

#787

THE STATE OF OHIO, DEPARTMENT OF REHABILITATION
AND CORRECTION AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, DEPARTMENT OF REHABILITATION
AND CORRECTION AND OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, AFSCME
(TRUMBULL CORRECTIONAL INSTITUTION

REVIEWED BY

JAN 16 2002

01/17/02
GRIEVANCE COORDINATOR

GRIEVANTS: BIANCA PAIGE AND ELIZABETH JOHNSON
OLB GRIEVANCE NO.: 27-27 (05-16-01) 2159-01-06
27-27 (04-12-01) 2149-01-06

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: JANUARY 14, 2002

APPEARANCES

For the Employer

Natalie D. Edwards
Johnnie Mae Fuller
Cindy Klein

Labor Relations Specialist
Lieutenant
Manager of Operations,
Office of Collective Bargaining,
and Second Chair
Advocate

David Burrus

For the Union

Brad Williams
Bianca Paige
Elizabeth A. Johnson
Jim Pagani

Penal Workshop Superintendent
Grievant
Grievant
Advocate

INTRODUCTION

This is a proceeding under Article 25 entitled Grievance Procedure, Section 25.03 – Arbitration Procedures, Section 25.04 – Arbitration/Mediation Panels of the Agreement between The State of Ohio, the Department of Rehabilitation and Correction (hereinafter referred to as the “Employer”) and Ohio Civil Service Employees Association, Local 11, AFSCME (hereinafter referred to as the “Union”) for the period

March 1, 2000 through February 28, 2008 (Joint Exhibit 1). The arbitration hearing was held on November 29, 2001. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. Neither party decided to provide briefs; the hearing closed with closing statements.

STIPULATED ISSUE

Were the Grievants removed for just cause? If not, what shall the remedy be?

STIPULATED FACTS

- Elizabeth Johnson
Date of Hire: 12/12/94
No active discipline on record prior to removal
Employee acknowledged receipt of Standards of Employee Conduct
From 12/94 to 2/96 the grievant was classified as a correction officer
From 2/96 until her removal the grievant was classified as a Penal Workshop Specialist

- Bianca Paige
Date of Hire: 9/19/94
No active discipline on record prior to removal
Employee acknowledged receipt of Standards of Employee Conduct
From 9/94 to 7/96 the grievant was classified as a correction officer
From 11/96 to 6/98 the grievant was classified as a TPW with the Dept. of Mental Retardation
From 6/98 to 4/99 the grievant was classified as a correction officer at OSP
From 4/99 to 7/99 the grievant was classified as a Storekeeper at OSP
From 3/00 to 4/01 the grievant was classified as a Penal Workshop Supervisor at TCI

PERTINENT CONTRACT PROVISIONS

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(1).

24.02 – Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. One or more reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. A fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
- D. One or more day(s) suspension(s);
- E. Termination

Disciplinary action taken may not be referred to in an employee's performance evaluation record. The event or action giving rise to the disciplinary action may be referred to in a performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirement of the other provisions of the Article. An arbitrator deciding a discipline grievance, must consider the timeliness of the Employer decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

(Joint Exhibit 1, Pgs. 81-82)

CASE HISTORY

The circumstances giving rise to the disputed removals took place at the Employer's Trumbull Correctional Institution in Warren, Ohio. Housed within this institution is a workshop, manned by Inmates, who dismantle donated personal computers, scavenging for parts and upgrading and fixing them before shipping the computers to schools and other locations. The computers are donated by corporations, government agencies and other institutions with unneeded or outdated computers. This non-profit program is a division of Ohio Penal Industries (OPI).

Bianca Paige, one of the Grievants, had approximately four months of service at OPI the time of her removal and was classified as a Penal Workshop Specialist. The record indicates she enjoyed probationary status when terminated by the Employer. Elizabeth Johnson, the other Grievant contesting her removal also worked at OPI and was classified as a Penal Workshop Specialist. She had worked at OPI since February of 1996 and enjoyed full time job status. Both individuals supervised Inmates working in the OPI operation, with Johnson serving as the "group leader," which involved supervising Paige's activities.

On or about December 11, 2000, Lieutenant J.F. Fuller received a confidential phone call informing her that Inmate Hargrove had in his possession pornographic material, which he had received from Inmate Hogg. She was advised that Inmate Hogg was downloading this material off the Internet while working at the OPI computer refurbishing area.

