

ARBITRATION DECISION

October 8, 2007

#978

In the Matter of:

State of Ohio, Department of Youth Services)

and)

Ohio Civil Service Employees Association,)
AFSCME Local 11)

Case No. 35-04-20070316-0010-01-03
Timothy Townes, Grievant

APPEARANCES

For the State:

Mark Tackett, Labor Relations Officer 3, Advocate
Victor Dandridge, Office of Collective Bargaining
Terry Smith, Labor Relations Officer 2, Indian River
Ed Glennon, Accident Prevention Coordinator

For the Union:

Steve Wiles, Staff Representative
Bruce Thompson, Chapter President
Timothy Townes, Grievant

Arbitrator:

Nels E. Nelson

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GENERAL COUNSEL

BACKGROUND

The grievant is Timothy Townes. He was hired by the Department of Youth Services on January 13, 1992, as a Youth Leader, which was later changed to Juvenile Correction Officer. At the time of the grievance, the grievant was working on the third shift on Unit A at the Indian River Correctional Facility. The institution is a high security correctional facility for males up to 18 years old. Unit A houses 44 youths and one JCO is assigned to the unit on the third shift.

The events giving rise to the grievance began on December 11, 2006. On that date, the grievant started his shift at 11:00 p.m. A video tape of the unit shows that at 11:24 p.m. the grievant allowed six or seven youths out of their rooms at the same time to use the restroom. It also reveals that he failed to properly perform the hallway checks that are required every 30 minutes and the 2:00 a.m. headcount.

At 3:40 a.m. the grievant notified operations that he had found a youth out of his assigned room. When Tim Groff, the Operations Manager, came to the unit, he found three youths in one room and discovered that two other youths had changed rooms. In one room a youth had rolled up a blanket to make it look like he was in his bed.

On December 15, 2006, Ed Glennon, the Accident Prevention Coordinator, began an investigation of the incident. He interviewed the grievant, JCO Gene Matakoto, Groff, and three youths. Glennon issued his report on January 11, 2007, indicating, among other things, that the grievant did not see "flesh" while doing his hallway checks every 30 minutes and that he failed to perform the 2:00 a.m. head count.

A pre-disciplinary hearing was held on January 30, 2007. The grievant was charged with the violation of Rules 3.5, 3.6, 5.1, and 5.7 of the General Work Rules. At

that time, the union acknowledged that the grievant made a mistake and indicated that he was willing to take responsibility for his mistake.

The hearing officer issued her report on February 12, 2007. She reported that the grievant admitted that he did not make proper room checks and head counts. The hearing officer noted that the grievant was honest and forthcoming regarding his actions. She concluded, however, that was just cause to discipline the grievant.

On March 9, 2007, the grievant was notified that he was being removed. The removal notice states that he was being terminated for the violation of Rules 3.6 and 5.1 of the General Work Rules.

On March 19, 2007, the union filed a grievance on behalf of the grievant. It charged that the state violated Sections 24.01, 24.02, and 24.06 of Article 24 of the collective bargaining agreement. The union claimed that there was not just cause for the grievant's termination; that the principles of progressive discipline were not followed; and that the penalty was not reasonable or commensurate with the offense.

When the grievance was not resolved, it was appealed to arbitration. The hearing was held on September 5, 2007. The parties opted to offer oral closing statements rather than to submit written closing statements.

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?

RELEVANT CONTRACT PROVISIONS

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.

* * *

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 oral reprimand(s) (with appropriate notation in employee's file);
- b. One or more written reprimand(s);
- c. Working suspension;
- d. One or more fines in an amount of one (1) to five (5) days, the first time for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB.

* * *

- e. One or more day(s) suspension(s);

* * *

- g. Termination.

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24.06 - Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting.

* * *

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

* * *

An employee may be placed on administrative leave or reassigned while an investigation is being conducted except that in cases of alleged abuse of patient or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment.

STATE POSITION

The state argues that there was just cause to remove the grievant. It points out that on December 11-12, 2006, he failed to make several of the 30-minute hallway checks and the 2:00 a.m. formal head count. The state indicates that this is a clear policy violation.

The state contends that the grievant's neglect of his duties was a serious matter. It claims that his failure to follow Post Orders to do security checks and to physically see the youths while conducting them left the staff and youths in a vulnerable situation. The state indicates that "this type of egregious behavior should not and cannot be tolerated in a juvenile correction facility." (State Written Opening Statement, page 2)

The state observes that the grievant's December 11-12, 2006, incident was not his first offense. It reports that in May 2005 the grievant received a six-day suspension for reporting youth counts and recording them in the unit log book without visually inspecting the individual rooms. The state indicates that the grievant's neglect of his duties resulted in a youth chipping the mortar and removing a cinderblock from the wall in his room.

The state maintains that the penalty it imposed on the grievant was consistent with the disciplinary grid. It points out that the grievant's violation of Rules 3.6 and 5.1 are

level three and five offenses so that with the prior six-day suspension, the appropriate penalty is removal. The state notes that at the time the grievant was suspended for six days he was warned that a further violation of the work rules could result in his removal.

The state rejects the union's argument that the grievant should have been put on administrative leave. It observes that Terry Smith, a Labor Relations Officer 2, testified that he discussed placing the grievant on administrative leave with the warden but that they concluded that it was safe for the grievant to continue to work. The state indicates that the grievant's offense did not involve the abuse of a youth, which would have required placing him on administrative leave.

The state maintains that there was not an excessive delay in removing the grievant. It states that an investigation was conducted, a pre-disciplinary hearing was held, and a recommendation for discipline was sent to the central office. The state notes that the central office met the requirement to decide on the appropriate discipline within 45 days.

