

ARBITRATION DECISION NO.:

440

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation

and Correction

Mansfield Correctional Institution

DATE OF ARBITRATION:

May 21, 1992

DATE OF DECISION:

June 6, 1992

GRIEVANT:

David Bowman

OCB GRIEVANCE NO.:

27-20-(91-10-08)-1383-01-03

ARBITRATOR:

Harry Graham

FOR THE UNION:

Dennis Williams

FOR THE EMPLOYER:

Roger A. Coe

KEY WORDS:

Removal

Effect of Criminal Finding

of Not Guilty

Purchase of Drugs by a

Corrections Officer

Credibility

ARTICLES:

Article 24-Discipline

\$24.01-Standard

FACTS:

The grievant was employed as a Correctional Officer 2 at the Mansfield Correctional Institution, a maximum security state prison. During an investigation involving drug smuggling into the facility, an inmate stated that the grievant said he could secure drugs for prisoners, and another inmate stated that if marijuana could be secured, it could be brought in by the grievant. The Mansfield Police Department drug unit was notified and set up a drug transaction with the grievant. The telephone calls setting up the transaction were

taped. The grievant was led to believe that the person he would meet was the brother of an inmate who would supply the marijuana. When the deal was made, the State Highway Patrol and the Mansfield Police Department intervened. The grievant was arrested. One charge was dropped due to lack of evidence, and the grievant was subsequently found not guilty by a jury on the remaining charge. Despite this verdict, the State removed the grievant from his position on September 30, 1991.

EMPLOYER'S POSITION:

The State asks that the "not guilty" verdict be disregarded, that there is reason to believe that evidence was not put before the court that was relevant to the determination of this dispute. According to the State, the evidence against the grievant is plentiful and incontrovertible, e.g., tapes of conversations between inmates, tapes of telephone conversations between police and the grievant, and testimony of several people involved in the incident. The grievant did in fact purchase three pounds of marijuana from the undercover agent, and this is not contradicted by the grievant or by any other evidence at the hearing. Therefore, the State insists that it had the requisite just cause to discharge the grievant and asks that the discharge be upheld.

UNION'S POSITION:

The Union does not dispute the account which led to the discharge, but asks that it be viewed considering additional facts. The Union states that the grievant was approached by his supervisor and asked to be especially vigilant about drug use in his area. The grievant exercised initiative to break up a drug ring which was smuggling drugs into the prison. It was while the grievant was conducting this investigation that he was arrested for purchasing drugs. Additionally, the Union asserts that because the grievant was found not guilty in the Richland County Court of Common Pleas, the State cannot make a showing of just cause in order to sustain the grievant's discharge.

In addition, the grievant was a good employee, with only one instance of discipline, a written reprimand. Testimony was offered to show that the grievant was respected by both co-workers and supervisors. In light of all the above, the Union urges that the discharge of the grievant be reversed and that he be returned to employment and made whole.

ARBITRATOR'S OPINION:

The judgment of the Richland County Court of Common Pleas is not determinative of this dispute and is not binding upon an arbitrator. The outcome rests entirely upon the evidence and testimony provided during arbitration.

It is without question that the grievant did in fact engage in a drug purchase. Testimony is on the record from an investigator from the State Highway Patrol stating his opinion that the grievant expected to bring the marijuana into the prison. In a taped telephone conversation, the grievant indicated his ability to deliver marijuana to an inmate. In a surreptitious tape recording of a conversation between two inmates, the grievant is referred to as someone who brought marijuana into the prison on many occasions.

The grievant's explanation that he was attempting to break up a drug ring appears to be an effort to find a credible excuse for his actions. The grievant's supervisor never requested that he do any more than keep alert to drug activity. The grievant never informed his supervisor of any plan to enter into a drug purchase in order to break up a drug ring, and the grievant made no reference to such plans when interviewed by the State Highway Patrol immediately after his arrest. The implausibility of the grievant's explanation for his actions is underscored by the fact that no investigation of this kind had ever been authorized or conducted before this event. It is more plausible to believe that the grievant was engaged in the conduct with which he is charged.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

**The State of Ohio, Department
of Rehabilitation and Correction**

Case Number:

27-20-(911008)-1383-01-03

Before:

Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

Dennis Williams

Staff Representative

OCSEA/AFSCME Local 11

1680 Watermark Dr.

Columbus, OH. 43215

For Department of Rehabilitation and Correction:

Roger A. Coe

Labor Relations Officer

Department of Rehabilitation and Correction

Pickaway Correctional Institution

11781 State Route 762

Orient, OH. 43146

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on May 21, 1992 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was the discharge of David Bowman for just cause?

