

ARBITRATION DECISION NO.:

155

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Corrections - Ohio State Reformatory

DATE OF ARBITRATION:

September 9, 1988

DATE OF DECISION:

October 24, 1988

GRIEVANT:

Willard Dill

OCB GRIEVANCE NO.:

G-87-2389

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

Butch Wylie, Advocate

FOR THE EMPLOYER:

Edward Morales, Advocate

KEY WORDS:

Discharge

Effect of Motive and Intention

Appropriateness of Penalty

ARTICLES:

Article 24 - Discipline

§ 24.01 - Standard (in part)

§ 24.02 - Progressive Discipline (in part)

§ 24.05 - Imposition of Discipline (in part)

§ 24.06 - Prior Disciplinary Actions (in part)

FACTS:

Grievant was employed as a Penal Workshop Supervisor at the Ohio State Reformatory in Mansfield. He had been employed by ODRC for nearly 7 years. Three prior disciplinary incidents involving the Grievant had been stipulated for this record. Grievant was charged with intentionally

conspiring with an inmate to trade sunglasses for cigarettes. Grievant admitted giving the sunglasses to the inmate but denied asking for the cigarettes in return. The Grievant was discharged.

EMPLOYER'S POSITION:

The Grievant admits delivering the sunglasses to the inmate. A "wire" worn by the inmate recorded the exchange of items and shows an intent to barter.

UNION'S POSITION:

The Grievant was a victim of entrapment. The sunglasses were given to the inmate but not in a barter exchange. The nature of the contraband was not serious, like weapons or drugs, and lesser penalties have been given to others for similar offenses. The punishment of dismissal is too harsh and not corrective nor progressive.

ARBITRATOR'S OPINION:

The conflicting and self-serving testimony from the three witnesses, the Grievant, the inmate and an ex-co-worker of the Grievant, is not controlling. The tape recording made by the inmate of the exchange revealed the Grievant did not attempt to refuse the cigarettes from the inmate and showed the intent of two parties trying to carry off a secret deal. Perfect progression in the course of discipline was not followed in the case, however the punishment given was commensurate with the offense because a rule was violated and the Grievant testified that he knew of the rule and understood it. Discharge was one of the stated possible disciplinary actions for violation of this rule. The decision to dismiss the Grievant was not unreasonable, capricious or arbitrary. Based on the grievant's words, an intentional, unremorseful, willful action on the grievant's part could reasonably be found by the Superintendent, justifying the dismissal.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

Ohio Department of Rehabilitation
and Corrections

Employer

and

OCSEA, Local 11,
AFSCME, AFL-CIO

Union

Grievant: Dill

Hearing Date: September 9, 1988

Opinion Date: October 24, 1988

For the Employer:

Edward Morales, Advocate

For the Union:

Butch Wylie, Advocate

Present in addition to the Advocates named above and the Grievant Willard Dill were Robert Steele (OCSEA), Brenda Persinger (OCSEA), Michael Miller (Union President, OSR), John Porter (OCSEA Associate General Counsel), Ted Durkee (Labor Relations DRC), Eric Dahlberg (Superintendent OSR), Freddie Sharp Matthews (OCB), and Emil Lewis Jr.

Procedural Matters:

The parties gave the Arbitrator permission to tape record the proceedings for the purpose of refreshing her memory and on the condition that the tapes will be destroyed upon rendering of the award. The parties also gave the Arbitrator permission to submit this award for publication. (The Arbitrator has decided subsequently to withhold this decision from publication because of the personnel matters involved.) All witnesses were sworn. The parties stipulated in writing that the matter was properly before the Arbitrator.

Relevant Contract Sections:

Section 24.01 - Standard (in part)

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.

Section 24.02 - Progressive Discipline (in part)

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.

Section 24.05 - Imposition of Discipline (in part)

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

Section 24.06 - Prior Disciplinary Actions (in part)

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

Relevant Standards of Employee Conduct:

Personal Conduct pages 2-3 (in part)

2. Employees shall not, without authorization from the Appointing Authority, allow themselves to show partiality toward or become emotionally, physically, or financially involved with inmates, parolees, probationers, furlougees or their families, or establish a pattern of social fraternization with same.
 - a. An employee shall not offer or give to an inmate, parolee, probationer, furlougee, or a member of his/her family, or to any person known to be associated with him/her any article, favor, or service which is not authorized in the performance of the employee's duties and which conflicts or appears to conflict with the employee's duties.

