ARBITRATION DECISION NO.:
377

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Rehabilitation and Corrections, Dayton Correctional Institution

DATE OF ARBITRATION:
September 4, 1991

DATE OF DECISION:
September 17, 1991

GRIEVANT:
Michael Ward

OCB GRIEVANCE NO.:
27-03-(91-02-11)-0068-01-03

ARBITRATOR:
Anna D. Smith

FOR THE UNION:
Patrick A. Mayer, Advocate

FOR THE EMPLOYER:
Roger A. Coe, Advocate
David Burrus, Second Chair

KEY WORDS:
Removal, Improper Job Performance
Attendance at Pre-Disciplinary Meeting
Postponed Pre-Disciplinary Meeting
Imposition of Discipline Within 45 Days
Union Waiver of Pre-Disciplinary Meeting Elements

ARTICLES:
Article 24 - Discipline
§24.01-Standard
§24.04-Pre-Discipline

§24.05-Imposition of Discipline

FACTS:

The grievant had been a Corrections Officer 2 employed at the Dayton Correctional Institution approximately four years. He had prior discipline including a ten day suspension. A sergeant at the institution saw the grievant watching four inmates playing cards outside their regular housing unit. While the sergeant was reporting the incident, the grievant entered the room and admitted watching the inmates play cards. A pre-disciplinary meeting was scheduled first for November 30, then December 3 and later December 4, 1990 because each meeting was canceled due to the grievant's absence. The pre-disciplinary meeting was held December 17, 1990 without the grievant or the employer representative recommending discipline in attendance. The grievant's removal order was signed January 15, 1991.

EMPLOYER'S POSITION:

There was just cause for the grievant's removal. That he allowed four inmates to play cards outside their regular housing unit was not disputed. The grievant admitted to the Unit Manager that he had done so. Discipline was imposed within 45 days of the pre-disciplinary meeting which was held. The employer did not hold scheduled pre-disciplinary meetings on November 30, December 3, and 4 due to the grievant's absence. A pre-disciplinary meeting was held December 17 and the removal order was signed January 15, 29 days later. The presence of the management representative recommending discipline at the pre-disciplinary meeting is not mandated by the contract, and alternatively, the union waived this requirement. Lastly, the inmates' statements were not relied upon by the hearing officer or the employer when discipline was recommended, therefore, their unavailability to the union was not a procedural error.

UNION'S POSITION:

There was no just cause for removal of the grievant. It was not disputed that the grievant allowed four inmates to play cards outside their housing unit. Contract section 24.04 mandates attendance of the management representative recommending discipline at the pre-disciplinary meeting. The employer also withheld evidence from the union which was used to support discipline. The union did not and cannot waive these contractual rights. Additionally, discipline was not imposed within 45 days as required by the contract. Pre-disciplinary meetings were scheduled on November 30, December 4, 5 due to the grievant's absence. The meeting was finally held on December 17 without the grievant. The meetings were rescheduled at the employer's request, therefore, the 45 day limit runs from the first scheduled meeting. The disciplinary notice was signed on January 15, 1991, 46 days after the first scheduled meeting. Therefore, the employer's procedural errors warrant a reduced penalty.

ARBITRATOR'S OPINION:

It was proven that the grievant knew that four inmates were outside their housing unit, playing cards. The union presented no evidence that the inmates had permission to be out of their housing unit, while the employer provided a rational explanation for why the inmates were not disciplined. The employer did not commit procedural errors when the employer's representative recommending discipline was not present at the pre-disciplinary meeting. The contract allows the union to waive the meeting entirely. The ability to waive any part of the meeting is subsumed in the power to waive the meeting itself. The union representative present at the meeting failed to object to the employer representative's absence, therefore that requirement had been waived. Secondly, no procedural error occurred due to the employer's refusal to supply inmate statements to the union. The statements were not used to support discipline at arbitration or at prior times. Lastly, discipline was imposed within 45 days of the pre-disciplinary meeting. Meetings scheduled on November 30, December 4, and 5, 1990, were not held due to the grievant's absence. The triggering event for the 45 day period was the pre-disciplinary meeting actually held on December 17, 1990. Therefore, the employer committed no procedural error which warrants a reduction in the penalty.

AWARD:
Grievance denied.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTIONS

and

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL/CIO

OPINION

Anna D. Smith, Arbitrator

Case:
27-03-(910211)-68-01-03

Michael Ward, Grievant
Removal

I. Appearances

For the State of Ohio:

Roger A. Coe, Advocate, Labor Relations Officer, Ohio Department of Rehabilitation and Corrections
David Burrus, Second Chair, Labor Relations Officer
Melvin D. Morton, Unit Manager, Dayton Correctional Institution, Witness
Kurt E. Klopfenstein, Correctional Supervisor I, Dayton Correctional Institution, Witness
A. Hasani Stone II, Labor Relations Officer, Dayton Correctional Institution, Witness

For OSCEA Local 11, AFSCME:

Patrick A. Mayer, Advocate, Staff Representative, OCSEA Local 11, AFSCME, AFL-CIO.

