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IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION  
AFSCME LOCAL 11, AFL-CIO

Grievant: William Wheeler

Case No. 27-14-200060424-1514-01-03

Date of Hearing: March 28, 2007

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: James McElvain, OCSEA Staff Representative

Witnesses:

Grievant: William Wheeler

Donna Jackson – Chapter President

For the Employer:

Advocate: Dave Burrus, Chief, Bureau of Labor Relations

2<sup>nd</sup> Chair: Buffy Andrews, Labor Relations Officer

Witnesses:

Donna J. Smith, Correction Officer Supervisor

**OPINION AND AWARD**

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: May 23, 2007

## **INTRODUCTION**

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2006 through February 28, 2009, between the State of Ohio Department of Rehabilitation and Corrections ("DR&C") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, William Wheeler ("Wheeler") for violating DR&C Standards of Employee Conduct, Rules 7: failure to follow post orders, administrative regulations, policies or directives and 24: interfering with, failing to cooperate in, or lying in an official investigation or inquiry regarding conduct which occurred on January 7, 2006.

The removal of the Grievant occurred on or about April 11, 2006 and was appealed in accordance with Article 24 of the CBA. This matter was heard on March 28, 2007 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties on or about April 17, 2007.

## **BACKGROUND**

The Grievant was employed as a Corrections Officer ("CO") for DR&C and worked at the Northeast Pre-Release Center ("NEPRC") in Cleveland, Ohio. The Grievant had been employed approximately eight (8) years at the time of his removal. The Grievant was discharged as a result of two separate incidents which occurred on January 7, 2006.

The Grievant was assigned the entry/visitation post on January 7, 2006. Inmate visitors are processed at this post which requires the CO to conduct a search to prevent any contraband items from entering into the institution. COs are also required to maintain an inventory log of the visitor belongings, i.e., cell phones, that are prohibited inside the institution.

On January 7, 2006, the Grievant processed an inmate visitor who arrived at the facility via public transportation. The visitor had three (3) large packages that were wrapped in holiday paper and because of the size of the packages the storage lockers located in the visitors' area were inadequate. The Grievant decided to keep the packages under his desk while the visitor was inside the facility. Upon leaving the facility, the visitor forgot to retrieve the packages which remained under the Grievant's desk until discovered later that day. DR&C contends that the Grievant violated NEPRC policy by not contacting a supervisor for direction when confronted with this storage dilemma. Furthermore, the Grievant's failure to report the packages became more acute when the visitor left the facility without the packages.

The second incident occurred later that day, when the Grievant left his post at 3:25 p.m. to visit an inmate who was being held in G unit, pending an investigation. The inmate was in the security control, i.e., segregation, as a result of possession of contraband food items that were discovered in her cell. The Grievant upon entering segregation had a conversation with the inmate that was heard, in part, by CO Tony Bucci ("Bucci"), that suggested to DR&C that the Grievant was coaching the inmate to state that the contraband items were removed from the refrigerator by the inmate. DR&C believed that the Grievant provided the food items, which were two containers with chicken wings, and the only reason he went to Unit G was to coach the inmate in being deceptive when questioned by staff regarding how the food items came into her possession.

On January 9, 2006 the inmate admits to having the chicken wings but does not implicate the Grievant or her cellmates. (JX 2, p. 29). On January 13, 2006 a hearing occurs and she pled guilty to a violation of Rule 51 (possession of contraband) and once again does not implicate the Grievant. However, on February 14, 2006 the inmate provides an (unsigned) written statement

accusing the Grievant of providing the chicken wings to her on January 7, 2006 as well as some peach cobbler pie several months ago. (JX 2, p. 31).

According to DR&C, the Grievant was unable to provide any credible explanation for seeking this inmate and engaging in any type of conversation, other than to interfere with an official investigation that was going to disclose his involvement. Furthermore, the Grievant had no authorization to interact with the inmate.

On April 11, 2006 the Grievant received notice that effective April 13, 2006 he was being removed for the following infractions:

- 7. Failure to follow post orders, administrative regulations, directives or policies or,
- 24: Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

The removal was based in part upon holding the packages in violation of NERPC policy, and in part, on talking to the inmate in Unit G without authorization in an obvious attempt to interfere with an official investigation. (JX 3).

