

ARBITRATION DECISION NO.:

688

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Rehabilitation and Correction

DATE OF ARBITRATION:

DATE OF DECISION:

October 23, 1998

GRIEVANT:

Regina Carter

OCB GRIEVANCE NO:

27 01 (97 08 20) 0094 01 09

ARBITRATOR:

John J. Murphy

FOR THE UNION:

Time P. Shafer, Staff Rep.

Jamie Parsons, Staff Rep.

FOR THE EMPLOYER:

Cynthia Sovell-Klein, OCB

KEY WORDS:

Corrections Employee

Credibility

Drug Possession on State Property

Investigation (Criminal)

Investigation (Initial)

Just Cause

Removal

ARTICLES:

Article – 24 Discipline

§24.02 – Progressive Discipline

§24.05 – Imposition of Discipline

FACTS:

On July 7, 1997, two employees assigned to the Central Office of the Department of Rehabilitation and Correction (DR&C) found a cigarette case in the mailroom. The case contained seven marijuana roaches (stubs of marijuana cigarettes) and a roach clip. The employees brought their discovery to a guard, and the

Ohio State Highway Patrol (OSHP) was notified.

On the next day, the grievant approached her supervisor, and she explained that on the previous day she had lost her cigarette case containing marijuana roaches and a clip. During an investigation, the grievant stated that her daughter in law placed the roaches and clip in the cigarette case, but she was unaware of that fact until the evening of July 7.

The OSHP and DR&C completed their investigation, and the grievant was not criminally charged. The Employer, however, decided that it had just cause to remove the grievant from employment.

EMPLOYER'S POSITION:

The evidence produced in the grievant's defense was simply not convincing, and it did nothing to weaken the evidence in the record of her violation of the DR&C rule against possessing drugs while on duty. The first time the grievant admitted that her cigarette case contained drugs was on the morning of July 8; she told her supervisor that her cigarette case was missing and that it contained marijuana. Just prior to this admission, the grievant had been informed by a co worker that her cigarette case had been found in the mailroom and had been given to the security guard. Therefore, when the grievant approached her supervisor early on July 7, she knew that DR&C had her cigarette case and that it contained marijuana.

UNION'S POSITION:

The Union argued that the grievant was an unwitting transporter of the marijuana. She did not know that her case contained these items until the evening of July 7. Upon learning of this fact, she brought this information to the attention of her supervisor on July 8.

The Union also argued that the total amount of marijuana contained in the cigarette case was only .362 gram. Based on the minute quantity and the lack of knowledge of the contents of the case on the part of the grievant, the Union contended that the Employer lacked just cause to discharge the grievant.

ARBITRATOR'S OPINION:

The Arbitrator found considerable evidence that the grievant possessed drugs while on duty and on state property. The grievant acknowledged and the parties stipulated that the grievant brought her cigarette case to work on July 7 containing marijuana. The OSBP report noted that the grievant appeared anxious or "panicky" on July 8 when she inquired about the whereabouts of her cigarette case. Furthermore, the grievant never suggested at any time during the investigation or during the arbitration hearing that some third party possessed her cigarette case during the workday of July 7. The failure by the grievant to offer the exculpatory information when she first admitted to her supervisor that drugs were in her cigarette case was significant. This failure to offer the exculpatory information to the supervisor was not an admission by silence, nor was it a prior inconsistent statement. However, the failure to offer the exculpatory information at the time she first admitted there were drugs in her cigarette case is relevant to the issue of her credibility, and the Arbitrator gave weight to the grievant's failure to present that information sooner.

The grievant was also given an opportunity to explain why the defense of "unwitting possessor" was first raised in the administrative interview and not raised in her prior admission to her supervisor of drugs in her cigarette case. She testified that, "he did not ask if the contents were mine, and I did not tell her supervisor that the contents were not mine." According to the Arbitrator, this explanation did not ring true. Both the grievant and her supervisor testified to the fact that they had a trusting relationship, and the grievant's supervisor testified that the grievant was honest and dependable. It was difficult for the Arbitrator to believe the grievant's almost lawyer like explanation of her failure to offer the exculpatory information to her

supervisor, "I was not asked, and I did not offer the information."

The Arbitrator attached little significance to the fact that the grievant was not subject to any criminal prosecution. The imposition of criminal charges depended on whether the evidence obtained by the OSHP constituted sufficient evidence to find the elements of a crime to have been committed, and does not reflect on whether the Employer had just cause to discipline the grievant.

Finally, the Arbitrator stated that the weight of the marijuana plant material was not relevant. The rule implemented by DR&C makes no mention of the weight of drug material being a factor to consider when disciplinary action is taken. Given the purpose and function of the DR&C, gradation of sanctions for the possession of drugs by employees of the department did not appear sensible.

AWARD:

The grievance was denied, and as a result, the removal order was upheld.