B. Conveying or trafficking in contraband pages 5-6 (in part)

Contraband is defined as any article which is intended for the unauthorized use or possession of an inmate or which is prohibited by law from being carried onto the grounds of an institution or detention facility. Examples of contraband which could be intended for an inmate's unauthorized possession or use include letters, stamps, tools, paper, food, messages and money. Examples of contraband which are prohibited by law include firearms, knives, explosives, ammunition, drugs and alcoholic beverages.

**Rule 20a

Inmate related offenses including: Giving preferential treatment, offering or receiving a favor or anything of value to an inmate, furlougee, parolee, or probationer without authorization of the DR&C.

10* (penalty points for each offense)

*Unless there are extenuating circumstances.

**Rule violation for off duty conduct.

Preliminary Remarks:

This grievance concerns a charge against Grievant Williard Dill. Mr. Dill was employed as a Penal Workshop Supervisor at Ohio State Reformatory (OSR) in Mansfield, Ohio. At the time of the incident, he had been employed by ODRC for about 7 years. Prior discipline was stipulated to include (pursuant to 24.06):

February 86 - violation of tool control policy
(verbal reprimand)

February 87 - careless workmanship (Rule #2)
one-day suspension

December 88 - unauthorized absence (Rule #1a)
written reprimand

(questionable date - hearing was 9/88)

The Grievant was charged with violation of Rule 20(a) "Giving preferential treatment, offering or receiving a favor or anything of value to an inmate . . . without authorization of DR&C". Under the Standards of Employee Conduct (Employer Exhibit 4), a violation of this Rule 20(a) could on first offense subject the violator to dismissal; however, mitigating circumstances could reduce the penalty. In particular, the Grievant was charged with intentionally conspiring with an inmate to barter contraband (sunglasses) with an inmate in return for an item of value, i.e., a carton of cigarettes. For this violation, the Grievant was discharged, and he has grieved that discharge. Through his union representative, the Grievant has admitted giving the sunglasses to the inmate and has in a looser sense acknowledged receipt of the cigarettes. However, he denies a barter motive and alleges what amounts to entrapment. On his behalf, the Union argued (1) that the nature of the contraband was not serious (e.g., unlike drugs or weapons), (2) that other persons have shared items with inmates out of altruistic motives with lesser penalties, and (3) that dismissal is too harsh, not corrective, nor progressive.

Since the basic "giving and receiving" issues are not in direct dispute, the key issue is the motive and intention surrounding the event. The Arbitrator's job, as trier of the fact in the case, is to judge whether the employer has proven an "intention" to barter. On one hand, the question of motive or intentionality goes to the heart of whether #20a was violated, but secondly the same issue has direct impact on the question of the appropriateness of the remedy.

This Arbitrator usually attempts to outline the facts as testified to and then separately review and draw conclusions from those facts. However, because of the nature of the testimony and the evidence in this case, the Arbitrator will attempt in Part I to describe and make findings about the events and in Part II to discuss the remedy in light of her findings about the event.

I. Facts as Found on the Event

The evidence in this case comes from four sources: the Grievant, an inmate, an ex-employee of OSR, and a tape recording. The first three sources in the Arbitrator's view were unreliable, incredible, and tainted. Let us take the three testimonies seriatim:

The Inmate. Inmate D.S. is a convicted felon, serving a term for aggravated burglary. At the time of this incident, his record showed him to be a cooperative inmate who was about to be moved to another institution because his security status (medium) was no longer appropriate to OSR which had been recently designated Closed/Maximum. The inmate worked in the furniture factory for the Grievant. According to the inmate's testimony, he heard from "other inmates" that the Grievant could get him a pair of sunglasses, which during the summer was apparently an item in some demand, unavailable in either sufficient quantity or quality at the commissary. The

inmate claimed that on his own initiative he asked the Grievant if he could get him (the inmate) a pair of sunglasses. The inmate claimed that the price demanded in return by the Grievant was a carton of cigarettes, the brand Pall Malls. The inmate said he thought the particular brand was for the Grievant's wife. The Grievant gave the inmate the glasses. The inmate claimed that when he was unable to get the cigarettes to the Grievant in a timely manner that 2 other inmates (apparently sent by the Grievant) approached the inmate and indicated that if he (the inmate) did not payoff promptly he was in physical danger. The inmate, claiming to fear for his person, approached a prison official (Sgt. Rachel) and reported the deal. The inmate agreed to be wired and to deliver the cigarettes to the Grievant while being recorded. The inmate did carry out this assignment which is the subject of the evidence tape to be discussed subsequently.