Ancillary to the removal, the Grievant also received a two (2) day fine on April 11, 2006 for violating Rules 3(B): failure to follow call-off and 3(G): leaving work area without the permission of a supervisor. The Rule 3(G) violation was based upon the Grievant's leaving his work area on January 7, 2006 to visit the inmate in G unit.

As a result of the investigatory process, on February 10, 2006, the Grievant received notice that two (2) separate predisciplinary conferences ("Pred.") were both scheduled for February 12, 2006. One Pred. conference for the alleged absenteeism violations of Rules 3(B) and 3(G) was to begin at 2:30 p.m. and the other Pred. conference for the alleged performance violations of Rules 7 – failure to follow post orders; 8 – failure to carry out a work assignment;

24 – interfering with or failure to cooperate; 37- actions that could compromise; and 45(A) – without express authorization giving preferential treatment was to commence at 3:30 p.m.

On January 6, 2006 the first investigatory interview occurred concerning the Grievant's failure to call off properly in violation of Rule 3(B) on December 9, 2005. On January 12, 2006 a second investigatory interview occurred regarding potential violations of Rule 3(G) and also Rule 24 – interfering with or failing to cooperate in an official investigation, for the Grievant's conduct once he arrived at G unit.

Both predisciplinary conferences were continued until March 17, 2006. (JX 2, p. 8). After the Pred. conferences, on March 22, 2006, Yvonne Thornton ("Thornton"), Hearing Officer, issued a handwritten report consisting of three pages indicating that "just cause" existed for discipline for violating Rules 7, 24, 37, 45(A), 45(B) and 3(G). (JX 2, pp. 10-12). The Hearing Officer's report is silent on whether just cause existed for discipline for violations of Rules 3(B) and 8. The Hearing Officer's Report is also silent on whether two separate Pred. conferences occurred and what process was followed to differentiate the facts relating to the absenteeism violations (Rules 3(B) and 3(G)) from the performance related violations (Rules 7, 8, 24, 37, 45(A) and 45(B)).

In any event, on April 11, 2006 the Grievant received a two day fine for violation of Rules 3(B) and 3(G). This discipline was subject to a grievance, which ultimately was resolved on May 22, 2006 when both parties executed the Grievance Settlement Agreement.<sup>1</sup> On April 11, 2006 the Grievant also received notice of his removal for violation of Rules 7 and 24. This matter was grieved and is the subject of this hearing. The Union contends that all facts associated with the Grievant's alleged conduct on January 7, 2006 were known to DR&C at the

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<sup>1</sup> The Grievance Settlement Agreement provided that the Grievant would receive two (2) days of back pay but the two day fine for violation of Rules 3(B) and 3(G) would remain as part of the Grievant's discipline record in accord with Article 24. (Union Exhibit (UX) 1).

time the two day fine was issued. DR&C by not including the other alleged violations of Rules 7 and 24 waived its ability to remove the Grievant by subjecting the Grievant to double jeopardy.

DR&C on the other hand contends that two separate tracks are permissible in imposing discipline. Performance issues and attendance violations are independent of each other and are progressed accordingly. Rules 3(B) and 3(G) were attendance violations, whereas Rules 7 and 24 were performance related. The Rule 24 violation represents his third active violation under the performance track disciplinary grid requiring removal.

The Union seeks reinstatement, restoration of all rights and any economic harm resulting from his removal. The Employer states that just cause existed for the removal and that the grievance should be denied.

## **ISSUE**

Was the Grievant disciplined for just cause? If not, what shall the remedy be?

## **RELEVANT PROVISIONS OF THE CBA AND DR&C POLICIES**

### **ARTICLE 24 – DISCIPLINE**

#### **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(i).

## STANDARDS OF EMPLOYEE CONDUCT

### Rules.

- 7: Failure to follow post orders, administrative regulations, policies or directives.
- 24: Interfering with, failing to cooperate in or lying in an official investigation or inquiry.

## POST ORDERS

### Chapter: Security and Control 01-500 (in part):

#### I. AUTHORITY

This post order is issued in compliance with Administrative Regulations, related A.C.A. Standards and Ohio Revised Code 5120.38 which delegates to the Warden the authority to manage and direct all inmates, personnel, volunteers, programs and activities connected with the Institution.

