

#942

ARBITRATION DECISION

October 9, 2006

In the Matter of:

Ohio Department of Youth Services)	
Indian River Juvenile Correctional Facility)	
)	Case No. 35-04-20050405-0017-01-03
and)	Shelli Jackson, Grievant
)	
Ohio Civil Service Employees Association,)	
AFSCME Local 11)	

APPEARANCES

For the Employer:

Mark Tackett, Management Advocate, DYS Labor Relations
 Marissa Hartley, Second Chair, Legal Intern, OCB
 Terry Smith, Labor Relations Officer, Indian River
 Melinda Hopper, Labor Relations Officer, DYS
 Christopher Freeman, Operations Administrator
 Arthur Tate Jr., Superintendent

For the Union:

Steve Wiles, Staff Representative
 David Long, Research Assistant
 Shelli A. Jackson, Grievant
 Bruce Thompson, Chapter President

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant is Shelli Jackson. She was hired by the Department of Youth Services on April 11, 1988, as a Juvenile Correction Officer at the Indian River Juvenile Correctional Facility. Indian River is a maximum security facility that houses approximately 235 juveniles from 12 to 21 years old. Many of the juveniles have been convicted of serious crimes, including murder and rape.

The events leading to the grievant's termination began on December 7, 2004. At 9:25 a.m. on that day, Arthur Tate, the superintendent, who was responding to a signal 14 in the I Unit, met the grievant in the sally port. When he noticed that she had on slipper-type shoes with no backs, he asked her if she had a shoe restriction to permit her not to wear her uniform shoes. Tate claims that he repeated his inquiry several times in the sally port and as they walked down the hall to the I Unit but the grievant ignored him. The grievant testified that she did not remember Tate saying anything either in the sally port or walking down the hall.

When Tate and the grievant arrived at the I Unit, they met Christopher Freeman, an Operations Manager. Tate testified that he told Freeman to have the grievant report to the operations office to speak to him. Freeman stated that he directed and then ordered the grievant to report to the operations office but she responded that she could not be bothered. He indicated that he followed her upstairs to the A unit where he relieved her of duty. The grievant claimed that she did not remember telling Freeman that she could not be bothered and stated that she never heard a direct order to report to the operations office.

After the grievant was relieved of duty, she went to the operations office where

Tate was waiting for her. At that time, the grievant admitted to him that she did not have a shoe restriction. He then told her that a report would be forthcoming for insubordination.

Another incident occurred on December 8, 2004. On that date, the grievant was working at her usual post in A Unit with Ralph Graham, a third-shift JCO, who was mandated to work overtime on the first shift. At approximately 6:30 a.m., operations called the unit to bring the youths to the cafeteria for breakfast. After the grievant and Graham counted the youths, they brought them to the cafeteria. A few minutes after the grievant and Graham left the unit, Charles Ford, an Operations Manager, arrived and found that a youth had been left unattended on the unit. He filed an incident report outlining what had happened.

The two events were the subject of separate investigations. The December 7, 2004, incident was initially investigated by Freeman on the day it occurred. He reviewed the incident reports filed in the case and interviewed the grievant. He concluded that administrative action should be taken against the grievant.

When the employer recognized the problem of having Freeman investigate an incident in which he was a participant, it reassigned the investigation. It was initially reassigned to Ford but when he was promoted, it was switched to James Koss. He completed his investigation on February 22, 2005, and concluded that administrative action against the grievant might be warranted.

A pre-disciplinary hearing was held on March 1, 2005. The grievant was charged with violating Rules 2.1 and 4.1 of the DYS General Work Rules. A few days later, Johnetta Williams, the hearing officer, concluded that there was just cause for discipline

against the grievant. On this basis, Joe Marsilio, who had become superintendent, requested Thomas Stickrath, the Interim Director of the Department of Youth Services, to remove the grievant. On March 16, 2005, he approved the request.

The investigation of the December 8, 2004, incident followed the investigation of the prior incident. The record indicates that on March 15 and 16, 2005, C. Hill-Gunn interviewed the grievant and several witnesses to the incident. She issued her investigatory report on March 16, 2005. She concluded that the grievant did not act appropriately on the date in question.