Lieutenant Fuller instructed the block officer to immediately shakedown Inmate Hargrove's cell. This search surfaced ten Paiges of sexually graphic and explicit

pornographic material. Upon further investigation, it was determined the copies did, in fact, originate at OPI. The pictures, more specifically, were downloaded from a hard drive and copied to a floppy disk, and printed off a computer and printer located in OPI.

These findings caused a search of the OPI area on December 19, 2000.

Lieutenant Fuller and a number of other individuals conducted the search. Numerous security violations were found, which include in pertinent part:

1. Telephone splitters for a telephone with direct outside line capabilities.
2. Several 3.5 floppy disks in unauthorized areas.
3. Motorola cellular phones in unauthorized areas.
4. Numerous keys lying unprotected in desk drawers.
5. Several laptop computers hidden all over the building with charged battery packs attached to the computers
6. Christmas cards created on State purchased paper without approval from any supervisor.
7. Numerous uncontrolled software applications stored and hidden throughout the building.
8. Inmates' legal papers and personal letters.
9. Inmates using their own personal laptop computers containing legal work.
10. Numerous unauthorized tools stored in boxes hidden inside the tool room.
11. Personal items belonging to an Inmate inside the tool room, stored in plastic bags behind a refrigerator and microwave. The refrigerator and microwave were worded "staff use only."¹
12. Several personal phone calls were made daily on the phone without prior approval or authorization.

On January 31, 2001, a Pre-disciplinary Conference was held, which dealt with both Grievant's situations. The hearing officer determined there was just cause to remove both individuals.

On March 6, 2001, Paige and Johnson were advised they were being terminated from their positions. They were found to have violated the Standards of Employee Conduct in a number of ways:

¹ This security violation was not specified in Paige's charges.

You were found to have violated the Standards of Employee Conduct Rule 5: Purposeful or careless acts which result in one or more of the following: b. damage, loss, or misuse of property of the State to include but not limited to vehicles, telephones, computer hardware, computer software, electronic mail and internet usage; c. Damage, loss or misuse of property to include but not limited to property of any employee, any individual under the supervision of the Department or member of the general public.

Rule 7: Failure to follow post orders, administrative regulations, policies, procedures, or directives.

Rule 8: Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment.

²Rule 24: Interfering with or failing to cooperate in an official investigation or inquiry.

Rule 27: Failure of a supervisor to properly supervise or enforce work rules.

Rule 28: Loss of any control of any instrument that could result in a breach of security or jeopardize the safety of others to include but not limited to weapons, Class A Tools, keys, communication devices, etc.

Rule 38: Actions that could compromise or impair the ability to effectively carry out his/her duties as a public employee.

Rule 42: Unauthorized actions that could harm or potentially harm any individual under the supervision of the Department.

Rule 45: Without express authorization, giving preferential treatment to any individual under the supervision of the Department, to include but not limited to a: The offering, receiving, or giving of a favor. ²

(Joint Exhibit 7 and 8)

On April 11, 2001, Grievant Johnson contested her removal by filing a grievance.

The following allegations were contained in this document:

On April 10, 2001, Ms. Elizabeth Johnson was removed from her position. The Administration broke (sic) Art. 24 for:

1. Did not follow progressive discipline at all.
2. Did not properly investigate the matter.
3. Withheld a list of witnesses (or had none) and documents used to impose discipline.
4. Did not initiate disciplinary action in a timely manner.
5. Did not prove one thing for just cause.

² These rule violations were not cited in Paige's charges.

(Joint Exhibit 6)

On May 15, 2001, Grievant Paige also protested her removal by filing a grievance (Joint Exhibit 7). The allegations contained therein are identical to those posed by Johnson.

The parties were unable to resolve the disputed grievances. Neither party raised substantive nor procedural arbitrability concerns. As such, the grievances are properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined it had just cause to remove the Grievants from employment. A series of security violations, related to a number of policies and post orders, were violated. Most of these violations, moreover, justify removal based on associated penalties contained in the Standards of Employee Conduct (Joint Exhibit 2)

The evidence regarding Grievant Johnson's conduct clearly established she was guilty as charged. The handling and control of tools is critical to the security of the institution, which includes the safety and health of staff and Inmates. Grievant Johnson failed to follow established policies regarding tool control and inventory of these items; some of which were found in the Inmates' work area at the time of the shakedown.

