conference was subsequently reconvened when the sentencing information became available to the Employer. Both the Administrative Hearing officer and Eric G. Dahlberg, the Superintendent, provided the Director of the Department with a removal recommendation based on a violation of Rule 17-A of the Standards of Employee Conduct of the Department of Rehabilitation and Correction. Rule 17-A deals with a **9**

violation for off-duty conduct and states:

“ . . .

17a. Commission of a felony or any offense involving dishonesty or moral turpitude.

“ . . . ”

(Joint Exhibit 4)

On September 24, 1987 the following Notice of Disciplinary Action documented the Employer's removal decision:

“ . . .

Dear Mr. Ramey:

Pursuant to the authority granted in the Collective Bargaining Agreement between the State of Ohio and the Ohio State Reformatory this letter is to advise you that you are to be REMOVED from the position of Correction Officer 2 effective:

October 19, 1987.

You are to be REMOVED for the following infractions: You have been convicted of a felony. This constitutes a violation of Rule 17-A of the Standards of Employee Conduct of the Department of Rehabilitation and Correction. In addition, such behavior on your part compromises the integrity of your position and violates the public trust.

Pursuant to the AFSCME/OCSEA contract, Article 25.07, you may choose to grieve this disciplinary action. You must file a grievance through your Union representative within fourteen (14) calendar days of notification of this action.

Eric G. Dahlberg
Superintendent

Date

Richard P. Seiter
Director

10/14/87

...”

(Joint Exhibit 3)

In response to the above managerial action, the grievant filed the following grievance on October 20, 1987: **10**

Contract Article(s) Section(s) Allegedly Violated:
24.01, 24.02, 24.04, 24.05, 24.08, 43.01, Article 41
Statement of Facts (for example, who? what? when? where?,
etc.):
I Randy Ramey do grive (sic) my removal as an (sic)
Correction (sic) officer 2 for the Department of
Rehabilitation and Correction at the Ohio State
Reformatory. There is NO JUST CAUSE (Grievant's emphasis)
for the Disciplinary Action. Disciplinary measure imposed
is not reasonable or commensurate with the offense and being
(sic) used solely for punishment.

...”

(Joint Exhibit 2)

A Step 3 meeting was held on November 10, 1987 but the Parties were unable to resolve the grievance. The grievance is properly before this Arbitrator.

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THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to remove the Grievant for engaging in off-duty misconduct. The off-duty misconduct dealt with the conviction and sentencing of the Grievant for committing an aggravated felony in the second degree (Employer Exhibits 1 and 2). This offense purportedly violated Rule 17a which deals with the "Commission of a felony or any offense involving dishonesty or moral turpitude." (Joint Exhibit 4).

The Employer maintained that its just cause arguments were not tainted by any procedural defects. The Union, more specifically, failed to provide evidence and testimony to support many of the provisions cited in the grievance (Joint Exhibit 2).

With respect to notice considerations, the Employer maintained that the Grievant was given forewarning of the possible or probable consequence associated with his off-duty misconduct. To

counter the Union's allegation, the Employer introduced a document evidencing the reception by the Grievant of the Standards of Employee Conduct (Joint Exhibit 4).

Allegations dealing with the fairness and objectivity of the investigation surrounding the altercation were also refuted by the Employer. Hall testified that the Employer agreed to a continuance in anticipation of an actual conviction and sentencing prior to any formal action. He also noted that if the case had been plea bargained to a misdemeanor offense or

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dismissed; the resulting disciplinary outcome might have been quite different.

The Employer emphasized that it applied its rules and penalties even-handedly and without discrimination. Jay Denton, Deputy Superintendent of the Probation Department Section, testified that the Grievant was not similarly situated to convicted felons hired by the facility. He distinguished their circumstances in a number of ways. First, the hiring of ex-felons falls within the rehabilitation mission of any corrections facility. In other words, it would be highly hypocritical for a facility providing rehabilitation services not to consider individuals for employment after they have demonstrated attitudinal and behavioral changes. Second, when one considers these ex-felons for possible employment opportunities, certain criteria must be evaluated by any facility. Some of these criteria include the completion of a rehabilitation period including the sentence, probation, and other penalties ascribed to the ex-felons. Other criteria involve the applicants release from disability regarding weapons possession, general qualifications and prior work record, and the circumstances surrounding the previous offense. The circumstances, more specifically, should not serve as a negative predictor of future performance. By satisfying these preconditions of employment, these ex-felons are subject to the same standards of conduct as other employees once they gain employment. Denton and Hall noted that employees, such as the Grievant, who engage in off-duty misconduct while under the

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employ of the facility, have not fulfilled many of the previously mentioned criteria, which makes them unemployable.