II. Hearing

Pursuant to the procedures of the parties a hearing was held at 9:15 a.m. on September 4, 1991 at the Office of Collective Bargaining, 65 East State Street, Columbus, Ohio before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument, 10:30 a.m., September 4,

1991. The opinion and award is based solely on the record as described herein.

III. Issue

By agreement of the parties, the issue is:

"Was the grievant removed for just cause? If not, what should the remedy be?"

No issue of arbitrability was presented.

IV. Joint Exhibits and Stipulations

Joint Exhibits

1. 1989-91 Collective Bargaining Agreement;
2. Discipline Trail;
3. Grievance Trail;
4. Grievant's Discipline Record;
5. December 24, 1990 Memo to Grievant;
6. O.D.R.C. Standards of Employee Conduct.

Joint Stipulations of Fact

1. The Grievant was employed as a Correction Officer 2 at the Dayton Correctional Institution on December 15, 1986.
2. The Grievant was on notice as to the work rules relevant to the facts of this grievance.
3. The Grievant's discipline record is attached hereto as Joint Exhibit 4.

V. Relevant Contract Provision

Article 24 - Discipline

§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....

§24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request 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. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. 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. When the pre-disciplinary notice is sent, 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....

§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.

VI. Case History

On the morning of November 20, 1990, while making a routine building check on the R-T Unit of Dayton Correctional Institution, Sgt. Klopfenstein saw four inmates playing cards on the R-1 side with the Grievant, Michael Ward, watching. As housing unit officer, Ward's duties included insuring that inmates were not "out of place." Three of the inmates, however, were such; that is, they were not assigned to the R-1 unit and were consequently in violation of institution rules. Sgt. Klopfenstein testified that when he approached, they looked up but continued to play. Officer Ward said, "You're all busted. Don't get a heart now." Then he said they would finish the game and be gone. Sgt. Klopfenstein ordered them off, but Officer Ward said to let them finish the game. Sgt. Klopfenstein ordered them off again and then tried to reach the unit manager, Melvin Morton, by phone. Thereupon the game broke up.

Sgt. Klopfenstein went to Morton's office. While he was telling Morton of the incident, Ward came in and said to write him up, he would take the heat. He also said he did not care if he was written up because he was going to be gone soon anyway.

Sgt. Klopfenstein wrote an incident report, but does not think he wrote conduct reports on the inmates because of a statement Ward made that they were there by his permission, and officer permission would constitute a defense before the Rules Infraction Board. He also testified that an officer does not have authority to give inmates permission to be out of place to play cards.

Unit Manager Morton corroborated Klopfenstein's testimony about statements made by Ward in Morton's office following the incident and disavowed knowledge of inmate discipline resulting from the incident.

Labor Relations Officer Stone scheduled a pre-disciplinary meeting for November 30, 1990. When the hearing was scheduled, Ward signed a statement that he did not waive his right to the meeting (Joint Ex. 2). He indicated the date was acceptable and that he would be there. According to Stone, he also declined to have the Employer representative recommending discipline be at the hearing. Nevertheless, Ward did not appear at the scheduled hearing, it being his "good day." Later he said that the reason he agreed to the hearing on his good day was that he forgot. The hearing was not held in absentia, according to Stone, because of the severity of the charges. The hearing would have been held on Stone's next scheduled work day, December 3, but Ward called in sick. On December 4, Stone called Ward and informed him the pre-disciplinary hearing would take place at 9 o'clock that day. Again the hearing did not take place, this time because Ward went home early. He did not return to work. The pre-disciplinary meeting was finally held December 17, with neither the Grievant nor the Employer representative recommending discipline in attendance. Larry Hunt, Chapter President, appeared for the Grievant. Inmate pass logs and statements did not come up at the hearing, and Stone did not rely on them in recommending discipline. The Union representative also did not object to proceeding in the absence of either the Grievant or Management representative. On December 24, 1990, a memo was sent to the Grievant by certified mail reviewing the three aborted attempts to hold the pre-disciplinary hearing and informing him that the in absentia hearing had been held (Joint Ex. 5).

The removal order was signed on January 15, 1991, citing Rule 9 (failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment), Rule 12 (inattention to duty), and Rule 39 (other actions that could compromise or impair the ability of the employee to effectively carry out his duties as a public employee) (Joint Ex. 4).