The pre-disciplinary hearing took place on March 23, 2005. The grievant was charged with violating Rule Nos. 2.3, 3.3, 5.1 of the DYS General Work Rules. On the same date, Marc Blitz, the hearing officer, concluded that there was just cause for disciplining the grievant.

On March 24, 2005, Marsilio requested Stickrath to approve the removal of the grievant. He also noted that DYS had already approved the grievant's removal for the December 7, 2004, incident but that the removal notice had not yet been served and suggested that the two incidents be combined in one removal notice. Marsilio cautioned Stickrath that the 45-day limitation period would end on April 15, 2005. His request to combine the two causes of discipline and to terminate the grievant was approved by Stickrath.

The grievant was notified of her removal on April 4, 2005. The union responded by filing a grievance on her behalf. It charged that the employer violated Article 2, Section 2.10, and Article 24, Sections 24.01, 24.03, and 24.05, of the collective bargaining agreement. The union asked that the grievant be reinstated and made whole.

When the grievance was not resolved, it was appealed to arbitration. The hearing was held on August 16, 2006. Written closing statements were received on September 15, 2006.

RELEVANT CONTRACT PROVISIONS

Article 2 - Non-Discrimination, Section 2.01 - Non Discrimination and Article 24 - Discipline, Sections 24.01 - Standard, Section 24.02 - Progressive Discipline, Section 24.03 - Supervisory Intimidation, and Section 24.05 - Imposition of Discipline.

ISSUE

The issue as agreed to by the parties is:

Was the Grievant removed for just cause, and, if not, what should the remedy be?

EMPLOYER POSITION

The employer argues that there was just cause to remove the grievant from her position. It charges that she violated the following rules of the Department of Youth Services General Work Rules Policy 103.17:

Rule 2.1 – Insubordination;
Rule 3.3 – Leaving the work area without permission;
Rule 3.6 – Failure to follow work assignment; and
Rule 4.1 – Failure to follow a direct order, instructions, or command of a supervisor.

The employer contends that two separate incidents justify its position. It states that on December 7, 2004, the grievant was wearing a slipper-type shoe with no heel that is against its dress code policy. The employer claims that the grievant disrespectfully ignored Tate's inquiry as to whether she had medical documentation to wear the shoes.

The employer maintains that there is no doubt that the grievant heard Tate's questions. It states that she admitted in her statement and at the pre-disciplinary hearing

that she heard Tate and that she tuned him. The employer observes that this contradicts her testimony at the hearing that she did not remember Tate saying anything to her.

The employer reports that the incident continued when the grievant and Tate reached the I Unit. It indicates that Freeman, at Tate's direction, told the grievant to report to the operations office but she ignored him and proceeded up the stairs to the A Unit. The employer reports that after the grievant ignored Freeman's direct order, he relieved her of duty.

The employer argues that disrespectful and insubordinate behavior cannot be tolerated in an institutional environment. It states that the safety and security of the youths and the staff depend wholly on JCOs following the rules and complying with directions. The employer states, "if [the grievant] is comfortable with blatantly disregarding the dress code and walking away from her supervisor, who knows how poorly she treats the youth." (Employer Written Closing Statement, page 4)

The employer contends that the grievant's conduct warranted her removal. It points out that the grievant had an active 12-day suspension for another serious violation. The employer stresses that even without the prior suspension, the grievant's actions would have been enough for termination.

The employer maintains that the grievant knew that her slipper-type shoes were not appropriate for the work environment. It states that this was revealed by Tate questioning her about her footwear. The employer claims that the grievant went to change her shoes before reporting to the operations office because she knew the shoes she was wearing were a violation of the dress code.

The employer argues that its decision to terminate the grievant is also justified by

the incident that occurred on December 8, 2004. It charges that the grievant and another JCO left a youth in seclusion unsupervised when they moved the other youths to the cafeteria. The employer insists that it was the grievant's responsibility to insure that the youth in seclusion was monitored.