The Employer also contested the assertion that "Sewel," another corrections employee, was treated differently than the Grievant. The Employer noted that it had reinstated this individual after all the criminal charges were dropped; and would have treated the Grievant in a like matter if the circumstances were identical.

Ex-felons are al-so differentially situated in terms of the background information that others have, once they become gainfully employed at the facility. Both Denton and Hall testified that ex-felons' backgrounds are not made known to the general public; this information is specifically limited to individuals on a need-to-know basis.

A number of arguments were proferred by the Employer as it attempted to establish that the misconduct in question had a direct impact on the Grievant's employment. First, the public's trust and interest would be violated if a known convicted felon was returned to work at the facility. Individuals involved in the daily supervision of incarcerated felons are entrusted with certain responsibilities which

require a higher standard of personal conduct. The Grievant, moreover, was convicted of assaulting a citizen whose taxes help sustain the services provided by the institution.

Second, if the Grievant was returned to work, he would not be able to engage in normal correction activities, which would negatively impact his ability to perform his job. The Employer

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noted that even if the Grievant was able to obtain a release from disability, it would be forced to restructure his daily activities by reducing the Grievant's direct contact with inmates. Such an undertaking would dramatically modify his traditional duties and responsibilities as a corrections officer.

Third, the Employer contended that the Grievant's return would jeopardize its ability to defend itself against suits initiated by inmates. Hall testified that inmates are quite litigious, and they frequently initiate lawsuits dealing with the use of excessive force by corrections officers. Although the facility has been extremely successful in defending itself against such suits, this record might be jeopardized if the Grievant was involved in an altercation. The facility's potential liability would increase as a consequence of the Grievant's low credibility.

Fourth, Denton and Hall emphasized that a corrections officer's work environment is laden with a great deal of stress; and that the Grievant's conduct raises questions concerning his ability to deal constructively with stress. In other words, the same types of stresses and confrontations which caused the Grievant to react in such a violent fashion against a civilian, also exist on a daily basis in the facility. Thus, the Grievant's profile indicated to the Employer that a similar occurrence might arise at the facility.

Fifth, by reinstating a known felon, the possibility of manipulation and harassment becomes more probable. Denton

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testified that inmates would target the Grievant for abuse purposes, and also engage in manipulation strategies to improve their standing within the facility. Denton noted that the above conditions would reduce the Grievant's performance potential.

Sixth, the Employer maintained that the Grievant's ability to perform his responsibilities were also negatively impacted by the publicity surrounding his arrest. Inmates, more specifically, in custody at the Richmond County Jail at the time of the Grievant's incarceration and trial, and subsequently transferred to the facility, would be aware of the circumstances surrounding his arrest and conviction. Similarly, if the Grievant was on work release at the facility while serving time at the County Jail, he potentially could be guarding inmates that he fraternized with at the County Jail.

Lastly, the Employer emphasized the inherent conflict of interest associated with the reinstatement of a convicted felon within a penal institution. These individuals are charged with the rehabilitation and reintegration of offenders, and thus, terminating their criminal careers. Convicted felons, such as the Grievant, who have not completed elements of their rehabilitation program, cannot realistically fulfill their rehabilitation responsibilities, and thus, perpetuate the facility's goals and objectives.

In terms of potential mitigating factors, the Employer viewed the relief from disability, the work relief judgment, and the Grievant's participation in an alcohol rehabilitation program as non-defenses. The Employer agreed with the Union's

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assertion that the Supplemental Entry (Union Exhibit 1) serves as a proper form of relief from the weapons disability. In a like fashion, the Employer emphasized, however, that these entries are not binding or enforceable because the Judge did not order the facility to grant the Grievant access to the facility's work release program. The Judge, moreover, failed to order the reinstatement of the Grievant as a consequence of the Supplemental Entry (Union Exhibit 1). The Employer urged the Arbitrator to discount these judgment entries and focus his analysis on the Employer's application of its Standards of Conduct (Joint Exhibit 4). In the Employer's opinion, these guidelines should determine whether an employee who commits a felony can effectively perform his job duties.

The Employer argues that the Union did not contend that the Employee Assistance Program (Joint Exhibit 1, Pg. 37) was a valid defense; and that in this particular instance it does not serve as a valid defense. The Employer maintained that the Agreement (Joint Exhibit 1, Pg. 37) clearly establishes that the Employee Assistance Program is not in lieu of discipline. Although the Employer commended the Grievant on his rehabilitation efforts, the Employer felt that it did not excuse his off-duty misconduct.