TEXT OF THE OPINION:

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In The Matter of the Arbitration

OPINION AND AWARD
Regina Carter Grievance

between

Ohio Civil Service Employees Association/AFSCME

and

State of Ohio, Department
of Rehabilitation and Corrections

ARBITRATOR: John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE STATE:

Also Present:

FOR THE STATE:

Cynthia Sovell Klein
Office of Collective Bargaining
State of Ohio
106 North High Street
Columbus, Ohio 43217

Also Present: Nicholas Menidis
Management Representative

Charles Davis
Supervisor

FOR THE ASSOCIATION: Timothy P. Shafer
Jamie Parsons
Staff Representatives
OCSEA/AFSCME
1680 Watermark Drive
Columbus, Ohio 43215

Regina Carter
Grievant

Also Present: Louise wade
Grievant's Daughter in Law

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FACTUAL BACKGROUND:

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On Monday, July 7, 1997, two employees assigned to the mail room in the Central Office of the Department of Rehabilitation and Correction separately observed a cigarette case on the counter. The case had two compartments, one smaller than the other. Both employees checked the cigarette case separately and found seven "roaches" (seven stubs of marijuana cigarettes approximately 1/2inch in length) and a "roach clip" (a metal object used to pierce the roach and hold it to a person's mouth).

The employees brought their discovery to a guard who alerted the Security Office of the Department. The Department contacted the State Police, and both the Department and the State Police conducted an investigation on Tuesday, July 8. Early in the morning of July 8 at approximately 8:30 a.m., the Grievant approached both employees separately to inquire about her purse. According to the State Police investigation, one employee lied to the Grievant, and the other told the Grievant a guard had taken the case to the Security Office. The Grievant's next step on the morning of Tuesday, July 8, was to approach her supervisor, Charles Davis. She explained to Davis that she had lost her cigarette case during the previous day, and that it contained marijuana roaches and a marijuana roach clip.

While the Grievant was making inquiries of fellow employees about her cigarette case, and speaking to her supervisor, the

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investigation by the Department and the State Police was ongoing. The Grievant was interviewed in the company of the Association representative by the supervisor assigned to conduct the Department investigation. The Grievant acknowledged that she had lost her cigarette case the previous day, and she

provided a description that fit the case in the possession of the Security Office. She then said that the roach clip and the several roaches were placed in her cigarette case by her daughter in law without her knowledge. The Grievant stated that she was unaware of the fact that the roaches and roach clip were in her cigarette case until she had had a conversation with her daughter in law on the evening of July 7.

The State Police and the Department completed their investigations. The Grievant was not criminally charged. The Department, after observing the required pre disciplinary conference, decided that it had just cause for removal of the Grievant from employment.

ISSUE:

The parties stipulated that all procedural requirements for bringing this matter to arbitration had been met, and that the issue in arbitration was: was the Grievant, Regina Carter, removed for just cause; if not, what should the remedy be?

RELEVANT DEPARTMENTAL POLICY:

STANDARDS OF EMPLOYEE CONDUCT RULE VIOLATIONS AND PENALTIES

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30.	While on duty or on state owned or leased property the:	1 st	2 nd	3 rd	4 th	5 th
	a. Conveyance distribution, possession or consumption of alcoholic beverages and/or drugs of abuse				R (removal)	

OPINION:

I. Cause for Discipline

There is considerable evidence that the Grievant possessed drugs while on duty and while on state owned property. The Grievant acknowledged and the parties stipulated that the Grievant brought her brown cigarette case to her workplace in the Department on July 7, 1997. There was further agreement that she left the cigarette case in the mail room. There was further agreement by the parties, and acknowledgment by the Grievant that the cigarette case contained seven marijuana roaches and a roach clip in addition to a small blue lighter and a Salem cigarette package containing eight cigarettes.

The Grievant testified that she smokes one package of cigarettes per day, and opens the cigarette case approximately twenty times per day. She acknowledged that she opened the cigarette case during the day on July 7 prior to leaving the case in the mail room.

The State Police report noted that the Grievant appeared anxious or "panicky" on the two occasions early on Tuesday, July 8,

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when she inquired with two employees about the cigarette case. Furthermore, the Grievant never suggested at any time during the investigation or during the arbitration hearing that some third party possessed the cigarette case during her workday of Monday, July 7.

It is true that the Grievant was not subject to any criminal prosecution as a result of the State Police investigation. Little or no significance can be attached to the prosecutorial decision not to proceed. That decision deals with whether the evidence obtained by the State Police constituted sufficient evidence to find the elements of a crime to have been committed. This record in this arbitration shows no explanation for the failure to prosecute. Furthermore, the prosecutorial decision is not related to the decision requested in this arbitration: whether the Employer had just cause to discipline.

II. The Grievant's Defense: An Unwitting Possessor of Marijuana Roaches

The defense of the Grievant is that she was an unwitting transporter of the roaches and roach clip in her cigarette case. She claims she did not know that her case contained these items, and did not learn of this fact until the evening of Monday, July 7.