The employer disputes the grievant's version of the two incidents at issue. It rejects her claim that she did not hear Freeman's order to report to the operations office. The employer asserts that she ignored him and proceeded to go upstairs to change her shoes because she knew that the ones she was wearing were not in compliance with the dress code.

The employer questions the grievant's testimony that she left the youth on the unit because she was told to take the other youths to the cafeteria. It points out that the grievant admitted that in all her years of experience she had never left a youth unsupervised. The employer notes that she also stated that relief staff, who are supposed to watch any youths in seclusion, are to report to a unit five minutes prior to the other youths leaving the unit.

The employer argues that the grievant's length of service does not mitigate the situation. It claims that "as a tenured employee, [the grievant's] sense of awareness and her responsibility to conduct herself appropriately on duty should far outweigh that of a less senior employee." (Employer Written Closing Statement, page 6)

The employer contends that removal was the appropriate penalty. It reports that at the time of the two incidents the grievant had a 12-day suspension on her record. The employer stresses that the violation of any work rule called for her removal.

The employer concludes that the grievant's removal was commensurate with her

offense and consistent with its work rules and past practice. It requests the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that the employer did not meet its burden of proof under Article 24, Section 24.01, to establish that there was just cause for the grievant's removal. It states that there were several inconsistencies between the testimony of Freeman and the statement given by Marsilio. The union also claims that there were a number of conflicts between the testimony of Freeman and Tate.

The union challenges the seriousness of the grievant's alleged insubordination. It acknowledges that Tate testified that the conduct of the grievant involved the worse case of insubordination that he had seen in his 36 years of experience. The union suggests, however, that if such were true, the employer would not have waited three months to discipline the grievant.

The union rejects the employer's claim that the grievant was more responsible for the December 8, 2004, incident than Graham because she was the lead person. It recognizes that the grievant was the permanent staff member on the A Unit and that Graham was mandated to work overtime on the relevant date. The union stresses that there is no lead position or classification.

The union maintains that Tate's behavior was inappropriate. It points out that the grievant testified that in the sally port Tate was "breathing down her neck and hollering at her." (Union Written Closing Statement, page 3) The union notes she stated that in the operations office she was confronted by four or five managers and that Tate used "in your face tactics." (Ibid.)

The union argues that on December 8, 2004, the grievant followed the normal procedures. It indicates that she radioed operations and informed them that A Unit was moving out and that a youth was in seclusion. The union claims that about a week before the alleged incident Freeman told the JCOs that the A Unit should move out to dietary at 6:30 a.m. without a call from operations.

The union concludes that "the employer delayed the assessment and enforcement of discipline in these two incidents just to stack the deck in their favor." (Union Written Closing Statement, page 3) It asks the Arbitrator to reinstate the grievant and make her whole.

ANALYSIS

The grievant was charged with violating a number of DYS General Work Rules on December 7 and 8, 2004. On the first date, the employer claims that the grievant was insubordinate. This charge is based on two more or less separate incidents. With respect to the first incident, Tate testified that he repeatedly asked the grievant if she had permission to wear the slipper-type shoes she was wearing but she totally ignored him.

The grievant's testimony that she did not hear Tate's inquires is unpersuasive. Not only is her denial self-serving, it is contrary to her earlier statements. When she was interviewed by Freeman on day of the incident, she stated that she told Tate that she had worn the shoes before and that no one ever said anything to her. At the pre-disciplinary meeting on March 1, 2005, the grievant acknowledged that Tate had asked her about her shoes.

The grievant complained about Tate's conduct. She testified that he was "breathing down her neck." The grievant also claimed that he was so close to her that she

had "no personal space."

The Arbitrator cannot attach much weight to these allegations. Tate denies that he behaved as the grievant claimed. In addition, even if the grievant's claims are true, it would not excuse the grievant's failure to respond to Tate's repeated inquires.

A related incident occurred after Tate and the grievant arrived at the I Unit. The employer charges that at that time, the grievant ignored Freeman's request and then his direct order to report to the operations office. Freeman testified that the grievant told him that she did not "want to be bothered."