The state acknowledges that the grievant had 15 years of seniority. It claims, however, that the disciplinary grid calls for removal and does not allow any discretion regarding the penalty. The state suggests that the grievant's long service could be considered an aggravating factor since it meant that he was thoroughly familiar with the rules and procedures.

The state asks the Arbitrator to deny the grievance.

UNION POSITION

The union argues that the grievant's discharge violates the collective bargaining agreement. It states that there was not just cause for his removal as required by Article

24, Section 24.01. The union further charges that the discipline was not progressive or commensurate with the offense as required by Sections 24.02 and 24.06.

The union contends that the termination penalty should have been mitigated. It points out that the grievant had 15 years of seniority, which should not be eliminated by one mistake. The union submitted the grievant's evaluations, which indicated that in the most recent period he met or exceeded the standard in all seven areas of the evaluation.

The union observes that the grievant cooperated in the investigation. It states that he admitted his mistake from the start and never blamed his co-workers. The union notes that Glennon reported that the grievant was honest and forthright.

The union characterizes the state's argument that the disciplinary grid does not allow for mitigation as "ludicrous." It asserts that if mitigation were not possible, the grievant would have been removed after the pre-disciplinary hearing.

The union argues that the time it took to impose discipline on the grievant suggests that his offense was not regarded as very serious. It points out that the incident occurred on December 11-12, 2006, but he was not removed until March 9, 2007. The union notes that during that time the grievant continued to work on the same unit and shift. It adds that the grievant's removal notice was signed on March 8, 2007, but he was mandated to work on the first shift on March 9, 2007.

The union acknowledges that the grievant was previously suspended. It reports, however, that following his suspension he went two years without any discipline. The union notes that discipline is supposed to be corrective and claims that it sometime takes more than one disciplinary action to correct an employee's behavior.

The union charges that the grievant was not supplied with the proper equipment to do his job. It observes that the General Work Rules indicate that the grievant was supposed to have a flashlight to help perform bed checks. The union complains that the grievant did not have a flashlight.

The union asks the Arbitrator to return the grievant to his former position and to make him whole for all of the losses he suffered.

ANALYSIS

A disciplinary case generally involves two questions. The first issue is whether there was misconduct that justifies disciplinary action. The second question, assuming that there is at least some misconduct, is whether the penalty is proper.

In the instant case, there is no question regarding misconduct. The grievant admits that on December 11-12, 2006, he failed to make all of the required 30-minute hallway checks and the 2:00 a.m. headcount. Despite failing to do so, he made entries in the unit log indicating that he had done so. Thus, there is no question that just cause exists for discipline.

The dispute between the parties is over the second question - the propriety of the penalty imposed on the grievant. The state relies on the disciplinary grid. It contends that given the grievant's six-day suspension in May 2005, and his level 3 and 5 offenses on December 11-12, 2006, the disciplinary grid calls for his removal and provides no flexibility, i.e., does not offer a choice of penalties. The union maintains that the termination penalty is subject to mitigation and, in fact, should have been mitigated.

The union offered several arguments for mitigation. Its argument that the state failed to use progressive discipline must be rejected. As indicated above, the grievant

was suspended for six days in May 2005 for essentially the same misconduct. He was warned at that time that further misconduct could lead to his termination.

The union's claim that termination was not commensurate with the offense must also be dismissed. The grievant's failure to perform the hallway checks and headcount are serious offenses. Disregarding the procedure in the Post Orders jeopardizes the safety and security of the both the staff and the youths.

The union's argument that the grievant's long service makes termination inappropriate can not be accepted. While long service is a significant factor in assessing the propriety of a disciplinary penalty, it cannot excuse serious and repeated misconduct. In fact, as the state argued, it could be argued that the grievant, as a long-service employee, should have understood the importance of the hallway checks and the headcount more than a less senior employee.

A similar analysis applies to the grievant's cooperation in the investigation. While his honesty and forthrightness are positive factors, he did commit a serious offense for a second time in less than two years. In addition, any attempt to deny the fact would have been fruitless given that a video camera in the hallway of Unit A establishes the grievant's misconduct.

The union's complaint regarding the time it took to discipline the grievant cannot be used to set aside his termination. Although the prompt imposition of discipline is important, the investigation and pre-disciplinary hearing contributed to the delay. In any event, the state made its final decision regarding the grievant's discipline within the 45 days allowed by Article 24, Section 24.06, of the contract.

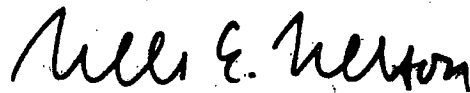
The Arbitrator rejects the union's contention that the state's failure to place the grievant on administrative leave suggests that his offense was not regarded as serious. Section 24.06 states that the employer "may" place an employee on administrative leave or reassign him during an investigation. Smith explained that the employer reserves the use of administrative leave for cases where an employee is accused of abuse.

The union's complaint that the grievant had no flashlight must be dismissed. While page 3 of the Post Orders indicates that the grievant's Personal Protection Pouch should have contained a flashlight, he never complained regarding the lack of a flashlight. Furthermore, even though the grievant did not have had a flashlight, which would have been useful in making the hallway checks and the headcount, the record indicates that on a number of occasions when the grievant was supposed to make hallway checks and the headcount, he never left the desk in the day room.

While the Arbitrator is reluctant to see the discharge of a long-service employee, the record leaves him no choice. On December 11-12, 2006, the grievant committed a serious offense less than two years after being suspended for six days for the same offense.

AWARD

The grievance is denied.



Nels E. Nelson
Arbitrator

October 8, 2007
Russell Township
Geauga County, Ohio