At the time of the incident leading to his removal, Ward had been a corrections officer at the Dayton Correctional Institution for nearly four years. As stipulated by the parties, he was on notice of the work rules relative to his removal. The following discipline had been imposed for assorted rule violations prior to his removal:

Date	Discipline	Rule Violation
12/18/87	Oral Reprimand	1

12/21/87	Written Reprimand	1b
2/7/88	5-Day Suspension	25
3/2/88	1-Day Suspension	1a, 25
5/22/89	Written Reprimand	1
8/14/89	Written Reprimand	25
8/17/89	1-Day Suspension	1a, 6c
2/13/90	3-Day Suspension	1
6/11/90	3-Day Suspension	6c
7/22/90	Oral Reprimand	2b
11/13/90	5-Day Suspension	3d
12/5/90	10-Day Suspension	1,2b,3d,7,9,38,44

(Joint Ex. 4)

A grievance was filed January 25, 1991, alleging no just cause for removal and requesting reinstatement with full back pay and seniority. On February 26, 1991, a Step 3 meeting was held but the Grievant did not attend. Again there were no procedural objections. The grievance was denied at this level and subsequently moved to arbitration where it presently resides.

VII. Positions of the Parties

Position of the Employer

Management contends it has a clear case on the merits. The facts are unrebutted: the Grievant clearly violated rules that are reasonably related to the mission of the Department and he was on notice with respect to those rules. A short-term employee, the Grievant had discipline problems from the beginning of his employment. This was simply the last straw.

The only issues, Management asserts, are with respect to the Grievant's due process rights under the Contract. First, the Employer claims it did impose discipline within 45 days of the pre-disciplinary conference as required. Because of the Grievant's past record and the charges against him, Management continually tried to hold the conference to give him an opportunity to be heard. He repeatedly failed to appear. The language of the pre-disciplinary notice to the effect that failure to appear constitutes waiver is boiler plate. The Employer could have proceeded with the first scheduled conference and would have terminated the Grievant thereafter. Instead, it went overboard to protect the employee's rights. Finally, a pre-disciplinary meeting was held where the Grievant was properly represented. Only then was discipline imposed.

The second due process issue is the availability of inmate statements. The hearing officer testified that he did not rely on inmate statements in recommending discipline, and it is mere speculation that the appointing authority relied on them in imposing discipline. Even if there is an error, Management argues, it is a harmless one since there is ample evidence of the Grievant's guilt without them.

Finally, there is the matter of the absence of the charging management official from the pre-disciplinary conference. The Union did not object to his absence, nor did it request his presence. Contrary to the Union's position, Management believes both the Union and employee have the right to waive Contractual rights. In any event, the Employer contends that the officials presence is not an absolute requirement of the Contract.

In conclusion, the Employer maintains that it has gone out of its way to afford the Grievant all his rights even though the Grievant has consistently expressed a lack of interest in the matter. The Employer urges that the grievance be denied in its entirety.

Position of the Union

The Union first argues that the absence of the Grievant should not be taken as a sign of lack of interest. The arbitration hearing was postponed several times at the behest of Management. Claiming the Grievant

was available for the earlier dates, the Union points out that he has obligations to his new employer and family that in all likelihood made it impossible for him to attend the arbitration.

If the Grievant had been able to attend, the Union contends he would have rebutted several key Management points. One of these is that the inmates were in the building as the result of being issued passes for a specific purpose. That no discipline was issued to the inmates supports this contention. Moreover, no evidence has been presented to show they were not issued passes.

With respect to procedural issues, the Union asserts that the Contract is not vague or ambiguous regarding the presence of the management official at the pre-disciplinary conference. Article 24.04 says the employer representative "shall be present" unless a certain set of circumstances exists. Similarly, §24.04 is clear with respect to witnesses and documents used to support contemplated discipline. This is an absolute requirement and does not depend on Union request. Although the hearing officer claims he did not see them and that they were not used in the imposition of discipline, the warden had them and he is responsible for recommending discipline to the director. Somewhere along the discipline trail they were used, asserts the Union.

Although Management says it bent over backwards to guarantee the Grievant his due process rights, it did not do so with the employer representatives presence at the hearing, nor with the documents. These rights are not waiverable rights, contends the Union. The parties to the Contract can waive only those rights where latitude is specifically granted, such as in Article 13.07, Overtime.

The 45-day limit on imposition of discipline is another absolute, as upheld by virtually the entire main arbitration panel and even acknowledged by Management advocates. The first pre-disciplinary meeting was scheduled for November 30, 1990. No indication was given as to why it could not proceed without the Grievant. ODRC has done so in the past and the Grievant was on notice that failure to appear would constitute a waiver. That Management rescheduled the hearing is irrelevant. The only notice the Grievant has is that for November 30; the only notice the Union has is for November 30. The relevant date is therefore November 30, and the director signed the removal order on the 46th day.