#### III. APPLICABILITY

To all employees, particularly those employees assigned to the Entrance Security Post.

#### VI. PROCEDURE

##### 7. Inmate visitation

Inmate visitors will enter through A-bldg and wait in the waiting area until processed by the visitation officer. After being processed by visitation the visitor must show picture I.D., remove hat, coat or jacket, empty pockets. Clear the walk through or hand held metal detector. If unable to clear the hand held metal detector, contact the Shift Captain. Children will be searched the same. Clothing items not worn will be searched (i.e. coats, hats, gloves, etc.). Search canes, crutches, walkers, artificial limbs, wigs, toupees, prosthetic devices and wheel chairs. Visitors are stamped with invisible reflective ink. The stamp will be rotated and logged daily. The stamp will be checked under the "Black Light" to ensure its clarity.

- Coat, jacket, sweater, hat, gloves and scarves suitable to weather.
- A maximum of \$20.00 cash money, change, bills (ones and fives only), or a combination thereof.
- No wallets, purses or change purses authorized . . . .

Items not worn will be placed in a clear plastic bag. Other items will be secured in a vehicle or locker. Visitors will be hand stamped going in and the stamp checked going in/out.

## NORTHEAST PRE-RELEASE CENTER POLICY AND RULES

### Chapter: Security and Control 310-05-01:

#### I. AUTHORITY

This policy is issued in compliance with Administrative Regulations, related A.C.A. Standards and Ohio Revised Code 5120.38 which delegates to the Warden the authority to manage and direct all inmates, personnel volunteers, programs and activities connected with the institution.

#### II. PURPOSE

The purpose of this policy is to establish minimum standards of security at the various entrance points to Northeast Pre-Release Center, to enhance and provide the means necessary to prevent the introduction of drugs and/or other contraband from entering the institution; and as part of escape prevention efforts.

#### VI. PROCEDURE

##### D. Visitor entry/exit

##### b. Visitor Searches

Items not worn by the visitor will be placed in a clear plastic bag. This will include such items as cash money, comb, hairbrush, handkerchief, picture I.D. card, baby bottle, diapers, pacifier, powder, lotion and medication. All other items must be secured in his/her vehicle. There is limited locker space available for visitors who must take public transportation.

## POSITION OF THE PARTIES

### THE EMPLOYER'S POSITION

The Grievant's conduct on January 7, 2006 violated NEPRC policies/procedures in that he permitted an inmate visitor to leave three (3) large wrapped packages at his post. The



packages were wrapped presumably as Christmas gifts, but due to their size were unable to fit in the storage lockers. Because the inmate visitor rode a bus to the institution the visitor could not secure the large packages in a vehicle. Upon leaving the institution the inmate visitor forgot to retrieve the packages which remained at the Grievant's post until January 8, 2006.

The Grievant in accord with NEPRC policy should have contacted a supervisor to obtain advice on the appropriate action to pursue. By doing nothing, the Grievant put the institution at a security risk by allowing sealed packages to remain at his post. Captain Donna J. Smith ("Smith") testified that the Warden's office was within fifty feet of the Grievant's post causing additional security concerns regarding the Grievant's storage of these packages.

During the January 12, 2006 the investigatory interview regarding a violation of Rule 8 Grievant admitted that the visitor left the packages and they were too big to fit into the lockers but also denied that he accepted the packages. (JX 2, pp. 47-48). This investigatory interview began at 0805 and ended at 0810 hours and the only rule at issue was Rule 8 (failure to carry out a work assignment or the exercise of poor judgment). (JX 2, p. 45-46). This interview was conducted by Capt. Smith.

Also on January 12, 2006 the Grievant had a second investigatory interview concerning possible rule violations of 3(G) and 24 at issue. (JX 2, p. 58). The record is silent as to when this interview began or ended. (JX 2, p. 59). The Employer argues that the Grievant left his post without authorization to visit an inmate that was discovered with contraband found which was presumably was provided by the Grievant. This interview was also conducted by Capt. Smith.

