

ARBITRATION DECISION NO.:

507

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Correction
Orient Correctional Institution

DATE OF ARBITRATION:

June 18, 1993

DATE OF DECISION:

July 9, 1993

GRIEVANT:

Michael Bradford

OCB GRIEVANCE NO.:

27-21-(92-09-15)-0789-01-03

ARBITRATOR:

Harry Graham

FOR THE UNION:

Brenda Goheen

FOR THE EMPLOYER:

Cheryl F. Jorgenson

KEY WORDS:

Removal
Back Pay
Credibility
Drug Trafficking
Just Cause
Offset of Interim Earnings
 Against Back Pay
Remedy

ARTICLES:

Article 24 - Discipline
 § 24.01 - Standard

FACTS:

The grievant, a Pharmacy Attendant at the Orient Correctional Institution, was removed after being involved in a scheme to provide drugs to other employees at the Institution. On June 22, 1992 a management official at Orient observed the grievant giving an envelope containing about forty pills to an inmate. The inmate then secreted them on his person and got into the Food Service Truck he was driving as

an honor inmate. The inmate drove to the prison sallyport where the truck and the inmate were searched but the pills were not found. After passing through the sallyport a prison employee approached the truck and received the pills from the inmate and immediately took them to the Warden where they were later determined to be Vasotec, a medication for high blood pressure.

The grievant had more than ten years of unblemished service with the State. The inmate was a felon who at the time of this incident was serving a sentence for aggravated burglary. Subsequent to the incident, he was granted parole and is now out of prison. The grievant was discharged.

EMPLOYER'S POSITION:

The grievant was engaged in a clandestine operation to dispense the Vasotec to a co-worker. The facts that 1) the grievant was dealing with an inmate, 2) was stealing drugs belonging to the State, and 3) was not licensed to dispense prescription medication all constitute violations of prison procedures. There can be no question that the pills given to the inmate were the same pills that ended up in the Warden's office. As such, the discharge of the grievant was appropriate and the grievance should be denied.

UNION'S POSITION:

The Union disputes that the pills received by the inmate from the grievant were Vasotec. In fact, the food service manager had called the pharmacy and asked for Tylenol, which was not an unusual request. The Union contends that the grievant gave the inmate Tylenol and that after that point the pills and truck were in the exclusive control of the inmate. Thus, the State cannot know with certainty what drug was passed from the grievant to the inmate and the dispute comes down to a case of one person's word against another's. Furthermore, the inmate had every incentive to set up the grievant in an effort to advance his own parole application.

ARBITRATOR'S OPINION:

The Arbitrator must be convinced that the grievant did the deed with which he or she is charged in order for a discharge to be sustained. Here, the state has not been convincing. The case involves a grievant with no discipline on his record in his ten years of service being accused by a felon who has spent the bulk of his adult life in prison and who, after accusing the grievant, was subsequently awarded parole. Skepticism is therefore warranted.

There are too many unanswered questions to determine with any degree of confidence whatsoever that the contents of the bag received by the inmate from the grievant were Vasotec or Tylenol or something else. It therefore must be concluded that the State did not meet its burden of convincing the Arbitrator that the grievant did the deed with which he is charged.

AWARD:

The grievance is sustained and the grievant is to be restored to employment. He is to be paid all straight time wages he would have earned but for this incident. He is to receive all benefits that would have accrued including seniority, pension credit, holiday and vacation pay. All record of this incident is to be expunged from his personnel file. The earnings of the grievant from the date of the discharge to the date of the award may be used to offset the liability of the State for backpay.

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:
27-21-(92-09-15)-0789-01-03

Before: Harry Graham

Appearances:

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For OCSEA/AFSCME Local 11:
Brenda Goheen
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OCSEA/AFSCME Local 11
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For Department of Rehabilitation and Correction:
Cheryl F. Jorgensen
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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on June 18, 1993 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: The parties agree upon the issue in dispute between them. That issue is:

Was the removal of Michael Bradford for just cause?
If not, what shall the remedy be?

Background: The events which prompted the State to discharge Michael Bradford are sharply disputed between the parties. In essence, the State asserts that the Grievant was involved in a scheme to provide drugs to other employees at the Orient Correctional Institution. The Union asserts that was not the case.

There are many aspects of Mr. Bradford's discharge upon which the parties agree. The Grievant was initially employed at Orient Correctional Institution on May 31, 1981. He was a Pharmacy Attendant and served in that capacity without incident until June 12, 1992. On that date Mr. Bradford was observed giving an inmate at Orient, Edward Richardson, an envelope containing pills. The Grievant was under surveillance as it had been reported by Richardson to the administration of the prison that he was involved in a drug trafficking scheme. After receiving the pills Richardson secreted them on his person and got into the Food Service Truck he was driving as an honor inmate. This entire sequence of events was observed by David Morris, a management official at Orient. Richardson drove his truck through the prison sallyport. While in the sallyport he and the truck were searched but the pills were not discovered. Upon passing through the sallyport Morris entered the truck and received the pills from Richardson. He took them to the Warden's office where they were photographed and the bag in which they were contained marked for evidentiary purposes. Richardson was then given the pills and he took them to the Food Service Department and gave them to the Food Service Manager, J.C. Jordan. Thereupon the drugs were confiscated. It was

subsequently determined that the drugs were Vasotec, a medication for high blood pressure. In sum, there were about 40 pills in the envelope confiscated from Mr. Jordan.