The inmate impressed the Arbitrator as a very glib, manipulative, and self serving young man. His desire to remain on the good side of prison officials was manifest. His testimonial approach was a self-interested selection of information. He was deliberately careful to implicate no other inmates. Given his felon status and his self-seeking motivation coupled with some clear manifestation of intelligence, the Arbitrator can only accept as "true" those parts of his testimony which were independently corroborated. Interestingly, much of his testimony was so corroborated.

The inmate admits he first asked for the glasses; the Grievant agrees.

The inmate states that the Grievant gave him the glasses; the Grievant agrees.

The inmate claims that the Grievant requested Pall Mall cigarettes in return; the Grievant denies this claim.

The inmate states he brought the cigarettes to the Grievant, laid them on his desk, that the Grievant placed them in a paper bag, and retained them after the inmate left; the Grievant admits the actions occurred but argues the context was significantly different.

The inmate stated that he thought the cigarettes (Pall Malls) were for the Grievant's wife as the Grievant did not smoke; the Grievant stated neither he nor his wife smoked.

The inmate claimed to be in fear from the threats of two inmates; this claim of fear was confirmed by Mr. Lewis in his testimony.

The second witness of note was Mr. Emil Lewis, an ex-employee of the prison, who voluntarily appeared to testify on the Grievant's behalf. Mr. Lewis quit the prison because of his clearly expressed dislike of his supervisors and the work situation. He admitted that he believed that he had been unfairly treated and especially so by the Superintendent. He said he was asked to testify after he wrote a letter to the Union about "what was going on at the prison". The letter was produced and revealed absolutely no connection to the incident of this grievance. Mr. Lewis testified that at the time of the alleged barter he had been sent by Mr. Rachel to search the Grievant's office to find the contraband (cigarettes) given to the Grievant by the inmate. At that time, Lewis signed a statement saying that he "found the cigarettes in a paper bag hidden in a trash can, that from hiding he observed the Grievant come back to the location, remove the cigarettes and place them in an unknown location." At the hearing, Mr. Lewis recanted this statement saying he had never found the cigarettes, and he had never seen the Grievant find them. He said he was compelled by Mr. Rachel to lie because Mr. Rachel wanted "to get" the Grievant. Mr. Lewis also testified that he knew the inmate D.S., that D.S. was a good worker, and that he

trusted D.S. He also testified that D.S. had told him that the Grievant was providing contraband sunglasses to other inmates and that therefore he "D.S." could get the Grievant. Lastly, Lewis testified that D.S. had told him he was afraid of two inmates who were leaning on him.

Manifestly, Mr. Lewis was highly motivated to testify in any way to hurt the prison system. On the stand, he clearly admitted his animosity. Which time was he lying? Actually, the answer to that question is irrelevant. The Grievant had testified that the inmate brought him the cigarettes and that he took them and threw them away. Thus, the original statement of Lewis and its truthfulness is irrelevant. However, Lewis did add some credence to the inmate's testimony by saying he "trusted" him and by corroborating the "fear" issue. Lewis also charges that Rachel did not like the Grievant as an employee. Did Rachel force Lewis to lie? The Arbitrator drew the distinct impression that Mr. Lewis at the time of the incident wanted very much to ingratiate himself with his superiors. So if the affidavit was in fact a lie, the instigator of the lying is unclear. Mr. Lewis' testimony on why he was called by the Union to become a witness strained all credulity. Perhaps his motives to testify had an altruistic justice seeking component; however, his clear cut desire to retaliate against his employer was also patent.

What of the Grievant? The Grievant said that the inmate pestered him innumerable times to get him sunglasses. He said he knew of no particular reason why the inmate should ask him for sunglasses. The Grievant said that he told the inmate "held see what he could do". The Grievant maintained he never asked for anything in return, including cigarettes. He noted that neither he or his wife smoked! The Grievant said that while visiting a bar run by a friend he discovered a pair of abandoned sunglasses; he asked his bartender friend if he could have them. Upon receiving an affirmative reply, he took the glasses and gave them as a gift to the inmate. On cross examination, the Grievant volunteered that the bartender smoked Pall Mall's. The Grievant maintained that whenever the inmate mentioned cigarettes, he told him (the inmate) emphatically that he did not want them.

