

ARBITRATION DECISION NO.:

174

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Central Ohio Psychiatric Hospital,
Timothy B. Moritz Forensic Unit

DATE OF ARBITRATION:

December 15, 1988

DATE OF DECISION:

February 27, 1989

GRIEVANT:

Michael Whiteside

OCB GRIEVANCE NO.:

23-06-(88-05-20)-0027-01-03

ARBITRATOR:

Linda DiLeone Klein

FOR THE UNION:

Shirley Taylor

FOR THE EMPLOYER:

Jennifer Dworkin

KEY WORDS:

Just Cause For Removal
Progressive Discipline
Conveyance of Firearm
Onto Hospital Grounds

ARTICLES:

Article 24 - Discipline
§24.01-Standard
§24.02-Progressive
Discipline

FACTS:

Grievant has been employed as a Psychiatric Attendant at the Timothy B. Moritz Forensic Unit

of the Central Ohio Psychiatric Hospital for four years and seven months. He has had one written reprimand and has been an above average employee. On April 10, 1988, while working at the facility, the Grievant was approached by an employee requesting Union assistance. Being a Union Steward, the Grievant went to the car to retrieve his briefcase containing his Union material. Upon re-entering the unit, the Grievant had to pass through the metal detector and have his briefcase inspected by a Corrections Officer. In searching the case, a .357 magnum revolver was found by the officer. Grievant stated that he had the wrong case, and returned the weapon to his car. The Grievant returned to the check-point at which time five loose bullets were found in his case. Grievant took the bullets back to his car and returned to the facility at which time, nothing out of the ordinary was found in his case and he was given permission to enter.

Ultimately, the supervisor of the correction officer was informed by a third-party of the above-referenced events. The supervisor subsequently searched the Grievant's case once more and found one .357 bullet in the lid of the case. The Grievant admitted that the ammunition was his, at which point he was arrested and charged with conveyance of ammunition pursuant to the Ohio Revised Code Section 2921.36.

Based on the facts described above, Management determined that the Grievant should be discharged for violating Institutional Directive A-27 and the ORC Section 2921-36 both of which prohibit the knowing conveyance of weapons or ammunition onto hospital grounds.

EMPLOYER'S POSITION:

Employer maintains that Grievant was aware of the policy stated in ORC and the institution directive regarding firearms because it is stated in a posted sign at the entrance of the facility. The State contends that the Grievant's offense is compounded by the fact that he made three separate attempts to bring the prohibited items into a maximum security facility. The State further asserts that the Grievant's claim that he inadvertently and unknowingly brought the items onto the ground failed to use good judgment. The Employer maintains that it cannot risk further lapses in judgment which will jeopardize the safety of the patients and employees of the facility.

UNION'S POSITION:

Union contends that the Grievant neither knowingly nor deliberately transported a weapon and ammunition onto hospital grounds. The Grievant attended a gun show prior to reporting for work and inadvertently and accidentally left the gun, which he unsuccessfully attempted to trade at the show, in the briefcase. Union asserts that Management failed to consider the Grievant's cooperative attitude and the unintentional nature of his actions in dismissing him.

The Union maintains that the discipline imposed in this case was punitive and unduly harmful and asks that the Grievant be reinstated to his position.

ARBITRATOR'S OPINION:

The arbitrator believes that the Grievant's actions were not intentional. However, he finds that the Grievant was negligent in his actions and cannot be absolved of his responsibility to follow unit policies. Specifically, the Grievant should have known that he had originally placed six bullets in his briefcase, and he was therefore, remiss in not continuing the search until the last round of ammunition was recovered. The arbitrator stressed that weapons pose an exceptional hazard to patients and employees at the unit and that a violation of policy concerning this hazard should be considered a major breach of security, warranting severe discipline.

The disciplinary action cannot be mitigated by the Grievant's performance and attendance because the offense itself has its own consequences. If the penalty were reduced because the Grievant did not knowingly bring the items onto the grounds, the unit's policy would be weakened

and an unsafe work environment would be created. Therefore, due to the severity of the Grievant's offense and the type of Institution involved..Removal was appropriate.

AWARD:

Grievance is denied.