It was the opinion of the Employer that the giving of medicine to an inmate for transmittal to another employee represented a breach of prison regulations. Accordingly, the Grievant was discharged on September 3, 1992. A grievance protesting that discharge was promptly filed. It was processed through the procedures of the parties without resolution and they agree that it is properly before the Arbitrator for determination on its merits.

Position of the Employer: As the Employer views this situation it is beyond dispute that the Grievant gave an inmate a prescription drug. That drug was to be taken to another employee. No prescription was on file for the drug. No authorization to dispense the Vasotec was given by the pharmacist. The Grievant was engaged in a clandestine transaction to supply medication to a co-worker. He is not licensed to dispense prescription medicine. Even if he were, to do so under these circumstances is a major breach of prison procedures. He was dealing with an inmate. He was also stealing drugs belonging to the State.

In this situation Bradford was observed giving pills to Richardson. Those pills were later confiscated from Richardson and found to be Vasotec, a prescription medicine. The bag containing the pills was carefully marked and the State crime laboratory confirmed that the bag taken from Jordan was the same bag given to Richardson by prison officials to take to him. In the final analysis, no doubt exists but that Bradford acted as claimed by the Employer in this instance. Hence, the discharge penalty was appropriate and the grievance should be denied according to the Employer.

Position of the Union: The Union points out that at the time of this incident the Grievant had more than ten years of service with the State. He had an unblemished record.

The Union acknowledges that Bradford passed medicine to Richardson as claimed by the Employer. It disputes that the pills received by Richardson were Vasotec. According to the Union Mr. Jordan, the Food Service Manager, had called the pharmacy and asked for Tylenol. Such a request is not uncommon and in fact, Bradford gave Richardson Tylenol to take to Jordan. The Union points out that from the time he received the pills from Bradford to the time he left the sallyport and Morris entered his truck that the medicine was under the exclusive control of Richardson. Richardson is a felon. At the time of this incident he was serving a sentence for aggravated burglary. Much of his life has been spent in prison. Subsequent to this incident he was granted parole and is now out of prison. In essence, as the Employer cannot know with certainty what drug was passed from Bradford to Richardson this dispute comes down to a case of one person's word against another's. Richardson had every incentive to set up Bradford in an effort to advance his parole application. It cannot be said with any assurance that the pills received by Richardson were Vasotec as asserted by the State or Tylenol as claimed by the Grievant. As that is the case, the Employer cannot sustain a showing of just cause as required by the Agreement.

Discussion: cursory reference to the published decisions of arbitrators in discharge disputes will reveal a great deal of discussion over the question of the burden of proof that must be met by an employer in order to sustain a discharge. It suffices to observe that the arbitrator must be convinced that the Grievant did the deed with which he or she is charged in order for a discharge to be sustained. In this situation that is a high hurdle for the State to surmount. On the one hand, the Grievant had over ten years of service at the time of his discharge. No discipline is on his record. His accuser is a felon who has spent the bulk of his adult life in prison. He subsequently was awarded parole. A certain degree of skepticism concerning his role in these events is warranted.

Of most concern is that the pills given to Richardson were under his sole and exclusive custody from the time he received them to the time they were confiscated by David Morris outside of the sallyport. The Grievant testified that he gave Richardson Tylenol. Vasotec was taken from Richardson by Morris. An unanswered question in this dispute is how did Richardson secure the Vasotec? It could have come from Bradford as asserted by the State. Or, Richardson could have accumulated some and secreted it as part of an effort to ingratiate himself with prison officials in order to advance his application for parole.

Another unanswered question in this dispute is how Richardson managed to get the pills through the search of his person and vehicle at the sallyport? A presumably thorough search failed to reveal the evidence subsequently used to justify the discharge of the Grievant. How this could occur is a mystery.

It cannot be determined with any degree of confidence whatsoever that the contents of the bag received by Richardson from Bradford were Vasotec as claimed by the State. Nor can it be determined that the pills received by Richardson were Tylenol as asserted by the Union. Given the unanswered questions surrounding this event it must be concluded that the State did not meet its burden of convincing the Arbitrator that the Grievant did the deed with which he is charged. The State has failed to prove its case in this situation.

Award: The grievance is sustained. The grievant is to be restored to employment. He is to be paid all straight time wages he would have earned but for this incident. He is to receive all benefits that would have accrued including seniority, pension credit and holiday and vacation pay. All record of this incident is to be expunged from his personnel file.

The Grievant is to promptly supply to the State a record of his earnings from the date of his discharge to the date of this award. Those earnings may be used to offset the liability of the State for backpay.

Signed and dated this 9th day of July, 1993, at South Russell, OH.

HARRY GRAHAM
Arbitrator