The Grievant upon hearing that the inmate was under investigation for possession of the chicken wings sought out the inmate who had been placed in segregation. The Grievant went

out of his way to visit the inmate after allegedly disposing of the "hot trash"<sup>2</sup> from the visiting area. (Employer Closing Statement, p. 4).

The Grievant provided various reasons for going to G unit, but the only plausible explanation is that he wanted to coach the inmate on what to tell the investigator. CO Bucci's Incident Report dated January 7, 2006 (JX 2, p. 52) indicates she heard the Grievant state "So you were cleaning out the refrigerator and you threw some chicken in the garbage and then you got them out. . ." and at the end of his conversation the Grievant added "That's it. You were cleaning out the fridge and you took them out of the garbage." (JX 2, p. 13).

Based upon the above facts, the Grievant was removed because he had two prior active performance track disciplinary violations which included a four month suspension for a violation of Rule 37 and a reprimand for Rule 12. (Joint Stipulations). The Grievant's reason for going to G unit is the crux of this case. If the evidence supports the Grievant's various versions for visiting the inmate which included: to shake his head at her; to help her stay out of trouble; because they had the same lawyer; etc., then the grievance should be granted. The record does not establish any legitimate business reason for Grievant to go to G unit other than to coach the inmate's testimony, and avoid implicating himself.

The Employer also contends that the two day fine issue was settled on the same day as the removal grievance was being heard at Step 3 with no procedural argument raised by the Union. The Union waived Step 4 of the grievance procedure (mediation) and is now barred from raising this argument. The Union also fails to acknowledge that the two day fine based upon attendance track violations 3(B) and 3(G) are distinct from 7 and 24 violations which were progressed on the performance disciplinary track.

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<sup>2</sup> Hot trash are items left in the inmate visitor entry area that COs are required to place in the trash compactor designated for this purpose.

The Employer also points out that when the two day fine grievance was settled, the parties agreed to restrict any future use of that Settlement Agreement, as only necessary to enforce its provisions and terms. Finally if "just cause" is not established, the Union should be limited to the remedy sought on the face of the grievance (reinstatement), not expanded remedies the Union raised in its opening statement which includes back pay, overtime and all other financial benefits.

### **THE UNION'S POSITION**

The Grievant was disciplined twice for the same occurrence. The Grievant received a two day fine for 3(B) and 3(G) on March 29, 2006. Although charged under the absenteeism track the 3(G) charge was performance based, related to the January 7, 2006 conduct and was treated by DR&C during the disciplinary process similar to Rule 24. Therefore, when DR&C charged the Grievant with violations of Rules 7 and 24 under the performance track and removed him he had already been disciplined. (Union Closing Statement, pp. 1-2).

The Union contends that when the Rule 3(G) charge was issued DR&C had knowledge of all the alleged acts of the Grievant that led to his removal. The Union points out that the Employer used the same pred. packets for both the absenteeism and performance charges without demonstrating the particular facts to support each alleged charge. (UN X 1 and JX 2).

Regarding the hearing, the Employer relied solely upon written statements and failed to produce credible witnesses at the hearing to meet its burden of proof to sustain this removal. For example, the inmate provided three statements during the investigation was not called to testify at the hearing. CO Bucci who was in the segregation unit and heard parts of the conversation with the inmate was not called to testify. Also, the inmate's three other roommates who may have had knowledge regarding the origin of the contraband, were not interviewed during the

investigation or called as witnesses. The Grievant denied giving the contraband to the inmate – and the only evidence is the statement of the inmate dated February 14, 2006. (JX 2, pp. 31-32).

The Union discounts the inmate's credibility because the February 14, 2006 statement is her third written statement and the only statement that implicates the Grievant.<sup>3</sup> The Union opines that the inmate statement on February 14, 2006 was motivated by a promise from Laura Solnick ("Solnick"), investigator, that the inmate would be transferred back to Marysville. (JX 2, p. 27). When the inmate was informed that she would not be transferred she refused to sign the February 14, 2006 statement. (JX 2, p. 27).