The Union's attempt to place the blame on Brad Williams, a Penal Workshop Superintendent, for the abuse of this policy is laughable. Williams did admit that he had brought a few tools into the area over a considerable amount of time. These few instances, however, do not account for the massive number and types of tools scattered

throughout the area. Some tools were never properly accounted for, while others were not located in a specified area necessary for proper control. Williams, moreover, was not the Grievant's supervisor nor did he have any training responsibility. He was merely responsible for facilitating incoming and outgoing product; no other responsibilities fell within his jurisdiction.

Of particular import are other forms of contraband found in the area. Evidence clearly links the pornographic material to a computer and other devices specifically found in the OPI area. Finding these documents in the possession of a non-OPI Inmate, in the general population, underscores the potential risk of a work environment out of control. Some of the cell phones were, indeed, locked up, but one in particular was found in the Inmate's work area. Unauthorized possession of this device allows potential access outside the facility with all of its related problems. A telephone had been rigged at OPI, which allowed direct access outside the facility. This situation engenders a tremendous security risk, when one realizes all telephone calls either entering or leaving the facility are monitored by a special telephone system. Laptop computers were scattered secretly throughout the area, some of which were loaded with personal legal work product and other personal correspondence.

Both Grievants, but especially Johnson, either condoned, or through neglect, allowed these circumstances and many others to fester beyond manageable control. The Grievants had the primary responsibility for the supervision of these Inmates while working at OPI. Obviously, with the discovered contraband and other policy violations, the Grievants were derelict in their duties. Also, conditions of this sort strongly evidence a complete disregard for the workplace in terms of efficient and orderly operations.

Paige was equally responsible and served as a co-conspirator in the manner the Inmates were supervised and the workplace maintained. Even though Johnson trained her regarding required duties and responsibilities, and may have done so improperly, Paige was still directly culpable. Prior to her appointment to OPI, she served as a Corrections Officer and Storekeeper. As such, Paige was well aware of some of the existing protocols regarding security requirements.

The Union's Position

Both Grievants were not removed for just cause. Evidence presented by the Employer did not establish the requisite level of proof necessary for termination. Several due process issues were raised questioning the propriety of the administered discipline.

Policies and procedures were not applied consistently. If the mentioned issues had been ongoing, then they should have surfaced and dealt with at a much earlier date. To impose discipline under these circumstances appears arbitrary and capricious.

The Grievants were unaware of much of the identified contraband. Neither individual knew where the material was hidden, and how it arrived on the scene.

The tool related charges were obviously misplaced. Critical to this determination is the role played by Williams. He admitted that on several occasions he brought tools into the OPI area, but he never logged in a Class "A" tool, nor did he ever report it to anyone. Thus, anyone could have brought these tools into the work area.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, a complete review of the record including pertinent contract provisions, it is this Arbitrator's opinion that the

Employer had just cause to terminate Grievant Johnson. For reasons specified below, however, Grievant Paige was not terminated for just cause. She was not similarly situated to Grievant Johnson, and thus, her actions did not justify removal.

The Union and Grievant Johnson had their arguments hampered substantially by Grievant Johnson's acknowledgment of a variety of security related policies. She never maintained she never knew about these policies. Rather, she appeared to have ignored them and placed little emphasis on their import. Unfortunately, this became a pervasive theme throughout the entire episode. As such, Grievant Johnson violated Rule 27 – Failure of a supervisor to properly supervise or enforce work rules. When any employee acknowledges certain work rules, and then claims ignorance regarding their application, admissions of this sort harshly challenge an individual's credibility.

Grievant Paige's probationary status at the time of removal also raises an interesting query. Typically, a probationary employee can be removed without just cause, and then is unable to press the matter through the grievance procedure. This traditional approach did not take place here, nor did the parties raise this particular standing issue at the arbitration hearing. The matter was processed by the parties in a fashion similar to the Johnson grievance (Joint Exhibit 6). As such, the Arbitrator, without any formal protestation raised by either party, must deem Grievant Paige's grievance (Joint Exhibit 7) arbitrable.