TEXT OF THE OPINION:

**Arbitration Proceedings
Before
Linda DiLeone Klein**

In The Matter Between

**The State of Ohio
Department of Mental Health**

and

**Ohio Civil Service
Employees Association
AFSCME, Local 11**

Grievance No.:
23-06-880520-0027-01-03

Discharge of Michael Whiteside

Heard:
December 15, 1988

APPEARANCES

For the Employer
Jennifer Dworkin,
Labor Relations Specialist

For the Union
Shirley Taylor,
Staff Representative

Issue

Was the grievant discharged for just cause? If not, what shall the remedy be?

Facts and Contentions

The grievant was a Psychiatric Attendant at the Timothy B. Moritz Forensic Unit (TBMFU) of the Central Ohio Psychiatric Hospital (COPH), and effective May 13, 1988, he was discharged for violating Institution Directive A-27 and the Ohio Revised Code 2921.36. Specifically, he brought a .357 Magnum revolver and six bullets onto the hospital grounds and into a maximum security facility.

The Ohio Revised Code 2921.36 provides as follows; "No person shall knowingly convey, or attempt to convey, onto the grounds of a detention facility or of an institution that is under the control of the Department of Mental Health. . . .any of the following items:

(1) Any deadly weapon or dangerous ordnance as defined in section 2923.11 of ORC, or any part of or ammunition for use in such a deadly weapon or dangerous ordnance."

The hospital issued Institution Directive A-27 to set forth its policy regarding contraband and prohibited items; the intent of the policy was to maintain a safe work and treatment environment. Directive A-27 states in part:

"Persons found with contraband in the maximum security area shall be subject to disciplinary action."

To further define its position, Management issued a Standard Guide for Disciplinary Action; pursuant to the "discipline grid" set forth in the guide, bringing guns, knives or any other weapons into the premises will result in a six day suspension or a removal on the first offense.

According to the Assistant Superintendent of the hospital, COPH is the "most restrictive end of the continuum of mental health care". The hospital functions in a custodial and treatment capacity for pre-trial and indicted felony offenders who require sanity evaluations or are mentally ill. The patients may be dangerous to themselves or others, and they have generally been charged with felonies such as rape, armed robbery and murder. Even though the hospital is a maximum security institution, the Correction Officers at TBMFU do not carry firearms. Firearms are locked in a box before the security officers enter the facility, and firearms are prohibited except when under the control of a law enforcement officer. The rationale behind this policy is to ensure that the patients do not have access to weapons, thereby minimizing opportunities for abusive, dangerous situations. In this regard, the facility is searched periodically to remove contraband from the patients.

In order to provide the required security and treatment, the hospital employs Psychiatric Attendants, such as the grievant. The grievant has worked at the facility since September 1983, and until the incident at issue, his record reflected one written reprimand dated November 4, 1987 for "inappropriate charting", and his performance evaluations indicated that he was an above-average employee.

The grievant works the third shift at TBMFU, and on Sunday April 10, 1988, he reported as scheduled at 11:00 P.M. As per usual procedure, all employees must be cleared by security before entering TBMFU. This includes passing through the metal detector and opening items such as purses and briefcases for inspection. The grievant reported at 11:00 P.M. without incident.

The grievant also serves as a Union Steward, and during his shift, an employee requested Union assistance which required the grievant to go to his car while on his break in order to retrieve a briefcase containing Union related material. Upon re-entering the Unit at approximately 12:15 A.M., the grievant had to pass through the metal detector and open his briefcase for inspection by

Correction Officer Ward.

As the grievant and Officer Ward began searching through the briefcase, they immediately discovered a .357 Magnum revolver. According to Officer Ward, the grievant seemed surprised when he saw the gun and said that he had the wrong case. The grievant then walked back to his car and placed the weapon in his locked trunk. The grievant returned to the area of the metal detector and he and Officer Ward searched the briefcase again. At this point, they discovered five loose bullets in the case. The grievant returned to his car to place the five bullets in his locked trunk and he proceeded back to the metal detector where his briefcase was searched a third time. On this occasion, nothing out of the ordinary was discovered and Officer Ward gave the grievant permission to return to his work unit.

Shortly thereafter, Officer Ward advised his Supervisor, David Shrader, that he was going to take a break, and Officer Ward left for the allotted break period.