If not, what shall the remedy be?

Background: There is no substantial dispute over the facts prompting this proceeding. Rather, the dispute is over the interpretation to be placed on those facts.

The Grievant, David Bowman, was employed as a Correctional Officer 2 at the Mansfield Correctional Institution. That facility is a maximum security prison operated by the State of Ohio. In May, 1991 officials at the prison commenced an investigation of alleged drug smuggling into the facility. An inmate had come forward and indicated that such activity was in process at the prison. The account proffered by the inmate indicated that the Grievant had stated that he could secure drugs for prisoners. The administration of the Mansfield facility came to learn that a different inmate (Grizzly) had stated that if marijuana could be secured

it could be brought into the prison by the Grievant. (Buzzard)

In due course the Mansfield Police Department drug unit, METRICH, was notified of the situation. A number of telephone calls were made by the drug unit to the Grievant in order to set up a drug transaction. In the final analysis, a drug purchase was arranged. It involved a meeting to occur at a rest area on US Highway 30 adjacent to Interstate 71. The Grievant was to be provided with three (3) pounds of marijuana. The telephone calls setting up this transaction were taped and came onto the record in this proceeding as evidence.

In due course a meeting at the Highway 30 rest area occurred. The Grievant was led to believe that the person he would meet was the brother of an inmate who would supply him with the marijuana. In fact, an undercover narcotics agent kept the rendezvous. The marijuana transaction was consummated. At that point members of the METRICH unit and the Ohio State Highway Patrol intervened. The Grievant was arrested. In due course his case came to trial in the Court of Common Pleas of Richland County, OH. One count was dismissed by the judge for lack of evidence. After hearing evidence, the jury unanimously returned a "not guilty" verdict. That occurred on September 27, 1991. Notwithstanding the not guilty verdict, on September 30, 1991 the State removed Mr. Bowman from employment. A grievance protesting that action was promptly filed. It was processed through the machinery of the parties without resolution and they agree that it is properly before the Arbitrator for determination on its merits.

Position of the Employer: The State urges that the findings of the Richfield County Court of Common Pleas be disregarded. It points out that the prosecutor involved on behalf of the State was trying his initial drug case. In the Employer's opinion, there is reason to believe that evidence was not put before the Court that is relevant to the determination of this dispute.

According to the State, the evidence before the Arbitrator is incontrovertible. It indicates beyond any doubt that the Grievant was a participant in a scheme to smuggle drugs into the Mansfield facility. That evidence is copious and consists of clandestine tapes made of conversations between inmates, tapes of telephone conversations between law enforcement personnel and the Grievant and the testimony of various people involved in this incident. Testimony was received from the inmate who initially reported the alleged drug smuggling scheme to the effect that Bowman had smuggled drugs into the prison on prior occasions and that he would do so again. Additional testimony came from members of different law enforcement departments, the Ohio State Highway Patrol, the Mansfield METRICH drug unit and the Ashland Police Department implicating Mr. Bowman in this incident. The State points in particular to the account of the actual drug transaction given by the undercover narcotics agent. He testified without contradiction that he met the Grievant at the Highway 30 rest area as arranged and that he provided marijuana to the Grievant. At that point officers of the Mansfield Police Department and the Highway Patrol swooped in and made the arrest. It is incontrovertible that the Grievant purchased three pounds of marijuana from the undercover narcotics agent precisely as arranged by the Mansfield Police Department. The evidence from the tape recordings and the testimony is not contradicted in any way by the Grievant or any other evidence proffered at the hearing. As that is the case, the State insists it possessed the requisite just cause to discharge the Grievant and that the discharge be upheld.

Position of the Union: The Union points out that the Grievant was found not guilty in the Richland County Court of Common Pleas. A jury reached that verdict unanimously. Given that fact, the Union asserts that the State cannot make a showing of just cause in order to sustain the discharge at issue in this proceeding.

During his service with the State Mr. Bowman was a good employee. He has one instance of discipline, a written reprimand, on his record. Testimony came onto the record from a supervisor and another Corrections Officer to the effect that Mr. Bowman was highly regarded by co-workers and supervisors alike. As that is the case, the Union urges that the interpretation placed upon this incident by the State be viewed with skepticism by the Arbitrator.