The Union acknowledges that the Grievant's disciplinary history justifies removal for the alleged offense, but this does not release Management from its Contractual duty to afford the Grievant due process. In the Union's view, the multiple and grievous procedural errors call for reinstatement with full back pay.

VIII. Opinion of the Arbitrator

There is virtually no question that the Grievant knew that inmates were out of place on his post and allowed it to happen. This is evident from his reaction when Sgt. Klopfenstein discovered them and from his statement in the unit manager's office. The Union suggests that the Grievant's testimony and pass logs would rebut Management's case, but does not offer that evidence, despite multiple opportunities to do so. It further argues that the absence of discipline against the inmates supports the proposition that they were not out of place. Management, however, provided a reasonable explanation for not having disciplined the inmates. Management clearly has borne its burden of proof and its case is unchallenged by any evidence whatsoever. The Grievant is guilty as charged. Given his disciplinary history, which shows a flagrant disregard for the rules of the workplace and the Employer's efforts to redeem him, removal is warranted.

The Union raises several due process issues which it argues merit the overturning of the removal. The first of these is absence of the Employer representative from the pre-disciplinary conference. The right to meet with this person is unwaiverable, contends the Union. It is true that the Contract states that this person "shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend" (§24.04). However, the same section also gives the employee the right to waive the entire meeting. Surely if the whole is waiverable, a part of the whole is also waiverable, and the unrebutted testimony of Labor Relations Officer Stone was that the Grievant said he did not want the Management official there. Moreover, when the pre-disciplinary conference was ultimately held, the Union representative did not object to Management's absence. The purpose of having the Employer representative at the pre-disciplinary meeting is so that the employee can confront his accuser. If neither interested party--the employee who is interested in the disciplinary outcome and the Union who is interested also in the integrity of the Contract- cares to question

Management or to hear or react to information the Management official may have provided, his absence does not make the procedure unfair.

A second due process issue is with regard to the inmate statements which should have been provided if they were to be used against the Grievant. The pre-disciplinary hearing officer disavowed having ever read them, although he knew of their existence. To what extent, if any, they might have been relied upon by higher levels of management cannot be determined from the record, since there is no reference to them until the Step 3 response. Again the Union makes an allegation--that they must have been used somewhere in the disciplinary process--without providing evidence that the assertion is true. In any event, Management's case both at the pre-disciplinary meeting and in arbitration was made without them, and so the Grievant was not harmed by their having been withheld in the pre-disciplinary stage.

Finally, there is the timeliness of discipline issue. Whether Management adhered to the 45-day time limit depends on whether the pre-disciplinary meeting was concluded on November 30. If the answer to this is yes, then the removal order was signed on the 46th day and the Employer is in violation of §24.05. Labor Relations Officer Stone's testimony indicates that it was not an unusual practice to reschedule these meetings. Although the language of the pre-disciplinary letter puts the employee on notice that failure to appear could result in waiver of the conference right, the Employer is not bound to proceed with a conference as originally scheduled. The boiler-plate of the letter provides for extenuating circumstances, there is a custom of rescheduling, and the Contract is silent. I conclude that the Employer has exercised its discretion and that it has done so properly to afford the Grievant an opportunity to be heard rather than to eclipse his rights, as suggested by the Union.

In conclusion, I do not agree with the Union that the fact pattern depicts a scenario of grievous abrogation of due process. In another context, to be sure, I could take a dim view of the absence of the management official from the pre-discipline conference, withholding of witness statements, and repeatedly rescheduled meetings ultimately held without two principals. Here, however, the Grievant first agrees to take responsibility for the inmates' behavior, simultaneously states his disinterest in the consequences, and then follows through by failing to appear at any of the many opportunities afforded him to protect whatever interest he may have in his job and reputation. Management did not deprive the Grievant of a fair consideration of his case by acceding to his disinclination to confront his accuser, not supplying unused evidence prior to grievance discovery, repeatedly postponing the conference because of the Grievant's failure to appear, and finally informing him before the discipline decision that the meeting had been held. This is a pattern of Management attempts to complete the discipline process without abrogating the due process rights of an employee who has held himself apart throughout. Management cannot be said here to have breached the just cause standard or to have otherwise violated the Contract. Indeed, if any party deprived the Grievant of a full consideration of his case, it was the Grievant himself.

IX. Award

The grievant was removed for just cause. Accordingly, the grievance is denied in its entirety.

Anna D. Smith, Ph.D.
Arbitrator

September 17, 1991
Shaker Heights, Ohio