The Union was unable to justify its due process and other procedural claims. The Johnson grievance (Joint Exhibit 6) contains many potential procedural and due process claims. Yet it would be inappropriate for the Arbitrator to consider these matters since they were never raised by the Union at the hearing. Addressing these

points in this Opinion and Award would cause the Arbitrator to consider matters not formally in the record. Doing so, moreover, would prejudice the matter in the Union's favor because the Employer, at the hearing, never had an opportunity to address these concerns.

Stacking allegations were raised by the Union at the hearing. The Arbitrator's review of the record, however, failed to support this accusation. Granted, some of the charges were related because of the nature of the violations and the contrabands surfaced by the investigation. They played a critical role in the dispute. But for the purpose of the present analysis, the proposed violations reflect proper independent indices of misconduct.

The position description (Joint Exhibit 14) and the Grievants' testimony indicated they played the primary "supervisory" role at OPI for the purpose of daily operations; they supervised and monitored the Inmates at OPI. Daily production operations were primarily monitored by the Grievants; and they had the responsibility for security, as well as other post orders and policies.

The Union was never able to establish that Williams had direct supervisory responsibilities over the Grievants. He only had limited responsibilities dealing with the operation. Specifically, he monitored the donated goods at the receiving end of the process and the refurbished goods once the products were completed. To cast the blame on Williams for all the security related misconduct at OPI is farcical and totally unsupported by the record.

In an operation like OPI, security issues are of utmost import. Its accessibility, as a consequence of donated material and refurbished work product, is ripe for security

violations. Access to laptops, cell phones, and tools must be controlled because of security and safety concerns. These items, if allowed into the general population, engender unlimited security risks.

In this Arbitrator opinion, the Employer was unable to substantiate all of the proposed rule violations, and yet, those remaining for review are so egregious to the safety, health and security of the institution that they warrant Grievant Johnson's removal. The discussion which follows, and related analysis, well depict the hazardous nature of Grievant Johnson's misconduct.

Rule 5(b) states in pertinent part:

5. Purposeful or careless act(s), which result in one or more of the following:

b. Damage, loss or misuse of property of the State to include, but not limited to vehicles, telephones, computer hardware, computer software, electronic mail and internet usage.

(Joint Exhibit 2, Pg. 3)

Clearly, pornographic material accessed illegally by using OPI computers, printers and fax equipment violate this standard of employee conduct. Allowing this activity, whether directly or as a consequence of mere negligence, is a dischargeable offense. This violation, moreover, abridges Policy 112-12, which deals with the access and use of computer hardware and software by the Inmate population. The Policy, itself, states:

It is the policy of the Department that Inmate access to computers be limited to educational, vocational, and industrial endeavors. Inmate access to computers that are capable of accessing Inmate, employee, victim, or other sensitive or confidential information is strictly prohibited.

(Joint Exhibit 5, Pg. 105)

The Employer was able to clearly link these photographs to the OPI operation. The computer signature on the pornographic material indicated OPI as the source of this contraband. By failing to properly supervise the Inmates, laptops, and other related equipment used to access the Internet, Grievant Johnson caused a substantial security breach and the importation of contraband throughout the institution.

The telephone and cell phone charges equally violate Rule #5. The telephone in question was located on a wall platform, in the computer refurbishing area, next to a locked wall mounted fax security box. The telephone had direct outside telephone line access. Access which directly breaches the institution's telephone security apparatus. It becomes quite difficult to accept Grievant Johnson's explanation regarding this condition. She maintained she never knew about this condition. If she were alert and cognizant of her work environment, she should have known that an illegally accessible phone was in a work area under her control.

Similarly, the cell phone found during the search raises security concerns and equal suspicion regarding Grievant Johnson's conduct. The cell phone was found in an Inmate Clerk's desk drawer, in a case containing two batteries, a battery charger and a car cigarette charger. The cell phone and accessories made the entire "package" operable. An Inmate could have received collect calls or initiated calls on a "pay as you

use” basis. Once again, access to this cell phone allowed someone to totally bypass the existing telephone security system with a multitude of associated problems.