The Union does not dispute the account of the drug transaction that prompted the State to discharge Mr. Bowman. Rather, it urges that it be viewed in a different context than that urged upon the Arbitrator by the State. According to the Union the Grievant was approached by his supervisor, Sergeant Scott Thompson,

and told to be especially vigilant about drug use in his area. It was in compliance with this directive that Officer Bowman exercised initiative to break the drug ring that was smuggling drugs into the prison. Hence, his activity to unmask the source of the drugs and bring the culprits to justice. He believed that was just what he was doing when he agreed to the drug purchase that occurred on Highway 30. In essence, the Union claims that the State is penalizing a conscientious officer who exercised initiative with discharge. Such an action does not meet the just cause test specified in the Agreement. As that is the case, the Union urges that the discharge of Officer Bowman be reversed and that he be returned to employment with a make whole remedy.

Discussion: That the Grievant was acquitted in the Richland County Court of Common Pleas is not determinative of the outcome in this forum. It is well established that the holdings of bodies such as Unemployment Compensation hearings, Workers Compensation hearings and courts are not binding upon an arbitrator. It may be that the evidence submitted to them is the same as that submitted to the arbitrator and that the same result occurs. On the other hand, a different result is entirely possible from arbitrable review. The outcome of a dispute of this nature rests entirely upon the nature of the evidence and testimony provided to the arbitrator and the weight placed upon it by the neutral.

In arbitration proceedings concerning discharge there is a great deal of dispute between the parties over the proper standard of proof to be required in order to convince an arbitrator that a grievant has committed the offense with which he or she is charged. That debate is sterile. In the final analysis, the arbitrator must be convinced that the Grievant has done the deed with which he is charged. Once that occurs, inquiry may turn to whether or not the penalty administered is appropriate to the offense. Suffice it to observe that in this situation particular scrutiny must be given to the evidence against the Grievant due to the nature of the deed he is alleged to have committed.

In this situation it is incontrovertible that the Grievant engaged in a drug purchase transaction at the Highway 30 rest area. A transcript of the interview with him done immediately after his arrest is on the record. Testimony is also on the record from various law enforcement personnel concerning the arrangements for that transaction and the manner in which it occurred. Testimony from an experienced investigator from the Ohio Highway Patrol is on the record reflecting his opinion that the Grievant expected to bring the marijuana into the prison. The record is replete with references to "z's" which is shorthand talk for ounces. In the view of the Highway Patrol Investigator the Grievant intended to bring the marijuana into the prison in small amounts, "z's." In a taped telephone conversation the Grievant made reference to his ability to deliver the marijuana to his "friend," an inmate. In addition, there is a surreptitious tape recording of a conversation between two inmates regarding this event. Reference is made to Bowman as the courier for the marijuana into the prison. An inmate, (Grizzly) told the informer that Bowman (Buzzard) had brought drugs into the prison on many occasions.

When Bowman's supervisor, Sergeant Thompson, spoke with him about drugs in their pod or area, the conversation was routine in nature. Bowman never spoke with him about conducting a drug investigation. Nor was he ever informed about Bowman's alleged intention to enter into a drug purchase. It appears to the Arbitrator that Sergeant Thompson had no expectation that the Grievant would do anything more than what was expected of any conscientious Correctional Officer; keep his eyes and ears open and make appropriate reports to his supervisor. At no time during the course of his alleged drug investigation did the Grievant inform his supervisor that he planned to enter into a purchase of a large amount of marijuana in an effort to discover the supplier. Nor did he make any reference to any investigation when interviewed by the Highway Patrol at the rest area immediately after his arrest. The notion that the Grievant was entering into a drug purchase transaction involving three pounds of marijuana as part of an investigation smacks of an ex-post-facto effort to find a plausible excuse for his activity. As no such investigation had been authorized nor any report of its existence made the purported rationale for the Grievant's activity is viewed with skepticism. This view is bolstered by the fact that no investigation of the sort allegedly conducted by the Grievant had ever been authorized or conducted prior to this event. In essence, it is more plausible to believe that the Grievant was engaged in the conduct with which he is charged.

This is obviously a very serious offense. The worst offenders against society are lodged in the Mansfield

prison, a maximum and super-maximum facility. If the account of the State is credited, as it must be given the testimony and evidence, there can be but one outcome to this dispute.

Award: The grievance is denied.

Signed and dated this 6th day of June, 1992 at South Russell, OH.

HARRY GRAHAM
Arbitrator