With respect to the Rule 7 charge, CO Donna Jackson ("Jackson") and the Grievant, upon cross examination indicated that items too large to fit in the storage lockers were kept behind the CO's desk. The Grievant was instructed by Capt. Smith on January 8, 2006 to prepare an Incident Report (JX 2, p. 41) and Grievant complied. (JX 2, p. 42). Moreover, even if the Grievant violated Rule 7 a third violation under the performance track is only a five day fine, not removal.

The Union was unaware that the Grievant was charged under the absenteeism track for a Rule 3(G) violation and did not raise this defense at Step 3. In preparation for this hearing, this issue was discovered and the Employer was given notice at least two days prior to the hearing.

The Union seeks the Grievant's reinstatement, back pay, all economic loss incurred and any other remedy he otherwise would have been entitled to receive.

### **DISCUSSIONS AND CONCLUSIONS**

Based upon the sworn testimony, exhibits and the post-hearing statements, the grievance is granted in part and denied in part. My reasons are as follows:

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<sup>3</sup> The inmate provided written statements on January 9, 2006 and January 27, 2006 without any indication of the Grievant's involvement. (JX 2, pp. 29, 40).

The Union objected to the Grievant being charged twice for his January 7<sup>th</sup> conduct, because the Union was unaware that the Rule 3(G) was treated as a violation of the absenteeism track under these facts. In other words, the Employer disciplined the Grievant for Rule 3(G) and Rule 24 for conduct the Union contends was the same offense

DR&C Standards of Employee Conduct (JX 4) provides for two separate tracks for progression of discipline. An "attendance track" for attendance related offenses, and a "performance-based standards track" for "conduct" not specifically related to attendance. The grouping of similar or the same offenses is preferable which allows the progression of discipline to be predicated upon comparable violations. (JX 4, pp. 6-7). The absenteeism track and the performance track contain separate disciplinary grids based upon the number of offenses, determines the appropriate penalty which ranges from an oral reprimand to removal. The foregoing serves as an overview of how the two distinct tracks were established and the intent to discipline progressively attendance related offenses separately from other offenses.

Due to the unique fact pattern discussed before, it is necessary to review the conduct of the parties regarding the two day fine Settlement Agreement to ascertain if the Union's position has any merit. Although, this defense of "double jeopardy" by the Union should have been raised at Step 3, no language in Article 24 precludes my review and the doctrine of waiver is inapplicable due to its preclusiveness and the need to resolve this grievance requires a limited review on the issue of the Grievant being disciplined twice for the same conduct.

#### **I. THE APRIL 11, 2006 TWO DAY FINE**

The two day fine was for the following infractions: Rule 3(B): failure to notify a supervisor . . . or to follow call-off procedure; and Rule 3(G): leaving work area . . . without the permission of a supervisor. The Grievant received notice of the two day fine on April 11, 2006.

The Rule 3(B) incident involved the Grievant's conduct on December 9, 2005 when he failed to follow the ninety (90) minute call-off procedure prior to the beginning of his shift. (UN X 1, p. 1). The Rule 3(G) infraction occurred on January 7, 2006 when he left his post and went to Unit G to visit the inmate without authorization. It is undisputed that both 3(B) and 3(G) are governed by the disciplinary grid of the absenteeism track. (JX 4, pp. 9-10).

On April 22, 2006 the Grievant filed a grievance regarding his two day fine. The pred. conference notice dated February 10, 2006 was specific, in that the Grievant is alleged to have violated Rules 3(B) and 3(G) and discipline would be based upon a finding of just cause for those violations. (UN X 1, Predisciplinary Conference Schedule). DR&C as part of its investigation interviewed the Grievant on January 12, 2006 regarding the Rule 3(G) charge. During this interview, the Grievant is also required to respond to possible discipline associated with a Rule 24 violation (UN X 1 Investigatory Interview dated 1-12-06). The Investigatory Interview is silent as to any separation of the facts regarding Rule 3(G) and/or Rule 24. As will be discussed later, this same investigatory interview was used by the Employer to justify a Rule 24 violation.

Also included in the Pred. Packet was a separate notice of investigatory interview for the rule 3(B) violation. The investigatory interview occurred on January 6, 2006 for the Rule 3(B) violation only.