Grievant Johnson admitted to knowing about the cell phones in her work area. She had received a donated shipment, which consisted of some of these devices. Grievant Johnson, however, had no idea how an Inmate could have gained access to the cell phone since others had been secured in the tool room. In a corrections institution, this type of laissez faire supervision should not be condoned or tolerated.

Once a laptop computer or other device is donated or otherwise received by the State, it becomes its property and is subject to misuse. Many charged and operational laptop computers were found hidden and scattered throughout the OPI area. This circumstance again violates Rule #5 because of computer misuse, but the laptops were loaded with other incriminating documents causing further policy and related Standards of Conduct violations. These laptops and related software allowed Inmates free access for letter writing and personal legal work. Again, these conditions glaringly violated Policy 112-12.

Several other Rule #7 violations surfaced as a consequence of the investigation. Policy 310-36 deals with the control, use, storage, and disposal of tools, culinary and medical utensils and hazardous materials in keeping with good security practices. This policy’s Inventories Section contains procedures of critical import to the present analysis. This Section contains the following relevant provisos:

3. All inventories will be signed and dated by the responsible employee using form DRC 2331.

4. When new tools and/or replacements and additions are drawn for replacement, the old tool must be turned in so that it may be safely disposed of according to institution procedures for handling such items.
5. Inventories of tools in use will be posted conspicuously on shadow boards, and placed in or affixed to toolboxes and Inmate tool kits. This also includes tool kits in all vehicular equipment.
6. Inventories shall be maintained of all tools in storage or not in use.
7. All tools will be inventoried daily at the end of each work shift by the supervisor having custodial responsibility for the tools.

(Joint Exhibit 5, Pg. 110)

Grievant Johnson clearly violated these requirements. Rule #7 was again violated as a consequence.

Grievant Johnson failed to inventory a large supply of tools. They were found hidden in the tool room and on the shop floor. Some of these items were Class "A" tools and included saw blades and actual cutting equipment. A Torx ratchet screwdriver set with assorted bits was also found in the Inmates' work area. These tools in use were not posted on shadow boards, violating certain custodial responsibilities and preventing accurate periodic audits.

Policy 310.37 deals with procedures that provide for a safe and secure method for the issuance and distribution of keys and locks within each institution. By violating this policy, Rule #28 was violated because the Grievant lost control of keys jeopardizing the security of others. Keys were readily available to Inmates as they were found throughout the area. Certain cabinets were either left open or were accessible to Inmates who had control of these keys.

In response to these admitted conditions, Grievant Johnson noted that those items that had to be secured were secured with her own keys. She, moreover, asserted that when all keys were put on key rings and identified for security purposes, the OPI area was overlooked.

These justifications, in my view, fall short in terms of any reasonable explanation for the conditions Grievant Johnson helped perpetuate. Security breaches can easily be accomplished when Inmates have access to keys, which have never been inventoried.

Similar violations concern a photo identification kit found in a readily accessible area. The Grievant had no response to this finding. Contraband of this sort poses a tremendous security threat, and could not have been donated during the normal course of business.

Progressive discipline does not apply in this instance. These individual violations, as well as their cumulative effects, easily justify removal. Massive security breaches were perpetrated by Grievant Johnson's misconduct and loss of control.

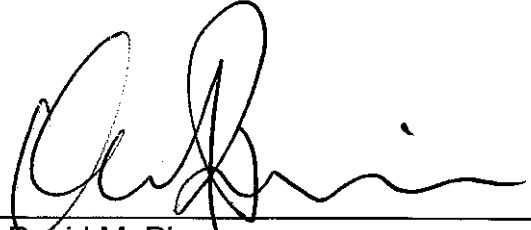
Grievant Paige, however, is not similarly situated. She held probationary status prior to the search, and spent a limited time in the area since she was on sick leave. Grievant Johnson, moreover, helped develop the processes used in OPI and served as a lead person. She trained Grievant Paige regarding policies, practices, and proper process. Any shortcomings in Grievant Paige's performance, therefore, is directly attributable to Grievant Johnson's interventions.

AWARD

Grievant Johnson's grievance is denied. Her termination was for just cause.

Grievant Paige's grievance, however, is upheld. She shall be reinstated to her former position with all back pay, less interim earnings, and seniority. Any related leave balances shall be reimbursed.

January 14, 2002
Moreland Hills, Ohio



Dr. David M. Pincus
Arbitrator