The defense continues with the Grievant's assertion that she first learned that her daughter in law had placed the roaches and roach clip in her cigarette case on Monday evening, July 7. On

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learning of this fact, she honestly brought this information to the attention of her immediate supervisor early on the morning of July 8. She told her supervisor, Charles Davis, that she not only lost her cigarette case, but the case contained the marijuana roaches and clip.

The evidence produced by the Grievant to support this defense was simply not convincing, and it certainly did not weaken the substantial evidence in the record of her violation of the Department rule against possessing drugs while on duty. The Grievant's daughter in law testified that she placed the marijuana roaches and clip in the Grievant's cigarette case in Stuebenville, Ohio during the evening of Sunday, July 6. While this witness acknowledged that she regularly carried a purse, she stated that it was simply not available.

The Grievant, daughter in law, Grievant's son and children then proceeded to drive from Stuebenville to Columbus, Ohio. Under the Grievant's defense, she claims that she was unaware of the drugs in her cigarette case on the early evening of July 7 through the drive to Columbus, and through the workday on Monday, July 7.

While the Grievant testified that she smokes twenty cigarettes per day, and handled the case during the day of July 7, she never discovered the seven roaches and metal roach clip. She also testified that she never felt any bulge in the small compartment

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that contained these drugs while she handled the cigarette case during the day on July 7. While the Grievant's testimony and that of her daughter in law create questions of credibility, the central evidence questioning the credibility of the Grievant centers on the time when she first raised the defense of "an unwitting possessor" of the drugs.

The first time that the Grievant admitted that the drugs were in her cigarette case occurred early on Tuesday morning, July 7. At this point, she told her immediate supervisor Charles Davis that her cigarette case was missing, and that it contained roaches and a roach clip. Just prior to this admission to Davis, the Grievant had been informed by a co employee that her cigarette case had been found in the mail room, and had been given to the Security Office of the Department. Therefore, when the Grievant approached Davis early on July 7, she knew that the Department had her cigarette case, and the Department knew that the cigarette case contained drugs.

The key point in the record, however, is that the Grievant did not raise the defense of "unwitting possessor." She never offered to Davis the exculpatory information that the drugs belonged to her daughter in law, and that the daughter in law had placed the drugs in her cigarette case without the Grievant's knowledge.

It was not until a few hours later during the administrative interview conducted by the Department in the company of the Union

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that the Grievant first offered the exculpatory information. At this point the Grievant stated for the first time that the drugs were not hers.

The failure by the Grievant to offer the exculpatory information when she first admitted to her supervisor that drugs were in her cigarette case is significant. This failure to offer the exculpatory information to the supervisor is not an admission by silence by the Grievant. In a similar way, failure to offer the exculpatory information is not a prior statement by the Grievant that is inconsistent with the claim raised four hours later in the administrative interview. The failure by the Grievant to offer the exculpatory information on her first admission of drugs in her cigarette case at the workplace is relevant to the issue of her credibility, and is given weight in respect to that issue.

The Grievant was given an opportunity to explain why the defense of "unwitting possessor" was first raised in the administrative interview and not raised in her prior admission to her supervisor of drugs in her cigarette case. She testified that "he did not ask if the contents were mine, and I did not tell Davis that the contents were not mine.,,

This explanation does not ring true. Both the Grievant and Davis testified to a trusting relationship and a good rapport with each other at the workplace. Davis supervised four employees, including the Grievant; Davis supervised the Grievant for her

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thirteen months of employment with the Department. Davis evaluated the Grievant's performance with a

positive rating, and testified that she was very dependable and honest. It is difficult to believe the Grievant's almost lawyer like explanation of her failure to offer the exculpatory information to Davis. "I was not asked, and I did not offer the information."

III. The Sanction of Discharge

- The Grievant's supervisor testified that all new employees are trained in the policies and procedures of the Department, including the Standards for Employee Conduct. Indeed, the parties stipulated that the Grievant had been so trained. Rule 30 of the Departmental policies does not provide for any progressive discipline in the case of the first offense involving possession of drugs while on duty or on state owned property. The Association raised the question of the reasonableness of this sanction as applied to the Grievant's workplace. The workplace involved both the control center and a records warehouse building; neither are detention centers operated by the Department. On the other hand, inmates are regularly assigned to provide assistance at these buildings, and the Grievant acknowledged this fact.

Lastly, the point was raised at the arbitration hearing that the total amount of marijuana constituted by the seven roaches was only 0.362 gram. The weight, however, of the marijuana plant material is not relevant. The Department's rule does not grade

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sanctions based upon the weight of the drug material. Given the purpose and function of the Department of Rehabilitation and Correction, gradation of sanctions for the possession of drugs by employees of the Department would not appear sensible.

AWARD:

- The grievance is denied.

John J. Murphy
Arbitrator

Date: October 23, 1998

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