The grievant disputes Freeman's testimony. She testified that she never heard a direct order. The grievant also stated that she could not remember saying that she did not want to be bothered and did not think that she would have said it.

The Arbitrator must accept Freeman's version of the incident. His testimony was supported by the written statements of Tim Groff, an Operations Manager, and Marsilio. In addition, the grievant in her interview on the same day as the incident acknowledged telling Freeman that she did not want to be bothered because her toe was hurting.

Another incident took place on December 8, 2004. The employer charges that on that date, the grievant and Graham left a youth in seclusion when they moved the A unit to dietary. It claims that the grievant bore more responsibility than Graham because she was working on her normal shift and unit while he was mandated to work overtime on a different unit. The employer maintains that the grievant's conduct constitutes a violation of Rule Nos. 3.3, 3.6, and 5.1.

The grievant denied any violation of the rules or procedures. She testified that she called operations and told them that there was a youth in seclusion and that she would

be moving the unit to breakfast and at that point in time, it was their responsibility to be sure that the youth in seclusion was monitored. The grievant added that she was not a lead worker so Graham was equally responsible for the incident but he was not removed.

The Arbitrator believes that the grievant's conduct constitutes a violation of the rules and procedures. The grievant acknowledged in an interview on March 15, 2005, that it has never been acceptable to leave a youth unattended. Graham also admitted that he knew that policy prohibited leaving a youth on a unit without supervision. If it was time to move to the cafeteria and no relief had arrived to monitor the youth, the grievant should have again called operations or perhaps stayed on the unit while Graham escorted the youths to the cafeteria. It was simply unacceptable and, perhaps, unprecedented to leave a youth alone on the unit.

The Arbitrator must reject the suggestion that the grievant was the victim of disparate treatment. While the Arbitrator is not convinced that the grievant had some quasi-supervisory authority or responsibility because she was working on her regular unit and Graham was not, the difference in the disciplinary records of the two employees justifies their different treatment. The grievant was involved in another incident the day before and had already served a 12-day suspension. There is no evidence that Graham had a similar record.

The remaining issue is the proper penalty. The Arbitrator appreciates that termination is the most severe penalty an employer can impose on an employee. He also understands that senior employees are usually given extra consideration in the meting out of discipline.

Despite these facts, the Arbitrator must uphold the grievant's termination. First,

insubordination is a serious offense. The grievant's misconduct took place in a correctional facility where following orders is particularly important. Second, the very next day the grievant violated policies and procedures when she left a youth unattended. The safety and security of the youths require that they be monitored at all times.

The grievant's disciplinary history is a major factor supporting her termination. The record indicates that she received a 12-day suspension on January 19, 2005. The disciplinary grid removes any doubt that removal was the proper penalty.

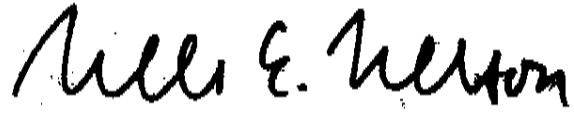
The union raised a number of issues regarding the procedures followed by the employer in the instant case. It complains that the imposition of discipline was delayed. The union also charged that the employer was "stacking" charges against the grievant in order to justify her termination.

The Arbitrator must reject these claims. While the incidents at issue occurred December 7 and 8, 2004, and the grievant was not terminated until April 4, 2005, the delay was due in part to the grievant's absence from work due to problems with her foot. Furthermore, the union was unable to show how the delay prejudiced the grievant's case or violated the contract. The decision to combine the incidents of December 7 and 8, 2004, appears to have been reasonable and does not suggest that the charges against the grievant were combined for the purpose of sustaining her termination.

Based on the above analysis, the Arbitrator must conclude that the grievant's discharge was for just cause and was in compliance with the collective bargaining agreement.

AWARD

The grievance is denied.



Nels E. Nelson
Arbitrator

October 9, 2006
Russell Township
Geauga County, Ohio