The Position of the Union

- It is the position of the Union that the Employer did not have just cause to remove the Grievant for engaging in off-duty misconduct. This position was based upon several procedural defects, the lack of nexus between the Grievant's job and the **17**

off-duty misconduct, and a number of mitigating factors.

The following procedural defects were argued by the Union. First, the Employer's investigation into the nature of the Grievant's off-duty misconduct was not fair and objective. Second, the degree of discipline was not reasonably related to the Employer's efficient and safe operations.

The Union maintained that the Employer did not apply its rules and penalties even-handedly and without discrimination. The Union noted that disparate treatment existed because the Employer failed to consider certain factors which it normally evaluates when reviewing the applications of new employees with felony convictions. Denton's testimony indicated that the Grievant was removed solely on the basis of having received a felony conviction.

The Union offered a number of arguments in support of its contention that the Employer failed to establish that the Grievant's off-premises criminal activity justified removal. First, the Employer's policy dealing with the hiring of convicted felons refutes the claim that the Grievant would have problems fulfilling his responsibilities because of respect and role model difficulties. If this premise was indeed accurate, the Employer would have a blanket policy against the employment of individuals with the felony convictions. Denton also testified that the Employer had a practice of hiring individuals on parole. Yet, the Employer failed to provide any evidence supporting the notion that it could not properly

supervise the Grievant's parole. The Employer, moreover, did not offer any

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evidence indicating that the Grievant's parole would adversely affect the facility.

Second, the Union also challenged the Employer's liability arguments. The Union maintained that the Grievant's conviction does not engender any greater liability than those of other employees with felony convictions. A liability action, moreover, does not seem very likely in light of the Grievant's work record, which does not evidence a history of excessive force. Hall's testimony regarding the success rate of inmate initiated lawsuits also reduces the veracity of the Employer's Argument. He, more specifically, contended that inmates were seldom successful in their attempts to prove that excessive force was initiated by employees.

Last, the Union emphasized that nexus must be proven by evidence rather than speculation. The Union maintained that many of the nexus arguments proposed by the Employer were not supported by facts but were overly laden with speculation and incomplete information.

The Union argued that the judgments (Joint Exhibit 3, Employer Exhibit 1) granting the Grievant relief from disability were properly authorized by the Court of Common Pleas. As a consequence, the charges raised by the Employer concerning the propriety of the judgments were viewed by the Union as misplaced. The Union asserted that Ohio Revised Code 2923.14(c) provides for investigations by the County Prosecutor, who may raise objections for the granting of relief. Since the Employer failed to establish that the County Prosecutor raised any

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objections, the Union contended that the judgments were still operational.

Federal relief from disability requirements (Employer Exhibit 4) were not viewed by the Union as valid restrictions precluding the Grievant's reinstatement. Hall allegedly testified that in prior situations the facility never required Federal relief judgments. The Grievant, moreover, maintained that he only possessed State relief while awaiting final sentencing. The Union contended that if the Arbitrator determines that the relief from Federal disability is a requisite condition of reemployment, then the Grievant should be granted an opportunity to obtain the relief.

Since the Employer has granted work release in the past, the Union asserted that a similar option should be provided to the Grievant. The Union noted that the Employer allowed an employee incarcerated for a Driving While Intoxicated conviction to be placed in a work release program.

The Union argued that the Grievant's actions were aggravated by his alcoholism condition. The Grievant, however, has successfully completed an alcoholism treatment program which suggests that a similar incidence will not take place if the Grievant is returned to work. The Union also emphasized that the corrective activities engaged in by the Grievant are anticipated in an Employee Assistance Program negotiated by Parties (Joint Exhibit 1, Pg. 37).

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THE ARBITRATOR'S OPINION AND AWARD

- From the evidence and testimony presented at the hearing, it is this Arbitrator's opinion that the Employer had just cause to remove the Grievant for off-duty misconduct. The misconduct in question deals with felonious assault, an aggravated felony of the second degree.

The record clearly indicates that procedural defects did not taint the removal decision. Although the Union raised a number of procedural defects in the grievance (Joint Exhibit 2), it only argued potential problems dealing with the fairness and objectivity of the Employer's investigation. Without the presentation of any evidence and testimony concerning the noninvestigation issues, it is impossible for this Arbitrator to pass judgment on the propriety and legitimacy of these assertions. In a like fashion, although the Union articulated its fairness argument in its brief, it failed to provide arguments in support of its contention.