Another Correction Officer, Emma Alford, is assigned to monitor the premises from the control room, and she has access to a camera in order to observe the area of the metal detector. When Officer Ward left for his break, Officer Alford asked Sgt. Shrader if he had been informed about the incident with the grievant and the gun. Sgt. Shrader indicated that he had no knowledge of what had occurred, and when Officer Ward returned, Sgt. Shrader questioned him. After talking to Officer Ward, Sgt. Shrader notified Officer Baldrige about the incident at the metal detector; Sgt. Shrader also spoke to the Nursing Supervisor in the grievant's unit because Officer Baldrige had indicated that he wanted to meet with the grievant.

At 1:30, Officer Baldrige proceeded to TBMFU and escorted Officer Ward and the grievant to the hospital Police Department to discuss the matter. Officer Baldrige requested permission to search the grievant's vehicle, but the grievant declined. Consequently, his car was impounded until a search warrant could be obtained. During the course of this discussion, the grievant asked if he could return to his unit to pick up his briefcase. Because the grievant was considered to be in an off-duty status, Officer Baldrige said that he would go and retrieve the item himself. When Officer Baldrige returned with the grievant's briefcase, he asked for permission to search it, and the grievant said yes. The search revealed one .357 bullet in the lid portion of the briefcase. The grievant admitted that the ammunition was his, at which point he was arrested and charged with conveyance of ammunition pursuant to ORC. He was then transported to Franklin County jail. It should be noted that the charges were ultimately dropped.

Based upon the above-referenced events, Management determined that the grievant should be discharged for bringing a weapon onto the hospital grounds and for bringing ammunition into a maximum security facility.

The State maintains that all employees, including the grievant, are well aware of the policy regarding firearms because there is a sign posted at the entrance to the facility which sets forth the section of the ORC prohibiting conveyance of weapons and ammunition onto the premises. Furthermore, says the State, common sense dictates that such items would be prohibited in an environment where security is an integral part of the Employer's functions and responsibilities. Under the conditions existing at TBMFU, the penalty of discharge is commensurate with the seriousness of the infraction committed by the grievant. The State maintains further that the grievant's offense is compounded by the fact that he made three separate attempts to bring the prohibited items into a maximum security facility.

The grievant's claim that he inadvertently and unknowingly brought a weapon and ammunition onto the grounds is simply not believable, says the Employer; even if the grievant's claim were true, then he failed to use good judgment. The Employer cannot risk further lapses which will jeopardize the well-being and safety of patients and employees.

The State asserts that the rule against conveyance of weapons and ammunition onto hospital

grounds has been consistently applied over the years, and the Union cannot point to another instance which was as blatant a violation as the matter at hand. For example, Officer Baldrige was discharged for bringing ammunition onto hospital grounds in 1983, however, the State Personnel Board of Review reduced the removal to a suspension. This case is not comparable to the grievant's, and furthermore, the Board applies different standards than those used in arbitration, says Management. In all other instances of illegal conveyance of weapons, employees have been removed.

The State acknowledges that Officer Ward received a two-day suspension for his neglect of duty in handling this incident, however, his offense was not the same as the grievant's.

The State asks the Arbitrator to uphold its position and to deny the grievance in its entirety.

The Union contends that removal was not justified under the circumstances of this case.

The grievant neither knowingly nor deliberately transported a weapon and ammunition onto hospital grounds. He went to a gun show on Sunday, April 10, 1988, and he had placed the unloaded weapon and six bullets in a briefcase for the purpose of trading the items. He was not successful in this regard, and he returned the briefcase to his trunk when he left the show. When the grievant drove to work later that day, he did not remember that he had the gun in the car, claims the Union; until he and Officer Ward discovered the item during the initial search, the grievant had forgotten that he still had it in his possession. What occurred here was inadvertent and accidental, says the Union. When the bullets were discovered during the second search, the grievant realized that there should have been six rounds, but a thorough search by Officer Ward failed to locate the sixth item. The grievant was always cooperative with Officer Ward and he voluntarily put the weapon and five bullets back into his locked trunk. The Union submits that Management failed to consider the grievant's cooperative attitude and the unintentional nature of his actions when assessing the penalty.

The Union submits further that the incident was not treated as a major violation of security. Officer Ward did not contact a Supervisor immediately, the items were not confiscated and the grievant was not ordered off the grounds. Officer Ward thereby contributed to the breach of security, yet he only received a two day suspension.

The Union maintains that the discipline imposed in this case was punitive and unduly harsh. The Union asks that the grievant be reinstated to his position.