On the day in question, the Grievant testified that when the inmate showed up with the cigarettes he told him, "first off," in a loud voice that "I told you I don't want no damn cigarettes". Secondly, the Grievant maintained that he "knew immediately he was being set up". He said he took the cigarettes and threw them away in the trash so they would not be found because he knew it was a set up deal. The Arbitrator asked the Grievant why he did not immediately call in higher officials to witness the inmate and the cigarettes and thus thwart the "set up". He said "they already probably knew, and I didn't want to get caught". The Grievant's main argument was that he never intended a barter, only a gift to an inmate he liked, and that the cigarettes were forced upon him unwillingly to entrap him in a compromising situation. What to make of this testimony? Like both the inmate and Mr. Lewis, the strong self-interest to manipulate the story to one's own end was manifest. The Grievant was not a credible witness; he often twisted answers and contradicted himself. His response to why he did not call witnesses in to view the cigarettes was particular improbable and incredible.

The last part of the evidence is the tape of the conversation between the Grievant and the inmate. As the Arbitrator faced writing an opinion with only the testimony of three apparently self-serving and incredible witnesses, any attempt to ascertain a semblance of truth seemed hopeless.

However, through modern science the tape was rendered quite intelligible (see the letter of October 17, 1988 attached). First, the tape clearly reveals that the Grievant did not loudly and emphatically (nor quietly and weakly) refuse the cigarettes. More importantly, four statements clearly heard lend direct credence to the barter scheme. Never in his testimony did the Grievant go through the transcript and deny any of these words.

In particular note the following lines:

Page 1 -- Dill's last response on that page

"I'd be scared to do any fucking thing, but I'm going to take these son of bitches here and hide them". (emphasis added)

Page 2 -- Dill's fourth statement

"This is the deal, see, if they figured I was making a deal with you and they go down and check your commissary list see, . . . " (emphasis added)

Page 2 -- Dill's sixth statement

"I figure if they go down and check yours and say, hey, he bought Pall Malls and he don't smoke Pall Malls, you know . . ." (emphasis added)

Page 3 -- Dill's last statement on to Page 4

". . . My luck, I'd get to the gate and say, hey, what you got in the sack. A carton of Pall Malls, and they will where'd you get the carton of Pall Malls? They know I don't smoke."

The whole tenor of the conversation is two wary persons carrying off a secret deal.

The Grievant's unsolicited testimony that his bartender friend, provider of the glasses, smoked Pall Malls adds distinct credence to the inmate's story that the Grievant did in fact ask specifically for Pall Malls.

The Arbitrator finds that the employer has met the burden of proof that the Grievant intentionally bargained to give the inmate a pair of sunglasses for a carton of cigarettes.

Harshness of Discipline Question

The Union argues on the Grievant's behalf that the discipline is not commensurate with the offense, not corrective, and not progressive. Certainly, dismissal from one's job of 7 years is a severe result. The Union notes that sunglasses/cigarettes are certainly not on the par with drugs or weapons, a point hardly in dispute. The Union analogizes the case to the Purifoy case where a guard took out zucchini from an inmate and gave zucchini bread back. The zucchini bread analogy fails in one direction as much as the guns/drugs does in the other. The Grievant had in the period under consideration a verbal warning, written warning, and a one day suspension. If the nature of the work violations had merely progressed, the next progression would be a more serious suspension, not a dismissal. In that sense, perfect progression was missing. However, the question of commensurate punishment remains. The job of the Arbitrator is not to substitute her judgment for management's. The Grievant violated a clearly stated and reasonable work rule which he admitted under oath to understand. The stated possible discipline was dismissal. The Superintendent had the duty to determine whether any circumstances mitigated the violation. Reading the transcript and hearing from the Grievant himself, the Arbitrator cannot say that the Superintendent's judgment was unreasonable, capricious, or arbitrary. Reading and hearing the Grievant's words, the Superintendent could reasonably have found an intentional, unremorseful, willful action on the part of the Grievant justifying dismissal.

Decision

Grievance Denied.

Date: November 3, 1988

Rhonda R. Rivera

Arbitrator