In addition to the January 6, 2006 investigatory interview of the Grievant, DR&C provided other documents to the Grievant and Union as part of the Pred. packet. Included in the pred. packet was the Notice Of Investigatory Interview which indicated on January 12, 2006 the interview was to occur and the Grievant would be interviewed for the following:

“Rule 3(G): Leaving the work area/post facility without the permission of a supervisor.

24: Interfering with or failing to cooperate in or lying in an official investigation or inquiry.” (UN X 1, Notice Of Investigatory Interview dated January 12, 2006).

The interview notice did not separate the Grievant's conduct into separate tracks, but combined the Rules 3(G)/24 investigation into one matter. The record is silent as to when this interview began or ended. (JX 2, p. 59). The record is also silent on whether the Grievant was informed that the interview was designed to obtain facts relating to Rule 3(G) and Rule 24 offenses, independent of each other.

Clearly on January 12, 2006 DR&C believed that discipline of the Grievant was a real possibility for both 3(G) and 24 violations. It must be noted again, that Rule 24 offenses are intended only for the disciplinary grid of the performance track.

On January 12, 2006 the investigatory interview is conducted by Capt. Smith. During this fact finding session Capt. Smith questioned the Grievant regarding his conduct in the following areas: Did the Grievant leave his post to go to G unit? Who authorized the Grievant to go to G unit? Who was the inmate in segregation? Who was the CO on duty? Did the Grievant talk to the inmate? What was the conversation about? What was your purpose in talking to the inmate? Who was present when you were talking to the inmate? How did the sallyport door to segregation get opened? Do you know why the inmate was in segregation? How did you know the inmate was in the hole? Would you have spoken to anyone in segregation? What type of prior contact have you had with the inmate? When you were having a conversation with the inmate did you talk about chicken wings? Did the inmate say she got the chicken wings out of the trash? When were you aware that you and the inmate had the same attorney? Prior to this incident did you have conversations with her? How many other inmates

have you taken upon yourself to talk to? Do you normally take the hot trash? Have you been advised not to leave your post in the past?

After the investigatory interview Capt. Smith concluded in her January 12, 2006 Interview Finding that the Grievant left his post without permission and he went to segregation and spoke to an inmate. (UN X 1, NEPRC Investigatory Interview Findings). The facts obtained in the interview indicated a violation of both Rule 3(G) and Rule 24 occurred according to Capt. Smith. The disciplinary trail for the two day fine was provided by the Union as Exhibit 1. However, the Pred. documents did not include charges or notices, or the Hearing Officer's report after the Pred. conference(s). Moreover, there is no delineation between the documentation for the two day fine and for the removal regarding Rules 3(G) and 24. Nonetheless, the documents do show that the first disciplinary consequence was that the Grievant received a two day fine on April 11, 2006 based upon the absenteeism track violations of Rules 3(B) and 3(G).

## **II. THE APRIL 13, 2006 REMOVAL**

The removal was for the following Rule infractions: Rule 7: Failure to follow post orders, administrative regulations, policies or directives; and Rule 24: Interfering with, failing to cooperate in, or lying in an official investigation or inquiry. The Grievant received notice of his removal on April 11, 2006. For reasons contained below, reliable and credible evidence exists to find the Employer met its burden in proving the Grievant violated Rule 7.

As previously discussed, the Rule 7 violation involved the packages that were left at Grievant's post by an inmate's visitor and Rule 24 involved his interaction with the prisoner in Unit G on January 7, 2006. It is also undisputed that both Rule 7 and 24 are offenses intended to be governed by the disciplinary grid of the performance track. (JX 4, pp. 11, 13).



On April 22, 2006 the Grievant filed a grievance which is the subject matter of this proceeding. The Grievant was first notified on February 10, 2006 of the allegations that led to his removal by the Predisciplinary Conference Notice. (JX 2, p. 1).

The Pred. Conference Notice specifically listed numerous Rules that the Grievant was alleged to have violated: 7 (failure to follow post orders . . .); 8 (failure to carry out a work assignment); 24 (interfering with . . .); 37 (actions that could compromise . . .); and 45(A) (without express authorization giving preferential . . .). (JX 2, p. 1). On February 28, 2006 the charge was amended to include Rule 45(B) (. . .receiving or giving anything of value). (JX 2, p. 5).