OPINION

There is no dispute regarding the essential facts of this matter. The grievant even admitted that the .357 Magnum revolver and six rounds of ammunition were in his possession on hospital grounds. A review of the testimony of those employees directly involved reveals no allegation of an attempt to intentionally bypass security; nor was it contended that the grievant was uncooperative or unwilling to return the weapon and five bullets to his car. The grievant's testimony about the incident was straightforward and the Arbitrator is inclined to accept his statement that he had forgotten that the weapon was in his possession until the initial search of the briefcase. However, this does not mean that he can be absolved of the responsibility to comply with regulations. Furthermore, the grievant is culpable for returning to the metal detector for a second time with the bullets still in his briefcase. He exacerbated the situation when the search revealed only five bullets; the grievant should have known that he had originally placed six bullets in the briefcase, and he was, therefore, remiss in not continuing the search until the last round of ammunition was recovered.

The issue that arises here is whether the offense committed by the grievant warrants the penalty assessed by Management. In order to resolve this question, the Arbitrator must consider

that TBMFU is a maximum security area which houses patients who have been charged with violent crimes. Some patients are mentally ill and some have been hospitalized for evaluation of their condition and their competency to stand trial. The patients can be considered to be dangerous to themselves and others, and strict security must be followed to prevent injury, assault and escapes. To enhance its goal in this regard, Management has concluded that its security officers will not carry firearms; this minimizes the opportunity for a patient to obtain a weapon. In addition, the facility is searched periodically for items which, when used improperly, can be dangerous.

The Ohio Revised Code 2921.36 and the policy of the institution complement each other in that the policy is based upon the law and the law supports the policy. In a facility which houses patients in a tenuous state of self-control, it is reasonable and necessary to prohibit certain items from the premises. Because some patients have access to the grounds, it is necessary to impose measures to ensure that no weapons or items which can be used as weapons are in vehicles in parking areas. The sign at the entrance to the facility enunciates the policy and the law, therefore, it can be held that the grievant violated both when he entered the grounds with a weapon and ammunition in the trunk of his car. Whether this was done intentionally or inadvertently, the fact remains that the law and the policy were violated.

Even in a work environment which is not part of a maximum security facility, firearms cannot be tolerated, and at TBMFU, weapons pose an exceptional hazard to patients and employees. A violation of the policy can therefore be considered a major breach of security warranting severe discipline. The Arbitrator is of the opinion that removal is a penalty commensurate with the offense of bringing a weapon and ammunition onto hospital grounds and into a maximum security facility. Even assuming that the grievant's act was neither deliberate nor intentional, removal is still warranted for the reason that his negligence and lack of judgment could lead to serious consequences; bringing prohibited items into the area unintentionally can still subvert security within the facility.

Another aspect of this case which must be considered is the involvement of Correction Officer Ward and the two day suspension he received for failure to adhere to security procedures. Officer Ward did not immediately notify his Supervisor about the gun or the bullets; he did not confiscate the items, and he did not tell the grievant to remove the items from the grounds. In fact, he permitted the grievant to return to his work area. The Union contended that Officer Ward did not treat the incident as a major security violation, therefore, re-moval was not warranted. The Union also contended that Officer Ward contributed to the security breach and received minor discipline, therefore, the grievant's penalty should be modified. The Arbitrator has considered the Union's position here and must disagree. Officer Ward did not perform his security duties as required, but he was not guilty of illegal conveyance, as the grievant was. These are two different infractions warranting different corrective actions.

The discipline grid provides for either a six day suspension or removal for the first offense of bringing guns, knives or other weapons onto the premises, however, due to the severity of the grievant's offense, removal was the appropriate measure. The potentially hazardous consequences of bringing a gun and bullets into TBMFU must be considered when assessing the penalty.

The disciplinary action cannot be mitigated by the grievant's performance and attendance. The offense itself has its own consequences. If the Arbitrator were to reduce the penalty based upon the argument that the grievant did not knowingly bring the items onto the grounds, she would, in essence, weaken the enforcement of the policy and create an unsafe work and treatment environment.

AWARD

For the reasons set forth in this Opinion, the grievance of Michael Whiteside is denied.

Linda DiLeone Klein

Dated this 27th day of February, 1989
Cleveland, Ohio