The Union's disparate treatment argument is also viewed as deficient by the Arbitrator. Where just cause disciplinary actions are at issue, an arbitrator must decide whether a particular employee has been dealt with differently from other employees. The following general principal typically governs the majority of disparate treatment claims: If the evidence establishes that penalties for the same misconduct, under similar -circumstances, have been reasonably consistent, then the employee's assertion will be viewed as unsupported (Aerojet Liquid Rocket Co., 75 LA 255, Wollett, 1980; Agorico Chemicals **21**

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- CO., 55 LA 481, Greene, 1970; Anaconda Aluminum Co., 62 LA 1049, Warns, 1974). The Union did not provide any evidence indicating that other employees engaging in off-duty felonious misconduct have been given different penalties. Comparisons were proposed attempting to equate the Grievant's situation with those of convicted felons hired by the Employer. These cohort groups are not similarly situated, and thus, attempts at any comparison for disparate treatment purposes are unfounded. When the Employer hires convicted felons they have completed a rehabilitation period and have paid their societal dues. Obviously, the Grievant does not fall within this category at the present time.

A copy of the Grievant's conviction was entered into the record (Employer Exhibit 2). It is axiomatic that copies of Court records are acceptable evidence and may be received by an arbitrator as such. Thus, the Employer has met its burden in proving the commission of a wrongful act by the Grievant.

It next must be determined whether a nexus exists between the Grievant's wrongful act and a number of different but related outcomes. These outcomes include harmful impacts on: the Employer's reputation or product; the Grievant's ability to perform the job satisfactorily; and other personnel who refuse to work with the Grievant. For a number of reasons, this Arbitrator concludes that nexus does exist.

First, testimony indicates the existence of potential adverse publicity to the facility. The felony-related activity took place in a public place; and the arrest and conviction became a matter of public record. The police report (Employer **22**)

Exhibit 1) introduced at the hearing also clearly indicates that witnesses identified the Grievant as a guard at the Ohio State Reformatory.

Second, the facility's mission deals with the rehabilitation and reintegration of convicts into society by changing their existing behavioral and attitudinal profiles. Thus, the Employer's "product" consists of the quality of services provided in its attempt to realize the above objectives. It is this Arbitrator's opinion, a reinstatement decision would disrupt rather than enhance the efficiency of the facility's operations.

Third, the nature of the felony conviction is extremely job-related. The Classification Specification (Joint Exhibit 5) clearly indicates the enormous amount of time that a Corrections Officer 2 spends in direct contact with inmates. If reinstatement took place, the Grievant would be subject to manipulation and harassment as a consequence of his known felony conviction. Efficiency would also be hampered by the increased liability associated with the Grievant's reinstatement. The Employer's arguments dealing with its potential inability to properly defend itself, and the Grievant, if legal actions were initiated by inmates, was viewed as quite convincing. Reinstatement would also send an inappropriate signal to all inmates. When someone commits a felony certain negative consequences should be anticipated. If one reinstated the Grievant within this particular work setting, inmates could misinterpret the severity of the Grievant's activities, and rationalize the decision as

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condoning such behavior. These misperceptions would undermine the rehabilitation goals of the facility.

The relief from disability and work release judgments issued by the Court of Common Pleas are not viewed as binding on the Employer. In this Arbitrator's opinion, they provide the Grievant with potential access to a position; if in fact the Employer determines that reinstatement is appropriate. In this particular instance, these items are deemed to be non-issues because the Arbitrator concurs with the Employer's removal decision. This finding should not be interpreted as a determination by this Arbitrator that the Judge exceeded his authority in rendering the above judgments. There is, however, an enormous distinction between affording a convicted felon potential access to a job, and demanding that an employer rehire a convicted felon. The latter alternative was never ordered by the Court of Common Pleas.

The Union's employee assistance arguments were not sufficiently developed. The Union provided testimony concerning the Grievant's alcohol abuse tendencies and his rehabilitation attempts. This Arbitrator is unclear, however, on the relationship between the above conditions and the Employee Assistance Program (Joint Exhibit 1, Pg. 37) negotiated by the Parties. The Union never contended that the Employer violated this provision. It presented these rehabilitative efforts in an attempt to mitigate the penalty attached to the Grievant's activities.

Even though this Arbitrator views the Grievant's rehabili-

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tation activities as highly commendable, this Arbitrator does not feel that sufficient grounds for mitigation exist. As Arbitrator Harry Shulman has noted:

"[The Arbitrator's] power is only to modify penalties which are beyond the range of reasonableness, and are unduly severe. If the penalty is within that range, it may not be modified."

(Ford Motor Co. and UAW, Opinion
A-2, June 17, 1943)

The nature of the off-duty misconduct engaged in by the Grievant, his length of seniority, and the unique job setting characteristics, all indicate that the penalty is well within the range of reasonableness.

AWARD

The Grievance is denied and dismissed.

September 23, 1988

Dr. David M. Pincus

Arbitrator

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