Prior to issuing the February 10, 2006 Pred. notices, DR&C had already interviewed the Grievant on January 12, 2006 regarding the Rule 8 allegation. (JX 2, p. 43). The Rule 8 Investigatory Interview Notice listed only that rule as a possible violation. Also on January 12, 2006, the Grievant was interviewed by Capt. Smith regarding Rules 3(G) and 24 which is the same notice utilized by the Employer in the two day fine grievance. (JX 2, p. 56). The January 12, 2006 Investigatory Interview by Capt. Smith regarding violation of Rules 3(G) and 24 was used for both the absenteeism and performance alleged offenses without differentiating the factual divide applicable to each Rule - only.

Additionally, DR&C provided other documents to the Grievant and Union as part of the Pred. Packet including but not limited to: CO Bucci's incident report dated January 7, 2006; statements from the inmate; and Investigator Solnick's reports. The predisciplinary conference<sup>4</sup> was scheduled for March 17, 2006, with Thornton acting as the Hearing Officer. (JX 2, p. 6).

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<sup>4</sup> Ted Williams, Labor Relations Officer, on March 13, 2006 advises the Grievant as follows: "Your predisciplinary conferences have been scheduled for March 17, 2006 at 2:00 p.m. and 3:00 p.m." (Emphasis added). A logical inference would suggest that the absenteeism offenses and the performance based offenses conferences were held at

Thornton on March 21, 2006 issued her Report as the Hearing Officer of the Pred. Conference and found just cause for discipline for the following Rules violations: Rule 7 (JX 2, p. 10); Rules 24, 37, 45(A) and 45(B) (JX 2, p. 11) and Rule 3(G) (JX 2, p. 12).

On August 11, 2006 the Grievant was removed.

### ANALYSIS

Beginning January 12, 2006 and thereafter, the conduct of the Grievant in violation of Rules 3(G) and 24, became intertwined in the investigation and was never separated during the disciplinary process to establish the division required in maintaining the disciplinary grids regarding attendance and performance offenses argued by the Employer.

The Investigatory Notice and Interviews on January 12 were a compilation of the review of Grievant's conduct upon leaving his post and what happened in the segregation unit. An examination of the facts, indicates that the most pivotal individual to have firsthand information of what occurred in the segregation unit was CO Bucci. (JX 2, p. 52).

CO Bucci prepared an incident report on January 7, 2006 stating what she heard between the Grievant and the inmate. DR&C was put on notice on January 7, 2006 the possibility existed that the Grievant was "coaching" an inmate. The performance track investigation modality was appropriate and should have been pursued. However, not only did Capt. Smith's questions on January 12, 2006 migrate between Rules 3(G) and 24 continuously, but also the Predisciplinary Hearing Officer Report fails to distinguish the facts applicable to the separate disciplinary grids involved in this matter. Moreover, the investigatory interview notices combined Rules 3(G) and 24 together.

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different times, but on the same day. (JX 2, p. 8). However, the record is silent regarding order and which matter the Hearing Officer undertook and/or did both matters become combined into the same conference?

Although, the Rule 3(B) interview occurred prior to January 7, 2006 an analysis of the record suggests that the Employer has the capability to conduct a separate investigation involving attendance violations only. (UN X 1, Investigatory Interview, dated January 6, 2006).

Moreover, a review of the inmate visitor package(s) issue convinces this Arbitrator that the Employer can and has investigated potential offenses properly and without confusion. On January 12, 2006 the Employer conducted a separate Investigatory Interview only relating to the inmate visitor package matter. This interview began at 0805 and concluded at 0810. (JX 2, p. 45). The notice states that the Grievant was being interviewed for a Rule 8 possible violation and all of the interview questions revolved around the packages and the Grievant's responsibility as a CO on that post. (JX 2, pp. 43-49). No ambiguity or merging different disciplinary grids occurred during the Rule 8 investigation, demonstrating that at least this part of the removal process was handled properly.

The Record before this Arbitrator is also flawed by using the identical Investigatory Interviews for attendance/performance track violations, without delineating which questions were intended only for the investigation of a specific rule violation. The evidence in this record is also subject to alternative conclusions when combining the attendance and performance track Pred. Conferences together, especially when the underlying facts arguably constitute one act.

The Employer's actions in processing Rules 3(G) and 24 together destroyed the separateness and integrity of the disciplinary grids. The inclusion of Rule 3(G) in the disciplinary trail for non-attendance offenses is at odds with the Employer's position and continues the merger of the January 7<sup>th</sup> incidents into essentially one act. Simply, an absenteeism track offense if progressed independently from a performance track offense should

not be included as part of the removal documents as reflective in the Pred. Hearing Officer's Report. (JX 2, p. 12).

Accordingly, I find that the Grievant was disciplined twice by the Employer for the same offense, and the finding of a Rule 24 violation in addition to Rule 3(G) was double jeopardy. The issuance of the two day fine abrogated the Employer's ability to subsequently discipline the Grievant for a Rule 24 violation. If properly performed, the Employer would have the absolute authority to discipline the Grievant for the separate acts of (1) leaving his post and (2) the conduct displayed in the segregation unit. In other words, no double jeopardy exists if the conduct is separate acts.

Given my grave concerns as to the investigatory process, I concur with the Union that the Grievant's discipline on April 11, 2006 regarding Rule 24 was not for just cause and contrary to Article 24. Simply, the two day fine was issued first and based upon the facts of this case, was the discipline for the Grievant's conduct for violating both Rules 3(G) and 24. DR&C treated the Grievant's conduct as a single act and is now precluded from imposing multiple punishments. See, Elkouri & Elkouri, pp. 980-981, 6<sup>th</sup> Ed. (2005); United International Investigative Service, 114 LA 620 (Maxwell, 2000).

Regarding the packages that were left with the Grievant, I find that the investigatory interview and hearing testimony supports a violation of NEPRC Policies and Post Orders. Simply, if packages are unable to fit in the storage lockers no evidence suggests that storing the packages at Grievant's desk was the next option. The NEPRC has a vault where the packages were taken after Capt. Smith became involved on January 8, 2006. (JX 2, p. 41). Finally, the testimony from CO Jackson that large items such as car seats are routinely kept in the visitors' areas, is distinguishable from three (3) large wrapped packages that were accepted by the

Grievant. Capt. Smith credibly testified that it is against the policy to accept packages from visitors, considering the warden's office is located about forty feet from the entryway post. I find that credible evidence indicates that just cause existed to find a violation of Rule 7, by the Grievant.

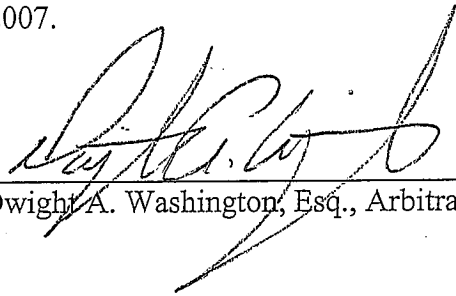
The remedy, however, is tempered by the Grievant's behavior in admitting to visiting an inmate in the segregation unit without signing the log book or authorization; that this was the first time the Grievant voluntarily sought out an inmate to talk to; the circuitous route the Grievant took from the hot trash compactor to G unit; and the fact that no rational explanation offered by the Grievant why it was necessary for him to visit that inmate. Based on the above, the Grievant is not blameless by a long shot and this remedy reflects my concerns for his conduct on January 7, 2006. The Grievant shall be reinstated, with minimum back pay, but with no other economic benefit. The violation of Rule 3(G) shall be a five day fine and will remain on his record in accord with the CBA.

#### **AWARD**

1. The Grievant shall be reinstated with all applicable seniority rights within thirty (30) days of this award.
2. The discipline for Rule 3(G) was for just cause and shall be a five day fine.
3. Just cause did not exist to remove the Grievant for violating Rule 24.
4. The Grievant is entitled to thirty (30) days of back pay calculated at his rate of pay as of April 11, 2006.
5. Aside from the back pay contained in paragraph 4, the Grievant is entitled to no other economic benefit.

6. The Arbitrator shall retain jurisdiction for a period of sixty (60) days to resolve any dispute over the implementation of this Award.

Respectfully submitted this 23<sup>rd</sup> day of May, 2007.



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Dwight A. Washington, Esq., Arbitrator